IN BRIEF

RAINEY COLLINS LAWYERS

COMMERCIAL ISSUES

WELCOME

to the Summer edition of Rainey Collins Commercial Issues newsletter.

In this new look edition we look at Board membership and possible personal liability, how to deal with employees' misuse of drugs and alcohol in the workplace, shareholders' agreements, five tips for contracting, and the implications of the recent anti-spam legislation.

These articles and others are available on our website **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

JAMES JOHNSTON

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Personally Liable For The Actions Of Your Board?

Given the recent high profile demise of 2 large corporations and 10 finance companies, Board member responsibility has been very much in the headlines. If you are a Director or Chairperson of a Board, whether of your own company, or a corporate, not-for-profit or social organisation (or if you plan to become one) there has never been a more relevant time to consider your role, obligations and responsibilities...

If you are on a Board what are you there to do? You are to apply your expertise and skills. This can include asking the hard questions and debating if necessary. Board members need to be diligent and committed to the strategy, performance and compliance of the entity they are governing.

Compliance is crucial because non-compliance can lead to litigation and Directors being found negligent or fraudulent. You should be aware of the laws and other rules relevant to your organisation and ensure that they are complied with. This will include being familiar with the Constitution and other governing documents for your organisation.

You are not expected to know every aspect of every relevant law and nor is your board. Instead, the expectation is that you, as a Board, will obtain professional advice to aid decision making when necessary. Boards need all the relevant information to make effective decisions and this fact imposes a positive duty on Board members to request all that information.

Does being paid increase the risk of being held personally liable?

Expectations are likely to increase where Board members are paid to compensate them for the demands of their role and the skills that they bring to it. However, whether paid or not, it seems increasingly likely following Australian trends that if the Board makes a bad decision you will be compared to a reasonable person, but one holding your job, having your previous experiences and armed with the information you had or should have asked for, when the Board made its decision. If you failed to act as the "reasonable person" you run the risk of being held personally liable.

If you are, any indemnity insurance you have will go some way to ensuring that possible court-ordered damages or compensation doesn't come from your own pocket, but the fact remains that you were identified as contributing to your organisation's downfall.

While the high profile cases are a reminder to be conscientious and wary, an overly cautious Board can also be of poor value to an organisation. It is not hard to imagine how decisions made solely on the basis of minimising risk and liability might not be the best for the strategic direction of your organisation.

Conclusion

Your role on your Board, whatever the nature of the organisation, is a crucial one. You take your skill and expertise to your role on a Board, as well as your personal attributes, and you need to exercise that expertise at all times. The fall-out from the recent high-profile cases serves as a salutary lesson for those already on Boards and those contemplating Board membership.

FINTAN DEVINE

Employees' Misuse Of Drugs And Alcohol In The Workplace

Employees affected by drugs and alcohol can pose a number of difficulties for employers. As well as having a detrimental effect on work performance, an employee under the influence of drugs and alcohol can pose a health and safety hazard to others in the workplace.

Employers have responsibilities to take all practicable steps to eliminate significant hazards in the workplace. An employee under the influence of drugs and alcohol could pose a significant risk to other people's safety and so is a potential hazard. Accordingly, an employer has a responsibility to take action to eliminate or at least minimize the effect of an employee under the influence of drugs and/or alcohol. This might involve removing the affected employee from the workplace, and potentially disciplinary action, such as dismissal.

Does your workplace have a drugs and alcohol policy in place?

Such a policy could:

- Impose behavioural standards (not being under the influence at work, no alcohol or non-prescription drugs on the premises).
- Impose mandatory testing for safety reasons.
- Set out assistance available for rehabilitation.

If disciplinary action is to be considered, a fair and correct process should be followed. Remember the decision to discipline an employee needs to be justifiable as a decision a fair and reasonable employer would have made in the circumstances. The process set out below should be followed:

Investigation and Findings

1. The employer must carry out a full investigation of all the relevant facts before deciding on what action to take. In the absence of a right to drug test an employee this could involve the employer's, or the employer representative's, own observations and evidence of other employees, clients, etc.
2. The allegation of drug and/or alcohol misuse should be put to the employee in all cases, and they should be given an appropriate time frame within which to reply. Even if it seemed obvious that an employee was under the influence of drugs and/or alcohol this step should be followed. There may be an explanation for the behaviour such as a medical condition or recent bereavement.
3. You may want to consider suspending the employee if the drug and/or alcohol misuse was particularly serious or if the health and safety of other employees might be affected by this employee's behaviour. Normally you need the power to suspend in the employment agreement, however you can suspend for safety reasons without an express power in the agreement.
4. Once the investigation is complete you need to decide if the employee was under the influence of drugs and/or alcohol, and whether this created a health and safety hazard. The findings of the investigation should be communicated to the employee.

