HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MELWAY PUBLISHING PTY LTD APPELLANT

AND

ROBERT HICKS PTY LTD (TRADING AS
AUTO FASHIONS AUSTRALIA) RESPONDENT

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13
15 March 2001
M1/2000

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 20 May 1999.*

3. *In place thereof, order that the appeal to the Full Court of the Federal Court of Australia be allowed, the orders made by Merkel J on 30 October 1998 be set aside and the respondent's application be dismissed.*

4. *Respondent to pay the appellant's costs at first instance and in the Full Court of the Federal Court of Australia.*

On appeal from the Federal Court of Australia

Representation:

D K Catterns QC with C D Golvan for the appellant (instructed by Marshalls & Dent)

G A A Nettle QC with S L Hinchey and P Zappia for the respondent (instructed by Freehills)

Intervener:

J W K Burnside QC with M J Crennan intervening on behalf of the Australian Competition and Consumer Commission (instructed by Australian Government Solicitor)

CATCHWORDS

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd

Trade practices – Restrictive trade practices – Misuse of market power – Wholesale distribution systems – Manufacturer appoints exclusive distributor to a sector of retail market and refuses to supply another potential distributor – Whether manufacturer took advantage of market power for purpose of deterring or preventing person from engaging in competitive conduct.

Words and phrases – "take advantage of" – "market power".

Trade Practices Act 1974 (Cth), s 46.

1 GLEESON CJ, GUMMOW, HAYNE AND CALLINAN JJ. The appellant ("Melway") is the publisher of a street directory for Melbourne and its metropolitan area. The respondent, a wholesaler of motor vehicle parts and accessories, sought unsuccessfully to obtain supplies of directories from Melway. The respondent alleged that Melway's conduct was in contravention of s 46 of the *Trade Practices Act* 1974 (Cth) ("the Act") in that, having a substantial degree of power in a market, it took advantage of that power for the purpose of preventing the respondent from engaging in competitive conduct in that market.

2 The respondent commenced proceedings against the appellant in the Federal Court of Australia. The proceedings were successful before Merkel J at first instance[1]. By majority, an appeal to the Full Court of the Federal Court was dismissed[2].

3 In this Court, it was not in dispute that Merkel J correctly identified the relevant functional market as the wholesale and retail market for street directories in Melbourne[3]. He found that wholesale and retail activities in that market were closely linked. Merkel J's conclusion that the appellant had a substantial degree of power in that market was not challenged[4]. The question was whether what was treated as a refusal to supply involved taking advantage of that power for the proscribed purpose of preventing the respondent from engaging in competitive conduct in the market for Melbourne street directories, and thus a contravention of s 46(1)(c) of the Act. That question was answered in the affirmative.

4 A claim that there had been a taking advantage of power for the purpose of preventing entry into a market, and thus a contravention of s 46(1)(b), was abandoned below. No attempt was made to pursue it in this Court. 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 of the appellant's product. Although he submitted that the relevant market in which competitive conduct was allegedly deterred or prevented was a market (being the

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1 *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627.

2 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128 (Sundberg and Finkelstein JJ; Heerey J dissenting).

3 (1998) 42 IPR 627 at 638.

4 (1998) 42 IPR 627 at 639.

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".)

5 On appeal, all the members of the Full Court of the Federal Court agreed that the refusal of supply was for the proscribed purpose, but there was disagreement as to whether the appellant had taken advantage of its market power.

The legislation

6 Section 46 of the Act provides, so far as is presently relevant:

"(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

…

(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market."

7 Section 4F(1)(b) of the Act provides that a person shall be deemed to have engaged in conduct for a particular purpose if the person engaged in the conduct for purposes that included that purpose and that purpose was a substantial purpose.

8 In this litigation, the respondent sought damages and injunctive relief, but it is significant that s 77 of the Act empowers the Australian Competition and Consumer Commission ("the ACCC") to institute proceedings for the recovery on behalf of the Commonwealth of the heavy pecuniary penalties for contravention of s 46 which are prescribed in s 76. There is some force in the suggestion, which appealed to the Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*[5], that provisions such as s 46 should, if such a construction is fairly open, be construed "in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful"[6].

The relevant market

9 The facts found by Merkel J concerning the market were not in dispute in this Court, and may be summarised as follows[7].

10 The first Melway street directory was published by Melway in 1966. By September 1998, 26 editions of the directory had been published and distributed for sale to the public. By the early 1980s Melway had become by far the largest selling street directory in Melbourne. Merkel J found that, at the time of the proceedings before him, the Melway directory held in excess of 80 per cent – 90 per cent of the retail market share for Melbourne street directories. Of the competing directories, Gregory had less than 5 per cent, UBD had between 2.5 per cent and 5 per cent, and another directory had an insignificant share of the market. So strong was Melway's brand image that "Melway" had come to be used in Melbourne as a generic term for street directories. Barriers to entry into the market, by other publishers, were substantial. They were related to the method of compilation and production of street directories. It was found that, absent some new form of technology, it was neither rational nor likely that a new entrant would enter that market.

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5 [1995] 1 NZLR 385 at 403, 406.

6 [1995] 1 NZLR 385 at 403.

7 (1998) 42 IPR 627 at 629-633.

11 At the time of the events the subject of this litigation, Melway operated, as it had done for a number of years, the following system of distribution of its product. The retail market was divided into a number of segments. For example, newsagents and bookshops (including bookshops in large retail stores such as Coles Myer) constituted one segment, service stations and retail outlets for automotive parts constituted another segment, office stationers another, and there was a segment for "over the counter" sales by authorised car dealers. Selected wholesale distributors were appointed, and assigned exclusively to defined market segments.

12 There was strong competition between retailers in relation to sales of the Melway street directory. It was common for retailers, within a segment, or across segments, to compete, particularly in relation to price. The price at which the Melway street directory was available to the public varied considerably as a result of this competition at the retail level. On the other hand, at the wholesale level there was little competition. Merkel J made the following findings[8]:

> "Subject to minor exceptions, Melway only distributes directories through its appointed wholesalers. It has few, if any, direct sales. Melway's appointment of wholesalers from time to time has been informal, without any contractual documentation and on the basis that the distributorships are confined to an allocated market segment and are terminable at will. In the past, distributors have accepted that their appointment was on the basis that they would only sell the *Melway* street directory within their allocated market segment which, save for the service station segment where there were two competitors, was to be an exclusive Melway distributorship for that segment. As a consequence, in general, the *Melway* wholesalers were able to sell to retailers within the allocated segment without any competition in that segment from any other wholesaler in respect of the *Melway* street directory. In the service station segment, Burson Automotive and Paul and David Auto compete with each other but not with other wholesalers. Accordingly, there is no competition across the allocated segments.
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> From time to time problems have arisen when a wholesaler encroached upon what was believed to be the territory of another wholesaler. In such instances Melway resolved the dispute. However,

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8 (1998) 42 IPR 627 at 631-632.

such encroachments were unusual as, generally, the wholesalers appeared to be content with their protected market segments."

13 The circumstances in which Melway indicated that it was unwilling to supply the respondent arose out of a decision by Melway to change its appointed wholesale distributor for a particular market segment. What has been referred to at all stages of this litigation as a refusal to supply needs to be understood in that context.

The refusal to supply

14 The respondent's attempt to obtain supplies of street directories from the appellant followed the termination of its appointment as the wholesale distributor for the portion of the retail market served by suppliers of automotive parts. The appointment had been made in 1986. The termination resulted from a breakdown in business relations between the two men who had previously controlled the respondent, Messrs Pawsey and Nagel[9]. Mr Pawsey acquired Mr Nagel's shareholding in the respondent during 1993, and Mr Nagel commenced his own business. During 1994 Melway came to develop a preference for Mr Nagel, and decided to appoint his company as the sole distributor to retailers of automotive parts, and to terminate the appointment of the respondent. Notice of termination was given in February 1995. The termination was to take effect on 30 June 1995. The lawyers for the respective parties became involved, and confrontation resulted. The respondent informed Melway that, in the event that the respondent's distributorship came to an end pursuant to the termination notice, the respondent would wish to obtain wholesale supplies of Melway street directories for sale to the retail market. In response to a request for more information as to what it was seeking, the respondent said it would require between 30,000 and 50,000 directories per annum. The respondent indicated that it expected to be in a position to continue to supply street directories to many of the retailers of automotive parts with whom it had previously dealt, and, in addition, that it hoped to acquire new customers. The response was that, following termination of the distributorship, Melway did not propose to have any further business dealings with the respondent.

15 What was characterised, by way of a convenient shorthand, as a refusal to supply might equally well have been characterised as a termination of a distributorship. Refusal to supply is an expression which, in the context of the Act, may be used in relation to different kinds of conduct, with different legal

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9 (1998) 42 IPR 627 at 633-635.

consequences. The consequences may depend upon the context in which the refusal occurs.

16 At the hearing, there was a good deal of evidence, regarded by Merkel J and the Full Court as inconsequential, as to the reasons for Melway's preference for Mr Nagel's company, as against the respondent, as a wholesale distributor. As to the question why, given its decision to appoint Mr Nagel's company as a wholesale distributor, Melway was not willing to supply the respondent, the answer followed from the nature of Melway's distribution arrangements. Mr Godfrey, an officer of Melway who was involved in the decision to refuse supply, said that to supply the respondent would in effect amount to dismantling the distribution system. When asked why Melway did not want to dismantle its distribution system, he referred to the small margins on which people were operating, and agreed that to supply the respondent "would have brought Mr Pawsey directly into competition with Mr Nagel". He said he did not want that.

17 To describe the conduct of Melway simply as a refusal to supply the respondent involves an element of over-simplification. Section 46 aims to promote competition, not the private interests of particular persons or corporations[10]. 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.

18 What was said in *Burdett Sound Inc v Altec Corporation*[11] by the United States Fifth Circuit Court of Appeals in relation to United States legislation is in point:

> "[W]e reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business."

19 There was no legal obligation upon Melway to have any wholesale distributors at all. If it had chosen to do so, it could have supplied retailers

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10 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191.

11 515 F 2d 1245 at 1249 (1975). See also *United States v Colgate & Co* 250 US 300 at 307 (1919); *Byars v Bluff City News Co Inc* 609 F 2d 843 at 854 (1979).

directly itself, or it could have supplied the retail market through a single wholesale distributor. Distributorship arrangements may restrict intrabrand competition but promote interbrand competition.

