



Australian
Competition &
Consumer
Commission

Determination

Applications for revocation of A91016 to A91018 and substitution for A91281 to A91283

lodged by

Australian Payments Clearing Association Limited

in respect of

the High Value Clearing System (HVCS)

Date: 2 May 2012

Authorisation no.: A91281,
A91282 and A91283

Public Register no.: C2011/994

Commissioners: Sims
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC revokes authorisations A91016 to A91018 and grants authorisations A91281 to A91283 in substitution (reauthorisations). The reauthorisations relate to the High Value Clearing System (HVCS), operated by the Australian Payments Clearing Association Limited. The ACCC grants reauthorisation for 10 years until 24 May 2022.

The HVCS provides a framework within which participating members, mainly financial institutions such as banks, can electronically exchange high value payments with each other. The HVCS regulations and procedures in some form have been previously authorised by the ACCC since 1998.

Most recently, on 25 November 2011, the Australian Payments Clearing Association Limited (APCA) lodged an application for revocation of authorisations A91016 to A91018 and substitution with authorisations A91281 to A91283.

Specifically, APCA is seeking reauthorisation only for HVCS Regulations 5.2(h) and 5.16 to 5.31 (inclusive) and clauses 5.1 and 5.2 of the HVCS Procedures. These provisions (referred to as the relevant provisions) relate to suspension and termination of HVCS membership in certain circumstances and the requirement that members join the Society for Worldwide Interbank Financial Transactions (SWIFT) and use the SWIFT Payment Delivery System (PDS) in clearing and settling payments.

Public detriment

The ACCC considers that the HVCS suspension and termination provisions, and the requirement that members join SWIFT, could potentially result in some anti-competitive detriment by preventing institutions from electronically exchanging high value payments or forcing them to develop more costly alternative bilateral arrangements for doing so. However, the ACCC does not consider that the suspension and termination provisions place unreasonable obligations on members.

Further, the ACCC considers any potential detriment is mitigated by the checks and balances in place to ensure that these requirements are not used for anti-competitive purposes. Importantly in this respect, the ACCC notes that since these requirements were instituted in 1997 they have never been invoked.

Accordingly, the ACCC considers the anti-competitive detriment generated by these provisions to be low.

Public benefit

The ACCC considers that the relevant provisions of the HVCS Regulations and Procedures are likely to continue to result in benefits to the public through:

- efficiencies in processing high value payments and ensuring the integrity of those processes;
- economies of scale; and
- a more secure system with reduced potential settlement risk by facilitating an almost instantaneous payment delivery through Exchange Settlement Accounts (ESAs).

While these benefits arise from the HVCS as a whole rather than from the relevant provisions specifically, the ACCC accepts that without these sanctions, the efficacy and integrity of the HVCS would be diminished and the confidence of members and users of the HVCS would be reduced. The provisions, therefore, result in a benefit to the public by contributing to the integrity and efficacy of the HVCS.

Balance of public benefit and detriment

Overall, the ACCC considers that in all the circumstances, the likely public benefit generated by the relevant provisions will outweigh the likely public detriment.

Interim authorisation

The ACCC granted interim authorisation on 25 January 2012.

Length of authorisation

APCA sought authorisation for five years. Having considered the stability of the arrangements previously authorised and for which reauthorisation was sought, the ACCC grants authorisation to the relevant provisions for 10 years.

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List of abbreviations

The Act	<i>Consumer and Competition Act 2010</i>
ANZ	Australia and New Zealand Banking Group Limited
APCA	Australian Payments Clearing Association Limited
BITS	Bank Interchange Transfer System
ESA	Exchange Settlement Account
HVCS	High Value Clearing System
Participating Members	Participating members are institutions that participate on a day-to-day operational basis in one or more of APCA's clearing systems. Participating members need not be owner members.
PSNA	<i>Payment Systems and Netting Act</i>
RBA	Reserve Bank of Australia
RITS	Reserve Bank Information and Transfer System (RITS)
RTGS	Real Time Gross Settlement system consists of RITS/RTGS central platform, and a number of feeder systems (such as HVCS and RITS) which provide payments to be settled across that platform.
SWIFT	Society for Worldwide Interbank Financial Transactions
SWIFT PDS	SWIFT Payment Delivery System
SWIFT PDS CUG	SWIFT PDS Closed User Group

1. The application for authorisation

- 1.1. On 25 November 2011 the Australian Payments Clearing Association Limited (APCA) lodged applications under section 91C(1) of the *Competition and Consumer Act 2010* (the Act) for the revocation of authorisations A91016 to A91018 and substitution of authorisations A91281 to A91283 for the revoked authorisations.
- 1.2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach 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.
- 1.3. 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.
- 1.4. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the revoked authorisation (reauthorisation). In order for the ACCC to reauthorise conduct, the ACCC must consider the application for reauthorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
- 1.5. Relevantly, the initial authorisations¹ were made:
 - under section 88(1) of the Act (for authorisations A90617 and A90618) 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
 - under section 88(8) of the Act (for authorisation A90619) to engage in conduct that constitutes or may constitute the practice of exclusive dealing under section 47 of the Act.

