

EDITORIAL

What fantastic weather we have been having – don't you just love Christchurch when it is like this? Its great to spend time outdoors and enjoy the events this fantastic city can offer. Coming up is the Ellerslie International Flower Show from 10-14 March. It must be nearly time to rebrand this great event to reflect our City's involvement!

Once again, employment law is in the news with the Government looking at imposing changes to the Holidays Act 2003. One of the changes relates to Rest and Meal Breaks and flexibility around these. It is interesting that in an office environment this matter does not seem to pose the same difficulties found in other industries, although it is understandable that large organisations might find it difficult to administer breaks.

Keeping up with current legislative requirements for staff can be a daunting job, particularly for small business owners with considerable compliance responsibilities already. MML lawyers can answer any queries you might have or point you in the right direction to obtain the information you need.

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Employment Update

The employment law landscape is an area of reform that the National Government has targeted since taking office. Listed below are some of the recent changes and proposals for change in employment law.

Definition of Serious Harm

The Minister of Labour, Hon. Kate Wilkinson, announced in December 2009 that the Government proposed to amend 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 that currently exist.

Report on Workplace Deaths

In December 2009 the Government ordered a report into workplace deaths. At that time there had been 31 workplace deaths in 2009 - all 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.

Holidays Act Review

The Government intends that proposals for change to the Holidays Act 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.

Watch this space for further updates!

Rest and Meal Breaks

Since 1 April 2009 employees have been entitled to compulsory rest and meal breaks after a certain number of hours of work. Many workplaces met or exceeded the compulsory minimums, however for some workplaces the compulsory prescription of rest and meal breaks presented difficulties and significantly affected their workplaces.

The Rest Breaks and Meal Breaks Amendment Bill, whilst maintaining an entitlement to rest and meal breaks, proposes that: employers and employees may agree on the timing of the breaks rather than the timing being prescribed by legislation, 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.

The Government hopes that this relaxation of the requirements will provide employers with the flexibility to schedule their rest and meal breaks in a way that best suits their industry.

Franchises

When businesses develop successful and profitable enterprises including brand logos and a format which works they often consider franchising these intellectual property rights. The return for the franchisor is royalties whilst for the franchisee it enables them to enter into a well known business model that has already been proven.

Sue McCormack has acted for Mod's Hair since its inception and just as the franchisor / franchisee relationship requires an ongoing close association so does the franchisor and its legal advisor. Mod's Hair has franchised its business model throughout New Zealand and is franchising the brand throughout Australia.

As with all successful franchises the association between the franchisee and franchisor is symbiotic - the franchisee relies on the franchisor and other franchisees to maintain the reputation of the brand. It is vitally important that franchisors choose franchisees with suitable business acumen to grow and maintain the brand and who work well within the system that a franchise offers.

The franchise agreement governs the relationship between the parties setting out the conditions upon which the franchisee is to operate. Most agreements will include:
Fees to be paid (both upfront and ongoing);



Sue McCormack with one of the owners of Mod's Hair franchise, Julianne Liebeck discussing ongoing growth for the continuing development of their brand.

Duration of the franchise and renewal rights;
Ongoing development and training; Intended territory and market;
Dispute resolution procedure; and
Rules relating to the on-sale of the franchise.

In New Zealand there is no specific franchise legislation however successful franchisors

will ensure they abide by the self regulating code of conduct published by the Franchise Association of New Zealand that aims to promote high standards of franchisee conduct.

If you consider your business may be right for franchising, please call Sue McCormack to discuss further.

Christchurch Golf Resort – Finalist in Canterbury V5 Awards

Christchurch Golf Resort Limited is one of eleven finalists in the Canterbury V5 Initiative.

V5 is an initiative established by the Canterbury Employers Chamber of Commerce, Canterbury Development Corporation and the University of Canterbury and seeks to identify up to five projects of national significance that have the potential to generate significant benefits for the Canterbury region over the next two decades.

Tony Herring has acted for Christchurch Golf Resort Limited since its inception in 2003 and has advised on all aspects of the establishment of what will be an extremely exciting tourism opportunity for New Zealand.

The Christchurch Golf Resort will be an international Golf Academy and Resort based in Spencerville, adjacent to the Styx River. An International Golf Academy and associated resort community will be established on 157 hectares of land.

As well as being a significant contributor to the tourism industry within Canterbury and New Zealand, the Resort will promote an



environmentally driven design and provide an ecological link with the Styx River, two issues close to the hearts of Mortlock McCormack Law.

The Resort will create employment for more than 120 full-time people and will feature significant use of new unique and specialist technology.

The five winning projects will be announced at a Canterbury V5 function on 11 March 2010 so watch this space!

Mortlock McCormack Law is excited to be involved in such an exciting project with the potential to provide huge benefits for the region in the years to come.



