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Mr Ken Walliss  
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Australian Competition and Consumer Commission  
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By facsimile (03) 9663 3699

Dear Ken

**Resolution of telecommunications access disputes – a draft guide**

Optus welcomes this opportunity to comment on the Australian Competition and Consumer Commission's (ACCC's) draft guidelines "Resolution of telecommunications access disputes".

Optus supports the release of a set of guidelines outlining the arbitration provisions of both Part XIC and the Telecommunications Act 1997 and the ACCC's approach to administering these provisions. Optus also supports the ACCC's intention to regularly review the effectiveness of its arbitration processes, provided that it does not lead to inconsistencies in the ACCC's approach.

Whilst Optus support the majority of the proposed processes outlined in the ACCC's draft guidelines, Optus believes that certain issues need further clarification. These include:

1. The extent to which the ACCC will rely on alternate dispute resolution (ADR) processes; and
2. The extent to which the ACCC will rely on written submissions as opposed to oral proceedings.

This letter will discuss each of these issues in turn.

**The ACCC should not over emphasis the role of ADR**

The ACCC's guidelines state that:

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*"New s. 152CLA requires the Commission to have regard to the desirability of access disputes being resolved in a timely manner (including through the use of alternative dispute resolution methods such as mediation and conciliation)".*

Accordingly, the ACCC will encourage disputing parties to actively consider ADR processes such as expert determination and mediation.

Optus has two concerns regarding the use of ADR processes in the course of an arbitration. First, arbitrations are an avenue of last resort for parties that cannot achieve a commercial settlement. Accordingly, Optus does not take the decision to pursue an arbitrated outcome lightly but only does so where we believe that an arbitration will result in a more efficient and timely outcome than pursuing commercial processes further. Hence, where the ACCC is notified of a dispute between parties, it should take this as indicative that any commercial negotiations between the parties, including any potential ADR processes that may have been undertaken, have failed. Therefore, Optus believes that unless there is consent by all parties, the ACCC should not refer issues to ADR processes such as mediation, conciliation and expert determination.

Second, there is a real danger that the use of ADR processes will only serve to delay the arbitration process. Therefore, Optus emphasises the need for the ACCC to set strict time limits if an ADR process is to be used. Furthermore, the ACCC should closely monitor all ADR processes entered into as part of an arbitration and if either the ACCC, or the disputing parties, believe that the process will not achieve commercial agreement, then it should be abandoned so that the relevant issues may be considered within the substantive phase of the arbitration.

In many instances, Optus believes that the independent expert body that is best able to resolve a dispute is the ACCC. It has built up an expert knowledge of telecommunications, it has available a team of dedicated resources and has the legislative powers to take action.

#### **Detailed written submissions may prove more effective than oral hearings and summary submissions**

The ACCC's draft guidelines indicate its preference for either summary submissions or oral evidence. According to the ACCC the current reliance on written submissions tends to delay arbitration processes particularly where parties provide "tit-for-tat" replies to each other's submissions.

Optus shares the ACCC's concerns regarding delay and the need to achieve expedited outcomes. However, Optus cautions the ACCC's intention to rely less on written submissions. This is for several reasons. First, it is important that all parties to a dispute not only state their view but also adequately justify their view so that the arbitrator is fully informed of all the relevant facts. Written submissions allow parties

to do this. However, this may not be the case if there is a greater reliance on either oral hearings or summary submissions. Second, given that written submissions serve to provide the ACCC staff with an important information source which complements the research undertaken by its own staff, it is unclear whether a lesser reliance on written submissions will lead to more expeditious outcomes. Third, oral hearings may bring a personality bias into the process, which may adversely affect arbitrated outcomes. Furthermore, a greater reliance and encouragement on detailed submission will raise the standard of submissions resulting in a more considered and well-researched decision by the arbitrator.

Optus therefore proposes that in the future each party to an arbitration should be encouraged to provide at least one detailed submission outlining and justifying their arguments to a reasonable extent. However, in the interest of expediency parties should be discouraged from submitting voluminous tit-for-tat submissions in reply to other parties. Instead each party should be given the opportunity to reply to the other parties' submissions at a conference with Commissioners'. Alternatively, the ACCC could request individual parties to respond to specific issues raised within a detailed submission. Optus believes that such arrangements are likely strike an appropriate balance between expediency and allowing each party to adequately prosecute their case.

Optus requests that the ACCC takes the above concerns into account when finalising its guidelines "Resolution of telecommunications access disputes".

If you require any further information regarding this matter please do not hesitate to contact me on (02) 9342 8437.

Yours sincerely,



Andrew Sheridan  
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Interconnect and Economic regulation