

PLANES, KEYNES AND SUPPLY CHAINS: GLOBALISATION, THE INFORMATION AGE, AND MARKET DEFINITION UNDER THE *TRADE PRACTICES ACT 1974*

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Introduction

The purpose of this paper is firstly to introduce and examine the concept of a 'market' and its use in the restrictive trade practices provisions of the *Trade Practices Act 1974* (Cth) (TPA).¹ It will secondly consider the impacts of globalisation and the information age on TPA markets and thirdly analyse some recent decisions dealing with alleged global markets under the TPA.

It will be argued that the TPA comprehends and regulates markets larger than Australia, that current economic theory, as applied in the TPA, is adequate to deal with global and transnational markets, that 'market' has a consistent meaning throughout the TPA unless expressly qualified, and that for the TPA to apply to conduct outside Australia by persons carrying on business in Australia, no more is required than to prove Australia (or some part of it) falls within the market in which conduct occurred.

I. The economic frame work

The High Court in *Boral Besser Masonry Ltd v ACCC*² held that the concept of a 'market', as well as many related concepts, in the TPA are economic concepts that can only be understood by considering economic theory. The economic concepts of 'market' and of 'competition' are essential to understanding the function and application of the TPA. Neither is exhaustively defined in the TPA.³ It is accordingly proposed to first examine the basic economics which underlies these concepts and informs their statutory meaning.

¹ Part IV of the TPA.

² *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374.

³ *Trade Practices Act 1974* s 4E:

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

This paper approaches the relevant economic principles from the perspective of a competition law practitioner: as a framework or tools of trade to be understood, used and developed, rather than in the abstract. Its ambit is confined accordingly.

Before proffering working economic definitions⁴ of market and competition it is necessary to understand a precursor concept, that of economic efficiency. The relationship of the concepts of efficiency, competition and market may be stated as follows:

The goal for any system of organising the exchange of goods and services is to maximise social welfare. Welfare is maximised when the supply and acquisition of goods and services is *efficient*. *Competition* is the process of rivalry between suppliers and acquirers which leads to and drives efficiency. A *market* is the arena in which the supply and exchange of particular goods or services (and their close substitutes) takes place and thus the arena in which the competitive process occurs. Effective competition in a market makes the market efficient.

Put shortly:

Efficiency is the objective, competition is the process for its achievement and market is the conceptual arena in which competition takes place.

The concept of economic efficiency has three components:⁵

1. productive efficiency;
2. allocative efficiency; and

services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

Trade Practices Act 1974 s 4:

competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.

⁴ There are of course numerous competing economic theories. That used in this paper is the prevalent theory of free market economics used in Western democracies.

⁵ For a more detailed consideration, see, for example, *Australian Retailers Association v Reserve Bank of Australia*: [2005] FCA 1707, (2005) 148 FCR 446. The approach is approved by Weinberg J [422], [424] *et seq*.

3. dynamic efficiency.

Productive efficiency

Productive efficiency is concerned with *how* things are produced and with the costs of producing the goods or services in question.⁶ Because the resources (such as labour and materials) used to make things are scarce, it is preferable that no more than is necessary is used in production of a particular thing, thus freeing the balance of resources to be used to produce other wanted things.

The optimal outcome is achieved (and hence social welfare maximised) where the products and services that are produced are produced at the lowest possible cost over the long run using best existing technologies and realising all available scale economies.

Allocative efficiency

Allocative efficiency is concerned with *what* and how much of something is produced. It is concerned with optimising the mix of what and how much is produced to most closely align with what consumers demand and what they will pay. Demand for many things may be effectively unlimited, as is often the choice of the end use to which resources (such as capital and labour) might be put. Efficiency is maximised when suppliers produce only that which is demanded at the real cost of producing it and only as much as consumers will acquire at that real cost. Cost in economic terms includes a normal profit to the producer, that is, a return that is just sufficient to cause the producer not to switch its productive capacity to some other use.

Dynamic efficiency

Dynamic efficiency is concerned with the development and supply of new products and services over time to reflect improvements in production techniques and shifting consumer demand. Dynamic efficiency is often driven by striving to stay ahead of (or in touch with) one's competitors.

Achievement of each of these economic objectives is obtained through the process of competition and, conversely, retarded through the absence of

⁶ Economists sometimes also describe this as technical efficiency.

competition. Suppliers and consumers are driven to achieve these outcomes, for the betterment of all, by the presence of others who do or are able to constrain their production and consumption decisions.

The expedient by which competition causes efficiency is simply that firms that are not as good or as efficient as their rivals must either catch up or exit the market.

Firms compete in two ways: in the product and/or service they offer, with all its particular qualities and benefits, and on the price they charge for it. Economists often speak only of changes in price, but this is always only a shorthand way of dealing with the price and product / service mix. All goods and services must and obviously do have both aspects. In the case of some markets, particularly where the product is relatively undifferentiated, such as retail petroleum, then price may very well be the determining factor in consumer choice. Even then however consumer choice may be affected by, for example, the amenity of a service station, such as its ease of ingress or egress or its cleanliness and by the efficiency or politeness of its staff. The greater the degree of differentiation, such as in the market for motor vehicles generally, the more easily it is seen that price is but one factor in the purchasing decision.

Example

An example of inefficiency and the social detriment generated by lack of competition is afforded by the motor vehicles produced in the former Soviet Bloc under a command economy, that is, one where pricing and production decisions are set by the government rather than the market and there are no competitors and hence no constraints on the producer. The cars were heavy, poorly constructed, inefficient, and very expensive. Even so, there were never as many of them as people were prepared to buy, even at their exorbitant price, because they were the only cars available. They did not significantly improve over time.

These vehicles disappeared from the market upon exposure to competitive western markets. Competition punishes inefficiency thus, if one uses more steel than necessary to build a car, if one charges more for the car than it

efficiently costs to make, or if one fails to innovate by introducing things such as air bags or electronic braking, then one's sales go to one's competitors and one's business fails.