The HVCS Regulations and Procedures

- 1.6. APCA has sought reauthorisation for its Regulations and Procedures for the High Value Clearing System (HVCS), specifically:
 - Regulations 5.16 to 5.31 (inclusive) covering suspension and termination; and
 - Regulations 5.2(h) and clauses 5.1 and 5.2 of the HVCS Procedures requiring HVCS members join the Society of Worldwide Interbank Financial

¹ On 24 July 2009, amendments to the *Trade Practices Act 1974* as it was then, contained in the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, commenced operation. All authorisations in effect on that date, including the HVCS authorisations, are deemed to provide statutory protection from legal action under the cartel provisions (s.88(1A)) of the Act.

Telecommunications (SWIFT) network and use the SWIFT Payment Delivery System (PDS)

(referred to as the relevant provisions).

- 1.7. APCA has sought reauthorisation for a period of five years.

The High Value Clearing System

- 1.8. The HVCS was established by APCA in 1997 as part of the more general development of real time gross settlement systems in Australia. APCA submits that it provides a best practice, efficient and highly secure electronic payments mechanism for the Australian finance industry.
- 1.9. The mechanism for HVCS participating members exchanging payments with each other is the SWIFT PDS. The SWIFT PDS uses SWIFT's FIN-Copy product to exchange payment messages between its participating members in a closed user group.
- 1.10. When a participating member sends a payment to FIN-Copy, it is queued while a settlement request message is sent via the SWIFT network to the settlement platform of the Reserve Bank of Australia (RBA), the Reserve Bank Information and Transfer System (RITS). RITS settles the payment and forwards a settlement response to FIN-Copy. FIN-Copy matches the settlement response it receives to the queued payment. It then forwards the completed payment to the participating member which is to receive the payment.
- 1.11. All members settle directly for their own transactions. Consequently, there is only one category of member in the HVCS; a direct clearer/direct settler. Participating members in the HVCS comprise all parties which hold exchange settlement accounts with the RBA, as well as the RBA itself. Settlement of HVCS payments occurs on a real time (i.e. immediate) basis.
- 1.12. Large value payments and payments which are time critical are primarily dealt with through HVCS.
- 1.13. The HVCS regulations previously authorised by the ACCC encompass membership criteria, suspension and termination provisions, representation arrangements, fees, the management committee for the system, the advisory council, member meetings, settlement and dispute resolution. The HVCS procedures previously authorised encompass the rules for conducting exchanges, file specifications and standard forms. They are technical in their nature and are directed to ensuring that exchanges are conducted efficiently and securely. Some essential and important features are the membership criteria, fees, management committee, advisory council, members meetings, failure to settle and disputes.

HVCS – Membership criteria

- 1.14. Entitlement to membership is functionally based. Prior to amendments in 2004 members had to be “providers of payment services” which essentially meant being a deposit taking institution. Now members have to be “senders” or “issuers” (or represent and settle for such bodies) of payments cleared under the HVCS rules. This represents a more open membership in line with APCA's revised Constitution.

- 1.15. There is a single class of membership in the HVCS. HVCS members must directly send and receive payments with all other HVCS members and clear and settle directly using an Exchange Settlement Account (ESA) or by such other means as recommended by the management committee and determined by the Board.
- 1.16. APCA notes that the HVCS members must be able to comply with all applicable requirements of any relevant service provider. The only service provider of HVCS at present is SWIFT.
- 1.17. At least one meeting of all HVCS members must be held each year.

Settlement

- 1.18. HVCS members are required to provide finality of settlement through an ESA at the RBA or through another means recommended by the management committee and approved by the Board.

Failure to settle

- 1.19. “Failure to settle” rules were put in place in August 2004 following approvals in the RBA pursuant to the *Payment Systems and Netting Act 1998 (Cth)* (PSNA) and the *Cheques Act 1986 (Cth)*.

Disputes

- 1.20. A dispute between HVCS members or between the Board/management committee and a HVCS member, which has application to the HVCS regulations and procedures, can be referred to the management committee or the Board for determination and allocation of costs.

