Sharp Tudhope

LAWYERS

Your Business and the Law

LawXLink

Contents

Your Business and the Law 2

Setting up your business 3

Employing staff 10
Employment Relations 2000 10
Health and Safety at Work Act 2015 13
Other important legislation for employers 16

Dealing with your customers 18
Consumer Guarantees Act 1993 18
Fair Trading Act 1986 20
Privacy Act 1993 22
Personal Property Securities Act 1999 23
Credit Contracts and Consumer Finance Act 2003 24
Insolvent transactions under the Companies Act 1993 25

Dealing with your competitors 28
Commerce Act 1986 28

Dealing with land 31
Resource Management Act 1991 31
Building Act 2004 32
Property Law Act 2007 34

Dealing with the wider community 36
Income Tax Act 2007 36
Human Rights Act 1993 36
Financial Transactions Reporting Act 1996 and Anti-Money Laundering and Countering Financing of Terrorism Act 2009 37
Hazardous Substances and New Organisms Act 1996 38

Where to from here? 39

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What laws apply?

Your Lawlink lawyer will be able to advise you about the specific legal requirements that apply to your business.

Your Business and the Law

Operating a business is a challenging endeavour: you need to satisfy your customers, manage your staff, pay your bills, collect your debts and ultimately make a profit. You also need to comply with a wide range of business laws and regulations. The number of laws and regulations affecting your business can at times appear overwhelming. However, like many business challenges, meeting your legal obligations is a challenge that can be managed with careful planning.

Your business should have plans in place to ensure that it complies with its legal obligations. There are a number of reasons why it is important for your business to put a legal compliance plan in place. These include:

- Limiting your personal liability: you can become personally liable if the business you own or operate fails to comply with its legal obligations.
- Avoiding penalties for non-compliance: penalties for non-compliance can be severe. Individuals can face significant fines or imprisonment and businesses can also face significant fines or can be closed down.
- Avoiding unnecessary costs: the costs of defending any legal action arising from non-compliance can be significant, both in terms of the financial cost and the staff time which can be lost.

The first step when developing a legal compliance plan is to identify the business laws that apply to your business. The purpose of this guide is to assist with this process by providing a general outline of the business laws that affect most New Zealand businesses. These business laws relate to:

- Setting up a business;
- Employing staff;
- Dealing with customers;
- Dealing with competitors;
- Dealing with land; and
- Dealing with the wider community.

In addition to these general business laws, there are a range of laws that affect only particular businesses. As a result, the information in this guide cannot replace the detailed legal advice you can receive from your Lawlink lawyer.

Setting up your business

One of the first decisions you need to make when you decide to set up in business is what legal structure you will use. Generally, the options available to you are:

- Form a company under the Companies Act 1993;
- If you plan to trade on your own, trade personally; or
- If you are entering business with other people, trade through a partnership.

This section reviews each of these options.

Trading through a company

If you are setting up or operating a business, you should consider trading through a company. Trading through a company limits your personal liability. Because a company has the ability to act and enter into transactions like a natural person, business obligations are incurred by the company itself. If the company fails to meet those obligations, it will generally be the company itself, rather than the shareholders or directors of the company, who will be liable for those defaults. In contrast, if you operate your business in your personal name, you will be personally liable for all of your business obligations.

Although a company structure limits the personal liability of the owners and managers of the company, some personal liabilities remain. Shareholders are liable to pay for their shares. Directors of a company face greater risks of personal liability than shareholders as they have obligations under the Companies Act 1993, the Health and Safety at Work Act 2015 and other legislation which, if breached, can result in unlimited personal liability. However, provided that they comply with their obligations under the Companies Act, directors do not generally have personal liability for the obligations of the company.

Requirements for forming a company

For a company to be formed it must have:

- A name;
- At least one share and one shareholder;
- At least one director, at least one of whom must be resident in New Zealand or in an "enforcement country" (countries named in regulations);
- A physical address for service and for the company's registered office in New Zealand.

Constitution

The constitution of a company establishes the rules by which a particular company will operate. These rules govern such matters as the appointment and removal of directors and the processes required for the transfer of shares.

Companies do not need to have a constitution. A company without a constitution will simply be governed by the standard provisions of the Companies Act. By adopting a constitution a company has the ability to modify, restrict or add to the requirements of the Companies Act.

Constitutions can be particularly useful if you want to:

- Set the minimum number of directors a company should have;
- Place restrictions on share sales;
- Permit insurance and indemnity for directors; or
- Allow company financing of share purchases.

Directors' duties

Directors of companies are responsible for the day-to-day management of the company. The Companies Act allows directors flexibility to manage a company while at the same time ensuring that they are personally accountable for their actions. The definition of "director" not only includes those named as directors, but also those who effectively exercise the powers of directors or those who influence a director.

Directors have duties under the Companies Act to:

- Act in good faith in what they believe, on reasonable grounds, are the best interests of the company;
- Exercise their powers for a proper purpose;
- Not act in a way that contravenes the Companies Act or the company's constitution (if it has one);
- Not allow the company's business to be carried on in a manner likely to create loss to creditors;
- Not agree to the company incurring an obligation unless the company can reasonably meet that obligation;
- Exercise the care and skill of a reasonable director in the same circumstances;
- Disclose any material financial interest or benefit that they (or their relatives) have in any transaction with the company;

- Generally not disclose information they hold as a director;
- Disclose certain details if they buy or sell the company's shares.

A director who complies with these duties should not be held personally liable for their decisions and activities as a director.

Please note that directors and officers also have important legal duties under legislation such as the Health and Safety at Work Act 2015, the Fair Trading Act 1986 and the Building Act 2004 and could face personal liability for any breach of those duties.

Who can be a director?

The Companies Act provides that a person cannot be a director if they are:

- Under 18 years of age;
- An undischarged bankrupt;
- Prohibited from directing, promoting or participating in the management of a company or of an incorporated or unincorporated body under any statute;
- Prohibited from being a director or promoter of, or taking part in the management of an overseas company or limited partnership;
- Prohibited from being an officer of an employer under the Employment Relations Act 2000 if the company will employ people;
- Subject to a property order made under the Protection of Personal and Property Rights Act 1988; or
- Not authorised to act as a director of the company by the company's constitution.

Directors' certificates

Directors are accountable to the shareholders of their company. In some cases, such as when a company issues shares or is to be amalgamated, directors must certify in writing that they have met the requirements of the Companies Act. Companies must keep these certificates and they must be available for shareholders to inspect.

