

# A Comparison Of Competition Laws Relating To Product Tying In The Context Of Franchising

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## Introduction

Product tying (also called “exclusive dealing”) in the context of franchising essentially involves the franchisor granting the franchise on the condition that the franchisee takes other products or services from the franchisor (*full line forcing*) or from a third-party nominated by the franchisor (*third line forcing*.) The franchisor “forces” the franchisee to purchase a second product or service from a designated source.

The grant of the franchise (typically comprising a bundle of intellectual property rights including a licence to use a trademark and copyright in manuals and systems) is the tying product, while the typical tied product is the products or the equipment that the franchisee must purchase from the designated source. The franchisor may require that the franchisee purchase products or equipment from the franchisor or designated suppliers, with a view to maintaining quality and consistency amongst franchisees, or to provide the franchisor with an alternative income stream either from profits made on the supply of products to the franchisee or from rebates or other incentives paid to the franchisor by a third-party supplier.

Product tying provisions have historically been regarded as anti-competitive because they interfere with the freedom of the franchisee to acquire the second product or service from whom it chooses.<sup>1</sup>

The competition laws in Australia, the United States and the European Union have provisions that regulate product tying, including product tying provisions in franchise agreements and whilst the different competition laws have similarities in dealing with product tying provisions there are some notable differences. These differences will be considered in the course of this paper.

Each jurisdiction identifies the need to deal with the licensing of intellectual property (including by way of franchising) in a manner different to other types of commercial transactions. To this end, Australia excludes certain intellectual property transactions from the general provisions of the Trade Practices Act 1974 (pursuant to section 51 (3)). The European Union provides an exemption from article 81 of the Treaty of Rome by issuing block exemptions. The United States does not provide an exemption but has issued Antitrust Guidelines for the licensing of Intellectual Property which outlines the enforcement policy of the United States government in relation to its antitrust law.

## Competition Laws

### Australia

The Trade Practices Act is the primary statute that regulates competition and anticompetitive behavior in Australia. Product tying (in the Act called ‘exclusive dealing’) is regulated by section 47 which applies to vertical arrangements between corporations at different levels in the distribution chain.<sup>2</sup> Product ty-

ing can contravene the Act in two ways:

1. Where the product tying arrangement has the purpose or effect or likely effect of substantially lessening competition;<sup>3</sup> and
2. By third line forcing, which is a per se offense and does not require that the product tie have any effect on competition.<sup>4</sup>

2. Franchise agreements are fundamentally vertical in nature as they occur within a distribution chain for a particular brand of goods or services.

3. See section 47 (2)-(5), (8) and (9).

4. See section 47 (6) and (7). Australia is the only country which prohibits third line forcing per se. In 1976 the Swanson Committee (Trade Practices Act Review Committee, Report to the Minister of Business and Consumer Affairs (1976) was of the opinion that third line forcing was, in virtually all cases, have an anticompetitive effect and justifies a per se prohibition. However, this view was subsequently criticised on the basis that third line forcing did not always lead to anticompetitive outcomes. In 1993, the Hilmer Report (Report by the Independent Committee of Inquiry, National Competition Policy Review (1993) AGPS, Canberra) recommended that third line forcing the subject to the same substantial lessening of competition test that is applied to other forms of exclusive dealing under section 47. That recommendation was not followed. However, recently the Dawson Report (Committee of Inquiry for the Review of the Trade Practices Act, Parliament of Australia, Review of the Competition Provisions of the Trade Practices Act (2003)) also concluded that third line forcing can in fact be beneficial and pro-competitive and recommended that the prohibition of third line forcing should cease to be a per se prohibition and be made subject to a substantial lessening of competition test. The Australian Government has accepted that recommendation and the Trade Practices Legislation Amendment Bill 2004 was introduced to Federal Parliament on the 25th June this year, although has not yet been passed.

