

Appendices

Appendix A Composition of the Enquiry and Terms of Reference	512
Appendix B November 2006 hearing schedule	515
Appendix C April-July 2007 hearing schedule.....	517
Appendix D Technical Team engagements.....	520
Appendix E Updated statistics in Task Group (Falkena III) report	523
Appendix F “Complex monopoly”, “collective dominance” and “tacit collusion”	534
Appendix G “Concurrent jurisdiction” as a defence – the effect of the ATM PCH agreement and rules.....	546
Appendix H FICA and Direct Charging.....	548
Appendix I The payment card reforms in Australia.....	551
Appendix J Steps taken by Grindrod Bank to become a member of PASA	562

Appendix A Composition of the Enquiry and Terms of Reference

4 August 2006

Enquiry into Competition in Banking

Composition of the Enquiry and Terms of Reference

Introduction

1. The purpose of the Competition Act, set out in section 2, is to promote and maintain competition in the Republic in order —
 - (a) to promote the efficiency, adaptability and development of the economy;
 - (b) to provide consumers with competitive prices and product choices;
 - (c) to promote employment and advance the social and economic welfare of South Africans;
 - (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
 - (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
 - (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.
2. Section 21 of the Competition Act gives the Competition Commission the responsibility and the function, among others, to implement measures to increase market transparency and to enquire into and report to the Minister of Trade and Industry on any matter concerning the purposes of the Act.
3. In 2004 the Task Group for the National Treasury & the South African Reserve Bank recommended that the Competition Commission should investigate the possibility of a complex monopoly in the governance and operation of the national payments system. The Commission is also aware of widespread public concern regarding the level of charges made by banks and other providers of payment services to consumers.
4. Following on the findings in the research report *The National Payment System and Competition in the Banking Sector*, the Commission announced earlier this year that it would hold an enquiry in terms of Section 21 into particular aspects of competition in banking.

Terms of Reference

5. The subject matter of the enquiry will be:
 - (a) the level and structure of charges made by banks, as well as by other providers of payment services, including:
 - (i) the relation between the costs of providing retail banking and/or

- payment services and the charges for such services;
 - (ii) the process by which charges are set; and
 - (iii) the level and scope of existing and potential competition in this regard;
- (b) the feasibility of improving access by non-banks and would-be banks to the national payment system infrastructure, so that they can compete more effectively in providing payment services to consumers;
- (c) any other aspect relating to the payment system or the above-mentioned charges which could be regarded as anti-competitive.
6. The objects of this enquiry are, in connection with the subject matter stated above:
- (a) to increase transparency and competition in the relevant markets;
 - (b) to ascertain whether there are grounds upon which the Competition Commissioner should initiate, and the Commission consequently use its powers to investigate, any specific complaints of contraventions of the Competition Act;
 - (c) to engage with the banks, other providers of payment services, the appropriate regulatory authorities and other stakeholders in order to ascertain the extent to which, consistent with the soundness of the banking and payments system, there could realistically be improvements in the conditions affecting competition in the relevant markets, including increased access to the national payments infrastructure;
 - (d) to enable the Commission to report to the Minister and make recommendations on any matter needing legislative or regulatory attention.

Panel

7. The enquiry is to be conducted for the Commission by a panel, appointed by the Competition Commissioner, consisting of Mr Thabani Jali (Chairperson), Mr Oupa Bodibe, Mrs Hixonia Nyasulu and Mr Rob Petersen SC.
8. The panel will be assisted by a full-time administrative and technical staff, and by such expert consultants as may be necessary.
9. The panel will shortly issue guidelines and initial questionnaires for the assistance of those wishing or willing to submit relevant information to the enquiry.

Submissions

10. The enquiry depends entirely on the voluntary submission of information by all interested parties, and their willingness to have the significance and reliability of that information tested in co-operation with the panel and its supporting staff.
11. The enquiry will be on-the-record and its record will be made available to the public, subject only to restrictions on disclosure provided for in the Competition Act. Information submitted to the enquiry will be regarded as information submitted to the Commission for purposes of the Act.
12. It is envisaged that, in the course of the enquiry, public hearings will be held to

supplement and examine submissions made in writing or in interviews.

Report

13. The report of the Chairperson (endorsed by other panel members or together with any differing or supplementary reports by other panel members, as the case may be) will be provided to the Commissioner within a year.
14. The panel may make interim recommendations to the Commissioner, including, if necessary, recommendations concerning any alteration in these terms of reference.

Enquiry secretariat and contact details

The enquiry manager is Mr Charles Frank.

The personal assistant to Mr Frank is Ms Kamogelo Seleka.

Communications with the enquiry should be directed to Mr Frank, who, in consultation with the Chairperson, will also be responsible for liaison with the media.

Contact details:

Tel: 012-394 3250 Fax: 012-394 3493

e-mail: bankingenquiry@compcom.co.za

A banking enquiry website to facilitate public access to information has been set up, and is in the process of development:

www.compcom.co.za/banking

Appendix B November 2006 hearing schedule

1st November 2006: Red Room, Ground Floor, Commission Offices, Pretoria

No	Presentation by
1	Welcome and Introduction by Chairperson, Mr T Jali
2	Report by the Enquiry on Submissions received by the 27 th October 2006 and the Hearings Schedule
3	Presentation by Dr P Hawkins on the background and landscape of the banking sector in South Africa
4	Dr Hawkins continues with her presentation
5	Ombudsman for Banking Services, Adv N Melville

2nd November 2006: Red Room, Ground Floor, Commission Offices, Pretoria

No	Presentation by
1	Consumer Representative : Financial Sector Campaign Coalition, Mr J Mahlangu – COSATU
2	Nedbank
3	Mercantile Bank
4	Benchmark Foundation, Mr A Ramadie

3rd November 2006: Red Room, Ground Floor, Commission Offices, Pretoria

No	Presentation by
1	National Credit Regulator, Mr G Davel
2	Micro Finance South Africa (MFSA), Mr H Ferreira, and Mr M Seymour
3	Financial Sector Campaign Coalition - Consumer Representatives, Ms C Caine, Mr N Kholisile (SACP) and Mr E. Paulus

9th November 2006: Red Room, Ground Floor, Commission Offices, Pretoria

No	Presentation by
1	First National Bank
2	Commercial Independent Bureaux Association (CIBA), Mr J de Wet and Mr W Pienaar
3	Bank Pensioners Society, Mr P Mc Queen and Mr W Hartung
4	Wizzit Payments (Pty) Ltd
5	Consumer , Mr N Iliev

13th November 2006: The Centre for the Book, 62 Queen Victoria Street, Cape Town

No	Presentation by
1	Pick 'n Pay
2	South African Retailers' Payment Issues Forum (SARPIF)
3	Shoprite Checkers
4	Consumer Groups : FSCC, Mr E Paulus; The Black Sash, Mrs M Naidoo, Ms N Mbambo and Ms M Madyosi; Savings and Credit Co-operatives League, Mr V Botha (Sibanya SACCO)
5	Standard Bank

29th November 2006: The Royal Hotel, 267 Smith Street, Durban

No	Presentation by
1	Ithala Limited
2	Consumer Groups: Ethekwini Civic Forum, Mr S Naidoo; Ms S Raj, Mr B Meintjies, Ms N Srikissoo; 1860 Pioneers Foundation, Mr R Choonilall
3	Intecon, Mr R de Swardt

30th November 2006: Red Room, Ground Floor, Commission Offices, Pretoria

No	Presentation by
1	ABSA Bank
2	NET 1
3	Payment Association of South Africa (PASA)
4	The Banking Association of South Africa

Appendix C April-July 2007 hearing schedule

3rd April 2007: ATMs and direct charging

No	Presentation by
1	Overview of ATMs by Dr P Hawkins - Enquiry Technical Team
2	Dr Hawkins continued
3	First National Bank

4th April 2007: ATMs and direct charging

No	Presentation by
1	Capitec Bank
2	Nedbank
3	Nedbank

11th April 2007: ATMs and direct charging

No	Presentation by
1	ATM Solutions
2	Standard Bank
3	ABSA Bank

17th April 2007: Payment cards and interchange fees

No	Presentation by
1	Presentation by Ms J Louw : Enquiry Technical Team
2	ABSA Bank
3	ABSA Bank

18th April 2007: Payment cards and interchange fees

No	Presentation by
1	MasterCard
2	MasterCard
3	MasterCard

19th April 2007: Payment cards and interchange fees

No	Presentation by
1	Nedbank
2	Standard Bank
3	First National Bank

25th May 2007: The National Payment System- Access and regulation

No	Presentation by
1	Presentation by Dr P Hawkins – Enquiry Technical Team
2	ABSA Bank
3	ABSA Bank

28th May 2007: The National Payment System- Access and regulation

No	Presentation by
1	First National Bank
2	Bankserv
3	Mercantile Bank

29th May 2007: The National Payment System- Access and regulation

No	Presentation by
1	PASA
2	Standard Bank
3	Nedbank

5th June 2007: Payment cards and interchange fees

No	Presentation by
1	Standard Bank
2	Standard Bank

**18th June 2007: Market power & level and structure of charges
Payment cards & interchange fees**

No	Presentation by
1	Presentation by Mr K Weeks – Enquiry Technical Team
2	Standard Bank
3	Visa International

**19 June 2007: Payment cards & interchange fees
The National Payment System- Access and regulation**

No	Presentation by
1	MasterCard
2	MasterCard
3	PASA

9th July 2007: Market power and the level & structure of charges

No	Presentation by
1	Nedbank
2	Nedbank
3	First National Bank
4	First National Bank

17th July 2007: Market power and the level & structure of charges

No	Presentation by
1	ABSA Bank
2	ABSA Bank
3	KLA

Appendix D Technical Team engagements

Date	Description	Venue
2006		
13-Jun-06 (Prior to constitution of Enquiry)	Briefing to Economic Policy Advisors on the progression from the 2004 Competition in Banking report to the 2006 FEASibility report prepared for the Competition Commission on the National Payment System	The Office of the Presidency
26-Jul-06 (Prior to constitution of Enquiry)	Interview at the request of EuroCommerce and SARPIF	Competition Commission, Pretoria
23-Aug-06	Absa	Absa, Johannesburg CBD
24-Aug-06	Nedbank	Nedbank, Sandton
24-Aug-06	FirstRand Bank	FRB, Sandton
24-Aug-06	Standard Bank	Standard Bank, Johannesburg CBD
29-Aug-06	Nedbank	Nedbank, Sandton
29-Aug-06	FRB	FRB, Johannesburg CBD Bank City
31-Aug-06	Absa	Absa, Johannesburg CBD
31-Aug-06	Standard Bank	Standard Bank, Johannesburg CBD
11-Sep-06	Master Card	Competition Commission, Pretoria
13-Sep-06	Banking Association	Parktown
12-Sep-06	Banking Ombudsman	JCI Building , Johannesburg
18-Sep-06	Banking Association	Competition Commission, Pretoria
20-Sep-06	Ithala	Ithala, Durban
20-Sep-06	Bank of Beroda	Bank of Beroda, Durban
03-Oct-06	Capitec	Cape Town
03-Oct-06	SARPIF, Pick n Pay, Shoprite Checkers and Clicks	Cape Town
04-Oct-06	Standard Chartered Bank	Sandton
04-Oct-06	HSBC	Sandton
10-Oct-06	Micro Finance South Africa	Competition Commission, Pretoria
12-Oct-06	Mercantile Bank	142 West Street, Sandown
12-Oct-06	Banking Association	Parktown
13-Oct-06	Financial Sector Campaign Coalition (FSCC) and Benchmark Foundation	Competition Commission, Pretoria
13-Oct-06	Commercial Independent Bureaux Association	Competition Commission, Pretoria
16-Oct-06	Registrar of Banks, SARB	Pretoria
17-Oct-06	National Treasury	Pretoria
17-Oct-06	VISA	Competition Commission, Pretoria
18-Oct-06	First Rand Bank	Competition Commission, Pretoria
19-Oct-06	Micro Finance South Africa	Competition Commission, Pretoria
23-Oct-06	MasterCard	Teleconference
25-Oct-06	National Treasury	Pretoria

Date	Description	Venue
26-Oct-06	Nedlac	Rosebank
30-Oct-06	FSCC, Cosatu, SACP	Parktown
20-Nov-06	Standard Bank	SBSA, Johannesburg
01-Dec-06	ATM Solutions	Competition Commission, Pretoria
01-Dec-06	CIBA	Competition Commission, Pretoria
2007		
23-Jan-07	Bankserv	Johannesburg
24-Jan-07	MasterCard	Competition Commission, Pretoria
25-Jan-07	National Payments System Department, SARB	Pretoria
29-Jan-07	National Treasury	Pretoria
07-Feb-07	FRB	Competition Commission, Pretoria
13-Feb-07	Nedbank	Competition Commission, Pretoria
13-Feb-07	American Express	Competition Commission, Pretoria
13-Feb-07	ABSA	Competition Commission, Pretoria
14-Feb-07	FRB	Sandton
15-Feb-07	MasterCard and .econ	WWB Offices, Illovo
26-Feb-07	Standard Chartered Bank	Sandton
26-Feb-07	FRB	Bank City, Sandton
06-Mar-07	First Data	Parktown
06-Mar-07	MasterCard and Edgar, Dunn & Co	WWB Offices, Illovo
14-Mar-07	Visa	Competition Commission, Pretoria
28-Mar-07	Pretorium Trust	Pretoria
29-Mar-07	Net-1	Rosebank
06-Apr-07	Standard Bank	Standard Bank, Johannesburg, CBD
10-Apr-07	ATM Solutions	Sandton
10-Apr-07	FSCC	Parktown
20-Apr-07	ABSA	Johannesburg
07-May-07	Nedbank	Competition Commission, Pretoria
07-May-07	NPSD	Pretoria
07-May-07	PASA	Competition Commission, Pretoria
08-May-07	FRB	Sandton
10-May-07	Banking Association	Competition Commission, Pretoria
17-May-07	UK Office of Fair Trading - Telecon	CT, Jhb and Pta
11-Jun-07	APACS and LINK (UK)	London, UK
15-Jun-07	KLA	KLA, Rosebank
27-Jun-07	FRB	Bank City, Johannesburg
28-Jun-07	Nedbank	Nedbank, Sandton
02-Jul-07	ABSA	Main Street Johannesburg
05-Jul-07	KLA	KLA, Rosebank
03-Jul-07	Smart ATM	Parktown
10-Jul-07	National Treasury	Pretoria
23-Jul-07	Nedbank	Competition Commission, Pretoria
24-Jul-07	Direct Transact	Competition Commission, Pretoria

Date	Description	Venue
01-Aug-07	KLA	Rosebank
02-Aug-07	National Credit Regulator	Competition Commission, Pretoria
14-Aug-07	Standard Bank	Competition Commission, Pretoria
15-Aug-07	Exploratory process First meeting	Competition Commission, Pretoria
17-Aug-07	PASA	Parktown
17-Aug-07	Eskom	Megawatt Park, Sandton
24-Aug-07	Prof Harvey Wainer	Parktown
28-Aug-07	PASA	Competition Commission, Pretoria
03-Sep-07	Exploratory process - continued	Competition Commission, Pretoria
04-Sep-07	Exploratory process - continued	Competition Commission, Pretoria
06-Sep-07	National Treasury	National Treasury Office, Pretoria
19-Sep-07	Department of Trade and Industry	Pretoria
20-Sep-07	ATM Solutions	Parktown
29-Oct-07	American Express	Competition Commission, Pretoria
30-Oct-07	MasterCard	Deloitte Offices, Pretoria
06-Nov-07	MFSA	Parktown
08-Nov-07	Net 1	Parktown
28-Nov-07	ATM Solutions	Johannesburg
06-Dec-07	ATM Solutions	Teleconference
10-Dec-07	ATM Solutions	Teleconference
12-Dec-07	Bankserv	Teleconference
2008		
17-Jan-08	PASA	Parktown
17-Jan-08	ATM Solutions	Johannesburg
12-Feb-08	National Credit Regulator	Midrand
14-Feb-08	Reserve Bank of Australia	Teleconference
20-Feb-08	PASA	Johannesburg
27-Feb-08	MFSA	Teleconference

Appendix E Updated statistics in Task Group (Falkena III) report

The appendix updates some of the data in the 2004 Task Group (Falkena III) Report on *Competition in South African banking* – commissioned by the National Treasury and the SA Reserve Bank – with a view to assessing possible continuations of, or changes in, the trends highlighted in the 2004 report.