Shareholders' rights and remedies

Shareholders are the owners of the company. Shareholders' rights under the Companies Act include:

- The right to appoint and remove directors;
- The right to adopt, alter and vary a constitution;

- The right to be bought out: dissenting minorities can force a company to buy their shares when they vote against major transactions or certain amendments to the constitution or the rights attaching to their shares;
- The right to information: a shareholder may make a written request to the company for information;
- The right to inspect records: specified company documents must be available for inspection;
- The right to question management: the board of directors takes responsibility for managing the company but shareholders can question management at shareholders' meetings;
- The right to approve major transactions: a company must not enter into a major transaction (as defined in the Companies Act) unless it is approved by a special shareholders' resolution;
- The right to sue a director: a shareholder may bring an action against a director for a breach of duty owed to that shareholder;
- The right to a remedy for prejudicial or oppressive conduct: shareholders have a right to a remedy for prejudicial or oppressive conduct by the company.

The solvency test

The solvency test is one of the key features of the Companies Act. This test provides that:

1. A company must be able to pay its debts as they become due in the normal course of business; and
2. The value of the company's assets must be greater than the value of its liabilities.

A company must pass the solvency test when it:

- Buys out a minority shareholder;
- Gives financial assistance for the purchase of its own shares;
- Redeems or purchases its own shares;
- Approves discount schemes for shareholders;
- Amalgamates with another company;
- Makes distributions to shareholders; or
- Reduces shareholder liability.

If a company is going to take any of these steps, the directors must be satisfied that the company will pass the solvency test immediately after the step is taken.

Information required to be held by the company

The Companies Act requires that a company keep and maintain various company records at its registered office. These records must include:

- The full names and addresses of current directors;
- The company's constitution (if any);
- Directors' resolutions and certificates;
- Shareholders' resolutions;
- Copies of written communications to all shareholders for the previous seven years;
- Financial statements;
- Accounting records;
- An interests register (where the interests of the directors in company transactions are recorded); and
- A share register (the official record of all shareholding in the company including any share transfers, issues, repurchases or redemptions).

Reporting requirements

Every year a company is required to file an annual return with the Companies Office. This is essentially a snapshot of the current structure of the company including the contact details and the address of the company's registered office names and addresses of the company's directors and shareholders, details of the ultimate holding company and the number of shares on issue.

If a company issues shares, adopts a new constitution, or there are changes to the ultimate holding company, the registered office or the names or addresses of its directors, these changes must be reported to the Companies Office. Shareholding changes may be updated either as they happen or at the time of filing the annual return.

Some companies are also required to provide an annual report containing the company's financial statements and auditor's report (if required) under the Financial Markets Conduct Act 2013.

http://www.business.govt.nz/companies

The Companies Office website provides a fast and user-friendly service to assist with the online registration and maintenance of various company documents and records. This includes such things as company incorporations, annual returns, changes to directors, shareholders and addresses, and changes to the constitution.

Trading personally

If you decide not to incorporate a company, you can carry out your business in your own personal name. In this way you can avoid the cost and administration required to form and administer a company.

However, if you trade personally, you will have unlimited personal liability for all contracts that you enter into and for any claims made against your business. This can be a significant risk and most businesses therefore operate through a company structure.

Trading in partnership

If you are entering business with others you could consider trading through a partnership. Trading through a partnership is generally similar to trading personally. Partners in most partnerships accept unlimited personal liability for all contracts entered into by the partnership and for any claims made against the partnership business. If you are a partner in a business you therefore become personally liable not only for your own actions but for the actions of your business partners as well.

If you want to become a partner in a business without incurring unlimited personal liability, you may be able to establish a partnership under the Limited Partnerships Act 2008 which is a separate legal entity. This Act offers an alternative to a standard partnership by allowing one or more partners to limit their liability. It has been designed to facilitate the development of New Zealand's venture capital industry by allowing investors to enter partnership arrangements without incurring unlimited personal liability.

Partnerships are generally governed by specific partnership agreements and the Partnership Act 1908. Limited partnerships must have a partnership agreement that meets the requirements of the Limited Partnerships Act 2008.

If you want to enter into business in either a general partnership or a limited partnership, you should speak with your Lawlink lawyer to ensure that an appropriate partnership agreement is put in place.

Summary

If you are establishing a new business you need to decide how you will structure your business ownership. You can operate your business through a company or you can trade personally, either alone or in partnership with others. You may also be able to trade as a limited partnership. Although the company structure is the most common ownership structure, you should consult both your Lawlink lawyer and your financial and taxation advisers as they will be able to help you choose the most appropriate structure for your business.

Employing staff

When you have established your business, you may need to employ people to help your business grow and develop. If you employ people, you will be subject to a range of laws which govern all employment relationships within New Zealand. This section briefly outlines the most important of these laws for you.

Employment Relations Act 2000

The Employment Relations Act 2000 (the ERA) governs employment relationships in New Zealand. The ERA establishes the legal rules covering the negotiation and enforcement of employment agreements as well as the processes required to resolve employment disputes.

The ERA recognises that employment relationships must be built on mutual obligations of trust and confidence. The overriding principle established by the ERA is that employers and employees must act in good faith when dealing with each other. This good faith principle has a broad application. It applies, for example, where parties, including unions, are bargaining for a collective employment agreement or where an employer is considering a restructure of its business or following a disciplinary process.

The ERA recognises that employment agreements can be governed by collective agreements or individual agreements. Employees have the freedom to choose whether they want to be party to a collective agreement or negotiate their own independent agreement. The ERA sets out the different rules which apply to the negotiation of such agreements.

Under the ERA, union membership is voluntary, but employers have a legal obligation to provide new employees with information regarding any relevant union the employee can join. Where a new collective agreement is being negotiated, the relevant union usually commences this process, with the ERA governing aspects of the negotiation process as well as setting out the powers a union has (such as access rights to the workplace). In respect of individual agreements, these cannot be based too closely upon a collective agreement (if such an agreement exists), but the parties to an independent agreement may agree to such terms as they see fit.

