The Telecom New Zealand Case

Gina Cass-Gottlieb and John Mackay examine the implications of the Telecom New Zealand Court of Appeal case

The 20 year management rights to three radio frequency bands appropriate for use in cellular mobile telephone services were offered for sale by tender by the New Zealand Government as part of its privatisation policy. As a result of the tendering process and subject to the Commerce Commission's approval, Telecom Corporation of New Zealand Limited ("Telecom") became entitled to the management rights to two frequencies, AMPS A (the most sought after frequency) and TACS B. BellSouth acquired, through a New Zealand subsidiary, the rights to use a third frequency, TACS A.

The Commerce Commission refused to grant clearance or authorisation to Telecom for the purchase of the rights to AMPS A. Clearance was given for Telecom's purchase of the rights to TACS B on the condition that Telecom would sell the TACS B rights by public tender if it acquired the AMPS A rights. Telecom appealed from the decision of the Commerce Commission to the High Court. The High Court dismissed the appeal. Telecom then appealed to the Court of Appeal, which delivered its judgment on 23 June 1992.

The Issues

In essence, the issues before the Court of Appeal were:

1. Whether without the AMPS A rights Telecom had a dominant position in the market for mobile telephone services?
2. Whether any existing dominant position of Telecom would be strengthened by the acquisition of the AMPS A rights?
3. If so, whether the likely benefits to the public of the acquisition by Telecom would outweigh the likely detriment? If so, Telecom was entitled to an authorisation under s66(8) of the *Commerce Act*.

The Court of Appeal decision

The Court confirmed the Commission's and the High Court's treatment of the mobile and fixed telephone service markets as distinct markets.

However, it overturned the High Court's decision, with Justices Cooke, Casey and McKay adopting one line of reasoning, and Justices Richardson and Hardie Boys another. However, all five judges agreed with the result, which was to permit the acquisition by Telecom New Zealand of the AMPS A rights to proceed.

Was Telecom dominant?

Justices Cooke, Casey and McKay held that Telecom was and is in a position to exercise a dominant influence over the supply and price of services in both the fixed and mobile markets. It was stressed by the Court that imminent developments could be taken into account in determining the dominance of Telecom in the mobile and fixed telephone services markets. Justice Cooke found that BellSouth would be providing strong competition in the mobile market once an agreement with Telecom was finalised, but did not think that either at the time of the Commission's decision or at the time of judgment this prospect could properly be described as imminent.

On the other hand, Justice Richardson (with whom Justice Hardie Boys agreed) held that the question whether or not Telecom was in a position to exercise a dominant influence in the mobile telephone market depended on an overall assessment, having particular regard to the behavioural constraints on Telecom. Justice Richardson found that Telecom was not in a dominant position in the mobile market and accordingly was entitled to a clearance under section 66(7) for the following reasons:

- the constraints operating on Telecom were real and effective;
- there was no evidence that Telecom was extracting monopoly profits in the mobile market;
- there was no evidence that Telecom would forestall access to newcomers or only offer interconnection on discriminatory terms; and
- assessed over an appropriate time frame, BellSouth's entry, the likely entry of another competitor on the TACS band, regulatory and legal controls and the commercial and public environment provided substantial assurance of non-discriminatory interconnection. Accordingly, Telecom would be operating in an effectively competitive environment.

Authorisation of acquisition

Because Justices Cooke, Casey and McKay found Telecom to be dominant, the crucial issue for them was whether Telecom was entitled to an authorisation under section 66(8) of the Commerce Act. Section 66(8) provides:

> *"The Commission shall grant an authorisation under subsection (6) of this section if it is satisfied that the merger or takeover proposal, if implemented, would result or would be likely to result, in a benefit to the public which would outweigh any detriment to the public which would result or be likely to result from any person (whether or not that person is a participant in or otherwise a party to the merger or takeover proposal) acquiring a dominant position in a market or strengthening a dominant position in a market."*

What is required by the legislation is a balancing exercise between the likely public benefit from the acquisition and likely public detriment from the strengthening of Telecom's dominant position in either matter. Telecom argued that obtaining additional AMPS spectrum was important to Telecom in the ongoing development and upgrading of its analogue mobile network.

Justice Cooke (with whom Justices Casey and McKay agreed) accepted that the transition to digital technology was necessary to enable Telecom to improve its service and meet competition. He also held that users of Telecom's service would benefit if AMPS A and AMPS B were to be operated in tandem. In the fixed market Telecom was experiencing vigorous competition from Clear Communications Limited and in the mobile market BellSouth would be a formidable competitor as soon as it commenced business.

