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ECS/SUNC2793-9070283

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**CORRS
CHAMBERS
WESTGARTH**
lawyers

28 May 2010

By email: adjudication@accc.gov.au

FILE No:	
DC	
MARS/PRISM	

Sydney
Melbourne
Brisbane
Perth

Richard Chadwick
General Manager, Adjudication
Australian Competition and Consumer
Commission
GPO Box 3135
CANBERRA ACT 2601

Contact
Eddie Scuderi (07) 3228 9319

Dear Mr Chadwick

Application for Authorisation - Suncorp and Bendigo ATM Network

We act for Suncorp-Metway Limited (**Suncorp**) and Bendigo and Adelaide Bank Limited (**Bendigo**) (collectively, the **Applicants**).

Authorisation pursuant to Section 88(1) of the *Trade Practices Act*

Please find **attached**:

- 1 Form B – Agreements affecting competition or incorporating related cartel provisions;
- 2 Form E – Exclusive Dealing;
- 3 A detailed submission in support of the Application for Authorisation on behalf of the Applicants (**Submission**); and
- 4 A cheque for \$9,000 as payment for the relevant lodgement fee. (The conduct referred to in the Form E arises from the proposed arrangements to which the Form B applies.)

Interim authorisation

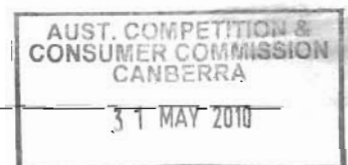
Please note that the Applicants also seek interim authorisation pursuant to Section 91(2)(d) of the *Trade Practices Act*.

The grounds upon which interim authorisation is sought are detailed in section 5 of the Submission.

Confidentiality

Please note that the Applicants request confidentiality in relation to the information contained in the Confidential Annexures to the Submission.

5464696/1



28 May 2010

Australian Competition and Consumer Commission

Application for Authorisation - Suncorp and Bendigo ATM Network

**CORRS
CHAMBERS
WESTGARTH**
lawyers

Please do not hesitate to contact us if you would like to discuss any aspect of the Application for authorisation.

Yours faithfully

Corrs Chambers Westgarth

A handwritten signature in black ink, appearing to be 'Eddie Scuderi', with a stylized flourish extending to the right.

Eddie Scuderi
Partner

FORM B

Commonwealth of Australia

Trade Practices Act 1974 - subsection 88 (1)
**AGREEMENTS AFFECTING COMPETITION OR
INCORPORATING RELATED CARTEL PROVISIONS:
APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88(1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to make a contact or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act;
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act;
- to make a contact 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 that Act; and
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
(Strike out whichever is not applicable)

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91237 Suncorp Metway Limited ABN 66 010 831 722 (Suncorp) and
Bendigo and Adelaide Bank Limited ABN 11 068 049 178 (Bendigo),
(collectively, the **Applicants**).

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

The Applicants each carry on business as retail banks.

Suncorp is a diversified financial services group and a market leader in general insurance, life insurance, wealth management and banking. It has operations in Australia and New Zealand. Suncorp is the fifth largest Australian listed bank. More details regarding Suncorp's business are contained in the supporting submission.

Bendigo Bank provides banking and wealth management services to individual and small to medium businesses. It is represented in all States and Territories with more than 190 company-owned branches, 250 locally-owned community bank branches, 90 agencies and its own ATM Network. More details regarding Bendigo's business are contained in the supporting submission.

- (c) Address in Australia for service of documents on the applicant:
c/o Eddie Scuderi
Partner
Corrs Chambers Westgarth
Waterfront Place
1 Eagle Street
Brisbane QLD 4001

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

The Applicants wish to enter into and give effect to an agreement by which they will offer their Approved Cardholder customers Direct Charge free ATM transaction services on an electronically linked ATM Network for approved transactions.

Details of the proposed arrangements are contained in the supporting submission.

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might be cartel provisions or substantially lessen competition:
(Refer to direction 4)

Please see the supporting submission.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of ATM transaction services. Please see the supporting submission for more details.

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

Interim authorisation is sought on the grounds set out in the supporting submission and ultimately, authorisation is sought for a period of 5 years.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

The proposed arrangements will be entered into and given effect by the Applicants. Details of the Applicants' businesses are provided in the supporting submission.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

The proposed arrangements will be entered into and given effect by the Applicants. Details of the Applicants' businesses are provided in the supporting submission

4. Public benefit claims

- (a) Arguments in support of authorisation:
(Refer to direction 6)

Please refer to the supporting submission.

- (b) Facts and evidence relied upon in support of these claims:

Please see the supporting submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

Please refer to the supporting submission.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:
(Refer to direction 8)

Please refer to the supporting submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to the supporting submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

(a) Is this application to be so expressed?

