



Ambiguity in Contemporary Market Definition Statute in the Australian Jurisdiction: A Critical Examination from Two Australian Case Studies

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Abstract

This paper investigates and critical analyses the market definition issues in *News Ltd v Australian rugby Football League Ltd* (1996 ATPR 41-466 and in *Regent Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647. Here the author examines the application of the provisions of the Trade Practices Act 1974 (Commonwealth) particularly sections 4, 45, 46 and 50 in relation to 'market definition in Australia'. By attempting to critically analyse the issues of market definition within the *per se* rule and the rule of reason in an Australian legal sense, the author seeks an explanation to outline the key elements one needs to establish under the 'substantial lessening of competition test', 'the notion of substitution', 'otherwise competitive with,' and 'the time factor' in relation to market definition.

Keywords: Market definition, Notion of substitution, Australian Trade Practice Acts, Competition law.

1. Introduction

The purpose of this paper is to critically analyse the market definition issues in *News Ltd v Australian rugby Football League Ltd* (1996 ATPR 41-466 and in *Regent Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647. Initially we need to examine the application of the provisions of the Trade Practices Act 1974 (Commonwealth) particularly sections 4, 45, 46 and 50 in relation to 'market definition in Australia'. Within this context, this paper is proposed to outline the key elements one needs to establish under the 'substantial lessening of competition test', 'the notion of substitution', 'otherwise competitive with,' and 'the time factor' in relation to market definition.

The definition of market under section 4E of the Act refers to: -

"Market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services."

The questions that arise in this paper are explored in five sections.

Firstly, I deal with the *per se* rule and the rule of reason in an Australian legal sense. From this, the author discusses the facts of the Superleague and Regent's case in relation to issues of market definition. The author also outlines the *per se* prohibitions which consists of conduct that is so likely to damage competition and it is prohibited absolutely without requiring any evidence as to its effect on competition. For example the exclusionary provisions under section 45 involving contracts, arrangements, or understandings in restraint of trade or commerce. The rule of reason is confined to measuring the effect of conduct on competition in a market on a 'with and without' basis.

The second section discusses the concepts and definition of market in Australia. From this, the author outlines the concept approach to market definition and the four important elements that define a market. For example, the elements are the product, geography, levels of function, and time factors.

The third section of this paper introduces the concepts of close competition and strong substitution to the process of defining the relevant market.

The fourth section address the concept of section 45-substantial lessening of competition, section 46- misuse of market power and inducing breach of contract to the process of defining of a market.

The fifth section deals with the summary and this paper's conclusion.

1.1 *The facts of the Superleague's case*

The New South Wales Rugby League (NSWRL) has administrated and promoted the game of Rugby League since 1908. They changed their name to the Australia Rugby League (ARL) on 3 May 1986. The administrators of ARL have extensive control over the Clubs who participate in the annual premiership competition. The Clubs employ the individual players and support personnel, such as coaches, aides, and medical staff.

In 1994, News Ltd decided to form a new organisation called the Superleague. ARL responded by requesting "Commitment Agreements" from each of the 20 Clubs in the premiership competition and maintaining and demanding that those clubs must remain loyal to the ARL until the year 2000.

After hearing that News Ltd's new organisation (Superleague) would involve ARL participation, the ARL decided to undertake further arrangements with other Clubs by getting them to agree to sign a more extensive loyalty agreement that made up the 20 clubs bound to the ARL. In response to this News Ltd then decided to sign new players and coaches for its Superleague.

News Ltd instituted court action on ARL's loyalty and commitment agreements on the following grounds:

- it contains exclusionary provisions in breach of section 45, and
- it constituted a contract, arrangement, or understanding for the purpose and the effect of substantially lessening competition, and
- ARL was misusing its market power to prevent or deter competition in breach of section 46.