The ERA requires employers to:

- Have a written employment agreement with every employee setting out who the parties are and what the employee's conditions

are including: what they will do, where and how often they will do it, and what they will be paid;

- Clearly indicate any agreed matters including 90 day trial and probationary periods: and/or availability provisions;
- Keep records relating to minimum entitlement provision including accurate time and wage records (these should include references to annual leave and public holiday);
- Provide empolyees with written information regarding services available from the Ministry of Business, Innovation and Employment to resolve employment relationship problems including personal grievances;
- Provide employees, where relevant, with an employment protection provision which will apply if the employer's business is sold or transferred, or if the employee's work is contracted out;
- Observe the terms of its employment agreements;
- Ensure that they provide a safe and healthy workplace free from bullying, harassment and discrimination; and
- Act in good faith, including being active in communicating with employees to maintain a productive relationship, and where a proposal is contemplated that may negatively impact on the continuation of employment, to consult with potentially affected employees.

Penalties can be awarded against an employer who fails to comply with any of its legal obligations.

Resolving disputes with employees

The Ministry of Business, Innovation and Employment has a specialist service called Resolution Services, which provides free mediation services to assist with resolving employment disputes. Mediation is the primary focus for resolving employment disputes, with a high percentage of disputes being resolved at the mediation level.

However, if mediation is not successful, or not wanted, employers and/or employees can apply to the Employment Relations Authority (the Authority) for the dispute to be resolved. The Authority has wide-ranging powers to conduct an investigation into the matter and has the power to make binding decisions. In the event that mediation has not been attempted the Authority will normally direct parties to attempt mediation.

The Authority has a lot of remedies available to resolve employment disputes. For example, if an employee has been unjustifiably dismissed, the Authority can order that the employee be reinstated to their previous

position. Where reinstatement is not appropriate the Authority can order an employer to pay their former employee reimbursement of lost wages and other benefits, compensation for humiliation, monetary penalties and costs.

An employee or employer dissatisfied with any decision from the Authority, can appeal the decision to the Employment Court.

Your obligations as an employer under the ERA

The ERA governs all employment relationships within New Zealand. It directs employers how to conduct employment negotiations, and resolve disputes correctly.

Employers must not only advise their employees of their rights under the grievance procedures in the ERA, but need to understand the correct procedures when dealing with their employees. In particular, in matters of discipline and redundancy, employers must be able to prove that their actions are justifiable and procedurally fair.

The ERA also provides some protection for employees when their employer's business is restructured, or is sold. Certain types of employee (such as those employed in cleaning or food catering businesses) are defined by the ERA as 'vulnerable' when such a restructuring or business sale occurs. Your Lawlink lawyer can advise you on the proper steps to take to comply with the requirements relating to employees if you are selling or restructuring your business.

To manage your obligations under the ERA, you should formulate your own compliance programme. Your Lawlink lawyer can assist you with this process. The benefits of a comprehensive compliance programme include:

- Helping you to develop and evaluate your human resource management system;
- Helping you to identify your labour requirements for running your business efficiently and profitably;
- Helping you to ensure your employees are engaged on appropriate and certain terms;
- Lowering the risk of employees bringing personal grievance actions;
- Helping to ensure employees are treated fairly, which promotes positive employer/employee relationships;
- Increasing the level of confidence unions hold in an employer, which will assist in ensuring that valuable labour hours are not lost on protracted disputes with unions;

- Helping to ensure that the right person is employed in the right job;
- Helping with staff performance review procedures and disciplinary procedures; and
- Helping you to end employment relationships with minimal risk.

Summary

The ERA is one of the most significant business laws affecting the day-to-day operation of New Zealand businesses. It is therefore important that you understand your obligations under the ERA and establish a compliance programme to ensure that you meet those obligations. Lawlink includes a large number of lawyers who specialise in providing advice in this complex and significant area of the law. If you are an employer or are planning on employing staff, you should contact your Lawlink lawyer to discuss how the ERA will affect you and your business.

Health and Safety at Work Act 2015 (HSWA)

The HSWA substantially reformed health and safety laws in New Zealand and the relevant obligations, offences and penalties. It identifies that a well-functioning health and safety system relies on participation, leadership and accountability by government, business and workers. The legislation is designed to be flexible and workable for both small and large businesses without imposing unnecessary compliance costs.

The HSWA creates a wide range of duties for any "Persons Conducting a Business or Undertaking" (a "**PCBU**"). A PCBU has a legal duty, as far as is reasonably practicable, to ensure the health and safety of its workers, or those whose activities are influenced or directed by the PCBU (for example, employees of a contractor or subcontractor hired by the PCBU). PCBUs must also ensure, as far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out by the PCBU.

There are also obligations on:

- PCBUs who manage or control workplaces;
- PCBUs who design, manufacture, import, supply, install or construct plant, substances or structures;
- Directors and officers of PCBUs (there is a specific obligation for directors and officers to exercise due diligence to ensure that the PCBU complies with its obligations); and

- employees and other persons in a workplace (e.g. visitors to the workplace).

The HSWA imposes substantial penalties for breach of the Act and creates a new hierarchy of offences. The most serious offences carry a maximum penalty of $3m for an organisation, $600k or imprisonment for up to five years or both for a director, officer or self-employed person, and $300k or imprisonment for up to five years or both for any other individual.

Your obligations under the HSWA

If you are an employer you must:

- Have procedures for identifying and assessing hazards and risks to health and safety;
- Eliminate risks to health and safety, so far as is reasonably practicable and, if risks cannot be eliminated, they must be minimised;
- Keep employees informed of existing hazards and risks, emergency procedures and where to find and use protective gear and safety devices;
- Provide adequate training and supervision;
- Investigate the cause of any work accidents;
- Take all reasonably practicable steps to ensure employees' actions or inactions do not harm any other person in the workplace;
- Monitor the health of workers and conditions at the workplace for the purpose of preventing injury or illness;
- Provide reasonable opportunities for employees to participate in processes for the improvement of health and safety;
- Consult and co-ordinate with other PCBUs with the same duties; and
- Record and give notification of work accidents to Worksafe.

Health and safety compliance programme

As an employer you should implement a health and safety compliance programme. A well designed compliance programme should help you to meet your obligations under the HSWA and assist with:

- Reducing workplace injuries;

- Avoiding criminal liability;
- Reducing ACC levies;
- Improving staff relations;
- Reducing the likelihood that you will breach your obligations under the HSWA; and
- Avoiding adverse publicity.

Your health and safety compliance programme should include:

- A workplace health and safety manual; and
- Regular health and safety audits.

Your health and safety manual should clearly state that you give health and safety in the workplace a high priority. It should also outline the procedures for identifying hazards and eliminating, reducing or minimising them, and should emphasise that this is the responsibility of every employee.

