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Trade Practices (Industry Codes — Franchising) Amendment Regulations 2001 (No. 1)¹

Statutory Rules 2001 No. 1²

165

I, WILLIAM PATRICK DEANE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Trade Practices Act 1974*.

Dated 28 JUN 2001 2001

WILLIAM DEANE
Governor-General

By His Excellency's Command

IAN MACFARLANE
Minister for Small Business
for the Treasurer

1 Name of Regulations

These Regulations are the *Trade Practices (Industry Codes — Franchising) Amendment Regulations 2001 (No. 1)*.

2 Commencement

These Regulations commence on 1 October 2001.

3 Amendment of Trade Practices (Industry Codes — Franchising) Regulations 1998

Schedule 1 amends the *Trade Practices (Industry Codes — Franchising) Regulations 1998*.

Schedule 1 Amendments

(regulation 3)

[1] Schedule, clause 2

omit

The purpose

insert

(1) The purpose

[2] Schedule, clause 2

insert

(2) In relation to franchise agreements concerning the retail marketing of motor fuel, this code is intended to operate concurrently with the *Petroleum Retail Marketing Franchise Act 1980*.

[3] **Schedule, subclause 3 (1), before definition of *associate***

insert

ABN has the same meaning as it has in the *A New Tax System (Australian Business Number) Act 1999*.

[4] **Schedule, subclause 3 (1), definition of *disclosure document***

substitute

disclosure document has the meaning given by clause 6.

[5] **Schedule, subclause 3 (1), definition of *interest in a franchise*, paragraph (c)**

omit

, controlled by a trustee,

[6] **Schedule, subclause 3 (1), after definition of *master franchise***

insert

master franchisee or *subfranchisor* means a person who is:

- (a) a franchisee in relation to a master franchise; and
- (b) a franchisor in relation to a subfranchise granted under the master franchise.

[7] **Schedule, subclause 3 (1), after definition of *serious offence***

insert

subfranchisor has the same meaning as *master franchisee*.

[8] Schedule, subparagraph 4 (1) (d) (v)

substitute

- (v) payment for goods and services at or below their usual wholesale price; or

[9] Schedule, subparagraph 4 (1) (d) (vii)

substitute

- (vii) payment of the usual wholesale price for goods taken on consignment; or

[10] Schedule, clause 6

substitute

6 Franchisor must maintain a disclosure document

- (1) A franchisor must, before entering into a franchise agreement, and within 3 months after the end of each financial year after entering into a franchise agreement, create a document (a *disclosure document*) for the franchise in accordance with this Division.
- (2) A disclosure document:
 - (a) must be:
 - (i) if the franchised business has an expected annual turnover of \$50 000 or more — in accordance with Annexure 1; or
 - (ii) if the franchised business has an expected annual turnover of less than \$50 000 — in accordance with Annexure 1 or 2; and
 - (b) may include additional information under the heading 'Other relevant disclosure information'; and
 - (c) must be signed by a director or an executive officer of the franchisor.

6A Purpose of disclosure document

The purposes of a disclosure document are:

- (a) to give to a prospective franchisee, or a franchisee proposing to enter into, renew or extend a franchise agreement, information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and
- (b) to give a franchisee current information from the franchisor that is material to the running of the franchised business.

6B Requirement to give disclosure document

- (1) A franchisor must give a current disclosure document to:
 - (a) a prospective franchisee; or
 - (b) a franchisee proposing to renew or extend a franchise agreement.
- (2) If a subfranchisor proposes to grant a subfranchise to a prospective subfranchisee:
 - (a) the franchisor and subfranchisor must:
 - (i) give separate disclosure documents, in relation to the master franchise and the subfranchise respectively, to the prospective subfranchisee; or
 - (ii) give to the prospective subfranchisee a joint disclosure document that addresses the respective obligations of the franchisor and the subfranchisor; and
 - (b) the subfranchisor must comply with the requirements imposed on a franchisor by this Part.

Note A subfranchisor is also sometimes referred to as a master franchisee: see subclause 3 (1).