The ARL counter-claimed that News Ltd had influenced other clubs to contravene and breach their loyalty agreements by forming the alternative Superleague to be in competition with the ARL in the market. The grounds of legal attack raised by News can be addressed by the exclusionary provision under the TPA.

1.2 *Exclusionary provision under the doctrine of ancillary restraints.*

According to Mr Eddie Scuderi of Forrs Chambers Westgarth (Note:1), "an exclusionary provision occurs where two or more competitors arrive at, or propose a contract, arrangement, or understanding which has the purpose of preventing, restricting, or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons, or to or from those persons in particular circumstances or on particular conditions."

Mr Justice Burchett rejected News Ltd argument in relation to the exclusionary provisions on the following grounds (Note: 2)-

- 1) These loyalty agreements were individual agreements between the individual clubs and the ARL. No actual communication of intent among or between each of the clubs signing the agreement as a restraint of trade within the market.
- 2) The 20 Clubs were in joint commercial venture with ARL and were not in competition with each other's market, as the market though segmented by individual supporters of a particular club, was only a part of a larger market being the sum of its segments.
- 3) No establishment that the Clubs were in competition under the TPA by seeking to maximise prize money, gate receipts, sponsorship returns and merchandising rights through the joint venture with the ARL.
- 4) No contravention of the TPA in relation to the signing of players between Clubs because the TPA excludes employment contracts.

In this case, the goal of the loyalty agreements was to have a high quality competition and establish long term sponsorships for all of the Clubs. From this we would consider that Mr Justice Burchett favors a wider market definition. He referred to the doctrine of ancillary restraints by saying that this restraint generally would appear to be anti-competitive in a narrow market. However, when considered in the wider market for sports, they were merely an ancillary to an intra-ARL pro-competitive and in-the-market competition supportive goal. That is, they were to assist the league to compete against the other codes of football and also other sports such as basketball and cricket.

1.3 *The Regents Pty Ltd v Subaru (Aust) Pty Ltd.*

Regents Pty Ltd was an authorised Subaru dealer. Its franchise was terminated when it failed to sell sufficient numbers of Subaru cars. Before termination, Regents applied to Subaru to supply it with genuine spare parts for Subaru motor vehicles and appoint it as an authorised dealer. Regent pleaded for a wholesale market for Subaru cars. It also requested Subaru to allow it to carry out repairs and service to Subaru cars. In relation to market definition, his Honour Nicolson agreed with Burchett J. in adopting a wider market definition than a narrow market definition. "His Honour stated that the refusal to supply spare parts to Regents was ancillary to a pro-competitive purpose on the part of Subaru to enable it to compete in the broader market for the supply of motor vehicles". (Note:3).

From this, His Honour, Nicholson J. was applying the comprehensive rule of reason than the truncated rule of reason. The comprehensive rule of reason is confined to the effect of the conduct impacting the market on a 'with and without' basis.

The court finally rejected the notion of a single brand market for Subaru spare parts, holding that it was a submarket within an overall cars and parts market in Australia.

Another example of the rule of reason is what Mr. Justice Burchett considered in his judgement in the Superleague's case-

"...the judgements are much concerned with the Rule of Reason, under which it may have been appropriate to start with a narrowly defined market, and then to consider a wider market in the context of the pro-competitive colour it might give a practice. It appeared anti-competitive in the narrower setting....it would be perverse not to remember, when selecting the market boundaries appropriate to a particular case, that the purpose of the Act is the preservation and promotion of competition. That is, the purpose in the implementation of choice of a market is to be instrumental. Therefore, situations where an American court would apply the Rule of Reason because a restriction would actually strengthen a sports league in its endless competition with other sports are cases where an Australian court should consider whether both realism..., and policy requires the selection of a wider sports market."

In the next section, the author discusses the four elements of a market.

2. What is the market?

In order to determine whether a conduct has any effect in a market, one needs to determine what a market is and what it is not.

Another definition of market from Queensland's case (Note:4) was:-

"A market is the area of close competition between firms.... The field of rivalry between the parties... Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices...in determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction."

