



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

The Association of Superannuation
Funds of Australia

in respect of

provisions of a Memorandum of
Understanding concerning the
stewardship arrangements for
participation in the Superannuation
Transaction Network

Date: 19 December 2016

Authorisation number: A91548 & A91549

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC grants authorisation to the Association of Superannuation Funds of Australia to make and give effect to certain provisions of a Memorandum of Understanding concerning the stewardship arrangements for participation in the Superannuation Transaction Network (Network). The applications are made as a result of the transfer of stewardship arrangements from the Australian Tax Office to a new industry sponsored body – the Gateway Network Governance Body (Gateway Body).

The Network is an electronic network used to transmit ‘Superannuation Transaction Messages’ (Messages). Messages carry information regarding superannuation fund members’ registration, rollover or contributions. The Network does not process financial payments; these are transferred directly between employers and superannuation funds through the banking system.

The Gateway Body will comprise of superannuation funds, gateway operators and other industry participants who propose to agree on standards and procedures for their participation in the Network through a new Memorandum of Understanding (new MoU).

The clauses of the new MoU that are the subject of the applications for authorisation relate to the implementation of the self-governance framework. The Gateway Standard which consists of the minimum technical standards and operating requirements for Gateway Operators is not part of the new MoU and does not change as a result of the Proposed Conduct.

The ACCC considers that the Proposed Conduct is likely to result in public benefits resulting from the ability of the Gateway Body to enforce compliance with the Gateway Standard to improve operational efficiency and enhance the security and integrity of the Network.

The Proposed Conduct is likely to result in limited public detriment as the Gateway Body’s entry and termination provisions are unlikely to place unreasonable requirements on the Gateway Body members. There are also checks and balances on the manner in which the provisions will be employed by the Gateway Body.

The ACCC grants authorisation until 10 January 2022.

The applications for authorisation

1. On 29 July 2016, the Association of Superannuation Funds of Australia (ASFA) lodged applications A91548 and A91549 with the Australian Competition and Consumer Commission (**ACCC**).¹
2. The ASFA (the Applicant), on behalf of the Gateway Network Governance Body (Gateway Body) and current and future Gateway Operators who become signatories to the new Memorandum of Understanding (new MoU) for participants in the Superannuation Transaction Network (Network), seeks authorisation to make and give effect to provisions of the clauses 2, 4, 5 (c), 6.1,

¹ 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 CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC’s *Authorisation Guidelines* at www.accc.gov.au/publications/authorisation-guidelines-2013

6.2, 10, 11 and 12 of the new MoU concerning the stewardship arrangements for the Network.

3. The Applicant seeks authorisation for five years.
4. On 26 October 2016, the ACCC issued a draft determination proposing to grant authorisation for five years.

The Proposed Conduct

5. Authorisation is sought by the ASFA, on behalf of the Gateway Body and current and future Gateway Operators who become signatories to the new MoU for participants in the Network, to make and give effect to the following clauses in the new MoU:

- **Clause 2** (Application and effect) which deals with the application and effect of the new MoU including making it legally binding on each Gateway Operator. The new MoU, together with the *Superannuation Data and Gateway Services Standards for Gateway Operators transacting within the Superannuation Transaction Network* (the Gateway Standard), takes effect as a contract between the Gateway Body and each Gateway Operator; and collectively, between each of the Gateway Operators.
- **Clause 4** (Acceptance by the Gateway Body of applicant parties as Gateway Operators) covers matters relating to eligibility for admission as a Gateway Operator and also sets out the application process for prospective Gateway Operators. As well as fulfilling certain administrative requirements, Gateway Operators must demonstrate that their business practices and operations will be sound and secure and will not adversely impact the integrity, security, efficiency reliability and stability of the Network.
- **Clause 5 (c)** (The role of the Gateway Body concerning access and entry and exit of Gateway Operators to or from the MoU) comprises the acknowledgement by parties to the new MoU that the Gateway Body may, in its role in managing the integrity of the Network, undertake initiatives and steps in relation to matters including the efficiency, effectiveness and security of the Network, compliance with the Network governance arrangements, engagement with the Network and the management of entry and exit of Gateway Operators and engagement with industry, government and other stakeholders.
- **Clause 6.1** (Obligations of Gateway Operators) includes Gateway Operator obligations such as complying with applicable laws, paying fees, costs, charges and expenses, not acting in a way that adversely affects the integrity, security, efficiency, reliability and/or stability of the Network, and attending Gateway Operators meetings.
- **Clause 6.2** (Rights to use the Network to exchange messages) provides that, with limited exceptions, Gateway Operators may only use the Network to exchange Superannuation Transaction Messages (Messages) with a person who is also a Gateway Operator under the new MoU.