Action

5. After completing the investigation you must consider what action to take. This may be:
   - No further action.
   - Verbal warning (recorded in writing for the employee with a copy on the file).
   - Written warning (with a copy to go on the file).
   - Dismissal on notice under contract.
   - Dismissal without notice for serious breach (the employer must still follow all the steps).

Warning

6. For all but the most serious matters, the employer must warn the employee of the misconduct and require an improvement in behaviour. The employee must also be told that this is a warning, and that his or her job may be on the line if their conduct is repeated. If there is a repeat you must go through the investigation process again before deciding on the outcome.

Reasons

7. If any employee is dismissed, he or she has the right to ask the employer for a written statement of the reasons for the dismissal. This request can be made up to 60 days after the employee is advised of the dismissal. The employer must provide the written statement of reasons within 14 days of the request.

Personal Grievance

8. If an employee then wishes to raise a personal grievance, it must be done within 90 days of the grievance ... for example 90 days from the date of the disciplinary decision being communicated to the employee. If the personal grievance is raised after 90 days, an employer can consent to extend the time for lodging. You should get advice before agreeing to any such extension.

Situations where an employee's use of drugs and/or alcohol outside the workplace is affecting their job performance, but not creating a health and safety issue, should be dealt with initially as a performance management issue. Obtain our free checklist on Handling Performance Issues from our website www.raineycollins.co.nz or by calling me on 0800 733 424.

ALAN KNOWSLEY

Business Seminars

Business Seminars on Buying and Selling a Business, Succession, Asset Protection and Contracting are held regularly. See our website www.raineycollins.co.nz or call us on 0800 733 424 for details.

Top 5 Tips For Contracting ...

Whether a contract for video store membership or for services valued at thousands of dollars some general considerations apply to most contracting situations. These are our top five:

1. **Who are you contracting with?** The parties must be legal entities for the contract to be legally enforceable. Eg. a company must be registered. And who will sign the contract? If execution is undertaken incorrectly the contract will be voidable. Eg. are you dealing with an authorised representative of the company if applicable? Have all the Trustees signed if a Trust is involved?
2. **What are you contracting for?** Take time to clearly describe the nature of the goods or services being supplied.
3. **What happens if something goes wrong?** Discuss and determine the preferred dispute resolution process and remedies for each party in the event of an accident or breach. This should expressly include specifically foreseeable events if applicable.
4. **How much will be paid, and when?** Put clear parameters around method and basis for payment. Eg. provide that payment is expected 20 working days following the date of a GST invoice and invoices will be issued at intervals reflecting key milestones in the project.
5. **Intellectual property?** If something is being developed or created under the contract, who owns what at the end? Generally under the law you will own the intellectual property in a product or outcome you paid for. However, creators often wish to retain some rights over the intellectual property. This needs to be negotiated and included in the contract.

KIRSTEN FERGUSON

Don't Get Stuck With An Unwanted Shareholder

Patrick is one of the two shareholders in a small company that runs an IT consultancy. His fellow shareholder, Andrea, passes away suddenly. All her shares in the company pass to her husband under her Will, along with her other property, and for sentimental reasons her husband does not wish to sell them. However he is totally unfamiliar with how the business runs, which proves difficult when it comes to decision-making. A properly drafted Shareholders' Agreement could have helped Patrick avoid this situation.

Shareholders' Agreements can prevent problems and uncertainty in the event of an untimely death or a planned or unplanned exit from the business. As the example illustrates, and contrary to common belief, small business shareholders also should have one.

What is a Shareholders' Agreement?

It is a contractual arrangement recorded in writing between company shareholders, which sets out the rules around joint ownership.

