



Australian
Competition &
Consumer
Commission

Determination

Application for revocation of authorisations A91153 &
A91154 and substitution of new authorisations
A91434 & A91435

lodged by

Australian Payments Clearing Association Limited

in respect of

certain provisions in the regulations for the
Consumer Electronic Clearings System

Date: 15 October 2014

Authorisation numbers: A91434 & A91435

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC has decided to re-authorise the certification, suspension and termination provisions of the Australian Payments Clearing Association's Consumer Electronic Clearings System regulations.

The ACCC grants re-authorisation until 6 November 2024.

The applications for authorisation

1. On 20 June 2014, the Australian Payments Clearing Association (APCA) lodged with the ACCC applications for the revocation of authorisations A91153 & A91154 and the substitution of authorisations A91434 & A91435 for the ones revoked (re-authorisation). Re-authorisation was sought because the existing authorisations are due to expire on 5 January 2015.
2. On 26 August 2014 the ACCC issued a draft determination proposing to re-authorise the arrangements for ten years.

The conduct

3. APCA seeks re-authorisation of the following provisions of its regulations in relation to its Consumer Electronic Clearing System (CECS):
 - 4.7 - CECS Membership – Suspension
 - 4.8 - Effects of Suspension
 - 4.9 - Termination
 - 4.11- Financial Claims Scheme – Suspension
 - 10.5- Failure to Settle – Suspension
 - 13.1- Certification – Initial Certification(the certification, suspension and termination provisions).
4. The ACCC first authorised aspects of APCA's CECS regulations in 2000. The arrangements were re-authorised in 2004 and 2009.

The applicant – APCA

5. APCA is a public company limited by guarantee, incorporated on 18 February 1992. APCA's charter, as set out in its constitution, is:
 - (a) to enable competition and innovation, promote efficiency, and control and manage risk in the Australian payments system, and to generate and collate ideas and information in support of that objective; and
 - (b) to facilitate industry collaboration, self-regulation and system-wide standards, and to co-ordinate the operation of effective payment systems.
6. APCA does not process payments. It co-ordinates and manages payments clearing arrangements for each of the clearing systems it establishes. Individual institutions are responsible for their own clearing operations and must conduct their operations according to APCA's rules as set out in the regulations and procedures for each of APCA's clearing systems. These clearing systems are discussed further below.

7. APCA's board is comprised of three independent directors (including the Chair), one director appointed by the Reserve Bank of Australia (the RBA), the CEO of APCA (non-voting) and a number of directors appointed by APCA members (currently nine directors are appointed by APCA members).

Background

Payments, clearing and settlement

8. In Australia, banks, building societies, credit unions, some card organisations and some major retailers provide a means for individuals and businesses to make payments to each other and thus transfer financial assets of value. The institutional infrastructure within which such transactions occur and which give effect to the transactions is referred to as the payment system. A payment system carries payment messages (in the form of payment instruments such as cheque, credit card etc) via delivery mechanisms, which result in the transfer of funds from one party's account to another's.
9. Where the parties to transactions within a payment system maintain accounts with different payment organisations, a payments clearing and settling process is required between the payment organisations. Clearing and settling allows payment organisations to reflect the changes in their customers' accounts and for value to pass between the payment organisations to reflect the net effect of the transactions upon the value of financial assets held by each payment organisation.
10. Clearing involves the cross-institutional exchange of individual payment messages for the purpose of obtaining settlement. Settlement is the exchange of value between institutions.
11. Settlement in Australia is achieved through transfers of Exchange Settlement Account balances held with the RBA. For transactions encompassed by CECS, settlement is deferred, taking place on the morning of the next business day. Deferred settlement systems carry an inherent risk of an institution processing a third party transaction and then not receiving settlement from the third party's organisation. The CECS regulations include processes to deal with situations where an institution fails to settle. These procedures have been approved by the RBA under the *Payment Systems and Netting Act 1998*.

Membership of APCA

12. Membership of APCA is open to participants in and operators of Australian payment systems which are recognised by the Board of APCA to meet a set of recognition criteria. APCA currently has two classes of members, voting members and operator members.
13. Voting membership confers rights in relation to governance of APCA including rights to appoint directors and vote at company meetings. To automatically qualify as a voting member the member must participate in at least three recognised Australian Payment Systems and have a payment system market share of at least 5%. Members participating in at least three recognised Australian Payment Systems who have a market share of less than 5% are eligible to be elected as voting members. The RBA is also designated as a voting member.
14. Operator members are administrators or operators of a recognised Australian Payment System. Operator members have the right to be consulted on issues

relevant to the payment system that they operate, and may engage in and contribute to discussions of industry issues and policy development but may not appoint directors or vote at general meetings.

