

International **Comparative** Legal Guides



Franchise **2020**

A practical cross-border insight into franchise law

Sixth Edition

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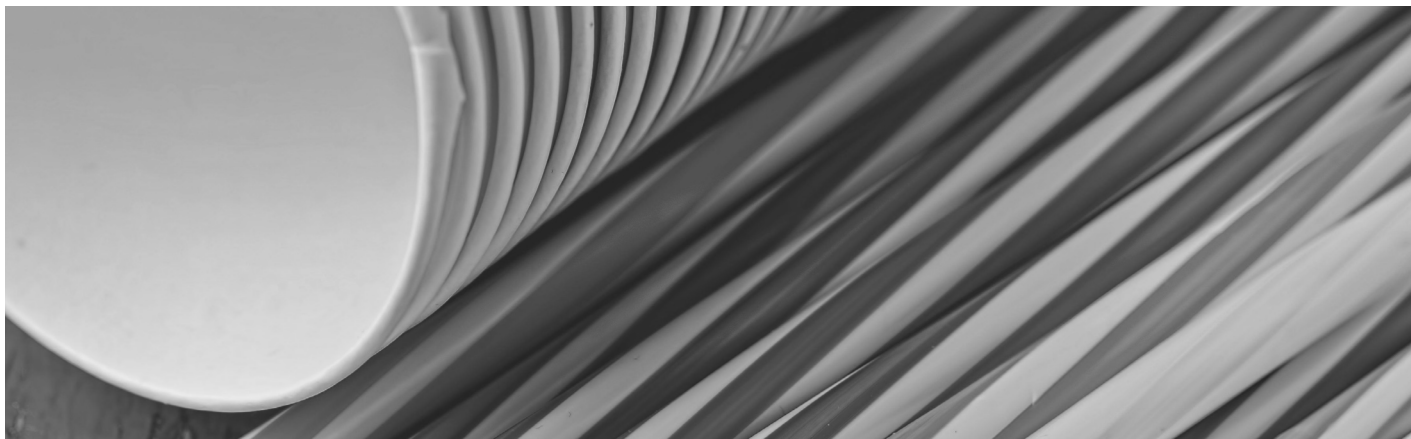
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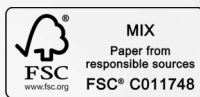
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1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

There is no legal definition of franchising in New Zealand.

However, a franchisor that is a member of the Franchise Association of New Zealand (FANZ) must comply with the Code of Practice and Code of Ethics.

Under the Rules of the FANZ, a franchise is defined as a 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 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.
- The requirement by the franchisor to provide ongoing marketing, business or technical advice.

1.2 What laws regulate the offer and sale of franchises?

There are no specific laws regulating the offer and sale of franchises in New Zealand. However, many laws have an impact on franchising, including the:

- Commerce Act 1986.
- Commerce (Cartels and other Matters) Amendment Act 2017.
- Companies Act 1993.
- Consumer Guarantees Act 1993.
- Contracts and Commercial Law Act 2017.
- Defamation Act 1992.
- Employment Relations Act 2000.
- Fair Trading Act 1986.
- Health and Safety at Work Act 2015.
- Human Rights Act 1993.
- Personal Property Securities Act 1999.
- Privacy Act 1993.
- Property Law Act 2007.
- Real Estate Agents Act 2008.
- Resource Management Act 1991.
- Trade Marks Act 2002.
- Unsolicited Electronic Messages Act 2007.
- Advertising Standards Authority Codes.

Pyramid selling schemes are illegal in New Zealand (section 24, Fair Trading Act 1986). The Financial Markets Conduct Act 2013 is the main statute governing the sale of investments and securities.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a “franchisee” for purposes of any franchise disclosure or registration laws?

Yes, but please note that we have no franchise disclosure or registration laws in New Zealand.

1.4 Are there any registration requirements relating to the franchise system?

There are no registration requirements so all franchisors do not need to be registered with a professional, regulatory or government body before setting up a franchise system.

However, a franchisor that wishes to join the FANZ must:

- Complete the appropriate application form.
- Pay the prescribed fee.
- Submit its franchise agreement and disclosure document for approval by an independent scrutineer who will check that the documents comply with the FANZ Rules and Code of Practice.

