

Misleading job advertisements

A small business owner has admitted to misleading job seekers, including international tourists, about the availability of work in parts of New South Wales and Queensland. The trader, trading as Backpacker Employment Services (BES), published a number of advertisements in local newspapers in the mid-north coast of New South Wales area offering fruit-picking jobs.

The business owner represented that:

- fruit-picking jobs were available in a variety of locations in New South Wales and in Queensland
- fruit-picking jobs could be supplied to unemployed persons if they agreed to pay for a six-month subscription at a cost of \$50 or a 12-month subscription for \$100 with BES
- employment could be guaranteed to subscribers for the length of their subscription
- 200 and 300 fruit-picking jobs were available at an orchard in New South Wales.

The investigation by the ACCC revealed that the trader had no arrangement with the orchard and the business owner had no reasonable grounds for representing that he would be able to offer fruit-picking jobs to subscribers for the entire period of their subscriptions.

The ACCC considered that, by making these representations, the trader had breached sections of the *Trade Practices Act 1974*.

The trader provided a court-enforceable undertaking to the ACCC that he would refrain from making the representations detailed above in circumstances where they were not correct and/or he did not have reasonable grounds for making such representations.

The business owner has also undertaken to:

- write to subscribers of BES informing them of the undertaking and offering a refund
- publish a consumer notice in the Manning River Times and the Port Macquarie News correcting the misrepresentations made
- provide a refund of the entire subscription fee to any BES subscriber who requests a refund
- implement a trade practices compliance program, and
- attend trade practices law training.

Small businesses need to be aware of the relevant rules, regulations and the *Trade Practices Act*.

If you have any concerns about unfair business dealings or would like more information about the *Trade Practices Act*, please contact your local solicitor.

Brisbane's first environmental covenant

Brisbane's first environmental covenant between a property owner and the Brisbane City Council has been signed, with the aim of helping to boost the city's bushland.

A conservation covenant is a voluntary agreement between a land owner and an authorised body to help the land owner protect and manage the environment on their property.

It is usually registered on the title of the land and can apply to all or part of a property. Although there are exceptions, it is usually permanent.

The terms of the agreement are negotiated between the land owner and the covenant provider and may only be changed with the agreement of both parties.

Voluntary conservation covenants are attached to the property title rather than the owner, legally binding current and future owners to restoration and protection.

Under the contract, the residential property will be reclassified as "conservation" under the Brisbane City plan.

Properties with canopy, mid-storey and under-storey forest areas of a minimum half-hectare, or the capacity to restore a half-hectare, are eligible for the covenant.

For more detailed information on environmental covenants, please contact your local solicitor.

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End of Telstra CDMA mobile phone network

As of April 28 this year, the Telstra CDMA mobile phone network is no longer operational. Telstra was advised in January by the Federal Government that the shutdown of the CDMA network had to be delayed by three months, due to problems with the replacement Next G network. The CDMA network was originally to close on January 28 but Telstra was ordered by the Federal Government to delay the closure until last month. Until July 1, Telstra will continue to resolve issues of affected customers through the 1800 888 888 hotline and continue to run the Next G handset replacement program for people still experiencing problems with the network changeover.



Case in point: 'The Chaser's War on Everything'

Late last year, members of 'The Chaser's War on Everything' ABC comedy/satire team were charged with entering a restricted area during the Asia-Pacific Economic Cooperation (APEC) meeting in Sydney. This is what ended up happening with the case.

Background

Late last year, during the Asia-Pacific Economic Cooperation (APEC) meeting in Sydney, two presenting members of 'The Chaser's War on Everything' ABC comedy/satire team were charged, along with six Chaser crew and production team members, and three hire-car drivers, with entering a restricted area without special justification contrary to the *APEC Meeting (Police Powers) Act 2007*.

The legislation (which is was in force from July 4, 2007, until September 13, 2007) provided for "declared areas" (setting in effect an outer perimeter of affected space) and "restricted areas" inside declared areas established around APEC meeting venues and accommodation. The relevant areas were along Macquarie Street, Sydney, north of King Street where are declared area was in place, and north of a gate about 30 metres south of Bridge Street where a restricted area commenced.

Facts

The Chaser team created a fake "motorcade" consisting of, in order: two motorcycles, a black 4WD vehicle, a black sedan and another black 4WD. Five male members of the team walked alongside the motorcade. The three vehicles had obviously bogus APEC identification stickers and Canada identification stickers on their windscreens. The sedan had Australian and Canadian national flags on its bonnet. All had tinted windows. The five runners wore obviously bogus identification. Nine cameras were in operation, some fixed, some handheld and some with audio recording. Recordings from those cameras have been taken into consideration.

