

IN BRIEF FROM RAINEY COLLINS

AUTUMN 2005

Welcome

to the autumn edition of our Rainey Collins newsletter In Brief.

This edition covers a variety of business, property, family and employment issues you should be aware of from a legal perspective.

These articles, and others, are also available on our website www.raineycollins.co.nz if you want to download them or send them to anyone.

In our last edition, we covered tax on airpoints. The position has changed since then so see our website for the latest developments.

If you have yet to visit our new premises at level 23, Mobil on the Park, in Wellington, then please call in and do so. We will be happy to show you around.



James Johnston
Chairman of Partners

Contents

Questions every Director or Intending Director should ask	1
Rainey Collins Grows Client Services	2
Seven Vital Privacy Issues for Employers.....	2
What happens if I'm Appointed Executor?	3
How does the new Building and Housing Department affect you?	3
Five new Rights for Children.....	3
Upcoming Seminars.....	3
Free Downloads	3
Fixed Term Agreements Reminder	4
Don't risk your Trust not Working.....	4
Employment Agreement Update.....	4

Questions every Director or Intending Director should Ask

Companies are always on the lookout for new Directors. If you are a Director or considering becoming one, there are 10 questions you should ask first.

Much has been said and written about 'governance'. Corporate governance is a hot topic, whether it relates to a small family company or the board of a large multinational corporation. It is especially relevant when it goes wrong as offending Directors can lose personal assets, receive very heavy fines and, in the worst cases, go to jail.

Governance includes, of course, the legal duties of company Directors. These legal duties are set by the Companies Act but are also contained in a complex web of related areas such as employment law, health and safety, holidays and many others.

While the obligation to act honestly, diligently and without self-interest is essential, it is possible sometimes to lose this focus. Sitting at the boardroom table can be intimidating and, particularly for those contemplating their own businesses, even frightening.

Fortunately *Fortune Magazine* developed 10 questions which, in some cases, appear to be very simple but should be asked by every Director. These questions, with my comments added, are:

1. How does the company make money?

This question is very simple and yet very important. A Director must know how the company makes its money because it is at the core of understanding the company's business.

2. Are the customers paying up?

Cash flow is the life force of any business. Without a strong cash flow a business cannot survive. It is important that Directors know whether customers are paying up, in full, on time and, if not, why not. Prompt steps can be taken to address any cash flow issues.

3. What could really hurt the business in the next few years?

Identifying potential risks at an early stage is vital. It means Directors can put in place strategies to minimise or remove the damage associated with any potential major risks, should they eventuate.

4. How is the business doing relative to its competitors?

A comparative analysis of competitors is important and can be used as one of many key yardsticks to measure the success of the business. It is also important that Directors keep apprised of what any competitors are doing and the reasons for their actions. For instance, if competitors decide to move out of a territory or get out of a product, it is important to assess why this is occurring and the impact that it will have on your business.

5. What would happen if key personnel left the business?

For many businesses, its success is a direct result of the personnel involved. Accordingly, it is important for Directors to consider the consequences should key personnel be head hunted or not able to work for any reason. It is important for Directors to consider who would run the business and whether or not succession plans should be put in place to ensure that the company can survive the loss of key personnel.

6. How is the business going to grow?

A Director must know how the business is going to grow. Any plans for growth should be carefully considered so that the risks can be identified and decisions made on the basis that the various risks are reasonable, given the goals sought from the growth.

7. Is the business being run within its means?

All Directors must be satisfied that the business is operating within its means. Directors must understand the sources and application of the business' funds. They must also be made aware immediately if the business cannot meet its obligations as the personal liabilities for insolvent trading are severe, even for Directors not involved in the day-to-day operation of the business.