Justice Cooke held that the *Commerce Act* does not provide that unlimited competition is to be pursued at all costs, however wasteful of resources. If a reasonable amount of competition is being promoted, the public detriment from excluding further competition may not be

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Pornography, Free Speech and the Status of Women

Sarah Ross-Smith argues for a new rationale for the censorship of pornography

The current censorship classification guidelines came into effect on 3 July 1992. They state that one of the guiding principles is that "adults in a free society should be able to see, hear, and read what they wish, provided there is sufficient protection for young people and that those who may be offended are not exposed to unwanted and unsolicited adult material".

These statements of guiding considerations encapsulate conflicting principles. On the one hand there is a liberal and permissive approach: we live in a free society, therefore liberal freedoms of expression and action are permitted. But this has to be counterbalanced against other, collective goals, which may modify or limit an absolute right to see, hear and express one's self in a particular manner.

Freedom of speech

Freedom of speech is a hallmark of democratic society: it purportedly enables all groups within society the opportunity for criticism of facets of that society, allows for vigorous debate, encourages critical thought and allows any citizen the opportunity to express dissenting political or social views.

But to what extent should this be conceptualised in terms of an absolute right? How far can we allow the right of the citizen to self expression to encroach upon another's claim to dignity, self respect and equality?

Free speech and the right to self expression are seen as an ends in themselves. Their very existence is a priori a valuable thing, to be protected without questioning its underlying purpose, nor a consideration of its sometimes harmful effects.

Absolute rights?

The current debate surrounding pornography has defined the argument in terms of an absolute right to freedom of speech and a collateral right to view and hear. Any threat to this freedom to speak or to see is presented as the "thin edge of the wedge"; advocates of the continued existence of hard core and violent pornography which degrades and demeans women are seen as the protectors of "society".

Perhaps this says something about how we value women, that we are prepared to see the protection of pornography as the protection of democracy, but the eradication of demeaning and dangerous depictions of women as destructive, and fundamentally inconsistent with the aims of a democratic society. Even ardent supporters of democratic rights do not assert that all rights are absolute in all situations. But the rights talk which is conducted in the media discussion of pornography consistently pushes the misconception that the right to freedom of speech is an absolute freedom irrespective of its consequences.

Pornography and classification

The recognition that some forms of self expression are damaging both to individuals and society, has resulted in the regulation and restriction of certain kinds of publication. But the standard for regulation has almost invariably come back to notions of "obscenity" of "offensiveness".

The current guidelines are no exception, for although there is some consideration of demeaning images, that is not a ground per se for a refusal to classify, only to restrict publication.

Bestiality, children, cruel and dangerous acts and nonconsensual sex, predictably, get the gong. Additionally, publications which "promote, incite or instruct in matters of crime" or "promote, incite or encourage the use of prohibited drugs" will also be refused classification. Surely, the continued humiliation and degradation of women is of greater concern than the use of prohibited drugs, and constitutes an "urgent" policy consideration, justifying refusal to classify this sort of material altogether?

The distinction between an approach which advocates non-publication on the ground of morality and those who assert non-publication because it demeans women, is that the latter is a political, not a moral objection. Erotic images are not per se pornographic. What is pornographic is the deception of women which is demeaning, which constructs women in a way that entrenches gender inequalities in our society and which values women only as the objects of male sexual desire. The word "pornography" derives from the Greek "porne" meaning harlot and the definition is useful because it provides an historical location of the practice. If we see pornography as something demeaning and disempowering to women, and that it is the status of women within our society which is infringed, rather than appealing to an homogenous moral code, then the offence standard should be replaced.

The difficulty with an obscenity or offensiveness approach is that it merely enforces prevailing standards of morality; it does not necessarily eradicate images of women which devalue and degrade, and which make a mockery of our liberal society's claim to equality.

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serious. It may more readily be outweighed by the public benefit of economies of scale and other efficiences.

The strengthening of Telecom's market dominance by the acquisition of AMPS A was found to be moderate and would diminish over time. Justices Cooke, Casey and McKay therefore allowed the appeal and granted to Telecom an authorisation under s66(8) of the *Commerce Act* for the acquisition of the management rights to AMPS A.

Justice Richardson considered that even if he were wrong in his conclusion that Telecom was not in a dominant position in the mobile market, he was satisfied that its dominance would be likely to be strengthened by the acquisition of the AMPS A management rights. However, the likely benefit to the public of the acquisition would outweigh the likely detriment for the purposes of s66(8) of the *Commerce Act*.

Telecom's appeal was therefore allowed.

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