

The definition of a franchise agreement under the Franchising Code of Conduct (“the Code”) is very broad, capturing a wide range of agreements, such as licensing and distribution agreements, not traditionally considered to be a franchise. The Australia Competition and Consumer Commission who are responsible for enforcing the Code also take a broad approach to the definition.

Elements of Franchise Agreement

Whilst each agreement must be considered on its own facts, there are four key elements for an agreement to be characterised as a franchise agreement. These may be classified as:-

1. There must be an agreement which does not necessarily have to be in writing;
2. There must be the granting of a right to carry on a business under a system or marketing plan;
3. Carrying on the business must be with the association of a trademark or commercial symbol; and
4. There must be a payment of a fee other than for payments for goods and services.

Conclusion

Many cases heard by the Courts in relation to the definition of a franchise agreement have considered whether or not a system or marketing plan exists and whether that is substantially determined or controlled by the licensor/franchisor.

It is important to note that the name given to an agreement is not relevant in determining whether it is to be characterised as a franchise agreement. A license agreement or distribution agreement will be governed by the Code if it meets the key elements referred to above. The risk for a Franchisor in not complying with the Franchising Code of Conduct is that a Court or the ACCC may impose penalties and require the Franchisor to subsequently comply with the Code. The Franchisor may also be liable to pay compensation to the Franchisee and any costs incurred by the ACCC.

To ensure your rights are protected in regards to any licensing, distribution or franchise agreement you should contact Tony Pattinson of Ferguson Cannon to obtain expert legal advice.