In Regent's case, His Honour Nicholson J. in his judgement referred to the capacity of Subaru to change the mix of products in response to various market pressures. He concluded that the market should be defined very broadly in relation to the supply of motor vehicles, parts and ancillary services (Note:5). As a result, the degree of substitutability in defining the relevant product market would establish understanding the market concept. For example, one needs to recognise the importance of an industry's production flexibility in determining the relevant market.

In the next section, the author discusses the concept of a market.

According to Professor Maureen Brunt, a market needs products, space, function, and a time dimension. She observed:

"...between what set of products can customers and suppliers switch? Including, within what geographic space? Is the focus to be on the selling function or the type of buying function, and how many levels or stages of production and distribution is it appropriate to distinguish in order to assess the scope for substitution through trade? Finally, how much time is needed for customers and suppliers to make their adjustments in response to economic incentives?" (Note:6).

2.1 The product dimension

The product dimension refers to the range of goods or services (including substitutes for them) which will satisfy customer requirements within a market. Hence, price changes are important issues as customers would respond to these issues in making a buying decision. It is also the clue to determine whether the products are in the same market.

In News' case, Swan, an economist discovered that there was zero or minimum correlation between rugby league and other sports such as rugby union. Swan also discovered that the relationship could only be determined by changes in the customer buying price and not consumer preferences.

Another aspect in relation to the product factor would be the degree of close competition. For example one needs to look into the demand substitutability by customers and supply substitutability by producers.

In News' case, His Honour Burchett J. found that *"...the relevant authorities which require only close substitutes to be included in the relevant market, but failed to apply them. His Honour considered a great deal of evidence of competition between sports for spectators at games given by witnesses associated with the clubs. The sports included rugby league, rugby union, Australian rules football, basketball, and soccer."* (Note:7)

Another aspect in relation to whether rugby league could be substituted for other sports by a television station, His Honour Burchett J said, *"...rugby league was a desirable but essential part of a station's programming mix. From this*

he concluded that rugby league was substitutable for other sports, as far as television programming was concerned. Once again, it seems he has confused substitute products and complementary products: rugby is seen as a complement to other programs; it is needed to provide a balance for viewers, and for the demographic group it offers to advertisers. Diversity may well be essential, as the judge notes, but if this is so, then each sport possesses an important element of monopoly power as it helps the television stations deliver that diversity to its viewers and sponsors.”(Note: 8).

From this we concluded that His Honour Burchett J identified that if each professional sport to be included in the same market would result to be too broad a definition of a market (Note:9). According to Corones (Note: 10), a more realistic market definition would be that each professional sport was a distinct market. He further emphasised that if we include all sports to be in the same market would result too broad for a product market definition. Product market definition involves the notion of substitutes that are available to consumers.

In the next section the author discusses the issues of otherwise competitive, in relation to the definition of a market under S4E.

2.2 What is ‘Otherwise competitive?’

The notion of ‘otherwise competitive with’ was associated to the market elasticities and the notion of product substitution in providing a complete explanation to the definition of a market under Section 4E.

In the News’ case, His Honour Burchett J found that: “It would be simplistic and misleading, in many cases, to see the market as confined to the product produced by the undertaking in question. The Act, following economic theory, embraces this, and was deliberately amended in 1977, to ensure that it did so, to include other goods or services that are substitutable for, or otherwise competitive with that product. See S4E. As a matter of statutory interpretation, the addition of the words **or otherwise competitive** with emphasis, as does the whole provision added by the amendment, the legislative intention is to specify a wider rather than a narrower market. There is good reason for this, since too narrow a delineation of the market will exaggerate the power of a relatively large firm within it, perhaps bringing down on that firm, inappropriately, harsh sanctions so as to cripple its ability to compete in the wider real market in which it actually does business.” (Note:11).

From this we conclude that the price and product elasticities and the concept of product substitution do not provide a full resolution of the definition of a market.

