

Partner

Stewart Lloyd Germann
B.Com, LLB, FCIS, ANZIM, Notary Public

Partner

Clive Frederick Neifeld
B.Com, LLB

Ground Floor, Princes Court
2 Princes Street, PO Box 1542
Auckland, New Zealand
DX CP20531, Auckland

Telephone 0-9-308 9925
Facsimile 0-9-308 9922
email stewart@germann.co.nz

Franchising in New Zealand

Stewart Germann Law Office is an affiliate member of the Franchise Association of New Zealand Incorporated. Stewart Germann has over 20 years experience in franchising and he gives advice to both franchisors and franchisees.

WHAT IS FRANCHISING?

Quite simply, franchising is a method of marketing goods and services. The franchisor owns the name, idea, secret process or piece of equipment together with the goodwill and know-how associated with it. The franchisor grants a licence (franchise) to another person (the franchisee) permitting the exploitation of such name, idea, process or equipment and the goodwill and know-how associated with it. The inclusion in the franchise agreement of regulations and controls relate to the operation of the business and the conduct of which the franchisee exploits these rights. In return the franchisee pays a fee or other consideration to the franchisor for the rights which are obtained and the services with which the franchisor will continue to provide to the franchisee.

Franchises can involve transactions between manufacturers and wholesalers, manufacturers and retailers, wholesalers and retailers, retailers and retailers. A franchisee, like anyone involved in small business, must be highly committed, willing to work and must also be able to work in a team situation, taking direction where necessary.

The term "franchise" has no legal meaning in New Zealand. It is a term which is used, and sometimes abused, in a variety of ways. The **business format franchise** is a franchise in which an entire ready-made business format is made available. It is important to understand what is not a franchise. Too often a so-called "franchise" is advertised for sale when all that is being offered is an exclusive sales territory and the right to use a trade name. There is much more to a business format franchise than that.

This is a good time to go into franchising. Why? The level of business activity has increased; business confidence has increased over the past 12 months and especially during the last 6 months; there seem to be plenty of people around with money available who are looking for good business opportunities; to become a franchisee of a proven business can be rewarding and exciting. There is unlimited potential for further franchising in New Zealand. However, a major consideration is that the quality of franchises is maintained at all times.

PROCEDURE

Franchisor

A person wishing to go into franchising as a franchisor must have done all necessary homework and be prepared in every way. The operating procedures manuals must be written in clear language, the logo and/or trade mark should be protected by registration and the Franchise Agreement should be in final form after a number of drafts have been done. A Disclosure Document detailing the business and all payments required should be produced. The franchisor and the franchising lawyer will require a number of meetings and the franchisor should seriously consider joining the Franchise Association of New Zealand.

Franchisee

An intending franchisee should consult his or her accountant and lawyer before buying a franchise. Even before this stage, that person should have had one or two meetings with the franchisor and obtained considerable information. What usually happens is that when a franchisee expresses an interest to take up a particular franchise, after an initial interview and if the franchisee wants to go further, the franchisor will ask the potential franchisee to sign a Confidentiality Agreement. After that has been done, the franchisor will make available to the potential franchisee a lot more information which will include detailed information about the particular franchise, financial information and other data, a disclosure document, the form of franchise agreement and the operating procedures manuals. The franchising lawyer must be experienced in this area and must be able to look at and explain the disclosure document, the franchise agreement, the concept of franchising and what may happen to the client. The lawyer must go through a number of questions with the client in relation to matters which the client may not have even thought about. An intending franchisee should really ensure that the franchisor has a good reputation in the market place, is fair and reasonable in dealing with his franchisees, that the franchise itself has a track record, that the initial franchise fee is not excessive, that the royalty payments and the advertising levy amounts are within an acceptable range, that the business is sufficiently detailed in the operating procedures manuals and that the franchisor intends to be around for years to come. I always tell my franchisee clients to ask the question - "what am I getting for the franchise fee and what is the franchisor going to do to benefit me?"

FRANCHISE AGREEMENT

The Franchise Agreement is an important document and must be carefully thought out. The usual clauses which are included in a Franchise Agreement include the grant of franchise, franchisee's obligations (which include to promote the franchised operation, pay royalties and advertising levy, maintain insurances, standard of conduct, secrecy), franchisor's obligations (which include management assistance, training, referral of business, promote good relations between franchisees), advertising, books of account, assignment or sub-franchise, termination, action upon termination, term of franchise, rights of renewal, directors' guarantees, the cooling off provision and a dispute resolution clause.

In conclusion, it is essential to obtain professional advice from both a franchising lawyer and an accountant. Franchise consultants can also be very helpful because of their wide experience and database of different franchise opportunities available. Do your homework, make the decision and go for it! Franchising is exciting but it must also be rewarding and profitable and both the franchisor and the franchisee must be winners.

For more information please contact **Stewart Germann**.

Stewart Germann Law Office
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