

## NEWSLETTER

### IMPORTANT UPDATES FOR EMPLOYEES AND EMPLOYERS – HOLIDAYS ACT 2003

Many people are aware of the new Holidays Act, which came into force on 1 April 2004. There has been much discussion surrounding the terms of the Act, in particular the provision of four weeks annual leave to all employees. There are also other changes to employee entitlements, some of which are as follows:

- Minimum entitlement of three weeks annual holiday after one year's employment. The four week entitlement comes into force in April 2007.
- Employees are to receive a minimum of five days paid sick leave after six months of employment.
- There is now a separate entitlement to bereavement leave. After six months of employment, the employee is entitled to three days of bereavement leave on the death of close family members. In addition, and by agreement with the employer, the employee may receive 1 day of bereavement leave on the death of any other person who had a close relationship with the employee. An employee can apply for this bereavement leave in respect of each bereavement suffered. (These provisions differ from the Holidays Act 1981 whereby the entitlement for

sick leave and bereavement leave was a total of five days).

- Pay rates of time and a half are to be paid for employees who work on a public holiday.
- There are new rules governing when annual leave can be treated as sick leave or bereavement leave.

These are of course minimum entitlements and many employees will have negotiated terms in excess of these provisions with their employers. If so, these entitlements will remain in force and will not be altered by the new Act.

All existing employment agreements must be amended to reflect the changed provisions by 1 April 2005.

We have prepared a letter to employees for use by our employer clients. This letter outlines the basic provisions of the new Act, and annexes the new clauses which will replace the provisions of the Holidays Act 1981 in each employment agreement. We envisage that the letter and attached new clauses will be discussed between employer and employee, and then signed by both parties to indicate consent to the variation of the existing employment agreement. The letter and the new clauses can then be annexed to the employment agreement and employers will have fulfilled their obligations in respect of updating employment agreements.

An important new aspect of the Act for employers is the keeping of a Holiday & Leave Record Book. We would be pleased to discuss exactly what records and data are required to be kept as part of this book with our employer clients. Holiday records must be retained for a period of 6 years.

In addition, employers are advised to familiarise themselves with the new calculations of annual holiday pay and other leave. There are also new

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#### NEWSLETTERS

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requirements for pay-as-you-go holiday pay for employees on fixed term contracts.

These matters are important as the new Act carries fines for failing to comply. Briefly, every employer who acts in contravention of the new Act, or who fails to comply with its provisions, commits an offence. Individual employers who breach the Act are liable to a penalty not exceeding \$5,000.00, and companies to a penalty not exceeding \$10,000.00.

In summary, we would be pleased to advise employees and employers alike on the changes to the Holidays Act. We can provide amendments to current employment agreements to ensure compliance with the Act, and entirely new employment agreements for staff hired after 1 April 2004. We are also able to provide casual agreements and fixed term agreements, all of which reflect the new Holidays Act provisions. We invite you to telephone either Michael Robinson or Claire O'Donnell in order to discuss how the Holidays Act will affect you and your requirements for compliance under that Act.

## CONSUMER GUARANTEES – WHAT ARE YOUR RIGHTS?

The Consumer Guarantees Act 1993 ("CGA") applies to the supply of goods and services to consumers and offers considerable rights and remedies in the case of faulty goods and/or inadequate services.

### Who does it protect?

The CGA applies to any supply of goods or services to a consumer. A consumer is anyone acquiring goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption (except where goods are purchased for re-supplying in trade, using to manufacture or process goods or to repair in trade other goods or fixtures on land).

If you acquire goods or services of a type normally purchased for personal, domestic or household use, you are a consumer. Providing the goods or services fall into the personal, domestic, or household use category, the CGA applies even if you purchased them for business purposes.

### Individual contracts for business suppliers

You can contract out of the CGA only when supplying to a business. If you have not contracted out, the CGA will apply to the purchase of the office computer, work vehicle or tearoom microwave.

### What must a vendor do to comply?

The CGA provides a number of guarantees to protect the consumer and regulates the standard of goods or services in the marketplace. The vendor must:

- have the right to sell the goods
- ensure goods are of an acceptable quality
- provide services using reasonable care and skill
- ensure the goods or services are fit for the consumer's purpose for acquiring them or any purpose represented by the seller
- ensure the goods comply with any description and/or sample supplied
- supply goods or services at a reasonable price, and provide services in a reasonable time
- make sure that repairs to goods and spare parts are available.

### Is the price right?

Where a price has not been previously agreed for goods or services, the consumer does not need to pay more than a reasonable price. If the price has not been discussed, the consumer can order goods from a supplier, without the fear that the supplier will charge more than what is reasonable for those goods.

### How long should I wait?

A common complaint is that the time of delivery of goods or services does not meet a customer's expectations. Under the CGA, goods must be provided, and services completed within a reasonable period of time.

### Consumer remedies

Where there has been a minor breach or defect, the supplier may elect to either repair, replace or refund the goods, or rectify the services. If this remedy is not completed within a reasonable period of time, the consumer can reject the goods, and in the case of services, either cancel the contract, or have the failure remedied elsewhere and recover all reasonable costs involved.

Where there is a substantial defect, the consumer can either have the goods replaced or demand a refund. In the case of services, the consumer can cancel the contract or obtain damages for any reduction in value. The consumer can also obtain damages for any losses that are reasonably foreseeable. Losses can include the cost of re-installing goods, restoration of premises, loss of use of goods, emotional stress, loss of wages and business losses (where the supplier has not contracted out of the CGA).