On a morning of the APEC meetings, the fake motorcade was waved on by police towards the restricted area. The

motorcade then proceeded through an open gate further into the declared area. The motorcade then stopped briefly before moving towards a second open gate which in fact marked the beginning of the restricted area (although police in the vicinity were unaware of that and the Chaser team were uncertain where the restricted area began). The motorcade then stopped just short of the second gate. A person in the motorcade asked people with whom he was in contact about the restricted area and was given to understand that it commenced up ahead. The motorcade then proceeded again through the second open gate. There was no attempt by police lining the route to inspect or stop it.

The motorcade then stopped short of the point they had been told was the beginning of the restricted area and told police that there had been a change of plans and they needed to turn back. The motorcade members suspected that they had entered the restricted area, which was not what they had intended to do. Police waved the motorcade into an intersection to be able to turn around and go back.

The motorcade then stopped in the turn, and one of the Chaser members (dressed as Osama Bin Laden) got out of the sedan and started to walk up the street.

Police then arrested the 11 accused and seized items. (The two motorcyclists rode away) Prior to the event the Chasers had carried out an examination of the area and conducted a planning session with some video and audio recording being considered.

The court found that the evidence established that the Chaser plan, in what was considered the unlikely event that they were allowed to pass through any gates, was to stop short of the restricted area and to get the Chaser member

dressed as Osama Bin Laden out of the vehicle.

The case

Police prosecutors were primarily responsible for the conduct of the prosecutions. A prosecutor is a person who acts as a complainant or chief witness instigating prosecution in a criminal proceeding.

A large amount of evidence was made available to police prosecutors, along with representations on behalf of the accused (The Chaser team). The matter was then transferred from the police to the Office of the Director of Public Prosecutions (ODPP).

The decision

The ODPP found that it was an offence to enter a restricted area without special justification. Special justification is defined in the Act and included circumstances where a person was permitted to be in the area by a police officer and where the person was required to be in the area for a work-related purpose.

In the case of the 11 accused, the ODPP found that on the evidence available the Chaser team had the existence of an honest and reasonable (but ultimately mistaken) belief that they would not enter or be taken into the restricted area, and that, when they did enter it, it was with the permission of the police (given by waving them through the first intersection and then allowing them through the second gate unhindered and then directing to make a u-turn). Police permission does constitute special justification for entry.

On the basis of the above reasoning, the ODPP determined that there was no reasonable prospect of a conviction and for that reason the prosecutions did not proceed.

Moveable soccer goals

The use of moveable or unsecured, soccer goal posts in Queensland is now regulated by a mandatory safety standard introduced early this year. The mandatory safety standards apply to traders, manufacturers and importers selling moveable soccer goals in Queensland. Industry, soccer clubs and coaches must be aware of the types of moveable soccer goals covered by the new standards, manufacturing requirements and mandatory warning labels. Moveable soccer goals are designed to be moved into position and relocated following a game or training. Many moveable soccer goals are made of steel tubing and can weigh up to 200kg. Queensland introduced the new safety standard following a series of deaths and injuries in Australia caused by moveable goal posts. Typically, injuries and deaths occur when a child swings on the cross bar causing the moveable goals to topple over and trap them. Fines of up to \$40,000 for an individual or \$202,500 for a corporation may apply to traders who supply goods that do not comply with the mandatory safety standard. Although the mandatory safety standard does not apply to goals that are currently in use or supplied prior to January 1 this year, soccer clubs need to be aware of the dangers of unsecured goal posts and are encouraged to secure their existing posts to minimise the risk of injury.

Clubs need to have a risk management plan in place to cover all equipment but especially moveable goal posts.

Starting a small business

Aspiring small business people need to do their homework before registering a new business name. Before starting a business it is a good idea to understand how fair trading and licencing laws may apply to the operations of the business.

Extensive planning prior to starting up a new business is essential and it should address how the goods or services are going to be sold, how to handle customer complaints, business promotion, and compliance with advertising, packaging and labeling requirements.

A current business name registration is a legal obligation under the Business Names Act 1962, and helps new business owners establish and give credibility to their business identity. Business names can be registered at any of the Office of Fair Trading centres throughout Queensland by fax and mail.

