



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for revocation and substitution of authorisations A30228 & A30229

lodged by

the Australian Payments Clearing Association

in respect of

**provisions contained within the
Consumer Electronic Clearing System (CECS)
regulations and manual**

Date: 18 November 2009

**Authorisation no.: A91153
A91154**

Public Register no.: C2009/1326

Commissioners: Samuel
Kell
Schaper
Court
Walker
Willett

Summary

The ACCC proposes to grant authorisation to the Australian Payments Clearing Association (APCA) for those provisions of its Consumer Electronic Clearing System (CECS) regulations and manual relating to initial certification of CECS members and to suspension and termination of CECS membership.

The ACCC proposes to grant authorisation for five years.

APCA's charter is to co-ordinate, manage and ensure the implementation and operation of effective payments clearing and settlement systems, policies and procedures. CECS is one such payment clearing and settlement system.

CECS establishes minimum standards to protect and facilitate the conduct and settlement of exchanges of consumer electronic payment messages resulting from EFTPOS and ATM transactions. CECS provides a forum in which participants in the EFTPOS and/or ATM systems agree on minimum mandatory standards and procedures for the clearing and settlement of EFTPOS and ATM transactions. These standards include specifications for equipment, cards, communication links and message formats.

The CECS standards are set out in the CECS manual and CECS regulations. The CECS manual sets out technical standards and operational requirements and the CECS regulations contain provisions relating to corporate governance of the system.

The CECS regulations and manual were first authorised by the ACCC in 2000 and reauthorised in 2004. The authorisation granted in 2004 expired on 3 November 2009.

On 30 October 2009 the ACCC granted interim authorisation to the proposed arrangements. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

APCA has not sought reauthorisation for the CECS regulations and manual in their entirety. Rather, APCA seeks reauthorisation only for those provisions in the CECS regulations and manual which it considers may be exclusionary provisions. Specifically, APCA seeks reauthorisation for those provisions of the CECS regulations and manual relating to initial certification of participants in CECS and suspension and termination of CECS membership.

The ACCC considers that the requirement that CECS participants be certified, and the CECS suspension and termination provisions, will produce a public benefit by promoting the efficient operation and enhanced security and integrity of the CECS. Absent these provisions, the confidence of users with the CECS system would likely be diminished.

The collective setting of these requirements may also result in transaction cost savings as the requirements would otherwise be subject to bilateral negotiation between individual members.

Exclusion from CECS would have an adverse effect on the ability of the institution concerned to directly clear and settle EFTPOS and ATM transactions and potentially could make it very difficult for the institution to directly clear and settle EFTPOS and ATM transactions. This may result in some anti-competitive detriment. However, the ACCC considers that the certification, suspension and termination provisions do not place unreasonable requirements on participants.

Further, refusal of certification or termination of CECS membership does not preclude an institution from participating in the EFTPOS or ATM system. Most, particularly small, institutions are not members of CECS. Rather, these institutions enter into agreements with a CECS member to process their transactions in CECS and clear and settle transactions on their behalf. Accordingly, an organisation excluded from CECS would be likely to continue to have its ATM and EFTPOS transaction cleared and settled through CECS.

In addition, there are a number of checks and balances in place to mitigate against any potential anti-competitive misuse of the certification, suspension and termination provisions.

On balance, the ACCC considers that the public benefit is likely to outweigh the public detriment. The ACCC proposes to grant authorisation for five years.

The ACCC will now seek further submissions from the applicants and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

The proposed authorisation does not extend to any provisions of the CECS regulations and manual other than those relating to the requirements that CECS members be certified and the CECS suspension and termination provisions as identified by APCA in its application for reauthorisation.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	<i>Trade Practices Act 1974 (Cth)</i>
APS	Advanced Payments Systems
APCA	Australian Payments Clearing Association
CBA	Commonwealth Bank of Australia
CECS	Consumer Electronic Clearing System
RBA	Reserve Bank of Australia

1. The applications for authorisation

- 1.1. On 13 July 2009 the Australian Payments Clearing Association Limited (APCA) lodged applications for the revocation of authorisations A30228 and A30229 and their substitution with authorisations A91153 and A91154 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B.
- 1.3. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution. In certain circumstances the ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place. In order for the ACCC to reauthorise conduct, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.
- 1.4. Application A91153 was made under:
 - section 88(1A) of the Act, to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act and
 - section 88(1) of the Act, to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 1.5. Application A91154 was made under:
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act), and
 - section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 1.6. The Consumer Electronic Clearing System establishes minimum standards to protect and facilitate the conduct and settlement of exchanges of consumer electronic payment messages resulting from EFTPOS and ATM transactions. CECS provides a forum in which participants in the EFTPOS and/or ATM systems agree on minimum mandatory standards and procedures for the clearing and settlement of EFTPOS and ATM

transactions. These standards include specifications for equipment, cards, communication links and message formats.

- 1.7. The CECS standards are set out in the CECS manual and CECS regulations. The CECS manual sets out technical standards and operational requirements and the CECS regulations contain provisions relating to corporate governance of the system.
- 1.8. The CECS regulations and manual have the effect of a contract under seal between APCA and each CECS member and between CECS members. Current CECS members are listed in Attachment D.
- 1.9. APCA seeks reauthorisation for those provisions in the CECS regulations and manual which it considers may be exclusionary provisions. Specifically, APCA seeks reauthorisation for the following provisions which concern requirements that CECS members be certified and the rules governing suspension and termination of CECS membership.