HVCS fees

- 1.21. An entrance fee of \$36,100 is levied on all new members of HVCS to recover APCA’s administrative costs.
- 1.22. APCA levies a periodic operating fee on each HVCS member to cover its costs of administering the system. A proportion of these costs is levied equally among members and the balance in proportion to the transaction volume. Each HVCS member also pays an annual fee to APCA of \$1,400 as a contribution to covering administrative costs.

Previous Authorisations

- 1.23. Authorisation was originally granted to all the HVCS regulations and procedures in April 1998 for a period of ten years (authorisations A90617 to A90619).
- 1.24. On 14 February 2007, the ACCC revoked authorisations A90617 to A90619 and substituted authorisations A91016 to A91018. These substitute authorisations were specifically for HVCS Regulations 5.2(h) and 5.16 to 5.31 (inclusive) and clauses 5.1 and 5.2 of the HVCS Procedures (2007 reauthorisations).

Interim authorisation

- 1.25. On 1 December 2011, APCA requested interim authorisation to enable it to continue operating the current HVCS pending determination of its application for reauthorisation. APCA requested interim authorisation as its existing authorisation was due to expire on 13 February 2012.
- 1.26. The ACCC wrote to interested parties seeking comments on the request for interim authorisation. No submissions were received.
- 1.27. On 25 January 2012, the ACCC granted interim authorisation. 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.

Draft determination

- 1.28. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.29. On 21 March 2012, the ACCC issued a draft determination proposing to reauthorise the relevant provisions for 10 years.
- 1.30. A conference was not requested in relation to the draft determination.

2. Background to the application²

Payment Systems

- 2.1. A payment system refers to arrangements which allow consumers, businesses and other organisations to transfer funds, usually held in an account at a financial institution, to one another. It includes the payment instruments - cash, cheques and electronic funds transfers - which consumers use to make payments and the usually unseen arrangements that ensure that funds move from accounts at one financial institution to another.
- 2.2. In Australia, banks, building societies, credit unions and some card organisations provide the means for consumers, businesses and organisations to transfer funds to one another.
- 2.3. A payment system comprises the:
- Payment instruments – which is the form that a payment message takes (e.g. cheque, debit card) and is the means by which one party transfers value to a third party.
 - Delivery mechanisms – which is the means by which payment messages are carried from one point within the payment system to another.
- 2.4. Where both parties to a payment transaction maintain accounts with the same financial institution, payment arrangements are relatively simple. The financial institution debits the paying customer and credits the receiving customer. Where parties to the payment instruction are customers of different financial institutions, a process is needed for both the institutions to reflect the change in their customers' accounts and for funds to pass between those institutions. The process is called clearing and settling.
- 2.5. Clearing is the cross-institutional exchange of individual payment messages for the purpose of obtaining settlement. Settlement is the exchange of value between institutions providing payment services for the purpose of providing finality of payment for the obligations arising out of payments clearing.
- 2.6. Settlement between financial institutions in Australia is achieved through transfers of their ESA balances held with the RBA.
- 2.7. Real Time Gross Settlement systems (RTGS) allow payments between participants to be settled across ESAs held with the RBA prior to the delivery of the payment to the recipient. The intended effect is that where a payment is settled on an RTGS basis the recipient of the payment is assured of receiving value for it even in the event of a failure of the financial institution which sent the payment.

² The information in this section is sourced primarily from APCA's submission in support of the applications for reauthorisation and information contained on APCA website www.apca.com.au.

The applicant

- 2.8. APCA is a public company limited by guarantee, incorporated on 18 February 1992. APCA's charter as set out in its Constitution is to co-ordinate, manage and ensure the implementation and operation of effective payments clearing and settlement systems, policies and procedures.
- 2.9. APCA does not process payments. Individual institutions are responsible for their own clearing operations and must conduct their operations according to regulations and procedures under each of APCA's clearing systems.
- 2.10. APCA is currently responsible for five payment clearing systems, namely the:
- Australian Paper Clearing System (APCS) – which co-ordinates and manages the implementation and operation of policies and procedures for the conduct and settlement of exchanges of paper based payment instructions which are primarily cheques, between its participating members.
 - Bulk Electronic Clearing System (BECS) – which manages the conduct of the exchange and settlement of bulk direct entry electronic low value transactions. The direct entry system allows approved organisations (for example utility companies and insurance providers) to make arrangements with their financial institution to debit and/or credit large numbers of customers' accounts on a regular basis.
 - Consumer Electronic Clearing System (CECS) – which provides minimum standards to facilitate the conduct and settlement of exchanges of ATM and EFTPOS payment instructions.
 - High Value Clearing System (HVCS) – which provides a framework within which participating members can electronically exchange high value payments with each other.
 - Australian Cash Distribution and Exchange System (ACDES) – which governs the exchange and distribution of wholesale cash.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.
- 3.2. Broadly, APCA submits that the suspension and termination provisions of the HVCS Regulations and the requirement that members of HVCS also be members of SWIFT, continue to result in public benefit through the protection of the security, efficiency and integrity of high value payment clearing and settlement processes. APCA submits that this benefit outweighs any resulting detriment to the public (including any detriment constituted by a lessening of competition).³
- 3.3. The ACCC invited submissions from any interested party potentially affected by the application, including HVCS members, regulators and other stakeholders in high volume payments clearing system.
- 3.4. No submissions were received.

