A TELEOLOGICAL APPROACH TO MARKET DEFINITION – HAS IT LED TO SINGLE PRODUCT MARKET DEFINITION?

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ABSTRACT

The recent decision of *Australian Rugby Union v Hospitality Group Pty Ltd*[1] has once again re-emphasised the need to consider market definition, not as an end in itself, but as a means of analysing competition and market power. Importantly, it reaffirms earlier cases, which have suggested that the approach to market definition must be teleological in nature. To some extent this decision has corrected the errors evident in the approach to market definition undertaken by Burchett J in *News Ltd v Australian Rugby League Pty Ltd.*[2] In addition to this, the significance of the *Australian Rugby Union*[3] case is its implicit acceptance that market definition for a particular item can be a single, distinctive, and possibly brand name product. On this point, overseas authority has been followed. This article considers the approach of the Australian courts as well as considering the overseas jurisdictions.

INTRODUCTION

> 'There is a very great difference between adopting a purposive approach to market definition and falling prey to market gerrymandering. It is essential that the courts appreciate the difference, and that the argument of competition law cases in the future is enlightened by a franker analysis of the components of both, and the difference between them. One of the great pitfalls of anti-trust cases is that almost everyone has an immediate, strong, intuitive prejudice for a particular market definition on any given set of facts. One of the earliest lessons which experience teaches is how frequently this prejudice is wrong.'[4]

An essential feature of the political and economic landscape of modern industrialised countries is that of globalisation. The telecommunication

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1 *Australian Rugby Union v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

2 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466.

3 *Australian Rugby Union v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

4 Sweeney, C. 'Professional Sporting Leagues and the Competition Laws' (1997) *CCLJ Lexis*, 9 at 77.

and Internet revolution has allowed national boundaries to be broken down and disregarded. The law is obviously not immune to this. Developments from afar are increasingly being recognised and utilised. Australian competition law, based as it is on the *Sherman Act 1890* (US)[5] has a long history of consideration given to deliberations from other jurisdictions.[6] The increasingly easier access to overseas resources has seen significantly more use being made of these sources – rather than just the traditional reliance on English authorities. The Australian Parliament has been able to draw extensively on the influences of the United States and Europe.[7] Given this historical genesis, a comparative review can only assist in the understanding of our present legislation and where it may be heading. What this article seeks to do is to examine the Federal Court decisions of *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd*[8], *News Ltd v Australian Rugby League Pty Ltd* [9], and *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [10] and contrast them with authority from the United States of America and Europe. Importantly, the later case of *Australian Rugby Union*[11] demonstrates that despite some reluctance of Australian courts to utilise overseas authorities[12], there is no doubt that they will become increasingly more relevant in competition law. Given the strong antitrust history of those jurisdictions[13], it is fundamental that this is recognised and understood. This case also implicitly rejects the approach to market definition adopted by Burchett J in *News Ltd*[14]

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5 The first proscriptive legislation to apply to competition law in Australia (*Australian Industries Preservation Act 1906* (Cth)) was loosely based on the *Sherman Act 1890* (US). Subsequently Australian legislation included the *Trade Practices Act 1965* (Cth), and then the present legislation *Trade Practices Act 1974* (Cth) (as amended). Additional American legislation includes the *Clayton Act 1914* (US), the *Federal Trade Commission Act 1914* (US) and the *Robinson-Patman Act 1936* (US).

6 Of course, the limitations of common law restraint of trade led to the legislative provisions. See for example *Nordenfelt Gun Co Ltd* [1894] AC 535; *Rawlings v General Trading Co* [1921] 1 KB 635; *Mogul Steamship Co Ltd v McGregor, Gow & Co and Ors* [1892] AC 25.

7 McInerney, A. 'The Super League Litigation: Has *Klor's Inc v Broadway Hale Stores* Come Down Under' (1997) 25 *ABLR*, 384 at 384-385.

8 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159.

9 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 (TJ – Burchett J); (1996) ATPR 41-467 (Full Federal Court, Lockhart, von Doussa, Sackville JJ).

10 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

11 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

12 As noted by Heerey J in *ACCC v Boral Ltd and Ors* [1999] FCA 1318 at para 159: 'It is necessary of course to bear in mind the warnings in Eastern Express … that caution is required in translating United States judgements to the interpretation of Australian law which evinces a somewhat different approach to legislative drafting.'

13 As noted by Brunt, M. 'The Use of Economic Evidence in Antitrust Legislation: Australia' (1986) 14 *ABLR*, 261 at 265: 'So what we now find is a law which, at its core, superimposes substantive prohibitions derived from the United States and EEC models upon Anglo-Australian common law judicial and procedural traditions.'

14 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466.

(opting instead for the method adopted by French J in *Singapore Airlines Ltd*[15]). This places the Australian position on par with what has occurred overseas – interestingly counsel of *News Ltd*[16] relied on European authority to support their claim.[17] This approach is not to look at market definition on its own, but to examine it only in the context of the anti-competitive conduct. A purposive based teleological approach rather than legalistic approach has been taken. Accordingly, the Australian cases are contrasted with the decision of the United States District Court of Columbia in *Federal Trade Commission v Cardinal Health and Ors*[18], the United States Supreme Court in *Brown Shoe Co v United States*[19] and the decision of the European Court of Justice in *United Brands v The Commission of the Economic Community.*[20] What will be seen is that the process of market definition in Australia has increasingly become more sophisticated and more akin to what has happened elsewhere. This only can lead to greater harmonisation of competition (or antitrust laws) amongst the major trading nations of Australia. This alliance of restrictive trade practices laws has led to greater efficiency, particularly for those firms operating on a multi-national stage.