Occupations such as motor dealers, real estate agents, property developers and letting agents are all required by law to be licensed. There are heavy penalties that apply for individuals and businesses operating without a licence, and fair trading inspectors conduct regular compliance checks to ensure this professional standard is met. Businesses also need to check that they are selling safe products which meet Queensland and Australian mandatory standards.

One of the first things to think about when establishing a business is the best way to structure the business. The legal structure of the business affects the ownership, tax structure, risks and future of that business. The three most common legal structures are a sole trader, a partnership with another person or persons, or a proprietary limited company. Licensing, permit or registration requirements vary for each of these structures.

The licensing, permit or registration requirements for each business will vary based on factors such as the structure of the business as mentioned above, whether the business is employing staff, the location of the premises and the type of business that is being operated. It is

important to ascertain the specific licensing, permit or registration requirements applicable to your business.

There are some licences that are common to many businesses. Every business operating in Australia needs to apply for an Australian Business Number (ABN). The ABN is a single identifier for any dealings with the Australian Taxation Office (ATO) and for future dealings with other departments and agencies at all levels.

Business name registration is required for proof of being a business to:

- open bank accounts
- advertise in the Yellow Pages
- purchase from wholesalers at wholesale prices
- have business equipment connected
- help establish a business' reputation and credibility.

Registration must be renewed either every year or every three years if the business still operates.

In addition to business name registration, Australian company registration provides an applicant with an Australian Company Number (ACN) which, together with the name and the status of the company, serves to identify it. Applicants may reserve a proposed company name for a period of two months. ASIC is obliged to reject the proposed name if it is identical to another company or business name or if the name is of a kind, declared by regulations, to be unacceptable for registration.

Another factor to consider when starting up a business is registration of a trade mark. Registration of a trade mark gives goods or services an individual stamp and is part of a business' intellectual property. Subject to certain tests and qualifications prescribed by law, a trade mark can consist of a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or a combination of these. Before designing and applying for a trade mark on goods or services, a search in the official trade mark records must be completed to find out if the trade mark is available for use.

Another important factor to consider when setting up a business is the registration of a domain name on the internet. An internet domain name allows a business to have a professional presence on the internet. There are a number of different domain name types to choose from. Some domains have special requirements while others are less strict. The following is a brief description of the most common domain types:

• com.au

Intended for Australian businesses, companies and incorporated bodies. An ACN or ARBN is required to apply (that is, you must be a company or have a registered business name). This domain is the most frequently used by Australian businesses.

• net.au

Mainly intended for Australian organisations providing network connectivity or some sort of network service, but available to all Australian businesses. You need an CAN or ARBN to apply.

• asn.au

For Australian associations, including incorporated bodies, political parties, trade unions, sporting and special interest clubs. Association incorporation number or ARBN required.

There are also a number of regulations on record keeping that businesses must abide by. Under tax law, a person carrying on a business must keep records that explain all transactions. These records include all documents that are relevant for the purpose of ascertaining income and expenditure. The person must keep their records in written English or enable the records to be readily accessible and convertible into written English. Any books of accounts, records or documents relating to the preparation of your income tax return must be retained for at least six years. For more comprehensive information about the rules, regulations and legislation that affects starting up a business, please contact your local solicitor.

Ensure your employees are legal!

Employers hiring staff from overseas are urged to make sure that employees meet all necessary visa requirements.

To enable employers to check if hired staff from overseas are eligible to work in Australia, the Department of Immigration has launched a new service. The service was developed after a number of overseas workers who did not meet the visa requirements to work in Australia were deported.

The online service, known as the Visa Entitlement Verification Online (VEVO), can help employers to ensure that their workers are legally entitled to work. Employers can face fines of up to \$13,200 and two years imprisonment for each offence of employing an illegal worker. Companies can face fines of up to \$66,000 per illegal worker.

The VEVO service is free, available 24 hours a day, seven days a week and provides an email response very quickly to the employer to confirm whether the person they are seeking to employ is available to work.

There is also a faxback system and phone hotline that can be utilised.

To use the service, please phone 1800 070 040 or visit www.immi.gov.au/vevo.

Spotlight on real estate advertising

There are strict rules and regulations that aim to get rid of false and misleading representations by real estate agents and auctioneers. Under the Property Agents and Motor Dealers Act 2000, it is illegal for someone to make false or misleading representations about a property or its value when they are promoting it for sale.

This includes making misleading representations and advertising low lead-in prices to potential buyers, if the client is not prepared to accept the price the property is promoted at.

