Can a Corporation No Longer Maximise Profits - Misuse of Market Power and the Decision in *Melway v Hicks*

LYNDEN GRIGGS*

> Clearly enough, the High Court [*in Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*] intended inefficient and therefore anti-competitive conduct to be sufficient grounds (together with the requisite market power) to establish liability under s46. Whether the High Court intended efficiency to be a complete defence, however, is another matter entirely.'[1]

The issue raised here may once again be presented before the High Court, following the Full Federal Court decision of *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (trading as Auto Fashions Australia)*.[2] Leave to appeal to the High Court has been sought.[3] The relationship between s 46[4] of the *Trade Practices Act 1974* and situations where a monopolist, near monopolist or supplier refuses to deal has been considered in a number of cases.[5] Similarly, the issue has attracted much academic comment.[6] Behind this debate about the use

* Senior Lecturer in Law, University of Tasmania. My thanks to an anonymous referee. The usual caveat applies.

1 P Prince, 'Queensland Wire and Efficiency – What can Australia Learn from US and New Zealand Refusal to Deal Cases?' (1998) 5 *CCLJ Lexis* 1, 91.

2 (1999) ATPR 41-693.

3 R Baxt, 'Section 46 given added strength' (1999) 15(6) *Company Director* 42, 43.

4 Section 46 states: (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.

5 *McDermott v BP Australia Ltd* (1997) ATPR 41-547; *Regent's Pty Ltd v Subaru (Aust) Pty Ltd* (1996) ATPR 41-463; *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd* (1994) ATPR 41-318; *Aut 6 Pty Ltd v Wellington Place Pty Ltd* (1993) ATPR 41-202; *Berlaz Pty Ltd v Fine Leather Care Products Ltd* (1991) ATPR 41-118.

6 Just some of the literature on s 46 which includes argument surrounding refusal to deal includes: S J Lee, 'Queensland Wire Industries: A Breath of Fresh Air' [1989] 18 *Federal Law Review* 212; M Janet, 'The Meaning Of 'Use' Of A Dominant

of economic efficiency as a complete defence to an allegation of a misuse of market power lies an issue which exists at the very heart of competition policy in this country. Should the goal of competition policy be narrowly defined in terms of consumer benefit, ie lower prices, improved choice, or should the objective be broader, but arguably more nebulous, that being a more productive, efficient economy which will (hopefully) increase the welfare of the Australian community as a whole – through increased employment opportunities, increased competitiveness and greater export dollars.[7]

Readers would be aware that the High Court ruled in *Queensland Wire Industries v BHP* that BHP would not have engaged in the conduct in question in a competitive market. There was in essence a causal link between their market power and the use of that power – this usage did not have any moral overtones, commercially reprehensible conduct was not required.[8] Despite this decision requiring an analysis of what a company would do in a competitive market[9] – in

Position: from Queensland Wire to Electricity Corp v Geotherm Energy' (1993) *23 Victoria University of Wellington Law Review* 191; W Pengilley, 'Misuse Of Market Power: Present Difficulties, Future Problems' (1994) 2 *TPLJ* 27; K McMahon, 'Refusals To Supply By Corporations With Substantial Market Power', (1994) 22 *ABLR* 7; S Corones, 'The Relative Significance Of Market Shares And Barriers To Entry As Indicators Of Market Power' (1993) 21 *ABLR* 373; W Pengilley, 'Refusal To Supply Until A Debt Is Paid Does Not Amount To A Misuse Of Market Power', (1993) 3 *Australian Corporate Lawyer* 43; G Raitt, 'Taking Advantage of Market Power: The Competitive Market Hypothesis' (1999) *LIJ* 70; R Dammery, 'Section 46 of the Trade Practices Act: The Need for Prospective Certainty' (1999) *CCLJ Lexis* 4; Sullivan and Jones 'Monopoly Conduct, Especially Leveraging Power From One Product Or Market To Another' in Jorde and Teece (eds), *Antitrust, Innovation and Competitiveness* (1992) 165; R L Smith and D K Round, 'Section 46: Oligopoly and Predatory Pricing' (1998) *CCLJ* 15; S J Hardy, 'Misuse of Market Power – Purpose or Effect' (1997) 5 *TPLJ* 114; M G Landrigan, 'Is the Australian Rugby league Wrapped Up?... Section 46 of the Trade Practices Act and the Cellophane Fallacy' (1996) 4 *TPLJ* 156; Sullivan, 'Post –Chicago Economics: Economists, Lawyers, Judges and Enforcement Officials in a Less Determinate Theoretical World' (1995) 63 *Antitrust Law Journal* 669.