Gateway Operators may use the Network to exchange Messages with a person who is not a Gateway Operator but solely to the extent such exchange is required to be made with that person in a particular format, so that a superannuation entity on whose behalf that Gateway Operator is acting remains in compliance with the *Superannuation Industry (Supervision) Act 1993* (Cth), and any associated regulations or standards made under it or other applicable legislation. Similarly, Messages exchanged between a Gateway Operator and the ATO Small Business Clearing House and / or the ATO are also permitted under this clause.

- **Clause 10** (Dispute resolution) covers the dispute resolution process for the resolution of disputes arising out of, or in connection with, the new MoU and the Gateway Standard. Disputes will be determined by the Resolutions Group; a resolution sub-committee appointed by the Gateway Body Board. If a party disagrees with a determination of the Resolutions Group, that party may refer the dispute to the Gateway Body Board for determination. If a party then disagrees with the Gateway Body Board's determination, that party may refer the dispute to arbitration by an independent arbitrator.
- **Clause 11** (Remedies for non-compliance by Gateway Operators with the Network procedures, including probation and termination) deals with the process for terminating participation in the new MoU as a Gateway Operator and placing Gateway Operators on probation.

In particular, the Gateway Body must first notify the Gateway Operator of the relevant issue as a dispute prior to its termination.

The Gateway Body may place a Gateway Operator on probation in circumstances including if the Gateway Operator breaches a material obligation under the new MoU or the Data and Payment Standard and if the Gateway Operator engages in conduct regarded by the Gateway Body to be contrary to the efficient, reliable and secure operation of the Network.

The Gateway Body shall not unreasonably refuse revocation of the probationary status should the Gateway Operator demonstrate full compliance with its obligations under the new MoU and the Gateway Standard for the appropriate probationary period.

- **Clause 12** (Annual fees): The aggregate annual fees payable by all Gateway Operators in any financial year will not exceed the lesser of 15 per cent of the total operating costs of the Gateway Body in the same financial year or \$112,500.

(The **Proposed Conduct**)

Interim Authorisation

6. At the time of lodging the applications, the Applicant also requested interim authorisation for the Gateway Operators and the Gateway Body to make and give effect to the provisions of clauses 2, 4 and 5(c) of the new MoU.
7. The interim authorisation was sought to allow transitional steps to be taken by the Gateway Body to seek, consider and accept applications by Gateway

Operators to be bound by the new MoU, in order to assist in transition from the Current MoU and from Australian Taxation Office (ATO) oversight.

8. The ACCC granted interim authorisation on 7 September 2016. The ACCC's statement of reasons is available on the ACCC's public register at <http://registers.accc.gov.au/content/index.phtml/itemId/1197593/fromItemId/278039/display/acccDecision>

Background

Industry Participants and definitions

Contributions – means the superannuation contributions paid by an employer to and administered by a superannuation entity on behalf of a beneficiary.

Co-sponsors – five industry associations (the Australian Business Software Industry Association (ABSIA), the Australian Institute of Superannuation Trustees (AIST), the Financial Services Council (FSC), the Gateway Association & Transaction Exchange (GATE) and the Association of Superannuation Funds of Australia (ASFA)) (the co-sponsors) have been working with the ATO in relation to the handover of the stewardship of the Network and have agreed to the establishment of the Gateway Body, to assume responsibility for the governance and oversight of the Network.

Current MoU – Memorandum of Understanding for participants in the Superannuation Transaction Network under the ATO stewardship and current arrangements.

Data and Payment Standards – Data and Payment Standards or *Superannuation Data and Payment Standards 2012* determines the standards relating to superannuation data and payment matters for the purposes of the *Superannuation Industry (Supervision) Act 1993*. These are a set of common rules developed by the ATO for sending superannuation registration, contribution and rollover data messages electronically.

New MoU – Memorandum of Understanding for participants in the Superannuation Transaction Network under the proposed Gateway Body stewardship. The new MoU will regulate participation in the Network between Gateway Operators and implement the self-governance framework. The new MoU will supersede and replace the Current MoU.

Gateway Network Governance Body (the Gateway Body) – a not for profit industry sponsored body that will oversee the Superannuation Transaction Network (network) and its operations. The Gateway Body will manage the network through the new MoU and the Gateway Standard. The Gateway Body will take over the stewardship role previously managed by the ATO.

Gateway – a network entry and/or exit point operated by, or on behalf of, an employer or superannuation entity for the purpose of routing and/or switching the data comprised in, or exchanged in connection, with a superannuation transaction message. This excludes any employer's or superannuation entity's internal or private gateway which operation (including exchanges of messages) is contained exclusively within the relevant superannuation entity's network boundary.

