

Towards Competition and Open Access on Cable Networks

**Annabel Butler provides a summary of the
Telecommunications (Service Providers Class Licence) Direction No. 1 of 1995**

This is the first of two articles on the Telecommunications (Service Providers Class Licence) Direction No 1 of 1995 ("Direction") issued by the Minister for Communications and the Arts, Mr Michael Lee. The second article will focus on whether the Direction adequately addresses the Government's policy of open and non-discriminatory access to broadband services delivered by cable - as announced by the Minister on 24 November 1994.

Background

The Direction was signed by the Minister on 31 July 1995, and tabled in the Senate on 22 August 1995. The Direction only applies to telecommunications services which are delivered by cable installed, but not owned, by the licensed carriers. Infrastructure which has been installed by non-carriers, such as broadcasters or transport authorities, is not subject to the Direction.

The Direction was formulated following proposals by Optus and Telstra and their joint venture partners to construct cable networks to deliver services ranging from conventional telephony through to interactive broadband and pay TV services. Under both proposals the infrastructure is installed by the carriers but is owned by separate legal entities, Optus Vision and Foxtel, termed "carrier associates" in the Direction.

The objective of the Direction set out in the Explanatory Statement is

'to promote competition, diversity of content, technical innovation and new investment in broadband services delivered by means of cable.'

What is a 'carrier associate'

"Carrier associates" are defined as:

- a person (other than an individual) in which a direct or indirect interest is held by a carrier that is in a position to have a significant influence on the business activities of the person; or

- a person (other than the Commonwealth of Australia) that has a direct or indirect interest in a carrier and that is in a position to have a significant influence on the business activities of the carrier.

The definition is not intended to apply to genuine arm's length arrangements with third parties in the course of a carrier's business, such as an outsourcing arrangement. That is, if a carrier-built infrastructure is operated by an outsourcing party, and a carrier had a limited passive investment in that outsourcing party, the network would not be regarded as a carrier associate network.

The Direction is intended to ensure that carrier associates are subject to three core principles of the Telecommunications Act 1991. First, connection of eligible service providers; secondly, non-discriminatory treatment of service providers; and thirdly, interconnection to network facilities. However, where pay TV services are concerned, carrier associates are exempt from these three principles until 30 June 1997. The Direction allows the industry two years to roll out cable and establish infrastructure, recognising the need for commercially sensitive treatment of an industry in its initial stages. The exemption may be extended until 30 June 1999 if the government decides that there is appropriate competition in the delivery of pay TV by cable.

While the Direction ensures that one network provider is able to use another's network, which discourages duplication of infrastructure, it accepts that some duplication may need to occur for bona fide commercial reasons.

An important aspect of the Direction is that carrier associates are encouraged to make capacity for community access and education available on their networks. The Direction allows carrier associates to discriminate in the provision of services in favour of non-profit community, charitable and educational organisations.

The Explanatory Statement of the Direction makes it clear that if either carrier seeks to use a carrier associate structure to circumvent the provisions of the Direction, the government will legislate to prevent it.

Carrier associates and service providers are expected to cooperate with AUSTEL in the implementation and administration of the class licence conditions set out in the Direction.

Use of Carrier Associate's Network by Other Persons

Clause 2

Where a person proposes to supply an eligible service, and a telecommunications network is needed to do so, a carrier associate must connect the eligible service, or a facility used for supplying the eligible service, if so requested.

Similarly, where a person proposes to supply telecommunications services (other than point-to-point services), and a telecommunications network is needed to do so, a carrier associate must connect the telecommunications services, or a facility that is to be used for supplying the telecommunications services, if so requested.

However, up until 30 June 1997, if a carrier associate's service is used to supply a pay TV service, the carrier associate does not have to comply with a request to connect either:

- (a) a telecommunications service for the purpose of supplying a pay TV service; or
- (b) a facility solely for the purpose of supplying a pay TV service.

If, after it has been connected, a telecommunications service or facility is used to supply a pay TV service without the written consent of the carrier associate, the carrier associate may disconnect the service or facility. This provision only applies until 30 June 1997.