[7] As Prince, above n 1, 2-3 says:

> Indeed debate continues over the fundamental objective of Australian competition law. Should its primary aim be to improve the standard of living of consumers by encouraging lower priced and better quality goods and services? Or is the key objective to provide a more efficient business environment to assist producers and manufacturers, and by so doing to improve the welfare of society as a whole?

[8] See the comments by S Corones, *Competition Law in Australia* (1999) 321.

[9] It can be noted that prior to *Queensland Wire v BHP* (1989) 83 ALR 577, the legislation had been restrictively interpreted. For example in *TPC v CSPB Farmers Ltd* (1980) 5 TPC 778, s 46, as it was then drafted, was held not to have been infringed even though the sale price of the item in question had been reduced by

essence an economic analysis, later cases have tended to focus on the presence or absence of a proscribed purpose.[10] This later development was subject to stringent criticism by O'Bryan.[11]

> Despite the High Court's judgment in *Queensland Wire*, which decided that the content of s46 was economic law and that a contravention did not require a predatory intent, s46 litigation continues to be decided without regard to economics and with over-emphasis on the issue of purpose. This is the arena of lawyers, who search vigilantly for evidence of purpose, and grapple with philosophical differences between foreseen outcomes and motives, intention and purpose. This too, is the area of judges, more skilled in assessing predatory or aggressive behaviour than the economic benefit or harm flowing from business conduct.
>
> But this is the old law of monopolistic practices, which has more to do with impressions of 'normal' or 'predatory' business behaviour than efficiencies in industry. It is this old law which the High Court sought to overturn when it asked the question: 'What would BHP have done in a competitive market'.[12]

Melway v Hicks continues this trend. Once again there is an absence of detailed debate surrounding the economic efficiency as against equity debate of s 46 and a failure to implement, what some would see, is the economic law that is promulgated in the legislation.

The Full Federal Court decision in *Melway v Hicks* is examined against this background. Without any attempt to resolve the debate as

CSPB Farmers from $178 to $144.60 when a new competitor had begun to advertise that it would sell the same item at $145. The result of this conduct by CSPB was that the new competitor declined to enter the market. The Commission argued that CSPB was aware that its selling price was high, and did nothing until a new competitor indicated its intention to enter the market. The claim of the Commission was rejected. CSPB Farmers was able to point to a systemic method of price calculation, a system that had not been altered when the reduced price was announced. In the Annual Report of the Trade Practices Commission for the year ending 30 June 1980, the Commission indicated that 'monopolisation in terms of the Act is going to be very difficult to establish and that cases are therefore likely to be rare'. See Annual Report for the year ending 30 June 1980, para 1.7.5. The legislation prior to 1986 was also in more restrictive terms than currently exists. Before 1986 the legislation sought to avoid monopolisation by prohibiting a company in a position substantially to control a market from taking advantage of its market power for the purpose of eliminating competitors, preventing market entry or deterring or preventing competitive conduct. The reference to controlling a market was deleted in the 1986 amendments and replaced by the present test of a substantial degree of market power.

10 See for example *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1991) 27 FCR 460; *Eastern Express v General Newspapers Pty Ltd* (1992) 35 FCR 43.

11 O'Bryan, 'Section 46: Law or Economics?' (1993) 1 *CCLJ* 64.

12 Ibid 84.

to whether s 46 should indeed be interpreted solely on the basis of economic grounds, or whether other considerations should be taken into account; the difficulties in respect of the Federal Court decision are outlined in failing to provide the type of guidance needed, as to the method of analysis to be used, in the consideration of s 46 disputes.

