I. Introduction

Franchising is developing in New Zealand at a very fast rate. Some people may wonder exactly what franchising is. It is also fair to say that some people use the term loosely and in the wrong context.

Quite simply, franchising is a method of marketing goods and services. It has evolved out of a number of business transactions, methods, and practices which have been common and popularly known for many years. As a legal and marketing concept, it is not new.

In 2017, Massey University and Griffith University conducted a survey of New Zealand franchising and some highlights from that survey are as follows:

- The number of business format franchise systems operating in New Zealand has increased, with 631 business format franchise systems operating in New Zealand, compared with 446 in 2012.
- The survey estimated that franchised businesses contribute around NZ$27.6 billion to the New Zealand economy.
- The number of units operating with business format franchise systems has also increased, with an estimated 37,000 units compared with 23,600 in 2012.
- There are an estimated 124,200 employees of New Zealand business format franchise systems, up from 80,400 in 2012, with approximately sixty percent of employees in permanent full-time employment.
- Franchising covers a wide range of industry categories and subsectors. Predominant sectors included “retail trade” (twenty-three percent),

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“other services” (twenty percent), “accommodation and food retail” (eighteen percent) and “administration and support services” (eight percent).

- The median total start-up cost for a franchisee was $308,500 for retail and $87,550 for non-retail.
- The median initial franchise fee was $35,000.
- Fifty percent of franchise systems have been operating since before 2000.
- Median time before franchising is four and a half years. Thirty-six percent are franchised within first year.
- The overall level of disputes per franchise unit was low (1.9 percent). Only twenty-two percent of franchisors experienced a substantial dispute with a franchisee within the last twelve months. The most common action was mediation (forty-nine percent), followed by correspondence via a solicitor (forty-one percent). There was little incidence of litigation (ten percent) where substantial disputes occurred.

II. Legal Landscape in New Zealand

Although there are no specific franchising laws in New Zealand, existing laws protect franchisees such as the Fair Trading Act 1986,2 the Commerce Act 1986,3 and the Contract and Commercial Law Act 2017.4 Those Acts focus in particular on misrepresentations and restrictive trade practices which include anti-competitive behaviour.

Once a franchisee has chosen a particular brand and franchise system, and wishes to progress further with enquiries, the first question to ask is whether the franchisor belongs to the Franchise Association of New Zealand (FANZ). The FANZ was formed in 1996 and publishes the Code of Practice5 (the Code) with which all members must comply. While many franchisors belong to the FANZ, some have chosen not to join, yet still comply with the Code.

III. Code of Practice

The Code of Practice has four main aims, which are as follows:

1. To encourage best practices 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 selfregulation for franchising.

4. To demonstrate to everyone the positive will within franchising to regulate itself.6

The Code applies to all members including franchisors, franchisees, or affiliates such as accountants, lawyers, and consultants, and all prospective new members of the FANZ must agree to be bound by the Code before they can be considered for membership.

Prospective franchisees will usually be given a disclosure document and franchise agreement by a franchisor. The Code states that franchisors must provide the disclosure document to prospective franchisees at least fourteen days prior to the signing of the franchise agreement.7 The disclosure document must provide certain information including the following:

• Details about the franchisor and its directors including experience and a viability statement with key financial information of the franchisor;

• Details of any bankruptcies, receiverships, liquidations, or materially relevant debt recovery;

• Criminal, civil, or administrative proceedings within the past five years;

• A summary of the main particulars and features of the franchise;

• A list of components making up the franchise purchase;

• Details of any financial requirements by the franchisor of the franchisee; and

• Other information as listed in the Code.8

Franchising in New Zealand covers goods and services in many areas, including general retail, leisure and education, business and commercial, food and beverage, health and fitness, computer and technology, home and building services.

IV. Independent Legal Advice

It is essential for prospective franchisees to obtain independent legal advice from a lawyer experienced in franchising as well as independent accounting and taxation advice. The Code of Practice requires all franchisor members who belong to the FANZ to recommend to prospective franchisees to seek expert advice from a lawyer.9 Many franchise agreements contain a

8. Id., App’x A §§ (10)–(15).
9. Id., App’x A § (13).
solicitor’s certificate requiring the lawyer to certify that the franchise agreement and its effect have been explained to the franchisee.

