



## When Duty Calls

Territorial Forces, jury duty, witnesses or voting

**An employee may need to be away from work for Territorial Force service, jury duty, appearance in court as a witness or to vote in an election. What are the obligations of both the employer and the employee, and who pays? This article gives an overview of the issues involved and clarifies the obligations for both sides.**

### Territorial Force service

An employee who is a member of the Territorial Force will require absences from work for training or service. The Volunteers Employment Protection Act 1973 sets out the obligations for both employers and employees.

The employee's job is protected while they are in full time training or service for up to three months in a single year, and/or part time training not exceeding a total of three weeks in the training year that runs from 1 July to 30 June the following year.

**Employer Obligations:** All employers are bound by the above legislation unless the employment agreement provides for volunteer leave that is at least as favourable to the employee as the terms of the Act and addresses matters regarding leave entitlements if required. An employer should get specialist advice on this type of provision in an employment agreement.

An employer is not obliged to pay the employee for time away from work; the time away is treated as leave without pay. For practical purposes, the time is treated as continuous employment so the employee continues to accrue holiday and special leave entitlements. The service time cannot be deducted from the employee's entitlement to annual leave, except at the direct request of the employee.

An employer can apply to have the employee's territorial force service or training postponed. However, they would have to explain why the employee's absence would cause them undue hardship.

Employment cannot be terminated because the employee has applied for leave, has been or is on service or because

the employee is a member of the Territorial Forces.

When returning to work the employee must be in the same position on terms and conditions as previously. This does not apply to seasonal or casual work if the work would not normally have continued beyond the leave period, for example being a fruit picker going on leave and returning after the end of the picking season.

**Employee Obligations:** An employee must give at least 14 days notice that leave is required. If inadequate notice is given, their job is not protected and an employer is arguably not bound to hold their job open.

### Jury duty

In New Zealand every permanent resident and citizen over the age of 18 must be registered on the Electoral Roll. Subject to a few exceptions concerning occupation or criminal history, every person registered is qualified to serve as a juror, and must be prepared to do so. Failure to attend jury service, without being formally excused, may result in a fine of up to \$300.

If jury duty would cause an employee hardship, some of the grounds on which the employee may be excused include work or family commitments, disability, health and religious grounds. The Jury Summons provides a full list of grounds for excuse.

If an application to be excused is declined, the application may have to be put before a judge.

For civil jury duty, the court pays a juror about \$66 for the first day or part day and about \$33 for every other day or part day. If serving on a jury at a criminal trial, generally, for attendances of up to three hours where the employee will not be absent from work for the full day, the fee is \$31. For more than three hours up to a full day or for more than three hours but not after 6pm the fee is \$62. For more than three hours and later than 6pm up to 9pm the fee is \$89, after 9pm the fee is \$127. A different schedule of fees applies after the fifth day of jury duty.

**Employer Obligations:** An employer is not required to pay an employee for time spent on jury duty. However the employer may

pay the employee as usual and in return the employee reimburses their jury fee to their employer. This agreement must be documented when this is agreed.

If an employee cannot perform jury duty due to financial hardship caused by a suspension of pay, a court may find the employer in contempt of court for wilfully obstructing the proceedings. The Criminal Procedure Bill presently before Parliament recommends employers be responsible to ensure that they do not put an employee in a position of hardship should the employee attend jury service.

The Bill proposes that an employer be fined up to \$10,000 if they dismiss, threaten to dismiss or prejudice an employee who is absent from employment due to jury duty.

### Appearance as a witness

Where a person is required to attend court as a witness, they must attend or risk being held in contempt of court.

**Employer Obligations:** An employer must allow an employee time to attend court.

There is no obligation to pay the employee during this time. However, if that causes hardship which prevents the employee attending court, there is a risk the employee could be held in contempt of court. However, as the Criminal Procedure Bill does not yet address an employer penalty for this situation we would recommend employers seek advice if this situation arises.

**Employee Obligations:** There is no prescribed form or time frame for an employee to give notice to an employer to appear as a witness. However, it is in interests of all for the employer to be informed immediately a summons or subpoena is received, so that any written agreement concerning costs can be sorted quickly.

