



BRIEFING

Proposed definition of a “franchisee employer” for the Accredited Employer Work Visa system

Date:	12 November 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-4157

Action sought		
	Action sought	Deadline
Hon Kris Faafoi Minister of Immigration	Agree to the proposed definition of a “franchisee employer”.	12 November 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Andrew Craig	Manager, Skills and Residence (Immigration) Policy	Privacy of natural persons	Privacy of natural persons	✓
Matarena Kabwea	Policy Advisor, Skills and Residence (Immigration) Policy	Privacy of natural persons	N/A	

The following departments/agencies have been consulted

Minister’s office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister’s Notes | <input type="checkbox"/> Withdrawn |

Comments



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Purpose

This paper seeks your agreement to the proposed definition of a franchisee employer. This definition will be part of the new Accredited Employer Work Visa [2021-2254 refers].

Executive summary

In March 2021, you agreed to implement the Accredited Employer Work Visa (AEWV) system on 1 November 2021. However, due to having to make other changes for onshore migrant visas in response to COVID-19, the implementation date was delayed to 4 July 2022. As part of the initial advice, the Ministry of Business, Innovation and Employment (MBIE) indicated it would undertake further work to define a “franchisee employer” for the purpose of the AEWV.

Cabinet agreed in 2019, through the Migrant Exploitation review, that franchisees would be required to meet further requirements (similar to the labour hire requirements) under the AEWV [DEV-20-MIN-0034 refers]. The franchising business model has underlying risk factors that make franchisee employers more susceptible to exploiting migrants and therefore, it warrants additional scrutiny to help minimise migrant exploitation in the sector. The franchise accreditation was intended to work alongside the other Migrant Exploitation review proposals, such as the *Duty to Prevent*, to target different migrant exploitation risk factors as part of a complete package of proposals.

MBIE has created a definition that will determine who is considered a “franchisee employer” (see Annex One). This definition pinpoints areas in the franchisor-franchisee relationship that present greater risks of migrant exploitation including buying into an existing business system that is largely associated with a trademark, and having a third party control certain aspect of the franchisee employer’s business operation. This will be used to determine which businesses will receive greater scrutiny in line with the AEWV’s approach in dealing with higher risk business models.

However, you may choose to remove the franchise category and not adopt the definition at this time. The proposed approach to target franchisees is not well supported by the sector, i.e, the Franchising Association New Zealand (FANZ). There is work in progress (the *Duty to Prevent*) that once complete, may be able to minimise exploitation amongst franchisees and therefore, may be the only necessary form of mitigation needed to minimise exploitation amongst franchisee employers. However, it is unclear when the *Duty to Prevent* policy work is likely to be implemented.

In developing the definition, MBIE has considered whether the administrative costs of having the franchise category are proportionate to the risks that franchisees present. MBIE considers the risks presented by the franchise business model necessitates a higher level of scrutiny now and is an important part of meeting the Government’s overall concerns regarding migrant exploitation. Therefore, MBIE considers it appropriate to introduce these requirements as the new visa system goes live. MBIE will keep these settings under review and will adjust the settings over time as needed (i.e, by introducing longer accreditation period for some groups of employers, lifting or adding to some of the restrictions, or making changes to the definition to change the scope).

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that officials have undertaken consultation on the definition of a “franchisee employer” for the purpose of the Accredited Employer Work visa system.

Noted

- b **Agree** to either:

- i. Adopt the proposed definition of a franchisee employer for the purpose of the Accredited Employer Work visa system (**Recommended**).

Agree / Disagree

OR

- ii. Remove the franchise category and mitigate the risks of franchisees by relying on alternative risk profiling pathways (**Not recommended**).

Agree / Disagree

- c **Note** that removing the franchise category will require Cabinet approval.

