



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

**Cuscal Limited, National Australia Bank Limited and
rediATM network members**

in respect of

**rediATM network direct charging arrangements and
ATM deployment arrangements**

Date: 27 January 2010

Commissioners: Samuel
Kell
Schaper
Court
Walker

Authorisation no.: A91175
A91176
A91177

Public Register no.: C2009/1400

Summary

The ACCC grants authorisation to agreements between Cuscal Limited (Cuscal) and members of the rediATM network:

- to not directly charge cardholders of members of the rediATM network for ATM transactions at ATMs operated by any network member and to refuse to offer such a discount to cardholders of non rediATM network members
- to not charge cardholders of non-members a direct charge fee greater than a specified maximum direct charge fee and
- about the deployment of ATMs by rediATM network members.

The ACCC grants authorisation for five years.

The rediATM network, which includes 94 members, the vast majority of which are credit unions and, pursuant to the proposed arrangements, the National Australia Bank (NAB), has around 3100 ATMs, accounting for around 11% of Australian ATMs.

Under reforms to Australia's ATM system which provide for customers to be charged directly for ATM transactions by ATM operators, larger financial institutions may gain a competitive advantage over smaller financial institutions by virtue of their larger network of ATMs at which they can continue to offer their cardholders direct fee free transactions.

The ACCC considers that the proposed agreement between rediATM network members not to directly charge each other's cardholders for ATM transactions will be pro-competitive, providing a public benefit by allowing members of the rediATM network to develop arrangements that facilitate access to direct charge free ATM transactions for their cardholders at a wider range of ATMs.

This will assist in ensuring that rediATM network members are not at a competitive disadvantage in providing ATM services, or retail banking services more generally, as a result of the reforms to the ATM system. Absent the ability to offer their customers access to direct fee free transactions through a reasonable network of ATMs, the ACCC considers that many rediATM network members may be at a competitive disadvantage to larger institutions.

The ACCC notes that the general intent of the reforms to the ATM system is to expose cardholders to direct charging so as to increase competition and transparency in the provision of ATM services and promote choice and the provision of ATM services in a wide range of areas.

However, in recognition of the competitive advantage that large financial institutions may have over smaller institutions under the direct charging regime, the ATM reforms, and in particular an ATM Access Regime prescribed by the Reserve Bank of Australia, explicitly provide for smaller financial institutions to develop arrangements such as those proposed in the current application to facilitate access to direct fee free transactions at a wider range of ATMs for their cardholders.

In respect of the NAB's involvement in the arrangements, the RBA has stated that the NAB's involvement is consistent with the spirit of the Access Regime and will benefit not only the customers of NAB and rediATM, but also promote competition between card issuers.

The ACCC does not consider that rediATM network members agreeing not to directly charge each other's cardholders for ATM transactions will undermine the intent of the reforms aimed at introducing greater competition and transparency to ATM fees.

The ACCC also considers that the proposal for rediATM network members agreeing on a cap on the ATM transaction fees they will charge foreign cardholders will also result in a public benefit by providing greater certainty about these fees, increasing uniformity and consistency of charges across the rediATM network. This will assist in promoting the rediATM brand and competition for the provision of ATM transaction services more generally.

The ACCC considers the public detriment resulting from members agreeing on a cap on the ATM transaction fees they will charge foreign cardholders is limited as members will independently determine the fees they charge, subject to the cap, and because the arrangements only affect around 11% of ATMs in Australia.

Further, the ACCC considers that the proposal for rediATM members to coordinate the deployment of ATMs within their network will assist in achieving greater coverage for the network, improving the efficiency of the network and providing greater choice for customers in undertaking ATM transactions.

The ACCC considers that the proposal for rediATM members to coordinate the deployment of ATMs within their network, while potentially lessening competition between members of the network to some extent, is unlikely to result in a significant public detriment given the limited number of ATMs affected by the arrangements.

Concerns were raised that any redeployment of NAB ATMs, which are audio enabled, may cause access problems for vision impaired customers. While such redeployment would result in a corresponding increase in access at the location to which the ATM is redeployed, the ACCC accepts that any redeployment would disadvantage vision impaired customers accessing the ATM in its existing location in the short term. However, it is anticipated that there will be very few instances of such redeployment as a result of the arrangements for which authorisation is sought. To the extent that NAB deploys less new ATMs under the arrangements than would otherwise be the case this would also be a detriment to vision impaired users.

However, it is intended that all rediATMs be audio enabled by 2011. As a result any detriment will be short term and the proposed arrangements will ultimately facilitate access to direct fee free transactions at a much wider range of audio enabled ATMs for vision impaired customers of both the NAB and other rediATM network members.

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

If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 18 February 2010.

On 21 August 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.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
ANZ	Australian and New Zealand Banking Corporation Limited
APCA	Australian Payments Clearing Association
Bankwest	Bank of Western Australia Ltd
Cashcard	Cashcard Australia Limited
Commonwealth Bank	Commonwealth Bank of Australia Limited
Cuscal	Cuscal Limited
NAB	National Australia Bank Limited
RBA	Reserve Bank of Australia
St George	St George Bank Limited
The Act	The Trade Practices Act 1974
Westpac	Westpac Banking Corporation Limited

1. The applications for authorisation

1.1. On 28 July 2009 Cuscal Limited (Cuscal), National Australia Bank Limited (NAB) and rediATM network members (collectively the applicants) lodged applications for authorisation A91175 to A91177 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. Application A91175 was made under:

- 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
- 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.

1.4. Application A91176 was made under:

- 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
- 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).

1.5. Application A91177 was made under:

- section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.

1.6. In particular, the applicants applied for authorisation, in broad terms, to make and give effect to arrangements between Cuscal and the rediATM network members:

- to not directly charge cardholders of members of the rediATM network for ATM transactions at ATMs operated by any network member and to refuse to offer such a discount to cardholders of non rediATM network members

- to not charge cardholders of non-members a direct charge fee greater than a specified maximum direct charge fee
 - about the deployment of ATMs by rediATM network members.
- 1.7. The arrangements are described in greater detail at paragraphs 2.27 to 2.34 of this determination.

Other parties

- 1.8. 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.
- 1.9. Cuscal envisages that a range of other financial institutions may choose to join the rediATM network in the future. Each future rediATM network member will make and give effect to the above arrangements. Cuscal seeks that authorisation extend to those future members.
- 1.10. Cuscal states that for the purposes of the applications for authorisation future members of the rediATM network will not include Commonwealth Bank of Australia Limited, Westpac Banking Corporation Limited, Australian and New Zealand Banking Corporation Limited, Cashcard Australia Limited, Customers Ltd or any of their related bodies corporate.

Interim authorisation

- 1.11. The applicants requested interim authorisation at the time of lodging the applications on 28 July 2009.
- 1.12. The ACCC granted interim authorisation on 21 August 2009. In granting interim authorisation the ACCC considered that the protection provided by interim authorisation would allow the applicants to provide their cardholders with access to a wider range of ATMs without incurring a direct charge while the ACCC considers the substantive applications.
- 1.13. The ACCC also took into account that no objections were raised to the application for interim authorisation.

Draft determination

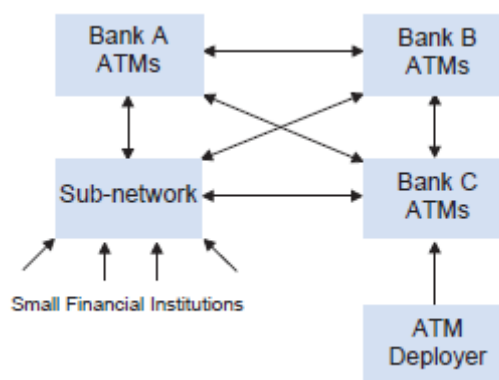
- 1.14. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.15. On 29 October 2009, the ACCC issued a draft determination proposing to grant authorisation to the rediATM network arrangements for 5 years.
- 1.16. A conference was requested in relation to the draft determination.

2. Background to the applications

The ATM System before March 2009

- 2.1 The information in paragraphs 2.2 to 2.6 is taken from the Reserve Bank of Australia (RBA) document, *Access Regime for the ATM System: a consultation document, December 2008* and describes Australia's ATM system as it operated prior to reforms to the ATM system implemented on 3 March 2009.¹ Further information about the ATM system is available in the RBA's consultation document.
- 2.2 The Australian ATM system is comprised of a number of ATM 'networks', linked together through a series of bilateral agreements. Most of these individual networks are owned by large banks and were initially established to provide their customers with access to cash withdrawals and some account management functionality. There are also two 'sub-networks', operated by Cashcard and Cuscal, which were initially set up to serve building societies and credit unions (respectively), although these days their membership is wider. These sub-networks effectively link together ATMs of a large number of smaller institutions so that they can provide their customers with access to a larger network of ATMs. In addition, in recent years, a large number of ATMs have been developed by owners that are not financial institutions, but rather whose sole business is to provide ATM services. The networks owned by these 'independent deployers' are also linked into the system, typically through one of the financial institutions. Figure 2.1 provides a stylised representation of the Australian ATM system.

