Draft Determination

Applications for authorisation

lodged by

Visa Worldwide Pte Limited
Visa AP (Australia) Pty Ltd
MasterCard Asia/Pacific Pte Ltd

in respect of

coordination relating to the mandatory use of PINs for point of sale credit card transactions

Date: 11 October 2013

Authorisation numbers: A91379 & A91380

Commissioners: Sims
Rickard
Cifuentes
Court
Walker

Summary

The ACCC proposes to grant authorisation to Visa and MasterCard to allow them, together with American Express and Participating Financial Institutions, to coordinate in relation to the removal of signatures as a method of authentication for most credit card transactions that are completed in person. The ACCC proposes to grant authorisation until 30 October 2015 (which is the timeframe requested) to allow the applicants to delay the current expected dates for implementation (mid 2014) if they consider it necessary.

<u>Next steps</u>

The ACCC will seek submissions in relation to this draft determination before making its final decision. The Applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

Visa has implemented changes to the rules governing its card scheme to provide that signatures will no longer be an acceptable form of customer verification from early 2014. Visa and MasterCard are now seeking authorisation to allow them to work co-operatively with each other, American Express and Participating Financial Institutions (as named in the Draft Determination) to coordinate in relation to the implementation of mandatory use of PINs for credit card transactions that are conducted at points of sale (**mandatory PIN@POS**).

The ACCC proposes to grant authorisation to the parties for this conduct as it considers that the likely public benefits will outweigh the likely public detriments. In reaching this conclusion, the ACCC considers that without the coordinated conduct, Visa and MasterCard would independently implement mandatory PIN@POS and American Express would also make similar arrangements, although potentially at a later date than proposed by Visa.

The ACCC considers that the most significant public benefits and public detriments relate to the coordination between the relevant parties rather than the benefits and detriments of mandatory PIN@POS. However, to the extent that the Proposed Arrangements also lead to the earlier implementation of mandatory PIN@POS, the ACCC considers that some regard may be had to the public benefits and public detriments that may arise from the earlier removal of signatures as a method of authentication.

The ACCC considers that the coordination between the card schemes and financial institutions to implement mandatory PIN@POS, including a coordinated public communications campaign, is likely to give rise to some public benefits. These public benefits include efficiencies for financial institutions and some merchants. The magnitude of these benefits cannot be estimated with any certainty but they are likely to be modest in comparison to similar costs regularly borne in the relevant industries affected.

The ACCC also considers that a coordinated approach to the implementation of mandatory PIN@POS is likely to reduce confusion for merchants and cardholders regarding the changes that will be required to implement mandatory PIN@POS.

The ACCC considers that the coordination to implement mandatory PIN@POS may potentially reduce competition between the card schemes on one aspect of card security measures. However, it does not appear that this would result in substantial public detriments as the card schemes will continue to compete in relation to fees and all other aspects of their product and service offerings to cardholders and merchants.

The ACCC granted interim authorisation on 18 September 2013 to permit Visa, MasterCard and one or more of the Participating Financial Institutions to make arrangements and/or arrive at understandings and give effect to those arrangements and/or understandings relating to the public communications strategy regarding the voluntary adoption of PINs at point of sale in Australia.

The ACCC has now also decided to grant interim authorisation to allow Visa, MasterCard and the Participating Financial Institutions to reach agreement with American Express regarding its involvement in the coordinated implementation of mandatory PIN@POS and the public communications strategy relating to the adoption of PIN@POS in Australia. This interim authorisation will commence immediately and will remain in place until it is revoked or the date the ACCC's final determination comes into effect.

Contents

The applications for authorisation

1. On 4 July 2013, Visa Worldwide Pte Limited, Visa AP (Australia) Pty Ltd (collectively, **Visa**) and MasterCard Asia/Pacific Pte Ltd (**MasterCard**) (collectively, the **Applicants**) lodged applications for authorisation (A91379 & A91380) with the ACCC. The applications for authorisation were varied on 2 September 2013 to permit the Applicants to also coordinate with American Express Australia Limited (**American Express**).[1]

2. The applications for authorisation were further varied on 10 October 2013 to clarify the conduct for which authorisation has been sought and to extend the period for which authorisation is requested.

3. Visa and MasterCard are seeking authorisation to allow them to work cooperatively with each other, American Express and Participating Financial Institutions[2] to remove signature as a method of authentication for credit card transactions that are completed in person at a point of sale (also known as "mandatory PIN@POS"). The Applicants have now sought authorisation until 31 October 2015.

4. The Applicants also made two separate requests for interim authorisation to enable them to engage in conduct related to the application while the ACCC is considering the substantive applications (see paragraphs —125 - 137).

5. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the **Act**). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.[3]

The conduct

6. The Applicants seek authorisation for the following conduct from the date of authorisation:

   a. The Applicants and American Express and/or Participating Financial Institutions (together, **Participating Third Parties**) making and giving

[1] Applicants, Letter to the ACCC, 24 September 2013.

[2] Participating Financial Institutions are defined in the Applicant's supporting submission as the financial institutions which are participants in the Steering Committee and listed at section 4.4 of the Applicant's Supporting Submission. These are: Australia and New Zealand Banking Group Limited, Bank of Western Australia Ltd, Citigroup Pty Limited, Commonwealth Bank of Australia, Cuscal Limited, GE Capital Finance Australia, HSBC Bank Australia Limited, Indue Ltd, National Australia Bank Limited, Westpac Banking Corporation.