A franchisee should have a number of meetings with the franchisor and its representatives, and all questions and answers should be written down and carefully kept for future use if required. Prospective franchisees should be able to rely upon everything they are told but be wary of financial projections that the franchisor provides. That is a dangerous area and, in the author’s opinion, franchisors should not provide financial projections but should instead provide actual financial results and suggest that the franchisee seek its own independent accounting advice.

V. Structure

If a foreign franchisor wishes to establish a New Zealand company, it must comply with the Companies Act 1993 and the Financial Reporting Act 2013. In relation to the formation of a company, this can be done online, and the costs are minimal. All companies incorporated in New Zealand must have a director who lives in New Zealand or Australia and, in the case of a director living in Australia, the individual must also be a director of an Australian incorporated company. All directors must provide their place of birth and date of birth.

If a foreign business entity holds twenty-five percent or more of the shares in a company, the company must be audited and must file financial statements pursuant to the Financial Reporting Act 2013.

With respect to foreign investment, there are no barriers for funds coming into New Zealand. However, any proposed investment by a foreign entity (Overseas Persons) in significant business assets, certain types of sensitive land, residential land, or fishing quotas is subject to consent under the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. Overseas Persons include companies incorporated outside New Zealand or a company or other entity that is at least twenty-five percent owned or controlled by an Overseas Person or Persons. Overseas Persons that desire to

invest in these areas must file an application with the Overseas Investment Office for consent to the purchase before they can proceed.¹⁹

VI. Intellectual Property Protection

In New Zealand, the term “intellectual Property” encompasses trade marks, registered designs, copyrights, and patents. The protection of the rights to intellectual property is fundamental to any franchised business.

A. Trade Marks²⁰

A franchisor must obtain formal trade mark or service mark protection as a basis for any trading operation. There are forty-five classes of goods and services for trade mark protection in New Zealand and, of those classes, thirty-four relate to goods and eleven to services.²¹ For example, there are three food classes and two classes covering products such as beer, alcoholic beverages, fruit juices, and mineral water.²²

There is also a service class to protect advertising and business services.²³ The nature and extent of any trade mark protection needs to be considered for each particular case.

Trade marks may comprise any word, brand, label, symbol, device or logo that serves to distinguish the particular goods or services of one party from the goods or services of another party.²⁴ The Trade Marks Act 2002 governs registration of all marks.²⁵

The principal function of a trade mark is to indicate the origin of goods and services. It is important to select a distinctive trade mark so that the public will associate your goods and services with the unique brand.

Trade marks are protected by registration in the Intellectual Property Office of New Zealand.²⁶ Once you have selected or designed your trade mark then as a precautionary move it is possible to obtain a search of the Trade Mark Register to ensure that it does not conflict with anyone else’s mark.

¹⁹. Id. § 10.
²³. Id., Class 35.
²⁴. Trade Marks, supra note 20.
²⁵. Trade Marks Act 2002, pt 1, § 3 (N.Z.)
²⁶. Trade Marks, supra note 20.
Assuming that the trade mark is available, its protection is afforded by filing an application and paying the requisite fee. Once processed, the Trade Mark Office will issue a filing date and application number.27

The benefits of trade mark registration are as follows:

1. It can be used to prevent any competitor from using the same or similar mark on similar goods or services in New Zealand.
2. It serves as public notification of your rights in that trade or service mark.
3. It can prevent registration of an identical or confusingly similar mark.
4. Trade mark registration is a valuable business asset.

It is also possible to have common law rights in an unregistered mark which can be protected by the tortious action of passing off.28

B. Registered Designs

Registered design protection pursuant to the Designs Act 195329 is available for a wide range of products. Protection may be obtained for novel features of shape, configuration, pattern, or ornament applied to an article by an industrial process. The features protected by a registered design must appeal to and be judged by the eye such as design on china and cutlery.

It is possible to obtain a preliminary search in the designs section of the Intellectual Property Office, and such a search can provide advice as to whether or not the proposed design is likely to infringe an existing registered design and/or whether it is in fact registrable.