Gateway Operator – any person or entity which operates or supplies functions and services including Gateway-related data and messaging services. Gateway operators are intermediaries that facilitate the transfer of electronic data messages compliant with the *Superannuation Data and Payment Standards 2012*. For example, an employer sending information about super contributions for an employee to their superannuation fund.

Under the ATO stewardship of the Network there are 10 Gateway Operators who are signatories to the Current MoU.

Rollover – the process of transferring or rolling over of a superannuation benefit from one superannuation entity (e.g. superannuation fund) to another superannuation entity.

Superannuation Transaction Message – a message contained within the Network relating to a superannuation transaction. These messages carry information regarding superannuation fund members' registration, rollover or contributions. Each year approximately 80 million messages are exchanged between employers and super funds in respect of rollovers and changes to fund members' data.

Superannuation Transaction Network (Network) – the network used to send and receive Superannuation Transaction Messages between the Gateway operated by a Gateway Operator and the Gateway operated by one or more other Gateway Operators. Analogous to a telephone utility, these gateways connect employer data transaction flows to super funds. They also connect one super fund to another where a member's account information needs to be transferred. This network is known as the Superannuation Transactions Network.

SuperStream – SuperStream is a government reform to improve the efficiency of the superannuation system. Under SuperStream, all superannuation transactions will be sent electronically. Employers will be required to send super contributions on behalf of their employees by submitting data and payments electronically.

The Gateway Standard – the Gateway Standard or the *Superannuation Data and Gateway Services Standards for Gateway Operators transacting within the Superannuation Transaction Network* sets out minimum technical and operating requirements for Gateway Operators in relation to messages sent or received in connection with superannuation transactions.

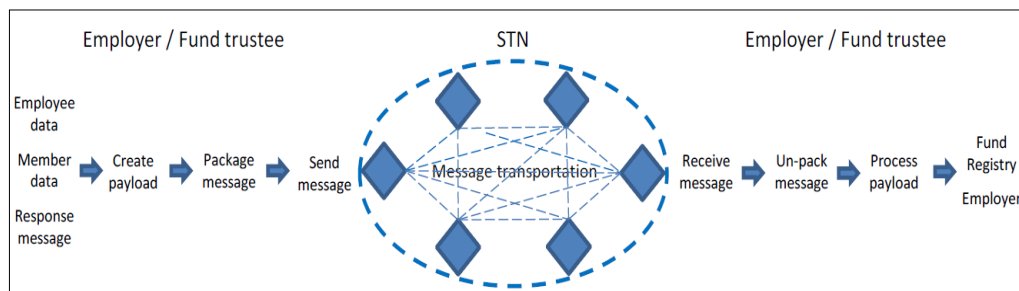
Industry Reforms

9. In December 2010, the Commonwealth Government announced the 'Stronger Super Reforms' which included support for recommendations to enhance the 'back office' of the Australian Prudential Regulatory Authority (APRA) regulated superannuation funds (the 'SuperStream' reforms).
10. SuperStream includes measures to digitalise transactions. The ATO was tasked with developing a set of common rules (the *Superannuation Data and Payment Standards 2012*) for sending superannuation registration, contribution and rollover data messages electronically (Data and Payment Standards).
11. This network, the Superannuation Transaction Network (Network) consists of a number of 'Gateways', which are network entry and/or exit points, operated by

the Gateway Operators for the purpose of receiving, routing, switching and packaging the mandated data required in Superannuation Transaction Messages (Messages) (see figure 1). (Gateway Operators do not process money, which is transferred through the banking system.)

12. Messages are messages that pass between Gateway Operators and are required for a superannuation registration, rollover or contribution in compliance with the Data and Payment Standards. However, the Data and Payment Standards do not mandate operating or security standards for members of the Network.

Figure 1: The Superannuation Transaction Network



13. Superannuation funds and employers participate in the SuperStream environment in a way that is regulated by the SuperStream laws, as well as the broader superannuation laws. Gateway Operators are intermediaries in this process and are not directly regulated. The ATO has stated that Governments have taken the policy view that regulation of intermediaries in the superannuation system, whether an administrator, clearing house or gateway was not desirable.
14. The ATO has advised that in recognition of this, the then Assistant Treasurer, Sen. Arthur Sinodinos, asked the ATO in early 2014 to provide interim stewardship of the gateway network from a governance perspective and work with industry stakeholders in putting together a self-regulated, industry-funded governance body to provide this governance on a permanent basis. He asked that this body be in place by 1 July 2016.

