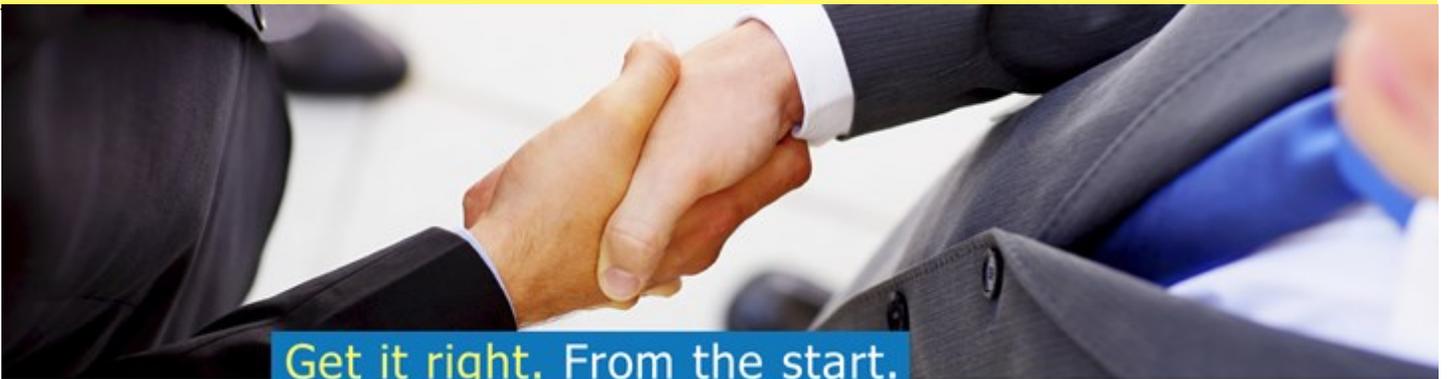


Corporate & Business Law



Get it right. From the start.

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SCATTINI

Lawyers

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Our Business Law Team

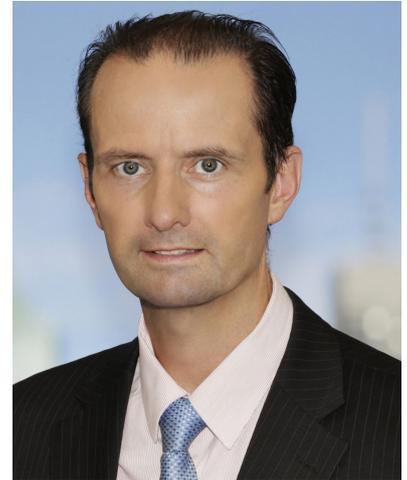
The Quinn & Scattini Business Law Team has dedicated lawyers led by Duncan Murdoch whom deal with a range of commercial and business matters including:

- Business Sales and Acquisitions
- Franchising
- Business Structuring
- Banking, Finance and Securities
- Landlord and Tenant Law
- Intellectual Property
- Employment Law
- Commercial Agreements
- Succession Planning
- Taxation

The Business Law Team provide advice and assistance to a diverse range of clients across numerous industry sectors including:

- retail
- hospitality, food & beverage
- professions—doctors, engineers, accountants, etc
- manufacturing
- health & pharmaceutical
- printing & publishing
- transport
- R&D and technology
- agriculture and primary production
- financial
- building & construction

We recognise that each client has different needs and we tailor our advice to the specific requirements of our clients.



Duncan Murdoch
Director

Business Sale and Taxation

When a business owner determines it is time to sell their business there are a number of issues that the Seller needs to consider:

- determining the value of business;
- does the Buyer have the financial capacity to pay the purchase price;
- GST;
- CGT;
- will the Seller be release from any security given for the business. For example, under a premises lease;
- will the Seller be release from any warranties previously given;
- what confidentiality obligations will the Seller be required to meet;
- what restraint of trade obligations will the Seller be required to meet;
- what steps need to be followed to ensure the business assets are transferred to the Buyer;
- what are the Seller's obligations in respect of its employees;
- if there is a premises Lease, the process for obtaining consent from Landlord to assignment of Lease;
- if the business is franchised, the process for obtaining consent from Franchisor to assignment of the Franchise Agreement.

There are also practical steps to take such as informing utilities/service providers and suppliers that the business sold and cancelling insurance once the sale has settled.