The court may pay a witness fee for being absent from work, and also other allowances and expenses incurred. For an absence from work of less than three hours, the fee is \$25; or more than three hours the fee is \$50/day. Allowances are also available for meals and for being away from home overnight. Public transport travelling expenses are paid and other expenses may be paid if public transport



is not available, or the age or health of the witness makes public transport unsuitable.

### Employees voting

If an employee works on an election day, an employer must allow employees time off to vote if they have not had a reasonable opportunity to vote before starting work. The employee must be allowed to leave work to vote no later than 3pm and may be absent for the remainder of the day.

If an employee is required for essential work that will go past after 3pm, the employee must be able to leave work for a reasonable time but for not more than two hours.

No pay deduction can be made if the employee leaves work to vote. If so, an offence has been committed and there could be a fine of up to \$1,000.

### Conclusion

Expected and unexpected absences for national or civic duty can raise issues of concern for both employers and employees. The law makes it clear that some things, like the courts, are bigger than both of you. When duty calls, talk to each other in good faith, try to agree on issues in writing, and get advice as soon as any uncertainty arises. Before then, review your employment agreements to assess how well you are prepared for any of the above, and then contact us so that you don't fail to prepare for that call of duty.

# Contracts

## The devil is in the detail

**Signing contracts with suppliers is an everyday occurrence in business. This article highlights the need to look carefully at each contract to ensure it leads to the outcome that is desired and avoids any unpleasant surprises further down the track.**

All too often business people want to exit a contract only to find that they have no right to terminate and they are tied into an expensive and undesirable arrangement for the next two, five, or even 10 years. In the absence of a technical 'out', the legal remedies can be limited, high risk and expensive.

### Get advice

Sometimes the contractual terms are not able to be read at the time of signing. For instance a schedule may be presented which refers to standard terms and conditions and it is all signed there and then, without proper consideration of applicable documentation.

Always carefully read all the contract's terms and conditions (T&Cs). These agreements may seem straightforward and 'standard', but there can be costly consequences when things go wrong – which could be avoided with an hour or two of professional advice at the start.

The standard T&Cs can sometimes be renegotiated. Any variations should be recorded in the agreement; do not rely on a verbal variation to a written contract.

### Standard form contracts

Standard form contracts are usually written for the benefit of the party presenting the contract. For consumers, the Consumer Guarantees Act 1993, which cannot be contracted out of, provides some degree of protection. Commercial parties, on the other hand, are taken to understand the consequences of everything they sign and contracts will not, under that Act, be voided because terms are believed to be unfair or even oppressive.

### Common pitfalls

Some common pitfalls in standard form agreements are:

- **Breach of contract:** Usually the breach clause provides a strong remedy for the other party if you breach the contract.



This, however, does not usually go both ways. Often you might find that you do not even have the product or are no longer provided with the service, and yet you may still be bound to pay some or all of the contract price.

Another common occurrence is that these contracts can limit the damages that could be claimed for the other party's breach. Consider the risk to which your business could be exposed should the other party not fulfil their side of the deal? Are the damages provided for in the contract sufficient?

- **Contract termination:** Who has the right to cancel the contract and on what conditions? Often there is an initial term and a subsequent right to cancel the run-on contract. If this is the case, be very careful to ensure that the initial term is short. What seems like a good price today could be very expensive when paying for a service that you do not want for the next 10 years.

Another common pitfall can be that only the party that drafts the contract has the right to cancel, while the other party is tied in until the term has run its course, regardless of performance issues. If you

cannot renegotiate this condition, then ensure that the term is short, perhaps with rights of renewal, rather than signing up for a long-term commitment.

- **Negotiated terms and conditions:** Many standard form agreements have a clause that specifically excludes any negotiations or other agreements from being part of the contract. As noted above, if special T&Cs are negotiated ensure that they are part of the written agreement. To avoid doubt, ensure that the written variations documenting the negotiations are cross referenced to this clause and vice versa.

This is by no means an exhaustive list, but does provide a useful starting point for the critical analysis of a contract's T&Cs.

A contract may look favourable at the time of signing, but a lot can happen in a couple of years. We strongly recommend caution about committing to long term contracts, particularly where the terms for remedies or exit could be one-sided. Legal advice before you sign can save a great deal of money and anxiety later and/or give you the information to renegotiate on better terms. Remember, the devil is in the detail.