Your manual should also identify any particular hazards and give warnings about those hazards, as well as setting out emergency procedures, including how to deal with an accident.

However, it is not enough simply to have a good health and safety manual. You should continually assess health and safety in your workplace. The second element in every compliance programme should therefore be regular health and safety audits. Audits will assist in reducing the number of hazards in your workplace as well as minimising your liability.

Summary

Employers who fail to meet their obligations under the HSWA can face significant fines and even imprisonment. If you are an employer you should establish a vigorous health and safety compliance programme to protect your employees from injury and to protect yourself from legal liability. This programme should include developing a health and safety manual as well as establishing a regular audit process.

If you have any questions about your obligations under the HSWA and establishing a health and safety compliance programme, you should contact your Lawlink lawyer.

Other important legislation for employers

If you are an employer, you should also familiarise yourself with the following laws:

Minimum Wage Act 1983: Every employee aged 16 and over is entitled to the prescribed minimum wage, regardless of whether a lower wage is negotiated in their employment agreement. This Act requires the Minister for Workplace Relations and Safety to review the prescribed minimum rate each year.

Parental Leave and Employment Protection Act 1987: Employees have minimum entitlements to parental leave, including paid parental leave, and certain preferential rights to re-employment. If an employment agreement gives lesser entitlements, that part of the agreement will have no effect.

Holidays Act 2003: Every employee is entitled to a minimum of four weeks' paid leave each year, plus 11 specified statutory holidays. An employee is also entitled to 5 sick days regardless of how many days per week they work. An employer and an employee cannot agree to restrict or reduce these entitlements.

Immigration Act 2009: If you are an employer you must ensure that all of your employees are New Zealand citizens or have the legal right to work in New Zealand as required by the Immigration Act.

Smoke-free Environments Act 1990: As an employer you must take all reasonably practicable steps to ensure that no person smokes at any time in your workplace.

Wages Protection Act 1983: If you are an employer you cannot make any deduction from your employees' wages or salary without that employee's written request or consent, which that employee may revoke at any time.

Human Rights Act 1993: This Act prohibits discrimination. Discrimination is defined in the Act to mean treating people differently because of their sex, marital status, religious belief, ethnical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation. It is unlawful to discriminate against someome on any of these grounds.

Privacy Act 1993: This Act is designed to promote and protect individual privacy. It affects every person or organisation that deals with information about private individuals, including information collected about employees.

KiwiSaver Act 2006: Employers are required to make compulsory contributions towards employees' KiwiSaver savings (except for employees under 18 years of age or if the employer pays into an alternative superannuation scheme). An employer can either elect to pay KiwiSaver contributions in addition to an employee's remuneration or can take a 'total remuneration' approach (total remuneration package is inclusive of KiwiSaver contributions).

Summary

If you employ staff in your business you need to understand your legal obligations as an employer. You have significant obligations to your employees under the Employment Relations Act 2000, the Health and Safety at Work Act 2015 and a wide range of other related legislation. To ensure that you comply with these obligations you should carry out a thorough review of your employment practices and establish a regular review process. Your Lawlink lawyer will be able to assist you with these processes.

Dealing with your customers

Every business has customers. Just as your employment relationships are regulated by the law, so too are your relationships with your customers. This section will briefly outline the most important of these laws for you.

Consumer Guarantees Act 1993

If you are involved with providing goods or services to consumers (as opposed to other businesses) you need to understand and comply with your obligations under the Consumer Guarantees Act 1993 (the CGA). A consumer is a person who "acquires goods or services of a kind ordinarily required for personal, domestic or household use or consumption" and who does not hold himself or herself out as buying the goods to resupply them in trade or to use them in the manufacturing process or to repair other goods.

The CGA gives consumers remedies against manufacturers, importers and distributors of goods (rather than just against retailers). It implies statutory quality guarantees into the supply of both goods and services.

Consumer guarantees

The CGA establishes the minimum guarantees which you must provide to your customers. If you provide goods to consumers, you must guarantee that:

- You have the right to sell the goods you are selling;
- You are able to give clear title to the goods (i.e. you guarantee that the goods are not subject to any security interest);
- The goods are of an acceptable quality;
- The goods are fit for their purpose;
- The goods match any description or sample you have provided; and
- The goods will be delivered when agreed with the consumer or, if no time has been agreed, within a reasonable time.

If you provide services to consumers, you must guarantee that your services will be:

- Carried out with reasonable care and skill;

- Completed within a reasonable time;
- Fit for their purpose; and
- Provided at a reasonable price where the price is not specified in advance.

These guarantees apply to all sales of goods and services covered by the CGA, including sales by auction and internet transactions. If you fail to meet your obligations under these guarantees you can become liable to pay compensation. The compensation payment could include the cost of replacement goods or services and consequential costs incurred by your customer (e.g. travel expenses and costs of rectifying damage caused by your defective goods or services), or loss of income suffered by your customer as a result of the defective goods or services you supplied.

You cannot contract out of the minimum guarantees established by the CGA except for certain business to business transactions. If you try to do so you can face a fine up to $200,000 for an individual or $600,000 for a company. You may be liable even if your attempt to contract out of the required guarantees is unintentional.

Reservation of title clauses

Reservation of title clauses (sometimes called Romalpa clauses) are a common feature of contracts for the supply of goods. They provide that ownership of the goods does not pass to the purchaser until they have paid in full. Where a purchaser is a consumer and the goods are of a kind covered by the CGA, these clauses can only be enforced if certain procedures are followed, including obtaining the consumer's signature. Consequently, if you want to include reservation of title clauses in your contracts with customers, you need to ensure that your contract terms comply with the CGA and are signed by your customers. You will also need to consider registering your rights under the Personal Property Securities Act 1999 (an Act considered elsewhere in this guide).

Your Consumer Guarantees Act compliance programme

If you manufacture, import, distribute or supply goods or services you need to take steps to avoid or minimise the possibility of breaching the CGA. You should establish a compliance programme incorporating regular reviews of your sales documentation. Any such review should include checking your terms of trade, labelling and packaging. If you are a retailer, your compliance programme should also include checking your "upstream" supply contracts to ensure you can pass liability for defective goods back to the manufacturer or distributor.

Your Lawlink lawyer can assist you with carrying out these checks.

Establishing a compliance programme will also help to ensure that:

- If you can contract out of any of the provisions of the CGA, you do so effectively;
- Any limitation or exclusion of damages clause you include in your contractual documents is enforceable; and
- Any reservation of title clauses you need are effective.

