25 July 2003

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Australian Competition and Consumer Commission
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Dear Arek

DRAFT DETERMINATION - MODEL NON-PRICE TERMS AND CONDITIONS

This letter provides Optus' comments in response to the ACCC's draft determination on the model non-price terms and conditions. In particular, this letter sets out Optus' comments on whether the draft determination adequately satisfies the objectives of the Government's legislative reforms as presented in section 152AQB of the Act. Our specific comments on the individual model terms and conditions are set out in the attachment to this letter.

Optus considers that the ACCC has made significant progress to set acceptable model terms and conditions across a number of the less contentious non-price conditions of supply. For example, the ACCC's endorsement of the need for more accurate and timely billing terms may improve the service levels for access seekers. Similarly, the principles that deal with confidentiality and communication with end-users and the arrangements for the suspension and termination of services are likely to improve upon current commercial arrangements.

However, whilst there have been improvements in the abovementioned areas, Optus does not believe that the draft determination, as a package, meets the full intent of the Government's reforms. The purpose of the Government's package of reforms was to establish transparency and fairness in the terms and conditions offered to access seekers, with the objective of assisting parties in reaching commercial agreement on fair and reasonable terms and conditions of access. In particular, we believe that the need for model non-price terms and conditions was driven by a desire to ensure that as far as possible end-users receive equitable outcomes whether or not they elect to purchase a service from an access seeker or from Telstra.

Optus understands that the initial requirement for the legislative reforms was borne out of frustrations that the existing commercial and industry self-regulatory processes had not adequately dealt with a number of stalemate, contentious non-price related issues. As such, on a range of operational matters it was felt by industry that existing commercial agreements and the industry-wide ACIF codes had failed to provide equitable terms and conditions of supply. The establishment of model terms and conditions by the ACCC was meant to provide industry with an opportunity to address these issues without the need for invoking bilateral dispute processes or re-examining the existing codes, both of which would be time consuming.

In this context, Optus has provided a number of specific examples in our submissions of operational issues or arrangements that should be examined by the ACCC in developing its model terms and conditions. Whilst it is evident that the ACCC has taken some of Optus' concerns into account in the draft determination, Optus believes that the ACCC needs to go further in its role by setting non-price terms and conditions for all of the areas of contention. In particular, Optus is concerned that the ACCC has referenced a number of key operational issues to existing ACIF codes, without necessarily considering whether that code actually deals with the current issues. As an example, in developing the ULLS ACIF Code G572:2001 industry was mainly concerned with the incidence of interference type faults. Experience over the last two years suggests that the majority of faults are actually due to line faults, however the ACIF code does not provide model terms and conditions for this.

The main concerns for access seekers relate to arrangements for 'ordering and provisioning', 'faults and maintenance' and 'access to online information systems'. These are the areas where Telstra's access arrangements have the potential to discriminate against access seekers and indirectly impact on the service levels received by end-users. Unfortunately, these are the contentious areas that the ACCC seems to have placed in the 'too difficult' basket by reverting back to the current access agreements, ACIF codes or TAF codes. For example, with respect to ordering and provisioning the ACCC states quite clearly that it would be concerned if access agreements did not ensure that ordering and provisioning arrangements should be provided in a non-discriminatory manner. However, the ACCC has not proposed to act on this point. For ULLS, Telstra currently avoids this provision by claiming that it does not provide ULLS to itself. The development of model terms and conditions provides the perfect opportunity for the ACCC to address this issue once and for all, so as to ensure that:

- customers can be provided with a service that uses an underlying copper pair by an access seeker in the same timeframe that the service can be provided by Telstra;
- if a customer's service develops a fault due to a line break, that the customer's service can be restored in the same timeframe regardless of who provides the service; and

- a customer can receive Service Qualification from an access seeker and Telstra in the same timeframes.