No single component of efficiency is desirable to the exclusion of others, and the optimal levels of pricing, investment, development, and product choices are driven by the process of competition.

II. The TPA

The TPA endeavours to promote competition in markets in a number of ways. The first is by prohibiting, *per se*, arrangements which are necessarily harmful to the competitive process. This includes obvious examples such as agreeing with one's competitors not to compete in certain areas, fixing prices, rigging bids, sharing out customers and potential customers, or agreeing not supply customers in certain circumstances or locations, or setting prices for on sellers.⁷ Each of these dealings removes a constraint that drives the competitive process and hence economic efficiency. They have no economic benefit and hence are banned *per se*.⁸

Other acts, which only have the *potential* to harm competition, are subject to a test: whether the conduct in question is intended to, or does, or is likely to *substantially* lessen competition.⁹ In order to measure the effect or potential effect upon competition of certain conduct, the TPA relies on the concept of a market. The effect of conduct upon competition is assessed in the context, or market, in which the goods or services in question are supplied or acquired. The concept of a market is also used in s 46 to impose certain constraints on those who have substantial power in a particular market: it is effectively to prevent taking advantage of that power to harm the competitive process in that or any other market.

⁷ Previously principally found in ss 45, 45A, 47(6) and (7), 48 of the TPA. Following the repeal of s 45A, see new Div 1 of the Part IV of the TPA.

⁸ Some types of conduct may be the subject of authorisation under Part VII of the TPA because additional circumstances disclose a net public benefit, such as countering market power elsewhere in a supply chain. There are also some defences specific to certain arrangements such as joint ventures.

⁹ See, for example, TPA ss 45, 47, 50.

It will readily be observed that the consequence, or potential consequence, of any conduct will be made more substantial if the market in question is very small and that the converse applies if that market is very large.¹⁰ Similarly participants in very small markets will appear to have more power to act without constraint than they would if a larger market were found. Thus identifying the appropriate market within which power and conduct are to be assessed is a critical framework for the enquiry.

The other use of the concept of a market in the TPA is the limitation upon the application of the Act to conduct: in order to be subject to the TPA, the conduct must lessen competition in a market in Australia.¹¹ This is an area of considerable interest in matters presently before the Court and one which will be discussed in more detail below. Whilst normally identification of a market is not relevant to per se contraventions such as price fixing, it can be of central importance to see if demonstrated price fixing, for example, is subject to the TPA at all.

There is judicial authority also for a further use of market, which is that identification of a market for particular goods or services, even in a price fixing case, can be used to see if the parties are in fact in competition.¹²

It is contended that the appropriate market is effectively a conclusion drawn from analysing the conduct, the good or service in question and the relevant constraints. To propose a market and then see who is in it is to reverse the logical process of analysis. It is also impossible to *prove* a market without going through the identified steps discussed below. It should be lastly noted

¹⁰ See, for example, the observations of Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, [187] ('Queensland Wire').

¹¹ See above reference to the definition provided in TPA s 4E.

¹² See *ACCC v Australian and New Zealand Banking Group Ltd* [2008] FCA 1623 at [33], [40] and [52]. The matter was decided on other grounds: that the construction of the TPA, as it then stood, required pleading of a market in any case in a price fixing case. Leave to appeal was refused: *ACCC v Australian and New Zealand Banking Group Ltd* [2008] FCA 1935 by Spender J. Little now turns on this because the new cartel provisions in the TPA clearly do not rely on the concept of a market in relation to per se contraventions except only in this third jurisdictional sense described above.

that defining a market is not necessary to consider matters of substitution or the efficiency of a market.¹³

III. Defining the market

It will be seen from a discussion of the economic underpinnings of the TPA that if a supplier is effectively constrained by external forces in its price and output choices then the ends of competition will be achieved and efficiency will be optimised. Market definition can thus be seen as the result of a process of identification and consideration of the relevant constraints upon such choices.

The legislative frame work is provided by s 4E of the TPA which provides that:

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 with, the first mentioned goods or services.

The High Court held in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*¹⁴ that the TPA is an economic statute seeking to attain economic purposes and must be interpreted accordingly. This was approved in the *Boral*¹⁵ decision noted above. That is, 'market' and 'competition' are economic concepts to be interpreted in accordance with economic principles. It is also to be noted that the TPA has been held to be remedial legislation and thus must be interpreted accordingly.¹⁶ The objectives of the TPA, set out in section 2 of the TPA, are relevantly to promote the welfare of all Australians through the promotion of competition and fair trading and provision for customer protection.

¹³ *Visa International Service Association v Reserve Bank of Australia*: [2003] FCA 977, (2003) 131 FCR 300, [455].

¹⁴ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1.

¹⁵ *Boral v ACCC* (2003) 215 CLR 374; see also *NT Power Generation Pty Ltd v Power and Water Authority & Ors*: [2004] HCA 48, (2004) 210 ALR 312 ('NT Power').

¹⁶ *Webb Distributors (Australia) Pty Ltd v Victoria* (1993) 179 CLR 15, [41].

This outcome, of interpreting the TPA to achieve its economic objectives, is of course mandated by s 15AA of the *Acts Interpretation Act 1901* (Cth) and has been so held by the High Court in *ACCC v Baxter Healthcare Pty Ltd*.¹⁷

The clearest and most widely used economic definition of a market for the purposes of the TPA appears in *Re Queensland Co-operative Milling Association Ltd: Re Defiance Holdings Ltd* ('QCMA'):¹⁸

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. (If there is no close competition there is of course a monopolistic market.) 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.

Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another.

Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

This explanation of the concept has been universally adopted and accepted by all Australian Courts.¹⁹ Two subsequent decisions, also universally approved, amplify QCMA. In *Trade Practices Commission v Australia Meat Holdings Pty Ltd* ('AMH')²⁰ Wilcox J held:

A market is the field of activity in which buyers and sellers interact and the identification of market boundaries requires consideration of both the demand

¹⁷ *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, [15], [48], [64].