What about goods or services you supply to other businesses rather than private consumers?

The Contract and Commercial Law Act 2017 applies to the sale of goods not covered by the CGA. It implies conditions as to title, quality and fitness of goods into contracts for the sale of goods. If you are selling goods to other businesses you must have the right to sell the goods and the goods you sell must be fit for their purpose and of merchantable quality. These obligations are not as extensive as those imposed by the CGA but are still important.

Fair Trading Act 1986

The CGA covers your obligations to consumers who purchase goods or services from you. The Fair Trading Act 1986 (the FTA) is much broader in scope and governs your relationships with every person or business you engage with in the operation of your business.

The FTA is designed to encourage fair business practices. It prohibits misleading and deceptive conduct, false representations, and unfair practices. More recent changes cover:

- online sales (traders must make clear when they are selling in trade);
- additional disclosure obligations for businesses offering extended warranties;
- prohibition of unsubstantiated representations – these are representations a person makes without reasonable grounds for them irrespective of whether the representation can be proved to be false or misleading; and
- prohibition of "unfair terms" in standard form consumer contracts. A court may declare a term "unfair" if it is satisfied that the term:
    - would cause a significant imbalance in the parties' rights and obligations;

- is not reasonably necessary to protect the legitimate interests of the party who would benefit from it; and
- would cause some detriment (whether financial or otherwise) to the other party.

The FTA also deals with consumer information, product safety standards and the sale of unsafe goods and services. Businesses cannot contract out of their obligations under the FTA in their dealings with consumers but contracting out is sometimes possible for business to business transactions.

Enforcement and remedies

If you fail to meet your obligations under the FTA you can face significant penalties. These include:

- Having all or part of a contract declared void; or
- Repaying the amount of the commercial gain resulting from an offence;
- Monetary penalties (up to $600,000, depending on the offence, plus repayment of any illegitimate commercial gain);
- Management banning orders preventing persons from being involved in management; and
- Court injunctions to prevent further infringements from occurring.

A business that is convicted of an offence may also have to:

- Publish information (e.g. to clarify misleading advertising);
- Publish corrective statements;
- Provide replacements or supply parts; and/or
- Refund money and return goods.

You can face these penalties following legal action by your customers or business associates or following legal action by the Commerce Commission (the legal authority established to enforce the FTA and other related business laws). However, courts will often impose a lower fine or penalty if they are satisfied the business has tried to operate an effective compliance programme.

Your Fair Trading Act compliance programme

You are legally obliged to comply with the FTA. You also have a commercial interest in making sure your competitors comply with it. It is therefore important that your employees know what the FTA requires. You should therefore establish a compliance programme to ensure

that your staff understand and comply with their obligations and can identify breaches of the FTA by your competitors. Your Lawlink lawyer can assist you to develop a robust compliance programme.

Privacy Act 1993

If you collect, store, use or disclose information about individuals in the course of running your business you must comply with the Privacy Act 1993. This Act is designed to promote and protect individual privacy. It affects every person or organisation that deals with information about private individuals. No businesses are exempt.

The Privacy Act sets out 12 information privacy principles that must be observed by anyone who holds information about private individuals. These principles establish rules regarding:

- The collection, use, storage and disclosure of information relating to individuals; and
- The rights that individuals have to access and correct that information.

Effects of non-compliance

Individuals can complain to the Privacy Commissioner if they believe that an organisation holding information about them has interfered with their privacy. The Privacy Commissioner may endeavour to settle the complaint by conciliation or mediation. If this is unsuccessful, the complaint may be taken to the Human Rights Review Tribunal. This Tribunal has the power to make an order restraining an organisation from continuing or repeating an interference, award damages and costs up to a maximum of $350,000, or order the organisation to remedy the interference. It is also worth noting that it is a criminal offence under the Crimes Act 1961 to use or disclose personal information in order to obtain an advantage or pecuniary gain.

Your privacy compliance programme

If you or your organisation handles personal information, you will need to consider your activities in the light of the information privacy principles and other requirements of the Privacy Act. As a first step, you should appoint a privacy officer. That person should then conduct a privacy audit and set up your ongoing Privacy Act compliance programme.

A good compliance programme will:

- Ensure that your business complies with the information privacy principles set out in the Privacy Act;

- Enable your privacy officer to deal appropriately with requests from the Privacy Commissioner or any other person;
- Enable you or your business to deal properly with any complaint.

Personal Property Securities Act 1999

If you supply goods to your customers before receiving payment, you should ensure that your terms of trade allow you to retain ownership of those goods until you receive payment in full. Such retention of ownership clauses in your terms of trade (often referred to as reservation of title/Romalpa clauses, or security interest clauses) provide some security for you if any of your customers experience financial difficulty.

However, the benefits of these clauses can be lost if you do not register your security interest on the Personal Property Securities Register (PPSR).

The PPSR was established by the Personal Property Securities Act 1999. This Act provides a common set of rules to establish security interests in personal property and to prioritise them, and sets up a single procedure for their registration. The Act provides for registration of a wide range of security interests, not only security interests created by reservation of title rights. For instance, a lease of goods for a period of 12 months or more is deemed to be a security interest. Consequently, it is important that businesses which lease equipment for 12 months or more are aware of the need to register their security interest otherwise they could potentially lose ownership of their leased goods. As a general guide, registered security interests take priority over unregistered security interests.

If you need to secure payment from your customers, whether by way of reservation of title provisions in your terms of trade or by a more general security over your customers' assets, you should investigate your options under the Personal Property Securities Act 1999. Understanding this Act is also important if you are granting security over your business assets to any of your suppliers or lenders.

Securing payment from your customers is important for your business. If you want to ensure that your business terms give you the best level of security possible, contact your Lawlink lawyer and ask them to review your terms of trade and business contracts.

Credit Contracts and Consumer Finance Act 2003

If you provide any type of credit or lease arrangement to private individuals for personal, domestic or household purposes, you must comply with the Credit Contracts and Consumer Finance Act (the CCCFA). The CCCFA is designed to protect the interests of borrowers. It does so by requiring lenders to disclose to borrowers the most important elements of their credit arrangements. The CCCFA applies to credit contracts and to some lease arrangements. It will also apply to layby sales if credit fees or interest charges are payable.