No

(b) If so, the following information is to be furnished:

(i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

Not applicable.

(ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

Not applicable.

(iii) Where the parties to the similar term contract(s) are not known description of the class of business carried on by those possible parties:

Not applicable.

8. Joint Ventures

(a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)?

No.

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

9. Further information

- (a) Name and address of person authorised by the Applicants to provide additional information in relation to this application:

Eddie Scuderi
Partner
Corrs Chambers Westgarth
1 Eagle Street,
Brisbane QLD 4001.
Email: eddie.scuderi@corrs.com.au
Telephone: 07 3228 9319.
Facsimile: 07 3228 9444.

Signed on behalf of the Applicants:



Dated 28 May 2010

(Signature)

Eddie Scuderi

(Full Name)

Partner, Corrs Chambers Westgarth

(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing – provide a true copy of the writing; and
 - (b) to the extent that of any of the details have not been reduced to writing – provide a full and correct description of the particulars that have not been reduced writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
 9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

FORM E

Commonwealth of Australia

Trade Practices Act 1974 - subsection 88(8)

**EXCLUSIVE DEALINGS:
APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (8) of the *Trade Practices Act 1974* for an authorisation under that subsection to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of applicant:

(Refer to direction 2)

A91233
Suncorp-Metway Limited ABN 66 010 831 722 (Suncorp) and
Bendigo and Adelaide Bank Limited ABN 11 068 049 178 (Bendigo),
(collectively, the **Applicants**).

(b) Short description of business carried on by applicant:

(Refer to direction 3)

The Applicants each carry on business as retail banks.

Suncorp is a diversified financial services group and a market leader in general insurance, life insurance, wealth management and banking. It has operations in Australia and New Zealand. Suncorp is the fifth largest Australian listed bank. More details regarding Suncorp's business are contained in the supporting submission.

Bendigo Bank provides banking and wealth management services to individual and small to medium businesses. It is represented in all States and Territories with more than 190 company-owned branches, 250 locally-owned community bank branches, 90 agencies and its own ATM Network. More details regarding Bendigo's business are contained in the supporting submission.

(c) Address in Australia for service of documents on the applicant:

c/o Eddie Scuderi
Partner
Corrs Chambers Westgarth
Waterfront Place
1 Eagle Street
Brisbane QLD 4001

2. Contract, arrangement or understanding

- (a) Description of the conduct that would or may constitute the practice of exclusive dealing:

(Refer to direction 4)

The Applicants wish to refuse to give a Direct Charge Free ATM transaction service to Foreign Cardholders in relation to the supply of ATM transaction services at their electronically linked ATM Network.

- (b) Description of the goods or services in relation to the supply or acquisition of which this application relates:

This application for authorisation relates to the supply of ATM transaction services by the Applicants.

- (c) The term for which authorisation of the conduct is being sought and grounds for supporting this period of authorisation:

Interim authorisation on the grounds set out in the supporting Submission and ultimately, authorisation is sought for a period of five years.

3. Parties to the proposed arrangement

- (a) Class or classes of persons to which the conduct relates:

(Refer to direction 5)

The conduct relates to retail customers of financial institutions other than the Applicants who have been issued with a card and pin code to use with an ATM and who choose to use ATMs operated by either Suncorp or Bendigo.

- (b) Number of those persons:

- (i) At present time:

Greater than 50.

- (ii) Estimated within the next year:

(Refer to direction 6)

Greater than 50.

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable.

4. Public benefit claims

- (a) Arguments in support of authorisation:

(Refer to direction 6)

Please refer to the supporting submission.

- (b) Facts and evidence relied upon in support of these claims:
Please refer to the supporting submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the *relevant* goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

Please refer to the supporting submission.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the *likely* effect of the conduct on the prices of the goods or services described at 2 (b) above and the prices of goods or services in other affected markets:

(Refer to direction 8)

Please refer to the supporting submission.

- (b) Facts and evidence relevant to these detriments:
Please refer to the supporting submission.

7. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

No.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

8. Further Information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Eddie Scuderi
Partner
Corrs Chambers Westgarth
1 Eagle Street,
Brisbane QLD 4001.
Email: eddie.scuderi@corrs.com.au
Telephone: 07 3228 9319.
Facsimile: 07 3228 9444.

Signed on behalf of the Applicants:

Dated **28 May 2010**

Signed on behalf of the Applicants



(Signature)

Eddie Scuderi

(Full Name)

Corrs Chambers Westgarth

(Organisation)

Partner

(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.

3. Describe that part of the applicant's business in the course of which the conduct is engaged in.

4. Provide details of the conduct (whether proposed or actual) which may constitute the practice of exclusive dealing in respect of which this authorisation is sought.