C. Copyright

Under the Copyright Act 199430 the labour, skill and judgment that an author, artist, or creator has expended in the creation of an original literary, artistic, musical, or dramatic work is protected. Copyright arises automatically in the work. It is not the ideas that can be protected but the tangible form the ideas take such as the manual, the logo, or the advertising jingle.

Protection is in the form of a right to prevent anyone else from copying or reproducing the work or a substantial part of the work without the author's permission.

D. Patents

The registration of patents is governed by the Patents Act 2013.31 In broad terms, patent protection may be obtained for inventions (ideas) that are new and are capable of manufacture. Patent rights are granted by statute,

27. Id.
and the system operates as a reward for technical innovation by granting exclusive monopoly rights for a defined period.

To obtain a valid patent, the invention must be new. An invention should not have been used, sold, published or otherwise known in New Zealand by the applicant or any third party prior to the date of application. Hence, confidentiality is important.

It is essential to have expert advice in the areas of trade marks, registered designs, copyright, and patents.

VII. Cartels Legislation

The Commerce (Cartels and Other Matters) Amendment Act 2017 became law in New Zealand in August 2017. This new Act amended the Commerce Act 1986 and key changes include the following:

A. Cartel Conduct Prohibitions

Broadly speaking, there are three new “cartel conduct” prohibitions that are unlawful unless an exemption applies:

(1) a prohibition on competitors fixing prices;
(2) a prohibition on competitors jointly restricting output; and
(3) a prohibition on competitors colluding to allocate markets.

These new prohibitions clarified the law in New Zealand and will have a far-reaching impact on business. However, some types of anticompetitive arrangements are exempt from the cartel prohibitions and are summarised below.

B. Collaborative Activity Exemptions

This exemption applies to cartel conduct by competitors in a “collaborative activity” where the cartel provision is reasonably necessary for the purpose of the collaborative activity. The collaborative activity exemption may also apply to a restraint of trade provision post-termination of a franchise agreement in certain circumstances. Competitors can seek clearance for proposed collaborative activities that contain a cartel provision giving certainty that the proposed activities will not breach the Commerce Act.

The collaborative activities exemption is an important exemption for those involved in franchising in New Zealand. Some provisions of franchise agreements may be regarded as cartel provisions (such as territory allocation and noncompetition agreements) and so any franchisor entering New Zealand will want to obtain legal advice that this exemption applies to any cartel provisions in the proposed franchising activities.

33. Id. § 31.
34. Id. § 31(4).
35. Id. § 31(1).
36. Id. § 31(4)(b).
C. **Vertical Supply Contract Exemption**\(^{37}\)

This exemption recognises that there may be circumstances where a supplier and a customer may be in competition with each other, and, as a result, provisions in their supply agreement risk being cartel provisions. This exemption allows cartel provisions that are included in vertical supply contracts where certain requirements are met. Those requirements are that the contract is entered into between a supplier and customer, that it relates to the supply of goods and services, including the maximum price at which the customer may resupply the goods or services, and that it does not lessen competition.\(^{38}\)

D. **Joint Buying and Promotion Agreements Exemption**\(^{39}\)

This exemption may apply when competing buyers arrange to purchase goods or services together on terms that individually the competitors could not negotiate on their own. This exemption applies only to price fixing and not the other forms of cartel conduct.

The amendments to the Commerce Act affect New Zealand businesses that include the following:

1. Many suppliers and resellers—for example, distribution agreements with territorial allocation clauses; and
2. Most franchisors and franchisees because most franchise agreements contain territorial allocation clauses and restraints of trade.

Because the cartels legislation impacts upon key areas contained in franchise agreements, in the author’s opinion it is very important to explain the basis of a number of clauses that are commonly inserted in franchise agreements. Such clauses include approved products, approved services, restraint area, restraint period, and location of a franchised operation.

**VIII. Territories**\(^{40}\)

A key part of franchising is a franchisor being able to offer some sort of territory to their franchisees. Most franchise systems in New Zealand rely on specific territories. A potential franchisee who has selected a franchise system and obtained a copy of the disclosure document and franchise agreement from the franchisor must look carefully at the territories available and what is being offered by the franchisor.

A “territory” refers to a specific area within which the franchisee will be able to conduct the franchised business. The reach of the territory depends on the business. If the business will be conducted in a shopping mall, the

\(^{37}\) Id. § 32.