Existing arrangements

15. Under the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) both employers and superannuation funds are required to comply with the Data and Payment Standards. The SIS Act mandates that superannuation transactions must be sent and/or received in a prescribed electronic format. In order to fulfil their compliance obligations, employers and funds use the Network.
16. Gateway Operators work co-operatively with each other, through an interim consensual arrangement, being the *Memorandum of Understanding for participants in the Superannuation Transaction Network* (Current MoU). Under the Current MoU, Gateway Operators make certain commitments to each other regarding various matters, including compliance with the arrangement described in the Current MoU as the *Superannuation Data and Gateway Services Standards for Gateway Operators transacting within the Superannuation Transaction Network* (the Gateway Standard). The Gateway Standard sets out minimum technical and operating requirements for Gateway Operators in relation to Messages.

17. The intended governance and oversight structure will be contractual in nature, i.e., an updated version of the Current MoU which, when executed, will form a binding and enforceable agreement between Gateway Operators and the Gateway Body (new MoU). Gateway Operators who apply to be members of the Gateway Body will be bound by the new MoU upon acceptance of their application by the Gateway Body.
18. While the ATO will continue to be responsible for the administration and enforcement of the Data and Payment Standards, the Gateway Body will be responsible for ensuring that participants in the Network meet the Gateway Standard (for Gateway Operator to Gateway Operator data exchange) which it expects to do through collaboration, oversight and consultation with its members.
19. The new MoU does not make any changes to the Gateway Standard and creates an additional layer of compliance oversight and procedures for enforcement of the standard with the aim to enhancing adherence to the standard.

Gateway Body proposed structure and membership

20. The Gateway Body is to be incorporated as a not-for-profit, public company, limited by guarantee with a constitution setting out the powers, objects and structure of the company.
21. Nine directors with equal voting rights will form the Gateway Body board including an independent chair. The breakdown of the directors will be as follows:
 - superannuation Funds – 3 directors
 - Gateway Operators – 3 directors
 - employers – 1 director
 - software providers – 1 director
 - independent Chair.

The ATO and APRA will be invited as observers to the Gateway Body board meetings where required.

22. The membership structure of the proposed Gateway Body will have three categories:
 - Co-Sponsor members – made up of four of the sponsoring industry association organisations (ASFA, ABSIA, FSC and AIST);
 - Associate Co-Sponsor member – the other sponsoring industry association, GATE, which is the industry association for Gateway Operators; and
 - Gateway members – Gateway Operators participating in the Network (being those who have signed up to the new MoU).

23. The ATO has set aside a grant of \$2.0 million for the setup and initial operations of the Gateway Body until June 2018.
24. Following this, funding will move to an industry self-funded model to be managed by the Gateway Body. The industry funded model is to split the annual Gateway Body funding requirements between APRA regulated funds (85 per cent) and Gateway Operators (15 per cent). The Gateway Body will determine these fees on a cost recovery basis.
25. It is proposed the collection of the APRA regulated funds portion of the funding will utilise an existing APRA levy collection mechanism which will require an amendment to current legislation. The Applicant submits that this method of collection has been supported by The Treasury and the Assistant Treasurer in order to progress the necessary Government approval and legislative changes.
26. The Gateway Operators' portion of the funding will be split between participating Gateway Operators using a methodology developed and proposed by the Gateway Operators and agreed by the Gateway Body. Based on this agreed methodology the Gateway Body will invoice Gateway Operators directly on an annual basis.

The Applicant's supporting submission

27. In support of its applications, the Applicant submits that the Proposed Conduct will result in a number of public benefits, particularly:
 - security and integrity of the Network, by ensuring standards are set across the network to safeguard personal and private information
 - the efficient transfer of data and payments links over the Network, from both employers to funds and inter-fund transfers through a set of standards for Gateway Operator behaviour to increase efficiency and drive down system costs for superannuation members
 - greater overall responsibility for industry stakeholders through an industry sponsored governance regime, reducing the need for government oversight
 - a more formal sustainable self-funded structure to drive additional efficiency enhancements in the future
 - a more formal structure to provide for better consultation.
28. The Applicant also submits that the new MoU will have the following multiple beneficiaries:
 - superannuation funds and employers that use the Network to meet their superannuation obligations
 - Australian superannuation fund members who rely on an efficient and secure superannuation industry and network
 - Gateway Operators through increased confidence in their products and the efficiency of their services.

