



Australian  
Competition &  
Consumer  
Commission

# Determination

## Application for Revocation and substitution

**lodged by**

**Australian Payments Clearing Association Limited**

**in respect of**

**the High Value Clearing System (HVCS)**

**Date: 14 February 2007**

**Revocation of authorisation nos:**  
A90617 to A90619  
**and substitution with authorisation nos:**  
A91016 to A91018

**Public Register no:** C2006/1966

**Commissioners:**

Samuel  
Sylvan  
King  
McNeill  
Smith  
Willett

# Summary

The ACCC grants revocation of authorisations A90617 to A90619 and substitution with authorisations A91016 to A91018 in relation to the High Value Clearing System (HVCS) for 5 years.

## The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether the proposed arrangements result in a net public benefit.

## The application for reauthorisation

The HVCS regulations and procedures were previously authorised by the ACCC on 1 April 1998. The HVCS provides a framework within which participating members can electronically exchange high value payments with each other. Authorisation was granted for 10 years.

On 20 October 2006, the Australian Payments Clearing Association Limited (APCA) lodged an application for revocation of authorisations A90617 to A90619 and substitution with authorisations A91016 to A91018 in relation to the HVCS.

While authorisation was originally granted to all the HVCS regulations and procedures, APCA is seeking reauthorisation only for HVCS Regulations 5.2(h) and 5.16 to 5.31 (inclusive) and clauses 5.1 and 5.2 of the HVCS Procedures. These provisions (referred to as the 'relevant provisions') relate to suspension and termination of HVCS membership and the requirement that members join SWIFT and use the SWIFT Payment Delivery System (PDS) in clearing and settling payments.

## Public detriment

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

Further, the ACCC considers any potential detriment is mitigated by the checks and balances in place to ensure that these requirements are not used for anti-competitive purposes. Importantly in this respect, the ACCC notes that since these requirements were instituted in 1997 they have not been invoked to prevent any member or prospective member from participating in the HVCS.

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

## **Public benefit**

The ACCC considers that the suspension and termination provisions of the HVCS regulations are likely to continue to result in a benefit to the public through the protecting of the security, efficiency and integrity of the high value payments clearing and settlement process.

Similarly, the ACCC considers that there are likely to be considerable efficiency gains for participating institutions through a centrally co-ordinated approach to the clearing and settlement of high value payments through the SWIFT PDS system. In addition to the likely cost savings generated by such an arrangement, the ACCC also accepts that these arrangements promote a more secure payments system and reduce potential settlement risk by facilitating settlement on an almost instantaneous basis through exchange settlement accounts.

## **Balance of public benefit and detriment**

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

## **Length of authorisation**

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

In this instance, the ACCC has decided to grant authorisation for the relevant provisions for 5 years.

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## List of abbreviations

The Act	<i>The Trade Practices Act 1974</i>
ANZ	Australia and New Zealand Banking Group Limited
APCA	Australian Payments Clearing Association Limited
BITS	Bank Interchange Transfer System
CBT	Computer based terminal (including hardware and software) and, in relation to an APCA PDS, means a computer based terminal used to access the APCA PDS.
ESA	Exchange Settlement Account
HVCS	High Value Clearing System
Participating Members	Participating members are institutions that participate on a day-to-day operational basis in one or more of APCA's clearing systems. Participating members need not be owner members.
PSNA	<i>Payment Systems and Netting Act 1998 (Cth)</i>
RBA	Reserve Bank of Australia
RITS	Reserve Bank Information and Transfer System (RITS)
RTGS	Real Time Gross Settlement system consists of RITS/RTGS central platform, and a number of feeder systems (such as HVCS and RITS) which provide payments to be settled across that platform.
SWIFT	Society for Worldwide Interbank Financial Transactions
SWIFT PDS CUG	SWIFT PDS Closed User Group
SWIFT PDS	SWIFT Payment Delivery System

# 1. Introduction

## Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 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’.
- 1.3 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.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 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 all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 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 determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.
- 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. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

## The applications

- 1.9 On 1 April 1998, the ACCC granted authorisations A90617 to A90619 to the Australian Payments Clearing Association (APCA) in relation to the regulations and procedures for the High Value Clearing System (HVCS). The HVCS provides a framework within which participating members can electronically exchange high value payments with each other.

- 1.10 On 20 October 2006, APCA lodged an application for revocation of authorisations A90617 to A90619 and substitution with A91016 to A91018 in relation to the HVCS.
- 1.11 While authorisation was originally granted to all the HVCS regulations and procedures, APCA is seeking reauthorisation only for HVCS Regulations 5.2(h) and 5.16 to 5.31 (inclusive) and clauses 5.1 and 5.2 of the HVCS Procedures. These provisions (referred to as the ‘relevant provisions’) relate to suspension and termination of HVCS membership and the requirement that members join the Society of Worldwide Interbank Financial Telecommunications (SWIFT) network and use the SWIFT Payment Delivery System (PDS). These provisions are attached at appendix B to the determination. A list of HVCS members is at appendix A.

## Chronology

- 1.12 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1: Chronology of application for revocation of authorisations A90617 to A90619 and substitution with authorisations A91016 to A91018**

DATE	ACTION
20 October 2006	Application for authorisation lodged with the ACCC.
17 November 2006	Closing date for submissions from interested parties in relation to the applications for reauthorisation.
4 December 2006	Closing date for APCA to respond to interested party submissions. APCA did not provide comment.
17 January 2007	Draft Determination issued.
7 February 2007	Closing date for submission from interested parties and the applicant in relation to the draft determination. No substantial submissions were made.
14 February 2007	Final Determination issued.