\(^{38}\) Id. § 32(1).

\(^{39}\) Id. § 33.

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territory may only be the immediate mall property. In other franchised businesses, the territory may be a specifically defined area set out on a map attached to the franchise agreement. In other cases, the territory may be non-exclusive, or there may be no territory at all, and, in consequence, “a free for all” within which numerous franchisees will be conducting their own separate businesses with no demarcation line.

The issue of territory is a very important one for consideration. As a franchising lawyer, territorial disputes and territorial issues have increased in recent years, and the main problem comes from franchisors allowing new franchisees to operate franchises either within what an existing franchisee thought was its own particular territory, or offering the right to open a second outlet to a franchisee within the same territory because the existing franchisee is under-utilising the territory or underperforming.

A. Concise Territory

In the majority of cases, a franchisor will divide up New Zealand into concise and separate territories that will be allocated to each new franchisee. Territories should be carefully defined on maps, and a typical clause in the franchise agreement may be as follows:

The franchisor grants to the franchisee a franchise to establish and carry on a business within the territory as set out in the schedule and delineated in red on the map attached and to carry on the business within the territory using the methods and techniques developed by the franchisor.

This type of clause gives certainty to a franchisee by way of a map being attached to the franchise agreement with the boundaries of the territory clearly defined. There can be no doubt as to the boundaries of the territory that a franchisee is contracting by way of execution of the franchise agreement and payment of the initial franchise fee. In this author’s opinion, some franchisors make the mistake in the early days of giving franchisees too big a territory that a particular franchisee does not service and exploit to its maximum potential.

Some franchisors may wish to cover their position by reserving in the franchise agreement the right to take back part of the territory in the future (perhaps when the system has become established) by re-demarcation of the boundaries during the term. This may be framed as an absolute right or in the franchisor’s discretion (reasonable or otherwise) that the territory is not being (or has become) and/or may not be capable of being serviced to its maximum potential. A franchisee should be aware of a blanket sole discretionary right that is commonly drafted as follows:

The franchisor shall have the right at any time during the term to reduce the territory if in the franchisor’s opinion the franchisee is not maximising or is unlikely to be able to maximise business exploitation of the territory.

A possible way out of the above is for the franchisee’s lawyer to suggest inclusion of an amendment along the following lines:
“provided that the franchisor shall not be entitled to reduce the territory to an area within a [insert number] kilometres radius from the premises.”

The qualification like this will remove any challenge by a franchisee.

B. Exclusivity of Franchise

What a franchisee requires in entering into a franchise arrangement is certainty. There must be certainty as to the upfront franchise fee payable, certainty as to the ongoing service fees or royalties payable together with advertising levies, and, most importantly, certainty in relation to the territory. A possible clause to consider is along the following lines:

If the franchisor or the franchisee identify the opportunity to establish a further franchise in the territory (‘the proposed franchise’) then the franchisee shall be considered prior to any third party as the proposed operator of the proposed franchise. The existing franchisee, subject to meeting all new franchisee criteria, shall be offered a 14 day first right of refusal.

This type of clause provides a clear indication that the franchisee has not been given an exclusive territory, but will be considered first and foremost should the franchisor wish to open another outlet in the vicinity of the existing franchised business. However, an important caveat for the franchisor is whether the existing franchisee has been operating the business in such a way that gives confidence to the franchisor that the existing franchisee will be able to manage more than one outlet in the territory. Because of this important fact, the clause quoted earlier usually continues and provides the following:

If the franchisor considers the franchisee is capable of operating the proposed franchise in addition to the franchisee’s commitment(s) under its then existing franchise agreement(s), it shall notify the franchisee in writing and the franchisee shall indicate its willingness to accept the proposed franchise. The final decision as to the suitability or otherwise of the franchisee to operate the proposed franchise shall rest solely with the franchisor. If the franchisee declines within 14 days to accept the proposed franchise, then the franchisor shall be free to either itself open a new store within the territory or allow a new franchisee to open a new store within the territory.

As can be seen above, the clause is explicit, clear, and unambiguous, but it is essential in all cases for the proposed franchisee to have independent legal advice from a lawyer experienced in franchising.

