Markets in Professional Sports

***Hendry & ors v WPSBA* and the Importance of Functional Markets**

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ABSTRACT

***Hendry & ors v WPBSA* raises important issues concerning market definition in professional sports, and more generally. The article points to the confusion on and importance of distinguishing between different functional markets. Where sports bodies seek to foreclose entry of a rival league/organiser, it is primarily upstream (players and tournaments) and not downstream (broadcasting rights, sponsorship, gate) markets which are critical, as the decision confirms.**

In *Hendry, Williams & Sportsmaster Network v World Professional Billiards & Snooker Association*[1] (*Hendry v WPBSA*) Lloyd J found that the World Professional Billiards & Snooker Association (WPBSA) was dominant in *"a relevant market … between professional snooker players and promoters of snooker tournaments*", and that it had abused that dominance. This - one of the first private actions under the UK *Competition Act 1998* - raises important issues concerning the appropriate functional level for market definition in professional sports, and more generally. In cases where a professional sporting body which also operates a league/tournament series, imposes restrictions on players which are alleged to prevent a proposed rival league it has been argued that the relevant product markets are downstream ones such as broadcasting rights and sponsorship. However, in these cases the restrictions operate on upstream markets and only have a secondary effect on the output of sporting competitions. Thus the appropriate level for market definition is upstream as correctly concluded in *Hendry v WPBSA*. However, pleading the case on this basis is of limited assistance to the Claimant who will also want to wrest a lucrative

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[1] *Hendry, Williams & Sportsmaster Network v World Professional Billiards & Snooker Association* Case [2002] UKCLR 5.

television rights contract from the established league. Thus inevitably both Claimant and Defendant will be drawn into seeing downstream market definition as crucial, and this will be problematic for the Courts. Here the way market definition was tackled by the litigants in *Hendry v WPBSA* is examined and compared to the controversial decision in the Australian Rugby Superleague case.

The facts

The WPBSA is a professional players' association representing all professional snooker players world-wide. It is the main commercial organiser of professional snooker tournaments. Table 1 shows the professional snooker tournaments schedule for 2000/2001, their promoters/organisers, and the prize money for each tournament. According to this data, the WPBSA organises over 60% of all professional snooker tournaments as measured by number of tournaments, and its share of total prize money is almost 80% including the World Championships which is by far the most lucrative and largest tournament series. In addition, the WPBSA has 100% of the professional snooker television rights sold to free to air television broadcasters in the UK, and most if not all the pay TV rights (Table 2). The most lucrative contract is the WPSBA's five year contract with the BBC worth £31 million.

Table 1: Professional snooker tournaments, organisers & prize money, 2000/01

Organisers	Tournaments	Prize Money £ (000)	Share	
			Prize money	Number of tournaments
WSA	British Open	441		
WSA	Grand Prix	441		
WSA	Liv Vic UK championship	540		
WSA	China Open	311		
WSA	Regal Welsh Open	441		
WSA	Thailand Masters	282		
WSA	Regal Scottish Open	441		
WSA	Embassy World Championship	1,532		
Total WSA		**4,430**	**78.8%**	**61.5%**
Cuemasters Ltd	Regal Scottish Masters	195	3.5%	7.7%
Benson and Hedges	Benson and Hedges Masters	650	11.6%	7.7%
Kevin Norton	Irish Masters	160	2.8%	7.7%
Barry Hearn and the Matchroom Organisation	Premier League	150	2.7%	7.7%
Richard Balani	Rothmans Malta Grand Prix	36	0.6%	7.7%
Total		**5,621**		

Source: Sport 110.