20 The distinction between interbrand and intrabrand competition has been examined by the United States courts in considering the application of that country's antitrust legislation to vertical restraints imposed by manufacturers on distributors. Such restraints typically include limiting, geographically or otherwise, the customers to whom a particular distributor may sell. The overall effect on competition of such restraints is not necessarily negative; it may be positive. Although the legislative context is different, it is of interest to note what was said on this subject by the Supreme Court of the United States in *Continental T V Inc v GTE Sylvania Inc*[12] and by the United States Eleventh Circuit Court of Appeals in *Graphic Products Distributors Inc v Itek Corp*[13]. In the latter case the Court said[14]:

> "We note first that a vertical restraint on trade, almost by definition, involves some reduction in intrabrand competition. When a manufacturer restricts a dealer to selling only within a certain territory, or only to certain customers, or only from certain locations, it is necessarily restraining intrabrand competition. However, this may or may not have a negative effect on the welfare of the consumer … The effects of a restraint of intrabrand competition on consumer welfare cannot be viewed in isolation from the interbrand market structure. A restriction of intrabrand competition may – depending on the interbrand market structure – either enhance or diminish overall competition, and hence consumer welfare."

21 The respondent's inquiry about suppliers was not put on the basis that it intended to sell the directories it requested to a new retail market. It wanted to sell many of them to its previous customers, who were retailers to whom Mr Nagel's company was supplying, and to retail customers of other distributors. The acknowledgment of Mr Godfrey that he did not want the respondent to compete with existing wholesale distributors, and, in particular, with Mr Nagel's company, was made in the context of a distribution system which was inconsistent with such competition. Consequently, it was an aspect of the system

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12 433 US 36 (1977).

13 717 F 2d 1560 (1983).

14 717 F 2d 1560 at 1571 (1983).

itself, and not merely the response to the respondent's request, that was under scrutiny.

22 Merkel J made the following findings of fact[15]:

> "(1) Melway believed that its current wholesale distribution system provided for an appropriately regulated, orderly marketing and distribution of *Melway* street directories. In particular, Melway believed that the appointment of distributors as exclusive distributors in respect of particular segments of the market for Melbourne street directories enabled it to maximise sales of its street directories.
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> (2) It is difficult to ascertain the basis for Melway's belief other than that its experience was that its 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 maximise its sales. That factor, plus the alleged expertise of distributors in relation to their segment, was said by Melway to have resulted in maximising overall sales of the *Melway* directory.
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> (3) There was considerable uncertainty as to the consequences that might follow if Melway's current distribution system was dismantled. Melway was of the view that replacement of the present system by a different system in which appointed distributors competed generally for retailers' business in the wholesale market for *Melway* street directories would be harmful to its business and ought to be resisted.
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> (4) The evidence does not enable me to form any view as to whether the dismantling of the current system would be likely to be harmful or beneficial to Melway's business. If it be relevant, I do accept that Melway's resistance to changing the existing system was because it was satisfied that that system constituted a reasonable commercial regulation of its distribution system in order to maximise sales of its directories.
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> (5) Although Melway requested Auto Fashions to supply it with information in relation to the quantity and terms on which it wished to obtain supply of the *Melway* directories, Melway did not intend to supply directories to Auto Fashions after the termination of its distributorship.

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15 (1998) 42 IPR 627 at 635-636.

(6) Godfrey and Lane, who were involved in Melway's decision to refuse supply, appreciated that it was the intention of Auto Fashions to sell any directories supplied by Melway to existing retail customers of Auto Fashions and new retail customers without regard to the market segment in which the retailers operated. They also appreciated that the supply of directories to Auto Fashions on that basis would be inconsistent with the maintenance of the distribution system established by Melway which protected the distributors from competition from other distributors within their allocated market segments.

(7) A reason proffered by Godfrey and Lane for the refusal of supply to Auto Fashions was that Auto Fashions was no longer an appointed distributor of *Melway* street directories as Beyond Auto Pty Ltd had replaced it as a distributor in the automotive parts market segment. However, Godfrey conceded that there were no reasons in his mind for refusing supply to Auto Fashions other than that he did not want competition on the part of Auto Fashions for the customers of existing distributors. Godfrey also said that he refused to supply *Melway* street directories to Auto Fashions as the supply would be basically dismantling the existing wholesale distribution system. Lane was not prepared to concede that either concession represented his view which was that the 'prime reason' for the refusal was that he was satisfied with the existing distribution system.

(8) The order by Auto Fashions for 30,000 to 50,000 directories was acknowledged by Lane to be a 'big order' for Melway. It is unlikely that supply would have been refused if Auto Fashions had agreed not to compete with the current Melway distributors by only selling directories to retailers which were not in any of the segments allocated to those distributors. Lane conceded that he would be delighted to sell 50,000 directories to a person who would not be competing with his existing distributors.

(9) Melway did not intend, and refused to supply Auto Fashions with *Melway* street directories after the termination of its distributorship, as it did not want Auto Fashions to compete for customers with its appointed distributors in their allocated market segments."

23 Findings (8) and (9) make it clear that, from Melway's point of view, what was contemplated was not that the respondent would go out and open up a new retail market, (there was no finding that there were considered to be substantial unexploited possibilities for further market penetration of Melway directories), but that Melway would take sales from existing distributors including, most obviously, the new wholesale distributor which had been appointed in place of

the respondent to service the respondent's previous customers. The significance of this will appear when consideration is given to the reasoning by which Merkel J, and the majority in the Full Court, concluded that Melway had taken advantage of its market power.

Taking advantage of market power for a proscribed purpose

24 The statutory prohibition, which applies to a firm that has a substantial degree of power in a market, is (relevantly) against taking advantage of that power for the purpose of preventing another from engaging in competitive conduct in that or any other market.

25 Although there are two aspects of that prohibition, they are inter-related. The practical significance of that relationship may vary according to the circumstances of particular cases, or classes of case.

26 It was held by this Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[16], that the expression "take advantage of" does not mean anything materially different from "use", and does not require conduct which is predatory or morally blameworthy. There was no attempt, in argument in this Court or in the Federal Court, to challenge or subvert that holding. Nothing in the dissenting judgment of Heerey J in the Full Court of the Federal Court called it into question. Nothing in these reasons for judgment is intended to call it into question. The task is to determine the meaning and effect of the expression "take advantage of", without any overtones of predatory behaviour, when applied to a case such as the present. As the division of opinion in the Full Court of the Federal Court shows, the outcome is not self-evident.

27 The reasoning of Deane J, with whom Dawson J agreed, in *Queenland Wire*, illustrates the potential importance of the relationship between the two aspects of the statutory prohibition. Deane J said[17]:

> "[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

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16 (1989) 167 CLR 177.

17 (1989) 167 CLR 177 at 197-198.

> dominant supplier of steel and steel products. In refusing supply in order to achieve that purpose, BHP has clearly taken advantage of that substantial power in that market."

28 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. That was because the nature of the purpose was such that, in the circumstances of that case, it could not have been achieved by the conduct impugned (a refusal to supply) had it not been for the existence of the market power. In a competitive market, a refusal to supply QWI with Y-bar would not have prevented QWI from becoming a manufacturer or wholesaler of star pickets. QWI could have obtained supplies from some other manufacturer of Y-bar. It was only BHP's market power which meant that its refusal to supply was capable of achieving what was found to be its purpose. Refusing supply, unconstrained by the possibility that supply could be obtained from a competitor, for the purpose of preventing QWI from becoming a manufacturer or wholesaler of star pickets was an exercise of market power. In the circumstances of the case, Deane J held that the finding as to purpose, once made, meant that the finding as to taking advantage of market power was virtually inevitable.

29 It is not presently material to consider whether the finding as to purpose, in that case, was correct. Given that finding, and given BHP's market power, Deane J regarded the application of s 46 as clear. Viewed in that light, his approach is an illustration of the point made by Scalia J in the Supreme Court of the United States when he said[18]:

> "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist."

30 In the present case, there was no suggestion of a purpose of preventing the respondent from becoming a wholesaler of street directories. It was never suggested that Melway had any concern, for example, to prevent the respondent from distributing the products of one of its competitors. What Melway intended to do, and did, was to terminate the respondent's Melway distributorship, with the necessary consequence that it would cease to be a wholesaler of Melway street

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18 *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 at 488 (1992).

directories. Melway was not the only possible source of supply of Melbourne street directories. It was the only possible source of Melway street directories, but that would have been the case if it only had 10 per cent of the market, or if it had no substantial degree of market power. Its ability to stop the respondent becoming a wholesaler of Melway directories resulted from the fact that it was Melway, and could appoint, or not appoint, distributors as it saw fit in its commercial interests.

31 As the Privy Council observed in relation to corresponding New Zealand legislation, in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*[19], 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 as 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[20]. 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.

32 In the present case Merkel J, and all three members of the Full Court of the Federal Court, concluded that the refusal to supply was for the proscribed purpose. The appellant submits that they came to that conclusion too readily. However, part of the explanation of the finding is to be found in certain evidence as to the practical operation of Melway's wholesale distributorship system as it emerged at the trial. This evidence concerned what Merkel J described as the Repco incident and the Target/K-Mart tender[21].

33 A firm named Paul and David Auto was appointed wholesale distributor of Melway directories to the market segment consisting of service station

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19 [1995] 1 NZLR 385 at 402.

20 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 214 per Toohey J.

21 *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627 at 642-643.

proprietors. That firm also supplied other products by wholesale to service stations. Another significant wholesaler of car accessories was Repco. As a consequence of Melway's distribution system, Repco was obliged to purchase Melway directories, for resale, from its competitor, Paul and David Auto. At a time when the respondent was a wholesale distributor, Repco negotiated and obtained from it better prices for Melway directories. For a time the respondent was selling, by wholesale, directories to another wholesaler (Repco) for resale into the service station segment. Melway intervened, and, under its pressure, the respondent agreed to stop supplying Repco.

34 The second matter concerned an attempt made by Target and K-Mart (which were both subsidiaries of Coles Myer Ltd) to have three wholesale distributors competitively tender to them for the supply of 70,000 Melway street directories over 12 months. Neither Target nor K-Mart was in the allocated segment of one of the distributors. Target was in the segment of another, and K-Mart was in the segment of the third. Melway wrote to each of the distributors seeking to persuade them not to tender on the basis that the tender was inconsistent with the distribution system. The distributors were reminded that their appointments were liable to be terminated at will, and that wholesale prices could be changed by Melway. The distributor who was not currently serving a segment which included either Target or K-Mart withdrew from the tender, fearing that, if it proceeded, it would lose its distributorship.

35 Merkel J described these as examples of Melway using its market power in order to prevent competitive conduct between its wholesalers[22].

