

entitled to assume that the treaties have not been incorporated as part of domestic law. These treaties as incorporated require the ABA to, among other matters, develop the cultural identity of children through the Children's Television standards, and to promote the right of Australians to social and cultural development through the Australian content standard.

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1 See *Project Blue Sky & ors v Australian Broadcasting Authority*, unreported, Davies J, Federal Court, 2 August 1996 and orders 26 August 1996. The ABA's appeal to the Full Court (Northrop, Wilcox and Finn JJ) was successful (Northrop J dissenting). A special leave application will be heard by the High Court on 11 April 1997.

2 Allars, M, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204 at page 216.

3 The Australian Content Standard was determined on 15 December 1995, with effect from 1 January 1996.

4 The Variation to the Children's Television Standards was determined on 15 December 1995

and came into force on 1 January 1996. The Children's Television Standards were determined by the Australian Broadcasting Tribunal under the *Broadcasting Act 1942* and by effect of section 21(2) of the *Broadcasting Services (Transitional Provisions) Act 1992* are taken to be standards determined under section 122(1)(a) of the BSA.

5 Per Mason CJ and Deane J, *supra* note 6.

6 The decision of the Full Federal Court (Northrop, Wilcox and Finn JJ, Northrop J dissenting) was delivered on 12 December 1996.

7 *Minister for Immigration v Teoh* (1995) 183 CLR 273

8 The children's program includes programs made for preschool children (P programs) and programs made for primary school children (C programs).

The New Fair Trading Condition in British Telecommunications' (BT) Licence

Christina Hardy provides an update on telecommunications regulatory developments in the UK.

There have been some recent changes to BT's licence relating to interconnection price control and fair trading that provide an interesting opportunity for some comparisons with Australia's new framework for open competition.

To put the UK developments into a wider European context, European Union Member States are gearing up for full liberalisation of the voice telephony market from January 1998. As the UK has had a deregulated telecommunications market for thirteen years, any change to the UK regulatory regime provides an insight into potential trends and options for regulation of the EU telecommunications sector post-January 1998.¹

This article gives a brief outline of the relevant parts of the UK telecommunications licensing regime, sets out the major provisions of the new Price Control changes and the Fair Trading Condition in BT's licence and reviews the guidelines to the fair trading condition.

UK background

A fair and efficient interconnection framework is critical to any deregulated telecommunications market if competition is to thrive. In the UK each "public telecommunications operator" (PTO) licence contains specific conditions geared to ensuring other operators interconnect to each other's "systems" (networks) so that any-to-any service can be provided to customers and setting ground rules about a wide range of matters that facilitate competition such as prohibiting certain anti-competitive conduct. Unlike Australia, much of the detail about the regulatory rules is in each individual PTO licence, and not in the legislation.

Predictably, the operation of BT's licence conditions come under more scrutiny than do those of other operators. Thirteen years after competition was introduced into the UK market, OFTEL has recommended a modification to BT's licence by inserting a "fair trading condition"² at the same time as relaxing other conditions, such as those about price control, the basis for funding the universal service obligation and monitoring interconnection standard service charges.

As the Director-General of OFTEL, Don Cruickshank, put it: "the [Price Control and Fair Trading] package provides the basis for continued investment by BT and its competitors in the UK. It is deregulatory. But if BT is to have more pricing freedom, then OFTEL has to have effective powers to deal with anti-competitive behaviour. That is why Price Control and the introduction of the Fair Trading conditions are tied together in a single package."³

Price Control

The price control part of the package sets out a new methodology for calculating BT's interconnection charges and gives BT more power to set access charges for different services, depending on how competitive the service is.⁴ The final draft of the price control measures is due for release in May 1997 and the package will come into operation from August 1997.

The new system of calculating interconnection charges set out in the June 1996 package is based on long run incremental costs for the period August 1997 to July 2001, replacing the existing system of calculating interconnection

charges according to fully allocated historic costs. Put simply, under the new system, BT is able to take into account a wider category of its costs when calculating what its access charges will be.