ACIF codes are primarily intended to set out general principles and specify uniform processes and transactions by which parties can interact in respect of the provision of a number of services. As such, the codes are not intended to set contractual terms and conditions and may not always ensure equitable outcomes for the end user. By their very nature codes cannot always guarantee equitable outcomes, rather they describe inter-carrier processes and cannot venture into the territory of providing comparisons between these processes and Telstra's internal processes. Indeed, whilst equity may be a concern of the codes, it is equity between the access seekers that is the focus not equity between access seeker and access provider.

Finally, Optus notes that the codes are developed in a consensual framework, with the result that contentious issues or issues that are judged to be 'commercial' in nature will commonly be left to bilateral discussions. The ACCC should not assume that simply because an ACIF code exists in relation to a service that all issues have been adequately addressed and that this is sufficient basis for the model terms. Carriers often trade–off the need to complete a code and ensure that a service commences rather than ensuring that the code meets all the first-best operational arrangements. In many instances Codes may be accepted and voted through with issues not addressed or with a resulting sub-optimal position for access seekers. The following examples highlight the inadequacies of the ACIF codes in this respect:

- ACIF C513:2002 Fault Management Code has not defined any suitable fault rectification timeframes. There has been some recent work in ACIF to improve the definition or operational meaning of what is meant by expressions such as "immediately" to "close of next business day", however, there remain no timeframes for when the problem must be resolved by the access provider.

- Whilst the ACIF Code C513:2002 does have a set of industry agreed fault symptom and fault clearance codes, this code does not apply in the case of LCS, which is a particular area of contention.

- The ACIF Code G572:2001 does not, and is not equipped to deal with Telstra's internal processes for addressing faults in a manner that differentiates between the different categories of fault types and the standard process follows that used for telephone line faults. As a result, on many occasions it takes 2 to 3 days before a technician is sent to investigate the fault, which is subsequently fixed in less than an hour.

- The ACIF Code C569:2001 does not deal adequately with the provisioning of ULLS because it allows Telstra to simply use its standard telephone processes to provision for ULLS. The result is that the time it takes Telstra to provide its

customers with a telephone service is shorter than the time it takes them to provide an access seeker with ULLS. Optus has highlighted this issue to the ACCC in more detail in our submission on the KPI monitoring procedures.

In summary, Optus does not consider that the ACCC should revert back to ACIF codes until it can confidently be satisfied that customers will receive equitable outcomes from Telstra and access seekers as a result of the particular ACIF code. Optus does not believe that this is the case for any of the areas discussed in the draft determination. For the ACCC to revert issues of contention back to ACIF would appear to conflict with the purpose of the Government's reforms. Optus proposes that the ACCC should request specific information from carriers on those aspects of the operational codes that need to be improved. The ACCC could then address these issues by developing appropriate model terms and conditions of supply in consultation with the industry.

In addition to the concerns outline above, Optus does not consider that the ACCC has adequately addressed issues relating to service migration provisions in the proposed model terms. In practical terms service migration can include anything from small upgrades to systems to the complete re-engineering of how a service is delivered. There is a need therefore, for a much wider range of notice periods to deal with individual circumstances than the ACCC has allowed for. Further details of Optus' specific concerns are set out in the attachment to this letter.

A final concern for Optus is the fact our request for the ACCC to assess the need for enforceable service levels does not appear to have been addressed. As a result, for most declared services access seekers will continue to have to accept service on a "reasonable efforts" basis with no guarantee that service levels will be met.

Notwithstanding our specific comments above, Optus does recognise the difficulties the ACCC has faced in developing a homogenous set of model terms and conditions particularly given the current range of bilateral agreements and codes that have to be considered. The process of setting standard terms and conditions requires the ACCC to make a judgement between conflicting interests of the access seeker and the access provider on detailed operational matters. This requires specialised expertise to assess the likely operational implications of these competing positions. Given these complexities, it is perhaps unsurprising that the draft determination has not addressed all issues of contention raised by access seekers. However, in addition to the specific issues raised in this letter, Optus would encourage the ACCC to continue to refine and improve the model terms and conditions over time. In this respect, Optus considers that the ACCC's separate obligation to develop and monitor Telstra's compliance with key performance indicators for certain non-price terms and conditions of supply provides the ACCC with an obvious reference point to review the adequacy of the current model terms and conditions.