Further, a carrier associate does not have to comply with a request to connect eligible services or telecommunications services if one of the exemptions under clause 2(9) is satisfied. That is, if:

- (a) AUSTEL declares the service to be an unlicensed service; or
- (b) AUSTEL advises the carrier associate in writing that the connection of the service or facility

- is not technically feasible; or
- (c) the carrier associate has reasonable grounds for believing that the recipient would fail to a material extent to comply with the terms and conditions on which the carrier associate would supply the service. (Evidence that the recipient is not credit worthy is an example of a "reasonable ground"); or
 - (d) the connection of the service or facility would significantly reduce the capacity of the carrier associate's network that is available to meet the reasonably anticipated requirements of the carrier associate for its own use (this allows the carrier associate commercial flexibility in planning its capacity - especially in relation to providing new kinds of eligible services); or
 - (e) the carrier associate has reasonable grounds for believing that the unused part of the capacity of the carrier associate's network is insufficient to supply the relevant service; or
 - (f) the connection of the service or facility would require the carrier associate to supply a particular telecommunications service that the carrier associate has not previously separately supplied to another person.

If, having told a carrier associate that the connection of a service or facility is not technically feasible, AUSTEL subsequently tells a carrier associate that the connection is technically feasible the carrier associate must connect the service or facility as requested.

Clause 2(11) allows delay in the connection of a service or facility for:

- (a) a period that is reasonable in the circumstances and is not substantially longer than delay normally experienced for connection of a service or facility of that kind and in that locality; or
- (b) a reason that is beyond the control of the carrier associate, or of another person which the carrier associate has arranged to connect the service.

Non-Discrimination

Clause 3

Clause 3(2) provides that a carrier associate must not discriminate against a

person in relation to supplying telecommunications services to a carrier or to another eligible service provider for the reason that a person:

- (a) supplies, or proposes to supply, eligible services under a class licence; or
- (b) uses, or wishes to use, eligible services supplied under a class licence; or
- (c) is a carrier; or
- (d) uses, or wishes to use, telecommunications services supplied by a carrier.

However, there are three situations specified in the Direction in which a carrier associate is allowed to discriminate in favour of certain services and organisations. Clause 3(3) gives a carrier associate a discretion to discriminate in favour of services that are supplied:

- (a) for community, charitable or educational purposes; or
- (b) to non-profit community or charitable organisations, educational institutions or health facilities; or
- (c) to a person who is disadvantaged on financial or health grounds.

The intention of this clause is to permit carrier associates to offer favourable access arrangements to community and educational service providers. The term "educational" is described in the Explanatory Statement as referring to "structured learning programs and the like, rather than general programs such as documentaries which may have an information or educational aspect".

Further, clause 3(4) provides that the prohibition against discrimination does not apply if a carrier associate service supplied by the carrier associate is used to supply a pay TV service and the telecommunications services that are supplied, or proposed to be supplied, by the carrier associate are used, or are to be used, to supply a pay TV service. It is to be noted that a carrier associate's ability to discriminate on this ground only lasts until 30 June 1997.

Under clause 3(6) a carrier associate may discriminate against a person in relation to supplying telecommunications service to a carrier, or another eligible service provider, if such discrimination is justified by:

- (a) a significant difference in costs borne by the associate carrier that

will be, or is likely to be, related to the discrimination; or

- (b) the different characteristics (other than those related to costs) of the services supplied; or
- (c) the commercial value to a person of services supplied by that person using a telecommunications service supplied by the carrier associate; or
- (d) the desirability of trial program and pilot programs being conducted that promote the objects of the Act.

This section means that a carrier associate would be able to charge an eligible service provider a different rate depending on whether the service was used by the service provider for a service with a high or low commercial value. For example, the telecommunications services used in a home-shopping service and a foreign language entertainment service may have the same transport characteristics but the services supplied to the customer may have a different commercial value.

Clause 3(7) goes on to provide that discrimination is justified on the ground of costs if the difference in the costs borne by the carrier associate results from one or more of the following:

- the quantities in which the services are supplied;
- different capacity (ie transmission, bandwidth) needed to supply the services (this includes capacity required as part of the carrier associate's reasonably anticipated requirements for its own use);
- places from or to which the services are supplied;
- periods for which the services are supplied;
- performance characteristics at which services are supplied;
- network matters relating to supply of services; and
- administrative or operational costs in relation to services.

Supply of point-to-point Telecommunications Services to a Carrier

Clause 4

If a carrier reasonably requests a carrier associate to supply point-to-point telecommunications services to the requesting carrier, then the carrier associate must supply (or arrange for the supply of) the telecommunications services

to the requesting carrier for the purposes of supplying point-to-point telecommunications services on such conditions as the requesting carrier and the carrier associate agree.