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (trading as Auto Fashion Australia)[13]

Melway, for some thirty years, has published the Melway street directory for the Melbourne metropolitan area. Today this directory has some 80-90% of the market share for Melbourne street directories. Its rivals, UBD and Gregory, have somewhere in the order of 5% each. Melway did not sell the directories themselves. They appointed wholesalers representing the following retail categories:

- Newsagents and bookshops;
- Service stations;
- Office stationers;
- Authorised car dealers; and
- Automotive parts retailers.

The wholesale distributors were entitled to sell only within their particular market segment. Robert Hicks Pty Ltd, trading as Auto Fashions, had been the distributor for the last market share, but Melway had terminated their distributorship because Melway was dissatisfied with some aspects of their performance. The trial judge considered that the dominant reason for the replacement of Auto Fashions was Melway's belief that Beyond Auto Pty Ltd 'would do a better job'.[14] After its termination Auto Fashions sought to purchase 30,000-50,000 directories per annum, with the intent that it would sell to any retailer, irrespective of which particular market that retailer was in. Melway declined to supply. At first instance, Merkel J held that Melway had contravened s 46 of the *Trade Practices Act 1974*. It was only because of Melway's dominant position that they could afford to refuse to supply the directories. In a competitive market they would have sold the items.[15] That finding was appealed to the Full Federal Court, which in a two-to-one decision dismissed the appeal.

13 (1999) ATPR 41-693.

14 Ibid 42,858.

15 *Robert Hicks Pty Ltd (trading as Auto Fashions Australia) v Melway Publishing* (1999) ATPR 41-668, 42,522:

Two questions were relevant.[16] Did Melway take advantage of its market power by refusing to supply the directories, and did they take advantage for a purpose proscribed by s 46? The majority said yes to both questions.[17] In a competitive market, Melway would have supplied the street directories. They would not have voluntarily lost market share to a competitor. It only refused to supply because there was no other street directory that a substantial number of people wanted to buy.[18] The fact that the distribution system had been adopted from the start of the production of the Melway directory, some thirty years ago, when its market share was obviously zero, was irrelevant. The relevant causal link was the market share with the refusal to supply – not any link between the market share and the maintenance of its distribution system.

> The proper inferences to draw are that with a 10% market share, [Melway] would have supplied the directories, and that its refusal to supply at a time when it had an 85% share was because it was able to do so for want of any competitor who could effect the supply.[19]

By contrast to the majority, the minority approach of Heerey J was very different. The evidence did not categorically support a conclusion that in a competitive market, Melway would have supplied 30,000-50,000 directories to Auto Fashions. Indeed, there was no suggestion that the supply of these directories would have meant ad-

> It is only be 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 was 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 to supply Melway has taken advantage of its market power.

16 As noted by Finkelstein J (1999) ATPR 41-693 at 42,868.

17 The two majority judges were Sundberg and Finkelstein JJ; the minority judge Heerey J.

18 As stated by Sundberg J (1999) ATPR 41-693 at 42,866:

> In a competitive market for street directories, the appellant would have refused supply, thereby voluntarily losing market share to a competitor. In the real world it was able to refuse supply only because it had no effective competitor who could provide a street directory that lots of people wanted to buy. In my view, in refusing to supply directories to the respondent, the appellant used or availed itself of its market power, and thus took advantage of it.

