

# New Zealand

Stewart Germann

Stewart Germann Law Office

## MARKET OVERVIEW

### Franchising in the market

- 1 How widespread is franchising in your jurisdiction? In which sectors is franchising common? Are there any economic or regulatory issues in the market that are more or less hospitable to franchising or make it economically viable in your jurisdiction?

Franchising is very active in New Zealand. The last survey carried out in 2021 by Massey University and Griffith University confirmed that there are 590 business-format franchise systems operating. The sectors in which franchising operates include administration and support services (34 per cent), other services (14 per cent), retail trade (non-food) (11 per cent), accommodation and food retail (11 per cent), and transport, postal and warehousing (9 per cent).

### Associations

- 2 Are there any national or local franchise associations? What is their role in franchising, including any impact on laws or regulations? Are there any rules of conduct or membership requirements?

The Franchise Association of New Zealand Incorporated (FANZ) was formed in July 1996 and all members must comply with the FANZ Code of Practice and the Code of Ethics (the Code).

### Compliance

All members must attest that they will comply with the Code and members must renew their certificate of compliance on an annual basis.

### Disclosure

A disclosure document must be provided to all prospective franchisees at least 14 days prior to signing a franchise agreement. This disclosure document must be updated by franchisors every two years and must provide information including:

- a company profile;
- details of the officers of the company;
- an outline of the franchise;
- full disclosure of any payment or commission made by a franchisor to any adviser or consultant in connection with a sale;
- listing of all components making up the franchise purchase;
- references; and
- projections of turnover and possible profitability of the business.

### Certification

The Code requires franchisors to give franchisees a copy of the Code and the franchisee must then attest that he or she has obtained legal advice before signing the franchise agreement.

### Cooling-off period

All franchise agreements must contain a minimum seven-day period from the date of the agreement during which a franchisee may change its mind and terminate the purchase. The cooling-off period does not apply to renewals of term or resales by franchisees.

### Dispute resolution

The Code sets out a dispute resolution procedure that can be used by both franchisor and franchisee to seek a more amicable and cost-effective solution to disputes. The Code requires all members to try to settle disputes by mutual negotiation in the first instance. This process does not affect the legal rights of both parties to resort to litigation.

### Advisers

All advisers must provide clients with written details of their relevant qualifications and experience, and they must respect the confidentiality of all information received.

### The Code of Ethics

All members must subscribe to the Code of Ethics, which sets out the way in which the Code of Practice should be interpreted.

## BUSINESS OVERVIEW

### Types of vehicle

- 3 What forms of business entities are relevant to the typical franchisor?

Most franchisors conduct business in New Zealand as an incorporated company. Sole traders and partnerships are used and occasionally a franchisor may be a trading trust. Joint ventures are uncommon in New Zealand.

### Regulation of business formation

- 4 What laws and agencies govern the formation of business entities?

The Companies Act 1993 applies to all companies incorporated in New Zealand and to companies with an overseas shareholding. It does not apply to companies incorporated in another country, unless such a company has been registered as an overseas company on the New Zealand Register of Companies. If a trading trust is used, then the Trusts Act 2019 applies. The relevant agency is the Ministry of Business, Innovation and Employment.

## Requirements for forming a business

### 5 | Provide an overview of the requirements for forming and maintaining a business entity.

A new company can be incorporated online at [www.companies.govt.nz](http://www.companies.govt.nz). The first step is to obtain name approval. Following this, an application to incorporate must be completed, naming all the directors and shareholders of the company, who must give written consent to act as directors and to become shareholders. The address of the registered office of the company and the address for service must be provided, and both must be New Zealand addresses.

All new companies must be incorporated online. The name approval fee is NZ\$11.50 and the incorporation fee is NZ\$131.55. Once an overseas shareholder holds 25 per cent or more of the shares in a company, that company must file financial accounts and be audited. Otherwise, if the shareholders pass a unanimous resolution that no auditor need be appointed then the company does not have to be audited. When incorporating a new company it is wise to have a separate constitution, otherwise the provisions in the Companies Act 1993 will apply. For example, any pre-emptive rights will only exist by way of a separate constitution and not in reliance upon the Companies Act 1993.