# Directors' Duties

## Duties and responsibilities clear

**After a long period of relatively easy money the New Zealand credit cycle has turned. There has been a string of finance company receiverships over recent months and the extent to which the international credit crunch will spread is unclear. If the rate of company failures in New Zealand increases the actions of many directors will come under scrutiny.**

Company directors have specific duties and responsibilities, mainly to the company itself but in some situations also to the company shareholders or creditors. Most of these duties and responsibilities are expressed as broad statements of principle in the Companies Act 1993 ('the Act').

### Background

There are huge economic and social benefits to the company form of trading. A person who has invested in fully paid shares in a company and who does not have a management role with the company is entitled to limited liability: their liability is limited to the value of the money they have invested in the shares.

Limitation of liability is commercially attractive but there is a risk of abuse. With directors being the 'directing mind and will' or the 'brain' of a company their more reckless or self-serving actions can be exposed to personal liability. The Act addresses this in several ways.

### Directors' duties expressed in the Act

Before the 1993 Act many duties of directors were developed by the courts case by case ('common law duties'). Directors' duties are clearer and more accessible as they are now expressed in the Act.

Major duties are [our italics]: a duty to *act in good faith* and in what the director believes to be the best interests of the company (s131); a duty to exercise a power for a *proper purpose* (s133); a duty not to act *in contravention of the Act or constitution* (s134); a duty not to carry on business in a manner likely to create a *substantial risk of serious loss to the company's creditors* (s135); a duty not to *incur an obligation* unless the director believes on reasonable grounds that the *company will be able to perform* the

obligation when required (s136); a duty to *exercise the care, diligence, and skill* that a reasonable director would exercise in the same circumstances (s137); detailed provisions regarding *disclosure* and avoidance of transactions in which a director is interested (ss139-144); restrictions on *use of company information* by a director (s145); a requirement that directors *disclose relevant interests* in the company's shares and any acquisition or disposal (s148) and various *administrative and other miscellaneous obligations* (eg: the duty to supervise the share register under s90).

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### Who can enforce these duties?

Most of the statutory duties are owed to the company. Relatively few duties are owed to shareholders and there are no express duties on directors to creditors. However, in a liquidation situation, a creditor is entitled to apply for an order that a director who has breached a duty to the company repay money directly to the creditor.

The restricted rights of shareholders are improved by the possibility of a derivative action where, in certain circumstances, the shareholder may bring an action on behalf of the company.

### Solvency test

The directors of a company are required to certify that the company is solvent in a number of situations where creditors and shareholders are at risk if there are no

constraints on directors' actions, eg: where wealth is to be transferred from the company to the shareholders (including dividends, share buy-backs and share redemptions). A company is solvent if the:

- Company is able to pay its debts as they become due in the normal course of business (cashflow test); and the
- Value of the company's assets is greater than the value of its liabilities, including contingent liabilities (balance sheet test).

False statements or certificates by directors carry a maximum personal penalty of five years in prison or a \$200,000 fine.

### Continuing role of the courts

Although the 1993 Act goes a long way to expressly set out the previously common law duties of a director, it is not an exhaustive code. Directors' duties are fleshed out by judges both through interpretation of the bare statutory principles and finding fiduciary duties or other background equitable obligations. For example in the Court of Appeal decision in *Robb v Sojourner*<sup>1</sup> (a case where a failed company had been replaced with a successful 'phoenix company') creditors' rights against directors of the liquidated company were further clarified.

### Conclusion

Most commercial decisions by directors of small-medium enterprises do not carry much risk of liability for the breach of statutory duties. However, particularly for financially stretched companies, directors' actions may carry great risk for shareholders and creditors. Directors should consider their statutory duties and, if doubts remain, take advice on the standard of care required by our courts.

<sup>1</sup> [2006] 3 NZLR 808

# Out of volatility comes opportunity

We have certainly seen quite a high degree of volatility in investment markets recently (as a result of New Zealand finance company failures, the global credit crunch and currency fluctuations). One of the key lessons for investors is that this volatility creates a fantastic opportunity to buy good quality assets at a discount. This is currently the case in bond markets.

A bond is essentially an IOU. It means that if you invest your money with the government or a company, they will give you regular interest payments (generally six monthly) and pay back your principal on maturity. You can also buy and sell these bonds on the secondary market (so you can get out if you need to).

