Our ref: PJA\AJT\02 1383 8501
Your ref: 51693
Partner: Peter Armitage
Direct line: +61 2 9258 6119
Email: peter.armitage@ashurst.com

Ashurst Australia
Level 36, Grosvenor Place
225 George Street
Sydney NSW 2000
Australia

GPO Box 9938
Sydney NSW 2001
Australia

Tel +61 2 9258 6000
Fax +61 2 9258 6999
DX 388 Sydney
www.ashurst.com

30 August 2013

BY EMAIL

PUBLIC REGISTER VERSION

Ms Hayley Parkes & Ms Marie Dalins
Assistant Director / Director
Australian Competition & Consumer Commission

ashurst

Dear Ms Parkes and Ms Dalins

Authorisations A91379 & A91380

We refer to the above applications for authorisation and to the various submissions from interested parties.

This letter addresses the issues raised by interested parties in those submissions.

As a preliminary comment, the Applicants note that many of the issues raised in submissions from interested parties are concerns that do not arise as a result of the conduct for which the parties are seeking authorisation. As such, those concerns are not relevant to the ACCC's consideration of the authorisation applications. This is addressed further below.

1. **PIN@POS MANDATORY ONLY ON CHIP CARDS**

The Applicants wish to note at the outset that a number of the responses from interested parties are based on a misunderstanding of the scope of the conduct for which authorisation is sought. Specifically, a number of the responses do not appreciate that the proposed parallel mandates are limited to Australian issued chip cards used at Australian point of sale terminals.

The Applicants are not seeking authorisation for joint implementation of PIN@POS for all of their existing credit cards. As set out in section 4.8 of the original submission:

> "the mandate will not apply to magnetic stripe card transactions; it will only apply to domestic chip-initiated transactions i.e transactions involving chipped credit, debit or prepaid reloadable cards."

As such, the conduct for which authorisation is sought is more limited than is suggested by a number of interested parties.

2. **SECURITY OF CHIP AND PIN VS. SIGNATURE**

One of the submissions from interested parties[1] suggests that the security of the EMV protocol should be reviewed before implementing mandatory PIN@POS, lest criminals are

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1 See submission by Merchant Warrior dated 25 July 2013

able to simply move their operations from signature to PIN, following the introduction of the mandate.

The Applicants' view is that chip and PIN is a significantly more secure form of CVM than signature. EMV is the highest security standard globally at the present time, for card present transactions.

Based on the experience of the introduction of mandatory PIN@POS in overseas markets (in the UK, Canada, Europe and elsewhere), the Applicants expect that certain types of card present fraud will decline in Australia as a result of the introduction of mandatory PIN@POS in Australia.

The Applicants note that overseas experience has shown that fraud will move to jurisdictions where there are lower security measures in place and in particular jurisdictions that do not use EMV and PIN security. For example, the UK experience has been that the countries where fraud on UK-issued cards occurs has changed with fraudsters focusing on countries without 'chip and PIN', such as the United States.[2] There has been a similar experience in Europe.[3] Card fraud is highly mobile and is often internationally organised. The coordinated introduction of mandatory PIN@POS in Australia will increase card security in Australia and make it a less attractive jurisdiction for fraudsters.

It is also possible, of course, that criminals may potentially move their focus to other forms of payment transactions in Australia. However, this is not a reason not to proceed with the proposed conduct. The Applicants believe that mandatory PIN@POS is an important step in the right direction, in terms of reducing credit card fraud in Australia. In any event, the Applicants note that they, the banks and industry groups such as the Fraud Risk Council are each continually looking for ways to reduce all types of payment fraud in Australia.

