

9 September 2003

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Australian Competition and Consumer Commission  
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*By facsimile: (03) 9663 3699*

Dear Ken

**Proposed revisions to resolution of telecommunications access disputes – a guide**

Optus welcomes the opportunity to provide further comment on the ACCC's proposed revisions to the "Resolution of telecommunications access disputes guide".

The addition of guidelines supporting the new s.152DNA(8), s.152 DNA(6), s.152CLA(2), s.152 CLA(4), along with the removal of merits review and other miscellaneous, more minor amendments throughout (including Appendix 2) are supported by Optus.

Optus is particularly supportive of the new guidelines, which action s.152DNA, on backdating of arbitration determinations and the power to award interest to these backdated amounts. This not only incents the access provider and access seeker to avoid delays in arbitration, but it also provides the access seeker with at least some form of compensation in the cases where the access provider may use its dominant position to delay a lower price being implemented. Optus provides the following suggestions to the ACCC regarding the practical application of these interest calculations.

Optus believes it is appropriate for the ACCC to specify a proxy interest rate for determining the interest on backdated payments, this would assist with making the process transparent for all parties. Optus recommends that the most relevant proxy rate to specify in this case would be that interest rate which applies in the commercial access agreements. Given that this rate has been agreed upon by both parties, it seems relevant to apply in any arbitrated outcome.

**[Start commercial-in-confidence] [End commercial-in-confidence]**

In cases where there is no stated interest rate in the relevant access agreement, the Reserve Bank of Australia (RBA) Indicator Lending Variable Rate for Large Business could be applied

instead. Optus believes that in all cases, however, the rate applied should be calculated daily, given that this would be the method applied for any overdraft or other debt financing facility used to fund the overpayment.

Keeping in mind that the rate of interest should reflect the opportunity cost of the under or over payment, the rate applied will in some cases be higher than any specified debt financing rate. As suggested by the ACCC, Optus agrees with the ACCC that the specified rate will be required, in some instances, to take into account other factors such as the risk of not being repaid in the case of insolvency. **[Start commercial-in-confidence] [End commercial-in-confidence]**. Therefore, if the ACCC does issue a proxy rate at the outset, an allowance should be made for those circumstances where it is appropriate to apply a risk premium.

On a separate note, Optus would like to take this opportunity to note that in most cases arbitration is a last resort for parties in commercial negotiations. Parties are likely to have already undertaken some commercial processes, including escalation and consideration of commercial ADR. This suggests that parties are unlikely to take the decision to pursue an arbitrated outcome lightly, and will only do so where it is believed that the outcome will be more efficient and more timely than pursuing commercial processes further.

As such, Optus believes that there remains a need for the ACCC to set strict time limits if an ADR process is to be pursued, particularly in those circumstances where it is unlikely that agreement will be reached by both parties in the process. In these circumstances, it may be the case that the ACCC is the most relevant independent expert body to resolve a particular dispute.

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

Yours sincerely

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