³ APCA, Form FC, item 2(b).

4. ACCC evaluation

- 4.1. The ACCC's evaluation of the relevant provisions in the HVCS Regulations and Procedures is in accordance with the relevant net public benefit tests⁴ contained in the Act. While there is some variation in the language of the tests, in broad terms the ACCC will assess the likely public benefits and public detriments including those constituted by any lessening of competition that would be likely to result. If the public benefits outweigh the public detriments the ACCC may grant authorisation. For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment C.

The relevant areas of competition

- 4.2. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 4.3. APCA submits that in assessing the relevant area of competition it is important to analyse the parts of the economy in which HVCS operates. It submits that HVCS regulates the exchange and settlement of high value payment instructions between its participating members.⁵
- 4.4. APCA notes the ACCC's assessment of the relevant area of competition in the 2007 reauthorisations determination,⁶ which was limited to the exchange and settlement of high value payments. It further notes that the ACCC's consideration of the relevant area of competition did not extend to determining the degree to which other various payment instruments (such as direct entry instructions) may be substitutable.⁷
- 4.5. The HVCS has the role of coordinating, managing and ensuring the operation of policies and procedures for the conduct and settlement exchanges of high value payment between members.
- 4.6. The HVCS Regulations encompass membership criteria, suspension and termination provisions, representation arrangements, fees, the management committee for the system, the advisory council, member meetings, settlement and dispute resolution. The HVCS Procedures encompass the rules for conducting exchanges, file specifications and standard forms.
- 4.7. In circumstances such as these, it is not essential that the ACCC conclusively define the relevant markets as it is apparent that the net public benefit will arise regardless of the scope of the defined market.
- 4.8. Nevertheless, for the purpose of assessing the applications for reauthorisation, the ACCC considers the relevant area of competition affected by the proposed conduct is likely to be the exchange and settlement of high value payment systems. However, the

⁴ Sections 90(5A), 90(5B), 90(6), 90(7) and 90(8).

⁵ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 3.

⁶ ACCC, Determination in relation to Applications for Revocation and Substitution lodged by APCA in respect of the High Value Clearing System, 14 February 2007.

⁷ APCA Submission, Annexure 3.

ACCC acknowledges that electronic payment systems more generally may also be relevant depending on the functional specifications of the relevant systems.

The counterfactual

- 4.9. The ACCC applies the ‘future with-and-without test’ (or ‘counterfactual’), as established by the Tribunal, to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.⁸
- 4.10. 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.
- 4.11. APCA did not make specific submissions on the relevant counterfactual. In relation to the 2007 reauthorisations, which were for substantially the same conduct, APCA submitted that without the suspension and termination provisions or ‘last resort sanctions’ to ensure compliance, members may not always comply with the HVCS Regulations and Procedures.⁹
- 4.12. APCA further submitted in relation to the 2007 reauthorisations that without the requirement to join SWIFT PDS (or a similar mechanism), high value payments would be processed through a number of disparate systems and settlement of payment obligations arising from those systems would be on a net deferred basis which would lead to a number of inefficiencies. APCA has made similar submissions in relation to its claimed public benefits in its current application.¹⁰
- 4.13. On this basis, the ACCC considers that the most likely counterfactual in the foreseeable short to medium term if the ACCC denies authorisation is that the market will collectively set regulations and procedures as contained in the HVCS Regulations and Procedures but without the suspension and termination provisions or the requirement to join SWIFT.
- 4.14. In particular, APCA has sought reauthorisation for these provisions as it considers that they may constitute an exclusionary provision and/or may have the effect of substantially lessening competition, in breach of the competition provisions of the Act.
- 4.15. Accordingly, absent reauthorisation, APCA and its members may be at risk of breaching the Act if they continued to operate the HVCS without alteration and would therefore be unlikely to continue to give effect to those relevant provisions of the HVCS Regulations and Procedures. In this situation, it may be that sanctions for non-compliance with the ACPA Constitution and the HVCS Regulations and Procedures along with the requirement to join SWIFT would become ineffective and/or would have to be subject to bilateral agreements.

⁸ *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.