C. Alternative Clause

Another way is to confirm that the franchisee has not been granted an exclusive territory, but to combine that provision with a right of first refusal by a franchisee should a franchisor wish to establish another franchise outlet within the territory. Such a clause would state as follows:

The franchisee acknowledges that it has not been granted an exclusive franchise territory but that it has been granted the right to carry on a business at the premises. The franchisor agrees that it shall give the franchisee a first right of refusal (provided the franchisee is in full compliance with all of its obligations pursuant
to this agreement) to purchase another franchise it may propose to offer in respect of the establishment of another [insert brand name] outlet at a site which is within the area as specified in the schedule (‘the territory’) on no less advantageous terms than the proposed franchise offer to any third party. The franchisee shall then have fourteen (14) days from the receipt of notice of such offer to notify the franchisor by notice in writing whether or not it wishes to accept the offer. If it wishes to accept the offer then it must agree to open the new [insert brand name] outlet within ninety (90) days of acceptance.

This type of clause is necessary to ensure that a franchisee has not been granted an exclusive territory.

D. No Territory Franchises

Some franchise systems prescribe no territories whatsoever. There is a difficulty here for the initial franchisee who should be concerned about saturation of the area of the franchisee’s proposed operation, that is, how far is the franchisee going to travel to get business? This is especially relevant when, in the case of a new system, there are no actual (as opposed to hypothetical or anticipated) figures to justify a viable business. The logical reaction would be to request a limit on the number of franchisees to operate in the area, although such a limit can also be counterproductive because it may stultify the establishment of and/or the growing of brand awareness to the public.

IX. Taxation

Taxation is payable on all income earned in New Zealand. The current rates for companies is twenty-eight percent. The goods and services (GST) tax rate is fifteen percent, and it is added on to all goods and services with no exceptions. Although there are no restrictions on the transfer and remittance of currency from New Zealand to an overseas jurisdiction, franchisors must comply with the tax laws of New Zealand. In relation to the payment of royalties, dividends, or interest, non-resident withholding tax (NRWT) must be deducted by the payee before funds are remitted to the overseas entity. The tax deduction must be paid by the payer to the New Zealand Inland Revenue Department (IRD), but a tax credit would be available to the

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42. New Zealand tax law defines royalties as “payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematographic films, films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. The term ‘royalties’ also includes income or gain from alienation of any property or rights described in this paragraph to the extent that such income or gains are contingent on productivity, use or disposition of such property or rights.” Tax Administration Act 1994 (2013 ed. sch 1 p1,646 (N.Z.).
overseas company. The rate of tax varies on the country involved, and New Zealand has double taxation treaties with a large number of countries. For example, in relation to Australia, Japan, Singapore, and the United States, the rate of NRWT is five percent in relation to royalties, and, in relation to Canada, China, Taiwan, and the United Kingdom, the rate is ten percent. In relation to Fiji, Indonesia, Malaysia, and the Philippines, the rate is fifteen percent.

It is common for franchise agreements and licence agreements to contain a “gross up” clause in relation to any withholding tax liability, and the following clause should be considered:

All royalties and other sums payable under this agreement shall be paid free and clear of all deductions and withholding taxes unless the deduction or withholding tax is required by law. If any deduction or withholding is required by law, the franchisee shall pay to the franchisor any sum as will, after the deduction or withholding has been made, leave the franchisor with the same amount as it would have been entitled to receive in the absence of any such requirement to make a deduction or withholding.

The clause essentially means that the franchisor would receive royalty payments net of any overseas taxes.

X. Restraint of Trade

During the term of the franchise agreement, a franchisee is normally prevented from carrying on any competing business. The franchisee may even be prevented from carrying on any other business whatsoever to ensure that their full time and attention are devoted to the success of the franchise business.

The franchise agreement will also almost invariably contain a restraint of trade that will apply to the franchisee following the termination or expiration of the agreement or the sale of the franchise business to a third party. A restraint of trade is a covenant prohibiting competition with the franchisor or the franchised system. The length and area provisions of the restraint will normally be set out in a schedule, and they will be subject to general legal principles governing restraints of trade.

The courts have recognised that it is reasonable for a person in the position of the franchisor to impose a contractual restraint upon any competitive

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46. Id.
conduct by a franchisee. Contractual restraints of this type are known as “restrictive covenants” or “agreements in restraint of trade.”