¹⁸ *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 ('QCMA'), [190].

¹⁹ See, for example, *Queensland Wire*, *Boral*, *NT Power*, *supra*

²⁰ *TPC v Australia Meat Holdings Pty Ltd* (1989) ATPR 40-932.

and supply side. The ideal definition of a market must take into account substitution possibilities in both consumption and production. The existence of price differentials between different products, reflecting differences in quality or other characteristics of the products, does not by itself place the products in different markets. The test of whether or not there are different markets is based upon what happens or (would happen) on either the demand or the supply side in response to a change in relative price.

It should be noted here the reference to relevant price is intended to include a change in the quality of the good or service provided for example where the price of a service remains but a part of the service, such as the availability of home delivery or restricted trading hours, is introduced.

The third seminal decision on the identification of markets is that of French J (as he then was) in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd*:²¹

In competition law [market] has a descriptive and a purposive role. It involves fact finding together with evaluative and purposive selection. In any given application it describes a range of economic activities defined by reference to particular economic functions (e.g. manufacturing, wholesale or retail sales), the class or classes of products, be they goods or services, which are the subject of those activities and the geographic area within which those activities occur. In its statutory setting the market designation imposes on the activities which it encompasses limits set by the law for the protection of competition. It involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.

The Tribunal described as follows the process of delineating the relevant market in *Re Tooth & Co Ltd; Re Tooheys Ltd*:²²

It is first necessary to identify close competition relevant to the matter in consideration.

The market should comprehend the maximum range of business activities and the widest geographic area within which, given a sufficient economic incentive, buyers

²¹ *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158.

²² *Re Tooth & Co Ltd; Re Tooheys Ltd* (1979) 39 FLR 1.

can switch from one supply source to another and sellers from one production flow to another.

The long run substitution possibilities are of importance rather than the short term transitory ones.

At the extremities of the market there is such a break in substitution possibilities that firms within its boundaries would collectively possess substantial market power.

Within the bounds of the market, substitution possibilities may be more or less intense and more or less immediate: the field of substitution is not necessarily homogeneous but may contain within it sub-markets such that their competitive relationship has a wider effect upon the functioning of the market as a whole.

The market is a multi dimensional concept - with dimensions of product, functional level, space and time.

A distillation of the case-law

From these decisions a series of propositions that both apply as a matter of law and are consistent with economic principles can be derived:

1. The expression market *definition* is itself perhaps misleading in that the actual task is market *selection*, that is the process is both evaluative and purposive and involves a choice by the arbiter of fact that meets the purposes of the TPA in preventing harm to competition;
2. A market is not a physical place, or a feature of the physical world: it is an intellectual construct created to analyse competition and competitive effects or, to use the words of the Full Court in *Universal Music Australia v Australian Competition and Consumer Commission*,²³ it is but a metaphor;
3. The concept of substitution is central;
4. The concept of *close* substitution measures the level of constraint and thus involves questions of degree and judgment;
5. Markets must be defined (or selected) by examining both supply and demand side substitutes;

²³ *Universal Music Australia v ACCC* (2003) 131 FCR 529, [545].

6. In assessing substitutes and the degree of constraint, one looks at the long run and thus allows time for substitution to occur;
7. The finding on a market is a question of fact informed by the evidence, commercial realities and, perhaps, expert economic opinion;
8. The relevant activities and constraints that constitute the process of competition take place within the market and thus the selected market must be large enough to comprehend those activities and constraints;
9. Different conduct by the same person may fall to be analysed, and held to have occurred, in different markets according to the purpose of the analysis;
10. The process of market selection always proceeds from the identification of the conduct in question, not vice versa;
11. A market has dimensions, incorporated into its definition, of product (or service), geographical extent and the functional levels in the supply chain that are relevant in considering the conduct in question.

Substitution

The central process in understanding and defining a market is *substitution* between actual or potential suppliers and acquirers in response to a change in either the price or quality of one supplier's product. If in response to a supplier changing price or reducing quality one can simply purchase another thing to meet that demand, or get it from another source, then the supplier will be constrained to be efficient in its price and output decisions. The degree of constraint is critical, because it is constraint that we are in effect measuring, hence the requirement that the putative substitute be a close substitute to the good or service in question.

The process used to identify and delineate close substitutes is defined in *QCMA*:²⁴

It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a simple but fundamental question: if the firm were to 'give

²⁴ *QCMA* (1976) 8 ALR 481.

less and charge more' would there be, to put the matter colloquially, 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 a price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?

In practice the test used to examine and identify the closeness of substitutes is the SSNIP test. In essence, if a person supplying the product or service in question wished to introduce a small but significant non-transitory increase in price²⁵ in the order of 5-10%, to what alternative products would customers turn or to what alternative sources of supply. Proposed market boundaries are expanded until there are no identified alternatives that would prevent the business in question successfully imposing the SSNIP. The smallest area in which a hypothetical profit maximising monopolist could successfully introduce a SSNIP identifies the boundaries of the relevant market.

The difficulty with empirically applying the SSNIP test is that often the test is applied to gauge conduct that has not yet occurred: the assessment is thus qualitative and hypothetical. The dangers of applying the test in these circumstances was noted by the Full Court in *Seven Network & Anor v News Ltd & Ors* ('*Seven Network*')²⁶ where, inter alia, the likelihood of certain football-following subscribers switching codes was in issue. Their Honours found guidance from the test but thought it inherently unsafe to draw strong conclusions in the absence of evidence and noted the importance of the direct evidence of the parties themselves, who were perhaps in the best position to judge such matters.

²⁵ Hence the "SSNIP" test.

²⁶ *Seven Network Limited v News Limited* [2009] FCAFC 166, (2009) 182 FCR 160.

IV. The market dimensions

Product market

Market definition usually starts with the identification of the product or service in issue, then identifying, from both demand and supply perspectives, those products or services that compete with it.

