

Compliance Check: Are you a franchise?

by Katrina Chambers

Many people do not realise that supply and distribution arrangements, as well as trade mark and other intellectual property licences, can fall within the definition of a franchise under the Franchising Code of Conduct (the Code), even if the parties do not call it a franchise, or recognise it as one.

If the following elements are present, you should get legal advice about whether the Code applies:

- one party grants the other party a right to offer, supply or distribute goods or services under a system or marketing plan; and
- the business is associated with a trade mark, advertising or commercial symbol; and
- a fee or royalty (including a training fee) is payable.

The Australian Franchising Code of Conduct is mandatory. Penalties for non-compliance are imposed under the *Trade Practices Act 1974 (Cth)*.

Contrary to popular belief, there is no exception for related companies or 'once off' transactions.

The exception for overseas franchisors has now been removed.

Failure to comply with the Code can result in the commencement of an investigation or proceedings by the ACCC, or court action by the affected parties.

Remedies can include:

- damages and compensation;
- injunctions;
- setting aside of contracts;
- corrective advertising; and
- orders to pay ACCC costs.

As well as considering the application of the Code, when entering into supply and distribution arrangements, you should also obtain advice about the restrictions in the *Trade Practices Act* in relation to unfair contracts, third line forcing and other exclusive dealings and price fixing.

For more information about franchising or *Trade Practices Act* compliance, please contact Katrina Chambers from our office.

Flower and Hart Welcomes Katrina Chambers



Flower and Hart is pleased to announce Katrina Chambers' return to Flower and Hart as of 8 September 2009 as Special Counsel. Katrina will be part of the Commercial and Corporate team, and will specialise in intellectual property, franchising and commercial contracts. She has completed a Masters in Intellectual Property Law through the University of Melbourne, as well as a degree in Science and an Honours degree in Law.

Katrina worked for Flower and Hart from 1997 to 2004 and returns to us after working as a Senior Associate in one of Brisbane's largest law firms. Her experience includes protection and commercialisation of intellectual property, intellectual property disputes, franchising, licensing, supply and distribution agreements, trade practices, IP due diligence, venture capital and technology mergers and acquisitions.

Katrina has the advantage of broad commercial experience and has worked for a wide range of clients ranging from SMEs and spin out companies to ASX listed companies, state government, research institutions and the university sector. Katrina has also acted for a variety of national and state based franchisors.

Katrina can be contacted on 07 3233 1207 or katrina.chambers@flowerandhart.com.au

We are pleased to announce the first winner of the carton of wine, as per our competition in the Winter 2009 edition, is from our client, International Education Services. If you would like to be in the running for the remaining two cartons, simply nominate to receive your newsletters and bulletins by email by contacting us on news@flowerandhart.com.au

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