Regulations 4.14 – 4.14A (CECS membership – suspension)

- 1.10. Regulations 4.14 and 4.14A provide that CECS membership may be suspended in certain circumstances, including:
 - Where the member is subject to prudential supervision and the relevant supervisor requests such suspension.
 - By agreement with the member.
 - Where membership requirements are no longer satisfied. These membership requirements include that the member:
 - participate in at least one system in which CECS members participate in interchange activities
 - provide for the obligations incurred by it as a result of the exchange of payment instructions in that system
 - complies with any applicable laws, the Constitution of APCA, the CECS regulations and the minimum applicable technical and operational standards in the CECS manual and
 - agree to pay all relevant fees, costs, charges and expenses.
 - Where an insolvency event occurs in respect of the member.
 - The member breaches its obligations under the CECS constitution, regulation or manual and fails to rectify the breach or provide a satisfactory explanation for the breach within 30 days.

Regulations 4.15 – 4.19 (CECS membership – effects of suspension).

- 1.11. Suspension from CECS removes the suspended member's rights to votes at any CECS meeting or any meeting of the CECS Management Committee. Suspended CECS members are not excused from discharging their obligations in accordance with the CECS regulations, manual or constitution.

Regulations 4.20 – 4.24 (Termination)

- 1.12. Regulations 4.20 to 4.24 provided that a CECS member ceases to be a CECS member on:
- resignation
 - insolvency events
 - ceasing to be involved in relevant activities, or
 - APCA Board termination due to an unresolved suspension event.

Regulations 8A.5 – 8A.6 (Failure to settle – suspension)

- 1.13. Settlement involves CECS members settling their obligations arising from exchanges in CECS (that is, as a result of EFTPOS and ATM transactions). Settlement is described in greater detail at paragraphs 2.9 to 2.11.
- 1.14. Regulations 8A.5 and 8A.6 provide for automatic suspension of CECS membership if a member fails to settle.

Regulations 11.1 & 11.1C (Certification – initial certification) and CECS Manual clause 2.1.7 (Common requirements and certification – failure to meet technical requirements)

- 1.15. Regulations 11.1 and 11.1C require CECS members to be certified before participating in interchange activities and provide for the certification of CECS members and for the revocation of certification by the CECS Management Committee if the Management Committee considers that the requirements for certification are no longer met.
- 1.16. Clause 2.1.7 provides for the reporting to the Management Committee of any failure to meet certification technical requirements that could pose a risk to the efficiency or security of the CECS.

Other relevant provisions in the CECS regulations and manual

- 1.17. CECS has only sought reauthorisation for those provisions of the CECS regulations and manual which APCA considers could potentially raise concerns under the Act - namely, those provisions relating to excluding corporations from directly participating in the CECS, as summarised above.

- 1.18. Criteria for suspending or terminating CECS members are, in some cases - such as, for example, in relation to certification and paying all relevant fees - set by reference to other provisions in the CECS regulations and manual.

Certification

- 1.19. The CECS manual requires that members meet certain technical, operational and security requirements before being certified.

Fees

- 1.20. Each new CECS member must pay an entrance fee, currently \$47,700. Entrance fees have been set to recover around 30 per cent of the costs by members contributing to the establishment of CECS and are distributed to those members in proportion to their contribution towards establishment costs.
- 1.21. All members must also pay APCA an annual membership fee, currently \$1100.
- 1.22. The operating costs of the CECS are borne by members as periodic operating fees, partially as a fixed share and partially in proportion to the member's share of national clearing volume of payment instructions sent through to the CECS. Entry and annual membership fees, along with the dispute resolution fees discussed below, are also used to reduce periodic operating costs.

Disputes

- 1.23. The CECS regulations provide for disputes between the APCA Board or Management Committee and a member or members, and disputes between members to be referred to the Management Committee for determination. However, a CECS member may refer a dispute directly to the APCA Board or request that the Board review a decision of the Management Committee.
- 1.24. A dispute resolution fee, currently \$1270, is payable by each CECS member that is party to a dispute.

Other parties

- 1.25. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.
- 1.26. APCA has named both current and future CECS members as parties to the proposed arrangements.

Previous authorisations

- 1.27. The CECS regulations and manual were first authorised by the ACCC on 16 August 2000 (A30176, A30177). The CECS regulations and manual were reauthorised on 13 October 2004 (A30228, A30229). These authorisations expired on 3 November 2009.

- 1.28. APCA seeks reauthorisation for the provisions of the CECS regulations and manual noted above for a further five years.

Interim authorisation

- 1.29. On 27 October 2009 APCA sought interim authorisation for the arrangements. On 30 October 2009 the ACCC granted interim authorisation.
- 1.30. In granting interim authorisation, the ACCC noted that the provisions in the CECS regulations and manual concerning initial certification of CECS members and the suspension and termination of CECS membership have not changed substantially since the ACCC last authorised the arrangements.
- 1.31. The ACCC considers that granting interim authorisation would preserve the status quo, allowing APCA and members of CECS to continue to engage in these arrangements while the ACCC considers the merits of the substantive application for revocation and substitution.

2. Backgrounds to the application

Payment systems¹

- 2.1. A payment is the transfer of a financial asset of the kind generally used as a medium of exchange from one person to another. Such assets are generally cash or obligations drawn on organisations which, in their normal course of their business, provide a means for their customers to transfer value to third parties.
- 2.2. In Australia, banks, building societies, credit unions and some card organisations provide a means for individuals and businesses to transfer value between each other. In that sense they all provide payment services.
- 2.3. While cash payments are still important in terms of volume, non-cash means of making payments predominate in value terms and are increasingly replacing cash.
- 2.4. The payment system is the institutional infrastructure that carries payment messages and transfers funds from one party's account to another's.
- 2.5. A payment system comprises payment instruments and delivery mechanisms. A payment instrument is the form the payment message takes (for example, cheque, credit card, etc) and is the means by which one party transfers value to a third party. Such a message is typically a request by one party (such as the drawer of the cheque or in the case of CECS, the holder of the card) to another party (the drawee of the cheque or the card issuer) to pay a certain sum to a third party (the payee).
- 2.6. A delivery mechanism is the means by which payment messages are carried from one point within the payments system to another.
- 2.7. Where both parties to a payment transaction maintain accounts with the same organisation, payment arrangements are relatively simple. The organisation debits the paying customer and credits the receiving customer. However, where the parties to the payment instruction are customers of different organisations, a process is needed for both organisations to reflect the change in their customers' accounts and for value to pass between those organisations. The process for doing so is called clearing and settling.

