MELWAY PUBLISHING PTY LTD v ROBERT HICKS PTY LTD*

I INTRODUCTION

The decision of the High Court of Australia in *Melway*[1] was handed down on 15 March 2001. It is only the second decision of the High Court in a substantive market-centred case under Part IV of the *Trade Practices Act 1974* (Cth). The first was *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*[2] which also concerned s 46 of the *Trade Practices Act 1974* (Cth).[3] Although the decision of the majority in *Melway* was firmly based on *Queensland Wire*, it provided the High Court with an opportunity to elaborate on the meaning of the key phrase in s 46 — 'take advantage' — and, in particular, the relationship between the phrase 'take advantage' and the purpose that is proscribed in the section.

The private litigation in *Melway* arose from a decision by a producer of street directories not to supply its directories to a wholesale distributor.[4] From modest beginnings in 1966, Melway Publishing Pty Ltd ('Melway') had become, by the early 1980s, the producer of by far the largest selling street directory in Melbourne. At first instance, Merkel J found that Melway directories held in excess of 80 to 90 per cent of the retail market share in Melbourne street directories.[5] Barriers to entry were substantial.[6]

For many years, Melway had divided the retailers who were selling its directories into a number of segments. The segments were, respectively: newsagents and bookshops; service stations; retail outlets for automotive parts; office stationers; and over-the-counter sales by the wholesaler and sales to authorised car dealers. One company was appointed the exclusive wholesale distributor to each of these segments — except for the service station segment for which there were two.

In 1986, Robert Hicks Pty Ltd ('Robert Hicks') was appointed exclusive wholesale distributor for suppliers of automotive parts. Robert Hicks was jointly controlled by two men — Messrs Pawsey and Nagel. In 1993, Mr Pawsey acquired Mr Nagel's shareholding in Robert Hicks and Mr Nagel started a rival business. Melway decided that it preferred Mr Nagel and terminated its agreement with Robert Hicks with effect from 30 June 1995. Melway refused to sell to Robert Hicks any of the 30 000 to 50 000 directories that it wished to acquire.

* (2001) 178 ALR 253 ('*Melway*').

1 (2001) 178 ALR 253.

2 (1989) 167 CLR 177 ('*Queensland Wire*').

3 See Frances Hanks and Philip L Williams, 'Implications of the Decision of the High Court in *Queensland Wire*' (1990) 17 *Melbourne University Law Review* 437.

4 For the facts and background to the decision, see the first instance decision in *Robert Hicks Pty Ltd (t/as Auto Fashions Australia) v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 629–34 (Merkel J).

5 Ibid 630.

6 Ibid 637–9.

Robert Hicks issued proceedings claiming that Melway's refusal to supply the directories infringed s 46 of the *Trade Practices Act 1974* (Cth). To make out its claim under s 46, Robert Hicks had to establish each of three propositions:

- that Melway had a substantial degree of power in a market;
- that its refusal to supply the directories represented a 'taking advantage' of that power; and
- that the 'taking advantage' was for one of the purposes proscribed in s 46. In this case, the alleged purpose was to deter or prevent Robert Hicks from engaging in competitive conduct in a market.

Robert Hicks succeeded at the trial before Merkel J. This decision was upheld by Sundberg and Finkelstein JJ (Heerey J dissenting) in the Full Court of the Federal Court,[7] but was overturned in a split decision of the High Court. The majority was Gleeson CJ, Gummow, Hayne and Callinan JJ. The minority was Kirby J.

The decision of the High Court focuses on a narrow issue — but one that is of critical importance to litigation under s 46. The issue is the 'taking advantage' of market power and, in particular, the relationship between proof of 'taking advantage' and proof of the proscribed purpose. The majority accepted the findings of the trial judge as to market definition, market power and purpose. But the majority found that the Federal Court had erred in finding that Melway's refusal to supply the directories constituted a 'taking advantage' of its power in a market.

This case note is arranged into four substantive sections. Part II examines the issue of market definition. Part III considers what the decision has to say as to the relationship between 'taking advantage' and purpose. Part IV analyses why the majority of the High Court came to disagree with three of the four judges of the Federal Court and with Kirby J. Part V discusses the impact and significance of the decision for business and for future litigation.

