

# TURNER HOPKINS

BARRISTERS & SOLICITORS

WINTER 10

## NEWSLETTER

KEEPING YOU INFORMED

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### ALL YOU NEED TO KNOW ABOUT EMPLOYMENT - BRIEF UPDATES

**The world of employment law is ever evolving and it can be difficult for employers to keep up with proposed changes and deal with the multitude of other tasks required to operate their businesses.**

At Turner Hopkins we give you information that you need to know – and in that spirit, we list below some of the areas of employment law currently being scrutinised by the Government, and some of the proposed amendments considered.

#### Definition of Serious Harm

The Government have proposed amending the definition of “serious harm” under the Health and Safety in Employment Act 1992. The definition of serious harm is important as an employer or person in control of a workplace must, where serious harm has occurred, report this immediately to the appropriate authority - the Department of Labour, The Civil Aviation Authority or Maritime New Zealand.

The proposed definition of serious harm will contain three main categories of harm:

- Trauma injury – physical harm arising out of a single accident or event and defined by the degree of physical incapacity,
- Acute illness or injury – requiring treatment by a medical practitioner and caused by exposure to workplace hazards, and
- Chronic or serious occupational illness or injury - physical or mental harm requiring hospital admission, in-patient surgery, or able to be confirmed by a specialist medical diagnosis.

It is expected that the proposed definition will be clearer and easier to use and will remove the gaps in coverage of certain types of harm or hazard which currently exist.

#### Report on Workplace Deaths

There were 31 workplace deaths in 2009 - all of which were men.

Most of the deaths remain under investigation. The Department of Labour has been asked to identify whether there are any common underlying causes and whether employers had failed to meet their obligations to keep employees safe. Some decisions have already been released and they underline the real need for employers to turn their minds to safety features in the workplace, particularly in workplaces involving machinery.

#### Holidays Act/Personal Grievance Review

The much-talked about review of the Holidays Act 2003 was received by the Minister of Labour in December 2009 and the Government intends that proposals for change will be introduced to a select committee for comment this year.

Some of the proposals may include:

- the opportunity to trade 1 week of annual leave for cash,
- a change in the method of calculating holiday and sick leave entitlements, and
- the transfer of public holidays to another day.



» A review of the way that the personal grievance system works is also being conducted. Submissions from those with experience in this field were invited, and closed in March 2010. It will be most interesting to see the conclusions drawn from those submissions.

## Watch this space for further updates!

### Rest and Meal Breaks

We are still receiving enquiries (mainly from employees) with regard to rest and meal breaks. This highlights that many employers are unaware that since 1 April 2009 employees

have been entitled to compulsory rest and meal breaks after a certain number of hours of work. Whilst many workplaces meet or exceed the compulsory minimums, some workplaces have had real difficulties and have found that the law, while well-intentioned, is overly prescriptive.

The Rest Breaks and Meal Breaks Amendment Bill (which had its first reading in Parliament on 27 April 2010), while maintaining an entitlement to rest and meal breaks, proposes that:

- employers may not have to provide a complete break from work duties in situations where the employee is a sole attendant, and

- where a break cannot reasonably be provided the parties may agree that time off is given at an alternative time, for example an employee may start later or finish earlier in the day.

If you have any questions relating to employment law (either as an employee or employer) we are very pleased to assist. Often queries can be answered with just a short phone call. Put us to the test – contact **Michael Robinson** or **Helen Wendelborn** of this office.

# OUTSOURCING PAYROLL... COULD IT BE RIGHT FOR YOU?

## Payroll is like housework

Payroll administrators may well think payroll is like housework. People only notice when something is wrong, and when you have finished it's time to do it again!

But the analogy stops there. Miss out Joe's overtime and Mary's holiday pay and you'll cause problems for them at home and at work. For most employees the money they earn is a major reason for working, and it's a sensitive issue. Produce too many pays incorrectly too often and you'll not only have angry employees, but you'll change the culture of your organization.