15. APCA oversees six payments system frameworks (five clearing systems including CECS and one payments infrastructure system) as described further below. Most voting members of APCA are also day to day operational participants in one or more of APCA's payments system frameworks. Participants in a framework who are members of APCA have the ability to appoint committees of management for the framework and vote at meetings of such committees. The rights and obligations of each framework participant member vary from framework to framework and may also depend upon the participant's category of membership within the framework.

Consumer Electronic Clearing System (CECS)

16. CECS is a payments clearing and settlement system established and managed by APCA to set minimum standards to protect and facilitate the conduct and settlement of exchanges of consumer electronic payment messages resulting from ATM transactions. Members of CECS include financial institutions, an ATM deployer, a credit card issuer and two large retailers. A full list of CECS members is at **Attachment A**.
17. Indirectly, the regulations for CECS also influence payments clearing and settlement in the EFTPOS system. The EFTPOS system is managed by Eftpos Payments Australia Limited which prescribes that certain parts of the CECS regulations also apply to EFTPOS terminals and transactions. Currently, Australia has more than 30,000 ATMS and 805,000 EFTPOS terminals.¹
18. Financial institutions and other businesses may participate directly in the clearing and settlement of consumer electronic transactions by becoming members of CECS. Currently, there are fifteen members of CECS, referred to as CECS Framework Participants. Alternatively, rather than becoming a CECS member, participants in the ATM and EFTPOS payment systems may indirectly participate by entering into an agreement with a CECS member to clear and settle transactions on their behalf. Most, particularly smaller, financial institutions in Australia engage a CECS member to clear and settle transactions on their behalf rather than becoming a CECS member and clearing and settling these transactions directly.
19. The price of CECS membership is currently \$73,600 per annum plus a proportionate corporate fee set according to the member's market share of CECS. If the member proposes operational changes which require other members to make systems changes the fee for this is \$6,400 per operational change. Dispute resolution fees are \$1,430 for each participant in any dispute which is to be resolved by the CECS Management Committee.
20. Participants in the ATM and EFTPOS payments systems who are not CECS members may contribute to the CECS standards and regulations through the CECS Advisory Council. While having no voting rights (since they have no direct transaction volumes), Advisory Council members have the right to attend and to be heard at CECS management committee meetings. The Advisory Council has representatives from processors and central clearing switch operators, software

¹ APCA website (www.apca.com.au), June 2014.

providers, security hardware suppliers, ATM and EFTPOS terminal suppliers, retailers and wholesalers, card schemes, and ATM operators.

The certification, termination and suspension provisions

21. APCA has sought authorisation for particular provisions within the regulations which govern CECS, in particular clauses 4.7, 4.8, 4.9, 4.11, 10.5 and 13.1:

- Clause 4.7, Suspension: permits the CECS management committee to suspend a member for a number of reasons including, if requested by any relevant prudential supervisor, by agreement of the member, for insolvency, for failure to rectify breaches of membership obligations, and for failure to settle settlement obligations.
- Clause 4.8, Effect of Suspension from CECS: provides for the consequences of a suspension of CECS membership including the suspension of voting rights in CECS management meetings and discretion for the management committee to remove any certification granted to the member. Suspension (unless accompanied by removal of certification) does not preclude the member from participating in CECS or excuse the member from discharging its obligations in accordance with the CECS regulations.
- Clause 4.9, Termination: establishes the circumstances and processes by which a member of CECS may cease to be a member. In particular, the APCA board may terminate CECS membership if an un-remedied suspension event has occurred, the board has consulted with any relevant prudential supervisor and the member has had an opportunity to make submissions to the board regarding the termination. The APCA board is not required to give any reasons for a decision to terminate membership and termination is effective immediately. Membership can also be terminated if the member becomes insolvent or ceases to be involved in interchange activities. The effect of termination is that the financial institution cannot directly participate in CECS.
- Clause 4.11, Financial Claims Scheme processing requirements: provides for automatic suspension of membership of CECS of any member which is subject to a declaration made by the Minister under section 16AD of the *Banking Act 1959*. This provision relates to claims made under the Financial Claims Scheme, designed to protect depositors of authorised deposit-taking institutions (banks, building societies and credit unions) and policyholders of general insurance companies from some potential losses due to the failure of these institutions.²
- Clause 10.5, Failure to Settle Suspension: provides for the automatic suspension of CECS membership if a member fails to settle.
- Clause 13.1, Initial Certification: Establishes requirements for participants in CECS (whether or not they are members of CECS) to gain and maintain certification before participating in interchange activities and for revocation of certification if the CECS Management Committee believes the requirements for certification are no longer met.