1. In *Northern Pacific Ry. Co v. United States*, 356 U.S.1,6 (1958) the United States Supreme Court explained the competitive harm in the following way:

*[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.*

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## Two Product Issue

The threshold question in any claim based on product tying is whether there are two separate products or services involved, with the supply of one being conditional upon the acquisition of the other. There will be no product tie if there is only one package of products or services that are supplied and not two separate products.<sup>5</sup> This issue is particularly relevant in franchising because of the argument that, depending on the nature of the tied product, there is in fact only one integrated product. That is, it may be possible for a franchisor to argue that particular designated products or equipment are so integral to the franchise “system” that the two “products” (the grant of the franchise and the tied product or equipment) are in fact one single integrated product. This argument was successful in the United States case of *Principe v. McDonald’s System Inc.* where the Court concluded:<sup>6</sup>

*Where the challenged aggregation is an essential ingredient of the franchise system’s formula for success, there is but one single product and no tie exists as a matter of law.*

Whilst there are numerous United States decisions on this issue<sup>7</sup>, Australian cases dealing with this issue in the context of franchising are rare. A decision of the Trade Practices Commission in *Double Bay Steak-*

*house Providers Pty Ltd*<sup>8</sup> gives some insight into the approach that may be taken should the matter come before the courts. In that decision a franchisor was granted a clearance<sup>9</sup> to require its franchisees to purchase certain designated supplies and ingredients from a source nominated by the franchisor. The franchisor argued it was imperative to its system that it control the ingredients used in the preparation of the food to be served by franchisees to customers. The Commission agreed, noting that the product ties were essential to maintaining quality and integrity of the franchisor’s system.

The majority of franchise systems would not succeed in this “one product” argument as most franchise systems are not sufficiently integrated so as to satisfy the criteria set down in the McDonald’s decision (that is, the packaged products are not “essential ingredients” of the success of the franchise system). This would explain why third line forcing cases, particularly in the context of franchising are rare; most franchisors realise that they would not pass this test<sup>10</sup> and most quality control measures that franchisors desire can be achieved by less restrictive methods than third line forcing.

### Full Line Forcing

In order to avoid the per se liability arising from third line forcing, many franchisors require franchisees to purchase products and equipment from the franchisor and not from a third-party. This brings the conduct within the full line forcing provisions contained in section 47(7). Full line forcing requires an analysis of whether the conduct will result in a

substantial lessening of competition in the relevant market.

The question of whether there is a substantial lessening of competition will be one of fact and degree. In *Dandy Power Equipment Pty Ltd and others v. Mercury Marine Pty Ltd*<sup>11</sup> Smithers J described the process to determine this question:

*“To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the proper nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening. To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been, is seen to be a substantial lessening of competition...it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market.”*

In that case, the supplier of outboard motors terminated a franchise agreement and refused to supply the franchisee with the products. The relevant markets to examine, to see whether there was a substantial lessening of competition, were the retail market for the sale of the outboard motors to the public and the wholesale market in which the supplier sold the outboard motors to retailers (including franchisees).

It is submitted that the relevant market is the market for the sale of comparable franchises. It is at that point that the franchisor, under the franchise agreement, requires franchisees to purchase products from a designated source. In the case of a McDonald’s or KFC franchise, the market is the sale of fast food franchises. As the market for most franchise sales is broad and competitive, very few franchisors could be shown to affect this market to the

5. See *Castlemaine Tooheys Ltd v. Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395; *Paul Dainty Corporation Pty Ltd v. National Tennis Centre Trust* (1990) 22 FCR 495. In *Castlemaine Tooheys* the brewers of beer agreed to supply beer to certain purchasers on the condition that it was transported by a carrier designated by the brewer. The High Court held that there was no breach of section 47 on the basis the brewer was supplying beer delivered as a package and not beer with a separate requirement for delivery by a specified carrier. Accordingly, the delivered beer, which is the beer as delivered by the nominated carrier, was a single product and there was no second product to create the tie.

6. 1980-2 Trade Cases 63556 (4th Cir CA) at p76966.

7. For example, *Principe v. McDonald’s Systems* *ibid*, *Siegel v. Chicken Delight, Inc.* 448 F.2d 43 (1971), *Krehl v. Baskin-Robbins, Inc.*, 664 F.2d 1348 (1992), *Subsolutions, Inc. v. Doctors Assoc., Inc.*, 62 F.Supp. 2d 616 (1999).

8. (1977) ATPR (Com) 35-100.

9. Under section 93 of the Act a corporation can avoid liability by lodging a notification and seeking a clearance from the Australian Competition and Consumer Commission in relation to exclusive dealing. The corporation will be immune from liability unless the Commission determines that the conduct should not be excused because the likely benefit to the public will not outweigh the likely detriment from the conduct (section 93(3A)).

10. That is, the package of products is not an essential ingredient for the success of the franchise.

11. (1982) 64 FLR 238.

extent that it would give rise to a substantial lessening of competition.

