
ITIL - the new buzz word in the IT space

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Introduction

“ITIL” is yet another acronym being used in the world of IT - and over the last couple of years, increasingly used. The term “ITIL” has even crept into standard form agreements of IT customers, with many IT customers making requests about an IT vendor’s ITIL capability. As a result of the new buzz word being so frequently used, I thought it would be useful to write a short article explaining ITIL - where it came from, what it is and the perceived benefits of ITIL. This article also briefly comments on including an obligation to comply with ITIL in agreements and making representations of ITIL capacity in tenders and other documents.

Where did ITIL come from and why is it important in Australia?

ITIL stands for “Information Technology Infrastructure Library”. It is a quality management standard for IT Service Management that was developed in the 1980’s by the UK Office of Government Commerce. ITIL was created as a guide for the UK Government on how best to minimise inefficiencies in the communication and co-operation between various IT functions and processes.

ITIL was updated and re-published in 2000/2001. The British Standard for ITIL (BS 15000) was published based on the newest version of ITIL and in 2002 BS 15000 was rewritten and relaunched based on feedback received from various stakeholders.

Australia has followed suit and in 2004, Standards Australia published *AS 8018-Australian Standard for ICT Service Management (Australian Standard)*. The Australian Standard is an adoption of BS 15000 and is virtually identical to the British Standard except for an additional clause added to the scope emphasising the desire and need for the Australian

Standard to be used by vendors of IT systems.

ITIL is now considered to be a worldwide best-practice standard in IT Service Management.

What is it ?

Put simply, ITIL is a collection of best practices for an IT organisation, designed to achieve operational improvements through more streamlined processes. ITIL emphasises the relationship between various IT processes by placing IT functions, processes and methods within a structured and tightly integrated framework. The integration is designed to maximise communication and co-operation between various IT functions and processes within business or government.

ITIL consists of seven parts: Managers Set, Service Support, Service Delivery, Software Support, Networks, Computer Operations and Environmental.

Understanding compliance with the Australian Standard

A company wishing to comply with the Australian Standard does not need accreditation or certification and may simply choose to move toward having the ideals of ITIL as part of its business. A company can choose to become certified (the company as a whole can be certified or a particular product can be certified), however for large organisations this may be an expensive and a laborious process.

IT customers have recognised the expense of becoming certified and rather than requiring evidence of certification, there is a trend in IT customers requiring a clause in agreements that obliges compliance with the Australian Standard. This can be done by way of a clause that expressly requires the supplier to comply with the *AS 8018-Australian*

Standard for ICT Service Management.

If the supplier is not compliant with the Australian Standard, a supplier should be cautious in agreeing to an obligation that requires absolute compliance with the standard - in the litigious world that we live in, an IT customer could bring an action against a supplier for breach of contract for failure to comply with the clause.

Note however, that it would be difficult and costly for an IT customer to prove non-compliance with a standard that does not require certification - particularly in large organisations. To prove non-compliance, an IT customer may even need to engage a team of ITIL experts to review and report on the entire IT processes of a business.

And even where an IT customer could prove failure to comply with the Australian Standard, it would be a difficult task to show that damage has been suffered by the customer as a result of the IT supplier failing to comply with the Australian Standard. Damages are payable where it can be shown that actual loss has been suffered as a result of the breach.

A related risk is whether a breach of the clause requiring compliance with the Australian Standard could lead to a customer exercising a termination right under the agreement. Usually, an agreement will have a termination right where the other party has committed a material breach of the agreement and that other party has failed to remedy that breach after being provided with notice of it. So, would a court consider the supplier’s failure to comply with the Australian Standard as a material breach of the agreement?

In answering the question, it is useful to consider the meaning of material breach. There is authority that the term “material breach” in a contract

should be accorded the same meaning as fundamental breach at common law.¹

A fundamental breach at common law is a breach that:

1. "goes to the very root of the contract";² or
2. deprives a party of substantially the whole benefit of the contract.³

In my view, it is unlikely that a court would consider the failure by a supplier to comply with a standard as a material breach unless the primary reason that the IT customer entered into an agreement with the supplier in the first place was because the supplier was compliant with the Australian Standard.

In some agreements, there are broad termination rights for failure to remedy any breach - where a broad termination right exists, a supplier should always be weary in agreeing to to a clause where there is a high risk of non-compliance. Perhaps a better approach for IT suppliers is to agree to comply with the general principles of the Australian Standard or a "commercial endeavours" type clause which does not require absolute compliance. Then, if the supplier can show that it has adopted the principles of ITIL or the Australian Standard, it will be safe from being found in breach of the obligation and from having a termination right triggered.

Would a supplier need to comply with the Australian Standard if there was a general clause requiring compliance with "relevant standards"?

Some agreements have a clause requiring suppliers to comply with all relevant standards. The question is whether such a clause could be interpreted to mean that the supplier must be compliant with the Australian Standard.

The general principle is that where there is ambiguity in an agreement, there are various rules of construction that are likely to be applied by a court in determining the implied meaning of the clause. These include:

- there is a general rule that a court will apply a presumption that the parties

did not intend its terms to operate unreasonably.⁴ Therefore where a particular construction would achieve an unreasonable result, the court will be reluctant to accept that it was meant by the parties.

- a commonsense approach must be taken particularly in commercial contracts which are expressed in an imperfectly constructed document - in other words, a clause must be construed to have business commonsense.⁵
- there are rules governing the material that can be received to assist a court in the construction process (for example, the parole evidence rule and its various exceptions).

If the first construction were adopted, the potential scope of a clause requiring compliance with all relevant standards would seem to be unreasonably broad (and constantly changing as new voluntary standards are introduced). The presumption against unreasonableness and the requirement to adopt a construction which has business commonsense arguably point to the narrower construction referred to above. However, this issue is not free from doubt and there may be further evidence concerning the parties' negotiations at the time of entering into the agreement which may point to the broader construction.

Making representations of ITIL compliance

More and more, suppliers are making representations in tenders and expressions of interest that they are compliant with ITIL and the Australian Standard.

If a supplier is not compliant with ITIL or the Australian Standard, the risk is that a successful claim under section 52 of the Trade Practices Act 1974 will be brought for misleading and deceptive conduct.

Given that section 52 claims are outside the scope of agreements, any amounts payable by the supplier as a

result of a successful claim would not be within an agreed liability cap in the agreement.

Conclusion

ITIL has received endorsement from many large organisations. It is praised for improving IT processes, reducing costs and complexities and forcing organisations to really focus on organisational structures and functions. However, where a supplier is not 100% compliant with the Australian Standard, a supplier should be reluctant to agree to a clause which requires compliance. Similarly, a supplier should refrain from making representations regarding compliance with ITIL.

Leaving contractual obligations aside, from what I have read, the guiding principles of ITIL certainly get my vote⁶ and IT businesses should really look into adopting the ideals of ITIL.

¹ Forklift Engineering Australia Pty Ltd v Powerlift (Nissan) Pty Ltd & Ors [2000] VSC 443.

² Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale (1967) 1 AC 361, Shevill v Builders Licensing Board (1982) 149 CLR 620, Cehave NV v Bremer Handelsgesellschaft mbH [1976] QB 44, Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26

³ Amann Aviation Pty Ltd v Commonwealth (1990) 22 FCR 527, Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909, Photo Production Ltd v Securicor Transport Limited [1980] AC 827, Academy Health & Fitness Pty Ltd v Power [1973] VR 254, Hong Kong Fir.

⁴ L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235.

⁵ See Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 at 201.

⁶ [see article at <http://www.csoonline.com.au/index.php/id;1128774117;fp;524288;fpid;1>]