Noted

Andrew Craig
Manager, Skills and Residence (Immigration Policy)

Labour, Science and Enterprise, MBIE

..... / /

Hon Kris Faafoi
Minister of Immigration

..... / /

Background

1. In 2019, Cabinet agreed that all franchisee employers entering the AEWV system would need to meet higher requirements because of the level of risk associated with the business model and the potential for migrant exploitation. MBIE has undertaken further work to clarify who should be considered a “franchisee employer” for the purposes of the AEWV system.
2. The franchising business model has underlying risk factors that make franchisee employers more susceptible to exploiting migrants and therefore, warrants additional scrutiny to minimise migrant exploitation under the AEWV. These risk factors include:
 - Franchising being an easy accessible entry model to people who are new to business, and who do not have experience in navigating the New Zealand law.
 - Franchises having less control over certain aspects of their business which can place them under financial pressure and may lead to franchisee employers using illegal employment and immigration practices (for example, cutting wages or falsifying information) to make up for their profit margins.
 - Franchises showing up more frequently in the Labour Inspectorate’s list of non-compliant employers.
3. Being considered a franchisee employer under this new immigration system means that employers will:
 - need to meet requirements above the standard and high volume requirements for all employers wanting accreditation. This includes demonstrating that they have been operating for at least 12 months and that at least 15% of their workforce are New Zealanders or residents,
 - have a shorter accreditation period, be subject to more onsite visits, and upfront verification (as opposed to just making declarations in their initial accreditation application), and
 - have to pay a higher fee to recover the costs of the checks and verification regarding their compliance with the franchisee requirements.

Challenges with narrowing the definition for franchisees

4. There is no single agreed definition of a franchise in New Zealand which makes defining a franchisee employer challenging. While there are general known features of a franchisee employer that involves buying into the use of a system and the right to use a trade-mark belonging to another business, these features are not easy to identify in practice.
5. Most franchisee employers self-identify as being part of a franchise business in order to be formally considered as a franchise in New Zealand. Most employers would do this by registering with an affiliated association such as FANZ, if the franchisor registers under the Westpac Franchise Directory, or by using a franchise agreement.
6. However, as stated above, it can be difficult to determine a franchisee employer in practice, as some of the external features of a franchise business can look very similar to other business models with different business structures. For example, a chain store will look similar to a franchise business externally, but is different in that all individual stores are owned by one company.
7. A range of similar business arrangements that fit the typical description of a franchisee may call themselves different things. As an example, a Z petrol station may identify as a retail seller but will operate and conduct itself similarly to a franchisee by having to buy into an existing system that is largely associated with a trademark, and having that third party control certain aspects of their business. Other hybrid businesses will have parts of their business that they wholly own, while other parts of their business are franchised out. This makes it

even harder to draw the line between when a business stops being a franchise and starts being a different business model.

8. Defining the scope of who should be considered a franchisee employer under the AEWV and therefore, who has to apply under the franchise category is necessary in order to:
 - avoid capturing businesses that may have a similar physical exterior as a franchisee but do not have the same business features and therefore, do not present the same risks
 - capture businesses that share similar features (and risk factors) as a franchisee
 - avoid employers declaring themselves as a different business model to avoid having to meet the higher requirements under the AEWV, and
 - reduce confusion amongst these employers as to who the higher requirements apply to under the AEWV.

The proposed definition of a franchisee employer

9. MBIE has developed a definition of a “franchisee employer” for the purposes of the AEWV system. As per the AEWV requirements, the “franchisee employer” needs to be considered the direct employer of that business.
10. The franchisee employer will also be a business that:
 - has purchased the right to use a pre-existing business system created by a third-party
 - has a business that uses a brand, trade mark, advertising, marketing channels, or a commercial symbol owned by that third party, and
 - has certain financial and reporting obligations to that third party as well as having expectations or restrictions on how the employer can run their business that come from that third party.
11. The full details of the proposed definition is provided in **Annex One**.
12. In developing this definition, MBIE considered definitions of a franchise relationship used by other jurisdictions including Australia and Canada. We also considered the definition provided by FANZ and looked at features outlined in franchise agreements.
13. We also looked at risk factors identified by the Migrant Exploitation review and some international research on franchising. We considered Labour Inspectorate and Immigration New Zealand (INZ) information and experience gained through their interactions with franchisee employers.

Analysis of the definition

14. MBIE identified three objectives that the definition of a franchisee employer needed to address. It needs to:
 - include business models that fit the risk model while excluding those that do not
 - be possible to operationalise, and
 - be possible for employers to understand.

