E-TALES

A WEEK OF IT

Email your tales of wit and woe to etales@computerworld.co.nz. Compiled by Sarah Putt.

Shopping for news

Wellington reader decides to check out the new iPad against the previous version, both displayed in a retailer's shop window. He's talking with the shop assistant when a man rushes in and pushes them aside, picks up the new iPad and logs in. Then he puts the iPad down and walks out of the shop without any comment. Our reader is curious, vaguely aware that he's seen the man somewhere previously. It turns out he was one of the Bridgecorp directors, recently convicted, and was keen to find out what had been written about him.

Just kiddin'

Our Etaler emailed Huawei's spokesperson to ask for a photo of an executive to accompany an article about the recent concerns about the company's links with the Chinese government. The PR emailed straight back apologising that he wasn't able to supply one. Our Etaler almost replied "Don't worry, I will try the People's Liberation Army" but thought they might not appreciate the joke.

Twitter stands in for reporter

Unfortunately our Etaler was unable to make the second day of the Telecommunications and ICT Summit in Auckland – an event in which the telcos talk about how they intend to make more money.

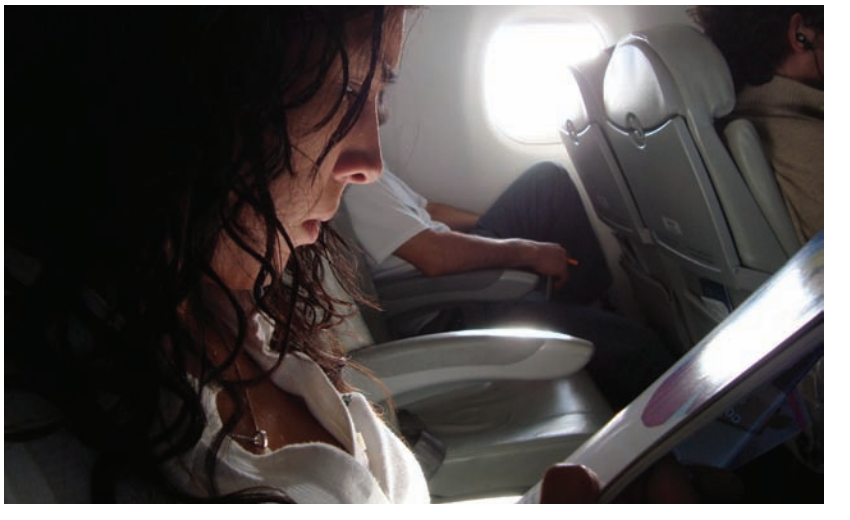
Thank goodness then for the stream of tweets during a session from @tomiahonen, the Twitter handle of the international keynote speaker Tomi T Ahonen. The conference agenda noted he is a "bestselling author on mobile" but he tweeted "I'm the 'biggest social media slut' in telecoms according to Forbes haha."

Among the tweets generated from his presentation were such gems as "The average teen texts the equivalent of Tolstoy's *War & Peace* every 7 months" and "Average person looks at mobile phone every 6.5 minutes during waking hours."

Hmmm, what makes mobile so unique?

In case you were wondering, according to @tomiahonan, Mobile Has 9 Unique Benefits. They are:

Mobile is first personal mass medium; Permanently connected; Always carried; Built in payment channel; Available at creative impulse; Has most accurate audience info; Captures social context of consumption; Enables augmented reality; and offers digital interface (to real world).



And a hat tip to you @geni-ict for taking a photo of the Powerpoint slide and tweeting it.

Glow in the dark

From time to time a technology product is launched that seems to capture the spirit of its time, the zeitgeist, if you will.

We are referring to a new electronic reader from Barnes & Noble that seems remarkably well timed to take advantage of new genres of writing which are blossoming on the e-book scene. The e-reader features small LED lamps which allow e-books to be read in the dark. Barnes & Noble says it will "end the bedtime reading debate - when you want to read and your partner wants to sleep." Etales agrees. We also reckon the glow-in-the-dark reader will be ideal for fans of EL James and other authors like her who are pioneering the soaraway market for "mommy porn."

