will assist producers of childrens programs who traditionally have found access to funds difficult as it will allow official co-productions to be included in the quota.

The ABA proposed release of a revised standard for discussion in early 1995. It is likely that the increased Australian C Drama quota will be included in the revised standard.

other developments

Another impetus for the production of Australian childrens drama programs is the Commonwealth Government's commitment made in the *Creative Nation* statement to spend at least 10% of the $20 million per annum allocated to the Australian Television Production Fund on Australian childrens drama programming. The programs produced with the fund will not count towards the proposed revised quota. This should further boost the production of childrens television programs.

One of the subscription television services to be operated by the ABC's dedicated subsidiary company will offer predominantly childrens programming (the other is a 24 hour news channel). The Minister has imposed on the subsidiary company's licence significant Australian content requirements. Accordingly, the amount of quality Australian childrens programs broadcast on television in Australia will increase dramatically.

The Australian Childrens Television Foundation was the host of the first World Summit on Television and Children in March 1995 which will be followed by the Festival of Television for Australian Children. One of the issues to be addressed at the Summit is the provision of childrens programs which reflect childrens needs, concerns, interests and culture.

Cathrine West is a solicitor at Blake Dawson Waldron.

What Price Access

Don Robertson and Bruce Meagher discuss the Privy Council's decision on the use of market power.

The *Competition Reform Bill 1994*, adopting many of the reforms suggested by the Hilmer Report, has highlighted the critical issue of when a corporation possessing market power may refuse access to goods or services provided by it. Even more difficult is the issue of what price that corporation may charge for access, including any monopoly rents it would otherwise be able to charge. That is, can it charge the monopoly price or must it only charge the price payable in a competitive market.

The Privy Council has recently delivered an important judgement in a case concerning these issues and the principles relating to the use of market power. Although New Zealand has its own unique regulatory framework in the area to which the judgement relates, the decision is of general importance.

background

The judgement is the culmination of a long running dispute concerning the term and conditions of interconnection between the networks of Telecom New Zealand ("TCNZ") and Clear Communications ("Clear"), the new entrant in the New Zealand telecommunications market. *[Ed.: see article "Interconnection and the dominant market position in New Zealand", CLB Vol 13 No 4, which reported on the NZ Court of Appeal decision].*

Clear brought an action under section 36 of the New Zealand *Commerce Act 1966*, a close equivalent to section 46 of the Australian *Trade Practices Act*. Section 36(1) provides:

No person who has a dominant position in market shall use that position for the purpose of:

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

(b) preventing or deterring any person from engaging in competitive conduct in that or any other market; or

(c) eliminating any person from that or any other market.

The Australian *Trade Practices Act 1974* contains similar words, except that it applies to all corporations having a substantial degree of power in a market, not just those who are dominant.

the facts

Before 1 April 1989, TCNZ had a monopoly over the provision of telecommunications services. Clear entered the market intending to compete with TCNZ for long distance calls and local calls for business customers in the CBDs of Auckland, Wellington and Christchurch.

Unlike Australia, New Zealand has no statutory right for competing carriers to interconnect with each other, no industry specific regulator and no provisions whereby guidance can be given as to the terms and conditions of interconnect, other than the provisions of the *Commerce Act*.

Whether interconnection should in fact occur was not in contest - TCNZ agreed that it should and had negotiated terms of interconnection in relation to long distance calls.

It is important to note that for the provision of business customer calls in the relevant CBDs, Clear intends to establish both local exchanges and a local loop, that is, direct connections to each of its customer's premises. The issue between the parties was the terms and conditions for interconnection which would allow Clear customers to communicate with TCNZ customers.

A number of offers and counter offers were made before matters reached an impasse in negotiations in relation to a particular contract for which Clear required interconnection.

the offer trial

At trial, TCNZ made an offer, based on a model developed by two US economists (the *"Baumol-Willig Pricing Rule"*). Under that offer:

- TCNZ would levy an access charge, equivalent to the monthly line rental for businesses, less any saving in average incremental cost resulting from Clear establishing its own local loop;

- TCNZ would levy a traffic charge from its own customers, equivalent to the standard charge less any saving occasioned by Clear carrying the call part of the way. An equivalent charge would be paid by Clear in respect of Clear's customers whose calls were delivered on the TCNZ network;
- Clear would meet the cost of the bridge between the Clear and TCNZ switches at TCNZ's incremental cost;
- TCNZ accepted that periodic adjustments might have to be made; and
- TCNZ further accepted that when Clear's local network became big enough there would be reciprocity in the access levy.