36 The findings of fact in the Federal Court as to the purpose of the refusal of supply to the respondent were not based solely upon admissions made by Mr Godfrey[23]. In a sense, the witness was only stating the obvious. Melway was found to have had a number of legitimate commercial reasons for desiring to maintain its wholesale distribution system, and restricting competition between its wholesale distributors was part of that system, as the explanation of the refusal to supply acknowledged. That did not make the findings as to proscribed purpose inevitable, but having been made in the Federal Court, it is difficult to disturb them at this stage.

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22 (1998) 42 IPR 627 at 642.

23 cf *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 487 per Bowen CJ; *Baxter v British Airways plc* (1988) 82 ALR 298 at 303 per Burchett J; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 482-483 per Lockhart, Gummow and von Doussa JJ.

37 An examination of the reasoning of Merkel J, which was upheld by the Full Court, on the issue of the purpose of the refusal of supply shows that his Honour did not rest his decision upon the proposition that since, by hypothesis, Melway's distribution system was intended to prevent its wholesalers from competing with one another, therefore conduct consistent with, and designed to maintain, the system had the anti-competitive purpose proscribed by s 46. As his references to the Repco incident and the matter of the call for tenders by Target and K-Mart were intended to show, Merkel J related his finding of purpose to wider considerations. As was said, the finding was not inevitable, but there was sufficient material to support it; it was based in part upon impressions of the evidence of Mr Godfrey and Mr Lane; and it was upheld in the Full Court. It has not been shown to be wrong.

38 It should be added, however, that it is not the case that the adoption by a manufacturer, whether with or without a substantial degree of market power, of a system of distribution involving what are sometimes called vertical restraints necessarily manifests an anti-competitive purpose of the kind referred to in s 46. When regard is had to the state of competition in the relevant market, the purpose may be pro-competitive. For example, competition in the retail market may be fostered by inhibiting the engagement in certain conduct by wholesalers or other "middle men". Or there may be explanations of the arrangements which justify the conclusion that restricting competition was no part, or no substantial part, of the purpose of the manufacturer. Melway sought to persuade the Federal Court that this was such a case, but failed to do so.

39 Argument in this Court was principally directed to the aspect of the question upon which there was disagreement in the Full Court, ie whether Merkel J was right to conclude that the conduct of Melway amounted to taking advantage of its market power.

40 Although there was no argument against the finding that Melway has a substantial degree of power in a market, the dispute as to whether it took advantage of that power requires attention to the meaning of the concept of market power.

41 In *Queensland Wire*, Dawson J said[24]:

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24 (1989) 167 CLR 177 at 200.

> "The term 'market power' is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner … But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal … The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices."

42 His Honour then went on to quote the authors Kaysen and Turner, who wrote[25]:

> "A firm possesses market power when it can behave persistently in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions."

43 The notion of market power as the capacity to act in a manner unconstrained by the conduct of competitors is reflected in the terms of s 46(3). Such capacity may be absolute or relative. Market power may or may not be total; what is required for the purposes of s 46 is that it be substantial. There has been no attempt in this Court to challenge the finding that Melway's market power is substantial.

44 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 co-existence 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.

45 In *Queensland Wire*, BHP, a manufacturer of steel and steel products, produced about 97 per cent of the steel made in Australia, and supplied about 85 per cent of Australia's requirements for steel products. A wholly owned subsidiary of BHP manufactured star picket fence posts. These were made from Y-bar produced by BHP. Substantially all of the Y-bar produced by BHP was supplied to the subsidiary and used in what was, in effect, a vertically integrated

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25 Kaysen and Turner, *Antitrust Policy* (1959) at 75.

manufacturing process. QWI, desiring to produce star picket fences itself, sought supplies of Y-bar from BHP, and was refused supply.

46 Mason CJ and Wilson J attached significance to the vertical integration. They observed that, although vertical integration does not necessarily indicate a substantial degree of market power, it is a common means by which a firm which has such power capitalises upon it[26]. Later, they said[27]:

> "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, if it 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."

47 The evidentiary basis for that conclusion is not entirely clear. It was not a finding made by Pincus J at first instance, or by the Full Federal Court on appeal. Not everyone would agree that, as a proposition of fact, it is self-evidently correct. But we are not concerned with the findings of fact in that case; it is the approach to the application of s 46 that is significant. The approach of Mason CJ and Wilson J was adopted by all the other members of the Court except Deane J.

48 Deane J's approach was different, and has been set out above. Dawson J said he agreed generally with Deane J[28]. In that connection it is to be remembered that a large part of Deane J's reasoning was devoted to whether Pincus J had been correct, at first instance, in construing s 46 as meaning that it required a predatory intent. However, Dawson J added[29]:

> "For the reasons given by Deane J 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*

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26 (1989) 167 CLR 177 at 190.

27 (1989) 167 CLR 177 at 192.

28 (1989) 167 CLR 177 at 198.

29 (1989) 167 CLR 177 at 202.

only by the absence of competitive conditions. Inferences in this regard can be drawn from the fact that BHP could not have refused to supply Y-bar to QWI if it had been subject to competition in the supply of that product." (emphasis added)

49 Toohey J said[30]:

"The only reason why BHP is able to withhold Y-bar (while at the same time supplying all the other products from its rolling mills) is that it has no other competitor in the steel product market who can supply Y-bar. It has dominant power in the steel products market due to the absence of constraint. It is exercising the power which it has when it refuses to supply QWI with Y-bar at competitive prices; it is doing so to prevent the entry of QWI into the star picket market; and it has been successful in that attempt."

50 Thus BHP's arguments that it was conducting a vertically integrated operation, converting substantially all the Y-bar it produced into fence posts, that Y-bar was only an intermediate product in that operation, and that its commercial decision to consume all its own product and not make some available for sale was legitimate, were rejected. Four of the five members of the Court based that rejection upon a finding that, if there were a competitive market, with other people offering Y-bar for sale, BHP would have been forced to offer Y-bar to QWI. Whether that conclusion was well based is beside the point. A majority of the Court considered that the way to test whether BHP was taking advantage of its power was to ask how it would have been likely to behave in a competitive market. Exactly how competitive such a market might be, and the assumed structure of such a market, were open questions. The important thing was that, once it was concluded that in a competitive market BHP would have been constrained to supply QWI, and that BHP's ability to refuse to supply resulted from the absence of such constraint, it followed that, in refusing to supply (for an anti-competitive purpose), BHP was taking advantage of its market power.

51 Dawson J's conclusion that BHP's refusal to supply QWI with Y-bar was made possible only by the absence of competitive conditions does not exclude the possibility that, in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. To that extent, one may accept the

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30 (1989) 167 CLR 177 at 216.

submission made on behalf of the ACCC, intervening in the present case, that s 46 would be contravened if the market power which a corporation had made it easier for the corporation to act for the proscribed purpose than otherwise would be the case.

52 The four members of the Court reasoned by inference from the premise that BHP could not have refused supply to QWI in a competitive market to the conclusion that its behaviour was made possible by the absence of competitive constraint (ie by market power). The source of the premise is not entirely clear. It seems to involve unstated assumptions about the nature and structure of the competitive market. There is nothing in s 46 that assists in that regard. An absence of a substantial degree of market power does not mean the presence of an economist's theoretical model of perfect competition. It only requires a sufficient level of competition to deny a substantial degree of power to any competitor in the market. 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.

53 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.

54 Merkel J, and the majority in the Full Court, following the example given in *Queensland Wire*, asked themselves whether, in a competitive environment, without its market power, Melway would have been compelled, in a practical sense, to supply to the respondent, and answered the question in the affirmative.

55 The appellant submits that the question as asked was flawed, and the answer was wrong. In particular, the appellant contends that the reasoning was based upon an erroneous view of the assumptions s 46 required to be made for the exercise.

56 In considering whether Melway had taken advantage of its market power, Merkel J quoted the passage from the joint judgment of Mason CJ and Wilson J in *Queensland Wire* set out above, and said[31]:

> "A similar analysis can be applied in the present case. It is only by virtue of its dominant position in the Melbourne directory market and the absence of a competitive market that Melway can afford, in a commercial sense, to withhold from supplying 30,000–50,000 directories at its usual wholesale price and terms to Auto Fashions. If Melway lacked substantial market power – in other words, if it were operating in a competitive market – it is highly unlikely that it would stand by, without any effort to compete, and allow Auto Fashions to secure its significant supply of directories from a competitor. Put another way, 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."

57 There are a number of difficulties about that process of reasoning. First, it appears to assume that the 30,000–50,000 directories in question would be sales lost to Melway, and gained by its competitors, if Melway were operating in a competitive market and, in that context, the respondent sought supply. But the decision not to supply the respondent was made in a situation where the respondent was primarily seeking to take business away from existing distributors. 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 by Melway 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. Thirdly, the focus of the question is too narrow. It is only as a manifestation of Melway's wholesale distribution system that the anti-competitive effect of the refusal to supply the respondent can be judged. What must be asked is whether Melway's wholesale distributor system,

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31 (1998) 42 IPR 627 at 641.

involving, as it did, restriction of competition at the wholesale level, amounted to taking advantage of its market power.

58 The most likely explanation of the assumption that, in a competitive market, a refusal of the respondent's application for supply would be a loss of 30,000–50,000 sales to Melway is that it was thought that s 46 required that assumption. But the hypothesis that Melway lacks a substantial degree of power in the market does not require the assumption that the distribution arrangements or practices of Melway and its competitors are such that they are all commercially obliged to supply anyone who seeks to become a wholesaler, or that, at the wholesale level in the market, there exists a state of perfect competition, or that a decision to confine supply to one or a small number of wholesalers will result in a loss of sales. The only purpose of the hypothesis is to seek to test whether Melway has taken advantage of its degree of market power. It is one thing to compare what it has done with what it might be thought it would do if it lacked that power. It is a different thing to compare what it has done with what it would do in circumstances that are completely divorced from the reality of the market.

59 In this connection the question of the relief obtained by the respondent is relevant. It highlights the problem which needs to be addressed in applying s 46 to the case. Merkel J granted an injunction restraining a refusal of supply to the respondent where the purpose is to prevent the respondent from engaging in competitive conduct with a Melway wholesaler. The Melway wholesalers were not parties to the proceedings. Their contractual rights against Melway were not in issue. But, as the form of the injunction discloses, it is one aspect of the distribution system itself that was under challenge, and not merely some isolated instance of refusal to supply. The impact of the decision for Melway's business arrangements extended well beyond its dealings with the respondent.