Figure 2.1²



- 2.3 When ATMs were first introduced in Australia in the early 1980s, cardholders could only use the ATMs of their own financial institution. However, over time these individual networks were connected so that by the 1990s most ATM cards could be used in any ATM in Australia, regardless of who owned the ATM.
- 2.4 The interconnection of ATM networks was facilitated through bilateral agreements between network owners that allow each institution's cardholders to use the other institution's ATMs. Among other things, these bilateral agreements provide for the

¹ Reserve Bank of Australia, *Access Regime for the ATM System: a consultation document*, December 2008, pp2-3.

² Ibid p3

payment of ‘interchange fees’ from the card issuer to the ATM owner in compensation for the service that the ATM owner is providing to the cardholder.

- 2.5 A 2000 Joint Study by the RBA and the ACCC found that ATM interchange fees for a cash withdrawal varied between \$0.80 and \$1.30, averaging around \$1.00. The RBA’s understanding is that there has been very little change in these fees since that time.
- 2.6 As interchange fees are a cost to the card issuer, many financial institutions charge their customers a ‘foreign fee’ when they use an ATM belonging to another financial institution. These fees are, however, typically significantly higher than interchange fees. In contrast, many smaller financial institutions choose to absorb the cost of the interchange fee for their customers, effectively providing them with fee-free access to a large number of ATMs.

Recent reforms to the ATM system

- 2.7 The applicants have submitted the applications for authorisation in the context of reforms, undertaken by the financial services industry and the RBA, aimed at improving competition and efficiency in Australia’s ATM system.
- 2.8 The reforms are aimed at addressing two main issues: the lack of competitive pressure on interchange fees and difficulties potential new entrants face in gaining access to the ATM system as a consequence of the interconnection of ATM networks being facilitated through bilateral agreements between network owners, meaning a potential new entrant that wanted to be a direct participant in the system needed to negotiate arrangements to establish connections with each existing participant.
- 2.9 The reforms, which came into effect on 3 March 2009, have been implemented through an ATM Access Code developed by the Australian Payments Clearing Association (APCA) that operates in conjunction with an Access Regime prescribed by the RBA.³
- 2.10 In announcing the Access Regime the RBA stated that it:
- had hoped that industry could implement this reform package without regulation by the Bank. For many years, the industry had argued that regulation was not needed, and that an industry-based solution could be found. However, the industry recently wrote to the Bank requesting that it use its powers to provide legal certainty to aspects of the reforms.
- While most of the package will be implemented through the industry Access Code, the (RBA Payments System) Board is proposing to use an Access Regime to set bilateral interchange fees to zero and to cap the fee that existing institutions can charge new entrants for establishing the necessary direct connections.⁴
- 2.11 On 13 March 2009 the *Payments System (Regulation) Act 1998* was amended to provide for an exemption from the restrictive trade practices provisions (Part IV) of the Trade Practices Act anything done in accordance with the Access Regime for the ATM system prescribed by the RBA.

³ On 10 December 2008 the RBA designated as a payment system pursuant to Section 11 of the *Payment Systems (Regulation) Act 1998*, Australia’s ATM system, enabling the RBA to prescribe an Access Regime for the system.

⁴ Reserve Bank of Australia, media release 2008-28, *Payment System Reform*, 10 December 2008.

Key elements of the reform package

2.12 The key elements of the reform package included:

- the abolition in most cases of bilateral interchange fees paid by financial institutions to ATM owners for the provision of ATM services to the first financial institution's account holders
- providing ATM owners with the ability to charge cardholders directly for ATM withdrawals, with any charge clearly shown before the customer proceeds with the withdrawal, and
- the introduction of an objective and transparent Access Code setting out the conditions that new entrants are required to meet, the rights of new entrants, and the requirements on current participants in dealing with new entrants.⁵

2.13 In announcing the release of the Access Regime the RBA stated that the reforms would:

- 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.⁶

2.14 In announcing the reforms the RBA also noted that, as was the case prior to the reforms, most banks will not charge their customers for use of their own ATMs. The RBA also noted that many small financial institutions have also entered into arrangements with larger networks to provide fee-free access to ATMs for their customers. Furthermore, financial institutions may choose to rebate their customers for any charges levied by ATM owners.⁷

Exceptions to the no interchange fee rule

2.15 The Access Regime provides for two exceptions to the requirement that no interchange fee be paid between participants in the ATM system in relation to any ATM transaction. The Access Regime provides that interchange fees can still be paid when the interchange fee is being paid by:

- a participant with a one-way arrangement to access one, and only one, other participant's ATMs and the fee is paid in respect of that arrangement, or

⁵ Ibid

⁶ Reserve Bank of Australia, media release 2009-03, *Payment System Issues*, 24 February 2009.

⁷ Ibid

- a participant is a member of an ATM sub-network and the fee is the common interchange fee payable between the members of the sub-network and the fee is paid to another member of that sub-network.⁸
- 2.16 Where interchange fees are paid within sub-networks the Access Regime requires that the interchange fee be published on the sub-network administrator's website or on the website of a representative of one of the participants in the sub-network. Administrators of ATM sub-networks are also required to publish the rules that govern access to the sub-network.
- 2.17 The RBA stated that in providing for these exceptions to the no interchange fees rule it was conscious that interchange-like fees can be pro-competitive in some circumstances where they apply outside a group of direct connectors to the ATM system. In particular, the RBA stated that fees which allow small institutions access to a larger network of ATMs than they would be able to provide themselves, free of direct charges, may help those institutions to compete on a more equal footing with the large players in the industry.⁹
- 2.18 In effect, where a small institution gains access to a larger range of ATMs, either through an arrangement with a direct participant or through joining a sub-network, if the institution pays an interchange fee to the ATM operator for transactions undertaken by its cardholders at ATMs operated by other parties to the arrangement, those ATM operators will have less need or incentive to levy a direct charge on the institution's cardholders at the point of the transaction.
- 2.19 The RBA stated that the alternative of not allowing interchange fees in any circumstances would place small financial institutions at a significant competitive disadvantage since customers would be attracted to larger banks' ability to offer a wide network of ATMs to their customers free of direct charges and that smaller institutions could not otherwise hope to replicate those networks.¹⁰

The applicants

Cuscal Limited

- 2.20 Cuscal is a wholesale provider of transactional banking, liquidity and capital management products to specialist financial service retailers. Relevant to the applications, Cuscal provides wholesale and transactional services to the mutual authorised deposit-taking institutions sector, including ATM management services.
- 2.21 Cuscal has a number of roles in the Australian ATM system:
- It owns ATMs.
 - It acquires transactions from its own ATMs.

⁸ Reserve Bank of Australia, *Payment Systems (Regulation) Act 1998, Access Regime for the designated ATM payment system*, section 11.

⁹ Reserve Bank of Australia, *Access Regime for the ATM System* February 2009, p6.

¹⁰ *Ibid*, p7.

- It is a direct participant in Consumer Electronic Clearing System (CECS) that is used to settle the exchange of value between issuers and acquirers of ATM card transactions in Australia.
- It owns and operates a sub-network, under the rediATM brand, within which it processes transactions for sub-network members that are not direct participants in CECS and settles and clears transactions in CECS on their behalf. In this respect, the range of services offered by Cuscal to its members includes:
 - acquiring transactions from members' ATMs
 - facilitating the issuing, by members, of debit cards to their respective cardholders using Cuscal's membership with Visa International
 - switching, clearing and settling transactions
 - providing access to the infrastructure that enables the connectivity, exchange of information, authorisation and reconciliation of transactions between members and between members and other financial institutions
 - providing access to Cuscal's interchange links with the major financial institutions.

2.22 Cuscal launched the rediATM brand in 2008 to bring all the members of the network together under a single brand. Cuscal's own ATMs form part of, and Cuscal is a member of, the rediATM network. Although Cuscal does not currently issue ATM cards itself, it states that it may commence doing so in the foreseeable future.

rediATM network members

2.23 A list of current and presently proposed future members of the ATM network is at Attachment D.

2.24 While the vast majority of the 94 current rediATM members are credit unions which are card issuers, acquirers or both, the rediATM network is not limited to credit unions and Cuscal receives expressions of interest in joining the sub-network from building societies and other issuers and ATM deployers. rediATM network members typically have only a limited geographical presence.

2.25 Cuscal states that existing members have joined the rediATM network mainly because they do not wish to directly participate in the CECS interchange and they wish to offer their cardholders access to a larger network of ATMs.