The product tie must then be examined to see if it has the effect or likely effect of substantially lessening competition. The test is not concerned with the competitive strength of the franchisor, but rather the competitiveness of the relevant market.<sup>12</sup> The reference to “substantial” means that the product tie “must be capable of being fairly described as a lessening of competition that is a real or of substance as distinct from a lessening that is insubstantial, insignificant or minimal.”<sup>13</sup>

In the Double Bay Steakhouse decision<sup>14</sup> the Commission found that the product tie was not likely to have a significant effect on competition having regard to the nature of the tie (being limited to essential ingredients) and the fact that the centralised purchasing requirements would enable the franchisees to compete more effectively on price.<sup>15</sup> In *Dandy Power*<sup>16</sup> the Court could not find any evidence that the actions of the supplier had the effect of substantially lessening competition in either of the relevant markets, or evidence that the supplier’s conduct had the purpose of substantially lessening competition.

### Section 51(3) Exemption

Section 51(3) of the Act may exempt a product tie from section 47 where the requirement for the product tie ‘relates to’ the subject matter of the intellectual property in question or, in relation to the license of the trademark, the kinds, qualities or standards of the goods bearing the mark. The exemption has been criticised for its vague terminology<sup>17</sup> and there has been only one

reported decision relating to it.<sup>18</sup> The many difficulties with the provision were discussed in the Ergas Report<sup>19</sup> and its applicability to most forms of business format of franchising is unclear. A literal reading of the section would make it inapplicable to many franchise agreements in that, in relation to the provisions dealing with trademarks, the product tie must relate to the kinds, quality or standards of goods bearing the mark and in most business format franchises the final products sold by franchisees do not themselves bear the trademark.<sup>20</sup>

### United States

Section 1 of the Sherman Act is the primary provision regulating anticompetitive conduct and provides that “every contract, combination...or conspiracy, in restraint of trade or commerce, the several States, or with foreign nations, is declared to be illegal.”<sup>21</sup> Section 14 of the Sherman Act (incorporating Section 3 of the Clayton Act)<sup>22</sup> makes tying arrangements illegal where the conduct substantially lessens competition or creates a monopoly.<sup>23</sup> There is no distinction between conduct which constitutes

third line forcing or full line forcing, both are prohibited under the same provision.

### Two Product Issue

The initial threshold question is, as under the Trade Practices Act, whether there are two products involved or just one. The question of whether there are two products or one integrated package was decided in the franchisor’s favour in *Principe v. McDonald’s System Inc.*<sup>24</sup> and against the franchisor in *Siegal v. Chicken Delight*<sup>25</sup> where the court held that the tied products were common articles that were not integral to the franchise system.

In *Jefferson Parish* the Court stated that to determine whether there were two separate products one must look at separate consumer demand for the products, rather than whether there is a functional relationship. It is not clear whether the consumer demand test in *Jefferson Parish* will override the “integrated system” analysis in the *McDonald’s* case. It is submitted that a case-by-case analysis is still required to determine the degree of integration of the tied product to the franchise system. This integration is more likely to be found in a distribution or product based franchise system where the franchisor’s trademark or system is indistinguishable from the products that the franchisee sells to consumers.<sup>26</sup>

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17. For example, see I. Eagles and L. Longdin, *Competition in Information and Computer Technology Markets: Intellectual Property Licensing and Section 51(3) of the Trade Practices Act 1974*, (2003) *Queensland University of Technology Law and Justice Journal* 28; see also the *Review of Intellectual Property Legislation under the Competition Principles Agreement*, Final Report (Ergas Report), Commonwealth of Australia (September 2000).

18. *Transfield Pty Ltd v. Arlo International* (1980) ATPR 40-166 where two different interpretations of the words ‘relates to’ were provided by the High Court. See Eagles and Longdin, *ibid* at page 32, for a short summary of the judgment.

19. *Op. cit.* n15, with the report concluding that the section be amended so as to impose a substantial lessening of competition test on the conduct, as opposed to an outright exemption.

20. This may be more relevant in the franchise system is where goods bear the trademark (for example, where the franchisor supplies its branded products).

21. The section provides in part: *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...*

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22. The section provides in part: *It shall be unlawful to any person engaged in commerce, in the course of such comments, to lease or make a sale or contract for the sale of goods..., whether patented or unpatented...or fix the price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods... or other commodities of a competitor... of the lessor or seller, where the effect of such lease, sale, or contract of sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*

23. However, section 14 only applies when both products are “goods, awareness, merchandise, machinery, supplies or other commodities”, and therefore tying arrangements involving franchises are challenged under section 1.