29. The Applicant submits that the Proposed Conduct will not result in public detriment as it:
- will not increase barriers to entry, given that an application by new Gateway Operators to be a party to the new MoU is not materially restricted or difficult. Access will be open to all relevant industry participants, i.e. any new Gateway. It is also highly unlikely that the Gateway Body will reject any applications by any solvent Gateway Operator that commits to compliance with the Gateway Standard and demonstrates interoperability.
 - is not anti-competitive and does not pose any significant detriments as the new MoU does not prevent or restrict Gateway Operators from competing for the business of providing data services to superannuation entities and funds, nor does it preclude employers and superannuation funds from establishing other arrangements outside the scope of the Network.
30. The Applicant adds that the formal agreement and commitment to the new MoU by the participants in the Network is conditional on the ACCC granting final authorisation. If final authorisation is not granted the new MoU provides that the parties agree that the new MoU will be terminated and the parties will revert to the existing arrangements for stewardship of the Network.

Consultation

31. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
32. The ACCC invited submissions from potentially interested parties, including superannuation funds, Gateway Operators, the ATO and the APRA.²

Prior to the draft determination

33. The ACCC received five public submissions supporting authorisation from:
- The Gateway Association & Transaction Exchange (GATE) – an industry association comprised of the Gateway Operators that are the subject of this application.
 - The Australian Institute of Superannuation Trustees (AIST) – a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector super funds.
 - The Financial Services Council (FSC) – an industry organisation with over 115 members which include companies in funds management, superannuation, life insurance, financial advice businesses and trustee services.
 - The Australian Chamber of Commerce and Industry (ACCI) – an industry body representing business associations, comprising of state and territory chambers of commerce and national industry associations.

² A list of the parties consulted and the public submissions received is available from the ACCC's public register: www.accc.gov.au/authorisationsregister

- The Financial Planning Association of Australia (FPA) – a professional community of financial planners with over 11 500 members.

GATE, the AIST and the FSC are also co-sponsors of the Gateway Body.

34. One public submission opposing the Proposed Conduct was received from Compliance Test, which provides an online self-service tool for organisations to test their products or services for compliance with data exchange standards. A confidential submission from another party opposing the Proposed Conduct was also received.
35. A summary of the submissions follows.
36. GATE notes that they have accepted the terms of the arrangements of the application after the ATO undertook that the ATO-owned Small Business Superannuation Clearing House (SBSCH), which GATE members consider to be a Gateway Operator, will comply with the standards as applicable to the signatories to the new MoU and will take part in the Gateway Operators meetings as defined under the new MoU.
37. GATE, the ACCI, and the AIST submissions highlighted that they have been part of the consultation process for the development of the Gateway Body.
38. Both the AIST and the ACCI submit that there is a public benefit from the proposed arrangements, and also highlight the importance of protecting the integrity of the Network through appropriate governance arrangements. The ACCI notes the reliability and efficiency aspect of the Network as a public benefit.
39. In relation to the Proposed Conduct's anti-competitive detriment, the ACCI and the FSC submit that the new MoU:
 - only covers intra-network transactions, and only grants powers to the Gateway Body and specified causes of action to other Gateway Operators, to the extent necessary to enforce common form operating practices within the network
 - does not limit the capacity of Gateway Operators to offer related services, for non-operators to offer related services or how those services are delivered provided the intra-network transactional messaging and responses are in accordance with the superannuation data and payment standards and the network operating standards.
40. The ACCI submits that the diversity of offerings by Gateway Operators proposing to enter the MoU supports the proposition that the new MoU will not excessively intrude on competition between entities offering gateway services.
41. In opposition to the proposed arrangements, both Compliance Test and the confidential interested party submit that the ATO is insisting on requirements that are not in the Data and Payments Standard which in turn prevent the exchange of messages other than through Gateway Operators using the Network. The consequence is that payroll software providers are being forced to partner with a Gateway Operator (or become a Gateway Operator) instead of being able to process messages themselves outside of the Network.

42. Compliance Test adds that poor technical and regulatory decisions made by the ATO have effectively prohibited direct transactions between employers and funds. This is because the technical standards developed by the ATO for the Network are extremely niche technologies that are rarely, if ever, voluntarily used by the private sector, and implementing them requires expensive commercial tools that are supplied by very few technology vendors.
43. This means that potential implementers of these standards face a high cost and complexity barrier. This in turn has led to the development of an intermediary market formed around SuperStream where Gateway Operators essentially shield other market participants from this complexity (for a fee).
44. The confidential interested party also argues that superannuation funds have an obligation to receive messages directly from outside the network (including employers) that are compliant with Data and Payments Standard. However no superannuation fund is currently accepting those SuperStream compliant messages.
45. In response to concerns raised by Compliance Test, the ASFA submits that those concerns are related to the design of the SuperStream system and regulations and technical standards:
- The ASFA submits that these concerns are not relevant to either the proposed role of the Gateway Body or the handover of governance from the ATO to the Gateway Body, which are the core elements of the Proposed Conduct for which authorisation is sought.
 - The Gateway Body authorisation applications concern only the transfer of the governance of the Network from the ATO to the Gateway Body and do not involve a change in the design of the Network nor the mechanisms for industry participants to exchange messages via the Network.