Any trade marks must be registered in accordance with the Trade Marks Act 2002. It is prudent to have the IP owned by a company that is not the New Zealand franchisor, and to have an IP licence agreement prepared and executed between the trade mark owner entity and the franchisor.

1.5 Are there mandatory pre-sale disclosure obligations?

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. However, a member of the FANZ must provide a potential franchisee with its disclosure document at least 14 days before the franchise agreement is executed.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

If a franchisor is a member of the FANZ then it must disclose all obligations to sub-franchisees. However, this does not apply if a franchisor is not a member of the FANZ.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

The format of a disclosure document is set out in the Code of Practice (for those that are members of the FANZ) and sets out company information, financial information, payments required and a brief outline of the main clauses of the franchise agreement. The disclosure document must be updated at least annually by the franchisor.

1.8 What are the consequences of not complying with mandatory pre-sale disclosure obligations?

There are no mandatory pre-sale disclosure obligations in New Zealand.

1.9 Are there any other requirements that must be met before a franchise may be offered or sold?

Before a franchise may be offered or sold, a franchisor requires a franchise agreement, which must be in writing. The agreement must comply with contractual law principles. Accordingly, it must:

- Have a clear subject matter.
- Be supported by consideration.
- Be executed by all relevant parties.

A franchise agreement is categorised as a valid and binding contract enforceable under the law of contract in New Zealand.

A franchisor that wishes to sell a greenfield franchise territory will normally find a franchisee itself. However, a franchisee that wishes to sell an existing business will normally employ a business broker to find a new franchisee. The business broker must be registered and comply with the Real Estate Agents Act 2008. This means that any purchasers of the business will deal with a registered business broker.

The FANZ does not impose any requirements in relation to the sale of franchises.

An overseas franchisor that wishes to enter the New Zealand market and sell franchises must comply with New Zealand legislation (as set out in question 1.2 above). There are no other government consents or official authorisations required. However, if an overseas franchisor wishes to take over or merge with a New Zealand franchisor, the consent or authorisation from the Commerce Commission may be required (Commerce Act 1986).

1.10 Is membership of any national franchise association mandatory or commercially advisable?

Membership of the FANZ is not mandatory; however, it is recommended that all franchisors belong to the FANZ and potential franchisees often check to see if a franchisor is a member of the FANZ.

1.11 Does membership of a national franchise association impose any additional obligations on franchisors?

The Code of Practice and Code of Ethics published by the FANZ is binding on all members of the FANZ, including franchisors and master franchisees. Each member of the FANZ must (FANZ Code of Ethics):

- Operate in accordance with all the requirements of the Rules and Code of Practice of the FANZ, and according to all relevant laws.

- Uphold the Code of Ethics for all members.
- Promote membership of the FANZ and adherence to its Code of Practice.
- Adopt the highest standards of competency, practice and integrity in all matters pertaining to franchising.
- Respect the confidentiality of all information, know-how and business secrets concerning a franchised business with which it is involved.
- Act in an honourable and fair manner in all its business dealings, and in such a way as to uphold and bring credit to the good name of the FANZ.

The Code of Ethics applies to franchisors that are either:

- Members of the FANZ.
- Not members of the FANZ but wish to comply with the Code, in which case the obligation to comply must be inserted into all franchise agreements to which they are party.

1.12 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

All franchise documents in New Zealand are written in English.

2 Business Organisations Through Which a Franchised Business Can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

If a foreign business entity holds 25 per cent or more of the shareholding in a company and the company is classed as 'large' (i.e. total assets exceed NZ\$20 million or total revenue exceeds NZ\$10 million as at the balance date of each of the two preceding accounting periods), the company must be audited and must file financial statements pursuant to the Financial Reporting Act 2013. In relation to foreign investment, there are no barriers for 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 (e.g., 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.

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 overseas 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, non-resident withholding tax of 15 per cent must be deducted.

2.2 What forms of business entity are typically used by franchisors?

A franchisor would typically use a New Zealand registered company. A new company can be incorporated online at 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 sign written

consents 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 reservation fee is NZ\$11.50 and the incorporation fee is NZ\$120.75. 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 are recent changes as follows:

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

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

There are no such requirements in New Zealand.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

The Commerce Act 1986 provides the regulatory framework relating to anti-competitive conduct. The Commerce Commission is responsible for enforcing that framework.

The Commerce (Cartels and Other Matters) Amendment Act 2017 became law on 14 August 2017.