The Seller should also consider:

- ensuring stock is of merchantable quality;
- warranting that the financial figures of the business are correct;
- making certain that the plant & equipment is in good order and condition;
- all licenses/permits required for the operation of the business have been obtained and current;
- being careful in making statements prior to sale of the business about the capabilities

The Seller may be requested to give certain warranties in respect of the business. If the statements are not true then they may expose the Seller to an action for misleading or deceptive conduct or misrepresentation.

Taxation

From a business perspective the two most common taxes to consider on sale of the business are:

Goods & Services Tax (GST)

The GST legislation - *A New Tax System (Goods and Services Tax) Act 1999* - provides exemption from GST on the sale of a business provided the GST going concern exemption applies. As GST is a considerable impost it is important to ensure the provisions for the going concern exemption are satisfied. Stamp duty is assessed on the GST inclusive price, making the overall tax impost even greater.

Capital Gains Tax (CGT)

There are four CGT possible concessions available for business owners:

- Small business 15-year exemption;
- Small business 50% active asset reduction;
- Small business retirement exemption; and
- Small business roll-over.

The rules vary as between each.

We can help you with:

- *appropriate advice as to your obligations to a potential Buyer in the event of the sale of your business;*
- *settling the sale of your business.*

Intellectual Property

Intellectual Property (IP) can be described as a form of intangible property right, original in nature created by a person through their mind. IP can exist in various forms such as by way of an invention or artistic endeavour.

Due Diligence

IP assets can form a large part of the value of a business. A prospective buyer must identify these assets and ensure they remain an asset of the business. It is important in that regard that appropriate due diligence is carried out such as checking:

- what copyrighted materials exist;
- what trade marks have been registered;
- that the IP stated as owned by the Seller is in fact the case;
- that technology has been appropriately patented;
- designs have been properly registered;
- there are no known disputes as to the ownership of the IP;
- that there are no third parties which may have taken a security interest in respect of the IP. The introduction of the Personal Property Securities Register (PPSR) through the *Personal Property Securities Act 2009 (Cth)* (PPSA) has strengthened the ability of third parties, through registration, to take security interests over personal property including IP assets.

Legislation

Apart from the PPSA there are a number of other pieces of Commonwealth legislation that define specific IP rights. These include: (a) *Copyright Act 1968* (b) *Trade Marks Act 1995* (c) *Patents Act 1990* (d) *Designs Act 2003* (e) *Circuit Layouts Act 1989* (f) *Plant Breeder's Rights Act 1994* and (g) the *Competition and Consumer Act 2010*.

Licensing and Agreements

The rights and obligations relating to IP assets can also be prescribed through various licensing and other agreements, such as: (a) Franchise Agreements (b) Software Licenses (c) Distribution Agreements (d) Publishing Agreements (e) Domain Names (f) Confidentiality Agreements, etc.

Registration

Some IP rights are granted automatically while others will only be granted after a formal registration process has been successfully completed.

What we can do for you:

If you are contemplating acquiring a business or are already in business or have an original idea or concept, Quinn & Scattini's Business Law Team can assist and advise you in relation to (a) IP registration (b) appropriate due diligence strategies (c) undertaking an IP audit of the business (d) identifying IP assets (e) developing strategies to protect IP assets (f) processes for pursuing infringements of your IP rights.



Business Start Up and Acquisition

Just like owning your own home is a desire of many Australians, the notion of owning and operating one's own business also appeals to many people. The reasons why are varied but may include that they: (a) have an entrepreneurial spirit (b) enjoy the challenge (c) are looking for financial independence (d) like the flexibility (e) don't feel fulfilled in paid employment (f) want to start a business doing something they have a passion for and enjoy (g) want to spend more time with family (h) like the idea of being in charge of their own destiny.

Starting or buying a business should not be taken lightly. Any prospective business person needs to consider various commercial, financial and legal issues, for example:

Commercial Issues

- Obtaining appropriate legal, financial, business and accounting advice.
- Preparing a business plan.
- Undertaking appropriate due diligence.
- Knowing what skills and knowledge are required.
- Obtaining appropriate tuition and training.
- Understanding staffing requirements including are staff motivated and properly skilled, licensed and trained.
- Verifying that all plant & equipment is in good and proper working order.
- Checking that stock is at sufficient levels, correctly identified/labeled and of merchantable quality.
- Ensuring all administrative procedures are documented and workable.