In providing these details:

(a) to the extent that any of the details have been reduced to writing provide a true copy of the writing; and

(b) to the extent that any of the details have not been reduced to writing provide a full and correct description of the particulars that have not been reduced to writing.

5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.

6. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.

7. Provide details of the market(s) likely to be effected by the conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.

8. Provide details of the detriments to the public which may result from the conduct including quantification of those detriments where possible.

Suncorp-Metway Limited and
Bendigo and Adelaide Bank Limited

Submission in support of Authorisation Application

24 May 2010

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Submission in support of Authorisation Application

1 Executive Summary

- 1.1 This submission is made to the ACCC by Suncorp Metway Limited trading as Suncorp Bank (Suncorp) and Bendigo and Adelaide Bank Limited, (Bendigo), which are together referred to in this application as the Applicants.
- 1.2 This document provides information and analysis in support of an application for authorisation by the Applicants of conduct they propose in relation to a Direct Charge free arrangement (**DCFA**) which is proposed by the Applicants for the benefit of their respective cardholder customers.
- 1.3 The Applicants also apply for interim authorisation on the grounds set out in Section 5 to this submission.
- 1.4 The application for authorisation concerns conduct that may, but for an authorisation, be regarded as:
 - (a) fixing, controlling or maintaining the price for services provided to consumers at automatic teller machines (ATMs) by the Applicants, in within the meaning of the offence and civil penalty provisions relating to cartel provisions in the Trade Practices Act 1974 (Cth) (TPA); or
 - (b) a provision in a contract, arrangement or understanding with the purpose, effect or likely effect of substantial lessening competition, in contravention of section 45(2)(a)(ii) and 45(2)(b)(ii) of the TPA; or
 - (c) a contravention of the prohibition on third line forcing in section 47(7) of the TPA.
- 1.5 The conduct will be contained in a Licence Agreement. The Licence Agreement has not been signed. The essential and relevant aspects of the proposed Licence Agreement are summarised in **Confidential Annexure B**.
- 1.6 The rationale for the DCFA arises from the reform of the ATM system in Australia following the Joint Report in October 2000 by the Reserve Bank of Australia (RBA) and the ACCC entitled "Debit and Credit Card Schemes in Australia – A Study of Interchange Fees and Access" (Joint Report).
- 1.7 The key aspects 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 the ATM withdrawals, with any charge clearly being shown before the customer proceeds with the withdrawal; and
 - the introduction of an objective and transparent Access Code for new entrants.

- 1.8 The Applicants consider that the introduction of direct charging has conferred an advantage on Issuers that own large ATM Networks. Those Issuers will be in a position to offer a reduced-charge or charge-free service to their cardholders at their own ATMs. Those cardholders will therefore be able to avoid Direct Charges in many locations. By contrast, cardholders of institutions such as the Applicants are likely to pay fees for a higher proportion of transactions because smaller Issuers such as the Applicants have correspondingly small (and in many cases, regionally located and concentrated) ATM fleets.
- 1.9 The Proposed Arrangements are a means by which the Applicants can increase the coverage of their Direct Charge free service. This is achieved through electronically linking their ATM networks and thereby creating a larger and geographically broader ATM Network for the benefit of their respective customers.
- 1.10 Such an arrangement will have pro-competitive effects in retail banking markets because it enables Suncorp and Bendigo to address their scale disadvantage in ATM transaction services.
- 1.11 The Proposed Arrangements do not involve any:
- Interchange like fees being paid;
 - restriction on the location, number or deployment of ATMs; or
 - agreement on the fee to be charged to Foreign Cardholders.

2 Introduction

- 2.1 This Submission is provided in support of the Application for Authorisation pursuant to Section 88(1) of the TPA to enter into and give effect to a contract, provisions of which may contravene the prohibition on cartel provisions and/or Sections 45 and/or 47(7) of the TPA.
- 2.2 The Applicants are seeking interim authorisation on the basis set out in Section 5 of this Submission.
- 2.3 The Applicants are otherwise seeking authorisation for a period of five (5) years in the first instance.

3 Definitions

3.1 In this Submission:

ACCC means Australian Competition and Consumer Commission.

Access Regime means the access regime for the ATM system comprising:

- (a) the Access Code developed by APCA; and
- (b) the access regime imposed by the RBA under the *Payment Systems (Regulation) Act 1998*.

Acquirer means an institution that acquires an ATM transaction.

APCA means the Australian Payments Clearing Association.

Applicants means Suncorp and Bendigo.

Approved Card means a card of the type listed in **Confidential Annexure A** to this Submission as that list is amended from time to time in accordance with the Licence Agreement and which cards enable Approved Cardholders to access the ATM Network to effect an ATM Transaction.

Approved Cardholder means:

- (a) a customer of Bendigo who has been issued with an Approved Card and a personal identification number by Bendigo; and
- (b) a customer of Suncorp who has been issued with an Approved Card and a personal identification number by Suncorp.