Clearing

- 2.8. Clearing is the cross-institutional exchange of individual payment messages for the purpose of obtaining settlement. It entails sorting, routing and exchanging payment instructions, verifying the integrity of instructions and the accuracy of the sums involved, correcting the sums for errors and other adjustments and finally, determining the net amounts which, once paid, will settle any resultant debt between the financial institutions involved.

¹ The information in this section is taken from APCA's submission in support of its application for authorisation.

- 2.9. In Australia, arrangements for the clearing of transactions involving cheques, direct entry payments, ATMs and debit cards and high value payments are co-ordinated through APCA under rules agreed between its members.
- 2.10. Other payments clearing systems such as credit cards (MasterCard, VISA and Bankcard), the BPAY system for the payment of bills and securities settlement systems are operated independently of APCA.

Settlement

- 2.11. Settlement is the exchange of value between institutions providing payment services for the purpose of providing finality of payment for the obligations arising out of payments clearing.
- 2.12. Settlement between financial institutions in Australia is achieved through transfers of their Exchange Settlement Account balances held with the Reserve Bank of Australia (RBA).
- 2.13. For transactions encompassed by CECS, settlement is deferred, taking place on the morning of the next business day. Deferred settlement systems carry the inherent risk of an institution processing a third party transaction and then not receiving due settlement from the third party's organisation.

The Australian Payments Clearing Association

- 2.14. APCA is a public company limited by guarantee, incorporated on 18 February 1992. APCA's charter, as set out in its Constitution, is to co-ordinate, manage and ensure the implementation and operation of effective payments clearing and settlement systems, policies and procedures.
- 2.15. The impetus to establish APCA can be traced in part to recommendations of the Campbell Committee². The Committee did not specifically recommend the establishment of a separate body for the management and regulation of payments clearing. It recommended that there be general oversight by the RBA of applications for direct participation in cheque clearing and that there be agency facilities available for non-clearing banks and non bank institutions. This directed the banks initially towards the need to review arrangements for payments clearing and processing, which led to the formation of APCA.
- 2.16. APCA does not process payments. It co-ordinates and manages payments clearing arrangements for each of the clearing systems it establishes. Individual institutions are responsible for their own clearing operations and must conduct their operations according to APCA's rules as set out in the regulations and procedures for each of APCA's clearing systems.

² Committee of Inquiry into the Australian Financial System (chair Keith Campbell) Final Report September 1981

2.17. APCA is currently responsible for five payment clearing systems, namely the:

- Australian Paper Clearing System (APCS) – which co-ordinates and manages the implementation and operation of policies and procedures for the conduct and settlement of exchanges of paper-based payment instructions, which are primarily cheques, between its participating members.
- Bulk Electronic Clearing System (BECS) – which manages the exchange and settlement of bulk direct entry electronic low value transactions. The direct entry system allows approved organisations (for example utility companies and insurance providers) to make arrangements with their financial institution to debit and/or credit large numbers of customers' accounts on a regular basis.
- High Value Clearing System (HVCS) - was established by APCA in 1997 as part of the more general development of Real Time Gross Settlement in Australia. It provides a best practice, efficient and highly secure electronic payments mechanism for the Australian finance industry.
- Australian Cash Distribution and Exchange System (ACDES) – which governs the exchange and distribution of wholesale cash. Until August 2001, notes and coins not in circulation were owned and managed by the RBA. The establishment of the ACDES followed the decision by the RBA to transfer the ownership and management responsibility for this cash to a number of banks.
- Consumer Electronic Clearing System (CECS) – which provides minimum standards to facilitate the conduct and settlement of exchanges of ATM and EFTPOS payment instructions.

APCA membership and management

2.18. APCA has three categories of membership:

- owner members - which confers rights relating to the governance of APCA, including rights to appoint directors and vote at company meetings
- participating members - which confers rights of participation in the relevant clearing system or systems, and rights relating to the governance of that clearing system and
- associate members - which allows individuals and organisations to be kept abreast of APCA's activities.

2.19. APCA's constitution provides for the creation of additional categories of membership if required. A new category of participating membership, for example, might be needed if technological change were to give rise to a new or different type of payment instrument.

2.20. The APCA Board of Directors, appointed by owner members, is ultimately responsible for the management of APCA.

- 2.21. Committees of management are appointed by the respective clearing system members to oversee the operations of each clearing system. Broadly, committees of management are responsible for technical and efficiency standards, operational procedures and policies, supervision of observance of clearing system rules, assessment of clearing volumes, dispute resolution, and approval of membership applications.