More autonomy is given to BT in that OFTEL has proposed to remove the need for annual determinations and detailed regulatory intervention in setting interconnection prices. Instead there is to be a broad framework of controls set by OFTEL within which BT will have pricing flexibility to set its own charges. The degree of control will depend on the competitiveness of the service concerned, which are categorised in the following way:

(a) for competitive services - that is, directory enquiries and operator assistance - BT will be free to set its own charges subject to the conditions in BT's licence, but charges for the conveyance services component of these services must be based on the same component charge underlying the conveyance services in the general network baskets and safeguard caps;

(b) for services likely to become competitive by July 2001, that is, inter-tandem/exchange conveyance and international direct dial (IDD), OFTEL will set a safeguard cap of RPI+0% so that charges cannot rise in real terms. OFTEL considers this will be a competitive safeguard because if services become competitive, prices should be driven below the cap;

(c) for "bottleneck" and non-competitive services, that is call origination, local tandem conveyance, single transit and call termination services, charge caps will be introduced on two separate baskets of interconnection services to ensure that charges reflect efficiencies BT could be expected to achieve in reducing its network costs. One basket is for call termination and another is for general network services. The weighted average increase in the charges for the services in the baskets will not be allowed to increase above an RPI-X% formula each year (which is similar to the current retail price caps applied to BT's charges)

(d) for interconnect specific services (which BT provides to other operators but does not use itself), specific cost controls will be applied.

The starting values for the non-competitive basket charges and interconnect specific services will be set by OFTEL (and not BT) as BT's interim accounts for 1996/97 will not be available in time for the implementation of the measures in August 1997. BT will be free to change these charges to meet charge cap requirements on 90 days notice.

Balanced against deregulatory interconnection changes is the introduction of a new fair trading condition which aims to counter any potential anti-competitive effect the price control measures may have.

Fair trading condition

BT's fair trading licence condition came into force on 31 December 1996.⁵ In an attempt to ensure that there is consistency between the application of general competition law principles and telecommunications-specific provisions, the fair trading condition is modelled on the cornerstones of EU competition law, Article 85 and Article 86 of the Treaty of Rome ("EC Treaty").

In Summary:

Article 85 prohibits collusion between undertakings which may affect trade between Member States and that has the object or effect of restricting competition within the common market.⁶

Article 86 prohibits any abuse by one or more undertakings of a dominant position within the common market or a substantial part of it.⁷

Translated to telecommunications in the form of the fair trading condition:

"The Licensee shall not do anything, whether by act or omission, which has or is intended to have or is likely to have the effect of preventing, restricting or distorting competition where such act or omission is done in the course of, as a result of or in connection with, providing telecommunications services, or any particular description of telecommunication service, or running a telecommunication system".⁸

An "act or omission" caught by the prohibition takes the form of:

(a) any abuse, either alone or with other undertakings, of a dominant

position within the UK or a substantial part of it, such as:

(i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(ii) limiting production, markets or technical development to the prejudice of consumers;

(iii) applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage; or

(iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;⁹ or

(b) the making (including the implementation) of any agreement, the compliance with any decision of any association of undertakings or the carrying on of any concerted practice with any other undertaking which has the object or effect of preventing, restricting or distorting competition within the UK.¹⁰

Whether or not anything is caught by the fair trading condition is to be determined with a view to ensuring there is consistency with general principles that apply to similar questions of directly applicable competition law, especially those of the European Court of Justice on the scope of the competition rules in the EC Treaty and whether the particular act or omission has been exempted from the EC competition rules.¹¹ Other things that will be considered when determining whether anything is caught by the condition are decisions or notices applying to the competition rules in the EC treaty, pronouncements of the Director-General of the (UK) Office of Fair Trading or report of the (UK) Monopolies and Mergers Commission as well as the condition guidelines.¹²

The Fair Trading Condition is enforced by the Director General of Telecommunications who, when he believes that there is or has been a breach and that it may occur again, may make

an order setting out what needs to be done to restore compliance.¹³

Guidelines

In January 1997 the Director General released the final draft of guidelines on the operation of the fair trading condition, containing material reminiscent of that which AUSTEL produced during its public consultation on the Decision Making Framework (DMF) in 1994.

The guideline is a summary of competition law matters as they relate to telecommunications. Issues that are covered include: factors in defining markets; assessing dominance in a relevant market; and the application of the fair trading condition to specific issues such as predatory pricing, price discrimination, refusal to supply or connect and anti-competitive agreements.