19 Ibid 42,867; see also Finkelstein J, ibid 42,869.

ditional sales to Melway.[20] The matter had to be considered from the perspective of economic efficiency.[21]

> [T]he point remains that the existence of a legitimate business reason which would explain the impugned conduct irrespective of the degree of market power necessarily points against a conclusion that such conduct in fact involved taking advantage of that power.[22]

Support for the minority approach was found in the United States Supreme Court decision in *Aspen Skiing Company v Aspen Highlands Skiing Corporation*,[23] a decision which, although on its facts found a misuse of power, was based on an examination of the efficiency of the conduct in question. Aspen Skiing operated the slopes of three mountains, Aspen Highlands operated the slopes of one mountain. From 1962-1978 they had issued a four-mountain ticket. Revenue from the All-Aspen ticket was decided according to usage of the mountains. If skiers were unable to get a four-mountain ticket, it was considered that the vast majority would just use the slopes of Aspen Skiing. In 1978 Aspen Skiing decided not to cooperate in the four-ticket pass and this saw the relevant market share of Aspen Highlands fall from 20.5% to 11%. Aspen Skiing was ordered by the Court to offer a combined ski ticket. The court considered that it was necessary to consider the impact on consumers, and also whether Aspen Skiing was seeking to exclude rivals on a basis other than efficiency. As stated:

> In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency', it is fair to characterise its behaviour as predatory.[24]

20 (1999) ATPR 41-693 at 42,862 (Heerey J)

> The evidence did not support a hypothesis that in a more competitive market Melway would have necessarily supplied 30,000-50,000 directories to Auto Fashions because it (Melway) would otherwise have lost those sales. So in refusing to supply Auto Fashions, Melway was not denying itself sales which it would have been commercially compelled to make in a more competitive market. Absent some dramatic expansion of the total market – an eventuality not suggested by the evidence – Melway would have made substantially the same sales.

21 Ibid 42,862 (Heerey J) quoting Hank and Williams, 'Implications of the Decision of the High Court in Queensland Wire' (1997) 17 *Melbourne University Law Review* 437.

22 (1999) ATPR 41-693 at 42,862-3.

23 472 US 585 (1985). Heerey J quoted this judgment at ibid 42,863.

24 472 US 585 (1985) at 605.

There was no normal business purpose for the exclusion of the rival from the four-mountain ticket - indeed Aspen still conducted multi-mountain operations in other areas.[25] Improper conduct was to be determined by the economic inefficiencies in excluding a rival, not in an assessment of the subjective intent of the monopolist or near monopolist. 'The key assessment the court needed to make was whether a corporation had behaved in an economically efficient manner'.[26] The legitimate business reasons put forward by Aspen Skiing, such as the complexity of the coupon system for the issuing of tickets and/or the inferior skiing at Aspen Highlands were not relevant – they did not go to economic efficiency.

Whilst the analysis in *Aspen* was the same as that of Heerey J in *Melway*, the facts were distinguishable so as to lead to a different result (in the view of his Honour). Melway had a legitimate reason for the distribution system that it operated – this system had been in operation for many years and there were genuine economic reasons to exclude Auto Fashions. The critical factor was not the purpose of Melway, but whether the corporation's actions were of such efficiency that they would have been adopted in a competitive market. In essence, Melway was seeking to maximise profits, not sales – and this is what any corporation in a hypothetical market would have been seeking to achieve.

> [E]conomic theory is quite clear that suppliers will not maximise sales at the expense of profit. Suppliers are assumed to aim to maximise profit, and so will supply up to the point additional sales start to detract from profits ... In my opinion, [the court in Melway] have erred in their analysis of likely conduct in the hypothetical competitive market by considering sales without regard to the likely effect on profit.[27]

Heerey J again emphasised this approach in his Honour's recent decision of *Australian Competition and Consumer Commission v Boral Ltd.*[28] This case was also dealing with an alleged breach of s 46 through the practice of predatory pricing. In finding no breach, his Honour stated:

> If the impugned conduct has a business rationale, that is a factor pointing against any finding that conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would

25 See the comments by Prince, above n 1, 13.

26 Ibid 14.

27 Raitt, above n 6, 71.

28 [1999] FCA 1318 (Unreported, Heerey J, 22 September 1999).

> ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power.[29]

The conduct of Melway can also be contrasted with that of Kodak, as explained in the decision of *Eastman Kodak Co v Image Technical Services Inc.*[30] Kodak had a cooperative arrangement with various independent service organisations that maintained Kodak photocopiers. This long standing successful arrangement was discontinued by Kodak, a discontinuance which was deemed to violate the United States equivalent to s 46 of the *Trade Practices Act 1974*. Again Kodak could not point to any objective reason for the change in policy.

Most recently this decision of *Eastman Kodak* was applied by the United States District Court in *Intergraph Corporation v Intel Corporation*[31] Intel is the world's largest manufacturer, designer and supplier of microprocessors for use in desktop computers. Their world-wide market share was in the vicinity of 88% with a revenue of some US$14.6 billion out of a total of US$16.6 billion. This dominance arose from its compatibility with the Windows based operating systems. Presently, Intel is best known for its Pentium line of chips. Intergraph was one of the first computer manufacturers to develop workstations based on Intel chips. The adoption of this technology by Intergraph was assisted by the transference of information from Intel to Intergraph. In 1997, Intel required manufacturers such as Intergraph to sign comprehensive non-disclosure agreements. Subsequently, Intel sought to add a term to the non-disclosure agreement with Intergraph, requiring Intergraph to provide Intel with royalty-free licence to the patents Intergraph had obtained. This development arose from action by Intergraph against its competitors for patent infringement. Many of those that were sued sought indemnity from Intel. Intel began cross-licence negotiations with Intergraph and it was when these negotiations failed that Intel sought to add the additional term in the non-disclosure agreement. Intergraph rejected the additional term, whereupon Intel removed Intergraph's access to chip samples and information.

The court concluded that Intel had breached its duty as a monopolist not to misuse its power in a manner that would unreasonably or unfairly harm competition.[32]

29 Ibid [158].

30 504 US 451 (1992).

31 3 F Supp 2d 1255 (1998); (1998) WL 180606 (NDAla).

32 (1998) WL 180606, 18. It should be noted that the decision was ultimately based on the essential services doctrine. See (1998) WL 180606 at 18.

> [T]he court concludes that Intel's refusal to supply ... essential technical information to Intergraph likely violates [the US legislation] ... *Moreover, the court concludes that Intel has no legitimate business reason to refuse to deal with Intergraph.*[33]

What these American cases establish is that a strong commercial justification needs to be made if long-standing distribution arrangements are to be altered. If the arrangements have continued to exist for a significant period of time and the entities are profitable, then a change of circumstances sufficient to warrant the termination of the distribution arrangement will need to be clearly given.[34] What these decisions of the United States demonstrate is that if the previous arrangements were successful (*Aspen*, four-mountain ticket: *Eastman Kodak* repair and maintenance of photocopiers: *Intergraph*[35] supply of information and chips); then a legitimate business justification must be provided for the change of policy. Of course, what may be difficult to determine is the extent to which legitimate business concerns and economic efficiency are one and the same. For example, American courts have permitted companies the right to refuse to deal where the company has moral or ethical concerns with the customer.[36] Having said this, however, the American decisions and *Queensland Wire* all dictate that the dominant standard is one of economic efficiency.[37]

These decisions can be contrasted with the decision in *Melway*. In that case the company was not permitted to stand by its long-standing distribution arrangements as a reason for refusal to supply. The failure of the court to undertake a detailed economic analysis, as appeared to be dictated by the High Court in *Queensland Wire*, leaves

33 Ibid 19. (emphasis added).

34 See the comments by Corones, above n 8, 357-58.

35 This decision has been criticised, particularly in the use of the essential services doctrine to support the courts finding. See the comments by W G Papciak, 'Antitrust, Sherman Act Violations – Essential Facilities Doctrine, Intergraph Corp v Intel Corp.' (1999) 14 *Berkeley Technology Law Journal* 323, 343; M A O'Rourke, 'Striking a Delicate Balance: Intellectual Property, Antitrust, Contract, and Standardization in the Computer Industry' (1998) 12 *Harvard Journal of Law and Technology* 1.