The Consumer Electronic Clearing System

- 2.22. The CECS was established in December 2000 following the ACCC's decision to authorise the proposed arrangements.
- 2.23. The management of clearing within CECS primarily involves setting minimum interchange procedures and standards to protect and enhance the security, integrity and efficiency of ATM and EFTPOS interchanges. The standards include specifications for equipment, cards, communication links and message formats. APCA submits that, currently, Australia has more than 27,300 ATMs and 665,000 EFTPOS terminals.
- 2.24. The primary objective of CECS is to coordinate, manage and ensure the development, implementation and operation of effective standards, policies and procedures to facilitate the conduct of:
- exchange and, where applicable, settlement of consumer electronic payment instructions falling within the scope of CECS and
 - all aspects related to the clearing cycle.
- 2.25. Members of CECS may settle directly or indirectly but there are no separate categories of membership. Eligibility for membership is, however, based on the type of interchange activity in which the member engages. Members need to be engaging in interchange activities in either the capacity of an acquirer or an issuer of cards, or represent one or more acquirers or issuers and effect settlement directly, or be a 'self acquirer.' Self acquirers are retail merchants who directly switch transactions to card issuers.
- 2.26. The main parties that participate in the EFTPOS and/or ATM systems include:
- **Issuers** - institutions that provide their cardholders with a card that can be used in an EFTPOS and ATM terminal.
 - **Acquirers** - institutions that support merchants' participation in EFTPOS arrangements by making payments to merchants and by forwarding transactions to issuers for authentication and settlement. The equivalent acquirer role in ATM exchanges has responsibility for discharging the obligation owed by the issuer to the cardholder.
 - **Switching/processing companies** – companies providing outsource facilities to issuers for transaction processing and switching.
 - **Merchants** – parties that initiate EFTPOS transactions as payment for goods and/or services and sometimes provide cash to customers. A merchant receives value for such transactions via payment to a nominated financial institution

account and is guaranteed payment, by the acquirer, for the value processed correctly. A merchant's participation in EFTPOS is facilitated by an acquirer and is subject to commercial negotiation. Merchants sometimes install their own terminals and other system components. In this case the acquirer must certify the technology used.

- 2.27. Those provisions within the CECS regulations and manual for which authorisation is sought are summarised in section one of this draft determination.

EFTPOS

- 2.28. EFTPOS provides customers with payment mechanisms for the purchase of goods and services at the point of sale. Payment is made through online debit of the customer's savings or cheque account, with a resultant credit to the merchant's account overnight. This transaction uses a debit card with a magnetic strip and a PIN to identify the customer. An increasing number of merchants also offer 'cash out' services.
- 2.29. The customer's transaction is authorised via an online link from the terminal to acquirer to issuer, where authenticity of the card and PIN are validated and a check is made of funds available.
- 2.30. EFTPOS terminals are owned by the merchant or by its acquiring institution. Australia's EFTPOS system is universal in the sense that all issued cards can transact at all terminals.

ATMs

- 2.31. ATMs provide customers with a means of withdrawing funds, transferring funds between accounts and undertaking balance enquiries. ATMs are typically located at financial institution branches and 'off site' as stand alone devices in, for example, shopping centres. Customers access their accounts using a debit card and a PIN, as with an EFTPOS transaction. The customer's transaction is authorised via an online link from the ATM to a processing centre where the authenticity of the card and PIN are validated and a check is made on funds available.

Debit cards

- 2.32. Australian financial institutions issue their own proprietary debit cards, which can be used in ATMs and for EFTPOS transactions. They also issue two combined function credit/debit cards: Visa and Mastercard. All these cards can be used in ATMs and for EFTPOS transactions.

Interchange

- 2.33. The physical components of the ATM and EFTPOS networks – the terminals, switches and communication links – are owned by individual industry participants. The availability therefore of these components to other participants is a matter for commercial negotiation between the participants concerned. The completion of such negotiations finds expression in bilateral interchange agreements between institutions that issue and acquire or do both.

- 2.34. Interchange agreements cover a range of commercial and technical matters. These agreements fundamentally govern access to EFTPOS and ATM interchanges by enabling a card issued to a customer by one institution to be used to pay a merchant whose acquirer is a different institution or to transact a different institution's ATMs.
- 2.35. APCA states that commercial matters aside, secure and efficient interchange is largely dependent on the preparedness of participants to adopt leading practice common standards for message transmission, transaction processing and manufacture of equipment. APCA submits that this is where CECS adds particular value.

Regulatory role of the Reserve Bank of Australia³

- 2.36. The Payments System Board of the RBA, through the *Payment Systems (Regulation) Act 1998* and *Payment Systems and Netting Act 1998*, oversees payments systems in Australia and is responsible for promoting the safety and efficiency of the payments systems.

The EFTPOS system

- 2.37. In 2004, the RBA 'designated' the EFTPOS debit card system under the *Payment Systems (Regulation) Act 1988*. After extensive consultation, the RBA determined standards for the setting of interchange fees for the EFTPOS system and determined an Access Regime for the system.
- 2.38. The interchange standards involve the adoption of a cap and floor on interchange fees. The RBA has stated that this standard has led to lower interchange fees.
- 2.39. The EFTPOS Access Regime is relatively limited in nature. It was designed to complement an Access Code, developed voluntarily by the industry, which addresses most of the aspects of access to the EFTPOS system. The Access Regime sets a cap on the price that an existing participant can charge an entrant seeking to establish a connection and sets out provisions that will ensure that negotiations over interchange fees are not used to frustrate entry.

The ATM system

- 2.40. In 2008, the RBA also designated the ATM system under the *Payment Systems (Regulation) Act*. After extensive consultation, the RBA determined an Access Regime for the ATM system which supported complementary industry-based reforms. The Access Regime sets a cap on the connection cost that can be charged to new entrants to the ATM system and prohibits the charging of interchange fees, except in specific circumstances. It also includes a prohibition on the charging of fees for establishing direct clearing/settlement arrangements and allows the RBA to exempt certain arrangements from compliance with aspects of the Regime where this is in the public interest.

