

# CLAW2212 - Lecture 5

FRANCHISING - WEEK 4 CONTENT

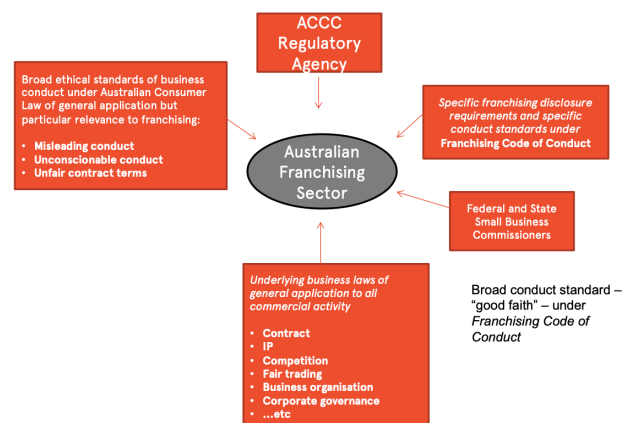
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## FRANCHISING CODE OF CONDUCT

- Prescribed by regulation under the Trade Practices Act 1974, now **Competition and Consumer Act 2010** as a mandatory industry code
- Franchisee has no right to renewal – big vulnerability
- **Restraint of trade clause** – on termination or expiry one party cannot compete for a certain time in a certain area
  - cannot be enforced if franchisee asked for renewal but franchisor refused
- franchisee has a right to assign / transfer (not under general law; added in code)
  - franchisor can't reasonably withhold consent

### KEY ELEMENTS

- Mandatory **prior disclosure**
- Mandatory **conduct regulation**
  - particular relationship issues and general standard
- Mandatory **mediation**



### AIMS

- I. Address imbalance of power
- II. Raise **standards of conduct** in the sector without endangering vitality and growth
- III. Reduce cost of resolving disputes
- IV. Reduce risk and increase **level of certainty** for all participants

**franchise** includes the following:

- (a) the rights and **obligations** under a franchise agreement;
- (b) a master franchise;
- (c) a subfranchise;
- (d) an **interest** in a franchise.

## MEANING OF FRANCHISE AGREEMENT

Franchising is not a business itself; it is a way of doing business – a business relationship

**s5** defines meaning of **franchise agreement**, all of the following

- **s5(1)a** – Must be a written, oral or implied **agreement**
- **System or marketing plan** – three requirements
  - s5(1)b** – franchisor grants to franchisee the right to carry on the **business** off offering, supplying or distributing goods or services in Australia under a **system or marketing plan** substantially **determined, controlled or suggested** by the franchisor or an associate
- Right to carry on the business of offering, supplying or distributing
- Under a system or marketing plan
  - System refers to method of operation. FA doesn't need to spell out the details, but it must at least provide for it to occur
- Must be substantially determined, controlled or suggested
  - Power to direct or restrain the content of the business plan on any substantial issue, determined by practical and commercial considerations

### Workplace Safety Australia v Simple OHS Solutions Pty Ltd

- **Trade mark, advertising or commercial symbol**
  - s5(1)c** – under which operation of the business will be substantially or materially associated with a trade mark, advertising or commercial symbol
- owned, used or licensed by franchisor OR specified by franchisor or associate **(i, ii)**
- Franchisee must pay or agree to pay an amount, including
  - s5(1)d** – initial capital investment fee, OR  
payment for goods / services OR  
fee based on % of gross / net income whether or not called a royalty or **franchise service fee** OR  
training fee
- but excluding
  - payment for g & s at or below usual wholesale price OR  
repayment of loan from franchisor  
payment of usually wholesale price for goods taken on consignment  
payment of market value for purchase or lease of real property, fixtures, equipment or  
supplies needed to start business or continue business under agreement

Following are considered franchise agreements: **(2)**

- **transfer, renewal**, extension or extension of scope of a **franchise agreement** AND
- **motor vehicle dealership** agreement are taken to be franchise agreements

NOT franchise agreements:

- employer / employee
- partnership
- landlord and tenant
- mortgager and mortgagee
- lender and borrower
- members of a cooperative under various state Co-operatives Acts

## **CASE LAW**

- Was the business carried on under a system or marketing plan?
- Some may try to contract around the definition

### **Capital Networks Pty Ltd v .au Domain Administration Ltd**

**ACCC v Kyloe Pty Ltd** – Kyloe was distributor of ice drink machines and resale of related products. Alleged that this distribution and license arrangement was a franchise. Used American case law for the requirements of a "system or marketing plan": sales training regime, assistance in conducting "opportunity meetings", use of RRP, restrictions on sale of products, recommended sales techniques, sales quotas, eliciting info from customers and passing on to Kyloe, comprehensive ads and promo program, sales and merchandising devices, guidance concerning operation / management of franchise, exclusive/divided sales territories. HELD not a franchise.

**Rafferty v Madgwicks** – whether a business venture involved sale of modular accommodation units manufactured in China and sold in Australia constituted a franchise agreement. Court considered the requirement of **system or marketing plan** and whether that plan is **substantially determined, controlled or suggested** by the franchisor.

- i) various factors may incl. inability to supply goods without approval, reservation by franchisor of right to approve promo and ad material, provision of training, sales structures, marketing and sales territories, etc [172]

- ii) matters may incl: extent to which franchisee's business involves sale of franchisor's goods&services, degree of responsibility for centralised management and uniform standards, obligations for promo campaigns, etc. [173]

While these criteria are helpful in determining existence, they are not essential and the Court will consider the agreement as a whole

**Workplace Safety Australia v Simple OHS Solutions Pty Ltd** – Simple agreed to act as exclusive distributor of WSAs subscription packages. One of the principle purposes of the FCC is to protect franchisees. **cl4(1)b** all three conditions were met. The Dist Agreement conferred on Simple exclusive right to provide, grant or confer sub packages ("service" under CCA).

**System / marketing plan** – required to set out a business plan, administer all sales in accordance with a process prescribed by WSA, comply with a provided manual

**Substantially controlled** – Simple must comply with all reasonable directors of WSA and WSA could refuse to consent marketing activities

## UBER AS A QUASI-FRANCHISE

- Resembles a contractor agreement – Uber's relationship with drivers is not a franchise agreement but an independent contract
- FCC exists as franchisees need protection – protects relationships and against power imbalance of franchisors – massive sunk cost (establishment fee, uniforms, stock). There is however very little capital outlay for an Uber driver (attraction of the service is you've got a car anyway)
- At higher levels we don't really need FCC to protect the weaker party
  - Motor vehicles franchise – sophisticated incorporation that doesn't necessarily need protection
  - Hotel franchises (Hilton etc) – can be company owned operated, franchised agreement of management contract (somebody owns the land and builds to Hilton's specifications)
- Same for Uber – do we really need it to protect drivers. More appropriate to consider it as a quasi-franchise – looks like a franchise in terms of system and brands.
- s5(1)d may be the let-out clause as there is no capital investment fee made payable. Uber drivers don't pay any initial fee to Uber. Nor do customers pay Uber drivers directly – the money goes to Uber and then they pay the drivers back
- s5(1)b involves carrying on a business – Uber drivers aren't doing this, merely a service to the franchisor