



Supreme Court of New Zealand

1 September 2010

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**The Commerce Commission v Telecom Corporation of New Zealand Limited
and Telecom New Zealand Limited
(SC 76/2009)
[2010] NZSC 111**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

In 1999 Telecom introduced a dial-up internet package which became known as its 0867 package. The Commerce Commission claimed that in doing so Telecom had used its dominant position in the market for a prohibited purpose and had thereby breached section 36 of the Commerce Act 1986. Both the High Court and the Court of Appeal rejected the Commission’s contention. The Supreme Court has unanimously dismissed the Commission’s appeal from those determinations. In doing so the Court has concentrated its attention on what constitutes “use” of a dominant position in a market. Since 2001 this has been referred to as a firm taking advantage of a substantial degree of market power.

After surveying decisions of the Privy Council and the High Court of Australia, the Court has held that the question of use or taking advantage should be determined by comparing what the dominant firm has done in the actual market with what a similarly situated firm would have done in a hypothetically competitive market; that is, in a market in which it did not possess a substantial degree of market power. To establish use or taking advantage of market power, it must be shown that the allegedly contravening firm would not have acted in the hypothetical market in the same way as it did in the actual market.

The Commission failed to show that Telecom would not have introduced its 0867 package in a market in which it lacked dominance. Hence the Commission failed to show that Telecom had used its dominance when it introduced the 0867.

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