



Westpac New Zealand Limited

To: Review of Franchising Regulation

**Subject: Westpac feedback on MED franchise
discussion paper**

Date: 21 November 2008

Introduction

This submission is made on behalf of Westpac New Zealand Limited (“Westpac”) on the Review of Franchising Regulation in New Zealand released by the Ministry of Economic Development in August 2008.

We appreciate the opportunity to comment on the appropriateness of regulating the franchising sector. In general, Westpac supports maintaining the status quo, with existing commercial legislation, including the Commerce Act and Fair Trading Act already covering the issues typically experienced.

Westpac has contributed to the Franchising Association of New Zealand’s (“FANZ”) submission and broadly endorses the content of that submission.

Westpac warmly encourages the Ministry of Economic Development to make contact to clarify any issues that this submission raises. Enquiries should be addressed to:

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Maintaining the status quo

Westpac supports the status quo, since existing legislation covers most or all commercial issues experienced in franchising. There is nothing inherently different about franchising that would warrant a separate regulatory framework.

Two additional reasons why more extensive franchise legislation may be impractical in New Zealand would be:

- 1) **Definition.** Only larger, full format franchise systems would comfortably fit into franchise specific legislation. Such a narrow definition required to limit to full format franchising would exclude most of the licensed and other loosely organised systems – meaning that exactly the systems you would like to legislate for would be excluded.
- 2) **The small size of the New Zealand market.** Having franchise specific legislation and the required enforcement regime would be prohibitively expensive for Government and the typically small New Zealand franchisors, meaning that it would unnecessarily curtail growth in one of the better job creating structures in existence.

Introducing franchise-specific legislation

Westpac does not see sufficient franchise-specific problems to warrant introducing franchise-specific legislation. If this is to be considered we want cheap and simple solutions that continue to support growth in the industry. Westpac support the FANZ self-regulatory regime and practice codes as a good base for any legislation to be built on. We support FANZ having greater ability to discipline members.

Mandatory information disclosure

In relation to the requirement of the provision of mandatory disclosure, Westpac considers that

- Disclosure would not be an issue for existing FANZ members and could be considered.
- The format and type of information should be kept in check to keep down cost and compliance.
- Buyers need better **understanding** rather than more information.
- Including a **checklist for due diligence** that needs to be covered that would force people to focus on the crucial questions.
- Keeping disclosure simple so people will read + understand it is the most effective approach.
- Complexity should be minimised to reduce a need for lawyers and consultants.

A requirement for a potential franchisee to seek professional advice, or for a franchisor to recommend that a potential franchisee seeks professional advice

Westpac is not satisfied that the costs associated with this requirement would outweigh the benefits. Should this approach be pursued, the bank would appreciate being consulted on a number of issues, including:

- Who is deemed to provide professional advice and how would they be qualified.
- Whether there should be State funding for very simple (lowest level) franchises.
- This requirement does not take into account people's right to refuse representation. It is important that this be retained to address the variety and

complexity of franchise arrangements available – some require little advice, some require a substantial amount.

Westpac sees more merit in consideration being given to providing an educational framework for advisors on franchises to go through with (some franchise systems are fairly unique, so there may be a need to provide framework for professional advisors to help their clients).

A cooling off period

Westpac sees little benefit in a cooling off period. It may be more beneficial to give a longer term remedy for ills or enforceable penalties for bad faith/mis-representation. In our view, a cooling off period is:

- Rarely used.
- More applicable for small or high pressure sales technique situations.
- Poorly targeted, in that problems usually manifest after a much longer period.
- More a “feel good” cover-your-back clause than a practical effective tool.

Enhanced dispute resolution, such as a mandatory mediation process

Westpac sees benefit to this approach. We note that a cheap, mandatory mediation process is provided by FANZ . However this can be a way of dragging the process on by the franchisor, who may be looking for a negotiated exit. The outcome tends to favour franchisor.

A mini-trial recommended as the next step as a time-frame is needed to finish the mediation period. However, a mini-trial may be prohibitively costly and too complex to operationalise for such a small market.

Rules for franchise contracts; and/or existing Commercial Law like the Commerce Act and Fair Trading Act cover most issues adequately

In our view existing legislation covers most issues adequately. However we do note that there are two exceptions to this general observation:

- Renewal fees can be expensive and a problem.
- Automatic termination clauses are becoming exceedingly severe, creating problems for franchisees that get into financial difficulty. This may influence the franchisee’s ability to sell the business as a going concern, and this can limit funding levels, costs and options. This is one place where the franchise model may perhaps present some unique issues.

An obligation of good faith

Westpac strongly opposes a proposal of an obligation of good faith for the following reasons:

- Good faith would be difficult to follow in practice as there is very little precedent in New Zealand, either under law or through operational approaches taken to business. New Zealand does not have a history of applying the concept of good faith in commercial transactions – instead New Zealand has adopted the approach taken in the Fair Trading Act, Contractual Remedies Act, etc which set out what parties can't do.
- Good faith attempts to promote good behaviour (rather than legislating against bad behaviour). This is a conceptual antithesis of the usual commercial relationship, since a commercial deal may be subjectively more beneficial to one party than another depending on the circumstances of the transaction, including such things as the risks involved, elasticity of demand/supply, uniqueness of the product (e.g. patented vs. not), and the market conditions prevailing at any point in time. What was seen as a good deal in the past may be seen as a bad deal in the future, or vice versa.
- Applying the concept of good faith to these types of commercial transactions and not others would merely confuse the market – and cause structuring of transactions to avoid the franchise regime.
- It would not address the main problem facing smaller franchisees – which is high legal costs making it impractical to pursue their existing contractual, statutory, and common law rights.
- What would be the guidelines for good faith? It is not possible to cover every scenario in legislation.
- Case law – would take too long to establish a practice especially for smaller sized franchise issues.
- Tough call for franchisor – balancing competing commercial interests of other franchisees in the same group with the effects on an individual franchisee and the franchisor.
- Good faith statutory obligations will likely lead to litigation, but this happens in the larger transactions anyway.
- Good faith requirements in legislation may make it easier for the Courts to intervene in some circumstances – for instance, where there is a clear gap in existing legislation leaving the disadvantaged party without a relevant remedy. However, determining what those clear gaps are in advance is very difficult.