A company must comply with the Companies Act 1993 and the Financial Reporting Act 2013. In relation to the formation of a company, there have been changes (which came into effect on 1 May 2015) as follows:

- all companies incorporated in New Zealand must have a director who lives in New Zealand, or lives in Australia and who is also a director of an Australian-incorporated company; and
- all directors must provide their place of birth and date of birth.

In relation to maintaining records with the Companies Office, company authority will be granted to directors and also to certain authorised persons (such as the person who incorporates the company online) allowing them to maintain up-to-date company information on the Register of Companies (such as resignation or appointment of directors, change of addresses and filing annual returns).

## Restrictions on foreign investors

### 6 | What restrictions apply to foreign business entities and foreign investment?

Pursuant to the Financial Reporting Act 2013, a company must be audited and must file financial statements if a large foreign business entity holds 25 per cent or more of the shareholding in a company, and, at the balance date for the two preceding account periods:

- the total assets for the company and its subsidiaries were more than NZ\$20 million; or
- the total revenue was more than NZ\$10 million.

In relation to foreign investment, there are no barriers to funds coming into New Zealand. If a foreign entity wishes to buy land in New Zealand and the land is greater than five hectares in area or will result in overseas investment in other 'sensitive' land (eg, foreshore or seabed, public parks and historic land), an application must be made to the Overseas Investment Office for consent to the purchase before it can proceed.

## Taxation

### 7 | What aspects of the tax system are relevant to franchisors? How are foreign businesses and individuals taxed?

The corporate tax rate for both resident and non-resident companies is 28 per cent. New Zealand has tax treaties with many countries – for example, in relation to Australia, Singapore, Japan and the United

States the rate of non-resident withholding tax is 5 per cent for royalties. In relation to the United Kingdom and Canada, the rate is 10 per cent, and for Fiji, Indonesia, Malaysia and the Philippines, the rate is 15 per cent. The non-resident withholding tax must be deducted from all interest and royalty income before funds are repatriated. The over-seas entity will be able to claim a tax deduction in the relevant country because a non-resident withholding tax certificate will be provided. If dividends are repatriated, a non-resident withholding tax of 15 per cent must be deducted.

## Labour and employment

### 8 | Are there any relevant labour and employment considerations for typical franchisors?

The Employment Relations Act 2000 applies in New Zealand. Union membership is voluntary, but there must be a written employment contract in relation to every employee of a franchisee. Strict procedures must be followed before employment can be terminated and any breach of these procedures could give rise to a personal grievance action that may cost the employer many thousands of dollars. Any properly drafted franchise agreement should contain a clause stating that a franchisor and a franchisee are not in a relationship of employer or employee, but that any franchisee must comply with New Zealand employment law.

## Intellectual property

### 9 | How are trademarks and other intellectual property and know-how protected?

The Trade Marks Act 2002 is the relevant statute and all trademarks must be registered in New Zealand. The relevant body to deal with this is the Intellectual Property Office of New Zealand. Trademark registrations last for 10 years and must then be renewed. Know-how is protected by normal intellectual property laws and would be deemed to be included in the definition of trade secrets; any properly drafted franchise agreement will include know-how in the definition of intellectual property and should contain a robust intellectual property clause.

## Real estate

### 10 | What are the relevant aspects of the real estate market and real estate law? What is the practice of real estate ownership versus leasing?

All real estate in New Zealand is recorded by Land Information New Zealand, which provides a registered title for each piece of land. Titles can be freehold, leasehold, strata, cross-lease or some combination. If the property being purchased is on a unit title (which would mean that there would be a stratum estate of freehold under the Unit Titles Act 2010), an overseas franchisor can own land. However, if the land is greater than five hectares in area or will result in overseas investment in other 'sensitive' land (eg, foreshore or seabed, public parks and historic land), an application must be made to the Overseas Investment Office for consent to the purchase before it can proceed.