6C Additional information

If a franchisee or prospective franchisee who is given a disclosure document in accordance with Annexure 2 asks the franchisor for the information referred to in sections 3, 5, 6, 9, 10, 11, 14, 17, 18, 19, 21 and 22 of Annexure 1, the franchisor must give that information, unless, in the circumstances, it is reasonable to withhold the information.

[11] Schedule, clause 8

after

Annexure 1

insert

or 2

[12] Schedule, clause 9

omit

[13] Schedule, clause 10

omit

in the form set out in Annexure 1

[14] Schedule, subparagraph 10 (a) (ii)

omit

pays non-refundable money

insert

makes a non-refundable payment (whether of money or of other valuable consideration)

[15] Schedule, clause 10, at the foot

insert

Note Subsection 9 (1) of the *Electronic Transactions Act 1999* provides that a requirement under a law of the Commonwealth to give information in writing is satisfied by giving the information electronically if it is reasonable to expect that the information will be readily accessible so as to be useable for subsequent reference, and the person to whom the information is given consents to it being provided electronically.

[16] Schedule, paragraph 11 (1) (c)

omit

non-refundable money

insert

a non-refundable payment (whether of money or of other valuable consideration)

[17] Schedule, Division 2.3

omit

[18] Schedule, paragraph 13 (1) (b)

omit

paying any money

insert

making any payment (whether of money or of other valuable consideration)

[19] Schedule, subclause 13 (3)

omit

repay all money paid

insert

return all payments (whether of money or of other valuable consideration) made

[20] Schedule, subclause 13 (4)

omit

(1)

insert

(3)

[21] Schedule, paragraph 17 (1) (c)

after

asks

insert

, in writing,

[22] Schedule, after subclause 17 (3)

insert

(4) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the reasonable costs of administering and auditing the fund must be paid from the fund.

[23] Schedule, subclause 18 (1)

omit

about it

insert

about the matter, in writing,

[24] Schedule, subparagraph 18 (2) (c) (iii)

substitute

- (iii) section 276 of the *Industrial Relations Act 1999* of Queensland;

[25] Schedule, paragraph 18 (2) (d)

omit

10% or 10

insert

at least 10%, or 10,

[26] Schedule, paragraph 18 (2) (f)

substitute

- (f) any judgment that is entered against the franchisor in a matter mentioned in item 4.2 of Annexure 1 or item 3.2 of Annexure 2;

[27] Schedule, paragraph 18 (2) (g)

omit

corporate.

insert

corporate;

[28] Schedule, after paragraph 18 (2) (g)

insert

- (h) a change in the intellectual property, or ownership or control of the intellectual property, that is material to the franchise system.

[29] Schedule, subclause 19 (1)

omit

under Annexure 1

[30] Schedule, paragraph 20 (3) (e)

omit

[31] Schedule, paragraphs 20 (4) (i) and (ii)

renumber as paragraphs 20 (4) (a) and (b) respectively

[32] Schedule, subclause 22 (1)

substitute

(1) This clause applies if:

- (a) a franchisor terminates a franchise agreement:
 - (i) in accordance with the agreement; and
 - (ii) before it expires; and
 - (iii) without the consent of the franchisee; and
- (b) the franchisee has not breached the agreement; and
- (c) clause 23 does not apply.

[33] Schedule, subclause 22 (2)

omit

paragraph (1) (b)

insert

subparagraph (1) (a) (iii)

[34] Schedule, subclause 29 (5)

substitute

(5) Subject to subclause (5A), the mediator may decide the time and place for mediation.

(5A) Mediation under this code must be conducted in Australia.

[35] Schedule, after subclause 29 (6)

insert

(7) For subclause (6), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.

[36] Schedule, after clause 30

insert

30A Termination of mediation

- (1) This clause applies if:
 - (a) at least 30 days have elapsed after the start of mediation of a dispute; and
 - (b) the dispute has not been resolved.
- (2) If either party asks the mediator to terminate the mediation, the mediator must do so.
- (3) Subject to subclause (2), the mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.
- (4) If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate stating:
 - (a) the names of the parties; and
 - (b) the nature of the dispute; and

- (c) that the mediation has finished; and
 - (d) that the dispute has not been resolved.
- (5) The mediator must give a copy of the certificate to:
- (a) the mediation adviser; and
 - (b) each of the parties to the dispute.

