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**Good News for Franchisors Operating Down Under**
**Australia's High Court Decision in *Master of Education Services***

## Article

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by Iain Irvine
Australia's High Court has handed down its much-anticipated decision in the case of *Master of Education Services v Ketchell* [2008] HCA 38 on appeal from a decision of the New South Wales Court of Appeal.

This case commenced as a claim by a franchisor for the recovery of monies due from the franchisee pursuant to a franchise agreement. One aspect of the Australian Franchising Code of Conduct (the Code) proved highly relevant. Clause 11(1) of the Code requires that franchisees supply franchisors with a written statement indicating that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code. A franchisor must not enter into, renew or extend a franchise agreement unless it has received such a written statement from the franchisee.

In *Master of Education Services*, no evidence was presented indicating that the franchisee, Ms. Ketchell, had provided the franchisor with the requisite statement. **The Court of Appeal thus ruled that the relevant franchise agreement was void and unenforceable** because the franchisor had not received such a written statement from the franchisee. Given the technical nature of this breach and the fact that it appeared to be a relatively minor failure by the franchisor to comply with the disclosure obligations under the Code, the Court of Appeal's decision was a surprise to many legal practitioners specializing in franchising in Australia.

Much to the relief of franchisors operating in Australia, the High Court **overturned** the decision of the Court of Appeal. Given that the Trade Practices Act 1974 (the TPA) provides for a range of remedies for a breach of the Code, including damages for consequential loss pursuant to section 82(1) of the TPA, the High Court reasoned that it is incorrect to find that a failure to comply with clause 11(1) should inevitably lead to invalidity of the franchise agreement. It is necessary, the High Court said, to determine the appropriate remedy in the circumstances of each case.

The High Court further reasoned that the Court of Appeal's conclusion is **inconsistent with the purposes of the Code**, in that it would give franchisors a means of avoiding their obligations under franchise agreements and at the same time cause franchisees to be left in breach of their obligations to third parties under contracts (such as supply contracts and leases) which they had entered into for the purposes of conducting the franchised business.

Regarding the franchisor's liquidated damages claim, the High Court awarded the franchisor monetary damages. A claim for damages under section 82 was technically available to the franchisee in this case. However, it is unlikely that her claim would have been successful, because certain evidence suggested that the franchisee *had* read the disclosure document and the Code and had obtained independent advice.

This decision has provided some relief, but Australian franchisors should bear in mind that **there remain a wide range of statutory remedies available to franchisees** for breaches of the Code. These remedies include avoiding the franchise agreement (as was sought by Ms. Ketchell), varying the terms of the franchise agreement, and damages. In each case, it will be up to a court to determine, based on the claims of the parties and the relevant circumstances, which remedy is appropriate.

Accordingly, it remains ever important for franchisors operating in Australia to be aware of their obligations under the Code, including those concerning disclosure, and to ensure that these obligations are fulfilled.