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FRANCHISING IN NEW ZEALAND

New Zealand is a member of the Commonwealth with a population of over 4.2 million people. It is one of the most deregulated countries in the world to conduct small to medium-sized business and there is no specific legislation controlling the operation of franchising in New Zealand.

Franchise Association of New Zealand (FANZ)

The FANZ which was formed in 1996 has over 200 members. Prior to 1996 New Zealand was part of the Australian Association. The FANZ imposes a Code of Practice and a Code of Ethics on its members who must comply with the two Codes.

Franchisors in New Zealand will either belong to the FANZ or not belong. Those who do not belong can be summarised as either ethical franchisors or unethical franchisors but the level of franchising disputes and litigation in New Zealand is very low. As I have said, those who belong to the FANZ must comply with the Code of Practice which has four main aims:

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

Code of Practice

All members must certify that they will comply with the Code and members must renew their Certificate of Compliance on an annual basis. A disclosure document must be provided to all prospective franchisees at least 14 days prior to signing a franchise agreement and the disclosure document must be updated annually. All franchise agreements must contain a minimum 7 day period from the date of the agreement during which a franchisee may change his or her mind and terminate the purchase – this is known as the cooling-off period which does not apply to renewals of term or resales by franchisees.

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

Growth in NZ

Franchising in New Zealand accounts for an annual turnover of over \$18 billion. The total number of systems operating in New Zealand exceeds 350 and over 75% of the systems originate in New Zealand. The number of systems, outlets and those employed in them has exhibited a 15-20% increase per annum during the last 5 years or so and I consider franchising to be still growing in New Zealand. A number of overseas franchisors have entered New Zealand and the major country is Australia. However, franchise systems from the UK, USA, Canada, South Africa and some Asian countries have also entered New Zealand which readily welcomes overseas systems.

Australia has a mandatory disclosure regime and franchising is regulated. In my opinion, what may work in Australia may not work in New Zealand and a number of US franchisors have discovered this the hard way. I always encourage US franchisors to enter New Zealand first, test their system here and then go on to Australia. Although Australia and New Zealand are similar countries so far as consumers are concerned, New Zealanders in my opinion are more discerning and certainly business ethics are usually higher in New Zealand than Australia.

Taxation

Overseas franchisors who enter New Zealand must have expert local taxation advice. New Zealand has tax treaties with many countries and if any income earned in New Zealand is to be repatriated to a franchisor in an overseas jurisdiction then non-resident withholding tax must be deducted. The overseas franchisor will be able to claim the tax deduction as a tax credit in the overseas country.

Marketing

Franchisors from overseas typically enter New Zealand by way of master franchising. The country is small enough to enable the appointment of one master franchisee for the whole of New Zealand. However, a number of Australian systems have come in and used direct franchising from Australia whereby all franchisees are appointed from Australia, usually through a subsidiary company incorporated in New Zealand. Development agents are sometimes used; for example Subway, and joint ventures in New Zealand are very rare indeed.

I am a great believer that the master franchisee for a country should be a local person familiar with the country, the way of life and how to market the franchise system. Those franchisors who import a master franchisee from their country invariably take longer to penetrate the New Zealand market, and sometimes fail.

Assuming that a master franchisee has been appointed from a foreign country and a trial period has elapsed (which should be at least one year) whereby the local master has tested the system and run a pilot operation, the NZ master would normally appoint franchisees starting in Auckland and by advertising in the *New Zealand Herald*. Also, the master may consider appointing a business broker to find franchisees or placing an advertisement in the *Franchise New Zealand* magazine which is well read by potential franchisees and distributed throughout the whole of New Zealand.

The foreign franchisor must have a trade mark registered in New Zealand before entering it and, at the same time, I recommend registering the trade mark in Australia. New Zealand and Australia have a combined population of over 23 million which is a substantial market for any franchise system.

Documentation

Foreign franchisors should always have their franchise documents perused and amended by a New Zealand lawyer experienced in franchising before providing them to any potential master franchisee or, if using the direct franchising method, franchisee. Also, I recommend that foreign franchisors should obtain taxation advice from the country which they wish to enter and must be cognisant of non-resident withholding tax on any monies repatriated from New Zealand to the particular foreign country.

Summary

New Zealand is a very active market in franchising. It has shown tremendous growth recently and will continue to grow. Any foreign franchisor should consult the FANZ and its website is: www.franchisebusiness.co.nz. Any foreign franchisor should have its documentation scrutinised and amended by a New Zealand-based franchising lawyer and it should also obtain expert taxation advice. As a precursor to entering New Zealand or any other country, a franchisor should have a registered trade mark or, at the very least, have submitted a trade mark application which has been accepted and is going through the process. The intellectual property of a system, including the trade marks, is a very valuable asset of a franchisor and must be protected.

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