



**Australian
Competition &
Consumer
Commission**

Draft Determination

Applications for Revocation and Substitution

Lodged by

Australian Payments Clearing Association Limited

In respect of

the Australian Paper Clearing System

Date: 8 December 2004

Revocation of authorisation nos:
A90550, A90551
and substitution with authorisation nos:
A90932, A90933

Public Register no. C2004/1437

Commissioners: Samuel
Sylvan
King
Martin
McNeill
Smith
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Executive Summary

The Australian Payments Clearing Association Limited (APCA) has lodged applications under section 91C of the *Trade Practices Act 1974* (the Act) for the revocation of authorisations previously granted by the Trade Practices Commission (the TPC) and the substitution of new authorisations.¹

The applications relate to provisions 4.27 to 4.33, 4.35, 4.37 and 4.38 of the Regulations for the Australian Paper Clearing System (the APCS). The APCS governs the clearing of cheques and payment orders. The relevant provisions relate to suspension and termination of APCS membership. The TPC previously granted authorisations (A90550, A90551, A90552) in respect of the APCS Regulations and Procedures and APCA's Memorandum and Articles of Association in September 1993.

This is the Australian Competition and Consumer Commission's (the ACCC) draft determination in relation to APCA's applications for revocations and substitution and revocation. In preparing the draft determination the ACCC has taken into account submissions by APCA and interested parties. Following the draft determination, APCA and/or interested parties may request that the ACCC hold a pre-determination conference. In general terms a conference provides the opportunity for the applicant and interested parties to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft. The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final written determination.

In order to grant authorisation the ACCC must be satisfied that the suspension and termination provisions in the APCS Regulations (continue to) result in a benefit to the public that outweighs any resulting detriment to the public, including that constituted by a lessening of competition. The ACCC must also be satisfied that the provisions result in such a benefit that they should be allowed to (continue to) be given effect to.

The ACCC considers that the anti-competitive detriment associated with the suspension and termination provisions is likely to be minimal. The ACCC considers that there are important checks and balances within APCA and the APCS arrangements to guard against the anti-competitive use of the suspension and termination provisions. In particular, the ACCC notes the review power of the APCA Board over decisions of the APCS Management Committee, including those regarding suspension and termination, and the ability of the RBA to monitor the performance of the APCS Management Committee through its position on both the Management Committee and the APCA Board.

The ACCC considers that the suspension and termination provisions of the APCS Regulations are likely to continue to result in a benefit to the public through the protection of the security, efficiency and integrity of paper clearing processes.

¹ APCA has also lodged an application under section 91B of the Act for the revocation of an authorisation previously granted by the TPC. As the revocation process differs from the process for an application for revocation and substitution, the application for revocation is subject to a separate determination.

Overall, following consideration of submissions by APCA and interested parties, and the information before it, the ACCC concludes that the public benefits resulting from the suspension and termination provisions of the APCS Regulations will outweigh the resulting public detriments. Accordingly the ACCC proposes, subject to any pre-decision conference that may be requested and further submissions received, to revoke authorisations A90550 and A90551 and to grant substitute authorisations A90932 and A90933. The ACCC proposes to impose a five year time limit in respect of the substitute authorisations.

List of Abbreviations

ACCC	Australian Competition and Consumer Commission
APCA	Australian Payments and Clearing Association
APCS	Australian Paper Clearing System
CBA	Commonwealth Bank of Australia Limited
ESA	Exchange Settlement Account
SSPs	Special Service Providers
RBA	Reserve Bank of Australia
the Act	<i>the Trade Practices Act 1974</i>
TPC	Trade Practices Commission (now the ACCC)

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1. Introduction

Authorisations

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.4 Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 The ACCC then issues a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final written determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.
- 1.8 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted, or another person on behalf of such a person. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined at paragraphs 1.3 – 1.7).

The applications

- 1.9 On 17 September 2004 the Australian Payments Clearing Association (APCA) lodged applications for the revocation of authorisations A90550 and A90551 and the granting of substitute authorisations under section 91C of the Act and revocation of A90552 under section 91B of the Act. As the revocation process differs from an application for revocation and substitution, this application is subject to a separate determination.²
- 1.10 Authorisations A90550³, A90551⁴ and A90552⁵ were initially granted by the Trade Practices Commission (now the ACCC) on 22 September 1993. The authorisations related to the Regulations and Procedures of the Australian Paper Clearing System (APCS) as well as APCA's Memorandum and Articles of Association.
- 1.11 APCA is of the view that a blanket authorisation is no longer necessary and is seeking re-authorisation only for Regulations 4.27 to 4.33, 4.35, 4.37 and 4.38 of the APCS Regulations ('the suspension and termination provisions'). These provisions relate to suspension and termination of APCS membership.

Chronology

- 1.12 Below is a chronology of significant dates in the consideration of the application.

DATE	ACTION
17 September 2004	APCA lodged two applications for revocation and substitution and one application for revocation in respect of the APCS Regulations and Procedures and the APCA Constitution.
28 September 2004	The ACCC wrote to interested parties requesting submissions in relation to APCA's applications.
29 October 2004	Submissions closed in relation to APCA's substantive applications for revocation and substitution and revocation.
18 November 2004	The ACCC received a letter from APCA advising that it did not intend to make any further submissions. APCA also noted that all interested party submissions support its applications.
8 December 2004	Draft Determination proposing to authorisation in respect of the suspension and termination provisions of the APCS Regulations.

² ACCC, Revocation of A90552, 8 December 2004

³ Application A90550 was made under sub-section 88(1) of the Act for an authorisation to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act.

⁴ Application A90551 was made under sub-section 88(1) of the Act for an authorisation to make or give effect to a provision of a contract or arrangement, or arrive at an understanding, where a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

⁵ Application A90552 was made under sub-section 88(8) of the Act for an authorisation to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

2. Background

Payment systems

- 2.1 A payment system refers to arrangements which allow consumers, businesses and other organisations to transfer funds usually held in an account at a financial institution to one another. It includes the payment instruments – cash, cheques and electronic funds transfers which consumers use to make payments – and the usually unseen arrangements that ensure that funds move from accounts at one financial institution to another.⁶
- 2.2 In Australia, banks, building societies, credit unions and some card organisations provide the means for consumers, businesses and organisations to transfer funds to one another.
- 2.3 A payment system comprises the:
- payment instruments – which is the form that a payment message takes (eg. cheque, debit card) and is the means by which one party transfers value to a third party; and
 - delivery mechanisms – which is the means by which payment messages are carried from one point within the payment system to another.
- 2.4 Where both parties to a payment transaction maintain accounts with the same financial institution payment arrangements are relatively simple. The financial institution debits the paying customer and credits the receiving customer. Where the parties to the payment instruction are customers of different financial institutions, a process is needed for both the institutions to reflect the change in their customers' accounts and for funds to pass between those institutions. This process is called clearing and settling.
- 2.5 The need to clear and settle payments transactions between financial institutions is generated by the use of payment instruments which enable funds to be transferred to third parties generally rather than only to third parties who are also customers of the institution issuing the payment instrument. Cheques and debit cards issued by banks, building societies and credit unions come into this category. Alternatively the use of a payment instrument which restricts the transfer of funds to third parties who are also customers of the same organisation (within what is called a 'closed system') will not generally generate the need to clear and settle. Charge cards issued by organisations such as American Express and Diners Club fall into this category.