National Australia Bank

2.26 Cuscal and NAB have entered into an agreement for NAB to join the rediATM network subject to gaining regulatory approval from the RBA and the arrangements the subject of these applications for authorisation being authorised by the ACCC. NAB currently owns and operates around 1650 ATMs and has over 2.5 million cardholders.

The arrangements

The rediATM network

- 2.27 The current rediATM network (excluding NAB) consists of around 1440 ATMs. Combined, rediATM network members have around 3.5 million cardholders. Most rediATM members are regionally based and the rediATM network provides their cardholders with access to ATMs outside of their own network.
- 2.28 NAB currently owns and operates around 1650 ATMs and has over 2.5 million cardholders. The rediATM network, including NAB, has around 3100 ATMs, accounting for around 11% of Australian ATMs. This compares with other ATM operators as follows.

Approximate number of ATMs in Australia¹¹

Institution	Approximate number of ATMs	Percentage of ATMs
Cashcard network	5500	20%
Customers Limited Network	5400	20%
Commonwealth Bank	4000	15%
Independent deployers	3800	14%
NAB/rediATM	3100	11%
Westpac	2800	10%
ANZ	2500	9%

- 2.29 With respect to branding, it is proposed that existing and future ATMs within the rediATM network other than ATMs operated by NAB will carry “rediATM” branding. NAB ATMs will carry NAB and rediATM co-branding.

The arrangements the subject of the application for authorisation

- 2.30 Participants in the rediATM network (including NAB) propose to not directly charge cardholders of other members of the network for ATM transaction services at ATMs operated by any network member and to refuse to offer such a discount to cardholders of non rediATM network members. Instead of charging each other’s cardholders directly, members will continue to pay each other interchange fees for transactions undertaken by their cardholders within the sub-network. These arrangements are

¹¹ Data provided by Cuscal in its applications for authorisation.

proposed to allow the rediATM network to match the direct charge free structure of those ATM networks with large ATM footprints.

- 2.31 Participants also propose to agree to not charge cardholders of non-members a direct charge fee greater than a specified maximum direct charge fee set by Cuscal in consultation with members of the network. To date this cap has been unilaterally determined by Cuscal and is presently set at \$2 for a withdrawal and \$1 for a balance enquiry. Members are free to charge foreign cardholders any fee up to the cap and each independently decides the level of fees (up to the cap) it charges. The applicants have advised that at present 41% of existing rediATM network members charge a fee below the cap.
- 2.32 The fee cap is designed to assist in promoting use of the rediATM network to foreign cardholders. The applicants state that the cap provides certainty to foreign cardholders that they will not be charged above a certain level for using any rediATM.
- 2.33 In addition, authorisation is sought for rediATM members to discuss and reach agreement about deployment of ATMs. These arrangements are designed to ensure efficient expansion of the network and allow coordination in managing the geographical coverage of the network while avoiding duplication and overlap.
- 2.34 The applicants propose to discuss and agree on all matters in relation to the deployment of ATMs in the rediATM network including:
- the geographical coverage of the rediATM network, with a view to identifying gaps in the network
 - how to fill gaps in the network most effectively and efficiently, including which member is best placed to do so
 - the determination of disputes arising between members in respect of the deployment of rediATMs
 - with respect to integrating existing NAB ATMs into the existing rediATM network, rationalisation of the network to avoid duplication and overlap, including the re-deployment of ATMs where necessary.

Related authorisation

- 2.35 On 4 June 2009 the ACCC granted authorisation A91119 in relation to an agreement between members of a 'Feesmart' branded ATM sub-network operated by Cashcard Australia not to directly charge each other's cardholders for ATM transactions undertaken at ATMs owned by a Feesmart member.

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.

Prior to the draft determination

- 3.2. The applicants submit that recent reforms to the ATM system and recent mergers between Westpac and St George Bank Limited and between Commonwealth Bank and BankWest have had the effect that larger ATM networks have significantly increased in size, and now have significantly more ATMs than the applicants, at which they can offer to cardholders direct charge-free transactions.
- 3.3. The applicants submit that the arrangements will:
- allow rediATM members to facilitate access to direct charge free ATMs for their cardholders at a wider range of ATMs
 - provide greater certainty and consistency of charging for foreign cardholders
 - allow for the expansion of the rediATM network in the most efficient manner and in the best interest of the network as a whole.
- 3.4. The applicants submit that absent the proposed arrangements NAB will not join the rediATM network, the direct fee arrangements will not be given effect to and network members will not be able to make the most efficient choices regarding future ATM deployment.
- 3.5. The ACCC sought submissions from over 60 interested parties potentially affected by the applications, including rediATM network members, other financial institutions, government agencies and consumer groups. A summary of the public submissions received from interested parties follows.
- 3.6. The Firefighters Credit Union submits that the arrangements will benefit credit union membership by improving access to direct charge free ATMs and sees no detrimental effects from the arrangements.
- 3.7. Customers Limited expresses concern that authorisation of the arrangements may set a precedent for other large financial institutions to follow, which may reverse some of the progress made by the reforms to the ATM system.
- 3.8. Blind Citizens Australia submits that the arrangements may cause significant access issues for people who are blind or vision impaired by facilitating the redeployment of NAB audio enabled ATMs currently used by blind or vision impaired customers. Blind Citizens Australia also argues that rediATM network members direct charging blind or vision impaired people who are not cardholders of one of the members of the rediATM network will unduly disadvantage them.

- 3.9. Vision Australia submits that while the arrangements may provide a benefit to blind or low vision rediATM cardholders who will be able to access audio enabled NAB ATMs free of direct charge, any redeployment of NAB ATMs would disadvantage blind and low vision NAB cardholders.

Following the draft determination

- 3.10. On 29 October 2009 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation.
- 3.11. A conference was requested by Vision Australia to discuss the draft determination.
- 3.12. The ACCC has received submissions on the draft determination from Blind Citizens Australia, Vision Australia and the applicants.
- 3.13. Vision Australia submits that because rediATM members' ATMs (other than NAB ATMs) are not audio enabled, very few vision impaired customers bank with rediATM members other than NAB. Therefore, Vision Australia submits that, contrary to the ACCC's conclusion in the draft determination, not many additional vision impaired customers would have access to direct fee free transactions at NAB audio enabled ATMs as a result of the arrangements.
- 3.14. Vision Australia also argues that while redeployment of NAB ATMs may benefit vision impaired users in the area to which the ATM is redeployed, any benefit would be outweighed by the loss of access for customers in the area where the ATM was previously located. In this respect, Vision Australia argues that in its experience removing access results in those affected by the loss being qualitatively more disadvantaged than those gaining access because of the need to re-learn or re-arrange the way in which they access the services, resulting in significant anxiety and uncertainty.
- 3.15. Vision Australia argues that to ensure that vision impaired NAB customers would not be disadvantaged as a result of the arrangements the ACCC should impose a condition of authorisation requiring that no NAB ATM be redeployed under the redeployment strategy resulting from the arrangements. In proposing this condition Vision Australia acknowledges that it may still be necessary to redeploy NAB ATMs for reasons unrelated to any agreement between NAB and other rediATM network members.
- 3.16. Vision Australia also argues that its understanding is that all ATMs come with the necessary hardware to be audio enabled and that it is up to each ATM operator to install relevant software to allow audio enabling. Given this, Vision Australia argues that it is not clear why rediATM network members cannot start audio enabling their ATMs prior to 2011, which is when the applicants have indicated that non NAB rediATMs will be audio enabled.
- 3.17. Vision Australia also argues that to ensure this timetable for the roll out of audio enabling of rediATMs is met, authorisation should be granted subject to a condition that all rediATMs are fully operational with audio enabled functionality by 30 June 2011.