Other payments systems managed by APCA

22. APCA is also currently responsible for four other payment clearing systems. These are:

² <http://www.apra.gov.au/crossindustry/fcs/Pages/default.aspx>

- the Australian Paper Clear System (APCS) relating to exchanges of paper-based payment instructions, primarily cheques
- the Bulk Electronic Clearing System (BECS) relating to bulk direct entry low value transactions, allowing businesses (such as for example utility companies) to make arrangements to direct debit and/or credit large numbers of customers' accounts on a regular basis
- the High Value Clearing System (HVCS) established as part of the development of real time gross settlement in Australia to provide an efficient and secure electronic payments mechanism for the finance industry, and
- the Australian Cash Distribution and Exchange System (ACDES) which governs the exchange and distribution of wholesale cash.

Submissions received by the ACCC

23. Before the draft determination the ACCC sought submissions from interested parties potentially affected by these applications, including members of CECS, the Business Council of Australia, Choice, Australian payment system participants and regulators. Submissions in support of the application were received from the Commonwealth Bank of Australia, Reserve Bank of Australia and Australian Securities and Investments Commission. No submissions were received in response to the draft determination.

24. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC assessment

25. The ACCC's evaluation of the certification, suspension and termination provisions is in accordance with the relevant net public benefit tests³ contained in the *Competition and Consumer Act 2010* (the CCA).

26. In its evaluation of the application the ACCC has taken into account:

- the application and submissions received from interested parties
- the information available to the ACCC from consideration of previous matters⁴
- the likely future without the conduct for which authorisation is sought.⁵ In particular, the ACCC considers that absent the conduct for which authorisation has been sought CECS members could continue to collectively set minimum standards to protect and facilitate the conduct and settlement of exchange of consumer electronic messages resulting from EFTPOS and ATM transactions, but without the suspension and termination provisions or certification requirements that provide for the exclusion of organisations that do not meet the technical, operations and security

³ Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8).

⁴ See previous applications for authorisation of the CECS arrangements A91153 & A91154 (2009), A30228 & A30229 (2004) and A30176 & A30177 (2000).

⁵ For more discussion see paragraphs 5.16-5.23 of the ACCC's Authorisation Guide.

requirements. This is due to the risk that these provisions may breach the CCA.

- The relevant areas of competition likely to be affected by the conduct. APCA seeks authorisation for provisions of the CECS regulations concerning certification requirements to participate in CECS and provisions for termination and suspension. On this basis the ACCC has confined its assessment of the applications to the clearing and settlement of consumer electronic payments.

Public benefit

27. APCA submits that the suspension and termination provisions in the regulations continue to result in a benefit to the public through the protection of the security, efficiency and integrity of consumer electronic payments clearing processes. APCA contends that these benefits can only be realised if members act in accordance with its regulations and that its suspension and termination provisions provide last resort safeguards to ensure this. APCA argues that without these sanctions, the efficacy and integrity of CECS would be diminished and the confidence of members and users of CECS would be reduced.
28. The RBA submits that the certification, suspension and termination provisions provide a public benefit by setting minimum standards for participation which helps efficiently facilitate the ongoing safe and reliable clearing and settlement of EFTPOS and ATM transactions. The RBA expressed the view that, importantly the standards for participation have been set to facilitate a broad range of participants.
29. ASIC and the Commonwealth Bank (CBA) similarly submit that the CECS suspension and termination provisions promote the efficient operation of CECS and enhance its security and integrity and that without these provisions the confidence of users of CECS would likely be diminished. ASIC also submits that the collective setting of the rules governing CECS reduces transaction costs as these requirements would otherwise be negotiated bilaterally.
30. The ACCC considers that the certification, suspension and termination provisions are likely to continue to result in public benefits through the protection of the security, efficiency and integrity of CECS and thus the ATM and EFTPOS based consumer electronics payments system. In particular, the ACCC accepts that without the ability of CECS members to self-enforce compliance with the standards established by CECS (through the ability to set minimum requirements for entry and suspend or terminate membership for non-compliance) the operational efficiency of CECS could be undermined. At the extreme, this could compromise the industry's ability to centrally coordinate the clearing and settlement of EFTPOS and ATM transactions, resulting in a return to the situation that prevailed prior to the introduction of CECS in 2000, whereby clearing and settlement arrangements were subject to bilateral negotiation between individual organisations.
31. The ACCC also considers that, to the extent that the collective setting of clearing and settlement requirements for ATM and EFTPOS transactions results in lower transactions costs than bilateral negotiation of these requirements, such transaction cost savings are likely to constitute a public benefit.

