

To Franchise or Not to Franchise

An issue that is frequently faced by businesses that have been running successfully for some time under an agency or distribution agreement is whether to move to the franchise format. The franchise format can offer you as the franchisor an extra level of control over your business, allow you to develop your business' brand consistently across your operational territory, and allow you to charge the franchisees fees.

Franchising is a very specific business format, so if you're considering changing your business format of that to a franchise, it's essential that you seek legal and business advice on whether the franchise system is the best avenue for your business.

Below is an outline of some factors that you should consider before moving your business towards a franchise system.

Legal implications

Franchising Code of Conduct

The franchise industry in Australia is governed by the *Franchising Code of Conduct*. This Code sets out the obligations that franchisors must adhere to when dealing with not only their franchisees, but also potential franchisees. Of particular importance is the requirement that a franchisor give each franchisee and potential franchisee a disclosure document. The Code clearly sets out the information that must be included in this document.

Your legal documents

Your franchise agreement and disclosure document form the cornerstone of your franchise. A well-drafted franchise agreement and thorough disclosure document are an asset to any franchise, as they will not only ensure that your business is protected as much as is legally possible, but also show a

potential franchisee that you have a highly-developed business format that you have invested in and are taking seriously.

Intellectual property

Intellectual property is one of the most important assets of any business, and this is particularly true of a franchise. In a franchise system, the intellectual property is an asset that the franchisor will licence to the franchisee in exchange for a franchise fee.

It is important to remember that intellectual property does not just include trade marks – it also includes your business and domain names. It is essential that your trade marks, business names and domain names are all registered with the relevant agencies, and that those registrations remain up to date, to protect your rights in this asset.

ACCC considerations

Over the past five years the Australian Competition and Consumer Commission (**ACCC**) has increased its focus on the franchise industry, and in particular, its focus on the activities of franchisors. It is essential that your franchise agreement and disclosure document comply with the Code, and that your business structure as set out under your franchise agreement does not breach the *Trade Practices Act*. If the structure of your franchise does breach the *Trade Practices Act*, you may be able to submit a notification or authorisation notice to the ACCC to have the conduct sanctioned. Your lawyer can advise you on these aspects of your agreement.

Other considerations

Whether or not to franchise your business doesn't only involve legal considerations; the practical

business considerations are just as important.

To be a successful franchise you must **offer your franchisees something in return for their investment**. Franchisees will often sell a previous business or give up their full time jobs to focus their energies exclusively on running their franchise. Franchisees will want to get more than just a licence to use your intellectual property; they will want some sort of defined territory, marketing plans and materials, training and support and guidance when it is needed. This means that you need to spend some time developing these aspects of your business, including any marketing plans and operations manuals, before you market your franchise to potential franchisees.

Conclusion

Whether or not to turn your business into a franchise is a significant decision that has many legal and practical implications. It's often a good idea to have already been running an outlet of the business, or operating the business as a distribution system to iron out the bugs before taking the step to move to a franchise. A franchise format is legally complex, and as such, you should seek advice from a lawyer experienced in franchise law before proceeding.

For more information on this article or any other aspects of franchising, [contact](#) franchising lawyer Alanna Van der Veen at Emery Partners.