Following the draft determination

46. A pre-decision conference was not requested in response to the ACCC's draft determination.
47. A submission opposing the authorisation was received from Free Super Software Pty Ltd. In particular, Free Super Software's submission raised concerns with Clause 6.2 (Rights to use the Network to exchange messages) of the new MoU.
48. Relevantly, Clause 6.2 states:
- a) *Subject to clause 6.2(b), Gateway Operators may only use the Superannuation Transaction Network to exchange (including, sending or receiving) Superannuation Transaction Messages with a person who is, at the time of such exchange, also a Gateway Operator under this MoU, in accordance with the applicable requirements described in this MoU or the Gateway Standard.*
 - b) *Nothing in clause 6.2(a) will prevent a Gateway Operator from exchanging (including, sending or receiving) messages relating to a Superannuation Transaction:*
 - (i) *with a person who is not also a Gateway Operator under this MoU, but solely to the extent such exchange is required to be made with that person,*

in a particular format, so that a Superannuation Entity on whose behalf that Gateway Operator is acting in connection with that exchange of messages remains in compliance, in relation to that exchange, with the Superannuation Industry (Supervision) Act 1993 (Cth), any associated regulations or standards made under it or other applicable legislation;

- (ii) with the ATO Small Business Clearing House (or such future equivalent replacement or successor organisation);*
- (iii) with the Australian Taxation Office, in connection with the Superannuation Transaction Network and related services; or*
- (iv) with the prior consent of GNGB.*

- c) Without limiting clauses 9.2 or 9.3 in any way, each Gateway Operator who exchanges messages relating to a Superannuation Transaction with a person who is not also a Gateway Operator under this MoU pursuant to clause 6.2(b)(i) assumes all risk and responsibility in connection with that exchange.*

49. Free Super Software submits that:

- Clause 6.2(b) limits Gateway Operators to only sending and receiving messages relating to a Superannuation Transaction with a person who is not also a Gateway Operator under the new MOU to the extent necessary to satisfy the legal obligations of the Superannuation Entity on whose behalf the Gateway Operator is acting.
- This restricts the number of organisations an employer or super fund can engage to assist with direct SuperStream messages and restricts what those organisations can do for the super fund. It restricts services a Gateway Operator can provide to a super fund or employer in relation to direct messages between employers and super funds and super funds and other super funds.
- Through this clause super funds and Gateway Operators can prevent another super fund from providing anything but the minimum direct messaging solution. By doing this the Gateway Operators are ensuring that their services, which are not restricted to the minimum legal requirements, can have more features than direct messages between employers and super funds.

50. Free Super Software also submits that clause 6.2(c) requires Gateway Operators to assume additional risks and responsibilities in exchanging messages with persons who are not also Gateway Operators pursuant to clause 6.2(b)(i) making this an unattractive option.

51. In response the Applicant submits that the restriction in clause 6.2(b)(i) only applies to Messages sent using the Network and does not restrict how Gateway Operators can operate outside of the Network. Specifically, the Applicant submits that:

- The terms of the new MoU do not have the effect of restricting the ability of Gateway Operators to provide services or to exchange data with or to a super fund or employer in relation to exchanging direct messages. The operation of the new MoU, which is restricted to Gateway Operators who are signatories to the new MoU, does not apply to bilateral arrangements made between recognised Gateway Operators and superannuation entities who are not signatories to the new MoU.

- Arrangements made between a Gateway Operator and other participants in the superannuation system who are not signatories to the new MoU are not contractually governed by conditions included in the new MoU.
- Clause 6.2(b)(i) is intended to avoid a Gateway Operator being in breach of clause 6.2(a) if it exchanges messages in the circumstances contemplated by clause 6.2(b)(i). It is not intended to (and on a plain reading, does not) overlay additional burdens or constraints on Gateway Operators not to exchange messages directly under bilateral arrangements.

52. The Applicant also states that to avoid any possible misunderstanding about this clause and/or how it is intended to interoperate with clause 6.2(a) it proposes to issue a guidance directive expressly clarifying the intent of clause 6.2(b)(i) which will confirm that arrangements made between Gateway Operators and other participants who are not signatories to the new MoU are not contractually governed by the new MoU.

