



**Australian
Competition &
Consumer
Commission**

GPO Box 3131
Canberra ACT 2601

23 Marcus Clarke Street
Canberra ACT 2601

tel: (02) 6243 1111
fax: (02) 6243 1199

www.accc.gov.au

Our Ref: C2007/2317
Contact Officer: Monica Bourke
Contact Number: 02 6243 1351

19 March 2008

Mr Mathew Webster
Senior Associate
Deacons
Grosvenor Place
225 George Street
Sydney NSW 2000

By email: mathew.webster@deacons.com.au

Dear Mr Webster,

Re: Exclusive Dealing Notification lodged by Jireh International Pty Limited N93274

DA 20.3.08

I refer to the above third line forcing notification lodged with the Australian Competition and Consumer Commission (the ACCC) on 17 December 2007. The notification has been placed on the ACCC's public register.

Jireh describes the conduct as:

Gloria Jean's Coffees franchisees will be required to purchase certain products from suppliers or the supplier approved by Jireh.

New franchisees or existing franchisees that are granted a renewal of their franchise agreement will be required to sign a franchise agreement, which includes certain clauses relating to the requirement.

The products subject to the notification include:

- beverage ingredients, biscuits, muffins, cakes, pastries, syrups, chocolate powders, premixes, sauces, essences, pre-made chiller mixes and pastry
- associated items such as lids, straw carry bags, labels, stickers and signage and
- certain branded products such as ceramic cups, heat insulated cups, paper bags, plastic cutlery, napkins, uniforms and other branded merchandise

Legal protection conferred by the notification came into force on 31 December 2007.

I note that the conduct you have notified applies to new franchisees or existing franchisees that are granted a renewal of their franchise agreement.

On the basis of the information that you have provided, it is not intended that further action be taken in relation to the notification at this stage.

As with any notification, please note that the ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct.

I also draw your attention to the disclosure requirements under the Franchising Code of Conduct and in particular, requirements regarding disclosure of any commission or rebate received through an agreement with a third party supplier. I note that amendments to the Code came into effect on 1 March 2008 which requires disclosure of the name of any business that will provide a rebate or financial benefit to the franchisor. I have attached, for your information, the ACCC's publication "Franchising Code of Conduct amendments" which provides a summary of the amendments.

A copy of this letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Monica Bourke on (02) 6243 1351

Yours sincerely



David Hatfield
Acting General Manager
Adjudication Branch



Franchising Code of Conduct amendments

Following a review of the Franchising Code's disclosure provisions, the Australian Government made a number of amendments to the code. They become law on 1 March 2008.

The Franchising Code regulates the conduct of franchising participants and aims to ensure that they are sufficiently informed about a franchise before entering into it. The code provides a cost-effective dispute resolution scheme for franchisees and franchisors to resolve any disputes.

The Australian Competition and Consumer Commission ensures compliance with the Franchising Code and the *Trade Practices Act 1974* by informing franchisors and franchisees of their rights and obligations under the code and enforcing it where necessary.

These amendments are outlined below.

Disclosure

A copy of the franchise agreement in the form it is to be executed

A franchisor is now required to give a franchisee:

- a copy of the Franchising Code
- a disclosure document in the required form
- a copy of the franchise agreement in the form it is to be executed (not previously required)

at least 14 days before the franchisee:

- enters into a franchise agreement, or
- enters into an agreement to enter into a franchise agreement, or
- pays any non-refundable money to a franchisor or their associate in connection with a franchise agreement.

Other agreements that the franchisee is required to enter into

The franchisor must give the franchisee a copy (as well as a summary) of any of the following agreements that the franchisee¹ is required to enter into under the franchise agreement (if applicable):

- a lease, sublease, license or other agreement under which the franchisee can occupy the premises of the franchised business

- a chattel lease or hire purchase agreement
- an agreement under which the franchisee gains ownership of, or is authorised to use, any intellectual property
- a security agreement, including a guarantee, mortgage, security deposit, indemnity, loan agreement or obligation, to provide a bank guarantee to a third party
- a confidentiality agreement
- an agreement not to carry on business within an area or for a time after the franchise agreement is terminated

at least 14 days before the franchise agreement is signed, if they are available at that time, or, if they are not available at that time, when they become available.

Disclosure of materially relevant facts

The franchisor must disclose any materially relevant facts (such as certain court proceedings) to the franchisee in writing, within 14 days (rather than 60 days) of becoming aware of it.

The existence and content of any undertaking or order under s. 87B of the Act is now also a materially relevant fact.

Creating a disclosure document

A franchisor must, within four months (rather than three months) after the end of each financial year after entering into a franchise agreement, create a disclosure document for the franchise in accordance with the code.

A franchisor must give a disclosure document to a franchisee proposing to renew or extend the scope or term of the franchise agreement.

When a long-form disclosure document must be given

Where the expected annual turnover of a franchise is more than \$50 000 at any time during the term of the franchise agreement, the franchisor must provide the franchisee with a long-form disclosure document.

If the expected annual turnover of the franchise is less than \$50 000 per annum, the franchisor may choose to provide a short-form disclosure document.

If a franchisee or prospective franchisee is given a short-form disclosure document, they may still request the additional information included in a long-form disclosure document. If the franchisee requests that additional information, the franchisor must provide it (previously the franchisor did not have to give the additional information, if in all the circumstances it was reasonable to withhold the information).