⁶ RBA website

http://www.rba.gov.au/PaymentsSystem/AustralianPaymentsSystem/about_the_australian_payments_system.html

Clearing

- 2.6 Clearing is the cross-institutional exchange of individual payment messages for the purpose of obtaining settlement. It entails sorting, routing and exchanging payment instructions, verifying the integrity of instructions and the accuracy of the sums involved; correcting the sums for errors and other adjustments and finally, determining the net amounts which, once paid, will settle any resultant debt between the financial institutions involved.
- 2.7 In Australia arrangements for the clearing of transactions involving cheques, direct entry payments, ATMs and debit cards and high value payments in Australia are co-ordinated through APCA under rules agreed between its members.
- 2.8 Other payments clearing systems such as credit cards (MasterCard, VISA and Bankcard), the BPAY system for the payment of bills and securities settlement systems are operated independent of APCA.

Settlement

- 2.9 Settlement is the exchange of value between institutions providing payment services for the purpose of providing finality of payment for the obligations arising out of payments clearing.
- 2.10 Settlement between financial institutions in Australia is achieved through transfers of their Exchange Settlement Account (ESA) balances held with the Reserve Bank of Australia (RBA).
- 2.11 For transactions encompassed by APCS settlement is deferred, taking place on the morning of the next business day. Deferred settlement systems carry the inherent risk of an institution paying away and then not receiving due settlement.

The Australian Payments Clearing Association

- 2.12 APCA is a public company limited by guarantee, incorporated on 18 February 1992. APCA's charter, as set out in its Constitution, is to co-ordinate, manage and ensure the implementation and operation of effective payments clearing and settlement systems, policies and procedures.
- 2.13 The impetus to establish APCA can be traced in part to recommendations of the Campbell Committee⁷. The Committee did not specifically recommend the establishment of a separate body for the management and regulation of payments clearing. It recommended that there be general oversight by the RBA of applications for direct participation in cheque clearing and that there be agency facilities available for non-clearing banks and non bank institutions. This directed the banks initially towards the need to review arrangements for payments clearing and processing, which led to the formation of APCA.

⁷ Committee of Inquiry into the Australian Financial System (chair Keith Campbell) Final Report September 1981

- 2.14 APCA does not process payments. It co-ordinates and manages payments clearing arrangements for each of the clearing systems it establishes. Individual institutions are responsible for their own clearing operations and must conduct their operations according to APCA's rules as set out in the Regulations and Procedures for each of APCA's clearing systems.
- 2.15 APCA is currently responsible for five payment clearing systems, namely the:
- Australian Paper Clearing System (APCS) – which co-ordinates and manages the implementation and operation of policies and procedures for the conduct and settlement of exchanges of paper based payment instructions which are primarily cheques, between its participating members.
 - Bulk Electronic Clearing System (BECS) – which manages the exchange and settlement of bulk direct entry electronic low value transactions. The direct entry system allows approved organisations (for example utility companies and insurance providers) to make arrangements with their financial institution to debit and/or credit large numbers of customers' accounts on a regular basis.
 - High Value Clearing System (HVCS) - was established by APCA in 1997 as part of the more general development of Real Time Gross Settlement (RTGS) in Australia. It provides a best practice, efficient and highly secure electronic payments mechanism for the Australian finance industry.
 - Australian Cash Distribution and Exchange System (ACDES) – which governs the exchange and distribution of wholesale cash. Until August 2001, notes and coins not in circulation were owned and managed by the RBA. The establishment of the ACDES followed the decision by the RBA to transfer the ownership and management responsibility for this cash to a number of banks.
 - Consumer Electronic Clearing System (CECS) – which provides minimum standards to facilitate the conduct and settlement of exchanges of ATM and EFTPOS payment instructions.

Membership of APCA

- 2.16 APCA has three categories of membership:
- Owner members – who have rights relating to the governance of the company, including rights to appoint directors and vote at company meetings. Owner members must be financial, trading or foreign corporations (pursuant to the meaning a Constitutional Corporation within the *Payment Systems and Netting Act 1998*) and must be a participant in at least one of APCA's clearing systems or an 'industry association' as defined by APCA's Constitution. Currently, the existing owner member industry associations are Credit Union Services Corporation Limited (CUSCAL) and Creditlink Services Ltd who

represent most credit unions and Australian Settlements Limited who represent all building societies.

Owner members are responsible (through the board of directors) for the governance of APCA and the oversight/control of APCA's five clearing systems. Directors are nominated by:

- the RBA;
 - any single owner, or group of owner members, which has or which collectively have at least 5% of the Adjusted National Clearing Volume. This is calculated based on a specified statistical period across the three systems in which the organisation or group has its highest levels of clearing activity;
 - building societies, and any building society industry association nominated by any building society(ies), acting collectively;
 - credit unions and any industry association nominated by any credit union(s), acting collectively; and
 - up until 17 August 2004, being two years after the introduction of APCA's new Constitution (which changed the company from one limited by shares and guarantee to a public company limited by guarantee only), any owner members, acting collectively, that prior to the company's conversion held 'A' class redeemable preference shares.⁸
- Participating members – are institutions that participate on a day to day basis in one or more of APCA's clearing systems. Participating members need not be owner members.

A participating member's rights and obligations on clearing and settling payment instructions are dependent on its particular category of membership within the relevant clearing system. All categories have the same rights to vote at meetings of the relevant clearing system, and to appoint a committee of management for that clearing system. The requirements for participating membership vary from system to system but the eligibility rules common to each system are that a participant must:

- be body corporate which carries on business at or through a permanent establishment in Australia;
- be able to comply with the applicable Regulations and Procedures and related technical and operational standards;
- agree to pay all applicable fees, costs, charges and expenses;

⁸ These shares were held by state and regional banks.

- not adversely affect the integrity of exchanges or otherwise introduce a significant new risk into the system; and

- not impair overall efficiency of the system.

- Associate members – are persons or organisations, not being owner members or participating members, who are otherwise interested in the functional integrity and efficiency of clearing systems. Associate members have no voting or participation rights but are entitled to attend Annual General Meetings and receive information about APCA and its clearing systems.

Management of APCA

2.17 The Board of Directors, appointed by the owner members, is responsible for the management of APCA.

2.18 Prior to the recent revision to APCA's Constitution each nominee director had one vote at the Board with six votes out of a possible nine required for a question to be decided in the affirmative. Voting is now partially related to clearing volumes. Clearing volume is the simple average of a member's percentage share of the transaction volume in each of APCA's clearing systems.⁹ Fifty votes are attributed to those members, or groups of members, with 5% to 20% of clearing volumes. Those with less than 5% have a corresponding reduction in votes below 50. Those with more than 20% gain extra votes up to a maximum of 100 votes at 30% of clearing volume.

2.19 Committees of management are appointed by the respective clearing system members to oversee the operations of each clearing system. Broadly, they are responsible for technical and efficiency standards, operating procedures and policies, supervision of observance of the clearing system rules, assessment of clearing volumes, dispute resolution, and approval of membership applications according to the relevant rules.

⁹ For the ACDES it is an average volume and value.

3. Australian Paper Clearing System¹⁰

- 3.1 The APCS was established in December 1993. It has the role of coordinating, managing and ensuring the implementation and operation of policies and procedures for the conduct and settlement of exchanges of paper-based payment instructions, i.e. primarily cheques, between its participating members. A list of the current members of the APCS is provided at Attachment A. There are more than 2.2 million cheque transactions each day, although their use of cheques is falling.¹¹
- 3.2 The APCS Procedures encompass the rules for conducting exchanges, file specifications and standard forms. The Procedures are technical in nature and are aimed at ensuring that exchanges are conducted efficiently and securely.
- 3.3 The APCS Regulations encompass membership criteria, suspension and termination provisions, representation arrangements, fees, the management committee for the system, the advisory council, member meetings, settlement and dispute resolution. Some of the Regulations, along with relevant changes to the Regulations made since the 1993 authorisation, are outlined below.

