
Telecommunications Carrier Licensing

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INTRODUCTION

There are now more than 25 licensed telecommunications carriers¹ under the *Telecommunications Act 1997* (Cth) (1997 Act) which fully commenced on 1 July 1997. Prior to 1 July 1997 only Telstra, Optus and Vodafone were licensed to operate as telecommunications carriers under the *Telecommunications Act 1991* (Cth). The Australian Communications Authority (ACA) individually licenses carriers under the 1997 Act.

The main object of the regulatory regime established by the 1997 Act is to promote the long-term interests of end-users of telecommunications carriage services and the efficiency and international competitiveness of the Australian telecommunications industry.² The regulatory regime was designed to achieve full and open competition in the provision of telecommunications infrastructure and services by removing regulatory barriers to entry into the telecommunications industry including the limit on the number of licensed telecommunication carriers.

This article discusses the licensing of telecommunications carriers under the 1997 Act. Section A provides background information on the telecommunications infrastructure which is already being used by newly licensed carriers which have been granted a carrier licence since 1 July 1997. Section B looks at the process of applying for a carrier licence. Section C examines in detail the key questions which are relevant to determining whether a person is required to hold a carrier licence under the 1997 Act. Section D outlines the obligations and rights associated with being a licensed carrier under the 1997 Act.

A. TELECOMMUNICATIONS INFRASTRUCTURE OF NEWLY LICENSED CARRIERS

Newly licensed carriers which have been granted a carrier licence by the ACA since 1 July 1997 are already using a variety of telecommunications infrastructure to supply telecommunications services to the public. AAPT supplies a range of services including voice, data, frame relay and Internet access services over one of the largest switched networks in Australia that consists of major switches in most capital cities and nodes in several regional locations in Australia. Primus supplies similar services over a global network that includes switches in several capital cities in Australia.

United Energy supplies high bandwidth services over a fibre optic network in Victoria. Windytide supplies pay TV services over a hybrid fibre coaxial cable network in Darwin and over MDS systems in many regional and rural centres. Macrocom supplies wholesale trunk communications services over a microwave network that links Melbourne and Sydney via Canberra. Iridium supplies mobile services throughout Australia over a global network that consists of 66 low earth orbit satellites.³

B. APPLYING FOR A CARRIER LICENCE

A person may apply to the ACA for a carrier licence provided that the person is a corporation, an eligible partnership of corporations or a public body.⁴ An applicant for a carrier licence must have a current industry development plan (IDP) which has been approved by the Minister for Communications, Information Technology and the Arts (the Minister). An IDP is a plan for

the development of Australian industries involved in the manufacture, development and supply of telecommunications facilities and must include relevant particulars of a carrier's:

- (i) strategic commercial relationships with Australian and multinational companies;
- (ii) research and development activities;
- (iii) export development plans; and
- (iv) arrangements aimed at encouraging employment in related industries.⁵

An application for a carrier licence must also be accompanied by an application charge that is currently \$10,000. A person need not own any telecommunications infrastructure before applying for a carrier licence.

C. REQUIREMENT TO HOLD A CARRIER LICENCE

Under the 1997 Act a carrier licence must be held by the owner of a telecommunications network unit that is used to supply carriage services to the public unless:

- (i) there is a nominated carrier declaration in force in relation to the network unit; or
- (ii) an exemption applies.⁶

The key questions which are relevant to determining whether a person is required to obtain a carrier licence under the 1997 Act are:

- (1) What is a network unit?
- (2) What is a carriage service?
- (3) When is a network unit used to supply a carriage service to the public?
- (4) When is a nominated carrier declaration in force in relation to a network unit?

- (5) What exemptions may be applicable?

1. What is a network unit?

A network unit includes:

- (a) a single line link connecting distinct places in Australia that are at least 500 metres apart;
- (b) multiple line links connecting distinct places in Australia where the aggregate of the distances between the places is at least 5 kilometres;
- (c) designated radiocommunications facilities used to supply carriage services between points in Australia; and
- (d) facilities specified in a determination made by the Minister.⁷

(a) Single and Multiple Line Links Connecting Distinct Places

A line is defined to mean 'a wire, cable, optical fibre, tube, conduit, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with carrying communications by means of guided electromagnetic energy'.⁸ A line link consists of a single line or two or more lines that are connected together by one or more telecommunications facilities. A facility that is not a line may not form part of any line link. A line may also not form part of a line link to the extent that the line is on the customer side of the *boundary of a telecommunications network*.⁹