[37] Schedule, Annexure 1, paragraph 1.1 (b)

after

name,

insert

ABN,

[38] Schedule, Annexure 1, after paragraph 1.1 (b)

insert

- (ba) the signature of the franchisor, or of a director, officer or authorised agent of the franchisor; and

[39] Schedule, Annexure 1, paragraph 1.1 (c)

before

date

insert

preparation

[40] Schedule, Annexure 1, paragraph 1.1 (d)

after

A franchise agreement is legally binding on you if you sign it.

insert

You are entitled to a waiting period of 14 days before you enter into this agreement.

If this is a new franchise agreement (not a renewal, extension or transfer) of an agreement, you will be entitled to a 7 day 'cooling off' period after signing the agreement, during which you may terminate the agreement without cost.

[41] Schedule, Annexure 1, item 2.1

after

name,

insert

ABN,

[42] Schedule, Annexure 1, item 2.4

after

name,

insert

ABN,

[43] Schedule, Annexure 1, subparagraph 4.1 (b) (iii)

substitute

(iii) section 276 of the *Industrial Relations Act 1999* of Queensland.

[44] Schedule, Annexure 1, item 5.1

after

pay an amount

insert

, or give other valuable consideration,

[45] Schedule, Annexure 1, item 6.4

omit

For each of the last 3 years

insert

For each of the last 3 financial years

[46] Schedule, Annexure 1, item 7.1

omit

significant and

[47] Schedule, Annexure 1, item 8, heading

substitute

8 Franchise site or territory

[48] Schedule, Annexure 1, item 8.2

omit

franchised territory:

insert

territory of the franchise:

[49] Schedule, Annexure 1, paragraphs 8.2 (a), (b) and (d)

omit

franchise

insert

franchised business

[50] Schedule, Annexure 1, paragraphs 8.2 (d) and (e)

after

territory

insert

of the franchise

[51] Schedule, Annexure 1, paragraph 9.1 (d)

omit

franchisor;

insert

franchisor, or from an associate of the franchisor;

[52] Schedule, Annexure 1, after item 13.7

insert

13.8 If 2 or more of items 13.1, 13.3 and 13.6 apply to a payment, the information required by those items in relation to that payment need be set out only once.

[53] Schedule, Annexure 1, after item 14.1

insert

14.2 For item 14.1, the material conditions of a financing arrangement include the following:

- (a) any requirement that the franchisee must provide a minimum amount of unborrowed working capital for the franchised business;

- (b) any requirement that a franchisee must meet a stated debt to equity ratio in relation to the franchised business.

[54] Schedule, Annexure 1, item 15.1

substitute

15.1 Summary of the conditions of the franchise agreement that deal with obligations of the franchisor (or references to the relevant conditions of the franchise agreement, if attached), including:

- (a) an obligation to provide training:
 - (i) before the franchised business starts; and
 - (ii) during operation of the franchised business; and
- (b) any obligation that continues after the franchised business ceases to operate.

[55] Schedule, Annexure 1, paragraphs 16.1 (c) and (d)

substitute

- (c) development of the site, premises, vehicles and equipment;
- (d) training:
 - (i) before the franchised business starts; and
 - (ii) during operation of the franchised business;

[56] Schedule, Annexure 1, paragraph 16.1 (g)

omit

[57] Schedule, Annexure 1, paragraph 16.1 (i)

omit

sales quotas

insert

minimum performance criteria

[58] Schedule, Annexure 1, paragraph 16.1 (j)

omit

premises;

insert

premises, vehicles and equipment;

[59] Schedule, Annexure 1, paragraph 16.1 (m)

substitute

(m) indemnities and guarantees;

[60] Schedule, Annexure 1, paragraph 16.1 (n)

omit

franchisee, directors,

insert

the franchisee or its directors,

[61] Schedule, Annexure 1, item 18.1

omit

Summarise

insert

Summary of

[62] Schedule, Annexure 1, paragraph 18.1 (a)

after

lease

insert

, sublease, licence

[63] Schedule, Annexure 1, after paragraph 18.1 (b)

insert

(ba) an agreement under which the franchisee gains ownership of, or is authorised to use, any intellectual property;

[64] Schedule, Annexure 1, paragraph 18.1 (c)

omit

or security deposit;

insert

, security deposit, indemnity, loan agreement or obligation to provide a bank guarantee to a third party;

[65] Schedule, Annexure 1, item 20.2

substitute

20.2 Financial reports for each of the last 2 completed financial years that have been prepared by the franchisor in accordance with sections 295 to 297 of the Corporations Law.