It should firstly be remembered that the process of market identification is iterative and that conclusions in respect of each of the dimensions may alter after consideration of substitution in another dimension. By way of example there may be demand for shirts in a particular location. That demand might comprehend a certain range of prices, brands, colours and styles but consumers who want shirts would not see trousers as being close substitutes and thus, from the demand perspective, the product market would be one for the supply of shirts. One could then proceed to draw a geographic market bounded by the farthest reaches of shirt manufacturers prepared to supply into the market and the greatest distance consumers would go to seek such supply.

It may be however, that a manufacturer of trousers has the staff and equipment to enable it to shift its production to make shirts if it were profitable to do so. Its potential to supply shirts puts it in the putative market for shirts, whether or not it actually makes them. If, upon factual analysis of the substitution possibilities, it emerges that producers can make either shirts or trousers (or other garments) by switching their production, then the appropriate market may well be one for apparel even though consumers would not treat trousers and shirts as substitutes. Having identified the constraint, and substituting apparel as the product, it may be that the range of potential suppliers alters and thus the geographic extent of the market needs to be re-examined.

The geographic market

Once a tentative definition of the product dimension has been reached, one analyses the widest geographic area within which buyers will switch suppliers and sellers will switch production flows in response to an economic incentive. This will often be a function of time and transport costs.

A customer for a cup of coffee will perhaps have a very narrow range of alternate sources that he or she will switch between in relation to a price or quality incentive. If a customer is not prepared to go more than two blocks then he or she may simply forego the purchase all together if none of the coffee within that radius is cheap enough or adequate.

A brick manufacturer in Sydney may not constrain brick prices in Brisbane if the cost of transporting the bricks makes it impracticable to sell its bricks in that location, even if higher prices are obtainable in Brisbane.

In the latter case, the prohibitive cost of transporting products of a particular value beyond a certain distance will in all likelihood set the geographic boundaries for the supply of the product and thus define the outer boundaries of the market.

In the former example however, there is unlikely to be a geographic market for coffee confined to a two block radius of the business or consumer in question. This is because the constraints on the particular business are in turn influenced by the constraints imposed on each of its close competitors. Business A may decide to employ a superior barista, obtain the best beans and reduce its prices to something approximating the economic cost of a cup of coffee. Each of the five nearest coffee shops may then be constrained to drop their prices or improve their coffee. If this occurs, then each of the five nearest shops to those first five shops might be similarly constrained: these will not be the same as the five shops nearest to business A. This effect, called a chain of substitution, is critical in properly identifying markets. Business A would not be able to act anti-competitively, that is without constraint, if it simply acquired the five nearest coffee shops because each of the five acquired would remain constrained by others and thus any endeavour to adversely alter the price or quality would ultimately be defeated.

Put another way, a hypothetical monopolist who acquired Business A and the five nearest shops would not be able to impose significant price or quality changes without losing customers. The market boundary must be expanded outwards until there is a break in substitution possibilities. For this reason,

retail petrol outlets are usually found to exist in a city-wide market rather than suburb-by-suburb markets.

Functional markets

Functional market definition is concerned with identifying the relevant part or parts in the chain of supply that need to be examined in order to understand the competitive effects of the conduct and the relevant constraints. It will yield different outcomes depending on both the features of the chain and the nature of the conduct. If the chain of supply is, say - wheat grower, wheat board, miller, baker, supermarkets and bread shops, consumer - then it would be rare to regard them as all in a single market. It can be simply tested by considering, for the purposes of s 50, whether if a miller acquired a bread shop it would be able to act uncompetitively at either level and what the constraints upon it would be. If there is no alteration of power at either level, then the proposed functional market is probably too large. As with all aspects of market definition, one starts with the level or levels directly affected by the conduct and works outwards until the conduct can be properly comprehended.

To take another example, if the relevant chain of supply was hotels, booking agents, customers, then the consequences of an arrangement between hotels in a certain locale to remove certain customer discounts or to limit the availability of rooms on agreed days, might simply be passed on by the agents to customers without affecting competition between the agents. In these circumstances the relevant functional level of the market must include both the hotels and the consumers. To do otherwise would lead to the unsupportable conclusion that price-fixing in the market causes no harm (because it does not impact on competition between agents and one has chosen to define the persons who suffer the harm to be outside the market). If instead the agreement between the hotels were to limit what might be offered to the agents or the circumstances of engagement of the agents, then the appropriate functional market may be simply that between the hotels and the agents.

An important consideration before reaching a conclusion as to whether a particular functional market exists, and whether it is appropriate to consider it alone, is the ease with which participants in upstream or downstream markets

can integrate forwards or backwards into the putative market: if they can and would in response to an economic incentive, the proposed market may well be too narrow.²⁷

The time aspect

The time 'dimension' of a market concerns not substitution itself but the period over which substitution will, or is likely to, take place. In some cases, such as retail service stations, responses to price movements by one competitor may be counted in hours or even minutes. If however a new service station had to be built to restrain the conduct, this would obviously take considerably longer and could be a matter of a year or more. In any case, the consideration is always the same: will the substitutes, in the time they take to come about, be sufficient to constrain the entities and the conduct in question? As is clear from *QCMA*, the TPA is not concerned with transitory advantages or absence of constraint, but only those that occur in the long run.

Time is also relevant in defining demand characteristics. At any given point, consumers will only want taxis to take them to a particular place, will only want a courier to take parcels to a single and un-substitutable destination and will only want to purchase a particular hit record and no other. This demand, ignoring the long run nature of substitution, yields product markets which are self-evidently far too narrow because the demand is transient. The demand must be aggregated over time to a demand for taxis or courier services in a particular area or region defined by the supply side substitution possibilities (i.e. how far the taxi will go or the courier service will take the parcel in the usual course). In the case of a hit record the market may well prove to be one for recorded music.²⁸

V. The effects of globalisation & the information age on market definition

A thesis of this paper is, with the possible exception of s 4E, that the phenomena of globalisation and the information age may substantially alter the

²⁷ *Seven Network*.