Table 2: Snooker television rights Contracts,

Organisers	Tournaments	Broadcaster	Hours (1)	Fees (£million)
WSA	Grand Prix	BBC	37	£2.5
WSA	Liv Vic UK championship	BBC	37	£3.7
WSA	Embassy World Championship	BBC	100	£21.7
Benson and Hedges (2)	Benson and Hedges Masters	BBC	37	£3.1
		Total (5 year contract with the BBC, 2000/05) (3)		**£31.0** (5)
WSA	Regal Welsh Open	BBC Wales	27	
Cuemasters Ltd	Regal Scottish Masters	BBC Scotland	20	£0.038
WSA	British Open	Sky TV	49	£0.25 (4)
WSA	Regal Scottish Open	Sky TV	49	£0.25 (4)
Barry Hearn and the Matchroom Organisation	Premier League	Sky TV	n/a	n/a
WSA	China Open	Local broadcasters	0	n/a
WSA	Thailand Masters	Local broadcasters	0	n/a
Kevin Norton	Irish Masters	RTE	30 (6)	0
Richard Balani	Rothmans Malta Grand Prix	Malta TV	0	n/a

Source: unless otherwise stated this information was sourced from various sources gathered by 110 Sport Ltd.

(1) Minimum Hours Coverage.

(2) Benson and Hedges Masters is sanctioned by the WSA who sells the rights to the BBC as a block together with other tournaments.

(3) Source: agreement between WSA and BBC on broadcasting rights, 8 September 2000. It covers the period from Sept. 2000 to Sept. 2005. From 2002 nominal fee will have to include RPI.

(4) Source: agreement between WSA and BSkyB on broadcasting rights, 16 October 2000. Figure refer to 2000/01 season. For subsequent seasons figure (TBC) will raise to £0.2625m (2001/02), £0.275625m (2002/03), £0.2894065m (2003/04).

(5) In addition foreign rights have been acquired by TWI - (International distribution) - £1.8 m.

(6) Estimate.

All professional snooker players are members of the WPBSA and subject to the rules of membership and disciplinary action by the WPBSA. The third Claimants (Sportsmasters Network) had sought to set up their own tournament series, and alleged that the WPBSA's rules and actions had acted to prevent this, and were of its dominance. The rules related to the sanctioning of tournaments (Rule A5), the players' ranking system, logos and advertising (Rule P), and players' interviews/promotional work (Rule S).

Prior to trial the WPBSA withdrew Rule A5 and admitted its dominance in the market for organising and promoting tournaments, but at trial withdrew this admission. The *WPBSA*, under its rules of February 2001 are alleged to have restricted professional players' freedom to decide in which tournament to play. In particular, Rule A5 restricts a player from playing in any snooker tournament not organised, promoted or sanctioned by the WPBSA. Rule 5.1 of the February rules prohibit players from playing in any tournament whether snooker or any cue sport without permission. Rule 5.2 restricts a player from participating in any kind of snooker tournament

whilst a WSA tournament is being held. Lloyd J found the WPBSA's sanctioning rules were an abuse, but not the others.

Application of Competition Rules to Sport

Hendry v WPBSA concerns a professional sporting body which both regulates and commercially exploits a professional sport. The EC Commission has stated that not all restrictions administered by dominant sporting bodies are anticompetitive. There are legitimate grounds for exempting certain "sporting rules" from the application of EC competition law:

> *"… (i) the Commission recognises the regulatory powers of sports organisations as regards the non-economic aspects linked to the specific nature of sport; (ii) the rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not, in principle, caught by the Treaty's competition rules …"*[2]

The factors listed by the EC Commission have limited relevance to professional snooker. The above quotation refers to team sports such as football, rugby, cricket, which differ significantly from individual sports such as professional snooker. First, there is no need for restrictions of the type identified above such as handicapping individual players or equalising resources between players. Second, the level of investment by a promoter to stage a snooker tournament is substantially less than for team sports and, indeed, other major individual sports such as tennis and golf. Football, for example, requires clubs to make large capital investments in home grounds, where matches can be played. Snooker is played in rented sports facilities conference and/or exhibition centres for several days or a few weeks and which have many other uses.

