

TURNER HOPKINS

B A R R I S T E R S & S O L I C I T O R S

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NEWSLETTER

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BREAKING NEWS FOR FINANCE COMPANY INVESTORS

In an exciting development Turner Hopkins has teamed up with Australian litigation heavyweight Slater & Gordon to investigate the viability of legal action arising from finance company collapses.

The potential claims will target the corporate trustees of finance companies who are alleged to have failed in their duty to adequately monitor the activity of the finance companies and in their general obligation to protect the interest of the investors (as their beneficiaries).

As most people will be aware heavy losses were suffered by investors in the likes of Bridgecorp, Hanover Finance, OPI Pacific, Capital and Merchant, Strategic Finance, St Laurence and many other companies.

Our website (www.turnerhopkins.co.nz) outlines the case for victims of failed finance companies in New Zealand and invites investors to register their interest.

Slater & Gordon is Australia's largest law firm and specialises in financial claims and multi-plaintiff actions of this nature. Turner Hopkins has been working with Slater & Gordon in developing this project for the past year and a half.

Whilst Slater & Gordon has had significant experience in dealing with cases of this nature along with other class action claims (for example tobacco, asbestos, tainted blood and pharmaceutical claims) this type of action is unprecedented in New Zealand. To a large extent that is because New Zealand has no express provision for class action lawsuits. A draft class action bill and proposed changes to the High Court Rules have been prepared but are yet to be implemented. Nevertheless even in the absence of the rules being changed, a multiple plaintiff action of this nature will be able to proceed.

This claim comes on the heels of a settlement agreement reached in Australia in late March 2011 when Slater & Gordon acted for a number of investors in a failed finance company which obtained a successful settlement against the trustees of the Australian finance company Fincorp. Whilst Australian and New Zealand law differ in some respects, this case involved very similar circumstances as to what occurred in New Zealand. In our view it raises the real prospect of New Zealand victims being able to receive compensation from finance companies. The total losses incurred by over 20,000 investors in finance companies in New Zealand amounted to over two billion dollars. In the event that this action is successful it will result in investors being able to recoup some of those losses.

A unique factor in this project is that joining the proceeding is not likely to cost the investors anything. It is expected that the claims will be brought with the assistance of litigation funding in which a third party funder will meet the up front legal costs and provide the plaintiffs with protection against any adverse outcome. In return the funder would expect to receive an agreed portion of any successful result.



» Another positive factor is that it is anticipated that the trustee companies involved are large and solvent and are likely to have significant insurance cover.

People who have lost money through finance company failures are encouraged to register their interest on our website or email any enquiries to claims@turnerhopkins.co.nz.

This project is being managed by our litigation partner **Michael Robinson**.

LEGAL LAUGH

A lawyer died and went to heaven. Meeting Saint Peter at the gate, he protested, "There must be some mistake. I'm only 54. I really shouldn't be here yet."

Saint Peter consulted the big book. "Well", he replied, "according to the time you've charged your clients, you are 87."

CONSUMER LAW UPDATE

A Consumer Law Reform Bill ('the Bill') will be introduced to Parliament later this year to update and simplify consumer law.

This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.

The Ministry of Consumer Affairs ('the Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed, however, listed below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law

related to layby sales, unsolicited goods and services, door to door sales, and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.

- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.

- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety

Statements that will provide some guidance on acceptable product safety. Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry

to stop selling a product if it has been implicated in a serious incident.

The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.

- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

If you have any queries regarding consumer law please contact Douglas Mitchell or anyone in our commercial team.

Email: douglas@turnerhopkins.co.nz



COPYRIGHT (INFRINGEMENT FILE SHARING) AMENDMENT ACT

The internet has totally revolutionised the entertainment industry.

Downloading music and movies, also known as file sharing, has become common practice in this day and age. However, it is sometimes easy to forget that behind that one click on the "download" button, lies someone's art, their work and source of income that when downloaded without permission, is in breach of our copyright laws.

The Copyright (Infringing File Sharing) Amendment Act 2011 ("the Act") was passed into law by Parliament on 18 April this year and commences 1 September 2011. The Act repeals a section of the Copyright Act 1994 and replaces it with two new sections that specifically deal with illegal peer-to-peer file sharing.

A review of section 92A of the Copyright Act 1994 concluded that the enforcement measure was ineffective in its current state and its repeal and subsequent replacement is intended to offer greater deterrence for illegal file sharing through the implementation of a three-step notice regime. Previous concerns over an ad-hoc approach to the suspension of internet accounts and a lack of judicial oversight have been addressed with the new Act requiring either the Copyright Tribunal ('the Tribunal') and/or District Court to assess matters and oversee the formulation of proportionate remedies.

The Three-Step Regime

The Act provides an overview of the 'Infringing File Sharing' regime and states

that the purpose of the amendment is to "provide copyright owners with a special regime for taking enforcement action against people who infringe copyright through file sharing."

The regime itself is based on a notice system where three kinds of infringement notices will be sent to offending account holders before enforcement ensues.

The first notice is a detection notice, it is followed by a warning notice, and finally an enforcement notice. The notices are to be issued to the account holder by the Internet Protocol Address Provider (IPAP); which was formerly known as an Internet Service Provider (ISP).

Penalties

If an account holder continues to infringe after receiving all three notices, the copyright owner is able, under the Act, to apply to the Tribunal or District Court for relief and enforcement options.