References to conditions of a franchise agreement

A disclosure document must include references to the relevant conditions of the attached agreement (rather than a summary) that deal with:

- the obligations of the franchisor (including training)
- specific obligations of the franchisee, such as the selection and acquisition of site and premises, starting the franchise, training, complying with standards or operating manuals, insurance and marketing
- specific other conditions of the agreement, including the term of the agreement, provisions for any variations, renewal and extension, transfer, mediation, the franchisor's right to inspect records and any restriction on the franchisee's operations during and after the agreement.

Business experience of officers in a management role

A disclosure document must include the business experience of each officer of the franchisor.

Details of s. 87B undertakings

A long-form disclosure document must include the date and content (rather than only the date) of any undertaking or order given by, or made against, the franchisor under s. 87B of the Trade Practices Act.

¹ Or directors, shareholders, beneficiaries, owners or partners of the franchisee.

Name of business that will provide a rebate or financial benefit to franchisor

A long-form disclosure document must disclose the name of any business (not previously required) that will provide a rebate or financial benefit to the franchisor (or associate of the franchisor) from the franchisor supplying the franchisee with goods or services.

Auditing of marketing and other cooperative funds

If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor must within four months (rather than three months) after the end of the financial year:

- Prepare a financial statement detailing all the fund's financial receipts and expenses for the last financial year.
- Have the statement audited by a registered company auditor unless 75 per cent of the franchisor's franchisees in Australia have voted to exempt the franchisor from this requirement. This decision must be revisited every three years.

The franchisor is required to give the franchisee:

- a copy of the statement within 30 days of preparing the statement
- a copy of the auditor's report, if required, within 30 days of preparing the report.

Names and contact details of past franchisees

If the information is available, a long-form disclosure document must include the name, location and contact details of the franchisee for each franchise agreement (as well as the number of franchises) transferred, terminated, not renewed, bought back or ceased to operate in the last three years.

The franchisor does not have to provide these details if the franchisee has requested in writing that their details not be disclosed.

Directors of franchisor to disclose convictions

A disclosure document must include details of criminal, trade practices and other litigation against the franchisor or

a franchisor director (previously this was only required for the franchisor).

Financial details of consolidated entity

If the franchisor is part of a consolidated entity required to provide audited financial reports under the *Corporations Act 2001* and a franchisee requests these reports, a disclosure document must include either:

- these reports for the last two financial years (not previously required), or
- a copy of an independent audit provided by a registered company auditor (or a foreign equivalent for a foreign franchisor), supporting a statement by at least one director that the franchisor is able to pay its debts as and when they fall due within 12 months after the end of the financial year covered by the financial statement.

Details of the history of the franchise site and territory

In a separate document given to the franchisee with a long-form disclosure document (rather than in the disclosure document), the franchisor must disclose whether:

- the proposed territory or site of the franchise was the site of a previous franchise granted by the franchisor, and if so,
- details of the previous franchise, including the circumstances in which the previous franchisee ceased to operate.

Exceptions

The Franchising Code now applies to overseas franchisors who grant only one franchise or master franchise in Australia (these franchisors were previously exempted from the code).

Conditions of a franchise agreement

Association of prospective franchisees

A franchisor must not induce a franchisee or prospective franchisee not to form an association or associate with other franchisees or prospective franchisees for a lawful purpose (previously this applied to franchisees but not prospective franchisees).

General waivers of representation

A franchise agreement must not contain or require a franchisee to sign a waiver of any verbal or written representation made by the franchisor (waivers of this kind were previously permitted in a franchise agreement).

Terms

The Franchising Code now refers to the *Corporations Act 2001* rather than the *Corporations Law*.

The definition of a serious offence now includes any contravention of the *Corporations Act*.

An associate of a franchisor is a person who has a relationship with the franchisor that is relevant to the franchise system, including supplying goods, real property or services to a franchisee, and who is:

- a director of the franchisor, or
- a related body corporate, or a director of a related body corporate of the franchisor, or
- a partner in the franchisor, or
- a person who directly or indirectly owns, control or holds with the power to vote at least 15 per cent of the issued voting shares in a franchisor that is a proprietary company.

Dispute resolution

The Mediation Adviser is responsible for organising the resolution of disputes under the Franchising Code.

The parties to a mediation must act in good faith and, unless the parties agree otherwise, each party will be equally liable for costs associated with mediation or help to resolve the dispute.

ACCC contacts

ACCC Infocentre 1300 302 502

Small business helpline 1300 302 021

ACCC website www.accc.gov.au

ACCC franchising website
www.accc.gov.au/franchisingcode

For all other business information go to www.business.gov.au.

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service, www.relayservice.com.au.

TTY or modem users, phone 133 677 and ask for 1300 302 502.

Voice-only (speak and listen) users, phone 1300 555 727 and ask for 1300 302 502.

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Important notice

The information in this fact sheet is for general guidance only. It reflects the ACCC's views on what is required to comply with certain provisions of the *Trade Practices Act 1974*. It does not constitute legal advice and should not be relied on as a statement of the law relating to the Act. You should obtain legal advice if there is doubt about whether any conduct may breach the Act.

Other federal or state laws may impose additional requirements or responsibilities on your business when dealing with other businesses or consumers, beyond the requirements of the Act.