60 It may be convenient, but it is unsatisfactory, to treat the question of the form of relief as inconsequential. A conclusion that the present case involved a contravention of s 46 would necessitate consideration of how the legislation was intended to operate in practice. That would require consideration of the available remedies. An injunction expressed in terms which leave unclear the form of conduct which will expose a party to the consequences of breach of a court order, and which beg the major question in issue in the case, is inappropriate. If we were otherwise inclined to favour the respondent's arguments, we would not have found it possible to conclude that there was a contravention of s 46 without addressing, and answering, the arguments of the appellant concerning the form of relief. That would not only be because of the need to make an order. It would be because those arguments are bound up with the question of the meaning and effect of the legislation.

61 Bearing in mind that the refusal to supply the respondent was only a manifestation of Melway's distributorship system, the real question was whether, without its market power, Melway could have maintained its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market. That question was not specifically addressed by Merkel J. It was, however, addressed by Heerey J in the Full Court.

62 In the Full Court of the Federal Court, Sundberg and Finkelstein JJ agreed with the reasoning of Merkel J[32]. Heerey J dissented[33]. He observed that Melway had adopted its segmented distribution system before it secured its position of market dominance, and there was no reason to believe that it would not be both willing and able to continue that system in a competitive market. He pointed out that, in refusing to supply the respondent, Melway was not denying itself sales, and there was no justification for assuming that in a competitive market it would be denying itself sales. The reasoning of Heerey J is to be preferred.

63 In this Court, whilst there was an alternative argument supporting Merkel J and the majority in the Full Court, the primary argument for the respondent departed from the approach taken by all four judges in the Federal Court. It was submitted that, where an alleged taking advantage of market power by a corporation consists in the corporation's refusal to supply another, it is neither necessary nor relevant, in the determination of the question whether the corporation has taken advantage of its market power, to establish whether the corporation would or would not have refused supply if it lacked market power. It was contended that, if the supplier does have a substantial degree of market power, the grant or refusal of supply is necessarily taking advantage of the substantial degree of market power, because the power to grant or refuse supply is the power substantially to control the market. The respondent argued in its written submissions:

> "In this case the Appellant had a substantial degree of market power. Necessarily, it took advantage of that power when it refused to supply the Respondent. What it may or may not have done, in a competitive market, was nothing to the point."

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32 (1999) 90 FCR 128 at 138-141, 143-144.

33 (1999) 90 FCR 128 at 134-135.

64 In oral argument the point was expressed by saying that what gave Melway its market power was the power to supply or refuse supply. Its refusal to supply to wholesale distributors other than its existing wholesale distributors was an exercise of that attribute which gave it the market power it had. To refuse supply for the proscribed purpose found to exist was to take advantage of its market power for that purpose.

65 This argument has the merit that it faces up to the fact that the refusal to supply the respondent the 30,000–50,000 directories it mentioned was merely the corollary of the distributorship system maintained by Melway. It addresses the real issue, which is whether that system involves taking advantage of market power.

66 The argument denies that, where the case is one of refusal to supply, in determining whether a corporation is taking advantage of its power in the market, it can ever be relevant to consider how the corporation would have behaved without such power. However, such a proposition is directly contrary to the reasoning of four of the five members of the Court in *Queensland Wire*.

67 The respondent's argument depends upon equating the exercise of power in a market with deciding whether to grant or withhold supply. That begs the question. As Dawson J explained, in *Queensland Wire*, market power means capacity to behave in a certain way (which might include setting prices, granting or refusing supply, arranging systems of distribution), persistently, free from the constraints of competition. This is the generally accepted meaning of the concept, and it is reflected clearly in the provisions of s 46(3). Barriers to entry into a market by competitors are a common reason for the existence of market power. They could exist, as in the present case, because of technological factors, or they might result, for example, from legislation which gives a statutory monopoly. Freedom from competitive constraint might make it possible, or easier, to refuse supply and, if it does, refusal to supply would constitute taking advantage of market power. But it does not follow that because a firm in fact enjoys freedom from competitive constraint, and in fact refuses to supply a particular person, there is a relevant connection between the freedom and the refusal. Presence of competitive constraint might be compatible with a similar refusal, especially if it is done to secure business advantages which would exist in a competitive environment.

68 The conclusion in favour of the respondent on the issue of taking advantage cannot be supported on the ground now advanced as the respondent's primary submission. This was not a case in which the fact of a refusal to supply self-evidently revealed that it was an exercise of the appellant's market power. The creation and maintenance of the appellant's distribution system, at a time

when it did not have a substantial degree of market power, shows that its maintenance, when the appellant had market power, was not *necessarily* an exercise of that power. The respondent's contention that there was a use of market power required demonstration by other means. At trial, and in the Full Court, the use of market power was said to be demonstrated by reference to hypotheses about how the appellant would have acted if it had not had a substantial degree of market power. For the reasons given earlier, those arguments were flawed and should be rejected.

69 It is as well to add that, because the question whether there has been a taking advantage of market power is a question of fact, much turns on the evidence given at trial and the inferences which may properly be drawn from that evidence. The ACCC, intervening, submitted that there would be a breach of s 46 if the market power which a corporation had, made it easier to act for the proscribed purpose than otherwise would be the case. That was not the case that was made below and the findings of fact necessary to support such an argument were not sought or made. The case should be disposed of on the basis on which it was argued by the parties in the Federal Court and this Court. Neither party suggested a new trial might be appropriate.

70 The respondent did not seek to rely on the decision of the European Court of Justice in *Commercial Solvents Corp v EC Commission*[34], or cases that followed that decision. The reason is apparent when the terms of Art 86 of the Treaty of Rome, and the issues that arose in that case, are examined. Article 86 prohibits an abuse of a dominant position within the Common Market or in a substantial part of it. The abuse in the *Commercial Solvents* case involved a corporation with substantial market power refusing supply of certain products, used in the production of derivative products, to a former customer, and taking over part of the downstream market occupied by its former customer. It was the elimination of downstream competition with itself that made the refusal of supply an abuse. In its judgment the Court said[35]:

> "[A]n undertaking which has a dominant position in the market in raw materials and which, *with the object of reserving such raw material for manufacturing its own derivatives*, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating

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34 [1974] 1 CMLR 309.

35 [1974] 1 CMLR 309 at 340-341.

> all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86." (emphasis added)

To omit the words emphasised is to distort the principle for which the decision stands. The circumstances of that case are well removed from those of the present case; and the legislation is different.

Orders

71 We would allow the appeal with costs. The orders made by the Full Court of the Federal Court should be set aside. In place of those orders, the appeal to that Court should be allowed, the orders made by Merkel J should be set aside, the respondent's application should be dismissed, and the respondent should be ordered to pay the appellant's costs at first instance and in the Full Court of the Federal Court.

72 KIRBY J. The appellant refused to supply its product, a street directory, to the respondent, which had formerly been a distributor. It wanted to limit distribution of the product to a small number of distributors. The product commanded more than 80% of the relevant market. The respondent offered to purchase a very large quantity of the product, a portion of which it intended to sell in new markets. But it also intended to compete with the appellant's designated distributors. The respondent contended that, in refusing to supply the appellant's product to it, the appellant had "take[n] advantage" of "a substantial degree of power in [the] market" for a "purpose" proscribed by s 46 of the *Trade Practices Act* 1974 (Cth) ("the Act"). That "purpose" was to prevent the respondent "from engaging in competitive conduct in that ... market"[36].

73 In the Federal Court of Australia, the primary judge, Merkel J[37], and the majority of the Full Court[38] upheld the respondent's complaint. Of all the many arguments which the appellant deployed to resist this conclusion, only one remains at issue. The appellant was undoubtedly a "corporation". It had a "substantial degree of power" in the given "market", namely, the wholesale and retail sale of street directories in Melbourne[39]. It was found, and unanimously confirmed in the Full Court[40], that the appellant's "purpose", in refusing to supply the product to the respondent, was the proscribed "purpose" of preventing the respondent from engaging in competitive conduct in the specified market. This Court has accepted that that finding must stand[41].

74 Accordingly, the only remaining contention which would take the appellant outside the statutory proscription is that the appellant did not "take advantage" of its monopoly power to achieve its "purpose". In short, the existence of that "power" was merely coincidental. It was legally irrelevant.

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36 The Act, s 46(1)(c). A claim based on s 46(1)(b), although pleaded, was not pursued at trial. See the reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ ("the joint reasons") at [4].

37 *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627 ("reasons of Merkel J").

38 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128 per Sundberg and Finkelstein JJ, Heerey J dissenting ("Full Court reasons").

39 Reasons of Merkel J (1998) 42 IPR 627 at 638-639.

40 Full Court reasons (1999) 90 FCR 128 at 137 per Heerey J, 142 per Sundberg J, 147 per Finkelstein J.

41 Joint reasons at [37].

There did not exist the causal link between the "power" and forbidden "purpose". Findings to the contrary were wrong.

75 The mere statement of the foregoing facts indicates how unrealistic such a conclusion appears to be. It contradicts the conclusion of the primary judge who received evidence and heard argument over nine days of trial; conclusions which would ordinarily be taken to enjoy certain advantages over an appellate court, including this Court[42]. It reverses the conclusions on the facts reached by the majority of the Full Court who approached the task before them obedient to the interpretation of the applicable provision of the Act established by this Court's decision in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[43]. That decision has been praised[44] and criticised[45] by commentators. But no one in this appeal argued that it was wrongly decided or should be reconsidered. Had such a submission been made, this Court would have been differently constituted[46]. Therefore, given concurrent findings of fact and uncontested principles of law, it is (on the face of things) surprising that the appeal should now be upheld.

76 However, the necessity to establish that a monopolist has "take[n] advantage" of its power for a proscribed purpose is laid down by the Act. Perhaps the majority judges below, despite their stated reliance on *Queensland Wire*, misunderstood the meaning of "take advantage" or fell into the logical fallacy of *post hoc ergo propter hoc*[47]. I do not consider that they made any such mistakes.

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42 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330 [90]; 160 ALR 588 at 619.

43 (1989) 167 CLR 177 ("*Queensland Wire*").

44 Hanks and Williams, "Implications of the Decision of the High Court in *Queensland Wire*", (1990) 17 *Melbourne University Law Review* 437; O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64.

45 Pengilley, "Misuse of Market Power: Present Difficulties – Future Problems", (1994) 2 *Trade Practices Law Journal* 27; Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56. There has been "intense criticism" of rulings of the United States Supreme Court on analogous questions: see *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 at 487 (1992).

46 By convention, submissions to overrule recent authority of the High Court are heard by all seven Justices.

47 "After it, therefore due to it": the fallacy of confusing consequence with sequence.

77 To give reasons for my minority opinion, it is necessary to record some additional facts; to examine the purposes of the applicable provisions of the Act; to recall what this Court held in *Queensland Wire* concerning the phrase "take advantage of"; to consider analogous authorities in other jurisdictions; and then to draw these materials together to explain my conclusion.