Now, the more complicated bit – how bonds are priced. The key thing to remember is that the price of a bond is inversely related to its market interest rate (known as the yield). This means if the interest rate goes up (as many have recently as a result of some of the factors listed above), the price of the bond goes down (and vice versa).

Let's take an example. You invest \$10,000 into a new issue bond which has an 8% coupon, ie: the interest rate that you get per annum. After nine months, the interest rate at which you can sell the bond (the yield) has increased to 9%. This means that because there is an inverse relationship between interest rates and bond prices, the value you could sell the bond for has decreased.

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So the bond may be worth, say, \$9,200 if you were to sell it. But the key is that this creates a great buying opportunity for a new investor looking to enter the bond market. Effectively it means that a new investor would only have to pay \$9,200 for a bond that will pay back \$10,000 at

maturity, meaning you will get a more attractive yield of 9%.

This is because the amount of interest you receive (the coupon of 8%) does not change and you effectively receive this income on the full \$10,000 face value (not the \$9,200 you have paid), and you receive \$10,000 both on the \$9,200 investment.

Let's talk about this in relation to a product from ING, the Regular Income Fund<sup>1</sup>.

This fund invests into Collateralised Debt Obligations (CDOs) which are effectively like repackaged loans which are traded like bonds. The fund has no leverage and has an average BBB- rating from Standard & Poor's. The fund has been affected by the global credit crunch and has suffered mark-downs in its value as a result of 'mark to market', ie: paper, losses from its underlying securities, even though the fund remains fundamentally robust.

However, this creates an opportunity. The fund is still receiving regular coupon income of around 8%. However the unit price of the fund is below 90 cents, which means the running yield for a new investor would be around 12% gross. Now, where can you get a 12% return for a diversified portfolio of BBB- securities?

## The lessons?

- Don't just put your money in the bank. Look at some of the outstanding buying opportunities in the market as a result of recent volatility.
- Buy in the gloom and sell in the boom, because no one ever got truly rich by following the herd.

Please contact us if you would like to speak to a PortfolioGroup financial adviser who can assist with this.

*Source: Strategji Limited*

<sup>1</sup> An investment statement is available via [www.ingnz.com](http://www.ingnz.com) or from your Financial Adviser

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# Postscript

## New Wills Act

The new Wills Act came into effect on 1 November 2007. Not only does this new legislation modernise the language in the statute (much of it dating from 1837), but there are also some specific changes that may affect some *Fineprint* readers.

Getting married or entering into a civil union now invalidates a previous Will, unless made in contemplation of that marriage or civil union. Previously this only applied to those entering into a marriage. If that marriage or civil union is dissolved, the rights of a former spouse or civil union partner are revoked.

When a Separation Order is in force at the time of death, a separated spouse or civil union partner is now disinherited, unless the contrary is clearly expressed in the Will.

In addition, there is now a provision in the Act for the courts to correct any inadvertent drafting errors in a Will or to alter the Will to reflect the true intentions of the Will maker.

If you think that any of these changes affect you, please get in touch with us as soon as possible so we can discuss a review of your Will.

## Register an Australian company online

The Companies Office has announced a new online service for Australian incorporated companies intending to register as an overseas company in New Zealand.

This service can be accessed at [www.companies.govt.nz](http://www.companies.govt.nz) and is quicker and more cost effective than the current manual process.

## Computer disposal

New Zealanders dropped off nearly 300 tonnes of computer equipment and mobile phones for safe disposal or recycling on New Zealand's first national eDay last September organised by the Computer Access New Zealand Trust, with support from the Ministry for the Environment. This followed a very successful inaugural eDay in Wellington in 2006.

To learn how to dispose of mobile phones, batteries, household lamps and computer equipment in an environmentally responsible way, visit [www.mfe.govt.nz/publications/waste](http://www.mfe.govt.nz/publications/waste)

## New insolvency legislation now in force

Reforming the personal insolvency regime, the new Insolvency Act 2006 came into force on 3 December 2007.

The main change is the new No Asset Procedure (NAP) which gives a one-off 12 month alternative procedure from bankruptcy for debtors with total debts between \$1,000 and \$40,000. The NAP will be filed and administered with the Official Assignee.

In addition the Official Assignee also takes over the receipt of applications for bankruptcy from the Courts, and also for the administration of Summary Instalment Orders (SIO).

There is more on this new regime in the Autumn 2007 edition of *Fineprint*.

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