- 3.18. Vision Australia further submits that the ACCC should grant authorisation subject to a condition requiring that rediATM network members actively promote the availability of audio enabled ATM services directly to their customers and via blindness and low vision communication channels.
- 3.19. Blind Citizens Australia submits that it shares Vision Australia's concerns with the arrangements, including the possible redeployment of audio enabled NAB ATMs.
- 3.20. In response to Vision Australia and Blind Citizens Australia's concerns, the applicants reiterate that the proposed arrangements will grow rather than reduce the number of ATMs in the rediATM network.
- 3.21. The applicants state that they expect that if some ATMs are relocated as a result of the arrangements the number will be small and the number of NAB ATMs relocated will only be a smaller subset again.
- 3.22. More generally, in relation to redeployment of NAB ATMs the applicants submit that ATMs are moved routinely in response to various considerations, for example, inadequate numbers of customers accessing the ATM at its current location or the lease at the site at which the ATM is operating expiring. The applicants state that such redeployments will continue irrespective of the proposed arrangements.
- 3.23. With respect to audio enabling rediATMs the applicants state that while it is correct that rediATMs had the necessary hardware to be audio enabled the software in these ATMs needed to be upgraded. The applicants state that audio-enabled software is currently in the process of being developed and that it is planned that it will be rolled out as soon as the development and testing work is completed. The applicants note that they expect the full software roll out to be completed within the first quarter of 2011 which will effectively result in the rediATM network being substantially audio enabled at that time.
- 3.24. The applicants reiterate that the proposed conduct the subject of their application for authorisation, including NAB joining the rediATM network, will have no effect on the timing of audio enabling rediATMs.
- 3.25. The views of the applicants and interested parties are outlined in the ACCC's evaluation of the rediATM network arrangements in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

4. ACCC evaluation

4.1. The ACCC's evaluation of the rediATM network arrangements is in accordance with test(s) 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.
- sections 90(6) and 90(7) of the Act which state 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) 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 was made and the provision was given effect to, or in the case of section 90(7) 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.
- section 90(8) of the Act which states that the ACCC shall not authorise the proposed exclusive dealing conduct unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

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(s) affected by that conduct.

Submissions

- 4.4. The applicants submit that it is not essential to precisely define the markets likely to be affected by the conduct for which authorisation is sought as it is apparent that a net public benefit would or would not arise regardless of the scope of the market.
- 4.5. The applicants identify three markets which they submit are relevant to consideration of the proposed arrangements:
- Local markets for the supply of ATM transaction services to ATM cardholders.
 - A national wholesale market for the deployment and operation of ATMs.
 - The markets for retail banking services, as defined in the ACCC's public competition assessment of the proposed acquisition of BankWest and St Andrew's Australia by Commonwealth Bank of Australia.¹²
- 4.6. The applicants submit that while other non-cash payment instruments such as credit cards and EFTPOS could also be substitutable services for customers in some circumstances, for the purposes of considering the current application the applicants limit the relevant markets to the retail ATM markets.

ACCC view

- 4.7. Broadly, for the purpose of assessing this application, the ACCC considers the relevant areas of competition affected by the proposed conduct are those identified by the applicants. The ACCC notes the following in respect of these areas of competition.

ATM transaction services

- 4.8. Search costs involved, relative to the fees charged by ATM operators, limit the extent to which consumers will be prepared to 'shop around' outside their immediate geographical area when undertaking ATM transactions. Accordingly, the ACCC is satisfied that competition in respect of provision of ATM transactions services to consumers occurs primarily at the local level.
- 4.9. The ACCC also notes that customers making a purchase from a retailer in many cases have the opportunity to pay by EFTPOS, and when doing so, the option of making an, albeit sometimes limited, cash withdrawal from their account. In these circumstances this option may serve as an effective substitute to an ATM transaction.
- 4.10. Similarly, the ability to pay by EFTPOS, credit card or other means, where available, is in itself considered by many consumers to be an effective substitute to paying by cash. However, in respect of the current application the ACCC considers that its assessment will not be overly affected by possible variation in the precise boundaries of this area of competition.

¹² Australian Competition and Consumer Commission, *Public Competition Assessment: Commonwealth Bank of Australia – proposed acquisition of BankWest and St Andrew's Australia*, 10 December 2008.

Deployment and operation of ATMs

- 4.11. In respect of the development and operation of ATMs it is relevant to note that ATMs are deployed and operated by a range of large and small financial institutions who also provide account services and issue ATM cards as well as by independent ATM deployers, such as Cuscal, who have a network of ATMs but do not offer banking account services or issue ATM cards.
- 4.12. Many large financial institutions, and other ATM operators, have a national network of ATMs. Other, particularly smaller, financial institutions deploy ATMs over smaller geographical regions reflecting the more limited scope of their customer base of account holders.

Retail banking

- 4.13. The ACCC has considered retail banking markets in considering a number of proposed acquisitions in the banking sector.
- 4.14. The ACCC's market inquiries in respect of these acquisitions has suggested that in respect of some retail banking products, such as for example transaction accounts, the extent of a financial institution's ATM network is taken into consideration by consumers in choosing between financial institutions.¹³
- 4.15. More generally, the ACCC has noted that there are some retail banking products such as transaction accounts, small and medium enterprise banking and agribusiness banking for which physical presence is a key determinant of consumer choice. In contrast, the evidence provided to the ACCC has suggested that physical presence is not an important determinant of consumer choice for products such as saving/term products, credit cards, home and personal loans.¹⁴
- 4.16. The ACCC has concluded that there is strong evidence to suggest that price competition in respect of retail banking products is almost always national with market enquiries indicating that most financial institutions manufacture, distribute, market and price products on a national basis.

The counterfactual

- 4.17. 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.¹⁵
- 4.18. 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

¹³ Australian Competition and Consumer Commission, *Public Competition Assessment: Commonwealth Bank of Australia – proposed acquisition of BankWest and St Andrew's Australia*, 10 December 2008, p7.

¹⁴ Ibid

¹⁵ *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.

the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Submissions

- 4.19. The applicants submit that in light of the uncertainty about whether the arrangements raise concerns under the Act, absent the immunity afforded by authorisation, the applicants will not make or give effect to these arrangements.
- 4.20. The applicants submit that the counterfactual is therefore that the applicants not make or give effect to the no direct charge arrangements, the maximum foreign direct charge arrangements, the ATM deployment arrangements, and, in particular, that NAB would not become a participant in the rediATM network.

ACCC view

- 4.21. The ACCC notes that there is some question as to whether the proposed arrangements may raise concerns under the Act. Accordingly, absent the immunity afforded by authorisation the applicants, and any future parties to the rediATM network arrangements, would be less likely to reach agreement not to direct charge each other’s cardholders for ATM transactions, not to charge non-members a direct fee greater than the specified maximum direct charge fee, and about the deployment of ATMs by rediATM network members.

Public benefit

- 4.22. 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.¹⁶

- 4.23. 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.
- 4.24. Broadly, the proposed arrangements concern agreements between rediATM network members:
- not to charge each other’s cardholders for ATM transactions
 - not to charge cardholders of non rediATM network members ATM transaction fees above a certain level
 - about the deployment of ATMs within the rediATM network.

¹⁶ *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.

- 4.25. The ACCC's assessment of the likely public benefits from each of these proposed agreements follows.

Direct fee free arrangements

Submissions

- 4.26. The applicants submit that the number and distribution of ATMs is an important element of a financial institution's service and a determinant of choice for deposit account services and other retail banking services. The applicants submit that financial institutions with a smaller ATM network, including rediATM network members, are thereby at a competitive disadvantage to financial institutions with larger ATM footprints.
- 4.27. The applicants submit that the proposed arrangements will offer a mechanism whereby smaller financial institutions may acquire ATM scale and geographic coverage to rival the ATM networks of the major banks. In particular, the applicants submit that the inclusion of NAB in the rediATM network serves to increase these benefits by increasing the footprint of rediATMs to around 3100 Australia-wide.
- 4.28. The applicants submit that maintaining viable, smaller financial institutions ensures that consumers have choice regarding their retail banking and ensures that the retail banking market will be subject to continued competitive pressure. The applicants submit that ensuring rediATM network members are not at a competitive disadvantage will also assist the rediATM network in attracting new members to grow the network, and will assist members to grow cardholder numbers.
- 4.29. Specifically the applicants submit that under the reforms to the ATM system financial institutions with larger networks of ATMs, and therefore a larger range of locations where cardholders can transact free of direct charge, may be at a competitive advantage relative to rediATM network members who, absent the proposed arrangements, would be limited to providing direct fee free transaction to their own cardholders.
- 4.30. The applicants argue that the proposed arrangements will assist in ensuring that rediATM network members are not at a competitive disadvantage in providing ATM transaction services or in attracting and maintaining retail banking customers more generally.
- 4.31. The Firefighters Credit Union submits that as a small credit union, the arrangements can only benefit credit union membership by improving access to direct charge free ATMs.
- 4.32. Customers Limited submits that the public benefits highlighted by the applicants are limited to the benefits that their own members and customers will receive, rather than a wider public benefits test.