Approved Transactions means transactions that have been authorised and completed in accordance with the CECS Manual and in relation to an Approved Card, means one of the types of transactions listed in **Confidential Annexure A** to this Submission.

ATM Network means the electronically linked network of ATMs operated by Suncorp and Bendigo and Network ATM means an ATM within the ATM Network.

Bendigo means Bendigo and Adelaide Bank Limited.

CECS means Consumer Electronic Clearing System.

CECS Manual means the manual adopted by APCA currently entitled "CECS Manual for Consumer Electronic Clearing System (CS3)" as amended from time to time.

DCFA means a Direct Charge free arrangement.

Deployer means an independent owner/operator of an ATM.

Direct Charge means a fee charged directly to cardholders for an ATM transaction service, including withdrawals and balance inquiries.

Foreign Cardholders means the holder of an ATM card issued to that cardholder by an Issuer other than Suncorp or Bendigo.

Issuer means an institution that issues an ATM card to a cardholder.

Licence Agreement means an agreement between Suncorp and Bendigo giving effect to the Arrangements.

Proposed Arrangements means the proposed agreement between Suncorp and Bendigo for which authorisation is sought from the ACCC as more particularly described in section 4 of this submission.

RBA means Reserve Bank of Australia.

RBA reforms means the reforms introduced by the RBA affecting the provision of ATM transaction services including the introduction of the Access Regime and the requirement that ATM transaction service providers make transparent to customers accessing ATM services, any fee payable by the customer in respect of an ATM transaction.

rediATM Authorisation means the Authorisation granted by the ACCC to National Australia Bank and others in January 2010 being Authorisations A91175, A91176 and A91177.

TPA means the *Trade Practices Act 1974 (Cth)*.

4 Conduct for which authorisation is sought

4.1 Overview

Authorisation is sought to provide the Applicants with certainty regarding the following arrangements:

- (a) to make and give effect to an agreement between Suncorp and Bendigo to not to impose a Direct Charge on Approved Cardholders for the supply of ATM Transactions at an ATM forming part of the ATM Network (**DCFA**); and
- (b) to refuse to give a discount to a Foreign Cardholder in relation to the supply of ATM transaction services at an ATM forming part of the ATM Network (**Refusal Arrangement**).

4.2 Licence Agreement

The Proposed Arrangements for which authorisation is sought will be documented in a Licence Agreement. A summary of the key terms of the proposed Licence Agreement is contained in **Confidential Annexure B** to this Submission.

4.3 DCFA

Following RBA's reform of the ATM system, the providers of ATM transaction services have generally sought to charge Foreign Cardholders a Direct Charge for ATM services and not to charge their own customer cardholders any Direct Charge.¹

A number of participants in the ATM transaction services market have entered into arrangements to create sub-networks to enlarge their ATM footprint and have matched the Direct Charge-free structure of their larger ATM service market competitors.

The Applicants submit that the proposed DCFA for their Approved Cardholders carries significant benefit for the customers and allows the Applicants to better compete with larger banks and ATM service providers that have larger ATM footprints.

Importantly, the Applicants also submit that the DCFA does not have the purpose or effect of fixing, controlling or maintaining the price charged by the Applicants for ATM services because:

¹ RBA April 2009 Bulletin article "The Introduction of Direct Charging for ATMs".

- (a) the arrangements expressly require the Applicants *not to charge* the other party's Approved Cardholders a Direct Charge for specified ATM services; and
- (b) there is no agreement, arrangement or understanding preventing either Suncorp or Bendigo from deciding to charge its own customers a Direct Charge. The restriction relates solely to the Approved Cardholders of the other party.

However, the Applicants acknowledge that an agreement not to charge any Direct Charge may still technically be characterised as a price fixing arrangement. Consequently, the Applicants seek the certainty of protection by authorisation for the DCFA to the extent that it may be characterised as the making of, or giving effect to, a cartel provision within the meaning of Section 44ZZRD of the TPA, or a contravention of either Sections 45(2)(a)(ii) or 45(2)(b)(ii) of the TPA.

4.4 Refusal Arrangement

Following the reform of the ATM services market by the RBA, banks and other financial institutions have generally sought to impose a Direct Charge for the provision of ATM services only where the cardholder accessing their network or sub-network is not a customer of the relevant bank or financial institution.²

The Applicants wish to enter the Proposed Arrangements so as to ensure that there is no Direct Charge for their respective Approved Cardholders using the ATM Network for an Approved Transaction.³

On one characterisation, it might be said that the DCFA for Approved Cardholders constitutes a discounting arrangement and that the discount is not offered to Foreign Cardholders. On that basis, it might also be argued that the Refusal Arrangement constitutes third line forcing in contravention of Section 47(7) of the TPA.