Where a telecommunications network is used to supply a carriage service to an end-user in a building the *boundary of the telecommunications network* is the point agreed between the customer and the carrier or carriage service provider that operates the network. If there is no agreement the boundary is:

- (i) the side of the main distribution frame (MDF) in the building nearest to the end-user; or

- (ii) if there is no MDF - the side of the network termination device (NTD) nearest to the end-user; or

- (iii) if there is no MDF or NTD - the side nearest to the end-user of the first socket after the building entry point.¹⁰

Places are distinct unless they are all situated in:

- (i) the same property for which there is a single leasehold or freehold title and which is not subject to a lease;
- (ii) a combined area consisting of contiguous properties where the same person is the principal user of all the properties; or
- (iii) an eligible combined area specified in a determination made by the Minister.¹¹

Under the *Telecommunications Act 1991 (Cth)* the then Minister for Transport and Communications made a determination that a building other than a group of properties joined by common or party walls such as town or terrace houses is an eligible combined area.¹² This determination has effect as if it had been made by the Minister under the 1997 Act.¹³

(b) Designated Radiocommunications Facilities

Designated radiocommunications facilities include:

- (A) base stations used to supply public mobile telecommunications services;
- (B) base stations that are part of terrestrial radiocommunications customer access networks;
- (C) fixed radiocommunications links;
- (D) satellite-based facilities; and
- (E) radiocommunications transmitters or receivers specified in a determination made by the Minister.¹⁴

(A) Base Stations used to Supply Public Mobile Telecommunications Services

A service is a public mobile telecommunications service if:

- (i) an end-user can use the service whilst continually moving between places;
- (ii) the customer equipment is not in physical contact with any part of the network over which the service is supplied;
- (iii) the network has *intercell hand-over functions*; and
- (iv) the service is not an *exempt service*.¹⁵

A network has *intercell hand-over functions* if it includes:

- (i) at least 2 base stations which transmit and receive signals to and from customer equipment located in a cell; and
- (ii) the functions necessary to determine in which cell the customer equipment is located and cause the base station in one cell to stop and the base station in another cell to start transmitting and receiving signals to and from the equipment when the equipment moves from one cell to the other.¹⁶

A service is an *exempt service* if:

- (i) it is supplied by a network connected to a carrier's network where:
 - (1) the principal function of the network is to supply carriage services between customer equipment connected to the network;
 - (2) the supply of carriage services between equipment connected to the network and equipment connected to the carrier's network is at most only an ancillary function; and
 - (3) a communication cannot be carried between equipment connected to the network and equipment connected

to the carrier's network as a single transaction;

- (ii) it is a one-way only, store-and-forward communications service; or
- (iii) all of the end-users of the service are located in the same distinct place.¹⁷

Examples of services which these exemptions are intended to apply to include respectively trunked land mobile radio services supplied over private networks connected to carriers' networks, paging services and services which use micro-cell technologies such as mobile services and wireless PABXs on factory floors or resort properties.

(B) Base Stations which are Part of Terrestrial Radiocommunications Customer Access Networks

A base station is part of a terrestrial radiocommunications customer access network if:

- (i) the base station is not an *exempt base station*;
- (ii) the customer equipment is not in physical contact with any part of the network by means of which a carriage service is supplied;
- (iii) the service is wholly or principally used by each end-user at their premises or in the immediate vicinity;
- (iv) the network does not have *intercell hand-over functions*; and
- (v) the network is not an *exempt network*.¹⁸

An *exempt base station* is a base station that is used by a licensed broadcaster to:

- (i) supply broadcasting services to the public; or
- (ii) supply a secondary carriage service by means of the main carrier signal of a primary broadcasting service.

A network is an *exempt network* if it is used for the sole purpose of supplying

carriage services on a non-commercial basis.

(C) Fixed Radiocommunications Links

A fixed radiocommunications link consists of one or more facilities which are used to supply a carriage service between two or more fixed points where:

- (i) some or all of the communications carried by the facilities have the characteristic of *double-ended interconnection*; and
- (ii) the facilities do not consist of one or more base stations that are part of:
 - (1) a terrestrial radiocommunications customer access network; or
 - (2) a network that is used for the sole purpose of supplying carriage services on a non-commercial basis.¹⁹

A communication has the characteristic of *double-ended interconnection* if it is carried:

- (i) over a carrier's network;
- (ii) then over a radiocommunications link within 30 seconds; and
- (iii) then over a carrier's network within 30 seconds.