II THE RELEVANT MARKETS

The number of markets relevant to a consideration of the competition and monopoly issues in s 46 litigation depends on the character of the behaviour that is at issue. When the allegation is predatory pricing,[8] it is common for only one market to be relevant. However, when the allegation is that a person who has a substantial degree of market power is using that power for the purpose of damaging a person who is not in competition with the first person, the second person is generally a supplier to or a purchaser from the first person. Economics generally classifies such conduct as affecting vertically related persons. The vertical metaphor is used extensively: the supplier in the vertical chain is generally said to be upstream from the purchaser.[9]

[7] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128.

[8] See, eg, *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43.

[9] Philip Williams, 'The Exercise of Market Power: Its Treatment under the Australian and New Zealand Statutes' (1994) 9 *Review of Industrial Organization* 607, 621.

In the case of vertical conduct that falls under s 46, the economic analysis of the issues is generally facilitated by defining two markets. The field of endeavour in which the respondent has the market power is generally said to be the primary market, and the field of endeavour in which the plaintiff operates is said to be the secondary market. On the face of the facts in *Melway*, this would have been the most obvious procedure to adopt. That is, the primary market would have been the market in which Melbourne street directories are published and sold, and the wholesale activity would have been a separate market. One remarkable feature of the five judgments in the *Melway* cases is that no judge opts for this most natural classificatory schema.

This schema was, however, adopted by all judges in *Queensland Wire*.[10] That case involved vertical conduct: Broken Hill Pty Co Ltd ('BHP') was alleged to have constructively refused to supply Y-bar to Queensland Wire Industries Pty Ltd ('QWI'). Although the judgments of the High Court in *Queensland Wire* did not agree on how the relevant markets were best defined for the analysis of the economic issues of that litigation,[11] they did agree on one thing: that it was appropriate to define two distinct markets — a primary market from whose structure BHP derived its market power and a secondary market in which QWI was attempting to compete.[12]

The facts of *Queensland Wire* led to the interesting question of whether the circumstances of BHP's operations both in steel production and in the making of star picket fence posts suggested that these two activities should be classified as occurring within a single market. This issue seemed not to have been extensively argued, possibly because the facts at trial suggested that these two activities were organised by BHP quite separately.[13] Nevertheless, it was an issue on which Mason CJ and Wilson J made some interesting remarks:

> The analysis of a s 46 claim necessarily begins with a description of the market in which the defendant is thought to have a substantial degree of power. In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated. Accordingly, if the defendant is vertically integrated, the relevant market for determining degree of market power will be at the product level which is the source of that power.[14]

There was much discussion in Pincus J's trial judgment and in the judgments in the High Court as to the range of activities that should be included in the primary market.[15] The principal issue was whether the primary market should

[10] (1989) 167 CLR 177, 190, 192–3 (Mason CJ and Wilson J), 197 (Deane J), 209–12 (Toohey J). Dawson J expressed his general agreement with Deane J at 198.

[11] Ibid 192 (Mason CJ and Wilson J), 196–7 (Deane J), 200–1 (Dawson J), 211–12 (Toohey J).

[12] Ibid 192–3 (Mason CJ and Wilson J), 197 (Deane J), 209–12 (Toohey J).

[13] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 16 FCR 50, 54–6 (Pincus J).

[14] *Queensland Wire* (1989) 167 CLR 177, 187.

[15] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 16 FCR 50, 53–4, 56–7 (Pincus J); ibid 192 (Mason CJ and Wilson J), 197 (Deane J), 206, 209–12 (Toohey J).

cover all the steel and steel products that were produced by BHP's rolling mill at Newcastle or whether the primary market should be confined to only one of those products: the Y-shaped joint. As is clear from the previous quotation, the judgment of Mason CJ and Wilson J contains a suggestion for defining the functional level of a market when the defendant is vertically integrated. I have always found this passage very helpful. In particular, it is useful to think of the primary market as that which answers the question: what is the source of the market power which the respondent is utilising?