Such agreements must not exceed the boundaries of the courts’ notion of reasonableness. Two competing principles govern the courts’ decision-making process. The first principle is that it is reasonable for a person to stipulate that if he is willing to disclose all secrets of how to establish a particular business enterprise, then the recipient of the information cannot immediately terminate the contract and set up a competitive business, using the information which it has received during the course of the educational process. If the courts did not provide protection to franchisors in such situations, there would be no incentive for the owners of established businesses to share their secrets with others and enhance their business skills.

The second principle is that it is important for the well-being of the community that every individual should, in general, be free to advance his skills and earning capacity. The way that these two conflicting principles are resolved is to require that a restrictive covenant must be “reasonable” in its terms before it will be enforced.

The current position in New Zealand is set out in Section 83 of the Contract and Commercial Law Act 2017. Section 83 states as follows:

1. The court may, if a provision of a contract constitutes an unreasonable restraint of trade,
   (a) delete the provision and give effect to the contract as amended; or
   (b) modify the provision so that, at the time the contract was entered into, the provision as modified would have been reasonable, and give effect to the contract as modified; or
   (c) decline to enforce the contract if the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand.

2. The court may modify a provision even if the modification cannot be effected by deleting words from the provision.

What this means in practice is that if a franchise agreement provides for a three-year period of restraint when a two-year period would be considered to be reasonable, the covenant would be enforced to the extent that it could be rewritten by the court as being confined to a two-year term. The ability of the courts to modify excessive restraints is constrained by the principle that terms that could never have been considered reasonable will not be modified. The reason for this is that it is considered to be contrary to the public interest that a person should be able to intimidate a contracting party by stipulating for a wholly unreasonable constraint and then have the court enforce it.

51. Id. ¶¶ 5–6.
come to its rescue and rewrite the contract so that it falls within the boundaries of reasonableness. This is the doctrine of restraints which are “in terrorem,” that is, contracts that “terrorise” a contracting party. If a franchisor could only ever have reasonably sought a two-year restraint within a five kilometre radius of the business from which the person established goodwill, a nationwide restraint for six years could never be regarded as reasonable, and the courts will refuse to rewrite the clause so as to determine that the period of six years should be two years and the area of restraint should be five kilometres rather than the entire country.

What then is a reasonable restraint? There are two factors: area and time. For a franchise that teaches the art of making coffee and running a café, an area of restraint would typically be confined to the area in which the franchisee is likely to establish goodwill. A person who establishes a café in Auckland city is likely to establish goodwill that will extend perhaps 200 to 400 metres from the site. There are so many other competing cafés that the goodwill would not extend much further than that.

The duration of a restrictive covenant should be such as will enable a franchisor to interpose a new operator who will have a reasonable time to secure the retention of the customers. In the case of a café, it is unlikely that this will extend beyond two years.

A. Typical Clause

A typical restraint on competition clause that I include in franchise agreements is as follows:

1.1 The franchisee covenants that it shall not during the term (or any period in renewal or extension of it) except with the prior written approval of the franchisor, carry on or be directly or indirectly engaged or concerned or interested whether as principal, agent, partner, shareholder, investor, financier, lender, director, employee, consultant, independent contractor or otherwise howsoever in any business conducted in competition with the business, the franchisor and its other franchisees.

1.2 Both during the term and also following the termination of this agreement or its expiration by the effluxion of time the franchisee shall not:
   (a) act in any way to adversely affect the persistency or retention of the customers of the business; or
   (b) indefinitely use or disclose in any way the intellectual property or confidential information as defined in this agreement.

1.3 The franchisee shall not during the term or any renewal period or at any time following the termination of this agreement or its expiration through the effluxion of time for any reason disparage or do anything calculated to damage the franchisor’s goodwill, reputation and intellectual property rights or the goodwill of any other franchisees.

1.4 The parties agree that the restraints and restrictions contained in this agreement shall each operate as a separate and independent obligation of the franchisee enforceable to the full extent permitted by law, and shall not

52. Id. ¶ 7.
be affected by any invalidity in any other restraint or restriction contained in this agreement.

1.5 The franchisee and the guarantor shall not during the term of this agreement directly or indirectly engage in any activity or own or operate any similar business to the business or become interested whether as principal, agent, partner, shareholder, investor, financier, lender, director, employee, consultant, independent contractor or otherwise in any such business without the written consent of the franchisor.