24. *Op. cit.* n7.

25. 443 F.2d 48.(1971).

## Per se Liability

Historically, product tying assumed per se liability under section 1 of the Sherman Act, it being assumed that product tying was always anticompetitive and resulted from the franchisor's economic power.<sup>27</sup> However, the manner in which product tying arrangements are analysed was revised in *Jefferson Parish Hospital District v. Hyde*<sup>28</sup> where the United States Supreme Court held that substantial market power could not be presumed from the existence of the tying arrangement and that there had to be proof of substantial market power in the tying product (that is, the franchise) for there to be per se liability.<sup>29</sup> As noted previously, it will be rare that a franchisor will have market power sufficient to qualify for per se liability. Thus, although tying arrangements may be per se illegal, the requirement to prove market power requires a significant economic analysis akin to the rule of reason approach.<sup>30</sup> In *Jefferson Parish* the Court stated the requirement for market power:<sup>31</sup>

*"Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called "market power"—to force a purchaser to do something that he would not do in a competitive market... Thus the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other."*

By comparison, when looking at a breach of section 47 of the Trade Practices Act the focus is on the effect on competition and not market power.<sup>32</sup>

In the absence of proving substantial market power, a franchisee must prove that there are anticompetitive effects arising from the product tying under the rule of reason test.

The rule of reason analysis allows the courts to consider pro-competitive justifications for the product tie, and not just the anticompetitive effects. Whilst this analysis balances all relevant factors, in an effort to produce a fair and just result, it can effectively appear to be an insurmountable hurdle for a franchisee to clear, particularly in terms of the time and expense needed to gather and present all the necessary evidence.<sup>33</sup> In this respect, franchisees face a more onerous task under the rule of reason analysis than franchisees attempting to satisfy the 'substantial lessening of competition' test under the Trade Practices Act, in that not only must they prove an effect on competition but must also counter the franchisor's likely ar-

guments about the pro-competitive benefits of the product tie.<sup>34</sup>

## Antitrust Guidelines

The United States Department of Justice and the Federal Trade Commission have issued Antitrust Guidelines for the Licensing of Intellectual Property. These guidelines

26. For example, see *Krehl v. Baskin-Robbins, Inc.*, 664 F.2d 1348 (1982) where the Court held that the Baskin-Robbins franchise and the ice cream sold by the franchisees were one product.

27. See the reference in n1.

28. 466 U.S. 2 (1984).

29. Under section 1 tying arrangements will be illegal (whether the conduct is subject to a per se or rule of reason analysis) if the following four elements are present:

(1.) There are two separate products involved;

(2.) The licensee is given no choice but to take a tied product in order to have access to the tying product (for example, in the trademark or patent);

(3.) The licensor has market power in the tying product market; and

(4.) The arrangement affects a substantial volume of interstate commerce.

30. It has been noted that "the per se rule against tying is 'per se' in only one respect—namely, dispensing with proof of anticompetitive effects [in the tied to market]", Philip Areeda, *Antitrust Law* (1996) at p372, cited in *Little Caesar Enter. Inc v. Smith*, 34 F.Supp.2d 459 at 469 n16. The *Intellectual Property Antitrust Protection Bill*, introduced to Congress in 1997, would specifically exclude a presumption of market power in the case of a patent or copyright.

31. At page 14.

32. For example, in *ASX Operations Pty Ltd v. Pont Data Australia Pty Ltd* (1990) 27 FCR 460, the Court stated:

*"In asking whether provisions of the agreements have or would be likely to have the effect of substantially lessening competition... one looks not so much at the position of particular competitors as to the state or condition constituting the market or markets in question..."*

33. Whilst the rule of reason analysis is similar to the substantial lessening of competition test under the Trade Practices Act, it is a broader test in that it considers the purpose of the conduct and its likely effect on competition and takes into account the possible pro-competitive effects of the tying.