The Applicants submit that the better view is that the Refusal Arrangement does not constitute third line forcing because the discount, if that is how it is to be characterised, is not being refused for the reason that the Foreign Cardholder has not acquired services from a specified other person.

In any event, authorisation is sought to address the risk that the Refusal Arrangement might be seen as a contravention of Section 47(7) of the TPA.

4.5 Other restrictions

The Commission is asked to note that unlike the conduct authorised by the Commission in the rediATM Network Authorisation, the Proposed Arrangements **do not** involve any agreement between the Applicants on the amount that can be charged to Foreign Cardholders or any restriction on the manner, location or timing of the deployment of ATMs by either Applicant.

² IBID.

³ Bendigo currently charges its customers a \$0.70 fee for using a Bendigo ATM which, depending on the account relationship, will be rebated to the customer if the customer does not exceed their monthly transaction limit. This will continue to be the case for Bendigo Approved Cardholders after the Proposed Arrangements are implemented. However, this will occur directly between the Bendigo Approved Cardholders and Bendigo outside the Proposed Arrangements.

The Proposed Arrangements also do not involve the payment of any interchange-like fee between the Applicants.

5 Interim authorisation

- 5.1 The ACCC has the power to grant interim authorisations under section 91(2) of the TPA in relation to the current authorisation application. The Applicants submit that for the reasons outlined below, the granting of an interim authorisation in relation to the Proposed Arrangements is justified.
- 5.2 The key considerations for the granting of an interim authorisation were articulated by the Tribunal in *Re Queensland Timber Board*⁴.
- 5.3 The Applicants accept that the granting of an interim authorisation does not affect the power of the ACCC to subsequently revoke an interim authorisation pursuant to section 91(2AB) of the TPA.

Potential for prejudice

- 5.4 In *Re Queensland Timber Board* the Tribunal noted the need to identify any possible harm to the Applicants if the request for interim authorisation is denied, as well as any potential harm to other parties if the request is granted/denied.
- 5.5 The introduction of direct charging under the reforms to the ATM system have created a scale and coverage imbalance between those Issuers with large ATM Networks (the major banks and multi-party sub-network operators such as the members in the rediATM Network) and those with small, geographically specific fleets. The scale imbalance has meant that cardholders of smaller financial institutions such as the customers of the Applicants, have been more likely to incur Direct Charges at a "foreign ATM" rate for a higher proportion of their transactions.
- 5.6 As contemplated by the RBA in the Consultation Paper issued in the process of introduction of the RBA reform package, a multilateral interchange sub-network would enable the members of that network to acquire scale by reciprocal agreement with other members such that cardholders of those members would have access to a large network of ATMs at which they would not be charged directly.
- 5.7 Whilst the Proposed Arrangements do not create a sub-network because they lack the multilateral interchange component identified in the reform package, the Proposed Arrangements are designed to deliver the beneficial arrangements contemplated by the RBA and the reforms, including the benefits contemplated by sub-network type arrangements, without, in this case, any interchange-like fees being paid between the operators of the electronically linked ATM Network.
- 5.8 Importantly,
- Approved Cardholders will not be charged a Direct Charge;
 - the Direct Charge payable by Foreign Cardholders will be transparent;

⁴ *Re Queensland Timber Board* (1975) 24 FLR 205 at 210.

- 5.9 Suncorp and Bendigo will absorb their respective costs of implementing the Proposed Arrangements. The underlying rationale of the Proposed Arrangements is to allow the Applicants, as operators of smaller ATM networks, to enjoy economies of scale in competing with the major banks and other providers as a result of the proposed geographically wider and increased number of linked ATM Network offering DCFA.
- 5.10 There is little if any consequence for the other market participants in the ATM services market if an interim authorisation is granted. The Proposed Arrangements do not alter the existing ability for other market participants to implement Direct Charge free arrangements or to take advantage of the Direct Charge in the RBA reforms.

Urgency

- 5.11 An important factor identified in Re Queensland Timber Board was to look to any reasons as to why it was not realistically possible for a final authorisation application to have been lodged at an earlier time which would have obviated the need for interim authorisation.
- 5.12 The reason for urgency in this case arises from the fact that Suncorp and Bendigo have come to realise the extent to which they are now at a significant disadvantage to the major banks in the provision of ATM services by reason of scale. This issue has been made stark as a result of the recent merger of the Commonwealth Bank with Bankwest and the merger involving Westpac and St George. Those mergers have lead to significantly greater ATM Network exposure for the merged entities and created a significant gap as between the coverage enjoyed by those entities and the ATM coverage held by Suncorp and Bendigo.
- 5.13 **Confidential Annexure C** contains details of the ATM network coverage for each of the major participants in the ATM transaction services market and highlights the significant scale disadvantage under which the Applicants operate in that market.
- 5.14 By way of illustration, the ATM network operated by the Commonwealth Bank – BankWest is more than five times the size of the network currently operated by Suncorp and more than three times the size of the network currently operated by Bendigo.
- 5.15 In addition to the competition faced from the large ATM networks operated by the major banks, the Applicants also compete with a number of other linked ATM networks of significant scale. For example:
- Cuscal Limited, through the rediATM network, offers over 90 Credit Unions and the National Australia Bank a linked ATM network offering Direct Charge free ATM transaction services on over 3100 ATMs;⁵
 - HSBC offers its cardholder customers direct, charge free access at “almost 2700 [now 2800] Westpac, St George and BankSA ATMs nationally”.⁶