Franchisors can lease commercial buildings without restriction. If real estate agents are engaged, they must comply with the Real Estate Agents Act 2008. Franchisors who request real estate agents to find premises for them will have to pay an agreed commission to the relevant agents. The Property Law Act 2007 is also relevant in relation to real estate and must be consulted.

## Competition law

### 11 | What aspects of competition law are relevant to the typical franchisor in your jurisdiction? How is competition law enforced in the franchising sector?

The Commerce Act 1986 provides the regulatory framework relating to anticompetitive conduct and the Commerce Commission is charged with policing that framework. The Commerce (Cartels and Other Matters) Amendment Act 2017 made significant changes and replaced the previous prohibition on price-fixing between competitors with an expanded prohibition on cartel provisions, which extends to market allocations and output restrictions as well as to price-fixing by competitors.

The New Zealand cartel prohibition is very wide and will have a strong impact on franchise networks. Some additional clauses must be inserted into franchise agreements and there should be explanations as to why certain clauses are necessary. Consideration must be given to cartel clauses in franchise agreements. For example, clauses that set or influence prices, restrict output, or allocate markets will be impacted. The possibility that alternative arrangements might achieve the same or a similar commercial outcome as a cartel clause should also be considered. Another consideration is whether the collaborative activity exemption or the vertical activity exemption would apply. Expert legal advice should be obtained in relation to this act.

There will not be a cartel arrangement in place where parties are not in competition with each other. In most franchise systems, the franchisor will not be in competition with its own franchisees, but that is not always the case. For example, a franchisor that owns its own outlet might be found to be in competition with franchisees. Similarly, where a franchisor sells online directly to the end consumer, yet at the same time has franchisees who sell to those consumers, the franchisor may be in competition with its franchisees. There may also be instances where franchisees are in competition with each other. Where a franchisor is in competition with a franchisee or where franchisees are found to be in competition with each other, there will be a competitive relationship, so the franchisor needs to be cognisant that there may be provisions in its franchise agreements that amount to cartel provisions.

Consideration must also be given to the Commerce (Criminalisation of Cartels) Amendment Act 2019, which came into force on 8 April 2021 and introduced a new criminal offence for cartel conduct. The proposed new criminal sanctions reflect the covert nature of cartels and the harm they cause to consumers and the economy.

The Commerce Act 1986 provides a number of statutory exceptions that would not constitute a cartel arrangement and may be pro-competitive. These exceptions relate to collaborative activities (for example, joint ventures or franchise arrangements), joint buying, vertical supply contracts and specified liner shipping arrangements. There are no defences for mistakes of fact relating to the elements of joint buying or of promotion and vertical supply contracts. Therefore, it will be possible in the future for a director of a franchisor company to be criminally liable under the Commerce Act 1986 for a cartel offence. For an individual who commits an offence, the penalty on conviction could be imprisonment for a term not exceeding seven years or a fine not exceeding NZ\$500,000, or both. For a company that commits an offence, the penalty could be up to NZ\$10 million.

## OFFER AND SALE OF FRANCHISES

### Legal definition

#### 12 | What is the legal definition of a franchise?

There is no franchise-specific legislation in New Zealand, so there is no legal definition of a franchise. However, the Franchise Association

of New Zealand Incorporated (FANZ) was formed in July 1996 and all members must comply with the FANZ Code of Practice. The Code of Practice, in section 2.1, defines 'franchise' as a business operated as a franchise, and that term is further defined in the rules as follows.

*'Franchise' means the method of conducting business under which the right to engage in the offering, selling or distributing of goods or services within New Zealand includes or is subject to at least the following features:*

- *the grant by a Franchisor to a Franchisee of the right to the use of a Mark, in such a manner that the business carried on by the Franchisee is or is capable of being identified by the public as being substantially associated with a Mark identifying, commonly connected with or controlled by the Franchisor;*
- *the requirement that the Franchisee conducts the business, or that part of the business subject to the Franchise Agreement, in accordance with the marketing, business or technical plan or system specified by the Franchisor; and*
- *the provision by the Franchisor of ongoing marketing, business or technical assistance during the term of the Franchise Agreement.*

## Laws and agencies

### 13 | What laws and government agencies regulate the offer and sale of franchises?

No government agencies regulate the offer and sale of franchises. However, there are a number of laws that must be complied with, including the Commerce Act 1986, the Fair Trading Act 1986 and the Real Estate Agents Act 2008. If a broker is used by a franchisor to assist with the sale of franchises, then the following procedures will be relevant.