36 Such as refusal to sell advertising space to an exhibitor of pornographic movies (*America's Best Cinema Corp v Fort Wayne Newspapers Inc* 347 F Supp 328 (1972); see also *Homefinders of America Inc v Providence Journal Co* 621 F 2d 441 (1980).

37 As stated by McMahon, above n 6, 11. 'In the United States Supreme Court case of Aspen the test for exclusionary conduct was the Chicago School standard of 'exclusion on some basis other than efficiency'.

the decision open to criticism[38] and, as previously noted, possibly subject to appeal.[39]

The High Court in *Queensland Wire* required that the courts apply an analysis to s 46 based on the hypothetical competitive market – yet no indication was given how this was to be achieved.[40] Arguably it is this very reason that subsequent decisions have tended to focus on the more legally familiar territory of proper purpose.[41] The majority in *Melway* falls into this trap. By not providing any detailed economic analysis of the competitive market in which Melway conducted itself, it has given no direction as to the policy divide between the role of economic efficiency in s 46 and the equity objectives of the section. As stated in the United States decision of *MCI v AT & T*:

> [The first question is] whether we should focus our examination on economic efficiency and consumer benefit, or whether we should more expansively consider the political or social consequences of bigness or concentration of economic power.[42]

In answering this some would suggest that it is solely the role of government to choose between economic efficiency and equity objectives.

It is democratically-elected governments that must choose between different weights or 'social welfare functions' to determine what is desirable, depending on what they think equity is. They must decide how to trade off efficiency and equity objectives. They could promote the welfare of consumers and producers through the market by addressing market failure. They could compensate market disadvantaged people by social security payments. That is, they must consider what their role is as economic managers of society's resources as a whole and of resources available for social security and wage programs.[43]

The court in *Melway* didn't take up this opportunity. Accordingly, a supplier in a position of monopoly or near monopoly is none the

38 See the article by Raitt, above n 6 ,.

39 As noted by Baxt, above n 3, 43.

40 As noted by Prince, above n 1, 34. 'Later cases have simply not come to terms with – or have just not accepted – the central theme of Queensland Wire – that economic efficiency should be the key criterion for determining liability under s46.'

41 As noted by O'Bryan, above n 11, 84. See also the comments by Prince, above n 1, 7.

42 708 F 2d 1081, 1110.

43 C Johnston, 'Consumer Welfare and Competition Policy' (1996) 3 *CCLJ* 245, 258.

wiser as to when they may refuse to supply. 'In other words, there is no essential link between competitiveness and a decision to supply only within one's group although the High Court [in *Queensland Wire*] seems to believe that one necessarily involves the other'.[44]

Can this question be answered? It is possible to delineate the circumstances when a monopolist or near monopolist can refuse to deal with another entity. First, it can be submitted that there lies an important distinction between the supply to a new customer and supply to an existing client. Obviously, it cannot be expected that supply should occur to each and every person who requests it.[45] A supplier will legitimately have an interest in the wholesalers or retailers who are marketing their products. A selective distribution system could be justified by the type of product, the cost of distribution, the promotion of the brand, or indeed and perhaps overriding all other criteria, the maximisation of profits. By contrast, the refusal to supply where there has been a previous long-standing relationship will be more difficult to justify. This should only be possible where there is such a change of circumstances that the refusal can be legitimated by an appeal to economic efficiency. However this will not resolve the matter: other factors may be considered as relevant. This could include the decentralisation of political power, the favouring of small business units, the product diversity to be provided to the consumer, and at what cost - in essence the value of economic efficiency in its promotion of macroeconomic measures such as gross domestic product, retail sales and its effect on the consumer price index as against equity in its role of ensuring a concern for the individual.

> The ... common sense view is that the responsibility of a judge is to determine which of the litigants in a dispute has the relevant legal right. It may be that in determining which party is entitled to a decision in its favour the judge must take account of efficiency considerations.[46]

The way forward is for the courts to recognise the role to be played by economic analysis, to pay due homage to it, but also to articulate the relationship that economic efficiency has with equity objectives in

[44] W Pengilley, 'Yet another layer of regulation', *Financial Review*, 17 February 1989, 15 – quoted in Lee, above n 6, 227.

