

RAINEY COLLINS LAWYERS

Not For Profit Edition

Winter 2011

Welcome

To the first issue of our Not For Profit newsletter ...

In this issue we discuss conflicts of interest on Boards, the possible benefits of your Charitable Trust becoming an Incorporated Trust Board and the recent Greenpeace Case.

I trust you find the information of interest and use.

James Johnston
Chairman of
Partners



If you would like further information on any of the matters raised in this newsletter or on any other subjects relating to Not for Profit organisations, business or commercial matters please contact Ronette Druskovich or Olivia Porter by telephone on 04 473 6850 or by email on ...
rdruskovich@raineycollins.co.nz or
oport@raineycollins.co.nz

Alternatively we have a selection of free articles on our website
www.raineycollins.co.nz

You can also follow us on
Twitter @RaineyCollins.

Conflicts of Interest on Boards – Are they as serious as they sound?

Unfortunately, conflicts on Boards arise all the time, but they don't have to be a big issue – so long as you know how to deal with them. In this article we provide some guidance on how to approach conflicts on Boards.

Let's take Sarah – she's the Wellington Representative of a national organisation set up to assist small business owners around New Zealand. Sarah runs a small business in Wellington. At a meeting of the organisation, a proposal is tabled that will significantly benefit small businesses in Wellington. Does Sarah have a conflict of interest in this situation and is she able to participate in the discussion and vote on the matter?

First of all, it is necessary to consider what the organisation's rules say.

Check to see how "conflict of interest" is defined. Often, the rules include a provision that a Representative will not have a conflict where that Representative's interest is not different in kind from the interests of other members of that region. If Sarah's organisation has a similar provision, she would not have a conflict of interest provided her interest is no different to other small business owners in Wellington. However, if there was no such provision in the rules, it is likely that she does have a conflict of interest.

It is best practice for the rules of an organisation to require Representatives to disclose their interest and the extent of the interest to the Board. It is also common to prohibit any Representative from participating in the discussion concerning, or voting on, a matter in which they are interested. Depending on how the rules are drafted a Representative may be:

1. Able to participate in the discussion about the matter in which they are interested and able to vote;
2. Able to participate in the discussion about the matter but unable to vote;
or
3. Required to leave the meeting while the matter is discussed and unable to vote.

What's best for your organisation will depend on its individual circumstances. Get advice from your lawyer if you're not sure what conflict of interest provisions are best to include in the rules of your organisation.

If you're uncertain if a conflict of interest has arisen – it's best to take a conservative approach and err on the side of caution. In that situation, make sure the conflict (or possible conflict) is disclosed to the Board and follow the procedure set out in your rules.



Ronette Druskovich

Would your Charitable Trust benefit from becoming an Incorporated Trust Board?

The trustees of a Charitable Trust recently approached us for assistance in applying for a grant from the New Zealand Lottery Grants Board.

Trusts (including family trusts, corporate trusts and charitable trusts) are not separate legal entities, meaning the trustees enter into trust commitments and own trust property personally. Unfortunately for the Trust, the New Zealand Lottery Grants Board only provides grants over \$10,000 to legal entities. This meant that the Trust was unable to apply for the grant they wanted.

Fortunately for the Trust, Charitable Trusts (and unincorporated charitable societies) can incorporate as a trust board and become a "legal entity". This is a relatively straightforward process with several other benefits over and above being able to apply for certain grants from bodies such as the New Zealand Lottery Grants Board.

Ownership of Trust Property

Without incorporating, trustees hold trust property in their personal names on behalf of the trust, e.g. Bill Smith, Tina Brown and Michelle Jones. By comparison, trust property of incorporated trust boards is held in the name of the trust board. This can be beneficial because there is no need to worry about recording the change in legal ownership of trust property whenever trustees change.

This is particularly important if the unincorporated trust owns land, because the Land Registry Office has to be notified each time the trustees change so that the current trustees are recorded as the owners of the land. However, an incorporated trust board is recorded as the owner of all property, including land, and the ownership records don't have to be updated every time the trustees change.

Liability of Trustees

Without incorporating, trustees ordinarily enter into agreements and contracts personally, on behalf of the trust. This raises numerous liability concerns for trustees. On the other hand, an incorporated trust board is able to enter into contracts and is sued as a "legal entity" rather than the individual trustees. This reduces the possible personal liability of individual trustees.

If your organisation is a Charitable Trust or you are considering establishing a charitable organisation, talk to your legal adviser about the potential benefits of becoming an incorporated trust board.



Olivia Porter

When is a charity not a charity? The recent "Greenpeace Case"

The High Court recently upheld a decision of the Charities Commission not to grant Greenpeace charitable status. The main reason for denying Greenpeace status as a charity was that its purposes of promoting disarmament and peace were political in nature, and therefore, according to the Commission, not charitable.

The law currently prevents an organisation from being registered as a charity if it has political purposes. The exception to this is if the political purposes are "secondary, subordinate, or incidental to a charitable purpose" and "not an independent purpose" of the organisation.

In this case, the High Court stated that the extent to which Greenpeace relies on its political activities to advance its causes "means that the political element cannot be regarded as 'merely ancillary' to its charitable purposes."

This case confirmed that the Charities Commission is entitled to reject an organisation's application for registration as a charity if that organisation undertakes political activities.

However, the High Court hinted that this area of law may be reconsidered by the Court of Appeal or Supreme Court in light of recent Australian case law. The High Court of Australia has found that political activities will not disqualify an organisation from being charitable, provided of course that those political activities further the organisation's charitable purposes. Greenpeace may well appeal the decision to the Court of Appeal. So, watch this space ...

Tel (04) 473 6850

Fax (04) 473 9304

DX SP 20010

www.raineycollins.co.nz

Level 16

163 – 171 Featherston Street

PO Box 689

Wellington 6140

If you are not on our mailing list and would like to receive future editions of our Not For Profit Newsletter call Kay on 04 473 6850 or email kjohnston@raineycollins.co.nz

You can unsubscribe in the same way if you do not want to receive future copies.

© Copyright. 2011. Rainey Collins Lawyers. All Rights Reserved.