²⁸ *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352.

outcome of the market definition process but do not, and need not, alter the process of analysis itself. They simply alter substitution possibilities.

Global markets have been with us for some time. Coal, oil, iron and wheat are some examples of commodities that are internationally traded and which experience global competition: increased demand in one country or the failure of a significant producer in another alters the price globally. The boom in China and the earthquakes in Chile have recently demonstrated the phenomenon in relation to the world prices of coal and copper respectively.

Globalisation, or the advent of global markets, has two primary drivers: relative reduction in transport costs and relaxation of trade barriers by politics. A third cause, the information age, is simultaneously creating new markets as well as transforming old ones and is also significant in the globalisation of markets.

In terms of transport costs, fuel is relatively cheap and can be used to move goods enormous distances efficiently. Thus something as complex and as heavy as a car can today be sold competitively 12,000 miles from where it was made. The raw materials themselves are often transported enormous and seemingly inefficient distances. Thus coal, iron and oil are shipped from Australia to Japan and Korea, transformed there into energy and steel and shipped back to Australia as manufactured goods. This works only because transport costs are so low relative to the value of the goods concerned. This phenomenon has created and transformed not only international markets but also markets within Australia itself.

Grocery chains for example source goods throughout Australia and the world, bring them to central distribution points and then send them throughout Australia as needed. A banana grown in North Queensland might be shipped to Sydney, stored until needed and then shipped for sale to a store in Queensland. All of this is a function of low transport costs, supported of course by highly specialised and efficient transport systems and logistics as well as sophisticated food preservation and ripening technologies.

Cars are shipped in purpose-built vessels with their own built-in loading and unloading ramp so that cars can be driven on and off vessels, greatly reducing

the loading and unloading times, reducing labour and greatly reducing damage to the vehicles. Seasonal fruit and vegetables are flown around the world because the transport cost is so low that there is significant demand when this cost is factored into the price. Thus fresh Australian and Brazilian produce may compete in a market in Singapore.

The transformative effect of the information age, with near instantaneous world wide communication has not only introduced new products and services and thus created new markets for them, but has also radically altered some existing markets. Ready examples of transformed markets include recorded music, encyclopaedias, financial services and marketing. Services are bought and sold and performed without regard to the location of the buyer or the seller and the servers supporting the transaction can be anywhere in the world.

Software is a product now able to be purchased anywhere in the world over the internet and, perhaps because it is a relatively new product, no one even thinks when defining the market of where it might have been stored pending sale. It is developed seamlessly in many nations and sold throughout the world. Call centres, used for both marketing and to satisfy service or maintenance requirements for various products, can be anywhere on Earth and usually only require fluency in the language of the country to be serviced and the availability of electronic communications, usually via the internet.

The internet itself further allows sales without a physical presence and with greatly reduced transactional costs. For products that do not need to be inspected in advance, such as air fares, housing loans and shares, they can sold virtually anywhere in the world by the posting of schedules and prices on the internet. They can similarly be paid for electronically.

Trade barriers

Nations for many reasons impose constraints upon competition from beyond their shores: the reasons include simply revenue raising, 'protection' of local producers, securing a reliable source of a necessary or strategic commodity and notions of social good.

Market driven economies work on the premise that maximum consumer welfare is derived from the greatest choice at the lowest cost, which is in turn achieved by the greatest amount of free competition. A tariff or import quota enables local manufacturers to compete with importers by ensuring consumers pay a higher price for the imported item. Unless the tariff is truly transitional, for example to allow local manufacturers to become efficient without reliance on price support, consumers will always pay more for and therefore consume less of, the product than they would have otherwise. The market is thus inefficient and consumers are worse off.

Developed economies have to a significant extent reduced or removed trade barriers and thereby increased trade and reduced costs to consumers. This comes of course at a social cost, for example the loss of jobs in garment manufacturing in Australia because hourly labour rates here exceed weekly labour rates in some developing economies. Production has accordingly moved to where the costs are lowest.

Example - recorded music

To examine how globalisation and information technology create and transform markets one might take as an example the recorded music industry. For many years the product was recorded music with a physical platform that varied (record, cassette or compact disc) with at times competition between the platforms. The supply chain might be - artist, recording company, national distributor, record shop, consumer - with direct sales from artists to consumers being so few as to be irrelevant for analysis.

From a geographic perspective the market, at its largest, would be national, reflecting the limitation of supply rights under copyright laws to certain nations. National chains competing and constraining each other throughout Australia, notwithstanding the presence of many small independent record stores, would support a national retail market for recorded music (see, e.g. *Howard Smith, Composite Buyers*).

Globalisation and the new information technologies have or will influence the definition of every aspect of markets for recorded music. The dynamic efficiencies with competition have revolutionised the capacity to record, store and faithfully reproduce music. An improbably large music collection can be stored on and reproduced from an iPod. As importantly, an electronic recording means that music can be promoted, sampled and sold electronically from virtually anywhere to virtually anywhere with the purchase effected by the electronic use of credit and debit cards.

Thus from the product perspective, electronic music may now relevantly be substitutable for pre-recorded music on CDs: indeed music can be downloaded to a CD format if required. The influence of this change in product substitutes can be seen in the falling price of CDs as well as the virtual replacement of personal CD players with iPods in the reproduction market. The range of products is now also much wider, as the product that consumers previously could buy was chosen by record companies: reproduction, distribution and transaction costs via the internet are very low thus enabling anyone, including artists to distribute and sell recorded music. The new product dimension and substitutes inform the functional and geographic markets.

Geographic markets would traditionally be substantially influenced by the trade barriers restricting parallel importing. These restrictions presently maintain price differentials for the sale of the same CD across the globe. The price differential can of course only be maintained whilst there is an ability to restrict the on-sale of the product purchased to certain locations. The ability to price discriminate, that is to profitably charge more to a particular customer in a particular location or circumstance, is a defining feature of a market. If the customer can defeat the price change by sourcing elsewhere, that alternative source, wherever located, is in the same market. The inability to successfully price discriminate is a certain indicator of the widening of the market.