Financial Issues

- Ensuring there is sufficient capital to finance the business venture.
- Making sure the business accounts system is up to date and correct.
- Properly assessing present and forecast costs, liabilities, income, cash flow and profits.
- Confirming taxation obligations.
- Clarifying the terms & conditions of any business loans.
- Checking the terms & conditions of any chattel hire purchase, rent or lease agreements.
- Understanding security obligations in relation to mortgages, charges, guarantees, etc.

Legal Issues

There are a myriad of legal issues to also consider, which will vary depending upon the particular business and industry. For example:

- What structure should be adopted—sole trade, partnership, company or trust ?
- If you are going into business with someone else do you have an agreement such as a partnership or shareholders agreement dealing with ownership, management and exit strategies ?
- Is there a properly drawn agreement or contract in relation to the purchase of the business ?
- Do you understand the statutory and regulatory obligations applicable to the business and industry and have they been complied with ?
- What intellectual property rights attach to the business and are these protected ?
- Are there any current or expected legal proceedings that may impact on the business or you ?
- Do you understand your rights and obligations in relation to employees ?
- Have you understood the terms & conditions of any premises lease or license and have they been complied with ? Has the landlord given consent to your occupation and use of the premises ?
- Is the premises suitable for operation of the

We can help you with:

- *Advice in relation what due diligence you should consider;*
- *Undertaking necessary searches;*
- *Advice about issues relevant to start up; businesses and existing business acquisitions;*
- *Drafting all relevant documentation;*
- *Meeting applicable statute and regulatory compliance;*
- *Settling the acquisition;*
- *All matters incidental to the above.*

Employment Law

Transfer of Business

In the course of the sale or acquisition of a business invariably there will be employee considerations to take into account.

From 1 July 2009, most Australian workplaces are governed by the *Fair Work Act 2009* (Cth). The Act sets out certain criteria to ascertain if there has been a "transfer of business". This criteria includes:

- the employment of the 'transferring employee' for the old employer terminating;
- within three (3) months after the termination, the employee becomes employed by the new employer;
- the work the employee performs for the new employer is the same or substantially the same as the work they performed for the old employer;
- a connection exists between the two employers, for example, that the new employer owns or has use of some or all of the old employer's assets.

Where there has been a transfer of business, certain workplace instruments (transferable instruments) that covered employees of the old employer continue to cover those employees employed by the new employer. Types of transferable instruments include: (i) enterprise agreements, (ii) collective agreements (iii) Australian workplace agreements (AWAs) (iv) awards.

In the event of a sale and acquisition of a business it may well be that the provisions of the *Fair Work Act 2009* (Cth) apply. Accordingly, both sellers and buyers should obtain appropriate legal advice as to their rights and obligations upon a transfer of business. This includes, for example:

- the buyer (new employer) undertake appropriate due diligence to ensure they understand what awards or other transferable instruments apply to any transferring employees and that they are complied with;
- the new employer ensuring the transferring and new employees are given a Fair Work Information Statement.

- The Fair Work Information Statement sets out certain information explaining the effect on an employee regarding their lawful entitlements.
- The buyer ensuring the old employer has met its obligations to any transferring employees in respect of employee entitlements up until settlement of the sale of the business.

Quinn & Scattini have experience in a wide range of employment and workplace relations matters and provide practical and cost effective advice in the following areas:

- Issues relating to the *Fair Work Act 2009* (Cth) – this Act replaced the *Workplace Relations Act 1996* (Cth);
- Unfair Dismissal
- Unlawful Termination
- Preparing and advising on employment contracts
- State Awards
- Collective Agreements
- Greenfields Agreements
- Executive Services Agreements
- Preparing and advising on other industrial relations contracts
- Confidentiality Agreements
- IP Agreements
- Restraint of Trade Agreements
- Advising on employment contract disputes
- Underpayment of Wages
- Employers trying to contract out of their obligations (eg requiring employees to become sub contractors to avoid paying super etc)
- Handling general employment disputes
- Bullying and Harassment

Commercial & Business Agreements

Quinn & Scattini Lawyers regularly draft and advise on a wide range of commercial and agreements including:

- Contracts of Business Sale in relation to the sale and acquisition of businesses
- Franchise agreements
- Agency Agreements
- Intellectual Property licensing agreements
- Confidentiality Deeds
- Restraint Deeds
- Distribution and supply agreements
- IT agreements
- Deeds of Partnership, Joint venture Agreements, Shareholder Agreements
- Loan Agreements, Mortgages, Charges
- Contractor and Employee Agreements
- Premises Leases and Occupation Licenses
- Rights of Entry
- Trust Deeds
- Agistment Agreements
- Management Agreements
- Buy/Sell Agreements and Option Deeds
- Asset Sale Agreements
- Building/Construction Agreements
- Deeds of Guarantee
- Deeds of Indemnity
- Equipment/Chattel lease agreements
- Shareholder Agreements

We also advise on a range of matters relating to commercial and business practice:

- contract performance
- breach of contract and termination
- trade practices
- consumer protection
- occupiers liability
- product safety and warranties
- employment law
- asbestos management
- personal guarantees
- landlord & tenant rights & obligations
- relief against forfeiture
- structuring, asset protection and succession planning
- risk management and due diligence
- copyright, trade secrets, trade marks, domain names and IP licensing
- statutory, regulatory and code compliance
- tortious remedies

What we can do for you:

If you require advice on any commercial or business matter or need assistance drafting commercial agreements we have the skills and experience to assist you through that process.



Succession Planning

Business Succession Planning

Succession planning is intertwined with business risk management, taxation, insurance and estate planning. A sound succession plan will assist to ensure a smooth transition with less likelihood of disruption to business operations in the event of the transfer of management, control & ownership of the business should you decide to sell or retire from the business or in the event you die, suffer ill health or are forced to exit the business. A well thought out plan will also provide financially for those you care for and reduce any emotional anxiety of your business partners and your family.

Fundamental to the success of any succession plan is ensuring you have an up to date and valid Enduring Power of Attorney (EPA) and Will which should incorporate appropriate directions in relation to your business.

Enduring Power of Attorney (EPA)

An EPA is a legal document which allows you to appoint one or more attorneys to make decisions on your behalf whilst you are still alive but somehow incapacitated through say illness. For example, your attorney may be able to manage the business in your absence.

Wills and Testamentary Trusts

A Will is a legal document which sets out how you want your assets to be distributed after you die. The document names the people you want to receive your assets — your beneficiaries. The Will also appoints an executor/trustee to administer your estate.

To provide more specific asset protection and to minimise taxation, a testamentary trust maybe a more prudent vehicle. A testamentary trust is a trust created by a Will whereby your assets are given to a trustee to be held for the benefit of beneficiaries on the written terms of the trust deed. The trust is typically set up to be discretionary in nature. Benefits of using a trust include:

- under a standard Will if you simply gift assets directly to a beneficiary and that beneficiary is at risk now or in the near future of claims from creditors or a matrimonial dispute, the assets you gifted effectively increase the pool of assets at risk. However, with a testamentary trust as the trust asset is not owned by the beneficiary a trust can offer a level of protection from creditors of the beneficiaries and/or a spouse, in the event of a

marital/relationship breakdown.

- testamentary trusts also allow the taxable income of the estate to be taxed more effectively through flexibility of distribution by allowing income to be distributed to those beneficiaries that pay a lower marginal tax rate and/or have access to tax free thresholds (such as children and low income earners).

Buy/Sell or Option Agreements

If you are in business with co-owners a sound business succession plan will provide a mechanism whereby a retiring, deceased or permanently disabled co-owner's interest in the business can be bought by the surviving or remaining co-owners.

Buy/Sell or Option Agreements enable the owners to prescribe certain conditions and mechanisms in the event of the future sale of a retiring, deceased or permanently disabled co-owner's interest and the purchase of that interest by surviving or remaining owners.

This includes an appropriate life, TPD, trauma insurance plan, so that in those events the insurance payout effectively funds the sale and purchase of the deceased or permanently disabled co-owner's interest.

Risks

If a succession plan is not in place or not properly thought through and/or there is inadequate insurance in place then the risks may include:

- the remaining or surviving co-owners being unable to fund the purchase;
- the estate of the deceased owner not obtaining the benefit of asset at its market value;
- a forced sale of the business at a discounted price;
- the closure of the business;
- credit provider's may require additional security.

We can help you with:

- *appropriate advice about succession planning;*
- *drafting Wills/Testamentary Trusts and EPAs;*
- *drafting Buy/Sell or Option Agreements;*
- *general taxation advice;*
- *referrals to insurance brokers and insurers.*

Business Structuring

There are a number of different structures which can be used to operate a business. Each has its own advantages and disadvantages. The most common structures are:

Sole Proprietor

A sole proprietor or sole trader is an individual who operates a business on their own account. The key characteristics are:

- the success or failure of the business falls on them solely;
- they are solely responsible for all costs, expenses and liabilities;
- they bear all risk;
- they are entitled to all income/profits;
- income earned by the sole trader is taxed at their marginal tax rate;
- they may or may not need to register a business name depending on the name used.