[3] Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website **www.accc.gov.au**.

effect to arrangements and/or arriving at and giving effect to understandings containing provisions that:

i. MasterCard and/or if it chooses to do so, American Express, will implement changes to their respective scheme rules and arrangements to:

   a. require merchants and acquirers to ensure that for Nominated Transactions after a nominated date, the chip-reading device (including mobile point-of-sale devices) does not allow PIN-entry to be bypassed;

   b. where there is a third party issuer, require the issuer (or its processor) to decline Nominated Transactions after a nominated date unless verified by PIN; and

   c. specify that:

      - **Nominated Transactions** means all card-present credit debit and charge card transactions completed in Australia using an Australian issued chip card other than transactions initiated with Excluded Card Types and transactions that do not require verification by a cardholder (such as transactions below a particular value threshold); and

      - **Excluded Card Types** means cards that may be issued to agreed categories of cardholders to accommodate specific individual cardholder needs.

   (**Proposed PIN@POS mandate**), noting that, in the case of American Express, the terms of its PIN@POS mandate may be different to take account of the differences in the American Express card scheme (**Amex PIN@POS mandate**);

ii. Visa may implement changes to its scheme rules and arrangements to provide that they have the same or substantially similar effect as the Proposed PIN@POS mandate; and

iii. the dates on which:

   a. Visa and MasterCard will implement the Proposed PIN@POS mandate (which dates will be the same or substantially similar for both Visa and MasterCard); and

   b. American Express will, if it chooses to do so, implement the Proposed PIN@POS mandate or the Amex PIN@POS mandate (which dates may be the same or substantially similar to Visa and MasterCard's dates);

b. the Applicants (or one of them) and Participating Third Parties, making arrangements and/or arriving at understandings and giving effect to arrangements and understandings which contain provisions that they, or some of them, will jointly fund the preparation, modification and implementation of a public communications strategy encouraging the use of PIN@POS and concerning the implementation of mandatory PIN@POS in Australia;

c. the Applicants (or one of them) and Participating Third Parties, making arrangements and/or arriving at understandings and giving effect to arrangements and understandings which contain provisions that they, or some of them, will jointly agree upon the terms on which the public communications strategy encouraging the use of PIN@POS and concerning the implementation of mandatory PIN@POS in Australia will be implemented [sic]; and

d. the Applicants (or one of them) and Participating Third Parties, making arrangements and/or arriving at understandings and giving effect to arrangements and understandings which contain provisions that they or some of them will adopt and adhere to the public communications strategy.

(collectively referred to throughout this draft determination as the "**Proposed Arrangements**")

7. Visa has already amended its scheme rules to provide for the introduction of mandatory PIN@POS. These rules are summarised in more detail at section 4.8 of the Applicants' supporting submission[4] and essentially provide that:

a. Merchant terminals will be required from 17 March 2014 to force the use of PINs on eligible transactions.

b. Issuers (e.g. financial institutions) will be required to decline any eligible transactions that are completed without a PIN from 30 June 2014.

c. The requirement to use a PIN will apply to all domestic chip initiated transactions (e.g. it will not apply to foreign cards or magnetic stripe transactions) in Australia with the exception of:

    i. transactions initiated with non-PIN-preferring cards to accommodate specific individual cardholder needs (e.g. cardholders who are unable to use a PIN due to disability or other special circumstances will be able to use a signature);

    ii. unattended transactions;

    iii. Visa Easy Payment Service transactions;[5] and

    iv. Visa payWave transactions[6] that do not require a customer verification method.

[4] Applicants, Submission to the ACCC, 4 July 2013.
[5] These are transactions made at participating retailers where cardholders do not need to enter a PIN or sign a receipt for purchases below a specified value.
[6] Visa payWave is a form of contactless payment technology.

The Applicants

8. Visa and MasterCard are global payments technology companies. They provide payment processing services to financial institutions including transaction processing, risk management and information services.

9. Most relevantly to the Proposed Arrangements, both Visa and MasterCard operate card payment schemes to which financial institutions can become members in order to issue cards and acquire transactions. Visa and MasterCard both own and administer electronic card payment networks. This is explained in further detail in paragraphs 10-13.

Background

Visa and MasterCard card schemes

10. Visa and MasterCard both operate a “four party” or “open loop” model for their card schemes which include the following parties:

    a. the payer (the cardholder);

    b. the payer’s financial institution (the issuer);

    c. the recipient (the merchant); and

    d. the recipient’s financial institution (the acquirer).

11. In this model, the card schemes rely upon banks and other financial institutions to issue cards to cardholders and acquire transactions from merchants.

12. Cardholders are issued Visa or MasterCard branded credit cards by financial institutions. Most major financial institutions are members of both schemes, but not all financial institutions offer new cardholders a choice between a Visa or a MasterCard credit card (for example, the Commonwealth Bank of Australia does not offer new customers the choice of a Visa card).

13. Visa, MasterCard and American Express do not supply or own point of sale terminals or hardware. These terminals are often supplied by the merchant’s financial institution, however independent providers also supply these terminals. Some major retailers own and operate their own point of sale terminals and systems, including switching networks to transmit transactions.

American Express card scheme

14. In contrast to the Applicants, American Express operates a “three party” or “closed loop” model which includes the following parties:

    a. the cardholder;

b. the merchant; and

c. American Express – who, in addition to operating the card scheme, is an issuer and an acquirer.

15. Unlike Visa and MasterCard, American Express directly issues cards to cardholders. The major banks who are licensed to issue American Express cards will often issue them as a “companion” or “dual” card where the card is issued with either a Visa or a MasterCard and both cards are linked to the one credit card account.