It is surprising that this approach to market definition was not adopted in any of the five judgments that were written in the *Melway* litigation. If one were to ask 'what is the structure of the market that gives Melway such market power?', the answer would not be 'a combined wholesale and/or retail market'. The source of Melway's market power is the structure of the market in which street directories are produced. In other words, it is the market for the publication and sale of street directories that is the source of the market power of Melway. Whether Melway can be said to infringe s 46 must then depend on its use of that power in the primary market to deter or prevent a person from engaging in competitive conduct in the secondary market (the wholesale market).

This most obvious approach is supported by the facts found by Merkel J at the trial: 'Subject to minor exceptions, Melway only distributes through its appointed wholesalers. It has few, if any, direct sales.'[16] In other words, Melway was not in the business of distributing its product to retailers. Furthermore, counsel for the appellant is reported as having said before the High Court that the purpose of the conduct was to influence the downstream activity of wholesaling:

> Counsel for the appellant in this court identified the contention against his client as having been that it had sought to deter or prevent competitive conduct between wholesale distributors of Melbourne street directories that would have occurred if the respondent had been able to win sales from other distributors for the appellant's product.[17]

Counsel for the appellant disputed this allegation but submitted that nothing turned on this issue:

> Although he submitted that the relevant market in which competitive conduct was allegedly deterred or prevented was a market (being the market in which distributors sold to retailers) more narrowly defined than the market in which the appellant had a substantial degree of market power (the wholesale and retail market for street directories in Melbourne) nothing was said to turn on whether these were distinct markets. (Even if they were, s 46 would have applied because it refers to 'that or any other market'.)[18]

It may be the case that nothing would have turned on the Court adopting the classification of markets that was preferred by the appellant. However, that would not necessarily have been the case — particularly if the Court had

[16] *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 631, quoted in *Melway* (2001) 178 ALR 253, 256 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[17] *Melway* (2001) 178 ALR 253, 255 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[18] Ibid.

followed the lead of *Queensland Wire* in defining quite distinct primary and secondary markets. If the Court had said that Melway derived its market power from the structure of the market in which Melbourne street directories were produced, that would have opened the question of how best to characterise the downstream market in which the plaintiff operated. The most obvious starting point may well have been that its business was the wholesaling and distribution of automotive parts. This involved, among other things, acquiring, wholesaling and distributing street directories. This, then, may have been the most appropriate definition of the product dimension of the market.

It is not clear from the various decisions in *Melway* whether the handling of business in the street directories was a substantial part of the business of wholesalers of automotive parts: the decision of the trial judge merely observes that 'the *Melway* directory is regarded as an important and leading product by its distributors.'[19] This finding may have been consistent with the proposition that the handling of street directories was only a very small part of this type of business and that many of those who operated in this type of business did not, or even did not wish to, handle street directories. If those were the facts, it would seem open to be concluded that the purpose of Melway's refusal to supply was not to deter or prevent Robert Hicks from engaging in competitive conduct (in the market for wholesaling and distributing automotive parts) because the effect on a participant in that market of being unable to get a supply of Melway street directories would be *de minimis*. If selling Melway street directories were but a minimal part of the general activity of persons who wholesale and distribute automotive parts, it would seem difficult to conclude that a refusal to supply the directories to a distributor of automotive parts had the purpose of deterring or preventing a particular wholesale distributor from engaging in competitive conduct in the market in which they operated.

III THE NEXUS BETWEEN 'TAKING ADVANTAGE' AND PURPOSE

Although the decision of the High Court in *Queensland Wire* traversed most of the principal issues that might arise under s 46 of the *Trade Practices Act 1974* (Cth), it paid particular attention to the interpretation of two phrases: 'substantial degree of power in a market' and 'shall not take advantage of that power'. The High Court in *Queensland Wire* had to pay particular attention to the interpretation of 'substantial power in a market' because the Full Court of the Federal Court had found that BHP had not infringed the section. The Full Court reached this decision on the basis that, for all practical purposes, all the Y-bar that BHP produced had been sold to its wholly owned subsidiary, Australian Wire Industries Pty Ltd.[20] The Full Court reasoned that, because a sale to a wholly owned subsidiary did not constitute 'trade or traffic', 'there has never been a market for Y-bar so as to attract s 46 of the Act'.[21] The High Court rejected this reasoning. It

[19] *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 632 (Merkel J).