But the real genius lies in the product's name. The Nook e-reader (glow in the dark edition) will go on sale in the US in May.

Competition law needs an overhaul

OPINION

MICHAEL WIGLEY

Wigley is a lawyer specialising in ICT

At the annual Telecommunications and ICT Summit in Auckland last week ICT Minister Amy Adams was asked what she might do in relation to the uptake of the Ultra Fast Broadband network. In reply she said:

"Competition law in NZ is very carefully regulated under the Commerce Act. You have the Commerce Commission sitting there as our competition watchdog with a number of powers, able to look at any allegations of inappropriate behaviours of dominant positions. So I'm very confident that they have the skills they need to investigate any allegation that arises in that space."

The trouble is, skills don't overcome the lack of tools available to the Commission. The two most recent Commission Chairs – Paula Rebstock and Mark Berry – have identified the problems around a key piece of the Act: section 36. This is often called the monopolisation or abuse of dominance provision. It's a key provision for reviewing Sky's position.

Telcos are familiar with the s36 problem, spanning court decisions from the Privy Council Telecom-Clear interconnection decision decades ago through to the more recent 0867 Supreme Court judgment. There has been considerable well-reasoned criticism of the restrictive approach by the courts in interpreting s36. As things stand it is unlikely that many, if any, s36 cases will be brought as it is unworkable and wouldn't capture many anti-competitive situations. I am aware of only one informed commentary that supports the current approach.

The reality is that an unworkable s36 can give large firms close to a free ride (much more so than in Australia). That doesn't help the roll out of UFB, nor does it help our economy.

Even the Commerce Commission itself, in identifying the problems for New Zealand, notes the "potential for significant economic harm", because addressing problems using s36 is proving challenging.

The main problem revolves around the strict application in New Zealand of only one test: the "counterfactual test". This contrasts with Australia where, under similar legislation, several flexible tests are used.

The Commission used the 0867 case, as it said, to "urge, on appeal to the Supreme Court, the departure from Privy Council precedent and the adoption of a more flexible approach that, like Australia, recognises several alternative means of demonstrating whether a firm has taken advantage of its substantial market power, without relying solely on the counterfactual test."

When starting an earlier review to address these problems then Commission Chair, Paula Rebstock, noted:

"Addressing the problem of anti-competitive behaviour by market participants with substantial market power under section 36 is proving challenging. Due to the potential for significant economic harm, the Commission is making this review a priority and will use an expert panel to provide clarity in this complex area."

The position hasn't improved under the current Commission Chair, Mark Berry, as the Commission lost its appeal. The status quo was largely confirmed. The main objective of the appeal – a move from the sole counterfactual test to more flexible tests – was not achieved. That objective will only be achieved if the Commerce Act is amended.

This largely leaves only the multiple firm provisions in the Act to deal with the Sky type of issues, such as the s27 restriction on certain two-or-more party contracts and arrangements. This is something that the Commission can address as to Sky, as most relevant issues involve contracts between at least two parties.

But not having an effective s36 is a big gap in the tool box and it would help if the Commission reactivated its expert review.

This is not to say that Sky TV would have breached the Commerce Act if the tests were more flexible, rather it is about recognising that the Commission does not have enough tools under that Act if there are problems.

There's a need to look elsewhere – what about alignment with Australia, when competition issues are increasingly international? As Dr Berry commented:

"The [0867] decision has not delivered the alignment with Australian jurisprudence that the Commission had sought in terms of being able to employ alternative, lesser threshold, tests for determining whether a firm has taken advantage of its substantial market power."

We are falling behind internationally. This gives a dominant provider a lot more freedom to act anti-competitively than in other countries such as Australia. Yet, as the Commission has identified, a robust approach is more important in small economies such as ours than in larger economies such as Australia, given how large firms can impact our small country.

• *Wigley, represents a number of telco stakeholders but the views here are his own.*