Clear rejected this proposal claiming that:

- there should be no access levy;
- TCNZ should bear sole responsibility for universal service costs;
- there should be either a free exchange of calls between networks or a settlement regime.

the Baumol-Willig Pricing Rule

This rule, most simply stated, says that it is an acceptable use of market position for the supplier of goods or services in particular markets to charge its competitor the opportunity cost arising because the competitor is supplying goods or services which, in other circumstances, the supplier might have expected to have supplied itself. This is true despite the fact that in a situation such as the present the supplier is in a position to dominate the market.

Under the *Baumol-Willig Pricing .Rule* the market is to be assessed as if it were a "perfectly contestable market", that is, a market where there is complete freedom of entry and exit and where potential competition precludes monopolistic behaviour and economic inefficiency.

The designers of the rule accepted that TCNZ was able to secure monopoly rents, which would not exist in a fully contested market. However, they did not regard this as invalidating the model.

the decision

The Privy Council concluded that the perfectly contestable market and the *Baumol-Willig Pricing Rule* were appropriate tools to use in distinguishing legitimate from illegitimate market conduct.

It was held that it was not inappropriate to recover opportunity cost even though they acknowledged that to some extent this might involve the extraction of monopoly rents.

implications of the decision

If the reasoning in this case were to be applied to section 46 of the *Trade Practices Act*, it would profoundly influence the philosophy and method of application of that section. The following important points were made:

The concepts of "purpose" and "use" of market power are interrelated. However, whilst it is legitimate to infer "purpose" from the use of market power to produce anticompetitive effects, the converse argument is not legitimate. As the court says, it is "a hopeless task" to say that TCNZ did not have an anticompetitive purpose. A competitor will always be seeking in one sense to "deter" the other competitor from competing successfully. One cannot infer that conduct is improper use of market power from such an "anticompetitive" purpose.

A court may distinguish legitimate use of market power if the market player offers its goods or services at the same price as it would in a fully competitive market, namely, at marginal cost. In other words, a person with a substantial degree of market power does not "use" it unless that person acts in a way which a person not in such a position but otherwise in the same circumstances would have acted.

In a market where there are economies of scale and scope, marginal cost is not the correct yardstick. The theory of perfect contestability is an appropriate model to use in this case. This model implies that there can be differential pricing, with prices varying in ratio to their marginal cost (Ramsay Pricing). It also implies that price should at least cover marginal cost or average incremental cost. Some prices should also deliver a contribution towards common costs arising from economies of scale and scope. Further, there is an implication that competitors are entitled to recover opportunity costs.

On this basis a market player having a substantial degree of power in the market is entitled to recover opportunity costs, even if this includes monopoly rents.

The purpose of provisions such as s46 should not be to remove the monopoly elements of pricing but to create the conditions for competition where these monopoly rents can be "competed out" of the market. A monopolist is entitled, like everyone else, to compete with its competitors. If it was not permitted to do so it would be holding an "umbrella" over inefficient competitors which competition laws are not intended to do.

Don Robertson is a partner and Bruce Meagher a solicitor with Freehill Hollingdale & Page

Improper "use" of Data

Sheila McGregor and Lesley Sutton discuss the implications of an English Court of Appeal decision for laws covering computer-held data and electronic data communications.

Section 88 of the *Telecommunications Act 1991 (Cth)* makes it a criminal offence for an employee or any person performing services on behalf of a carrier or eligible service provider (a *"prescribed person"*) to *"use"* any information or document that has come to their knowledge or into their possession in their capacity as a *"prescribed person"* except in certain defined circumstances.

The *Telecommunications Act* does not give a definition of the term *"use"*.

Similarly, the New South Wales *Privacy and Data Protection Bill* would make it a criminal offence for a public employee or former employee to *"use"* any personal information to which the employee or former employee has or had access in the performance of his or her official functions for the purpose of obtaining a financial or other benefit.

Again, there is no definition of *"use"*.

The English Court of Appeal has recently been required to look at what the term *"use"* means in the context of data protection in *R -v- Brown (Gregory Michael) [1994] 2 WLR 673.*

the facts

The case involved an alleged contravention of s5(2)(b) of the *Data Protection Act 1984 (UK)* which prohibits *"the use ... of any data, for any purpose other than the purpose or purposes described in the entry"*.

The appellant was a police officer. He was also in the debt recovery business. The appellant was found guilty of two contraventions of the *Data Protection Act.*

In the first contravention, the appellant's debt recovery business had been engaged by one party to recover a debt owed by another party. The appellant caused a computer check to be carried out via a police computer relating to the second party's vehicle. No data emerged as a result of the computer check. However, the appellant was found guilty of attempted improper use of data.

In the second contravention, the appellant again ran a police computer check on a vehicle that belonged to a party being investigated by the debt recovery agency. There was no evidence that the appellant