

Key licensing issues

Ian Philip discusses the important role of carrier licence conditions in regulating the provision of telecommunications services to Australians

The Act establishes a regime by which the Minister, not AUSTEL, will issue general telecommunications, licences and public mobile licences. Section 55 of the Act specifies that the licensing of general carriers has been established on the basis that the general carriers be:

- the primary providers of Australia's line base and satellite base public communications capacity; and
- the primary suppliers of telecommunication services by the use of line links and satellite base facilities.

Similarly, mobile carriers are to be licensed on the basis that they are to be the primary suppliers of public mobile telecommunication services.

As far as licence conditions are concerned, some of them are set out in the Act but most are to be established by way of declaration by the Minister. Both the general telecommunications licences and public mobile licences are subject to the following conditions under Section 62 of the Act:

- that the licensees *comply with the Act* and its regulations;
- that the licensees *comply with directions* to terminations or orders that AUSTEL is able to make under the Act;
- that the licensees act in a manner consistent with Australia's obligations under international conventions notified to the licensees by the Minister under Sections 75 and 76 of the Act; and
- that, and this is the heartland of the licence conditions, the licensees *comply with conditions specified in declarations made by the Minister* under Sections 64 and 65 of the Act, either in relation to licences of particular class or particular licences.

Turning to the conditions that the Minister may impose by declaration on a particular class of licences or a particular licence, Section 63(4) provides that conditions addressing the following issues can be imposed:

- the term of the licence;
- obliging the licensee to engage in specified activities;
- limiting the geographical area in which services are to be provided;
- prohibiting specified activities;
- the development of the telecommunications industry;

- the extent of foreign ownership or control of the licensee;
- how licensees are to ensure and maintain quality in the supply of telecommunication services;
- mode of dealing with enquiries and complaints by customers;
- the maintenance of technical standards;
- network roll-out;
- consultation with Government authorities as to the use of new technology;
- requiring the licensee to assist Government authorities in relation to the law enforcement and national security issues; and
- obliging the licensee to enter into an Ombudsman scheme.

This list is not exhaustive. The Minister can also make declarations in relation to any other conditions that should apply to the licences.

Prescribed carrier obligations

Certain specified conditions of a licence can be declared to be prescribed carrier obligations (PCO), and one would expect that these conditions would be those that have a particular *public interest* component to them. PCOs should not be confused with the Universal Service Obligations, which only Telecom bears. The condition to be imposed on all general carriers under Sections 72 and 73 of the Act, in relation to the continuation of access to untimed calls for residential, charitable and welfare customers, is also specified as a PCO.

One would expect conditions concerning the quality of telecommunication services, the maintenance of those services and the accuracy of call recording and billing to be PCO.

There will no doubt be an interesting tussle going on as to which licence conditions are to be PCOs, particularly bearing in mind the personal right to recover damages given to any person who suffers loss or damage as a result of the failure by a carrier to comply with a PCO.

Because interconnection and access as between carriers *should not* be a matter simply for commercial determination between them, it is essential for interconnection and access matters to be dealt with in the licence conditions.

Supplementary licence conditions

It is clear that this is contemplated to some extent by Section 138 of the Act, which describes the so called supplementary access conditions which may be included by the Minister in the carrier licences.

These supplementary access conditions will relate to:

- the grant by the licensee to other carriers of rights or interests in relation to facilities, or in relation to land in or on which facilities are located; or
- the supply by the licensee to other carriers of specified goods or services in connection with matters associated with the supply by the other carriers of services by means of interconnected facilities, for example, customer billing, operator assistance and the publication of directories.

In relation to the supplementary access conditions that are mentioned in Section 138 of the Act, it is interesting to speculate whether all carriers, or only general carriers, or only the merged Telecom/OTC (AOTC), are going to be obliged to provide operator assistance services, and who is going to be obliged to provide directory services. Surely, the second carrier is going to be entitled, if it wishes, to establish such services, and again there would need to be an exchange of information.

I expect conditions to be inserted in relation to the exchange of customer billing information, the exchange of information concerning network development and the exchange of information concerning the testing of communications. All interconnected carriers are going to need to know information about the volume of communications and the degree to which the communications are completed successfully or not.

It would be prudent to assume that commercial negotiations between the carriers may not fairly deal with these issues. The licence conditions should therefore deal with the precise details of this kind of information and how quickly it should be provided.

It does not appear that it is going to be a licence condition that the carriers

comply with access agreements, and therefore the enforcement of the access agreements will be a matter between the carriers. While the Minister stated in the second reading speech that the Act establishes an arbitration process to enable AUSTEL to arbitrate on carrier disputes concerning access and interconnection matters, the arbitration structure only relates to the establishment of terms and conditions and the variation of the terms and conditions of interconnection and access.