Process of Market Definition

For competition law, the notion of the market is obviously critical. Our legislation refers to contracts, arrangements or understandings that lessen competition in a market[21], misuse of market power[22], full line forcing which leads to a substantial lessening of competition in a market[23] and mergers that lead to a substantial lessening of competition in a substantial market.[24] Initial case law in Australia focussed solely on the products supplied[25] without consideration of the conduct under

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15 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159.
16 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466.
17 *News Ltd v ARL* (1996) 58 FCR 447 at 482, referring to *United Brands Co. v The Commission of the European Communities* (1978) 1 CMLR 429.
18 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784.
19 *Brown Shoe Co v United States* 370 US 294 (1962).
20 *United Brands v The Commission of the Economic Community* (1978) 1 CMLR 429.
21 *Trade Practices Act 1974* (Cth) s45.
22 *Trade Practices Act 1974* (Cth) s46.
23 *Trade Practices Act 1974* (Cth) s47.
24 *Trade Practices Act 1974* (Cth) s50.
25 For example see *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465 where a market was found for Datsun cars.
26 See Clarke, P. and Corones, S. *Competition Law and Policy.* Melbourne: Oxford University Press, 1999, 128.
27 In Australia cases to take this approach include *Singapore Airlines Ltd v Taprobane*

examination.[26] Today, that is no longer the case. In all jurisdictions[27] market definition needs to be considered in light of the relevant analysis that is being undertaken – that is, is market definition pertinent because of the need to identify market power, or an examination of the degree of market concentration.[28] Importantly the recent Australian authority of *Australian Rugby Union Ltd v Hospitality Group Pty Ltd*[29] indicates that the approach here is following the method used overseas.

Market definition 'involves issues of fact as well as issues of law'.[30] It is a tool to be used in analysing the problem.[31] Substitutability[32] and cross elasticises of demand and supply[33] will be relevant as will the presence of barriers to entry.[34] However, the starting point in Australia in determining the market in an antitrust case must be the legislative provision - s4E[35] of the *Trade Practices Act 1974* (Cth):

> 'For the purposes of this Act, unless the contrary intention appears, "market" means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive

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Tours WA Pty Ltd (1991) 33 FCR 158; *QIW Ltd v Davids Holdings Pty Ltd* (1993) 42 FCR 255.

28 As stated in *Queensland Wire Industries Pty Ltd v BHP* (1989) 167 CLR 177 at 195: 'In the case of an alleged contravention of the provisions of s46(1), there will be ordinarily little point in attempting to define relevant markets without first identifying precisely what it is that is said to have been done in contravention of the section.' See also *Re Queensland Stock & Station Agents Association* (1989) 87 ALR 321.

29 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

30 Stewart, I. 'Mergers and Competition: An Analysis of Section 50 of the Trade Practices Act' (2000) 74 *AIJ*, 533 at 535.

31 *Re Queensland Independent Wholesalers Ltd* (1995) 132 *ALR* 225; Smith, R. and Norman, N. 'Functional Market Definition' (1994) 4 *Competition and Consumer Law Journal*, 1; Corrigan, M. 'Current Issues in Market Definition under the Trade Practices Act' (1997) 5 *TPIJ*, 154.

32 See *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 at 195; *Re Tooth & Co Ltd; Re Tooheys Ltd* [1979] ATPR 40-113 at 18,196.

33 Stewart, I. 'Mergers and Competition: An Analysis of Section 50 of the Trade Practices Act' (2000) 74 *AIJ*, 533 at 535; Stewart, I. 'The Economics and Law of Section 46 of the Trade Practices Act' (1998) 26 *ABLR*, 111 at 118.

34 Stewart, I. 'Mergers and Competition: An Analysis of Section 50 of the Trade Practices Act' (2000) 74 *AIJ*, 533 at 535. This aspect is critical in the consideration of market definition in merger cases. See s50(3)(b) of the *Trade Practices Act 1974.* It is also critical in assessing the extent of market power under s46.

35 This provision was introduced to give effect to the opinion of the Swanson Committee (Trade Practices Review Committee, *Report to the Minister for Business and Consumer Affairs,* Canberra: AGPS 1976 at para 29) that substitute products involve 'products which have a reasonable interchangeability of use and which have high cross-elasticity of demand, that is where a small decrease in the price of a particular product would cause a significant quantum of demand for a similar product to switch to the product in question.'

36 This can be contrasted with the approach of the Australian Competition and Consumer Commission when analysing a merger. Their guidelines indicate a market as 'the smallest area of product, functional and geographic space within which a hypothetical current and future profit maximising monopolist would impose a small

> with, the first mentioned goods or services.'[36]

This is traditionally interpreted[37] by way of reference to the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* [38]:

> 'Before giving our reasons we should explain our understanding of the market concept, and of the relationship between "markets" and "sub-markets". We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them … 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. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive … Accordingly, 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, very much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply'.[39]

What this tells us is that the process of market definition is designed to allow an examination of the competitive influences within a market and the extent of market power.[40] Substitution is the essential element.[41] There is no set market for a particular product[42] – the market may in fact be narrow or wide, depending on the purpose for which the definition is required.[43] In essence the question to be asked is: '[w]hat definition

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but significant and non-transitory increase in price (SSNIP) above the level that would prevail absent the merger. More generally, the market can be defined as the smallest area over which a hypothetical monopolist (or monopsonist) could exercise a significant degree of market power.' ACCC *Merger Guidelines,* June 1999 at para 5.44.

37 As noted in *ACCC v Boral* [1999] FCA 1318 at para 121.

38 *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169.

39 *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 190.

40 As noted in *Re John Dee (Exports) Pty Ltd* (1989) ATPR 40-938 at 50,219.

41 See the comments by the High Court in *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR at 188. The High Court adopted the view of the Court of Justice of the European Communities in *Hoffman La Roche v Commission* (1979) 1 ECR 461 at 562; 3 CMLR 211 at 272: 'The concept of the relevant market … implies that there can be effective competition between the products which form part of it and this presupposes that there is sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.'