## 2. Background to the application<sup>1</sup>

### Payment Systems

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

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<sup>1</sup> The information in this section is sourced primarily from APCA's submission in support of the applications for reauthorisation and information contained on APCA's website [www.apca.com.au](http://www.apca.com.au)



## The applicant

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

### *The High Value Clearing System*

- 2.13 The High Value Clearing System was established by APCA in 1997 as part of the more general development of RTGS in Australia. APCA submits that it provides a best practice, efficient and highly secure electronic payments mechanism for the Australian finance industry.
- 2.14 The mechanism for HVCS participating members exchanging payments with each other is the SWIFT PDS.

- 2.15 SWIFT is a consortium of more than 2200 member banks, based in Brussels but operating a worldwide system for rapid transfer of money and messages among financial markets. The system, established in 1973 to eliminate paper flows, is owned and directed by the member banks. The SWIFT network is the proprietary telecommunication network and associated software owned and utilised by SWIFT to provide communications services to its users.
- 2.16 The SWIFT PDS uses SWIFT's FIN-Copy product to exchange payment messages between its participating members in a closed user group. When a participating member sends a payment to FIN-Copy, it is queued while a settlement request message is sent via the SWIFT network to the RBA's settlement platform, the Reserve Bank Information and Transfer System (RITS). RITS settles the payment and forwards a settlement response to FIN-Copy. FIN-Copy matches the settlement response it receives to the queued payment. It then forwards the completed payment to the participating member which is to receive the payment.
- 2.17 All members settle directly for their own transactions. Consequently, there is only one category of member in the HVCS a direct clearer/direct settler. Participating members in the HVCS comprise all parties which hold exchange settlement accounts with the RBA, as well as the RBA. Settlement of HVCS payments occurs on a real time (i.e. immediate) basis.
- 2.18 Large value payments and payments which are time critical are primarily dealt with through HVCS.
- 2.19 The HVCS regulations previously authorised by the ACCC encompass membership criteria, suspension and termination provisions, representation arrangements, fees, the management committee for the system, the advisory council, member meetings, settlement and dispute resolution. The HVCS procedures previously authorised encompass the rules for conducting exchanges, file specifications and standard forms. They are technical in their nature and are directed to ensuring that exchanges are conducted efficiently and securely. Some essential and important features are the membership criteria, fees, management committee, advisory council, members meetings, failure to settle and disputes.

#### *HVCS - Management Committee and Board of Directors*

- 2.20 Participating members of each system appoint a committee of management with delegated responsibility for overseeing the operations of the 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 rules. Participating members are entitled to participate in annual meetings of the relevant systems. These meetings provide a forum for discussion on all matters relating to the operations and management of the system.
- 2.21 In relation to the Board of Directors, voting directors of APCA are nominated by owner members. Directors hold office for 2 years. The chairman is a non-voting director and holds office for two years from the date of appointment, and may be re-appointed. A nominee director may not simultaneously hold the office of chairman of APCA. APCA's policy since October 1999 has been to appoint an independent chairman from

outside APCA's membership. The Chief Executive Officer of APCA is also a non-voting director.

- 2.22 The voting at management committee level is proportionate to clearing, with a simple majority of over 50% of eligible votes required to pass a resolution.
- 2.23 Voting at the Board and general meeting level is more complex. Voting is partially related to clearing volume, while preserving checks and balances that prevent particular groupings having a predominant voting position. Clearing volume for this purpose is the simple average of a members' percentage share of the transaction volume in each of APCA's clearing systems. Fifty votes are given to those members or groups of members with 5% and up 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. Two thirds of eligible votes are required to pass a normal resolution.

#### *HVCS – Membership criteria*

- 2.24 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 "senders" or "issuers" (or represent and settle for such bodies) of payments cleared under the HVCS rules. This represents an opening of membership in line with APCA's revised Constitution.
- 2.25 There is a single class of membership in the HVCS. HVCS members must directly send and receive payments with all other HVCS members and clear and settle directly using an ESA or by such other means as recommended by the management committee and determined by the Board.
- 2.26 APCA notes that the HVCS members must be able to comply with all applicable requirements of any relevant service provider. The only service provider of HVCS at present is SWIFT.
- 2.27 At least one meeting of all HVCS members must be held each year.

#### *Settlement*

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

#### *Failure to settle*

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

#### *Disputes*

- 2.30 A dispute between HVCS members or between the Board/management committee and a HVCS member, which has application to the HVCS regulations and procedures can

be referred to the management committee or the Board for determination and allocation of costs.

#### *HVCS fees*

- 2.31 An entrance fee of \$25,000 (indexed from the commencement of the system) is levied on all new members of HVCS to recover APCA's administrative costs.
- 2.32 APCA levies a monthly operating fee on each HVCS member to cover its costs of administering the system. A proportion of these costs is levied equally among members and the balance in proportion to the transaction volume. Each HVCS member also pays an annual fee to APCA of \$1,000 as a contribution to covering administrative costs.

#### *Advisory Council*

- 2.33 There is provision in the HVCS regulations for a HVCS Advisory Council to be established. APCA notes, to date there has been no demand from non member participants in the clearing system for the HVCS Advisory Council.

