EXPLANATORY STATEMENT

Issued by the Australian Competition and Consumer Commission

Class Exemption (Variation) Determination No. 2 of 2009 in respect of LCS

Trade Practices Act 1974

Legislative Provisions

Section 152AS of the Trade Practices Act 1974 (the TPA) provides that the Australian Competition and Consumer Commission (ACCC) may make, by written instrument, a class determination exempting each of the members of a specified class of carrier or of a specified class of carriage service provider from any or all of the standard access obligations (SAOs) referred to in section 152AR of the TPA.

A class determination under section 152AS of the TPA may be unconditional or subject to such conditions or limitations as are specified in the determination.

The ACCC must not make a class determination under section 152AS of the TPA unless the ACCC is satisfied that the making of the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services (LTIE), as further defined in section 152AB of the TPA.

The instrument setting out the class determination is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Purpose

The purpose of the variation instrument is to vary the existing LCS class determination made by the ACCC in August 2008, to align it with the LCS individual exemption order made by the Australian Competition Tribunal on 24 August 2009.

Background

The local carriage service (LCS) is a wholesale local call service. It involves the carriage of a telephone call from one end-user to another end-user in the same standard zone.

The ACCC decided to extend the expiry date of the declaration of the LCS under section 152ALA of the TPA from 31 July 2009 for five years. The LCS had previously been declared by the ACCC in July 1999 and August 2006. Declaration means that an access provider supplying the LCS is subject to a number of SAOs pursuant to section 152AR of the TPA. Terms of access can be governed by commercial negotiation, the terms of an access undertaking or, in the absence of an accepted access undertaking, by ACCC determination in an access dispute.
On 9 July 2007 and 12 October 2007, Telstra Corporation Limited (Telstra) lodged two applications with the ACCC under section 152AT of the TPA seeking individual exemptions from the SAOs in respect of the supply by Telstra of the LCS in a total of 387 Exchange Service Areas (ESAs) in metropolitan areas of Australia (the Exemption Applications).

At that time, the ACCC decided to consider whether a class determination should be granted to members of a specified class of carrier or of a specified class of carriage service provider from any or all of the SAOs in conjunction with its consideration of whether to make the orders sought by Telstra in its Exemption Applications.

The ACCC decided to make individual exemption orders under section 152AT with respect to Telstra’s supply of the LCS (the LCS individual exemption orders), but specified a number of conditions.

Following consultation with parties, the ACCC determined that making a class exemption in favour of carriers and carriage service providers other than Telstra under section 152AS of the TPA would promote the LTIE as it would promote competition in the fixed voice market (principally by the promotion of Unconditioned Local Loop Service-based competition), with flow-on competition benefits to end-users, and would promote more efficient use of and investment in infrastructure.

The ACCC found that it would promote the LTIE to grant a class exemption from the SAOs as they relate to the supply of the LCS in those Exchange Service Areas (ESAs) covered by the LCS individual exemption orders.

The ACCC also found that the class exemption should commence on the same day as Telstra’s LCS individual exemption orders. It would not promote the LTIE for the class exemption to commence any earlier than Telstra’s LCS individual exemption orders because such an outcome would undermine the rationale for granting the exemptions.

The ACCC was also of the view that the LTIE would be promoted without the imposition of conditions on the class determination. Accordingly, the class determination was not made subject to conditions.

Following review in the Australian Competition Tribunal (the Tribunal) of the ACCC’s decision to grant LCS individual exemption orders, the Tribunal decided to vary the LCS individual exemption orders.

There are two aspects of the Tribunal’s decision that are of particular relevance to the ACCC’s original LCS class exemption. The first is that the Tribunal’s decision varies the process for determining which ESAs are exempt under the LCS individual exemption orders. This is likely to result in a different exemption footprint under the Tribunal’s LCS individual exemption orders than that specified in the ACCC’s original LCS class exemption. The second is that the Tribunal’s decision changes the dates under which the LCS individual exemption comes into practical operation with the result that the dates of practical operation of the individual exemption orders and the ACCC’s original class exemption no longer align.
Variation to LCS Class Exemption Determination

The ACCC has decided to vary the LCS class exemption determination to ensure it is consistent with the Tribunal’s LCS individual exemption orders in relation to the ESAs subject to the orders and the dates of practical operation of the orders.

The ACCC’s view is that varying the class exemption in this manner ensures incentives for other potential access providers to invest in infrastructure and provide wholesale voice services are not diminished. The ACCC’s view is that such incentives promote competition and efficient investment in infrastructure. Therefore, the ACCC’s view is that the proposed variation would promote the LTIE.

The variations are set out below.

- Item 1 varies paragraph 2 of the original class exemption determination. The expiry date is varied to be consistent with that specified in the Tribunal’s LCS individual exemption orders.
- Item 2 varies paragraph 3 of the original class exemption determination. The definition of ‘Attachment A’ is deleted and the definition of ‘Exemption ESA List’ (adopting the same definition as that contained in the Tribunal’s LCS individual exemption orders) is inserted.
- Item 3 deletes paragraph 6 of the original class exemption determination and inserts new paragraphs 6 and 7. This ensures the area in which the class exemption applies and when it takes practical effect are the same as the Tribunal’s LCS individual exemption orders. The new paragraph 6 adopts as the class exemption footprint the list of Exemption ESAs as published by the ACCC on its website pursuant to the LCS individual exemption orders. The new paragraph 7 provides that the class exemption does not have effect with respect to a particular ESA until 6 months after its first appearance on that list of Exemption ESAs.
- Item 4 deletes Attachment A. This ensures the geographic area in which the class exemption applies is the same as the Tribunal’s LCS individual exemption orders.

Tribunal’s LCS individual exemption order

The Tribunal’s LCS individual exemption order as referenced in the variation instrument was made on 24 August 2009 following an application for merits review of the ACCC’s LCS individual exemption orders. The Tribunal’s LCS individual exemption order is available on the ACCC’s website at http://intranet.accc.gov.au/content/index.phtml/itemId/1085943.

Consultation

On 14 October 2009, the ACCC published the proposed variation to the class exemption determination for public comment. The variation instrument setting out the proposed variation to the class exemption determination was published on the ACCC’s website (www.accc.gov.au) and a media release was issued. Interested
stakeholders were asked to make submissions to the ACCC by 5.00pm, 23 October 2009.

The ACCC received two submissions - one from TransACT Capital Communications and one from Optus. Both submissions supported the proposed variation.

The ACCC considered the submissions in deciding to vary the class exemption determination.

**Regulation Impact Statement**

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not necessary for the variations to this class exemption determination.