[45] See the comments by Corones, above n 8, 357.

[46] J L Coleman, 'Efficiency, Utility and Wealth Maximization', in *Markets, Morals and the Law* (1988) 457. Part of the difficulty in an economic analysis is the difficulties in proving the efficiencies of the conduct in question. See the comments by F Easterbrook, 'On identifying Exclusionary Conduct' (1986) 61 *Notre Dame Law Review* 972, 975.

determining whether conduct impugns s 46.[47] It may well be the case that an analysis of this nature would have seen the same result in *Melway*. Perhaps the economic grounds outlined by the minority judge in that case, Heerey J, that Melway was simply seeking to maximise profits and would not seek extra sales at the expense of profits, would be outweighed by the need to ensure that a monopolists power would be limited – though the circumstances of this case, it is difficult to see how this would be the case.[48]

> An economic theory of law is certain not to capture the full complexity, richness, and confusion of the phenomena – criminal activity or whatever – that it seeks to illuminate ... the economist can play an important role in suggesting changes designed to increase the efficiency of the system ... [but] it is not for the economist, qua economist, to say whether efficiency should override other values in the event of a conflict.[49]

Conclusion

In many respects, the decision of *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (trading as Auto Fashions Australia)* does what many decisions since *Queensland Wire* have done. That is, provide a very limited economic analysis of the efficiency of the market player whose conduct is in question. Again what we have seen is equal or greater weight being given to the evidence of purpose of that player.

> Not only have the courts failed to specify the circumstances in which a purpose will be permissible or proscribed [under s 46], they have not identified, with any degree of precision, what the appropriate yardstick of evaluation is to be.[50]

To this end, the minority judgment of Heerey J in *Melway* is to be preferred. His Honour recognises the efficiency of the distribution system adopted by Melway, the fact that this system had seen the business grow from zero market share to some 80-90%. Accordingly, in the economic analysis of this market, Melway had not taken advantage of its market power; it was simply maximising profits, rather than sales. Perhaps this type of economic analysis is un-

[47] This will avoid the debates surrounding the intent or purpose of the market participants. See S J Hardy, 'Misuse of Market Power – Purpose or Effect?' (1997) *TPLJ* 114.

[48] It is worth noting that one of the difficulties with economic advice is the apparent lack of consistency. A point brought out by Prince, above n 1, 71.

[49] R A Posner, 'The Economic Approach to Law' (1975) *Texas Law Review* 757, 765 and 774.

[50] W Pengilley, 'Hilmer and Essential Facilities' (1994) 17 *University of New South Wales Law Journal* 24.

suited to the legal training of our judiciary,[51] perhaps there is an unease with an economic law and a need for a balancing of equity and economics – a job arguably more suited and more appropriately given to government.

> The central problem appears to be that the change articulated in *Queensland Wire* from a subjective assessment of intent and purpose to an objective test of commercial efficiency as the basis for liability under s 46 is perhaps more a matter of national economic policy than jurisprudence.[52]

If this is true, it goes some way to explaining split decisions such as *Melway*. But this debate must be raised in some forum; if Parliament won't lead the way – perhaps it is up to the judiciary to prompt our elected representatives into considering the matter.

Postscript

Sincewriting this casenote,the High Court has brought down its decision in *Melway v Hicks* [2001] HCA 13. The High Court, in allowing the appeal by Melway, preferred the reasoning of the dissenting judgment (Heery J) in the Full Federal Court. The interpretation of the counduct of Melway as simply a refusal to supply involved an 'element of oversimplification'. The critical question was whether the wholesale distribution system amounted to taking advantage of market power. The fact that this distribution system was in place before Melay had any market power demonstrated that its maintenance when Melway had market power was not necessarily an exercise of that power. Kirby J dissented, largely on the basis of consumer-protection issues and with a focus on the consideration of the refusal to supply.

51 A point recognised by Prince, above n 1, 46-7.

52 Ibid 48.