1. Cartel Conduct Prohibitions

Broadly speaking, there are three new ‘cartel conduct’ prohibitions that are unlawful unless an exemption applies:

- (a) a prohibition on competitors fixing prices;
- (b) a prohibition on competitors jointly restricting output; and
- (c) a prohibition on competitors colluding to allocate markets.

These new prohibitions clarified the law in New Zealand and will have a far-reaching impact on business. However, some types of anti-competitive arrangements are exempt from the cartel prohibitions and are summarised below.

2. Collaborative Activity Exemptions

This exemption applies to cartel conduct by competitors in a “collaborative activity” where the cartel provision is reasonably necessary for the purpose of the collaborative activity. The collaborative activity exemption may also apply to a restraint of trade provision post-termination of a franchise agreement in certain circumstances. Competitors can seek clearance for proposed collaborative activities that contain a cartel provision giving certainty that the proposed activities will not breach the Commerce Act.

The collaborative activity exemption is an important exemption for those involved in franchising in New Zealand. Some provisions of franchise agreements may be regarded as cartel provisions (such as territory allocation and restraint of trade) and so any franchisor entering New Zealand will want to obtain legal advice as to whether this exemption applies to any cartel provisions in the proposed franchising activities.

3. Vertical Supply Contract Exemption

This exemption recognises that there may be circumstances where a supplier and a customer may be in competition with each other and, as a result, provisions in their supply agreement risk being cartel provisions. This exemption allows cartel provisions that are included in vertical supply contracts where certain requirements are met.

4. Joint Buying and Promotion Agreements Exemption

This exemption may apply when competing buyers arrange to purchase goods or services together on terms that, individually, the competitors could not negotiate on their own. This exemption applies only to price-fixing and not the other forms of cartel conduct.

The amendments to the Commerce Act affect New Zealand businesses, including:

- (a) many suppliers and resellers – for example, distribution agreements with territorial allocation clauses; and
- (b) most franchisors and franchisees, since most franchise agreements contain territorial allocation clauses and restraints of trade.

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

3.2 Is there a maximum permitted term for a franchise agreement?

There is no maximum permitted term for a franchise agreement in New Zealand. A typical term might be five or 10 years, with rights of renewal of five or 10 years (as applicable).

3.3 Is there a maximum permitted term for any related product supply agreement?

There is no maximum permitted term.

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

A franchisor can require franchisees to purchase approved products from the franchisor. However, there is a prohibition on stipulating minimum resale prices in relation to products for resale to customers of the franchisee. Resale price maintenance by suppliers is prohibited and illegal in New Zealand under section 37 of the Commerce Act 1986.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

The only obligation which a franchisor must observe when offering franchises in adjoining territories is to ensure that any adjoining territories do not encroach or traverse the specific territory of a franchisee. In other words, a franchisor should act in good faith when dividing the territories and appointing different franchisees.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Non-compete obligations are legal and enforceable, and are typically imposed on the franchisee during the term of the agreement and for a defined period following termination of expiration of the agreement.

The New Zealand courts will enforce post-term restrictive covenants against the franchisee – in particular, non-compete and confidentiality restrictive covenants – provided that their geographical scope and duration are reasonable. There has been an increase in such cases in the last year or so.

4 Protecting the Brand and Other Intellectual Property

4.1 How are trade marks protected?

The Trade Marks Act 2002 is the relevant statute and all trade marks must be registered in New Zealand. The relevant body to deal with is the Intellectual Property Office of New Zealand (IPONZ). Trade mark registrations last for 10 years and must then be renewed.

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Know-how, trade secrets and confidential information are protected by normal intellectual property laws. Any properly drafted franchise agreement will include know-how and trade secrets in the definition of intellectual property and should contain a robust intellectual property clause.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Copyright is protected in New Zealand under the Copyright Act 1994; trade marks and software can also be protected with a binding Licence Agreement to Use Trade Marks and Intellectual Property granted by the franchisor to the franchisee.

5 Liability

5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

There are no mandatory disclosure obligations.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for pre-contractual misrepresentation allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

Where a franchisor and a master franchisee both enter into a contractual arrangement with a franchisee, the disclosure document must contain material information in relation to both the franchisor and master franchisee (including financial disclosure relating to both the franchisor and the master franchisee).