34. In addition to claims based on the antitrust legislation, tying arrangements can give rise to claims of patent misuse. A franchise based on or including a patent is not common in business format franchising. However, where a patent is involved in patent misuse is another tool available to a franchisee. Patent misuse will occur where the franchisor extends the scope of the patent monopoly to require the purchase of other products or services that are not covered by the patent. Patent misuse acts only as a shield to defend against a claim of patent infringement and is not a separate cause of action that a franchisee may bring against a franchisor and therefore does not give rise to a claim for damages against the franchisor as occurs under antitrust law. However, the advantage of the patent misuse over antitrust law is that the court's focus is on the misuse of the patent (by extending its monopoly to control the supply of other non patented products or services) rather than considering whether the conduct and anticompetitive effect. Therefore a franchisee is not required to establish tying under the rule of reason. As with tying claims under the Sherman Act, there must be two separate products before there can be a claim of patent misuse. Whilst the consumer demand test espoused in *Jefferson Parish* applies for antitrust purposes (with the intent of promoting free use and competition) the test in relation to patent misuse imposes a lower threshold. *"The law of patent misuse in licensing need not look to consumer demand (which may be nonexistent) but need look only to the nature of the claimed invention as a basis for determining whether a product is a necessary concomitant of the invention or an entirely separate product."* (*Senza-Gel Corp v. Seiffhart*, 803 F.2d 661, 670-71 (Fed. Cir. 1986). 1986). Essentially, the question is asked as to whether the tied product is an inseparable part of the patented product. If it is then a court asks whether the product is a staple or non staple product. A staple product is one that can be used other than in conjunction with the patented product, whereas a non staple item is useless on its own. In *Senza-Gel* the lease of a machine was tied to the license of a patented process. The lease payments on the machine made it economic to license the patented process (and agree to the lease payments on the machine) if the licensee wished to use a different machine to use the process. The court found that the machine was useful for other commercial purposes that did not infringe upon the patent and was therefore a staple product. As such, the patented process and the tied machine were two separate items. Accordingly, the patent owner had tied its patented process to the use of a non patented machine and effectively extended the scope of its patent monopoly to include the machine, therefore giving rise to patent misuse.

set out the policy of the Government in relation to enforcement of antitrust legislation in the context of intellectual property licensing. Essentially, the guidelines will create a 'safe harbor' from antitrust enforcement by the Government where the franchisor and franchisee do not account for more than 20% of the relevant market and the product tie is not per se illegal.<sup>35</sup> The Guidelines provide that the Government will conduct a rule of reason analysis in deciding whether to challenge a tying arrangement.<sup>36</sup> The guidelines are policy guidelines for the Government and do not prevent a franchisee from taking direct action under the Sherman Act. Therefore, the Guidelines do not have the same benefits to a franchisor intended by section 51(3) of the Trade Practices Act or the block exemptions issued by the European Commission.

### European Union

The general ban on anticompetitive agreements is contained in article 81(1) of the Treaty of Rome.<sup>37</sup> The process of determining whether an agreement infringes article 81(1) is more structured than the approach taken in Australia and the United States. There is a distinct 'filtering' process that enables a step-by-step

analysis of the franchise agreement. Whilst the provisions of article 81(1) are broadly stated the exemptions and guidelines provided by the European Commission provide a framework for analysis.

The Guidelines on Vertical Restraints provide guidance regarding the determination of whether there are two distinct products, in essence espousing a consumer demand test similar to that enunciated in *Jefferson Parish* and thereby avoiding the need to resort to case law to determine the appropriate test.<sup>38</sup>

A threshold requirement under article 81(1) is that the product tie must have an "appreciable" effect on competition. Whilst this is reminiscent of the substantial lessening of competition test under the Trade Practices Act, the European Commission provides clarity as to what this means by way of the *de minimis* notice<sup>39</sup> which provides essentially that if the franchisor is small or has a small share of the market then, subject to the franchise agreement not containing certain 'hardcore' restrictions, article 81(1) will not apply.

Most franchise systems will fall within the exemption contained in the *de minimis* notice and article 81(1) will therefore not apply to tying arrangements contained within those agreements. However, large franchise systems might exceed the market share requirements in the *de minimis* notice in which case the franchisor may look for exemption under the Vertical Restraints Block Exemption.<sup>40</sup>

The purpose of the block exemption is to create a safe harbour from article 81(1) for agreements in vertical relations that are considered to be pro-competitive, or at least neutral in relation to inter-brand competition. The fact that an agreement does not fall within the exemption is not fatal, but does mean it will be

judged by the general principles of article 81(1) unless the franchisor obtains an individual exemption under article 81(3).