16. Under this model, American Express issues its proprietary cards to cardholders and is a merchant acquirer. As a merchant acquirer, American Express directly contracts with merchants to allow them to accept transactions on its network. Merchants who have not entered into a merchant agreement with American Express may not accept and process American Express card transactions.

17. In Australia, American Express has granted a licence to the four major banks to permit them to issue American Express branded credit cards on the American Express network.

Comparative size of card schemes

18. According to statistics published by the Reserve Bank of Australia, the Visa and MasterCard card schemes combined attract more than 80% of the total credit card transactions in Australia (85.8% by transaction number, 81.2% by transaction value). The American Express and Diners Club card schemes attract less than 20% of total credit card transactions (14.2% by transaction number, 18.8% by transaction value).[7]

19. American Express submits Diners Club has less than a 1% share of total credit card transactions.[8]

Submissions received by the ACCC

20. The ACCC tests the claims made by the Applicants in support of an application for authorisation through an open and transparent public consultation process.

21. The ACCC sought submissions from 110 interested parties potentially affected by these applications and received submissions from 23 interested parties. A summary of the public submissions received from interested parties follows.

22. Submissions in support of the application were received from:

a. representatives of merchants (the Australian Retailers Association, Master Grocers of Australia) and merchants (Woolworths);

[7] Reserve Bank of Australia, Market Shares of Credit and Charge Card Schemes, July 2013 (available from **http://www.rba.gov.au/statistics/tables/xls/c02hist.xls?accessed=2013-09-17-18-19-26**).

[8] American Express, Submission to ACCC, 19 July 2013, p. 3.

b. financial institutions, many of whom are also Participating Financial Institutions and will therefore benefit from the authorisation (National Australia Bank, Commonwealth Bank of Australia, Cuscal, Indue and GE Capital), Bendigo and Adelaide Bank, Diners Club and American Express;

c. providers of payment processing solutions (Tyro and National Billing Group (CabFare)); and

d. a consumer representative body, the National Seniors Association.

23. Interested parties made a number of arguments in support of the Proposed Arrangements, including noting the efficiencies for financial institutions and merchants that will arise through a coordinated approach, the benefits that mandatory use of PINs may have in reducing the incidence of fraud and the benefits that may be experienced through more efficient transactions at point of sale.

24. The Reserve Bank of Australia supports the authorisation, based on the assumption that the counterfactual is that both Visa and MasterCard would both implement PIN@POS but on different timetables.[9]

25. The Australian Small Business Commissioner notes that the implementation of mandatory PIN@POS would be unlikely to lessen competition or result in public detriment and may have positive benefits for small business. However, the Australian Small Business Commissioner also outlined potential issues that may negatively affect small businesses and consumers, such as additional costs to small business (needing to change the way in which credit card transactions are processed), concerns relating to the collection of tips and the clarity of amounts charged to customers in the absence of paper slips.

26. The NSW Small Business Commissioner also made submissions, after consultation with Restaurant and Catering NSW and the Australian Hotels Association (NSW).[10] Restaurant and Catering Australia also made a separate submission. These parties submit that whilst they were broadly supportive of the initiative there are some concerns, specific to small business, that could be addressed by the ACCC imposing conditions such that:

a. The Applicants and financial institutions should not unreasonably profit from the implementation - including reducing fees and charges to small business merchants to reflect the reduced costs from removing paper based transactions.

b. The Applicants must establish a formal working group to work through the concerns and views of small business merchants, and the Steering Committee must have regard to any recommendations from the working group.

27. These parties also note that for the implementation of PIN@POS to be successful, the coordinated campaign must effectively engage with the wide range of small business merchants that will be impacted.

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9 Reserve Bank of Australia, Submission to ACCC, 9 August 2013, p.2.

10 NSW Small Business Commissioner, Submissions to ACCC, 19 July 2013 and 13 September 2013.

28. PayPal submits that whilst it supports initiatives such as PIN@POS, it has concerns that the PIN@POS initiative could create a barrier to entry or discourage the development of new payment methods. PayPal also notes a concern that the relevant advertising materials should not suggest that transactions using other methods are less secure.

29. Submissions from an individual[11] and the Welfare Department of St Joseph's Hospital raise some concerns about the potential harm to consumers through either a shift in liability in relation to fraudulent transactions or the difficulties that some groups of consumers may incur in trying to memorise PINs.

30. The views of the Applicants and interested parties are considered in the evaluation chapter of this draft determination. Copies of public submissions may be obtained from the ACCC's website **www.accc.gov.au/authorisationsregister.**

ACCC evaluation

31. The ACCC's evaluation of the Proposed Arrangements is in accordance with the relevant net public benefit tests[12] contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.

32. In order to assess the effect of the Proposed Arrangements and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

The relevant area of competition

33. The Applicants submit that it is not essential to precisely define the markets likely to be affected by the Proposed Arrangements, as this is a matter where a net public benefit would (or would not) arise regardless of the scope of the market.

34. The Applicants submit that the areas of competition that may be affected are the various national markets in which services associated with payment cards are supplied to financial institutions by payment card scheme operators and by financial institutions to merchants and cardholders.

35. The ACCC agrees that for the purpose of assessing the Proposed Arrangements, a precise market definition is not necessary. The ACCC proposes to consider the Proposed Arrangements in terms of the competition between Visa, MasterCard and American Express in relation to the provision of products and services to:

[11] Raky Pathak, Merchant Warrior, Submission to ACCC, 25 July 2013.
[12] Subsections 90(5A) and 90(5B), 90(6), 90(7) and 90(8). The relevant tests are set out in Attachment A.

a. financial institutions;

b. merchants; and

c. cardholders.

