

# Terms of Trade: Ensure You Can Get Paid For What You Do

If you supply goods or services without written terms you can find yourself in disputes that could have been avoided if there had been clear, written, terms of trade from the start, detailing your rights and the buyer's responsibilities.

In particular, clear terms of trade minimise and prevent bad debt.

Questions you should consider for your terms of trade:

## 1. Exactly Who Is The Other Party?

- The legal entity you are contracting with should be clearly identified ... is it a company, partnership or individual, and who has the power to sign for the entity?

## 2. The Price

- What is the price?
- Does the price include or exclude GST?
- Is the price a firm quote or only an estimate?
- What happens if you discover new circumstances not covered in the price?

## 3. Acceptance of Quote

- If a quote is given, how long is the quote open for acceptance?

## 4. Payment

- Is the price payable in advance, "cash on delivery", or on the 20th?
- Will interest accrue on the unpaid debt if payment is not made by the due date? Interest on unpaid accounts must be specified in advance to be enforceable.
- What are the interest rate and other terms if payment is not made on time?
- Will the debtor be liable for your legal costs for pursuing the debt?
- Is a guarantee required if you are giving credit? This may be necessary when you are dealing with a company rather than an individual.

## 5. Risk and Insurance

- At what time does risk in the goods pass to the buyer?
- If you, the seller, are to install the goods, who will bear the risk of damage while the goods are being installed?
- Is insurance required, and who will pay for it?

## 6. Reservation of Title

- Does ownership of the goods pass to the buyer when the goods are delivered, or do you, the seller, retain

ownership until you have received full payment? (A clause stating that the seller retains ownership until full payment is called a "reservation of title" clause, or a "Romalpa" clause. The Consumer Guarantees Act requires that for a "reservation of title" clause to be enforceable, it must be explained fully to the consumer. The consumer must acknowledge this in writing and the consumer must be given a copy of the agreement. You need to get them to sign the terms of trade to enforce this clause. Have them do this in all cases so you can prove they agreed to the terms.

We have developed Terms of Trade relevant to a wide range of businesses. These are based on our experience over many years advising businesses just like yours and collecting debts for small and large organisations throughout New Zealand.

To have us compare your existing terms to those we believe are most likely to be appropriate for you, please contact me by e-mail on [trobins@raineycollins.co.nz](mailto:trobins@raineycollins.co.nz) or phone 0800 733 424.

**Tracy Robinson**



# Conflicts Of Interest... An Expensive Lesson?

The recent High Court decision in the Diagnostic Medlab case brings to the fore the issue of conflicts of interest. According to the High Court the board level errors were such that a half billion dollar contract was set aside.

But what does this mean for your own boards? The decision provides a timely

reminder to regularly and rigorously check your organisation's conflict of interests register for possible conflicts. It is also a clear lesson that all board members should understand what has been disclosed and where appropriate how to get updated information so that prudent decision making can occur. Indeed in some instances it is better that the interested director not

participate in any way in discussions regarding the particular matter.

The case is subject to an appeal so we will continue to watch this space.

**James Johnston**



**Business Seminars** on Succession, Asset Protection and Buying and Selling a Business are held regularly. See our website [www.raineycollins.co.nz](http://www.raineycollins.co.nz) or call us on 0800-733-424 for full details.

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## IN BRIEF RAINEY COLLINS COMMERCIAL ISSUES

AUTUMN 2007

## Welcome

to the Autumn edition of Rainey Collins' Commercial Issues newsletter. In this edition we look at business succession and what business owners need to do now, simple ways to protect your business name and logo, Kiwisaver information for employers, restraints of trade and getting them right, discuss the importance of formalising business venture arrangements before it's too late, and provide some vital practical tips for your terms of trade to help you get paid for what you do.

These articles and others are available on our website [www.raineycollins.co.nz](http://www.raineycollins.co.nz)

You can download them or send them to others.

I trust that you find the information of interest and value to your business.

**James Johnston**  
Chairman of Partners



## Business Succession... What You Need To Do... Now!

**Is a good slice of your wealth trapped in your business? Would it be available to your family if you die? Have you taken the time to plan properly for the future? For many business people, the answer is usually "no"!**

Most of us spend many years and a good part of our lives working hard, taking the usual commercial risks, managing the never-ending problems with customers, staff, suppliers, banks and the IRD. But are we focused only on the day-to-day running of our business, or the annual cash flow?