### Compliance for businesses

If you are in business, the cost of non-compliance under the CGA can be very high – ensure you comply! Please talk to us if you need assistance.

## UPDATING I.T. POLICIES IN EMPLOYMENT AGREEMENTS

A change to the Crimes Amendment Act came into force in late 2003. It is now an offence to intercept private communications or disclose any information which results from an action, without the consent of the person whose communication is being intercepted. This includes emails and faxes.

The effect of this amendment is that if an employer chooses to monitor an employee's emails and/or network activities without the employee's consent, such monitoring may be illegal. It is our recommendation that existing employment agreements and in-house policies relating to each employee's access to the Internet and email should be amended to include the following clause:

*"The employee consents to any monitoring carried out by the employer or by contractors hired by the employer of network activity. The employee understands and consents to monitoring of the employee's access to the Internet and email."*

If you need any assistance with amending or updating your employment agreements, or if you don't have current employment agreements in place, please contact either Michael Robinson or Claire O'Donnell at our office.

## BEWARE THE TAX RISKS WHEN FILING RETURNS!

Did you know that every time you file a tax return, whether GST, PAYE, FBT or income tax, you are taking a tax position and can be penalised if that position is later found to be incorrect? You do not have to gain any financial benefit for a penalty to apply.

The two most common penalties that taxpayers incur are the "Lack of Reasonable Care" penalty and the "Unacceptable Tax Position" penalty. Both of these penalties are outlined below:

### Lack of Reasonable Care

The penalty for not taking reasonable care when adopting a tax position is 20% of the tax shortfall that arises.

For example, a taxpayer is careless in claiming in the wrong GST return, GST on an asset purchased for \$90,000.00. The tax shortfall is therefore the GST claimed of \$10,000.00 and the 20% penalty would be \$2,000.00.

In general terms, where a taxpayer engages the services of a tax agent or accountant to assist with the completion of a tax return, the taxpayer will have taken reasonable care and the penalty won't apply.

### Unacceptable Tax Position

A taxpayer is liable to pay a shortfall penalty of 20% of the tax shortfall if the taxpayer takes an unacceptable tax position and the tax shortfall arising from the taxpayer's tax position is more than both:

- \$20,000.00; and
- The lesser of \$250,000.00 and 1% of the taxpayer's total tax figure for the relevant return period.

A taxpayer takes an "unacceptable tax position" if, viewed objectively, the tax position fails to meet the standard of being about as likely as not to be correct. A tax payer does not take an unacceptable tax position merely by making a mistake in the calculation or recording of numbers in a return.

For example, a taxpayer returns the sale of a commercial property in the GST return when the property was settled rather than in the return when the time of supply was triggered. The sale amount is \$450,000.00. The tax shortfall is therefore \$50,000.00 and the 20% penalty would be \$10,000.00.

## Penalties May be Reduced

These penalties may be reduced in the following circumstances (the percentage reduction is shown in brackets):

Voluntary Disclosure (40% or 75%); or

Timing Difference (75%); and

Good Behaviour (50%); and

Penalty capped at \$50,000.00 (provided the error is either voluntarily disclosed or discovered by the Inland Revenue within prescribed time limits).

### NOTE:

Only one reduction is possible for voluntary disclosure and timing differences (e.g. temporary shortfalls). Other rules apply.

## No Discretion to Remit

The Inland Revenue has no power or discretion to remit these penalties, except under limited hardship grounds. While it is possible to argue against the application of the Lack of Reasonable Care penalty (as the word "reasonable" is subjective in nature), it is much more difficult to argue against the application of the Unacceptable Tax Position penalty.

## Summary

As these penalties apply to any tax position taken in a tax return, it is imperative to ensure that your accounting and financial systems are robust to mitigate unnecessary risk of penalties applying.

In particular, the scope of the Unacceptable Tax Position is so wide that it will penalise most errors where the tax at stake is more than \$20,000.00. The Institute of Chartered Accountants is currently discussing the scope of this penalty with the Inland Revenue in an attempt to limit its scope to more reasonable bounds.

If you are at all uncertain about the tax effect of any transaction, we strongly advise that you discuss the

matter with a Horwath adviser prior to filing a tax return to ensure that these penalties are not incurred.

This article was contributed by Horwath Porter Wigglesworth Ltd, Chartered Accountants & Business Advisors.

For further information, phone

Chris Lindsay on 303 2485 or visit their website at [www.horwath.co.nz](http://www.horwath.co.nz).

## TURNER HOPKINS NEWS

### New Design for Our Website

Anyone who has tried to access our website recently will have seen that the site is currently undergoing some changes. We have decided it is time for an update of our web page, and we expect to be on-line again very shortly at [www.turnerhopkins.co.nz](http://www.turnerhopkins.co.nz). Please do visit our website when you have a chance, we appreciate all feedback.

### The Demise of the "Snail"

Some readers may have seen the remains of the Turner Hopkins "S-Cargo" runaround vehicle (commonly known as "the Snail") pictured in the North Shore Times recently. The Snail was set alight as part of a spate of vandalism that occurred on Lake Road overnight and was completely demolished. Staff reactions to the loss are varied!

### Disclaimer

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

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