The dual role of the WPBSA as regulator and commercial tournament organiser poses a potential conflict of interest. The EC Commission's recent analysis in *Formula One* concluded that this could distort competition sufficiently to require the complete separation of the two functions. While no decision was published in the Formula One investigation because the complaint was withdrawn, the EC Commission negotiated complete separation of the sport's regulatory and commercial functions in two unrelated bodies.[3]

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[2] "Limits to application of Treaty competition rules to sport: Commission gives clear signal" *EC Commission Press Release* IP/99/965, 9 December 1999; Also "Commission debates application of its competition rules to sports" *EC Commission Press Release* IP/99/133, 24 February 1999.

[3] The EC Commission objected to: *"… what it saw as the conflict between the legitimate role of the Federation International d'Automobile (FIA) as the regulator of international motor sport and its interest in the commercial side of motor racing. These arrangements resulted, in the view of the Commission, in Formula One Administration (FOA), the company which markets the rights to Formula One races, being able to impose restrictive contracts on third parties."* "Commission welcomes progress towards resolving the long-running FIA/Formula One Case" *EC Commission Press Release*

The Defendant in *Hendry v WPBSA* made two claims rejected by the judge. The first was that because the WPBSA in its "commercial" activities was a non-profit body it would act in the best interests of the sport and not abuse its dominant position. That is, competitive conduct could be inferred from the status of an organisation.[4] This formalistic position was correctly rejected by Lloyd J who declared that the *"status of the WPBSA is irrelevant; what matters is its activities".*[5]

Second, the Defendant argued that as a rule-making body the WPBSA was replaceable, and therefore could not leverage its regulatory powers to create barriers to entry to its commercial activities of organising and promoting tournaments. Indeed, as was pointed out, the third Claimant had sought to become the regulator of the sport as part of its bid to set up an alternative tournament series! Lloyd J rejected this argument concluding that statements and plans to replace the WPBSA as a new regulator of the sport did not mean they were commercially realistic or realisable, and in any case could not be carried out with the *"degree of ease"* sufficient to provide a practical competitive constraint on the WPBSA.[6] Each restriction was to be assessed on the basis of its reasonableness and competitive impact.

Relevant Market Analysis

In the proceedings there was considerable discussion as to what were and were not relevant product markets.[7] Since the rules covered players, tournaments, broadcasting rights and sponsorship, inevitably a large number of product markets were identified.

The Defendant argued that the WPBSA in its commercial role did not operate in any relevant market affecting players and/or tournaments. It claimed that the WPBSA was not a buyer of players' services - players entered tournaments induced by prize money – but was the players' "agent". Therefore, since there was no buyer/seller relationship between the WPBSA as tournament organiser and players; there was no relevant market!

IP/01/120, 26 January 2001; "Commission opens formal proceedings into Formula One and other international motor racing services" *EC Commission Press release IP/99/434*, 30 June 1999. A recent speech by EC Competition Commissioner Mario Monti makes clear that "*Where regulation and organisation being vested in a single body leads to significant commercial conflicts of interest, the Commission will look carefully at whether another scenario should be required."* "Competition and Sport the Rules of the game" Conference on "Governance in Sport" - European Olympic Committee - FIA - Féderation Internationale de l'Automobile, Brussels, 26 February 2001 SPEECH/01/84.

[4] The proposition that a non-profit organisation is exempt from competition rules was wrong in law. See *Trade Association, Professions and Self-regulating Bodies* (OFT 408).

[5] para. 89.

[6] para 95.

[7] EC Commission's *Notice on the definition of the relevant market for the purposes of Community competition law* OJ 97/C 372/03, 1997, 5-13 and *Market Definition* (OFT 403, March 1999).

While in a contractual sense there was not a standard buyer/seller relationship, as indeed there was not a principal/agent relationship, there was a commercial and market relationship which had competitive significance. Snooker is a vocation for professional players. Professional snooker players provide their services in return for prize money, sponsorship and promotional income. The key input in the production of snooker is the professional snooker player. There is a supply of professional snooker players' services and a demand for those services from tournament organisers which, in turn, is derived from the income generated by tournaments and related activities. The WPBSA as a tournament organiser induces players to participate in tournaments, and sold a range of services to broadcasters, sponsors and fans. In these activities it competed with other commercial tournament organisers, and with them for players' services as the critical input to organising a tournament.