The facts, legislative provisions and issue

78 Most of the facts relevant to my reasons are contained in the joint reasons[48]. However, it is appropriate to mention a number of additional facts, upon which there were findings or about which there was undisputed evidence. Such facts lend colour to the monopolistic conduct of Melway Publishing Pty Ltd ("the appellant"). They help to explain why Robert Hicks Pty Ltd ("the respondent") succeeded at trial, and on appeal. Such findings should not be overturned lightly. As Lord Hoffmann said, with the concurrence of the other participating members of the House of Lords, in *Biogen Inc v Medeva plc*[49]:

> "The need for appellate caution in reversing the judge's evalution of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

79 The primary judge accepted that consumers treated the name of the appellant's Melbourne street directory as a generic description of street directories for that city[50]. Several witnesses gave evidence that it was an "icon" of the city[51]. A director of the appellant referred to it as "a Melbourne institution"[52]. So popular was the directory that 60% of the national sales of street directories by the large retail chain K-Mart comprised sales of the appellant's Melbourne directory. It was probable that, alone, it constituted at

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48 Joint reasons at [9]-[23].

49 [1997] RPC 1 at 45 (original emphasis).

50 Reasons of Merkel J (1998) 42 IPR 627 at 630.

51 Reasons of Merkel J (1998) 42 IPR 627 at 630.

52 Full Court reasons (1999) 90 FCR 128 at 142.

least 50% of the market for street directories in Australia[53]. Despite some aggressive marketing and promotion of their products by its competitors, UBD and Gregorys, the appellant's Melbourne directory continued to maintain its dominant share of the wholesale and retail market for street directories in Melbourne[54]. In the result, without access to the appellant's Melbourne directory, it would, as a practical matter, be impossible for a would-be wholesaling competitor to enter that market and service consumer needs at a competitive price.

80 So great was the market dominance enjoyed by the appellant in respect of Melbourne street directories that, in substance, the appellant was a monopolist. It did not face effective inter-brand competition[55]. Indeed, at trial and on appeal, the appellant conceded that, in the relevant market, it enjoyed the "substantial degree of power" that brought it within the sights of s 46(1) of the Act. 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[56].

81 A critic of the Federal Court's decision[57] has complained about the respondent's double standards, given that it was formerly prepared to take the benefits of the restricted distributorship and only complained of a breach of the Act when it lost that privileged status. Comments of this kind are irrelevant. History is full of the stories of converts. Some of them embrace new spiritual convictions; others economic. The respondent's commitment to self-interest was steadfast. It was a commitment which, it asserted, would now maximise competition in the specified market. As I shall show, that is one of the applicable purposes of the Act. Complaints that the Act might procure a result that is successful in promoting the purpose of competition must therefore fall on deaf ears. Somebody pays for the high profits of the appellant's distributors who

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53 Reasons of Merkel J (1998) 42 IPR 627 at 631.

54 Reasons of Merkel J (1998) 42 IPR 627 at 630.

55 Reasons of Merkel J (1998) 42 IPR 627 at 638.

56 Full Court reasons (1999) 90 FCR 128 at 143.

57 Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56 at 74.

wholesale its Melbourne directory in the segmented market within which there may be no intra-brand and little effective inter-brand competition. That somebody is the consumer.

82 The closed system of distribution instituted by the appellant comprised only six independent distributors who sold the product to retailers[58] in accordance with an informal agreement which they had with the appellant. Appointment to this highly profitable position was terminable at the will of the appellant, as the respondent discovered, to its great disadvantage. The arrangements imposed divisions on the market and prohibited supply or price competition within a division not assigned to a given distributor. The rigidities involved were illustrated by the so-called "Repco incident" and "Target/K-Mart tender"[59]. As these are summarised in the joint reasons[60], I will not repeat them. Such incidents clearly demonstrate that the distributors were obliged to comply with an anti-competitive arrangement for distribution of the product under the threat of the sanction that contravention would lead to termination of their appointment[61].

83 Although the appellant asserted that, from the time of its entry into the specified market until the trial, it had maintained this distribution system, there was no objective evidence as to when it first implemented, or sought to maintain, the distribution system which existed at the time of the trial[62]. Nor was the precise (or even approximate) time at which the appellant acquired its dominant position in the market investigated or identified at trial. It was not strictly necessary to do so. Section 46 of the Act attaches its requirements to the "tak[ing] advantage" of such market power. The respondent's case was that this occurred when the appellant prevented it from "engaging in competitive conduct" in the specified market by refusing to supply it with a large quantity of Melbourne directories that it was willing to order for distribution and resale.

84 There were some unresolved factual questions. For example, there was evidence at the trial that distributors were instructed not to sell the Melbourne directory at less than a specified price. During a short interval in 1989, when Gordon and Gotch Limited assumed overall distribution of the product for the appellant, it wrote to the respondent, inferentially with the appellant's authority, expressing concern about "rumoured prices", stating: "[W]e may have to further

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58 Reasons of Merkel J (1998) 42 IPR 627 at 631.

59 Reasons of Merkel J (1998) 42 IPR 627 at 642-643.

60 Joint reasons at [32]-[35].

61 Reasons of Merkel J (1998) 42 IPR 627 at 642.

62 Reasons of Merkel J (1998) 42 IPR 627 at 631.

rationalize the number of wholesalers if the offenders cannot toe the line." All of this is consistent with an attempt by the appellant to regulate forcefully the distribution of its Melbourne directories. Indeed, the appellant, in a letter to the respondent of June 1989, explained its overall distribution philosophy. This was to promote "the orderly marketing of our product". Unfortunately for the appellant, that distribution system, like so many other earlier forms of "orderly marketing", must now run the gauntlet of the Act.

85 The contention that the appellant adhered to its system of distribution because it had found it specially useful and profitable in marketing the kind of product it sold was not supported by the evidence when regard was had to what happened after the launch by the appellant of a Sydney equivalent to the Melbourne directory. At the time of that launch, the segmented market system, adopted for the Melbourne directory, was not instituted. On the contrary, the respondent, then still in favour, was appointed the sole distributor of the product for the entire Sydney street directory market. One of the appellant's directors suggested that the Sydney market was "different to Melbourne". However, the prospect of selling a very large number of directories in Sydney would have been irresistible to the appellant. The marketing director of the appellant was asked whether he would accept an order for 50,000 street directories if there was demand for them in Sydney. His answer was: "Well, we sure would [be delighted] if they took 50,000 Melways in Sydney."[63] This answer, given at a time when the appellant's sales of its Sydney directories constituted only 10% of the market, suggests an understandable willingness to embrace a different distribution system where the appellant's product did not dominate the relevant market. It tends to confirm the impression to which the primary judge and the majority in the Full Court gave effect. 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.

86 The circumstances of the termination of the distribution arrangement with the respondent are also relevant to evaluating the conclusion which the judges of the Federal Court reached on this issue. At the time of its first appointment, the respondent was owned, in equal shares, by Mr R Pawsey and Mr W Nagel. It was the respondent that identified to the appellant a new segment of the retail market which could be exploited to promote sales of the Melbourne directory, namely suppliers of automotive parts. By inference, the appellant's already rigid distribution system had not taken adequate advantage of this market segment.

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63 Quoted by Finkelstein J in Full Court reasons (1999) 90 FCR 128 at 145.

Exploiting this segment, the respondent rapidly became the appellant's second largest distributor[64]. This is precisely the kind of evidence which tends to indicate the value, from the point of view of consumers, of loosening the rigidities of the appellant's segmented distribution system and permitting distributors, ready, willing and able to do so, to explore the possibilities of new markets, serving unfulfilled consumer needs.

87 After Messrs Pawsey and Nagel parted company, leaving Mr Pawsey in sole control of the respondent, the appellant terminated the respondent's appointment as a distributor. It appointed a company controlled by Mr Nagel in its place to service the market segment of automotive part suppliers built up by the respondent. It was at this point that the respondent made its request for the supply of between 30,000 and 50,000 Melbourne directories a year[65]. The respondent informed the appellant that it proposed to sell the Melbourne directory to new retail segments not serviced by the existing distribution arrangements[66]. 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.

88 However, the respondent also made it plain to the appellant that it wished to compete with existing distributors (such as Mr Nagel's company) in retail segments controlled by them under their arrangements with the appellant[67]. The appellant refused to supply the Melbourne directories requested by the respondent. It stated that it did "not propose to have any further business dealings with [the respondent]"[68]. The primary judge found that such refusal was because the appellant did not want the respondent to compete for customers with its appointed distributors in their already allocated market segments[69]. He held that, in doing so, the appellant had "take[n] advantage" of its substantial power in the specified market for a proscribed purpose.

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64 Reasons of Merkel J (1998) 42 IPR 627 at 633.

65 Reasons of Merkel J (1998) 42 IPR 627 at 634.

66 Reasons of Merkel J (1998) 42 IPR 627 at 634.

67 Reasons of Merkel J (1998) 42 IPR 627 at 634.

68 Reasons of Merkel J (1998) 42 IPR 627 at 634.

69 Reasons of Merkel J (1998) 42 IPR 627 at 636.

89 Given all of the foregoing facts, the last-mentioned conclusion was clearly open on the evidence. In my view, the evidence virtually compelled such a conclusion. The judges who reached that view correctly applied the principles established by this Court in *Queensland Wire*. Now, without overruling the approach to s 46 of the Act mandated by that decision, but with dark hints of factual errors in it[70] and seemingly grudging acceptance of its holding, a result is reached that effectively, but not explicitly, in my opinion, overturns *Queensland Wire*. Because I do not agree with this, either as a matter of legal authority or of legal policy, I am bound to explain my contrary opinion.

The purpose and policy of the Act support the decision

90 I start with some basic points about the Act. They affect the approach which this Court should take to any ambiguities in the phrase "take advantage of" in s 46 of the Act. The object of the Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"[71]. The Act incorporates a number of important departures from the previous law. It should be approached as a "fundamental piece of remedial and protectionist legislation [that is to] be construed broadly"[72]. This approach to the meaning and purpose of the Act is not only to be taken to Pt V, which concerns consumer protection, but also to Pt IV, designed to outlaw "Restrictive trade practices"[73]. This approach is warranted, indeed necessary, because of the important policy objectives that the legislation evidences, the large economic purposes it sets out to attain and the atypical mode of drafting that was adopted to express the Parliament's objectives[74].

91 It is highly desirable that the Act's provisions with respect to restrictive trade practices should be "sufficiently certain ... to enable persons affected by it to understand its operations and effect"[75]. That objective was included in the

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70 Joint reasons at [45]-[53].