These technological changes, at a functional level, mean that it is possible (and has also in fact been successfully demonstrated) that not only the

record shop but also the record company might be able to be successfully bypassed. Key features of record shops, such as listening to albums before buying them, are now all but defunct as music can be sampled over the internet. Record companies remain viable because they control the rights to very significant amounts of work and because of their role in promoting (and thus creating demand for) and distributing artists' work. Nevertheless the emerging constraint of direct sales from artist to consumer may well permanently change the functional market for most purposes of analysis.

The effect of these developments may well prove profound in the recorded music markets. If a chain of music stores cannot increase its price without consumers simply switching to another source, then no amount of industry concentration can lessen competition. This of course is not the present situation because suppliers (artists and record companies) retain the ability to choose to permit or not the product to be available from the alternate source.

VI. Market definition and s 4E

Until relatively recently, s 4E was a section of the TPA that had received little consideration, particularly insofar as the use of the expression 'market in Australia' is concerned. The consideration has arisen largely in that context of an alleged international air cargo cartel and various litigation concerning it.

Section 5 of the TPA extends the operation of Part IV of the TPA (the restrictive trade practices provisions) to the engaging in of conduct outside Australia by bodies corporate incorporated, or carrying on business in Australia or by Australian citizens or persons ordinarily residing within Australia. Conduct outside of Australia is thus not (generally speaking) a contravention unless s 5 applies.²⁹

²⁹ *Bray v Hoffman La Roche* (2002) 118 FCR 1, [2002] FCA 243.

Section 4E can be seen as providing a second limitation, that is, even when a company carries on business in Australia, it does not contravene the TPA unless its conduct relates to a market in Australia.

The significance of globalisation and the information age is that over time more and more markets will have at least a transnational dimension. The issue arises as to how, if at all, the TPA applies to such markets.

There have been at least three judicial approaches in interpreting and applying the concept of a market in Australia:

1. That the TPA applies to a market in Australia and not elsewhere;³⁰
2. That the TPA applies to a market that is larger than Australia, including a global market, provided the market is not wholly outside Australia;³¹
3. That the TPA applies to a market that is partially in Australia provided that, in the case of a price-fixing allegation, there is sufficient connection between Australia and the conduct.³²

Each of the recent cases considering s 4E has involved attacks on an application for discovery under O15A of the Federal Court Rules;³³ attempts to set aside s 155 TPA notices requiring the provision of information before litigation;³⁴ consent orders in penalty proceedings;³⁵ and attempts to strike out pleadings.³⁶

³⁰ *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, [2008] FCA 1458, [19], [20], [21] ('Auskay No.1').

³¹ *Riverstone Computer Services Pty Ltd v IMB Global Financing Australia Ltd* [2002] FCA 1608, 20, 21, 22, 23, 24. ('Riverstone'); *Emirates v ACCC* [2009] FCA 312 ('Emirates').

³² *ACCC v Singapore Airlines Cargo Pte Ltd* (2009) 256 ALR 458, [2009] FCA 510 ('Singapore Airlines').

³³ *Riverstone* [2002] FCA 1608.

³⁴ *Emirates* [2009] FCA 312; *Singapore Airlines Ltd v ACCC* [2009] FCAFC 136 ('Singapore Appeal').

³⁵ *ACCC v Qantas Airways Limited* (2008) ATPR ¶42-266, [2008] FCA 1976, ('Qantas'); *ACCC v British Airways PLC* [2008] FCA 1977.

³⁶ *Singapore Airlines* [2009] FCA 510; *Auskay No.1* [2008] FCA 1458, [19]; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd (No.5)* [2009] FCA 1614 ('Auskay No.5').

*Riverstone Computer Services Pty Ltd v IMB Global Financing Australia Ltd*³⁷ involved an application for pre-trial discovery concerning the sale of new and second hand IBM mainframe computers. Such products were very expensive, made in relatively few places and sold worldwide, had a small number of very large users and had a transport and installation cost that was negligible compared to their value. There may well have been no substitutes. A global market for such computers was asserted and would seem intuitively possible.

Hill J held that the fact that a market for a particular thing was global did not signify that there was not a market in Australia, within the meaning of s 4E, for that thing.³⁸ His Honour rejected the submission that a 'market in Australia' meant wholly within Australia. Strict political boundaries to a market are usually only relevant economically if by some reason (such as a licensing requirement or other legal impediment to operation or entry) they serve to restrict competition. Otherwise boundaries are likely to be 'fuzzy'.³⁹

The view is orthodox economically as well as supporting the objectives of the TPA: that the welfare of Australia is enhanced if conduct injuring Australians is not beyond the TPA merely because the market is larger than Australia.

The decision was followed in *Qantas*,⁴⁰ a matter in which Qantas admitted participation in an international air freight cartel, and which proceeded upon agreed facts. Lindgren J held that 'market in Australia' in s 4E simply excluded a market outside Australia.⁴¹

This alleged cartel has been a rich source for the ensuing consideration of s 4E. The ACCC has reached consent dispositions with five other respondents and judgments (also by Lindgren J) adopting the position in *Qantas* have followed. In none of these cases were the facts contested.

³⁷ *Riverstone* [2002] FCA 1608.

³⁸ *Riverstone* [2002] FCA 1608, [21], [22].

³⁹ *AMH* (1989) APTR 40-932 per Sheppard J at 50, 097.

⁴⁰ *ACCC v Qantas Airways Limited* (2008) ATPR ¶42-266, [2008] FCA 1976.

⁴¹ *Qantas* [2008] FCA 1976, [33], [34].