Public detriment

32. APCA submits that the certification, suspension and termination provisions and the CECS system in general is unlikely to lead to significant public detriment, in particular because:
- nothing in the CECS regulations and manual restricts CECS members in competing for the business of end users of consumer electronic payments services; and
 - the existence of CECS does not preclude institutions from establishing other clearing arrangements outside the scope of the CECS regulatory infrastructure.
33. APCA states that if set at an inappropriate level, minimum mandatory standards and procedures could potentially stifle innovation by network participants by potentially raising barriers to entry to the ATM and EFTPOS networks. However, APCA submits that its minimum standards, at the level at which they are currently set, do not increase the barriers to entry. APCA also notes that the CECS regulations also allow CECS members to bilaterally agree to divergent standards from those established by CECS, provided that the integrity, security and efficiency of CECS overall is not diminished. CECS submits that the remaining requirements applied to CECS members are a reflection of the practical requirements of providing value as an authorised deposit taking institution under the *Banking Act 1959* (card issuers) or clearing transactions (acquirers and merchant principals).
34. The RBA submits that it does not consider that re-authorisation of the certification, suspension and termination provisions would cause any material lessening of competition or any other public detriment.
35. ASIC noted that refusal or termination of CECS membership does not prevent an entity from participating in the EFTPOS or ATM systems. ASIC submits that there are a number of checks and balances in place to mitigate any potential anti-competitive misuse of the relevant provisions in the CECS regulations.
36. The ACCC notes that refusal of certification or termination of CECS membership does not preclude the financial institution from participating in the EFTPOS or ATM system. Most, particularly small, financial institutions are not members of CECS. Rather, these financial institutions enter into agreements with a CECS member to process their transactions in CECS and clear and settle transactions on their behalf.
37. Accordingly, an organisation excluded from CECS would be likely to continue to have its ATM and EFTPOS transaction cleared and settled through CECS. However, the organisation would not be able to directly clear and settle its transactions. Rather, the organisation would need to enter into an agreement with an existing CECS member to do so on its behalf.
38. Further, exclusion from the CECS system would not preclude an institution from establishing other direct clearing and settling arrangements outside the CECS arrangements. However, the institution would likely need to negotiate bilateral agreements with other participants outside of the CECS arrangements to do so. While procedures and standards for ATM and EFTPOS interchange were subject to bilateral negotiations between financial institutions prior to CECS being introduced, given that members now operate under the CECS system, it would likely be significantly more difficult for institutions excluded from CECS to negotiate such agreements outside of the CECS in the future. In addition, such bilateral negotiation

is likely to be more costly for the institution to negotiate and more difficult to manage than participating in CECS.

39. Therefore, the ACCC considers that exclusion from CECS would have an adverse effect on the financial institution concerned and potentially could make it very difficult for the institution to directly clear and settle consumer electronic payment instructions. Absent appropriate checks and balances on the use of the suspension and termination provisions this has the potential to result in anti-competitive detriment.
40. However, the ACCC considers that the certification, suspension and termination provisions do not place unreasonable requirements on members and that there are adequate checks and balances on the manner in which they are employed including:
- if a member is subject to prudential supervision, the prudential supervisor must be consulted prior to suspension of the member from CECS
 - the representation of the RBA on the APCA Board and the right for the RBA to be represented on the CECS Management Committee⁶ responsible for certification of members and membership suspension and termination decisions
 - suspension does not preclude a member from participating in CECS
 - the termination provisions can only be invoked in limited circumstances, namely, on resignation of the member, the member becoming insolvent, being wound-up or ceasing to be engaged in interchange activities or if the member has been suspended and the event leading to suspension has not been remedied by the member
 - certification can only be revoked in limited circumstances, namely, if the participant fails to meet applicable technical, operational or security requirements, with participants first given the opportunity to be heard by the Management Committee on the proposed revocation.

Balance of public benefit and detriment

41. For the reasons outlined in this 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 from the certification, suspension and termination provisions. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

42. APCA is seeking re-authorisation for five years. The ACCC previously granted re-authorisation to the relevant CECS regulations for periods of five years, after initially granting authorisation for three years. Where arrangements have already been in place for a period of time the ACCC may consider it appropriate to grant authorisation for a longer period.⁷ Given the ACCC's conclusion on the balance of public benefits and public detriments and the fact that the ACCC has regularly

⁶ The RBA has previously, but does not currently, exercise this right in relation to the CECS Management Committee.