36. Although Visa and MasterCard do not directly supply cards to cardholders or services to merchants, they directly compete to attract, retain and encourage more transactions on their networks which includes encouraging more consumers to become cardholders (e.g. through methods of authentication, loyalty programs) and more merchants to accept their cards and process transactions.

37. American Express submits that it competes “directly and vigorously” with Visa and MasterCard, including in relation to the acceptance of their respective cards by merchants at points of sale.[13]

38. Financial institutions, including the Participating Financial Institutions, supply complementary services to those provided by the card schemes in competition with each other for cardholders (e.g. terms of credit, fees and other loyalty programs) and for merchants (e.g. the supply of terminals and transactions acquisition services).

39. Most major banks issue a mix of Visa, MasterCard and American Express credit cards and provide or support merchant terminals that accept all credit card types.

The future with and without

40. To assist in its assessment of the proposed conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.

Future with the conduct

41. The Applicants submit that if the Proposed Arrangements are authorised, the Applicants will:

    a. implement their respective (and identical or similar) PIN@POS mandates; and

    b. jointly develop and implement the communications strategy in conjunction with the Participating Financial Institutions.

42. American Express submits that if the Proposed Arrangements are authorised, all three major card schemes will be able to have their views considered by the Participating Financial Institutions.[14] This will provide for reduced duplication

[13] American Express, Submission to ACCC, 19 July 2013.
[14] American Express, Submission to the ACCC, 26 September 2013.

and increased consistency in implementation. In this regard, the ACCC notes that in relation to the current dates proposed by Visa in relation to the rollout of mandatory PIN@POS, American Express submits that it "does not necessarily support the proposed timing".[15]

43. It therefore may be that in the future with the Proposed Arrangements either the timing for the implementation of mandatory PIN@POS as set out by the Applicants may be amended or that American Express may implement mandatory PIN@POS according to a different timeframe or schedule.

Future without the conduct

44. The Applicants submit[16] that in circumstances where the likely future without the Proposed Arrangements arises:

    a. Visa would still implement mandatory PIN@POS according to its current timetable as this is consistent with its business driver to seek to reduce card present fraud in Australia, following the successful implementation of chip and PIN in Europe.

    b. MasterCard would issue its own rules in relation to mandatory PIN@POS – not necessarily on the same terms or on the same timeframe as Visa – as it also wants to put this fraud prevention measure in place for cardholders as a matter of best practice.

    c. If Visa independently implements mandatory PIN@POS, MasterCard would have additional incentives to also implement mandatory PIN@POS in order to avoid MasterCard becoming the target of increased signature card present fraud (as fraudsters would not be able to perpetrate this fraud with Visa cards).

45. American Express submits that without the Proposed Arrangements, each of Visa, MasterCard and American Express will need to separately introduce rules to provide for PIN@POS, which may or may not be mandatory in all cases.[17] It further submits that, as a smaller participant, it may be particularly disadvantaged in any implementation as merchants and consumers may find it easier to use the cards of Visa and MasterCard.

46. The ACCC notes that the most likely future without the Proposed Arrangements could comprise one of the following scenarios:

    a. "Uncoordinated PIN@POS" – where Visa would proceed with its existing changes to its rules and MasterCard and/or American Express would separately proceed with the implementation of mandatory PIN@POS within a relatively short period of time. This is consistent with the submission by the Applicants.

    b. "Delayed PIN@POS" – one of the schemes (e.g. Visa) would proceed with its existing plan to implement mandatory PIN@POS and the other (most

15 American Express, Submission to the ACCC, 3 September 2013.
16 Applicants, Response to ACCC request for further information, 13 August 2013.
17 American Express, Submission to the ACCC, 26 September 2013.

likely MasterCard, or American Express) would decide not to also implement mandatory PIN@POS for a significant period of time; or

c. “No PIN@POS” – none of the card schemes would implement mandatory PIN@POS at this time.

47. In relation to an assessment of which future without would be most likely, the ACCC notes the following history in relation to the implementation of mandatory PIN@POS:

a. 2009 – Visa attempted to unilaterally introduce mandatory PIN@POS by issuing a rule change that specified that from 1 April 2013 only PIN transactions would be accepted at points of sale.

b. Early 2011– MasterCard issued updated advice to financial institutions on card security measures which did not include a plan to implement mandatory PIN@POS. The Applicants advise that at this time, MasterCard’s member institutions were not in favour of mandatory PIN@POS.

c. 2011 – The Applicants advise that financial institutions raised a number of concerns regarding the different approaches by Visa and MasterCard and Visa’s implementation plans were slowed, in part, due to these concerns

48. Visa subsequently amended the timeframe for implementation of mandatory PIN@POS and commenced working with MasterCard and Participating Financial Institutions toward a collaborative approach to fraud mitigation (including the Proposed Arrangements).

49. The Applicants submit that now the “appetite amongst MasterCard’s member financial institutions to introduce PIN@POS has increased”.[18]

50. Interested parties made submissions that only Visa or MasterCard could definitely advise whether they would proceed with the move to mandatory PIN@POS in the future without,[19] but that it was likely that each scheme would separately move to mandatory PIN@POS but with differences, such as different implementation dates.[20]

51. For the purposes of considering the potential effects of the Proposed Arrangements, the ACCC considers that the “uncoordinated PIN@POS” scenario (described in paragraph 47(a)) is the most likely future without as the ACCC considers that it is likely that:

52. MasterCard would also independently implement mandatory PIN@POS within a relatively short period of time following Visa’s implementation; and

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18 Applicants, Response to ACCC request for further information, 13 August 2013.