71 The Act, s 2.

72 *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

73 The heading of Pt IV of the Act. See *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503 per Lockhart and Gummow JJ, approved and applied in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41; *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43 at 60.

74 Australia, Senate, *Parliamentary Debates* (Hansard), 30 July 1974 at 542 (Senator Murphy).

75 Mr Howard (Minister for Business and Consumer Affairs), Terms of Reference, Trade Practices Act Review Committee ("the Swanson Committee"), 1 April 1976.

terms of reference given to the Swanson Committee by the Minister, the Hon J W Howard, in 1976[76]. But certainty is best promoted by the consistent application by courts of legal principles embodied in the Act as expounded by this Court. If those principles are considered mistaken or undesirable, the Act can be amended. There must be no misunderstanding of the deliberate policy of the Parliament with respect to the Act. It departed from the previous *Restrictive Trade Practices Act* 1971 (Cth) to follow both the mode of drafting, and some policy objectives, of the *Sherman Act* of the United States of America[77] (including in respect to s 46 of the Act[78]). In the Second Reading Speech for the original Bill of 1974, the Attorney-General (Sen the Hon L K Murphy) observed[79]:

> "[O]ther provisions, particularly those describing the prohibited restrictive trade practices, have been drafted along general lines using, wherever possible, well understood expressions. ...
>
> [I]t is questionable whether detailed drafting leads to more certainty. Often it does no more than obscure the broad purpose of a provision. Chief Justice Hughes of the United States Supreme Court made this very point in an opinion he delivered in 1933 in the case of *Appalachian Coals Inc v United States*[80] when he said of the *Sherman Act*:
>
> > 'It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.'"

92 It is important for this Court, and other Australian courts, to construe the Act so as to uphold the apparent purposes expressed in its language. We should not be energetic in providing "loopholes for escape".

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76 See Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56 at 78.

77 26 Stat 209 (1890) codified as amended 15 USC §§1-7 ("*Sherman Act*").

78 The analogous provision of which is *Sherman Act*, §2.

79 Australia, Senate, *Parliamentary Debates* (Hansard), 30 July 1974 at 542-543 (footnote added).

80 288 US 344 at 360 (1933). Hughes CJ, for the Court, went on: "The restrictions the Act imposes ... call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce ... and to promote competition upon a sound basis."

93 In the same Second Reading Speech, Senator Murphy made it clear that cl 46 (now s 46) did "not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have"[81]. The Act did not, and does not, forbid the existence and operation of monopolies. But it does set out to control, quite strictly, what "an enterprise which is in a position to control a market" may do in using ("tak[ing] advantage of") that power in the market. It does so because of the common experience that those with such power, on occasion, "tak[e] advantage of [their] market power to eliminate or injure [their] competitors"[82] or to exclude others from "competing effectively"[83]. Ultimately it is the consumer who suffers from rigid and controlled markets, either because of the alleviation of the pressure to enhance outlets for supply and servicing of the product (the restriction or closing down of branches and outlets) or by the removal of the constraints inherent in inter-brand and intra-brand price competition.

94 The definitions specified by the Act itself make it plain that the legislative purpose of s 46 is to have broad application. The word "purpose" is given a wide ambit[84]. First, the "purpose" of conduct need not be its sole purpose so long as it is, or was, a substantial purpose. Secondly, "lessening of competition" is defined in the Act to include the "preventing or hindering" of competition[85]. Thirdly, a proscribed "purpose" can be found even if ascertainable only by inference from conduct or other relevant circumstances[86].

95 Although the appellant's "purpose" must now be accepted to have been anti-competitive in a proscribed way, it is relevant to keep the foregoing statutory provisions in mind when seeking to identify the large objectives to which s 46 is addressed. In conformity with the language of the Act, its objects as explained to

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81 Australia, Senate, *Parliamentary Debates* (Hansard), 30 July 1974 at 544 cited in Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56 at 58.

82 Australia, Senate, *Parliamentary Debates* (Hansard), 30 July 1974 at 544 (Senator Muphy).

83 Australia, Senate, *Parliamentary Debates* (Hansard), 30 July 1974 at 544 (Senator Murphy).

84 The Act, s 4F.

85 s 4G.

86 The Act, s 46(7). These points are made by Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56 at 57-58.

the Parliament and contemporary approaches to statutory interpretation generally[87], this Court should construe s 46 of the Act so that it hits "the target of Parliamentary legislation" and "not merely ... record that it has been missed"[88]. Adapting what was said in the context of another Part of the Act, Pt IV is "based on the notion that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of 'monopoly' facilities to determine the terms and conditions on which they will supply their services"[89].

96 Those with "monopoly" or dominant power in a market can scarcely be expected to welcome such legislative interference in their previously uncontrolled freedom to exert their power. Understandably, they prefer to decide for themselves, amongst other things, how they distribute their products. For them, an "orderly marketing" system (to use the appellant's very words) may be congenial for many reasons. These may include the reduction or removal of price competition and the exclusion of the unpleasant risks of intra-brand competition which could threaten the cosy arrangements of the appellant and its pliant distributors selling their popular product at high margins of profit. Yet, looked at broadly, this would appear to be precisely the kind of arrangement which the Act, and specifically s 46, was designed to forbid and subject to the bracing requirements of competition.

97 These general remarks about the purposes and the policy of the Act and of s 46 do not, of course, provide the solution to the present appeal. By reference to the text of the section and to past authority, it remains for me to identify the "target" which the Parliament intended that s 46 should hit. But returning to basics in matters such as this is sometimes helpful to legal analysis as a check against excessively "metaphysical analysis"[90].

98 Where the posited outcome of a case appears to undermine the achievement of the apparent purposes of the legislation that is invoked, courts

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87 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA.

88 *Norcal Pty Ltd v D'Amato* (1988) 15 NSWLR 376 at 384 per McHugh JA citing Lord Diplock in "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice* (1978) 265 at 274; Gamertsfelder, "Why the Decision in *Hamersley Iron* may not be Good Law", (2000) 74 *Australian Law Journal* 621 at 627.

89 *Re Australian Union of Students* (1997) 147 ALR 458 at 462; [1997] ATPR ¶41-573 at 43,956; cf *United Brands Co v EC Commission* [1978] 1 ECR 207 at 278-279; [1978] 1 CMLR 429 at 487-488 cited in *Queensland Wire* (1989) 167 CLR 177 at 190.

90 Full Court reasons (1999) 90 FCR 128 at 137.

should at least pause to reconsider their analysis and check against the possibility that, somewhere along the way, they have lost their bearings. If the purpose of s 46 of the Act is to foster competition in Australian markets as a means of promoting efficiency and consumer welfare[91], and to prevent market dominance from frustrating these objectives[92], the outcome favoured by the Federal Court appears to secure these results. The outcome now favoured by this Court would appear to reinforce the power of the "monopolist" to pursue its proscribed "purpose" without the annoying hindrance of the Act. On the face of things, this appears a most curious outcome. It suggests (to my mind at least) that an incorrect approach may have been taken to elucidating the meaning of the words "take advantage of", read in the context of the Act and given the Act's stated objectives.

A textual analysis supports the decision

99 Before the decision of this Court in *Queensland Wire*, it was commonly believed in academic commentary on s 46[93], and given effect in judicial decisions[94], that the words "take advantage of" in s 46 referred to "something unusual, predatory, forceful, or deceitful"[95]. This was an available interpretation, as the Swanson Committee Report noted[96] when it said that the phrase "could mean simply to use or it could mean to misuse".

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91 O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64 at 84.

92 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 March 1986 at 1626.

93 Heydon, *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* (1989), vol 1 at 2594 [5.300] the predecessor of which was cited by Toohey J in *Queensland Wire* (1989) 167 CLR 177 at 212.

94 eg *Trade Practices Commission v CSBP & Farmers Ltd* (1980) 53 FLR 135 at 154.

95 Heydon, *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* (1989), vol 1 at 2594 [5.300].

96 Trade Practices Act Review Committee, Report to the Minister for Business and Consumer Affairs (1976) at 39, par 6.5. Section 46 of the Act was amended in 1977 to insert the express reference to a "purpose" in order to clear up ambiguity and expressly to provide for the "element of intent" as recommended by the Swanson Committee: *Trade Practices Amendment Act* 1977 (Cth). See Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56 at 58, n 7.

100 The perception of the phrase as one importing connotations of misuse was perhaps congenial to lawyers. They often have a different way of looking at prohibitions than, say, economists, who are concerned with the operation of the market which is rarely, if ever, perfectly competitive[97]. Lawyers are accustomed to dealing with concepts such as predation, force and deceit. By daily experience, they are acquainted with notions of injustice, unfairness and morality. But in *Queensland Wire*, whatever else was agreed or disagreed, this Court unanimously held that the proper *legal* construction of s 46 of the Act was that "take advantage of" simply means "use". The issue was plainly presented to this Court for decision. At first instance, in *Queensland Wire*, Pincus J had suggested that "take advantage of" connoted reprehensible, predatory, unfair and hostile intent on the part of the corporation with substantial market power. This Court rejected that opinion[98]. It dismissed the idea that, because of those words, consideration had to be given to concepts of corporate morality and social acceptability in evaluating the deployment of the market power posited[99].

101 At the time of the decision in *Queensland Wire*[100], and since[101], support has been expressed for the notion that "take advantage of" carries implications of "misuse" of dominant market power. However, this Court had a choice. By analysis of the statutory language, read so as to achieve its apparent purposes, it settled the matter. If binding authority on contested legal issues decided by this Court is to be respected, the words "take advantage of" must be acknowledged to mean simply "use". A claimant for relief need show nothing more, so far as that part of s 46 is concerned.

102 Far from favouring any erosion of this holding, I consider that it was correct. If the matter is looked at simply as an orthodox question of statutory construction, there is no need to fortify the words used by the Parliament by

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97 O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64.

98 *Queensland Wire* (1989) 167 CLR 177 at 190-191 per Mason CJ and Wilson J, 194 per Deane J, 202 per Dawson J, 213-214 per Toohey J.

99 *Queensland Wire* (1989) 167 CLR 177 at 194 per Deane J, 202 per Dawson J.

100 eg the unimplemented proposal of the Blunt Committee: Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979), vol 1 at 70, par 9.27 referred to by Toohey J in *Queensland Wire* (1989) 167 CLR 177 at 213-214; see also the speech of the Hon L K Bowen, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 March 1986 at 1626.