(D) Satellite-Based Facilities

A satellite-based facility is a radiocommunications transmitter or receiver in a satellite.²⁰

2. What is a carriage service?

A carriage service is defined to mean 'a service for carrying communications by means of guided and/or unguided electromagnetic energy.'²¹ A communication includes any communication whether between persons and/or things and whether in the form of speech, music or other sounds, data, text, visual images, signals or any other form or combination of forms.²²

3. When is a network unit used to supply a carriage service to the public?

A network unit is used to supply a carriage service to the public if it is used to:

- (i) carry communications between two end-users both of whom are outside the *immediate circle* of the supplier of the service; or
- (ii) supply a point-to-multipoint service or designated content service to end-users at least one of whom is outside the *immediate circle* of the supplier of the service.²³

A person's *immediate circle* consists of the person together with the following persons:

- (i) if the person is an individual or partnership - employees of the individual or partnership;
- (ii) if the person is a body corporate - an officer of the body corporate, a related body corporate and officers of the related body corporate (within the meaning of the Corporations Law);
- (iii) if the person is a tertiary education institution - members of its governing body and officers, employees and students of the institution; or
- (iv) if the person is a Commonwealth, State or Territory government department, authority or institution - specified employees and members of the Commonwealth, State or Territory government.²⁴

The Minister has made a determination that extends a person's *immediate circle* in relation to joint venturers and independent contractors.²⁵ Under the determination a person's *immediate circle* is extended to include:

- (i) any other person who is engaged in a *specified joint venture* with the person;

- (ii) any other person who has been engaged by the person as a *specified contractor*, and
- (iii) persons who are within the *immediate circle* of any such other persons.

A *specified joint venture* is an association of two or more persons who agree by contract to engage in a common undertaking for profit where the supply of carriage or content services is no more than incidental to the common undertaking. A *specified contractor* means a contractor engaged under a contract to a person where the supply of carriage or content services is similarly no more than incidental to the contract.

The determination may apply where, for example, a joint venture partner of a mining company or a contractor engaged under a contract with a mining company uses a telecommunications network owned by the company for the purposes of a mining project.

4. When is a nominated carrier declaration in force in relation to a network unit?

A licensed carrier may apply to the ACA for a nominated carrier declaration in relation to one or more specified network units.²⁶ The ACA may declare that a licensed carrier is the nominated carrier in relation to specified network units where the ACA is satisfied that:

- (i) the carrier would be able to comply with all of the obligations imposed on the carrier as the nominated carrier in relation to the network units; and
- (ii) the making of the declaration would not impede the efficient administration of the 1997 Act.²⁷

A written agreement between the owner of the specified network units and the licensed carrier which provides the carrier with sufficient control over the network units to meet all of the obligations imposed on the

carrier as the nominated carrier may satisfy the ACA in relation to compliance with such obligations. Where a nominated carrier declaration is in force the owner of the specified network units is not required to hold a carrier licence.

5. What exemptions may be applicable?

An exemption from the requirement to obtain a carrier licence in relation to a network unit applies where the sole or principal use of the network unit is use by:

- (i) a defence organisation to carry communications necessary or desirable for defence purposes;
- (ii) an intelligence organisation;
- (iii) a transport authority to carry communications necessary or desirable for the working of aviation, train, tram, bus or road services;
- (iv) an organisation to carry communications necessary or desirable for the supply of broadcasting services to the public in specified circumstances; or
- (v) an electricity supply body to carry communications necessary or desirable for managing the generation, transmission, distribution or supply of electricity or charging for the supply of electricity.²⁸

Any remaining use of the network unit must be by a licensed carrier or an *exempt network-user* to supply carriage and/or content services. An *exempt-network user* is a person whose entitlement to use a network unit to supply services derives from rights granted to a licensed carrier or the police, fire or ambulance services in specified circumstances.²⁹

An exemption from the requirement to obtain a carrier licence also applies where the sole or principal use of a line link in relation to which an authorisation was in force under repealed telecommunications legislation³⁰ is in accordance with any

conditions specified in the authorisation.³¹ Similarly, any remaining use of the line link must be by a licensed carrier or an *exempt network-user* to supply carriage and/or content services.

The Minister may also determine that the requirement to obtain a carrier licence does not apply in relation to a specified network unit, person or use of a network unit.³² In accordance with three determinations made by the Minister the requirement to obtain a carrier licence does not apply in specified circumstances in relation to:

- (a) tertiary education institutions;
- (b) trials; or
- (c) visitors.

