



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Applications for authorisation**

**lodged by**

**Suncorp-Metway Limited and  
Bendigo and Adelaide Bank Limited**

**in respect of**

**an agreement not to impose a direct charge on each others'  
cardholders for ATM transactions**

**Date: 29 July 2010**

**Authorisation no's.: A91232 &  
A91233**

**Public Register no.:C2010/523**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Walker  
Willett

## Summary

The ACCC proposes to grant authorisation for Suncorp-Metway Limited and Bendigo and Adelaide Bank Limited to agree not to direct charge each others' cardholders for ATM transactions.

The ACCC proposes to grant authorisation for a period of five years.

Suncorp-Metway Limited (Suncorp) and Bendigo and Adelaide Bank Limited (Bendigo Bank) propose to agree not to direct charge each others' cardholders for ATM transactions. The purpose of the proposed arrangements is to provide their cardholders a larger range of ATMs from which they can undertake transactions at no direct charge.

Under reforms to the ATM system introduced in March 2009 that 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 own branded ATMs where they can continue to offer their cardholders direct fee free transactions.

The ACCC considers that the proposed agreement between Suncorp and Bendigo Bank not to directly charge each others' cardholders for ATM transactions will be pro-competitive, providing a public benefit by allowing smaller institutions 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 Suncorp and Bendigo Bank are not at a competitive disadvantage to larger financial institutions in providing ATM services, or retail banking services more generally, as a result of the reforms to the ATM system.

The general intent of the 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.

However, in recognition of the competitive advantage that large financial institutions may have over smaller institutions under the direct charging regime the reforms provide for smaller financial institutions to develop arrangements to facilitate access to direct fee free transactions at a wider range of ATMs for their cardholders.

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.

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

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

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## List of abbreviations

ACCC	The Australian Competition and Consumer Commission
ASIC	The Australian Securities and Investment Commission
ATM	Automatic Teller Machine
Bendigo Bank	Bendigo and Adelaide Bank Limited
CALC	Consumer Action Law Centre
RBA	The Reserve Bank of Australia
Suncorp	Suncorp-Metway Limited
The Act	The Trade Practices Act 1974
Tribunal	The Australian Competition Tribunal

# 1. The application for authorisation

- 1.1. On 31 May 2010 Suncorp-Metway Limited (Suncorp) and Bendigo and Adelaide Bank Limited (Bendigo Bank) (collectively the Applicants) lodged applications for authorisation A91232 and A91233 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B.
- 1.3. The Applicants applied for authorisation to agree not to directly charge each others' cardholders for ATM transactions undertaken at their ATMs. The Applicants seek authorisation for a period of five years.
- 1.4. Application A91232 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, and
  - 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 A91233 was made under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.

## Interim authorisation

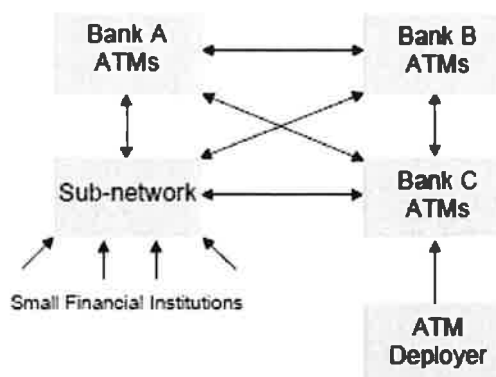
- 1.6. On 31 May 2010 the Applicants also requested interim authorisation.
- 1.7. On 24 June 2010 the ACCC granted interim authorisation. In granting interim authorisation the ACCC considered that the protection provided by interim authorisation would allow the Applicants to provide their cardholders with access to a wider range of ATMs without a direct charge while the ACCC considers the substantive applications.
- 1.8. 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.

## 2. Background to the application

### 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.<sup>1</sup> 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 2.1<sup>2</sup>



- 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

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

<sup>2</sup> 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.
- 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.<sup>3</sup>
- 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.<sup>4</sup>
- 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.

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<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

### *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

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<sup>5</sup> Ibid

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

<sup>7</sup> 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.<sup>8</sup>
- 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.<sup>9</sup>
- 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.<sup>10</sup>

## The applicants

- 2.20 Suncorp submits it is Australia's fifth largest Australian Securities Exchange-listed bank, serving about one million customers, with branches across Australia and New Zealand and has its own ATM network. Suncorp further submits that it has assets of more than \$95 billion.
- 2.21 Bendigo Bank is also a publicly listed company in Australia and submits that it has assets under management of more than \$47 billion. Bendigo Bank submits that it is represented in all States and Territories with more than 190 company owned branches, 250 locally –owned community bank branches, 90 agencies and has its own ATM network.

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

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

<sup>10</sup> *Ibid*, p7.