In all the cartel litigation, the airlines are registered as foreign corporations carrying on business in Australia and thus the TPA applies to their conduct outside Australia pursuant to s 5(1). The issue of whether and what further constraint is imposed by s 4E is thus enlivened.

This issue was explored in a class action brought against certain of the alleged cartel participants: *Auskay (No.1)*.⁴² In a motion to strike out the pleading, which did not plead a market, it was submitted that the geographic market was to be found in the physical location where the negotiations took place and the contract entered; that this was the competition or rivalry the TPA contemplated and that, as inbound cargo was contracted for outside Australia, the relevant conduct fixing the prices of inbound cargo outside Australia and was thus not in a market in Australia.

This submission claimed some support from Heydon J, writing extrajudicially⁴³ indicating that for a market to be in Australia ‘the buyers and sellers must engage in transactions in Australia’⁴⁴ and that ‘if a market extends beyond the limits of Australia, the Court would apply the [TPA] in reference to that part of it which falls within Australia’.⁴⁵

This submission found favour in *Auskay (No.1)*⁴⁶ where Tracey J held that ‘buyers and sellers of goods and services must negotiate and enter transactions in an area in which suppliers are engaged in close competition with each other [which] area must be located in Australia’.⁴⁷ The difficulties with this conclusion are discussed below.

Prior to delivery of judgment in *Auskay (No.1)*⁴⁸, two of the alleged cartel participants, Emirates and Singapore Airlines, moved the Federal Court to set aside notices under s 155 of the Act concerning their conduct on the basis, inter

⁴² *Auskay No.1* [2008] FCA 1458.

⁴³ *Trade Practices Law*, Law Book Company, loose-leaf / online service.

⁴⁴ *Ibid* at [3.258].

⁴⁵ *Ibid* at [3.510].

⁴⁶ *Auskay No.1* [2008] FCA 1458.

⁴⁷ *Auskay No.1* [2008] FCA 1458, [19].

⁴⁸ *Auskay No.1* [2008] FCA 1458.

alia, that the conduct in question occurred outside Australia and inbound transport markets could never be markets in Australia.⁴⁹ Limited evidence was led. Noting that the applicants had to exclude any reasonable hypothesis inconsistent with their contention that market must be wholly outside Australia, Middleton J found that the application failed at a factual level including because:⁵⁰

- a) there being no adequate evidence as to the relevant product and functional markets (e.g. was the product freight from A to B on a particular flight or freight services generally, was the correct functional level between airlines and freight forwarders or did it also include the customers who engaged the freight forwarders) meant that he could not reach a conclusion on the geographic market;
- b) there was no adequate evidence as to potential competition including the use of charter flights; and
- c) part of the services were provided in Australia.

His Honour also rejected the applicants' contention that the place of contracting was determinative of the geographic market,⁵¹ noting that 'competitive activities' must also extend to the provision of the service acquired and also that the concept of 'place of contracting' was of limited use with the advent of modern communications. He affirmed the views of Hill and Lindgren JJ that 'market in Australia' simply excludes a market wholly outside Australia. His Honour was assiduous in repeatedly noting that any conclusion as to the proper market must await evidence. His Honour did not read *Auskay* 'as dictating that in determining the geographic location of the market one is confined by the location of the making of the contract...'.⁵²

Whilst the *Emirates* decision was pending, Singapore Airlines sought to strike out ACCC proceedings against it in respect of the alleged cartel on the basis that the conduct occurred outside of any market in Australia and also that even

⁴⁹ *Emirates* [2009] FCA 312.

⁵⁰ *Emirates* [2009] FCA 312, [61].

⁵¹ *Emirates* [2009] FCA 312, [65], [66].

⁵² *Emirates* [2009] FCA 312, [72].

if such a market were in Australia, the pleading did not sufficiently identify the provisions ‘that fix the prices... of services supplied in competition in a market in Australia, or that have the purpose or effect of substantially lessening competition in a market in Australia’.⁵³

In this case, the applicant had pleaded a global market for air freight services, as well as alternative smaller markets larger than Australia but incorporating Australia. It had alleged that certain agreements, such as an agreement providing for the fixing of prices of all flights from Singapore, contravened the Act, notwithstanding that part of the alleged conduct might be to fix prices between, say, Singapore and Bangalore and thus between destinations not in Australia.

Jacobson J found that the pleaded global market was possible, and thus the pleading ought not to be struck out on that basis.⁵⁴ He also found however that the pleading did not allege how giving effect to the *entirety* of the understanding contravened the TPA; that in his view a combination of ss 4E, 45A and 45(3) required this and also required the applicant to plead how the respondents were said to be in competition in a market in Australia when servicing destinations external to Australia.

This leads to an interesting conclusion: accepting, as his Honour did, that the global market and its constituent facts had been properly pleaded, and that the airlines had been properly pleaded as competitors within that market, nevertheless the TPA (as it then stood) required an additional pleading of facts to demonstrate the connection to competition *here* of acts within the market by competitors in the market.

It is submitted that the fact of being in a market establishes, as a matter of economics and of the law, the connection between conduct in the market and acquirers in the market, whether directly affected or not. The process of defining the market itself identifies the scope of influence of specified conduct upon persons within the market, all of whom are harmed by injury to the

⁵³ *Singapore Airlines* [2009] FCA 510, [60].

⁵⁴ *Singapore Airlines* [2009] FCA 510, [61], [62], [63], [64], [65], [66].

competitive process. This is the gravamen of Part IV contraventions. Where in the market the harm is most keenly felt is not to the point.

The decision also indicates that an agreement may only contravene to the extent that it is pleaded to be sufficiently harmful to Australians, notwithstanding that Australia is part of the market. As noted, this conclusion appears based upon his Honour's construction of the TPA rather than economic principle. It is perhaps also based on a concern that Australia's laws should not constrain matters that do not clearly or immediately concern it.

