

# **EXPLANATORY STATEMENT**

**Issued by the Australian Competition and Consumer Commission**

**Class Exemption (Variation) Determination No. 3 of 2009 in respect  
of PSTN OA**

***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 PSTN OA class determination made by the ACCC in October 2008, to align it with the PSTN OA CBD individual exemption order and PSTN OA metropolitan individual exemption order made by the Australian Competition Tribunal on 9 September 2009.

## **Background**

The public switched telephone network originating access (PSTN OA) service is the carriage of telephone calls from the calling party (the A party) to a point of interconnection (POI) with an access seeker's network. The calling party must be assigned an end number from the geographic number ranges of the Australian Numbering Plan and be directly connected to the access provider's network.

The ACCC decided to extend the expiry date of the declaration of the PSTN OA under section 152ALA of the TPA from 31 July 2009 for five years. The PSTN OA had previously been declared by the ACCC in July 1999 and August 2006. Declaration means that an access provider supplying the PSTN OA 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 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 public switched telephone network originating access service in a total of 404 Exchange Service Areas (ESAs) in metropolitan and CBD areas of Australia (the 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 Applications.

The ACCC decided to make individual exemption orders under section 152AT with respect to Telstra's supply of the PSTN OA service in 17 ESAs in CBD areas (the PSTN OA CBD individual exemption order) and 248 ESAs in metropolitan areas (the PSTN OA metropolitan individual exemption order) (collectively 'the PSTN OA individual exemption orders').

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 PSTN OA in those ESAs covered by the PSTN OA individual exemption orders.

The ACCC also found that the class exemption should commence on the same day as Telstra's PSTN OA individual exemption orders. It would not promote the LTIE for the class exemption to commence any earlier than Telstra's 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 the PSTN OA individual exemption orders, the Tribunal decided to vary the PSTN OA metropolitan individual exemption order and PSTN OA CBD individual exemption order.

There are two aspects of the Tribunal's decision in relation to the PSTN OA metropolitan individual exemption order that are of particular relevance to the ACCC's original PSTN OA class exemption. The first is that the Tribunal's decision varies the process for determining which ESAs are exempt under the PSTN OA

metropolitan individual exemption order. This is likely to result in a different exemption footprint under the Tribunal's PSTN OA metropolitan individual exemption order than that specified in the ACCC's original PSTN OA class exemption. The second is that the Tribunal's decision changes the dates under which the PSTN OA metropolitan individual exemption comes into practical operation with the result that the dates of practical operation of the PSTN OA metropolitan individual exemption order and the ACCC's original class exemption no longer align.

In relation to the PSTN OA CBD individual exemption order, the Tribunal made only a minor variation to the expiry date. Otherwise, the areas and dates of practical operation for the Tribunal's PSTN OA CBD individual exemption order are the same as in the ACCC's PSTN OA CBD individual exemption order and the ACCC's original PSTN OA class exemption.

### **Variation to PSTN OA Class Exemption Determination**

The ACCC has decided to vary the PSTN OA class exemption determination to ensure it is consistent with the Tribunal's PSTN OA 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 PSTN OA 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 PSTN OA individual exemption orders.
- Item 2 varies paragraph 3 of the original class exemption determination. The definition of 'Exemption ESA List' (adopting the same definition as that contained in the Tribunal's PSTN OA metropolitan individual exemption order) is inserted. Definitions for 'International Special Service Code' and 'VPN Access Code' are inserted for clarification.
- Item 3 deletes paragraph 6 of the original class exemption determination and inserts new paragraphs 6, 7, 8 and 9.

New paragraph 6 provides that the class exemption operates in the CBD ESAs specified in Attachment A to the PSTN OA class exemption instrument. The exemption footprint in respect of CBD areas has not changed from the original class exemption. The PSTN OA class exemption will come into effect in CBD areas from 29 October 2009. This is consistent with the Tribunal's PSTN OA CBD individual exemption order.

New paragraphs 7, 8 and 9 ensure that the PSTN OA class exemption operates in respect of metropolitan areas in the same ESAs as the Tribunal's PSTN OA

metropolitan individual exemption order and takes practical effect at the same time as the Tribunal's metropolitan individual exemption order.

The new paragraph 7 adopts as the class exemption footprint in respect of metropolitan areas the list of Exemption ESAs as published by the ACCC on its website pursuant to the Tribunal's PSTN OA metropolitan individual exemption order.

The new paragraph 8 provides that the PSTN OA class exemption in respect of metropolitan areas does not apply to calls dialled using a Special Services Global Code or a Carrier or Carriage Service Provider Specific Access Code.

The new paragraph 9 provides that the class exemption in respect of metropolitan areas does not have effect in relation to a particular ESA until 6 months after its first appearance on the list of Exemption ESAs referred to in the new paragraph 7.

- Item 4 deletes Table 1 'Metropolitan ESAs' in Attachment A of the original class exemption determination. This ensures the geographic area in which the class exemption applies in respect of metropolitan areas is the same as the Tribunal's PSTN OA metropolitan individual exemption order.

### **Tribunal's PSTN OA CBD individual exemption order and PSTN OA metropolitan individual exemption order**

The Tribunal's PSTN OA CBD individual exemption order and PSTN OA metropolitan individual exemption order as referenced in the proposed variation instrument was made on 9 September 2009 following an application for merits review of the ACCC's PSTN OA individual exemption orders. The Tribunal's PSTN OA CBD individual exemption order and PSTN OA metropolitan individual exemption order are 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](http://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.