As in the Regents case, His Honour Nicholson J had to rely upon the same approach of News’ case where he rejected the narrow market argued for by the applicant (Subaru). Counsel for Subaru insisted that market should be confined to the wholesale and retail market of a single brand for Subaru parts.

2.3 The Geographic Dimension

The geographic dimension refers to the geographic area within a product is traded. As in News’ and Regents case the geographic area was Australia-wide.

2.4 The Functional Dimension

The functional dimension refers to the particular market level at which a company operates.

2.5 The Time Factor in Market Definition.

The time factor refers to the time required for suppliers or customers to switch products or for services to change in price. As in News’ case, His Honour Burchett J found that:-

“...the market in which rugby league competes cannot be identified only by short term consideration...The league’s recent growth has been rapid, but there is evidence that rugby union and basketball have also, though even more recently, made some strides, and that soccer has a strong hold on the young. A snap-shot picture of the competitive forces involving these sports in the short term might be very misleading. Long term prospects that can be more or less clearly foreseen are, to that extent, a present reality, from the point of view of identifying the constraints upon commercial action. This fact emphasizes the importance of the principle stated in Tooth; Toohey (supra), and in other cases cited earlier in these reasons, that substitution possibilities in the longer run may be significant for market delineation.” (Note:12).

In light of this, it would not be surprising to see that His Honour Nicholson J adopted this approach to market definition in the Regent’s case. (Note:13).

3. What is submarket?

According to Professor Brunt, a submarket is a segment within a larger market. Its role is to further the analysis of the functioning of the market as a whole (Note:14). On the other hand a single market exists by a brand named product in a position substantially to control that market.

In *Regents Pty Ltd v Subaru (Aust) Pty Ltd*, His Honour Nicholson J commented that “...the relevant market was for the supply of motor vehicles, parts and ancillary services and that market for Subaru parts was merely a submarket for this broader market.” (Note:15). He further stated that “...such a market may exist where the evidence supports a finding that consumers purchase the products solely in reliance upon its brand name and not in reliance its physical qualities.”

In conclusion, His Honour Nicholson J. held that “Subaru franchises are a package of new car sales and the supporting parts, service and warranty supply. Subaru was found to have two purposes: first, to promote competitive conduct in the market for cars; and secondly to preserve the competitiveness of the market.” (Note:16)

In the next section the author discusses the concepts of substantial lessening of competition using section 45, misuse of market power using section 46 and inducing a breach of contract.

3.1 Section 45 – Substantial Lessening of Competition.

The term ‘substantial’ is used in the TPA when related to the following scenarios-

- 1) in the deciding whether a merger would result in a substantial lessening of competition, and
- 2) in the determining whether a corporation has misused its market power, where found, must be a case that the corporation has a substantial degree of power in the relevant market.

As Justice French (Note:17) said “...to work out whether competition is being substantially lessened, there must be a purpose, effect, or likely effect of impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process.”

As a result, the notion of the purpose of the contract, arrangement, or understanding is more relevant to its anti-competitive effect, which comes under Section 4D.

In *News’ case*, His Honour Burchett said “...the ARL’s purpose in procuring the clubs to execute the Commitment and Loyalty Agreements was to preserve the quality of its rugby league competition through the joint participation of all clubs.”

Another argument from His Honour Burchett J in addressing the issue of pro-competitive under Section 4D was that “...the agreements were not entered into for an anti-competitive purpose, but to enable it to establish a rival league. Rather, they were entered into for a pro-competitive purpose, namely, to improve the quality of rugby league as a spectator sport and to enable it to compete more effectively with other spectator sports such as rugby union, Australian Rules football, and soccer.” (Note:18).

An additional attack was brought forward by *News* in its use of Section 45 as it argued that the Loyalty agreements were competition lessening within the Rugby League market.