(a) Tertiary Education Institutions

In accordance with the exemption for tertiary education institutions the requirement to obtain a carrier licence does not apply in relation to a network unit owned by an eligible tertiary education institution which is a member of the Australian Vice-Chancellors' Committee if the sole or principal use of the network unit is for the research, educational or administrative functions of the institution or another such institution. Any remaining use of the network unit must be:

- (i) in connection with the research and administrative functions of the Commonwealth Scientific and Industrial Research Organisation, the Defence Science and Technology Organisation, the Australian Institute of Marine Science or the Australian Nuclear Science and Technology Organisation;
- (ii) in connection with the functions of an affiliate of the institution; or
- (iii) by a licensed carrier or an *exempt network-user* to supply carriage and/or content services.³³

The exemption may apply where, for example, a telecommunications network owned by a university is used for the purpose of tele-teaching, shared access to library or research services (eg inter-library loans and catalogue access), student admission activities, Open Learning or distance education programs.

Pursuant to the exemption the requirement to obtain a carrier licence also does not apply to a network unit owned by an eligible tertiary education institution where it connects two or more points within a single campus of the institution. The exemption may also apply where, for example, a retail bookshop business located on the campus of a university uses a telecommunications network owned by the university to carry communications to the boundary of the campus.

(b) Trials

The requirement to obtain a carrier licence does not apply where the ACA has issued a certificate stating that a network unit is being used solely for a trial. In deciding whether to issue a trial certificate the ACA must have regard to:

- (i) the duration of the trial;
- (ii) any previous trials for a similar service;
- (iii) reasons for the trial;
- (iv) effect on competition of the trial;
- (v) charges to end-users participating in the trial;
- (vi) whether the trial would unreasonably affect the revenue of a licensed carrier; and
- (vii) any other matters which the ACA considers relevant.³⁴

The ACA may issue a trial certificate for a period not exceeding 6 months. The exemption may apply where, for example, a person wishes to conduct a pilot project involving only a few end-users to ascertain the technical feasibility of deploying a larger telecommunications network.

(c) Visitors Exemption

In accordance with the exemption for visitors the requirement to obtain a carrier licence does not apply where a network unit is used to supply a carriage service on a non-profit basis to a person on land:

- (i) in relation to which the person is a visitor; and
- (ii) in which either the owner of the network unit or a person within the owner's *immediate circle* has a legal or equitable interest.³⁵

The exemption may apply where, for example, a university student on work experience at a mining site of a mining company uses a telecommunications network owned by the company.

D. OBLIGATIONS AND RIGHTS OF LICENSED CARRIERS

Under the 1997 Act licensed carriers are required to pay an annual licence charge which consists of a fixed component that is currently \$10,000 and a variable component based on their share of eligible revenue as well as being subject to numerous obligations in the form of licence conditions which require compliance with the Act.³⁶ However, licensed carriers are able to own network units that are used to supply carriage services to the public and also have several other rights under the 1997 Act.

The obligations imposed on licensed carriers by the 1997 Act include complying with access obligations contained in the *Trade Practices Act 1974 (Cth)*, industry codes when directed by the ACA and industry standards, defence requirements, disaster plans, technical standards and the numbering plan.³⁷ In addition carriers must share in the cost of fulfilling the universal service obligation, enter into and comply with the Telecommunications Industry Ombudsman scheme, protect the confidentiality of communications, assist law enforcement authorities, prepare and comply with an interception capability plan and provide pre-

selection and calling line identification.³⁸

In addition to being able to own network units that are used to supply carriage services to the public licensed carriers have the right to access network facilities and information of other licensed carriers for the purposes respectively of installing competitive facilities and network planning, maintenance and reconfiguration.³⁹ Carriers also have the right to inspect land to determine its suitability for their purposes and the right to install and maintain facilities on land in specified circumstances.⁴⁰

CONCLUSION

With the removal of regulatory barriers to entry into the telecommunications industry including the limit on the number of licensed carriers any corporation, eligible partnership of corporations or public body may apply to the ACA for a carrier licence. The application charge of \$10,000 is only intended to provide a disincentive to applications for a carrier licence being made by organisations that are financially unsound. The most significant hurdle to applying for a carrier licence is preparing an IDP suitable for approval by the Minister.

In deciding whether to apply for a carrier licence under the 1997 Act an organisation which owns or intends to own one or more network units that will be used to supply carriage services to the public needs to carefully weigh the obligations on carriers against the rights of carriers under the 1997 Act. An organisation that does not wish to be subject to such obligations may arrange for an existing licensed carrier to apply for a nominated carrier declaration in relation to any such network units in circumstances where an exemption does not apply.

¹ A list of licensed carriers is available from the Australian Communications Authority's website at <http://www.aca.gov.au>

² 1997 Act s 3.