The Defendant's economist also contended that players were complements in the production of a tournament series and therefore there was not a relevant players market because players' services were not close substitutes. In assessing whether a boycott or restriction is anticompetitive, this claim confuses the role of professional snooker players participating in a given tournament series, with the provision of players' services to different tournament series. In the production of a specific tournament players may be viewed as jointly producing the tournament series. But they are not complements with respect to their choice of which tournaments to play in. Players actively compete to enter tournaments and there are other tournaments which players can enter. There are more players than there are slots available in tournaments, which offers a justification for introducing a ranking system. The argument advanced is similar to arguing that there is no market for coalminers or car assembly workers because it takes 1,000 miners/workers to run a pit or car assembly line respectively. This is an observation about the production process not market forces, or the appropriate definition of a market for competition law purposes. Or, to take an example central to *Hendry v WPSBA*, if there were a "clashing tournament", the players would not be complements but direct substitutes as they would have to choose between tournaments.

McCarthy & Ors v Australian Rough Riders Association[8] provides, in my view, the appropriate analysis of the issue. The facts are very similar in that several members of brought an action against Australian Rough Riders Association under the *Trade Practices Act* because they were prohibited from participating in unaffiliated rodeos. The Federal Court of Australia was clear stating at paragraph 51 that that rodeo organisations were:

> *"… competitive with each other", amongst other things, for the services of rodeo riders, notwithstanding their geographical separation, and the fact that temporally they clash but infrequently. The services provided by the rodeo*

[8] *McCarthy & Ors v Australian Rough Riders Association Incorporated & Anor* (1998) A.T.P.R. 40-836.

rider are the services of an entertainer; the reward is the prize money he earns from the performance"

Downstream vs. Upstream markets

The main thrust of the Defendant case was that the relevant markets were downstream (broadcasting rights and sponsorship) and that these were wider than professional snooker only. This was partly because some of the rules were clearly restrictions in those markets, such as limitation on logos (sponsorship), and it would have also been of value to the Claimants to establish dominance in these markets given the importance of the BBC television contract to the commercial success of its proposed rival tournament series. This was reflected in the way the Claimant's pleadings were drafted, and hence it was reasonable for the Defendant's to respond to these downstream market definitions. Further, to focus on these markets was helpful to the Defendant, since it was arguable that from the broadcasters and sponsors perspective they were wider than professional snooker.

Interestingly, the Defendant disagreed that a third "downstream" market, that of attendance at live matches, was relevant. It was argued that this was not a downstream market as such, but a market for the "sale of tickets", no doubt with the recent Article 82 World Cup ticket decision in mind.[9] While this was one possible characterisation, the claim by the Defendant that as such it had nothing to do with analysing the competitive constraints on tournament organisers was misconceived. If it could be shown that those attending tournaments would not have reacted to a 5% to 10% increase in ticket prices above the competitive price, then live attendances at professional snooker would have been a relevant services market. One can call this the "market for ticket sales", or the "market for sport", or the "market for live attendances in sport". Whatever the label, the purpose of the exercise is clear – to determine whether a tournament organiser has market power in one of the downstream markets. If the issue at hand was the allocation of tickets through intermediaries, then the complaint at the centre of the dispute differs. It is then about the market for the distribution of tickets not about sport as a spectator sport, although similar considerations may be relevant to delineating the market.[10]

It was correctly argued by the Defendant's economist in response, that a televised tournament could be a substitute for live attendance. This, however, does not alter the analysis; it only makes it more complex. This is because in defining markets under EC competition law and the *Competition Act 1998*, the approach is to look at the ability of the hypothetical tournament monopolist to raise price above the

[9] *Case IV/36.888 – 1998 Football World Cup.*

[10] The OFT Market Definition Guideline states at paragraph 5.17: *"The market definition is not unique … [it] can vary depending on where the test starts."* Thus in many cases this so called "market focus" or "asymmetric market definition" would have an impact on the appropriate relevant market definition.

competitive level. Since by definition such a hypothetical monopolist organiser of tournaments would have control of all downstream exploitations of a tournament series, adding broadcast rights and their price, and sponsorship, would not alter the conclusion.