This argument was rejected by Mr. Justice Burkett, as he found (Note:19)-

- 1) there was no contract, arrangement, or understanding between the Clubs or collusion of the managements of the clubs as a cartel or unity, and that each club individually and voluntarily entered into these agreements irrespective of the actions of any other club, and
- 2) as a result, there could be no lessening of competition within the Rugby League marketplace.

3.2 Section 46 – Misuse of market power.

Section 46 prohibits what is described as monopolisation or misuse of market power. This relates to conducts by powerful corporations that unfairly reduces or eliminates competition within its marketplace.

Section 46 has equivalents in other international jurisdictions. The counterparts to S 46 in other systems of competition law are linked as follows:

- 1) In the United States, Section 2 of the Sherman Act 1890, which deals:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor....”

- 2) In the European Economic Community, Article 86 of the Treaty of Rome 1957, which deals:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in”

In Australia, according to Wilcox J in *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) ATPR 41-128, “...section 46 seeks to protect against damage from its competitors. Yet it is one of the series of provisions designed to foster, not limit, trading competition; and it is axiomatic that effective competition activity by one market participant inflicts damage on other participants. The more competitive the market the more the principles underlying Part IV are applied, the greater the damage likely to be sustained by less efficient participants – it seems evident that something

more than competition, something more than ill-considered competition or aggressive competition, is required before S 46 is offended.”

In order to breach section 46, one needs to establish three elements:-

- 1) a legal person possesses a substantial degree of power in a market;
- 2) the legal person has used that market advantage;
- 3) the legal person acted for at least one of the following illegal purposes – damaging a competitor, deterring or preventing entry to the market, or deterring a person from competing.

As in Regent’s case, His Honour Nicholas J. addressed that “...by denying Subaru spare parts to Regents, it was alleged that Subaru precluded the competitive check on its price in the Subaru car service market which Regents could provide and thereby gain the power to price above competitive level.” (Note:20) As a result, the court needs to look into two questions. First, did Subaru have substantial power in relation to its spare parts? Secondly, was its refusal to supply spare parts to Regents so that Subaru would gain power to sell at a price above the competitive level?

As regards to the first question, His Honour held that there was no a separate market for Subaru spare parts because there was cross-elasticity of demand and cross-elasticity of supply.

R D Nicholson L stated:

“If the price of Subaru parts was raised, buyers (retailers of parts) may switch their patronage to other marques of cars/parts or to non-genuine parts. On the supply side, the manufactures of Subaru parts and non-genuine parts can adjust their production plans. In the case of the Subaru parts, the respondent – as a member of a group having a number of automobile distributorships in Australia – could change to other marques. There is both cross-elasticity of supply and demand.” (Note:21)

As regards to the second question, His Honour held that “...it was not trying to exploit those who had already purchased Subaru cars by charging excessive prices for parts and service, rather, its purpose was to sell more Subaru cars. Regents had performed poorly and the termination of its dealership was commercially justified.” (Note:22).

In light of this, Subaru did not have a substantial degree of market power and therefore could not breach section 46.

In News’ case, News’ counsel attacked the Commitment and Loyalty Agreements on the basis that the ARL had a substantial degree of market power, and that the ARL has also taken advantage of its power to prevent the entry of another legal person into the market or to deter or prevent competitive conduct, which they considered ARL had contravened Section 46.

News argued that the rugby league was in a market of its own making and control.

However His Honour Burchett said, “...had the applicant proved the existence of one of the markets it put forward, questions would have arisen as to whether the League has ‘a substantial degree of power’ in that market, and whether it has taken advantage of that power for the purpose of doing any of the things specified in S 46. It is impossible to consider whether the League has a substantial degree of power in the market until a market that exists has been delineated, and evidence has been given about it. But it can be said that the power to exclude teams from competition, on which the applicant’s submissions placed reliance, arose out of the functions of the League within a co-operative venture, the constitution of which committed this power to its use for the mutual advantage of all participants and so that, inter alia, the hard decisions could be reached. However the market is delineated, there is a difficulty in regarding the exercise of this power, assuming it was exercised, as amounting to take advantage of market power.” (Note:23) His Honour concluded that ARL did not have a substantial degree of market power and therefore could not breach section 46.