[20] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 17 FCR 211, 212 (Bowen CJ, Morling and Gummow JJ).

[21] Ibid 219.

found that the phrase 'substantial power in a market' was equivalent to the phrase 'market power', which is used by economists.[22]

The second key phrase in s 46 of the *Trade Practices Act 1974* (Cth) that was considered by the High Court in *Queensland Wire* was 'shall not take advantage of that power'. This arose because Pincus J at trial had found that BHP's constructive refusal to supply Y-bar to Queensland Wire did not constitute a 'taking advantage' as such a refusal would not ordinarily be regarded as reprehensible.[23] This was also rejected by the High Court. In doing so, the High Court made it clear that no standard of reprehensibility was implied by 'taking advantage'.[24] The classic statement of the meaning of 'taking advantage' is to be found in the judgment of Mason CJ and Wilson J:

> In effectively refusing to supply Y-bar to the appellant, BHP is taking advantage of its substantial market power. It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power — in other words, it if were operating in a competitive market — it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.[25]

This paragraph turned out to be of critical importance for the majority of the High Court in *Melway*.[26] The principal difference between the parties to the appeal in *Melway* was over the evidence that was required to prove 'taking advantage' and whether that evidence had been produced at trial. Perhaps the clearest statement of the importance of 'taking advantage' in these particular proceedings is the following:

> The focal point of debate was whether, even accepting the purpose for which it was found to have been done, Melway's refusal to supply the respondent was a taking advantage of that power for the proscribed purpose. Consistently with the approach of the Court in *Queensland Wire*, much of the argument was directed to a consideration of how Melway would have been likely to behave, if it had lacked the power it had. Section 46 of the Act requires, not merely the coexistence of market power, conduct, and proscribed purpose, but a connection such that the firm whose conduct is in question can be said to be taking advantage of its power.[27]

The wording of this paragraph suggests a proposition that the majority was keen to emphasise: that the elements required for proving 'taking advantage' are quite distinct from the elements needed to prove a proscribed purpose. Purpose may be proved in ways that are familiar to the courts in other contexts. Merkel J did not rest his finding of purpose merely on the proposition that the conduct was consistent with a policy of exclusive distribution. It was also based on his

[22] *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J), 196 (Deane J), 200 (Dawson J), 211–12 (Toohey J).

[23] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 16 FCR 50, 68.

[24] *Queensland Wire* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J), 194 (Deane J), 202 (Dawson J), 213–14 (Toohey J).

[25] Ibid 192.

[26] (2001) 178 ALR 253, 264.

[27] Ibid.

impressions of the evidence of trade witnesses.[28] Nevertheless, the majority of the High Court proceeded to say that proof of 'taking advantage' is proof of a causal connection between market power and the conduct,[29] and, furthermore, that proof of the causal connection requires proof of economic analysis.[30] This difference between proving the fact of purpose and proving the analytical connection between market power and the conduct that is the meaning of 'taking advantage' is evident in the language of the paragraph quoted above. The majority returned to this theme:

> To ask how a firm would behave if it lacked a substantial degree of power in a market, for the purpose of making a judgment as to whether it is taking advantage of its market power, involves a process of economic analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of s 46. But the cogency of the analysis may depend upon the assumptions that are thought to be required by s 46.
>
> In some cases, a process of inference, based upon economic analysis, may be unnecessary. Direct observation may lead to the correct conclusion. Deane J thought that *Queensland Wire* was such a case. As will appear, the respondent has principally sought to uphold the decision in the present case upon such a basis. It is necessary to consider, first, the way in which the issue was dealt with in the Federal Court.[31]

The reference to the judgment of Deane J in *Queensland Wire* is noteworthy. The majority in *Melway* criticised the judgment of Deane J in *Queensland Wire* on the ground that it infers 'taking advantage' from proof of purpose. The offending passage in the judgment of Deane J is this:

> [BHP's] refusal to supply Y-bar to QWI otherwise than at an unrealistic price was for the purpose of preventing QWI from becoming a manufacturer or wholesaler of star pickets. That purpose could only be, and has only been, achieved by such a refusal of supply by virtue of BHP's substantial power in all sections of the Australian steel market as the dominant supplier of steel products. In refusing supply in order to achieve that purpose, BHP has clearly taken advantage of that substantial power in that market.[32]