This update completes the picture up to the end of 2006 (the latest year for which we have comparable data), whereas the Task Group report reflected data up to 2002.

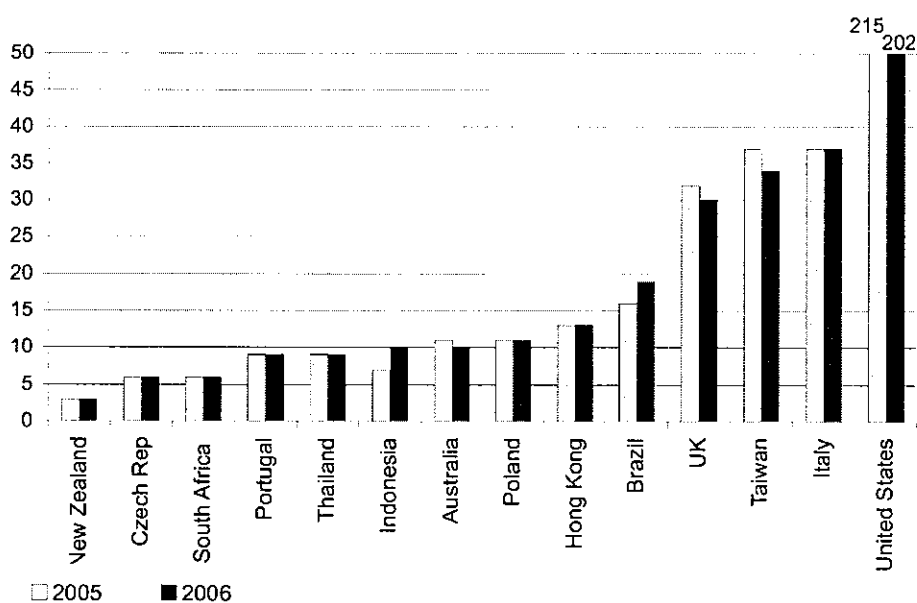
The update shows that:

- The number of South African banks in the World's Top 1000 banks increased from 5 in 2002 to 6 in 2004 – with the entry of African Bank (a micro-credit bank) as one of the world's most profitable banks.
- The top five South African banks have become more efficient, with the cost-to-income ratio falling from 67% in 2002 to 58.9% in 2006. This ratio improved significantly in 2006 from its level of 66.4% in 2005.
- Non-performing loans decreased from 3.2% in 2002 to 1.44% in 2006, which has been more in line with developed than developing countries.
- Loans and advances as a percentage of GDP topped 80% in 2006, from around 69% in 2002.
- The before-tax return-on-assets of the sector increased substantially from 0.8% in 2002 to 1.8% in 2006. After-tax returns increased from 0.43% to 1.4% over this period.
- The return on equity of the top five big banks increased from 22.46% in 2002 to 38.16% in 2006.
- The market share of the top five banks¹ (measured in terms of assets) increased from 80% in 2002 to 90% in 2006.
- The interest rate margin as a per cent of interest income decreased in 2002 and 2003, after which it increased. By 2006, it was at its highest level since 1994.
- The Herfindahl-Hirschman Index (HHI), which provides a measure of concentration, increased steadily between 2002 and 2005, indicating that the sector became more concentrated.

In summary, the trends identified in the 2004 report appear to have continued and indeed have strengthened in most cases. This is depicted in the figures and tables below.

¹ Standard Bank, Absa, FNB, Nedbank and Investec.

Figure 1 Number of banks in the global top 1000

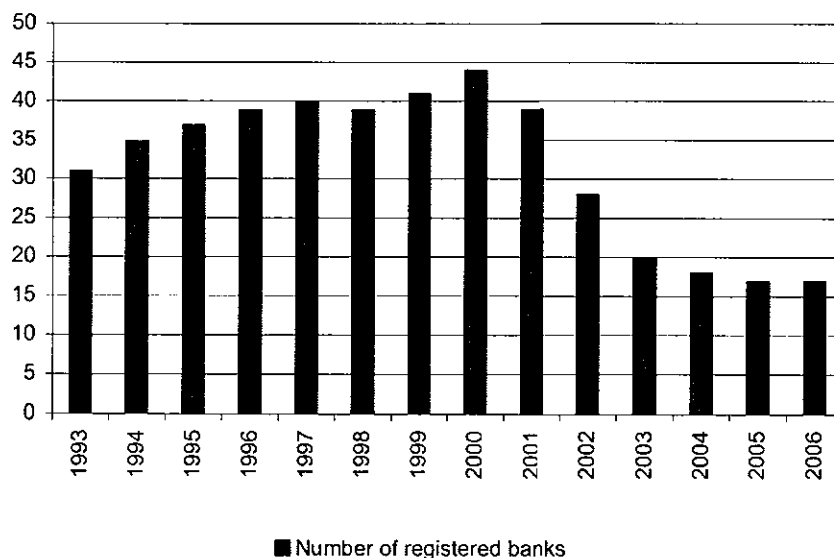


Source: *The Banker*²

The number of South African banks in the Top 1000 increased from 5 in 2002 (Standard Bank, Absa, FNB, Nedbank, Investec) to 6 in 2006 (African Bank was included for the first time in 2003/04). The combined tier 1 capital for these six South African banks increased from \$8,406 million in 2003 (equivalent to the 59th ranked bank in the world) to \$20,176 million in 2006 (equivalent to the 34th ranked bank in the world).

² The data used from *The Banker* throughout this document are calculated using the top 5 banks in each country.

Figure 2 Number of registered banks in South Africa



Source: Bank Supervision Department

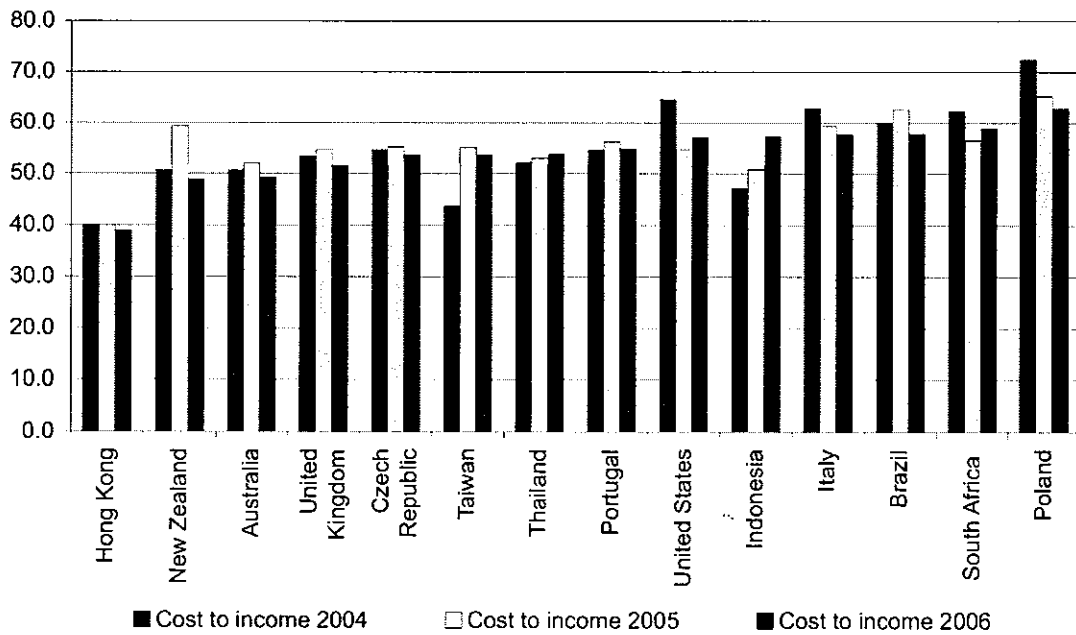
Table 1 Number of registered banks and the value of assets

	Number of registered banks	Value of banking sector assets R billions (month end balance for year)	Value of loans and advances R billions (month end balance for year)	Nominal GDP (SARB code 6006) R billions	Growth in bank assets	Growth in Nominal GDP	Value of Assets as a % of GDP	Loans and advances as a % of GDP
2000	44	R 819.24	R 616.48	R 922.15	12.53%	13.33%	88.84%	66.85%
2001	39	R 1,049.99	R 773.52	R 1,020.01	28.17%	10.61%	102.94%	75.83%
2002	28	R 1,099.98	R 863.55	R 1,168.78	4.76%	14.59%	94.11%	73.88%
2003	20	R 1,379.82	R 940.51	R 1,257.03	25.44%	7.55%	109.77%	74.82%
2004	18	R 1,498.11	R 1,077.11	R 1,386.66	8.57%	10.31%	108.04%	77.68%
2005	17	R 1,677.54	R 1,303.43	R 1,523.26	11.98%	9.85%	110.13%	85.57%
2006	17	R 2,075.15	R 1,659.66	R 1,741.06	23.70%	14.30%	119.19%	95.32%

Source: Bank Supervision Department

Number of registered banks decreased to 17 in 2005 (Peoples Bank Limited was deregistered) and did not change in 2006. On average, the loans and advances of the banking sector make up around 80% of its assets in 2006. The growth in bank assets outperformed growth in nominal GDP, with the growth rate in assets increasing substantially from 11.98% in 2005 to 23.7% in 2006.

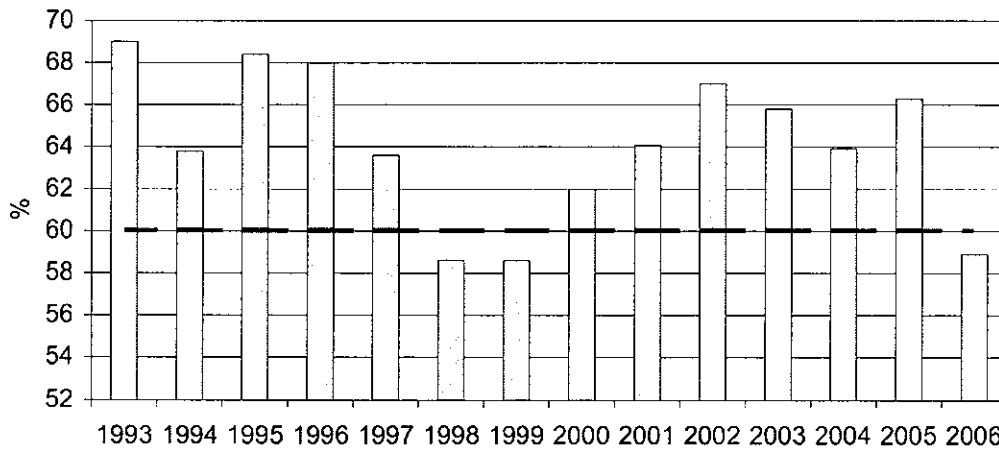
Figure 3 Cost-to-income ratios



Source: The Banker

The cost-to-income ratio increased from 60.3 in 2002 to 65.6 in 2003 after which it decreased again to 59 in 2006, improving the overall efficiency of South African banks over this period. However, most countries' banks improved their efficiency between 2004 and 2006, leaving South African banks outperforming only Polish banks on this measure.

Figure 4 Cost-to-income ratios of the South African banking sector

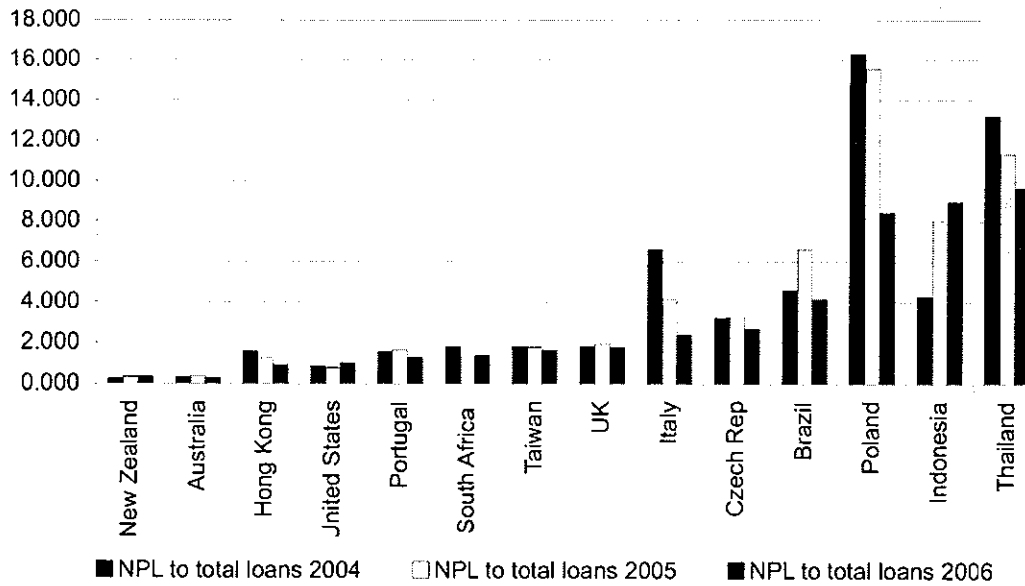


Source: Bank Supervision Department

Cost-to-income ratios for the South African banking sector as a whole decreased after 2002, except in 2005. However, this ratio improved significantly in 2006 to 58.9%. This was mostly attributable to the increase in total income whilst operating expenses remained fairly stable.³ Sixty per cent is the international benchmark of efficiency – with higher values considered to be inefficient.

³ Banks Supervision Department, Annual Report, 2006, p 49.