All real estate in New Zealand is recorded by Land Information New Zealand, which provides a registered title for each piece of land. Titles can be freehold, leasehold, strata, cross-lease or some combination. If the property being purchased is on a unit title (which would mean that there is a stratum estate of freehold under the Unit Titles Act 2010), an overseas franchisor can own land. However, if the land is greater than five hectares in area or will result in overseas investment in other 'sensitive' land (eg, foreshore or seabed, public parks and historic land), an application must be made to the Overseas Investment Office for consent to the purchase before it can proceed.

Franchisors can lease commercial buildings without restriction. If real estate agents are engaged, they must comply with the Real Estate Agents Act 2008. Franchisors that request real estate agents to find premises for them must pay an agreed commission to the relevant agents. The Property Law Act 2007 is also relevant in relation to real estate and must be consulted.

## Principal requirements

### 14 | What are the principal requirements governing the offer and sale of franchises under the relevant laws?

A franchisor can offer a new franchise territory (a greenfield franchise) directly to a franchisee without having to comply with the Real Estate Agents Act 2008 provided that it is selling the franchises on its own behalf and not acting on behalf of a third party. If the franchisor appoints a real estate agent, then the real estate agent would need to be licensed under the Real Estates Agents Act 2008.

If a franchisee or business broker wishes to sell an existing franchise to a third party (who would be the incoming franchisee), then the business broker must be a real estate agent licensed under the Real Estate Agents Act 2008.

### Franchisor eligibility

15 | Must franchisors satisfy any eligibility requirements in order to offer franchises? Are there any related practical issues or guidelines that franchisors should consider before offering franchises?

There is no law in New Zealand that would create such a requirement. To become a member of FANZ, the association's rules require a franchisor member to have a written franchise agreement and disclosure document, be financially sound and have the appropriate authorities to franchise, and provide the board with such documentary verification as it requires to support membership.

### Franchisee and supplier selection

16 | Are there any legal restrictions or requirements relating to the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers? What practical considerations are relevant when selecting franchisees and suppliers?

There are no laws, regulations or government policies that provide any restrictions in terms of this question. If a franchisor is a member of FANZ, it must provide any franchisee with its disclosure document, and the FANZ Code of Practice and Code of Ethics. The Code of Practice states that 'all members shall act in an ethical, honest and lawful manner and endeavour to pursue best franchise practice'. It also provides a cooling-off period for the franchisee and sets out a dispute resolution process to be followed.

### Pre-contractual disclosure – procedures and formalities

17 | What procedures and formalities for pre-contractual disclosure are required or advised in your jurisdiction? How often must the disclosures be updated?

There are no franchising laws requiring pre-contractual disclosure but great care must be taken to ensure that all representations are true and do not amount to misrepresentations that will fall foul of the Fair Trading Act 1986. A member of FANZ must provide a potential franchisee with its disclosure document at least 14 days before the franchise agreement is executed and the disclosure document must be updated at least annually by the franchisor.

### Pre-contractual disclosure – content

18 | What information is the disclosure document required or advised to contain?

The disclosure document must provide:

- the name, registered office and physical business address of the franchisor;
- the names, job descriptions and qualifications (if any) of the franchisor's directors, executive officers or principals;
- a detailed curriculum vitae of the business experience of the franchisor and any related entities, and those of its directors, secretary, executive officers or principals;
- a viability statement with key financial information of the franchisor;
- details of any bankruptcies, receiverships, liquidations, placements in administration or appointment of a statutory manager, or materially relevant debt recovery;
- details of any criminal, civil or administrative proceedings within the past five years;
- a summary of the main particulars and features of the franchise;
- a list of the components of the franchise purchase;

- details of any financial requirements by the franchisor of the franchisee;
- details of existing franchises, number of outlets and franchisor-owned outlets, franchises terminated over the past two years, and any unresolved litigation; and
- other information listed in the FANZ Code of Practice.