Trade practices implications

One important consequence of the nature of the conditions to be included in the carrier licences is that conduct necessary to comply with or otherwise give effect to those conditions will not be regarded as breaching the restrictive trade practices provisions of the *Trade Practices Act*.

Likewise, conduct necessary to comply with or otherwise to give effect to access agreements negotiated between the carriers, which may or may not have been arbitrated by AUSTEL, but which have been registered under Section 146 of the Act, is also exempt from these restrictive trade practices provisions.

While those access agreements must comply with certain provisions of the Act, this leaves it to the carriers to set most of the terms and conditions of the access arrangements, which may be utilised to take advantage of the trade practices exemption in Section 236 of the Act.

This may well be important in the light of the fact that Section 236 is the only specific *Trade Practices Act* exemption in the Act, and that it may well be doubtful that there are any other specific exemptions that fall within the exemption regime established under Section 51 of the *Trade Practices Act*. AUSTEL's right to refuse registration of an access agreement may not be sufficient to prevent this happening.

Section 70 of the Act sets out a scheme by which carriers may enter into agreements with the Minister, acting on the Commonwealth's behalf by which the Minister may restrict his powers in relation to the issuing of licences and the setting of licence conditions, so that if that agreement is breached, the Commonwealth is obliged to pay the carrier an amount specified in or worked out in accordance with the agreement.

This scheme has clearly been sought by the prospective carriers to elevate the licensing regime to a level of contract law so that there is at least some basis for a claim for contractual damages should the

Government change the manner in which carriers are to be permitted to carry on business.

AUSTEL Investigations

Section 333 of the Act gives AUSTEL the power to investigate a contravention of the condition of a carrier licence or a contravention of the code of practice in relation to dealings with foreign telecommunication operators. Any person can complain to AUSTEL about such a matter under Section 334 of the Act and AUSTEL can refer such a matter to the Ombudsman or the Trade Practices Commission.

Under section 343 of the Act AUSTEL can, if it is satisfied that a carrier has contravened a condition of a general telecommunications licence or public mobile licence, direct the relevant carrier:

- to do an act required by the condition of licence;
- not to engage in conduct prohibited by the condition; and
- to do other specified acts that AUSTEL thinks necessary to help remedy the contravention.

'The Minister does not have a power to revoke the licence for a breach of licence conditions'

If the condition is a PCO, Section 344 of the Act only entitles AUSTEL to direct the carrier to comply with the obligation if the carrier has *unreasonably* contravened the obligation as opposed to having simply contravened the condition. This seems strange in the light of the public interest importance placed on these conditions.

Both the Minister and AUSTEL can apply to the Federal Court for relief against a carrier's conduct which constitutes a contravention of a direction. Section 349 of the Act empowers the Federal Court to order a carrier to pay a pecuniary penalty not exceeding \$10 million if it is satisfied the carrier has contravened a direction. Criminal proceedings do not lie against a carrier merely because the carrier has contravened a direction in accordance with Section 352 of the Act.

For all conditions, other than a condition that a carrier comply with AUSTEL directions, the Minister alone may enforce licence conditions as such. Only the Minister can apply directly to the Federal Court for relief in relation to a contravention of licence conditions.

There appears to be an error in this regard in the drafting of Section 355 because it refers to Minister or AUSTEL applying under that section for an injunction and not being required to give an undertaking as to damages, when clearly only the Minister can make application under that section. This does not seem to be supported by a delegation power for the Minister similar to that contained in Section 61.

In similar fashion, the pecuniary penalty which may be ordered by a Federal Court for a contravention of a licence condition is an amount not exceeding \$10 million, and again, criminal proceedings do not lie against a carrier merely because the carrier has contravened a condition of a licence.

Private actions

A person who suffers loss and damage because of a carrier's contravention of a direction issued by AUSTEL that it comply with a PCO may seek damages from the Federal Court for that loss and damage. It should be remembered that such a direction can only be given by AUSTEL if the carrier has unreasonably breached its PCO. This is going to be a substantial obstacle to the enforcement of private rights under the Act.

Section 399 of the Act obliges AUSTEL to review and report to the Minister on carrier performance including the appropriate inadequacy of the strategies and policies that carriers are following to carry out conditions which have been declared to be a PCO and the efficiency with which the carriers are carrying out those obligations.

The Minister does not have a power to revoke the licence for a breach of the licence conditions. The Minister can only revoke the licence if the licensee requests it or, in the Minister's opinion, the licensee is about to cease to be an eligible corporation.

Ian Philip is a partner with Allen Allen & Hemsley, Solicitors of Sydney.