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November 2007 Newsletter

This newsletter deals with sub-distribution agreements and the Trade Practices Act, practical tips for on-line contracts, and immigration law and 457 Visa reform

TRADE PRACTICES

WHEN IS A SUB-DISTRIBUTION AGREEMENT NOT A FRANCHISE?

Section 51AD of the *Trade Practices Act 1974* requires certain steps to be taken in relation to a “franchise”, including compliance with the Franchising Code of Conduct and issue of a disclosure statement.

On 18 October 2007, Justice Tracey in the Federal Court found that a sub-distributorship agreement in relation to “Polar Krush” ice drink machines and products was not a “franchise agreement” for the purposes of the Code and Act. A significant element of this conclusion was the finding that there was no establishment of a system or marketing plan, with the sub-distributors given extensive freedom and minimal training or other requirements. The Act requires that the marketing plan must be “substantially determined, controlled or suggested” by the alleged franchisor.

Whenever negotiating a distributorship agreement, a supplier must balance the franchising and other legal requirements arising from greater control over their distributor, as against the commercial benefits that might be gained by greater control and more consistent systems throughout different distribution areas.

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CONTRACT LAW DOING BUSINESS ON-LINE

Most business and individuals would now have some experience of “clickwrap agreement”.

Clickwrap agreements are formed when customers through the *click* of a mouse or an on-screen button or icon signify their acceptance of the supplier’s terms. The contracts are formed entirely in an on-line environment.

The legal requirements for an on-line contract are the same as for any other contract. Generally, the important question is whether or not a contract has been formed. If a contract has not been formed or the terms of the contract are unclear, a supplier will not be in a position to enforce key rights or take advantage of key protections, such as limitation of liability, protection of a supplier’s intellectual property rights and the inclusion or exclusion of pre-contractual representations.

Some practical tips for suppliers to improve enforceability of their clickwrap agreements are:

- (a) including a statement on a supplier’s website stating that supply will only be on the clickwrap terms. This should be included as a separate dialogue box, which includes the clickwrap terms.
- (b) ensuring the buyer should not be able to finalise a purchase on-line, or by-pass to another webpage, unless the buyer accepts the clickwrap terms as a pre-condition to proceeding.
- (c) placing of the acceptance ‘click’ or icon at the foot, or at the end of the clickwrap terms so that a supplier is doing all that is possible for the buyer to read through the terms before accepting.
- (d) permitting the buyer to exit the process any time. This ability underlines the notion that the buyer has a choice whether to accept the clickwrap terms and that the buyer has not been misled or confused into agreeing to the terms.
- (e) recording and maintaining the time and date of the acceptance by maintaining an electronic

record of the buyer's acceptance, along with any records that are generated subsequently.

- (f) ensuring consistency between the website information and a supplier's supply terms. The supplier terms may contain a range of disclaimers and exclusions and it is likely that a Court may construe such exclusions narrowly (or even ignore them altogether) if a supplier's website contains statements and representations that are contrary to what is in a supplier's clickwrap terms.
- (g) consider implementing an on-line registration requirement for buyers as this process adds to the suggestion that the buyers were aware of the clickwrap terms. Registration would include registering names, ACN/ABNs and addressee. This would also assist in proving the identity of the customer.
- (h) having regard to the *Electronic Transactions Acts*. Even though such Acts do not deal directly with whether particular on-line terms form part of a contract between a supplier and a buyer, the provisions will impact on issues such as when acceptance is deemed to have taken place and the attribution of electronic communications.
- (i) considering the application of legal principles/laws applicable to contracts generally, including IP laws, consumer protection laws, limitation of liability terms and proof of identity.

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IMMIGRATION LAW

457 VISA REFORM

There have been recent changes in the area of 457 visas.

On 8 October 2007 the Minister for Immigration and Citizenship released new requirements for Minimum Salary Levels ("MSL") and occupations for the 457 Visa.

The MSL is to be calculated at a 'point in time' using specified calculations.

The new calculations will depend on the number of hours in the given period when equated to the number of hours/weeks in an average year and can be adjusted to take into account unpaid leave where the employee travels overseas and unpaid maternity leave. The applicable base salary ranges between \$37,655 - \$51,570, depending on what schedule the nominated occupation is listed. The amount of salary to be paid to a person in a given period:

- (i) includes the person's base salary before tax and separate from any allowances, bonuses, packaged items and the like; and
- (ii) excludes any deductions that would be 100% tax deductible (for the person) or otherwise exempt from Fringe Benefits Tax (FBT)
- (iii) excludes LAFHA.

A new gazetted list of acceptable occupations has also been issued for 457 visas.

General Changes

The Migration Regulations will specify the existing Subclass 457 sponsorship undertaking to add clarity and make them enforceable.

English language proficiency with an IELTS score of average 4.5 in 4 test components will also become a hallmark of a 457 visa unless the salary paid for the position is above \$75,000 or the applicant is otherwise exempt.

Required undertakings include that the visa applicant is paid at least the gazetted MSL along with limiting the ability of those who are recruited to work in a regional area to change their location.

Where sponsors:

- breach their undertakings; or
- provide incorrect information to DIAC; or
- do not continue to satisfy the criteria as an approved sponsor,

sanctions that may be imposed include:

- cancelling the sponsorships;
- bars on making further nominations;
- bars on future visa approvals under existing sponsorships; and
- requiring securities be paid where sponsors have previously breached undertakings.

Labour Hire Firms and the “On Hire” Industry

From 1 October 2007, labour hire firms are now prevented from being approved as standard business sponsors unless they intend employing the visa applicant in their own business. A labour hire company will now need to enter into a standard form Labour Agreement. Monitoring and sponsorship obligations will be replaced by Labour Agreement terms, which allow more flexibility.

Migration Amendment (Sponsorship Obligations) Bill 2007

Proposed significant changes apply to the obligations of “approved sponsors” including civil penalties for breaches of sponsorship obligations with a maximum fine of \$6,600 for an individual and \$33,000 for a company for each identified breach.

A sponsor will need to make the undertakings and comply with the obligations. The Minister will continue to have the power to cancel sponsorship approvals or bar sponsors with a failure to comply with an obligation.

The proposed obligations are as follows:

- pay the minimum salary level
- employ the sponsored person in the same or higher skilled activity
- pay travel costs of leaving Australia
- pay certain medical costs
- pay certain other fees and costs
- to keep records
- to pay costs of locating, detaining and removing etc sponsored persons

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