Membership Criteria

- 3.4 Entitlement to membership is now functionally based. Prior to recent amendments members had to be “providers of payment services” which essentially meant being a deposit taking institution. Now members have to be “issuers” or “collectors” (or represent and settle for such bodies) of payment instruments cleared under the APCS rules.¹² This opens up membership in line with APCS’s revised constitution and as a result Australia Post, American Express and Travelex are now entitled to take up membership if they wish, as they issue payment instruments cleared under the APCS rules.
- 3.5 There are three membership categories. Tier 1A Members clear and settle directly using an ESA.¹³ A Tier 1A Member must meet volume criteria (0.5% of “National Transaction Volume” or 2% of “Regional Transaction Volume”) to protect the efficiency of exchanges.¹⁴ A Tier 1B Member clears through a representative but settles directly through an ESA.¹⁵ A Tier 2 Member clears and settles through a representative.¹⁶ Tier 1 Members must

¹⁰ Unless otherwise stated, the information in this section is taken from APCA’s submission dated 15 September 2004, pages 8, 10-12

¹¹ APCA submission page 8.

¹² APCS Regulations, 4.6(b)

¹³ APCS Regulations, 4.2

¹⁴ APCS Regulations, 4.9

¹⁵ APCS Regulations, 4.3

¹⁶ APCS Regulations, 4.4

be prudentially supervised or otherwise be of undoubted standing to protect the integrity of the system.¹⁷

Representation Arrangements

- 3.6 A member that does not directly clear in any region must appoint a Tier 1A Member to receive items on its behalf.¹⁸ The commercial relationship between the two parties is a matter for them and is not covered in the APCS rules.

Fees

- 3.7 An entrance fee of \$5000 is levied on all new Members of the APCS.¹⁹ This fee is significantly less than the fee of \$517,000 that applied to new Tier 1 Members prior to the recent amendments to the Regulations.
- 3.8 An operational change fee of \$20,000 (indexed from the commencement date of the system) is levied on Members that require other Members to deliver items to a new BSB number²⁰. APCA advise that this fee is set to partly recover the cost incurred by Member in changing their systems to recognise a new BSB and it is used to lower the operating fees charged by APCA.
- 3.9 APCA levies a monthly operating fee on each Tier 1A Member to cover its costs of administering the system. A proportion of these costs is levied equally among Members and the balance in proportion to transaction volume.²¹ Tier 1B and Tier 2 Members also pay an annual fee to APCA of \$1000 as a contribution to cover administrative costs.²²

Management Committee

- 3.10 Under Board delegation a management committee oversees APCS. The Committee is chaired by a director nominated by the Board under Article 8.3(a) of the Constitution.²³ Committee members represent a number of banks that each have more than 5% of transaction volume and are therefore entitled to individual representation. Two members represent constituencies of banks that collectively have more than 5% of transaction volume. Credit unions and building societies are represented by industry bodies as of right and the Reserve Bank is represented as of right.²⁴ The chairman of the APCS Advisory Council also attends meetings of the management committee usually with one other member of the Advisory Council. All current Members of APCS have representation on the management committee. However there is provision for two discretionary seats to be allocated by the Board to accommodate Members of APCS that do not have 5% of

¹⁷ APCS Regulations, 4.8

¹⁸ APCS Regulations, 4.4

¹⁹ APCS Regulations, 6.1

²⁰ APCS Regulations, 6.8

²¹ APCS Regulations 6.11

²² APCS Regulations, 6.14

²³ APCS Regulations, 7.15

²⁴ APCS Regulations, 7.1

transaction volume and which cannot find representation through a constituency.²⁵

- 3.11 Each member of the management committee has a vote in proportion to the transaction volume of the APCS Member or Members that he/she represents.²⁶ More than 50% of eligible votes is required to pass a resolution.²⁷ Any matter can be referred to the Board. All changes to the Regulations as distinct from Procedures must be approved by a meeting of APCS Members and by the Board.

Advisory Council

- 3.12 APCA established an APCS Advisory Council in 1999. Advisory Councils have access to the same information as do management committees except for rare occasions when a particular piece of information is declared to be confidential by the chairman of the management committee.²⁸
- 3.13 Advisory Councils meet regularly and determine their work plans and agendas in consultation with the applicable management committee. Normally two members of the management committee attend Advisory Council meetings at the invitation of the Councils. Currently the APCS Advisory Council draws its members from processors/switches, technology providers, fraud protection providers, cheque guarantee companies, cheque paper manufacturers, printers and larger users of cheques.

Members Meetings

- 3.14 At least one meeting of all Participating Members must be held each year.²⁹

Settlement

- 3.15 Tier 1 Members are required to provide finality of settlement through an ESA at the Reserve Bank or through another means recommended by the management committee and approved by the Board.³⁰

Failure to Settle

- 3.16 New failure to settle rules were put in place in August 2004 following approvals by the RBA pursuant to the *Payment Systems and Netting Act 1998* and the *Cheques Act 1986*.
- 3.17 On 19 August 2004, the Payments System Board of the RBA determined the APCS to be an approved multilateral netting arrangement under the *Payments System and Netting Act 1998*. The Payments System Board also determined the APCS to be a “recognised settlement system” for the

²⁵ APCS Regulations, 7.1(e)

²⁶ APCS Regulations, 7.20

²⁷ APCS Regulations, 7.19

²⁸ APCS Regulations, 7A.9(d)

²⁹ APCS Regulations, 8.1

³⁰ APCS Regulations, 10.1

purposes of section 70A of the *Cheques Act 1986*, such that cheques drawn on a defaulter are taken to be dishonoured by virtue of section 70A (1) if the prerequisites for such “deemed dishonour” set out in that section are satisfied. The failure to settle rules became effective on 20 August 2004.³¹

Disputes

- 3.18 A dispute is defined as a difference between the APCA Board, the Management Committee, and any one or more APCS Members; or between two or more APCS members.³²
- 3.19 A dispute between Members or between the Board/management committee and a Member, which has application to the APCS Regulations or Procedures, can be referred to the management committee or the Board for determination and allocation of costs.³³

³¹ APCA submission, 15 September 2004, covering letter page 2

³² APCS Regulations 13.1

³³ APCS Regulations 13.1, 13.18

4. The original APCS authorisations

- 4.1 On 28 April 1993 APCA lodged three applications for authorisation (A90550³⁴, A90551³⁵ and A90552³⁶). In particular, authorisation was sought for its Memorandum and Articles of Association dated 6 February 1992 and the draft Regulations for the APCS to be established by it. APCA sought authorisation as it considered this may constitute a contract, arrangement or arrive at an understanding, where a provision of which may have the effect of substantially lessening competition within the meaning of section 45 of the Act. Authorisation was also sought in relation to conduct that would or might be exclusionary conduct, including, without limitation, a number of the Regulations for the APCS. In addition, authorisation was sought to engage in conduct that would or may constitute exclusive dealing. APCA described this conduct as the appointment of clearing representatives under the Regulations for the APCS.

