

COMMERCIAL e.SPEAKING

ISSUE 9 • DECEMBER 2005

Brought to you by

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Welcome to the end-of-year edition of Commercial e.Speaking. We hope you find the articles of interest. If you have any specific business or commercial topics that you would like to see covered in future issues, please get in touch with us.

What's in a Name?

- Select a business name with care

Have you really got a fixed term employment contract with your employee?

- The Susan Wood case

Succession Planning for Business Owners

- Preparing to exit the business

Business Briefs

Influenza Pandemic Planning – Ageing and Changing Population – Paid Parental Leave for Self-Employed – Financial Reporting Act: Directors of Overseas Companies

If you require any further information on any of the topics covered in Commercial e.Speaking, then don't hesitate to contact us. If you do not want to receive this newsletter, please [unsubscribe](#).



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What's In a Name? - Select a business name with care

When a business selects a new trading name it should bear in mind that the world is already full of traders who will wish to protect hard won intellectual property and goodwill. Failure to check for conflicts can lead to litigation and the need to rebrand.

Developments over the last two decades include:

- *Fair Trading Act 1986*: This prevents people in trade from indulging in 'misleading or deceptive' conduct (eg: traders who deal with the public under the same or similar trade names). There is an overlap between the traditional common law passing off action (a new entity passes itself off as the established business) and the Fair Trading Act's additional statutory provisions: they are often pleaded together.
- *Internet*: Domain names have rapidly assumed great importance for many businesses. Opportunist squatters (eg: the 'qantas.co.nz' case) can usually expect to be dislodged by the established business.
- *Companies Act 1993*: The Registrar of Companies' earlier supervisory role to prevent similar company names has all but disappeared.
- *Intellectual property*: Brand protection has assumed much greater importance in modern society and trademark registration has become more prevalent.

There are three major common misunderstandings when it comes to business names:

1. Company Name

Registration of a company name gives the company all the rights to that name, including the right to use the name as a trademark.

This is incorrect. Registration of a company name does not give any automatic right to use the name as a trademark, but simply prevents anyone else from registering a virtually identical company name. If your registered company name is the same as, or confusingly similar to, someone else's trademark, and the trademark rights pre-date your company incorporation, the trademark rights will prevent you from using your company name on the goods or services for which the trademark is registered.

2. Domain Name

Registration of a domain name gives the owner all rights in that name.

This is incorrect. Registration of a domain name simply prevents another person from registering an identical domain name and gives no other rights.

3. Business Name

You can register the name of your business as a "business name".

Unlike some other countries (eg Australia) there is no system of business name registration in New Zealand.

Selection of a trading name involves consideration of established company names, trademarks, and other intellectual property and unregistered trading names.

We recommend the following:

- Check the Companies Office Register available online at www.companies.govt.nz
- Look up the Registered Trademark website on www.iponz.govt.nz
- Check the Yellow Pages and White Pages of the telephone book (available on www.telecom.co.nz/home)
- Check trade publications or websites listing businesses (eg www.searchnz.co.nz for a business name search limited to New Zealand).

Spending time now to check the name of a new business may save much time, energy and money later on if the name chosen for your business conflicts with prior established rights.



Have you really got a fixed term employment contract with your employee? - The Susan Wood case

The important difference between fixed-term employment contracts and ordinary employment contracts is a topical issue in employment law and any confusion between the two can have significant implications for employers. The following article outlines the dangers that can stem from a poorly drafted fixed term employment agreement.

The difference between a fixed term contract and an ordinary employment contract can be a very important issue for employers. The recent, highly publicised, employment dispute between Susan Wood and TVNZ has highlighted first hand the significance of having a genuine arrangement in a fixed term employment agreement.

The Susan Wood case

TVNZ believed that it had a fixed term agreement with Ms Wood and that this enabled the company 'on renewal' to force a significant salary reduction. Ms Wood took a personal grievance against TVNZ arguing that she was a permanent employee and any salary changes needed her consent.

What did the Authority decide?

Ms Wood won her employment dispute and the Employment Relations Authority ruled that TVNZ had breached the Employment Relations Act 2000. The breach occurred because, previous to the signing of the contract, TVNZ had not given Ms Wood a genuine reason as to why her employment was to end at the end of the fixed term and, further, it had not sufficiently stated any such reasons in writing. Therefore Ms Wood was deemed to be a permanent employee of TVNZ and she was entitled to treat the fixed term provisions of her employment agreement as ineffective. This meant that her employer, TVNZ, could not change the contract without her consent.

The law

The law on fixed term contracts, governed by the Employment Relations Act, imposes strict criteria:

- Employers must have a genuine reason based on reasonable grounds for specifying that the employment of an individual is to come to an end at a certain time or following a certain event.
- This must be communicated to the employee before the contract is signed. It is not enough merely to stipulate that it is a fixed term agreement - there must be a genuine reason.
- The employers must also record these reasons in writing.

If these requirements are not met then the fixed term contract will be invalid, and it is likely that the employee's employment will be governed as if an ordinary employment contract had been signed.

Implications for employers

Well drafted fixed term contracts can allow for employees to terminate the contract at the end of the period and in some cases can deny employees certain employment protections dependent on length of service, such as parental leave. Therefore, it is essential that the Act's requirements are complied with.

If a fixed term contract breaches the Act it can be deemed ineffective. As observed in the Wood case, employers may lose the options of renewing the contract, changing the terms of the contract or seeking other fresh employees. Instead employers are bound indefinitely to the employment contract. This potentially opens the door to a wide number of personal grievances. Inattention or carelessness is dangerous when drafting an employment agreement and can be costly for employers. What appears to be a fixed term employment contract is not always a fixed term contract if the strict criteria are not met. All employers need to be aware of this.

