



The Legal 500 Country Comparative Guides

New Zealand: Franchise & Licensing

This country-specific Q&A provides an overview of franchise & licensing laws and regulations applicable in New Zealand.

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1. Is there a legal definition of a franchise and, if so, what is it?

The definition of “franchise” as contained in the Rules of the FANZ¹ is 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; and*
- *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.”*

Consideration should also be given to the definition of a Franchise Agreement which “means a contract, agreement or arrangement, whether express or implied, whether written or oral, between two or more persons by which one party to the agreement (“the Franchisor”) grants, authorises or permits the other party to the agreement (“the Franchisee”) the right to operate a Franchise. Any contract, agreement or arrangement which purports to be a Franchise Agreement shall be deemed to be a Franchise Agreement for the purpose of this definition, notwithstanding that it may lack any or all of the requirements or attributes referred to in the definition of “Franchise”.

¹ Rules of the Franchise Association of New Zealand (<https://www.franchiseassociation.org.nz/rules-and-codes/>)

2. Are there any requirements that must be met prior to the offer and/or sale of a franchise? If so, please describe and include any potential consequences for failing to comply.

In order to sell an existing franchised business the franchisee must have the business ready for sale. There are no legal requirements in New Zealand but there are practical requirements like having all legal documentation available and completed and, most importantly, know how the assignment or sale process will work and complying with the franchisor’s requirements. The potential consequences for failing to comply include not obtaining the consent of the franchisor to a sale and appearing to be unprofessional or unprepared to a potential purchaser.

3. Are there any registration requirements for franchisors and/or franchisees? If so, please describe them and include any potential consequences for failing to comply.

Is there an obligation to update existing registrations? If so, please describe.

There are no registration requirements in New Zealand.

4. Are there any disclosure requirements (franchise specific or in general)? If so, please describe them (i.e. when and how must disclosure be made, is there a prescribed format, must it be in the local language, do they apply to sales to sub-franchisees) and include any potential consequences for failing to comply. Is there an obligation to update and/or repeat disclosure (for example in the event that the parties enter into an amendment to the franchise agreement or on renewal)?

Prospective franchisees should be given a disclosure document and franchise agreement by a franchisor. The Code of Practice (Code) of the Franchise Association of New Zealand (FANZ) states that franchisors must provide the disclosure document to prospective franchisees at least fourteen days prior to the signing of the franchise agreement. The disclosure document must follow the format set out in the Code and provide certain information including the following:

- Details about the franchisor and its directors including experience and a viability statement with key financial information of the franchisor;
- Details of any bankruptcies, receiverships, liquidations, or materially relevant debt recovery;
- Criminal, civil, or administrative proceedings within the past five years;
- A summary of the main particulars and features of the franchise;
- A list of components making up the franchise purchase;
- Details of any financial requirements by the franchisor of the franchisee; and
- Other information as listed in the Code.

The disclosure document should be updated annually.

5. If the franchisee intends to use a special purpose vehicle (SPV) to operate each franchised outlet, is it sufficient to make disclosure to the SPVs' parent company or must disclosure be made to each individual SPV franchisee?

It would be sufficient, in my opinion, to make disclosure to the SPV's parent company.

6. What actions can a franchisee take in the event of mis-selling by the franchisor? Would these still be available if there was a disclaimer in the franchise agreement, disclosure document or sales material?

In relation to "mis-selling" I am presuming you mean misrepresenting the potential franchise business by the franchisor. The Fair Trading Act 1986 and the Contract and Commercial Law Act 2017 would be very useful in such circumstances. If the franchise agreement contains a disclaimer clause then that may or may not save a franchisor who misleads a franchisee - it

would depend upon the extent of the disclaimer clause and all of the circumstances.

7. Would it be legal to issue a franchise agreement on a non-negotiable, “take it or leave it” basis?

Yes.