⁷ See for example, Australian Payments Clearing Association Limited - Revocation and Substitution - A91281, A91282 & A91283, in which authorisation in relation to the High Value Clearing System was granted for ten years.

authorised similar CECS related regulations since August 2000, the ACCC is granting authorisation for ten years.

Determination

The application

43. On 20 June 2014, the Australian Payments Clearing Association (APCA) lodged applications for the revocation of authorisations A91153 & A91154 and the substitution of authorisations A91434 & A91435 for the ones revoked. The applications were made using Form FC Schedule 1 of the Competition and Consumer Regulations 2010. The applications were made under subsection 91C of the CCA, for authorisation of the following provisions of its regulations in relation to its Consumer Electronic Clearing System (CECS):

- 4.7 - CECS Membership – Suspension
- 4.8 - Effects of Suspension
- 4.9 - Termination
- 4.11- Financial Claims Scheme – Suspension
- 10.5- Failure to Settle – Suspension
- 13.1- Certification – Initial Certification

The net public benefit test

44. For the reasons outlined in this determination, the ACCC considers, pursuant to subsections 90(6), 90(7), 90(5A) and 90(5B), that in all the circumstances the proposed certification, suspension and termination provisions 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. The ACCC is also satisfied, pursuant to subsection 90(8), that the proposed certification, suspension and termination provisions for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place.

Conduct for which the ACCC grants authorisation

45. The ACCC grants authorisation to APCA's certification, suspension and termination provisions listed in paragraph 43 until 6 November 2024. The proposed authorisations are in respect of the certification, suspension and termination provisions as they stand at the time authorisation is granted. Any changes to the certification, suspension and termination provisions during the term of the authorisation would not be covered by the authorisations.

Date authorisation comes into effect

46. This determination is made on 15 October 2014. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 6 November 2014 (22 days after the determination is made).

Attachment A – Current CECS members

<u>Name of Institution</u>	<u>Address</u>	<u>Business</u>
Australia and New Zealand Banking Group Limited	ANZ Centre, Level 9, 833 Collins Street Docklands, VIC 3008	Financial Institution – CECS Issuer and Acquirer
Australian Settlements Limited	ASL House, 6 Geils Court, Deakin ACT 2607	Financial Institution – CECS Issuer and Acquirer
Bank of Queensland Limited	Level 17,BOQ Centre, 259 Queen Street, Brisbane QLD 4000	Financial Institution – CECS Issuer and Acquirer
Bendigo and Adelaide Bank Limited	The Bendigo Centre, Bendigo VIC 3550	Financial Institution – CECS Issuer and Acquirer
Cashcard Australia Limited	Level 11, 168 Walker Street , North Sydney NSW 2060	Independent ATM Deployer and Managed Service Provider – CECS Acquirer
Citigroup Pty Limited	GPO Box 40, Sydney NSW 2001	Financial Institution – CECS Issuer and Acquirer
Coles Group Limited	Level 5, Module 1, 800 Toorak Rd, Tooronga VIC 3146	Merchant/Retailer – CECS Self-Acquirer
Commonwealth Bank of Australia	Level 6, 201 Sussex Street, Sydney NSW 2000	Financial Institution – CECS Issuer and Acquirer
Cuscal Limited	Level 1, Margaret Street, Sydney NSW 2000	Financial Institution – CECS Issuer and Acquirer
Indue Limited	Level 3, 601 Coronation Drive, Toowong QLD 4066	Financial Institution – CECS Issuer and Acquirer
MoneySwitch Limited	125 York street, Sydney NSW 2000	Specialist Credit Card Institution – CECS Acquirer
National Australia Bank Limited	Level 3 (UB 3350), 800 Bourke Street, Docklands VIC 3008	Financial Institution – CECS Issuer and Acquirer
Suncorp-Metway Limited	Level 18, Suncorp Centre, 36 Wickham Terrace, Brisbane QLD 4000	Financial Institution – CECS Issuer and Acquirer
Westpac Banking Corporation	Level 20, 275 Kent Street, Sydney NSW 2000	Financial Institution – CECS Issuer and Acquirer
Woolworths Limited	1 Woolworths Way, Bella Vista NSW 2153	Merchant/Retailer – CECS Self-Acquirer