You must comply with the CCCFA if:

- Your business provides credit or leases goods to a person (i.e. not a company or a trust); and
- That credit or lease is provided for personal, domestic or household purposes; and
- You charge interest or fees or take security for the credit provided or, in the case of leased goods, the lease is for more than one year; and
- This is part of your normal business activity.

The CCCFA also affects businesses such as repossession agents and debt collectors.

If the CCCFA applies you must disclose to your customer in writing:

- The interest they must pay;
- The payments required;
- The interest rate;
- The fees you will charge; and
- Their rights under the CCCFA.

The CCCFA requires businesses to make their standard form contract terms, interest rates and fees publicly available free of charge. The CCCFA requires every lender to comply with the "lender responsibility principles" specified in the CCCFA. These principles require lenders to act with care, diligence and skill in all dealings with borrowers and in any advertising. The Ministry of Business, Innovation and Employment has developed The Responsible Lending Code which provides guidance to lenders on how to comply with the lender responsibility principles.

Different disclosure rules apply depending on the type of contract involved. Disclosure obligations for credit contracts are more onerous than those which apply to consumer leases. There are specific repossession rules governing when, how and what you can repossess and rules regarding the type and amount of fees and charges which can be imposed. The CCCFA also allows the Commerce Commission to investigate claims and prosecute lenders who act oppressively or do not meet their disclosure obligations. The matters which can be taken into account will be consumer focused and include the relative bargaining power of the parties and the actual circumstances in which the consumer entered into their contract.

Maximum penalties under the CCCFA are $200,000 for an individual and $600,000 for a company.

Insolvent transactions under the Companies Act 1993

Sometimes businesses aren't successful. When these businesses are your customers, it can impact on you. If a company is placed into liquidation on the basis that it is unable to pay its debts as they fall due, (i.e. it is "insolvent"), there are a number of rules which set out the basis on which the insolvent company's assets are to be distributed. Broadly speaking, secured creditors will be paid first, followed by particular categories of preferential creditors (e.g. employees and the IRD) and finally unsecured creditors.

If a company is insolvent, it generally means that its liabilities exceed its assets and there is not enough money to repay all the company's creditors. The general rule provided for in the Companies Act 1993 is that creditors of the same class (i.e. secured, preferential or unsecured) are to receive a proportionate share of the company's assets (once sold and converted to cash). So, for example, if a company has assets worth $100 and creditors totaling $200 (all unsecured) then the creditors will each receive 50 cents per dollar of their debt.

Of course, what will often happen in the lead up to a company's liquidation is that some of the company's creditors (often those who complain the loudest or those who hold some leverage over the company's directors) will have their debts paid in full. Parliament has decided that these sorts of payments result in inefficiencies and unfairness; these payments mean that some creditors receive full payment for their debt, while others receive nothing (or at least much less).

The insolvent transaction provisions in the Companies Act 1993 are designed to address this. These sections provide that a liquidator may apply to the court to set aside transactions occurring up to two years prior to a company's liquidation where:

- The transaction is entered into with a creditor of the company at a time when the company was unable to pay its due debts; and
- The transaction allows the creditor to receive more than they would have in the company's liquidation;

In practice, what this can mean is that up to two years after you have provided goods or services to a customer, and been paid, a liquidator can approach you and ask you to refund the payments you received on the basis that they meet the above criteria and were therefore "insolvent transactions". In order to avoid being required to pay back monies received, you need to be able to establish that when entering into the transaction with the company:

- You acted in good faith; and
- You did not reasonably suspect and did not have grounds to suspect that the company was insolvent; and
- You provided value or altered your position in reliance on the transaction.

In almost all situations the "suspicion of insolvency" test will effectively be the sole inquiry undertaken by the court.

The insolvent transaction provisions are not well known in the commercial world and can result in unpleasant surprises for businesses who may have all but forgotten about the insolvent company and the relevant transactions. There are, however, a number of ways in which you can minimise your risk, including:

- Insisting on cash on delivery, payment in advance or payment from a third party (e.g. a director personally) for any customers with whom you are unfamiliar or about whom you hold financial concerns;
- Insisting on personal guarantees or security (whether over the goods supplied or other assets of the company) prior to extending any significant credit to customers;
- Carefully managing your debtors to ensure that the extent of your exposure to any particular customer is kept to a level at which you are comfortable regarding the risk of non-payment and that the further supply of goods and services is closely linked to the payment of existing debt.

The law relating to insolvent transactions is complex. Please see your Lawlink lawyer for specific advice relevant to your particular situation.

Summary

A wide range of business laws govern your relationships with customers. Some of these laws, such as the Consumer Guarantees Act 1993 and the Fair Trading Act 1986, apply to almost all businesses whereas others such as the Privacy Act 1993 only apply to some businesses. You therefore need to identify which of these consumer protection laws apply to your business and then establish a compliance programme to ensure that you comply with those laws. Your Lawlink lawyer has the knowledge and experience to assist you with this process.

Dealing with your competitors

Competitors provide a constant challenge for most businesses. Healthy competition is an essential part of modern capitalism. However, competition can also lead to unfair business practices and be prejudicial to the interests of consumers and society as a whole.

To avoid these problems, a number of business laws are designed to promote healthy competition and prevent the misuse of market dominance. These laws include the Fair Trading Act 1986 and the Commerce Act 1986. The Commerce Act is the most important piece of legislation governing competition in New Zealand.

Commerce Act 1986

The purpose of the Commerce Act is "to promote competition in markets for the long-term benefit of consumers within New Zealand". One of the key concepts within the Commerce Act is the concept of the market. Your business market may be as large as providing telecommunication services nationwide or as small as the sale of food in a small town. For you to understand your obligations under the Commerce Act (and the obligations of your competitors) you first need to understand the nature of the market or markets in which your business operates.

Your obligations under the Commerce Act

To promote competition the Commerce Act establishes a strict code prohibiting certain practices within business markets. For example, the Act prohibits businesses from:

- Entering into contracts, arrangements or understandings if their purpose or likely effect (whether direct or indirect) is to substantially lessen competition in a market;
- Using market power to restrict, deter or eliminate competition within a market; or
- Engaging in price fixing or resale price maintenance.

Business purchases

The Commerce Act also prohibits business acquisitions that have or are likely to have the effect of substantially reducing competition in a market. Consequently, if you operate a business within a specific market and you want to acquire another business within that same market, you

need to consider whether your acquisition of that business will have an effect on competition.