8. How much do key personnel or management get paid?

Great care should be taken in determining the remuneration of key personnel and management. In the event that key personnel or management are asked to resign, it is important that Directors know the extent of their liability – or bottom line – under any employment agreement. When negotiating agreements with key personnel or management, appropriate caps limiting the

continued on page 2

Rainey Collins Grows Client Services

Rainey Collins is joined by Peter Johnston as a Partner. Peter will be assisting clients get the best results for them in the property and business fields as well as continuing to assist overseeing the team working in the Treaty of Waitangi area.

Managing Partner Alan Knowsley said “We are very pleased to have Peter join us as a Partner. He has worked in the firm for several years and has provided excellent service to our clients. Our growth in client services on a number of fronts will be supported and enhanced by Peter’s new role as a Partner and he will continue to look after our valued clients for many years to come.”



Seven Vital Privacy Issues for Employers

Breaching privacy in the work place can be expensive. A recent example involved an employer disclosing to other staff that an employee suffered from a serious medical condition.

As a result of that disclosure, the employee was embarrassed and felt compelled to resign. The employee complained to the Privacy Commissioner and a settlement was reached where the employer had to pay financial compensation.

The issue of privacy in the workplace raises important and difficult questions. The special nature of the employment relationship means that the employer has access to, and control over, a substantial amount of personal information about their employees.

However, an employer has to be very careful about what they do with the information. Any unfair use of an employee’s personal information could give rise to a personal grievance or a complaint to the Office of the Privacy Commissioner.

Seven vital issues regarding privacy that employers need to be aware of are:

1. Pre-employment enquiries

- You are entitled to seek personal information if it is necessary to do so. It is not appropriate to ask a potential employee to disclose all medical conditions, but it is acceptable to ask about conditions that could affect their employment.
- Don’t ask a potential employee for their date of birth or ask if they have dependants because you are not allowed to discriminate on these grounds.
- You are entitled to ask whether a potential employee has any criminal convictions or whether they have been through the police diversion scheme.

The new Criminal Records (Clean Slate) Act means that an employee does not have to advise an employer of any convictions that occurred more than seven years ago, provided certain criteria are met. It is an offence for an employer to require an employee to disclose convictions that are subject to the Clean Slate Act. The penalty is a fine of up to \$10,000. For more details on employees concealing criminal convictions, go to our website.

2. Personality tests

- Personality testing of job applicants is allowed under the Privacy Act. However, you must advise the candidate that the information may be passed to an outside agency for evaluation.

3. Job references

- If you request a reference from a previous employer, you must make sure that the candidate has authorised the collection of information from that referee. The previous employer who supplies the reference must also be authorised to disclose the subject’s personal information. More detail is included in the article on references located on our website.

4. Drug and alcohol testing

- This is not prohibited but testing has to be reasonable in the circumstances. The testing must be carried out fairly and in a way that does not intrude unreasonably into the individual’s personal affairs.
- Drug testing is permissible in post-accident or near-miss situations, or where an employee’s behaviour may cause harm. You are not able to test employees randomly for drugs.

5. Covert recording

- Covert work place surveillance is permissible if there is a proper purpose and is done reasonably, for example, to investigate a suspected theft.

6. Employee bag and vehicle checks

- This cannot be done without consent. Consent can be written in the employment agreement or sought at the time.

7. Monitoring of email and internet use

- You can set rules about this. We suggest that you cover it in your operating policies, not your employment agreements, because you can change a policy when you need to but you can only change an agreement with consent. Make sure that your employment agreements refer to the operating policies.

Jacinda Rennie



from front page

amount that key personnel or management can receive upon termination should be included.

9. How does bad news get to the Directors?

It is important that mechanisms are in place so that Directors get bad news at the earliest opportunity. Directors also need to be aware that corruption can occur at any time and that they should be ready to act accordingly.

Directors need to consider segregating duties and putting in place appropriate checks and balances. These can range from receiving necessary information, asking appropriate questions and demanding full answers, checking expense claims and, where necessary, ordering professional audits.

10. Have you understood the answers to the questions listed above?

Directors need to understand the answers to

the questions they ask so that appropriate steps – including further questioning – can be taken. A Director needs to use commonsense at all times. If you have a gut feeling that something is wrong or more information is required, follow through. Never assume that someone else will fix things or that “it’ll probably all be all right”!

