

The 2007 Conference of the International Bar Association
Singapore
14 – 19 October 2007
Paper Summary Form for IBA website (www.ibanet.org)

Constituent: International Franchising
Session title: International Issues for Franchisors that Expand Internationally
Date and time of session: Thursday 18 October 2007, 09.30-10.45
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Title of paper: The Australian Position

Paper abstract (100 words):

When a successful franchise expands internationally the franchisor is confronted with many opportunities and choices. One choice is how to structure the contractual arrangements for the local human resources required to support the franchise in new countries of expansion. The choices of whether to employ locally or relocate people native to the home of the franchisor, who ought to be the employer, or whether an employment or independent contractor arrangement is appropriate, are choices that need to be made in the light of local and international law. This paper examines these choices from the Australian perspective.

Keywords:

Australia, employee, independent contractor, Work Place Relations Act, superannuation, workers compensation, visa.

Immigration Issues for Franchisors that Expand Internationally

The Australian Position

1. Overview of Australian employment law

1.1 Employee or Contractor

Under Australian law, workers may be engaged as employees or independent contractors. Essentially, an employee works under the control of another person as part of the employer's business, while independent contractors supply services as part of the business that they themselves are operating. Managers would normally be employees.

In Australia, employees are generally engaged to perform work by way of a contract of employment or a statutory instrument such as a collective union agreement.

In addition to obligations set out in the contract of employment, the law implies certain duties into all such contracts, eg to exercise care and skill, show loyalty and preserve confidentiality. Independent contractors do not owe such duties unless specified in their contract of engagement.

Independent contractors do not receive any of the employment entitlements outlined later in this paper, including superannuation.

While there may be economic advantages in hiring contractors rather than employees, these must be weighed against the benefits of engaging employees who would owe the implied duties mentioned above.

1.2 Types of Employment

Employees may be engaged on a full-time, part-time or casual basis. An employee working 38 or more hours per week is generally considered full-time. A part-time employee works a set proportion of full-time hours. Part-time employees receive reduced entitlements based on their hours of work. For example, a part-time employee who works 19 hours per week (ie half full-time load), will be entitled to 2 weeks annual leave per year.

A casual employee works on an irregular basis in accordance with the company's business needs. For example, a casual employee may work 38 or more hours per week for several weeks during a busy period, but do no work during quiet periods. Casual employees are not entitled to annual leave and personal leave. They are entitled to parental leave in certain circumstances and they are entitled to superannuation.

What mix of full-time, part-time and casual employees a company engages will depend largely on its business needs. If the nature of the industry means that there will be a constant flow of work, then it is likely that the majority of employees would be full-time. If, however, the industry is seasonal in nature, or there are large fluctuations in work flow, the employer is likely to engage more part-time and casual employees to give it greater flexibility in meeting its changing business needs.

1.3 Governing Law

The contracts and agreements discussed above set out the terms and conditions of employment for employees working in Australia, and, as a general rule, are subject to Australian law. This is the case irrespective of whether the employing company is located in Australia or overseas.

The regulatory regime in Australia casts a very wide net in terms of capturing within Australian law persons actually working in Australia. The policy is that people working in Australia ought to be governed by the Australian laws of employment. The idea is that this is to be the case irrespective of where the employee is from and irrespective of where the employer might be based. It will include foreign based corporations who employ local or foreign people.

1.4 Minimum Employee Entitlements

Employment law in Australia is largely governed by the *Workplace Relations Act*. Under that Act, every employee has 5 minimum entitlements. These 5 minimum entitlements would apply whether the employer is an overseas franchisor or Australian franchisee. The 5 minimum entitlements are:

- (a) **Basic wage** – an employee must be paid no less than the basic hourly rate set out in any Australian Pay and Classification Scale that covers the employee, or the Federal Minimum Wage, whichever is the greater. Currently, the Federal Minimum Wage is set at \$13 per hour.
- (b) **Maximum ordinary hours of work** – an employee must not be required to work each week more than:
 - 38 hours; and
 - reasonable additional hours.

Management staff, including managers of a franchise, would not usually have fixed hours of work. Instead, their salary package would be structured to recognise that they would be required to work the hours necessary to discharge their duties, which may sometimes include evenings and weekends. Provided that a statement to this effect has been included in the employment contract, no problem with maximum hours is likely to arise.

- (c) **Annual leave** – an employee is entitled to 4 weeks' paid annual leave per year.
- (d) **Personal leave** – all permanent employees are entitled to:
 - up to 10 days' paid personal leave per year;
 - two days' unpaid carer's leave for each permissible occasion; and
 - two days' compassionate leave for each permissible occasion.

Personal leave may be sick leave or carer's leave. Carer's leave is taken when the employee cares for a member of their immediate family or household, when that family member or household member is sick or injured.

- (e) **Parental leave** – an employee can take up to 12 months' unpaid leave after the birth of a child if they are the primary care-giver. However, the parents may not take more than 12 months' parental leave in total.

Aside from these minimum entitlements, there are additional obligations on employers of workers in Australia derived from other legislation. These are discussed at 1.5 – 1.8 below.

1.5 Superannuation

All employers must make regular payments into a pension plan (which in Australia is referred to as a "superannuation fund") chosen by the employee. Contributions are made at the rate of 9% of an employee's earnings and are currently capped at \$146,000 per annum. Given the high rate of contribution required, superannuation is usually recognised as being part of an employee's total "salary package".

