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## **When is a car dealer required to obtain its franchisor's consent?**

This depends on the terms of the individual dealer agreement however most up to date dealer agreements will require the franchisor's consent in the following situations:

### **Transfer of Franchise - Sale of Business**

If a dealer wants to transfer the franchise to another entity (usually a buyer of the business in the case where the dealer has sold or is seeking to sell) the franchisor's consent will be required.

There is likely a process set out in the dealer agreement which should be followed and there is also a process set out in the franchising code which must be observed. Any deal with a purchaser should be subject to the franchisor's consent to the transfer and generally a request for the franchisor's consent will be made by formal written communication. A well advised franchisor will always ask for evidence that a deal has been done (signed contract of sale) and also ask for all the information about the proposed transferee (purchaser) they may need in order to properly assess the suitability of the purchaser to take on the franchised business. This may involve the purchaser completing a comprehensive application pack.

Both dealers and car companies should involve their legal representative as early as possible in the process as legal advice is necessary to ensure that the appropriate actions are taken which could impact on the outcome.

See separate Crea Legal article entitled 'Sale of a franchised car dealership' for further information on this topic.

### **Change of Corporate Structure - either Directors, Shareholders or Shareholding.**

Shareholding and directorship changes are a regular occurrence with dealers and it is seldom understood that the franchisor's consent is required prior to the changes taking place.

Some dealers find it objectionable to get consent for this but they should remember; the car company has granted a franchise to a dealer in reliance on the fact that certain people are responsible for the business as owners and operators. Obviously, it would be unfair on the car company if dealers could simply make changes to this situation without the knowledge of the car company who would one day find out that it effectively has someone else as its franchisee due to the occurrence of changes to the franchisee entity.

One very common practice when dealers are aware of the need to communicate with the franchisor on changes to corporate structure is to simply send the franchisor a notice, advising them of the changes. Car companies will need to ask themselves whether they are satisfied with this or whether they require a formal application for consent and it will typically depend on the degree of the changes.

See separate Crea Legal article entitled 'Changes to a Dealer's Corporate Structure' for further information on this topic.

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## **Change of Dealer Principal**

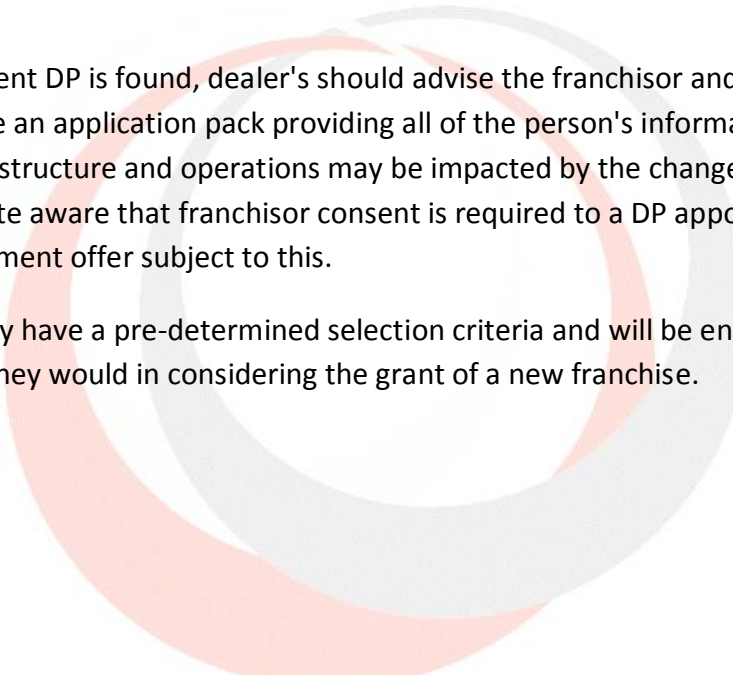
The Dealer Principal will usually be specified in the dealer agreement as a key person and franchisor consent will be required prior to making a change.

If change is sudden such as an employed DP resigning and leaving immediately, dealers should involve their franchisor straight away.

Transitional arrangements may be required whilst a recruitment process is undertaken which is reasonable but the franchisor will appreciate being kept abreast of what is going on.

When a replacement DP is found, dealer's should advise the franchisor and they may be required complete an application pack providing all of the person's information along with how the business structure and operations may be impacted by the change. Dealers should make the candidate aware that franchisor consent is required to a DP appointment and make any employment offer subject to this.

The franchisor may have a pre-determined selection criteria and will be entitled to apply it in the same way they would in considering the grant of a new franchise.



