How a Duck Walks:
An Exploration of the Legal Meaning of Franchising

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Abstract

There is no settled definition of franchising. Its meaning is interpreted differently depending on geography, discipline, and the particular application or structure of the franchise arrangement in any given context. An accepted taxonomy of franchising is needed, but has yet to be developed. The general definition can encompass and perhaps harmonise the different meanings of franchising across disciplines such as marketing, management and the law. This article surveys the elements of general definitions of franchising in the law of jurisdictions that have enacted franchise specific legislation, which commonly include the grant of a right or a licence; the use of intellectual property; a payment; and qualities of control, assistance or a system provided by a franchisor. Under this umbrella there is scope for more detail in specific definitions for diverse modes of franchising such as direct franchising; unit franchising; master franchising; area representation; area development; multi-unit franchising and co-branding. The focus of this article, however, is on the fact that in franchising there exists a significant element of dependency on the franchisor’s business, system, management, policies and operations such that a franchisee is also investing in a franchisor’s business. This relationship of the franchisee’s business to that of the franchisor is idiosyncratic to franchising; such dependency does not typically exist in most other types of investment in one’s own business. Existing definitions may fail to capture what one writer has termed this ‘peculiar blend of independence and dependence,’¹ and existing legislation may fail to accurately and fully address this aspect of the relationship.