Vanessa Clark, pictured here with her mum, Amanda Clark, on 2 October 2009, dressed for her Admission to the Bar as a Barrister and Solicitor of the High Court of New Zealand. Vanessa has been a member of the Mortlock McCormack Law litigation team since November 2007 when she began as a Summer Clerk. She is now thoroughly enjoying her position as a Solicitor.

Trust Beneficiaries' Rights to Information

How much information should beneficiaries under a trust be given, and what information are they entitled to? In many trusts the settlors and trustees are Mum and Dad and the beneficiaries are the children. Usually the children are kept informed and advised of the assets in the trust and the question of what information should be disclosed to the beneficiaries is often not an issue.

Questions may arise as beneficiaries get older or where communication between trustees and beneficiaries is limited or has broken down. The beneficiaries may become suspicious of the actions of the trustees and demand financial statements and other financial information from the trustees.

Trustees are not legally required to provide beneficiaries with Trust documents, although in many cases trustees will for example provide a copy of the Trust Deed, information and explanation as to investments, financial statements and accounts of the Trust.

Historically it was thought that a beneficiary under a fixed trust ("fixed beneficiary") had an entitlement to view trust documents and information, and a beneficiary under a discretionary trust ("discretionary beneficiary") did not. In a fixed trust the number of beneficiaries and the share they will receive are defined. In a discretionary trust the trustees may use their discretion as to who will be a beneficiary and what share a beneficiary will receive. The thinking was that a fixed beneficiary has an entitlement to Trust property, whereas a discretionary beneficiary merely has the right to be considered as a beneficiary which explained the different entitlements to Trust documents and information.

In Schmidt v Rosewood Trust Limited the Privy Council held that a beneficiary's entitlement to seek disclosure of trust documents is based on the Courts' inherent jurisdiction to administer Trusts rather than whether the beneficiary is a fixed beneficiary or a discretionary beneficiary. Both fixed and discretionary beneficiaries can apply to the Court for disclosure of Trust documentation.

Where a beneficiary applies for disclosure of a Trust's documents, the Courts will, in exercising their discretion, balance the interests of trustees, beneficiaries and third parties. The beneficiaries do not have an absolute right to information. The Court will consider the nature of the information and the interests of all the beneficiaries.



Information which the Courts have in the past provided to beneficiaries include:

- copies of the Trust Deed,
- financial accounts and statements of the Trust,
- Deeds of Variation of the Trust Deed
- Deeds of Retirement and Appointment of Trustees,
- valuations of assets of the Trust, and legal opinions relating to beneficiaries rights and the interpretation of a Trust Deed's provisions.

In exercising their discretion, the Courts will consider personal and commercial confidentiality and sensitivity, whether limitations need to be placed on the use of the documentation or information, whether some documents should be withheld in full or in part, and what impact the disclosure will have on the trustees, the beneficiaries or third parties.

There will be times when a trustee will refuse a beneficiaries' request for trust information. This decision is more likely to be respected and accepted where the trustee and beneficiary have developed a history of communication and respect. As trustee, if you are unsure as to what type of Trust information you need to disclose to the beneficiaries, we recommend you seek legal advice.

SNIPPETS

COURT ORDERED MEDIATION FOR CIVIL DISPUTES

In November 2009 the Government announced it will carry out a pilot scheme in the High Court in Auckland that will see parties referred to court-ordered private mediation for civil disputes.

The pilot scheme will consist of 50, one-day mediations carried out by private mediators. A panel of between 12 and 15 mediators, who hold legal qualifications and current practicing certificates, will be established.

Currently mediations are carried out by Associate Judges, however the Government would rather see Associate Judges spend time on cases that require judicial attention rather than mediating disputes.

A review of the scheme will take place after the pilot scheme has ended. If court-ordered private mediations prove successful, they may become the best way to deal with civil disputes.

The Government will be looking keenly at the outcome of the use of private mediators. The scheme has the potential to significantly increase the speed and quantity of civil cases dealt with in the High Court.

TWITTERING IN COURT



In a recent case in an Australian courtroom an instance of 'tweeting' was reported for the first time. Two journalists tweeted, which gave rise to outrage on the one hand and acceptance on the other; in particular from the presiding Judge who said that "tweeting can serve to inform the public in a more speedy and comprehensive manner than may be possible through traditional methods".

The issue surrounding the use of tweeting is that jurors are able to read the posts. Therefore, it is the content of tweets that is at issue. If the tweeting delves into commentary on the issues raised during a trial, or the demeanour of witnesses, then that may become problematic as it could affect the outcome of the trial.

Notwithstanding the merits of the arguments on either side of the twittering debate, it looks like tweeting is here to stay and raises the question of whether tweeting should be embraced and jurors educated about the potential risks and misuse of tweeting. However, equally, jurors should be encouraged not to twitter their time away outside of trial!

