'Sale of a franchised car dealership'

At some point most dealership businesses will be sold and it is important for dealer's not only to do all the usual things a business should do to keep its affairs in good order but to also understand the unique characteristics of the business sale process of a consequence of one or more franchises being involved.

Unless the dealer agreement specifically requires it, there is no obligation to inform a franchisor that the business is on the market for sale. Notwithstanding this, dealers should consider doing so because the franchisor may have expressions of interest from potential candidates in that region who could be introduced as potential buyers. A dealer may wish to maintain a level of confidentiality in any such communications. Franchisors need to be careful about acting as 'introducer' as there are a number of potential traps in this role.

When a deal of some kind has been done with a buyer (in writing and signed by the parties), the selling dealer will need to apply for the franchisor's consent to the transfer.

The Franchisor then has a period of 42 days to make their assessment and advise the selling dealer of the outcome. A sensible franchisor will ensure that the 42 days doesn't commence until they receive the completed application pack and any other information they reasonably require.

The franchisor will then usually interview the proposed purchaser and may require a presentation from the proposed purchaser to the decision makers in the franchisor business.

The franchisor should have a well established assessment criteria which can be applied to the proposed purchaser. The assessment of the proposed purchaser against the criteria should be well documented by the franchisor as it might be needed later in the event that the decision is challenged and reasonable justification is required.

Part of that assessment will be that the purchaser has the financial capacity to operate the franchise business so it may be important to look at what level of funding for the business has been approved.

Where the source of funding is a finance company which is an associate or related entity of the franchisor, dealers should not assume that if the finance division approves the finance the franchisor will approve the transfer. There will be overlap in each assessment process however different considerations might be given different weight.

If a transfer is approved a franchisor will need to carefully draft all correspondence with both the existing dealer and the proposed purchaser to establish control of the transaction and make sure all of its requirements are pre-conditions of its consent to the sale and will therefore be satisfied on or prior to settlement. There is often a high level of pressure coming from both selling dealer and proposed purchaser who are anxious to settle as soon as possible. They typically think that once they have done a deal, the rest is a formality but there is a significant volume of work, pre-settlement, on settlement and post settlement which should not be overlooked.

One issue which causes confusion is what term length the buyer is entitled to. Assuming the selling dealer's franchise is a fixed term, does the seller only get the remainder of that current unexpired term or a new term commencing on settlement? This will quickly become a 'live issue' if the quantum of the purchaser's offer was predicated on an assumption that it would be a new term and just the unexpired balance is offered by the franchisor.

If the business being sold is a multi-franchise business, the selling dealer and proposed purchaser will obviously need to go through this process with all franchisors and should remember that the sale of business will need to be subject to the consent of all franchisors. It is possible that some franchisors will and some will not approve the same purchaser as they may have different selection criteria. Also, it is possible that they could have quite different requirements as conditions of their consent to the sale.

The occupancy rights to the dealership site are often overlooked in the assessment of a transfer. Obviously the purchaser will need to acquire occupancy rights to the site for the operation of the dealership. If such occupancy rights are by way of lease to the purchaser, a franchisor and purchaser should ensure that the tenure on the lease is of sufficient length (including options) to accommodate the term of the franchise.

The circumstances in which a franchisor is entitled to withhold consent to a transfer are set out in the Franchise Code of Conduct which is applicable to all motor vehicle franchises. The main grounds tend to be that the proposed purchaser does not meet the selection criteria of the franchisor or the proposed purchaser does not have the financial capacity to operate the franchise to the required levels. These can result in quite technical arguments and both franchisor and dealer should seek the assistance of an experienced automotive franchise lawyer to establish the strength of their position in the situation when consent is withheld or consent is provided subject to unreasonably onerous conditions.

For advice on this or any other franchising matter, Steven Crea can be contacted on 0411 777 695 or steven@crealegal.com.au.