The interrelation between these downstream activities does, however, make market definition more complex. The hypothetical tournament monopolist would have to balance all downstream revenues, recognising that the revenues of each were interrelated since broadcasting tournament series would affect attendances and sponsorship, and may lead to lower ticket prices. There would therefore not be one price or service generated by professional tournaments, but a number of prices and services which generate interrelated revenue streams – ticket sales, sponsorship, TV broadcasting rights, and so on. The totality of these different revenue streams, and the competitive forces operating on each which will differ, act to influence the scope for the various consumers of these services/products to substitute or not substitute snooker for other sports and/or entertainment. The organiser of a snooker tournament would take all these into account.

Before one gets too worked up about this complexity, it is worth bearing in mind several aspects of market definition. First, as a technical matter it is not necessary to establish that the hypothetical monopolist can profitably raise prices in all downstream markets. It would be sufficient for him to be able to do so in one downstream exploitation to establish that professional snooker was a relevant product market. Market definition requires the identification of the narrowest range of these products/services over which the hypothetical monopolist of all snooker tournaments could profitably raise price above its competitive level. Second, because all the downstream exploitations of a sport are under the control of a hypothetical monopolist (and the actual sporting body/league organiser) it would be surprising if they were all not close substitutes. This is because the hypothetical monopolist would maximise the profits from these services which requires that their respective prices be set at levels where they are close, indeed perfect, substitutes.

A more relevant point is the indeterminacy of the competitive price for many professional sports. In all the downstream markets referred to above, there is no real possibility of identifying the competitive price. In the downstream markets for sponsorship and broadcasting the price is a product of general demand conditions and the relative bargaining power of broadcaster and tournament organiser. Indeed in many sports there a significant rents, that is financial returns to inputs which would not be competed away even in a competitive market. The distribution of these rents between broadcasters, sports leagues and clubs and players is not pre-ordained but takes place within a wide bargaining range which depends on the importance of the inputs and the relative bargaining ability of the parties. Further, as noted above there are significant interrelationships between the “prices” of the three downstream markets. Price, let alone the “competitive price”, is at best illusive. This was a major reason why Restrictive Practices Court in the Premier

League case dismissed much of the formal analysis of markets advanced by economists.[11]

The Need to Focus on the Appropriate Functional market.

The Defendant argued that the "downstream markets" of sponsorship and broadcasting were the relevant markets for competition law purposes. Since broadcasters and sponsors had close substitutes to snooker, the market was claimed to be wider than snooker, and therefore the WPBSA was not dominant. However, since the restriction operated on the "upstream markets" for players' services and tournaments, the discussion relating to downstream markets had only a secondary bearing on the core competitive issues.

The immediate impact of all the restrictions was on players' choice, mobility and income. All the restrictions affected players. The OFT's Guidelines make clear that the market definition test must be applied to *"the products (or group of products) at the centre of the investigation…"*[12] The First and Second Claimants were professional snooker players. In that role they were complaining of alleged restrictions on the provision of their services in participating in tournaments and exploiting their services. The market inquiry must therefore examine the restrictions from their perspective; that is in the market for professional snooker players' services.