Final determination

- 4.2 On 22 September 1993 the Trade Practices Commission (the TPC) issued a final determination granting conditional authorisation to APCA for the APCS Regulations and Procedures and APCA's Memorandum and Articles of Association. In its final determination the TPC recognised that the payments system is the core of the financial system and is vital to the functioning of the overall economy. It was satisfied that the public would benefit from the security and efficiency of the proposed paper clearing system under APCA and its Regulations and Procedures for the proposed system.
- 4.3 The TPC therefore concluded that in all the circumstances APCA's Memorandum and Articles of Association and its proposed Regulations and Procedures for the APCS were likely to result in benefits to the public which outweigh the potential detriment from any lessening of competition resulting from them and in respect of any exclusionary provisions contained in these documents, are likely to result in such a benefit to the public that the arrangements should be allowed to be given effect to, or the proposed arrangements should be allowed to be made.
- 4.4 The authorisation was granted so as to apply to persons who were, or became, parties to APCA's Memorandum and Articles of Association; or became parties to the proposed Regulations and Procedures for the APCS on

³⁴ Application A90550 was made under sub-section 88(1) of the Act for an authorisation to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act.

³⁵ Application A90551 was made under sub-section 88(1) of the Act for an authorisation to make or give effect to a provision of a contract or arrangement, or arrive at an understanding, where a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

³⁶ Application A90552 was made under sub-section 88(8) of the Act for an authorisation to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

or after the date on which the proposed Regulations and Procedures were made or arrived at.

- 4.5 The authorisation also extended to all future proposed amendments to the arrangements which APCA provided to the TPC and which the TPC considered not to be significant and would not materially alter the circumstances of the authorisation.
- 4.6 The TPC granted authorisation subject to the condition that Article 14.3 of the Memorandum and Articles of Association was amended to provide that any questions arising at a meeting of Directors which involves the review of a decision of the Management Committee will require five votes to be cast in favour of a resolution for it to be accepted.
- 4.7 The TPC did not impose a time limit on the authorisations although it did propose to conduct a review in five years.

Amendments to the APCS arrangements

- 4.8 APCA has made a large number of changes to the Regulations and Procedures since the authorisations were granted. APCA informed the ACCC and in each instance the ACCC did not consider that any of the changes materially altered the balance of benefit and detriment. In 2001 the ACCC conducted interested party consultations in relation to APCA's proposed amendments to the failure to settle rules for the APCS. Following the consultations, the ACCC considered that these changes were also not materially significant to the existing authorisations.
- 4.9 Effective from 17 August 2002 APCA converted its corporate structure to become a public company limited by guarantee. APCA advised the ACCC that it did not propose to submit the revised constitution for authorisation on the basis that authorisation would not be needed³⁷.
- 4.10 APCA also informed the ACCC that it was implementing a review of the APCS. The ACCC decided that it would await the completion of APCA's review of the APCS before reviewing the authorisations as proposed in the original authorisations.³⁸

³⁷ Letter from ACCC to APCA, 6 March 2002.

³⁸ Letter from ACCC to APCA, 6 March 2002.

5. The current applications

- 5.1 On 17 September 2004 APCA lodged two applications for revocation and substitution in respect of the APCS Regulations. In particular, APCA sought revocation of authorisations A90550 and A90551 and substitution of new authorisations to the extent that the provisions of the APCS Regulations relating to suspension and termination of APCS membership:
- are or may be an exclusionary provision within the meaning of section 4D of the Act; and
 - have the purpose or likely effect of substantially lessening competition in the market within the meaning of section 45 of the Act.
- 5.2 At the same time APCA also applied for the revocation of application A90552 which related to exclusive dealing conduct associated with the appointment of clearing representatives under the APCS Regulations. As the process differs from an application for revocation and substitution, this application is subject to a separate determination.
- 5.3 A full copy of the version of the APCS Regulations and Procedures that APCA lodged with its applications for revocation and substitution is on the ACCC's public register. APCA identified provisions 4.27 to 4.33, 4.35, 4.37 and 4.38 of the APCS Regulations, relating to suspension and termination of membership, as the only provisions which require authorisation. A copy of these provisions is provided at Attachment B and an overview of these provisions is provided at paragraphs 5.4 to 5.7 below.

APCS Regulations – Suspension and Termination of Membership³⁹

- 5.4 Suspension can only occur in a limited range of circumstances (Regulation 4.27(a) to (f)). Two of these are if a Member's prudential supervisor requests suspension (4.27(a)) or if the Member agrees to a suspension (4.27(b)). The circumstances where APCA can unilaterally suspend a Member are as follows:
- if a Member no longer satisfies the membership criteria (4.27(c))
 - during a period when a Member has operational difficulties preventing it from discharging its obligations under the rules (i.e. when a Member is suffering a 'Disabling Event')⁴⁰ (4.27(d))

³⁹ Information in this section is taken from APCA's submission dated 15 September 2004, pages 13 and 14

⁴⁰ A Disabling Event means: (a) a processing failure or a manifestation of industrial action which affects, or may affect, the ability of Participating Members to participate to the normal and usual extent in exchanges in one or more Regions; or (b) a total or partial loss of, or any degree of inaccessibility to, one or more places or locations at which exchanges are conducted in one or more Regions which affects Participating Members and which is of such a nature that normal and usual operations or facilities cannot be provided. (APCS Regulations, 1.1 – Definitions)

- if a Member becomes insolvent or fails to settle its clearing obligations (4.27(e)) and
 - if a Member breaches relevant provisions of the Constitution, the Regulations or the Procedures and does not rectify the breach or provide a satisfactory explanation within a prescribed time period (4.27(f)).
- 5.5 In lieu of suspending a Member, the management committee may impose conditions on the membership of that Member including changing the capacity in which that Member may participate in the APCS or vary any provision of the Procedures in relation to the exchange of Items addressed to or drawn on that Member (Regulation 4.30). The rights and obligations of that Member will then be subject to any such conditions or variations. The management committee may at any subsequent time vary or revoke any such conditions or variations.
- 5.6 Termination of membership (Regulations 4.33 – 4.35) can follow suspension provided any breach of the rules has not been remedied, the Board has consulted with the Member's prudential supervisor (if such a supervisor exists) and the Member has been provided with the opportunity to make submissions to the Board regarding termination. Otherwise, termination occurs only as a result of a Member resigning, becoming insolvent, or ceasing to exist.
- 5.7 Any resignation or termination of membership does not affect any right or liability arising under the Constitution, Regulations or Procedures prior to the time that resignation or termination takes effect (Regulation 4.36). The resigning or terminating member must immediately pay all sums of money (if any) it owes to other Members (Regulation 4.37(a)). Other Members must pay all sums of money (if any) owed to the resigning or terminating member (Regulation 4.37(b)).

6. Submissions in relation to the current applications

APCA's submission

Revocation and Substitution of A90550 and A90551

- 6.1 APCA submit that the suspension and termination provisions are last resort steps to be used only if a member's continuing membership would impair the efficiency and/or integrity of APCS. There are similar provisions in all of APCA's clearing system regulations and they have not been used since APCA was established. APCA submits that they provide a mechanism to ensure compliance with the Regulations and Procedures and to allow participants to have confidence in the APCS.
- 6.2 APCA submits that the suspension and termination provisions in APCS are currently authorised and have not been changed in the current amended Regulations.