The RBA's consideration of the benefits of direct fee free arrangements (within sub-networks)

- 4.33. In its consultation document in respect of the proposed Access Regime for the ATM system the RBA noted that it had received representations from many small financial institutions highlighting the difficulties they face in competing with financial institutions that have large networks of ATMs. Small institutions argued that in order to

compete effectively once direct charging was introduced, they need to be able to offer to their customers a reasonable network of ATMs from which they can withdraw cash at no charge – just as large institutions do.¹⁷

- 4.34. As discussed in Chapter 2, the Access Regime prescribed by the RBA provides for an exception to the prohibition on interchange fees, when the interchange fee is paid between participants in a sub-network, specifically to facilitate such arrangements.
- 4.35. In particular, the RBA has stated that fees which allow small institutions access to a larger network of ATMs than they would be able to provide themselves, free of direct charges, may help those institutions to compete on a more equal footing with the large players in the industry.¹⁸
- 4.36. The RBA has stated that the alternative of not allowing interchange fees in any circumstances would place small financial institutions at a significant competitive disadvantage since customers would be attracted to larger banks' ability to offer a wide network of ATMs to their customers free of direct charges and that smaller institutions could not otherwise hope to replicate those networks.¹⁹

ACCC view

- 4.37. As noted, smaller financial institutions may be placed at a competitive disadvantage as a result of the introduction of direct charging by ATM operators. Under the direct charging regime most banks will continue to offer ATM transactions to their own customers free of direct charges. As a result, financial institutions with a larger network of ATMs, and thereby a larger range of locations where their cardholders can make direct charge free withdrawals, may be at a competitive advantage to smaller financial institutions under the direct charging regime.
- 4.38. One way in which smaller financial institutions can facilitate access to a larger range of ATMs for their cardholders free of direct charge is by forming or joining sub-networks. The exceptions to the prohibition on interchange fees when the interchange fee is paid between participants in a sub-network prescribed in the RBA's Access Regime are specifically designed to facilitate such arrangements.
- 4.39. In short, where a small institution gains access to a larger range of ATMs through joining a sub-network, if the institution pays an interchange fee for transactions undertaken by its cardholders at ATMs operated by other parties to the arrangement, those ATM operators will have less need or incentive to levy a direct charge on the institution's cardholders at the point of the transaction.
- 4.40. While the access regime allows interchange fee arrangements within sub-networks, facilitating access to direct fee free transactions at ATMs throughout a sub-network of the type proposed by the applicants also requires sub-network members to reach an agreement not to directly charge each other's cardholders.

¹⁷ Reserve Bank of Australia, *Access Regime for the ATM System: A consultation document*, December 2008, p12.

¹⁸ Reserve Bank of Australia, *Access Regime for the ATM System* February 2009, p6.

¹⁹ *Ibid*, p7

- 4.41. The ACCC considers that the proposed rediATM network arrangements will be pro-competitive, providing a public benefit by assisting in ensuring that rediATM network members are not at a competitive disadvantage in providing ATM services to their cardholders as a result of the reforms to the ATM system.
- 4.42. In addition, as noted at paragraph 4.14, in respect of some broader retail banking products, such as for example transaction accounts, the extent of a financial institution's ATM network is taken into account by consumers in choosing between financial institutions. Accordingly, to the extent that the proposed arrangements assist in ensuring that rediATM network members are not at a competitive disadvantage in providing ATM services, the arrangements will also assist in ensuring that members are not at a competitive disadvantage in attracting and maintaining customers more generally as a result of the reforms to the ATM system.
- 4.43. Given the regional focus of some smaller financial institutions potentially affected by the reforms, the reforms could, absent arrangements of the types proposed by the applicants, potentially lead to a reduction in choice in financial service providers being particularly pronounced in regional areas. Arrangements such as the proposed rediATM network will assist in ensuring that this is not the case.
- 4.44. Customers Limited argues that the public benefits highlighted by the applicants are limited to the benefits that their own members and customers will receive. As noted, the ACCC considers that the proposed arrangements will assist in maintaining competition in the provision of ATM transaction services and retail banking services more generally. To the extent that such competition is maintained and promoted this would benefit all customers, not just those of rediATM network members.
- 4.45. In addition, with respect to these benefits from the arrangements that may flow only to the applicants and their customers, while the distribution of public benefits is a relevant consideration in weighing public benefits, this is not to say that public benefits flowing only to a section of the community would be given no weight. In any event, in this instance the customers to whom Customers Limited argues that the benefits of these arrangements will be confined are approximately 6 million cardholders.
- 4.46. The ACCC also notes arguments that arrangements such as those proposed in the current application offer a direct benefit to consumers in the form of direct fee free transactions at a wider range of ATMs. However, the ACCC also notes that the general intent of the proposed reforms is to expose cardholders to direct charging so as to increase competition and transparency in the provision of ATM services and promote choice and the provision of ATM services in a wide range of areas.²⁰
- 4.47. Accordingly, while the ACCC considers that allowing rediATM network members' cardholders to obtain direct fee free transactions at a wider range of ATMs will provide a public benefit by improving the competitive position of participants in the rediATM network, the ACCC does not consider that the avoidance of direct fees by cardholders at foreign ATMs in itself, where an interchange fee is paid instead of a direct charge, is a public benefit.

²⁰ Reserve Bank of Australia, *Access Regime for the ATM System* February 2009, pp4-5.

Maximum foreign cardholder direct charge cap

- 4.48. The applicants submit that the maximum direct charge arrangements are intended to promote more widespread use of the rediATM network and will result in lower average direct charges being paid by foreign cardholders at rediATM network ATMs.
- 4.49. While each member of the rediATM network maintains discretion in setting their fees below the cap the applicants submit that the fee cap will provide certainty to foreign cardholders regarding the maximum fee they will be charged at any rediATM network ATM thereby assisting them in making more informed decisions when using ATMs.
- 4.50. The applicants further submit that the arrangements will increase uniformity and consistency across the rediATM network which is important from the perspective of the 'look and feel' of the network and will strengthen its competitive position allowing it to better compete against those financial institutions with larger ATM footprints.

ACCC view

- 4.51. The ACCC considers that the extent to which the maximum direct charge arrangements will result in lower average fees for foreign cardholders using rediATM network ATMs is uncertain given that, for example, the maximum cap for a withdrawal is currently set at \$2 which is consistent with the maximum fee that many other ATM operators charge. While those rediATM network members charging below the cap would likely do so irrespective of the proposed arrangements, the extent to which those charging at the cap would increase foreign cardholder fees absent the arrangements is less clear as it would be expected that the maximum foreign fees charged by their competitors would act as some constraint on their pricing.
- 4.52. However, the ACCC notes that it is possible that some rediATM network members may charge higher fees for foreign ATM transactions absent the proposed arrangements.
- 4.53. More generally, a uniformly applied maximum foreign cardholder transaction fee cap will provide certainty to foreign cardholders regarding the maximum fee they will be charged at any rediATM network ATM and increase uniformity and consistency across the rediATM network. The ACCC considers that this will assist in promoting the rediATM brand and competition more generally for the provision of ATM transaction services.

ATM deployment arrangements

Submissions

- 4.54. The applicants submit that coordination of ATM deployment arrangements will assist in ensuring that the geographic coverage of the rediATM network of ATMs is expanded in a commercially sensible and efficient manner.
- 4.55. The applicants submit that the ATM deployment arrangements will ensure more rediATMs will be available across a wider geographic area, increasing convenience and choice for both member and foreign cardholders. The applicants submit that this in turn will protect the competitive position of rediATM network members and the rediATM network as a whole.

- 4.56. The applicants further state that the ATM deployment arrangements will lead to transactional and administrative cost savings for Cuscal and rediATM members by allowing deployment issues to be discussed collectively and will prevent duplication of scoping and approval costs where two members are seeking to deploy a rediATM at the same new site.
- 4.57. The applicants further contend that the arrangements will prevent rediATM network members ‘cannibalising’ each other’s supply of ATM transaction services, protecting the competitive position of the rediATM network as a whole.
- 4.58. With particular reference to the addition of NAB as a participant in the rediATM network, the applicants submit that the arrangements permit rationalisation to identify and eliminate overlap between NAB and rediATM sites. The applicants submit that this will increase choice for cardholders and generate cost savings for the rediATM network.

ACCC view

- 4.59. The ACCC considers that coordination of deployment arrangements within the rediATM network will assist in achieving greater coverage of the network by assisting the targeting of future deployment of ATMs to areas where there are currently gaps in the network. This will in turn improve the efficiency of the network and assist in promoting greater choice of options for customers in undertaking ATM transactions.
- 4.60. Coordination of deployment arrangements will also assist expansion of the network being undertaken in a more efficient and cost effective manner than if Cuscal was required to coordinate deployment through individual discussion with each member of the network.
- 4.61. This will improve the competitiveness of the rediATM network and promote competition between ATM transaction service providers more generally.

Public detriment

- 4.62. 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.²¹

Direct fee free arrangements

Submissions

- 4.63. The applicants state that the number of ATMs in the rediATM network, including NAB ATMs, account for only around 11% of ATMs in Australia.

