Wollermann FRANCHISE DEVELOPMENTS

415 Canterbury Road Surrey Hills Vic 3127
T +61 3 9999 5488
T 1300 249 276
F +61 3 9888 4040
E admin@franchisedevelopments.com.au
W www.franchisedevelopments.com.au

When is a Dealership, Distribution, Re-seller or IP Licence Agreements a franchise under the Code?

A "***franchise agreement***" is very broadly defined under the in the Australian Franchising Code of Conduct.

Many dealership and distribution agreements and even trademark licence and IP licence agreements may be deemed a **franchise agreement** and therefore require compliance with the Franchising Code. This is not the case in many countries overseas and many overseas and local companies granting these types of agreements have been caught out.

The recent Husqvarna Australia Pty Ltd **("Husqvarna") August 2018** case is an example where a prominent business may be caught.

Everyone knows Husqvarna a global power tool manufacturer based in Sweden, with 343 dealers throughout Australia.

Who would have thought this company would have fallen foul of our Laws and that their dealer agreements did not comply with the Franchise Code?

Husqvarna represented to their dealers that their dealership agreements were not franchise agreements.

The ACCC considered their dealership agreements were franchise agreements and the dealers were entitled to protections contained in the Franchising Code of Conduct.

The ACCC also considered that:

- Husqvarna's representations that their agreements were not a franchise agreement were likely to be misleading in contravention of section 18 and 29(1)(m) of the Australian Consumer Law and;
- Husqvarna likely terminated one or more dealership agreements in breach of the Franchising Code and therefore breached section 51 ACB of the *Australian Competition and Consumer Act.* Section 51 ACB; and
- This section prohibits a corporation from contravening mandatory industry codes, one of which is the Franchising Code of Conduct.

Husqvarna provided the ACCC court an enforceable undertaking under section 87B of the *Australian Competition and Consumer Act,* which required it to:

- Offer new dealers a new agreement which complies with the Franchising Code of Conduct and the Australian Consumer Law;
- Notify all existing dealers that the Franchising Code of Conduct applies to their existing dealership agreement and provide them with an option to transition to the new dealership agreement;
- Provide all existing and new dealers with a Disclosure Document in compliance with the Franchising Code of Conduct; and
- Establish and implement an Australian Consumer Law and Franchising Code of Conduct compliance program including practical staff training and education to minimise risks of future breaches of the Australian Consumer Law and Franchising Code of Conduct and to ensure their continuing obligations.

When are these Dealership and related agreements caught under the Franchising Code of Conduct?

It is not always black and white, there can be agreements that border on being a franchise arrangement and which require expert advice and analysis.

We recommend to our clients if there is any doubt whether the agreement may be deemed a franchise (irrespective of what the agreement is called) then err on the side of caution and ENSURE you follow the Code obligations of disclosure and that your agreement complies with the Franchise Code.

It is far better to do this than be subject to the issues that Husqvarna had to face apart from damage to the brand and reputation and possible fines and penalties.

A franchise agreement can be oral, written or implied between the parties and found to be in place from being partly written from surrounding documents such as operations manuals and related documents.

The three key elements required for a “franchise agreement” under the Code are:

1. **A system or marketing plan**

   A person (the franchisor) grants another (the franchisee) the right to carry on a

business in Australia supplying goods or services under a specific system or marketing plan substantially determined, controlled or suggested by the franchisor or its associate

See analysis below of these 3 elements below.

2. **Association with a Brand or Mark**

   The business is **associated** with a particular trademark, advertising or a commercial symbol **owned**, **used, licensed or specified by the franchisor or its associate.**

3. **Payment of fees**

   The franchisee is required to pay or agree to pay **an amount** to the franchisor or its associate before starting or continuing the business (this excludes certain payments).

A specific *system or marketing plan*:

System is not defined in the Code, but the Courts have stated it means a "*co-ordinated method or procedure or scheme whereby goods or services are sold"* or a "*method of operation under which the business is to be conducted"*

The system or marketing plan does not have to be detailed or spelt out in the agreement it could be via other policies or documents such as an operation manual and the agreement providing that the franchisee must follow the operations manual.