By attacking the Loyalty Agreements under section 46, News Ltd’s argument was that the market power of the ARL was such that it prevented the entry of competitors either directly or indirectly due ARL’s size and ability to control the Rugby market to the detriment of potential and real competitors, and this clearly violated Section 46.

The effect to this argument, logically meant that the ARL was a monopoly as it was the sole provider of its goods and services to the market concerned. This argument was supported by further argument emphasising the dominance of the ARL in the major Rugby centred states of Queensland and New South Wales, the lack of a substitutable product in these states, the near monopoly prices gained from the selling of television rights and merchandising, the lack of saleable television rights of the other Rugby codes in these and other markets, and the use of an American precedence that stated that a single code of sport could constitute and single market. Furthermore, the lack of any action to counter initiatives of other sports indicated that the ARL did not have to consider these initiatives as their market strength made them almost unassailable.

Mr Justice Burchett (Note:24) in rejecting all of these arguments established that these arguments did not apply in respect to what constitutes this market. Firstly, the ARL was not motivated by profit, but for the good of the game of Rugby league. It acted as the central promoter and preserver of the highest levels of the game, which is the

championship competition, and as such bore no relationship to any other competition or competitive sport. From this, it has been shown from subpoenaed advertising and marketing material that the ARL competed equitably with other sports and other forms of entertainment, and all of this was supported by argument by the ARL. Also, the relevance of the American precedent was rejected because of the simple social and economic differences with the Australian social and legal model.

From this, the conclusion was reached by His Honour, that the ARL competed with all sports and entertainment and that as such this showed that the ARL did not have substantial market power that could be defined and so could not breach Section 46 (Note:25).

As concerning the Loyalty Agreements, they were not restraints of trade but necessary for the co-operative nature of the league and for the necessary support of the competition and for the mutual benefit of each club.

4. Inducing breach of contract

Following on from the above decision and the flow of its legal logic, Mr Justice Burchett also found for the ARL in its counterclaim against News Ltd for inducing breaches to the Loyalty Agreements by various clubs. These breaches are sourced in the terms that News Ltd demanded from the members of its Superleague. These terms were the yielding of actual playing grounds, requiring the Superleague clubs to encourage sponsors to change or to get new sponsors to support the new Superleague that the Superleague clubs were to have different names and club logos, and the release of players from any contractual obligations to the old club.

4.1 The Judicial Conclusion to this Case

Mr Justice Burkett (Note:26) then made a series of orders against News Ltd to restore to the ARL to its previous situation, that is, prior to the Superleague. The result was that News Ltd's Superleague ceased to be a business entity in Rugby League as a result of these orders.

The orders declared that all contracts with players and coaches were of no effect, that the Superleague clubs direct players to play for the ARL, that all shares, player contracts, and trademarks owned by News Ltd were to be held on trust for the ARL, and that News Ltd was prohibited from organising, sponsoring television broadcasts, or advertising any Rugby League game until the year 1999.

5. Conclusion

The above list of factors may allow one to address the approach in relation to the market definition. In this article, the author has identified the shortcomings in the concept of relevant market, particularly the key elements one needs to establish under the 'substantial lessening of competition test', 'the notion of substitution', 'otherwise competitive with,' and 'the time factor' in relation to market definition.

Should the court establish any loss or damages suffered by a business customer as a result of the conduct in a business transaction by the supplier, the business customer would seek remedies under the Trade Practices Act (Section 82 Damages; Section 87 Specific Relief).

However, when analysing the effect of S. 4E and S. 46 of TPA in a commercial setting, the events must meet three tests.