[66] Schedule, Annexure 1, item 20.3

substitute

20.3 Item 20.2 does not apply if:

- (a) the statement under item 20.1 is supported by an independent audit provided by a registered company auditor within 12 months after the end of the financial year to which the statement relates; and
- (b) a copy of the independent audit is provided with the statement under item 20.1.

[67] Schedule, Annexure 1, item 23.1

substitute

23.1 On the last page of the disclosure document:

- (a) a statement to the effect that the prospective franchisee may keep the disclosure document; and
- (b) a form on which the prospective franchisee can acknowledge receipt of the disclosure document.

[68] Schedule, Annexure 2*substitute***Annexure 2 Short form disclosure document for franchisee or prospective franchisee**

(subclause 6 (2))

1 First page**1.1 On the first page:**

- (a) in bold upper case:

SHORT FORM DISCLOSURE DOCUMENT FOR FRANCHISEE OR PROSPECTIVE FRANCHISEE; and

- (b) the franchisor's name, ABN, ACN or ARBN, business address and phone number; and
-
- (c) the signature of the franchisor, or of a director, officer or authorised agent of the franchisor; and
-
- (d) the preparation date of the disclosure document; and
-
- (e) the following statement:

This disclosure document contains some of the information you need in order to make an informed decision about whether to enter into a franchise agreement.

Entering into a franchise agreement is a serious undertaking.

A franchise agreement is legally binding on you if you sign it.

You are entitled to a waiting period of 14 days before you enter into this agreement.

If this is a new franchise agreement (not a renewal, extension or transfer) of an agreement, you will be entitled to a 7 day 'cooling off' period

after signing the agreement, during which you may terminate the agreement without cost.

Take your time, read all the documents carefully, talk to other franchisees and assess your own financial resources and capabilities to deal with the requirements of the franchised business.

You should make your own enquiries about the franchise and about the business of the franchise.

You should get independent legal, accounting and business advice before signing the franchise agreement.

It is often prudent to prepare a business plan and projections for profit and cash flow.

You should also consider educational courses, particularly if you have not operated a business before.

2 Franchisor details

- 2.1 The franchisor's name, ABN, ACN or ARBN, address of registered office and principal place of business in Australia.
- 2.2 The name under which the franchisor carries on business in Australia relevant to the franchise.
- 2.3 A description of the kind of business operated under the franchise.
- 2.4 The name, ABN, ACN or ARBN, address of registered office and principal place of business of each associate of the franchisor that is a body corporate (if any).
- 2.5 The name and address of each associate of the franchisor that is not a body corporate (if any).
- 2.6 For each director, secretary, executive officer, or partner of the franchisor who is likely to have management responsibilities for the franchisor's business operations in relation to the franchise — name, position held and qualifications (if any).

3 Litigation

3.1 Details of:

- (a) current proceedings by a public agency, criminal or civil proceedings or arbitration, relevant to the franchise, against the franchisor in Australia alleging:
 - (i) breach of a franchise agreement; or
 - (ii) contravention of trade practices law; or
 - (iii) contravention of the Corporations Law; or
 - (iv) unconscionable conduct; or
 - (v) misconduct; or
 - (vi) an offence of dishonesty; and
- (b) proceedings against the franchisor under:
 - (i) section 127A or 127B of the *Workplace Relations Act 1996*; or
 - (ii) section 106 of the *Industrial Relations Act 1996* of New South Wales; or
 - (iii) section 276 of the *Industrial Relations Act 1999* of Queensland.

3.2 Whether the franchisor or a director of the franchisor has been:

- (a) in the last 10 years — convicted of a serious offence, or an equivalent offence outside Australia; or
- (b) in the last 5 years — subject to final judgment in civil proceedings for a matter mentioned in paragraph 3.1 (a); or
- (c) in the last 10 years — bankrupt, insolvent under administration or an externally-administered body corporate in Australia or elsewhere.