3. SUGGESTION THERE IS A NEED TO CHANGE CHARGEBACK RULES BECAUSE OF PIN@POS

One of the submissions[4] from interested parties appears to suggest that there may be a need to change the chargeback rules of the schemes, in response to the move to mandatory PIN@POS on chip cards. The Applicants submit that this is not required, for the following reasons:

- Visa and MasterCard have a "zero liability" policy when it comes to fraud. If the cardholder did not approve the transaction, they will usually be able to obtain a refund.
- Issuers also have their own policies that are consistent with this approach. If the transaction was not approved by the cardholder, they will usually be able to obtain a refund.
- Over and above this, the Financial Ombudsman (**Ombudsman**) offers an independent dispute resolution process for disputes between consumers and financial services providers, including disputes concerning the use of PIN. The approach of the Ombudsman is that cardholders are not held responsible for fraud. Where a dispute about a fraudulent transaction is taken to the Ombudsman, it is incumbent on the Bank or other financial institution to prove their case if they believe the cardholder contributed to the loss.

In summary, cardholders have more protections available to them when PIN is used, due to the oversight of the Ombudsman.

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2 Financial Fraud Action UK, *Fraud: The Facts 2012*, page 28

3 European Payments Council, 'SEPA FOR CARDS: The Magnetic Stripe: Why it is Hard for Americans to Say Good-Bye', *EPC Newsletter*, 15 July 2011

4 See for example submission by Merchant Warrior dated 25 July 2013

4. CONCERNS REGARDING THE MARKETING CAMPAIGN

The submissions by the Reserve Bank of Australia[5] raise concerns in relation to the content of the marketing campaign proposed by the Applicants.

Since these submissions were made, American Express has decided that it wishes to participate in the PIN@POS initiative. As a result, the marketing materials have been re-branded to include its logo.

The Applicants' view is that the marketing materials appropriately communicate the change which will be made following the introduction of mandatory PIN@POS. Consumers have been familiar with the PIN requirements of the EFTPOS system for some years. However, the requirement to use a PIN on the credit and debit card transactions of the Applicants (in relation to chip cards) is new and this is what must be communicated to customers.

The intention of the materials is to change the behaviour of consumers when making a credit or debit transaction, to utilise a PIN. The materials are not a general marketing campaign for the participating schemes.

Further, the marketing materials do not in any way suggest that the EFTPOS system is not a secure way to make payment, or suggest in any way that consumers no longer have the choice of pressing CHQ or SAV and entering a PIN on dual-network cards. Indeed, the communications program is not intended to target in any way the choice of account (cheque, savings, credit) at point of sale, and none of the materials or messages currently prepared contain any reference to this; the aim is purely to promote PIN instead of signature when making a purchase with a payment card.

5. CONCERNS REGARDING ELDERLY OR OTHERS WHO CANNOT REMEMBER NUMERALS

One of the submissions by interested parties[6] has identified concerns on behalf of the elderly or others who may, at times, experience difficulty in memorising and using a PIN, as compared to signing their name. It notes that those people would be at risk of exploitation if they were to give their PIN to another person to enter on their behalf.

As Visa and MasterCard do not issue cards, the concerns of the elderly or disabled are best handled on a case by case basis by the issuers who are familiar with the needs of specific cardholders. However, the Visa and MasterCard "mandates" will facilitate this approach by issuers.

The Visa mandate will allow chip cards to be issued which are "non-PIN preferring cards", to accommodate those individuals who, due to their special circumstances, are not capable of using a PIN. This exception to the mandate may be implemented by issuing banks, through liaising with their cardholders. Issuers may also continue to issue magnetic stripe cards to such individuals, which are not affected by the PIN@POS mandate.

MasterCard envisages its mandate will operate similarly, on an exceptions basis, to accommodate those individuals who need to use signature instead of PIN.

Further, discussions with the Australian Human Rights Commission indicated that the number of other forms of payment available at point of sale should also provide sufficient alternatives if required.

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5 Dated 19 July 2013 and 9 August 2013

6 Submission by social worker, Patricia Chan of St Joseph's Hospital, dated 1 August 2013

6. COSTS ARISING FROM MODIFICATION OF TERMINALS / METHOD OF OPERATING

A number of the submissions from interested parties raise concerns in relation to the costs of the PIN@POS mandate on small businesses.[7]

The concerns centre around the need for small businesses such as restaurants and cafes to upgrade to mobile terminals, to increase the number of counter terminals and/or to reconfigure premises to allow patrons to enter a PIN at the counter.