19 Tyro Payments, Submission to the ACCC, 10 July 2013; Commonwealth Bank of Australia, Submission to ACCC, 17 July 2013; Woolworths, Submission to the ACCC, 19 July 2013; Reserve Bank of Australia, Submission to the ACCC, 9 August 2013.

20 National Australia Bank, Submission to the ACCC, 15 July 2013; Commonwealth Bank of Australia, Submission to ACCC, 17 July 2013; Woolworths, Submission to the ACCC, 19 July 2013.

53. American Express would independently proceed with implementing PIN@POS arrangements, although it has not submitted that it would implement mandatory PIN@POS.

54. The ACCC also considers that the Proposed Arrangements are likely to lead to mandatory PIN@POS being implemented earlier by more card schemes. In this regard, the ACCC considers that the “delayed PIN@POS” future without is also relevant to its evaluation of the public benefits and public detriments.

Public benefit

55. 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.[21]

56. The Applicants submit that the following public benefits will arise from the conduct:

    a. avoidance of duplicated costs (i.e. efficiencies); and

    b. reduction in cardholder confusion.

57. In addition, interested parties submit that the coordinated introduction of mandatory PIN@POS will result in operational efficiencies and a reduction in fraud and fraud related disputes, which will be of benefit to consumers and merchants.

58. The ACCC’s assessment of the likely public benefits from the Proposed Arrangements follows.

Coordination will provide efficiencies

59. The Applicants submit that the coordination of their conduct would eliminate inefficiencies, because should the parties move to implement mandatory PIN@POS independently:

    a. Visa and MasterCard would separately engage with Participating Financial Institutions and have separate public communications documents and strategies.

    b. Merchant communications training would be carried out separately by each of Visa and MasterCard.

    c. Participating Financial Institutions would have to “do everything twice” – mainly in relation to the updating of hardware and software. This would include each financial institution updating its software to reject relevant

21 *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.

transactions that are not completed with a PIN and updating merchant terminal software and hardware.

60. The Applicants estimate that the specific additional costs that would be incurred if MasterCard were to proceed to mandatory PIN@POS significantly after Visa are as follows:

    a. Marketing costs (incurred by financial institutions, potentially supported by MasterCard) – approximately $5 million.

    b. Technology upgrade costs (also to be incurred by financial institutions) – approximately $10 million.

61. The Applicants submit that these additional costs would be passed through to cardholders and merchants. The Applicants also note that the addition of American Express further increases these benefits. As these costs will be incurred by the financial institutions rather than the card schemes, the Applicants were not able to provide a more accurate estimate or detailed breakdown of their magnitude.

62. A reduction in implementation costs, if any, achieved by a coordinated approach from Visa and MasterCard (and American Express) is likely to vary between financial institutions and merchants but is likely to be predominately a saving of operational expenditure such as project management overheads and more efficient use of staffing resources.

63. Furthermore, the ACCC understands that for some interested parties many of the potential efficiencies may only be achieved if each card scheme nominates the same implementation dates for mandatory PIN@POS. In this regard, the ACCC notes that the Proposed Arrangements provide that Visa and MasterCard will implement mandatory PIN@POS on the same or substantially similar dates as each other. Should American Express also choose to participate, the Proposed Arrangements also provide that American Express may also implement mandatory PIN@POS on the same or substantially similar dates to Visa and MasterCard.

64. In relation to the technology upgrades incurred by financial institutions, the complexity of the change to PIN@POS will depend upon the particular POS terminals and software operated by the relevant terminal owner. Some financial institutions and merchants already have point of sale terminals that are capable of being updated through a remote software update, which can be done at minimal cost – meaning that coordination is unlikely to remove a significant inefficiency. The Applicants estimate that approximately 40-55% of terminals are capable of being updated remotely.

65. Where a point of sale terminal requires a manual update, the Applicants have advised that swap outs (with terminals that have been updated with the relevant change) may take place over 12-24 months following 17 March 2014.

66. In the period between 17 March and 30 June 2014, where a terminal has not been updated, transactions will still technically be able to be processed with a signature. Following 30 June 2014, any transaction that has not been completed using a PIN (e.g. because the terminal has not been upgraded and has permitted PIN bypass) will be declined by the financial institution that issued the credit card.

67. The ACCC notes that financial institutions may also update terminals in accordance with their usual business plans to more advanced models that are capable of remote updates in the future. In this regard, whilst the ACCC accepts that there may be some benefits from the coordinated conduct it is unlikely to eliminate a significant inefficiency.

68. The ACCC accepts that if the implementation dates are closely aligned, large national merchants may also realise some efficiencies through the coordinated implementation, as it may remove the need for multiple instances of staff training.

69. In conclusion, the ACCC considers that some efficiency benefits are likely to be realised through the coordinated implementation by the card schemes of the introduction of mandatory PIN@POS. The magnitude of these benefits cannot be estimated with any certainty but they are likely to be modest in comparison to similar costs regularly borne in the relevant industries affected.

Coordination will reduce cardholder and merchant confusion

70. The Applicants submit that separate implementation timeframes and public communications strategies from the different card schemes and Participating Financial Institutions will lead to confusion by cardholders.

71. Interested parties also submit that separate implementation is likely to cause greater confusion for merchants and their staff.[22] Any confusion amongst merchants and their staff is likely to further compound any confusion experienced by cardholders.

72. The ACCC accepts that any significant changes to the way in which consumers and merchants use services that are as pervasive and as essential as electronic payment systems have the potential to lead to some confusion and disruption. In this regard, the ACCC notes that the Applicants estimate that at present only 55% of credit card transactions completed at a point of sale are completed using a PIN.[23] Therefore, significant changes to cardholder behaviour will be required to implement these changes.