Indicators courts have relied upon to find that parties intended that the business be operated **under a system or marketing plan** include requirement's in the agreement for a party to:

- provide a business plan which includes cash flows and marketing plans.
- to use a prescribed system to process sales.
- to follow and use an operation manual for marketing and sales for the operation of the business.
- use a prescribed or approved marketing plan.
- provision of technical and financial guidelines to operate the business.
- follow directions given for the operation of the business.

substantially determined, controlled or suggested by the franchisor or an associate of the franchisor.

To determine if this third element is met the courts have stated that the meaning must be determined by reference to the object and purpose of the legislation which is protection of a particular class of person, the franchisee.

This occurs from a practical and commercial analysis with regard to:

- The terms of the agreement and the extent that a party (franchisor) has **power** in a practical sense to determine, control or suggest the system, marketing plan and or business plan;
- Whether approval or consent is required from a party (franchisor) to market and promote material or activities of the other party;
- Whether a party (franchisor) can refuse its consent to marketing and promotional material or activities of the other party;
- The extent to which the business involves the sale of goods or services of one party (franchisor).

Payment of fee(s)

This can include a payment to the franchisor or its associate of:

(a) an initial capital investment fee; and
(b) a royalty, licence fee, franchise fee or a training fee but excludes:

- *Payment for goods and services at or below their usual wholesale price;*
- *Repayment by the franchisee of a loan from the franchisor;*
- *Payment of the usual wholesale price of goods taken on consignment;*
- *Payment of market value for the purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.*

Case Example: *Workplace Safety Australia Pty Ltd v Simple OHS Solutions Pty Ltd [2015] NSWCA 84*

This case is a good illustration of the elements where the Appeal Court held that the Distribution Agreement for the marketing and sale of online subscription packages, accessible via Workplace Safety Australia's website by Simple OHS was a franchise agreement under the Franchising Code of Conduct.

The on-line subscription packages were designed to assist businesses to meet their obligations under the occupational health and safety legislation.

The Appeal Court rejected WSA contention that the agreement was simply a **commercial arrangement** whereby WSA granted Simple OHS a licence to use the trademark for the purpose of marketing and selling subscription packages.

WSA argued the first three elements of the definition of franchise agreement in the Code were **not** satisfied that is there was no:

i. right granted to carry on business of offering, supplying or distributing goods or services in Australia;
ii. there was no business carried out under a system or marketing plan; and
iii. there was no system or marketing plan substantially determined, controlled or suggested by Workplace Safety Australia.

The Appeal Court disagreed and found the agreement created the right to carry on the business of offering services, being subscription packages under a system or plan because the agreement required Simple OHS Solutions to submit to WSA:

(a) a detailed business plan setting out how it intended to fund and operate the business, to process and administer all sales of subscription packages in accordance with the process advised and to use standard forms provided and to comply with the manual and directions provided; and

(b) WSA could refuse consent to Simple OHS Solutions' marketing activities and it was not material that the Agreement did not impose an obligation to business plan that had to be followed but only required Simple OHS Solutions to provide a business plan.

The Appeal Court did not give any weight to the fact that Simple OHS did not supply the subscription packages as they could only be purchased and accessed via WSA website and WSA continued to own all the intellectual property of the packages.

The Appeal Court concluded that the system and marketing plan was substantially controlled by WSA as it had power to give directions on how the business was operated and absolute discretion to refuse consent to marketing and promotional material and activities.

The Distribution Agreement obligated standard forms to be used to market and sell the subscription package.

Where does this leave Licensor's and Companies granting rights?

The Distribution or dealer or member agreement or License agreement may well be outside the ambit of the Franchise Code, but you need to be careful and seek specialist advice before you go to the market.

The more proscriptive the agreement the more controls and discretions for approval to the Licensor the more it may sway the agreement towards being a franchise arrangement.

CONTACT:

Robert Toth | rtoth@franchisedevelopments.com.au

Accredited Commercial Law and Franchisee Specialist | Member of the Franchising Council of Australia (FCA) | Member of the International Franchise Lawyers Associations (IFLA)

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