

2 March 2006

Mr Sean Riordan  
Australian Competition and Consumer Commission  
360 Elizabeth Street  
Melbourne VIC 3000  
By facsimile: (03) 9663 3699 (5 pages)

Dear Sean

**Optus submission on Australian Competition and Consumer Commission ("ACCC")  
Position Paper "Development Plan for Procedural Rules"**

This letter provides Optus' comments on the ACCC's position paper on the "Development Plan for Procedural Rules".

Optus is generally supportive of the objectives behind the recent legislation that gives the ACCC powers to set procedural rules to streamline its decision making process. Optus believes the development of these rules will give the ACCC an opportunity both to expedite its decision making process and also to adopt a more uniform approach to its regulatory decision making. This should in turn provide greater certainty to the often complex regulatory decision making processes.

Optus is broadly supportive of the approach proposed by the ACCC to develop the procedural rules, as set out in the position paper. Whilst we will largely reserve comment until we see the draft rules, we have nevertheless provided some initial input on matters that the ACCC ought to have regard to in developing the rules.

**Access undertakings**

Optus supports the intent of ACCC's proposal to develop procedural rules that will expedite the assessment of undertakings by removing some of the inherent causes for delay in the assessment process. It is reasonable that the rules, as proposed, should seek to streamline the undertaking process by encouraging access seekers to supply supporting information and data together with public versions of the undertaking at the time it is lodged. These are not contentious matters.

However, in respect of the other examples for delay cited, Optus recommends that the ACCC exercise caution. In developing these rules Optus considers that the ACCC needs to clearly delineate between behaviour that is obviously designed to "game the system" and that which is not. These rules should clearly target the former and not the latter.

The ACCC cites as a potential cause of delay an access provider modifying an undertaking with the result that the assessment process has to start again. This is one area where a balanced approach is required based on an assessment of the timing of the proposed amendment and the reasons for that amendment. An update required to be made to an undertaking early in the process to correct an error ought not to be considered an example of regulatory gaming. There would appear to be no reason why this should unnecessarily delay the ACCC's processes. In contrast, changes made to an undertaking later in the process that appear to have no objective basis should be proscribed.

Perhaps the most contentious example cited by the ACCC relates to the inter-relationship between arbitrations and the assessment of undertakings.

Currently, Part XIC contains a statutory emphasis in favour of the assessment of undertakings that is based on the assumption that undertakings provide a mechanism for a multilateral industry wide solution, rather than multiple bilateral arbitrations. However, in certain circumstances such confidence in the undertaking process has been found to be misplaced. The ACCC has noted a concern that access seekers can delay its decision making process by lodging undertakings when arbitrations are on foot. Presumably because this will potentially lead the ACCC to defer an assessment of the access dispute until it has assessed the undertaking and/or because it will need to progress the access dispute at the same time as the undertaking thereby stretching the ACCC's resources.

The introduction of the Procedural Rules now presents the ACCC with three options when overlapping access undertakings and access arbitrations arise:

1. Option 1 - defer the assessment of the access dispute until the ACCC has assessed the access undertaking;
2. Option 2 - defer the assessment of the access undertaking until the ACCC has made a determination in the access dispute; and
3. Option 3 - assess both the undertaking and the access dispute simultaneously.

The Procedural Rules should allow for each of these options. However, they should clearly identify a more balanced system for determining which option is appropriate in any particular set of circumstances.

Optus recognises that there is genuine scope for carriers to game the system in the inter-relationship between access disputes and undertakings. But it would be misguided to assume that the cause of the problem lies solely with the undertaking lodged by an access provider. Gaming can occur on both sides of the access divide. The ACCC, therefore, needs to adopt a measured approach in developing its rules that clearly indicates the circumstance when priority will be given to either an undertaking or an access dispute. To impose a blanket rule that gives a precedence to access disputes over undertakings would not be appropriate and is counter to the intent of the current legislation. The challenge for the ACCC is to find the right balance and to ensure that its rules are sufficiently clear to ensure that it adopts a uniform approach. Optus considers that this can best be addressed

by an examination of recent processes and developing guiding principles and rules based on these real examples.