If you have any queries in relation to the material presented in this letter, please contact me on 02 9342 8437.

Yours sincerely

Andrew Sheridan
General Manager
Interconnect & Economic Regulation

Attachment A

A. Billing and notifications

Optus generally supports the ACCC's principles with respect to billing and notification arrangements.

The timeframes of 20 days for notification and 10 days to make a refund or payment seem to be a reasonable step in the right direction. We are also pleased that the ACCC has acknowledged the need for a time limit to be placed on back billing of charges. We also acknowledge the ACCC's proposal for rebates to apply in respect of frequent rendering of incorrect invoices. With respect to the specific draft clauses Optus offers the following comments:

- Clause A.3: This clause implies that some or all charges may be notified by the access provider to the access seeker from time to time. This is not commercially feasible. Charges should be agreed and attached to the contract. Any later variation should only be by agreement.
- Clause A.4: This clause refers to a "statement of general principle" that billing may be more frequent than one month if the access seeker loses creditworthiness. The billing period should be fixed unless altered by agreement.
- Clause A.8: The timeframe of 20 billing days, whilst an improvement, is too short in many instances. It can, for example, take the access provider a significant amount of time to respond to a dispute and provide additional information that is requested to verify a bill. Optus suggests that this condition does not apply if the invoice if subject to a formal billing dispute.
- Clause A.14: This clause requires the access seeker to pay an invoice in full unless it lodges a billing dispute within the payment period. This is not always feasible. Optus suggests this clause is deleted.

B. Creditworthiness

Optus generally supports the ACCC's principles with respect to creditworthiness and security arrangements. However, given the fact that the need for security will depend upon the particular counter party and the circumstances we are not convinced that there should be model terms and conditions over and above these principles.

Optus suggests that the detailed security arrangements is a matter best left up to individual negotiation and not be subject to the model terms. However, the principles should be used to guide the establishment of these individual arrangements.

C. Liability (risk allocation) provisions

Optus particularly welcomes the ACCC's comments on the liability arrangements relating to local call services ("LCS"). The ACCC states that access seekers should be able pass on to the access provider its Customer Service Guarantee (CSG) liabilities for which the access provider is responsible. **[Start commercial-in-confidence]**

[End commercial-in-confidence]. The model clauses will help to establish the responsibility for CSG obligations and should lead to a more clear and timely process. Optus has the following comments on the specific model terms and conditions:

- Clause C.5: Optus does not accept that there should be any liability cap in respect of claims made by third parties against the innocent party (in clause C.11). The cap should however apply to property damage (clauses C.9 and C.10).
- Clause C.8: This clause requires each party to indemnify the other for claims arising out of the death or personal injury of personnel of the other party. This is contrary to the normal risk policy in interconnection arrangements, which is for each party to bear its own loss due arising in these circumstances.
- Clauses C.12 and C.13: These clauses require the access seeker to indemnify the access provider for all loss in connection with certain activities and the service. These indemnities are vague and need significant clarification.
- Clause C.18: This clause provides that there is no liability for network interruption caused by certain events. It is not clear how this exclusion clause is intended to interact with the indemnity clauses earlier on (and in particular the third party claims indemnity in clause C.11).
- Clause C.22: This clause should provide clear guidelines on the timeframes that are measured (eg CSG timeframes) to determine whether the access provider is liable to pay damages, rebates or penalties.

D. General dispute resolution procedures

Optus supports the ACCC's general principles on dispute resolution arrangements. However, we have a specific concern with Clause D.6 of the model terms and conditions. A requirement that parties should only commence an arbitration after having pursued a dispute resolution process is not practical. These dispute processes are successful when parties mutually agree to participate. If they are not voluntary they will simply delay the resolution of the dispute. In reality there are certain matters that are unlikely to be resolved through a dispute resolution process and such a process is only likely to add to the delay in seeking an arbitrated resolution. An example is prices that should apply for core services. Optus recommends that Clause D.6

is re-drafted to exclude the reference to "any arbitration whether pursuant to Part XIC of the TPA".