First, there has to be a proved instance of a misuse of market power by the decisions made by a firm. This usually raises the process of defining the relevant market involved. That is, whether the courts favour a broad markets or a narrow markets process. As to Smith and Walter (1997), "...the process of market definition involves value judgments about which there is some room for legitimate differences of opinion. It involves a question of degree... which precludes any dogmatic answer." (Note:27)

Second, consideration of whether the conduct is anti-competitive against a claimed public benefit.

Third that the constraints on the production and selling policies of the respondent, in relation to the regulation of access to services, are in contention with the Act (Part IIIA and XIC).

As His Honour Mason CJ and Wilson J in their joint judgment in Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd, their Honours stated:

"In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated. Accordingly, if the defendant is vertically integrated, the relevant market for determining degree of market power will be at the product level, which is the source of that power... After identifying the appropriate product level, it is necessary to describe accurately the parameters of the market in which the defendant's product competes; too narrow a description of the market will create the appearance of more market power than in fact exists; too broad a description will create the appearance of less market power than there is."

Finally, in regard to the statement of “Do you think that the approach taken in these cases results in a market definition that is too broad to undertake any meaningful analysis of competition?” The author agrees with the judgment of His Honour Mason CJ and Wilson J that too broad a description will create the appearance of less market power than exists. That is, in defining the market power one needs to identify the parties involved and the particular anti-competitive conduct at issue.

As was stated previously, firstly a market must exist and then be established and losses suffered or to be suffered due to illegal actions of competitors. The law is to support competitive and free markets so that the price of a good or service to a given market is just and equitable for all parties, customers and suppliers. This does not mean that market power cannot be used or abused; it only means that the abuser of such power is vulnerable to the law whereas in previous times they were not. Consequently, it is not the determination of market size, but the actions of the dominate players that is the source of judicial actions under this legislation.

References

Notes

Note 1. Trade Practices; the Superleague Decision, *Business Law Section Newsletter*, Law Council of Australia July 1996, 9-10.

Note 2. *Ibid* p 2

Note 3. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 45.

Note 4. See Queensland Cooperative Milling Association Ltd/Defiance Holdings Ltd, repropoed merger with Barnes Milling Ltd (1976) ATPR 40-012.

Note 5. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 92.

Note 6. See Brunt, “Market Definition Issues in Australia and New Zealand trade Practices Litigation” (1990) *Australian Business Law Review*, 86-133.

Note 7. *Ibid* p101.

Note 8. *Ibid* p 102.

Note 9. See Corones, ‘The Impact of Trade Practice Law Dispute Involving a Sports League and its Members’ (1997) 25 *Australian Business Law Review* 406.

Note 10. Corones, The impact of Trade Practices Law on Disputes Involving a Sport League and its Members.

Note 11. *Ibid* p 103.

Note 12. See Sweeney, ‘Professional Sports Leagues and the Competition Laws’ (1997) 4 *Competition & Consumer Law Journal* (1996) 173, p 198-200.

Note 13. *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647.

Note 14. See Brunt, “Submarkets as competition law markets: the appropriate approach to the submarket concept in market definition” (1998) 6 *Competition and Consumer Law Journal* 156.

Note 15. See *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647.

Note 16. *Ibid*

Note 17. *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) FCA 38, ATPR 41-752.

Note 18. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 163.

Note 19. Trade Practices; the Superleague Decision, *Business Law Section Newsletter*, Law Council of Australia July 1996, 9-10.

Note 20. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 371.

Note 21. *Ibid* p 372

Note 22. *Ibid* p 373

Note 23. *Ibid*

Note 24. Trade Practices; the Superleague Decision, *Business Law Section Newsletter*, Law Council of Australia July 1996, 9-10.

Note 25. *Ibid* p 9

Note 26. *Ibid*

Note 27. See Smith and Walter, ‘Commercial Reality versus Substitution in Market Definition’ (1975) 5 *Competition & Consumer Law Journal*, 17-18.