### **The application for reauthorisation**

- 2.34 While authorisation was originally granted to all the HVCS regulations and procedures, APCA is seeking reauthorisation only for those provisions related to suspension and termination of HVCS membership and the requirement that members join SWIFT and use the SWIFT PDS.
- 2.35 APCA submits that no other provisions of the HVCS regulations and procedures are at material risk of breaching the Act.

#### *Suspension and termination provisions*

- 2.36 The management committee, after consultation with the RBA, may suspend the membership of a participating member for a specified or indefinite period of time in the circumstances set out in Regulation 5.16 (a) to (f). Two of these are if a HVCS member agrees to suspension. The circumstances where APCA can unilaterally suspend a HVCS member are as follows:
- if a member no longer satisfies the membership criteria
  - during a period when a member has operational difficulties preventing it from discharging its obligation under the rules (i.e. when a member is suffering a 'disabling event')
  - if a member becomes insolvent or fails to settle its clearing obligations and
  - if a member breaches relevant provisions of the Constitution, the regulations or the procedures and does not rectify the breach or provide a satisfactory explanation within the prescribed time period.
- 2.37 Instead of suspending a HVCS member, the management committee may impose conditions on the membership of that member or may vary any provision of the procedures in relation to the exchange of items addressed to or drawn on that member

(Regulation 5.19). 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.

- 2.38 Termination of membership (Regulations 5.24 to 5.26) 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.

*SWIFT membership and use*

- 2.39 As part of the membership criteria, members of the HVCS must be able to comply with all applicable requirements of any relevant service provider. The only service provider for the HVCS at present is SWIFT.
- 2.40 Clause 5.1 of the HVCS Procedures states that to use the SWIFT PDS and to send and receive payments, a HVCS member must be a SWIFT User.
- 2.41 Clause 5.2 of the HVCS Procedures further states that if a HVCS member wishes to send and receive payments and use the SWIFT PDS, the member must approach the SWIFT Regional Account Manager regarding SWIFT requirements for becoming a SWIFT User. Under arrangements between APCA and SWIFT, APCA manages the admission of institutions to the group of SWIFT Users entitled to use the SWIFT PDS in the HVCS.

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

3.1. APCA provided a supporting submission with its applications for reauthorisation.

#### **Prior to the draft determination**

3.2. The ACCC also sought submissions from interested parties potentially affected by the application, including large financial institutions. The ACCC received brief submissions from:

- Australia and New Zealand Banking Group Limited
- The Commonwealth Bank of Australia
- The Reserve Bank of Australia (RBA) and
- Indue Empowering Financial solutions

3.3. The views of APCA and interested parties are outlined in the ACCC's evaluation of the proposed provisions in Chapter 5 of this determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links.

#### **Following the draft determination**

3.4. On 17 January 2007, the ACCC issued a draft determination in relation to the application for reauthorisation. The draft determination proposed to grant reauthorisation.

3.5. A conference was not requested in relation to the draft determination.

3.6. The ACCC did not receive any new submissions in response to the draft determination.

## **4. The net public benefit test**

- 4.1. 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.
- 4.2. 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 (as outline in Chapter 1).
- 4.3. 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.

### **Applications A91016 & A91018**

- 4.4. Application for reauthorisation A91016 and A91018 were made to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 4.5. The relevant test is found in section 90(8) of the Act.
- 4.6. Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

### **Application A91017**

- 4.7. Application for reauthorisation A91017 was made to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 4.8. In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

## Application of the tests

- 4.9. There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 4.10. The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>2</sup>
- 4.11. However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>3</sup>
- 4.12. Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 4.13. Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).

## Definition of public benefit and public detriment

- 4.14. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>4</sup>
- 4.15. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>5</sup>

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<sup>2</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>3</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>4</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

<sup>5</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.



## **Future with-and-without test**

- 4.16. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>6</sup>
- 4.17. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

## **Length of authorisation**

- 4.18. The ACCC can grant authorisation for a limited period of time.<sup>7</sup> This allows the ACCC at the end of the period of authorisation to evaluate whether the public benefits upon which its decision is made actually eventuated in practice and the appropriateness of the authorisation in the current market environment.

## **Conditions**

- 4.19. The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.<sup>8</sup>

## **Future and other parties**

- 4.20. Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:
- persons who become party to the contract, arrangement or understanding at some time in the future.<sup>9</sup>
  - persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>10</sup>

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<sup>6</sup> Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

<sup>7</sup> Section 91(1).

<sup>8</sup> Section 91(3).

<sup>9</sup> Section 88(10).

<sup>10</sup> Section 88(6).

## 5. ACCC evaluation

- 5.1. The ACCC's evaluation of the relevant provisions in the HVCS regulations and procedures is in accordance with the net public benefit test outlined in Chapter 4 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the relevant HVCS regulations and procedures.

### The market

- 5.2. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant markets affected by that conduct.
- 5.3. APCA did not provide specific comment on market definition.
- 5.4. Depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that the net public benefit will or will not arise regardless of the scope of the defined market.
- 5.5. The HVCS has the role of coordinating, managing and ensuring the operation of policies and procedures for the conduct and settlement of exchanges of high value payments between members.
- 5.6. The HVCS regulations encompass membership criteria, suspension and termination provisions, representation arrangements, fees, the management committee for the system, the advisory council, member meetings, settlement and dispute resolution. The HVCS procedures encompass the rules for conducting exchanges, file specifications and standard forms.
- 5.7. The ACCC has therefore confined its assessment of the applications for reauthorisation to the exchange and settlement of high value payments.

