



## **Submission**

Of the

**New Zealand Retailers Association**

To the

**Ministry of Economic Development**

In respect of the

**The Review of Franchising Regulation in  
New Zealand**

November 2008

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## **Introduction**

These submissions are presented by the New Zealand Retailers Association.

## **Background**

The Association is the largest trade association representing the retail industry in New Zealand.

Our membership includes the major supermarkets and general merchandise chain stores, specialised chains, traditional department stores and thousands of owner operators spread throughout the country.

Our membership also includes a range of specialised trade groups representing retailers, suppliers and distributors in the plumbing, metal fastener, pet, jewellery, equestrian, bicycle sporting goods industries.

Viewed nationally retail sales total some \$65b per annum.

The industry also employs approximately 325,000 people (17% of the workforce) in some 49,000 shops throughout the country.

## **Summary of Submission**

The Association has consulted a cross section of our membership involved in franchising in the course of the preparation of this submission.

These include some retailers who are also members of the Franchise Association of New Zealand as well a range of retailers who are members of the New Zealand Retailers Association only either as franchisors or franchisees.

We have also discussed the review directly with the Franchise Association of New Zealand and had the opportunity to review the submission prepared by Business New Zealand.

Put simply the Association is not supportive of moves to regulate franchising.

Almost without exception, our members support the concept of voluntary self regulation that is currently carried out through the codes operated by the Franchise Association of New Zealand. There is no support for regulatory controls amongst the members that replied to our invitation to comment on the discussion document.

## **General Submissions**

### **1) Definition**

The Association believes that further work needs to be done on the definition of franchising before any decisions are taken on the need or otherwise for regulatory controls.

For the purposes of the discussion document it is noted that 'franchising can be viewed as a form of licensing distribution agreement' but the paper adds that 'the term is often used loosely to refer to one or more types of agreements such as product franchising, manufacturing franchising or business format franchising'.

Membership feedback suggests that the model proposed in the discussion paper does not adequately address the cooperative franchise model.

Furthermore we have been informed that some business franchises in New Zealand operate under local definitional rules whereas others are compliant with the definition used in Australia.

We accordingly consider that further work should be undertaken on definitional coverage prior to the consideration of the need for any specific regulatory controls.

## **2) Options for Going Forward**

The Association notes that three options are proposed in the paper:

- maintaining the status quo;
- education and/or
- franchise specific legislation

### ***a) The Status Quo***

We are, as stated, primarily supportive of the first option as we consider, like Business New Zealand, that the status quo approach is the best option going forward regarding franchising law in New Zealand.

We note that there is already self regulation operated through the Franchise Association of New Zealand, which requires its members to adhere to a Code of Practice and also a Code of Ethics.

We believe such self regulatory models work well given our involvement with other industry sectors such as the Independent Compliance Committee of the NZ Juice and Beverage Association.

We also are aware of the successful self regulatory procedures followed by the Advertising Standards Authority on liquor and other sectoral issues.

### ***b) Education***

Notwithstanding our views above we recognise the importance of education as the next best step forward, as, like Business New Zealand, we believe that education also provides a possible non-regulatory solution to any perceived issues that may exist with franchising.

We accordingly support the suggestion that further work in targeting both franchisors and franchisees could be undertaken that would make them aware of what issues to look out for. Further, inclusion of questions franchisors and franchisees should ask when contemplating a franchise agreement may be appropriate to minimise any difficulties as and where they may exist.

### ***c) Franchise Specific Regulation***

We do not, as stated, support this option.

As a matter of principle we are supporters of a free and competitive market place. We believe that industry working together to develop, foster and maintain voluntary self regulatory processes (that achieve socially and economically desirable outcomes) is preferable to having regulatory solutions foisted upon industry by central Government that can be seen to be both cost prohibitive and administratively cumbersome.

We note that the discussion document proposes a number of differing options for regulatory solutions that might assist the industry including:

- information disclosure requirements
- obligations to obtain professional advice
- a cooling off period
- mandatory mediation procedures
- minimum contractual terms and
- obligations of good faith bargaining

We do not have the expertise to comment on these issues in any great detail but we make the following observations

### ***Information Disclosure***

We would have thought it was incumbent on all franchisors as a matter of principle to give franchisees certain specific information before any agreement is entered into and that it was up to both parties to seek appropriate professional legal advice before any particular contract is concluded.

We think that such an approach is simply normal commercial practice and accordingly do not think it is necessary for such practices to be the subject of formal regulatory requirements in franchise specific legislation.

### ***Cooling Off Periods***

We also think it is inappropriate to look at a mandatory cooling off period as part of franchise specific legislation.

It is noted that a cooling off period is prescribed in the voluntary Codes of both the Franchise Association of New Zealand and the NZ Direct Selling Association as well as being prescribed in the Door to Door Sales Act.

Our view is that cooling off periods have a much wider applicability than just for franchise agreements and accordingly we recommend the need for wider regulatory controls be considered if necessary as part of a wider legislative review on the issue.

### ***Mediation***

Feedback from our membership does not establish any support for mandatory mediation and indeed one member observes that mediation has not been of any particular assistance to the franchise concerned.

The company commented as follows:

“Mediation has not helped franchise ‘x’. Generally it requires both parties to compromise. As goodwill is owned by franchise ‘x’ members the compromise is at the cost of other members. Most mediators are lawyers – these only help with legal issues.

In a well run franchise for commercial reasons the parties will in effect mediate anything that can be solved. Litigation is the only answer against unreasonable claims“.

We are aware that the Ministry of Justice is currently carrying out a review of Tribunals and we have made submissions on that review in respect of Disputes Tribunals.

If it was necessary to examine other options a possible alternative approach to mandatory mediation could be to examine whether the scope of tribunals such as the Disputes Tribunal could be extended to commercial disputes such as franchise agreements

### 3) Other Issues

#### ***a) Cost/Benefit Considerations***

We are not in a position to proffer any cost/benefit comparisons on the options outlined in the discussion paper but are pleased to see that some costs assessments have been noted in the consideration of some of the regulatory options.

However, we feel that it is incumbent on the Ministry to undertake further work in this area in line with established practice.

It may even be appropriate for the Ministry to commission an independent assessment from an independent agency such as the NZ Institute of Economic Research in the process of considering the best way forward if the option of a regulatory outcome is ultimately decided upon.

#### ***b) Unconscionable Conduct***

We are supportive of the conclusion outlined in para 5 of the discussion paper that unconscionable conduct should only be considered as part of a wider review rather than as part of the current review on franchising.

Whilst as to-date we have not had any specific discussions with the Ministry of Consumer Affairs on this issue we will wish to do so.

### **Conclusion**

For the reasons outlined in this submission we are supportive of ongoing self regulation of franchise agreements within New Zealand.

We believe such agreements are best negotiated between the parties and do not consider the need for franchise specific laws has been substantiated.

We trust these submissions are helpful and would be more than happy to discuss them with the Ministry.

New Zealand Retailers Association  
November 2008