42 *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 59; *Re John Dee (Exports) Pty Ltd* (1989) ATPR 40-938 at 50,219; *Australian Meat Holdings Pty Ltd v Trade Practices Commission* (1989) ATPR 40-932 at 50,104.

43 Sweeney, C. 'Professional Sporting Leagues and the Competition Laws' (1997) *CCLJ Lexis*, 9 at 77.

of market will best assist in analysing the processes of competition relevant to the case?'[44] It is only by reason of simplicity that the definition of the market and the process of assessing market power are separated.[45] Critically the method of determining the market will involve a value judgement for which there can be differences of opinion.[46] This current recognition of the flexibility[47] and subjective factors in the process of market definition contrasts with early decisions – where the matter of market definition was considered a discrete matter for purview, separate and distinct from the conduct under question.[48] Cases that are more recent have reversed this process – recognising the need to first identify the anti-competitive conduct and then test this by reference to the identified market,[49] that being a 'purposive or teleological approach'.[50] The process today involves[51]:

- Identifying the alleged anti-competitive conduct in question;
- Specifying the activities of the firm allegedly in breach;

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44 Brunt, M. 'Marked Definition Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 *ABLR*, 86 at 123.

45 As noted in *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 at 187-188: '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. 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.'

46 As noted by Deane J in *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 at 195-196: 'The identification of relevant markets and the definition of market structures and boundaries … involves value judgements about which there is some room for legitimate difference of opinion. The economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap other markets and contain more narrowly defined markets which may, in their turn, overlap, the one with one or more others.' See also Corrigan, M. 'Current Issues in Market Definition under the Trade Practices Act' (1997) 5 *TPLJ*, 154.

47 Stewart, I. 'Mergers and Competition: An Analysis of Section 50 of the Trade Practices Act' (2000) 74 *ALJ*, 533 at 536.

48 For example see: *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465.

49 The more recent cases include *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158; *Dowling v Dalgety* (1992) 34 FCR 109; *Re 7-Eleven Stores* (1994) ATPR 41-357.

50 Corones, S. 'The Impact of Trade Practices Law on Disputes Involving a Sports League and its Member Clubs' (1997) 25 *ABLR*, 406 at 408.

51 As stated by Brunt, M. 'Market Definition Issues in Australia and New Zealand Trade Practices Litigation' (1990) *ABLR* 86 at 133: 'One begins with a specification of the conduct claimed to be unlawful … The next question will be: What productive activities of the enterprise generate this conduct? And, finally, what decision making unit within the firm (whether it be a company, a division, an establishment – or the whole complex organisation), and what particular product, or set of related products, should be the centre of the analysis? It is a matter, in short of seeking the constraints

- Clarifying the particular product or range of products produced by the firm; and
- Considering the competitive constraints on the activities detected.[52]

Whilst it will be a question of degree[53] as to what can be considered a substitute, the test requires that only close substitutes be scrutinised.[54] Potential substitutes are relevant[55]; nevertheless, the Full Federal Court in *Arnotts Ltd v TPC*[56] recognised the need to have reference to commercial[57] and practical reality[58], though it has been suggested that this has produced inconsistent results[59] and is open for 'diverse interpretation'.[60] In that case, the court accepting that whilst many people drink both tea and coffee, to place both beverages in the one market would frustrate the anti-competitive provisions of Part IV of the *Trade Practices Act 1974* (Cth).[61]

> 'The fact that, upon some occasions, some consumers select one product rather than another does not establish that the two products are "substitutable", so as to be within a single market. No doubt there are many people who sometimes drink tea and, at other times, coffee. But if, for example, a particular company dominated the sale of tea within Australia, it would thwart the objectives of provisions such as ss46 and 50 of the *Trade Practices Act* (Cth) to deny their application because

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upon the "price and production policies of the relevant activity of the firm in question".'

52 As noted by Brunt, M. 'Market Definition Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 *ABLR*, 86 at 104 – the approach as outlined can largely be attributed to the work of Edward S Mason, a noted American economist. See also Kaysen, K. and Turner, D. *Antitrust Policy: An Economic and Legal Analysis.* Cambridge: Harvard University Press, 1965.

53 As noted by *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 at 199 per Dawson J.

54 As noted in *Queensland Co-operative Milling Association* (1976) 8 ALR 481 at 515.

55 See *Re Tooth & Co Ltd; Toohеys Ltd* (1979) ATPR 40-113.

56 *Arnotts Ltd v TPC* (1990) 24 FCR 313.

57 As noted by Gyles J in *Australian Rugby Union Ltd v Hospitality Group Ltd* (2000) 173 ALR 702 at 714: 'Full weight must be given to the contemporaneous documents and commercial realities in assessing the evidence.' Similarly, in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 178: '[The] court must select what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law.' See also the recent decision of *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 1381.

58 On the role of commercial reality, see Smith, R. and Walker, J. 'Australian Trade Practices and the Emerging Role of Commercial Reality versus Substitution in Market Definition' (1997) 5 *Competition and Consumer Law Journal*, 1.

59 See Brewster, D. 'Market Definition and Substitutability: Australian Courts Continue to Struggle with Part IV of the *Trade Practices Act 1974* (Cth)' (1996) 12 *QUTLJ*, 246; Maughan, B. 'Super League: A Comment' (1998) *NZLJ*, 126.

60 Stewart, I. 'Mergers and Competition: An Analysis of Section 50 of the Trade Practices Act' (2000) 74 *ALJ*, 533 at 536.