²¹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.64. The applicants submit that an agreement between rediATM network members not to directly charge each other's cardholders will not undermine the intent of the RBA's reforms aimed at introducing greater competition and transparency to ATM fees. The applicants contend that the ATM Access Regime envisages that smaller institutions and those without a sufficiently large ATM footprint will develop arrangements such as the proposed no direct charge arrangements to facilitate access to direct charge free transactions for their cardholders at a wider range of ATMs.
- 4.65. The applicants further note that direct charges will continue to apply to ATM transactions undertaken by cardholders, both of rediATM network members and other financial institutions, outside the proposed arrangements thereby continuing to promote the objectives of the reforms to the ATM system.
- 4.66. The applicants further state that the proposed arrangements do not involve any agreement between rediATM network members about the fees they charge their own customers. Rather, each rediATM network member will continue to independently decide on fees to charge its own cardholders.
- 4.67. Customers Limited expresses concern that the arrangements could potentially set a precedent for other large financial institutions which may have an unintended impact on the operation of the ATM system and reverse some of the progress made through reforms to the system.

ACCC view

- 4.68. Under the proposed arrangements cardholders of rediATM network members will avoid direct fees when using ATMs operated by other rediATM network members. In effect, the proposed arrangements will facilitate arrangements whereby ATM owners within the rediATM network can continue to earn revenue, in respect of transactions from cardholders of other rediATM network members, through interchange fees as an alternative to direct charging.
- 4.69. However, as discussed in the ACCC's consideration of the public benefits of the proposed arrangements, in recognition of the competitive advantage that large financial institutions may have over smaller institutions under the direct charging regime, the ATM reforms, and in particular an ATM Access Regime prescribed by the RBA, explicitly provide for smaller financial institutions to develop arrangements such as those proposed in the current application to facilitate access to direct fee free transactions at a wider range of ATMs for their cardholders.
- 4.70. The arrangements proposed by the applicants in the current application also involve one of Australia's largest banks, the NAB, albeit that the NAB has a smaller ATM footprint than Australia's other major banks. Customers Limited has expressed concern that this could potentially set a precedent for other large financial institutions which may reverse some of the progress made through reforms to the system.
- 4.71. Prior to submitting the proposed arrangements for authorisation the applicants wrote to the RBA seeking the RBA's view on the proposal to include NAB in the arrangements.
- 4.72. The RBA's letter of 13 July 2009 in response stated:

While discussions of sub network membership has generally focused on smaller banks, reflecting the existing make-up of these networks, the Payments System Board does not believe that, in principal, a major bank joining a sub network raises any particular concerns, provided it joins on the same terms as other members. In this particular case, the expansion of the rediATM network would increase the capacity for many small financial institutions to compete with the banks offering the largest networks.

4.73. The RBA concluded that:

In summary, the Board is satisfied that the NAB joining the rediATM network is consistent with the spirit of the Access Regime and will benefit not only the customers of NAB and rediATM, but also promote competition between card issuers.

4.74. Accordingly, the ACCC does not consider that the proposed arrangements will undermine the intent of the reforms aimed at introducing greater competition and transparency to ATM fees.

4.75. In addition, the ACCC also notes that direct charging arrangements will continue to apply to foreign ATM transactions undertaken by cardholders of other financial institutions and to rediATM network members' cardholders when undertaking transactions at non rediATM network ATMs. That is, the objectives of the reforms will continue to be promoted by direct charging applying in respect of foreign ATM transactions in the ATM system more generally.

4.76. With respect to any future precedent that authorising the arrangements would set, any future application for authorisation of arrangements, involving any parties, relating to the establishment of an ATM sub-network, would be considered by the ACCC on its merits.

Maximum foreign cardholder direct charge cap

Submissions

4.77. The applicants state that the fee cap is designed to assist in promoting use of the rediATM network to foreign cardholders by providing certainty to foreign cardholders that they will not be charged above a certain level for using any rediATM. The applicants argue that the fee cap does not remove pricing discretion or potential price competition between rediATM network members.

4.78. Specifically, the applicants state that each member of the network retains the discretion to impose any foreign cardholder direct charge below the cap and that individual members' pricing decisions are likely to be influenced by factors including the identity of the foreign cardholder's issuer and the location of the ATM, including the number of other ATMs (whether rediATMs or otherwise) in the area.

4.79. The applicants submit that currently 41% of rediATM network members, and the NAB, charge below the maximum cap.

ACCC view

4.80. As noted, the fee cap sets a maximum charge that rediATM members are able to levy foreign cardholders for transactions. Subject to ATM fees not exceeding this cap the arrangements place no restriction on price competition between members of the

rediATM network. In addition, the fee cap applies to only around 11% of ATMs operating in Australia.

- 4.81. Accordingly, the ACCC considers that members of the rediATM network agreeing not to charge foreign cardholders direct ATM transaction fees in excess of the maximum foreign direct charge cap is unlikely to significantly impact on competition to provide ATM transaction services to consumers, particularly given that rediATM members account for only 11% of ATMs in Australia.

ATM deployment arrangements

Submissions

- 4.82. The applicants submit that there is some potential for the ATM deployment arrangements to lessen competition among members to deploy their ATMs at the same new site or similar locations, should it be the case that members are relevantly competitive in this regard. However, the applicants submit that any effect on competition more generally would be insignificant because:
- incentives to develop new sites will be increased because there is no risk of another member of the rediATM network setting up in competition at the new site
 - members will remain subject to competition for leasing space from other ATM deployers with the rediATM network accounting for only around 11% of all ATMs in Australia
 - the ATM deployment arrangements will, on a whole, make members of the rediATM network more competitive for deployment against those other financial institutions and ATM deployers with large ATM footprints.
- 4.83. Vision Australia states that while some NAB ATMs are audio enabled, making them more easily accessible for blind or vision impaired users, none of the ATMs operated by other rediATM network members are audio enabled.
- 4.84. Vision Australia and Blind Citizens Australia raise concerns that audio enabled NAB ATM machines may be redeployed from current locations thereby depriving vision impaired cardholders that presently have access to those ATMs of the ability to independently conduct banking transactions free of direct charge. Blind Citizens Australia states that it acknowledges that some current rediATM cardholders with vision impairments may gain access to NAB audio enabled ATMs free of direct charge but that this will not offset the disadvantages imposed on NAB cardholders caused by any redeployments.
- 4.85. Vision Australia raises additional concerns that co-ordination of deployment may mean it is less likely that in the future NAB audio enabled ATMs may be established in some areas.
- 4.86. In response to the concerns raised by Vision Australia and Blind Citizens Australia the applicants state that any decision to redeploy an ATM would be part of their overall objective to grow, rather than reduce, the size of their network.

- 4.87. The applicants also argue, while a decision to relocate an audio enabled ATM may impact on vision impaired people in one area, there would be a corresponding benefit to vision impaired people in the area to which the ATM is relocated.

Issues arising out of the draft determination

- 4.88. With respect to the concerns raised by Vision Australia and Blind Citizens Australia, the ACCC noted in its draft determination that the proposed arrangements should increase, rather than decrease, the number of vision impaired persons able to access direct fee free transactions from audio enabled ATMs by giving rediATM cardholders direct fee free access to NAB ATMs.
- 4.89. The ACCC also noted that to the extent that the proposed arrangements result in the redeployment of some NAB ATMs this could potentially result in some vision impaired persons having less convenient access to audio enabled ATMs, although, there would also be a corresponding increase in access at the new ATM location.
- 4.90. In response to the draft determination Vision Australia argues that, to ensure that vision impaired NAB customers would not be disadvantaged as a result of the arrangements the ACCC should impose a condition of authorisation requiring that no NAB ATM be redeployed under the redeployment strategy resulting from the arrangements. In proposing this condition Vision Australia acknowledges that it may still be necessary to redeploy NAB ATMs for reasons unrelated to any agreement between NAB and other rediATM network members.
- 4.91. In response the applicants submit that ATMs are moved routinely in response to various considerations. For example, inadequate numbers of customers accessing the ATM at its current location or the lease at the site at which the ATM is operating expiring. The applicants state that such redeployments will continue irrespective of the proposed arrangements. Specifically, 35 NAB ATMs were relocated in 2009, 16 of which were relocated after the ACCC granted interim authorisation to the proposed arrangements. The applicants state that none of these relocations were specifically as a result of NAB joining the rediATM network.
- 4.92. Vision Australia also submits that because rediATM members' ATMs (other than NAB ATMs) are not audio enabled, very few vision impaired customers bank with rediATM members other than NAB. Therefore, Vision Australia submits, not many additional vision impaired customers would have access to direct fee free transactions at NAB audio enabled ATMs as a result of the arrangements.
- 4.93. Vision Australia also argues that while redeployment of NAB ATMs may benefit vision impaired users in the area to which the ATM is redeployed, any benefit would be outweighed by the loss of access for customers in the area where the ATM was previously located. In this respect, Vision Australia argues that in its experience removing access results in those affected by the loss being qualitatively more disadvantaged than those gaining access because of the need to re-learn or re-arrange the way in which they access the services, resulting in significant anxiety and uncertainty.
- 4.94. In response, the applicants reiterate that the proposed arrangements would grow rather than reduce the number of ATMs in the rediATM network. The applicants also note

that there is no requirement in their ATM deployment rules that existing overlapping NAB and rediATMs must be moved, relocated or redeployed and that it is not necessarily the case that overlapping ATMs will be moved.