⁵ rediATM Authorisation.

- Cashcard Australia Limited and the Bank of China (Australia) Limited entered the FeeSmart joint venture for which they obtained authorisation from the Commission in 2009. The FeeSmart joint venture offers financial institutions the ability to offer direct charge free ATM transaction services at all Cashcard branded ATMs, which currently number in excess of 5300.⁷
- 5.16 Unless Suncorp and Bendigo take prompt action to address the scale difference, they run the risk of losing significant custom in the ATM transaction services market.
- 5.17 Also, as identified by the ACCC in its Public Competition Assessment in relation to the Commonwealth Bank's acquisition of BankWest and St Andrew's and in the rediATM Authorisation, the extent of a financial institution's ATM network is taken into consideration by customers in choosing between financial institutions for some retail banking products such as transaction accounts.⁸
- 5.18 Consequently, should Suncorp and Bendigo fail to promptly address the increasing scale disadvantage in ATM network coverage, they also run the genuine risk of being significantly less competitive in the retail banking services market. This is particularly so in the States where Suncorp and Bendigo are under-represented in ATM coverage as compared to other financial institutions.
- 5.19 In order to address the scale disadvantage, Suncorp and Bendigo have developed the Licence Agreement terms which have taken some months to negotiate. Once the negotiations were sufficiently advanced, it became apparent that an authorisation from the Commission may be needed to provide regulatory certainty. The Applicants moved quickly to prepare this application once that became clear.

Status Quo

- 5.20 In assessing whether to grant an interim authorisation, the Tribunal in *Re Queensland Timber Board* also looked to the extent to which relevant markets would change if interim authorisation was granted. The position outlined by the Tribunal was that an interim authorisation is more likely to be granted when it will maintain the status quo, and less likely when it will have the effect of permanently altering the competitive dynamics of the market or inhibits a return to the pre-interim position if final authorisation is ultimately denied.
- 5.21 The Applicants submit that neither of these concerns are material in this case. An interim authorisation will not alter the current practice of Suncorp or Bendigo.
- 5.22 An interim authorisation of the Proposed Arrangements will have no effect upon the wider ATM system and will not negatively alter the competitiveness of the market other than, in our submission, to render it more competitive.
- 5.23 The Proposed Arrangements raise a risk of a technical breach of the TPA and do not have substantial anti-competitive effects. The conduct does not involve setting prices to consumers at supra-competitive levels – indeed the exact opposite applies in respect of Approved Cardholders who will not pay any Direct Charge for ATM Transactions on the linked ATM Network.

⁶ HSBC website.

⁷ FeeSmart and Cashcard websites.

⁸ Page 7 of Public Competition Assessment and paragraph 4.42 of the rediATM Authorisation.

- 5.24 Should authorisation for the Proposed Arrangements ultimately be denied there will be nothing preventing the Applicants from reverting to their current practice and the Applicants will simply unwind the arrangements contemplated by the Licence Agreement including promotional arrangements.

6 The Applicants

Suncorp

- 6.1 Suncorp is a diversified financial services group and a market leader in general insurance, life insurance, wealth management and banking. It has operations in Australia and New Zealand.
- 6.2 Suncorp is a top 25 ASX, listed company with over \$95 million in assets and more than 16,000 employees.
- 6.3 Suncorp Bank is Australia's fifth largest listed bank. It services approximately one million customers with branches, agencies and business banking centres across Australia. Suncorp Bank also operates its own ATM Network.

Bendigo

- 6.4 Bendigo and Adelaide Bank Limited was formed in 2007 as a result of the merger between Bendigo Bank and Adelaide Bank. The company is publicly listed and has assets under management of more than \$47.1 billion.
- 6.5 The company's retail arm, Bendigo Bank, provides banking and wealth management services to individual and small to medium businesses. It is represented in all States and Territories with more than 190 company-owned branches, 250 locally-owned community bank branches, 90 agencies and its own ATM Network.
- 6.6 Adelaide Bank operates a substantial wholesale banking business specialising in mortgage lending through a network of brokers and managers.