> that company did not dominate the "hot beverage" market. The fact is that tea and coffee are distinct beverages, for each of which there is a distinct demand.'[62]

Similarly, the United States District Court in *Federal Trade Commission v Coca Cola Co.*[63] rejected an argument by Coca Cola that the relevant product market included all beverages, including tap water – the argument by the Respondents being that all beverages quench thirst:

> 'Although other beverages could be viewed as within the "outer boundaries of a product market … determined by the reasonable interchangeability of use or the cross elasticity of demand between [carbonated soft drinks] and substitutes *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784" for them, carbonated soft drinks represent at minimum a well-defined and the major beverage submarket …'[64]

This case also recognised that the determination of the market is 'a matter of business reality … of how the market is perceived by those who strive for profit in it'.[65] It provides a 'tool for classifying market restraints'[66] and assists in determining the 'extent and nature of competition'.[67] The following cases provide practical illustrations of how this process works.

SINGAPORE AIRLINES V TAPROBANE TOURS WA PTY LTD[68]

Singapore Airlines offered flights from Australia to the Maldives. In this capacity it acted as a wholesaler. It created the holiday tour program by putting together the various services required, such as meals, accommodation and flights. Travel agents then sold these holiday tours to consumers. Taprobane Tours was a wholesaler of tours. Singapore Airlines offered these tours to Taprobane, but the fare from Western Australia was higher than from the Eastern States. This had the effect of forcing Taprobane out of the market for the supply of tours to the Maldives. Taprobane alleged that this was a breach of s46, and at first instance, they were successful. The trial judge[69] concluded that the market in question was for the provision of holidays to the Maldives.

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61 *Arnotts Ltd v TPC* (1990) 24 FCR 313 at 332.
62 *Arnotts Ltd v TPC* (1990) 24 FCR 313 at 332.
63 *Federal Trade Commission v Coca Cola Co* 641 F Supp 1128 (1986).
64 *Federal Trade Commission v Coca Cola Co* 641 F Supp 1128 (1986) at 1133.
65 *Federal Trade Commission v Coca Cola Co* 641 F Supp 1128 (1986) at 1132.
66 Brunt, M. 'Market Definition Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 *ABLR*, 86 at 113.
67 Norman, N. and Williams, P. 'The Analysis of Market and Competition under the Trade Practices Act: Towards the Resolution of Some Hitherto Unresolved Issues' (1983) 11 *ABLR*, 396 at 400.
68 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159; 33 FCR

The Full Federal Court[70] held that whilst there may have been a sub-market for tours to the Maldives, this was part of a broader market for island holiday services.

Importantly, in the context of this paper, French J (with whom O'Loughlin J agreed) considered that defining a market had both a descriptive and purposive role.[71] 'It involves fact finding together with evaluative and purposive selection.'[72] Regard must be had to commercial reality as well as the policy of the statute.[73] Thus, from the perspective of demand side substitutability, consumers could look to other island holidays without difficulty, for example, there was not the special emotional considerations that attach to the support of a particular sporting club.[74] Furthermore, if one considers supply side substitutability, wholesale suppliers of holiday tours could easily switch their production to other destinations. There was not, unlike in *News Ltd*[75], the restrictions from either the demand or supply side of the equation. When one considers the market definition in light of the anti-competitive conduct, the restrictions imposed by Singapore Airlines for either the consumers or the wholesale suppliers were slight.

News Ltd v Australian Rugby League Pty Ltd[76]

The importance of recognising that market definition must be examined only after a consideration of the alleged anti-competitive conduct and that only close substitutes be considered was demonstrated by the decision of the trial judge in *News Ltd v Australian Rugby League Pty Ltd.*[77] The Australian Rugby League Ltd (ARL) had heard rumours that the News Ltd group was establishing a rival competition. To tie the existing clubs and players to the ARL, the organiser required the clubs to sign Commitment and Loyalty Agreements that precluded them from joining a competition other than that conducted by the ARL. The

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69 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1990) ATPR 41-054.

70 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159; 33 FCR 158.

71 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159 at 40,169.

72 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159 at 40,169.

73 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159 at 40,170.

74 Sweeney, C. 'Professional Sporting Leagues and the Competition Laws' (1997) *CCLJ Lexis*, 9 at 77. Also as noted by Lupica, M. *Mad as Hell,* 3 (1998) quoted in Piraino, T. 'A Proposal for the Antitrust Regulation of Professional Sports' (1999) 79 *BUL Rev*, 889 at footnote 1: 'Sports has been as big a twentieth-century entertainment phenomenon as the movies or television or anything that has happened or will happen with computers… Now [sports] is a dominant part of our culture, and our lives, and especially our language. It is a national obsession without any boundaries

agreement was to remain in place for a period of five years. News Ltd commenced proceedings alleging that the agreements contravened ss45 and 4D of the *Trade Practices Act 1974* (Cth) in that they contained exclusionary provisions. Alternatively, a claim was made based on s46 alleging a misuse of market power. The trial judge, Burchett J, held that the agreements were valid – this was overturned on appeal to the Full Federal Court. The Appellate Court decided that the agreements did contain provisions amounting to an anti-competitive boycott. Special leave to appeal to the High Court was refused.[78]

The trial judge decided that the market was not confined to rugby league but arguably extended beyond this to include other sports such as rugby union, Australian Rules football, basketball and soccer.[79] The Full Federal Court (on appeal) did not decide.[80] However, it is considered that the market would have been more narrowly drawn[81] had the matter been discussed by that judicial body.[82] A number of possible market definitions existed in this case.[83] Firstly, the market could consist of all spectator sports such as rugby league, union, soccer, football, cricket etc. Secondly, a narrower version identifies the market as simply that consisting of rugby league. Alternatively, markets could have been specified for 'rugby league competitions in Australia', or

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for age; in that way, it is much more an obsession than rock-and-roll music. Not everybody knows Mick Jagger. You better believe that everybody knows Michael Jordan.'

75 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466.

76 *News Ltd v Australian Rugby League* (1996) ATPR 41-466 (TJ – Burchett J); (1996) ATPR 41-467 (Full Federal Court, Lockhart, von Doussa, Sackville JJ).

