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

did anything with the information that he recovered, beyond calling it up on the screen for viewing. He was found guilty of improper use of the information.

The trial judge ruled that a person *"used"* personal data if he held it, in the sense of bringing it up on the screen of a computer, and it was this point that was considered by the Court of Appeal.

the decision

The Court of Appeal overturned the trial judge's decision. The Court held that *"use"* in s5(2)(b) of the UK *Data Protection Act* bore its ordinary meaning, and that to *"use"* data within the meaning of the section it was necessary to do something more than call it up on the computer screen in order to view it.

Laws J commented:

"in our judgement, it is one thing to access the computer and view what is contained within it and it is another thing then to use the information itself ... it is necessary to do something to the data, not merely to access it, before it is "used" within the statute. That would have arisen if the appellant, having accessed the information, then proceeded in the ordinary sense of the term, to make some use of it, so as for example in his own business affairs to deploy the information obtained against the interest of somebody else".

conclusion

The decision of the Court of Appeal, if followed in New South Wales, would mean that any party who wished to enforce privacy provisions such as those contained in the *Telecommunications Act* or the New South Wales *Privacy and Data Protection Bill* would be required to prove not only that information has been accessed, but also that the offending party has acted upon that information. As was discovered in *R -v- Brown*, proving that somebody has *"used"* information can be extremely difficult, if not impossible.

This result can be contrasted with the terms of the various State Acts dealing with computer crime. Section 109 of the *Crimes Act 1900 (NSW)*, for example, relates specifically to *"accessing"* of information, and could potentially extend to other conduct in *R -v- Brown*.

It will be interesting to see how the Acts dealing with *"use"* of information are found in practice to overlap with Acts dealing with *"accessing"* of information, and how the various State and Commonwealth pieces of legislation relevant to the security of electronically stored data are found to fit together in circumstances where their application gives different results.

Sheila McGregor and Lesley Sutton, Freehill Hollingdale & Page, Sydney.

National radio services for, and by, Indigenous people

A new chapter in Australian broadcasting begins with the launch of the National Indigenous Radio Service.

The National Indigenous Radio Service ("NIRS") will create a new sound on the current wave of national radio services and is an historic step for Indigenous broadcasting. It was officially launched when the keynote address of the newly elected Chairperson of NIMAA (the National Indigenous Media Association of Australia), Eileen Torres, was broadcast nationally. (The full speech is available from the NIMAA Secretariat).

The commencement of the National Indigenous Radio Service is the first time that a dedicated Aboriginal and Torres Strait Islander owned and operated national radio service was broadcasted on Australian airwaves.

"The National Indigenous Radio Service will provide Aboriginal and Torres Strait communities with the opportunity to nationally broadcast news, information and views concerning local, regional and national issues and to quickly address in a co-ordinated manner matters raised in the mass media that create a distorted view of Indigenous society".

The NIRS will begin broadcasting on a full time basis as soon as an intensive technical appraisal of the NIRS capabilities has been conducted. Initially, the NIRS will receive programming from Aboriginal and Torres Strait Islander radio stations that can supply programming on a regular basis.

This will enable the NIRS to broadcast Indigenous produced and presented material from all States and Territories to over 80 Aboriginal and Torres Strait Islander communities across the country.

capabilities

The design of the NIRS will incorporate technology to enable the 83 Broadcasting for Remote Aboriginal Communities Scheme ("BRACS") communities to receive the NIRS and also to provide program material for the service.

NIMAA has received preliminary technical advice indicating that the NIRS has the capacity to carry a text or data stream on the existing satellite channel. If the channel can be split to carry a data service, the National Indigenous News Service will piggy-back with the NIRS on the satellite channel.

This will create a dedicated Indigenous operated and produced satellite channel that provides an audio service to carry Indigenous news, views and information complemented with a data service that will deliver hard copy to accompany the NIRS audio material.

The technical appraisal of the NIRS will also disclose what technology is needed to enable a national Indigenous talk-back to operate on the NIRS.

The national talk-back program will create a forum where Aboriginal and Torres Strait Islander community leaders, elders and representatives can discuss news or issues, or respond to any publicity regarding their communities.

A national Aboriginal and Torres Strait Islander talk-back program would provide an economical and timely medium to respond to any issues of concern for Indigenous communities - especially in responding to biased, stereotypical and negative mass media coverage when it occurs.

value

The national Indigenous talk-back program - and the NIRS - will give Aboriginal and Torres Strait Islander communities the chance to re-establish song lines that have been broken since white occupation of Australia.

As soon as the technical appraisal is conducted, the infrastructure for the NIRS will be established and the service should be operating.

The National Indigenous Radio Service will provide Aboriginal and Torres Strait communities with the opportunity to nationally broadcast news, information and views concerning local, regional and national issues and to quickly address in a co-ordinated manner matters raised in the mass media that create a distorted view of Indigenous society.

Furthermore, the NIRS would provide a very effective medium for educating the wider society of the rich cultures and heritages of Aboriginal and Torres Strait Islander peoples.

[Reproduced from NIMAA News, Vol 2 Issue 6.]