73. By coordinating the advertising and implementation of mandatory PIN@POS, the Applicants, American Express and Participating Financial Institutions may be able to reduce some of the confusion that is likely to be experienced by cardholders, including by ensuring that merchants are better informed and able to answer questions from cardholders. This can be achieved through a unified public communication campaign that is appropriately resourced and supported by industry.

74. If each of the card schemes were to implement mandatory PIN@POS on significantly different terms or timeframes, this would be likely to lead to increased confusion for cardholders at the point of sale.

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[22] Tyro, ARA, Indue, National Australia Bank, Bendigo and Adelaide Bank, Commonwealth Bank of Australia, Australian Commissioner of Small Business, Woolworths and GE Capital.

[23] Applicant, Submission to the ACCC, 13 August 2013, p.4.

75. The ACCC therefore considers that there is likely to be some benefit from a coordinated approach to the implementation of mandatory PIN@POS as it is likely to assist in reducing confusion amongst cardholders by improving merchant and consumer education regarding the changes.

Benefits from the removal of signatures

76. The Applicants have not identified any public benefits associated with the removal of signatures as a method of authentication, because the Applicants submit that, both Visa and MasterCard would independently proceed with the implementation of mandatory PIN@POS – therefore such benefits are achieved irrespective of the Proposed Arrangements. American Express submits that in the future without the Proposed Arrangements, each card scheme would separately implement PIN@POS, but not necessarily on a mandatory basis.

77. The ACCC has broadly accepted the Applicants' view of the future without but also considers that the Proposed Arrangements may lead to the earlier or increased adoption of mandatory PIN@POS amongst the card schemes. In this regard, matters relating to the removal of signatures may be considered relevant to the assessment of public benefits and public detriments, but only to the extent that they will be brought forward and realised earlier.

78. In this regard, many interested parties submit that there will be public benefits from the implementation of PIN@POS including a reduction in fraud and costs associated with fraud disputes[24] and operational (efficiency) benefits for merchants including a decrease in the time taken to complete a transaction.[25]

79. Additionally, the Applicants have provided data which indicates that the types of fraud that will be prevented by the removal of signature represent less than 0.01% of total credit card transactions. In this regard, the ACCC notes that card present fraud represents a declining proportion of credit card fraud with card not present transactions (e.g. online) growing substantially in recent years.

80. The ACCC also notes that both Visa and MasterCard permit customers to make particular transactions (below a certain value) without any method of customer authentication (e.g. Visa payWave and MasterCard PayPass).

81. The ACCC considers that the removal of signature as a method of authentication may lead to some reduction in fraud and related costs associated with disputes relating to fraudulent transactions. However, the magnitude of this benefit is not clear due to the potential for fraudulent card present transactions to "migrate" to online fraud (e.g. a decrease in card present fraud may be offset by an increase in card not present fraud).

82. In relation to the operational benefits for merchants, the ACCC considers that there are likely to be some benefits to merchants with the mandatory use of

[24] Tyro Payment Systems, National Australia Bank, Australian Retailers Association, Australian Small Business Commissioner, National Seniors Australia, National Billing Group (CabFare), Woolworths and Restaurant & Catering Industry Association.

[25] National Australia Bank, Australian Small Business Commissioner, Woolworths and Restaurant & Catering Industry Association.

PINs, including reduced ”tender time” at the point of sale[26] (i.e. the time spent processing payment at the checkout) and less administration related to the use of paper based signature transactions (e.g. there will be no need to keep signature slips in case of disputes).

83. To the extent that there are reductions in the time spent at the point of sale, this may also lead to benefits for consumers in terms of faster processing of both their transactions and the transactions of other customers (e.g. less time may be spent queuing).

Public detriment

84. 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.[27]

85. The Applicants submit that there are no material public detriments (anti-competitive or otherwise) associated with the Proposed Arrangements.

86. Submissions from interested parties note that the potential public detriments from the Proposed Arrangements could include:

    a. reduced competition between the card schemes;

    b. costs and disruptions for merchants; and

    c. detriment for consumers.

87. The ACCC's assessment of the likely public detriments from the proposed conduct follows.

Reduced competition between the card schemes and other payment methods

Reduced competition between the card schemes

88. As has previously been noted (see paragraphs 33 – 39), the card schemes compete to attract transactions on their respective networks.

[26] See for example, Reserve Bank of Australia, *Payment Costs in Australia: A study of the costs of payment methods*, November 2007. This report notes that the average time to process an EFTPOS transaction takes around 35 to 40 seconds compared to credit cards and scheme debit, which takes around 45 to 50 seconds. Whilst this study does not directly compare the tender times for transaction types that are directly relevant to this matter (that is, the time taken to process a transaction with chip and signature, compared to chip and PIN), it does indicate that a PIN based transaction is likely to be quicker than a signature based transaction.

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

89. The Reserve Bank of Australia submits that “card payment systems compete on a wide range of characteristics, including security and convenience in the choice of authorisation methods available”. It submits that the coordinated implementation of PIN@POS would remove an element of competition between the card schemes in relation to the method of authentication offered to consumers and the security of transactions.

90. However, the Reserve Bank of Australia concludes that this is not a significant concern (as the Bank considers this element of competition does not generate significant public benefits), and that the card schemes will still have incentives to implement other measures for security or authentication.

91. The Applicants agree with the Reserve Bank of Australia’s conclusion, as they also do not consider it to be a significant area of competition between the schemes.