A close reading of the judgments in *Queensland Wire* suggests that the majority in *Melway* may have been too hasty in concluding that 'Deane J saw the case as one in which the identification of the purpose for which BHP was refusing to supply QWI led directly to the conclusion that BHP was taking advantage of its market power.'[33] In the first place, it would seem that this is not clear from the very passage on which the majority in *Melway* relied. That passage, quoted above, is consistent with the view that the final sentence in the quotation merely indicates that Deane J considered the 'taking advantage' to be clearly made out

[28] *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 642–3, referred to in ibid 263 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[29] *Melway* (2001) 178 ALR 253, 264.

[30] Ibid 266.

[31] Ibid.

[32] *Queensland Wire* (1989) 167 CLR 177, 197–8, quoted in ibid 261 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[33] (2001) 178 ALR 253, 261.

and not that this followed (as the majority in *Melway* suggests) directly from the proof of purpose.

A second reason why the majority in *Melway* may have erred in stating that Deane J inferred 'taking advantage' from purpose is the judgment of Dawson J in *Queensland Wire*. Dawson J stated that he agreed generally with the reasons for judgment of Deane J[34] and added some comments. One of these comments is a clear endorsement of the test proposed by Mason CJ and Wilson J for 'taking advantage':

> I am of the view that the words 'take advantage of' do not have moral overtones in the context of s 46. That being so, there can be no real doubt that BHP took advantage of its market power in this case. It used that power in a manner made possible only by the absence of competitive conditions.[35]

The majority in *Melway* wished to give the words 'take advantage of' a lot of weight in s 46 cases. It stated that this is important because the narrow purposes that are listed in s 46 are relatively easy to make out.[36] The majority seemed to be suggesting that, unless the words 'take advantage of' are taken very seriously, s 46 will be interpreted as proscribing many types of conduct that are quite unobjectionable. Their argument on public policy was most clearly stated as follows:

> As the Privy Council observed in relation to corresponding New Zealand legislation, in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*,[37] there are cases in which it is dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage. That is especially so when, in a context such as the present, the purpose referred to in s 46 is relatively narrow. The purpose presently in question is that of deterring a person from engaging in competitive conduct in a market. If a manufacturer supplies to a single distributor, or a limited number of distributors, then, from one point of view, turning down an application from a person who wishes to become an additional distributor will have the effect of preventing that person from engaging in competitive conduct. Purpose, in this connection, involves intention to achieve a result. Where distributorship arrangements are concerned, an intent to give a particular distributor exclusivity may constitute a very insecure basis for concluding that there had been a taking advantage of market power.[38]

The principal reason why the majority of the High Court upheld the appeal in *Melway* was that it accepted the argument of the appellant that the particular refusal of supply that was in dispute was merely an instance of a policy of exclusive wholesale distributors.[39] This meant that the conduct that was in question could only be understood as part of a system. Providing the system did

34 *Queensland Wire* (1989) 167 CLR 177, 198.
35 Ibid 202.
36 *Melway* (2001) 178 ALR 253, 262.
37 [1995] 1 NZLR 385, 403, 406.
38 *Melway* (2001) 178 ALR 253, 262 (citation omitted).
39 Ibid 268.

not contravene the *Trade Practices Act 1974* (Cth), a particular instance of the implementation of the system did not contravene it either:

> To describe the conduct of Melway simply as a refusal to supply the respondent involves an element of oversimplification. Section 46 aims to promote competition, not the private interests of particular persons or corporations. If Melway was otherwise entitled to maintain its distribution system without contravention of the Act, it is not the purpose of s 46 to dictate to Melway how to choose its distributors.[40]

Furthermore, a system of this type is, according to the majority, consistent with systems that one might find in a competitive market. This is clear when the majority criticised the passage in the judgment of Merkel J where he stated that: 'one would not expect to observe a refusal to supply 30,000–50,000 directories in a competitive market. Accordingly, in refusing supply Melway has taken advantage of its market power.'[41] The majority rejected the reasoning in this passage on a number of grounds, including that it fails to characterise the refusal to supply as an instance of a system of exclusive distribution:

> A second, and related, difficulty is that the reasoning fails to address the question of the nature of the wholesale distribution arrangements, both of Melway and its competitors, that would exist in a competitive market. Why, for example, might there not be a competitive market for Melbourne street directories in which Melway and/or its rivals supplied direct to retailers, or in which each operated through an exclusive distributor, or a fixed number of distributors? In such a case, as in the present case, a refusal to supply Melway directories to a wholesaler, or to another wholesaler might be regarded as unlikely to result in any reduction in total Melway sales. In a competitive market, a manufacturer does not necessarily increase total sales by selling to everyone who seeks wholesale supply, or lose market share by selling to only a small number of wholesalers or, for that matter, by selling all its product directly to retailers.[42]

IV THE DIFFERENCE BETWEEN THE MAJORITY AND THE MINORITY

In his minority decision, Kirby J disagreed with the majority only on the issue of 'taking advantage'. This is hardly surprising because this was the only issue on which the majority disagreed with the judgments of the trial judge and the majority of the Full Court of the Federal Court. One of the bases for the disagreement between Kirby J and the majority was the characterisation of the refusal to supply.

Although, as explained in the preceding section, the majority accepted that the refusal to supply in this particular case was merely an instance of a system of exclusive wholesale distributorships, it appears that the respondent failed to give a convincing rationale for this system at the trial. Merkel J made the following finding of fact:

> It is difficult to ascertain the basis for Melway's belief [in the efficacy of its current system of wholesale distribution] other than its experience was that its

[40] Ibid 258 (Gleeson CJ, Gummow, Hayne and Callinan JJ) (citations omitted).
[41] *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 641, quoted in ibid 266.
[42] *Melway* (2001) 178 ALR 253, 267.

> system had worked well for it. In substance, Melway's view was that freedom from competition in each allocated segment offered a necessary incentive to the distributor to exploit the segment to maximize its sales. That factor, plus the alleged expertise of distributors in relation to their segment, was said by Melway to have resulted in maximizing overall sales of the Melway directory.[43]

Despite this finding, the majority of the High Court in *Melway* disagreed with Merkel J's judgment that the refusal to supply represented a 'taking advantage' of Melway's market power. Indeed, the majority stated (rather summarily) that a manufacturer in a competitive market (an interesting implicit definition of the market) does not necessarily behave differently from the way in which Melway behaved.[44]

In contrast to this briefly stated view of the majority, Kirby J went to some length to characterise the behaviour of Melway as contingent upon its market power. The minority decision also saw the refusal of supply as an instance of a wholesale distribution system. However, it characterised that system as one that was contingent upon Melway's market power; it was not at all the type of efficient system that would emerge in a competitive market:

> In insisting on its closed distribution system in Melbourne, the appellant was not pursuing some universal philosophy of efficient market distribution, found to have worked for a product with unique or particular needs. It was simply engaging, as monopolists commonly seek to do, in a market strategy designed to 'take advantage' of its dominant market position. It was doing so to the disadvantage of competitors, of healthy competition and, ultimately, of the interests of consumers.[45]

Kirby J's characterisation of the refusal of supply is not consistent with the maximisation of profits that one would predict of a rational monopolist. His Honour characterised the refusal of supply as Melway's handing of profit over to the selected distributor wholesalers. This is, of course, an irrational strategy for a monopolist producer to adopt — it would be better for its shareholders to ensure that the profit is given to them rather than to the owners of the distributor:

> Quite apart from the interests of consumers who purchased the product, the position of the chosen distributors was extremely favourable. Unstimulated by uncongenial competition from outsiders, they were under little pressure to cut their own profit margins. As it happened, the respondent could give direct evidence of this. Prior to the termination of its status as one of these privileged distributors, it reaped great economic rewards from that position. The appellant's Melbourne directory was the respondent's most profitable product line. Alone, it earned the respondent $400,000 profit per annum.[46]

The most puzzling aspect of the minority decision is that it acknowledges that this characterisation of Melway's conduct is inconsistent with maximisation of

[43] *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, 635, quoted in ibid 259 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[44] *Melway* (2001) 178 ALR 253, 267.