The Defendant's focus on "downstream markets" would be appropriate only if the competitive abuse concerned restrictions on or complaints from broadcasters or sponsors. It was not the core issue that broadcasters and sponsors are suffering harm from the restrictions since they imposed some of them (logos). The fact that a broadcaster can substitute other sport and entertainment programmes to gain the same audience as snooker is irrelevant to whether a professional snooker player can escape a restrictive condition by applying his skills to another sport. It would be bizarre to argue that because a rule denies a player the right to compete in various snooker tournaments, that this is unimportant because the player has the option to become a tennis player because fans regard other "ball" games as close substitutes. In short, market definition must be undertaken from the perspective of professional snooker players not the final consumers of snooker tournaments.

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[11] RPC questioned this analysis stated that other league football matches were close substitutes, at least as far as broadcasters were concerned, and that, moreover, because the necessity of pay TV to differentiate its programming output from FTA channels, the attempt to define professional leagues as separate relevant product markets was circular. Moreover, and also relevant to this case, it was not possible, because the differentiated nature of sports rights and the way fees are set, to determine the price or the competitive price for those rights. These two considerations make it difficult to rigorously define the relevant market for sports broadcast rights. *In the matter of the Restrictive Practices Act 1976 and in the matter of an agreement between the Football Premier League Limited and The Football Association Limited and the Football League Limited and their respective clubs* (1999) UKCLR 258, 373.

[12] OFT 404 at para 2.8.

Cases involving restrictions on players typically confine the relevant product market to the sport in question. The ability of a professional sports person to transfer to other sports or occupations within the time period required of competitive analysis is negligible, and therefore common sense and economics dictate that the market be confined to the sport. This was the position taken by the judge. The key market identified by Lloyd J was the market for professional snooker players' services, although he did not express it as such. Since the WPBSA had a persistently high share of professional tournaments, it was found dominant.

Further, the issue which must be addressed in these cases is not whether a seller can profitably raise price, but whether a hypothetical buyer (a monopsonist) of the services of all snooker players could profitably depress players' wages/remuneration by five to ten per cent. Finally, the test does not require that the actual sports body be a profit seeking buyer only whether the hypothetical profit maximising buyer seeking to cartelised the market could raise price and increase profits.

Comparison with Australian Rugby SuperLeague Decision

The above discussion can be compared to controversial analysis of market definition in *News Ltd v Australian Rugby Football League.*[13] Not only does this decision offer several important insights into the problems of market definition in professional sport, but it has unsettled Australian antitrust law concerning the appropriate way to define markets in general has been met with a chorus of criticism from lawyers,[14] and the courts.[15]

[13] (1995) 58 FCR 447. C. G. Veljanovski "Sports Leagues do not have Market Power? Murdoch's Super League setback in an Australian Court" (1996) 17 *ECLR* 268.

[14] Gyle, J in *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [2000] FCA 823; who questions the decision and provides an annex of articles criticising the judgment: W. Pengilley "ARL v Super League: What Does it Mean for Sporting Organisations?" (1997) 5 Competition & Consumer LJ 77; G. A. Edwards, "From Super-League to the super-Market? The Appropriate Emphasis in Market Definition" (1996) 4 *Competition & Consumer LJ* 220; C. Sweeney "Professional Sporting Leagues and the Competition Laws" (1997) 4 *Competition & Consumer LJ* 173; "Trade Practices Act, Equity and Professional Sport: News Limited and Ors v Australian Rugby Football League Limited and Ors." (1997) 19 *Sydney LR* 95; W. Pengilley "Misuse of Market power: is section 46 infringed by a denial of spare parts to a motor vehicle dealer?" (1998) 14 *Australian & New Zealand Trade Practices Law Bulletin* 97; M. G. Landrigan "Is the Australian Rugby League Wrapped Up? Section 46 of the Trade Practices Act and the Cellophane Fallacy" (1996) 4. *Trade Practices LJ* 156; D. Hogan-Doran "Regents Pty Ltd v Subaru (Aust) Pty Ltd [1996] ATPR 41-463" (1996) 4 *Trade Practices LJ* 206; W. Pengilley "Super League" (Jan 1998) *New Zealand LJ* 32; D. Brewster "Market Definition and Substitutability - Australian Courts Continue to Struggle with Part IV of the Trade Practices Act 1974 (Cth)" (1996) 12 Qld Univ. of Technology LJ 246; R. York "Revolution and Competition Law: The Superleague Case, News Ltd v Australian Rugby Football League Ltd." (1997) 5 *Trade Practices LJ* 48; W. Pengilley "Super League: What are the Lessons?" (1997) 11 *Commercial LQ* 9; S. G. Corones "The Impact of Trade Practices Law on Disputes Involving a Sports League and its Member Clubs" (1997) 25 *ABLR* 406; P. Clarke & S. Corones *Competition Law and Policy - Cases and Materials* (Oxford University Press 1999) 128-129.; G. Blunt "Ramifications of Recent Definitions of market for Part VII" (1997) 5 Trade Practices LJ 56; D. Brewster "Market Definition and Substitutability – Australian Courts Continue to Struggle with Part IV of the *Trade Practices Act 1974 (Cth)"* (1996) *Qld Univ. Tech LJ* 246; C. Hodgekiss "Revolution and Competition Law: The Superleague case (1997) 5 *Trade Practices LJ* 48; D. Round