Of particular interest is the different approach taken in the UK and the EC to determining what level of market share presumes dominance in a market. In the UK, the relevant legislation excludes undertakings with less than a 25% market share which is used as a way of easily distinguishing cases that are unlikely to give rise to a misuse of market power. The guideline states that OFTEL would not presume that a player was dominant if it had a market share above 25%, but that it is unlikely that an operator with less than 25% market share would be capable of abusing a dominant position.¹⁴

The UK assessment of dominance contrasts with the European Court of Justice, which in a non-telecommunications case held that there was a presumption of dominance at or above a 50 per cent market share. Above 50 per cent, the onus usually shifts to the undertaking to show that the specific market conditions meant it was not dominant. The European Court of Justice has not examined the issue of market shares and dominance in the telecommunications sector.¹⁵

Conclusion

The price control and fair trading package reflects the maturity of the UK telecommunications market thirteen years after deregulation. It is also possibly the UK's opening gambit on influencing the structure of telecommunications regulation in the liberalised EU market. A challenge for the European Commission will be to reconcile the relative maturity of the UK telecommunications market (and comparative sophistication of the UK regulatory regime) and the embryonic competition in the majority of the EU Member States when it lays down the structure of future regulation of telecommunications across all EU Member States.

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1 Recent developments in access and interconnection regulation in the UK and draft proposals for the liberalised EU market will be the subject of a separate article in a subsequent CLB issue.

2 OFTEL, Guidelines on the operation of the Fair Trading Condition - Final Draft, 22 January 1997.

3 "Pricing of Telecommunications Services From 1997 - OFTEL's Proposals for Price Control and Fair Trading", Statement issued by the Director General of Telecommunications, OFTEL, June 1996

4 "Pricing of Telecommunications Services From 1997 - OFTEL's Proposals for Price Control and Fair Trading, Statement, June 1996, and "Network Charges from 1997", Consultative Document, December 1996, issued by the Director General of Telecommunications, OFTEL

5 BT was unsuccessful in its judicial challenge to the enforcement powers granted to the Director General in the fair trading condition.

6 An Introductory Guide to EC Competition Law and Practice, 5th edition, Valentine Korah, Seet Maxwell, 1994, p 2

7 Ibid, p 3

8 Condition 18A

9 Condition 18A(1)(b)

10 Condition 18A(3)(a)

11 Condition 18A(3)(a)

12 Condition 18A(3)(b)

13 Under s 16 of the Telecommunications Act 1984 (UK) the Director General can make a Provisional Order or a Final Order. Licensees are also protected by OFTEL's procedures for making Determinations which give an opportunity for a licensee to be heard.

14 Paragraph 28, Guideline

15 Paragraph 29, Guideline and Case C-62/86 AKZO Chemie BV v Commission [1991] ECR I-3359, [1993] 5 CMLR 215

Internet Telephony

Emma Maloney & Lisa Hill raise some of the technological, regulatory & industry issues of Internet telephony

Australian Internet Service Provider, OzEmail, recently launched a new product, OzEmail Phone, which it claims is the first commercial service in the world providing Internet telephony from a standard telephone. It is noteworthy because this product makes Internet telephony a realistic competitor in the long distance call market. It allows customers to make telephone calls using the Internet with a touch tone telephone at a substantially reduced rate compared with existing fixed line and mobile services.

This short article looks at the technology, the response of carriers and regulators to Internet telephony and at the legal position facing Internet telephony providers in Australia.

The Technology

The technology to make real time telephone calls over the Internet has been available for some time, but both parties needed personal computers. OzEmail Phone means that the caller makes a standard telephone call to a datacentre using a touch tone telephone. There, the caller's voice is digitised before the signal

is sent to a local carrier in the destination country using the Internet. When it is received the local carrier connects the call to the destination telephone.

Acceptance of Internet telephony as an alternative to PSTN has been slowed by compatibility and quality problems including response times, drop out and echoes and until now the need for microphones and speakers. So while the impact on telephony carriers may not have been felt as yet, technological developments and improving quality are a cause for concern as Internet telephony has the potential to drive down prices in the long distance market.