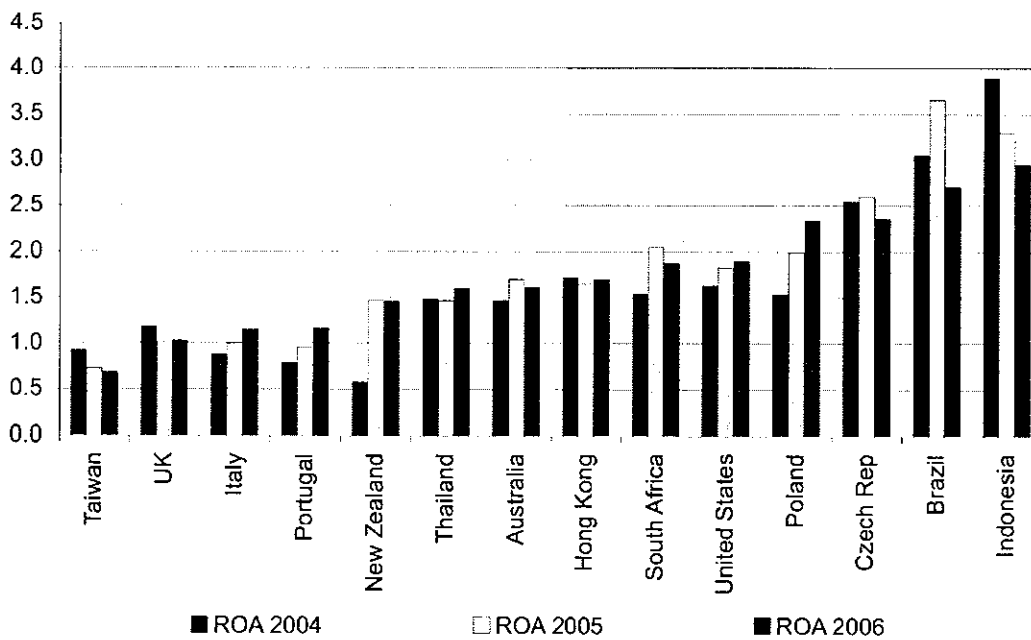
Figure 5 Non-performing loans as a percentage of total loans



Source: *The Banker*

Efficiency in the banking sector was also improved through a decrease in the non-performing loans as a percentage of total loans. This indicator decreased from 3.2% in 2002 to 1.44% in 2006. South African banks' performance is still in line with that of more mature banking industries.

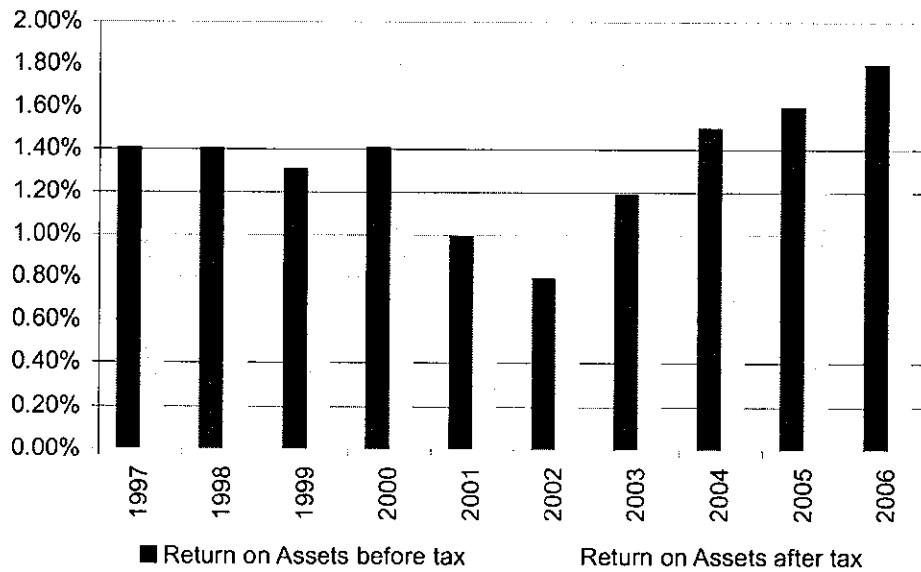
Figure 6 Return on assets



Source: The Banker

The return on assets for South Africa's top banks increased from 1.1% in 2003 to 1.9% in 2006. This is well above developed countries such as the UK, New Zealand and Australia.

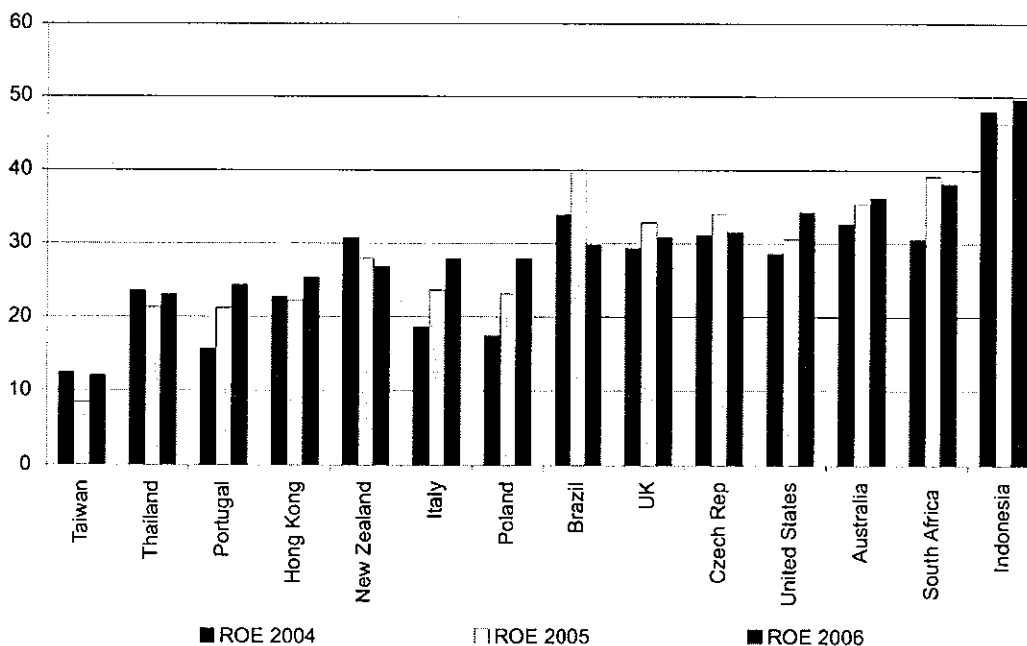
Figure 7 Return on assets of the South African banking sector



Source: Bank Supervision Department

The return on assets before tax for the South African banking sector as a whole increased substantially from 0.8% in 2002, to 1.8% in 2006. After tax return increased from 0.43% in 2002 to 1.4% in 2006.

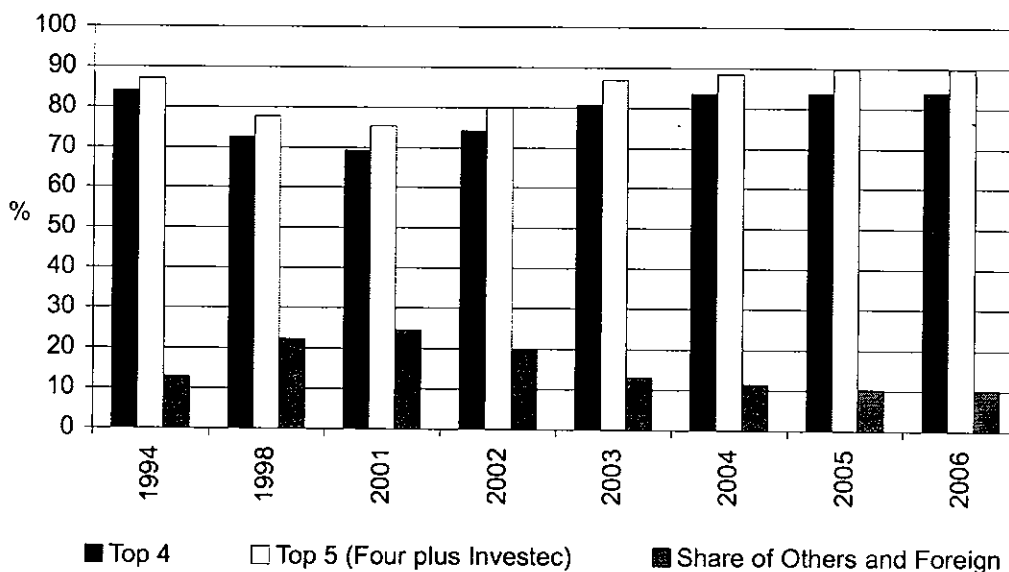
Figure 8 Return on equity



Source: The Banker

Return on equity for the South African banks increased from 22.46% in 2002 to 38.16% in 2006. Only one country (Indonesia) in this selection of comparators outperformed South Africa.

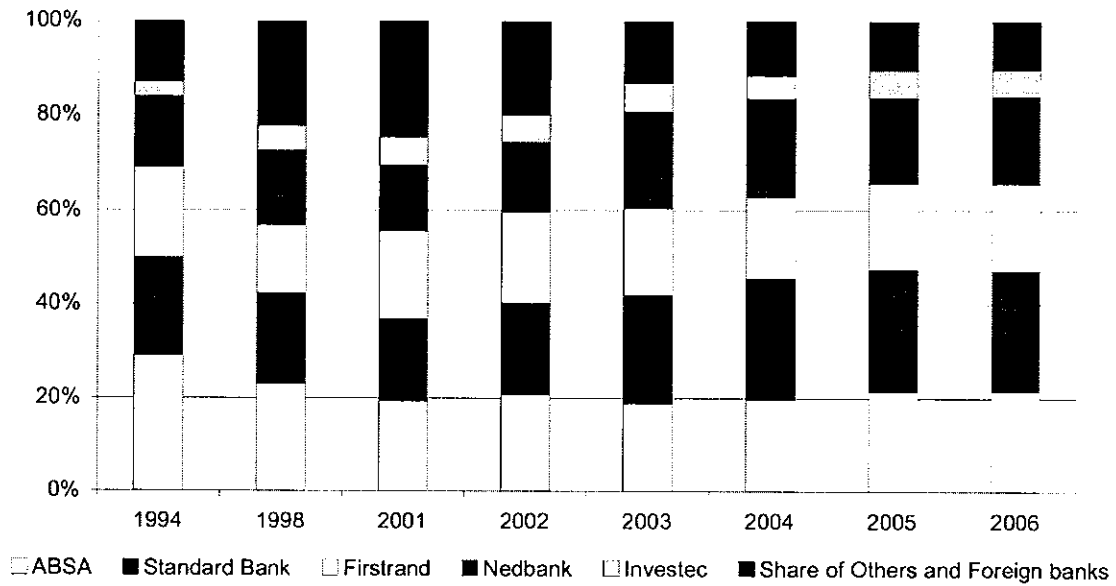
Figure 9 Market share of assets for South African banking industry



Source: Bank Supervision Department

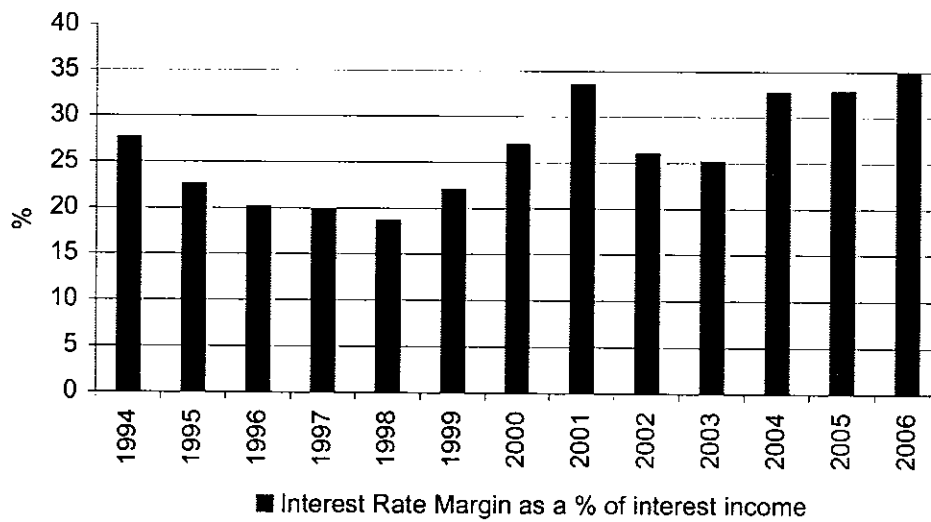
The market share of assets of the big four (and the big five when we include Investec), increased steadily from 2002 to 2005, reversing the trend we saw from 1994 to 2002. The market share of the top 4 (top 5) banks increased from 74.28% (80.09%) in 2002 to 84.06% (89.74%) in 2006.

Figure 10 Market share of assets of top South African banks



Source: Bank Supervision Department

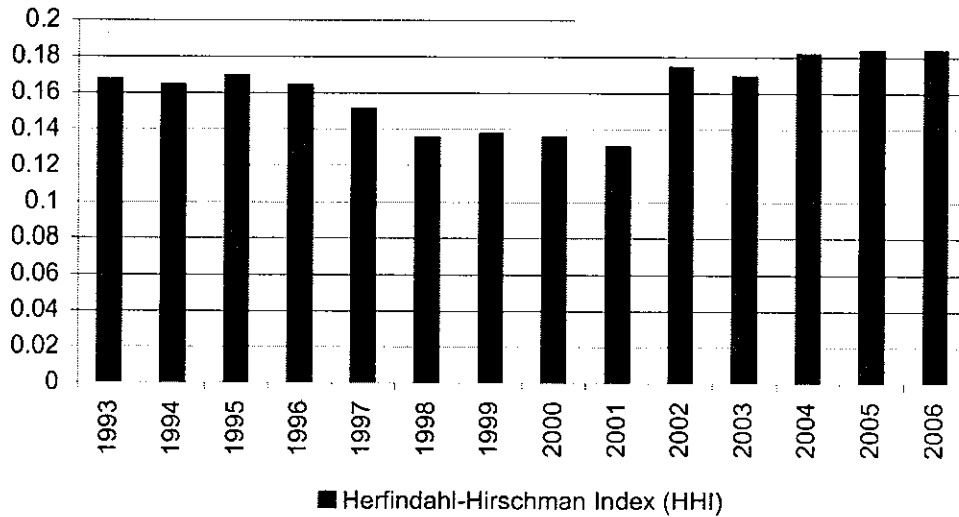
Figure 11 Interest rate margins as a percentage of interest income



Source: Bank Supervision Department

The interest margin as a percentage of interest income decreased in 2002 and 2003, whereafter it increased each year, to 35% cent in 2006; its highest level since 1994. The SARB repo rate increased eleven times between 2004 and 2006.

Figure 12 HHI Index



Source: Bank Supervision Department

From 2002 to 2005 the Herfindahl-Hirschman Index (HHI) index deteriorated further from 0.175 to 0.184. This index stayed unchanged at 0.184 in 2006.

Appendix F “Complex monopoly”, “collective dominance” and “tacit collusion”

The purpose of this Appendix is to address briefly three matters of a legal nature which arise in connection with an analysis of market power and with the behaviour of firms in an oligopolistic market. The are: (a) “complex monopoly”; (b) “collective dominance”; and (c) “tacit collusion”.

(a) “Complex monopoly”

In 2004 the Task Group (Falkena III) report recommended that the Competition Commission should investigate the possibility of a “complex monopoly” in the governance and operation of the national payment system. It also advised:

The concept of a *complex monopoly* should become part of the vocabulary of the Competition Commission. A *complex monopoly* occurs when firms, whether voluntarily or not and with or without agreement between them, so conduct their business that it prevents, restricts or distorts competition. This would give the Competition Commission scope to investigate anti-competitive behaviour even where it does not involve proven collusion.⁴

The concept of a “complex monopoly” does not have any foundation in South African competition law. The concept was – but is no longer – used in UK competition legislation. The UK Fair Trading Act of 1973 (since repealed) provided for “monopoly situations” to be referred by the Office of Fair Trading (OFT) to the Competition Commission in that country for investigation. Following investigation, various remedies (including, if appropriate, a structural remedy) were available to the Secretary of State.⁵

Monopoly situations could be of a “structural” or “behavioural” type. An example of a *structural* monopoly was a “scale monopoly” – where at least one quarter of the goods or services of a particular description supplied in the UK were supplied by or to one and the same person. A “complex monopoly”, on the other hand, was an example of a *behavioural* monopoly – where at least one quarter of the relevant goods or services were supplied by two or more persons who, whether by agreement or otherwise, so conducted their respective affairs as to prevent, restrict or distort competition.⁶

“Complex monopoly” was thus a term of UK legislative art. It enabled parallel conduct by firms, not prohibited by the Competition Act, to be scrutinised by the Competition Commission under the Fair Trading Act. Firms could be considered part of a complex monopoly in terms of the Fair Trading Act without necessarily being found to be collectively dominant in terms of the Competition Act or Article 82 of the European Treaty (see below).