- 4.95. The applicants expect that if some ATMs are relocated as a result of the arrangements the number will be small and the number of NAB ATMs relocated will only be a smaller subset again.

ACCC view

- 4.96. The proposed arrangements will limit competition between rediATM members for ATM sites and consequently, competition between them for, in particular, foreign ATM cardholders, at ATM locations. However, while this may have some impact both on competition between ATM deployers for sites and competition between ATM operators in supplying transaction services, given that the arrangements will only affect around 11% of ATMs the ACCC does not consider that the impact of the arrangements on competition is likely to be significant.
- 4.97. However, the ACCC considers that the ATM deployment arrangements will improve the competitiveness of the rediATM network thereby promoting competition between ATM transaction service providers.
- 4.98. Further, the ACCC notes that the aim of the ATM deployment arrangements is not to prevent any individual member from pursuing their own ATM deployment strategy, but rather, to ensure that the interests of the network as a whole are considered in deployment decisions.
- 4.99. In addition the vast majority of ATM deployers in Australia, responsible for around 89% of all ATMs, will continue to compete with each other, and with the rediATM network, for ATM sites.
- 4.100. For the reasons put forward by Vision Australia the ACCC accepts that giving rediATM cardholders direct fee free access to NAB ATMs may not increase the number of vision impaired persons able to access direct fee free transactions from audio enabled ATMs in the short term. This is because the current lack of audio enabled ATMs deployed by rediATM members other than NAB means few vision impaired customers currently bank with these institutions.
- 4.101. The ACCC also accepts that while redeployment of audio enabled NAB ATMs may benefit vision impaired users in the area to which the ATM is redeployed, in some cases this benefit will not offset the reduction in access for vision impaired customers in the area the ATM is redeployed from. To the extent that vision impaired persons are oriented to access and use the ATM at its existing location, the relocation of the ATM would generate an additional detriment to these customers.
- 4.102. The ACCC also accepts that to the extent that NAB deploys less new ATMs under the arrangements than would otherwise be the case this would be a detriment to vision impaired users.
- 4.103. However, the ACCC also notes that the aim of the proposed arrangements is to expand, rather than reduce, the size of the rediATM network. Further, as discussed in detail at

paragraphs 4.106 to 4.115 below, it is intended that non NAB ATMs in the rediATM network will be substantially audio enabled by 2011.

- 4.104. As a result, the proposed arrangements will ultimately facilitate access to a much wider range of audio enabled ATMs for vision impaired customers of both the NAB and other rediATM network members. Accordingly, any detriment to vision impaired ATM users will be short term.
- 4.105. This decision is made on the basis of the information provided by the applicants regarding the redeployment of NAB audio enabled ATMs and the roll out of audio enabling of rediATMs. However, if in fact rediATMs are not audio enabled as indicated by the applicants, or if as a result of the arrangements NAB redeploys or closes down audio enabled ATMs significantly to the detriment of vision impaired users, this may change the balance of public benefits and detriments of the arrangements.

Further issues raised by interested parties

Planned roll out of audio enabled ATMs by rediATM network members

Issues arising out of the draft determination

- 4.106. Vision Australia argues that its understanding is that all ATMs come with the necessary hardware to be audio enabled and that it is up to each ATM operator to install relevant software to allow audio enabling. Given this, Vision Australia argues that it is not clear why rediATM network members cannot start audio enabling their ATMs prior to 2011.
- 4.107. In response the applicants state that while it is correct that rediATMs have the necessary hardware to be audio enabled the software in these ATMs needs to be upgraded. The applicants state that audio-enabled software is currently in the process of being developed and that it is planned that audio enabling of ATMs (in addition to existing and planned NAB ATMs) will be rolled out as soon as the development and testing work is completed. The applicants note that they expect the full software roll out to be completed within the first quarter of 2011 which will effectively result in the rediATM network being substantially audio enabled at that time.
- 4.108. The applicants reiterate that the proposed conduct the subject of their application for authorisation, including NAB joining the rediATM network, will have no effect on the timing of audio enabling of rediATMs.
- 4.109. Vision Australia argues that to ensure the timetable foreshadowed by the applicants is met authorisation should be granted subject to a condition that all rediATMs are fully operational with audio enabled functionality by 30 June 2011.
- 4.110. Vision Australia further submits that the ACCC should grant authorisation subject to a condition requiring that rediATM network members actively promote the availability of audio enabled ATM services directly to their customers and via blindness and low vision communication channels.

ACCC view

- 4.111. The ACCC notes the concerns raised by Vision Australia about the roll out of audio enabled ATMs by rediATM network members. The ACCC considers that in order to ensure access by vision impaired customers to the widest possible range of ATMs it is desirable that this roll out occur as early as possible, subject to all necessary development and testing work being satisfactorily completed.
- 4.112. In this regard the ACCC notes the applicants' submission that they expect all rediATMs to be substantially audio enabled within the first quarter of 2011.
- 4.113. More generally, the roll out or otherwise of audio enabled ATMs by rediATM network members is unrelated to the conduct the subject of the current applications for authorisation. Specifically, audio enabling of rediATMs is proposed to occur irrespective of the proposed arrangements and the proposed arrangements will not affect the timing of this roll out.
- 4.114. As the roll out of audio enabled ATMs by rediATM network members is unrelated to the conduct for which the applicants seek authorisation the ACCC does not consider that the authorisation process, as it pertains to the current application, is the appropriate forum to consider these issues.
- 4.115. Similarly, the ACCC considers that the manner in which rediATM members choose to advertise and educate customers about the services they provide is a matter for them to consider rather than a matter relevant to consideration of the arrangements for which authorisation is sought.

Balance of public benefit and detriment

- 4.116. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.117. In the context of applying the net public benefit test in section 90(8)²² of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²³
- 4.118. Under reforms to Australia's ATM system which provide for customers to be charged directly for ATM transactions by ATM operators, larger financial institutions may gain a competitive advantage over smaller financial institutions by virtue of their larger network of ATMs at which they can continue to offer their cardholders direct fee free transactions.

²² 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.

²³ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- 4.119. The ACCC considers that the proposed agreement between rediATM network members not to directly charge each other's cardholders for ATM transactions will be pro-competitive, providing a public benefit by allowing members of the rediATM network to develop arrangements that facilitate access to direct charge free ATM transactions for their cardholders at a wider range of ATMs.
- 4.120. This will assist in ensuring that rediATM network members are not at a competitive disadvantage in providing ATM services, or retail banking services more generally, as a result of the reforms to the ATM system. Absent the ability to offer their customers access to direct fee free transactions through a reasonable network of ATMs the ACCC considers that many rediATM network members may be at a competitive disadvantage to larger institutions.
- 4.121. The ACCC notes that the general intent of the reforms to the ATM system is to expose cardholders to direct charging so as to increase competition and transparency in the provision of ATM services and promote choice and the provision of ATM services in a wide range of areas.
- 4.122. However, in recognition of the competitive advantage that large financial institutions may have over smaller institutions under the direct charging regime, the ATM reforms, and in particular an ATM Access Regime prescribed by the RBA, explicitly provide for smaller financial institutions to develop arrangements such as those proposed in the current application to facilitate access to direct fee free transactions at a wider range of ATMs for their cardholders.
- 4.123. In respect of the current arrangements, and the involvement of the NAB in the arrangements, the RBA has stated that the NAB's involvement is consistent with the spirit of the Access Regime and will benefit not only the customers of NAB and rediATM, but also promote competition between card issuers.
- 4.124. The ACCC does not consider that rediATM network members agreeing not to directly charge each other's cardholders for ATM transactions will undermine the intent of the reforms aimed at introducing greater competition and transparency to ATM fees.
- 4.125. The ACCC also considers that the proposal for rediATM network members to agree on a cap on the ATM transaction fees they will charge foreign cardholders will also result in a public benefit by providing greater certainty about these fees, increasing uniformity and consistency of charges across the rediATM network. This will assist in promoting the rediATM brand and competition for the provision of ATM transaction services more generally.
- 4.126. The ACCC considers the public detriment resulting from members agreeing on a cap on the ATM transaction fees they will charge foreign cardholders is limited as members will independently determine the fees they charge, subject to the cap, and because the arrangements only affect around 11% of ATMs in Australia.
- 4.127. Further, the ACCC considers that the proposal for rediATM members to coordinate the deployment of ATMs within their network will assist in achieving greater coverage for the network, improving the efficiency of the network and providing greater choice for customers in undertaking ATM transactions.

