



Franchising in Australia

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Franchising is an extremely popular business model in Australia. According to the Franchising Australia 2016 survey, there is estimated to be 1,120 separate franchise networks in Australia existing across a wide variety of different industries.

Australia's franchising industry is regulated by a national code which contains strict obligations which apply to all businesses intending to establish, purchase or operate a franchising network.

The legislative framework is established by a mandatory industry code applying to all franchises, known as the Franchising Code of Conduct (Code).

Barriers to Entry

Other than compliance with regulatory requirements, there are no real barriers to entry to the Australian Franchise market.

Unlike some jurisdictions, there is no requirement for a business seeking to franchise a

model to have a proven track record of trade within Australia, or even to have a site operating. However, not having a physical site may impede a brand breaking into the market because of the myriad of existing options available to those seeking to purchase a franchise. Further, the absence of a local business may also result in difficulties for the Franchisor being able to adequately comply with its disclosure obligations to prospective franchisees.

What is a Franchise in Australia?

The Code sets out three specific elements which must be present for an agreement to be a Franchise. If each of these elements are met, the arrangement will be a Franchise and captured by the requirements of the Code even though it may otherwise be referred to as a “licence”, a “service agreement” or something else.

An agreement will be a “Franchise” if it:

- specifies the use of a system or marketing plan substantially determined, controlled or suggested by the Franchisor or its associate;
- specifies the use of a common trade mark, advertising or commercial symbol owned, used or licensed by the Franchisor or an associate; and
- requires an upfront or ongoing fee payable to the Franchisor, which is for something other than payment for goods, a market value lease of real property or equipment, or repayment of a loan.

Major Obligations

Prior to selling a Franchise in Australia, a Franchisor must have in place a Disclosure Document.

The prescribed form of the Disclosure Document is set out in the Code. The Disclosure Document must contain significant details of the Franchisor, its associates, the history of the Franchise Network and the costs of establishing and running the franchised business.

A prospective franchisee must be given a copy of the Franchisor’s Disclosure Document at least 14 days before being asked to sign the proposed Franchise Agreement, a copy of which must have been attached to the Disclosure Document when issued.

The purpose of disclosure is to give a prospective Franchisee all relevant information that they will need in order to be able to make a considered assessment as to whether the

franchise is a sensible investment for them.

Prospective Franchisors must also be aware that they can be held responsible in certain circumstances if their franchisees fail to comply with applicable Australian legislation relating to payment of employees.

Franchisees operate as independent businesses to their Franchisor and are responsible for employment and payment of their own staff. Despite this, responsibility is extended under legislation to Franchisors to ensure that their Franchisees are not operating in contravention of the law relating to payment of employees and heavy penalties can apply. This may be a significant risk factor for a Franchisor looking to enter the Australian market and specialist advice should be sought in all cases.

Consequences of Non-compliance

Failure to provide a Disclosure Document, or providing a Disclosure Document that is incomplete or misleading in any material respect will have consequences for the enforceability of any Franchise Agreement that may be signed, and will also expose the Franchisor to enforcement action by the regulator and significant civil penalties for each contravention.

Initial steps for entry to the Australian Franchise Market

For a foreign franchise system that may be looking to break into the Australian market, the following initial steps should be considered as part of any entry plan:

A. Brand protection

There is no legal requirement in Australia to register a trade mark prior to commencing trade or granting a licence to others to use that trade mark. Despite this, the importance of branding in a franchise network will mean that all trade marks for the new franchise network should be applied for as soon as practicable upon making a decision to enter into the Australian market.

If a business already exists in Australia whose trade mark would conflict with a prospective franchisor's trade mark, this could be a significant barrier to entering the Australian market.

B. Obtain advice on the most appropriate Corporate Structure

Australian Corporations law comes with separate obligations and risks for persons who intend to act as Directors of an Australian company.

An appropriate decision on corporate structure will involve both legal and financial considerations. From the outset, establishing a corporate structure that will suit the Franchisor into the future will be one of the most cost effective decisions that the Franchisor can make during this early stage.

C. Consider whether a trial site should be opened by the Franchisor prior to selling a Franchise.

This will not only assist the business owner in testing its target market, it will also provide a benchmark against which to base the Franchisor's disclosure of establishment and ongoing costs for the business.

D. Review any existing Franchise Agreement currently in use against Australian requirements.

The Code contains some specific restrictions and prohibitions on the types of clauses that are allowed to be present in a Franchise Agreement.

These include restrictions on when an agreement may be terminated, as well as the

process that must be followed if a dispute arises between the Franchisor and Franchisee.

In addition to the Code, where the Franchisee in question will be a “small business” within the statutory definition set out in the Australian Competition and Consumer Act 2010 (Cth), a separate “unfair contract terms” regime may also apply to the Franchise Agreement. This can create some difficulty for franchise systems as the regime restricts a Franchisor’s ability to make unilateral changes to their agreement with their Franchisees, which is a right that is often present in franchise systems.

e. Prepare your Disclosure Document

For any Franchisor seriously considering moving into the Australian market, preparation of the Disclosure Document should be a priority. The disclosure requirements in the Code are prescriptive and require careful consideration to be done correctly. A failure to provide adequate or sufficiently detailed disclosure is one of the most common causes of franchise disputes, which can be avoided by taking the appropriate time and seeking advice from a local specialist.

McInnes Wilson Lawyers regularly provides advice to both domestic and international franchise networks, whether they are moving into the Australian market or heading offshore, and would be pleased to assist you or your clients.

Contact the article author for more info



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