When a property is being auctioned, real estate agents and auctioneers are prohibited from giving any bidder advice on:

- whether a reserve price has been set;
- what the reserve price is; and
- the price the property is likely to sell for.

This prevents false inducements to bidders to attend auctions in the belief a suggested selling price could be achieved when in fact it is well underneath the reserve price. It also protects bidders from spending money on building and pest inspections based on unrealistic valuations.

Real estate agents and auctioneers who contravene these provisions face fines of up to \$40,500 for an individual and \$202,500 for a company.

The Property Agents and Motor Dealers Act 2000 aims to promote a fair and competitive marketplace by providing:

- a comprehensive licensing system, which sets minimum entry standards;
- establishes standards for industry practice
- safeguards for consumers.

Under section 154 of the Act, real estate agents are required to provide a complaint-handling process. If you have a problem with advertising by a real estate agent, please contact your local solicitor.

Go Natural amends 'fruit pieces in yoghurt' packaging

Trading company Go Natural, will amend some packaging after the Australian Competition and Consumer Commission (ACCC) voiced concerns that the overall impression might mislead consumers about some products, the Go Natural berry pieces in yoghurt and Go Natural apricot pieces in yoghurt.

The ACCC was concerned that the packaging was likely to have implied that the products were unprocessed berry and/or apricot pieces coated in yoghurt. In fact, the product is a ball made from a fruit-based mixture consisting predominantly of fruit concentrate (about 35 percent), sugar (about 30 percent) and semolina (about 30 percent). Under a court-enforceable undertaking, Go Natural will:

- amend the packaging of the Go Natural berry/apricot pieces in yoghurt products
- amend representations on its website about the products
- publish an article for the food industry about this experience which can be accessed via www.gonatural.com.au
- review and implement changes to its trade practices law compliance program.

For more information about issues of misleading consumers in business and the relevant legislation, please contact your local solicitor.

Non-compliant bunks and toys removed from market

The Australian Competition and Consumer Commission (ACCC) has agreed conditions with Australian Discount Retail (Trading) Pty Ltd, which sold two models of bunk beds and a military toy set called the 'Special Mission Combat Force Military Play Set'. The ACCC was concerned that the bunk beds failed to comply with a number of requirements of the prescribed consumer product safety standard for bunk beds. The ACCC was also concerned that the toy set was supplied in breach of a banning order and contained lead exceeding the acceptable lead migration levels prescribed in the banning order. The company provided the ACCC with

an undertaking, that it would:

- ensure that goods it supplies that are subject to a prescribed consumer product safety or information standard comply with the relevant standard
- maintain effective product safety recall procedures
- maintain up-to-date copies of all relevant consumer product safety standards and information standards prescribed under the *Trade Practices Act 1974*

• implement a corporate compliance program emphasising product safety. This action by the ACCC demonstrates that all products supplied to the Australian market must comply with all relevant legislation.

Redbull wins redbullsucks.com from energy drink rival

The World Intellectual Property Organisation (WIPO) has ruled that a man who owned the domain name, redbullsucks.com, has to hand it over to Red Bull, the energy drink company. WIPO's arbitration and mediation centre ruled on the domain under its uniform domain name dispute resolution policy (UDRP) which protects trade mark rights holders against bad faith users of domain names which are identical or confusingly similar to a trade mark. The administrative panel in the case took Red Bull to task over its argument that the addition of 'sucks' to its trade mark was inherently confusing as to the origin of the domain name because 'sucks' was a generic term.

The panel rejected the argument that a user might think the domain name belonged to Red Bull because the term 'sucks' was so widely known as an insult, and therefore was a generic term which added nothing to the domain name, leaving the trade marked 'Red Bull' phrase as the main part of the name. The issue is not whether the domain name causes confusion as to source, but instead whether the mark and domain name, when directly compared, have confusing similarity. The panel found that the name was "confusingly similar" under this definition, though that definition could jeopardise the existence of legitimate protest sites. The panel found that the founder of the redbullsucks.com domain name did not have a legitimate interest in the domain because the site was not a site of legitimate criticism but one trying to sell a rival product.

The panel also found that the name was registered and used in bad faith. Had the domain name related to a genuine protest site, it might have shown a legitimate interest in the domain name, whether or not an objective consequence of that protest site was disruption of Red Bull's business. Those internet users perhaps disenchanted with Red Bull products, or merely curious about the redbullsucks.com website, were presented with an energy drink offered in competition with Red Bull's goods. The panel ordered that the domain name be transferred to Red Bull.

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