[45] Ibid 274 (Kirby J).

[46] Ibid 273.

profit. Furthermore, the minority decision is quite explicit in stating that Melway's refusal of supply was inconsistent with the maximisation of its profit:

> In view of the respondent's record of ferreting out and exploiting profitably a new retail segment, rationality would suggest that such an offer (other things being equal) would ordinarily have been accepted by a corporation in the position of the appellant, pursuing profit to the advantage of its shareholders.[47]

The unstated premise of the minority decision seems to be that market power gives a firm the ability to pursue goals other than profit maximisation. This premise has an element of truth. Market power may give a firm a cushion so that, even if it pursues strategies that are inconsistent with the maximisation of its profit, it may still be able to deliver its shareholders a rate of return in excess of its cost of capital. This would not be true of an enterprise that is operating in a highly competitive market. This proposition is not uncommon in the literature on the economics of discrimination,[48] but it seems unsatisfying as an explanation of a system of exclusive wholesale distribution. It is unsatisfying because it is hard to imagine what would motivate an enterprise to establish a system of exclusive wholesale distribution if it were not to maximise its profit. That is, the arbitrary or discriminatory use of market power may be one way to characterise the behaviour of Melway in terminating its agreement with Robert Hicks, but it is hardly satisfying as a way of characterising the behaviour of Melway in establishing a *system* of exclusive wholesale distributors.

Without some direct evidence that the company's objective was something other than profit maximisation, it would seem safer for the courts not to second-guess the judgment behind a particular business decision. As Blunt and Neale have emphasised, such second-guessing would make the conduct of business almost impossible.[49] Rather, in the absence of direct evidence to the contrary, courts should assume that monopolists attempt to maximise profit. In doing so, the courts would avoid asking whether a decision with respect to a particular contract was a profit-maximising decision; instead, the courts would be left to decide whether the broad strategies adopted by a monopolist infringe s 46. Monopolists appearing before the courts would be obliged to give coherent explanations of their broad strategies without having to justify their judgment as to how that strategy should be implemented in a particular case.

At heart, the principal basis for the disagreement between those judges who found for Robert Hicks and those judges who found for Melway in the decisions of the various courts was whether the conduct in dispute was the refusal to supply a particular distributor (Robert Hicks) or rather the system of exclusive wholesale distributors. As Warren Pengilley has pointed out, a very practical problem follows from the former view (not embraced by the majority of the High

[47] Ibid 275.

[48] Hanks and Williams, '*Queensland Wire*', above n 3, 445–6.

[49] Gaire Blunt and Jennifer Neale, 'The Development of Section 46 in Australia — *Melway* and Its Likely Impact on Business' in Frances Hanks and Philip L Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (2001) 202, 219.

Court): it places the courts in the position of detailed adjudication over which particular distributors a manufacturer should supply.[50]

V IMPACT AND SIGNIFICANCE OF THE DECISION

Melway stands for the proposition that proof of 'taking advantage' must be taken seriously. It involves proof of a causal connection between market power and the conduct that is in dispute. The proof of this causal connection involves economic argument. This is the principal lesson to be drawn from the decision.

This puts an important obligation on parties who are litigating in the courts. They cannot merely prove market power and the proscribed purpose. They must independently prove the causal connection between the market power and the conduct in question. If this was in doubt after *Queensland Wire*, it cannot be in doubt now. Enterprises with substantial market power may take some comfort from this — as the minority decision suggests.

A second, and perhaps more subtle, lesson emerges from *Melway*. This is that conduct that is the subject of complaint might best be characterised as part of a system. In the case of *Melway*, the majority did not consider whether the particular refusal that was complained of constituted a 'taking advantage'. Rather, they considered whether a system of exclusive distributorships constituted a 'taking advantage'. This lesson may well have implications for the way in which parties characterise conduct in pleadings under other sections of Part IV of the *Trade Practices Act 1974* (Cth).

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[50] Warren Pengilley, 'Can an Entity with Substantial Market Power Change Its Distributor?' (1999) 14 *Australian and New Zealand Trade Practices Law Bulletin* 139, 144.

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