2.22 According to recent RBA figures, Bendigo Bank (998 ATMs) and Suncorp (680 ATMs) respectively have the 10<sup>th</sup> and 11<sup>th</sup> largest ATM fleets in Australia, compared with:

Customers Ltd	5617
Cashcard	4799
Commonwealth Bank and Bankwest	3714
Bank of Queensland	3577
RediATM (including NAB)	3171
Westpac and St George	2971
ANZ	2652
iCash	1156
CashConnect	1031 <sup>11</sup>

### **Related authorisations**

2.23 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 others' cardholders for ATM transactions undertaken at ATMs owned by a Feesmart member.

2.24 On 27 January 2010 the ACCC granted authorisations A91175 – A91177 in relation to an agreement between Cuscal Ltd, National Australia Bank and rediATM network members:

- to not directly charge each others' cardholders for ATM transactions
- to not charge cardholders of non-member institutions a fee greater than a specified maximum charge
- about the deployment of ATMs by rediATM network members.

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<sup>11</sup> RBA, *Bulletin*, June qtr 2010 p44. The RBA states that Bendigo Bank has 998 ATMs and Suncorp 680.

### **3. Submissions received by the ACCC**

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.
- 3.2. Broadly, the Applicants submits that the proposed conduct will:
  - significantly improve their combined ATM network coverage
  - better enable them to compete in the ATM transaction services market
  - put them in a better position to attract new customers and ensure the customers have choice regarding their retail banking requirements
  - avoid a situation in which they will be at a significant competitive disadvantage as compared with 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.
- 3.3. The Applicants also submit that 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.
- 3.4. The ACCC sought submissions from 52 interested parties potentially affected by the application, including ATM service providers, other financial institutions, government agencies and consumer groups. A summary of the public submissions received from interested parties follows.
- 3.5. Cashcard Australia Limited (Cashcard) raised concerns that the proposed arrangements do not appear to be based on the exceptions provided under the reforms to the ATM system. Cashcard states that as the arrangements do not provide for a direct charge or interchange fees between the parties, it is likely that the arrangement is supported by other consideration between the parties. Cashcard states that such consideration does not appear to be based on the exceptions provided for pursuant to the reforms to the ATM system.
- 3.6. The Consumer Action Law Centre (CALC) submitted that it is generally supportive of the proposed arrangements as it is reasonable for smaller institutions to enter into these types of arrangements to allow them to compete with larger institutions.
- 3.7. The Australian Securities and Investment Commission (ASIC) did not object to the proposed conduct but suggested that the ACCC add a condition of authorisation requiring that the parties agree not to charge their customers for using the ATMs of the other party to the arrangement.
- 3.8. The views of the Applicants and interested parties are outlined in the ACCC's evaluation of the arrangements in Chapter 4 of this draft determination. Copies of

public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.

## 4. ACCC evaluation

4.1. The ACCC's evaluation of the proposed arrangements is in accordance with tests found in:

- 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](#).

### Area of competition

4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant area(s) of competition affected by that conduct.

4.4. The Applicants submit that the areas of competition identified by the ACCC in considering other, similar arrangements remain relevant to their applications.

## *ACCC view*

- 4.5. Broadly, for the purpose of assessing these applications, the ACCC considers the relevant areas of competition affected by the proposed conduct are:
- the local markets for the supply of ATM transaction services to ATM cardholders
  - a national wholesale market for the deployment and operation of ATMs, and
  - the markets for retail banking services.
- 4.6. The ACCC notes the following in respect of these areas of competition.

### ATM transaction services

- 4.7. The 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.
- 4.8. 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.
- 4.9. 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.

### Deployment and operation of ATMs

- 4.10. 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.
- 4.11. 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

- 4.12. The ACCC has considered retail banking markets in considering a number of proposed acquisitions in the banking sector.
- 4.13. The ACCC’s market inquires in respect of these acquisitions have 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.<sup>12</sup>

- 4.14. 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.<sup>13</sup>
- 4.15. 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**

- 4.16. 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.<sup>14</sup>
- 4.17. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.

### *Submissions*

- 4.18. The Applicants submit that, given the uncertainty as to whether the proposed arrangements would contravene the Act, absent the immunity afforded by authorisation, they would not make or give effect to the proposed arrangements.

### *ACCC view*

- 4.19. 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 would be less likely to reach agreement not to direct charge each others' cardholders for ATM transactions.

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<sup>12</sup> 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.

<sup>13</sup> Ibid

<sup>14</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

## Public benefit

4.20. 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.<sup>15</sup>

### *Submissions*

4.21. The Applicants submit that the breadth of coverage of ATM networks is an important element in a financial institutions service and attracting customers for deposit account and retail banking services. The Applicants submit that financial institutions with a smaller ATM network, such as themselves, are at a competitive disadvantage to financial institutions with a larger ATM footprint.