Spending time and energy to build a successful business is great, but there will never be a better time than now to think about how you are going to realise the value of your business for the future security of yourself and your family.

The starting point is to prepare a business succession plan.

### What is a Business Succession Plan?

A business succession plan is an exit strategy covering a multitude of reasons, usually voluntary, for exiting a business. It involves preparation and forward planning for both expected and unforeseen events. It emphasises finding the right person or people to come through and invest in and continue the business. A key focus is providing the exiting owner with an opportunity to realise full value for their efforts.

### So how do you do it?

Each plan will vary according to the type and size of the business, but will require evaluations of some common factors including:

- The **financial standing** of the business to determine its worth, including goodwill and debt levels. Will tax liabilities be triggered by succession?
- The **context** in which the business operates, to determine the degree of key person dependency and to start looking for a likely successor – perhaps a competitor, or an existing staff member, or a family member;
- The **structure** of the business, to determine any legal restrictions or conditions to be met before a transfer of ownership occurs, e.g. exercise of pre-emptive rights and release of personal guarantees;
- Your **needs as owner**. When do you wish to exit? Is a gradual exit, handing over in stages with a continued income stream, an option? Do you need to fully realise the capital value of the business for retirement or investment in another business?

For more detailed information please visit our website [www.raineycollins.co.nz](http://www.raineycollins.co.nz) to obtain a PDF copy of our free download 'Business Succession Planning', or for details of one of our complimentary business seminars on the same topic.

### Key Message

Seek the right expertise now to help you with this important part of your business strategy. You will then be able to exit your business on your own terms and at a time that suits you.

**Jane Stevenson**



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# Protecting Your Catchy Business Name And Logo

**Does your business have a catchy name and/or clearly identifiable logo? If you haven't registered it as a trademark, this could happen to you:**

Bill started a very successful retail business and as a result of a quality product, memorable logo, and significant exposure in the market, people very quickly learned about Bill's business and recognised his logo when they saw it.

Shortly afterwards, a competitor entered the market and began operating under a different business name. But they used a company logo so closely resembling Bill's that it began to cause confusion amongst his target market.

Bill attempted to stop his competitor from using the similar logo, but he hadn't registered his logo as a trademark. He found that he didn't automatically have exclusive use of it, or the ability to easily prevent a competitor using a very similar mark.

He had other options to try to stop his competitor using the similar logo, but they required him to go to court, and relied on the courts recognising "goodwill" in his business.

Goodwill generally equates to an established reputation, so for someone like Bill with a new business it can be hard to establish. Also, even if yours is a long-established business, think about how hard

it might be to provide tangible evidence of something as intangible as reputation.

The important point is that there's no need to leave it to the courts at all. You can avoid the situation Bill found himself in by registering either or both your company name and logo on-line either yourself or with legal assistance.

Compare that to the cost of litigation and you'd be wise to get on to it today! If your business is worth running, then your company name or logo is worth protecting.

**Holly Drummond**



# KiwiSaver... What Employers Need To Know

**Fines of up to \$300,000 can be imposed on employers who fail to comply with the new KiwiSaver scheme. Here are some key things that you need to know now.**

**What Does KiwiSaver Mean For Private Employers?**

KiwiSaver is a voluntary, largely employee-funded retirement scheme which employers will be required by law to make available to their workers. From 1 July this year, employees aged between 18 and 65 beginning a new job will automatically be enrolled in KiwiSaver, to which contributions will start from that employee's first pay. The employee may "opt out" between the second and eighth weeks; and anyone aged 18 to 65 already employed when the scheme comes into effect has the option to "opt in".

The scheme puts more onerous responsibilities on you as an employer that you must be careful to satisfy in order to avoid quite significant potential fines. Responsibilities will include:

1. Providing new employees with information packs;
2. Enrolling employees who "opt in";

3. Providing the IRD with the relevant information;
4. Passing on information from the provider of the scheme to the employee; and
5. Keeping the required records.

**What if I Already Offer a Superannuation Scheme?**

Several options are available to you. If you already offer a registered superannuation scheme that complies with certain rules, you can apply for an exemption from the automatic enrolment of new staff. New staff will still be able to opt into KiwiSaver, but the numbers of enrolling employees may be lower and may therefore reduce your responsibilities under the new law.

If your existing scheme meets all the KiwiSaver requirements, you will be able to convert it to KiwiSaver, with member consent. Alternatively, you can add a KiwiSaver section to your existing scheme to which members may transfer their interests if they choose.