53. The Applicant further states that it will, to the extent required, use its consent powers under clause 6.2(b)(iv) to offer Gateway Operator participants a standing consent in terms consistent with the guidance to exchange messages directly under bilateral arrangements. The Applicant states that for completeness, such guidance will also note (as expressed in clause 6.2(c)) that such activities fall outside the administration of the STN and are at the relevant party's own risk and responsibility.

54. All public submissions are available from the ACCC's public register.³

ACCC assessment

55. The ACCC's assessment of the Proposed Conduct is conducted in accordance with the net public benefit tests contained in the *Competition and Consumer Act 2010* (Cth) (the CCA).⁴ The ACCC has taken into account:

- the applications and submissions received from the Applicant and interested parties.
- the likely future without the Proposed Conduct for which authorisation is sought.⁵ In particular, the ACCC considers that absent authorisation:
 - the ATO could continue to be the steward of the Network. The formal agreement and commitment to the new MoU by the parties is conditional on the ACCC granting final authorisation and the parties would revert to the Current MoU if final authorisation is not granted by the ACCC.

In comparison to the Current MoU, the new MoU includes new provisions such as minimum entry requirements, management of entry and exit of Gateway Providers, compliance and enforceability provisions for effective self-regulation. These

³ www.accc.gov.au/authorisationsregister

⁴ Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8).

⁵ For more discussion see paragraphs 5.20-5.23 of the ACCC's *Authorisation Guidelines*.

provisions in the new MoU along with the Gateway Standard provide an additional layer of compliance oversight to increase confidence in the integrity and safety of the Network and provide assurance that the Network is reliable, secure and efficient.

However, the Gateway Standard which consists of the minimum technical standards and operating requirements for Gateway Operators does not change as a result of the Proposed Conduct. Therefore the electronic transfer of messages via the Network which started under the Current MoU with ATO oversight and the benefits from the electronic transfer of messages are likely to continue with or without the new MoU and the transfer of stewardship of the Network to the Gateway Body.

- the longer term stewardship of the Network is uncertain since the Government's intent was to provide interim stewardship of the gateway network from a governance perspective and work with industry stakeholders in putting together a self-regulated, industry-funded governance body to provide this governance on a permanent basis.
- the relevant areas of competition likely to be affected by the applications. Authorisation is sought for provisions of the new MoU regarding stewardship arrangements for the Network. On this basis the ACCC has confined its assessment to the supply of services for the routing, switching and packaging of data comprised in rollover messages about superannuation contributions passing between employers and Australian superannuation funds.
- that the Applicant has requested authorisation for five years.

Public benefit

56. An aim of introduction of the Network in 2014 and the facilitation of the electronic transfer of superannuation messages between Australian superannuation funds and employers was to increase the efficiency of the system. The minimum technical standards and operating requirements for participation in the Network were developed by the ATO and are not part of the new MoU and are not part of the Proposed Conduct for which authorisation is sought.
57. The clauses of the new MoU that are the subject of the applications for authorisation relate to the implementation of the self-governance framework for the Network. The ACCC notes that the Network was established with the intention that its stewardship would ultimately rest with the industry. The Gateway Body is the mechanism by which this is intended to be achieved. The Network is currently operated by the ATO with no statutory authority and under the industry stewardship arrangements, the ATO would continue to be responsible for the administration and enforcement of the Data and Payment Standards (which set out the minimum technical standards).
58. The ACCC considers that the new MoU with the admission, suspension and termination provisions is likely to result in public benefits through the protection of the security, efficiency and integrity of the Network. Under the current MoU, there are no disciplinary measures to enforce compliance with the Gateway

Standard. Compliance provisions such as probation and termination of participation by Gateway Operators for not complying with the Gateway Standard will be introduced through the new MoU. The ACCC considers that these compliance and enforceability provisions are important for the self-regulation of the Network by the Gateway Body and is likely to result in a public benefit resulting from the improved safeguarding of personal information through enhanced security and integrity of the Network.

59. In respect of the other public benefits put forward by the Applicant, the ACCC notes:

- benefits from the more efficient transfer of data and payments links over the Network flow as a result of the introduction of electronic messages and the Network rather than from the Proposed Conduct
- there is insufficient evidence to support the claim that a 'more formal sustainable self-funded structure [is] better able to drive additional efficiency enhancements in the future'.

Public detriment

60. The Gateway Body will be responsible for considering applications to become a Gateway Operator and will also have the power to withdraw the approval of Gateway Operators. In effect, the Gateway Body will be able to exclude parties from participating in the Network as Gateway Operators. Having the industry determine entry criteria and being able to terminate membership could potentially raise barriers to entry. Absent appropriate checks and balances, use of the termination provisions (or use of the entry provisions to deny membership) has the potential to result in anti-competitive detriment.