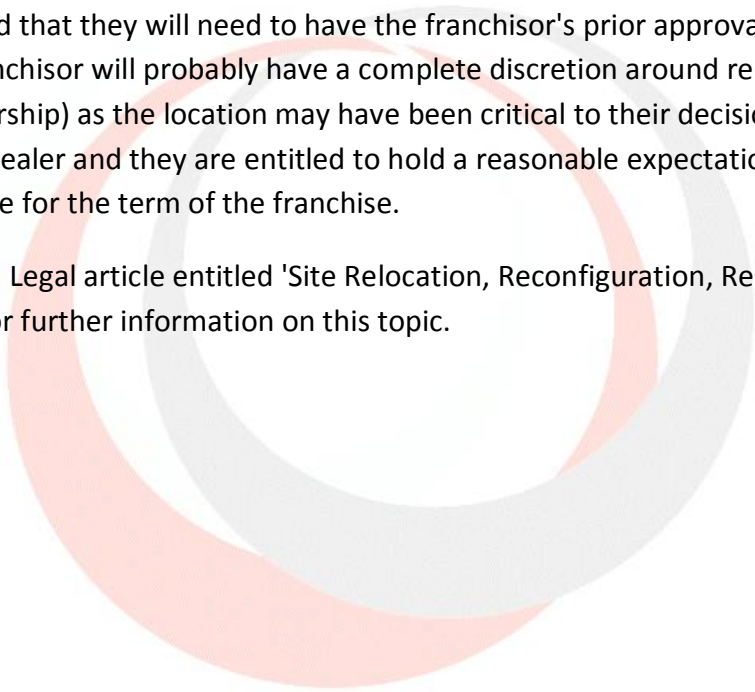
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## **Site Relocation or Reconfiguration**

The site is a key aspect of a dealership and again something which is subject to regular change by dealers in today's automotive world where good sites are at a premium. This is a big issue for multi-franchised dealers responding to the expansion and contraction of different brands' volumes and therefore capacity requirements over time. Dealers may not realise that a franchisor probably has a right to consider and consent to any proposed changes prior to such changes being carried out.

Any well drafted dealer agreement will be expressed to be location specific and dealer's should understand that they will need to have the franchisor's prior approval to any changes of this kind. A franchisor will probably have a complete discretion around relocating (some or all of the dealership) as the location may have been critical to their decision to grant the franchise to this dealer and they are entitled to hold a reasonable expectation that the site will be in this place for the term of the franchise.

See separate Crea Legal article entitled 'Site Relocation, Reconfiguration, Redevelopment or Refurbishment' for further information on this topic.



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## Competitive Franchises

Few issues can arouse the emotions like this one can. In recent years, clauses prohibiting a dealer from operating other automotive franchises have found their way into the dealer agreements of several major brands and, to the shock of many dealers, have been interpreted widely and actually enforced.

With around 70 brands in Australian market, many of whom are relative newcomers, we are seeing a very competitive situation resulting in a tug of war for dealer's attention and resources. Given this environment, if a car company has the benefit of a clause of this nature, it is inevitable that it will be used.

An objective observer can see valid arguments from both sides. Dealers loath the idea of being constrained in their business development and car companies are looking for a single minded focus on their brand.

Whatever your stance on the issue, these clauses do exist in some networks, they are not illegal and Dealers will have to comply with the requirement to obtain franchisor's consent before taking on another brand or agreeing to do so.

If you are a dealer who is refused consent, consult an automotive franchise lawyer to see if there is any legal basis for challenge to the decision.

Conversely car companies should seek legal advice;

- before withholding consent to make sure they are on solid ground and won't live to regret it, and
- if they do provide consent, to draft appropriate conditions around the extent of the approval.

See separate Crea Legal article entitled 'Competitive Franchises ' for further information on this topic.

### **Consequences of not obtaining consent**

First and foremost, the dealer will be in breach of the dealer agreement. Whilst it is possible for a breach notice to be issued, the more likely outcome is for the franchisor to request that the dealer submit a written request for consent to the particular matter. They will then go through the process of considering the matter.

If consent is provided, in reality it will be retrospective and the franchisor should write back to the dealer confirming this and, importantly, clearly and accurately setting out any express limitations on the consent.

If consent is not provided, again the franchisor should write to the dealer confirming this. A franchisor will need to carefully consider whether they wish to provide any reasoning and this will depend on the circumstances. Having the benefit of legal advice would be advantageous in making this decision.

The non-consenting franchisor will then have to work with the dealer to unwind any unauthorised changes which have already occurred. If the dealer is not cooperative, the franchisor will need to consider enforcement options. It may be necessary to formalise the matter with a breach notice at this stage if one was not issued earlier. Your lawyer will advise you of your options and suggest the best course of action.

***For advice on this or any other franchising matter, Steven Crea can be contacted on 0411 777 695 or [steven@crealegal.com.au](mailto:steven@crealegal.com.au).***

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