77 The decision of Burchett J was recently relied upon in *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-467.

78 Anon 'Private Action' (1996) 6 *ACCC Journal*, 49 at 52.

79 *News Ltd v Australian Rugby League* (1996) ATPR 41-466 at 41,685. However, it should be noted that his Honour was not required to conclude what the market was. However, the narrow market definitions put forward by News Ltd were rejected.

80 The Court concentrating on per se provisions of the legislation (ss45 and 4D), thus rendering analysis of the market redundant. The court did however recognise that many difficult issues were raised by the question of market definition. See (1996) ATPR 41-467 at 42,540.

81 The court may have adopted the American decisions which support the thesis that a single market existed for professional sports: see *National Collegiate Athletic Association (NCAA) v Board of Regents of the University of Oklahoma* (1984) 468 US 85; *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club Inc* (1972) 351 F Supp 462; *International Boxing Club of New York v United States* (1959) 358 US 242.

82 See the comments by Pengilley, W. 'Super League' (1998) *NZLJ*, 32 at 36; Anderson, W. and others 'Merger Misconceptions, the Industry Commission's Paper on the ACCC's Draft Merger Guidelines' (1996) 4 *CCLJ Lexis*, 18 at 11: 'However, Burchett J's application of the principles of market definition must be open to question and was the focus of considerable attention during the hearings. ' Indeed note the comment of the presiding judge in the appeal: Lockhart J who stated: 'I, for myself, … have difficulty seeing … how one could talk about this market … as including say cricket

more geographically defined to include New South Wales, the Australian Capital Territory and Queensland. Further options included a market for the supply of teams to play in premier rugby league competitions, a league market for the supply of a rugby league competition and markets for the supply of television rights, sponsorship rights and for the supply of competition for viewing by the public.

Burchett J considered that s4E of the *Trade Practices Act 1974* (Cth) required that the market be widely defined; otherwise a narrowly defined market would swell the anti-competitive effects of what was occurring.[84] However, as indicated, only close substitutes should be considered within the context of the market. It can be easily argued that given the peculiar characteristics of sport, that product market definition necessitated something narrower. Burchett J in including a number of sports in the product market concluded that:

> '[A]t least the rugby union, soccer, Australian rules football and basketball against which, the evidence shows, rugby league sees itself as competing for spectators, would attract a significant portion of rugby league's crowds if the League chose to attempt to assert market power by significantly raising prices or giving less; and the sports which would attract persons away from rugby league in those circumstances belong in the same market with it.'[85]

His Honour decided that it would be 'simplistic and misleading'[86] to adopt the narrow view postulated by News Ltd. The period for market definition could not be considered in the short run (his Honour indicating that ten years may have been appropriate)[87] and this led to the conclusion that there were other substitution possibilities within a decade.[88] This conclusion was, with respect, erroneous. From the perspective of the demand by spectators, the particular characteristics of sport[89] indicate that other sports may be alternatives. Nevertheless, they are not close substitutes – just like tea and coffee may be considered as alternatives, but not substitutes.[90] Also from the

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… Unless one takes it to the extreme of an entertainments market that is international … One gets to an area of absurdity then and the very intention of the Act is just thrown out the window…' (unreported) 27 May 1996, at 172 quoted in Corones, S. 'The Impact of Trade Practices Law on Disputes Involving a Sports League and its Member Clubs' (1997) 25 *ABLR*, 406 at 413.

83 See Corrigan, M. 'Current Issues in Market Definition under the Trade Practices Act' (1997) 5 *TPLJ*, 154 at 158. See also Sweeney C. 'Professional Sporting Leagues and the Competition Laws' (1997) *CCLJ*, *Lexis* 9 at 77.

84 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 at 41,667.

85 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 at 41,685.

86 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 at 41,667.

87 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 at 41,671.

88 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 at 41,685.

89 For a discussion of this see Sandercock, L. and Turner, I. *Up Where, Cazaly.* London: Granada 1981. At 230, they note the particular commitment that an individual has to a particular club: 'You inherit your football club, along with your religion and your

perspective of supply side substitutability, the clubs and players could not easily change to another sport – thus the other sports were not in the same product market definition.[91] 'If the constraining influences on the demand side and the supply side are considered by reference to the anti-competitive conduct at issue, and market definition is treated as subsidiary to the market power errors are less likely to occur'.[92] Furthermore, the reference to a 10-year period was arguably excessive.[93] 'It is plain that the longer the period allowed for likely customer and supplier adjustments to economic incentives, the wider the market delineated'.[94]

By contrast to the approach of Burchett J[95], the suggested teleological method would be to identify the conduct in question, with a resultant focus on the purpose of the anti-competitive provisions. The conduct here was the signing of the Commitment and Loyalty Agreements when another competition organiser offered its services. In essence, it was the attempt by one competition organiser, the ARL, to prevent the operations of another competition organiser (News Ltd). The activity of the firm in breach (ARL) was the production of rugby league games, which were then sold to television broadcasters, sponsors and the fans. This leads to the market definition of rugby league games. The players and clubs could not extend their operations into another sport – they

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politics, from your parents or older brothers and sisters. Or you settle on a champion player or a team which is shining when you are first initiated into the game. Conversions are not unknown, but they are rare. The original commitment in most cases lasts for life' quoted in Sweeney, C. 'Professional Sporting Leagues and the Competition Laws' (1997) *CCLJ Lexis*, 9 at 22.

90 As noted in *Arnotts Ltd v TPC* (1990) 24 FCR 313.

91 See the brief discussion of these points in Clarke, P. and Corones, S. *Competition Law and Policy – Cases and Materials.* Melbourne: Oxford University Press, 1999, 128-129.