Public detriment

- 6.3 APCA submits that the suspension and termination provisions (Regulations 4.28 - 4.38) if invoked have the effect of excluding the institution concerned from participating in and receiving services through the APCS. APCA notes that this does not automatically exclude the institution concerned from the process of clearing paper payment instruments or settlement but this would need to be done by bilateral arrangement with other participants outside of APCS. APCA submits that an excluded institution may have difficulty engaging other participants and accordingly, exclusion from the APCS may have an adverse impact on the institution concerned.

Public benefit

- 6.4 APCA submits that the following public benefits will result from the relevant provisions of the APCS Regulations:
- to function well, the economy requires the secure and efficient processing of transactions between financial institutions through a clearing framework of the kind constituted by APCA's Regulations and Procedures for the APCS
 - access to the APCS is and will continue to be available to potential participants on reasonable and clear terms
 - the APCS does not discriminate between different institutional types. Banks, non-bank financial institutions and other bodies corporate can participate provided they meet the required terms and conditions
 - APCA's payments clearing framework contributes towards protecting and enhancing the integrity of payments clearance and settlement and reducing risk within the payments system. It also contributes towards the efficiency with which payment instructions are cleared, and the timeliness and certainty with which value is provided to customers, and

- suspension or termination of a member from the APCS at APCA's instigation is important to provide a mechanism to ensure compliance with the Regulations and Procedures and to allow participants to have confidence in the APCS, even though suspension or termination is only contemplated in circumstances where the member's continuing membership would impair the efficiency and/or integrity of the APCS.
- 6.5 APCA submits that the scope of the application of suspension and termination provisions is limited to protecting the efficiency and integrity of the APCS and by extension the integrity of paper clearing and settlement. APCA submits that clearing and settlement is central to a well functioning payments system and it is in the public interest to maintain the efficiency and integrity of all aspects of clearing and settlement.
- 6.6 APCA submits that APCS can only be effective if its members operate in accordance with APCA's Constitution and the APCS Regulations and Procedures. Suspension and termination provide 'last resort' sanctions to safeguard this requirement.

Submissions from interested parties

- 6.7 The ACCC sought submissions from a wide range of interested parties in relation to the applications for revocation and substitution. Three submissions were received. A copy of all public submissions is available on the ACCC public register.⁴¹
- 6.8 The ACCC received submissions supporting the applications from the Commonwealth Bank of Australia Limited (CBA), Australia and New Zealand Banking Group Limited and CreditLink Services Limited.
- 6.9 CBA submitted that APCA is the appropriate forum for developing and setting technical and operational rules and that maintenance and enhancement of the integrity and efficiency of APCA's paper clearing system, along with the mitigation of risks affecting participants would be assisted by the ACCC approving the applications. CBA submitted that the proposed revocation and substitution will result in a net public benefit.

⁴¹ Responses, but no substantive submissions were also received from Citibank Pty Ltd and the New South Wales Office of Fair Trading.

7. The Statutory Tests

- 7.1 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted, or another person on behalf of such a person.
- 7.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined at paragraphs 1.3 – 1.7).
- 7.3 Under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 7.4 In particular, section 90(7) of the Act provides that the ACCC shall not make a determination granting authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding (not being a provision that is or may be an exclusionary provision) unless it is satisfied in all the circumstances that:
- the provision of the contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public; and
 - the benefit to the public outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- 7.5 Section 90(8) provides that the ACCC shall not make a determination granting an authorisation under section 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- 7.6 While there is some variation in the language between the test in section 90(7) and the test in section 90(8), the ACCC has until recently adopted the previous view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.⁴²
- 7.7 This view has recently been reconsidered by the Tribunal and it has found that the two tests are not precisely the same.⁴³ In particular the Tribunal considered that the test under section 90(6) (applying the same test as under section 90(7)) was limited to a consideration of those detriments arising from a lessening of competition. It was the Tribunal's view that the test under section 90(8) was not so limited.

⁴² *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

⁴³ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

8. ACCC Evaluation

The relevant market/s

- 8.1 Consistent with the statutory tests the ACCC must assess the public benefits and anti-competitive detriments resulting from the arrangements for which re-authorisation has been sought. This assessment is conducted within the context of the relevant market/s. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that net public benefit will or will not arise regardless of the scope of the defined market.
- 8.2 For the purpose of assessing the current applications the ACCC does not consider it necessary to determine the degree to which the various payments instruments (for example, debit cards, credit cards, cash and cheques) are substitutes for each other. The ACCC notes that the APCS has the role of coordinating, managing and ensuring the implementation and operation of policies and procedures for the conduct and settlement of exchanges of paper-based payment instructions, primarily cheques but also money orders and travellers' cheques, between its participating members.
- 8.3 The APCS Procedures encompass the rules for conducting exchanges, file specifications and standard forms. The APCS Regulations encompass membership criteria, suspension and termination provisions, representation arrangements, fees, the management committee for the system, the advisory council, member meetings, settlement and dispute resolution.
- 8.4 The ACCC has therefore confined its assessment of the applications to the clearing and settlement of paper based payment instructions.
- 8.5 There has been a rapid decline in the use of cheques in the Australian economy, from more than 80 per cent of the dollar value of non-cash retail payments in 1995 to less than 30 per cent in 2002.⁴⁴ In May 2000 there was an average of 3.1 million cheque transactions each day for an average total value of \$9.7 billion. In May 2004 there was an average of 2.2 million cheque transactions each day for a total average value per day of \$7.1 billion.⁴⁵ No separate figures are available for other paper based transactions.

Future with and without test

- 8.6 In order to identify and measure the public benefit and public detriment generated by the conduct for which authorisation is sought the ACCC applies the 'future with-and-without test'. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The ACCC will compare the public benefit and public detriment that will result in the future if authorisation is granted with the counterfactual.

⁴⁴ Reserve Bank of Australia, *The Changing Australian Retail Payments Landscape*, July 2003, pages 2-3.

⁴⁵ APCA, *Payments Monitor* – payments statistics, Third Quarter 2004.

- 8.7 Minimum standards and procedures, or rules (for example in respect of the payment instrument, payments messages and formats, infrastructure and communication links as well as the clearing and settlement processes) in a non-cash payment system such as cheques are necessary to ensure the integrity and security of the system. These rules can be set either through a series of bilateral agreements between the individual parties that exchange payments messages with each other within the system, or collectively by all parties that provide payment services within the system. APCA is the organisation through which payments system participants collectively set such rules for a number of systems including cheques.
- 8.8 The ACCC considers that the most likely counterfactual in the foreseeable short to medium term if the ACCC denies authorisation is the market with the collectively set minimum standards and procedures as contained in the APCS Regulations and Procedures, but without the suspension and termination provisions. This is particularly as APCA has only sought re-authorisation for the suspension and termination provisions of the APCS Regulations as it considers that these provisions may constitute an exclusionary provision and/or may have the effect of substantially lessening competition.
- 8.9 Accordingly, in the absence of authorisation, APCA and its members may be at risk of breaching the Act and would therefore be unlikely to give effect to those provisions of the APCS Regulations. In this situation it may be that sanctions for non-compliance with the APCA Constitution and APCS Regulations and Procedures would have to be subject to bilateral agreements.