The definition includes business models that fit the risk model and excludes those who do not

15. The proposed “franchisee employer” definition allows the system to define the parameters of the franchisee category by capturing business models that exhibit the same characteristics of concern but would otherwise not identify as a franchisee. This recognises that it is the features of a franchise relationship that create the element of risk rather than whether a business considers itself to be in a franchise relationship. This will allow the AEWV to tackle

migrant exploitation by focusing on businesses that are likely to be non-compliant based on known risk factors underpinning a franchise business model.

16. This may include business models like a management company operating a hotel based on requirements set out through an agreement, and commonly branded stores buying into a trademark and buying goods through a common contract (some petrol stations) or entering into an arrangement that allows bulk purchasing of goods (some liquor stores).
17. The key difference between these businesses and that of a pure franchising arrangement is that the document governing the relationship would not be named a franchise agreement. Some of these businesses may also have a less prescribed system compared to a purely franchising business.
18. An outline of these business models that may fit the model is provided in **Annex Two**.
19. The definition intentionally excludes business models like co-operative sellers, chain stores and subsidiary companies who are largely owned by their parent company. These businesses are excluded on the basis that they do not operate their business in the way that a franchisee is expected to. For example, individual chain stores operating under the Hallenstein brand are all owned by one company and therefore, would not meet the risk criteria. As all stores are owned by the head company, the owner then has a greater role and interest in monitoring their individual chain stores to ensure that they are compliant with minimum employment laws as evidence of non-compliance will fall on the head company.
20. Businesses not materially or substantially associated with a trademark or brand, such as wholesale resellers, will also be excluded. These are businesses that have been granted the right to sell a product associated with a brand or trademark within their business. However, their entire business operation will not be determined by that brand. For example, a store may be able to sell "Lotto" in their shop and therefore, can be associated with the "Lotto" brand. However, this association is not considered material as the way they lay out the rest of their shop and any details regarding product assortment and other parts of their business operation will not be determined by "Lotto".
21. Other businesses using licencing arrangements are also intentionally excluded from the franchise category. This is because licencing arrangements often use a very low prescription model that differs from a franchising business. For example, most licensee employers will purchase the right to use a pre-existing business system that is mandated by a third party allowing the employer to use the brand belonging to that third party. However, there will be minimal restrictions placed on the employer regarding how they operate their business. The business will be able to determine their own hours and run their own marketing plans. The business is also unlikely to have obligations to meet a minimum financial performance, other reporting obligations, or have ongoing royalty payment obligations to a third party. As such, they wouldn't meet the criteria of the definition.
22. While these businesses may present their own risks of migrant exploitation, for most of these other business models, their risk of exploitation has not been linked to the business model they use, in the same way that a franchisee has. Other business models such as triangular employers – employers who recruit employees and then place them with a third controlling party – have been identified as presenting a higher risk of migrant exploitation. However, they are being dealt with separately under the AEWV and need to meet requirements that are similar but more tailored to the business model they use.
23. Some subcontracting models were also identified through the Migrant Exploitation review as presenting a higher risk of migrant exploitation. However, the subcontracting business model was not identified as needing to meet higher requirements under the AEWV, as further research into those business model would be needed to identify specific areas of risk.
24. An outline of these businesses that do not fit the criteria is in **Annex Two**.

25. In 2019, Cabinet agreed to grant you the power to amend the types of employers (i.e. based on business model or industry) that should be meeting the highest level of accreditation under the AEWV [DEV-20-MIN-0034 refers]. We recommend that MBIE continue to review the group of employers that need to meet higher requirements and improve the system as we learn more.

Estimated impact on franchisees

26. In 2017, 631 franchise businesses were identified in New Zealand, with over 37,000 individual franchisees operating. As per our previous advice, around 400 businesses are estimated to be captured by this definition [2021-2254 refers].

The definition can be operationalised

27. When applying for accreditation, franchisee employers will be asked to self-determine whether they need to apply for a standard or franchisee accreditation based on the definition. Self-identification using the definition helps to streamline the application process because INZ will not require the employer to submit documentation for assessment to determine whether franchise accreditation is needed.
28. In cases where an INZ compliance staff identifies an employer who appear to be a franchisee within the standard accreditation cohort, officials may request further information, or the employer may be flagged for further investigation from INZ compliance. If there is evidence of intentionally providing misleading information, these employers will have their accreditation revoked.
29. INZ will ask businesses who were flagged in the system, and whose accreditation had not been revoked, but have been determined to fit under the franchise category, to apply under the franchise category when they apply for re-accreditation or will have their re-accreditation declined.
30. The full operational process is outlined in **Annex Three**.