### Pre-sale disclosure to sub-franchisees

19 | In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

Legally, none is required. However, if a franchisor belongs to FANZ, it must comply with the Code of Practice and publish a disclosure document. A sub-franchisor would have to provide a disclosure document to a potential sub-franchisee if that sub-franchisor were a member of FANZ.

### Due diligence

20 | What due diligence should both the franchisor and the franchisee undertake before entering a franchise relationship?

A representative of the franchisor will need to meet a potential franchisee a number of times. It is important for the potential franchisee to meet the directors of the franchisor company as the parties will be entering into a franchise relationship. The franchisee must obtain independent legal and accounting advice and the franchisor's disclosure document will contain a lot of useful and essential information about the franchisor. The franchisee must ask relevant questions and obtain answers to any statements contained in the disclosure document. The franchisee should speak to at least six existing franchisees in the system and ask them how they find the franchisor, the training, the support and other relevant information.

### Failure to disclose – enforcement and remedies

21 | What actions may franchisees or any relevant government agencies take in response to a franchisor's failure to make required disclosures? What legal remedies are available? What penalties may apply?

If a sub-franchisor misrepresented the position without recourse to a franchisor, the franchisor should not be liable in any way. If a representation is made by a director or employee of the franchisor or the sub-franchisor, the protection of a limited liability company may not protect that individual, who may be personally liable pursuant to the Fair Trading Act 1986. There is a specific provision in that act in relation to employees being liable for personal misstatements while in their employment. There may also be liability pursuant to the Contract and Commercial Law Act 2017.

### Failure to disclose – apportionment of liability

22 | In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

If a franchisee is permitted to enter into a sub-franchise agreement with a sub-franchisee, then the franchisee would be liable for any violations or breaches of the disclosure document. The franchisor would not

be liable in any way unless it has shared misleading information to the franchisee that is proven to be incorrect.

### General legal principles and codes of conduct

- 23 | In addition to any laws or government agencies that specifically regulate offering and selling franchises, what general principles of law affect the offer and sale of franchises? What industry codes of conduct may affect the offer and sale of franchises?

Contractual principles under the law of contract would apply to the first question. The second question is not applicable where a franchisor is a member of FANZ, in which case both the Code of Practice and the Code of Ethics would apply.

### Fraudulent sale

- 24 | What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises?

Franchisees could make a complaint to the Commerce Commission and request an investigation in relation to such activity. Such protection differs due to the fact that fraudulent or deceptive conduct should not occur in relation to franchise sales. Also, such franchisees could bring a civil action against the franchisor and it may be possible for the directors of the franchisor company to be called as separate defendants as they could be personally liable for damages if the franchisor company has no assets. This protection does not differ from the protection provided pursuant to existing civil laws in New Zealand.

## FRANCHISE CONTRACTS AND THE FRANCHISOR/FRANCHISEE RELATIONSHIP

### Franchise relationship laws

- 25 | What laws regulate the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

No specific laws regulate the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect.

### Operational compliance

- 26 | What mechanisms are commonly incorporated in agreements to ensure operational consistency and adherence to brand standards?

The franchisee must allow the franchisor (or its representative) to visit the premises at any reasonable time during business hours. The franchisee must also keep and maintain books of account and financial records, and complete financial accounts as may be prescribed by the franchisor. The franchisee shall permit the franchisor to inspect or obtain copies of any written records during normal business hours. If the franchisor considers that there is any irregularity in the books of account, then it may nominate an independent auditor to carry out an audit. It is also important to check whether there is a separate marketing bank account and how this will be controlled.

### Amendment of operational terms

- 27 | May the franchisor unilaterally change operational terms and standards during the franchise relationship?