³ The information in this section is taken from http://www.rba.gov.au/PaymentsSystem/australian_payments_system.html

- 2.41. The ATM reforms, which came into effect on 3 March 2009, were designed to:
- make the cost of cash withdrawals more transparent to cardholders and place downward pressure on the cost of ATM withdrawals
 - help to ensure continued widespread availability of ATMs by creating incentives to deploy them in a wide variety of locations, providing consumers with choice and convenience
 - promote competition between financial institutions, and
 - make access less complicated for new entrants, and therefore strengthen competition.
- 2.42. The reforms have resulted in customers now being charged directly for withdrawals by the ATM owner.

The RBA and CECS

- 2.43. The RBA also has a representative on the APCA Board and CECS Management Committee.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.
- 3.2. Broadly, APCA submits that the CECS provides public benefits by establishing leading-practice clearing and settlement standards to maintain and enhance the integrity of and efficiency of the ATM and EFTPOS networks. APCA submits that the EFTPOS and ATM systems are able to operate efficiently because each participant operates in accordance with these standards.
- 3.3. The ACCC sought submissions from a range of interested parties potentially affected by the application, including CECS members and other financial institutions, government departments and regulatory agencies and consumer and small business organisations. A summary of the public submissions received from interested parties follows.
- 3.4. Suncorp and Indue advised that they did not object to the application for revocation and substitution.
- 3.5. The Commonwealth Bank of Australia (CBA) advised that it supports the proposed arrangements. The CBA states that it supports:
 - the need for secure and efficient processing of transactions between financial institutions, as facilitated by CECS
 - access arrangements that underpin CECS
 - the importance of risk mitigation and the integrity of clearance and settlement, as provided by CECS and
 - the overall importance of CECS integrity and efficacy as afforded by existing CECS procedures.
- 3.6. The CBA submits that APCA is the appropriate forum for the settling and development of technical and operational rules, and that the maintenance and enhancement of the integrity and efficiency of the ATM and EFTPOS networks, along with the protection of the integrity and finality of settlements will be assisted by authorisation of the relevant CECS regulations.
- 3.7. Advanced Payments Systems (APS) is a New Zealand based software company which develops mobile payments systems based on the EFTPOS network.
- 3.8. APS opposes APCA's application for reauthorisation. APS argues that APCA has been responsible for preventing APS gaining access to the EFTPOS network for a mobile payments system it has developed.

- 3.9. APS states that a Mobile Funds Transfer system developed by it provides for a mobile phone based payments system that generates standard EFTPOS transactions. APS states that, by using the system, consumers can use their mobile phone to pay for goods and services without the user needing to be physically present at an EFTPOS terminal, with payment applied to the user's nominated bank account using the standard EFTPOS network and processes.
- 3.10. APS states that, to use the system, users perform a one-time registration using the bank debit card and an EFTPOS terminal, after which information is captured and stored in the APS platform. The customer is then able to send a text message with a transfer funds request. The APS system then builds a standard EFTPOS transaction and obtains authorisation in real time from the relevant financial institution via the EFTPOS network.
- 3.11. APS submits that its storage system does not include or compromise the card PIN or sensitive cardholder data and that the removal of the physical card from the EFTPOS/ATM terminal for the transaction eliminates the need for the consumer to be physically present at the merchant's premises to purchase goods or services.
- 3.12. APS argues that one difficulty in obtaining access to the EFTPOS network is that APCA will only deal with issues brought to it by CECS members. APS states that it was able to convince an APCA member to seek to have its software approved by APCA but that APCA rejected the application. APS argues that this was in spite of the devices having obtained the required certification as detailed in APCA's rules and independent experts confirming the security of the system.
- 3.13. APS submits that APCA's rejections were on the basis of an incorrect finding by APCA that the APS system stores the debit PIN. APS argues that APCA also rejected the applications on the basis that transactions under the system are 'not card present' when, in APS's view, the relevant data and PIN information is presented as a standard EFTPOS transaction. In this respect, APS submits that card-not-present transactions are not catered for within the CECS rules.
- 3.14. APS submits that the real rationale for rejecting the technology was that the system does not provide the commercial incentives to which financial institutions believe they are entitled for a mobile commerce transaction or provide the control of a new payments channel they believe is theirs by right.
- 3.15. APS submits that, as a consequence, the market lacks an effective mobile commerce solution, consumers are being denied cost savings and convenience benefits and APS is facing the prospect of writing off its substantial investment in the system.
- 3.16. In response, APCA notes that authorisation is sought only for its initial certification of CECS members and provisions for the suspension and termination of CECS membership. APCA states that the concerns raised by APS do not appear to relate to those aspects of the CECS system.
- 3.17. While APCA does not consider that the concerns raised by APS are relevant to consideration of its application for reauthorisation, APCA did respond to the concerns raised.

- 3.18. APCA states that APS' request to approve the system was assessed by its Technical Security Working Group and rejected because of concerns over the handling of the PIN. The proposal was then put to APCA's Standards Sub-Committee with the benefit of further information but was again rejected because it did not meet the relevant security specification requirements and due to concerns over the handling of the PIN in a manner contrary to the design principles of CECS.
- 3.19. APCA states that, although the Standards Sub-Committee has delegated authority to make such decisions, the matter was referred to the CECS Management Committee with a proposal from APCA management that an exemption be given to allow a trial of the system but that this recommendation was rejected.
- 3.20. APCA states that a second application was then made and also rejected due to concerns over the handling of the PIN.
- 3.21. The views of APCA and interested parties are further outlined in the ACCC's evaluation of the arrangements in Chapter 4 of this draft determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister), by following the links to this matter.