There is one main exemption to this requirement. This is where double superannuation coverage occurs. This coverage occurs when an employee is sent to work temporarily in another country and the employer or employee is required to pay superannuation (or equivalent) contributions under the legislation of both countries for the same work. The agreements on double superannuation coverage form part of broader international agreements on social security between Australia and a number of other countries. Australia currently has agreements covering double superannuation coverage with the following countries:

- the Kingdom of Belgium
- the Republic of Croatia
- the Republic of Chile
- the Kingdom of The Netherlands
- the Republic of Portugal
- the United States of America, and
- the Republic of Ireland.

In practice it is rare for this exemption to apply.

1.6 Long Service Leave

Each Australian State and Territory has long service leave legislation. By way of example, in NSW an employee who has completed at least 10 years' continuous service with an employer is entitled to 2 months' paid leave. An employee who is terminated after having completed at least 5 years service will be entitled to a payment on a pro rata basis.

1.7 Workers Compensation

Employers in Australia have to take out a policy of workers compensation insurance in respect of their employees. This provides for regular payments to employees in the event they are injured at work.

1.8 Taxation of Employees

An employer is generally required to withhold tax from salary and other cash payments to an employee and remit those amounts to the Australian Taxation Office. For this purpose, the franchise entity employing workers in Australia would have to register with the ATO.

2. Visa Requirements

Any non-Australian citizen seeking to visit and work in Australia requires a visa.

2.1 457 Visa

The most common type of visa obtained by foreign nationals seeking to enter Australia for business purposes is the subclass 457 long stay temporary business visa. The visa is generally known as a "457 Visa" and is designed to facilitate business entry of skilled individuals who have a sponsoring employer and would benefit Australia.

Essentially there are three steps in obtaining a 457 Visa:

1. *The employing company must lodge for sponsorship approval*

In order to be approved as a sponsor, the employer must demonstrate that the business is:

- (i) lawfully and actively engaged in business activities in Australia;
- (ii) is the direct employer of the temporary business entrant;
- (iii) is able to meet sponsorship undertakings (e.g taxes, workers compensation, Medicare levy and superannuation);
- (iv) will benefit Australia through the employment of a temporary resident, creation of trade links or addition to the economy;
- (v) will advance skills through technology or training; and
- (vi) agrees to abide by the relevant sponsorship undertakings.

Where the sponsoring business does not have an Australian operating presence, opportunities for sponsorship are limited. An overseas business can only sponsor an employee to Australia to:

- establish a branch or other business activity such as joint ventures, agency distributorships or subsidiary branches in Australia; or
- fulfil obligations for a contract or other business activity in Australia.

2. *The approved sponsor must lodge a business nomination for the activity in question*

In nominating a business activity to be filled by a temporary business entrant, the sponsoring employer must:

- (i) nominate a skilled position from a defined list of occupations. The list of possible occupations is specified by DIAC and includes a wide variety of generalist management occupations; and

- (ii) ensure the nominated position is remunerated at a gazetted minimum salary level (currently set at AUD\$41,850).

3. *The visa applicant must lodge a visa application*

The third step in the visa application process is the completion of the visa application containing the individual applicant's personal details. The main criteria for approval are that the visa applicant can demonstrate that he or she:

- (i) has skills which match those required for the position for which they have been nominated;
- (ii) has attributes consistent with their proposed employment in Australia; and
- (iii) meets health and character requirements.

Dependant family members must also meet the appropriate health and character requirements in order for the application to be approved.

Once the 457 Visa has been approved, the visa applicant can remain in Australia working for their sponsoring employer for up to 4 years.

457 Visa Holders are entitled to be paid superannuation contributions by their sponsoring employers. They are also entitled to receive their superannuation benefits once they permanently leave Australia. This payment is called the departing Australia superannuation payment (**DASP**).

2.2 Short Term Business Visas

It is important that individuals seeking to enter Australia for short periods of time for business purposes obtain the appropriate type of visa. If the purpose of a trip is business related, it will not be sufficient that the individual has a tourist visa.

There are two types of visas available to individuals seeking to enter Australia for up to 3 months for business purposes:

- (a) Electronic Travel Authorities (**Business ETA**); and
- (b) Business (Short Stay) Visa (subclass 456) (**456 Visa**)

The benefits attaching to each type of visa are identical - both allows business people to make a short visit to Australia to conduct business activities. Business activities may include:

attending conferences, business negotiations or conducting exploratory business visits; attending educational or business related meetings, seminars, conventions, conferences, or networking; informal studies or training.

The only difference the two visa types the application process.

Business ETA

The Australian Government has streamlined the application process for applicants for short term business visas from some countries.

An ETA is an electronically stored authority for travel to Australia. An ETA can be obtained instantaneously over the internet or my most travel agents and ETA information is

accessible by airlines, travel agents and Australian border agencies. Applicants for an ETA do not need to visit a Department of Immigration office to submit an application and will not receive a stamp or label in their passport. However, you will be provided with a confirmation for your records.

The current list of ETA eligible nations is as follows: Andorra, Austria, Belgium, Brunei, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong (SAR), Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Malta, Monaco, The Netherlands, Norway, Portugal, Republic of San Marino, Singapore, Spain, Sweden Switzerland, Taiwan, United Kingdom, United States of America, Vatican City.

456 Visa

Nationals of countries other than those listed above are not eligible for a Business ETA and must apply for a 456 Visa.

Applicants for a 456 visa must complete an application form indicating the purpose of their visit to Australia, pay the application fee and submit the application to the Australian mission in their country. The application will be processed by the mission and the applicant provided with a 456 Visa label for their passport. Missions in most jurisdictions prioritise the processing of this visa type.

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3 September 2007