61. However, the ACCC considers that the likely detriment is limited for the following reasons:

- Access to the Network is open to all organisations that commit to comply with the Gateway Standard, demonstrate interoperability and meet basic requirements in relation to business solvency.
- Membership of the Gateway Body Board includes three Gateway Operators, three superannuation fund representatives (the customers of Gateway Operators), an employer representative, a software provider, and an independent chair, and any amendment of the MoU requires 75 per cent majority of the Gateway Body Board. It would not be in the interest of these parties to exclude any party from becoming a Gateway Operator for reasons other than the security and integrity of the Network.
- All disputes, including in relation to termination of membership, are heard by a resolution sub-committee (Dispute Resolutions Group) appointed by the Gateway Body Board. There is also a right of appeal to the Gateway Body Board. Parties also have recourse to an independent arbiter if they are dissatisfied with the decision of the Board.

62. The ACCC also notes that the new MoU does not appear to:

- prevent or restrict Gateway Operators from competing for the business of providing data services to superannuation entities and funds, or

- preclude employers and superannuation funds from establishing other arrangements outside the scope of the Network for the exchange of messages in compliance with the Data and Payment Standards administered and enforced by the ATO.
63. Therefore, the ACCC is satisfied that the entry and termination provisions do not place unreasonable requirements on the Gateway Body members and that there are adequate checks and balances on the manner in which they will be employed.
64. In relation to the interested party concerns summarised at paragraphs 41 to 45, the ACCC considers that those concerns appear to relate to the design of the SuperStream arrangements and the regulations and technical standards chosen for the Network. The ACCC understands that these selections came about after extensive consultation with key stakeholder sectors conducted by both the Treasury and the ATO. The new MoU does not change the design of the SuperStream arrangements nor is the choice of these standards the subject of this authorisation application.
65. In relation to Free Super Software's concern in response to the draft determination that clause 6.2(b)(i) of the new MoU restricts services a Gateway Operator can provide to a super fund or employer in relation to direct messages, the ACCC notes the clarification provided by the Applicant that the new MoU does not impose such a restriction. Specifically, the new MoU only applies to Gateway Operators use of the Network. It does not restrict Gateway Operators from engaging in bilateral arrangement, such as direct messaging, outside of the Network. The ACCC also notes the Applicant's intention to issue a guidance directive clarifying this.
66. Free Super Software also raises concerns with clause 6.2(c) of the new MoU which provides that if a Gateway Operator does exchange messages with another person who is not also a Gateway Operator under the MoU pursuant to clause 6.2(b)(i), the Gateway Operator assumes all risk and responsibility in doing so. The ACCC notes that clause 6.2(b)(i) provides for the exchange of messages by a Gateway Operator, using the Network, with a party that is not a signatory to the MoU, in limited circumstances. The ACCC considers that if a Gateway Operator does exchange a message with a party that is not a signatory to the new MoU, and thereby not governed by the terms, conditions and standards of the new MoU, it is reasonable that the Gateway Operator assumes the risk in doing so.

Balance of public benefit and detriment

67. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
68. 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. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

69. The CCA allows the ACCC to grant authorisation for a limited period of time.⁶ This enables 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.
70. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC grants authorisation for five years.

Determination

71. On 29 July 2016, the Applicant lodged applications for authorisation A91548 and A91549 with the ACCC. Application A91548 was made using Form A and A91549 Form B of Schedule 1, of the Competition and Consumer Regulations 2010. The Applications were made under subsections 88(1) and 88(1A) of the CCA for the Proposed Conduct.
72. Authorisation is sought as the Proposed Conduct may involve making and giving effect to agreements that contain a cartel provision or that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA including as an exclusionary provision within the meaning of section 45 of the CCA.

The net public benefit tests

73. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Proposed Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the Proposed Conduct.
74. The ACCC also considers, pursuant to section 90(8), that the Proposed Conduct for which authorisation is sought is likely to result in such a benefit to the public that the Proposed Conduct should be allowed.

Conduct for which the ACCC grants authorisation

75. The ACCC grants authorisation to the Applicant for the Proposed Conduct as outlined in paragraph 5 until 10 January 2022.
76. This determination is made on 19 December 2016.

Interim authorisation

77. On 7 September 2016 the ACCC granted interim authorisation under subsection 91(2) of the CCA. Interim authorisation was granted to enable the

⁶ Subsection 91(1).

Gateway Operators and the Gateway Body to make and give effect to the provisions of clauses 2, 4 and 5(c) of the new MoU.

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

Date authorisation comes into effect

79. This determination is made on 19 December 2016. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 10 January 2017.