If you are considering a business purchase that may have an impact on competition in a particular market you may need to ask the Commerce Commission to approve your purchase. The Commerce Commission should approve the purchase if it is satisfied that the purchase will not have a substantially anti-competitive effect. Even if the effect will be anti-competitive, the Commerce Commission may still approve the purchase if it is satisfied that the public benefits from the acquisition will outweigh the harm from its anti-competitive effects.

It is your responsibility to seek the Commerce Commission's approval of any business purchase you propose that will have an impact on competition within a market. If you do not do so and it is later established that your business purchase has anti-competitive effects, you may become liable for significant fines or face injunctions to prevent or restrict your business activities.

Your competitors' obligations under the Commerce Act

If you believe that any of your competitors are breaching their obligations under the Commerce Act, you can apply to the court for an injunction to restrain their activities. You could also make a complaint to the Commerce Commission. However, in general the Commerce Commission will only take enforcement action when a consumer issue is involved, or some other public purpose will be served by doing so. Otherwise it will leave the protection of merely private interests to those directly involved.

Penalties for breaching the Commerce Act

The penalties for breaching the Commerce Act are significant. Courts may impose fines of up to $500,000 on an individual and up to $10 million on a company. If a company has made an identifiable commercial gain from its wrongdoing the fine may be even higher: up to three times the amount of the commercial gain, or if that is too hard to establish, up to 10% of the combined turnover of the company and its associated companies.

Given the size of these potential penalties, you need to ensure that you take steps to ensure that you meet all of your obligations under the Commerce Act. If you breach the Act but have a compliance programme in place designed to avoid breaches of the Act, this may influence whether the Commerce Commission will take action against you, particularly for minor breaches. Having a compliance programme in place may also have an effect on the level of any fine and other sanctions that a court is likely to impose.

Summary

Everyone who is in business needs to be aware of the Commerce Act's requirements. You also have a commercial interest in ensuring that your competitors comply with the Act. To ensure that you comply with your obligations under the Commerce Act you should carry out a compliance audit to review the way you trade, your relationships with competitors and your plans for expansion. Your Lawlink lawyer will be able to assist you with undertaking such a compliance audit.

Dealing with land

Most businesses deal with land in one form or another, as owners, developers, landlords or tenants. There are a wide range of laws relating to the ownership and use of land. The purpose of this section is to identify and summarise the most significant of these laws.

Resource Management Act 1991

If you occupy land in New Zealand, you will need to comply with the Resource Management Act 1991 (the RMA). The RMA contains the heart of New Zealand's environmental law and is designed to promote the sustainable management of New Zealand's natural and physical resources.

Sustainable management involves balancing the use of resources with the need to protect the environment and to provide for the needs of future generations. To achieve these goals the RMA sets up mechanisms to control the effects that activities may have on the environment. Regional and district councils administer resource management issues in their areas through planning and resource consent processes.

Your business must comply with the rules and conditions that the councils set in their plans and resource consents. Your business must also avoid, remedy or mitigate any adverse effect its activities may have on the environment.

Effects of non-compliance

The impact of breaching the RMA can be significant. It can result in a significant fine (up to $600,000 for a company and $300,000 for an individual and more for a continuing breach). Individuals can also face up to two years' imprisonment. If the environment has been damaged, huge clean-up costs could also be involved. If you breach your obligations under the RMA you may be prevented from operating until you have set up procedures to prevent a recurrence and obtained new consents from the appropriate councils. Given these significant penalties, you should establish a compliance programme to ensure that you meet your obligations under the RMA.

Complying with your obligations under the RMA

Completing an environmental audit or assessment of your business activities should be the first step in your compliance programme. If there are any problems, the audit should reveal them. Your business will then be in a position either to amend its operations or to obtain appropriate

consents for its existing operations. Your compliance programme should also include training, monitoring, reviewing and planning to ensure that your business continues to comply with its obligations.

Building Act 2004

If you are in the business of constructing buildings, you need to ensure that you meet all of your obligations under the Building Act 2004. This Act was passed in response to the leaky building issues, and to provide greater regulation of the building industry generally.

The Building Act is designed to ensure that:

- People who use buildings can do so safely and without endangering their health;
- Buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them;
- People who use a building can escape from the building if it is on fire; and
- Buildings are designed, constructed, and able to be used in ways that promote sustainable development.

The Building Act aims to achieve these goals by establishing:

- Strict guidelines for code compliance certificates, including (with some exceptions) providing that new buildings cannot be occupied until they have a code compliance certificate;
- A licensing regime for building professionals;
- Strict requirements for commercial buildings;
- A new warranty regime for residential dwellings; and
- Penalties for failure to comply with the code compliance certificate regime.

Building regulations were introduced on 1 January 2015 which protect consumers who are building a house or making major renovations to a residential building. The regulations include:

- Requiring a builder to provide a checklist of information and disclose other certain information to the consumer including information about their skills and business record;
- A set of minimum terms to be implied in the building agreement; and

- Requiring builders to fix any defect they have been informed about within 12 months.

Effects of non-compliance

The effects of breaching the Building Act can be severe. Fines can be up to $200,000 and increase for every day the breach continues. Furthermore:

- Employers may be liable for offences committed by employees and other agents;
- Directors may be personally liable for offences committed by their company;
- Landlords may be liable for offences committed by tenants; and
- Building owners can be liable for breaches committed by the building occupiers.

In addition to being able to impose fines, local authorities also have powers to close down or condemn buildings that do not meet the requirements of the Building Act. This can have a significant impact on businesses connected with that building, including the loss of rent or business profits and claims for breach of lease. Local authorities also have the power to carry out remedial work on a building at the owner's cost, or issue a notice requiring work to be rectified and other work to be stopped in the meantime. In the case of dangerous, earthquake-prone or insanitary buildings, local authorities have the power to attach to the building a notice that warns people not to approach the building.

Your building compliance programme

If your business owns, develops or occupies a building you need to ensure that your business meets its obligations under the Building Act. The first step is to review your business's existing position. This should involve checking existing consents, compliance schedules, leases, management agreements and other documentation. You should also establish a staff training and monitoring programme and incorporate regular property reviews into your business procedures.

If you co-ordinate these procedures with your compliance review of the Resource Management Act 1991 and the Health and Safety at Work Act 2015, you should have a comprehensive compliance picture for your land and buildings. You will then be able to remedy any problems and plan for the future. Your Lawlink lawyer can assist you with these compliance reviews.