⁴ Exhibit H, p iv, p 155.

⁵ Richard Whish, *Competition Law*, 4th edition, p 363.

⁶ *Id.*, pp 364-5; *Encyclopedia of Competition Law* (Sweet & Maxwell, Library CD edition), 1–052, 1–351.

By the time the Task Group (Falkena III) report appeared, the Fair Trading Act had in fact been repealed and replaced by the UK Enterprise Act 2002. "Complex monopoly" disappeared with the Fair Trading Act. Under the new provisions of the Enterprise Act, the OFT has power to make a reference to the Competition Commission, for purposes of a market investigation, where it has reasonable grounds for suspecting that any "feature or combination of features" of a market prevent, restrict or distort competition. A wide array of powers is available to the Commission following its investigation, including where appropriate the power to impose a structural remedy.⁷

It does not appear that any advantage was lost – but, on the contrary, it seems that greater flexibility was gained – by giving up the concept of "complex monopoly" in the UK law. We see no reason to import the concept into our legislative framework.

The present enquiry has been conducted on the basis of the general powers of the Competition Commission contemplated by section 21 of the Competition Act 89 of 1998. The Department of Trade and Industry is reported to be considering possible amendments to the Competition Act, including expanded powers on the part of the Competition Commission to conduct market investigations. Our views, based on the experience of the present Enquiry, have not been sought, and it is not part of our mandate under our terms of reference to consider and make recommendations in that regard.

(b) "Collective dominance"

Article 82 (formerly Article 86) of the European Treaty prohibits any abuse "by one or more undertakings of a dominant position". This wording raises the question of "collective dominance" by firms, although that expression is not actually used. In our Competition Act, by contrast, it is simply prohibited for "a dominant firm" to abuse its dominance in any of the ways specified.⁸ No concept of "collective dominance" appears to be invoked in our competition law; each firm's position must be evaluated on its own terms. At first sight this may seem a flaw, but on closer study, in our opinion, it turns out not to be the case.

In examining whether a particular firm has "market power" – the ultimate test for "dominance" in terms of section 7 of our Competition Act – one must consider whether the firm has the power *inter alia* "to behave to an appreciable extent independently of its ... customers".⁹ In an oligopolistic market, a firm's independence of its customers – its ability, for example, to raise prices significantly and sustain them without significantly losing sales – will depend on the reliance it can place on the behaviour that will be forthcoming from its rivals in response

⁷ Richard Whish, *Competition Law*, 5th edition, p 416.

⁸ See Chapter 2, Part B, of the Competition Act (sections 6-9).

⁹ See the definition of "market power" in section 1.

to its pricing decisions. Where the individual firm can rely on the response of the other firms not being a vigorously competitive one, that is a factor which is properly to be taken into account when assessing whether the firm concerned has appreciable market power.

In an oligopolistic market, whether or not each firm actually derives market power from the behaviour of the other firms – whether and to what extent it is able to rely on a non-competitive response from them – is always a question of fact. The likely behaviour of the other major firms in such a market is thus a factor contributing to the market power which each of them may have individually. The market power of each thus depends upon the others – their market power would be *interdependent* in that sense – but each would have it, or not, as the case may be. A special concept of “collective dominance” seems unnecessary to the analysis, and it is unclear what (if anything) it adds in the jurisdictions where it is employed.¹⁰

Section 79(1) of the Canadian Competition Act applies a test of dominance by requiring a finding that *one or more persons* “substantially or completely control ... a class or species of business.” The Competition Bureau (counterpart of our Competition Commission) “considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.”¹¹

The Canadian Competition Act provides for a prohibition order to be made by the Competition Tribunal in cases where persons who are collectively dominant engage in a practice of anti-competitive acts likely to prevent or lessen competition substantially in a market.¹²

The wording of the Act clearly contemplates cases where a group of unaffiliated firms may possess market power even if no single member of the group is dominant by itself. In joint dominance cases, there are three sources of competition that can defeat the profitability of a price increase. These are competition from existing rivals outside the allegedly jointly dominant group; competition from potential rivals (i.e. entrants) outside the allegedly jointly dominant group; and competition from within the allegedly jointly dominant group. Given this, an additional element of proof is necessary to establish joint control, or market power, by more than one firm, as compared to the case of a single dominant firm.

The jurisprudence provides only limited insights into the additional evidence necessary to establish control by a group of firms. To date, there have been only two cases involving joint dominance under the Act.¹³ In both instances, the fact that joint dominance existed was taken

¹⁰ See Sutherland and Kemp, *Competition Law of South Africa*, 7–14; cf Irvine, “Does the South African Competition Act Accommodate the Concept of Collective Dominance?”, 2004 *SA Mercantile Law Journal*, 448.

¹¹ Strikeman Elliott LLP, *Competition Act and Commentary* (2007), p 380, citing *Canada (Director of Investigation and Research) v. NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 (Comp. Trib.), *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* [1992], 40 C.P.R. (3d) 289 (Comp. Trib.) and *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* [1995], 64 C.P.R. (3d) 216 (Comp. Trib.). The objective in analysing factors relevant to the presence or absence of dominance “is to determine the extent to which a firm or group of firms is constrained from pricing above competitive levels because of the presence of effective competition or the likelihood of competitive entry.” (*Op. cit.*, p 366.)

¹² Section 79(1).

¹³ The author cites *Canada (Director of Investigation and Research) v. Bank of Montreal* [1996], 68 C.P.R. (3d) 527 (Comp. Trib.) and *Canada (Director of Investigation and Research) v. AGT Director Ltd. et al.* [1994], 32 C.C.T.D. No.

as a given and was supported by an explicit agreement.

A group of firms that collectively possesses market power may be able to coordinate its actions in a manner that allows the market price to be profitably increased above the non-coordinated price levels without the firms entering into an explicit agreement. Firms within an oligopoly normally base their decisions on how their rivals have behaved in the past. In addition, firms recognize that their current decisions may affect their rivals' future reactions. The fact that firms recognize these interactions over a longer time period results in competitive response strategies becoming more complex. It is possible for firms to act in a "consciously parallel" fashion, thereby achieving higher profits than would be the case in a competitive environment.

The jurisprudence in respect of the criminal conspiracy provisions is clear in not condemning "conscious parallelism".¹⁴ The Bureau has adopted a similar position with respect to the abuse provisions, recognizing that something more than mere conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities,

The ability of a group of firms to coordinate actions without entering into an explicit agreement can be addressed under the abuse provisions. To infer control by a group of firms, the Bureau will consider the following:

- (a) whether the group of firms collectively accounts for a large share of the relevant market;
- (b) any evidence that the alleged coordinated behaviour is intended to increase price or is for the purpose of engaging in some form of anti-competitive act;
- (c) any evidence of barriers to entry into the group, or barriers to entrants into the relevant market;
- (d) any evidence based on the particular facts of the case that members of the group have acted to inhibit intra-group rivalry; and
- (e) any evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.¹⁵

It does not seem to us that any of these factors would be left out of account in an investigation under our Competition Act as to whether a particular firm – or each firm on a list of firms – in an oligopolistic market actually possesses market power as defined. In our view, all relevant structural and behavioural facts and circumstances must be taken into account in evaluating whether a firm has such power.

Where oligopolists are able to act in parallel so as to avoid competitive outcomes in the market concerned – although they may remain within the law in doing so – the evidence of this ability will serve as evidence of the degree of independence of its customers that is enjoyed by each of the firms concerned. It is therefore difficult to see that the test for "collective dominance" outlined above would really enlarge the number of firms in respect of which an individual finding of dominance could be made. The concept of "collective dominance" does not seem to add anything definite or material to the exercise.

24 Trib. Dec. No CT9402/19.

¹⁴ The author cites *R. v. Canadian General Electric* [1974] 17 C.C.C. (2d) 433 and *R. v. Armco* [1974] 21 C.C.C. (2d) 129.

¹⁵ Strikeman Elliott LLP, *Competition Act and Commentary* (2007), pages 383-384.

European jurisprudence points towards the same conclusion. Richard Whish writes:¹⁶

One of the most complex and controversial issues in Community competition law has been the application – or non-application – of Article 82 EC and the ECMR [merger regulations] to so-called “collective dominance”. Discussion of this question in relation to Article 82 can be traced back at least to the early 1970s; an enormous body of literature has developed. The law and decisional practice on collective dominance, under both legal instruments, developed considerably in 1998 to 2002; of particular importance are the ECJ’s [European Court of Justice] judgments in *France v Commission* (the so-called *Kali und Salz* case)¹⁷ and *Compagnie Maritime Belge Transports SA v Commission*¹⁸ and the CFI’s [Court of First Instance] judgments in *Gencor v Commission*¹⁹ and *Airtours v Commission*.²⁰

In the 1970s, in *Hoffmann-La Roche v Commission*,²¹ the ECJ had held:

A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, whilst in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally.

However, subsequent European cases have amply confirmed that undertakings (firms) can derive their dominance or market power – their ability to behave to an appreciable extent independently of (say) their customers – from the adoption of common conduct in a market, even where they are not united by structural links or by actual agreements or understandings.²² Thus in *Compagnie Maritime Belge Transports SA v Commission* the ECJ held:

... the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.²³

In *Gencor v Commission* the CFI had to deal with a proposed merger of platinum and rhodium producers which, in the view of the Commission, was incompatible with the common market in that it would create or strengthen a dominant position that would hinder competition. The Court held that the merger regulations, although referring only to “a dominant position”, should be interpreted so as to apply also where the creation or strengthening of a collective dominant position would result, “that is to say a dominant position held by the parties to the concentration together with one or more undertakings not

¹⁶ *Op cit.*, 5th edition, pp 518-519.

¹⁷ Cases C-68/94 and 30/95 [1998] ECR I-1375, [1998] 4 CMLR 829.

¹⁸ Cases C-395/96 and 396/96 P [2000] ECR I-1365, [2000] 4 CMLR 1076.

¹⁹ Case T-102/96 [1999] ECR II-753, [1999] 4 CMLR 971.

²⁰ Case T-342/99 [2002] ECR II-2585, [2002] 5 CMLR 317.

²¹ Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211.

²² See the analysis of the cases by Whish, *op cit.*, 5th edition, pp 520-526.

²³ Para 45.

party thereto.”²⁴ In assessing whether there is a collective dominant position, the Commission is obliged to establish, using a prospective analysis of the relevant market, whether the merger in question would lead to a situation in which effective competition would be significantly impeded by the undertakings involved in the merger and one or more other undertakings which together, in particular because of the factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers.

The Court held that

there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.²⁵

Thus market conditions may be such that

each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to concerted practice.²⁶

In our view, this approach can serve just as well as a basis for the evaluation of the degree of market power enjoyed by each firm in such a market. No need would seem to arise for a special concept of “collective dominance” in order to arrive at findings of dominance based on market power in terms of Chapter 2, Part B, of our Competition Act.

Section 12A of our Competition Act, dealing with consideration of mergers, similarly requires consideration to be given *inter alia* to the probability that firms in the market after the merger “will behave competitively or co-operatively”. By watching, anticipating and shadowing each other, oligopolists may behave “co-operatively” without crossing the line to prohibited agreements and concerted practices which are the hallmarks of actual collusion and cartels.

(c) “Tacit collusion”

While parallel behaviour by oligopolists may provide evidence of market power on their part – and thus place them under the legal duty not to abuse their dominance – it does not follow that their behaviour would necessarily contravene the provisions of the Competition Act

²⁴ Para 125.

²⁵ Para 276.

²⁶ Para 277. Cf also *Airtours v Commission*, *supra*.

prohibiting competitors from engaging in restrictive horizontal practices.²⁷

John Campbell notes that

Section 4(1) of the [South African Competition] Act prohibits an "agreement between, or a concerted practice by, firms, or a decision by an association of firms" between parties in a horizontal relationship that brings about or constitutes a restrictive horizontal practice. The prohibition in article 81(1) of the Treaty of Rome governing European community competition law is in virtually identical terms, as is s 2(1) of the English Competition Act of 1998. The formulation in the United States is directed at "(e)very contract, combination in the form of a trust or otherwise, or conspiracy" that is anti-competitive, and in Australia anti-competitive conduct in the form of a contract, an arrangement or an understanding is the target. The different formulations are directed at precisely the same conduct.²⁸

Section 1 of our Competition Act provides that an "agreement", when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable; and "concerted practice" means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement as defined.

These definitions are as clear and precise in their distinctions as language will allow. The difficulty lies in determining when parallel conduct by firms is the result of contact (whether direct or indirect) between them which has replaced their independent action. This is a problem of evidence – and of the proper characterisation of any conduct proved to have taken place. It is not made easier by the widespread use of loose terminology that obliterates the distinctions which the legislature has taken care to make. "Tacit collusion" is an example of terminology that has come to be used in a way that confuses rather than clarifies the issues.

Writers on competition economics are in the habit of using the expression "tacit collusion" to refer without distinction to conduct which crosses and conduct which does not cross the line of legal prohibition referred to above. This is because it may make no difference to the *economic* result whether the conduct crosses that line or not.²⁹

²⁷ See section 4 of the Competition Act. Parties are in a "horizontal" relationship if they are actual or potential competitors.

²⁸ Brassey (ed), *Competition Law*, Chapter 5, "Restrictive Horizontal Practices", pp 129-130.

²⁹ Whish writes (*op cit.*, 5th edition, p 508): "There is little doubt that there are markets in which it is possible for economic operators to coordinate their behaviour without entering into an agreement or being party to a concerted practice in the sense of Article 81(1) or the Chapter I prohibition; such behaviour will be to their own self-advantage and to the disadvantage of customers and ultimately consumers. This situation is often described by economists as "tacit collusion": enjoying the benefits of a particular market structure without actually entering into an agreement to do so. If the firms in question had achieved the same end through explicit collusion, economists would have the same objection – that prices would be higher than they would be without coordination. Economists have no particular interest in whether collusion is 'tacit' or 'explicit': it is the effects of the collusion that matter. Lawyers however are considerably less comfortable with the expression tacit collusion. 'Collusion' is the evil at which Article 81 and the Chapter I prohibition are directed ('any agreement ... or concerted practice ... which has as its object or effect the prevention, restriction or distortion of competition'); in the same way section 1 of the US Sherman Act forbids 'every contract ... in restraint of trade', where the notion of collusiveness is inherent in the idea of contract." In fact, section 1 of the Sherman Act also prohibits every "combination" and "conspiracy" in restraint of trade – words which likewise import the notion of collusion.

Michael D. Whinston writes:³⁰

For example, imagine a scenario in which two firms sit down at a table with each declaring in sequence, "I am mortally opposed to price fixing, but tomorrow I will set my price equal to 100." Should such unilateral speech be treated differently than if they instead each said "I'll set my price equal to 100 if you do"? And does that differ from the situation in which firm 1 says "Let's set our prices equal to 100 tomorrow," and firm 2 replies "I agree"?