Where the franchisor is not in a direct contractual arrangement with the franchisee and the franchise is granted only by the master franchisee, the disclosure document must fully disclose the implications for the franchise agreement of the termination of the master franchisee's agreement with the franchisor.

If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement then such indemnity should be comprehensive with its main purpose being to protect the franchisor. There are no limitations on such an indemnity being enforceable against the master franchisee.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

Disclaimer clauses look and sound good but they will not protect a franchisor who has deliberately lied or misled a franchisee. Misleading conduct is governed by the Fair Trading Act 1986 and misrepresentations can be innocent, negligent or fraudulent. Disclaimer clauses may well protect innocent misrepresentations but they will probably not protect negligent or fraudulent misrepresentations.

5.4 Does the law permit class actions to be brought by a number of aggrieved franchisees and, if so, are class action waiver clauses enforceable?

Yes, and class action waiver clauses would be enforceable in New Zealand.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

Franchise Agreements usually have a Governing Law clause which states that they are governed by the laws of New Zealand and are subject to the jurisdiction of the New Zealand courts.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Yes, and any franchisor can apply for interlocutory relief by way of injunction; an application must be made to the High Court of New Zealand.

6.3 Is arbitration recognised as a viable means of dispute resolution and is your country a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Do businesses that accept arbitration as a form of dispute resolution procedure generally favour any particular set of arbitral rules?

Arbitration is an accepted method of dispute resolution in New Zealand and New Zealand has been a signatory to the New York

Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1983. All businesses would accept arbitration as a form of dispute resolution procedure but the preferable method to resolve disputes is by way of mediation, with arbitration a close second.

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

There is no usual length of term for a commercial property lease. However, in shopping malls the term offered by landlords such as Westfield is typically six years only, with no right of renewal.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

A franchise agreement can provide that the franchisor can acquire the premises at the end of the franchise relationship.

When finalising a franchise agreement, the franchisor should also ensure that special conditions are inserted into any lease between the landlord and the franchisee, which recognise the franchisor's option to take over the lease.

If the franchise agreement has ended either by effluxion of time or by valid termination and the franchisee refuses to vacate the premises, the franchisor will need to consider available legal remedies (including an injunction to prevent the franchisee from continuing doing business on the premises).

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

The Overseas Investment Amendment Act 2018 came into force on 22 October 2018. The changes to the legislation prevent certain overseas persons from buying residential property in New Zealand. With some exceptions for Australian and Singaporean citizens, anyone who is not a New Zealand citizen or is not 'ordinarily resident' in New Zealand is an overseas person. Expert legal advice needs to be obtained in relation to the purchase of real estate or being able to sub-lease any property by a non-national entity.

7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease in a particular location)?

Some landlords provide an initial rent free period which often equates to the fit-out period, but some do not. Most landlords are not currently demanding "key money" but in some premium locations "key money" may be required.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

Yes, but there must be a specific provision in the franchise agreement.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

Any properly drawn franchise agreement must contain a robust clause requiring a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement. If that requirement is not stated then the agreement is defective.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

There are no mandatory local laws in relation to this area.

9.2 Are there local rules that impose a minimum notice period that must be given to bring a business relationship that might have existed for a number of years to an end, which will apply irrespective of the length of the notice period set out in the franchise agreement?

There are no local laws imposing a minimum term but nothing lasts forever, so if the term of a franchise agreement is for an indefinite period, it may be possible to argue that there is an implied term. The particular facts of a case are important but, as a guideline, if a contract has been going for over 10 years then the courts may consider that a reasonable notice period is 12 months and thereafter the contract will terminate.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

In New Zealand the law is very definitive and any franchisor is not regarded as a joint employer together with the franchisee.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

There is no such risk in our opinion.

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

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 overseas 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, non-resident withholding tax of 15 per cent must be deducted.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

Withholding tax would only be deducted from the payment of royalties in the case of a licensor residing overseas – in that case non-resident withholding tax must be deducted. The rates vary depending upon the country. Further, it may be possible to avoid withholding tax by structuring payments due from the franchisee to the franchisor but expert taxation advice must be obtained in the local jurisdiction.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

There are no such requirements but all franchise agreements in New Zealand would normally specify New Zealand dollars.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

If a franchise agreement has been properly drafted there would be no such risk, in our opinion.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

There is a general legal obligation for parties to deal with each other in good faith, and a good faith clause should always be included in franchise agreements. The courts in New Zealand are moving towards implying a duty of good faith into franchise agreements if no such duty is expressly stated, 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. The Code of Ethics of the FANZ states that each member shall “act in an honourable and fair manner in all its business dealings ...”.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

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

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

Disclosure obligations will only apply if a franchisor is a member of the FANZ in which case it must comply with the Code of Practice. Paragraph 14.2 of the Code states as follows:

“A Disclosure Document is required to be provided to an existing Franchisee in conjunction with the renewal of the franchise agreement within one month of being requested by the Franchisee.”