The next decision was the appeal from the Emirates decision, which was pursued only by Singapore Airlines.⁵⁵ Relevantly, their Honours noted, without reviewing, the single Justice decisions that had preceded their consideration and concluded that there was no need to determine whether the observations of Heydon J were correct, nor what the relevant market in the conduct under investigation was, merely that it was not improbable that the relevant competition occurred in a market in Australia, or at least part of such market,⁵⁶ and this was sufficient to uphold the validity of the notices. They held that the market identified in the notices was not one wholly outside Australia, even though it included routes outside of Australia.⁵⁷ They specifically endorsed the conclusion of Middleton J that a finding on geographic market could not be made without adequate evidence as to the functional and product aspects.⁵⁸

The Full Court found it 'highly improbable' that airlines compete in a market in Australia on every route in the world, but did not express its reasoning. It is contended that this is a strong assertion in the absence of evidence, particularly evidence as to the ability of one or more airlines to either divert their freighter aircraft to, or acquire additional aircraft for, routes on which there is increased demand or on which price rises have occurred.

⁵⁵ *Singapore Appeal* [2009] FCAFC 136.

⁵⁶ *Singapore Appeal* [2009] FCAFC 136, [74].

⁵⁷ *Singapore Appeal* [2009] FCAFC 136, [74].

⁵⁸ *Singapore Appeal* [2009] FCAFC 136, [74].

In December 2009, Tracey J struck out Auskay's pleading, amended in light of his earlier decision, having before him all of the previous decisions.⁵⁹ His Honour accepted that 'market in Australia' excluded a market wholly outside Australian but observed that the law was otherwise unsettled.⁶⁰ It was accepted that a properly pleaded global market could include, as part of that market, a 'market in Australia'. His Honour noted a market included the places where competitors provide, or seek to provide, their services⁶¹ and acknowledged it was incorrect to have previously ruled that the place where contracts are entered is determinative of the market.⁶² He accepted firms may compete on the quality of their service.⁶³

His Honour nevertheless also ruled that:

1. A market for services requires strong substitutability on *both* the demand and supply side, that routes fell within the same market because two or more respondents compete on that route and 'there is cross elasticity of supply and demand on those routes'.⁶⁴
2. The market could not in fact be worldwide because there was not cross-elasticity of demand or supply on the route from Hong Kong to Moscow and from Dubai to Sydney and that all routes could not be in a single market.⁶⁵
3. Parties must plead the place or places in Australia in which particular respondents compete for there to be a market in Australia, i.e., even if the market is established to be global, a market in Australia must be separately established.⁶⁶

⁵⁹ *Auskay No.5* [2009] FCA 1614.

⁶⁰ *Auskay No.5* [2009] FCA 1614, [23].

⁶¹ *Auskay No.5* [2009] FCA 1614, [26].

⁶² *Auskay No.5* [2009] FCA 1614, [39], [40], [41].

⁶³ *Auskay No.5* [2009] FCA 1614, [36].

⁶⁴ *Auskay No.5* [2009] FCA 1614, [27], [32].

⁶⁵ *Auskay No.5* [2009] FCA 1614, [29].

⁶⁶ *Auskay No.5* [2009] FCA 1614, [24].

4. Even routes to and from Australia may not be in a market in Australia 'if most of the competitive activities in which the parties engage, and the negotiations..., take places outside Australia'⁶⁷; and
5. There must be 'competitive activity' within Australia.⁶⁸

It is suggested that the judgment is attended by a number of errors:

1. Markets include demand substitutes as well as supply substitutes⁶⁹
2. His Honour omits from his analysis *potential* competitors, which obviously will not currently be flying the route in question;
3. His Honour has assumed (as did the Full Court) that supply side substitution cannot occur between certain routes prior to having evidence on the point;
4. His Honour has treated competition as an event to which a locus can be meaningfully ascribed, rather than as a process that occurs throughout the market;
5. His Honour has placed too much emphasis on where negotiations occur (competition on price) and entirely disregarded competition in providing the service itself: all customers weigh the price of a service against its attributes; and
6. A transport market must definitionally include the places to and from where the goods are to be taken: a substitute supplier can only be a substitute if it is able, in the long run, to service the route in question.

The decision is on appeal.

Some threads can be drawn from this skein. The first is that the Courts in *Auskay* and *Singapore Airlines* do not accept that 'market' has a common

⁶⁷ *Auskay No.5* [2009] FCA 1614, [32], [40].

⁶⁸ *Auskay No.5* [2009] FCA 1614, [35].

⁶⁹ See, for example, *QCMA*.

meaning throughout the TPA (unless qualified)⁷⁰ or do not accept the conventional application of economic principles to it when used in s 4E. In the case of *Auskay*, it is respectfully considered his Honour did not apply underlying economic principle at all.

It would seem the expression 'in Australia' can only add to the definition of 'market' in s 4E that the geographic dimension must include Australia. It is difficult to see any textual need to alter the economic meaning of market within that section.

A possible perceived *legal* incentive to reinterpret 'market' in s 4E is the perception of a need to constrain the extraterritorial reach of the TPA beyond the jurisdictional requirements of s 5(1) relating to the contravention's connection to Australia. It has been argued above that all participants in a market are, axiomatically, connected with that market and sufficient connection lies at the heart of market definition. Insofar as particular conduct may have de minimis effect on the welfare of Australians, it is considered that, as held by Lindgren J in *Qantas*, this ought not be turned into a jurisdictional issue by imposing a gloss on s 4E but rather is best dealt with by ordering little or no penalty or other relief.

Remembering that the finding and application of an economic market is central to effective and just regulation, there is great harm in introducing additional concepts, such as an 'additional connection' to Australia or supposing that the competitive process necessarily takes place within, or coheres to, political boundaries. The suggestion that the competitive process 'happens' at a place, or that effect or injury to it is limited to a place, is heretical unless that place is understood and accepted to be the market.

The answers to the emerging problems of transnational markets in the information age lie in the returning to the principles of economics underpinning the TPA, and then trusting them to do their work.

⁷⁰ See, for example, s 46A TPA.