Yes. The operating manuals can be updated and changed by the franchisor from time to time. All changes should be reasonable and in the

best interests of the system, and all updates to the manuals are mandatory for all franchisees.

### Policy affecting franchise relations

- 28 | Do other government or trade association policies affect the franchise relationship?

No government or trade association policies affect the franchise relationship.

### Termination by franchisor

- 29 | In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Events that could lead to termination must be specified in the franchise agreement. There must be some default on the part of the franchisee for a valid termination to be confirmed. Also, it is usual and prudent for a notice of breach of franchise agreement to be issued by a franchisor to a specific franchisee and for the time limit for remedying the breach to have expired before the termination takes place. If a termination is unlawful, a franchisee would be able to seek redress from a court, with the remedies being either damages or an order from the court that the franchise be reinstated to the franchisee, which may then continue to conduct business pursuant to the franchise agreement.

### Termination by franchisee

- 30 | In what circumstances may a franchisee terminate a franchise relationship?

A franchisee may terminate a franchise relationship only if the franchisor has engaged in misrepresentations or fraudulent conduct as an inducement for the franchisee to enter into the franchise agreement in the first place. Termination would be pursuant to specific sections as set out in the Contract and Commercial Law Act 2017. Further, if a franchise agreement specifically allows the franchisee the right to terminate on, for example, six months' notice, the franchisee would be able to give such notice if required to exit the franchise but would lose the right to sell its business and recoup the upfront franchise fee together with any goodwill paid to the franchisor.

### Renewal

- 31 | How are renewals of franchise agreements usually effected? Do formal or substantive requirements apply?

All rights of renewal must be contained in the franchise agreement, which would normally set out the procedure for the franchisee to activate a renewal of term. Normally the franchisee must not have breached the agreement during the current term and the renewal option is normally exercisable by a franchisee giving the franchisor notice in writing not less than three months and not more than six months prior to the end of the current term. It is usual for a renewal fee to be paid by the franchisee to the franchisor and the amount of the renewal fee should be stated in the franchise agreement.

### Refusal to renew

- 32 | May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

A franchisor may refuse to renew its franchise agreement with a franchisee if some provisions in the franchise agreement allow it to do so.

If a franchisee has breached the franchise agreement in a material way during the term, or if two or more breach notices have been issued within a 12-month period, the franchisor may be able to block any renewal, provided the franchise agreement contains such a relevant clause. Further, if a franchisee is in default at the time of purporting to renew a franchise agreement, the franchisor could prevent such renewal.

### Transfer restrictions

33 | May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

A franchisor may restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity provided the franchise agreement contains a right of first refusal clause in favour of the franchisor. Further, any transfer or sale of a franchise by a franchisee is always subject to the consent of a franchisor, who should be able to say no without giving any reasons. The precise wording in any assignment or transfer clause is very important and if a franchise agreement contains such words as 'with such consent not to be unreasonably or arbitrarily withheld', then it would be harder for a franchisor to refuse consent.

### Fees

34 | Are there laws or regulations affecting the nature, amount or payment of fees?

There are no laws or regulations affecting the nature, amount or payment of fees, but should an unfair interest rate be imposed – for example, 30 per cent or 40 per cent – the equitable doctrine of unjust enrichment may be available to assist a disgruntled and unfairly treated franchisee.

The Supreme Court in New Zealand has ruled that a penalty clause will be enforceable unless it is 'out of proportion' with the innocent party's legitimate interests in having the contract performed. The relevant case is *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53.

### Usury

35 | Are there restrictions on the amount of interest that can be charged on overdue payments?

There are no restrictions on the amount of interest that can be charged on overdue payments. However, any ridiculous or oppressive amount is likely to be challenged by a franchisee or a franchisee's lawyer. If a franchisor wants to charge such a high rate of interest that it would be in the nature of an unjust penalty, then that rate of interest may be unenforceable by the court. The details of the case *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53 may be useful for reference.