**Choose Your Own Level of Participation**

As an employer you will have to make certain decisions with respect to how you wish to conduct the scheme in your workplace. For example:

- Do you wish to choose a default scheme for your employees?
- Will you take on an active role in making this scheme available to employees, for example by emphasising the benefits of the scheme to your employees?
- Will you offer employee benefits such as free financial planning advice, insurance benefits, and employer contributions subsidies which give rise to tax advantages?

While the Act ensures you are free to choose your own level of involvement, it is important to remember that an attractive retirement scheme goes a long way towards the employment and maintenance of a loyal staff; and with greater job satisfaction comes greater profitability. We can discuss options with you for the system that best suits your work environment and to assist your business to navigate safely through the KiwiSaver scheme.

**Claire Coe**



# Restraint Of Trade Clauses: Powerful Tools If Used Carefully...

**A restraint of trade clause in an employment agreement attempts to prevent an employee from working or being involved in a certain area of employment for a specified period and in a specific geographical area after leaving your employment.**

For example, a clause might prevent a valued salesperson in Lower Hutt from working as a salesperson for another employer in Lower Hutt within a five kilometre radius for three months after ceasing employment with their current employer.

Restraint of trade clauses are potentially valuable tools which give an employer the ability to prevent a former employee from competing against them after they cease employment with the employer. However, restraint of trade clauses must be enforceable to be effective, and the

Courts will not enforce a restraint of trade clause unless the clause is justifiable and reasonable.

The clause is justifiable if it attempts to protect an interest which rightfully belongs to the employer, such as trade secrets.

Many factors will be relevant in determining whether the clause is reasonable. These will include the necessity for the clause, and the duration and geographical scope of the restraint.

For example, a clause where an employer is based solely in Napier and which attempts to prevent the employee from working in the particular field of employment throughout New Zealand for a year after ceasing employment is unlikely to be considered reasonable. The adequacy of consideration given to an employee under the employment agreement will also be relevant to whether the clause is

considered reasonable.

Employers should carefully consider whether a restraint of trade clause will be enforceable before inserting one into an employment agreement, because they may find themselves liable for the costs of attempting to enforce the clause while still not reaping the benefits that they had initially hoped to achieve.

We advise that by far the best time to consider all the issues around restraint of trade clauses is when negotiations are underway to appoint someone, we are happy to consider situations for employers and provide suitably worded restraint of trade clauses.

**Alan Knowsley**



# Write It Down Before It Hits You Where It Hurts

**Had an idea for a business venture but need the help of a friend, longstanding colleague, or business partner?**

If you do, be careful! If you do not resolve issues that arise in the developmental stages of the project, there is a very good chance obligations will be imposed on you if you end up in court.

Even if you have not entered into a formal contractual arrangement with your business venture partner, you can be held to certain obligations that are considered to be a part of a joint-venture relationship.

Take the following situation: Mr Chirside and Mr Fay were associated in a project to develop a commercial property at a central-city site. Both men worked on the project, but Mr Chirside took principal responsibility for progressing it during the initial stages (as he had done on a previous similar project with Mr Fay).

Mr Chirside entered into an agreement for the purchase of the site, conditional on attracting a major retail tenant. He did so

through a company in which his family trust was a major shareholder. When a tenant was secured, the plan became feasible and the agreement was finalised.

At that point Mr Chirside tried to exclude Mr Fay, intending to complete the development alone. There was no written agreement between the men to pursue the project to its end together.

The courts became involved when Mr Fay attempted to hold Mr Chirside to his word. The courts agreed with Mr Fay and awarded him a substantial \$850,000 in compensation for his lost opportunity.

The alarming aspect is that the eventual outcome was totally outside the control of both men. They could have avoided the court simply by formalising their agreement from the start. Handshakes and hope are not enough.

While you may feel that casual arrangements are preferable early in a business relationship, particularly when you are uncertain whether the project will

even proceed, you must be careful.

You will be in a much better position if things "turn to custard" if you make formal contractual arrangements from the outset so that obligations cannot be imposed on you that you would never have agreed to.

While a degree of uncertainty is inherent in creativity and an inevitable aspect of a new business venture, this type of uncertainty is avoidable by taking very simple steps at the start of the project. That is by putting some expectations down on paper in an agreement. Do not leave it until you are standing in court to learn the extent and scope of your obligations to your business venture partner and are, like Mr Chirside, ordered to pay a very large sum of money.

**Kirsten Ferguson**



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The Budget has changed the position. See our website for the latest developments