4.22. The Applicants submit that the proposed arrangements will provide their cardholders with a significant benefit in that they will have access to a broader range of ATMs across the country without incurring a direct charge.

4.23. The Applicants submit that the proposed conduct will:

- significantly improve their combined ATM network coverage
- better enable them to compete in the ATM transaction services market
- place them in a better position to attract new customers and ensure the customers have choice regarding their retail banking requirements
- assist them to avoid a situation in which they will be at a significant competitive disadvantage as compared with 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.

4.24. The Consumer Action Law Centre (CALC) submitted that it is generally supportive of the proposed arrangements as it is reasonable for smaller institutions to enter into these types of arrangements to allow them to compete with larger institutions.

4.25. The Australian Securities and Investment Commission (ASIC) did not object to the proposed conduct but suggested that the ACCC add a condition of authorisation requiring that the parties agree not to charge their customers for using the ATMs of the other party to the arrangement.

4.26. In response, the Applicants submit that under the proposed arrangements no additional or direct fee, including a fee of the type contemplated by ASIC, will be paid by the Applicant's cardholders when they use each others ATMs.

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<sup>15</sup> *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.



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

- 4.27. 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.<sup>16</sup>
- 4.28. The RBA has stated that allowing 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.<sup>17</sup>
- 4.29. The RBA has stated that without this small financial institutions would be 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.<sup>18</sup>

*ACCC view*

- 4.30. 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 ATM's, 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.
- 4.31. 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 entering into reciprocal arrangements or forming or joining sub-networks. However, this requires participants to reach an agreement not to directly charge each others' cardholders.
- 4.32. The ACCC considers that the proposed agreement between the Applicants not to directly charge each others' cardholders will be pro-competitive, providing a public benefit by assisting in ensuring that the Applicants are not at a competitive disadvantage in providing ATM services to their cardholders as a result of the reforms to the ATM system.
- 4.33. In addition, as noted at paragraph 4.13, in respect of some broader retail banking products, such as for example transaction accounts, the extent of a financial institutions 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 the Applicants are not at a competitive disadvantage in providing ATM services, the arrangements will also assist in ensuring that smaller financial institutions are not at a competitive disadvantage in attracting and maintaining customers more generally as a result of the reforms to the ATM system.

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<sup>16</sup> Reserve Bank of Australia, *Access Regime for the ATM System: A consultation document*, December 2008, p12.

<sup>17</sup> Reserve Bank of Australia, *Access Regime for the ATM System* February 2009, p6.

<sup>18</sup> *Ibid*, p7

- 4.34. 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 the Applicants will assist in ensuring that this is not the case.
- 4.35. The ACCC notes the Applicants submission that the proposed arrangements will 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.<sup>19</sup>
- 4.36. Accordingly, while the ACCC consider that allowing the Applicants' cardholders to obtain direct fee free transactions at a wider range of ATMs will provide a public benefit by improving the competitive position of the Applicants, the ACCC does not consider that the avoidance of direct fees by cardholders at foreign ATMs in itself, is a public benefit.
- 4.37. The ACCC notes ASIC's submission that the benefits from improving the competitiveness of the Applicants would be enhanced if the Applicants did not charge their own customers a fee for using ATMs owned by the other party.
- 4.38. The Applicants will still incur costs in providing each others' cardholders with ATM transactions.
- 4.39. In the absence of direct charging by the ATM operator, the ACCC accepts that the Applicants will individually need to determine if and how they recover the costs incurred when their cardholders undertake transactions at ATMs owned by the other party.
- 4.40. In respect of the current arrangements, the Applicants have clarified that no additional or direct fee, including a fee of the type contemplated by ASIC, will be paid by the Applicant's cardholders when they use each others ATMs.

## **Public detriment**

- 4.41. 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.<sup>20</sup>

### *Submissions*

- 4.42. The Applicants submit that the proposed arrangements will not result in any material detriment. Further, the Applicants submit that 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.

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<sup>19</sup> Reserve Bank of Australia, *Access Regime for the ATM System* February 2009, pp4-5.

<sup>20</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.43. The Applicants also submit 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.
- 4.44. Cashcard Australia Limited (Cashcard) raised concerns that the proposed arrangements do not appear to be based on the exceptions provided under the reforms to the ATM system. Cashcard states that as the arrangements do not provide for a direct charge on interchange fees between the parties, it is likely that the arrangement is supported by other consideration between the parties. Cashcard states that such consideration does not appear to be based on the exceptions provided for pursuant to the reforms to the ATM system.
- 4.45. In response, the Applicants argue that authorisation should not be refused merely because the arrangements do not fall within the scope of the exemptions provided under the ATM Access Regime.
- 4.46. The Applicants also state that they will absorb their respective costs of implementing the proposed arrangements.