⁹ ACCC, Determination in relation to Applications for Revocation and Substitution lodged by APCA in respect of the High Value Clearing System, 14 February 2007, paragraph 5.9.

¹⁰ ACCC, Determination in relation to Applications for Revocation and Substitution lodged by APCA in respect of the High Value Clearing System, 14 February 2007, paragraph 5.10.

Public benefit

4.16. 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.¹¹

4.17. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstances where there are market failures (for example, high transaction and bargaining costs,¹² market power or information asymmetries¹³) regulation and/or restrictions on competition (such as horizontal agreements between competitors) may be required to deliver efficient outcomes.

4.18. The Act recognises that, in certain circumstances, arrangements which restrict competition can deliver public benefits where they address a potential market failure and therefore improve economic efficiency.

4.19. Broadly, APCA submits the relevant provisions will deliver public benefits, including:

- a secure and efficient processing system for transactions between financial institutions through a clearing framework of the kind constituted by APCA's Regulations and Procedures for the HVCS;
- providing access to the HVCS to members and potential members on reasonable and clearly understood terms with participation being open to different institution types, including banks, non-bank financial institutions and other bodies corporate provided these institutions meet membership requirements;
- APCA's payments clearing framework contributes towards protecting and enhancing the integrity of payments clearance and settlement, and reducing risk within the payments system. It also contributes to the efficiency with which payment instructions are cleared, and the timeliness and certainty with which value is provided to customers;
- APCA's ability to suspend or terminate a member from the HVCS is important to provide a mechanism to ensure compliance with the Regulations and Procedures and to allow participants to have confidence in the HVCS, even though suspension or termination is only contemplated in circumstances where the member's continuing membership would impair the efficiency and / or integrity of the HVCS.

Without these sanctions, the efficacy and integrity of the HVCS would be

¹¹ *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.

¹² Bargaining costs are part of the transactions costs of contracting. If transactions costs are high, markets may not work efficiently.

¹³ This refers to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would, leading to inefficient outcomes.

diminished and the confidence of members and users of the HVCS would be reduced. The provisions, therefore, result in a benefit to the public by contributing to the integrity and efficacy of the HVCS; and

- the HVCS, by utilising a centralised payment delivery mechanism like the SWIFT PDS, provides considerable efficiency gains for individual members of the HVCS and the payments industry generally by enabling all participants to send and receive payments of the same nature through the same system. The HVCS is a secure, virtually instantaneous (assuming the availability of funds in the paying member's ESA), irrevocable payment delivery system with scope to include full customer details within each payment message. In addition, because the HVS transfers value for payments in real time, it reduces the amount of settlement risk in Australia's payment system.¹⁴

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

Efficiencies arising from the relevant provisions of HVCS

- 4.21. APCA submits that the scope of the application of the suspension and termination provisions is limited to protecting the efficiency and integrity of the HVCS and by extension the integrity of high value clearing and settlement. APCA submits that clearing and settlement is central to a well functioning payments system, as is the ability to clear and settle payments through the HVCS without settlement risk. APCA therefore submits it is in the public interest to maintain the efficiency and integrity of all aspects of clearing and settlement, including the HVCS. APCA submits that these provisions also contribute towards payment instructions being cleared with timeliness and certainty which is valued by customers.¹⁵
- 4.22. APCA notes that the HVCS can perform this function effectively only if its members operate in accordance with APCA's Constitution and the HVCS Regulations and Procedures. APCA notes that the suspension and termination provisions provide 'last resort' sanctions to ensure compliance. APCA submits that without these sanctions, the efficiency and integrity of HVCS would be diminished and the confidence of members and users of the HVCS would be reduced.¹⁶
- 4.23. APCA also contends that although a participating member whose membership of the HVCS is suspended or terminated may be adversely affected, the existence of the suspension and termination provisions promotes confidence in the HVCS and therefore competition between members.¹⁷
- 4.24. APCA further submits that the provisions for suspension or termination of a member from the HVCS at APCA's instigation are reasonable and would only be relied on in

¹⁴ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

¹⁵ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

¹⁶ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

¹⁷ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

circumstances where the member's continuing membership would impair the efficiency and or integrity of the system.¹⁸

- 4.25. The ACCC has previously recognised a substantial benefit in the operation of a secure and efficient payments system.¹⁹ Consistent with its earlier analysis, the ACCC considers that the HVCS arrangements result in a public benefit through cost efficiencies as high value warrants and cheques are exchanged through a single system. The setting of operational and technical requirements which apply to all participants in a payments clearing system is likely to result in benefits in terms of the efficiency and integrity of the clearing system.
- 4.26. The ACCC accepts that a public benefit, in the form of the efficient operation and enhanced integrity of the HVCS, will continue to result from HVCS through the functioning of the suspension and termination provisions of the HVCS regulations. The exclusion of these provisions would be likely to diminish the confidence of members and users of the HVCS in the system.
- 4.27. The ACCC considers that the collective setting of suspension and termination provisions supports the efficient and reliable operation of the HVCS.