Public detriments

Suspension and termination provisions

- 8.10 APCA submits that the suspension and termination provisions, if invoked, have the effect of excluding the institution concerned from participating in and receiving services through the APCS. While this does not automatically exclude the institution concerned from the process of clearing paper payment instruments or settlement, it would need to be done by bilateral arrangement with other participants outside of the APCS. APCA submits that an excluded institution may have difficulty engaging other participants and accordingly, exclusion from the APCS may have an adverse impact on the institution concerned.
- 8.11 The suspension provisions allow for the Management Committee to suspend membership, including: at the request of the member's prudential supervisor; by agreement with the member; where the member no longer satisfies the membership requirements; during a period where the member is unable to meet its obligations under the rules ('a disabling event'); where the member becomes insolvent or fails to settle its clearing obligations; and, where a member breaches provisions of the Constitution, Regulations or Procedures and does not rectify the breach or provide a satisfactory explanation within a

designated time period.⁴⁶ The Management Committee may impose conditions on the membership of a Member instead of suspending the Member.⁴⁷

- 8.12 The termination provisions provide that termination of membership can follow suspension provided that any breach of the rules has not been remedied, the Board has consulted with the Member's prudential supervisor (if such a supervisor exists) and the Member has been provided with the opportunity to make submissions to the Board regarding termination. Otherwise, termination occurs only as a result of a Member resigning, becoming insolvent, or ceasing to exist.⁴⁸
- 8.13 APCA submits that these provisions are 'last resort' sanctions and have not been used or specifically contemplated since APCA's establishment. APCA notes that the suspension and termination provisions in the APCS Regulations are currently authorised and have not been changed in the current amended APCS Regulations.
- 8.14 The ACCC agrees with APCA's view that exclusion from the APCS may have an adverse impact on the institution concerned as they may not be able to clear and settle paper payment instruments. This may result in a low level of anti-competitive detriment. However, the ACCC considers that the suspension and termination provisions do not place unreasonable requirements on Members.
- 8.15 The ACCC considers that there are two important safeguards against anti-competitive misuse of the suspension and termination provisions – firstly, the possibility of APCA Board review of Management Committee decisions provides a safeguard, and secondly, the RBA's ability to monitor the performance of the APCS Management Committee through its position on both the Committee and the APCA Board.
- 8.16 In its 1993 authorisation, the TPC was concerned that although the four nationally operating banks would not collectively command sufficient votes to pass a resolution at the Board level, they would have sufficient votes to collectively block or veto consideration of matters by the Board, including reviews of Management Committee decisions.⁴⁹
- 8.17 Therefore, the authorisation granted in 1993 was subject to the condition that Article 14.3 of APCA's Memorandum and Articles of Association be amended to provide that any question arising at a meeting of Directors which involves the review of a decision of the Management Committee would require five votes (out of a total of nine) to be cast in favour of a resolution for it to be passed.⁵⁰ The purpose of this condition was to ensure that the

⁴⁶ APCS Regulations, 4.27(a) to (f)

⁴⁷ APCS Regulations, 4.30

⁴⁸ APCS Regulations 4.33 to 4.35

⁴⁹ Trade Practices Commission, APCS Determination, 22 September 1993, page 24, paragraph 6.8

⁵⁰ Trade Practices Commission, APCS Determination, 22 September 1993, page 32, paragraph 7.3

major four banks were not able to veto any APCA Board review of Management Committee decisions.

- 8.18 Currently, decisions of the APCS Management Committee may be reviewed by the APCA Board at the request of participating members. Voting on the APCA Board is partially related to clearing volumes, which is essentially the simple average of a member's percentage share of transaction volume in each of the APCA's clearing systems.
- 8.19 Article 7.3(a) of the current APCA Constitution is consistent with the condition imposed by the TPC. It provides that at meetings of the APCA Board, any question arising in a meeting of directors which involves the review of a decision by a Management Committee requires 55% or more of the maximum number of votes to be cast in favour of the question for it to be passed.
- 8.20 In contrast, any other question arising in a meeting of directors is to be answered in the affirmative if 66.67 per cent or more of the maximum number of votes which could be cast on a poll if all directors entitled to vote were present at that meeting are cast in favour of the question.⁵¹ APCA advised that the voting structure was specifically designed so that the major banks could not control resolutions at APCA.⁵²
- 8.21 The ACCC continues to consider that the ability of the APCA Board to review Management Committee decisions is an important means of guarding against the potential for discriminatory and anti-competitive decisions by the Management Committee.
- 8.22 The ACCC also notes that the RBA has representation on both the APCS Management Committee and the APCA Board. The TPC noted in its 1993 authorisation that it expected that the RBA would, to the extent that it was able, seek to promote competition in the payments system.⁵³ The ACCC considers that the RBA's ability to monitor the performance of the APCS Management Committee through its position on both the Committee and the APCA Board provides an important check and balance on the APCS arrangements.

Issues arising from the original TPC authorisation

- 8.23 In its 1993 authorisation, the TPC identified concerns in relation to the control of the Management Committee and the APCA Board (see paragraphs 8.16 - 8.17) and also in relation to access to the paper clearing system. The TPC did not identify any concerns with the suspension or termination provisions of the APCS Regulations.

⁵¹ Constitution of APCA, Article 7.3(b)

⁵² Transcript of proceedings, Australian Competition Tribunal hearing in relation to the proposed agreement to reduce EFTPOS interchange fees to zero, page 246.

⁵³ Trade Practices Commission, APCS Determination, 22 September 1993, page 25, 6.10

- 8.24 In relation to access to the paper clearing system, the TPC stated that the RBA should establish objective criteria and specify the time frame for providing building societies and credit unions with ESA facilities for the clearing of paper transactions. It considered that without the availability of this facility, these types of institutions would be unable to gain improved access to the paper clearing system.⁵⁴ Subsequent to the TPC's determination, Special Service Providers (SSPs) were established to provide settlement services for building societies and credit unions. Two SSPs were granted ESAs in 1994. In March 1999 the Payments Systems Board of the RBA announced changes to the eligibility requirements for ESAs which liberalised access to the accounts.⁵⁵ Individual building societies, credit unions and other organisations can now be eligible for ESAs.
- 8.25 The TPC also noted that the *Cheques and Payment Orders Act 1986* (the CPO Act) did not enable building societies and credit unions to issue cheques drawn on themselves as principals. The TPC stated that this restriction should be reviewed as it impeded full participation in the paper clearing system by these types of institutions.⁵⁶ The CPO Act was amended in 1998 to allow building societies and credit unions to issue cheques drawn on themselves.⁵⁷
- 8.26 APCA submits that access to the APCS is and will continue to be available to potential participants on reasonable and clear terms. APCA submits that it does not discriminate between different institutional types. Banks, non-bank financial institutions and other bodies corporate can participate in the APCS provided they meet the required terms and conditions.
- 8.27 The ACCC did not receive any submissions outlining concerns with any provisions of the APCA Constitution or the APCS Regulations and Procedures.
- 8.28 The ACCC notes recent changes made by APCA to the membership criteria for the APCS (see paragraph 3.4) mean that Members no longer need to be deposit taking institutions. Other organisations such as Australia Post, American Express and Travelex are now entitled to take up membership if they wish, as they issue payment instruments cleared under the APCS rules.⁵⁸
- 8.29 In addition, the ACCC notes that APCA established an APCS Advisory Council in 1999. The purpose of the Advisory Council is to provide a forum for interested organisations (who are not eligible for membership, but issue payment instruments, process and/or switch payment messages or otherwise participate in payments transfers related to the paper clearing cycle) to

⁵⁴ Trade Practices Commission, APCS Determination, 22 September 1993, page ii.

⁵⁵ Reserve Bank of Australia, *The Role of Exchange Settlement Accounts*, 1 March 1999.