News v ARFL was an action brought by a broadcaster (News Ltd) seeking to set up an alternative league competition to gain broadcast rights. News claimed that the ARL's Commitment and Loyalty Agreement which prevented clubs from supplying services to competitions not approved by the ARL and the NSWRL for the playing seasons 1995, 1996, 1997, 1998 and 1999 contravened sections 45 and 46 of the *Trade Practices Act*. The Court held that rugby operated in a wider market, and because of other factors the restriction (boycott) did not constitute a misuse of market power. This was overturned on appeal but the court did not revisit market definition leaving the judge's analysis on that point intact, and one might add a chorus of

The judge of first instance (Burchill J) looked at a host of downstream markets to conclude that rugby competed with many other sports as far as the groups of final consumers were concerned, perhaps because the Claimant was a broadcaster. On this basis and in light of the evidence, Burchett J decided:

> *"… I conclude that at least 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 proportion of rugby league's crowds if the League choose to attempt to assert market power by significantly raising prices or giving less …"*

The court's reasoning was based on a number of errors regarding market definition. The first, related to the nature of market definition. Burchett J quoted with approval the statement in of the *Tribunal in* Re Tooth & Co. Ltd [16]

> *"[C]ompetition may proceed not just through the substitution of one product for another in use (substitution in demand) but also through the substitution of one source of supply for another in production and distribution (substitution in supply). The market should comprehend the maximum range of business activities and the widest geographic area within which, if given, a sufficient economic incentive, buyers and sellers can switch to a substantial extent from one production plan to another. In an economist's language, both cross-elasticity of demand and cross-elasticity of supply are relevant".*[17] [Emphasis added]

The view that the market should comprehend the maximum range of business activities and the widest geographic area where buyers and seller have sufficient

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"Market Definition in Australian Antitrust: Time for a Changed Approach" (1996) 8 *Corporate & Business LJ* 193.

[15] Gyles J in *Australian Rigby Union Ltd v Hospitality Group Pty Ltd* [2000] FCA 823; affirmed on appeal *Australian Rigby Union Ltd v Hospitality Group Pty Ltd* [2001] FCA 1040. Note that Gyles was leading Counsel for News in *News Ltd v ARL*. Also see C. Beaton-Wells & D. K. Round "Australian Rigby Union Ltd v Hospitality Group Pty Ltd: A Salient Reminder of the Perils Facing Parties in Proving the Market under the *Trade Practices Act 1974 (Cth)"* (2001) 29 *ABLR* 211.

[16] [1979] ATPR 18,179, 18,196.