Real Estate Agents Act 2008

The Real Estate Agents Act 2008 came into force on 17 November 2009, replacing the 1976 Act and introducing a new regulatory regime. The Act's purpose is to promote and protect consumers' interests and "promote public confidence in the performance of real estate agency work". Some of the important changes are outlined below.

Real Estate Agents Authority

A Real Estate Agents Authority ("Authority") has been established as an independent Crown entity to replace the Real Estate Agents Licensing Board. It will be responsible for such matters as licensing, receiving complaints, disciplinary action, regulating standards, and consumer information. The Associate Minister of Justice Hon. Nathan Guy has stated that the public will now be able to access the Authority to gain impartial and easy to understand information and that the Authority will provide a robust, transparent complaints and disciplinary process.

Licensing

Every person engaged in real estate agency work must apply for a license on a yearly basis.

There will be a public register of licensees that will record whether the licensee has been disciplined in the last three years. This will allow consumers to make informed choices when choosing an agent.

Code of Conduct

The Authority will establish a Code of Conduct that will set minimum standards of behaviour by which all licensees must abide.

New Complaints and Disciplinary Processes

The Authority will, as required, establish Complaints Assessment Committees, to more effectively deal with complaints and investigate allegations about licensees. Each committee will have three members and will investigate complaints, make determinations about complaints, promote resolution of complaints, lay and prosecute charges before the Real Estate Agents Disciplinary Tribunal, refer complaints to other agencies where appropriate, inform complainants about decisions and publish decisions.

Real Estate Agents Disciplinary Tribunal

The Real Estate Agents Disciplinary Tribunal (the "Tribunal") is independent of the Real Estate Institute with members being appointed by the Minister. The Tribunal will hear and determine claims brought by a Complaints Assessment Committee and will hear any

subsequent appeals against the Committee's decision.

The hearings are to be held in public and appeals of Tribunal decisions will be heard in the High Court. The Tribunal may:

- suspend or cancel a license,
- impose a fine of up to \$15,000 in the case of an individual or up to \$30,000 in the case of a company,
- order agents to pay compensation of up to \$100,000 or have their license cancelled or suspended.

Disclosure Obligations

Real Estate Agents are now required to provide certain information to clients such as disclosing conflicts of interest, and making disclosure of all discounts and rebates the agent will receive. Agents must provide an approved guide to clients who are entering into agency agreements or agreements for sale and purchase. The guide will provide a plain language explanation of the document and the implications of signing it.

Agency Agreements

Clients must be given a copy of an agency agreement within 48 hours of signing. In the case of a sole agency agreement the client will have a cooling-off period, until 5pm on the day following signing, to elect to cancel the agreement.

Family Court - Early Intervention Programme

New procedures will be introduced to the Family Court in March 2010 following the implementation in 2008 and 2009 of two successful pilot programmes in selected Family Court Registries. These procedures (known as the National Early Intervention Program) are designed to allow Family Court matters to be resolved in a more timely and cost effective matter.

Cases in the Family Court will now be allocated a 15 minute Judicial Conference in a Judge's chambers within 14 days of the matter being filed. The purpose of this Judicial Conference is to immediately classify all cases as either urgent or intractable. This will determine how the cases are dealt with from the time they are filed.

Urgent Cases

Urgent cases are defined as those involving significant risk of harm or of an emergency

situation developing. Urgent cases will be allocated a 60 minute hearing within 14 days of the Application being filed. The purpose of the initial hearing is to determine the issues that need to be resolved together with any potential risks of harm to either the parties or their children.

If matters cannot be resolved during the initial hearing the Judge will make specific orders about the type or nature of evidence to be filed. These directions are intended to significantly reduce the volume of evidence filed in Family Court matters. If a final hearing is required, this will be focussed on addressing the specific issues previously identified by the Judge.

Intractable Cases

Intractable cases are those where it is unlikely that the parties will reach agreement because they are entrenched in their position. In cases involving children, a lawyer will be appointed to represent their interests as soon

as a defence is filed. Parties will be directed to attend counselling within 6 weeks of the application being filed. This counselling will be closely monitored by Judges to ensure that parties are engaging in the process. Parties will then proceed to either a Judge or Counsel led mediation within 12 weeks.

If matters cannot be resolved at mediation, parties will proceed to a 45 minute hearing. The Judge will question the parties in an attempt to quickly define the issues before moving on to investigate whether those issues can be resolved.

More complex or intractable cases that cannot be resolved at the 45 minute hearing will be allocated a half day hearing within 2 - 4 weeks of the short hearing date.

The aim of these new procedures is to reduce the cost and time delay by focussing on the specific issues and evidence.

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