If there is any doubt about existing employment agreements you should not hesitate to seek legal advice. Prevention is always a far better option than dealing with the consequences of a poorly drafted fixed term employment agreement.



Succession planning for business owners - Preparing to exit the business

This is the first of a series of articles we will be running dealing with succession issues for business owners. For those in the market to buy or sell a business it is important to understand the current national and international business market, and the opportunities that exist in this area.

According to the Ministry of Economic Development figures there are:

Number of Companies	Number Of Staff Employed
7,939	20 – 49
13,885	10 – 19
16,863	6 – 9
38,687	Total With Staff 6 – 49

Are there enough prospective purchasers to buy out all of the small business owners? With some planning owners can improve their chance of a successful business succession strategy, achieve their retirement plans, and realise the wealth they have created in their businesses.

The latest Grant Thornton International Business Owner Survey* indicates:

1. Are owners prepared to sell?

- **76% of NZ respondents said they would consider selling now if approached.** This suggests that 29,400 of the 38,687 businesses above would be in this category.
- The survey also showed that **51% of those surveyed plan to sell within the next 10 years.** That's indicative of 20,000 businesses (employing 6 – 49 staff). Of these 29% of the businesses (almost 6,000 businesses) anticipate a change in ownership within the next two years and 47% of the businesses (over 9,000) anticipate selling in 3 – 5 years.

2. Have owners prepared an exit strategy?

- 40% of owners have yet to do anything to prepare for sale!
- 26% have some expectation of selling/passing to a family member.
- 3% saw flotation/IPO as their exit strategy.

3. Is time is running out for many?

- The average age of business owners is 56 and one in five owners is older than 65 (roughly 7,700 of the 38,687 businesses).
- 67% of owners are 'stressed to extremely stressed' about not having enough leisure time and 61% of owners are 'stressed to extremely stressed' about not spending enough time with family and friends.

For buyers and sellers this is a problem, but also an opportunity.

Frank Habrle of the ANZ National Bank says, "As the owners get closer to retirement their energy levels drop, profitability stops growing, and they focus on running the business at the expense of thinking ahead. As a result business values are not optimised. To prevent this, owners should be preparing their business for sale even if that is not the immediate intention.

"Alternatively, there will be many opportunities for existing business owners or aspiring new business owners to acquire stakes in companies with strong potential for further sales and profit growth. High growth companies are much more likely to improve performance by a merger or acquisition than companies in general.

"Your advisor can assist with investment-banking/equity techniques to help existing business owners or new owners/managers fully or partially acquire small to medium sized businesses. If this sounds like you do not hesitate to seek further advice," Mr Habrle says.

Where to from here?

Subsequent articles in *Commercial e.Speaking* will comment on options/techniques for achieving:

- Full trade sale, or, a shareholder restructuring (one shareholder buying out the others).
- Full or partial sale to existing management/family (MBO) or new management (MBI).

*www.grant-thornton.co.uk/pages/publications_and_events-publications-ibos.html

Business Briefs

Influenza Pandemic Planning

The World Health Organisation has warned that the current risk from avian (bird) flu becoming the next human pandemic is high. The Ministry of Economic Development's website contains information designed to assist business continuity planning for influenza pandemics. There are two separate sets of information, a Business Continuity Planning Guide which contains information designed for general use by businesses and other organisations in New Zealand; and a Pandemic Planning Information Kit designed for infrastructure providers in the energy, communications, transport, water and waste sectors.

See: www.med.govt.nz/irdev/econ_dev/pandemic-planning/index.html

Ageing and Changing Population

The 2005 annual report of the Retirement Commission reports that New Zealand's population is rapidly ageing. It reports that the median age of our population has increased from 26 years in 1971 to 35 years in 2005, and is expected to increase to 40 years by the year 2020. In 2005 the oldest 10% of the population is 68 and older. By 2006 it is estimated to be 74 and older, and by 2051 the oldest 10% is estimated to be 81 and older.

The Retirement Commission reports that New Zealand's society is also becoming more diverse. Maori, Pacific and Asian populations are projected to increase their share of New Zealand's population – the Maori population is expected to increase by 29% over the next 16 years, the Pacific population by 59% and the Asian population by 145% - by contrast, European population is expected to reach 3.23 million, an increase of 5% or 150,000 people over the same period.

Paid Parental Leave for Self-Employed

The Parental Leave and Employment Protection (Paid Parental Leave for Self-Employed Persons) Amendment Bill, if enacted, provides parental leave for self-employed persons from 1 July 2006. Accordingly, a self-employed person will be entitled to parental leave if either the child is born on or after 1 July 2006, or they assume care of a child on or after 1 July 2006.

The Bill contains a wide definition of a 'self-employed person', including a person who works in one or more of the following types of work (but not as an employee):

- Providing goods and services for hire or reward under a contract for services.
- Carrying on a business (including a profession, trade, manufacture or undertaking carried out for pecuniary profit); or
- Working for a trust in a business.

In contrast to the existing treatment of employees, the Bill does not require businesses that engage self-employed contractors to keep a contractor's position open for them while they are on paid parental leave.

Financial Reporting Act – Directors of overseas companies

The Financial Reporting Act 1993 requires directors of overseas companies to deliver financial statements to the Registrar of Companies by stipulated time limits.

In *Hale v The Registrar of Companies*, the High Court in Auckland rejected the Hales' appeal from sentences of \$7,000 each for failing to deliver financial statements to the Registrar of Companies in contravention of ss 19 and 39 of the Financial Reporting Act.

The Hales, as sole shareholders of a vineyard investment company, holding shares of a minimal value only, had emigrated to Australia in ignorance of their obligations pursuant to Section 19. The prescribed maximum penalty under the Act is \$100,000, and the High Court upheld the fines of \$7,000 each.