*ACCC view*

- 4.47. Under the proposed arrangements Suncorp and Bendigo Bank will agree not to directly charge each others' cardholders for ATM transactions.
- 4.48. 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 reforms provide for smaller financial institutions to develop arrangements to facilitate access to direct fee free transactions at a wider range of ATMs for their cardholders.
- 4.49. 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.
- 4.50. In addition, the ACCC also notes that direct charging arrangements will continue to apply in respect of ATM transactions undertaken by cardholders, both of the Applicants and other financial institutions, outside of the proposed arrangements. 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.
- 4.51. With respect to Cashcard's concerns that the proposed arrangements may involve consideration between the parties that does not appear to be based on the exceptions provided for pursuant to the reforms to the ATM system the ACCC notes the Applicant's submission that they will each absorb their respective costs of implementing the proposed arrangements. Accordingly, the ACCC is satisfied that the arrangements are not inconsistent with the reforms.

## Balance of public benefit and detriment

- 4.52. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.53. In the context of applying the net public benefit test in section 90(8)<sup>21</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>22</sup>
- 4.54. 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.
- 4.55. The ACCC considers that the proposed agreement between Suncorp and Bendigo not to directly charge each others cardholders for ATM transactions will be pro-competitive, providing a public benefit by allowing smaller institutions to develop arrangements that facilitate access to direct charge free ATM transactions for their cardholders at a wider range of ATMs.
- 4.56. This will assist in ensuring that the Applicants 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 smaller financial institutions may be at a competitive disadvantage to larger institutions.
- 4.57. 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.
- 4.58. However, in recognition of the competitive advantage that large financial institutions may have over smaller institutions under the direct charging regime, the reforms provide for smaller financial institutions to develop arrangements to facilitate access to direct fee free transactions at a wider range of ATMs for their cardholders.
- 4.59. 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.

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<sup>21</sup> 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.

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

4.60. 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**

4.61. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>23</sup> 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.

4.62. In this instance, the Applicants seek authorisation for five years.

4.63. The ACCC proposes to grant authorisation to the arrangements for five years.

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<sup>23</sup> Section 91(1).

## 5. Draft determination

### The application

- 5.1. On 31 May 2010 Suncorp-Metway Limited and Bendigo and Adelaide Bank Limited lodged applications for authorisation A91232 and A91233 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91232 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).
- 5.3. Application A91233 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.
- 5.4. In particular, Suncorp and Bendigo Bank seek authorisation to agree not to directly charge each others' cardholders for ATM transactions undertaken at their ATMs.
- 5.5. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 5.7. The ACCC is also satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.8. The ACCC therefore **proposes to grant** authorisation to applications A91232 and A91233.

### Conduct for which the ACCC proposes to grant authorisation

- 5.9. The ACCC proposes to grant authorisation to Suncorp and Bendigo Bank to agree not to directly charge each others' cardholders for ATM transactions at their ATMs for five years.
- 5.10. This draft determination is made on 29 July 2010.
- 5.11. The attachments to this determination are part of the draft determination

## **Interim authorisation**

- 5.12. At the time of lodging the application Suncorp and Bendigo Bank requested interim authorisation to agree not to directly charge each others' cardholders for transactions undertaken at the other party's ATMs. The ACCC granted interim authorisation on 24 June 2010.
- 5.13. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## **Further submissions**

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

## **Attachment A — the authorisation process**

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

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

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

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

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

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

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



## **Attachment B — chronology of ACCC assessment for applications A91232 and A91233**

The following table provides a chronology of significant dates in the consideration of the applications by Suncorp-Metway Limited and Bendigo and Adelaide Bank Limited.

<b>DATE</b>	<b>ACTION</b>
31 May 2010	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
16 June 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
24 June 2010	The ACCC granted interim authorisation.
28 June 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
15 July 2010	Submission received from Applicants in response to interested party submissions.
29 July 2010	Draft determination issued.

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

## Trade Practices Act 1974

### Section 90—Determination of applications for authorisations

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

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

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

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

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

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

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

as the case may be.

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

(8) The Commission shall not:

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

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

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

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

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

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
  - (i) a significant increase in the real value of exports;

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

## Variation in the language of the tests

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

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup>

## 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 future<sup>27</sup>

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<sup>24</sup> *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.

<sup>25</sup> *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.

<sup>26</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>28</sup>

## Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>29</sup>. 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.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>33</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>34</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>35</sup>

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<sup>27</sup> Section 88(10).

<sup>28</sup> Section 88(6).

<sup>29</sup> Section 90(10A)

<sup>30</sup> Subsection 91A(1)

<sup>31</sup> Subsection 87ZD(1).

<sup>32</sup> Subsection 91B(1)

<sup>33</sup> Subsection 91B(3)

<sup>34</sup> Subsection 91C(1)

<sup>35</sup> Subsection 91C(3)