⁵⁶ Trade Practices Commission, APCS Determination, 22 September 1993, page ii.

⁵⁷ *Cheques and Payment Orders Amendment Act 1998*.

⁵⁸ APCA submission, 15 September 2004, page 10

communicate their opinions, advice and information to the Management Committee.⁵⁹

- 8.30 The ACCC also notes that recent amendments to the APCS Regulations included a significant reduction in the entrance fees that applied to new Tier 1 Members from \$517,000 to \$5000.⁶⁰ All new members will now be levied the same fee.⁶¹
- 8.31 Although the applications for re-authorisation only relate to certain of the suspension and termination provisions of the APCS Regulations, the ACCC considers that other provisions of the Constitution and APCS Regulations and Procedures are relevant to the ACCC's consideration of the public detriment arising from the application, particularly as they may invoke the use of the suspension and termination provisions.
- 8.32 The ACCC considers that the issues of concern identified by the TPC in its 1993 authorisation have been addressed. Furthermore, the ACCC has not been provided with information to suggest that any provisions of the APCA Constitution or APCS Regulations and Procedures impose inappropriate requirements on Members or would be likely to result in the anti-competitive use of the suspension and termination provisions.

Public Benefit

- 8.33 APCA submits that its payments clearing framework contributes towards protecting and enhancing the integrity of payments clearance and settlement and reducing risk within the payments system. It also contributes towards the efficiency with which payment instructions are cleared, and the timeliness and certainty with which value is provided to customers. APCA submits that to function well, the economy requires the secure and efficient processing of transactions between financial institutions through a clearing framework of the kind constituted by the APCS Regulations and Procedures.
- 8.34 APCA also submits that the suspension or termination of a member from the APCS at APCA's instigation is important to provide a mechanism to ensure compliance with the Regulations and Procedures and to allow participants to have confidence in the APCS, even though suspension or termination is only contemplated in circumstances where the member's continuing membership would impair the efficiency and/or integrity of the APCS.
- 8.35 In its 1993 determination the TPC recognised that there is substantial public benefit in the operation of a secure and efficient payments system and accepted that the payments system is the core of the financial system and is vital to the functioning of the overall economy. The TPC was satisfied that the public would benefit from the efficient operation, security and integrity of the proposed paper clearing system under APCA and its Regulations and

⁵⁹ APCS Regulations, 7A.2

⁶⁰ APCA, *ACCC APCS Re-Authorisation Briefing*, 21 June 2004

⁶¹ APCS Regulations, 6.1

Procedures for the proposed system.⁶² The TPC also recognised that any duplication of payments systems outside of the company's systems was not necessarily desirable as it could result in inefficiencies and a wasteful use of resources.⁶³

- 8.36 The ACCC accepts that a public benefit, in the form of the efficient operation and enhanced security and integrity of the APCS will continue to result from the APCS through the functioning of the suspension and termination provisions of the APCS Regulations. The exclusion of these provisions would be likely to diminish the efficiency and integrity of the APCS and reduce the confidence of Members and users of the APCS in the system.
- 8.37 It may also be argued that the collective setting of suspension and termination provisions may result in transactions cost savings as in the absence of authorisation, these provisions would be subject to bilateral negotiation between individual participants (see the discussion of the counterfactual at paragraphs 8.6 – 8.9). APCA did not make any submissions in relation to transactions cost savings.

Conclusion – weighing the public detriments and public benefits

- 8.38 In order to grant authorisation the ACCC must be satisfied that the relevant provisions of the APCS Regulations result in a net public benefit consistent with the statutory tests set out in section 7.
- 8.39 The ACCC considers that the anti-competitive detriment associated with the suspension and termination provisions is likely to be minimal. The ACCC considers that there are important checks and balances within APCA and the APCS arrangements to guard against the anti-competitive use of the suspension and termination provisions. In particular, the ACCC notes the review power of the APCA Board over decisions of the APCS Management Committee, including those regarding suspension and termination, and the ability of the RBA to monitor the performance of the APCS Management Committee through its position on both the Management Committee and the APCA Board.
- 8.40 The ACCC considers that the suspension and termination provisions of the APCS Regulations are likely to continue to result in a benefit to the public through the protection of the security, efficiency and integrity of paper clearing processes.
- 8.41 Overall, following consideration of submissions by APCA and interested parties, and the information before it, the ACCC concludes that the public benefits resulting from the suspension and termination provisions of the APCS Regulations will outweigh the resulting public detriments. Accordingly the ACCC proposes to revoke authorisations A90550 and A90551 and grant substitute authorisations A90932 and A90933.

⁶² Australian Payments Clearing Association Limited (A90550, A90551 and A90552), Determination, 22 September 2004, paragraphs 6.32, 6.36 and 6.41.

⁶³ Trade Practices Commission, APCS Determination, 22 September 1993, page 23, paragraph 6.4

Time Limit

- 8.42 Section 91(1) of the Act allows the ACCC to grant authorisation for a specific period of time. The ACCC proposes that, in these circumstances, a five year time period is appropriate.
- 8.43 The ACCC notes, however, that under section 91B(3) it is able to revoke an authorisation at any time (subject to a consultation process), if it appears to the ACCC that:
- a) the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular; or
 - b) condition to which the authorisation was subject has not been complied with; or
 - c) there has been a material change of circumstances since the authorisation was granted.

9. Draft Determination

The applications

- 9.1 The Trade Practices Commission (the TPC) granted authorisation to A90550, A90551 and A90552 on 22 September 1993, in response to applications from the Australian Payments Clearing Association Limited (APCA) for authorisation of its proposed Memorandum and Articles of Association and Regulations and Procedures for the Australian Payments Clearing System. The authorisation granted by the TPC was subject to conditions.
- 9.2 On 17 September 2004, APCA lodged applications under section 91C of the *Trade Practices Act 1974* (the Act) for revocation of authorisations A90550 and A90551 and substitution of new authorisations in relation to provisions 4.27 to 4.33, 4.35, 4.37 and 4.38 of the APCS Regulations. Revocation was also sought in respect of application A90552. As the revocation process differs from an application for revocation and substitution, this application is subject to a separate determination.

The statutory test

- 9.3 Pursuant to section 91C (7) of the Act, and for the reasons outlined in Part 8 of this determination, the ACCC is satisfied that the proposed revocation of authorisations A90550 and the substitution of A90932 is likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 9.4 Pursuant to section 91C (7) of the Act, and for the reasons outlined in Part 8 of this determination, the ACCC is satisfied that the proposed revocation of authorisation A90551 and the substitution of A90933 is likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements.

Conduct authorised

- 9.5 Accordingly, the ACCC proposes, subject to any pre-determination conference requested and further submissions, to revoke authorisations A90550 and A90551 and grant substitute authorisations A90932 and A90933 as sought by APCA.
- 9.6 Application A90932 replaces authorisation A90550 which was made under sub-section 88(1) of the Act for an authorisation to make or give effect to a provision of a contract or arrangement, or arrive at an understanding, where a provision of the contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act.
- 9.7 Application A90933 replaces authorisation A90551 which was made under sub-section 88(1) of the Act for an authorisation to make a contract or arrangement, or arrive at an understanding, where a provisions of which would have the purpose, or would have or might have the effect, of

substantially lessening competition within the meaning of section 45 of the Act.