Peter Johnston

What Happens if I'm Appointed Executor?

Recently a friend of mine was asked if she could be an Executor of her cousin's Will. She felt honoured to be considered competent and capable of fulfilling an Executor's duties. She wanted to take up the request but felt uncertain about what the role meant and fearful of the responsibilities it could entail.

My friend's situation is not uncommon. To clarify, the role of an Executor is simply to carry out the terms of a Will.

This means the Executor must find out what the assets and liabilities are and, if necessary, the assets must be valued. All debts, taxes and duties must be paid out of the Estate funds. The Executor may then distribute the balance to the beneficiaries in keeping with the terms of the Will.

Further, if there are claims against the Estate, these must be resolved before the Executors can distribute the Estate.

Claims contesting the contents of the Will may include:

1. Claims brought by the partner or children claiming they were not provided for in the Will.
2. A person seeking to enforce a promise or a gift in the Will for services they performed.
3. A spouse or de facto who make a claim under The Property (Relationships) Act instead of accepting the contents of the Will.

An Executor may distribute an Estate six months after the Grant of Probate by the Court if no claims have been made.

Further delays may occur however when matters are complex, for example, the Estate includes business and investments assets, valuations or tax matters.

If there are no claims and there is only one beneficiary, the Estate would usually be wound up by the end of six-month period. However if the Estate is wound up before the six-month period after the Grant of Probate, and there is a successful claim against the Estate, Executors may be held personally liable.

Further, if the Will grants a life interest in an asset (such as the use of property or income for life), the Estate cannot be wound up until the life interest beneficiary has died. The responsibilities of the Executors continue until the Estate is finally distributed.

Agreeing to be an Executor is an important decision. You may not want to take on the job if the family is divided and the Will is likely to be challenged.

Usually you cannot charge for your time and trouble so, if an Estate's administration is likely to be time consuming and onerous, you need to think hard about accepting.

Remember that, in most instances, the lawyer handling the Estate will do all of the work and make sure everything is done properly to minimise risk for you. The fees for this work are paid from the Estate's assets.



Kiri Skipwith

Five new Rights for Children

The new Care of Children Act, which comes into force in July this year replaces the outdated Guardianship Act and provides children with substantial new rights.

It also brings New Zealand into line with its obligations under the United Nations Convention on the Rights of the Child.

One of the main objectives of the new law is to ensure a stronger focus on the rights of the child. Children have five new rights. These are:

1. The law states that the Court must take into account the welfare and best interests of the child.
2. The child must be given a chance to express their views on matters that affect them.
3. Any views that the child expresses must be taken into account.
4. Children affected by a decision of a Family Court are given the right to appeal the decision to the High Court.
5. The Court must appoint a lawyer to act for the child (unless it is satisfied that the appointment would serve no useful purpose). This includes any proceedings that involve decisions on who is to provide day-to-day care for the child or arrangements in respect of contact with the child.



Jodi Ongley

How does the new Building and Housing Department affect you?

The new Department of Building and Housing was established in November last year and has responsibility for the administration of a range of property law matters including:

1. residential tenancies
2. unit titles
3. retirement villages
4. the Building Act.

The Department's role is described as a 'one stop shop' for regulatory issues and standards affecting building and housing and for resolving disputes relating to these matters.

It has taken over, with immediate effect:

1. leaky building claims
2. the Tenancies Mediation Service
3. the functions previously carried out by the Building Industry Authority.

The Housing Corporation will continue to exist as a stand-alone Crown entity with responsibility for the policy and operational functions connected with government housing provision.

For more detail about the Building Act reforms, go to our website for the complete version of this article.



Jane Stevenson

Upcoming Seminars

Demystifying Family Trusts

Nick Miles presents free seminars on Family Trusts.

We are also presenting free seminars on Relationship Property.

