

TransACT Capital Communications Pty Ltd

Submission on

Australian Competition & Consumer Commission

Proposed variation of WLR, LCS and PSTN OA
class exemptions

Draft Decision

October 2009

Mr Sean Riordan
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“By Email”

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Dear Mr. Riordan

TransACT is pleased to submit this concise response to the Australian Competition & Consumer Commission (ACCC) Draft Decision (Paper) on *Proposed variation of WLR, LCS and PSTN OA class exemptions*, released by the Commission on 14 October 2009.

“A class exemption provides that a specified class of carriers or carriage service providers may be exempt from the standard access obligations (SAOs) in section 152AR of the Trade Practices Act 1974 (TPA) that apply to a declared service. “

TransACT supports the proposal to vary the class exemptions made by the ACCC, in August and October 2008, in respect of the wholesale line rental (WLR) service, local carriage service (LCS) and public switched telephone network originating access (PSTN OA) service.

As indicated by the ACCC, the proposal to vary the expiry date, the date the exemptions take practical effect and the exchange service areas (ESAs) to which the WLR, LCS and PSTN OA class exemptions apply, ensures that the class exemption determinations are consistent with the final individual exemption orders handed down by the Australian Competition Tribunal (the Tribunal) in August and September 2009.¹

It is TransACT's view that the proposed variations as detailed by the ACCC for WLR², LCS³ and PSTN OA⁴ will provide the consistency, as specified above, between the class exemption determinations and the individual exemption orders.

Although TransACT has not provided a separate individual response to previous ACCC consultation or discussion papers on individual or class exemptions, TransACT notes its support of submissions lodged on behalf of the Competitive

¹ <http://www.acc.gov.au/content/index.phtml/itemId/892495>

² ACCC, Proposed variation of WLR, LCS and PSTN OA class exemptions, *Draft Decision October 2009*, P28

³ ACCC, *Draft Decision October 2009*, P42

⁴ ACCC, *Draft Decision October 2009*, P57 & 58

Carriers Coalition⁵ and in principle support of the Optus submission⁶ and their supplementary submission in January 2008.⁷

In the Optus submissions, issues were raised in relation to impediments to accessing the Unconditioned Local Loop Service (ULLS) where pair gain systems (PGS), including the remote integrated multiplexer (RIM), had been, or were planned to be, deployed. Optus stated that:

3.23 “Where these constraints arise they will act to cap the number of lines that can be serviced through ULLS. In effect this means that Telstra is protected from losing a certain percentage of service to competitors in any given exchange.”⁸

TransACT notes that in the Tribunal’s *reasons for determination*, that the Tribunal supported addressing the pair gain condition constraints, where it stated:

“It is appropriate that there be a condition to the effect that the exemptions do not apply to an SIO in respect of which an end-user cannot be supplied by way of the ULLS.”⁹

The Tribunal then subsequently accepted Telstra’s objection that:

“The imposition of such a condition principally for the reason that it would be enormously complex, costly and impracticable, and that any benefit to be derived from the condition would be outweighed by those costs and difficulties”

stating that:

“The imposition of the condition would be disproportionately expensive.”¹⁰

However, TransACT does not agree with this final view of the Tribunal and submits that had the Tribunal accepted the original determination, as was suggested by the ACCC, addressed by way of limiting the order to ESAs with 14,000 or more addressable SIOs, this would not have been *enormously complex, costly and impracticable* to measure or implement. The ACCC proposed an ESA with 14,000 SIOs would support Telstra and four entrants. The ACCC stated, *“This would provide the basis for effective competition in the downstream markets.”* The second way suggested by the ACCC was by way of a condition or limitation specifying that where an end-user cannot be supplied a voice service via ULLS then the exemption

⁵ [CCC submission to all Telstra declaration exemptions \(March 08\).pdf](#)

⁶ [Optus submissions.](#)

⁷ [Optus supplementary submission \(Jan 2008\).pdf](#)

⁸ [Optus submissions](#), P19

⁹ APPLICATION UNDER SECTION 152AV OF THE TRADE PRACTICES ACT 1974 (THE ACT) FOR A REVIEW OF AN EXEMPTION ORDER DECISION (INDIVIDUAL EXEMPTION ORDERS 1-4 OF 2008) MADE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (COMMISSION) IN RELATION TO TELSTRA CORPORATION LIMITED PURSUANT TO SECTION 152AT(3)(a) OF THE ACT, *Reason 23*

¹⁰ APPLICATION UNDER SECTION 152AV OF THE TRADE PRACTICES ACT 1974 (THE ACT) FOR A REVIEW OF AN EXEMPTION ORDER DECISION (INDIVIDUAL EXEMPTION ORDERS 1-4 OF 2008) MADE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (COMMISSION) IN RELATION TO TELSTRA CORPORATION LIMITED PURSUANT TO SECTION 152AT(3)(a) OF THE ACT, *Reason 24*

should not apply to that end-user. This was also initially support by the Tribunal, as stated above.

TransACT believes that the current interpretation of **Exemption ESA** does not accurately take into account the *true* ULLS capacity available in downstream markets, could be open to gaming because *ULLS Spare Capacity* is based on the aggregate number of spare DSLAM ports and may severely impact on the long term interests of end-users (LTIE) where Telstra may become the only choice of supplier to an end-user.

TransACT would also question the current interpretation of **Aggregate Market Share**, based on similar grounds in relation to the definition of *ULLS Spare Capacity* and its relevant application.

TransACT understands that previous Applications in relation to the individual exemptions have undergone extensive evaluation, merits review and judicial review. The ACCC may also consider that these issues are not directly related to the proposed variation of WLR, LCS and PSTN OA **class exemptions** Draft Decision October 2009. However, the interpretations would be reflected reciprocally in the class exemptions to those currently included in the individual exemption orders.

As the Exemption does not have effect with respect to an ESA until the Commission:

- (a) makes the necessary calculations to determine which ESAs are Exemption ESAs as at each Ascertainment Date; and
- (b) publishes on its website a list of those Exemption ESAs by the following Publishing Date.

TransACT would ask the Commission to verify whether there will be any period of consultation for comment on the Exemption ESA List, prior to or after the Publishing Date, noting that as per clause 6.2 of the orders that:

“The Exemption does not have effect with respect to an ESA until 6 months after the Publishing Date by which the Commission is to publish the Exemption ESA List on which that ESA first appears.”¹¹

Yours sincerely,



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¹¹ [Tribunal WLR exemption order 24 Aug 2009.pdf](#) ; [Tribunal LCS exemption order 24 Aug 2009.pdf](#)