It can be a thankless task as well. When someone contacts the payroll administrator and demands to speak urgently, is it to say thanks for a job well done or to complain because they think there is an error? Unfortunately, it is more likely to be the latter. And it doesn't end there. The payroll administrator will need to be able to explain complex issues in simple language. Issues such as why the sick leave rate is different from the annual leave rate; why some of the final holiday pay has been paid in dollars not time; or why the annual leave rate is different from when they

took leave last time, or why KiwiSaver has been deducted from their pay.

A payroll administrator has a tougher job than most would imagine. Consider, for example, that they have to cope with changes to employment Acts that over the years have become more and more difficult to administer. It is so difficult that in a recent survey the Employers and Manufacturers Association concluded, "the law is so complicated and confusing that most employers appear to find aspects of it unworkable and are not complying with all of it."

## Outsourcing Payroll could be an answer

If you are an employer and you're starting to think that vacuuming never sounded so easy, outsourcing your payroll may be the answer. All of your payroll processing requirements can be taken care of leaving you with peace of mind.

What do payroll outsourcing companies do? Well, at The Paymasters we take care of the complete payroll function. That includes data entry, payroll processing, employee banking, producing payslips, and reporting and filing IRD reports and payments. Client companies can then concentrate on their core business.

Companies may choose to outsource their payroll for a variety of reasons. One is that many employers find it difficult and time-consuming, keeping up with changes and understanding employment related legislation...and more changes are due. The Minimum Wage Act changed on April 1<sup>st</sup> this year, and more changes to the Holidays Act are likely in 2011.

Another common reason to outsource payroll is to lower overheads. Employee time is freed up for other tasks, and employees no longer need training in software, time to fix errors, or training in legislation. There is also no need to provide a backup person in case the payroll administrator is absent. Additionally, some companies like the confidentiality of having their pay processed off-site. Knowing that the IRD will have reports filed and payments made on time without the risk of penalties is another obvious benefit.

If you would like some more information about outsourcing payroll for your organisation please contact us and we will be very happy to discuss your particular requirements.

This article has been submitted by Jenny Sainsbury of The Paymasters Ltd. For further information please contact **Helen Wendelborn** of this office.

# COMPETITION TURNER HOPKINS BILLBOARD JUNE 2010

We have been conducting a marketing campaign promoting Turner Hopkins' professional services utilising various billboard sites in and around Auckland Central. The feedback we have had from what is an innovative move in the legal profession has been very positive.

We have now erected our June billboard (Busted/Trusted). We are offering a complementary dinner at the Marvel Grill restaurant located in the Berkeley Cinema

complex, Anzac Street, Takapuna, for two people to a value of \$150.00 to the first client to email Helen White at her email address [helen.white@turnerhopkins.co.nz](mailto:helen.white@turnerhopkins.co.nz) correctly identifying the location of the June billboard.

Marvel Grill is a new restaurant being developed by Alisdair Gribben. Alisdair has previous experience with La Zeppa and Vivace in Auckland. This promises to be an exciting addition to the dining scene in Takapuna.

# LEAKY HOME CRISIS - RECENT DEVELOPMENTS

## The Government has, at long last, announced its proposal to address the leaky homes crisis.

The crisis surrounding defective houses has escalated over recent years. In a report by PricewaterhouseCoopers (released in late 2009) the scope of the problem has been assessed as affecting between 22,000 and 89,000 houses. The report has adopted “consensus forecast” of 42,000 homes however many experts believe that the scale of the problem may well exceed the 89,000 estimate. Even on the Price Waterhouse Coopers conservative estimate the cost of remedial work is expected to amount to over \$11 billion!

Consistent with this assessment, we have noticed a significant increase in the number of leaky home disputes being referred to us. We have developed a considerable degree of experience representing not only homeowners but also builders, developers, architects-designers and other subtrades. Proceedings of this nature have traditionally been pursued through either the Weathertight Homes Tribunal or the High Court.

The latest proposal to address the problem envisages the Government contributing 25% of the repair costs with the relevant Local Authority contributing a further 25% on

accepted claims. The proposal was announced in mid May and at the time of writing this article Local Authorities were yet to respond to the suggestion. The specific details are not yet available.