The Applicants note that these concerns do not arise as a result of the conduct for which authorisation is sought; ie, the coordinated introduction of mandatory PIN@POS on domestic chip-initiated transactions. These same issues would arise if the parties were to implement mandatory PIN@POS individually. As a result, the Applicants submit that these concerns should not be given any weight in the ACCC's assessment of the applications for authorisation.

Further, in the vast majority of instances, the point of sale terminal equipment at merchant locations is owned by the Financial Institution that provides the transaction acquiring services to the merchant. The vast majority of acquiring activity in Australia is undertaken by Financial Institutions who are represented on the Steering Committee of this initiative, and these institutions are well aware of the unique issues pertaining to the bar, restaurant and café trade. These Financial Institutions are all developing plans to provide different terminal arrangements, such as mobile terminals, for those merchant sectors – in many cases replacing / swapping-out those currently deployed.

In any event, the coordinated introduction of mandatory PIN@POS will lower any costs that may arise from modification of terminals as merchants will only be required to implement and manage a single change. As outlined in the original submission, separate implementation of PIN@POS by the parties is likely to lead to confusion, as well as a duplicated costs and disruptions for merchants and others.[8] The benefits of the proposed conduct for merchants are discussed further at section 9 below.

7. CONCERNS REGARDING TIPS

Several submissions from interested parties raise concerns that tipping will be reduced if customers cannot add a tip when they sign the transaction record.[9]

Again, the Applicants note that this concern does not arise as a result of the coordinated conduct for which the parties are seeking authorisation. The issues in relation to the ability to enter tips in a PIN transaction also arise if the applicants were to implement PIN@POS at different times. Accordingly, the Applicants submit again that little or no weight should be given to these concerns, as they are not a result of the coordinated conduct.

In any event, the Applicants note that the terminal equipment choices offered by the merchant acquiring institutions include, in most cases, units that allow for the addition of a tip (usually either as a dollar figure or a percentage) at the time of PIN entry – which for many patrons would occur via a terminal brought to their table. Further, as noted in the submission by the National Billing Group Pty Ltd, it is common practice for cardholders to tip taxi drivers or waiters with cash which can also ensure that they are rewarded directly.

8. PRICE CLARITY

Some of the submissions raise concerns regarding "price clarity"; in other words, the customer's ability to see the price on the terminal before entering their PIN.[10]

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7 See for example, submissions by the Australian Small Business Commissioner dated 18 July 2013, the NSW Small Business Commissioner dated 19 July 2013 and Restaurant & Catering Australia dated 16 August 2013.

8 See also submission by Indue Ltd dated 18 July 2013

9 See for example submissions by the Australian Small Business Commissioner dated 18 July 2013 and Restaurant and Catering Australia dated 16 August 2013.

Again, the Applicants note that this is not a concern that arises as a result of the proposed authorised conduct and should not properly be considered by the ACCC. The PIN@POS conduct does not result in any change to the way in which terminals display prices to customers.

However, the Applicants understand that the price to be paid/authorised by the cardholder always appears on the terminal screen prior to the entry of the PIN being requested. Hence, the problem of "price clarity" only occurs if the merchant staff member entering the transaction into the terminal progresses beyond the "price screen" before presenting the terminal to the cardholder.

As such, this is a matter of educating the merchant staff that the terminal should be presented to the cardholder with the price to be authorised clearly visible on the screen, and that they should not progress beyond this point (eg, to the PIN entry screen) before the customer has validated the price to be paid.