### The counterfactual

- 5.8. In order to identify and measure the public benefit and public detriment generated by the relevant provisions, the ACCC applies the 'future with-and-without test'.
- 5.9. APCA submits that without the suspension and termination provisions or last resort sanctions to ensure compliance, members may not always comply with the HVCS regulations and procedures.
- 5.10. APCA submits that without the requirement to join the SWIFT PDS (or a similar mechanism), which is a centralised payment delivery mechanism, high value payments would be processed through a number of disparate systems and settlement of payment obligations arising from those systems would be on a net deferred basis which would lead to a number of inefficiencies.
- 5.11. The ACCC considers that the most likely counterfactual in the foreseeable short to medium term if the ACCC denies reauthorisation is the market with collectively set

regulations and procedures as contained in the HVCS regulations and procedures, but without the suspension and termination provisions or the requirement to join SWIFT.

- 5.12. In particular, APCA has sought reauthorisation for these provisions, as it considers that they may constitute an exclusionary provision and/or may have the effect of substantially lessening competition.
- 5.13. Accordingly, in the absence of reauthorisation, APCA and its members may be at risk of breaching the Act and would therefore be unlikely to give effect to those relevant provisions of the HVCS regulations and procedures. In this situation it may be that sanctions for non-compliance with the APCA Constitution and the HVCS regulations and procedures along with the requirement to join SWIFT would have to be subject to bilateral agreements.

## **Public Detriment**

### *Suspension and termination provisions*

- 5.14. APCA submits that the suspension and termination provisions, if invoked, have the effect of excluding the institution concerned from participating in the system. APCA notes that this does not per se exclude the institution concerned from the process of clearing items or settlement but the institution would need bilateral arrangements with other participants outside of the HVCS in order to do so. Potentially an excluded institution might have difficulty engaging other participants. To that extent, exclusion from the system would have an adverse impact on the institution concerned.
- 5.15. The suspension and termination provisions allow for the management committee, after consultation with the Reserve Bank of Australia, to unilaterally suspend a HVCS member: if a member no longer satisfies the membership criteria; during a period when a member has operational difficulties preventing it from discharging its obligation under the rules (i.e. when a member is suffering a ‘disabling event’); if a member becomes insolvent or fails to settle its clearing obligations; and, if a member breaches relevant provisions of the Constitution, the regulations or the procedures and does not rectify the breach or provide a satisfactory explanation within the prescribed time period. The management committee may impose conditions on the membership of a member instead of suspending the member.
- 5.16. 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.
- 5.17. APCA submits that these provisions are ‘last resort’ sanctions and have not been used or specifically contemplated since APCA’s establishment.
- 5.18. The ACCC agrees that exclusion from the HVCS may have an adverse impact on the institution concerned as they may not be able to electronically exchange high value payments, or at the very least, would need to enter bilateral arrangements outside of the HVCS which would be likely to be more costly and difficult to manage. This may

result in some anti-competitive detriment. However, the ACCC considers that the suspension and termination provisions do not place unreasonable requirements on members.

- 5.19. There are also a number of important safeguards against anti-competitive misuse of the suspension and termination provisions including:
- the possibility of APCA Board review of management committee decisions
  - the requirement that the Reserve Bank of Australia be consulted in respect of any decision to suspend a member
  - the requirement, where relevant, that if a member is the subject of Prudential Supervision, the prudential supervisor be consulted.
- 5.20. The ACCC also notes APCA's submission that the suspension and termination provisions are 'last resort' provisions and have not been invoked or contemplated since inception.
- 5.21. Given these safeguards the ACCC considers the anti-competitive detriment generated by the suspension and termination provisions to be low.

#### *Swift membership*

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

#### *Conclusion on public detriment*

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

- 5.27. Further, the ACCC considers any such potential detriment is mitigated by the checks and balances in place to ensure that these requirements are not used for anti-competitive purposes. Importantly in this respect, the ACCC notes that since these requirements were instituted in 1997 they have not been invoked to prevent any member or prospective member from participating in the HVCS.
- 5.28. Accordingly, the ACCC considers the anti-competitive detriment generated by these provisions to be low.

## **Public Benefit**

- 5.29. The RBA, ANZ, the Commonwealth Bank and Indue Empowering Financial Solutions provided submissions in support of APCA's applications for reauthorisation.

### *Suspension and termination provisions*

- 5.30. APCA submits that the scope of the application of the suspension and termination provisions is limited to protecting the efficiency and integrity of the HVCS and by extension the integrity of high value clearing and settlement. APCA submits that clearing and settlement is central to a well functioning payments system, as is the ability to clear and settle payments through the HVCS without settlement risk. APCA therefore submits it is in the public interest to maintain the efficiency and integrity of all aspects of clearing and settlement, including the HVCS. APCA submits that these provisions also contribute towards payment instructions being cleared with timeliness and certainty which is valued by customers.
- 5.31. APCA notes that the HVCS can perform this function effectively only if its members operate in accordance with APCA's constitution and the HVCS regulations and procedures. APCA notes that the suspension and termination provisions provide 'last resort' sanctions to ensure compliance. APCA submits that without these sanctions, the efficiency and integrity of HVCS would be diminished and the confidence of members and users of the HVCS would be reduced.
- 5.32. APCA also contends that although a participating member whose membership of the HVCS is suspended or terminated may be adversely affected, the existence of the suspension and termination provisions promotes confidence in the HVCS and therefore competition between members.
- 5.33. APCA further submits that the provisions for suspension or termination of a member from the HVCS at APCA's instigation are reasonable and would only be relied on in circumstances where the member's continuing membership would impair the efficiency and or integrity of the system.
- 5.34. In its 1998 determination the ACCC recognised a substantial benefit in the operation of a secure and efficient payments system. The ACCC was satisfied that the HVCS arrangements would result in a public benefit through increased cost efficiencies as high value warrants and cheques previously exchanged through APCA's paper clearing system would be migrated to the HVCS. The ACCC was also satisfied that the HVCS arrangements would result in a public benefit through reduced settlement and systemic risk in the payments system as payments which were exchanged through BITS and through APCA's paper clearing system (which at the time were settled on a net