- 4.128. The ACCC considers that the proposal for rediATM members to coordinate the deployment of ATMs within their network, while potentially lessening competition between members of the network to some extent, is unlikely to result in a significant public detriment given the limited number of ATMs affected by the arrangements.
- 4.129. Concerns have been raised that any redeployment of NAB ATMs, which are audio enabled, may cause access problems for vision impaired customers. While such redeployment would result in a corresponding increase in access at the location to which the ATM is redeployed, the ACCC accepts that any redeployment would disadvantage vision impaired customers accessing the ATM in its existing location in the short term.
- 4.130. However, it is anticipated that there will be very few instances of such redeployment as a result of the arrangements for which authorisation is sought. Further, it is intended that all rediATMs be audio enabled by 2011. As a result the proposed arrangements will ultimately facilitate access to direct fee free transactions at a much wider range of audio enabled ATMs for vision impaired customers of both the NAB and other rediATM network members.
- 4.131. 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(5A), 90(5B), 90(6), 90(7) and 90(8) are met.

Length of authorisation

- 4.132. The Act allows the ACCC to grant authorisation for a limited period of time.²⁴ 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.
- 4.133. In this instance, the applicants seek authorisation for five years.
- 4.134. The ACCC grants authorisation to the arrangements for five years.

²⁴ Section 91(1).

5. Determination

The applications

- 5.1. On 28 July 2009 Cuscal Limited, National Australia Bank Limited and rediATM members (the applicants) lodged applications for authorisation A91175 to A91177 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91175 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to 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. The application was also made under subsection 88(1A) of the Act to 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 the Act.
- 5.3. Application A91176 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to give effect to a contract, arrangement or understanding, a provision of which would have the purpose or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The application was also made under subsection 88(1A) of the Act to 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 the Act).
- 5.4. Application A91177 was made using Form E, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(8) of the Act to engage in conduct that constitutes, or may constitute, exclusive dealing.
- 5.5. In particular, the applicants applied for authorisation for themselves as well as each future member of the rediATM network to:
 - make and give effect to arrangements between Cuscal and all other members to not directly charge member issuers' cardholders for the supply of ATM transaction services at a rediATM
 - make and give effect to arrangements between Cuscal and all other members to not charge cardholders of issuers who are not members a direct charge which exceeds a specified maximum direct charge for the supply of ATM transaction services at a rediATM
 - refuse to give a discount to a foreign cardholder in relation to the supply of ATM transaction services at a rediATM
 - make and give effect to arrangements between Cuscal and all other members about the deployment of ATMs in the rediATM network.
- 5.6. For the purposes of the applications for authorisation future members of the rediATM network do not include Commonwealth Bank of Australia Limited, Westpac Banking

Corporation Limited, Australia and New Zealand Banking Corporation Limited, Cashcard Australia Limited, Customers Limited or any of their bodies related corporate.

- 5.7. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 5.8. For the reasons outlined in Chapter 4 of this 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.
- 5.9. 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.
- 5.10. The ACCC therefore **grants** authorisation to applications A91175 to A91177.

Conduct for which the ACCC grants authorisation

- 5.11. The ACCC grants authorisation for five years.
- 5.12. Further, the authorisation is in respect of the rediATM network arrangements described at paragraph 5.5 as they stand at the time authorisation is granted. Any changes to the rediATM network arrangements during the term of the authorisation would not be covered by the authorisation.
- 5.13. This determination is made on 27 January 2010.
- 5.14. The attachments to this determination are part of the determination.

Interim authorisation

- 5.15. At the time of lodging the application, the applicants requested interim authorisation for the arrangements. The ACCC granted interim authorisation on 21 August 2009.
- 5.16. 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.

Date authorisation comes into effect

- 5.17. This determination is made on 27 January 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 18 February 2010.

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 A91175-A91177

The following table provides a chronology of significant dates in the consideration of the applications by Cuscal Limited, National Australia Bank Limited and rediATM network members.

DATE	ACTION
28 July 2009	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
4 August 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
21 August 2009	The ACCC granted interim authorisation.
25 August 2009	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
8 October 2009	Submission received from the applicants in response to interested party submissions.
29 October 2009	Draft determination issued.
13 November 2009	Request for pre-decision conference.
7 December 2009	Pre-decision conference held.
21 December 2009	Closing date for submissions from interested parties in response to the draft determination.
27 January 2010	Final determination.

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.²⁵

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.²⁶

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.²⁷

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:

- persons who become party to the contract, arrangement or understanding at some time in the future²⁸

²⁵ *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.

²⁶ *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.

²⁷ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.²⁹

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation³⁰. 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.³¹ 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.³²

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.³³ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.³⁴

²⁸ Section 88(10).

²⁹ Section 88(6).

³⁰ Section 90(10A)

³¹ Subsection 91A(1)

³² Subsection 87ZD(1).

³³ Subsection 91B(1)

³⁴ Subsection 91B(3)

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.³⁵ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.³⁶

³⁵ Subsection 91C(1)

³⁶ Subsection 91C(3)

Attachment D — Applicants (each of which are members or proposed members of the rediATM Network)

Alliance One Credit Union Ltd
Allied Members Credit Union Limited
AMP Credit Union Limited
Australian Central Credit Union Ltd
Australian Country Credit Union Limited
Australian Defence Credit Union Limited
AWA Credit Union Ltd
B&E Ltd
Bankstown City Credit Union Ltd
Berrima District Credit Union Ltd
Big Sky Credit Union Ltd
CAPE Credit Union Limited
Capricornia Credit Union Ltd
Central Murray Credit Union Limited
Central West Credit Union Limited
Circle Credit Co-Operative Limited
Community Alliance Credit Union Limited
Community CPS Australia Limited
Community First Credit Union Limited
Companion Credit Union Limited
Country First Credit Union Ltd
Credit Union Australia Ltd
Cuscal Limited
Defence Force Credit Union Limited
EECU Limited
Electricity Credit Union Ltd
ENCOMPASS Credit Union Limited
Family First Credit Union Limited
Fire Brigades Employees' Credit Union Limited
Fire Service Credit Union Limited
Firefighters & Affiliates Credit Co-Operative Ltd
First Choice Credit Union Ltd
First Option Credit Union Limited
Fitzroy & Carlton Community Credit Co-op Limited
Ford Co-Operative Credit Society Limited
Gateway Credit Union Ltd
Goldfields Credit Union Limited
Gosford City Credit Union Ltd
Goulburn Murray Credit Union Co-Operative Limited
Heritage Isle Credit Union Ltd
Holiday Coast Credit Union Ltd
Horizon Credit Union Ltd
IMB
Industries Mutual Credit Union Limited
Intech Credit Union Ltd
Karpaty Ukrainian Credit Union Limited
La Trobe Country Credit Co-Operative Limited

La Trobe University Credit Union Co-Operative Ltd
Laboratories Credit Union Limited
Lysaght Credit Union Ltd
Macarthur Credit Union Ltd
Macquarie Credit Union Limited
Manly Warringah Credit Union Limited
Maritime, Mining & Power Credit Union Ltd
Maroondah Credit Union Ltd
mecu Limited
Melbourne University Credit Union Limited
Memberfirst Credit Union Limited
MyState Financial Credit Union of Tasmania Limited
National Australia Bank Limited
New England Credit Union Ltd
Northern Inland Credit Union Limited
Nova Credit Union Limited
NSW Teachers Credit Union Ltd
Orange Credit Union Limited
Plenty Credit Co-operative Limited
Police & Nurses Credit Society Limited
Police Credit Union Limited
Powerstate Credit Union Ltd
Pulse Credit Union Ltd
Queensland Teachers' Credit Union Limited
Queenslanders Credit Union Limited
R.T.A. Staff Credit Union Limited
Resources Credit Union Limited
Satisfac Direct Credit Union Limited
Savings and Loans Credit Union (S.A.) Limited
Select Credit Union Limited
Service One Credit Union Ltd
SGE Credit Union Limited
Shell Employees' Credit Union Ltd
South West Slopes Credit Union Ltd
Southern Cross Credit Union Ltd
South-West Credit Union Co-Operative Limited
St Marys Swan Hill Co-Operative Credit Society Ltd
Sutherland Credit Union Ltd
Sydney Credit Union Ltd
Tartan Credit Union Limited
The Broken Hill Community Credit Union Ltd
The Police Department Employees' Credit Union Ltd
The Summerland Credit Union Limited
The University Credit Society Limited
Warwick Credit Union Ltd
WAW Credit Union Co-Operative Limited
Woolworths Employees' Credit Union Limited
Wyong Council Credit Union Ltd