

LEGAL OVERVIEW OF THE NEW ZEALAND FRANCHISE MARKET

New Zealand is an exciting and fast developing market in relation to franchising. With a population of just over 4.2 million people and over 350 franchise systems, there is one system for every 12,000 people which is very high by world standards. New Zealanders love brands and businesses which succeed and at present there are no franchising specific laws. In my opinion, the existing laws adequately protect franchisees.

Possible Legislation

In February 2008 the Board of the Franchise Association of New Zealand (FANZ) met with the Honourable Lianne Dalziel, Minister of Small Business, to discuss a proposed framework for legislation which, in my opinion, is a knee-jerk reaction to the Green Acres fraud franchise saga which you have probably read about in our press. Specific items on the agenda in relation to the proposed legislation include the following:

- (a) Possible registration of Franchisors – if there were to be a register of franchise systems then this should operate only as a means of recording the existence of franchise systems.
- (b) Registration of sub-franchisees within a franchise system.
- (c) Registration of Advisers – the FANZ has some issues regarding the adequacy of claims to specialist expertise and professionalism in certain situations. There should also be a register of parties banned from acting as franchise advisers according to the FANZ.
- (d) Disqualification from registration for systems.
- (e) Disclosure documents requirements – the FANZ would be extremely concerned at the introduction of the very narrow, rigid and prescriptive form of disclosure requirements as prescribed in Australia (and recently made worse in my opinion by amendments to the Code of Conduct there).
- (f) Dispute resolution – this is no problem and is to be encouraged.

The current Code of Practice of the FANZ includes requirements to have a seven day cooling off period and to have a dispute resolution clause in all franchise agreements.

The FANZ has made written submissions on the proposed Bill and has asked to be heard at the Select Committee hearing which will be in Wellington in the future (date unknown). In my opinion, it is most unlikely that franchising-specific legislation would be enacted before the New Zealand General Election later this year, or if at all.

It is to be hoped that if any mandatory disclosure régime is imposed in New Zealand it will not be as prescriptive and wide as is the case in Australia which has its own Code of Conduct.

Franchising Case

On 11 December 2007 Mr Justice Baragwanath released a Judgment at the Auckland High Court in relation to the case of *TFAC Limited & Ors v David & Anor*. TFAC alleged misleading conduct and misrepresentations in trade (section 9 of the Fair Trading Act 1986)

against the defendants in the sale of a franchise authorising TFAC to sell sub-franchises for the provision of home services (a successful Australian brand – James’ Home Services – for which the defendants had acquired the New Zealand master franchise), TFAC having acquired the franchise for the eastern suburbs of Auckland for over \$202,500, giving notice of cancellation a few months later due to disillusionment. The High Court held that considering the overall effect of the defendants’ conduct, they were in breach of section 9 in that there was a basis for belief that the Australian experience was transferable to New Zealand so that the plaintiffs could rely upon it as an investment with solid prospects for them, when in truth the New Zealand market was never proved. The fact that the concepts of “*proven system for success*” were general rather than specific did not exonerate the defendants if the plaintiffs were in fact misled. The plaintiffs, not having made out a contractual claim for failure to achieve specifically represented sales, had their entitlement limited to compensation for what they had lost (a total of \$258,761 including \$26,000 for loss of income from employment and interest of 7.5% from June 2006 was awarded).

Code of Practice and Code of Ethics

All members of the FANZ must adhere to the Code of Practice and the Code of Ethics and the Code of Practice has four main aims which are:

1. To encourage best practice throughout franchising.
2. 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.
3. To provide the basis of self-regulation for franchising.
4. To demonstrate to everyone the positive will within franchising to regulate itself.

The present Code applies to all members including franchisors, franchisees and affiliates such as accountants, lawyers and consultants.

All franchisor members of the FANZ must have a Franchise Agreement which contains a dispute resolution clause and a seven day cooling-off provision and mediation is the favoured method of resolving disputes. It has a high success rate in relation to franchising disputes and that is probably because both parties respect each other and wish to continue their relationship.

International Aspects

New Zealand encourages and welcomes overseas franchise systems and New Zealand has double tax agreements with many countries, including the UAE. Such agreements limit the taxing rights of a particular country and reduce double taxation which is good for business.

Good Faith

Contract law governs the legal relationship between the parties to a franchise agreement. The Courts in New Zealand may be willing to imply a duty of good faith into franchise agreements which stems from an overseas trend to imply such a duty because of the special relationship between the parties.

Franchisor Dangers

It is crucial for franchisors, whether they be New Zealand franchisors or franchisors based overseas, not to overstate the financial position and success of their franchised businesses in New Zealand. Existing laws which cover misrepresentation are robust and dangerous (for example, Fair Trading Act 1986) and great care must be taken. The case which I have mentioned above of *TFAC Limited* is very important as it would seem unacceptable from the High Court of New Zealand's point of view for any overseas franchisor to "plug in" an overseas system in New Zealand and presume that it will be successful without testing the market and proving the viability of the business in New Zealand. However, please note that the case is a High Court decision and subject to any appeal to the Court of Appeal which may or may not happen in the future.

Whether franchising legislation comes in within the next year or so is unknown at this stage. In my opinion, self-regulation has been working and still is working and there is no need at present for franchising legislation in New Zealand. However, there seems to be a worldwide trend for franchising legislation which is probably inevitable in New Zealand at some stage. Ethical franchisors have nothing to fear and such legislation is bound to emphasise full disclosure of all material facts by franchisors to potential franchisees.

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