It is anticipated that homeowners would remain at liberty to pursue the potentially responsible parties (including builders, developers, designers, subtrades and possibly building product suppliers/installers) for amounts over and above those contributed by the Government and Local Authorities. Homeowners would also be at liberty to elect not to avail themselves of the financial assistance package and simply pursue the potentially liable parties through the Tribunal or Courts at their discretion. The approach to be adopted will need to be considered in each case and will vary depending on the particular circumstances not only of the homeowners and the house but also the potentially liable parties (and their financial circumstances) and the specific defects giving rise to the claim.

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The recent proposal also envisages bank loans becoming available for homeowners for the remaining 50% of the remedial costs. This assistance will need to be provided by trading banks and as yet the criteria and details are still to be determined.

Of particular importance for any party involved in a leaky home (especially owners) is to be aware of the very strict 10 year time limitations which preclude claims being commenced after the expiry of 10 years from the date on which the defective works or actions are alleged to have occurred. In light of the fact that most of the houses currently exhibiting leaks or water ingress were constructed in the period between 1992 and 2005 this strict 10 year limitation period is highly relevant. We strongly recommend any homeowner concerned about their house to take

urgent steps to assess their options. **Michael Robinson** or **Andrew Hooker** at this office have considerable experience in assisting parties involved in leaky home disputes and will be happy to answer any particular questions that clients may have concerning leaky homes (whether as a homeowner or party against whom a claim is being made).

## THREE STRIKES LAW

While there is consensus over the fact that there is too much serious crime in New Zealand, debate has raged over whether the ‘three strikes’ legislation is the correct way forward.

The legislation lists over 36 offences, which are qualifying offences and count as a strike against the offender:

- Strike one occurs when the offender commits the first qualifying offence. The offender will receive the standard sentence and a first warning.
- Strike two occurs if the offender commits another qualifying offence. The offender must serve the sentence without parole and will receive a second warning.
- Strike three occurs if the offender commits a third qualifying offence. The offender must be sentenced to the maximum sentence for that offence with no parole.

For murder and manslaughter the maximum sentence will be life imprisonment and under the legislation life will mean life (i.e. until the prisoner dies). For aggravated robbery,

kidnapping, and attempted murder the maximum sentence will be 14 years, and for sexual violation 20 years. For the second and third strikes all of these sentences will be served without eligibility for parole. Preventative detention will still be available if a longer sentence is required.

It is anticipated that the new law will improve public safety by locking up offenders for a longer period and improve public confidence in the justice system. It is also hoped the new law will relieve victims of the stress of attending parole hearings, and the anxiety and uncertainty of not knowing when offenders will be released on parole.

Critics argue that the ‘three strikes’ law will take away judicial discretion and ignore the factors that should be considered when assessing sentencing such as premeditation, an early guilty plea, and an offender who is remorseful. Dr Richard Ekins, Senior Lecturer at Auckland University’s Faculty of Law, has highlighted instances where inconsistencies may occur:

- Two men who commit an unpremeditated aggravated street robbery would ordinarily receive a sentence of 18 months to 3 years. If one of the men has previously had two strikes then he has to be sentenced to 14 years in prison – the maximum penalty for aggravated robbery.
- An armed robber, with no prior convictions, may brutally assault a victim while his accomplice, with two previous strikes, may be merely the getaway driver. In sentencing, the judge will have no discretion with the getaway driver – he will receive the maximum sentence with no parole while the armed robber may comparatively be punished less severely.

No doubt there will be ongoing debate about the merits and efficacy of the ‘three strikes’ law into the future. Watch this space for updates. If you have any queries regarding criminal offences please contact **Douglas Mitchell** or anyone in our litigation team.

# AWARD WINNING SERVICE. AND A REALLY GREAT DEAL.

(It's one more way we can say 'thank you' for the business you entrust to us).

Established back in 1850 and proudly New Zealand owned, TSB Bank has grown - and it really has grown - to become the nations' most loved bank. ('Loved' and 'bank' in the same sentence? Not something you see often, is it?)