### Foreign exchange controls

36 | Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

Laws and regulations exist restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic country. In all cases, non-resident withholding tax would have to be deducted. New Zealand has double taxation treaties in relation to many countries, so any tax paid in New Zealand by an overseas franchisor in relation to the repatriation of income should be able to be claimed as a tax credit in the franchisor's foreign country.

### Confidentiality covenant enforceability

37 | Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are important and they are enforceable as it is essential for a franchisor to be able to protect the integrity of all proprietary information.

### Good-faith obligation

38 | Is there a general legal obligation on parties to deal with each other in good faith during the term of the franchise agreement? If so, how does it affect franchise relationships?

There is no legal obligation for parties to act in good faith enshrined in New Zealand legislation. However, it is common and to be encouraged for good faith clauses to be inserted in all franchise agreements that apply to both franchisor and franchisee. The courts in New Zealand are moving towards implying a duty of good faith, but this has not happened yet. Both parties should act loyally and in good faith towards each other at all times, as that is the essence of any franchise relationship.

### Franchisees as consumers

39 | Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

New Zealand's current consumer law may cover business-to-business relationships and accordingly franchisors must contract out of consumer protection legislation such as the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 to the fullest extent possible.

The Fair Trading Act 1986 (FTA) was amended by the Fair Trading Amendment Act 2013, and further, the Fair Trading Amendment Act 2021 comes into force on 16 August 2022. The FTA has new obligations and restrictions relating to unfair contract terms, unsubstantiated representations, extended warranties, shill bidding, unsolicited goods and services, uninvited direct sales and lay-by sales, consumer information standards, product safety and product recalls, internet sales and auctions and auctioneers. The FTA also has a new right to contract out of certain provisions of the FTA in business contracts. Penalties for contravening the FTA go up to NZ\$200,000 for individuals and NZ\$600,000 for companies.

The Consumer Guarantees Act 1993 (CGA), which was amended by the Consumer Guarantees Amendment Act 2013, includes new guarantees relating to delivery and the supply of electricity and gas. It also has new obligations and restrictions relating to:

- contracting out of the CGA;
- collateral credit agreements; and
- indemnification of gas and electricity retailers.

### Language of the agreement

40 | Must disclosure documents and franchise agreements be in the language of your country?

There is no legal requirement for disclosure documents and franchise agreements to be written in English, but since the major language of New Zealand is English, all parties would insist that English is used.

### Restrictions on franchisees

41 | What types of restrictions are commonly placed on the franchisees in franchise contracts?

A franchise agreement imposes certain restrictions on the franchisee and some examples include the following:

- There may be a defined exclusive territory with a map attached or a non-exclusive territory.
- There is normally an obligation on the franchisee to use the approved suppliers as stipulated by the franchisor.
- The agreement will normally contain a restraint on competition for a certain area and duration.
- The agreement should contain a robust dispute resolution clause to be activated if there is a dispute between the parties. Normally mediation is recommended but some agreements require arbitration. This is a matter of contract.
- The agreement will contain a governing law clause and it will be subject to the exclusive jurisdiction of the courts in a stated country.

All franchise agreements must comply with the Commerce Act 1986 and the Fair Trading Act 1986. It is very important for both franchisors and franchisees to understand the implications raised by the Commerce Act 1986.

Key changes introduced in the Commerce (Criminalisation of Cartels) Amendment Act 2019 are detailed below.

### Cartel conduct restrictions

New cartel conduct restrictions are as follows:

- the previous restriction on competitors fixing prices; and
- new restrictions on competitors jointly restricting output and market allocation.

These new restrictions will have the most far-reaching impact on business.

### Collaborative activity exemptions

This is a new cartel exemption for permitted collaborative activities. Competitors will be able to seek clearance for proposed collaborative activities, providing certainty that the proposed activities will not breach the Commerce Act 1986.

### Vertical supply contract exemption

This is a new exemption for cartel provisions that are included in vertical supply contracts where certain requirements are met.

### International liner shipping exemption

This is a new exemption for international liner shipping from the prohibitions against anticompetitive agreements and cartels.