92 Clarke, P. and Corones, S. *Competition Law and Policy – Cases and Materials.* Melbourne: Oxford University Press, 1999, 129. It could certainly be argued that the trial judge was aware of the need to consider the definition of market within the constraints of the alleged anti-competitive conduct. Consider the following comment made by his Honour, Burchett J: *News Ltd v Australian Rugby League Pty Ltd* (1996) 58 FCR 447 at 478 – 'If the market is seen as the frame, too broad a market will produce a picture in which the identity of the competitive conflict is lost in a confused melee involving other conflicts, while too narrow a market will cut out of the picture vital parts of the very action intended to be depicted.'

93 See for example Edwards, G. 'From Super League to the Super Market? The Appropriate Emphasis in Market Definition' (1998) 7 *Competition and Consumer Law Journal*, 1 at 43.

94 *Re Tooth & Co Ltd and Toohеys Ltd* (1979) ATPR 40-113 at 18,196.

95 It can be noted that McInerney, A. 'The Super League Litigation: Has *Klor's Inc v Broadway Hale Stores* Come Down Under?' (1997) 25 *ABLR*, 384 at 397 makes the following summation of Burchett J's judgment. 'In summary, therefore, the trial judge in *Super League 1* appears to accept that competition in s45(2) of the TPA has allocative efficiency as its overriding objective for two reasons. First, the trial judge rejected the application of s4D to vertical arrangements consistent with a Chicago School approach. Secondly, the trial judge adopted a Chicago School approach to

could only play in another rugby league competition. There were no competitive constraints on the ARL.[96] Other sports were not, from the perspective of a supporter, interchangeable with their preferred choice of entertainment.[97] '[F]ans generally have not switched their allegiance from one professional sport to another when their favourite sport has raised ticket prices, suffered a strike or experienced other difficulties.'[98]

AUSTRALIAN RUGBY UNION LTD V HOSPITALITY GROUP PTY LTD [99]

The Australian Rugby Union (ARU) was the sole organiser of professional rugby union in Australia. The ARU organised international test matches and sought to prevent tickets being on-sold at a premium. The tickets contained the following term: 'This ticket may not be resold at a premium or for commercial purposes without the prior written consent of the ARU. If this ticket has been resold in contravention of the condition, the bearer of the ticket will be denied admission.' The ARU entered arrangements with International Management Group (IMG) whereby IMG would exploit the commercial opportunities, including hospitality packages, for 1999 and 2000 rugby union tests. Hospitality Group Pty Ltd (THG) entered a number of contracts with clients whereby they offered premium seats and hospitality packages to the international matches. THG did not have any contractual arrangement with ARU. Australian Rugby Union sought a number of remedies against THG. Ultimately, Gyles J granted injunctive relief.

In the judgement undertaken by his Honour he considered the issue of market definition. Importantly the analysis of Gyles J demonstrated the suggested teleological approach, previously articulated, (as compared with Burchett J in *News Ltd v Australian Rugby League Pty Ltd*[100] in determining the product market. Market definition was not to be looked at in isolation. It was only to be examined in the context of the anti-competitive conduct. 'Important as they are, elasticises and the notion of substitution provide no complete solution to the definition of

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market definition.'

96 See the discussion by Corones, S. 'The Impact of Trade Practices Law on Disputes Involving a Sports League and its Member Clubs (1997) 25 *ABLR*, 406 at 408-409.

97 American cases which have accepted this include *NCAA v Bd. of Regents* 468 US 85 (1984) (college football is watched by a unique audience for which advertisers are willing to pay a premium): *Los Angeles Mem'l coliseum comm'n,* 726 F.2d 1393 (NFL football); *Fishman v Estate of Wirtz* 807 f.2d 520 (NBA basketball) and *Philadelphia World Hockey Club Inc v. Philadelphia Hockey Club Inc* 351 F. Supp. 462 (1972).

98 Piraino, T. 'A Proposal for the Antitrust Regulation of Professional Sports' (1999) 79 *BUL Rev*, 889 at 895. See also Jacobs, M. 'Professional Sports leagues: Antitrust, and the Single-Entity Theory: A Defense of the Status Quo' (1991) 67 *Ind LJ*, 34.

a market. A question of degree is involved – at what point do different goods become closely enough linked in supply or demand to be included in the one market – which precludes any dogmatic answer.'[101] Referring to United States authority 'with profit'[102] his Honour accepted that each sport was distinct, appealing to its own group of players and supporters.[103] Furthermore, Gyles J accepted that alternatives were not necessarily substitutes[104] and referred with approval[105] to the European decision of *United Brands v Commission of the European Communities*[106] where it was accepted that bananas constitute a distinct product market. Referring to the decision of Burchett J in *News Ltd v ARL*[107] his Honour concluded that that decision has been much criticised and that s4E was designed to ensure that the overseas jurisprudence would be applied in Australia, rather than support either a wide or narrow version of the definition of a market.[108] Ultimately, the determination was that there existed a market for hospitality packages at rugby union matches.[109] Nevertheless, this narrow market had not been pleaded; accordingly, an argument based on this ground could not succeed.[110]

Importantly in the context of the thesis of this article, Gyles J adopted the approach to analysis of market definition as previously outlined. The alleged anti-competitive conduct in question was the imposition of the restrictive ticket condition, this condition not permitting the resale of the ticket. The firm allegedly in breach, the Australian Rugby Union, was in the business of organising and promoting the game of rugby union to fans, television broadcasters, and sponsors. Part of this service included hospitality packages to rugby union games. Given this identification of the alleged anti-competitive conduct, we can see that there was no substitutability with other hospitality packages offered by other sports.