92. The ACCC considers that the method of authentication and the security of transactions are points of differentiation between the card schemes, as has been recently demonstrated by the separate rollouts of Visa payWave and MasterCard PayPass, both of which were the subject of large marketing campaigns. However, as the Proposed Arrangements relate only to the removal of signature as a method of authentication, the ACCC considers that any public detriment arising from a reduction in competition between the card schemes from the Proposed Arrangements is likely to be small.

93. Furthermore, as each card scheme would be likely to independently introduce mandatory PIN@POS without the Proposed Arrangements, any competition that would exist between them relating to the use of PINs or signature would only exist for a short period of time.

94. The ACCC notes that the coordination permitted under the Proposed Arrangements is limited to specific activities related to the implementation of mandatory PIN@POS and does not extend to coordination in relation to fees or charges, or any other parts of the card schemes or financial institutions’ product or service offerings to cardholders or merchants.

Reduced competition with other payment methods

95. PayPal submits that the introduction of mandatory PIN@POS could lead to an increase in barriers to entry or discourage the development of new payment methods, such as digital wallets. In response, the Applicants submit that mandatory PIN@POS will not negatively impact alternative payment methods as it will not affect the ability of those providers to compete with other payment types, including credit cards.[28]

96. The ACCC considers that the Proposed Arrangements will not have a negative impact upon the ability or incentive of providers of alternative payment methods to compete with the card schemes.

97. The Reserve Bank of Australia and PayPal also raised concerns that the content of the promotional materials to be prepared by the card schemes and Participating Financial Institutions to support the implementation of mandatory

[28] Applicants, Submission to the ACCC, 4 September 2013.

PIN@POS might be misleading or harmful to other types of payment methods. The Applicants submit that the relevant promotional materials will only address "card present" transactions, and will seek to educate consumers that using a PIN is safer than using a signature.

98. Authorisation permitting the card schemes and financial institutions to engage in a joint marketing campaign does not constitute an approval or endorsement of any marketing materials that will be the subject of that campaign.

Costs or detriments associated with removing signature

99. As the ACCC notes in paragraph 77, to the extent that the Proposed Arrangements result in the earlier or more certain introduction of mandatory PIN@POS then the Proposed Arrangements may result in any costs or detriments associated with removing signature to occur earlier.

100. Some interested parties submit that there may be costs or disruptions for merchants and consumers from the removal of signatures for point of sale credit card transactions.

101. In particular, they submit that the following public detriments may arise, particularly in relation to small businesses, as: [29]

    a. merchants may incur costs associated with upgrading facilities or terminals to accommodate the mandatory use of PINs (e.g. mobile terminals to facilitate "pay at table" or changes at the POS to facilitate more customers entering PINS);

    b. there may be a reduced incidence of tipping in relevant industries (such as restaurants and taxis) if the terminal does not allow customers to add a tip; and

    c. there may be implementation problems that could lead to disruption and additional costs.

102. In light of these concerns, the NSW Small Business Commissioner and Restaurant and Catering Australia submit that the arrangements should only be authorised subject to a number of conditions (see paragraph 26) that would better ensure that the issues relating to small business are addressed by Visa and MasterCard.

103. National Seniors Australia, St Joseph's Hospital (Social Work Department) and Merchant Warrior submit that the move to mandatory use of PINs has the potential to lead to detriment to consumers, particularly groups of customers that are likely to have difficulties in remembering PINs.

104. In response, the Applicants submit that these concerns do not arise as a result of the Proposed Arrangements as mandatory PIN@POS would be implemented by both card schemes without authorisation.

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[29] Restaurant & Catering Industry Association, Australian Small Business Commissioner and NSW Small Business Commissioner.

105. The Applicants also note that merchants and consumers are familiar with PIN only transactions through the extensive use and operation of the eftpos network and that many of the detriments identified are readily able to be overcome (for example, through advances in terminal technology that facilitates “pay at table” in restaurants or the addition of tips to PIN based transactions).[30]

106. Given the ACCC’s finding on the likely future without the conduct, to the extent that any of these public detriments arise, the ACCC does not consider that the Proposed Arrangements contribute in a significant way to their size. Therefore, the ACCC does not consider it appropriate to require conditions on the grant of the authorisation as proposed by interested parties.

107. Nevertheless, the ACCC considers that the Applicants, American Express and Participating Financial Institutions should ensure that they effectively engage with small business in order to minimise any potential negative impact that the change to mandatory PIN@POS may have on small business. In this regard, the ACCC considers that further consultation with small business prior to the change and the provision of support during the transition would assist in reducing confusion for merchants and consumers alike.

108. In this regard, the ACCC notes that the Applicants have provided further detail regarding their plans to engage with small business, including extending an invitation to the Restaurant and Catering Industry Association to sit on a subcommittee and provide input on the concerns and views of small business merchants in the restaurant and catering industry.[31]

Balance of public benefit and detriment

109. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

110. In the context of applying the net public benefit test in subsection 90(8)[32] of the Act, the Tribunal commented that:

> … something more than a negligible benefit is required before the power to grant authorisation can be exercised.[33]

111. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

112. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

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30 Applicants, Submission to the ACCC, 30 August 2013.