³ Department of Communications, Information Technology and the Arts, *Telecommunications Carrier Industry Development Plans Progress*

Report: 1997-98, December 1998. Available from the Department's website at <http://www.dcit.gov.au>

1997 Act s 52.

Ibid Part 2, Schedule 1.

Ibid s 42.

Ibid Division 2, Part 2. To date no determination has been made by the Minister that specifies any facilities.

Ibid s 7.

Ibid s 30.

Ibid s 22.

Ibid Division 4, Part 2.

Telecommunications (Eligible Combined Areas) Determination, No 1 of 1991.

Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997 s 79.

1997 Act s 31. To date no determination has been made by the Minister that specifies any

radiocommunications transmitters or receivers.

Ibid s 32(1).

Ibid s 33.

Ibid s 32(2)-(5).

Ibid s 34.

Ibid s 35.

Ibid s 7.

Ibid.

Ibid.

Ibid s 44. To date no content services have been designated by the Minister.

Ibid s 23.

Determination Under Subsection 23(2), No 1 of 1998.

1997 Act s 77. A list of nominated carrier declarations is available from the ACA's website at <http://www.aca.gov.au>

Ibid s 81.

Ibid ss 45-9.

Ibid s 7.

Telecommunications Act 1975 (Cth) s 13(1)(a), *Telecommunications Act 1989 (Cth)* s 46, *Telecommunications Act 1991 (Cth)* s 108.

1997 Act s 50.

Ibid s 51.

Determination Under Subsection 51(1), 1998.

Determination Under Subsection 51(1), No 1 of 1998.

Determination Under Subsection 51(1), No 2 of 1998.

1997 Act Schedule 1.

Ibid s 62 and Parts 6, 16, 21 and 22.

Ibid Parts 7, 10, 13, 14, 15, 17 and 18.

Ibid Parts 3-5, Schedule 1.

Ibid Schedule 3.

Domain name disputes: A view from the Antipodes

Stephen Lance, Gilbert & Tobin

SYNOPSIS

This paper discusses the growing market significance of domain names and of conflicts between domain name holders and trademark owners.

It is a view from the antipodes in a world which still seems UScentric.

The paper focuses on the view from Down Under of the global attempts to implement a variety of dispute resolution mechanisms, including the move to an internationally endorsed mediation and arbitration process promulgated by the World Intellectual Property Organisation.

Introduction: the Cybermarket

There's no business quite like the domain name business.

Just ask the people of Tuvalu, a poor and tiny Pacific nation, 1,000 km north of Fiji. Until recently, the 10,000 inhabitants of this 26 square kilometre island never imagined that the Internet would be the cyberspace answer to their fiscal dreams. Tuvalu was allocated .tv as its national top level domain name (nTLD) by the International Standardisation Organisation.¹ So in 1995 the

Government of Tuvalu began to receive lucrative business proposals concerning the Internet use of their domain name. There was money to be made. The Government invited tenders from interested parties. Five flew to Tuvalu to make their case personally. Travelling on the only airline linking the country with the rest of the world, they landed on the airstrip which covers a third of the capital, Funafuti, and were soon whisked away to the country's only hotel. One company, *information.ca*, made an offer the Government could not refuse: an advance payment of \$US50 million – more than four times Tuvalu's annual GDP – followed by a projected \$US60 million to \$US100 million a year from Tuvalu's 65 per cent share of revenues. This for a country where a good wage is \$200 a month. As they say in the classics, *welcome to cyberspace*².

Tuvalu is just one of many examples of the new, flourishing *cybermarket* that exists in cyberspace. In the past six months in particular, the Internet has become the focus of a speculative boom. The mere mention of the word "online" or ".com" drives investors into a frenzy.

As Alan Greenspan has observed, there is probably some fundamental value underneath the Internet investment hype. For many puzzled analysts, that value lies in the raw numbers of users. From 1990 to 1997, the estimated number of Internet users grew from around one million to around 70 million.³

While the United States still accounts for the largest majority of Internet users, the rest of the world can hardly be described as disinterested. Between 1993 and 1996, the number of Internet hosts in Europe increased by about 600%.⁴ At the date of this paper, Australia registered 67,889 domain name spaces. Registrations in the .com.au space are growing by three per cent each week, compared to a growth rate of one per cent for the whole Internet. This ranks the .au domain space fourth behind Germany, Britain and the United States⁵ and this phenomenal growth (consistent with Australians' take-up rates of other new technologies including mobile phones and VCRs) has created administration challenges for the .au space (Australia's progressive response to these challenges is described at the end of this paper).