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L A W Y E R S

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By email

Richard Chadwick
General Manager, Adjudication
Australian Competition and Consumer Commission
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Copies to:

David Hatfield, Imogen Hartcher-O'Brien, Tanya Hobbs, Garth Layton

Public register version

Dear Dr Chadwick

ATM Fee Proposal – Application for Authorisation

We refer to the ACCC's draft determination of 30 August 2012 in respect of the ATM Fee Proposal (**draft determination**).

The Applicant and the parties are pleased that the ACCC is proposing to grant authorisation for the ATM Fee Proposal, and do not intend to raise any substantive issues in response to the draft determination. However, the Applicant wishes to address a number of points that were made in the draft determination, and in particular clarify its position regarding the limit on the number of Identified ATMs allowed in the Implementation Agreement, and the impact of ATM fees on very remote Indigenous communities.

Increases above the maximum number of ATMs allowed under the Implementation Agreement is subject to the parties' agreement and regulatory approval

The draft determination states:

- *"The total number of ATMs contemplated as being eligible to participate in the ATM Proposal is capped at 85, absent external funding from government or other sources" (paragraph 5).*
- *"Included in the Implementation Agreement is an allowance for a variation of this number to a maximum number of 85 ATMs eligible to participate in the ATM Proposal (without external funding)" (paragraph 17).*

The Applicant considers the statements at paragraphs 5 and 17 to be somewhat ambiguous and may give the incorrect impression that the total number of ATMs to which the ATM Fee Proposal may apply could increase beyond 85 ATMs, simply on the basis that external funding become available for the additional ATMs.

While the Implementation Agreement does contain a limited mechanism for a possible increase beyond the limit of 85 ATMs, such an increase would require agreement by the existing parties as well



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as the incorporation of any other relevant parties (in addition to, and separate from, any external funding).

[Restriction of publication of part claimed]

Additionally, an increase above the maximum number would also require express consent from the Reserve Bank of Australia (**RBA**). We note, the RBA recently varied the *Access Regime for the ATM System* (**Access Regime**), extending its exemption power under the Access Regime. One of the issues that prompted this review was the ATM Fee Proposal. Following the variation, on 29 August 2012, the RBA granted an exemption to participants in the ATM Fee Proposal from the application of paragraphs 11 and 12 of the Access Regime (enclosed), which prohibits the payment of interchanges fees between participants in the ATM system, except in limited circumstances.

The RBA's grant of exemption is conditional on the parties receiving the RBA's approval of any material amendments to the Implementation Agreement. An increase in the number of Identified ATMs above the maximum number permitted under the Implementation Agreement (as well as an increase to the maximum number itself) is specifically identified by the RBA as an amendment which may have a "significant impact" upon the bases on which the RBA made its grant of exemption (ie, the factors referred to in paragraph 16(a) to (d) of the Access Regime). Any such increase would, therefore, be conditional on the RBA being satisfied that all relevant requirements for the exemption are met (ie, including a consideration of the public interest and the interests of current and future participants in the ATM system).

We note that the ACCC's own approach is different to the RBA's. The draft determination states:

"...the proposed authorisation does not impose any limit on the number of ATMs that may be covered by the Implementation Agreement as long as the [eligibility] criteria...are satisfied in relation to each individual ATM" (paragraph 84).

In our view, the fact that the draft determination is completely silent on the requirement for RBA approval is likely to create confusion for interested third parties (who may not be aware of the separate need for RBA approval). In order to avoid this confusion, we consider it is important that the ACCC makes it clear in its final determination that while the proposed authorisation itself does not impose any limit on the number of ATMs under the ATM Fee Proposal, any increase in the number of ATMs above 85 would be subject to the agreement of the existing parties (and any future parties that may become a participant in the ATM Fee Proposal) and obtaining the necessary RBA approval.

References to ATM fees in very remote Indigenous communities

The ACCC makes a number of references to "disproportionately high total ATM fees" and "high ATM fees" in the draft determination.¹ Paragraph 39 of the draft determination also states that:

*"The ABA submits that the ATM Proposal will alleviate the immediate problem of **disproportionately high ATM fees** [emphasis added] being incurred in very remote Indigenous communities."*

¹ See in particular paragraphs 36 and 38 of the draft determination.



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The Applicant wishes to clarify its position (as set out in its submission) regarding the impact of ATM fees on Indigenous people living in very remote communities. The concern is not that ATM fees are “disproportionately high”, but that there is a disproportionate *expenditure* on ATM fees (compared to other Australians) due to a number of factors, including the remoteness of these communities and the lack of infrastructure, lack of financial literacy, and some specific behavioural and cultural issues facing Indigenous people. As noted in our submission, the ATM Taskforce did not find evidence of higher ATM fees being charged in remote communities. Therefore, we consider that references in the draft determination to “disproportionally high fees” are incorrect and should be amended.

Increases in the maximum number of ATMs is not likely to increase the potential for aggregation of market power

The draft determination states:

“...no matter the identity or number of any Future Parties, the potential for aggregation of market power is limited. The ACCC would also not be concerned if the number of ATMs covered by the ATM Proposal were to exceed 85 ATMs...” (paragraph 70).

The Applicant agrees with the ACCC’s view that an increase in the maximum number of ATMs that are part of the ATM Fee Proposal is not likely to increase the potential for aggregation of market power of the relevant parties. However, we consider that the second statement is problematic in that, if read out of context, it may appear to suggest that *any* increase above the cap would never result in any concerns of any kind. We would suggest that the ACCC make this point clearer in its final determination ie, that it would not be concerned *about potential increases in market power* if the number of ATMs covered by the ATM Proposal were to exceed 85 ATMs.

Other comments

The draft determination states:

“Any other changes to the Implementation Agreement during the term of the proposed authorisation would not be covered by the proposed authorisation...” (paragraph 85).

The Applicant contemplates that the parties may make variations to the Implementation Agreement that facilitates corrections of an obvious or minor error, or the improved administration of the ATM Fee Proposal.² Such variations may include an amendment relating to the method of invoicing and/or payment, dispute resolution, notices and the nomination and appointment of representatives or delegates of the parties under the Implementation Agreement. The Applicant would not consider these variations to constitute a material change of circumstances such that it may, as a consequence, impact on the assessment of net public benefit which justified the authorisation (if granted). The Applicant therefore requests that the sentence above be amended in the final determination as follows (or words to the following effect): ***“Any other changes to the Implementation Agreement during the term of the proposed authorisation would not be covered by the proposed authorisation, **except for changes correcting an obvious or minor error, or changes of an administrative nature.**”***

² See RBA, ‘Payments Systems (Regulation) Act 1998’ – Exemption from Paragraphs 11 and 12 of the Access Regime for the ATM System, Exemption No 1 of 2012, 29 August 2012, condition (b)(iii) (enclosed).



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Please contact us if you would like to discuss this letter or require further information from the Applicant and the Parties.

Yours faithfully

Gilbert + Tobin

A handwritten signature in blue ink, appearing to read "P. Gilardoni".

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