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

A franchisee is not automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term.

A franchisee can usually exercise its right of renewal provided that it:

- Complies with the required notice period.
- Is not in breach of the existing franchise agreement when giving notice of renewal or at the time of renewal of the franchise.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

Local law does not guarantee a right of renewal. There are no legal restrictions on fees or charges payable on renewal, provided that

these fees or charges are not unreasonable or ridiculous so as to be deemed harsh and oppressive.

If a franchisor refuses to renew a franchise, the franchisee may be able to obtain an order of specific performance from the High Court, which may force the franchisor to renew the franchise. However, in order to have any possibility of obtaining an order for specific performance (which is a discretionary remedy), the franchisee must:

- have validly exercised its right of renewal;
- have done everything required under the franchise agreement; and
- not be in breach of the franchise agreement.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

A franchisor may restrict a franchisee's ability to sell, transfer, assign or otherwise dispose of its franchised business 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.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

If a "step-in" right is contained in the franchise agreement then it will be enforceable. However, many franchise agreements do not contain any such right, but you also need to look at the deed of lease of the premises, as there may be special provisions in relation to the step-in rights of a franchisor.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Yes. The only restriction would be that if the power of attorney is granted by a company then it must comply with the Companies Act 1993.

17 Electronic Signatures and Document Retention

17.1 Are there any specific requirements for applying an electronic signature to a franchise agreement (rather than physically signing a "wet ink" version of the agreement), and are electronic signatures recognised as a valid way of creating a binding and enforceable agreement?

The answer is contained in section 22 of the Electronic Transactions Act 2002, whereby an electronic signature must adequately identify the signatory and adequately indicate the signatory's approval of the information to which the signature relates, and it must be reliable in every case.

17.2 If a signed/executed franchise agreement is stored electronically (either having been signed using e-signatures or a "wet ink" version having been scanned and saved as an electronic file), can the paper version of the agreement be destroyed?

The paper version of the franchise agreement should not be destroyed, as it is *prima facie* evidence in any litigation action.



Stewart Germann is a Barrister and Solicitor of the High Court of New Zealand and also a Notary Public. Stewart has a B.Com. in accounting and an LL.B. from the University of Auckland. He is a partner of Stewart Germann Law Office (SGL), a boutique franchising law firm at Auckland, New Zealand.

Stewart was Chairman of the Franchise Association of New Zealand (FANZ) from 1997 to 1999, and he has been involved in franchising law for over 35 years. Stewart specialises in franchising, licensing and the sale and purchase of businesses, although SGL undertakes a wide variety of work. He is included in the *International Who's Who of Franchise Lawyers 2018* and is also a qualified mediator. In 2001 he was elected to the Board of the Supplier Forum of the International Franchise Association, and was the first person from outside the USA and Canada to be elected to that Board, on which he served for six years.

Stewart was previously a member of the Advisory Editorial Board of the *International Journal of Franchising Law* and he has also spoken at franchising conferences in New Zealand, Australia and the USA.

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Stewart Germann Law Office (SGL) was founded by Stewart Germann in 1993. Previously, Stewart had been a partner in various law firms and he has been involved in franchising and licensing since 1980.

SGL handles all aspects of property law, commercial law and company law, with particular emphasis on franchising, businesses, licensing and distribution agreements. As well as acting for many New Zealand franchisors, the firm acts for a number of Australian franchisors who have entered New Zealand to expand their system. The firm also acts for franchisors in the USA and the United Kingdom. SGL prides itself in providing expert legal advice in relation to franchising, licensing and small business. It also provides advice in the area of intellectual property and the firm has considerable expertise in drafting commercial documentation.

SGL can assist franchisors with the preparation of franchise agreements and related documentation. The firm can also adapt foreign agreements for New Zealand conditions. SGL has wide contacts in the franchising industry in New Zealand and worldwide.

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