3.3 For items 3.1 and 3.2 — the following details (where relevant):

- (a) the names of the parties to the proceedings;
- (b) the name of the court, tribunal or arbitrator;
- (c) the case number;

-
- (d) the general nature of the proceedings;
 - (e) the current status of the proceedings;
 - (f) the date of order or undertaking under section 87B of the Act;
 - (g) the penalty or damages assessed or imposed;
 - (h) the names of the persons who are bankrupt, insolvent under administration or externally administered;
 - (i) the period of the bankruptcy, insolvency under administration or external administration.

4 Intellectual property

4.1 For any trade mark used to identify, and for any patent, design or copyright that is material to, the franchise system (*intellectual property*):

- (a) description of the intellectual property; and
- (b) details of the franchisee's rights and obligations in connection with the use of the intellectual property; and
- (c) whether the intellectual property is registered in Australia, and if so, the registration date, registration number and place of registration; and
- (d) any judgment or pending proceedings that could significantly affect ownership or use of the intellectual property, including:
 - (i) name of court or tribunal; and
 - (ii) matter number; and
 - (iii) summary of the claim or judgment; and
- (e) if the intellectual property is not owned by the franchisor — who owns it; and
- (f) details of any agreement that significantly affects the franchisor's rights to use, or to give others the right to use, the intellectual property, including:
 - (i) parties to the agreement; and
 - (ii) nature and extent of any limitation; and
 - (iii) duration of the agreement; and

- (iv) conditions under which the agreement may be terminated.
- 4.2 The franchisor is taken to comply with item 4.1 for any information that is confidential if the franchisor gives:
- (a) a general description of the subject matter; and
 - (b) a summary of conditions for use by the franchisee.

5 Franchise site or territory

- 5.1 Whether the franchise is:
- (a) for an exclusive or non-exclusive territory; or
 - (b) limited to a particular site.
- 5.2 For the territory of the franchise:
- (a) whether other franchisees may operate a business that is substantially the same as the franchised business; and
 - (b) whether the franchisor or an associate of the franchisor may operate a business that is substantially the same as the franchised business; and
 - (c) whether the franchisor or an associate of the franchisor may establish other franchises that are substantially the same as the franchise; and
 - (d) whether the franchisee may operate a business that is substantially the same as the franchised business outside the territory of the franchise; and
 - (e) whether the franchisor may change the territory of the franchise.

6 Marketing or other cooperative funds

- 6.1 For each marketing or other cooperative fund, controlled or administered by or for the franchisor, to which the franchisee may be required to contribute, the following details:
- (a) the kinds of persons who contribute to the fund (for example, franchisee, franchisor, outside supplier);
 - (b) whether the franchisor must contribute to the fund in relation to businesses owned or operated by the franchisor that are substantially the same as the franchised business and, if so, whether the contribution is worked out in the same way as for a franchisee;
 - (c) how much the franchisee must contribute to the fund and whether other franchisees must contribute at a different rate;
 - (d) who controls or administers the fund;
 - (e) whether the fund is audited and, if so, by whom and when;
 - (f) whether the fund's financial statements can be inspected by, or will be given to, franchisees;
 - (g) the kinds of expense for which the fund may be used;
 - (h) the fund's expenses for the last financial year, including the percentage spent on production, advertising, administration and other stated expenses;
 - (i) whether the franchisor or its associates supply goods or services for which the fund pays and, if so, details of the goods or services;
 - (j) whether the franchisor must spend part of the fund on marketing, advertising or promoting the franchisee's business.

Note Subclause 17 (3) of the Code deals with compliance by the franchisor with paragraph 6.1 (h).

7 Payments

Prepayments

- 7.1 If the franchisor requires a payment before the franchise agreement is entered into — why the money is required, how the money is to be applied and who will hold the money.
- 7.2 The conditions under which a payment will be refunded.