Property Law Act 2007

If your business leases land, either as a landlord or tenant, you also need to be familiar with the Property Law Act 2007 (the PLA). While your lease will contain the terms of your agreement with the other party, the PLA also contains rules and obligations that will be implied into the landlord and tenant relationship unless the lease document expressly provides otherwise.

Some matters that both landlords and tenants should be aware of include:

- As mentioned above, the PLA implies covenants into leases (such as the right of the tenant to quiet enjoyment);
- If a tenant leases a property that is not in good condition at the start of the lease, the tenant is not required to put the property into good condition at the end of the lease term (as was sometimes required before the PLA became law);
- Landlords bear the risk of damage to the leased premises and must ensure that appropriate insurance is in place (most leases will, however, provide that the tenant must meet the cost of insurance);
- Landlords may terminate the lease if the tenant negligently causes damage to the leased premises in such a way as to prejudice the landlord's ability to obtain insurance;
- Under the PLA, landlords have lost their right to "distrain"; that is, landlords can no longer take possession of a tenant's chattels and sell them to cover outstanding rent payments; and
- Landlords do not have the right to terminate a lease immediately if a tenant fails to pay rent. Under the PLA a landlord must serve the tenant with formal notice in a prescribed form, which must contain a minimum notice period within which the breach must be remedied, before the lease can be terminated. That minimum notice period will depend on both the express terms of the lease and the implied covenants in the PLA. There are a number of specific requirements set out in the PLA, including the forms which must be used and time limits which apply before action can be taken. Consequently, if you are involved with any dispute involving land, particularly a landlord/tenant dispute, you should contact your Lawlink lawyer to ensure that you meet your obligations under the PLA.

Summary

Almost all businesses deal with land in some way. There are a number of laws in New Zealand which regulate and control how land can be used and developed, the standards which apply to building developments and the relationships between landlords and tenants. Your Lawlink lawyer can provide you with detailed advice about how these laws apply to you.

Dealing with the wider community

In addition to its legal obligations to its customers and competitors, your business also has legal obligations to the wider community. Some of these obligations have already been considered, such as the obligations imposed by the Resource Management Act. This section of the guide reviews some other business laws which impose obligations on your business for the benefit of the wider community.

Income Tax Act 2007 and related legislation

All businesses need to comply with their tax obligations. Obligations are imposed on businesses under tax legislation such as the Income Tax Act 2007 and the Goods and Services Tax Act 1985. Significant penalties can be imposed for failing to comply with these obligations. All businesses therefore need to take active steps to ensure that they understand and comply with all of their taxation obligations.

Human Rights Act 1993

If you deal with people in your business, you need to comply with the Human Rights Act 1993. This Act prohibits discrimination. Discrimination is defined in the Act to mean treating people differently because of their sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation. It is unlawful to discriminate against someone on any of these grounds.

The Human Rights Act applies in a wide range of situations. To comply with this Act, you need to ensure that your business does not discriminate on any of the prohibited grounds. As examples, and this is not an exclusive list, your business cannot discriminate when:

- Employing staff;
- Providing private superannuation entitlements;
- Providing goods or services;
- Regulating entry into places where members of the public have general access; or
- Providing accommodation.

One of the most likely areas of non-compliance for businesses is employment procedures. This includes not just the obvious areas of the

engagement, appraisal, promotion and discipline of employees, but also general day-to-day dealings with and between staff. Your business can also be held liable for breaches of the Act by its employees. To avoid such liability your business must show that it has taken all reasonably practicable steps to prevent such conduct occurring in the workplace. Employment application forms, employee records and employment agreements also need special attention.

Effects of non-compliance

If your business breaches the Human Rights Act, it can be liable for a wide range of penalties, including:

- A declaration that you or your business has breached the Human Rights Act;
- An order that any offending activity cease;
- An order that you or your business take action to remedy the breach;
- Damages not exceeding $350,000 in a proceeding before the Human Rights Review Tribunal and in excess of that sum in the High Court;
- Compensation or a variation of the contract where a contract has been entered into in breach of the Human Rights Act;
- An order that you or your business undertake training to ensure that you comply with the Human Rights Act in the future.

Complying with the Human Rights Act

Human rights are a high profile public issue. Any suggestion that your business has breached the Human Rights Act could result in significant negative publicity. However, you can generate considerable goodwill for your business by establishing a reputation for dealing fairly with your staff and customers. Ensuring that you comply with your obligations under the Human Rights Act can therefore not only help you to avoid significant penalties and negative publicity but can also positively develop the goodwill of your business.

Financial Transactions Reporting Act 1996 and Anti-Money Laundering and Countering Financing of Terrorism Act 2009

If your business involves borrowing, lending, investing or managing money on behalf of others, you may be a financial institution that is required to comply with the Financial Transactions Reporting Act

1996 and/or the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. These Acts require various businesses (called "reporting entities") to do such things as verify the identity of individuals, establish, maintain and regularly audit an Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) programme, appoint an AML/CFT compliance officer, undertake ongoing due diligence and account monitoring, and report certain suspicious transactions.

If your business is involved in borrowing, lending, investing or managing money on behalf of others you should contact your Lawlink lawyer who will be able to determine whether your business is required to comply with these Acts and, if it is, what steps you need to take to comply. Compliance may also be required with the Financial Service Providers (Registration and Dispute Resolution) Act 2008 and the Financial Advisers Act 2008.

Hazardous Substances and New Organisms Act 1996

If your business imports, possesses or uses any hazardous substance or new organism, it will need to comply with the Hazardous Substances and New Organisms Act 1996. This Act is designed to protect the environment and the health and safety of people and communities by preventing or managing the adverse effects of hazardous substances and new organisms. The Act imposes a general duty on every person who imports, possesses, or uses a hazardous substance or new organism to ensure that any adverse effect in relation to that substance or organism on any other person or the environment is avoided, remedied, or mitigated.

Summary

The examples provided in this section show the wide range of laws that can have an impact on you and your business. Your Lawlink lawyer will be able to assist you with identifying which of these and other laws affect your business and help you to develop a compliance programme to ensure that you meet all of your legal obligations.

Where to from here?

Lawlink lawyers understand that you don't want to run through red tape, you just want to run your business. Although it is important that you have an understanding of the laws affecting your business and establish a complliance programme to comply with those laws, you do not need to deal with these legal challenges alone. Lawlink lawyers have the training, experience and contacts to help you meet all of your legal challenges.

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