



# Governance responsibility: are you up for it?

Ron Scott warns company directors not to be complacent about their responsibilities.

On more than one occasion I've heard directors of small companies comment that they are protected by limited liability and not concerned should their company be sued. The argument is that the company has no or limited assets and will simply go into liquidation.

It is clear that many directors are not aware of their responsibilities or indeed their liabilities.

## WHO IS A DIRECTOR?

One does not have to be called the director to be one! According to section 126 of the Companies Act 1993 a person is a director simply if they act like a director "by whatever name called". So if you have cheekily asked your spouse to be the director while effectively running the show yourself then you might not be in the clear.

## WHAT DOES A DIRECTOR DO?

The board of a company (which might be just one director) "has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company." (Section 128)

If you delegate decisions to an employee you must remember that you are still responsible.

If you delegate you must have very clear evidence that it was reasonable for you to expect that person to be capable of doing the job.

If the company does anything wrong (for example, builds a leaky home) then the director is liable. The director must act in good faith. The fact that I heard the comments about how they would use the limited liability provisions might be evidence that those directors were not acting in good faith.

You must take due care as a director. This includes keeping on top of what you need to know as a director. You

must be able to act as a reasonable director should. Therefore:

- Do you read trade news about your industry?
- Do you attend networking opportunities to keep aware of external developments?
- Do you take the opportunity to attend seminars on changes in policy?
- Do you read the company accounts properly and ask questions on things you don't understand?

The Act says that the measurement is what the director knows or ought to know. Just because you didn't get around to reading the accounts doesn't mean you're off the hook.

A competent builder might be expected to follow the installation instructions for a product to avoid leaky homes.

There is a raft of regulations and laws with which any business must comply. There are some general legislative requirements and many industry specific rules.

## TAXATION

A company is a taxpayer and therefore is treated like any other taxpayer. Where a company acts in such a way that it cannot meet its tax liabilities the IRD may be able to collect those taxes directly from directors.

You are responsible for making sure that the company pays taxes including PAYE, GST, FBT, provisional tax, withholding taxes and so on. In practice, this means that you will probably employ an accountant. Notice their statements which let them off the hook! If the accountant does not accept responsibility then who must? The board of directors!

The IRD is able to recover taxes from a director when:

- The company has entered an

arrangement resulting in the company not being able to meet its tax liabilities, and

- The director knew or should have known that a tax liability could have existed.

Each director is jointly and severally liable. In other words, if the other directors can't pay but you can, then you will be deemed liable for the whole liability. If you are invited to join a board then you might want to check the arrangements the other directors have made to protect their assets - and do likewise yourself.

So a director has major responsibilities. The liability for getting it wrong can be steep. Here are some examples of penalties:

- The directors who vote in favour of a distribution must sign a certificate saying that immediately after the distribution the company will still be solvent. Maximum penalty for not doing so? \$5,000.
- Forming a cartel. Maximum penalty \$500,000 (per director).
- Making a false statement about the company or its ability to trade. Maximum \$50,000 or up to two years imprisonment.

Being a company director, even in your own family business, has significant responsibilities. A limited liability company largely protects against business risk - but only if you do everything to the letter of the law. Hand on heart - who does that?

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