101 See eg Pengilley, "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management", (2000) 8 *Trade Practices Law Journal* 56 at 78.

adding adjectives of degree (such as "takes *substantial* advantage of") or pejorative adjectives (such as "takes *predatory/improper* advantage of"). If the Parliament had intended to add such adjectives, it would have done so. But such an approach would not only have been alien to the mode of drafting adopted for the Act when s 46 was originally enacted, it would also have ignored the fact that Committees of Inquiry had specifically called the ambiguity to notice[102]. Although some amendments were adopted to implement the Blunt Committee's other recommendations, no adjective was inserted. Nor was the section relevantly changed, either before or after the decision in *Queensland Wire*. Since that decision it has been open to successive governments to propose, and parliaments to enact, that this or some other provision be substituted. Instead, the interpretation adopted by this Court was allowed to stand. It should not now be undermined by the effective introduction of an adjective which is not there. It is enough that the appellant *used* its position of market dominance to attain the proscribed purpose which, it has been found, it had. Use, without anything else, was sufficient.

103 The Australian Competition and Consumer Commission ("the ACCC") which was heard as an intervener in this appeal, helpfully drew attention to a second textual consideration supportive of the view that the phrase "take advantage of" did not import any unduly stringent test[103]. This was that, in context, the words "take advantage of" must be read with what immediately follows. The use involved in the notion of "tak[ing] advantage" must be for one of the "purposes" proscribed. It is a mistake to dissect s 46 of the Act into single words or even separated phrases. The normal unit of communication in the English language is the sentence[104]. Thus, reading the relevant sentence in s 46 as a whole, there is no necessity to force onto the expression "take advantage of" notions of misuse or wrongful use of market power. To the extent that such notions exist in the section, they may be found in the classification of the "purpose" of the corporation concerned. It is in identifying that "purpose", and not in characterising the acts as "tak[ing] advantage", that the debates about proscribed, or permissible, conduct by a dominant market player arise.

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102 eg the Blunt Committee recommended that the words "take advantage" be replaced by "used" in order to avoid confusion: Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979), vol 1 at 70, par 9.27

103 The importance of the decision in *Queensland Wire* for the attainment of the objectives of national competition policy by the predecessor of the ACCC (the Trade Practices Commission) has been emphasised: Baxt, "Insights into the Commission: Views of a Former Chairman", in Steinwall (ed), *25 Years of Australian Competition Law* (2000) 64 at 67-68.

104 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397 citing *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann.

104 In the present case, this conclusion does not avail the appellant. Its "purpose" has been found, unanimously, to have been one of the purposes forbidden by the Act. It was to prevent the respondent from engaging in competitive conduct in the specified market. In other cases there could be real contests about the "purpose" of the conduct of a corporation in a dominant market position. In appropriate cases such contests might yield a conclusion that the real "purpose" was outside the statutory prohibition. There are numerous "purposes" which such a corporation might have which could explain and justify, for example, a refusal to supply a monopolist's product to a would-be competitor of current distributors. They could include the fact that the would-be competitor is judged as: (1) incompetent to handle a product that in some hands might be dangerous[105]; (2) a person with a poor credit record[106] or with unacceptable business ethics; (3) unqualified to offer essential after-sales service; (4) liable to damage the reputation of the supplier; (5) being unable to maintain accurate records; (6) prone to engage in deceptive advertising or unfair practices; or (7) likely to breach persistently the reasonable terms of a distribution agreement[107].

105 It is worth observing that no such "purpose" was, or could have been, found to justify the appellant's "use" of its market position to refuse supply of the large order for the Melbourne directory which the respondent offered to place with it. The nature of the product in question here makes all of the foregoing "purposes" inapplicable. To suggest them would have been absurd. A street directory is just not the kind of product that is dangerous or in need of expert and qualified after-sales service. Once you have it you put it in the vehicle and after-sales follow-up is scarcely a high priority. Nor were any of the other defects proved of the respondent.

106 If, then, the words "take advantage of" neither import nor require the notions of misuse of market power, it is but a small step to conclude, in the present case, the proscribed "purpose" being present, that the appellant had "take[n] advantage of" its power in acting as it did. It used its power to refuse an

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105 O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64 at 83.

106 cf *Australasian Performing Right Association Ltd v Ceridale Pty Ltd* [1990] ATPR ¶41-042; *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) 111 ALR 631; [1992] ATPR ¶41-196; Steinwall et al, *Butterworths Australian Competition Law* (2000) at 239-240 [4.43].

107 Marshall, "Refusals to Supply Under Section 46 of the *Trade Practices Act*: Misuse of Market Power or Legitimate Business Conduct?", (1996) 8 *Bond Law Review* 182 at 192; cf *Continental T V Inc v GTE Sylvania Inc* 433 US 36 (1977).

otherwise tempting order. This step the majority of the judges in the Federal Court correctly took.

107 A further argument supports the approach which this Court took in *Queensland Wire* to the interpretation of the phrase "take advantage of" in s 46 of the Act, an approach which placed "economics at the heart of s 46 analysis"[108]. By banishing evaluative notions of "normal" and "predatory" business behaviour from the concept of the phrase "take advantage of", and by posing the question: "What would the corporation with a dominant market position have done in a competitive market?", this Court offered a practical test. It is one suited to fostering competition in markets as a means of promoting efficiency and consumer welfare[109]. As this is what Pt IV of the Act is designed to achieve, the construction adopted in *Queensland Wire* had a double advantage. It conformed to orthodox legal analysis of the words of the section[110]. Additionally, it helped in the attainment of the economic objectives of the Act in a way that impermissibly importing evaluative and pejorative notions into the disputed phrase would frustrate.

108 Unfortunately, lawyers are often wedded to importing such notions[111]. To the extent that this Court now retreats from its holding in *Queensland Wire* that the phrase connotes no more than "use" of market position, it will encourage the restoration of a point of distinction which will weaken the effectiveness of s 46. It will undermine the capacity of that section to act as the Australian equivalent of analogous anti-trust laws in the United States and the European Union[112].

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108 O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64 at 64.

109 O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64 at 84.

110 Including dictionary definitions of the phrase "take advantage of": see *Queensland Wire* (1989) 167 CLR 177 at 213 per Toohey J.

111 O'Bryan, "Section 46: Law or Economics?", (1993) 1 *Competition and Consumer Law Journal* 64 makes this point by reference to a number of decisions of the Federal Court given before the present litigation.

112 Marshall, "Refusals to Supply Under Section 46 of the *Trade Practices Act*: Misuse of Market Power or Legitimate Business Conduct?", (1996) 8 *Bond Law Review* 182 at 183. See eg *United Brands Co v EC Commission* [1978] 1 ECR 207; [1978] 1 CMLR 429.

The authority of *Queensland Wire* supports the decision

109 The respondent's primary submission was that, properly analysed, *Queensland Wire* stands for only one relevant legal proposition applicable to this case. This was that "take advantage of" means no more than "use". In determining whether a corporation has "take[n] advantage of" its market power for a proscribed purpose, the respondent argued that all that was necessary was proof that, as a matter of fact, the corporation, having such power, had refused supply for a proscribed purpose. Upon this view, it was unnecessary to pose hypothetical questions (sometimes difficult to resolve) as to whether such corporation could or would, acting rationally, have engaged in the forbidden conduct if it were subject to effective competition. My own opinion is that this is a correct analysis of s 46(1) of the Act. I also consider that it is what the decision in *Queensland Wire* stands for as a binding principle of law. There is nothing in the language of the section itself that *obliges* the ascertainment of an answer to a hypothetical question. If, as was held in *Queensland Wire*, "take advantage of" means no more than "use", that presents a purely factual question to be answered. In short, if the supplier enjoys a substantial degree of market power, the grant or refusal of supply is necessarily, as a matter of fact, taking advantage of (sc "using") such market power. It is doing so because the power to grant, or refuse, supply is part of the power substantially to control the market.

110 When, in the joint reasons of Mason CJ and Wilson J in *Queensland Wire*, their Honours deal with the central question for decision in that case, they content themselves with ruling out the "additional, unexpressed and ill-defined standard"[113] which the notions of "reprehensible", "predatory" or "unfair" conduct involved. Instead, they opted for the synonym of "uses of market power"[114]. It is only when they went on to apply the principle so propounded that they tested the impugned corporation's conduct, in that case, by considering what it would have done if it lacked the market power, "in other words, if it were operating in a competitive market"[115]. The same can be said of the reasoning of Dawson J[116] (who expressed agreement on this point with the reasons of Deane J) and of Toohey J[117]. The application of a test expressed in hypothetical terms may sometimes be useful. But it is not essential. As I read *Queensland Wire*, it was not part of this Court's holding.

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113 *Queensland Wire* (1989) 167 CLR 177 at 191.

114 *Queensland Wire* (1989) 167 CLR 177 at 190-191.

115 *Queensland Wire* (1989) 167 CLR 177 at 192.

116 *Queensland Wire* (1989) 167 CLR 177 at 202-203.

117 *Queensland Wire* (1989) 167 CLR 177 at 216.

111 The respondent's primary argument also gains support from the reasoning of Deane J[118]. The fact that there were differences and uncertainties as to the hypothetical exercise (and that it was expressed in different ways) constitutes a further reason for confining the binding rule established in *Queensland Wire*, relevantly, to no more than that "take advantage of" in s 46 of the Act means "use" (and does not mean "misuse").

112 However, if I am wrong in the foregoing, it is appropriate to consider the alternative approach[119] on the footing that the hypothetical question forms part of the rule for which *Queensland Wire* stands. If this is done, it was certainly open to the majority judges in the Federal Court to conclude that the impugned conduct on the part of the appellant involved its taking advantage of its market power, in the sense that, acting rationally, it would and could not (but for that power) have acted as it did. Specifically, it would and could not have refused the respondent's offer to purchase between 30,000 and 50,000 copies of the Melbourne directory each year.

113 In the postulated competitive market required by the hypothetical question, the respondent would have had access to purchase the given number of copies of the directory from another source. Only the respondent's position as a "monopolist", and the exercise of power which it exerted in the form of its rigid marketing arrangement, prevented the postulates of a competitive market being fulfilled. The appellant's own evidence was that it sought to maximise its sales. In the Sydney market, where it lacked dominance, it acknowledged that it would have been delighted to supply 50,000 copies of the directory. It was therefore certainly open to the majority judges in the Federal Court to infer that the refusal to accept the respondent's order in the Melbourne market was because of some point of distinction applicable to that market. What was that distinction? Clearly, it was the position of market dominance which the appellant enjoyed in Melbourne and did not enjoy in Sydney. To infer that the refusal of supply involved "tak[ing] advantage of" the market dominance, in the non-judgmental sense of "using" it, was therefore, clearly, a conclusion available to the judges of the Federal Court[120]. Indeed, with every respect to those of a different view,

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118 *Queensland Wire* (1989) 167 CLR 177 at 194-195.