1.6 The franchisee and the guarantor shall not for a period of two (2) years after the termination of this agreement or its expiration through the effluxion of time either on their own account or with or for any other person, firm or company or by their servants or agents, solicit or endeavour to entice away from the franchisor or any other franchisee by any means whatsoever any business from any person, firm or company who during the term of this agreement is or was a customer of the franchisee or of the franchisor or of any other franchisee in the franchise network.

1.7 This restraint on competition shall apply to both the franchisee and the guarantor for the period as set out in the schedule from the date of termination or expiration of this agreement both within the territory or within the distance as set out in the schedule from a franchised area.

1.8 For the purpose of this clause, acts done by the franchisee and the guarantor outside the territory shall nonetheless be deemed to be done within the territory where their primary purpose is the obtaining of any business carried on by the franchisor and/or its agents within the territory from any person, firm, company or other entity with business premises within the territory. This restraint of trade restriction shall also apply to any internet use of the business by the franchisee and by the guarantor.

1.9 The franchisee and the guarantor acknowledge that the restraints as stated in this clause are fair and reasonable and are necessary to protect the franchisor.

There must always be certainty as to the terms of a restraint, and the foregoing clause has been tested in the courts and is robust and effective.

B. Some Relevant Cases

Although each case is very fact specific, broadly speaking recent cases regarding the enforcement of restraint of trade provisions in New Zealand have tended to uphold the restraint contained in the franchise agreement.

In Mike Pero (New Zealand) Limited v Heath and Others,\(^5\) Mike Pero (an established mortgage broker franchise in New Zealand) applied for interim injunction against Heath, a former franchisee. Heath did not renew his franchise agreement and then incorporated a new company to continue to provide mortgage broking services despite the restraint of trade provision in the franchise agreement.\(^6\) Mike Pero filed for an interim injunction, which the court granted.\(^7\) Heath had filed proceedings in the High Court alleging that the restraint was unreasonable and that Mike Pero did not have any

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\(^5\) Mike Pero (New Zealand) Ltd. v. Heath & Others [2015] NZHC 2040, Moore J.

\(^6\) Id. ¶¶ 1–18.

\(^7\) Id. ¶¶ 19–21.
goodwill to protect.\textsuperscript{56} The court disagreed with Heath and noted that Heath acknowledged the restraint when he entered into the franchise agreement, he must have known what he was doing when he did not renew his franchise agreement and that he had been well informed of the restraint.\textsuperscript{57}

In \textit{Supatreats Asia Pte Limited v Grace & Glory Limited and Others},\textsuperscript{58} the franchisor had a well-known ice cream parlour brand in New Zealand called Wendy’s Supa Sundaes. There was a master franchisor agreement with Cone Enterprises Limited.\textsuperscript{59} The two parties disagreed over a proposed new ice cream supplier. Cone argued that the new supplier was more expensive, but inferior in quality and refused to comply, and did not force the other franchisees to comply.\textsuperscript{60} As the parties were attempting to resolve the dispute, the director of Cone opened a new ice cream parlour store called Shake Shed & Co and other former Wendy’s franchisees cancelled their franchise agreement with Cone (and Supatreats) and rebranded to the new store.\textsuperscript{61} The director did not advise Supatreats of the re-branding and when Supatreats eventually found out it issued breach notices to Cone, Chang and other franchisees.\textsuperscript{62} Supatreats eventually terminated the master franchisor agreement and applied for interim injunctions against the defendants to stop the operation of the new stores under the restraint of trade provisions, alleging that the director induced other franchisees to enter into the new franchise agreement with Shake Shed.\textsuperscript{63} The defendants argued that the restraints were unreasonable and that Supatreats breached the franchise agreement.\textsuperscript{64} They also argued that since the roll out was complete the stores should remain open.\textsuperscript{65} The court disagreed and granted the interim injunctions.\textsuperscript{66} The judge commented that it was clear that the defendants knew of the restraint of trade provisions and continued to trade as Shake Shed in the face of express notice from Supatreats which was a significant factor in granting the injunctions.\textsuperscript{67}

