



# IF IT LOOKS LIKE A FRANCHISE...

Be wary of companies trying to sidestep the requirements of the Franchising Code of Conduct. Franchisors have specific steps they must take, and this includes a range of documentation they need to furnish to prospective franchisees.



**JANE GARBER-ROSENWZEIG**

Lawyer, Gable Lawyers



**M**any brands are proud to be part of the franchise industry, but there are others that while legally defined as franchises present to be some other type of arrangement and try to bypass the requirements of the Franchising Code of Conduct.

The Code clearly defines what defines a franchise business. If the four limbs of the Code definition of a franchise agreement are satisfied, then the business you are considering buying is a franchise regardless of what it has been labelled.

Simply put, the limbs of the definition are that:

1. There is an agreement between you and the owners of the brand (which can be written, oral or implied);
2. You are granted the right to work under a trademark or a brand name;

3. You have the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan that is substantially determined, controlled or suggested by the brand owner; and

4. Before starting or continuing the business, you must pay or agree to pay to the brand owner or their associate an agreed amount.

At this point, you may well ask whether it really matters if the business you are considering investing in is described in all documents as a licence or a distribution arrangement rather than a franchise. Actually, it matters greatly. If an arrangement is considered a franchise, then the Code applies, imposing onerous obligations on the reluctant franchisor relative to the documentation they must provide to prospective franchisees.

---

## EIGHT REQUIREMENTS

---

These requirements of the Code do not need to be met for licensing or distribution arrangements. However, the Code requires, among other things, eight specific requirements:

1. Provision of disclosure document, in the form and order as well as using headings and numbering of Annexure 1 of the Code. The purpose of the disclosure document is to provide material information to potential franchisees to help them evaluate the franchise opportunity. It must be maintained and updated at least annually.
2. Provision of a copy of the current Code, an up-to-date disclosure document and a copy of the franchise agreement (in the form to be executed) at least 14 days before

“

**If an arrangement is considered a franchise, then the code applies, imposing onerous obligations on the reluctant franchisor relative to the documentation they must provide to prospective franchisees.**

”

a prospective franchisee signs a franchise agreement or makes a non-refundable payment to the franchisor or an associate in connection with the proposed franchise agreement. The Code includes these requirements to allow each potential franchisee time to read the documents and obtain related legal, financial and business advice.

3. Provision of a copy of the information statement to a prospective franchisee as soon as practicable after the prospective franchisee formally applies or expresses an interest in acquiring a franchised business. An information statement must be in the form set out in Annexure 2 of the Code. It warns the potential franchisees of risks when investing into a franchise.
4. Receipt of statement from the franchisee regarding the franchise documents and receipt of advice certificates from a solicitor, an accountant and a business adviser. The franchisor must not enter into or renew a franchise agreement or extend the term or scope of the franchise agreement until receiving from the franchisee or prospective franchisee a written statement of having received, read and had a

reasonable opportunity to understand the disclosure document and the Code. The franchisor must also obtain signed statements that the prospective franchisee has been given advice about the proposed franchise documents and business by an independent legal adviser, an independent accountant and independent business adviser. This requirement does not apply upon renewal, extension of term or scope of the franchise.

5. Provision of copy of the lease and other agreements with the potential franchisee. The franchisor must provide a copy of the lease, an agreement to lease and all lease-related documentation to the potential franchisee as soon as practicable. If there are other relevant agreements, then the franchisor must provide those to the potential franchisee at least 14 days before the day on which the franchise agreement is to be signed. Other agreements include lease of equipment agreement, security agreement such as mortgage and confidentiality agreements.
6. Provision of financials or an audit report. Each franchisor must provide all potential franchisees with either the previous two financial years' worth of financial statements or an

independent audit report as to the solvency of the franchisor.

7. Disclosure of all material facts. The franchisor is obligated to disclose all material facts that have occurred after the previous update of the disclosure document.
8. The franchise agreement being compliant with the requirements of the Code as to items prohibited from being included. For example, a franchise agreement cannot contain a general release of the franchisor from liability toward the franchisee or a waiver of any verbal or written representation made by the franchisor.

When looking at any business opportunity, you need to remember that if something appears to be something else (like a franchise instead of a licence), then it is likely to be so. Evaluate the opportunity, assess all its aspects and documentation, and seek proper legal and accounting advice so as not to buy a cat in a bag. ■

*Jane's practice focuses on commercial law, franchising, distribution and licensing on a domestic and international basis, leasing, and the protection of intellectual property.*