Benefits from having economies of scale

- 4.28. The ACCC recognises economies of scale can result in public benefits through improvements in the costs of production and better allocation of resources.
- 4.29. APCA submits that the HVCS, by utilising a centralised payment delivery mechanism like the SWIFT PDS, provides and has provided considerable efficiency gains for individual members of the HVCS and the payments industry generally by enabling all participants to send and receive payments of the same nature through the same system.²⁰ APCA has not quantified the efficiency gains of its member institutions.
- 4.30. APCA further submits that access to the HVCS to members and potential members on reasonable and clearly understood terms with participation being open to different institution types, including banks, non-bank financial institutions and other bodies corporate provided these institutions meet membership requirements.²¹
- 4.31. The ACCC considers that having set up the system and having completed the transition from paper based payment systems to use of the SWIFT PDS under the HVCS, the SWIFT PDS provides APCA and its member institutions with a payment delivery system that is likely to improve the cost of engaging in high volume transactions.

¹⁸ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

¹⁹ ACCC, Determination in relation to Applications for Revocation and Substitution lodged by APCA in respect of the High Value Clearing System, 14 February 2007, paragraph 5.34 having regard to its 1998 Determination

²⁰ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

²¹ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

- 4.32. The ACCC considers that the requirement for HVCS members to use the SWIFT PDS may result in economies of scale in enabling APCA to provide access to additional members to the SWIFT PDS at little cost.
- 4.33. The ACCC also recognises that the requirement to use a single system can result in related efficiency gains for participating institutions through a centrally co-ordinated approach to the clearing and settlement of high value payments through a single system.

Risk reduction

- 4.34. APCA submits that the HVCS is a secure, virtually instantaneous (assuming the availability of funds in the paying member's ESA), irrevocable payment delivery system with scope to include full customer details within each payment message. In addition, because the HVS transfers value for payments in real time, it reduces the amount of settlement risk in Australia's payment system.²²
- 4.35. The ACCC considers that the HVCS arrangements result in a public benefit through reduced settlement and systemic risk in the payments system as payments which were exchanged through BITS and through APCA's paper clearing system (payments which were previously settled on a net deferred basis) were migrated to the HVCS. Under the previous deferred settlement systems, should an institution be unable to meet its obligations other institutions due to receive funds were exposed (settlement risk) and there was significant potential for other parties to fail (systemic risk).
- 4.36. Without the ability to suspend or expel a member who breaches the rules of the HVCS, including the APCA Constitution, the Regulations and Procedures, the benefit resulting from reduced settlement and systemic risk may not be capable of being realised.

ACCC conclusion on public benefits

- 4.37. The ACCC considers that the relevant provisions of the HVCS Regulations and Procedures are likely to continue to result in benefits to the public through:
- efficiencies in processing high value payments and ensuring the integrity of those processes;
 - economies of scale; and
 - a more secure system with reduced potential settlement risk by facilitating an almost instantaneous basis through ESAs.

Public detriment

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

²² APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

...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.²³

- 4.39. Agreements between competitors which impose restrictions on their decisions as to what they deal in, or with whom they deal, can result in allocative inefficiencies. Such agreements distort market signals and can suppress competitive dynamics that would exist in a competitive market.
- 4.40. These agreements also have the potential to increase barriers to market entry or expansion, which reduces the competitive restraint applying to market participants. Both can lead to increased prices and reduced choice for consumers and significant inefficiencies.
- 4.41. APCA submits that the suspension and termination provisions, if invoked, have the effect of excluding the member institution from participating in and receiving services through the HVCS. However, it submits that, while the participant whose membership is suspended and terminated may be adversely affected, the existence of the suspension and termination provisions promotes confidence in the HVCS. APCA considers that, to the extent that there may be a detriment, it would be minimal and in any case would be outweighed by the public benefit.²⁴
- 4.42. APCA does not perceive any barriers to admission to the HVCS by prospective members by reason of the requirement that such members also be members of SWIFT, nor has SWIFT given any indication that there would be impediments to prospective HVCS members becoming members of SWIFT.²⁵
- 4.43. An assessment of the likely public detriment generated by the proposed arrangement follows.