4. ACCC evaluation

4.1. The ACCC's evaluation of the provisions of the CECS regulations and manual for which authorisation is sought is in accordance with tests found in:

- Section 90(8) of the Act, which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.
- Section 90(7) of the Act, which states that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
 - the provision of the proposed contract, arrangement or understanding has resulted or is likely to result, in a benefit to the public and
 - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- Sections 90(5A) and 90(5B) of the Act, which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The market

4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market or markets affected by that conduct.

4.4. APCA submits that, at its most direct and limited level, CECS provides clearance and regulatory infrastructure for EFTPOS and ATMs, while, on a broader level, CECS provides part of the architecture for the provision of retail payment services.

- 4.5. APCA provides a self regulatory framework for the conduct and settlement of exchanges in a number of payment systems. As such, decisions by APCA members have the potential to impact on competition in a range of areas.
- 4.6. However, authorisation has only been sought for a limited range of provisions contained in the CECS regulation and manual. These provisions concern certification requirements to participate in the consumer electronic clearing payments system and provisions for termination and suspension of CECS membership.
- 4.7. On this basis, the ACCC has confined its assessment of the applications to the clearance and settlement of consumer electronic payments.

The counterfactual

- 4.8. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.⁴
- 4.9. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.10. As noted, APCA has sought reauthorisation for those provisions of the CECS regulations and manual which it considers may be exclusionary provisions. Namely, those provisions relating to certification requirements to become a member of CECS and those provisions dealing with termination and suspension provisions. Given the concerns that these provisions may breach the Act, the ACCC considers that the most likely situation absent authorisation is that these provisions would not be given effect.
- 4.11. That is, CECS members could continue to collectively set minimum standards to protect and facilitate the conduct and settlement of exchanges of consumer electronic payments messages resulting from EFTPOS and ATM transactions, but without the suspension and termination provisions or certification requirements for APCA members to participate in CECS.
- 4.12. Absent the ability to exclude organisations that do not meet technical, operational or security requirements from CECS, the CECS governance structure, and in turn the operational efficiency of CECS, could be undermined. At the extreme, this could compromise the industry’s ability to centrally coordinate the clearing and settlement of EFTPOS and ATM transactions, resulting in a return to the situation that prevailed prior to the introduction of CECS in 2000, whereby clearing and settlement arrangements were subject to bilateral negotiation between individual organisations.

⁴ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

Public benefit

4.13. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵

4.14. In considering public benefits, the ACCC considers the extent to which the benefit has an impact on members of the community and the weight that should be given to it, having regard to its nature, characterisation and the identity of the beneficiaries. In relation to cost savings, the ACCC will consider who is likely to take advantage of them and the time period over which the benefits are likely to be received.

4.15. APCA submits that the CECS system contributes to protecting and enhancing the integrity of payments clearance and settlement, and reducing risk within the payments system. APCA further submits that CECS contributes towards the efficiency with which payment instructions are cleared, and the timeliness and certainty with which value is provided to consumers.

4.16. APCA argues that these benefits can only be realised if members act in accordance with its procedures and that its suspension and termination provisions provide 'last resort' sanctions to ensure compliance.

4.17. APCA states that without these sanctions the efficacy and integrity of the CECS would be diminished and the confidence of members and users would be reduced and that, therefore, the integrity and efficacy of CECS would be compromised.

4.18. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

ACCC view

4.19. The arrangements for which authorisation are sought require members to be certified before participating in interchange activities and provide for suspension and termination of membership in certain circumstances.

4.20. In its 2004 determination, the ACCC concluded that the CECS standards and procedures contribute to the effective and efficient functioning of the EFTPOS and ATM networks by setting out the clearing and settlement processes and time periods that are applicable to all participants and providing contingency procedures where necessary.

4.21. The ACCC accepts that a public benefit, in the form of the efficient operation and enhanced security and integrity of the CECS, will continue to result from the CECS through the adoption of the suspension and termination provisions and the requirement

⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

that all CECS members be certified. Absent these provisions the confidence of users with the CECS system would likely be diminished.

- 4.22. It may also be argued that the collective setting of these requirements and provisions may result in transaction cost savings as they would otherwise be subject to bilateral negotiation between individual members.

Public detriment

- 4.23. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶

- 4.24. APCA states that conditions of membership do not favour one kind of institution over another and that the system is open to any organisation that issues cards used in ATMs or EFTPOS terminals or that acquires transactions through ATMs or EFTPOS terminals, or in the case of a merchant that switches EFTPOS transactions directly to the relevant card issuer.
- 4.25. APCA states that members of CECS have equal rights and obligations under the regulations and manual.
- 4.26. APCA also submits that nothing in the CECS procedures restricts the ability of participants to compete for the business of end users of payment services of the type contemplated by CECS.
- 4.27. Further, APCA submits that the existence of CECS does not preclude institutions from establishing other clearing arrangements outside the scope of the CECS. APCA states that prior to the establishment of CECS and initial authorisation of the arrangements in 2000, procedures and standards for ATM and EFTPOS interchange were subject to bilateral negotiations between issuers and receivers.
- 4.28. APS submits that APCA, through the application of the CECS regulations and manual, prevented a mobile funds transfer system developed by APS from being adopted in Australia despite, APS argues, the system meeting requisite standards for approval.
- 4.29. In response, APCA submits that the APS system did not meet requisite standards and that it followed appropriate procedures for considering the application.
- 4.30. Specifically in relation to its current application for authorisation, APCA notes that authorisation is sought only for its initial certification of CECS members and provisions for the suspension and termination of CECS membership. APCA states that the concerns raised by APS do not appear to relate to those aspects of the CECS system.

⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

ACCC view

- 4.31. APCA is seeking reauthorisation for those provisions in the CECS regulations and manual relating to initial certification of CECS members and suspension and termination of CECS membership.
- 4.32. In order to be certified, an organisation must be able to demonstrate that it meets all operational, technical and security standards for participation in CECS. The organisation must complete and submit a certification check list, along with a report from an independent auditor in respect of requirements of the CECS manual.
- 4.33. The checklist and accompanying documentation is then reviewed and a report provided to the applicant. If all necessary requirements are met, the applicant is certified. If all necessary requirements are not met, the applicant is provided with details of the deficiencies in the application and afforded an opportunity to rectify the deficiencies and reapply.
- 4.34. CECS membership can be suspended in a range of circumstances including, where a member is subject to prudential supervision and the relevant supervisor requests such suspension, membership criteria - including complying with all APCA and CECS rules - are no longer met or where the member is insolvent. CECS membership is automatically suspended where a member fails to settle its obligations arising from exchanges in CECS.
- 4.35. Suspension from CECS does not preclude the member from participating in CECS. However, a suspended member is precluded from voting at CECS meetings and nominating a member of, or voting at, Management Committee meetings.
- 4.36. CECS membership can be terminated due to resignation of the member, an insolvency event, the member ceasing to be involved in relevant activities or through the APCA Board terminating the member's membership due to an unresolved suspension event.
- 4.37. The termination provisions, if invoked, have the effect of excluding the institution concerned from participating in the CECS system. Similarly, the requirement that CECS members be certified has the effect of excluding from participating in the system any institution that does not meet specified technical, operational and security requirements.
- 4.38. The ACCC notes that refusal of certification or termination of CECS membership does not preclude the institution from participating in the EFTPOS or ATM system. Most, particularly small, institutions are not members of CECS. Rather, these institutions enter into agreements with a CECS member to process their transactions in CECS and clear and settle transactions on their behalf.
- 4.39. Accordingly, an organisation excluded from CECS would be likely to continue to have its ATM and EFTPOS transaction cleared and settled through CECS. However, the organisation would not be able to directly clear and settle its transactions. Rather, the organisation would need to enter into an agreement with an existing CECS member to do so on its behalf.

- 4.40. Further, exclusion from the CECS system would not necessarily exclude an institution establishing other direct clearing and settling arrangements outside the CECS arrangements. However, the institution would likely need to negotiate bilateral agreements with other participants outside of the CECS arrangements to do so.
- 4.41. While procedures and standards for ATM and EFTPOS interchange were subject to bilateral negotiations between issuers and receivers prior to CECS being introduced, given that members now operate under the CECS system, it would likely be significantly more difficult for institutions excluded from CECS to negotiate such agreements outside of the CECS in the future. In addition, such bilateral negotiation is likely to be more costly for the institution to negotiate and more difficult to manage than participating in CECS.
- 4.42. Therefore, exclusion from CECS, either because a request for certification was denied or through membership being terminated, would have an adverse effect on the institution concerned and potentially could make it very difficult for the institution to directly clear and settle EFTPOS and ATM transactions at all. This may result in some anti-competitive detriment. However, the ACCC considers that the certification, suspension and termination provisions do not place unreasonable requirements on members. Further, as noted, exclusion from CECS does not preclude an organisation's EFTPOS and ATM transactions from being cleared and settled through CECS (through agreement between the organisation and a CECS member).
- 4.43. A number of features of the certification, suspension and termination provisions also safeguard against their anti-competitive misuse, including:
- the requirement, where relevant, that if a member is subject to prudential supervision, that the prudential supervisor be consulted
 - the representation of the RBA on the CECS Management Committee and APCA Board responsible for certification of members and membership suspension and termination decisions
 - suspension of membership, while precluding the member from voting at CECS meetings and nominating a member of, or voting at, Management Committee meetings, does not preclude the member from participating in CECS (unless the member's certification is also removed)
 - the termination provisions are only able to be invoked on resignation of the member, the member becoming insolvent, being wound-up or ceasing to be engaged in interchange activities or if the member has been suspended and the event leading to suspension has not been remedied by the member
 - certification can only be revoked if the participant fails to meet applicable technical, operational or security requirements, with participants first given the opportunity to rectify any deficiency and be heard by the Management Committee on the proposed revocation.
- 4.44. The ACCC notes the concerns expressed by APS that APCA has used the CECS regulations and manual to deny approval for a mobile funds transfer system developed by APS, thereby precluding the system from having access to the EFTPOS network. In

response, APCA submits that the APS system did not meet requisite standards, in particular because it did not meet the relevant security specification requirements and due to concerns over the handling of the PIN in a manner contrary to the design principles of CECS. APS disagrees with this assessment.

- 4.45. The ACCC is not in a position, through its assessment of the current application for authorisation under the Trade Practices Act, to test the veracity of these claims. However, in respect of the current application, APS has not raised any concerns with the conduct the subject of the current application for authorisation. Namely, those provisions of the CECS manual and regulations relating to the circumstances in which an organisation can be excluded from participating in CECS.
- 4.46. Rather, the concerns raised by APS relate to the standards software must meet to be approved.
- 4.47. Authorisation has only been sought for those provisions of the CECS regulation and manual relating to the certification of participants and the suspension and termination of CECS membership. APS has not raised any concerns with these provisions or any related provisions of the CECS regulations and manual.