See our website for details
www.raineycollins.co.nz

Free Downloads

A Health and Safety Action Plan as well as an Employer's Guide to Disciplinary Processes are available on our website for free.

Fixed Term Agreements Reminder

Employers are able to enter into fixed term agreements, however they have to be careful about how it is done as there is a risk that the expiry of a fixed term agreement could amount to an unjustified dismissal.

A fixed term agreement is an employment agreement that terminates on a certain date.

As an employer, you can reduce the chance of this happening by following this checklist:

1. The employer must:

- Have a genuine reason, based on reasonable grounds, for specifying that the employee's employment is to end in that way, and
- advise the employee in writing of when or how his/her employment will end and the reasons for the employment ending in that way. This must be done even if the employee agreed to the fixed term.

2. Fixed term agreements can be used in the following situations:

- To cover a worker's parental leave or maternity leave.
 - For seasonal work, such as fruit picking.
 - To cover busy periods in hospitality and service industries, such as the Easter period.
 - To undertake specific projects or work of a finite duration, for example a building project in the construction industry.
- 3. The agreement is not 'genuine' if the purpose of the fixed term agreement is to:**
- Exclude or limit the employee's rights under employment law.
 - Establish the employee's suitability for permanent employment.
 - Exclude or limit the employee's rights under the Holidays Act.
- 4. The employment can end if one or more of the following occurs:**
- At the close of a specified period, for example

when a worker is to return from parental leave.

- On the occurrence of a specified event, for example at the end of a harvest.
- At the conclusion of a specified project.
- On a set date.

As an employer, you need to think carefully about the reasons for using a fixed term agreement and ensure that the reasons for doing so are recorded in writing and given to the employee.

Failure to follow the correct procedure when an employee commences a fixed term agreement could later result in their position being made permanent or an expensive, unjustified dismissal claim.

Alan Knowsley



Don't risk your Trust not Working

Trusts are for protecting property. They do this very well but only if they are properly administered.

If you get into financial difficulties and have significant assets in your Trust, the first thing your creditors will do is try to get their hands on those Trust assets.

This means it is absolutely vital that your Trust cannot be accessed by anyone other than those for whom it was established.

One of the main things that can make a Trust vulnerable is failure to run it properly as an entity that is completely separate from your personal assets. To make sure your Trust runs properly, you should:

1. Hold an annual meeting of Trustees and keep proper minutes of Trustees' decisions.
2. File an annual tax return.
3. Prepare annual accounts.
4. Keep proper records of all financial movements.
5. At all times keep the Trust's property separate from your remaining personal assets. That means never include any Trust property in a statement of your personal assets given to your bank.
6. If you and your spouse are the only Trustees, it is advisable to have a separate, independent Trustee as well. While this is not an absolute

legal requirement, it shows the world that the Trust property is no longer under your sole control.

7. Ensure that all of the Trust's assets are in the names of the Trustees.

All the above points are straightforward but failure to observe them could easily result in your Trust being vulnerable. If it turns out that your Trust is not giving you the protection you expect, then why have it in the first place?

Nick Miles



Employment Agreements Must Be Updated by 1 April 2005.

All employment agreements must contain a provision relating to working on a public holiday that is consistent with the new law which provides for time and a half. This applies to all new and existing agreements but there are complicated rules as to how this is implemented. Make sure your agreements are up to date with this change.

Alan Knowsley

RAINEY COLLINS LAWYERS

Receive future editions of *In Brief*

If you are not on our mailing list and would like to receive future editions of *In Brief*, phone Maureen on 04 473 6850 or email mharris@raineycollins.co.nz
You can unsubscribe in the same way if you do not want to receive future copies.

TELEPHONE 64 4 473 6850 · FACSIMILE 64 4 473 9304 · DX SP20010 · WWW.RAINEYCOLLINS.CO.NZ
LEVEL 23 · MOBIL ON THE PARK · 157 LAMBTON QUAY · PO BOX 689 · WELLINGTON