119 cf reasons of Merkel J (1998) 42 IPR 627 at 641; Full Court reasons (1999) 90 FCR 128 at 134-135 per Heerey J (diss), 139-140 per Sundberg J, 144 per Finkelstein J.

120 In *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 144 Lockhart J proposed a practical test: "The central determinative question to ask is: has the corporation exercised a right that it would be highly unlikely to exercise or could not afford for commercial reasons to exercise if the corporation was operating in a competitive

(Footnote continues on next page)

taking the commercially realistic approach which the authorities mandate, no other result seems consonant with the approach laid down in *Queensland Wire*[121].

114 The basic mistake of the appellant's submissions was that they sought, by a back door, to revive a pejorative view of the phrase "take advantage of" which every member of this Court rejected in *Queensland Wire*. For the purposes of s 46 of the Act, the arguments about the character of the use of market power are to be considered, if at all, in the classification of the "purpose" of the impugned corporation. Little wonder that the appellant should try to shift the focus from that word, given the unanimous opinion of the judges below that its "purpose" was not some competitive or efficiency-driven purpose that could withstand examination. It was the forbidden purpose of preventing the respondent from engaging in competitive conduct in the wholesale and retail market for street directories in Melbourne.

The decision is consistent with overseas approaches

115 The foregoing is sufficient to dispose of the appeal. However, it is not inappropriate for me to add that the view which I favour is also consistent with the way similar problems have been addressed in developed market economies, such as those of the United States and the European Union. In *Queensland Wire*, this Court looked to the law in those economic systems to derive guidance upon the large concepts reflected in s 46(1) of the Act[122]. We should do the same here.

116 Of course, there are dangers in referring to foreign analogies, given the differing language of the *Sherman Act*[123] and of the comparable provisions of the Treaty of Rome of 1957[124]. To assert that differences exist is to miss the point which, by analogy, I seek to make. Under both of those anti-trust systems (and to achieve their respective purposes of promoting competition and protecting

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market?"; cf Clarke and Sweeney, *Marketing and the Law*, 2nd ed (2000) at 496 [16.25].

121 Full Court reasons (1999) 90 FCR 128 at 139 per Sundberg J.

122 *Queensland Wire* (1989) 167 CLR 177 at 188-190 per Mason CJ and Wilson J, 200-202 per Dawson J, 210-211 per Toohey J.

123 §2.

124 Treaty Establishing the European Economic Community, done at Rome 25 March 1957, 298 *United Nations – Treaty Series* 11 (entered into force 1 January 1958), Art 86. See Marshall, "Refusals to Supply Under Section 46 of the *Trade Practices Act*: Misuse of Market Power or Legitimate Business Conduct?", (1996) 8 *Bond Law Review* 182 at 185.

consumers) exclusionary conduct by a corporation which enjoys a position of market dominance is looked at with vigilant scrutiny. This is because it is the very existence of that corporation's market power which renders its conduct potentially anti-competitive. In the context of the *Sherman Act*, Scalia J in the Supreme Court of the United States in *Eastman Kodak Co v Image Technical Services Inc*[125] explained the approach of the law in that country in terms that I regard as applicable to s 46 of our Act:

> "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist."

117 A like approach has been adopted by the European Court of Justice in *Commercial Solvents Corp v EC Commission*[126]. In that case, the dominant manufacturer of certain chemical products, used in the production of drugs to combat tuberculosis, decided that it would no longer supply the products to other drug producers because it intended to produce the finished drugs itself. A former customer complained that the refusal to supply amounted to a breach of Art 86 of the Treaty of Rome. The European Court of Justice upheld the complaint. It decided that a corporation, enjoying market dominance for the supply of such products, could not, without legitimate business justification, refuse to supply those products when such refusal would lead to the elimination of competition in the downstream market for derivative products. That Court's principle now extends beyond raw materials[127]. Similar results have been achieved in the courts of the United States[128].

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125 504 US 451 at 488 (1992). See also *United States v Grinnell Corp* 384 US 563 at 570-571 (1966); *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 at 605, n 32 (1985); *Intergraph Corporation v Intel Corporation* 195 F 3d 1346 at 1352-1356 (1999); *United States v Microsoft Corporation* 84 F Supp 2d 9 (1999) (findings of fact); 87 F Supp 2d 30 (2000) (findings of law); 97 F Supp 2d 59 (2000) (remedy).

126 [1974] 1 ECR 223; [1974] 1 CMLR 309.

127 *Hugin Kassaregister AB v EC Commission* [1979] 2 ECR 1869; [1979] 3 CMLR 345; *Centre Belge d'Etudes de Marché-Télé-Marketing SA v Compagnie Luxembourgeoise de Télédiffusion SA* [1986] 2 CMLR 558.

128 See eg *United States v Aluminum Co of America* 148 F 2d 416 (1945); "Refusals to Deal by Vertically Integrated Monopolists", (1974) 87 *Harvard Law Review* 1720; Steinwall, "*Microsoft*: Tying as an independent act of actual monopolisation in a market for a tying product", (2000) 8 *Competition and Consumer Law Journal* 125 at 141-142.

118 There are good reasons, in Australia, for adhering to substantially common legal approaches to the common problem of misuse of market power by dominant participants. In a world of global markets and intersecting economies, it seems scarcely appropriate now to adopt a construction of s 46(1) of the Australian statute which effectively affords a large loophole for monopolists, with dominant market position, to entrench themselves in anti-competitive distribution arrangements[129]. Such arrangements constitute an apparent affront to the overall strategy of the Act. They also threaten "to defeat or forestall the corrective forces of competition"[130].

119 In the United States, it is clear law that "consideration of intent [ie purpose] may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct"[131]. There is no good reason why a different approach should be taken to the equivalent Australian statutory provision. There is every reason why it should be taken to fulfil the purposes of s 46 of the Act. Adhering to the approach in *Queensland Wire* secures that result. Departing from the ruling in that decision, and loading the words "take advantage of" with values and objectives that they were not meant to carry, not only defeats the settled authority of this Court. It also undermines the achievement of the competitive, efficiency and consumer protection objectives of the Act.

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129 As to the international dimension of competition policy, see Fels, "Watersheds, Minefields and the Role of the Commission", in Steinwall (ed), *25 Years of Australian Competition Law* (2000) 25 at 61-62. The Marrakesh Agreement establishing the World Trade Organization (WTO Agreement) contains the agreement of member states (of which Australia is one) that they will ensure that abuse is avoided on the part of "Monopolies and exclusive service suppliers". That provision is in the WTO Agreement because such enterprises notoriously introduce anti-competitive conduct inimical to the object of efficient markets through competition which the WTO Agreement seeks to uphold: see Marrakesh Agreement establishing the World Trade Organization (WTO Agreement), done at Marrakesh 15 April 1994, (1995) *Australia Treaty Series*, No 8 (entered into force 1 January 1995), Annex 1B, General Agreement on Trade in Services (GATS), Pt 2, Art 8.

130 *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 at 488 (1992) per Scalia J (diss).

131 *United States v United States Gypsum Co* 438 US 422 at 436, n 13 (1978).

Conclusion and orders

120 The conclusions reached by the primary judge and the majority of the Full Court were therefore open to them. No error has been shown in their reasons. On the contrary, their reasons conform to this Court's authority. They were correct, both legally and factually.

121 The appellant criticised the form of the orders made by the primary judge and confirmed by the order of the Full Court. There is no doubt that the framing of orders to give effect to a decision that s 46 of the Act has been breached presents difficulties[132]. The object of such orders should be to make clear and unambiguous the obligation to be observed by the corporation that has been found to be in default[133]. Generally speaking, it would be undesirable for judges to be engaged in the ongoing supervision of the business of a corporation found to be in default[134]. However, even at the risk of offending purists, it cannot be the case that a difficulty in framing orders in orthodox terms can frustrate the effective operation of sections such as s 46 of the Act. Orders in the form of injunctions are clearly available to give effect to the decision of a court, and to implement the high policy of the Parliament. This is obviously the assumption upon which the Act is drafted. So long as the Act is valid (and the contrary was not suggested), courts must craft statutory injunctions to give effect to the Act's purpose, even when it requires a little legal imagination uncongenial to procedural and remedial traditionalists[135]. Orders similar to the injunction provided in the present case have been made in other cases[136].

122 I am not inclined to delay over the form of relief, given that, by majority in this Court, it will be ordered that that relief be set aside. Commonly, as happened after the decision of this Court in *Queensland Wire*, the parties resolve

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132 eg Hanks and Williams, "Implications of the Decision of the High Court in *Queensland Wire*", (1990) 17 *Melbourne University Law Review* 437 at 459-461.

133 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259.

134 Steinwall et al, *Butterworths Australian Competition Law* (2000) at 233 [4.36] with reference to *United States v Aluminum Co of America* 148 F 2d 416 (1945).

135 cf *Levy v Victoria* (1997) 189 CLR 579 at 650-652; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 367-369.

136 *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581; [1987] ATPR ¶40-809; see also McMahon, "Refusals to Supply by Corporations With Substantial Market Power", (1994) 22 *Australian Business Law Review* 7 particularly where the approach of United States case law is discussed.

their dispute by reference to the reasons of the Court[137]. They accommodate their conduct to the Court's explanation of what is required by the law. In the event that the orders made by the primary judge were considered to be too wide, it would have been open to the appellant to seek their confinement. The judgment entered at first instance was, and was expressed to be, interlocutory. No insurmountable obstacle would have arisen for reargument about the form of the orders. Their purpose was clear. It was to eliminate the anti-competitive element in the cosy distribution system from which the respondent had been excluded and which it sought to re-enter and subject to the bracing and beneficial phenomenon known as competition.

> "Both economic theory and empirical observation attest to the social utility of the competitive process. Economic markets work best when … the competitive process is given full reign. The misuse of market power to achieve a private gain is the very antithesis of what the competitive process seeks to achieve, namely an equality of opportunity for all the firms in a market to succeed. From the point of view of competition policy, the use of market power by a firm to damage the competitive process leads to a social welfare loss." [138]

123 The appeal should be dismissed with costs.

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137 Hanks and Williams, "Implications of the Decision of the High Court in *Queensland Wire*", (1990) 17 *Melbourne University Law Review* 437 at 461.

138 See Round, "Prohibiting the Abuse of Market Power: Rediscovering s 46?", in Steinwall (ed), *25 Years of Australian Competition Law* (2000) 102 at 102.