The definition will be clear for employers who already identify as a franchisee

31. We expect that most well-known franchisees will be able to use the definition to identify that they are a franchisee employer and therefore, will need to apply under the franchise category. The proposed definition highlights features that aligns with a typical franchise agreement¹.
32. Employers who will be captured under this definition but do not currently self-identify as a franchisee will require more communication and guidance to help them understand whether or not they fit under the category. Additional guidance and examples will be made available for these employers and information about the new accreditation process will be communicated to the sector.

Stakeholder feedback

33. MBIE tested the definition with FANZ to understand how easy the proposed definition would be to understand.

¹ A franchise agreement will often have the following clauses: a grant - to use a business system associated with a brand and intellectual property, the duration of the agreement, territory – specifying where the business is geographically permitted to conduct its business, fees that the employer needs to pay while they are using the system, training obligations, a list of approved suppliers, an advertising fund, specific clauses regarding intellectual property and confidentiality, reporting obligations, transfer rights and more. More detailed information over what can be found in a franchise agreement is outlined in both websites:

[What Is In A Franchise Agreement? \(findlaw.co.nz\)](http://findlaw.co.nz)

[What's in the franchise agreement? - Franchise New Zealand Advice Centre](http://www.franchiseadvicecentre.co.nz)

34. Overall, FANZ does not support the broader requirements of the AEWV policy. They remain concerned about the additional compliance costs for their members and that the policy unreasonably targets a large number of compliant employers.
35. Given this broader lack of support for the policy, FANZ indicated that they had concerns about the wording of the definition and considered their members would find it difficult to understand. They indicated some words/areas to change but have not provided written feedback. In response, we have made some amendments to make the definition simpler.
36. With these changes we consider that most employers should be able to use the definition and this will be supported with guidance and additional communication material (as outlined in paragraph 32 above).
37. We understand that FANZ has written to you and requested to meet with you. Officials will provide you with advice on how to respond back to them.

Managing risks arising from franchisee employers without a franchise category (not recommended)

38. While MBIE recommends the adoption of a franchise category given the risk these business models present, there are alternative options for managing the risk.
39. You may choose to not to adopt the proposed definition and remove the additional scrutiny on franchises altogether. The alternative options are to:
 - a. rely on other alternative risk profiling pathways through the AEWV system. INZ already has a record of franchisees with a history of non-compliance. INZ may be able to mitigate their risks by focusing on these already known employers, rather than on franchises as a whole. INZ will be able to monitor these other businesses at a higher frequency compared to other business models in the standard accreditation, and
 - b. rely on the *Duty to Prevent* policy work to address migrant exploitation at the franchisee level. Cabinet has also agreed to introduce a duty on third parties with significant influence or control to take reasonable steps to prevent employment standard breaches. If and when this is introduced it is likely to apply to franchisors who have control or influence within their franchise networks and would support increased employment compliance within the associated franchise businesses. While franchisors are not directly responsible for the employees of their franchisees, as the head of the network, they are able to use their position to detect and address non-compliance.

MBIE does not recommend removing the franchise category

40. MBIE considers that franchisees represent a risk of migrant exploitation and as such they require more scrutiny and costs associated with this higher level of scrutiny should be born proportionately. The current policy of having a franchise category supports the Government's broader focus on addressing migrant exploitation.
41. Relying on INZ's existing operating procedures may enable some scrutiny and detection migrant exploitation but costs will not be born proportionately and identifying possible cases will take longer and require more substantive work.
42. Relying on the *Duty to Prevent* work is not a robust alternative. Detailed policy work for this is still underway. It is likely to be combined with wider work investigating modern slavery legislation in supply chains which means there will be some delay before it can be used to address concerns about the franchise business model and the risk of exploitation amongst this group.