9. PUBLIC VS PRIVATE BENEFITS

Some of the submissions raise a concern that the authorisation will result in private benefits to the Applicants and the participating Financial Institutions, rather than public benefits.[11]

The Applicants note as a preliminary matter that these submissions misconceive the concept of "public benefit" under section 90 of the *Competition and Consumer Act 2010* (Cth). Public benefit refers to "*anything of value to the community generally*" and includes improvements in economic efficiency.[12] Further, for the purpose of this analysis, it is not appropriate to draw a dichotomy between so-called "public" benefits and "private" benefits. As held by the Australian Competition Tribunal "*cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account for the purposes of section 90 of the Act*".[13] As such, private benefits are relevant and it is just a question of weight having regard to who will take advantage of those benefits and over what time period.

The proposed conduct will result in improvements in economic efficiency as it will avoid the duplication of costs that would otherwise be incurred if mandatory PIN@POS was implemented by the card schemes separately in an uncoordinated manner. These cost savings are not limited to Visa, MasterCard and the Financial Institutions. The proposed conduct will also result in cost savings for merchants as merchants will also avoid the costs and disruption that would otherwise be incurred were the mandates to be implemented separately. Merchants will also benefit from the reduced confusion that is likely to result from a coordinated implementation, both in terms of potential confusion on the part of merchants and their staff as well as cardholder confusion. Specifically:

- merchants will avoid the costs and disruption of changing POS terminals more than once, as well as avoiding the costs and disruption of the additional staff training required to deal with implementation of the separate mandates at different times;
- merchants will avoid the inefficiencies and potential confusion that would result from having different requirements for different card schemes. For example, merchants must keep original signed receipts for card transactions verified by signature. A coordinated implementation of PIN@POS will mean that this

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10 See for example submissions by the Australian Small Business Commissioner dated 18 July 2013, Restaurant and Catering Australia dated 16 August 2013 and St Joseph's Hospital Social work department dated 1 August 2013.

11 NSW Small Business Commissioner, dated 19 July 2013

12 *Re Queensland Co-operative Milling Assn Ltd* (1976) 8 ALR 481 at 510; see also ACCC, *Authorisation Guidelines 2013*, paragraphs 6.11-6.15

13 *Re Qantas Airways Limited* [2005] ACompT 9 at [189]; see also ACCC, *Authorisation Guidelines 2013*, paragraphs 61.7-6.19.

requirement will be removed for both major card schemes at the same time, thereby simplifying and reducing record keeping requirements; and

- merchants will also benefit directly from the reduction in cardholder confusion that is likely to result from the coordinated introduction of PIN@POS as this confusion is likely to be mostly experienced by merchants at the point of sale.

As such, the proposed conduct will result in cost savings for a wide range of businesses, namely all businesses who are merchants as well as for the card schemes and Financial Institutions. This is clearly a public benefit within the meaning of section 90 of the Act.

In any event, it is likely the public benefits arising from this avoidance of duplicated costs and inefficiencies will flow through to cardholders and consumers more generally. This is because in the absence of the proposed conduct these duplicated costs would be inevitably passed through to cardholders and merchants in the form of higher prices for merchants' goods or services and higher fees for Financial Institutions' services.

10. NO REDUCTION IN COMPETITION ON SECURITY MEASURES

The submission by the Reserve Bank of Australia dated 9 August 2013 suggests that the parallel PIN@POS mandates remove one minor aspect of competition between the systems of Visa and MasterCard in relation to individually determining the authorisation methods available to cardholders on domestic chip cards. However, the Reserve Bank concludes that this is not a significant concern, given that such competition does not generate significant public benefits.

The Applicants agree that this ought not be a significant concern, as this is not a significant area of competition amongst the schemes.

In addition, the Applicants note that even if the ACCC was concerned about a reduction in this type of competition between the Applicants, this reduction does not arise out of the proposed conduct for authorisation. Any reduction in competition which might occur would arise even if the Applicants were to implement PIN@POS unilaterally. In this regard, the Applicants refer to their recent submissions to the ACCC dated 13 August 2013, on the counterfactual.

Yours faithfully

Ashurst Australia

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