7 The ATM System

Overview

7.1 The ATM Network to be operated under the will be part of the Consumer Electronic Clearing System (CECS). CECS is used to settle the exchange of value between Issuers and Acquirers of ATM card transactions in Australia. Each participant in CECS agrees for the benefit of each of the others to abide by the CECS regulations and CECS Manual, which set out the rules and technical requirements for processing and settlement of ATM card transactions. A management committee made up of the Australian Payments Clearing Association (APCA) members and system participants oversees the CECS.

7.2 Participants in an ATM Network

There are four main participants in an ATM transaction:

- the cardholder or customer;
- the institution that issues the card to the customer (Issuer);
- the institution that acquires the ATM transaction (Acquirer); and
- the owner/operator of the ATM.

7.3 The major banks variously perform roles as Issuers, Acquirers and ATM owner/operators on a national basis. They have extensive ATM Networks and interchange agreements with the primary objective of servicing their own cardholders. The major banks also have bilateral or unilateral arrangements with almost all Issuers and arrangements with ATM owners/operators. They also settle directly with other financial institutions for interchange transactions.

7.4 Regional banks play the roles of regional Issuer, Acquirer and ATM owner/operator. Their ATMs are generally concentrated around their cardholder base. The regional banks also have arrangements with Issuers and ATM owners/operators and settle with other financial institutions for interchange transactions.

7.5 Institutions such as credit unions and building societies are generally smaller Issuers and ATM owners/operators. They have smaller numbers of ATMs which are focussed on servicing their cardholders. Most of these institutions are members of networks such as Rediteller and Cashcard. Settlement in these networks is conducted between other financial institutions and the settlement bodies for these smaller institutions.

Operation of the ATM Networks

7.6 ATMs form part of the access network provided by a card issuing institution to its cardholders. When cardholders use ATMs other than those provided by their own financial institution, cross-institution clearing and settling is required.

7.7 ATM transactions on cards initiated by cardholders of Issuers are accepted by Acquirers by means of a series of bilateral agreements between them, and

settled via the Exchange Settlement Account each direct participant has with the RBA. These bilateral agreements provide for mutually agreed fees to be paid by the Issuer to the ATM operator to reimburse the ATM operator (who may or may not be the Acquirer) for providing the ATM service (Interchange Fees).

- 7.8 Where the Issuer and Acquirer are not the same institution, this is considered to be a foreign ATM transaction. In most cases, the cardholder is charged a foreign ATM fee by their Issuer. The foreign fee charged to cardholders by Issuers is currently \$1.50 - \$2.00 per withdrawal, although not all institutions charge a foreign fee.⁹

Existing ATM Networks

- 7.9 Confidential Annexure C provides details of the current number of and spread of ATMs in Australia including details relating to the networks currently operated by the Applicants.

- 7.10 The Commission will note that:

- Bendigo and Suncorp are at significant number and geographic – disadvantage as compared to the major banks and other ATM network service providers;
- by way of illustration, the ATM network operated by the Commonwealth Bank – BankWest is more than five times the size of the network currently operated by Suncorp and more than three times the size of the network currently operated by Bendigo;

- 7.11 In addition to the competition faced from the large ATM networks operated by the major banks, the Applicants also compete with a number of other linked ATM networks of significant scale. For example, see the information contained in paragraph 5.14 above. As the Commission is also aware,

Cashcard Australia Limited and the Bank of China (Australia) Limited entered the FeeSmart joint venture for which they obtained authorisation from the Commission in 2009. The FeeSmart joint venture offers financial institutions the ability to offer direct charge free ATM transaction services at all Cashcard branded ATMs, which currently number in excess of 5300.¹⁰

8 The relevant markets

- 8.1 The ACCC concluded in relation to the rediATM Authorisation that

the relevant markets were:

- local markets for the supply of ATM transaction services to ATM cardholders;

⁹ RBA 2009 Bulletin Article "The Introduction of Direct Charging for ATMs".

¹⁰ FeeSmart and Cashcard websites.

- a national wholesale market for the deployment and operation of ATMs; and
- the markets for retail banking services as previously identified by the ACCC in a public competition assessment of the proposed acquisition of BankWest and St Andrew's Australia by Commonwealth Bank of Australia.¹¹

8.2 The Applicants submit that the markets identified by the ACCC in the *rediATM* Authorisation remain the relevant markets against which this Application should be assessed.

9 Counterfactual

9.1 As you are aware, the Commission applies the "future with – and – without test" established by the Competition Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.

9.2 The Applicants submit that, given the uncertainty as to whether the Proposed Arrangements would contravene the TPA, absent the immunity afforded by authorisation, the Applicants will not make or give effect to these arrangements.

9.3 The Applicants submit that the counterfactual is therefore that the Applicants will not make or give effect to the DCFA or the Refusal Arrangement.