E. Confidentiality

Optus strongly agrees with the ACCC's statement that an access seeker should be entitled to protection of its confidential information and that end user information should be quarantined within the access provider's organisation. This is particularly relevant in resale relationships.

Optus proposes that model terms and conditions should contain an active obligation on the access provider to ensure that it has appropriate 'Chinese walls' or other 'ring fencing' arrangements to ensure that end user information is not misused. In respect of the specific clauses, Optus has the following comments:

- Clause E.2: Optus queries whether quarterly information is adequate for all circumstances, in some instances the provision of monthly traffic information may be required.
- E.4(d): Timeframes of notice should be specified in this clause to allow a party to protect the confidentiality of its information. For example, at least 20 business days notice may be appropriate.

F. Communications with end users

Optus supports the ACCC's principles for communication with end users and Optus agrees with the proposed draft model clauses. However, the term 'cold call' is quite subjective and should be defined. The access provider and access seeker should agree upon specific terms by which contact can be made by the access provider to the end user in circumstances where provisioning and service assurance procedures are required. In respect of the specific clauses Optus has the following comments:

- Clause F.1(c)(ii): This clause should also contain a provision that the access provider does not use the opportunity to make any comments on the access seeker's service.

G. Service Migration

This draft model terms and conditions set minimum notice periods of:

- 40 business days for changes to specification of core service;
- 10 business days for minor changes; and
- 60 business days for relocation of facilities.

This does not apply to non-core services and there will be no required indemnity or compensation to access seekers for failure to meet these timeframes.

The time periods proposed in the model terms and conditions are likely to be acceptable for minor changes or some changes to specifications of services. However, for relocation of facilities or major specification changes, 40 or 60 business days notice is wholly inadequate.

For example where the access provider is introducing an entirely new billing or provisioning system significant lead-times are required. **[Start commercial-in-confidence]**

[End commercial-in-confidence].

Further, a decision by Telstra to move a ULLS point of interconnect from the local switch to the remote access unit, could be classified as service migration. Such a relocation would require significant network changes to be implemented by the access seeker. It could also fundamentally change the economics of providing services through that access mechanism because of the significant additional capital expenditure that are likely to required to re-locate a ULLS service.

Optus has presented these concerns in our submissions to the ACCC and our view remains that a notice period between 6 to 18 months (similar to those imposed by Oftel in the UK) is the minimum required for significant changes to systems or relocation of services. Further, significant changes to systems and processes for declared service should only occur through the agreement of both parties. The access provider should not have a universal right to impose changes.

In addition to the above points, Optus is also concerned that the current draft model terms and conditions (Clause G.5) provide too much discretion for Telstra to determine what is a 'minor' amendment to existing specifications. For example, where changes to core services or systems are made, these could impact on the access seeker's internal systems to such an extent that 10 business days notice provide insufficient time to react to the change. It should either be agreed in the model terms what constitutes a minor change or the access provider should assume that all changes may potentially have a major impact on the access seeker and therefore a longer notice period should be provided.

H. Suspension and termination

In respect of suspension and termination the ACCC has referred to the TAF code that does require the access provider to give any notice periods for suspension or termination in the event of an emergency or insolvency. For all other matters the requirement is 20 days notice to rectify the matter. Optus considers that these general principles are reasonable, however, the model terms and conditions should provide more distinction between the suspension or termination of an 'individual service in operation' versus an entire 'core service'.

Attachment A

In respect of the specific model terms and conditions Optus has the following comments:

- Clause H.1: 'Practicable' should probably not be used, as it cannot be adequately defined in a dispute.

- Clause H.2(a): This condition should not be implemented without recourse to a remedy period or the billing dispute process.