8. How are trademarks, know-how, trade secrets and copyright protected in your country?

Trade marks are protected by registration in the Intellectual Property Office of New Zealand. Once you have selected or designed your trade mark then as a precautionary move it is possible to obtain a search of the Trade Mark Register to ensure that it does not conflict with anyone else’s mark.

Assuming that the trade mark is available, its protection is afforded by filing an application and paying the requisite fee. Once processed, the Trade Mark Office will issue a filing date and application number.

9. Are there any franchise specific laws governing the ongoing relationship between franchisor and franchisee? If so, please describe them, including any terms that are required to be included within the franchise agreement.

There are no specific laws.

10. Are there any aspects of competition law that apply to the franchise transaction (i.e. is it permissible to prohibit online sales, insist on exclusive supply or fix retail prices)? If applicable, provide an overview of the relevant competition laws.

The Commerce (Cartels and Other Matters) Amendment Act 2017 became law in New Zealand in August 2017. This new Act amended the Commerce Act 1986 and key changes include the following:

A. Cartel Conduct Prohibitions²

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

1. a prohibition on competitors fixing prices;
2. a prohibition on competitors jointly restricting output; and
3. 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.

B. Collaborative Activity Exemptions³

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 activity⁴. The collaborative activity exemption may also apply to a restraint of trade provision post-termination of a franchise agreement in certain circumstances⁵. Competitors can seek clearance for proposed collaborative activities that contain a cartel provision giving certainty that the proposed activities will not breach the Commerce Act⁶.

The collaborative activities 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 noncompetition agreements) and so any franchisor entering New Zealand will want to obtain legal advice that this exemption applies to any cartel provisions in the proposed franchising activities.

C. Vertical Supply Contract Exemption⁷

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. Those requirements are that the contract is entered into between a supplier and customer, it relates to the supply of goods and services including the maximum price at which the customer may resupply the goods or services, and that it does not lessen competition⁸.

D. Joint Buying and Promotion Agreements Exemption⁹

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:

1. Many suppliers and resellers – for example distribution agreements with territorial allocation clauses; and
2. Most franchisors and franchisees because most franchise agreements contain territorial allocation clauses and restraints of trade.

Because the cartels legislation impacts upon key areas contained in franchise agreements, in

the author's 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.

2 Commerce Act 1986, s 30A (N.Z.).

3 Commerce Act 1986, s 31 (N.Z.).

4 Commerce Act 1986, s 31(4) (N.Z.).

5 Commerce Act 1986, s 31(1) (N.Z.).

6 Commerce Act 1986, s 31(4)(b) (N.Z.).

7 Commerce Act 1986, s 32 (N.Z.).

8 Commerce Act 1986, s 32(1) (N.Z.).

9 Commerce Act 1986, s 33 (N.Z.).

11. Are in-term and post-term non-compete and non-solicitation clauses enforceable?

Such clauses are enforceable but careful drafting must be undertaken.

12. Are there any consumer protection laws that are relevant to franchising? Are there any circumstances in which franchisees would be treated as consumers?

The Consumer Guarantees Act 1993 applies between businesses and consumers. However, the relationship between a franchisor and a franchisee is usually outside the ambit of the Act.

13. Is there an obligation (express or implied) to deal in good faith in franchise relationships?

The current law has no express or implied obligation to deal in good faith. However, many franchise agreements contain express good faith clauses. In relation to the franchisee's obligations the clause might state as follows:

"The franchisee shall act loyally and in good faith towards the franchisor at all times."

In relation to the franchisor's obligations the clause might state as follows:

"The franchisor shall act loyally and in good faith towards the franchisee at all times."

- 14. Are there any employment or labour law considerations that are relevant to the franchise relationship? Is there a risk that the staff of the franchisee could be deemed to be the employees of the franchisor? What steps can be taken to mitigate this risk?**

There are specific employment laws which are relevant in franchising. In particular, the Employment Relations Act 2000 and the Health and Safety at Work Act 2015 must be complied with. There is no risk that the staff of the franchisee could be deemed to be employees of the franchisor but a well drafted franchise agreement should contain an independent proprietorship clause.

