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PRINTOUT Chris Keall

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Fixes for iPhone 4

Apple promised a software update this week, called iOS 4.1, which it said would address two problems bedeviling its new iPhone 4. One is a Bluetooth flaw, which stops the new handset from synching with some hands-free car kits and wireless earpieces (such as mine). Another is a problem with the iPhone 4's proximity sensor that reactivates the touchscreen keypad when the phone is at your ear – meaning a call can be accidentally muted or cut, or a voicemail deleted as you're listening to it. At press time, Apple had yet to reveal whether iOS 4.1 would address a third problem, the Grip of Death reception issue with the iPhone 4's external antenna. Previously the company has hinted this week's software upgrade could improved the way the phone handles a degraded signal when a user's hand inadvertently touches the external aerial. Apple does promise that iOS 4.1 will run fine on the older iPhone 3G. Many who downloaded iOS4 for their iPhone 3 complained it was so slow as to be unusable. For the latest, see nbr.co.nz/iOS4

Touch gets internet

Apple has upgraded its iPod range. The features are breathtaking and so are the prices (oh the joys of near-monopoly). The iPod Touch (8GB: \$379; 32GB: \$489, 64GB: \$649), the one that looks like an iPhone without the phone bit, gets the same ultra-high resolution "retina" display as the iPhone, plus the same ability to record 720p high definition video. Apple also demonstrated its Facetime video calling app, which utilises wi-fi, to show that a video call could be made between the new Touch (which adds a rear-facing camera) and an iPhone 4.

iPod Nano trimmed

The iPod Nano (from \$249) has been trimmed down yet again. The sixth generation model (pictured) loses its signature scroll wheel in favour a postage-stamp sized, multi-touch screen. It looks fiddly unless you've got dainty fingers but at least one US reviewer likes it.



Shuffle (2GB: \$89)

The new iPod Shuffle, like its predecessor, lacks any visual display. A new combination of clickable buttons and voice-over commands is supposed to make life easier for those who want to play songs in order (*NBR* found the previous version annoying). Memory capacity is 2GB. Many expected the hard drive-based iPod Classic to get the chop. It survived, with a new 160GB model in the line-up, albeit at a relatively unattractive \$429.

Ping!

Apple also unveiled iTunes 10, which includes a social networking feature called "Ping." Ping lets you follow your friends among iTunes' 160 million users to see what they're listening to.

Telecom wins decade-long case

The Supreme Court has nailed shut a long-running dispute over a controversial dial-up internet surcharge levied on Clear.net (now TelstraClear) and other providers during the late 1990s. The surcharge killed off a brief free internet craze. The Commerce Commission has, since 1999, sought to bring Telecom to task for its 0867 dial code package, which it claimed was a prohibited use of Telecom's dominant market position. The High Court and Court of Appeal both ruled in Telecom's favour – and the Supreme Court upheld that decision. It found the commission was unable to show that Telecom acted as a dominant firm when it brought in the 0867 package. Rather, Telecom was able to show that any firm acting competitively, dominant or not, would have introduced a scheme similar to the 0867 package.

Telecom vs ComCom '0867' decision a boon to monopolies

Michael Wigley

Thanks to last week's Telecom 0867 Supreme Court judgment (see Print-out, left), we're in for a time when monopolies and others with substantial market power – in all industries – can act aggressively against weaker competitors.

Many would regard this as anti-competitive, ultimately to the detriment of markets and consumers. It wouldn't be allowed to happen in other places such as the EU. But there are contrary views too in this complex area.

0867 is all about the Commerce Act's provision – section 36 – designed to minimise companies with substantial market power taking advantage of that power.

The case has been described as an historical curiosity. Yes, the facts are old hat. But what is important is the precedent for the future: the guidance as to how those with substantial market power can behave.

Two final appeals to the Privy Council interpreted s36 in a way that makes it largely unenforceable.

This frees up companies with SMP to act more aggressively in the market.

Good competition vs bad

By appealing to the new final appeal court (New Zealand's Supreme Court) the Commerce Commission hoped to clarify the position, overturn the Privy Council approach, and open up interpretations of s36 that would make it more effective.

The key challenge, in a broader economic context, is to delineate "good" pro-market competition by substantial market power firms, from "bad" anti-competitive competition.

What those with substantial market power do can often be "good" (after all, substantial market power firms must be able to compete and smaller firms shouldn't be sheltered from "good" competition: that can be inefficient). Often it can be "bad."

Drawing the line is controversial and difficult. There are differing economic views as to what is best.

However, the rubber hits the road in the way the legislation implementing those considerations is framed in each country.

Typically, courts will look to the wider economic principles when applying legislation such as s36. The

Supreme Court had little regard to the wider economic context, focusing on the legislation and case law.

Rightly or wrongly we are likely to see much academic criticism of that approach.

The monopoly power test

Under the specific words of s36, the Privy Council used the highly controversial "counterfactual" test. The Supreme Court is now calling that a "comparative analysis." Applying the words of the section, a company with SMP does not breach s36 if that company would have acted in the same way in a hypothetically competitive market.

In broad terms, the job is to hypothetically strip out the firm's substantial market power and figure out what would it have done? If it's the same, there is no breach.



Any business person, even with good legal advice, would look with bemusement at the contortions the courts go through to recreate this artificial and strange hypothetical.

With some tweaking, the Supreme Court has taken a similar approach, rejecting, for example, the idea that the Australian courts have a range of analytical tools we can use.

The courts, having come to this conclusion, go through contortions to work out what would happen in a hypothetical workably competitive market. It makes for strange reading as the courts second-guess what might be: a controversial issue in itself with plenty of "ifs" and "buts."

In doing this, the Supreme Court pointed to the need for certainty so businesspeople can assess if they are in breach or not.

Any business person, even with good legal advice, would look with bemusement at the contortions the courts go through to recreate this artificial and strange hypothetical.

Under the guise of certainty (something that is very difficult to achieve in this complex area, whatever happens) uncertainty continues to prevail.

Well, that's not quite right. It's close to certain that, except in rare

and blindingly obvious cases, the Commerce Commission won't bring claims. They can't win. That "certainty" opens the way for aggressive action against competitors by those with SMP.

Review needed

Many commentators are critical of this sort of outcome. But, if there is to be change, amending legislation is required. There needs to be a review.

European law doesn't tolerate this approach, for example. Under the legislation there, Telecom's activity was likely to be in breach. The highest EU court confirmed that a company with substantial market power has "a special responsibility not to allow its behaviour to impair genuine undistorted competition."

That's because competition is already weakened by the company with substantial market power. A far cry from what is happening in New Zealand.

The EU test is also complex to apply but that will always be the case in this area.

As general competition law (the Commerce Act) was inadequate for telecommunications, New Zealand, like many countries, regulated telecommunications, by way of the Telecommunications Act.

But the Telco Act does not take away the importance in telecommunications of the Commerce Act.

For example, price squeeze, issues around bundles, so-called "pocket pricing," on- and off-net mobile pricing differentials don't fit easily under the Telco Act.

The 10 year regulatory holiday for ultra fast broadband means the only remedy will be the Commerce Act. That's where the Commerce Act should shine.

However, many industry sectors don't even have industry-specific legislation, where there is a supplier with substantial market power. Weaker competitors now have more to worry about.

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