deferred basis) were migrated to the HVCS. Under the previous deferred settlement systems, should an institution be unable to meet its obligations other institutions due to receive funds were exposed (settlement risk) and there was significant potential for other parties to fail (systemic risk). The ACCC recognised that the setting of operational and technical requirements which apply to all participants in a payments clearing system would be likely to result in benefits in terms of the efficiency, security and integrity of the clearing system.

- 5.35. The ACCC accepts that a public benefit, in the form of the efficient operation and enhanced security and integrity of the HVCS, will continue to result from HVCS through the functioning of the suspension and termination provisions of the HVCS regulations. The exclusion of these provisions would be likely to diminish the confidence of members and users of the HVCS in the system.
- 5.36. It may also be argued that the collective setting of suspension and termination provisions may result in transaction cost savings as in the absence of authorisation these provisions would be subject to bilateral negotiations between individual participants. APCA did not make any submission in relation to transaction cost savings.

*Compliance with the Payment Systems and Netting Act (PSNA)*

- 5.37. The RBA states that the HVCS is a feeder system to Australia's real time gross settlement RITS which is a systematically important payment system that settles interbank transfers of around \$160 billion per day, of which \$100 billion relate to the HVCS.
- 5.38. The RBA notes that in the unlikely event that RTIS was unavailable, the HVCS has the capacity to exchange payments for net settlement. To ensure that the settlement of any payments exchanges in those circumstances are final, the HVCS has been granted an approval by the RBA under the PSNA. The PSNA specifies that before approving an arrangement the RBA must be satisfied that certain provisions are met.
- 5.39. One of these provisions is that the rules governing the arrangements provide that if a party to the arrangements goes into external administration, the co-ordinator may exclude the party from the arrangements. The RBA notes that for the HVCS this provision is met by Regulations 5.16, 5.24 and 5.26 of the suspension and termination provisions. The RBA states that absent these provision the PSNA approval may be void and that consequently there is a possibility that systematic disruption could result from a failure of a participant in the HVCS.
- 5.40. The ACCC accepts that the relevant suspension and termination provisions ensure compliance with the PSNA, and thereby, that the HVCS is able to act as a backup system for the exchange of payments for net settlement in the unlikely event that RTIS is unavailable. By providing this backup service the HVCS assists in maintaining the security and integrity of, and confidence in, the settlement system which is of benefit to the public.

### *Swift membership*

- 5.41. APCA notes that prior to the introduction of the HVCS, high value payments in Australia were processed through a number of disparate systems and settlement of payment obligations arising from those systems was on a net deferred basis.
- 5.42. Under the previous system APCA submits, inefficiencies were apparent as institutions used different clearing systems to send and receive payments of the same nature for which different delivery mechanisms were not inherently required or desirable. APCA submits that these inefficiencies related to, amongst other things, the implementation and establishment costs incurred in having multiple payment delivery systems for clearing the same kinds of payment and ongoing operational costs in having to maintain those separate systems. APCA states that the industry realised significant potential gains could be made by individual participants and the payments industry generally if all participants started sending and receiving payments of the same nature through the same system.
- 5.43. APCA submits that the HVCS, by utilising a centralised payment delivery mechanism like the SWIFT Payment Delivery System, provides considerable efficiency gains for individual members of the HVCS and the payments industry generally by enabling all participants to send and receive payments of the same nature through the same system. APCA contends that the HVCS is a more secure, virtually instantaneous (assuming the availability of funds in the ESA), irrevocable payment delivery system with scope to contain a large amount of customer details within each payment message. In addition, APCA states that because the HVCS transfers value for its payments instantaneously, it reduces the amount of settlement risk in Australia's payments system.
- 5.44. The ACCC accepts that there are likely to be considerable efficiency gains for participating institutions through a centrally co-ordinated approach to the clearing and settlement of high value payments through a single system. In addition to the likely cost savings generated by such an arrangement the ACCC also accepts that these arrangements promote a more secure payments system and reduce potential settlement risk by facilitating settlement on an almost instantaneous basis through ESA's.

### *Conclusion on public benefits*

- 5.45. The ACCC considers that the suspension and termination provisions of the HVCS regulations are likely to continue to result in a benefit to the public through the protecting of the security, efficiency and integrity of the high value payments clearing and settlement process.
- 5.46. Similarly, the ACCC considers that there are likely to be considerable efficiency gains for participating institutions through a centrally co-ordinated approach to the clearing and settlement of high value payments through the SWIFT PDS system. In addition to the likely cost savings generated by such an arrangement the ACCC also accepts that these arrangements promote a more secure payments system and reduce potential settlement risk by facilitating settlement on an almost instantaneous basis through ESA's.