[17] *News Ltd v ARL*, 58 FCR 447, 477/8.

economic incentive to shift is fairly radical. As Charles Sweeny QC has argued, Burchett J confused market definition with market power by taking a very longrun perspective of 10 years; twice as long as the period of foreclosure of the Commitment and Loyalty Agreements.[18] Under EC decisional practice and approach proposed under the UK *Competition Act 1998* it is the narrowest set of products that constitute the relevant product market not the largest conceivable list. The OFT's technical guidelines on market definition state clearly *"[T]he process starts by looking at a relatively narrow potential definition"* (para. 3.1). That is, the test seeks to identify the narrowest possible product market based on consumers' reactions to a price rise. It is generally the case that defendants will seek a very wide definition to escape liability. But the purpose of the test is expressly to identify the narrowest defensible market definition not the widest plausible one.

This was compounded by a further "error". The Appellant framed its argument in terms of the "core crowd" of spectators. To which the judge correctly stated that this was not critical:[19]

> *"Granted the core crowd might be hard to discourage nevertheless, if a significant body of spectators attracted by an enjoyable game at an appropriate price were at risk to being lost to rugby league, that would be a real constraint on any attempt to lower standards or raise price, irrespective of how firm the loyalty of the core crowd might remain" [499]*

However showing that some "marginal spectators" would change to other sport/entertainment does not establish that the market is wider. The critical issue is size of the response in attendances. The reaction of spectators as a group would need to be sufficiently strong (more than proportionate) to the anticipated price hike to establish other sports or entertainment were close substitutes. This was clearly stated by the Full Federal Court in *Arnotts Ltd v TPC*:

> *[T]he fact that, upon 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 ss. 46 and 50 of the Trade Practices Act to deny their application because the company did not dominate*

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[18] C. Sweeney "Professional Sporting Leagues and the Competition Laws" (1997) 5 *Competition & Consumer LJ* 173.

[19] The EC Commission's orientation document on broadcasting and sport falls into this trap: *"There is little substitutability between sports for fans. For football supporters, television coverage of athletics or golf is not a satisfactory substitute. There may be little substitutability for sponsors …"* "Broadcasting of Sports events and Competition law" (1998) *Competition Policy Newsletter* 18, 22). Cf Baimbridge, S. Cameron & P. Dawson "Satellite Broadcasting and Match Attendance – The Case of Rugby League" (1995) 2 *Applied Economic Letters* 343.

the "hot beverage market": The fact is that tea and coffee are distinct beverages, for each of which there is a distinct demand"[20]

Conclusion

Hendry v WPBSA illustrates the importance of applying market definition appropriately in professional sports cases. Under EC and UK competition laws, market definition should start a) from the product supplied by the parties or the subject of the complaint; and b) seek to identify the narrowest possible products or services. In cases involving restrictions on players' services, then it is this market which should be the beginning, focus and core of any relevant market definition/market power assessment. Further, when examining restrictions on upstream markets, the test should take on a buyers' perspective i.e. be a hypothetical monoposonist test looking, as in *Hendry v WPBSA*, at the ability of a buyer of professional snooker players' service to depress remuneration by 5%-10%.

Where a rival league seeks to use competition rules to challenge the establish league, the most direct route is to focus on the players' or team "boycott" or restriction which prevents players or clubs from competing in rival leagues. This focus on the upstream markets is not only the correct approach, is easier for the Claimant to establish. As argued above, it requires little economic analysis or empirical evidence, since it is fairly obvious that it would not be possible for top ranking players to easily move to another sport. But establishing that a sporting body is dominant and abused that dominance is of little commercial value if the lucrative broadcast contract remains intact. The commercial reality is that the broadcast contract, which in this case ran for five years, also needs to be unwound in order to give the rival league any hope of commercial success. It is for this reason that a direct attack must be simultaneously launched on the restrictions and length of the broadcasting or pay TV contracts which the established league has in place. However, as the case shows, pleading narrow market definitions and dominance in broadcasting rights and sponsorship may is not easy, and this is especially so for sports, other than football, even if they involve a ball!

[20] (1990) 24 FCR 312, 332.