31 Applicants, Submission to the ACCC, 30 September 2013.

32 The test at subsection 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

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

Length of authorisation

113. The Act allows the ACCC to grant authorisation for a limited period of time.[34] This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

114. In this instance, the Applicants seeks authorisation of the Proposed Arrangements until 31 October 2015. The Applicants submit that the current intention is for the arrangements relating to the coordinated introduction of mandatory PIN@POS to be finalised by 30 June 2014. However, in the event that the implementation needs to be delayed (for example, if the cardholder and merchant awareness campaign not be effective), authorisation for a period beyond this date may be required.[35]

115. The ACCC proposes to grant authorisation until 31 October 2015, as requested.

Draft determination

The application

116. On 4 July 2013, the Applicants lodged applications for authorisation (A91379 & A91380) with the ACCC. The Applicants varied the applications for authorisation on 2 September 2013 to permit the parties to also coordinate with American Express.

117. The applications for authorisation were made using Forms A and B, Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under subsections 88(1) and 88(1A) of the Act in respect of the Proposed Arrangements (as defined in paragraph 6).

118. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

119. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the Proposed Arrangements for which authorisation 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 conduct.

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34 Subsection 91(1).

35 Applicants, Submission to the ACCC, 4 July 2013, p 18.

120. Similarly, the ACCC is satisfied that the Proposed Arrangements are likely to result in such a benefit to the public that the conduct should be allowed to take place.

121. The ACCC therefore proposes to grant authorisation to applications A91379 and A91380.

Conduct for which the ACCC proposes to grant authorisation

122. The ACCC proposes to grant authorisation to the Applicants to engage in the Proposed Arrangements until 31 October 2015.[36]

123. This draft determination is made on 11 October 2013.

Further submissions

124. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Interim authorisation

Initial request for interim authorisation

125. At the time of lodging the application, the Applicants requested interim authorisation to permit them and the Participating Financial Institutions to jointly fund and coordinate a public communication campaign regarding the voluntary uptake by cardholders of PIN@POS (a campaign to encourage cardholders to set PINs and use them for transactions).

126. The ACCC granted interim authorisation under subsection 91(2) of the Act on 18 September 2013.

127. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

[36] The ACCC notes that the Applicants have not applied for, and the ACCC cannot authorise, the making of any arrangements or arriving at any understandings to the extent that conduct has already been engaged in by the parties (other than where that conduct is the subject of interim authorisation) (see subsection 88(12)) of the Act.

Further request for interim authorisation

Request for interim authorisation

128. The Applicants also made a further request for interim authorisation on 2 September 2013 to allow the parties to agree a range of matters with American Express regarding the public communications strategy for the adoption of PIN@POS in Australia.

129. Specifically, the Applicants have requested interim authorisation to enable the Applicants and one or more of the Participating Financial Institutions to:

   a. participate in meetings and discussions with American Express (including Steering Committee meetings) with a view to American Express assessing the feasibility of it implementing a PIN@POS mandate that has the same or substantially the same effect as Visa's current PIN@POS mandate;

   b. agree with American Express on the terms, if any, on which American Express will share in the funding of the preparation, modification and implementation of a public communications strategy concerning the promotion of the adoption of PIN@POS in Australia;

   c. agree with American Express upon the content of, and terms on which the public communications strategy concerning the promotion of the voluntary adoption of PIN@POS in Australia will be implemented, including but not limited to, the terms on which the American Express name and trademarks and references to "industry initiative" will or will not be used in the public communications strategy; and

   d. agree with American Express to adopt and adhere to the public communications strategy agreed pursuant to paragraphs 129(b) and (c) above in relation to the promotion of the voluntary adoption of PIN@POS in Australia,

   (collectively, the **Proposed Interim Arrangements**).

130. Section 91 of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.

131. The Applicants requested interim authorisation on the basis that:

   a. the interim arrangements are not anti-competitive and will have no anti-competitive impact on any relevant market;

   b. the urgency of the request is clear; and

   c. the grant of interim authorisation will not harm other parties.

132. In the event that interim authorisation was not granted, the Applicants submit that American Express would be unable to prepare for the roll out of mandatory PIN@POS (as it would not be able to discuss matters with the Applicants) which would then likely delay its own rollout (if it were to proceed). The

Applicants submit that this would have negative consequences including reduced efficiencies and continued instances of fraud as a result of any delay.

Consultation

133. The ACCC consulted with interested parties in relation to this request for interim authorisation and received submissions from three interested parties, two of which were in support[37] and one of which reiterated previous concerns stated in relation to the application for substantive authorisation.[38]

Reasons for decision

134. The ACCC has decided to grant interim authorisation for the Proposed Interim Arrangements, as:

    a. Granting the interim authorisation would permit American Express to discuss its participation in the rollout of voluntary or mandatory PIN@POS with the Applicants and Participating Financial Institutions.

    b. The ACCC does not consider that granting interim authorisation would cause harm to any interested parties. In this regard, the ACCC notes that interim authorisation does not permit the Applicants or American Express to implement any decisions made as a result of the discussions described in paragraph 134(a) in advance of the ACCC's decision regarding the substantive application for authorisation.

    c. American Express' ultimate participation in the coordinated roll out of PIN@POS may lead to some increased efficiencies and reduced confusion for consumers.

135. This interim authorisation commences immediately and will remain in place until it is revoked or the date the ACCC's final determination comes into effect.

136. The ACCC's decision to permit the card schemes and financial institutions to engage in a joint marketing campaign does not also constitute an approval of any marketing materials that will be the subject of that campaign.

137. The ACCC may review its decisions in relation to interim authorisation at any time. The ACCC's decisions in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

37 GE Money, National Billing Group (CabFare).
38 NSW Small Business Commissioner.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and

- that benefit, in the case of subsection 90(5A) 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 were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) 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 in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and

- that benefit, in the case of subsection 90(6) 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 was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:

    i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or

    ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or

    iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

    iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.