Balance of public benefit and detriment

- 4.48. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.49. In the context of applying the net public benefit test in section 90(8)⁷ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁸
- 4.50. The ACCC considers that the requirement that CECS participants be certified and the CECS suspension and termination provisions will produce a public benefit by promoting the efficient operation and enhanced security and integrity of the CECS. Absent these provisions the confidence of users with the CECS system would likely be diminished.
- 4.51. The collective setting of these requirements may also result in transaction cost savings as the requirements would otherwise be subject to bilateral negotiation between individual members.
- 4.52. Exclusion from CECS would have an adverse effect on the ability of the institution concerned to directly clear and settle EFTPOS and ATM transactions and potentially could make it very difficult for the institution to directly clear and settle EFTPOS and ATM transactions. This may result in some anti-competitive detriment. However, the

⁷ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

⁸ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

ACCC considers that the certification, suspension and termination provisions do not place unreasonable requirements on participants.

- 4.53. Further, refusal of certification or termination of CECS membership does not preclude an institution from participating in the EFTPOS or ATM system. Most, particularly small, institutions are not members of CECS. Rather, these institutions enter into agreements with a CECS member to process their transactions in CECS and clear and settle transactions on their behalf. Accordingly, an organisation excluded from CECS would be likely to continue to have its ATM and EFTPOS transaction cleared and settled through CECS.
- 4.54. In addition, there are a number of checks and balances in place to mitigate any potential anti-competitive misuse of the certification, suspension and termination provisions.
- 4.55. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(7), 90(8), 90(5A) and 90(5B) are met.

Length of authorisation

- 4.56. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 4.57. In this instance, APCA seek reauthorisation for five years.
- 4.58. The ACCC proposes to grant authorisation to the arrangements for five years.

Conduct not proposed to be authorised

- 4.59. The proposed authorisation does not extend to any provisions of the CECS regulations and manual other than those relating to the requirements that CECS members be certified and the CECS suspension and termination provisions as identified by APCA in its application.

Variations to the proposed conduct

- 4.60. The ACCC notes that any amendments to the requirements that CECS members be certified or to the suspension and termination provisions during the proposed term of this authorisation would not be covered by the proposed authorisation.

⁹ Section 91(1).

5. Draft determination

The application

- 5.1. On 13 July 2009 the Australian Payments Clearing Association (APCA) lodged applications for revocation of authorisations A30176 and A30177 and the substitution of authorisations A91153 and A91154 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91153 was made using Form FC, Schedule 1 of the Trade Practices Regulations 1974. The application was made under:
- section 88(1A) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act, and
 - section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3. Application A91154 was made using Form FC, Schedule 1 of the Trade Practices Regulations 1974. The application was made under:
- section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act), and
 - section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.4. In particular, APCA seeks authorisation for those provisions in its Consumer Electronic Clearing System (CECS) regulations and manual which relate to initial certification of CECS members and the suspension and termination of CECS membership and participation in the CECS system.
- 5.5. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 of this draft determination the ACCC considers that in all the circumstances the conduct for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

- 5.7. The ACCC is also satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.8. The ACCC therefore **proposes to grant** authorisation to applications A91153 and A91154.

Conduct for which the ACCC proposes to grant authorisation

- 5.9. The ACCC proposes to grant authorisation to the arrangements for five years.
- 5.10. Further, the proposed authorisation is in respect of the requirements that CECS members be certified and the suspension and termination provisions as they stand at the time authorisation is granted. Any changes to these requirements during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.11. This draft determination is made on 18 November 2009.
- 5.12. The attachments to this determination are part of the draft determination.

Conduct not proposed to be authorised

- 5.13. The proposed authorisation does not extend to any provisions of the CECS regulations and manual other than those relating to the requirements that CECS members be certified and the CECS suspension and termination provisions as identified by APCA in its Form FC.

Interim authorisation

- 5.14. On 27 October 2009 APCA requested interim authorisation for the arrangements. The ACCC granted interim authorisation on 30 October 2009.
- 5.15. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 5.16. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment B — chronology of ACCC assessment for applications A91153 and A91154

The following table provides a chronology of significant dates in the consideration of the application by APCA.

DATE	ACTION
13 July 2009	Application A91153 and A91154 for revocation and substitution lodged with the ACCC.
10 August 2009	Closing date for submissions from interested parties in relation to the applications for revocation and substitution.
18 September 2009	Additional interested party submission received.
16 October 2009	Submission received from APCA in response to interested party submissions.
27 October 2009	Application for interim authorisation lodged with the ACCC.
30 October 2009	ACCC granted interim authorisation.
18 November 2009	Draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed

covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

- (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.¹⁰

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.¹¹

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.¹²

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

¹⁰ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

¹¹ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

¹² Section 91(3).

- persons who become party to the contract, arrangement or understanding at some time in the future¹³
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁴

Six- month time limit

A six-month time limit applies to the ACCC’s consideration of new applications for authorisation¹⁵. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.¹⁶ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.¹⁷

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.¹⁸ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.¹⁹

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²⁰ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²¹

¹³ Section 88(10).

¹⁴ Section 88(6).

¹⁵ Section 90(10A)

¹⁶ Subsection 91A(1)

¹⁷ Subsection 87ZD(1).

¹⁸ Subsection 91B(1)

¹⁹ Subsection 91B(3)

²⁰ Subsection 91C(1)

²¹ Subsection 91C(3)

Attachment D — Current CECS members

Australia and New Zealand Banking Group Limited

Australian Settlements Limited

Bank of Queensland Limited

Bank of Western Australia Limited

Bendigo and Adelaide Bank Limited

Cashcard Australia Limited

Citigroup Pty Limited

Coles Group Limited

Commonwealth Bank of Australia

Cuscal Limited

Indue Limited

MoneySwitch Limited

National Australia Bank Limited

St. George Bank Limited

Suncorp-Metway Limited

Westpac Banking Corporation

Woolworths Limited