Those rules may include some or all of the following:

- Pre-emptive rights attaching to your shares, which provide the other shareholders with first right to purchase your shares in the event of your death or voluntary exit and may also provide for the company to automatically buy back the shares;
- A formula for establishing the value of your shares in the event of a planned or unplanned exit;
- A requirement for life insurance on each shareholder to be owned by the company owner so there is certainty that the company and/or the other shareholders, will have the necessary cash to buy back the shares at the agreed value;
- A provision in favour of surviving shareholders reserving the power to make business decisions where a third party, not involved in the business operations, becomes a shareholder. This may include a restriction on such a person becoming a director of the company.

If you don't have arrangements along the above lines in place, there is nothing you can do to stop the shares passing on death, as any other personal property does, to those entitled under inheritance laws.

If this would create a headache for your business, put arrangements in place before you get stuck with an unwanted shareholder.

CLAIRE COE

Useful and Helpful Articles

These articles and many more are available free to download from our website www.raineycollins.co.nz. Just click onto the articles icon and look in our articles library.

Slamming The Spammers ... And Getting Caught In The Crossfire!

"Spam" no longer means those random bulk emails about employment opportunities, or cut price Viagra. The Unsolicited Electronic Messages Act 2007 calls spam "commercial electronic messages" which generally covers any marketing or promotional emails. This recent legislation, could make a difference to how you do business. If part of your marketing involves email then you need to be aware of the changes to the law in this area so you are not caught in the crossfire in the war against spam.

But don't panic! While the legislation restricts promotion by email, it does not prohibit it. It is intended to encourage good direct marketing practice by:

- Requiring electronic messages to contain a functioning unsubscribe facility;
- Restricting the use of address-harvesting software;
- Ensuring electronic messages are sent only to customers who have consented to receiving it.

It is the consent requirement that has caused some panic. Many businesses rushed to regain consent for their e-news. You no doubt experienced a run of emails around September once the legislation came into force asking you to re-subscribe. However, because of the different types of consent under the Act in most cases the panic was and is unnecessary. Being aware of the parameters of the Act will go a long way to helping you make any necessary changes.

There are three categories of consent under the legislation: express, inferred and deemed.

Express
Express consent is self-explanatory – it is where someone expressly agrees that you can send them the email. This is the most fool-proof category and no doubt explains the number of emails you received asking you to confirm your desire to receive promotional material.

Inferred
The meaning of "inferred consent" will allow you to continue sending electronic material to existing clients/customers and contacts without their express consent. This is because their consent is inferred from the business relationship that you have with them. The extent of the consent however is limited to the provision of information relating to your area of business and their custom. So, unless you're a book retailer providing information about ice cream, you're probably not going to have to worry.

Deemed
The third category of consent covers marketing to contacts who have not expressly consented and who have no pre-existing relationship with you or your business. This situation is closer to people's common understanding of "spam". However, again the Act does not prohibit sending this type of email. To comply with the new legislation:

- The recipient's business email address must have been conspicuously published, perhaps on a website, and the recipient must not have expressly stated that they do not want to receive unsolicited messages;
- The messages you are sending must be relevant to the business, role, functions or duties of the recipient in their business or official capacity; and
- A functioning unsubscribe facility must be included in your email, or a point of contact if the recipient chooses not to receive future messages.

As an example, under the new legislation you could obtain the email address of the sales and marketing representative of a company from their website and send them an email describing the goods or services you could offer them (assuming of course that there is no express statement on the same website prohibiting such correspondence). Your email, and the information you provide in it, would however have to directly relate to their business and role.

All Emails
You also need to be aware that the legislation also covers individual emails. A single email sent by a staff member could therefore be considered spam. Things to watch for include:

- The inclusion of a link to your company website in your standard email format. If a link is included, the email must clearly and accurately identify the sender so that subsequent direct contact can be made if further emails are not desired; and
- The inclusion of irrelevant product information in an email response relating to a specific query. Restrict information or responses to information within the scope of someone's role or request.

Penalties
What if you don't comply with the legislation? The focus of the newly established Anti-Spam Compliance Unit is education and encouragement to comply, but penalty provisions range from simply stopping spammers, through to monetary penalties. The latter includes awards of either damages correlating to the amount of benefit received by the spammer or compensation relative to any loss suffered by the spammed party. Actual monetary penalties can be up to $200,000.00 for an individual and $500,000.00 for an organisation for each single infringement.

For more information about the legislation and enforcement check out www.antispam.govt.nz or contact the Unit Manager joe.stewart@dia.govt.nz

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