For example, options 2 or 3 would be suitable where the undertaking has certain unacceptable elements:

1. the undertaking is substantially similar to an access undertaking previously rejected by the ACCC;
2. the undertaking does not, on a preliminary assessment, appear to satisfy the criterion for accepting an access undertaking set out in section 152BV of the *Trade Practices Act 1974* (Cth) (the "**Act**"); or
3. the undertaking is, on a preliminary assessment, inconsistent with applicable model terms and conditions relating to access to the relevant core service set by the ACCC pursuant to section 152AQB of the Act.

Optus can provide two initial examples to illustrate the above points: Telstra's ULLS undertaking of 2005 and Optus' Mobile Termination undertaking of 2004.

Telstra's 2005 ULLS undertaking is a clear example of when the rules ought to give priority to access disputes:

- The ACCC has recently rejected Telstra's December 2004 ULLS undertaking and its December 2005 ULLS undertaking is substantially similar as far as most of the material grounds for rejection are concerned. Moreover, Telstra has now filed 4 separate sets of undertakings for ULLS since January 2003.
- While Telstra now proposes a geographically averaged pricing regime, this is a pricing formulation rejected by the ACCC consistently since 2002 and it is also inconsistent with the applicable model price terms and conditions.
- There are long standing access disputes in respect of ULLS prices.

Accordingly this undertaking fails all of the three examples given above and it would not be appropriate for the ACCC to afford any priority to Telstra's December 2005 ULLS undertaking. The development of the rules provides the ACCC with an opportunity to make it clear that, in these circumstances, it will not defer existing access disputes and that these will be given priority over the assessment of the undertaking.

By comparison, Optus' experience with its Mobile Termination undertaking, is that a number of access seekers lodged access disputes when they became aware that Optus was about to lodge an undertaking on mobile termination in late 2004. The fact that these disputes were lodged a few days before the undertaking should not have afforded those disputes any greater weight in the ACCC's decision making process. Optus considers that there were very good policy reasons for the ACCC to defer those access disputes whilst it considered the Optus undertaking. Central to this was the fact that Optus' undertaking was

supported by a detailed cost model, the first time Optus had been in a position to present such a model to the ACCC for its consideration. To have made a decision in those access disputes the ACCC would necessarily have had to consider and consult on the cost model presented by Optus to support its undertaking. It would have been logical for the ACCC to defer those access disputes until it had reached a view on the Optus undertaking.

Instead, the ACCC chose to run both processes in parallel. Given the limitation on the ACCC resources (the same staff who were assessing the undertaking were also working on the access disputes), Optus would argue that this decision has inevitably delayed the ACCC's decision making process. To give a simple example, had the access disputes been deferred there would have been no requirement to take up staff and commissioners time in determining whether or not an interim price should be set – a process that took a number of months to conclude.

Optus would argue that this provides a clear example of where the rules ought to indicate a priority to undertakings over access disputes. That is, in circumstances where the ACCC's consideration of a matter is not well advanced or where significant new information is lodged with the ACCC it would seem appropriate that the ACCC resources should be directed initially to an assessment of an undertaking. Once a decision on the undertaking was made the ACCC ought to be able to move quickly to issue a final decision in any relevant access disputes.

### **Joining of Access Disputes**

The ACCC has flagged the current restrictions it faces on its ability to join disputes where they cover common matters and proposes to use the procedural rules to address these matters.

Whilst Optus can see the rationale for joining disputes to assist in streamlining the ACCC's processes, these rules should not unduly undermine the rights of the parties in a particular dispute. In certain circumstances, both parties to a dispute might, for reasons of commercial confidentiality, object to joinder of another dispute. It would not be appropriate in this instance for the ACCC to proceed to do so against the wishes of both parties to one of the disputes. It would therefore seem reasonable for the procedural rules to provide that the Chairperson will not determine that the Commission is to hold a joint arbitration hearing unless at least one of the parties in each dispute consents to the joinder of the hearings.

### **Procedure of the ACCC in an arbitration hearing about an access dispute**

Optus does not consider that there is any need to displace the ACCC's procedural powers set out in section 152DB of the Act. Those rules enhance the ACCC's discretion in the conduct of the proceedings. There may be some utility in enhancing and expanding such procedural flexibility through relevant modifications, but the existing flexibility should not be limited.

**Procedures for dealing with confidential information**

Optus does not have any specific comments at this time on the procedures for dealing with confidential information.

Optus trusts that the ACCC will find the above comments useful as it develops the draft procedural rules.

Yours sincerely

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Interconnect & Economic Regulation