Establishment costs

- 7.3 Details of the range of costs to start operating the franchised business, based on current practice, for the following matters:
- (a) real property, including property type, location and building size;
 - (b) equipment, fixtures, other fixed assets, construction, remodelling, leasehold improvements and decorating costs;
 - (c) inventory required to begin operation;
 - (d) security deposits, utility deposits, business licences, insurance and other prepaid expenses;
 - (e) additional funds, including working capital, required by the franchisee before operations begin;
 - (f) other payments by a franchisee to begin operations.
- 7.4 For item 7.3, the details for each payment must include:
- (a) description of the payment; and
 - (b) amount of the payment or the formula used to work out the payment; and
 - (c) to whom the payment is made; and
 - (d) when the payment is due; and

(e) whether the payment is refundable and, if so, under what conditions.

7.5 For item 7.4, if the amount of the payment cannot easily be worked out — the upper and lower limits of the amount.

Other payments

7.6 For each recurring or isolated payment payable by the franchisee to the franchisor or an associate of the franchisor or to be collected by the franchisor or an associate of the franchisor for another person:

- (a) description of the payment; and
- (b) amount of the payment or formula used to work out the payment; and
- (c) to whom the payment is made; and
- (d) when the payment is due; and
- (e) whether the payment is refundable and, if so, under what conditions.

7.7 For item 7.6, if the amount of the payment cannot easily be worked out — the upper and lower limits of the amount.

7.8 If 2 or more of items 7.1, 7.3 and 7.6 apply to a payment, the information required by those items in relation to that payment need be set out only once.

8 Franchisor's obligations

8.1 Summary of the conditions of the franchise agreement that deal with obligations of the franchisor (or references to the relevant conditions of the franchise agreement, if attached), including:

- (a) an obligation to provide training:
 - (i) before the franchised business starts; and
 - (ii) during operation of the franchised business;
- and

- (b) any obligation that continues after the franchised business ceases to operate.

9 Franchisee's obligations

9.1 Summary of the conditions of the franchise agreement that deal with obligations for a franchisee (or references to the relevant conditions of the franchise agreement, if attached) for the following matters:

- (a) site selection and acquisition;
- (b) requirements for starting the franchised business;
- (c) development of the site, premises, vehicles and equipment;
- (d) training:
 - (i) before the franchised business starts; and
 - (ii) during operation of the franchised business;
- (e) opening the franchised business;
- (f) complying with standards or operating manuals;
- (g) warranties and customer service;
- (h) territorial development and minimum performance criteria;
- (i) maintenance and appearance of premises, vehicles and equipment;
- (j) insurance;
- (k) marketing;
- (l) indemnities and guarantees;
- (m) participation requirements for the franchisee or its directors, management or employees;
- (n) records and reports;
- (o) inspections and audit.

10 Financial details

10.1 A statement as at the end of the last financial year, signed by at least 1 director of the franchisor, whether in its directors' opinion there are reasonable grounds to

believe that the franchisor will be able to pay its debts as and when they fall due.

10.2 Financial reports for each of the last 2 completed financial years that have been prepared by the franchisor in accordance with sections 295 to 297 of the Corporations Law.

10.3 Item 10.2 does not apply if:

- (a) the statement under item 10.1 is supported by an independent audit provided by a registered company auditor within 12 months after the end of the financial year to which the statement relates; and
- (b) a copy of the independent audit is provided with the statement under item 10.1.

11 Receipt

11.1 On the last page of the disclosure document:

- (a) a statement to the effect that the prospective franchisee may:
 - (i) keep the disclosure document; and
 - (ii) ask the franchisor for the information referred to in the following sections of Annexure 1:
 - Section 3 — Business experience
 - section 5 — Payments to agents
 - section 6 — Existing franchises
 - section 9 — Supply of goods or services to a franchisee
 - section 10 — Supply of goods or services by a franchisee
 - section 11 — Sites or Territories
 - section 14 — Financing
 - section 17 — Summary of other conditions of agreement
 - section 18 — Obligation to sign related agreements

- section 19 — Earnings information
 - section 21 — Updates
 - section 22 — Other relevant disclosure information; and
- (b) a form on which the prospective franchisee can acknowledge receipt of the disclosure document.
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Notes

1. These Regulations amend Statutory Rules 1998 No. 162, as amended by 1999 No. 188.
2. Notified in the *Commonwealth of Australia Gazette* on *29 June* 2001.