The problem with this set of examples is that it characterises the first scenario somewhat naively as involving only "unilateral" conduct. In fact the act of the two firms in deliberately conveying their pricing intentions to each other in this way, while avoiding actual or apparent agreement, could well be characterised as procuring co-ordinated conduct through direct or indirect contact that replaces their independent action. That would fall within the definition of "concerted practice" in our Competition Act.

Campbell illustrates aptly the legal boundary-line between unilateral and collusive conduct:³¹

Assume that apple farmers in the Western Cape number about fifty. Some are bigger than others and one or two are very big indeed. One of these raises the price of apples and soon the others follow. Is this a concerted practice, *prima facie* evidence of one or just the normal workings of the market. Clearly costs rise, and sooner or later producers will have to adjust their prices to preserve their viability; someone has to be the first to do so and the news will always leak out, generally sooner rather than later.

The competition laws are not designed to hit parallel conduct of this description. More is required: there must be evidence of contact (direct or indirect) and of some form of co-operation. Direct contact is relatively straightforward. If two or more farmers, following the above example, set a price for apples by means of direct notification between them of the prices they intend to charge and with the understanding that neither will undercut the other, a court will have little difficulty in finding a concerted practice. But such communications can also take place without any such notification through indirect contact, for example where the farmers hold press conferences in order to state their views on issues such as output, prices, demand, costs, industry margins of profit, etc. The more farmers that speak publicly in this manner, the greater the level of communication, and in this way behaviour can be both instigated and modified.

In *ICI v The Commission*³² the European Court was fully aware of these possibilities:

'Although every producer is to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to co-operate with his competitors, in any way whatsoever, in order to determine a co-ordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.'

...

Something more than mere indirect contact must ... be required if innocent price leadership is not to be caught in the net; it is undesirable (and probably impossible) to provide a *numerus clausus* of the additional ingredients, but they must be such as to remove the risk of, for example, increasing prices or, at a more general level, involve some organization or plan that replaces genuinely independent responses to changing market conditions.

³⁰ Lectures on Antitrust Economics, The MIT Press, Cambridge, Massachusetts, 2008, "Price Fixing", p 20.

³¹ *Op cit.*, pp 133-134; p 137.

³² [1976] 1 CMLR 295 at paras 172-6.

In this regard the Australian approach is instructive. There, and again because of the difficulties in proving an actual consensus, the courts hold that this may be inferred from surrounding circumstances such as actual parallel conduct, joint action between the parties on some or other issue, similar pricing structures, opportunities for the parties to reach consensus or any other evidence tending to show that two or more parties are acting in concert. In particular, if there is coincidence in time, character or the direction of the actions taken by parties, an inference of concert may be drawn.

Trebilcock, Winter, Collins and Iacobucci write:³³

A cartel can be associated with an explicit agreement [whether overt or covert], in which a written or oral contract is established among cartel members, or an implicit [tacit] agreement, which simply establishes a common understanding among suppliers as to the benefits of cooperative pricing or output decisions and the consequences of deviations from cooperation.

...

The concept of tacit agreement or tacit collusion covers a wide range of behaviour. At one end of this range, the distinction between a tacit agreement and an explicit agreement can be as tenuous as the difference between a wink and a handshake. At the other end of the range of tacit collusion, the border between agreement and rational, independent behaviour by competing suppliers becomes murky. In many oligopolies, each firm in the market sets a price close to the monopoly level purely as a matter of individual interest, with no communication whatsoever with other firms. The recognition by each firm of responses by other firms to potential price cuts leads to non-aggressive pricing. ... (Do firms in any oligopoly *not* consider their rivals' reactions to potential price changes?)

Despite these clear passages, the authors go on to suggest that tacit collusion between competitors is "outside the scope of the law".³⁴ That cannot be correct. "Tacit" merely means unspoken, silent or wordless. The fact that *collusion* is tacit rather than express in no way suffices to remove it from the prohibition.

This can readily be illustrated by examining the use of the word "tacit" in conjunction with "agreement". Is an unspoken, silent or wordless *agreement* between firms in a horizontal relationship *outside the scope* of the prohibitions against price- and other forms of market fixing? It would be startling if the law could be so easily circumvented.

In the law of contract, the concept of a "tacit term" is well recognised. It is used to denote an unexpressed term read into an otherwise express agreement on the basis of the unarticulated but nevertheless inferred or imputed intention of the parties to treat the term as binding between them. The inference or imputation is usually derived from the express terms of the agreement and the surrounding circumstances.³⁵ And just as there can be a tacit term

³³ *The Law and Economics of Canadian Competition Policy* (2002), pp 87-89.

³⁴ *Id.*, p 89.

³⁵ See *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H-532G per Corbett AJA; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at 367H. See also Du Bois (ed), *Wille's Principles of South African Law* (9th edition), p 799. Van der Merwe, Van Huyssteen, Reinecke and Lubbe, *Contract: General Principles* (2nd edition), p 257 note: "There is no difference between express and tacit terms as far as their nature and effect are concerned. However, there is a difference in the way in which these terms are to be proved: an express term is proved by direct evidence and a tacit term by circumstantial evidence." Cf *Williston on Contracts* (4th ed) vol 1, §3:2: "A binding mutual understanding or so called 'meeting of the minds' (consensus ad idem) sufficient to establish a contract requires no express language regarding every detail of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances." Also *Corbin on Contracts*, vol 3, §561, §562.

in an otherwise express agreement, so there can be an *agreement* — that is to say, a legally binding contract — that is itself *entirely tacit*.

Discussing contractual “offer and acceptance”, Christie says:³⁶

The communication of an offer normally takes place by means of words, spoken or written, but this is not always so. The offeror may choose to make his intention clear by conduct unaccompanied by words, in which case his offer would properly be described as tacit or partly tacit. Such an offer could also be described as an offer by conduct, or by actions, or an implied offer. Countless offers of this sort are made daily in shops, buses and railway stations.

...

Just as an offer can be made tacitly, so can an acceptance. The Appellate Division on a number of occasions directed its mind to the question of acceptance by conduct – when the offeree, instead of signifying his acceptance of the offer by written or spoken words, does so by his conduct. In *Timoney and King v King* 1920 AD 133 141 Innes CJ said: “An acceptance may be inferred from conduct.”

In *Reid Bros (SA) Ltd v Fisher Bearings Co Ltd* 1943 AD 232 241 Watermeyer ACJ said:

“Now a binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn.” ...

It being possible to make an offer tacitly, and to accept tacitly, it follows that a tacit offer may be tacitly accepted, giving rise to what is usually described as a tacit contract but may also be described as an implied contract or a contract by conduct (it being remembered that conduct may be negative as well as positive and there may be acceptance by silence).

The law in the United States and other (English) common law jurisdictions is, in this regard, essentially the same as ours.³⁷

36

The Law of Contract in South Africa (5th ed), pp 81-82. Cf also De Wet en Van Wyk, *Die Suid-Afrikaanse Kontrakereg en Handelsreg* (5th ed), pages 31-32: “Onderhandelinge tussen mense geskied gewoonlik deur die middel van die gesproke of geskrewe woord, maar spraak of skrif is vir die maak van ’n afspraak nie noodsaaklik nie. Mens kan jou bedoeling aan ’n ander ook by wyse van gebare meedeel, bv. deur te knik met die kop of jou hand op te steek. Veral instemming kan geredelik deur niegeartikuleerde gedrag betuig word, maar dit is nie ondenkbaar dat mens ook ’n aanbod op die wyse kan maak nie, bv. deur op ’n veiling jou hand op te steek, waarmee jy te kenne gee dat jy die voorafgaande bieder met ’n rand of tien rand, na gelang van die geval, oorbie. Waar dié verklaring in woorde gemaak word, praat ons van ’n uitdruklike wilsverklaring, en waar dit by wyse van nie-geartikuleerde gedrag geskied, van ’n stilswyende wilsverklaring. In kwaliteit verskil die stilswyende wilsverklaring nie van die uitdruklike nie, en die stilswyende wilsverklaring het juridies dieselfde waarde as die uitdruklike, behalwe waar spesifiek voorgeskryf word dat die verklaring ’n bepaalde vorm moet aanneem om regsgeldig te wees. Of bepaalde gedrag ’n (stilswyende) wilsverklaring is, is natuurlik ’n feitlike vraag, wat onder omstandighede moeilik kan wees om te beslis, maar dit beteken nie dat die stilswyende wilsverklaring daarom regtens onbestaanbaar is nie.”

37

See e.g.:

Chitty on Contracts (29th ed), vol 1, par 1-066: “Contracts may be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination.”

Story on Contracts (1884), vol 1, §11: “Both species of contract [i.e., express and implied] are, however, equally founded upon the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, which belongs to the law of evidence.”

Farnsworth on Contracts (3rd ed), vol 1, §3.10: “No formalities are generally required for an offer. It may be made by spoken or written words or by other conduct. Sometimes a contract that results from words is described as ‘express,’ while one that results from conduct is described as ‘implied in fact,’ but the distinction as such has no legal consequences. Conduct that would lead a reasonable person in the other party’s position to infer a promise in return for performance may amount to an offer [and thus be capable of contractual acceptance]. One who holds out goods may be taken to be offering them for sale. One who begins to perform services for another in apparent expectation of

Just as an agreement may be tacit rather than express, so obviously may a concerted practice – co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action – be brought about by means that are tacit rather than express. These are clearly both forms of *tacit collusion*, and it seems inappropriate to use the latter expression to refer to unilateral parallel conduct which involves no replacement of independent action through contact (direct or indirect) between the firms concerned.

In *Theatre Enterprises, Inc. v Paramount Film Distributing Corp.*,³⁸ the United States Supreme Court concluded:

The crucial question is whether respondents' conduct towards petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. ... But this court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.³⁹

American antitrust author and Federal Appeals judge Richard A. Posner has argued for a new legal boundary-line which would prohibit unilateral parallel conduct by a firm in cases where it is *intentionally* rather than *unconsciously* parallel in character.⁴⁰

Tacit collusion is not an unconscious state. If the firm's sales manager recommends that the firm offer a wider variety of products in order to exploit consumer demand more effectively, and the financial vice president recommends against that course on the ground that it will make it more difficult for the industry to maintain "healthy" prices, the president of the firm can be in no doubt of the significance of his action if he adopts the financial vice president's recommendation. Or if a salesman has correctly calculated that a proposed sale would yield a handsome profit, and his boss turns it down on the ground that it might provoke a competitor to retaliate because the sale price would be considered price cutting, again there would be no ambiguity that the firm's action was designed to preserve a collusive arrangement. Or take the common case in which each seller in a market has "sleepers," that is, customers who do not shop around for the best deal but are content with their current supplier. If each seller declines to try to wake the other sellers' sleepers, on the ground that if he does so the others will try to wake his sleepers and everyone will then be worse off, the seller will know that he is acting to preserve a collusive arrangement.

In our view this argument begs the question which it is supposed to address. None of the conduct described is necessarily indicative of the existence of "a collusive arrangement" or, conversely, necessarily inconsistent with purely unilateral calculations by the firm concerned

payment may be taken to be offering to furnish them for reasonable compensation. The question of fact in each case is whether a reasonable person in the position of the other party would understand that payment was expected for the services and that they were not gratuitous." In §3.13 the author adds that an acceptance likewise may be inferred from conduct other than words. "The language or other conduct that will suffice as acceptance [of the offer] ... depends on the circumstances, and cases tend to turn on their special facts." See also §3.14.

38 346 U.S. 537, 74 S.Ct. 257 (1954).

39 346 U.S. 537, 540-541.

40 *Antitrust Law* (2nd edition), "Price Fixing and the Oligopoly Problem", p 97.

about the likely conduct of its competitors in the event that it were to adopt a particular output or pricing choice.

The difference between express collusion and tacit collusion is that, in the latter instance, the firms *conspire* – i.e., *arrange to act together – without needing to use words*. Collusion, whether express or tacit, requires more than that the firms separately arrive at the same conscious calculation of self-interest, taking each other's likely behaviour into account. It is essential not to confuse the common rational behaviour of oligopolists – who necessarily, and indeed by definition, take into account the likely behaviour of their competitors – with “tacit collusion” between the firms concerned.

The approach advocated by Posner would demand of firms behaviour that is not rational market conduct in their circumstances. In the examples which he puts forward, he would in each case require of the firm a *short-term* profit maximising decision which, while understandably recommended by the sales staff, is understood by the senior executives to be *likely to reduce profit in the longer term*. Expecting oligopolists not to behave as oligopolists – i.e., not to take each other's likely conduct into account – is to repudiate the rationality of individual conduct which is the central claim of the market system as a means of regulating social production and distribution. It is to expect of market participants that they should – while facing competition – abandon the calculation of self-interest in their business decisions.

Such an approach is too hazy to recommend itself as a solution to the serious competition issues that are posed by oligopoly behaviour. Behavioural prohibitions require clear delineation, or else the rule of law is undermined. If, for structural reasons, rational market decisions must produce an anti-social result, and behavioural prohibitions are unsuitable, the remedy must be sought in a regulatory or other intervention of public power.

It is with these considerations in mind that we have addressed the issues, and assessed the available evidence, discussed in this report.

Appendix G “Concurrent jurisdiction” as a defence – the effect of the ATM PCH agreement and rules

At the hearing of the Enquiry on 25 May 2007, Absa drew attention to the issue of “concurrent jurisdiction” in regard to banking practices which comply with current regulatory stipulations although they may be thought to fall foul of the Competition Act.⁴¹ The discussion concerned access to the national payment system, and non-bank acquiring, but the principles would be applicable equally, for example, to the question of interbank arrangements in respect of off-us ATM transactions.

Banking is an industry under the regulatory authority of the Minister of Finance and of the South African Reserve Bank (the SARB). The same applies to the national payments system.

Section 4 of the Competition Act, prohibiting restrictive practices by parties in a horizontal relationship (i.e. by actual or potential competitors), is part of Chapter 2 of the Competition Act. Section 3(1A) of the Act provides:

- (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.
- (b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of section 21(1)(h) and 82(1) and (2).

Section 21(1)(h) gives the Competition Commission the responsibility to negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act. Section 82 deals further with the negotiation of such agreements. -

Such agreements as are in existence currently between the Competition Commission and these authorities do not operate to reconcile the regulatory arrangements applicable to ATM service provision with the principles of the Competition Act. That is a matter which, in our view, needs attention.

In the absence of a relevant agreement, the issue raised by Absa must be addressed on general principles.

The clear implication of sections 21(1)(h) and 82 of the Competition Act is that the legislation empowering other regulatory authorities should, as far as possible, be interpreted

⁴¹ Transcript, pp 101-103.

consistently with the principles of the Competition Act. Such other legislation should never lightly be read as having been intended to permit anti-competitive conduct. It would be contrary to legal principle and public policy to construe such other legislation as suggesting or encouraging the disregard of the basic competition law enacted by Parliament.

In our view, furthermore, where the law in terms of which the other relevant authority exercises its (concurrent) jurisdiction may *permit but does not actually require* the conduct allegedly contravening the Competition Act, the existence of concurrent jurisdiction would not provide a defence.⁴²

The question also arises as to what the legal outcome would be where the applicable regulatory provisions cater only for a particular mode of agreement or arrangement, devised by the parties in the horizontal relationship themselves, that would allegedly contravene the Competition Act. In our view, if the parties could have devised and obtained approval for an agreement or arrangement that would not contravene the Act, but failed to do so, they ought not to have such a defence.