43. MBIE will continue to monitor these settings and keep them under review. If we find over time that the policy is capturing more good employers than non-compliant employers, then we can amend the definition to change the scope. Over time, we may be able to make other changes such as reassessing the duration of accreditation for the higher risk employers or by easing some of the restrictions placed on these groups of employers.

Next steps

44. If you agree to the proposed definition of a franchisee employer, MBIE will develop additional guidance and communications materials to support employers to accurately self-identify when applying for accreditation.

Annexes

Annex One: Proposed definition of franchisee employer

Annex Two: Parameters of the franchise category

Annex Three: Proposed operational process

Annex One: Proposed definition of a franchisee employer

For the purposes of the AEWV, a business will be considered a “franchisee employer” if they meet the features as identified in criteria a, b, c and d.

As per the Accredited Work visa requirement, a “franchisee employer” is a business that is:

- a. the direct employer of that business.

A “franchisee employer” is also a business that:

- b. purchases the right to use a pre-existing business system mandated by a third party business, and
- c. is substantially or materially associated with a brand, trade mark, advertising, marketing channels, or a commercial symbol owned by that third party, and
- d. has that third party controlling certain activities or structures within their business, set out through an agreement, operational guideline or through a terms and conditions document, that covers **one or all** of the following features:
 - Continuing financial performance or reporting obligations to that third party
 - An ongoing obligation to pay that third party any fee, or percentage of profits generated by the business from the “rights to use” detailed in b & c above
 - Restrictions, expectations, or control imposed by that third party, over where the business can source goods and services and/or how to set up or run their business
 - Restricted ability to refuse requests by that third party, raise concerns or complaints regarding that third party, and/or lack of ability to easily exit or terminate the agreement.

Annex Two: Parameters of the franchise category

Business models that may be captured under this franchisee employer definition

Business type	Description
Management agreements	A management company will hold a management agreement to direct and control the day-to-day operations of a hotel and to implement the relevant operational brand standards, subject to the owner having approval or consultation rights on certain matters (as identified in the management agreement).
Buying/marketing groups	Businesses that have bulk purchasing agreements, and the right to use branding & other collateral forms.
Retail sellers	This includes businesses like the Z petrol station, who may self-identify as a retail seller but have the same features as a franchise in that they buy into an existing system, have financial obligations placed on them by the third party, and have some restrictions regarding how they can operate their business.

Business models that will be excluded from the franchise category

Business model	Description
Chain stores	Stores operating under the same model, and under the control of one parent company.
Subcontractors	This refers to employees being contracted to undertake part of a broader contract that has been awarded to a principal contractor. This would include businesses like Chorus, and some construction sectors.
Licensing arrangements	A licence agreement is a written agreement in which the licensor grants another person or company the right to use an intellectual property belonging to another party. An intellectual property licence is an agreement that gives a licensee rights to use the brand, logo, trade mark, copyright, know-how or any other type of intellectual property that the licensor owns. Most licensees are free to develop their own system for operating their businesses, such as choosing the fit-out of their store front, and are not subject to a performance criteria and will often determine their own marketing.
Co-operative sellers	When a group of businesses enter into an agreement with a third party that restricts who these businesses can sell their products to. For example, dairy farmers under a co-operative agreement with Fonterra, can only sell their produce to Fonterra.
Subsidiary companies	When one parent/holding company has complete control over the other subsidiary companies. This means that the parent company has control over the following:

- Controls the composition of the board of the company; or
- Is in a position to exercise, or control the exercise of, more than one-half the maximum number of votes that can be exercised at a meeting of the company; or
- Holds more than one-half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or
- Is entitled to receive more than-half of every dividend paid on shares issued by the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital.

Stand-alone business	Business owner owns all aspects of the business.
Triangular businesses	When one party holds the employment agreement, and sends their employer to do work for another controlling third party, splitting the key responsibilities between two parties. Usually the controlling third party pays a fee to the employer for their employer (but is not always the case).
Independent Contractors	Self-employed people using app-based platforms for services such as: Uber/Ola, Book a Bach, AirBnB.
Non-profit Organisations	Normally does not follow a standard business model in which the purpose is to generate profit for owners.
Wholesale - reseller	Where a business has the right to re-sell a product from a wholesaler, i.e. a shop selling lotto or a brand of drink in their store from that wholesaler.

Annex Three: Proposed operational process