Suspension and termination provisions

- 4.44. APCA submits that the suspension and termination provisions, if invoked, have the effect of excluding the institution concerned from participating in the system. APCA notes that this does not per se exclude the institution concerned from the process of clearing items or settlement but the institution would need bilateral arrangements with other participants outside of the HVCS in order to do so. Potentially an excluded institution might have difficulty engaging other participants. To that extent, exclusion from the system would have an adverse impact on the institution concerned.²⁶
- 4.45. The suspension and termination provisions allow for the management committee, after consultation with the RBA, to unilaterally suspend a HVCS member:
- if a member no longer satisfies the membership criteria;

²³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

²⁴ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 4.

²⁵ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 2.

²⁶ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 4.

- during a period when a member has operational difficulties preventing it from discharging its obligation under the rules (i.e. when a member is suffering a ‘disabling event’);
- if a member becomes insolvent or fails to settle its clearing obligations; and,
- if a member breaches relevant provisions of the Constitution, the Regulations or the Procedures and does not rectify the breach or provide a satisfactory explanation within the prescribed time period.²⁷

The management committee may impose conditions on the membership of a member instead of suspending the member.

- 4.46. The termination provisions provide that termination of membership can follow suspension provided that any breach of the rules has not been remedied, the Board has consulted with the member’s prudential supervisor, if such a supervisor exists, and the member has been provided with the opportunity to make submissions to the Board regarding termination. Otherwise termination occurs only as a result of a member resigning, becoming insolvent, or ceasing to exist.
- 4.47. APCA submits that these provisions are ‘last resort’ sanctions and have not been used or specifically contemplated since APCA’s establishment.²⁸
- 4.48. The ACCC agrees that exclusion from the HVCS may have an adverse impact on the institution concerned as they may not be able to electronically exchange high value payments, or at the very least, would need to enter bilateral arrangements outside of the HVCS which would be likely to be more costly and difficult to manage. This may result in some anti-competitive detriment. However, the ACCC considers that the suspension and termination provisions do not place unreasonable requirements on members wishing to avoid suspension and termination.
- 4.49. There are also a number of important safeguards against anti-competitive misuse of the suspension and termination provisions including:
- the possibility of APCA Board review of management committee decisions
 - the requirement that the RBA be consulted in respect of any decision to suspend a member
 - the requirement, where relevant, that if a member is the subject of Prudential Supervision, the prudential supervisor be consulted.
- 4.50. The ACCC also notes APCA’s submission that the suspension and termination provisions are ‘last resort’ provisions and have not been invoked or contemplated since inception.

²⁷ HVCS Regulations 5.16(a) to (f).

²⁸ APCA submission in support of its application for revocation and substitution, 25 November 2011 (APCA Submission), Annexure 4.

- 4.51. Given these safeguards the ACCC considers the anti-competitive detriment generated by the suspension and termination provisions to be low.

SWIFT membership

- 4.52. Essentially, participation in the HVCS requires the member to join SWIFT. In effect, admission as a SWIFT user is controlled by APCA. APCA notes that this requirement may potentially have the effect of excluding institutions from the market if they are unable to join SWIFT.
- 4.53. The ACCC agrees that the requirement for members to join SWIFT may have the effect of preventing institutions electronically exchanging high value payments, or at least making it more difficult and costly for them to do so, if they were unable to join SWIFT, which may result in some anti-competitive detriment.
- 4.54. However, as in respect of the HVCS suspension and termination provisions, the ACCC does not consider that the requirement to join SWIFT places unreasonable obligations on members. In this respect, APCA has advised that since the inception of the HVCS in 1997 each prospective member that has applied to join SWIFT as a member of SWIFT in connection with the HVCS has been admitted.
- 4.55. Accordingly, the ACCC considers the anti-competitive detriment generated by the requirement that HVCS members join SWIFT to be low.

ACCC conclusion on public detriments

- 4.56. The ACCC considers that the HVCS suspension and termination provisions, and the requirement that members join SWIFT, could potentially result in some anticompetitive detriment by preventing institutions from electronically exchanging high value payments or forcing them to develop more costly alternative bilateral arrangements for doing so. However, the ACCC does not consider that these requirements place unreasonable obligations on members.
- 4.57. Further, the ACCC considers any such potential detriment is mitigated by the checks and balances in place to ensure that these requirements are not used for anticompetitive purposes. Importantly in this respect, the ACCC notes that since these requirements were instituted in 1997 they have not been invoked to prevent any member or prospective member from participating in the HVCS.
- 4.58. Accordingly, the ACCC considers the anti-competitive detriment generated by these provisions to be low.

Balance of public benefit and detriment

- 4.59. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the relevant provisions of the HVCS Regulations and Procedures are likely to result in a public benefit that will outweigh any likely public detriment.