- 15. Is there a risk that a franchisee could be deemed to be the commercial agent of the franchisor? What steps can be taken to mitigate this risk?**

There is no such risk provided the franchise agreement contains an independent proprietorship clause.

- 16. Are there any laws and regulations that affect the nature and payment of royalties to a foreign franchisor and/or how much interest can be charged?**

All payments to a foreign franchisor are subject to non-resident withholding tax and the Income Tax Act 2007 must be complied with. The rate of interest charged should be a commercial rate.

- 17. Is it possible to impose contractual penalties on franchisees for breaches of restrictive covenants etc.? If so, what requirements must be met in order for such penalties to be enforceable?**

By "contractual penalties" it is implied that these would be monetary penalties and any penalties of that nature will probably be unenforceable in New Zealand. If a breach of a restrictive covenant were to be pursued through the courts, then damages may be imposed by the court.

- 18. What tax considerations are relevant to franchisors and franchisees? Are franchise royalties subject to withholding tax?**

Franchisors and franchisees must comply with the Income Tax Act 2007. If a franchisor and a franchisee are New Zealand entities then franchise royalties would not be subject to withholding tax. However, if a franchisor is domiciled overseas then non-resident withholding tax must be deducted by the franchisee in relation to any payments made to the franchisor.

- 19. Does a franchisee have a right to request a renewal on expiration of the initial term? In what circumstances can a franchisor refuse to renew a franchise**

agreement? If the franchise agreement is not renewed or it if it terminates or expires, is the franchisee entitled to compensation? If so, under what circumstances and how is the compensation payment calculated?

The franchise agreement should be for a term of years with a right of renewal of a fixed term of years. If the initial term is going to expire then a franchisee can request a right of renewal provided the agreement allows for that. A franchisor may be able to refuse consent to a franchisee to renew a franchise agreement if the franchisee has breached the agreement during the term or if the franchisee is in arrears of payments required to be made to the franchisor.

20. Are there any mandatory termination rights which may override any contractual termination rights? Is there a minimum notice period that the parties must adhere to?

The answer to the two questions is no.

21. Are there any intangible assets in the franchisee's business which the franchisee can claim ownership of on expiry or termination, e.g. customer data, local goodwill, etc.

The answer is probably no. A carefully drafted franchise agreement should state that the franchisor owns all customer data. Further, if the term of a franchise expires or is terminated then any goodwill of the franchisee is lost.

22. Is there a national franchising association? Is membership required? If not, is membership commercially advisable? What are the additional obligations of the national franchising association?

New Zealand has the Franchise Association of New Zealand (FANZ). Membership is voluntary but good franchising practice requires a franchisor to join the FANZ. The FANZ has a Code of Practice and Code of Ethics which are accepted throughout. If any franchisor wants to join then they must meet the membership criteria in force at the particular time.

23. Are foreign franchisors treated differently to domestic franchisors?

Yes, foreign franchisors must comply with all relevant legislation including the Companies Act 1993 and the Income Tax Act 2007.

24. Are there any requirements for payments in connection with the franchise agreement to be made in the local currency?

No but invariably New Zealand dollars are prescribed.

25. Must the franchise agreement be governed by local law?

No but it is advisable to have the agreement governed by the laws of New Zealand and to be subject to the jurisdiction of the New Zealand courts.

26. What dispute resolution procedures are available to franchisors and franchisees? Are there any advantages to out of court procedures such as arbitration, in particular if the franchise agreement is subject to a foreign governing law?

The Code of Practice sets out an excellent dispute resolution clause which is widely used in New Zealand. Mediation is the preferred mode of resolving a dispute but should that fail then arbitration is next in line. Both mediation and arbitration are private and confidential and are far faster than going through the courts.

27. Does local law allow class actions by multiple franchisees?

Yes.