The provisions of the current PCH agreement between banks that is applicable to off-us ATM transactions, together with the accompanying clearing rules applied by the payment system management body, PASA, do not explicitly require any particular pricing arrangement. Nevertheless, they are obviously predicated on the current charging model. So far as we can see, there is nothing to prevent banks entering into an ATM PCH agreement, and obtaining through PASA appropriate clearing rules, predicated on a direct charging model.

⁴² In the United States, the so-called "state action" doctrine provides a defence to alleged contraventions of federal antitrust law. This doctrine applies under certain circumstances where states have created their own regulatory regime that displaces competition in certain markets. (See Hovenkamp, *Antitrust*, 4th edition, pp 332-337.) However, historically the state action doctrine applied only to conduct *mandated* by the state. (See e.g. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975).) Where the state merely *authorises* the conduct under its regulatory regime, the conduct is not generally shielded from antitrust enforcement. It may be different, however, where the regulatory scheme itself depends on the conduct which would otherwise be condemned – for example, where the scheme of regulation necessarily involves the participants setting price or engaging in other anti-competitive conduct. (Cf e.g. *Southern Motors Carriers Rate Conference v U.S.*, 471 U.S. 48, 105 S.Ct. 1721 (1985).) Also, where the state itself does not conduct (cf *Hoover v. Ronwin*, 446 U.S. 558, 104 S.Ct. 1989 (1984)) or at least actively supervise (cf *California Retail Liquor Dealers Ass'n v Midcal Aluminum Co.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *Patrick v Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988)) the arrangement under which, say, prices are set, the defence will not apply. Furthermore, the restraint on competition must be one that is clearly articulated and affirmatively expressed as state policy. (Hovenkamp, p 333 citing *Midcal*; cf also *Lafayette v Louisiana Power and Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978).)

In European competition law, the defence of "state compulsion" is very similar. According to Whish, *Competition Law*, 5th edition, p 128, this defence has been raised on numerous occasions, but has always failed. "For a successful defence, it would seem that three requirements must be satisfied. First, the state must have made certain conduct *compulsory*: mere persuasion is insufficient; secondly, the defence is available only where there is a legal basis for this compulsion...; and thirdly, there must be no latitude at all for individual choice as to the implementation of the governmental policy."

Broadly speaking, similar criteria would not seem to jar with the approach to "concurrent jurisdiction" as contemplated by our Competition Act.

Appendix H FICA and Direct Charging

This appendix sets out reasons for the view that, in the absence of a suitable exemption, FICA might present an impediment to the implementation of the direct charging model for off-us ATM transactions.

In terms of section 21 of FICA, an "accountable institution" – an expression which includes banks⁴³ – may not establish a business relationship *or conclude a single transaction*⁴⁴ with a client⁴⁵ unless the accountable institution has taken the prescribed steps to establish and verify *inter alia* the identity of the client.

This presents, of course, no unusual difficulty in the case of on-us ATM transactions, because in that case the ATM service provider transacting with the client and the institution which has issued the card to the client are one and the same. The issuer would ordinarily have complied with FICA when entering into its business relationship with the client,⁴⁶ or would have been required to do so subsequently in terms of that Act.⁴⁷ However, the matter is different where off-us ATM transactions occur. Here the user ordinarily has no pre-existing relationship with the ATM provider. The "prescribed steps"⁴⁸ in terms of FICA for establishing and verifying *inter alia* the identity of the client are such that they could not practically be taken by the ATM provider itself in that situation. The customer approaches the terminal, the card goes in, buttons are pressed, electronic signals fly, and the cash comes out or a payment is effected: the relationship between ATM provider and customer in off-us situations is impersonal, momentary and mechanical. Accordingly, the ATM provider would not have complied and would not be able to comply with FICA – *if FICA were to be applicable to that*

⁴³ "Accountable institution" is defined in section 1 of FICA as meaning "a person referred to in Schedule 1". That Schedule contains 19 items. Item 6 refers to: "A person who carries on the 'business of a bank' as defined in the Banks Act, 1990 (Act 94 of 1990)". Item 7 refers to mutual banks, item 14 to the Postbank (which is excluded from the Banks Act) and item 16 to Ithala (which has an exemption under the Banks Act).

⁴⁴ A "single transaction" is defined in section 1 of FICA as meaning "a transaction other than a transaction concluded in the course of a business relationship" (see below). "Transaction" is defined in section 1 of FICA as meaning "a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution." In terms of section 4(c) of FICA, the Financial Intelligence Centre is empowered and directed to "give guidance to accountable institutions" and others "regarding the performance by them of their duties and their compliance with the provisions of this Act". The Centre issued Guidance Note 2 (Government Notice 735, in *Government Gazette* 26469 of 18 June 2004) which seeks to interpret the Act, and which suggests that a transaction between an accountable institution and a client is "an instance of commercial activity between" them taking place in accordance with the nature of the business carried on by the institution in question. That is probably correct. Cf *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 at 216: business transactions are "dealings in the way of business with third parties". Also *id.*, at 224-225.

⁴⁵ "Client" is not defined in FICA. One of the ordinary meanings of "client" is simply a customer (*Webster's Third New International Dictionary*); and a shop's "clientele" are its customers (*The Shorter Oxford English Dictionary*). Although the word "client" may usually imply a professional relationship, here, in its actual context – which must include the full range of business entities identified as "accountable institutions" in Schedule 1 of FICA – it could be held to bear the broader meaning.

⁴⁶ "Business relationship" is defined in section 1 of FICA as meaning "an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis".

⁴⁷ Read with Government Notice R749 (*Government Gazette* 26487) of 21 June 2004.

⁴⁸ See Government Notice R1595 (*Government Gazette* 24176) of 20 December 2002, Chapter 1.

service provider in respect of the transaction.

Under current arrangements between banks the problem is avoided because the off-us ATM provider *does not conclude a transaction with the cardholder*. Instead, the ATM provider undertakes the cash dispensing or other ATM service *on behalf of the issuer*. The latter, by means of this outsourcing arrangement,⁴⁹ itself provides the cash-dispensing or other ATM service to, and enters into the relevant transaction with, the client. Thus, currently, the off-us ATM service provider is *not* required to take the steps prescribed under FICA for establishing and verifying *inter alia* the identity of the cardholder in respect of the transaction.

A change to direct charging for ATM services would mean that, in off-us situations as well, a *transaction would be concluded directly between the ATM service provider and the cardholder* to whom the cash is dispensed or other ATM service is supplied. Would it necessarily follow that, in off-us situations, the ATM service provider would be in breach of FICA for failing – being unable in fact – to establish and verify *inter alia* the identity of the client?

Where the ATM service provider is not a bank, it would ordinarily *not* be an “accountable institution” within the meaning of FICA,⁵⁰ and so would *not* be required to take the prescribed steps to establish and verify *inter alia* the identities of those with whom it enters into transactions. The fact that it would be unable in any case to take the steps prescribed by FICA is thus irrelevant: FICA simply would not apply. We are confronted therefore by the anomaly that banks,⁵¹ which *are* accountable institutions, could – having the same inability to take the prescribed steps where they directly provide the service in off-us ATM transactions – be held to be in contravention of FICA, whereas non-bank ATM providers would ordinarily be in the clear.

It is arguable that an off-us ATM transaction with a stranger would not be a “transaction” as defined in FICA – i.e., one concluded between a client and an accountable institution in accordance with the type of business carried on by that institution – when the institution concerned is a bank. It is similarly arguable that the bank’s customer in such a case is not its “client” as contemplated by FICA, because no account-holding by the customer with that bank is involved. However, this is an area where clarity and certainty rather than points of argument are needed for institutions to rely on.

Current exemptions from the provisions of FICA and the regulations do not seem to cover

⁴⁹ It is unnecessary to consider whether “agency”, or rather simply mandate, would describe the legal relationship involved here.

⁵⁰ Likewise, merchants providing cash-back at the point of sale would ordinarily not be accountable institutions as contemplated by FICA. Note, however, that a non-bank ATM service provider – or indeed an entity providing cash-back at the point of sale – might also be engaged in some other kind of business (dealing in foreign exchange, for example) which is referred to in the list in Schedule 1. In that case it would be an accountable institution.

⁵¹ Also mutual banks, the Postbank and Ithala.

the matter.⁵² Paragraph 4 of the Exemptions promulgated in Government Notice R1596 (*Government Gazette* 24176) of 20 December 2002, as amended by Government Notice R1353 (*Government Gazette* 27011) of 19 November 2004 does not seem to cover the situation of direct charging, where the off-us ATM service provider concludes a transaction directly with the customer and not simply with the issuing bank acting on the customer's behalf. Paragraph 17, does serve to limit the scope of the particulars required, and the records to be kept, where withdrawals, transfers and payments not exceeding R5 000 per day or R25 000 per month are involved, and where accounts with balances not exceeding R25 000 are maintained. However, the *remaining* particulars and records which *are* required would themselves be beyond what is practical for the service provider to obtain directly where off-us ATM withdrawals are concerned.⁵³

It is for these reasons that a specific exemption such as the one suggested in the chapter on ATMs and Direct Charging should be considered.

⁵² Currently "there are no exemptions whereby one bank can rely on the FICA identification and verification of a client by another bank (or accountable institution), nor whereby a bank can rely on the fact that it is a (small value) single transaction between itself and a non-client." Memorandum by Stuart Grobler, *supra*, para 2.

⁵³ Absa's view is that only cash deposits remain a problem for non-banks. We believe an agency relationship with the issuing bank in respect of deposits could address this. See Absa, September 2007, Direct charging models for ATM's, p 19-21.

Appendix I The payment card reforms in Australia

1. Introduction

Leading the drive to regulate the interchange fee has been the Reserve Bank of Australia (RBA).⁵⁴

It has been concluded earlier in this chapter that an interchange-setting methodology which merely quantifies certain costs and does not assess demand elasticities cannot be adequate for achieving the legitimate purpose of interchange as a mechanism balancing the two sides of a two-sided market. It has been concluded further that, in calculating relevant costs on the issuing side as a necessary ingredient in interchange setting, the costs of credit extension should not be included. Having regard to these fundamental considerations, the Banking Enquiry panel cannot recommend for South Africa the methodology adopted in Australia for regulating interchange. Nevertheless, the Australian experience remains highly instructive.

2. Background to the reforms

In Australia the Prices Surveillance Authorities (PSA) raised the first questions about interchange fees and *ad valorem* merchant service fees in a report on credit card interest rates in 1992.⁵⁵ These issues were again raised in 1995, with the PSA concluding that the interchange fees on credit and debit cards were unlikely to be priced efficiently.⁵⁶ In its 1995/96 annual report the Australian Payments System Council questioned the mechanisms of the card schemes and rationales for their pricing structures.⁵⁷

The Financial System Inquiry (the "Wallis Committee") was established in 1996 to look into the efficiency and governance of the payments system.⁵⁸ Its report in 1997 recommended that the Australian Competition and Consumer Commission (ACCC), and a new Payments System Board (PSB) within the RBA, review the credit and debit card interchange fee arrangements as well as limitations on access to the MasterCard and Visa card schemes.

⁵⁴ MasterCard Worldwide, *Insights*, First Quarter 2007, "Interchange Regulation: Lessons learned from the RBA Intervention in Australia", p 1.

⁵⁵ "In a wide-ranging inquiry that looked at, amongst other things, the profitability of credit card operations, the PSA noted that interchange fees for credit cards had not changed despite technological improvements and the increasing scale of credit card operations. It also questioned why fees to merchants were charged on an *ad valorem* rather than flat rate, since the costs incurred by their financial institutions varied more directly with the number of transactions than their value." (Reserve Bank of Australia (RBA) and Australian Competition and Consumer Commission (ACCC), October 2000, *Debit and Credit Card Schemes in Australia. A Study of Interchange Fees and Access*, p 2.)

⁵⁶ "The PSA noted that, despite a number of indications that unit costs for debit card transactions should have fallen over the 1990s, interchange fees in debit card payment schemes had not changed since they were first negotiated in the late 1980s." (*Id.*)

⁵⁷ *Id.*

⁵⁸ "The Inquiry strongly advocated the substitution of electronic forms of payment for paper-based transactions as a means of achieving substantial gains in efficiency." (*Id.*, p 3.)

In September 1999 the ACCC and the PSB jointly launched an investigation into interchange fees for debit and credit cards, and membership criteria for credit card schemes.⁵⁹ Their report suggested, *inter alia*, that interchange fee arrangements for credit cards might be encouraging the use of credit cards relative to more efficient payment instruments (such as debit cards).⁶⁰ Among the recommendations was that the RBA regulate credit card schemes. In 2001, the RBA designated the Bankcard, MasterCard and Visa credit card schemes as payment systems under the Payment Systems (Regulation) Act 1998.

In August 2002 the RBA formulated a Standard for the setting of credit card interchange in all these schemes.⁶¹ As a result, interchange fees were reduced in November 2003 from an average rate of 0.95 per cent to an average of 0.55 per cent of credit card⁶² transaction values.⁶³ The Standard required a recalculation of the benchmarks every three years using updated cost estimates. The first recalculation occurred in the third quarter of 2006, resulting in a new benchmark of 0.50 per cent effective from 1 November 2006.⁶⁴

Rules against surcharging by merchants were abolished from January 2003. Rules regarding the membership criteria of Visa and MasterCard were amended to ease the "restricted access" to these schemes.⁶⁵ The "honour all products" rule was abolished with effect from January 2007, leaving merchants free to choose to accept either debit cards or credit cards or both.⁶⁶

Reforms to be implemented in the debit card market were only finalised in the first half of 2006.⁶⁷ These included the improvement of access and transparency in the EFTPOS system, abolition of the "honour all products" rule and lowering of the interchange fees.⁶⁸

59 *Id.*, p 4.

60 *Id.*, p 5.

61 See RBA, November 2005, *Common Benchmark for the Setting of Credit Card Interchange Fees*, p 1.

62 Interchange fees have historically been the same for both debit cards and credit cards. Prior to the reforms in 2003, interchange fees on debit cards also averaged around 0.95 per cent of the transaction value, declining to around 0.55 per cent when the credit card reforms were introduced (RBA PSB. *Annual Report 2007*, p 26).

63 RBA estimates indicate that prior to the 2003 interchange reforms more than 35% of a card issuer's revenue came from interchange, with almost all of the remainder (61%) coming from cardholders who used their card as a borrowing tool ("revolvers"). A mere 3.5% came from "transactors". (Visa, Second Submission, June 2007, document T, pp 13-14.)

64 RBA PSB. *Annual Report 2007*, p 23.

65 We do not deal with the Australian access regime in this Appendix. It is discussed in the chapter on access and regulation.

66 "On 1 January 2007, the honour-all-cards Standard covering the Visa system came into force; MasterCard provided a voluntary undertaking that had the same effect for the MasterCard system. The effect of this Standard and undertaking is that the schemes are no longer allowed to require that merchants accept debit cards as a condition of accepting credit cards and *vice versa*. There are also requirements that scheme debit cards must be visually and electronically distinguishable from scheme credit cards." RBA PSB *Annual Report 2007*, p 24.

67 The Bank introduced an interchange Standard for the EFTPOS and Visa Debit systems in April 2006, which came into effect on 1 November 2006 (RBA PSB. *Annual Report 2007*, p 26).