Partnership

This is where two or more individuals carry on a business together with a view to making a profit. In Queensland partnerships are regulated under the *Partnership Act 1891*. There are both “general” partnership and “limited” partnerships each having different rules.

Partnerships should be documented in a Deed of Partnership to reflect their agreement.

Key characteristics are:

- a partnership does not have a separate legal personality as does a company;
- partners usually each contribute skill, knowledge and capital jointly although the percentage of contribution can vary;
- partnership property is jointly owned although the percentage of ownership can vary;
- partners act as agents;
- the relationship of partnership gives rise to fiduciary responsibilities;
- each partner pays tax on income at their own marginal tax rate;
- liability of the partners is generally joint and several.

Company

Companies are regulated through the *Corporations Act 2001 (Cth)* as administered by the Australian Securities & Investments Commission (ASIC). Shareholders represent the ownership of the company and the directors manage the company. There are a number of different types of companies including private and public companies.

General characteristics of a company include:

- the company is a separate legal entity to that of the directors and the shareholders;
- the company has perpetual succession;
- shareholder’s liability can be “limited”;
- by registering the company name others are restricted from using that name in Australia;
- income of the company is taxed at the company rate.

Directors have a number of obligations including:

- acting in the company’s best interests;
- ensuring the company keeps up-to-date and correct financial records;
- not allowing the company to trade “insolvent”.

Although a company is a separate legal entity and does offer liability protection, directors can still be held personally liable and face criminal prosecution where they have breached their duties.

Trusts

A trust involves property, assets and income being held by a trustee on behalf of others (beneficiaries). Trusts are often adopted for their asset protection and tax minimisation characteristics. There are a number of different types of trusts, such as: (a) Discretionary trusts (b) Unit trusts (c) Hybrid trusts (d) Fixed trusts (e) Testamentary trusts; and (f) Inter vivos trusts. Different rules apply depending on the type of trust.

We can help you with:

- *structuring advice;*
- *drafting Deeds of Partnership, shareholders/ directors Agreements, Trust Deed;*
- *incorporating companies;*
- *business name registration;*
- *advice and drafting of service agreements between business entities.*

Bankruptcy and Insolvency

Factors Contributing to Business Failure

Each year in Australia many budding entrepreneurs seek to start a new business or buy an existing business. Unfortunately a number of these ventures fail within the first few years. Factors contributing to failure may include:

- Failure to obtain proper legal, accounting, business or financial advice before starting the venture;
- Failure to properly plan;
- Over confidence leading to overlooking obvious risks and pitfalls;
- Business plans based on budgets designed more to satisfy criteria of banks rather than on realistic projections;
- Little or no previous business experience;
- Little knowledge of budgeting, accounting or financial management;
- Under capitalised leading to heavier reliance on credit and overdrafts;
- Poor business management generally including (a) failure to keep overheads adequately under control (b) failure to properly allow for slow payers and bad debts (c) poor stock control (d) not understanding the cost of providing a particular goods or services;
- Not understating the target market;
- Not adapting to a changing market, economic or regulatory environment;
- When problems with cash flow and profitability do arise, not obtaining early advice to look at appropriate strategies to trade through difficult periods.

Bankruptcy

Statistics from ITSA show that for the period 1986/87 to 2010/11 bankruptcies in Australia have increased from 7,534 per year to 23,093 per year. Of these bankruptcies, 15% to 20% are business related, meaning the person's bankruptcy was directly related to his or her proprietary interest in a business.

Insolvency of an individual is formally dealt with under the *Bankruptcy Act 1966 (Cth)*. Conditions which generally apply include:

- A creditor cannot make you a bankrupt unless you owe \$5,000 or more and a judgement or court order has been issued;
- The period of bankruptcy is generally 3 years but can be extended;
- Certain debts remain payable, eg. fines and penalties;
- Bankruptcy does not release you from certain debts, eg. child support;
- If you are a director of a company, upon bankruptcy you are disqualified and must cease to act as director;
- If you are "insolvent" but continue to accrue debt you can be prosecuted;
- you cannot travel overseas without the trustee's prior consent;
- particular industry associations or licensing authorities may impose certain restrictions or conditions should a member or licensee become bankrupt;
- You are entitled to keep certain assets, eg. household furniture, tools of trade, personal affects, motor vehicles (up to set limit);

- The trustee has power to void transactions made within 5 years prior to bankruptcy;
- If you are employed during bankruptcy you may be required to make contributions from your income to the trustee for the benefit of creditors.