## **Balance of public benefit and detriment**

- 5.47. The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the relevant provisions of the HVCS regulations and procedures are likely to result in a public benefit that will outweigh any public detriment.
- 5.48. The ACCC considers that the HVCS suspension and termination provisions, and the requirement that members join SWIFT, could potentially result in some anti-competitive detriment by preventing institutions from electronically exchanging high value payments or forcing them to develop more costly alternative bilateral arrangements for doing so. However, the ACCC does not consider that these requirements place unreasonable obligations on members.
- 5.49. Further, the ACCC considers any such potential detriment is mitigated by the checks and balances in place to ensure that these requirements are not used for anti-competitive purposes. Importantly in this respect, the ACCC notes that since these requirements were instituted in 1997 they have not been invoked to prevent any member or prospective member from participating in the HVCS.
- 5.50. Accordingly, the ACCC considers the anti-competitive detriment generated by these provisions to be low.
- 5.51. The ACCC considers that the suspension and termination provisions of the HVCS regulations are likely to continue to result in a benefit to the public through the protecting of the security, efficiency and integrity of the high value payments clearing and settlement process.
- 5.52. Similarly, the ACCC considers that there are likely to be considerable efficiency gains for participating institutions through a centrally co-ordinated approach to the clearing and settlement of high value payments through the SWIFT PDS system. In addition to the likely cost savings generated by such an arrangement the ACCC also accepts that these arrangements promote a more secure payments system and reduce potential settlement risk by facilitating settlement on an almost instantaneous basis through ESA's.
- 5.53. Following consideration of APCA's applications for reauthorisation the ACCC concludes that the public benefits likely to result from the relevant provisions of the HVCS regulations and procedures are likely to outweigh the anti-competitive detriment.

## **Length of authorisation**

- 5.54. The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances. This allows the ACCC at the end of the period of authorisation to evaluate whether the public benefits upon which its decision is made actually eventuated in practice and the appropriateness of the authorisation in the current market environment.
- 5.55. In this instance, APCA has not sought reauthorisation for a particular length of time.



- 5.56. The ACCC considers that 5 years is the appropriate duration for reauthorisation. It is open for APCA to reapply for authorisation at the expiration of authorisation. In the event that an application for reauthorisation is received by the ACCC, whether reauthorisation should be granted would be considered based on the circumstances at that time.

## **6. Determination**

### **The application**

- 6.1. On 20 October 2006, APCA lodged an application for revocation of authorisations A90617, A90618 and A90619 and their substitution with authorisations A91016, A91017 and A91018 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2. While authorisation A90617, A90618 and A90619 relate to all the HVCS regulations and procedures, APCA is seeking reauthorisation only for HVCS Regulations 5.2(h) and 5.16 to 5.31 (inclusive) and clauses 5.1 and 5.2 of the HVCS Procedures. These provisions (referred to as the 'relevant provisions') relate to suspension and termination of HVCS membership and the requirement that members join SWIFT and use the SWIFT Payment Delivery System (PDS).

### **The net public benefit test**

- 6.3. For the reasons outlined in Chapter 5 of this determination, the ACCC considers that in all the circumstances the arrangements for which reauthorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 6.4. The ACCC is satisfied that the arrangements for which reauthorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 6.5. The ACCC therefore revokes authorisations A90617, A90618 and A90619 and grants substitution with authorisations A91016, A91017 and A91018.

### **Conduct for which the ACCC grants authorisation**

- 6.6. The ACCC grants reauthorisation to APCA for HVCS Regulations 5.2 (h) and 5.16 to 5.31 (inclusive) of the HVCS and clauses 5.1 and 5.2 of the HVCS Procedures.
- 6.7. Further, the authorisation is in respect of the relevant provisions as set out at the time authorisation is granted. Any changes to the relevant provisions during the term of the authorisation is not be covered by the authorisation.

### **Determination**

- 6.8. The ACCC grants authorisation to APCA on 14 February 2007 for 5 years.

## **Date authorisation comes into effect**

- 6.9. This determination is made on 14 February 2007. If no application for review of the determination is made to the Australian Competition Tribunal (Competition Tribunal), it will come into force on 8 March 2007.

## Appendixes

### A - HVCS members

Each current member of the High Value Clearing System, namely:

ABN AMRO Bank NV	Investec Bank (Australia) Limited
Adelaide Bank Limited	JP Morgan Chase Bank, National Association
AMP Bank Limited	Laiki Bank (Australia) Limited
Arab Bank Australia Limited	Macquarie Bank Limited
Australia and New Zealand Banking Group Limited	Mizuho Corporate Bank, Limited
Australian Settlements Limited (ASL)	National Australia Bank Limited
Bank of America, National Association	Oversea-Chinese Banking Corporation Limited
Bank of China (Australia) Limited	Rabobank Australia Limited
Bank of China	Rabobank, Australian Branch (Co-Operative Centrale Raiffeisen – Boerenleenbank)
Bank of Queensland Limited	Reserve Bank of Australia
Bank of Western Australia Limited	Royal Bank of Canada
Barclays Bank plc	Societe Generale Australia Branch
Bendigo Bank Limited	St. George Bank Limited
BNP Paribas	Standard Chartered Bank
Citigroup Pty Limited	State Bank of India
CLS Bank International	State Street Bank and Trust Company
Commonwealth Bank of Australia	Suncorp-Metway Limited
Cuscal Limited	The Bank of Tokyo – Mitsubishi UFJ Ltd
Deutsche Bank AG	The Hong Kong and Shanghai Banking Corporation Limited (Australian Branch)
HBOS Treasury Services plc, Sydney Branch	The International Commercial Bank of China
HSBC Bank Australia Limited	Toronto Dominion Bank
HSBC Bank plc	UBS AG (Australian Branch)
ING Bank (Australia) Limited	United Overseas Bank Limited
ING Bank NV (Sydney Branch)	Westpac Banking Corporation
Investec Australia Limited	

