

Legal Aspects of Franchising in New Zealand

No Franchising Laws

In New Zealand there are no particular laws in relation to franchising so unlike Australia there is no mandatory disclosure regime. Certainly, there are laws in New Zealand which protect any statements made which are misleading or false and amount to misrepresentations. There is a very positive climate towards franchising which has matured over the last 10 years or so.

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Franchise Association of New Zealand

The Franchise Association of New Zealand (FANZ) was formed in 1996 when New Zealand broke away from Australia and formed its own independent Association which has over 210 members of which approximately 145 are franchisor members. Self-regulation is working in New Zealand and all franchisor members of the FANZ have to comply with the Code of Practice and the Code of Ethics as published by the FANZ. The Code of Practice has four main aims as follows:

1. To encourage best practice throughout franchising.
2. To provide reassurance to those entering franchising that any member displaying the logo of the FANZ is serious and has undertaken to practise in a fair and reasonable manner.
3. To provide the basis of self-regulation for franchising.
4. To demonstrate to everyone the positive will within franchising to regulate itself.

The Code applies to all members including franchisors, franchisees or affiliates such as accountants, lawyers and consultants and all prospective new members of the FANZ must agree to be bound by the Code before they can be considered for membership.

In my opinion, there are three types of franchisors in New Zealand being:

- (a) Those franchisors who belong to the FANZ and agree to adhere to its Code of Practice and Code of Ethics;
- (b) Those franchisors who are ethical but who elect not to belong to the FANZ; and
- (c) Franchisors who are not ethical and who do not belong to the FANZ. It is this last category of franchisors who need to be stopped and their numbers are diminishing thanks in part to the growth of the FANZ and in the franchising grapevine in New Zealand. The public has become far better educated in relation to the purchase of franchises and many potential purchasers are put off now if a franchisor does not belong to the FANZ.

Trans-Tasman Franchising

There are New Zealand franchise systems which are going into Australia and there are Australian franchise systems entering New Zealand. If an Australian franchisor wishes to enter New Zealand that franchisor must choose the most suitable method which will include master franchising, direct or unit franchising, area development franchising, conversion franchising or joint ventures. The most common by far is either master franchising or direct franchising and because New Zealand has a population of about 4.2 million people it is usual for an Australian franchisor to appoint one master franchisee for the whole of the country.

Taxation Aspects

A large number of Australian franchisors are happy to appoint franchisees in New Zealand and to use the direct franchising method. In my opinion, any Australian franchisor needs to have New Zealand legal advice from a lawyer experienced in franchising and expert taxation advice from a New Zealand accountant. Some Australian franchisors form a new company in New Zealand which is a wholly owned subsidiary of the Australian company and the New Zealand company issues Franchise Agreements to franchisees. However, some Australian franchisors use the Australian company and issue a Unit Franchise Agreement to a New Zealand franchisee.

We have Double Tax Agreements with many countries overseas, including Australia, USA and the UK. Most Agreements limit the foreign country's tax on royalty payments to 10%. Generally, foreign taxes are withheld at the rate of 10% to 15% on royalties and licence fees paid from offshore entities to New Zealand tax residents. It is important to obtain expert taxation advice.

Franchise Agreement

Franchise Agreements in New Zealand are usually much shorter than their Australian counterparts. Having said that, most Australian franchisors wish to use their current Franchise Agreement in New Zealand with necessary modifications. The clauses which usually need changing include restraint of trade covenants; stamp duty/taxation aspects; dispute resolution; governing law; compliance with legislation and a few others. If an Australian franchisor wishes to join the FANZ then it will need to publish a Disclosure Document in New Zealand and that document together with the Franchise Agreement which must have been changed for New Zealand conditions are submitted to the FANZ for approval.

Dispute resolution is working very well in New Zealand and it is mandatory for franchisor members of the FANZ to offer dispute resolution as a means of resolving disagreements.

In summary, New Zealand is a vibrant and exciting market for franchising which is growing year by year. Because a number of New Zealand franchise systems have reached maturity, some of those are going overseas. From an Australian franchisor's point of view, New Zealand is an attractive market to enter as the laws are similar, the government and economy are stable and it is a safe place to live. Small to medium sized businesses are growing and franchising is considered to be a positive and effective way of developing a system and allowing others to own part of it provided they comply with the relevant Franchise Agreement.

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