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SETTING PRICES FOR CUSTOMERS – IS IT LEGAL?

Some elements of franchising per se are anti-competitive and could run fowl of the Commerce Act 1986. That Act in particular looks at restrictive trade practices and it also covers resale price maintenance.

In June 2007 the United States Supreme Court overturned a 100 year precedent and held that “vertical price restraints are to be judged by the rule of reason”. What does this mean for New Zealand?

US laws are not applicable in New Zealand but in a franchising context it always pays to be aware of what is happening around the world. In New Zealand and in full compliance of the Commerce Act a franchisor cannot stipulate and enforce any minimum prices for products or services. However, it can stipulate maximum prices and a typical clause in a franchise agreement might read as follows:

“The franchise shall ensure that it never charges any member of the public an amount exceeding the maximum prices of any products or services as stipulated by the recommended retail price of the products or services from time to time as the franchisor sees fit.”

The franchisor may have legitimate interests in managing the prices which suppliers charge their franchisees, offering consumer price guarantees to customers, ensuring the pass – through of promotions from suppliers, maintaining or increasing quality of products or services while keeping customer prices low, encouraging consistent pricing and advertising or promotional programmes or national pricing advertising, and eliminating free riders such as franchisees who do not contribute to an advertising fund but who may benefit from advertising or marketing activities, or dealers who do not provide certain services but benefit from those dealers who do. Franchisors have struggled to accomplish these goals without risking a breach of the Resale Price Maintenance Laws.

Franchisors do not have any ability to adopt resale price maintenance policies and to incorporate them into franchise or distribution agreements without inevitably inviting trouble from franchisees and especially the Commerce Commission is dangerous. In my opinion, franchisors must at all times be aware of their perceived interference in pricing products or services. Obviously, guidelines would assist any franchisee and a franchisor is in the position of checking out the prices which competitors charge and maintaining a vigilance on competitor activity. New Zealand has relatively free market forces which boils down to what the customer will pay for a particular product or service. I do not think that New Zealand will follow the US in its relaxation of minimum resale price maintenance agreements being deemed to be legal. To do so, would be a complete departure from its current laws and those of Australia.

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