The fact is, for the last 10 years on end TSB Bank has had the highest customer satisfaction rating of all banks in New Zealand. Add to this their amazing 22 successive years of profit growth and how easy they've made it for folks to deal with them, and you'll begin to understand why we're bringing this special client-only offer to you.

For a limited time, if you're looking to buy a new home, or refinance your existing home loan, TSB Bank is offering you a really rewarding reason to experience their award-winning service for yourself.

As an exclusive offer to Turner Hopkins' clients, arrange a home loan through TSB Bank before the end of July and you'll receive:

- A great home loan rate (see [www.tsbbank.co.nz](http://www.tsbbank.co.nz) for current rates available)
- Up to \$750 towards legal fees (based on 0.25% of the loan amount, up to a maximum of \$750)
- No application fee

A TSB Bank Home Loan is not an off-the-shelf

kind of product. You are free to mix and match from a range of interest rate, loan and repayment options to create a home loan package most suited to your needs.

This special offer is only available to you as a Turner Hopkins client, and only until 31 July 2010. Terms and conditions apply, see TSB Bank for details. To find out more, simply call in to TSB Bank on the corner of Hurstmere and Lake Road, Takapuna (phone 09 920 4270) or on the corner of Queen and Wellesley Streets in the city (phone 09 920 4222) or visit [www.tsbbank.co.nz/tsb.aspx/turner-hopkins](http://www.tsbbank.co.nz/tsb.aspx/turner-hopkins) to find out more.

**TSB Bank**   
*expect more*

## THE BENEFITS AND PITFALLS OF FRANCHISING

**Are you contemplating buying a franchise? It is helpful to have an understanding of how franchising works, and the potential pitfalls for the franchisee, before signing any franchise agreement.**

Franchising is a business model in which one business, the franchisor, allows a separately owned business, the franchisee, to use their systems, brand name and other intellectual property rights in return for royalties and other payments. The advantage for a franchisee is that they get the benefit of a proven and tested business model. The franchisor, on the other hand, is able to expand their business without providing the capital and taking on the risk. The association between the parties is symbiotic. The franchisee relies on the franchisor and the other franchisees to maintain the reputation of the brand.

The franchise agreement sets out the conditions upon which the franchise is to operate. This will usually include:

- fees to be paid, both upfront and ongoing,
- duration of the agreement and renewal rights,
- intended territory or market,
- dispute resolution procedure, and

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- rules relating to the on-sale of the franchise.

In order to assist the franchisee and to ensure consistent quality of service amongst franchisees there is usually a franchise manual that provides operational details. This manual contains the business model, with most agreements requiring strict adherence to it.

Fundamentally, franchise agreements should be approached like any other contract and need to clearly reflect the arrangement between the parties. The agreement should be carefully examined by an independent lawyer, preferably one with franchise experience. Many franchise agreements, particularly with large firms, are non-negotiable. Prospective franchisees should be prepared to decline to sign contracts that contain onerous and one-sided terms.

There are a number of common pitfalls within franchise agreements. For example, the franchisee needs an exclusive territory within which the franchisor may not grant any other franchise licenses. Clauses that allow reduction of this territory by the franchisor are common and should be considered carefully. Also, the franchisor should specify the steps they will take to protect the intellectual property rights

being paid for. The exact method of calculating the royalties needs to be specified as well as penalties for late payments. Clauses that allow for early termination are very common and need to be clearly understood. Agreements that limit the liability of the franchisor to the franchisee are cause for concern, particularly when related to obligations for marketing, training, and disclosure statements in the negotiation phase.

There is no specific franchise legislation to protect franchisees, however a large number of franchisors abide by a self regulating code of conduct that aims to "promote high standards of franchise conduct" and does offer some protection against unreasonable and unfair conduct on the part of the franchisor.

If you would like us to assist you with any franchising or other business matters, please contact **Mike Newdick**.

### OUR WEBSITE

Visit us on the internet at [www.turnerhopkins.co.nz](http://www.turnerhopkins.co.nz)

### NEWSLETTERS

If you would like to receive our newsletter by email please reply to [helen.white@turnerhopkins.co.nz](mailto:helen.white@turnerhopkins.co.nz)

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