**PART 5 HVCS MEMBERSHIP**

**Participating Members**

5.1 Each Participating Member must at all times satisfy the applicable minimum technical and operational standards and other requirements set out in these Regulations and the Procedures.

**Qualifications - All Participating Members**

5.2 In order to be a Participating Member in the HVCS and subject to Regulation 5.2A, a person must:

- (a) be a Constitutional Corporation which carries on business at or through a permanent establishment in Australia;
- (b) be:
  - (i) a Sender; and
  - (ii) a Receiver; or
  - (iii) a body corporate that represents one or more Senders and Receivers and, in such capacity, settles directly or indirectly by arrangement with another Participating Member in accordance with Part 10 of these Regulations for the value of the payment obligations incurred by those Senders or Receivers as a result of the exchange of Payments pursuant to these Regulations and Procedures.
- (c) be able to comply with all applicable laws, the Constitution, these Regulations and the Procedures;
- (d) be able to comply with the technical, security and operational standards which are contained in these Regulations and the Procedures;
- (e) obtain appropriate System Certification;
- (f) (if applicable) be a person named or referred to as a party or proposed party to a contract, arrangement or understanding in any successful application lodged by the Company with the Australian Competition and Consumer Commission for authorisation under section 88 of the Trade Practices Act 1974 in respect of any matter contained in the Articles (insofar as they relate to the HVCS), these Regulations or the Procedures;
- (g) agree to pay all applicable fees, costs, charges and expenses which may be levied on, or which are to be reimbursed by, Participating Members in accordance with these Regulations;
- (h) be able and agree to comply with all applicable requirements of any relevant Service Provider as specified in the Procedures;

Last amended  
25/06/2014  
13/04/01

Last amended  
25/06/2014  
13/04/01

Last amended  
25/06/2014  
13/04/01

Last amended  
25/06/2014  
13/04/01

### Successful Applications

- 5.9 If an application for participating membership is accepted the Management Committee must determine the date from which the successful applicant is admitted as a Participating Member and entitled to use the APCA PDS specified in the successful application. That date must not be less than 21 days after the date on which the Management Committee approved the application.
- 5.10 The Secretary must promptly notify the applicant and all Participating Members of each successful application for participating membership and the date on which that applicant will commence as a Participating Member in the HVCS.

### Rights, Restrictions and Obligations of Participating Members

- 5.11 A Participating Member (in its capacity as a Participating Member) may not share in any distribution of capital or profits of the Company or in a distribution on a winding-up, dissolution or a reduction of the capital of the Company.
- 5.12 A Participating Member (in its capacity as a Participating Member) has no right to vote at general meetings of the Company.
- 5.13 A Participating Member has the same rights as the Owner Members of the Company to receive notices, annual reports and audited profit and loss accounts and audited balance sheets and to attend and speak at general meetings of the Company. Last amended effective 17.08.02
- 5.14 A Participating Member has the right to be a participant in the HVCS, to send and receive payments in accordance with these Regulations and the Procedures and to vote at any HVCS meeting convened in accordance with Part 8 or any other meeting of the Participating Members of the HVCS convened in accordance with the Constitution or the Corporations Act. Last amended effective 17.08.02
- In exercising any such right, each Participating Member must act in good faith.
- 5.15 A Participating Member may not transfer or share its participating membership.

### Suspension

- 5.16 The Management Committee, after consultation with the Reserve Bank of Australia, 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 5.2 and 5.3;
  - (d) a Disabling Event occurs in respect of the Participating Member, but only during the continuance of that Disabling Event and any subsequent period which might be necessary because of the applicable requirements pertaining to any particular APCA PDS;
  - (e) an Insolvency Event (not being an event which results in automatic cessation of membership pursuant to Regulation 5.24(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.

Last amended  
effective 17/08/02

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

### Effect of Suspension

- 5.17 Subject to Regulation 5.20, a Participating Member whose membership is suspended under Regulation 5.16 is not entitled to:

Last amended  
effective 20/08/04

- (a) participate in the HVCS;
- (b) clear and settle payments using an APCA PDS; nor
- (c) vote at any HVCS meeting convened in accordance with Part 8, or any other meeting of the Participating Members of the High Value Clearing System (CS4) convened in accordance with the Constitution or the Corporations Act,

Last amended  
effective 17/08/02

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).

- 5.18 In addition, if a Participating Member whose membership is suspended under Regulation 5.16 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 Committee, but may continue to attend and participate in such meetings, during the period of suspension under Regulation 5.16.

- 5.19 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 or vary any provision of the Procedures in relation to the exchange of payments addressed to or initiated by 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.