The Act also permits the Tribunal to award damages against the account holder, the sum of which is to be determined by the Tribunal. The amount ordered can be up to \$15,000, and is to be based on the level of damage or loss sustained by the copyright holder.

Alternatively, the copyright holder will be able to apply to the District Court

for a suspension of the account holder's internet account. The District Court may, after considering both parties' arguments, make a suspension order requiring an IPAP to suspend

the internet account of an offender for up to six months. The suspension order is supposed to be reserved for more serious offenders.

Account holders are able to challenge the

infringement notices and can request a hearing if they feel they should not be penalised.

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ISP Definition Amended

The new amendment has also redefined an internet service provider and the former acronym of 'ISP' has been replaced with 'IPAP', which stands for "Internet Protocol Address Provider". The new definition is a broader one which encapsulates some organisations that are not traditional ISPs such as businesses and universities. The amendment bestows upon such organisations similar responsibilities as a traditional ISP and requires such organisations to send notices to infringers in the same manner as a traditional ISP.

If you have any queries regarding copyright law please contact Jane Min or anyone in our commercial team. Email: janem@turnerhopkins.co.nz

A KING OR A QUEEN – THE LAW OF SUCCESSION

Following the recent marriage of Prince William and Catherine Middleton, the expectation of children in the future raises the question of succession.

Succession to the British Throne is passed on by "male-preference primogeniture". The rule has been in place for over 300 years and means male children are preferred over



female children and an older child is preferred over a younger child of the same gender.

The British Government is currently consulting with Commonwealth countries about changing the laws on Royal Succession to enable an older sister to succeed over a younger brother. The current rules could block the succession of a first-

born daughter of Prince William and Catherine Middleton.

Our own Prime Minister has said he agrees that the current rules are "old fashioned". However, because the British Monarch is also head of state of Canada, Australia, nine countries in the Caribbean, three in the South Pacific as well as New Zealand, any amendment to the rule would have to be approved by all these countries.

SLEEPING ON THE JOB - IS IT "WORK"?

A recent case has drawn media attention due to the finding by the Court of Appeal that a disability services worker, sleeping over at a community home, was entitled to receive at least the minimum wage whilst sleeping. Here's an outline of the case – what do you think?

Mr Dickson worked for Idea Services Limited as a community service worker providing care and support to people with disabilities who live in community homes. A requirement of his position was that Mr Dickson sleep overnight in the home so that he could deal with any issues that arose during the night and for security purposes. He was paid \$34.00 per sleepover, and \$17.66 per hour for any time during which he was required to be actively working and tending to the needs of the residents. If there were no incidents during the night Mr Dickson would receive \$34.00, which amounted to between \$3.40 and \$4.30 per hour depending on the length of the sleepover.

Mr Dickson claimed that he was entitled to the minimum wage prescribed under the Minimum Wage Act 1983 ("the Act") for every hour of his sleepover. This claim was upheld at both the Employment Relations Authority and the Employment Court.

The Court of Appeal was required to consider whether sleepovers constitute "work" for the purposes of section six of the Act, which states:

"Every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

The Court of Appeal agreed that three factors must be considered in order to determine whether the sleepover constituted "work":

- the constraints placed on the employee's freedom to do as he or she pleases;

- the nature and extent of responsibilities placed on the employee; and
- the benefit the employer receives from having the employee perform the role.

Mr Dickson had significant restraints placed on him when sleeping over, important responsibilities that he had to attend to with respect to both the home and the residents, and the employer derived a correspondingly significant benefit. The Court of Appeal therefore agreed that in this instance all of these factors applied to a significant degree and therefore Mr Dickson's sleepovers constituted work for the purposes of the Act. Mr Dickson was therefore entitled to receive the minimum wage during his sleepover at the community home.

The Court of Appeal rejected Idea Services Limited's alternative argument that the Act was breached only if the employee's average rate of pay over a pay period was less than the prescribed minimum.

This decision will have a great impact on the disability services sector. Ralph Jones, Chief Executive of Idea Services Limited, is quoted as saying this decision would cost the organisation about \$176 million in back payments. Idea Services Limited lodged an application for an appeal against the Court of Appeal decision, and the outcome is likely to be newsworthy.

If you have any queries regarding this article or an employment query in general, please contact Helen Wendelborn. Her email address is helen@turnerhopkins.co.nz.

STAFF NEWS

Introducing Maria Cotter, Credit Controller

Maria has been with Turner Hopkins for 12 years in various roles. For the last four years Maria has been our amazing Credit Controller. Her role involves liaising with clients regarding their invoices and all manner of accounting reconciliations.

We are also pleased to offer Maria's superb skills to our clients to assist in recovery of accounts owing to them by their debtors. Several of our clients have achieved very good results in this manner.

Maria is passionate about her job and enjoys the contact with a wide range of clients.

Outside of work Maria has many interests, including motorbike riding with friends, classic cars, dancing, watching and participating in most sports and spending time with her family.

If you have any queries with regard to payment of our invoices or you would like to see how Maria can help your business, then please do not hesitate to contact her direct on maria@turnerhopkins.co.nz.



OUR WEBSITE

Visit us on the internet at www.turnerhopkins.co.nz

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If you would like to receive our newsletter by email please email helen.white@turnerhopkins.co.nz

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