- 9.8 The applications relate to provisions 4.27 to 4.33, 4.35, 4.37 and 4.38 of the APCS Regulations. These provisions are provided at Attachment B.
- 9.9 Pursuant to section 88(10) of the Act authorisation is also proposed to apply to any other person who subsequently becomes a party to the contract, arrangement and understanding constituted by the relevant provisions of the APCS Regulations at a time after authorisation is granted.

Time limit

- 9.10 The ACCC proposes to grant the substitute authorisations for a period of five years from the date on which the authorisations come into force.

Attachment A

APCS Members

Adelaide Bank Limited
AMP Bank Limited
Arab Bank Australia Limited
Australia and New Zealand Banking Group Limited
Australian National Credit Union Limited
Australian Settlements Limited
B & E Limited
Bananacoast Community Credit Union Limited
Bank of America National Association
Bank of China
Bank of Cyprus Australia Pty Limited
Bank of Queensland Limited
Bank of Western Australia Limited
Bank One National Association
Bendigo Bank Limited
Citibank Pty Limited
Commonwealth Bank of Australia
Credit Union Services Corporation (Australia) Limited
CreditLink Services Limited
Deutsche Bank AG
First Australian Building Society Limited
Greater Building Society Limited
HSBC Bank Australia Limited
HSBC Bank plc
HSBC Building Society (Australia) Limited
Heritage Building Society Limited
Hume Building Society Limited
Hunter United Employees' Credit Union Limited
IMB Limited
ING Bank (Australia) Limited
ING Bank N.V. (Sydney Branch)
IOOF Building Society Limited
JP Morgan Chase Bank
Laiki Bank (Australia) Limited
Lifeplan Australia Building Society Limited
Mackay Permanent Building Society Limited
Macquarie Bank Limited
Maitland Mutual Building Society Limited
Members Equity Pty Limited
Mizuho Corporate Bank Limited
National Australia Bank Limited
Newcastle Permanent Building Society Limited
Oversea-Chinese Banking Corporation Limited
Pioneer Permanent Building Society Limited
Police Association Credit Co-operative Limited
Queensland Police Credit Union Limited
Queensland Professional Credit Union Limited
Queenslanders Credit Union Limited
Rabobank Australia Limited
Reserve Bank of Australia
St George Bank Limited
State Street Bank & Trust Company
Suncorp Metway Limited
Taiwan Business Bank, Sydney Branch
The Bank of Tokyo-Mitsubishi Limited, Australian Branch
The International Commercial Bank of China
United Overseas Bank Limited
Victoria Teachers Credit Union Limited
Westpac Banking Corporation
Wide Bay Australia Limited

Attachment B

Suspension

4.27 The Management Committee may suspend the membership of a Participating Member for a specified or indefinite period of time in the following circumstances (each a "Suspension Event"):

- (a) the Participating Member is subject to prudential supervision and the relevant supervisor requests such suspension;
- (b) by agreement with the Participating Member concerned;
- (c) the Participating Member no longer satisfies any applicable requirement for membership set out in Regulations 4.6 to 4.8 inclusive;
- (d) a Disabling Event occurs in respect of the Participating Member, but only during the continuance of that Disabling Event;
- (e) an Insolvency Event (not being an event which results in automatic cessation of membership pursuant to Regulation 4.33(b) or (c)) occurs in respect of the Participating Member; or
- (f) the Participating Member breaches its obligations under the Constitution, these Regulations or the Procedures and fails to rectify the breach or provide an explanation satisfactory to the Management Committee within 30 days of receipt of a request from the Secretary to rectify the breach or provide such an explanation.

Law amended
17/01/02

A Participating Member may also be automatically suspended in accordance with Part 12.

Effect of Suspension

4.28 Subject to Regulation 4.31, a Participating Member whose membership is suspended under Regulation 4.27 is not entitled (including, without limitation, in any capacity as a Representative) to:

Last amended
effective 20/06/04

- (a) participate in the Australian Paper Clearing System (CS1);
- (b) clear and settle Items in accordance with these Regulations and the Procedures; nor
- (c) vote at any APCS meeting convened in accordance with Part 8,

except to the extent set out in the Procedures or approved by the Management Committee (or the Chief Executive Officer if authorised to grant such approvals by the Management Committee). If that Participating Member is an Appointor, the relevant provisions of the relevant Representation Agreement are also suspended during the period of suspension under Regulation 4.27.

4.29 In addition, if a Participating Member whose membership is suspended under Regulation 4.27 has nominated a member of the Management Committee pursuant to Regulation 7.1(b) or (c), that member is not entitled to vote at meetings of the Management Committee, but may continue to attend and participate in such meetings, during the period of suspension under Regulation 4.27.

4.30 If a Suspension Event occurs in respect of a Participating Member, the Management Committee may (in lieu of suspending the membership of that Participating Member) impose conditions on the membership of that Participating Member (including changing the capacity in which that Participating Member may participate in the Australian Paper Clearing System (CS1)) or vary any provision of the Procedures in relation to the exchange of Items addressed to, or drawn on, that Participating Member. The rights and obligations of that Participating Member under these Regulations shall be subject to any such conditions or variation. The Management Committee may at any subsequent time vary or revoke any such conditions or variation.

4.31 A Participating Member whose membership is suspended under Regulation 4.27 or which is subject to any condition or variation under Regulation 4.30 is not excused from discharging, in accordance with these Regulations and the Procedures, obligations incurred by it under the Constitution, these Regulations and the Procedures including, without limitation, obligations incurred in connection with Items exchanged prior to the suspension of that Participating Member, except as expressly provided in or pursuant to these Regulations or the Procedures.

Last amended
effective 20/06/04

4.32 The Secretary must immediately notify all Participating Members (by the most expeditious means available) of any suspension under Regulation 4.27 and must promptly notify all Participating Members of all other action taken under Regulations 4.27 to 4.31 inclusive.

Termination

4.33 A Participating Member ceases to be a Participating Member on:

- (a) resignation;
- (b) becoming insolvent or making an arrangement or composition with creditors generally;

- (c) being wound-up, dissolved or otherwise ceasing to exist; or
- (d) the Board terminating that Participating Member's membership in accordance with the Constitution and these Regulations.

Last amended
28/06/2008

4.35 The Board (after consultation with the Management Committee) may by notice in writing to a Participating Member, terminate the membership of that Participating Member with immediate effect or with effect from a Membership Change Date occurring not less than 3 months and not more than 6 months after the service of the notice, provided that the Board may not terminate the membership of a Participating Member unless the following pre-conditions have been fulfilled:

- (a) a Suspension Event has occurred in respect of that Participating Member and has not been remedied;
- (b) (if that Participating Member is subject to prudential supervision) the Board has consulted with the relevant supervisor regarding such termination; and
- (c) the Board has provided an opportunity for that Participating Member to make submissions to the Board regarding such termination.

The Board is not obliged to give any reasons for such decision and may revoke any such notice at any time before it becomes effective.

Effect of Termination

4.37 Subject to any rights of set-off, counterclaim or combination which are available at law, upon any resignation or termination of the membership of a Participating Member:

- (a) the resigning or terminating Participating Member must immediately pay all sums of money (if any) owed by it to any other Participating Member in respect of exchanges in each Region; and

- (b) all sums of money (if any) owed to it by any other Participating Member in respect of all such exchanges must be paid by that other Participating Member to the resigning or terminating Participating Member.

The records maintained by the Company shall be prima facie evidence of the sums owing by, or to, such Participating Member.

- 4.38 Any Participating Member which resigns or whose membership is terminated immediately ceases to be entitled to effect exchanges in accordance with these Regulations and the Procedures.

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