- 4.60. In the context of applying the net public benefit test in section 90(8)²⁹ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.³⁰
- 4.61. The ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment constituted by any lessening of competition. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7) 90(5A) and 90(5B) are met.
- 4.62. In addition, the ACCC is satisfied that the test in section 90(8) is met as the reauthorisations sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

Length of authorisation

- 4.63. The Act allows the ACCC to grant authorisation for a limited period of time.³¹ 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.
- 4.64. In this instance, APCA seeks authorisation for five years.
- 4.65. The ACCC notes that the HVCS arrangements have not fundamentally changed since it sought reauthorisation in 2006, nor has APCA proposed in these applications to fundamentally change the relevant provisions of the HVCS.
- 4.66. Given the stable history and likely stable medium-term future of this matter, the ACCC considers that it is appropriate to grant reauthorisation of the conduct for longer than the period sought by APCA.
- 4.67. As such, the ACCC grants authorisation to the relevant provisions of the HVCS for 10 years until 24 May 2022.

Future Parties

- 4.68. The ACCC extends the reauthorisations to future members of the HVCS. The ACCC notes that it may at any time review the reauthorisations and potentially revoke them should the addition of a future party alter the balance of likely public benefits and detriments sufficiently to constitute a material change of circumstances.³²

²⁹ 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.

³⁰ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

³¹ Section 91(1).

³² Section 91(1).

5. Determination

The application

- 5.1. On 25 November 2011 APCA lodged applications for authorisation A91281, A91282 and A91283 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Applications A91281 to A91283 were made using Form FC under section 91C(1) of the Act in respect of authorisations under sections 88(1), 88(1A) and 88(8) of the Act.
- 5.3. APCA has applied for revocation of authorisations A91016 to A91018 and substitution of authorisations A91281 to A91283 for its Regulations and Procedures for the High Value Clearing System (HVCS), specifically:
- Regulations 5.16 to 5.31 (inclusive) covering suspension and termination; and
 - Regulations 5.2(h) and clauses 5.1 and 5.2 of the HVCS Procedures requiring HVCS members join the Society of Worldwide Interbank Financial Telecommunications (SWIFT) network and use the SWIFT Payment Delivery System (PDS)
- (referred to as the relevant provisions).
- 5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 5.5. For the reasons outlined in Chapter 4 of this determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought is 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 in accordance with tests found in sections 90(6), 90(7), 90(5A) and 90(5B) of the Act.
- 5.6. In addition, the ACCC is satisfied that the test in section 90(8) is met as the authorisations sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 5.7. The ACCC therefore **revokes** authorisations A91016, A91017 and A91018 and **grants** authorisations A91281, A91282 and A91283 in substitution in relation to the relevant provisions of the HVCS Regulations and Procedures.
- 5.8. Pursuant to clause 88(10) of the Act, the ACCC extends the authorisations to future members of the HVCS.
- 5.9. Further, the authorisations are in respect of the relevant provisions of the HVCS Regulations and Procedures for the HVCS as they currently stand. Any changes to the relevant provisions of the HVCS Regulations and Provisions during the term of the authorisations would not be covered by the authorisations.

- 5.10. The attachments to this determination are part of the determination.

Interim authorisation

- 5.11. On 1 December 2011, APCA requested interim authorisation to enable it to continue operating the current HVCS. APCA requested interim authorisation as its existing authorisation expired on 13 February 2012. On 25 January 2012, the ACCC granted interim authorisation.
- 5.12. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

- 5.13. This determination is made on 2 May 2012. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 24 May 2012.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (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 A91281, A91282 and A91283

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

DATE	ACTION
25 November 2011	Application for authorisation lodged with the ACCC.
1 December 2011	Request for interim authorisation.
16 December 2011	Closing date for submissions from interested parties in relation to the request for interim authorisation.
25 January 2012	The ACCC granted interim authorisation to enable it to continue operating the current HVCS.
23 December 2011	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
21 March 2012	Draft determination issued.
5 April 2012	Closing date for submissions from interested parties in relation to the draft determination.
2 May 2012	Determination issued.

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

Competition and Consumer Act 2010

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.³³

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.³⁴

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.³⁵

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 future³⁶

³³ *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.

³⁴ *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.

³⁵ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.³⁷

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation³⁸. 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.³⁹ 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.⁴⁰

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.⁴¹ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁴²

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁴³ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁴⁴

³⁶ Section 88(10).

³⁷ Section 88(6).

³⁸ Section 90(10A)

³⁹ Subsection 91A(1)

⁴⁰ Subsection 87ZD(1).

⁴¹ Subsection 91B(1)

⁴² Subsection 91B(3)

⁴³ Subsection 91C(1)

⁴⁴ Subsection 91C(3)