28. Must the franchise agreement and disclosure documents be in the local language?

Yes - they should be written in English.

29. Is it possible to sign the franchise agreement using an electronic signature (rather than a wet ink signature)?

Yes, so long as the Unsolicited Electronic Messages Act 2007 is complied with.

30. Can franchise agreements be stored electronically and the paper version be destroyed?

Yes.

31. Please provide a brief overview of current legal developments in your country that are likely to have an impact on franchising in your country.

The Commerce (Cartels and Other Matters) Amendment Act 2017 became law in New Zealand in August 2017. This new Act amended the Commerce Act 1986 and key changes have been made in relation to cartel conduct prohibitions, collaborative activity exemptions, vertical supply contract exemptions and joint buying and promotion agreements exemptions as explained in 10 above. 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.

The Commerce (Criminalisation of Cartels) Amendment Act 2019 will come into force in April 2021.

The specific policy objectives for introducing criminalisation for cartels are to:

- promote detection and deterrence of cartels while ensuring that efficiency enhancing collaborative activity is not deterred;
- improve cartel enforcement by the Commerce Commission; and
- facilitate New Zealand's contribution to enforcement efforts against global cartels.

The new cartel offence is targeted at the individuals who are the decision-makers for the cartel and their corporations. The key element of the offence is the requirement to show 'intention' to engage in cartel conduct.

The maximum fines (up to \$500,000 for an individual or \$10 million for a company) are the same as the maximum pecuniary penalties that may be imposed under the civil cartels regime, with the additional sanction of up to 7 years imprisonment in the case of individuals.

There are also other elements in the Act that are designed to mitigate business uncertainty and compliance costs from the new criminal regime.

These include the following:

- existing exceptions and exemptions in the Act to the civil prohibition for cartel conduct will also apply to the new criminal offence, including the exceptions relating to:
 - collaborative activities (such as joint ventures), and
 - specified international shipping activities (such as vessel-sharing agreements)
- new defences in the new section 82C provide for circumstances where a defendant is mistaken in fact as to whether one or more of the exceptions applied
- a two-year transitional period before the criminal offence comes into force to allow for businesses to learn from experience under the existing civil regime for cartel conduct that came into effect in August 2017.

32. In your opinion, what are the key lessons to be learned by franchisors as a consequence of the COVID-19 crisis?

There are a number of lessons to be learned by franchisors, in my opinion, and they include the following:

- To ensure that the force majeure clause contains a pandemic provision. In relation to the force majeure clause which I draft, it states the following:

"Neither party shall be liable to the other and neither party shall be deemed to be in default for any failure or delay to observe or perform any of the terms and conditions applicable to

the party under this Agreement (other than the payment of money) caused or arising out of any act beyond the control of that party including (but not limited to) fire, flood, lightning, storm and tempest, earthquake, strikes, lock-outs or other industrial disputes, acts of war, acts of terrorism, riots, civil commotion, explosion, malicious damage, government restriction, unavailability of equipment or product, disease and/or virus of epidemic or pandemic proportions or other causes whether the kind enumerated above or otherwise which are beyond the control of that party and where such failure or delay is caused by one of the events above then all times provided for in this Agreement shall be extended for a period commensurate with the period of the delay.”

- Many franchisors were kind to franchisees during the lockdown period and either charged no royalties or reduced royalties. Everyone is caught up in COVID-19 consequences and the message in New Zealand has been, and still is, keep well and be kind. For franchisors that will include being cognisant of the pressures on their franchisees. I have noticed a big increase in mental health issues and many franchisors have introduced wellness programmes for franchisees and their families. Further, many franchisees have been suffering financially in relation to lease payments as many landlords have been tough and nasty. Some franchisors have given rental relief in some way to help key franchisees. In summary, we are all in this together and everyone is suffering in some way or other. Franchisors need to remember that all of the franchisees and their families are their greatest asset, and the success of any franchise system comes down to the quality and durability of the people operating in it, namely the franchisees.