> 'Are the differentiating characteristics of international rugby union hospitality packages such as to deny interchangeability of function with packages involving other sports or entertainment? I have little difficulty in concluding, as a matter of fact, that, generally speaking, there is no relevant interchangeability between different recognised sports. Each is distinct with a recognised identity precisely because it has its own special

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99 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702.
100 *News Ltd v Australian Rugby Union Ltd* (1996) ATPR 41-466.
101 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 716-718.
102 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 718: 'That United States and European decisions and concepts are relevant to market definition pursuant to the Act. This is not surprising, as market is essentially an economic concept. It is important, as, in each place, but particularly in the United States, there is a well developed jurisprudence on the topic which can be resorted to with profit.'
103 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 719-720.
104 Quoting from *Arnotts Ltd v TPC* (1990) 24 FCR 313.
105 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 720.
106 *United Brands v Commission of the European Communities* (1978) 1 CMLR 429.

characteristics, appealing to its own audience of players and fans.'[111]

The fact that fans and players may occasionally play or follow other sports was irrelevant.[112] The product offered by the Australian Rugby Union was unique and as they exercised a monopoly on the conduct of international rugby league, there was no competitive constraint. The ticket condition was designed to retain the monopoly on this field of endeavour. The conclusion could be made that the ARU could extract a significant monopoly profit.[113] Thus by examining the market definition in the context of the alleged anti-competitive conduct, single product markets can easily be justified. Gyles J commented that a single product market is appropriate where there is a 'distinct product with a distinct demand'.[114] By contrast Burchett J in *News Ltd v ARL* considered that a single product market would only exist where there is a special factual situation.[115] The difference in analysis reflects their different conclusions as to product definition. It is submitted that the approach of Gyles J is to be preferred – his Honour recognised that market definition can only be considered in light of the alleged anti-competitive conduct. Once this is done and as it can be seen that the consumer is unwilling or unable to change their allegiance from one sport to another[116], a single product market in sporting endeavours becomes not only feasible, but also preferable.

Brown Shoe Co. Inc. v United States[117]

Brown had 1230 retail outlets for shoes in the United States of America – it was the third largest retailer, as well as being the biggest manufacturer. It sought to merge with GR Kinney Company Inc – the eighth largest retailer with 350 retail outlets. Before examining the question of market definition, the Court considered the structure of the

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107 *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466.

108 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 731.

109 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 731.

110 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 732.

111 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 719-720. Reference was made to a number of authorities from the United States. These included *THG of NCAA v Board of Regents of University of Oklahoma* 468 US 85 (1984) and *International Boxing Club of New York Inc v United States* 358 US 242 (1959).

112 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 720.

113 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 731-732. As noted: 'Taking all of this into consideration, there is much to be said for the view that there is no close substitute for international rugby union test match hospitality. It is unique in its appeal to a significant number of consumers, primary and secondary … The conclusion is open that if the ARU were able to control all international rugby union test match hospitality packages it would be able to extract a significant monopoly profit compared with that which would prevail if there were competition from other providers of international rugby test match hospitality packages.'

industry and made the following observations. There was an increasing level of vertical integration whereby entities were involved in both the manufacture and retail of shoes. Given this, the product market was found to be in shoes, with a distinct submarket for each of men, women and children's shoes. 'The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'[118] The practical indicia to guide the definitional process was 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct consumers, distinct prices, sensitivity to price changes, and specialized vendors'.[119] However, this analysis was only made after consideration of the increasingly concentrated structure of the market, should the merger go ahead. Thus the alleged anti-competitive conduct (the increase in competition in the shoe market) was articulated before the product market was identified. This could only be considered in light of the shape of the industry and the competitive constraints within that industry. Once the increase in retail concentration was recognised, together with the greater vertical integration, the identification of the product market as shoes (with distinct sub-markets) spoke for itself. For consumers, there were no close substitutes for shoes. For manufacturers, (particularly with the links between manufacture and retail), supply side substitutability was similarly restricted. They could not easily move to the production of other goods.

Federal Trade Commission v Cardinal Health and Ors[120]

The defendants (McKesson Corp, Bergen Brunswick, Cardinal Health, and Amerisource Health Corp) were, respectively, the four largest wholesale drug distributors in the United States of America. They were the only wholesalers in the United States to provide a national coverage. Cardinal and Bergen announced a decision to merge; this was shortly followed by an announcement that McKesson and Amerisource would merge. The Federal Trade Commission, the United States equivalent to the Australian Competition and Consumer Commission, sought injunctive relief pending administrative review of the merger. The Federal Trade Commission argued that the relevant market was the US$54bn industry that specialised in the wholesale supply of prescription drugs. The Respondents contended that the

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[114] *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 720.
[115] *News Ltd v Australian Rugby League Pty Ltd* (1996) ATPR 41-466 at 41,671.
[116] See Seal, J. 'Market Definition in Antitrust Litigation in the Sports and Entertainment

relevant industry was the larger US$94bn prescription drug industry – the other methods of distribution being direct from the manufacturer, self-warehousing and mail order.

The District Court accepted that the starting point for any analysis was identification of the product market.[121] However, '[I]t is imperative that the Court, in determining the relevant market, take into account the economic and commercial realities of the pharmaceutical industry'.[122] Thus, the market can only be determined by a consideration of the alleged anti-competitive conduct and the facts relevant to that industry. As with the Australian position, substitutability was the key.[123] However, in undertaking this analysis, '[T]he Supreme Court has recognised that within a broad market, well defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes'.[124] Accordingly, the appropriate market was that of wholesale drug distribution. This conclusion was assisted by the public recognition of the submarket, the product's characteristics, the unique production facilities and distinct consumers and vendors.[125] The anti-competitive conduct that would lead from this possible merger included higher prices, the possibility of collusive practices and the elimination of current discounting which was occurring.[126] Finally, the barriers to entry acted as a constraint to new entrants into the industry. The expertise, likelihood of entry and increase in competition were all factors in granting the injunction.[127] Again, after identifying the alleged anti-competitive conduct, the product market can be ascertained. For a significant section of the community, there was no close substitute for reliance on the wholesale supply of prescription drugs. Similarly, the suppliers themselves could not easily convert to another form of production.