10 Public benefit

DCFA

10.1 The Applicants submit that financial institutions rely on the breadth of coverage offered by their existing ATM networks as an important element in their customer service offering and that the ATM network at their disposal assists in securing deposit account and retail banking custom.

10.2 The Commission has previously recognised that the extent of a financial institution's ATM coverage is a factor that consumers take into account in choosing between financial institutions for the customer's general retail banking needs, including transaction account needs.¹²

10.3 Financial institutions with a smaller ATM network, such as the ATM networks currently deployed by Suncorp and Bendigo, are at a competitive disadvantage to those financial institutions with larger ATM footprints.

¹¹ Page 14 of the *rediATM* Network authorisation.

¹² Public Competition Assessment: Commonwealth Bank of Australia – proposed acquisition of BankWest and St Andrew's Australia, 10 December 2008, page 7 and paragraph 4.42 of the *rediATM* Authorisation.

- 10.4 As previously stated in this submission, the recent mergers of CBA and BankWest and of Westpac and St George Banks have further entrenched the competitive advantage of the larger banks as compared to the smaller banks in relation to ATM Network coverage.
- 10.5 The DCFA also provides Approved Cardholders with a significant benefit in that they will be able to access a broader range of ATMs across the country without incurring a Direct Charge.
- 10.6 By authorising the Proposed Arrangements, it is submitted that the Applicants will:
- significantly improve their combined ATM Network coverage;
 - be better able to compete in the ATM transaction services market;
 - be in a better position to attract new customers and ensure the customers have choice regarding their retail banking requirements; and
 - avoid a situation in which the Applicants will be at a significant competitive disadvantage as compared to the major banks and other financial institutions that have a broader ATM network coverage, including those participants who received the benefit of the rediATM authorisation.
- 10.7 The Applicants also submit that the proposed Licence Agreement giving effect to the Proposed Arrangements will create an ATM Network and a financial arrangement that is closely analogous to a sub-network exception to the prohibition on interchange fees. However, an additional benefit arises from the fact that unlike the sub-network arrangements envisaged by the interchange fee exception in the RBA reforms, the Proposed Arrangements do not involve any interchange-like fee being paid by the Applicants.
- 10.8 The Applicants submit that the Proposed Arrangements deliver the benefits and avoid the adverse consequences identified by the Commission in the rediATM Authorisation including:
- allowing smaller institutions to gain access to a larger range of ATMs therefore reducing the need or incentive to levy a Direct Charge on the institution's cardholders at the point of the transaction¹³;
 - the Proposed Arrangements will be pro-competitive by ensuring that the Applicants are not at a competitive disadvantage in providing ATM services to their Approved Cardholders as a result of the reforms to the ATM system¹⁴;
 - the Proposed Arrangements will also assist in ensuring that the Applicants are not at a competitive disadvantage in attracting and

¹³ Paragraph 4.39

¹⁴ Paragraph 4.41

maintaining customers more generally in relation to retail banking services as a result of the reforms to the ATM system¹⁵;

- although the customers directly benefiting from the DCFA will be the Applicants' own customers, the Proposed Arrangements will assist in maintaining competition in the provision of ATM transaction services and retail banking services generally and will therefore benefit all customers¹⁶.

11 Public detriment

- 11.1 The Applicants submit that there are no material detriments likely to arise from the Proposed Arrangements.
- 11.2 The Proposed Arrangements will not undermine the intent of the ATM system reforms which have been introduced to ensure greater competition and transparency of ATM fees.
- 11.3 It is inconsistent with the ATM services reforms for smaller institutions such as the Applicants to be prevented from expanding their networks in a way which still meets the objective of transparency in relation to the Direct Charges charged to customers for ATM services.
- 11.4 The Applicants also submit that it would be inconsistent for a major bank like the National Australia Bank to have the benefit of an authorisation in relation to the rediATM network if smaller financial institutions such as the Applicants could not seek to expand their network coverage in the way envisaged by the Proposed Arrangements.
- 11.5 The Commission is also asked to note that the Proposed Arrangements do not contain any restriction on the timing, location or number of ATMs to be deployed by either of the Applicants and no agreement on the price which should be charged to Foreign Cardholders accessing the ATM Network.

12 Conclusion

- 12.1 For the reasons outlined in this submission, the Proposed Arrangements carry significant public benefits and satisfy the objectives of the RBA's reforms to the ATM system and do not give rise to any public detriments.

¹⁵ Paragraph 4.42

¹⁶ Paragraph 4.44

Confidential Annexure A

EXCLUDED FROM PUBLIC REGISTER

Confidential Annexure B

EXCLUDED FROM PUBLIC REGISTER

Confidential Annexure C

EXCLUDED FROM PUBLIC REGISTER