- 5.20 A Participating Member whose membership is suspended under Regulation 5.16 or which is subject to any condition or variation under Regulation 5.19 is not excused from discharging, in accordance with these Regulations and Procedures, obligations under the Constitution, these Regulations and the Procedures including, without limitation, obligations incurred in connection with payments 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 20/08/04

- 5.21 The Secretary must immediately notify the System Administrator and all Participating Members (by the most expeditious means available) of any suspension under Regulation 5.16 and must promptly notify all Participating Members of all other action taken under Regulations 5.16 to 5.20 inclusive.

### Reinstatement of a Suspended Participating Member

- 5.22 The Management Committee after consultation with the Reserve Bank of Australia may at its

discretion reinstate a suspended Participating Member effective on a given date specified by the Management Committee having regard to any applicable requirements pertaining to the relevant APCA PDS, including those imposed by the Service Provider.

- 5.23 The Secretary must as soon as reasonably possible notify the System Administrator and all Participating Members of any decision under Regulation 5.22 to reinstate a suspended Participating Member and the re-commencement date for that member.

#### Termination

- 5.24 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 Articles and these Regulations.

- 5.25 A Participating Member may, by notice in writing to the Company, resign as a Participating Member with effect from a date which is not less than 21 days after the date of the service of the notice. The notice is irrevocable.

A Participating Member may not resign except by giving notice in accordance with this Regulation 5.25.

- 5.26 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, 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.

- 5.27 Any resignation or termination of the membership of a Participating Member shall not affect any right or liability arising under the Constitution, these Regulations or the Procedures prior to the time such resignation or termination takes effect or arising in respect of any act, matter or thing occurring prior to that time.

Last amended effective 17/10/02

A Participating Member who resigns pursuant to Regulation 5.25 or whose membership is terminated pursuant to Regulation 5.26 shall continue to be bound by the Constitution and these Regulations in respect of:

Last amended effective 17/10/02



- (a) any act, matter or thing occurring prior to the time such resignation or termination takes effect or as a result of such resignation or termination; and
- (b) any fees, costs, charges and expenses which may be levied on, or which are to be reimbursed by, Participating Members in accordance with these Regulations in respect of periods which commence prior to the time such resignation or termination takes effect or which relate to any such act, matter or thing.

#### Effect of Termination

- 5.28 The Secretary must immediately notify the System Administrator and all Participating Members (by the most expeditious means available) of any termination or resignation of membership under Regulation 5.24.
- 5.29 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 obligations arising from the exchange of payments; and
  - (b) all sums of money (if any) owed to it by any other Participating Member in respect of all such payments exchanged must be paid by that other Participating Member to the resigning or terminating Participating Member.
- 5.30 Any Participating Member which resigns or whose membership is terminated immediately ceases to be entitled to effect exchanges in the HVCS in accordance with these Regulations and the Procedures.
- 5.31 A Participating Member which resigns or whose membership is terminated is not entitled to be repaid all or part of any entrance, operating or other fee which has been paid by it.

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**PART 5 SWIFT PDS CLOSED USER GROUP**

**Overview**

- 5.1 The SWIFT PDS CUG uses the facilities of the SWIFT FIN-Copy Service, designed to meet the needs of high value clearing systems internationally. The SWIFT FIN-Copy Service allows each country to configure its closed user group to meet its own specific requirements. APCA has worked with SWIFT to configure the SWIFT PDS to meet the Australian domestic high value clearing needs of its members. For the SWIFT PDS CUG APCA's SWIFT PDS configuration allows some variation from normal SWIFT messaging, to cater for RITS/RTGS System requirements. Details of SWIFT PDS CUG requirements are set out in this Part 5 and in Appendix D.

To use the SWIFT PDS to send and receive payments a Participating Member must be a SWIFT User.

**SWIFT Membership**

- 5.2 Each Applicant proposing to use the SWIFT PDS which is not a SWIFT User, should approach the SWIFT Regional Account Manager regarding SWIFT requirements to becoming a SWIFT User. The size and international nature of the SWIFT network requires that the connection of new SWIFT Users be carried out on set dates (March, June, September and December) each year. Because of this requirement and internal systems development by the Applicant, SWIFT advises that Applicants proposing to use the SWIFT PDS should allow at least 6 months to complete the SWIFT membership process.

**SWIFT PDS Closed User Group Management**

- 5.3 The SWIFT PDS CUG will be administered by the Company. The Company will be responsible for certification pursuant to Clauses 7.36 to 7.43 inclusive, the daily operation of the SWIFT PDS CUG and the maintenance and implementation of the HVCS Regulations and Procedures applicable to the SWIFT PDS CUG.

Applicants should contact the SWIFT PDS Operations Manager concerning requirements for HVCS membership and the requirements in relation to use of the SWIFT PDS. Copies of applicable SWIFT forms can be obtained from the Company by contacting the SWIFT PDS Operations Manager.

Last amended effective 20/06/05

**SWIFT PDS CUG Membership Application - General**

- 5.4 Applicants proposing to use the SWIFT PDS will be required to complete the applicable SWIFT forms for SWIFT PDS CUG membership for test and training and/or SWIFT PDS CUG membership for live operations (as the case may be).

Last amended effective 20/05/05

Completed forms should be returned to the SWIFT PDS Operations Manager as the Company may be required to countersign the completed forms before on-sending them to SWIFT if the Applicant is to be admitted to the SWIFT PDS CUG.

Last amended effective 20/06/05

**SWIFT PDS CUG Membership Application for Test and Training**

- 5.5 As part of their overall SWIFT PDS System development, Applicants should ensure that they