By contrast, in \textit{Dorn Investments Limited v Paul Hoover},\textsuperscript{68} Dorn was a master franchisee of Green Acres, a lawn mowing franchise in New Zealand. Dorn had become unsatisfied with Hoover, a franchisee, and removed a significant cleaning contract, which accounted for a large part of Hoover’s earnings.\textsuperscript{69} Hoover then rebranded and continued servicing the same area

\begin{itemize}
  \item \textsuperscript{56} Id. ¶¶ 35, 43.
  \item \textsuperscript{57} Id. ¶¶ 39, 45, 73.
  \item \textsuperscript{58} \textit{Supatreats Asia Pte Ltd. v. Grace & Glory Ltd. & Others} [2018] NZHC 1612, Wylie J.
  \item \textsuperscript{59} Id. ¶ 11.
  \item \textsuperscript{60} Id. ¶¶ 13–14, 18.
  \item \textsuperscript{61} Id. ¶¶ 15, 20, 23.
  \item \textsuperscript{62} Id. ¶¶ 21, 24, 73.
  \item \textsuperscript{63} Id. ¶¶ 2, 24, 28.
  \item \textsuperscript{64} Id. ¶¶ 29(b)–(c).
  \item \textsuperscript{65} Id. ¶ 58.
  \item \textsuperscript{66} Id. ¶ 81.
  \item \textsuperscript{67} Id. ¶¶ 46, 60, 68.
  \item \textsuperscript{68} \textit{Dorn Inv. Ltd. v. Hoover} [2016] NZHC 1325, Asher J.
  \item \textsuperscript{69} Id. ¶¶ 7, 30.
\end{itemize}
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and clients.\textsuperscript{70} Dorn terminated the franchise agreement and sought an interim injunction to restrain Hoover.\textsuperscript{71} Hoover argued that the removal of the cleaning contract amounted to repudiation.\textsuperscript{72} The court acknowledged that there was a restraint and Hoover had breached it.\textsuperscript{73} However, the court also agreed with Hoover that taking the contract off him arguably resulted in repudiation of the franchise agreement.\textsuperscript{74} Dorn never gave Hoover the chance to rectify any issues with how he had been operating.\textsuperscript{75} Furthermore, an injunction would be severely detrimental to Hoover as the business was his only source of income, so the court did not grant an injunction.\textsuperscript{76}

There is a trend to enforce restraint of trade provisions by the New Zealand courts. However, each restraint of trade scenario needs to be examined on its merits, and no one can assume that because there is a franchise system involved, the restraint will be upheld. The party attempting to enforce the restraint must show that there is a proprietary or legitimate interest justifying the restraint, and that the restraint goes no wider than is reasonably necessary to protect that interest. The actions of the parties leading up to the breach of the restraint are also relevant, and, while franchisors who behave fairly may feel confident about the enforceability of their restraints, nothing is certain. The cases where the courts have been prepared to uphold restraints involve successful and well-established systems with strong brands, strong systems, and a strong network of franchisees. Therefore, in relation to interim injunction applications, the courts will recognise the need for enforceable restraints of trade to protect a franchisor’s goodwill. So long as the case for harm is a strong one, the courts are willing to enforce a restraint of trade even if there will be significant cost and difficulty for the restrained party; and the remedies can even include forcing a restrained party to rejoin a franchise system that it is in dispute with, pending outcome of trial. Franchisees should consider the risks of the restraint being enforced before entering (or breaching) restraints of trade.

XI. Conclusion

Franchising in New Zealand is sophisticated, and it continues to expand annually. There are a number of overseas brands, but New Zealand-made franchises dominate the market. New Zealand is attractive to enter because there is no franchise-specific legislation, but care should be taken, and competent legal and other professional advice should be sought at all times.

\textsuperscript{70} Id. ¶ 8.
\textsuperscript{71} Id. ¶¶ 10–11.
\textsuperscript{72} Id. ¶¶ 29–30.
\textsuperscript{73} Id. ¶ 19.
\textsuperscript{74} Id. ¶ 42.
\textsuperscript{75} Id. ¶¶ 29–42.
\textsuperscript{76} Id. ¶¶ 35, 43.