



FRANCAST

FRANCHISEES IN AUSTRALIA?

GET YOUR DISCLOSURE DOCUMENT READY NOW

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The amendments to Australia's Franchising Code of Conduct (Code) (the Amendments) take effect on March 1, 2008 ([Please see our October 2007 FranCast](#), which provides an overview of the Amendments).

These Amendments will, among other things, significantly **increase the compliance costs** for franchisors that have relied on the single or master franchise exemption.

Single/Master Franchise Exemption

One of the most significant changes to the Code involves the **elimination of the single franchise or master franchise exemption** (Exemption). Under the current law, a non-Australian franchisor that grants a single franchise or master franchise to operate in Australia does not have to:

- provide a franchisee with an Australian disclosure document; or
- comply with the Code's ongoing disclosure requirements.

Adherence to Disclosure Requirements

Effective March 1, 2008, all franchisors (including those who previously relied on the Exemption) must adhere to the Code's disclosure requirements, and, consequently, franchisors are required to:

maintain an Australian disclosure document in order to sell, renew, or extend the scope of franchises in Australia;

update the Australian disclosure document within four months of the end of each fiscal year;

provide (at least once every year) to any franchisee in the franchise system an Australian disclosure document upon the franchisee's written request;

in master (or subfranchise) franchise arrangements, the franchisor and the master franchisee (or subfranchisor) must give a prospective franchisee either (i) separate Australian disclosure documents relating to the franchisor-master franchisee (or subfranchisor) relationship and the master franchisee (or subfranchisor)-franchisee relationship or (ii) a joint disclosure document;

notify franchisees, in writing, within a reasonable time (not exceeding 14 days) of any materially relevant fact that is not disclosed in the disclosure document provided. Materially relevant facts will include changes in the majority ownership or control of the franchisor or in the directorship of the same; legal proceedings against the franchisor or if the proceedings are brought by a group of franchisees (at least 10 percent or 10 franchisees), against the franchisor, or a director; the franchisor becoming an externally administered body corporate; and changes in the relevant intellectual property or ownership or control thereof; and

obtain the certificates required under the Code from the franchisee prior to execution of a franchise agreement setting out that the franchisee has obtained independent advice or has chosen not to do so despite being told to do so by the franchisor.

A recent lower court has held that a franchise agreement was void where the franchisor had failed to obtain the required certificates (described above) from the franchisee. Leave has been granted to appeal the case to the High Courts. The lower court case has potentially far-reaching implications if it means that even a technical violation of the initial or ongoing disclosure requirements, or the requirement to obtain certificates from the franchisee, can result in a franchise agreement or a master franchise agreement being void. A decision by the High Court in this case will be eagerly anticipated.

In addition to the disclosure requirements, franchisors will have to update certain franchise relationship provisions (including waivers, releases, dispute resolution, transfer and termination provisions) to ensure compliance with the Code.

Contents of the Australian Disclosure Document

As noted above, the franchisor must prepare an Australian disclosure document to sell franchises in Australia. However, the Code **does not require registration** of an Australian disclosure document.

Australia's standard disclosure document contains 23 disclosure items and mandates certain minimum disclosures that are similar to those required by the US, including disclosure relating to:

- the basis for any earnings claims that are made;
- brokers;
- the franchisor, associates (similar to an "affiliate," but may include individuals), directors, and officers and their business experience;
- litigation (only for proceedings occurring in Australia) and intellectual property;
- initial and ongoing fees;
- territory and existing franchisees;
- sourcing (including disclosing the specific name of the business that provides rebates or other financial benefits to the franchisor), initial investment, financing;
- obligations of the franchisee and franchisor and summary of the franchise agreement;
- financial information (including statement by the director of franchisor certifying franchisor's financial position) and financial statements;
- any rebates the franchisor receives from recommended suppliers to franchisees;
- other relevant agreements and information; and
- receipt pages and copy of the Code.

Although the Australian disclosure document may have certain sections that require more disclosure (e.g., associates, director's financial certification, and an attached copy of the Code), for the most part the Australian disclosure document is more abbreviated than the US disclosure document (e.g., training, site selection, and relationship provisions are mainly disclosed by referencing the applicable section in the franchise agreement, as opposed to providing a narrative). Accordingly, a franchisor's current US disclosure document should contain much of the information required to prepare an Australian disclosure document.

Compliance is Critical

In preparing an Australian disclosure document, it is imperative for franchisors to comply with the Code's disclosure requirements (as well as any other requirements under the Code) because, under current law,

technical breaches of the Code may render a franchise agreement illegal or unenforceable (whether or not the franchisor otherwise complied with the Code).

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