However, a carrier associate does not have to supply point-to-point telecommunications services if the service supplied by the carrier associate is used to supply a pay TV service and the requesting carrier requests the carrier associate to supply a telecommunications service that is to be used to supply a pay TV service. Once again, this exception only applies until 30 June 1997.

Further, a carrier associate does not have to supply a service if AUSTEL tells the carrier associate in writing that the supply is not technically feasible. However, if AUSTEL subsequently tells the carrier associate in writing that the connection is technically feasible the carrier associate must then supply the requested telecommunications services.

If a carrier associate supplies (or arranges to supply) a point-to-point telecommunications service and that service is subsequently used to supply a pay TV service without the written consent of the carrier associate, the carrier associate can, until 30 June 1997, cease to supply the service.

Interconnection to Network Facilities by a Carrier

Clause 5

If a carrier requests a carrier associate to interconnect the requesting carrier's network facilities to a network of the carrier associate for the purpose of the carrier associate supplying point-to-point telecommunications services, then the carrier associate must do so on such commercially negotiated terms and conditions as agreed between the carrier and the carrier associate.

However, if a carrier associate service supplied by the carrier associate is used to supply a pay TV service and the sole purpose of the request for interconnection is for the requesting carrier to supply a pay TV service then the carrier associate does not have to interconnect the requesting carrier.

Further, if AUSTEL tells a carrier associate in writing that the interconnection of the facility is not technically feasible then obviously the carrier associate does not have to interconnect the requesting carrier. However, if AUSTEL subsequently tells the carrier associate that interconnection is technically feasible then the carrier associate must arrange for interconnection.

Also, if after the carrier associate has

allowed or arranged for interconnection of a requesting carrier's network facility, the facility is used to supply a pay TV service without the written consent of the carrier associate, then the carrier associate may disconnect or arrange to disconnect the facility. This provision will cease to have effect on 30 June 1997.

Consent Required to Supply a Pay TV Service

Clause 6

As a condition of the class licence, a carrier associate must not use another carrier associate's network to supply a pay TV service without the written consent of the other carrier associate.

Conclusion

The Explanatory Statement of the Direction states that the Direction may need to be revisited after the 1997 telecommunications policy review. Obviously, if changes are made to the *Telecommunications Act 1991* following the review, the Direction will need to be amended. The Explanatory Statement also foreshadows the Government's intention to review the exemption for pay TV services in the lead-up to 30 June 1997. If there is "appropriate competition in the delivery of

pay TV services" the Government will allow the exemption to continue for a maximum period of 5 years, that is, until 30 June 1999. Determining what is "appropriate competition in the delivery of pay TV" is open to interpretation. No guidance is given as to the criteria by which the Minister will determine effective competition. In its current form, there is no certainty in the review process proposed for the Direction.

The Explanatory Statement also raises the issue of objectionable material being available on broadband networks. It states that the options for regulation of point-to-point services (such as self regulation, complaints procedures and the introduction of offence provisions) are being considered in relation to content regulation for more general point-to-point services, including broadband applications. These services are receiving attention in the implementation of the Government's national strategy for the adoption of new information and communication services.

The second article on the Direction will examine whether it meets its objective of promoting competition, diversity of content, technical innovation and new investment in broadband services delivered by means of cable.

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Making International Multimedia Deals in The Interactive Age

Martin Cooper reports on the views presented to a conference on multimedia legal issues in Cannes, France in May 1995.

Between 21 and 22 May 1995 the International Bar Association and the International Chamber of Commerce conducted a conference dealing with legal issues relating to multimedia in the interactive age, in Cannes, France.

Some 120 delegates from all European countries and from the US, Australia, Israel and New Zealand joined to hear 24 speakers grapple with a number of issues relating to exploitation of this media.

The Chairman of the program, Dr Mathias Schwarz of Munich and the

University of Leipzig raised a number of issues relating to the definition of multimedia. Is it a film for copyright purposes? Are 'on demand' services a transmission to the public? He also looked at questions of when a data base is protected under copyright and the EC Data Base Directive in relation to this.

He raised questions relating to cross border on demand services, questions such as droit morale and the function of collecting rights societies in dealing with the complexity of multimedia copyright issues.