The Vertical Restraints Block Exemption relates to the sale of goods or services but does include franchise agreements where the grant of the franchise is directly related to the sale of goods or services by the franchisee.<sup>41</sup> Product tying is also specifically exempted where the market share of the supplier on both the market of the tied product and the market of the tying product does not exceed 30%.<sup>42</sup>

If an agreement is not exempted under the block exemption then it may still be excused from article 81(1) if the product tying was necessary to ensure the quality of the end product.<sup>43</sup> The Guidelines note that most of the obligations in a franchise agreement can be assessed as being necessary to protect the franchisor's intellectual property or to maintain common identity amongst the franchise network, and accordingly fall outside the scope of article 81(1) and fulfill the conditions for exemption contained under article 81(3).<sup>44</sup> In *Pro-Nuptia de Paris GmbH v. Pronuptia de Paris Imgard Schillgallis*<sup>45</sup> the Court of Justice of the European Communities held that due to the overall pro-competitive effects of franchising article 81(1) does not

35. As indicated previously, under the *Jefferson Parish* analysis most product tying in franchising will not be per se illegal.

36. at paragraph 5.3

37. Article 81 is similar to section one of the Sherman Act, in that it broadly prohibits anticompetitive agreements and practices. It prohibits agreements between undertakings "..... which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition." Pursuant to article 81 (2) all agreements prohibited by article 81 (1) void. Article 81 (3) exempts certain agreements from article 81 (1) where the agreement effectively promotes competition. Article 81 (3) also previously provided a mechanism for the European Commission to provide an exemption from article 81 (1) where the agreement has sufficient pro-competitive effects (this type of provision was similar to the individual authorisation provisions contained in section 88 and the notification provisions in s93 of the Trade Practices Act). Individual exemptions are no longer possible in the EU since Regulation 1/2003. However, 'block exemptions' still apply to certain types of agreements and certain industry sectors.

38. The Commission Notice, *Guidelines on the Vertical Restraints* 2000/C 291/01 at paragraph 216.

39. Notice on Agreements of Minor Importance, C368/14 (2001).

40. Regulation (EC) No. 2790/1999. This exemption can be contrasted with exemption provided for the licensing of intellectual property rights in the Technology Transfer Block Exemption 772/2004 which provides exemptions in relation to licences of intellectual property (specifically patents, know how, software copyright and designs, but not other types of copyright or trademarks) between two companies for the manufacture or provision of licensed products. This exemption will not apply in most of business format franchises as it relates primarily to the licensing of technology for the purpose of producing 'contract products' and does not apply to agreements licensing trademarks or copyright (but does include agreements licensing know how).

41. See the Commission Notice, *Guidelines on the Vertical Restraints* 2000/C 291/01 paragraph 30.

42. *Ibid* paragraph 218.

43. For example, see *Campari-Milano's Agreement* [1978] 2 CMLR 397

44. At paragraph 201.

apply where the franchise agreement does not restrict franchisees beyond what is necessary for the proper functioning of the franchise system, including provisions which established the strict control necessary for maintaining the identity and reputation associated with the franchisor. In some respects, this reasoning is analogous with the *Double Bay Steakhouse* decision<sup>46</sup> regarding the key components of a franchise system which a franchisor should be allowed to control under a franchise agreement.

### Conclusion

The competition laws in each jurisdiction have the same goal, that is to regulate anticompetitive conduct. Product tying, for so long considered anticompetitive per se, is now being recognised as being pro-

competitive in many instances. Franchising is also widely recognised as, overall, being pro-competitive. At this moment, it is submitted that only the competition law in the European Community recognises these benefits in any meaningful way.

The per se prohibition of third line forcing under the Trade Practices Act is clearly inappropriate.<sup>47</sup> The substantial lessening of competition test under the Trade Practices Act and the rule of reason analysis under the Sherman Act provide the ability to consider the overall effect of the product tie, but both require a long and expensive analysis to form a conclusion.

The provisions of section 51(3), in its current form, are largely ineffective<sup>48</sup> and the Antitrust Guidelines in the United States do not provide

a franchisor with protection from direct action by a franchisee.

The European Community provides a structured framework, starting with its general prohibition in article 81(1) and then provides exemptions and guidance through the various elements that may need examination.<sup>49</sup> To be sure, a franchisor must diligently review its position to ensure that it comes within the exemptions provided or otherwise does not breach the general prohibition. However, the method of analysis of these issues is more logical, structured and workable than in the other jurisdictions. The legislators in Australia and United States therefore have recourse to a model to follow if and when significant reform in these areas are considered by them.

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45. (1986) I CMLR 414.  
46. Op. cit. n8.

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47. See the conclusions of the Dawson Committee referred to in n4.

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48. It remains to be seen whether the amendments proposed in Ergas Report will make any significant difference.  
49. For example, the de minimis Notice, the Vertical Restraints Block Exemption and the accompanying guidelines.