It is possible to enter into Part IX Debt Agreements, Part X Personal Insolvency Agreements as an alternative to bankruptcy.

Insolvency

Statistics from ASIC show that for the period 1999/00 to 2010/11 companies entering into external administration increased from 4,205 per year to 9,829 per year.

Insolvency of a company is formally dealt with under the *Corporations Act 2001*. Conditions which may apply include:

- the Act imposes on directors a positive duty to prevent insolvent trading such that directors can be subject to a civil claim or criminal proceedings if they fail this duty;
- an administrator, receiver or liquidator is appointed;
- director's can remain liable for the company's unpaid tax.

What we can do for you:

If you are experiencing non-disputed financial distress Quinn & Scattini can assist you to negotiate a settlement with your creditors or put you in contact with other professionals to assist you to manage your debt. If you are contemplating bankruptcy or insolvency we can provide you with advice as to your rights and obligations and the processes to be followed whether that be in relation to Part IX Debt Agreements, Part X Personal Insolvency Agreements, bankruptcy petitions, debt restructuring, company deregistration, company winding up applications, assisting with the appointment of an administrator or receiver or advice generally.

Franchising

As a concept, franchising is a market-expansion method wherein an existing business owner (Franchisor) licenses others (Franchisees) to use its operating systems, know-how and intellectual property to sell its range of goods and services. In return the Franchisor receives certain fees and royalties. McDonalds restaurants are a well known example of a business model utilizing a franchise strategy.

Franchising in Australia is regulated through a Code as administered by the ACCC. The legal relationship between the Franchisor and its Franchisees is created by a Franchise Agreement and ancillary documents including IP Licenses, Deeds of Guarantee & Indemnity, Restraint Deeds, Premises Leases and Occupation Licenses, Operations and Procedures Manuals, etc.

As with any business there are various factors which must be taken into account in order to ensure the franchised business is successful. When considering buying into a franchised system questions to consider include:

- what are the costs
- is the territory exclusive or non-exclusive
- is the franchise system proven and profitable
- is there a sound strategy for the future of the franchise system over the short, medium and long term
- is the brand is strong
- does the Franchisor commit to marketing
- is the product or service marketable
- does the Franchisor provides strong administrative and management support to its Franchisees
- is mentoring available
- is there a comprehensive training program
- are the Operations Manuals easy to follow.

Quinn & Scattini Lawyers has extensive experience acting for and advising:

- Franchisors regarding development and documentation of their franchise system including Code compliance;
- prospective Franchisees in relation to acquiring a franchised business;
- existing Franchisees in regards to their ongoing rights and obligations and the sale of their franchised business.

Quinn & Scattini Lawyers have acted in respect of the acquisition and sale of various franchise systems including (a) The Coffee Club (b) Gloria Jeans Coffees (c) Pizza Hut (d) Eagle Boys Pizza (e) Pizza Capers (f) Dominos Pizza (g) Subway (h) Outback Jacks (i) Big Chief (j) Brumby's Bakery (k) Bakers Delight (l) BB's Café (m) Bucking Beef (n) Cheesecake Shop (o) Blockbuster (p) Video Ezy (q) Poolwerx (r) Battery World (s) Fastway Couriers (t) etc.

We have also assisted Franchisors in the following industries to develop their legal documentation: (a) protective coating (b) freight forwarding (c) hair & beauty (d) building industry (e) marketing industry (f) pet food industry.

What we can do for you:

if you are considering:

- *buying a franchised business we can advise you in relation to necessary due diligence; the terms & conditions of the Franchise Agreement, Disclosure Document, any IP licenses, any premises Lease/occupation licenses, ancillary franchise documents and assist you to settle the acquisition;*
- *selling a franchised business we can advise you on the your obligations under the Franchise Agreement as seller/Assignor and assist you to settle the sale;*
- *growing your existing business and looking at franchising as a strategy for growth we can advise you on commercial and legal issues relevant to that strategy.*



Delivering Solutions Since 1974



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This is general advice only. You should seek specific advice for your particular circumstances.**