

PRESENTERS



Sarah Pilcher, Principal, The Franchise Lawyer, Auckland

Sarah has worked outside the law as a Human Resource Manager, a franchise consultant and in family owned commercial property services businesses giving a genuine understanding of how business works and what issues business owners and managers have to deal with. She has been the lawyer for many of New Zealand's best known franchise systems over the years, and has written or reviewed hundreds of franchise agreements.



Deirdre Watson, Barrister, Auckland

Deirdre has practised as a Barrister since 1993, and has undertaken a wide variety of general commercial and civil litigation, including contract, franchising and general civil litigation. She holds an LLM (Hons), has written a number of articles in franchising, lectures at Auckland University in franchising and is a Board Member of the New Zealand Franchise Association.

The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.

Cover and text stocks used in this publication are from Forestry Stewardship Council certified mills, manufactured under the environmentally responsible paper manufactured environmental management system ISO 14001, using pulp from well managed forests and other controlled sources.

CONTENTS

1. COMMON PITFALLS AND DISPUTES	1
INTRODUCTION	1
FRANCHISING IN NEW ZEALAND.....	1
DEFINITION OF FRANCHISING	2
<i>Business/Full Format Franchising</i>	2
<i>Licence or Franchise?</i>	3
<i>Master Franchising</i>	3
BEWARE AND BE AWARE.....	4
ADVISING A FRANCHISEE.....	5
BACKGROUND AND DUE DILIGENCE RESEARCH.....	6
<i>Reputation and substance of franchisor</i>	6
THE DOCUMENTATION.....	8
<i>Disclosure Document and other Forms</i>	8
<i>Franchise Agreement</i>	9
<i>What to Cover</i>	9
AMENDMENTS AND SPECIAL CONDITIONS	10
<i>This Agreement is Not Negotiable!</i>	10
ACTING FOR VENDOR OR PURCHASER OF EXISTING FRANCHISE BUSINESS	11
KEY TERMS	12
<i>Term of Franchise</i>	12
<i>Territory</i>	12
<i>Customer “Ownership”</i>	13
<i>Premises, Fitout and Lease</i>	14
<i>Fees, costs, expenses</i>	14
GUARANTEED INCOME.....	16
FRANCHISOR OBLIGATIONS.....	16
MINIMUM PERFORMANCE CRITERIA.....	17
SYSTEM CHANGES AND UPDATES.....	17
MANUALS	18
DISPUTE RESOLUTION	18
TERMINATION AND RESTRAINT OF TRADE.....	18
PERSONAL GUARANTEES.....	20
2. TYPICAL FRANCHISE DISPUTES AND HOW TO SOLVE THEM	21
INTRODUCTION	21
TERMINATION OF FRANCHISE AGREEMENTS	21
<i>Is there a right to terminate?</i>	21
<i>Exercise of a contractual discretion – does a franchisor have to observe good faith when exercising its contractual power to terminate?</i>	21
<i>Practical concerns for franchisors wanting to terminate</i>	28
3. RESTRAINT OF TRADE UPDATE	31
THE BASICS	31
<i>What is a legitimate interest in franchising?</i>	31
<i>The Court of Appeal disagreed</i>	33
<i>Conclusions to be drawn from the cases on the question of legitimate interest</i>	34
<i>Homes Services Sector</i>	35
<i>Conclusion</i>	36
<i>Does the restraint of trade clause go wider than necessary to protect the “legitimate interest”?</i>	36
<i>Relevance of Adequacy of damages in restraint of trade cases</i>	37
<i>Advice to drafters</i>	38
4. COMPLAINTS ABOUT THE QUALITY OF THE SERVICES PROVIDED BY THE FRANCHISOR	39
5. COMPULSORY MEDIATION CLAUSES	43
CONCLUSION	43