68 RBA PSB. *Annual Report 2006*, pp 11-18.

3. Regulation of the credit card system

As indicated above, the Standard enforced from November 2003 reduced credit card interchange fees by an average of 40 basis points (i.e., by 0.40 per cent). It appears that the reduction in interchange was fully passed through by acquirers to merchants by way of reduced merchant service charges. The merchant service charge has declined by 0.6 per cent since the implementation of the reforms.⁶⁹

Following the MasterCard, Visa and Bankcard reductions, the merchant service charges of American Express also decreased, but only by approximately 29 basis points since September 2003 – i.e. from around 2.46 per cent to 2.17 per cent. Diners Club merchant service charges decreased by about 18 basis points over the same period, from around 2.37 per cent to 2.19 per cent⁷⁰.

Even though the merchant service charges of the three-party schemes remained significantly higher than for the four-party schemes it is estimated that, since the inception of the reforms, merchants have saved a net total of at least AUS\$2.5 billion.⁷¹ The table below summarises the changes.

Table 2 Interchange fee reductions in Australia

	Prior to 2003	2006/2007	Decrease	% Change
Avg. interchange fee ⁷²	0.95	0.50	0.45	-47%
Weighted MSC ⁷³	1.4	0.80	0.60	-43%
American Express ⁷⁴	2.46	2.17	0.29	-12%
Diners Club	2.37	2.19	0.18	-7.6%

Source: RBA PSB, *Annual Reports, 2006, 2007*.

Although the merchant service charges in the four-party schemes fell substantially, research data showed that 70 per cent of merchants were not aware of it and that merchants maintained that no changes had been applied to their applicable fees.⁷⁵ There was no

⁶⁹ RBA PSB. *Annual Report 2007*, p 30.

⁷⁰ *Id.*

⁷¹ *Id.* "These savings are offset slightly by the small increase in the combined market share of American Express and Diners Club since the reforms..."

⁷² This is an average interchange fee for the four-party systems.

⁷³ This relates to four party schemes.

⁷⁴ This is the MSC.

⁷⁵ Morgan, R. 2005 *Tracking study on credit card surcharging and the interchange fee*; MasterCard Worldwide, *Insights*,

evidence that consumer prices had actually fallen as a result of the interchange reductions.⁷⁶

On the issuing side, although interchange revenue contracted, marginal prices charged to cardholders did not adjust as such.⁷⁷ However, actual prices facing cardholders did adjust in three ways: benefits and reward programs became less generous; annual and other fees increased; and surcharging by merchants was permitted. According to the RBA and the four major banks in Australia, the average amount that had to be spent by a cardholder in order to receive loyalty benefits increased by about 31 per cent⁷⁸ and the average annual fee revenue per credit card account increased by about 43 per cent from \$40 to \$70.⁷⁹ Other effects included changes in the product offerings, and adjustments of interest rate charges on credit in order to attract customers discouraged by higher cardholder fees. Competition on interest rates charged on credit cards led to a proliferation in the number of low-rate cards that emerged. According to the 2006 annual report of the PSB, the newly applied interest rates could be as low as 8.99 per cent compared to interest rates in the order of 16 per cent to 18 per cent before the reforms.⁸⁰

Surveys also indicated that only about 12 per cent of large companies and about 2 per cent of smaller companies had started to surcharge within a few years after the reforms.⁸¹ Where merchants did introduce surcharging, it tended to be arbitrary and non-systematic. Furthermore, it has evidently occurred mainly in markets with low levels of competition. Most retail segments show very little or no surcharging.⁸² In 2006, the RBA commissioned East & Partners to include questions regarding surcharging in their survey of merchant acquiring business. The results showed that surcharging is becoming more common amongst large merchants, and in June 2007, 17 per cent of large merchants imposed a surcharge. Most merchants apply the same surcharge to both debit and credit cards, with some merchants applying higher rates to more expensive cards such as American Express and Diners Club. The average surcharge for MasterCard and Visa cards is around \$1, compared to a \$2 surcharge on American Express and Diners Club cards.⁸³

The combined market share of American Express and Diners Club increased from an average of 14.9 per cent of the value of purchases in 2002/2003 to 16.5 per cent in

First Quarter 2007, "Interchange Regulation: Lessons learned from the RBA Intervention in Australia", p 3.

76

Id.

77

See Evans and Schmalensee, 2005, *Economic Rationale for Interchange fees*.

78

In order to receive a \$100 shopping voucher, the average amount spent increased from around \$12,400 to around \$16,300 (RBA PSB. Annual Report, 2007, p 31)

79

RBA PSB. *Annual Report* 2006, p 13.

80

Id.

81

Id.

82

MasterCard Worldwide, *op. cit.*, p 4.

83

RBA PSB. *Annual Report* 2007, p 29.

2005/2006.⁸⁴ This fuelled arguments that merchants have been harmed because of the relative increase in the usage of the more expensive three-party model cards. However, the bulk of this increase occurred in 2004 when two of Australia's major banks commenced the issuing of American Express and Diners Club cards.⁸⁵

Even though the rate of growth in credit card transactions in Australia decreased substantially from about 34 per cent during 2000/2001,⁸⁶ it still increased by around 7 per cent during 2005/2006 and 5.4 per cent during 2006/2007⁸⁷ – thus answering MasterCard's warning that the reduction of interchange might lead to a "death spiral" of its network.⁸⁸

Under the 2002 Standard determined by the RBA for the setting of credit card interchange fees, each participating scheme appointed its own specialist to collect, verify and calculate the eligible costs in order to arrive at a benchmark for interchange. To ensure that the cost calculations were representative, the data of issuing banks making up at least 90 per cent of the volume of card transactions for the scheme had to be included. The eligible costs were set out comprehensively by the RBA and include issuer's costs associated with authorisation, processing, fraud-related expenditures and the free-funding period.⁸⁹

Once each scheme had calculated its benchmark, it was required to set its weighted-average interchange fees⁹⁰ no higher than that.⁹¹ Under the Standard set in 2002, the RBA required a recalculation of the interchange fee in September 2006.

During 2005/2006, however, the RBA made changes to the regulations affecting credit card systems. Under the amended Standard the procedures would stay the same, but after the individual schemes' cost calculations had been completed, the RBA would use the information to calculate a single weighted-average interchange fee which will then be set as

⁸⁴ RBA PSB. *Annual Report* 2006, p 14.

⁸⁵ *Id.* Their combined share in the volume (i.e. number) of transaction however was 12.4% for 2005/2006, lower than their share in the value of transactions. This is indicative of their differentiated business model and concentration of customers in the higher net-worth population resulting in higher per transaction values.

⁸⁶ RBA PSB. *Annual Report* 2006, p 13.

⁸⁷ RBA PSB. *Annual Report* 2006, p 13; RBA PSB. *Annual Report* 2007, p 11.

⁸⁸ See Frankel and Shampine, 2006, "The Economic Effects of Interchange Fees", 73 *Antitrust Law Journal* (3/2006), 627-673, p 656.

⁸⁹ This is fully explained in the Guidance note attached to RBA, November 2005, *Common Benchmark for the Setting of Credit Card Interchange Fees*. Initially, the RBA argued that the interest-free period, being a benefit provided to cardholders, ought not be recovered through fees charged to merchants. The interchange fee should consequently comprise only costs attributable to the merchants' benefits net of any costs associated with the line of credit provided to cardholders. Subsequently, however, the RBA accepted that the costs associated with the interest-free period be included in their list of eligible costs for the purpose of the interchange calculations.

⁹⁰ The weighted average fee is calculated using weights for each scheme that reflect the structure of its own business over the previous financial year. This is also one of the aspects of the Standard that is proposed to be reconsidered in the RBA's next review of the reforms (RBA PSB. *Annual Report* 2007, p 25).

⁹¹ In other words, its particular interchange levels for different categories of cards and card usage could vary above or below the benchmark, provided that the weighted average did not exceed the benchmark.

a common benchmark for all the scheme participants to adhere to.⁹² (Each scheme would then have to ensure that the weighted average of its own interchange fees did not exceed the common benchmark.) The nominated issuing banks chosen to participate in the cost calculations had to include a minimum number. Also, Bankcard was now exempted from the RBA regulations.⁹³ The amendments resulted in a common benchmark interchange fee of 0.50 per cent, implemented since 1 November 2006. Both Visa and MasterCard also introduced an array of different interchange fees applicable to different cards, transactions and merchants.⁹⁴

The reason for the change to a common benchmark was to overcome the problem that, under the original standard, a scheme with higher costs would be entitled to set a higher weighted average interchange than a scheme with lower costs, and thus gain an undue competitive advantage in attracting issuers.⁹⁵

The RBA stated that the new Standard was not aimed at further reducing the interchange fee. It was intended rather to promote more sound competition between the schemes and increase the incentives towards cost saving.

4. Regulation of the debit card system

There are two distinct debit card systems in Australia: the EFTPOS system and the "scheme" debit card systems.

The local EFTPOS system has accounted for 85 per cent of debit card transactions.⁹⁶ It is a purely domestic system and its cards cannot be used overseas. The system involves bilateral negotiations between the participating parties and the interchange fee is a flat fee, paid from the issuer to the acquirer ranging between 18 to 25 cents per transaction.⁹⁷ This was obviously designed to subsidise merchant acceptance. The EFTPOS system wanted to change its interchange fees to zero in 2003. At first this was rejected due to access considerations, but accepted in December 2003 conditional on adequate investigations into the access issues by the industry and the RBA.⁹⁸ Despite legal challenges by merchants wishing to retain the benefit of the previous interchange arrangements, the EFTPOS system is now subject to a regulated interchange Standard.

⁹² *Id.*

⁹³ It was decided that Bankcard's costs were reflective of a small, domestic scheme and were not representative of the industry as a whole and credit card issuing in general. *Id.*, p 3. The Bankcard scheme closed down in the first half of 2007.

⁹⁴ *Id.* p 24.

⁹⁵ This aspect has been dealt with earlier in this chapter.

⁹⁶ RBA PSB. *Annual Report 2006*, p 15.

⁹⁷ *Id.*

⁹⁸ *Id.* p 17.

In the scheme debit cards system, the cards are signature-based and can allow for transactions over the internet and telephone, as well as overseas transactions. In contrast to the EFTPOS system, an interchange fee of 0.55 per cent of the transaction value was being paid from the acquirer to the issuer in 2006.⁹⁹

In the most recent report of the PSB, the current regulatory regime applicable to debits cards is described as follows:¹⁰⁰

As part of the package of reforms to Australia's debit card systems announced in April 2006, the Bank introduced interchange standards for the EFTPOS and Visa Debit systems. These standards came into effect on 1 November 2006, the same date as the new credit card benchmark came into effect.

In the scheme debit systems, interchange fees have historically been the same as in the credit card systems. Prior to November 2003, these fees averaged around 0.95 per cent of the transaction value (excluding GST). They then fell to around 0.55 per cent when the credit card reforms were introduced. In contrast, interchange fees in the EFTPOS system are flat fees – historically averaging around 20 cents per transaction – and flow in the opposite direction to those in the credit card and scheme debit systems (that is from issuers to acquirers).

These differences in interchange fees in the two types of debit card systems meant that on a \$100 debit card transaction, an issuer was around 75 cents better off in terms of interchange revenue if its customer used a scheme debit card rather than an EFTPOS card. The Board was concerned that, if this situation persisted, the EFTPOS system would have difficulty competing simply because of the structure of interchange fees, which themselves were not subject to the normal forces of competition.

The EFTPOS interchange Standard requires that interchange fees in the EFTPOS system (which are bilaterally negotiated) be between 4 and 5 cents (excluding GST) if the transaction does not involve a 'cash out' component. Interchange fees for transactions that do include cash out are not covered by the Standard; the Bank's liaison suggests that in some cases the interchange fees on these transactions remain at around 20 cents or higher while, in other cases, the fees have fallen in line with the new rates for purchase transactions.

The Visa Debit interchange Standard operates in a similar fashion to that of the credit card interchange Standard, in that the weighted-average interchange fee must be no more than a cost-based benchmark. Based on information supplied by industry, the Bank announced on 29 September 2006 that the benchmark was 12 cents (excluding GST).

In announcing the Visa Debit interchange Standard the Bank indicated that the same arrangements would apply to the debit card schemes operated by both MasterCard and Visa. It also indicated that the schemes could provide undertakings that they would comply with the Standard rather than having it formally gazetted. In particular, in April 2006 the Board announced that 'the Visa Debit Standard on interchange fees will only be gazetted, if, by 1 July 2006, Visa has not provided the Bank with an enforceable undertaking that would deliver the same outcomes as the Standard. Similarly, the Bank will consider designating the MasterCard debit system, and then imposing a standard, if by 1 July 2006, MasterCard has not provided the Bank with an enforceable undertaking to the same effect. MasterCard voluntarily agreed to set interchange fees for its debit card in accordance with this benchmark. In contrast, Visa did not and, consequently, on 7 July 2006, the Bank gazetted the Visa Debit interchange Standard.

⁹⁹ *Id.* p 15.

¹⁰⁰ RBA PSB. *Annual Report 2007*, pp 22-23.

As for credit cards, both schemes have a number of different interchange categories for different types of merchants and types of payments (Table 7). MasterCard has also introduced a chip rate for its debit cards, applicable when a card with a chip is used in a terminal that is not chip enabled. MasterCard initially had a relatively simple structure with only electronic and standard rates. At the end of June 2007, it released a table of rates very similar to those of Visa. MasterCard also introduced a 'tiered merchants' rate for large merchants that is substantially below other interchange rates. This rate requires merchants to meet volume thresholds but, unlike MasterCard's tiered merchants rate for credit cards, does not require merchants to accept all MasterCard products.

5. Regulatory issues concerning the three-party schemes

In Australia, both American Express and Diners Club agreed in negotiations to remove their no-surcharge rules.¹⁰¹ A media release by the RBA dated 24 February 2005 stated:

American Express and Diners Club

Over recent months the Bank has examined whether it would be in the public interest to regulate the American Express and Diners Club card payment systems. This follows the issuing of American Express cards by two banks and the establishment of a partnership between another bank and Diners Club.

The Bank considered, in particular, whether there was a case to regulate the payments between American Express and Diners Club and their bank partners. It concluded that, at this stage, such regulation would not improve the overall efficiency of the payments system. In its view, regulation of these payments would have relatively little effect on merchant charges. Further, the existing incentives facing issuers of these cards could only be addressed through considerably more extensive regulation than that currently existing in the credit card schemes.

In the Bankcard, MasterCard and Visa schemes, the interchange fee paid by the merchant's bank to the cardholder's bank has an important influence on the charge levied on the merchant by its bank. In contrast, in the American Express and Diners Club arrangements, the causation runs the other way. Merchant charges are determined largely independently of the payment to the partner banks: instead, the fees that merchants pay influence the size of the payments to the banks. Given this, regulating the payments that flow between American Express and Diners Club and their partners would be likely to have little effect on merchants' costs of accepting the cards. This is in contrast to the credit card schemes, where merchant service fees fell quickly following the reforms to interchange fees.

On the issuing side, regulation of specific payments to the partner banks would be likely to lead to other forms of payment, leaving the incentive of banks to participate in the arrangements largely unchanged. One possible response might have been to regulate the totality of payments, including marketing payments, between American Express and Diners Club and their bank partners. Such regulation would then also be required in the Bankcard, MasterCard and Visa schemes. The Bank's view is that, at the current time, this form of extensive regulation is not in the public interest.

While the Bank is not intending to regulate the payments between American Express and Diners Club and their bank partners, it has had concerns about a number of clauses in these schemes' agreements with merchants. The relevant clauses have had the effect of reducing competition between the schemes by limiting merchants' ability to steer customers to lower-cost means of payment. Given this, the Bank has sought the agreement of American Express and Diners Club to either delete or change these clauses. It has also sought greater transparency in the average fee charged by the schemes. In response, both American

¹⁰¹ Visa, June 2007, Second Submission, document U, p 5.