United Brands v The Commission of the European Community[128]

United Brands was principally involved in the production and export of

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Industry' (1993) 61 *Antitrust Law Journal*, 742. Also as noted by Sweeney, C. 'Professional Sporting Leagues and the Competition Laws' (1997) *CCLJ Lexis*, 9 at 22: 'A supporter will regard himself or herself as bonded to a particular club, the association having been formed and fixed early in life, the association becoming identified as a central aspect of the supporter's social identity, in the much the same manner as a religious affiliation.' (Citations deleted.)

117 *Brown Shoe Co. Inc. v United States* 370 US 294 (1962).

118 *Brown Shoe Co. Inc. v United States* 370 US 294 (1962) at 325.

119 *Brown Shoe Co. Inc. v United States* 370 US 294 (1962) at 325.

120 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784.

121 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at para 11,quoting from *Brown Shoe Co. Inc. v United States* 370 US 294 (1962).

bananas. Indeed, if this was to be considered a separate market, the company accounted for 35 per cent of world trade in 1974. The European subsidiary, United Brands Continental B.V., coordinated banana sales in a large number of countries of the European Union. The Respondents alleged that there had been a misuse of market power by the appellant in the marketing and pricing of bananas.[129]

It was held by the Court of Justice of the European Communities that United Brands had misused its dominant market power and significantly, for the purposes of this discussion, the relevant product market was simply bananas – rather than a broader fresh fruit market. This conclusion was reached although consumer expenditure on bananas dropped when other fruits were in plentiful supply. Importantly these conclusions were decided by a consideration of the structure of the market. The market definition was only considered in light of the alleged anti-competitive conduct. Given that United Brands was vertically integrated from banana plantations to wholesale and retail outlets and had protection against weather disruptions to crops (by way of plantations being spread over a large geographic area) it was able, by advertising and product differentiation, to establish a consumer preference for the bananas of United Brands.

> 'The Commission maintains that there is a demand for bananas which is distinct from the demand for other fresh fruit especially as the banana is a very important part of the diet of certain sections of the community. The specific qualities of the banana influence customer preference and induce him not readily to accept other fruits as a substitute.'[130]

Thus, with the market share enjoyed by United Bananas and its resultant market power, the company was able to operate independently of other business competitors. This allowed it to set higher prices for its bananas with the conclusion that it 'prevented effective competition from being maintained on the relevant market'. In essence, competition was being eliminated.

Fundamentally however, consideration of the anti-competitive conduct and the structure of the company set market definition. From the perspective of purchasers, other fruits were not effective substitutes. In addition, it was not possible for United Brands to change its production from bananas to another crop easily.

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122 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at para 12.
123 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at para 11.
124 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at para 13, quoting from *Brown Shoe Co. Inc. v US* 370 US 294 at 325 (1962).
125 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at para 12.
126 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at para 32.
127 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784 at paras 19-26.

CONCLUSION

The examination of *Australian Rugby Union,*[131] *Singapore Airlines*[132] and the United States decisions of *Brown Shoe*[133] and *Cardinal Health*[134] as well as the adjudication of the European Court in *United Brands*[135] demonstrates that the approach to market definition is broadly similar in all jurisdictions.[136] Given this, overseas jurisprudence and literature is likely to be more heavily used in the future than it has in the past. What has been demonstrated by the examination of the cases is that market definition is not to be considered in isolation. It is to be viewed only in the context of the alleged anti-competitive conduct. As Fisher states:

> 'Thus, the primary question in defining the relevant market ought to be that of the constraints on the alleged monopolist. The principal constraints can be of two types, those relating to demand and those relating to supply. The courts have paid appropriate attention to demand and supply substitutability – appropriate because those are criteria by which to judge the constraints on the alleged monopolist. It should not be forgotten, however, that it is the constraints which are the object of analysis and not the properties of substitutability themselves.'[137]

Once these constraints are isolated, it is then possible to identify how this may be anti-competitive in light of the activities of the firm and the products produced by it. This can raise the question of competitive constraints on the firm. The approach of Burchett J in *News Ltd v ARL*[138], with regard to market definition needs to be questioned, Gyles J in *Australian Rugby Union*[139], and French J (a decade earlier) in

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128 *United Brands v The Commission of the European Community* (1978) 1 CMLR 429.

129 The relevant provision was Article 86 of the Treaty of Rome; it is broadly equivalent to s46 of the *Trade Practices Act 1974* (Cth).

130 *United Brands v The Commission of the European Community* (1978) 1 CMLR 429 at 483-484.

131 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702.

132 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159.

133 *Brown Shoe Co. Inc. v United States* 370 US 294 (1962).

134 *Federal Trade Commission v Cardinal Health and Ors* (1998) WL 433784.

135 *United Brands Co. v The Commission of the European Communities* (1978) 1 CMLR 429.

136 The uniformity that is represented in the approach to market definition may not exist across all aspects of competition law. Note the word of caution expressed by McInerney, A. 'The Super League Litigation: Has *Klor's Inc v. Broadway Hale Stores* Come Down Under?' (1997) 25 *ABLR*, 384 at 405: 'The policy goal of s45(2), "workable competition", and common market integration in Art 85 of the Treaty [*Treaty Establishing the European Community 1957*] ensure that the approaches to the issues of product market definition and classic boycotts are given different emphasis in Australia and Europe. These findings suggest that while the comparative analysis of European competition law may offer insight as to the overriding policy goals of Australian competition law policy, it may be misguided to transport European

Singapore Airlines[140] together with the overseas cases (*Brown Shoe*,[141] *Cardinal Health*[142] and *United Brands*[143]) all demonstrate that the critical starting point is identification of the alleged anti-competitive conduct. Market definition is not to be considered in isolation. It is only after articulation of the conduct is made and recognition of a firm's activities that market definition can sensibly be isolated. Without this type of analysis, the markets stated will ultimately be broader than they should otherwise be. This type of analysis also conclusively recognises that single product market definition can legitimately exist in Australia today.