

Update 28 May 2008: The risks of an unintended franchise



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Summary

The definition of 'franchise' in the *Franchising Code* is wider than many professionals think. We have seen several cases where the licence of a trademark, or business branding, unintentionally created a franchise relationship.

What creates the problems?

Trademarks and other intellectual property assets are often owned by a superannuation fund or a single-purpose, non-trading entity to protect them from business risks. The assets are then licensed to the operating entity, which pays licence fees in return.

Independent contractors are also often licensed to use corporate branding on equipment, uniforms and paperwork as part of their operation.

What is a 'franchise'?

A 'franchise' under the *Code* has three elements:

- Permission to use a trademark or business symbol;
- Payment for the privilege; and
- A business system or plan substantially set out by the franchisor.

A simple licence will have only the first and second elements and is clearly not a franchise. However, if there is any suggestion that the business system is suggested or controlled, there is a real risk that a franchise exists.

What are the risks?

There are at least three possible risks.

- If a franchise exists without complying with the disclosure and other requirements of the *Code*, it is a breach of the *Trade Practices Act* and penalties apply.
- A 2007 NSW Supreme Court decision suggests that the entire agreement may be unenforceable as an unlawful contract.
- If the trademark is owned by a superannuation fund, the trustee risks being in breach of its prudential obligations to members.

How can Fleming Muntz help?

Fleming Muntz's business law specialists can give advice on existing agreements and eliminating compliance risks, as well as drafting new documents to avoid any risk of creating an unintended franchise.

Important fine print

This update is for general information only. It is not a complete guide to the area of law. Competent advice should be obtained before taking any action.

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