Express and Diners Club have agreed to:

- i. reword clauses in their merchant agreements that currently prohibit merchants from encouraging cardholders to use another card; and
- ii. publish their average merchant service fee in Australia on a quarterly basis. Diners Club has already done so.

American Express has also agreed that, should it seek to introduce a debit or prepaid card in Australia, it will not require merchants to accept such cards as a condition of accepting its existing cards, provided schemes issuing similar cards are subject to the same requirements.

As a result of these changes merchants will now have at least three options if they are not satisfied with the cost of accepting American Express or Diners Club cards: they can decline acceptance of any cards issued by the schemes; they can accept the schemes' cards but charge customers for using the cards; or they can accept the schemes' cards but indicate to customers that they would prefer another payment method be used. In addition, merchants will be better informed about how their particular merchant service fee compares with the average fee.

Finally, to provide all interested parties with a sounder basis for analysis, the Bank has written to the Bankcard, MasterCard, Visa, American Express and Diners Club schemes asking for their agreement to the publication of market share data. The data would be published regularly in the Reserve Bank Bulletin.¹⁰²

6. Australian costing methodology and EDC (2002) methodology in SA

The following table sets out, for purposes of comparison, the elements in the cost calculation used in the regulation of interchange in Australia and the elements used by EDC in 2002 to arrive at their interchange recommendations to the ABCI and the South African banks in 2003.

Table 3 Comparison of cost calculations used in Australia and South Africa

Cost calculation elements used in Australia	EDC's 2002 cost calculation elements for SA
Issuers' transaction processing and authorisation	Issuers' processing costs
(i) Receiving, posting to cardholder accounts and other processing of data for domestic credit card transactions;	(i) Incoming interchange processing costs (transaction receipt processing) – per transaction of receiving transmissions from acquirers, balancing, verifying, processing, merging files etc;
(ii) Receiving and processing authorisation requests for domestic credit card transactions;	(ii) Transaction settlement management costs – per unit cost per transaction of processing settlements;
(iii) Receiving and processing retrieval requests;	(iii) Chargebacks, replacement and document retrieval costs – unit costs of domestic chargebacks and re-presentments from SA acquirers and the unit costs of domestic document retrievals requested as an issuer; and
(iv) Receiving and responding to referral enquiries;	(iv) Chargebacks and disputed transaction losses – value of losses issuers incur by writing off small value domestic chargebacks and writing off cardholder disputes.
(v) Investigating and processing exception transactions;	
(vi) Maintaining and updating card authorisation files;	
(vii) Clearing and settlement of domestic credit card transactions;	
(viii) Receiving and processing chargebacks and re-presentments;	
(ix) Net chargeback write-offs;	
(x) Scheme fees for processing and authorisation,	

102

http://www.rba.gov.au/MediaReleases/2005/mr_05_02.html

clearing and settlement, retrievals and chargebacks; and

- (xi) Compliance with scheme requirements related to processing and authorisation, clearing and settlement.

Issuers' costs of fraud and fraud prevention

- (i) Investigation of suspect credit card transactions;
- (ii) Processing fraud files;
- (iii) Developing and maintaining fraud management systems, including detection and prevention systems;
- (iv) Developing and implementing measures to monitor cardholder usage for potential fraud;
- (v) Developing and operating fraud detection measures in cardholder application processing and the opening of new accounts;
- (vi) Development and production of card security features where such features are implemented principally for the purposes of fraud prevention;
- (vii) Compliance with scheme fraud mitigation measures, such as fraud reporting, blocking accounts, logging lost/stolen cards, paying card capture rewards and maintaining hot card files and card recovery bulletins;
- (viii) Assisting and liaising with other members, schemes, law enforcement and other relevant parties for fraud investigations and prosecution;
- (ix) Secure delivery of cards where such delivery is employed principally to prevent fraud;
- (x) Scheme fees related to fraud prevention and investigation, such as for recovered cards, bulletin and file updates and payments to other members for captured or recovered cards under scheme rules; and
- (xi) Total domestic fraud losses net of recoveries.

Issuers' payment guarantee costs

- (i) Credit write offs and losses – collect the total value of bad debt written off during the year net of recoveries;
- (ii) Fraud losses – data is collected for the total value of fraud losses on POS transactions written off during the year net of amounts that were charged back to acquirers to recover;
- (iii) Authorisation and referrals – for authorization, the unit costs of processing domestic authorisation requests are collected split between on-us and off-us transactions. Thus the unit cost of authorisation requests, deciding on approve, decline or refer and then notification. Referrals occur when the merchant needs to contact the issuer to verify the cardholder identity before authorisation. Included in the data collected are:
 - CPU usage charges for authorisation, processors and mainframes;
 - Software licenses and maintenance fees;
 - Charges from third parties for processing, switching and authorisation;
 - Other issuer costs related to authorisation;
 - Purchase confirmation call costs (costs associated with verification activities);
- (iv) Collections – these are the costs involved in collecting on accounts in arrears. This includes the annual operating costs of the collection department; and
- (v) Other risk control costs – this includes the costs associated with specific risk prevention measures and are composed of six distinct data elements:
 - Fraud investigation costs;
 - Incremental secure card delivery costs;
 - Unit cost of issuer creation and processing of the Negative File Management and Electronic Hot Card File (EHCF). This is a centrally held list of cards for which transactions will not be authorised. This includes:
 - o Receiving calls from cardholders and statusing accounts;
 - o Prioritising the negative file and generating entries;
 - o Computer recourse charges;
 - o Software development;
 - o Preparation and transmission of the hot files;
- (vi) Issuer payments to Retail Decisions (RED) for the EHCF processing;
- (vii) Fraud prevention systems updates;
- (viii) Total costs of collecting cards at POS;

Cost to issuers of interest-free period

Cost to issuers of free funding period

- (i) The value of any advances outstanding on credit card accounts that did not accrue interest is determined for each day in the prior financial year. The value of cash advances, international transactions, fees and any other transactions other than domestic credit card purchase transactions that may be reflected in those advances are subtracted from these advances;
 - (ii) The average daily value of advances not accruing interest is determined by summing the daily value of these advances calculated in (i) and dividing by the applicable number of days in the year;
 - (iii) The average daily cash rate for the prior three financial years is determined using the rate for the inter-bank cash market for each business day published monthly in the Reserve Bank of Australia *Bulletin*. As at November 2005, this rate was published in *Bulletin* Table F1. For example, for the initial cost-based measure that must be calculated by 15 September 2006, the daily cash rate would be averaged for the three years between 1 July 2003 and 30 June 2006; and
 - (iv) The average daily value of advances calculated in (ii) is multiplied by the average daily cash rate to obtain the total cost of funding the interest-free period. If agreed to by the Reserve Bank, an alternative method of calculating the cost of the interest free period which is equivalent to the above method may be used.
- (i) Covers non-reimbursed expenses associated with the funding of interest bearing funds.

Sources: Association of Bank Card Issuers and Merchant Acquirers (ABCI): Edgar, Dunn & Company, "2002 South Africa Domestic Interchange Study"; and Reserve Bank of Australia, "Common benchmark for the setting of credit card interchange fees", 2006

Appendix J Steps taken by Grindrod Bank to become a member of PASA

Step	Name	Duration ¹⁰³	Start	Finish
1	PASA membership	153.d	2007/02/01	2007/09/03
2	Bank Council Membership	1.d	2007/02/01	2007/02/01
3	Initial approach to PASA	1.d	2007/02/05	2007/02/05
4	Receive application form	1.d	2007/02/05	2007/02/05
5	Information Gathering	87.d	2007/02/06	2007/06/06
6	Prepare application	40.d	2007/02/06	2007/04/02
7	Prepare transaction volumes	10.d	2007/02/06	2007/02/19
8	Prepare technical information for PCHs	40.d	2007/02/06	2007/04/02
9	Prepare general information	14.d	2007/02/06	2007/02/23
10	Confirm PCHs needed with PASA	1.d	2007/02/06	2007/02/06
11	Meeting with Bankserv	1.d	2007/02/19	2007/02/19
12	Meeting with CR Card PCH Chairman	1.d	2007/02/20	2007/02/20
13	Meeting with VISA	1.d	2007/02/21	2007/02/21
14	Meeting with Master Card	1.d	2007/02/28	2007/02/28
15	Prepare business plan for MasterCard and VISA	43.d	2007/03/15	2007/05/14
16	Follow up meeting with MasterCard	1.d	2007/05/15	2007/05/15
17	Prepare transaction volume projections for MasterCard	1.d	2007/05/16	2007/05/16
18	Complete MasterCard membership application forms	1.d	2007/05/16	2007/05/16
19	Complete BIN application forms	1.d	2007/05/17	2007/05/17
20	Submit Grindrod Bank's Financials, banking licence and other docs to MasterCard	14.d	2007/05/18	2007/06/06
21	Follow up meeting with VISA	1.d	2007/05/28	2007/05/28
22	Check total costs of PCHs	12.d	2007/02/21	2007/03/08
23	Receive acceptance letter from SARB to join SAMOS	1.d	2007/04/03	2007/04/03
24	Meet potential mentor	1.d	2007/03/15	2007/03/15
25	Draw up mentor agreement	1.d	2007/03/16	2007/03/16
26	Receive signed mentor agreement	41.d	2007/03/20	2007/05/15
27	Retail Division Management Committee sign off PCH	1.d	2007/04/16	2007/04/16
28	Sign off PASA application	1.d	2007/04/17	2007/04/17
29	Submit PASA application	.d	2007/04/17	2007/04/17
30	PASA ExO ensures completeness	29.d	2007/04/18	2007/05/28
31	PASA Council grants provisional membership	1.d	2007/05/30	2007/05/30
32	PASA sends Grindrods' applications to PCH PGs	1.d	2007/05/31	2007/05/31
33	PCH PGs approves applications	1.d	2007/06/01	2007/06/01

¹⁰³ Number of days taken to complete the task.

Step	Name	Duration ¹⁰³	Start	Finish
34	Send out letters of Introduction to all Banks and SARB	4.d	2007/06/04	2007/06/07
35	Receive letters of confirmation from all Banks	46.d	2007/06/08	2007/08/10
36	PASA Council approval of new member	1.d	2007/08/13	2007/08/13
37	Confirmation of membership by PASA ExO	1.d	2007/08/14	2007/08/14
38	PCH agreements provided by PASA ExO	1.d	2007/08/15	2007/08/15
39	Board Resolution From Grindrod Bank for signing agreements	1.d	2007/08/16	2007/08/16
40	Lodgement of signed PCH and other agreements with PASA ExO	1.d	2007/08/17	2007/08/17
41	Final sign off by PASA 3 days before going live	1.d	2007/08/20	2007/08/20
42	Receive SWIFT BIC application forms	1.d	2007/04/13	2007/04/13
43	Complete SWIFT BIC application forms	1.d	2007/04/16	2007/04/16
44	Submit SWIFT BIC forms to SWIFT fro non-live SWIFT BIC	1.d	2007/04/23	2007/04/23
45	Clear issue about getting SWIFT test BIC code	1.d	2007/05/15	2007/05/15
46	Receive test SWIFT BIC code	21.d	2007/05/16	2007/06/13
47	Receive non-live SWIFT BIC code	1.d	2007/06/04	2007/06/04
48	Load live BIN code on other bank's POS	91.d	2007/04/02	2007/08/06
49	Go live	1.d	2007/09/03	2007/09/03
50	Other PASA members	43.d	2007/06/25	2007/08/22
51	Meet members to obtain letters of confirmation	2.d	2007/06/25	2007/07/03
52	Receive letters of confirmation from PCH members	31.d	2007/07/03	2007/08/17
53	Letters of confirmation lodged with PASA ExO	2.d	2007/08/17	2007/08/20
54	Negotiate fees with other participants	1.d	2007/08/21	2007/08/21
55	Sign Bi-lateral agreements	1.d	2007/08/22	2007/08/22
56	Operator	6.d	2007/04/23	2007/04/30
57	Application to operator	1.d	2007/04/23	2007/04/23
58	Operator decides on no of test partners	1.d	2007/04/24	2007/04/24
59	Service Agreements provided by Operator	1.d	2007/04/25	2007/04/25
60	Operator Service agreements signed	1.d	2007/04/26	2007/04/26
61	Operator Service Agreements signed	1.d	2007/04/27	2007/04/27
62	Operator Certification of successful testing	1.d	2007/04/30	2007/04/30
63	Get Garage card	37.d	2007/04/02	2007/05/22
64	Contact SABS	1.d	2007/04/02	2007/04/02
65	Complete application form	1.d	2007/04/03	2007/04/03
66	Make payment	1.d	2007/04/05	2007/04/05
67	Submit application for IIN	30.d	2007/04/10	2007/05/21
68	Receive IIN	1.d	2007/05/22	2007/05/22
69	Make payment for standard	1.d	2007/04/25	2007/04/25
70	Submit application for standard	1.d	2007/04/26	2007/04/26
71	Receive Standard	14.d	2007/04/27	2007/05/16
72	SAMOS membership	44.d	2006/12/21	2007/02/21

Step	Name	Duration ¹⁰³	Start	Finish
73	Meet SARB NPS	1.d	2006/12/21	2006/12/21
74	Receive application forms	1.d	2006/12/22	2006/12/22
75	Gather all required information	6.d	2007/02/06	2007/02/13
76	Meet with SARB NPS technical	1.d	2007/02/06	2007/02/06
77	Follow up meeting with SARB NPS	1.d	2007/02/13	2007/02/13
78	Submit SAMOS application	.d	2007/02/21	2007/02/21
79	SARB Testing	80.d	2007/02/13	2007/06/04
80	Appoint SAMOS representative and security officers	1.d	2007/05/31	2007/05/31
81	Prepare letter of confirmation for SARB and IDs and photos	1.d	2007/06/01	2007/06/01
82	All to visit SARB	1.d	2007/06/04	2007/06/04
83	SARB operator determines no & type of test partners	1.d	2007/02/13	2007/02/13
84	Set up infrastructure	4.d	2007/02/14	2007/02/19
85	Acquire hardware	1.d	2007/02/14	2007/02/14
86	Install hardware	1.d	2007/02/15	2007/02/15
87	Acquire software	1.d	2007/02/16	2007/02/16
88	Install software	1.d	2007/02/19	2007/02/19
89	Establish network link to SARB	1.d	2007/02/14	2007/02/14
90	SARB settlement account opened	1.d	2007/02/20	2007/02/20
91	PASA ExO confirms Test may begin	1.d	2007/02/21	2007/02/21
92	Test partners agree to test schedule	1.d	2007/02/22	2007/02/22
93	Setup of test schedule by SAMOS Operator	1.d	2007/02/23	2007/02/23
94	SARB certification of successful SAMOS testing	1.d	2007/02/26	2007/02/26
95	SARB Settlement account	37.d	2007/03/06	2007/04/25
96	Apply for Settlement and loan account	1.d	2007/04/23	2007/04/23
97	SAMOS Service Agreement supplied by ExO	1.d	2007/04/24	2007/04/24
98	SARB Operator Service Agreement Signed	1.d	2007/04/25	2007/04/25
99	Apply for FIR account	1.d	2007/03/06	2007/03/06
100	Receive FIR account	1.d	2007/04/24	2007/04/24
101	Receive technical SAMOS training	1.d	2007/08/21	2007/08/21
102	Receive SAMEX training	4.d	2007/09/11	2007/09/14