



## LEGAL ASPECTS OF BUYING, RENEWING, EXTENDING AND SELLING ANY FRANCHISE

**Introduction** - Buying, extending, renewing, or selling any Franchise will affect your life for future years. Parties must be aware of legal issues involved in such a transaction and recognise that both Franchisees and Franchisors have justifiable business interests to protect. Franchisors must know what they are selling and a potential Franchisee must know what they are buying. A Franchisor must also determine the most advantageous structure of ownership to operate the business. This article aims to address some prevalent issues and common problems relating to Franchising.

**Disclosure** - A minimum level of disclosure is required by the *Trade Practices (Industry Codes – Franchising Regulations 1988)* (the “Code”), aimed to provide information to the Franchisee in order to allow them to make an informed decision based on accurate information on whether to become involved in a Franchise. A Disclosure Statement must be provided by the Franchisor to the prospective Franchisee at least fourteen (14) days before entering into the agreement. It must contain details and experience of the Franchisor, litigation that the Franchisor is a party to, fees and costs, intellectual property, and goods and services you must acquire or provide.

A Franchisor must not make misleading or deceptive statements. The law provides remedies against such behaviour including a claim for damages and other remedies including some under the Federal Trade Practices Act or the relevant State or Territory's Fair Trading Act. Further, any breach of the Code is enforced under section 51AD of the Trade Practices Act 1974.

**Documentation** - Any sale, renewal, extension and/or purchase should be detailed in writing in a Franchise Agreement identifying what is expected from each party, including what they must do, how much and when they must pay and what is being transferred. It may be necessary to have completion of the Contract subject to various conditions such as cooling off, finance, liquor licensing, and transfer of lease, minimum trading levels over a period of time and/or the satisfaction of the Franchisee's accountant with the financials of the Franchise.

**Training and/or Operations Manual** – Franchisors generally provide manuals to assist with the operation, management and training. These documents must be consistent with the Franchise Agreement. This should be a useful resource for all parties.

**What is being transferred?** - Components of a Franchise usually include names, goodwill, premises (lease or ownership), equipment, machinery and fixed assets, stock, current orders, supply agreements, intellectual property, and licenses. The Franchisor must be able to guarantee the transfer of the ownership of all components to the Franchisee. When negotiating a price for a Franchise, consideration of the plant and equipment, location of premises, goodwill and stock are vital. It may be necessary to seek an independent valuation of the business.

**Fees** - A Franchise may consist of various fees. These fees may include a royalty, sign on/establishment, marketing, advertising, training, management and software licence fee.

**Industry Requirements** - It is important to ensure a Franchisee is aware of industry and general requirements affecting the Franchise. Appropriate industry bodies, existing Franchisors or the local council may be helpful in obtaining additional information.

**Franchise Territory** - It must be determined prior to commencement of the Franchise whether the Franchisee is granted an exclusive or non-exclusive territory, be limited to a particular site, or may operate a business which is substantially the same in a certain defined area.

**Term and Termination of a Franchise Agreement** – The term of a Franchise Agreement will vary from one Franchise to another. There may also be an option to renew the arrangement for a further term. This will generally be addressed in the Franchise Agreement. Termination may be by either agreement or assignment (subject to Franchisor consent). The arrangement may also be terminated if the Franchisee no longer holds relevant licences or permits on expiration of the term of the Agreement.

**Remedies** - The Code provides a mediation process between the parties if there is a dispute. Due to the time and cost involved, litigation should be seen as a last resort. Apart from contractual remedies available to both the Franchisor and Franchisee, various provisions of the Code and Trade Practices Act prescribe various remedies such as injunction or making orders varying or refusing to enforce the agreement and list several offences.

**Conclusion** – Buying, extending, renewing or selling a Franchise is exciting yet inherently involves risk. What may appear simple can often end in financial and legal hardship. Whether as a buyer or seller, it is strongly recommended that advisers including accountants and lawyers are involved in the process, to ensure rights and obligations are respectively protected and honoured.

**DISCLAIMER**

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