Because the new cartel legislation impacts upon key areas contained in franchise agreements, it is very important to explain the basis of a number of clauses that are commonly inserted in franchise agreements. Such clauses include approved products, approved services, restraint area, restraint period and location of a franchised operation.

### Courts and dispute resolution

- 42 | Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

The lowest level court in New Zealand is the district court, which can determine claims involving up to NZ\$350,000. For claims exceeding NZ\$350,000, the High Court of New Zealand is the relevant body. Appeals from the High Court of New Zealand go to the Court of Appeal of New Zealand, which sits in Wellington. Appeals from the Court of Appeal go to the Supreme Court of New Zealand, which also sits in Wellington.

If a franchisor belongs to FANZ, the franchise agreement must contain a dispute resolution clause. The Code of Practice prescribes that mediation is mandatory, and it has a high chance of success.



### Stewart Germann

stewart@germann.co.nz

Shortland Street  
PO Box 1542  
Auckland 1140  
New Zealand  
Tel: +64 9 308 9925  
Fax: +64 9 308 9922  
www.germann.co.nz

There is also the Arbitration Act 1996. A domestic franchisor who is not a member of FANZ can resort to court action, but the courts usually require an attempt to resolve the dispute by way of mediation. A foreign franchisor could issue proceedings in New Zealand and sue a particular franchisee, but again, the courts may require an attempt to settle any dispute by way of mediation. The governing law in any franchise agreement is important and most foreign franchisors require the governing law to be that of their home country. At the same time, it is recommended that foreign franchisors should stipulate that the governing law should be the law of New Zealand, as it is far easier to take swift action in relation to a defaulting master franchisee or franchisee through the New Zealand courts and to apply New Zealand law.

There is also the Disputes Tribunal whereby disputes between parties can go to a hearing before a referee with no lawyer representation allowed. The maximum amount of any claim is NZ\$30,000.

### Governing law

- 43 | Are there any restrictions on designating a foreign governing law in franchise contracts in your jurisdiction? How does the governing law affect the contract's enforceability?

There are no such restrictions. The choice of governing law is very important. If New Zealand is chosen as the jurisdiction where the contract is to be enforced and a judgment is obtained, then the Reciprocal Enforcement of Judgments Act 1934 applies.

### Arbitration – advantages for franchisors

- 44 | What are the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction? Are any other alternative dispute resolution (ADR) procedures particularly favoured or disfavoured in your jurisdiction?

The principal advantages of arbitration include the fact that a hearing date would usually be much earlier than a court hearing date, the costs should be lower than the costs of litigation, any arbitration is confidential between parties so the result will not appear in the press or elsewhere, and it should be more informal than litigation in the High Court. Disadvantages include the fact that one party may want publicity but will not get it and enforcement of the arbitral award that may have to go down the path of litigation. Mediation is strongly favoured over arbitration in New Zealand and the FANZ Code of Practice sets out mediation in great detail.

**National treatment**

45 | In what respects, if at all, are foreign franchisors treated differently (legally, or as a practical matter) from domestic franchisors?

Foreign franchisors must still comply with the laws of New Zealand insofar as they affect them. The only way they would be treated differently from domestic franchisors may be in the area of taxation, where income of any sort that is to be repatriated from New Zealand to an overseas jurisdiction will be subject to non-resident withholding tax.

**UPDATE AND TRENDS****Legal and other current developments**

46 | Are there any proposals for new legislation or regulation, or to revise existing legislation and regulation? Are there other current developments or trends to note?

The Fair Trading Amendment Act 2021 was passed to extend the existing prohibition on Unfair Contract Terms (UCT) to standard form small trade contracts worth under NZ\$250,000 (including GST) and introduced a new statutory prohibition on unconscionable conduct.

These changes will come into force on 16 August 2022. If a standard form small trade contract is signed prior to this date then the UCT regime will not apply however if the contract is amended or varied after 16 August 2022 and it falls within the definition of small trade contracts then the new amendments will apply to that varied/renewed contract.

Trends in franchising in New Zealand suggest that more multi-unit ownerships by franchisees will evolve.