



LICENSING VS FRANCHISING



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WHAT IS FRANCHISING?

Franchising was originally used as a distribution method for manufacturers and suppliers.

Today, when people refer to franchises, they are generally referring to a business format franchise.

Under a business format franchise, the franchisee is given the right to use the franchisor's trademark and the franchisor's business and marketing systems. In order to achieve brand consistency, the franchisee must follow the franchisor's processes and procedures.

The franchisor may supply products and services directly to the franchisee or arrange for the franchisee to purchase products and services from third party suppliers.

The franchisor will often centrally manage operational activities such as marketing and supply chain responsibilities.



WHAT IS A TRADEMARK?

A trademark can be a letter, number, word, phrase, logo or picture which is registered so that the user of the trademark can distinguish its goods and services.

A trademark must be registered in each country in which it is used.

In Australia a register of trademarks is maintained by IP Australia.



WHAT IS LICENSING?

Licensing is similar to franchising, in fact every franchise agreement is a licence agreement (but not every licence agreement is a franchise agreement).

Under a licence agreement, the licensor gives the licensee the right to use the licensor's intellectual property (which may include the licensor's trademark).

An example of a licence agreement is a software licence agreement, where the licensee is given permission (a licence), to use the licensor's software on certain terms and conditions.

Under a licence agreement the licensee is generally free to operate its business however the licensee wishes, as long as it does not damage the licensor's brand.

As a consequence, a licensor generally does not provide assistance or support to licensees.



If you use licensing as a growth strategy, you need to be careful not to franchise by accident.

WHAT IS INTELLECTUAL PROPERTY?

Intellectual Property refers to creations of the mind and includes trademarks, designs, logos, trade secrets, business know-how, copyright and patents.

Intellectual property can be protected in a number of ways, including by registration in certain circumstances and by agreement, including a licence or franchise agreement.



Licence Agreements vs Franchise Agreements

Licence agreements and franchise agreements generally grant people the right to use a trade mark and intellectual property in a defined territory.

All franchise agreements are licence agreements but not all licence agreements are franchise agreements.

Licence agreements cannot be used to create a franchise style relationship without being caught by the Franchising Code.

So, how can you tell if a licence agreement is a franchise agreement?

Definition of a "Franchise Agreement"

In Australia, franchising is governed by the Franchising Code of Conduct. The Franchising Code defines a franchise agreement using 4 criteria:

- 1 there is a written, oral or implied agreement.
- 2 the franchisee has been given the right to carry on a business using a system or marketing plan which the franchisor creates and controls.
- 3 the operation of the business is substantially associated with a brand image or trademark owned or specified by the franchisor.
- 4 there is a requirement that the franchisee pays or agrees to pay an amount to the franchisor.



If a business system or structure has the four criteria it is likely to be a franchise, regardless of what it is called.



Since the first and the third criteria are generally common to both licence agreements and franchise agreements, whether or not a licence agreement is a "franchise agreement" is likely to boil down to whether there is a marketing system or whether amounts such as fees are payable under the agreement.

QUESTIONS TO CONSIDER

Are there any fees payable under the agreement?

Is there a system which the licensee must follow?

Will you provide support to the licensee?

Is there a marketing plan that you control?



SYSTEM OR MARKETING PLAN

There is no definition of "system" or "marketing plan" in the Franchising Code, however, it is likely that there is a system or marketing plan which the franchisor creates and controls if some or all of the following apply:



- there are suggestions for retail prices to be charged for products or services,
- there are products that must be produced,
- there are specific methods for selling products or providing services,
- there are detailed advertising programs,
- there are restrictions on the sale of products,
- there are recipes that must be followed.

PAYMENTS

Are there amounts payable under the agreement which are caught by the Franchising Code?

These amounts can include:

- royalty payments,
- up front licence fees,
- advertising payments,
- commissions,
- training fees, and
- payment for goods.

Amounts caught by the Franchising Code do not include:

- payment for goods on a genuine wholesale basis,
- the repayment of a loan,
- the payment of a market value amount for the purchase or lease of property, fixtures, equipment or supplies needed to start the business.



IS YOUR LICENCE AGREEMENT REALLY A "FRANCHISE AGREEMENT"?

If your licence agreement:

1. Grants the licensee the right to operate a business using your business name, trademark or other commercial symbol;
2. Requires the licensee to make payments to your business;
3. Requires the licensee to operate its business using systems that you have created and control; and
4. Requires the licensee to operate its business using a marketing plan the you have created and control.

Your business is likely to be a franchise.



PENALTIES UNDER THE CODE

There are significant penalties which may be payable under the Franchising Code for:

- 1** the failure to create a Code compliant disclosure document (600 penalty units or \$133,200.00) ;
- 2** the failure to provide pre-entry disclosure documents as required by the Code (600 penalty units or \$133,200.00);
- 3** the failure to maintain a Key Facts Sheet (600 penalty units or \$133,200.00).



So, be careful not to franchise by accident.

ABOUT HAARSMA LAWYERS

Franchising is what we do and it's what we have been doing for 35 years.

We have been involved in franchising and licensing for over 35 years.

We have assisted companies such as Soonta, the RAA, VIP Home Services, Wok in a Box, Bean Bar, Pancake Kitchen, Delicia Acai, Hearing Life and many others with franchising their business.

What do you need?

I want to franchise my business

I want to get out of my franchise

I am in a franchise dispute

I want to buy a franchise business

I am already a franchisor

I want to sell my franchise
business

Let us use our expertise and experience to help you

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