



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Applications for authorisation

lodged by

NPP Australia Limited

in respect of

certain provisions of the New Payments  
Platform Regulations

Date: 8 March 2017

Authorisation number: A91560 – A91562

Commissioners:

Sims  
Rickard  
Court  
Featherston

# Summary

**The ACCC proposes to grant authorisation to NPP Australia Limited in relation to certain provisions of the New Payments Platform Regulations.**

**The ACCC proposes to grant authorisation to the suspension and termination provisions of the NPP Regulations for five years and to the eligibility criteria and settlement obligations in perpetuity.**

## Next steps

**The ACCC will seek submissions in relation to this draft determination before making its final decision.**

## The applications for authorisation

1. On 18 October 2016, NPP Australia Limited (NPPA)<sup>1</sup> lodged applications A91560 – A91562 with the Australian Competition and Consumer Commission (ACCC).<sup>2</sup>
2. NPPA seeks authorisations for New Payments Platform (NPP) Regulations concerning eligibility requirements and settlement provisions, and suspension and termination of NPP Participants (the Proposed Conduct).
3. The NPP is a new infrastructure for Australia’s low-value payments.<sup>3</sup> The NPP aims to increase the efficiency of electronic payments and to allow those payments to be completed in near real time (including at times outside standard banking hours). The NPP Regulations govern the rules of access and participation in the NPP, including high level obligations in relation to basic infrastructure, clearing transactions and settlement.
4. NPPA seeks authorisation for five years in relation to the suspension and termination provisions and in perpetuity for the eligibility requirements and settlement provisions.

## Background

### Australian Payment Systems

5. Financial institutions such as banks and credit unions provide a means for individuals and businesses to make payments to each other. The institutional infrastructure within which such transactions occur is referred to as the payment system. A payment system carries payment messages (in the form of payment

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<sup>1</sup> NPPA is a joint venture company, established in August 2014, which is responsible for the oversight of the NPP program.

<sup>2</sup> 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](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

<sup>3</sup> Low value payment is not a reference to the value of the payment per se. “Low Value” is an industry term applied generally to bulk payments and cheques. It includes direct credit and direct debit but excludes cash and card payments.

instruments such as cheque, credit card, etc.), which result in the transfer of funds from one party's account to another's.

6. If parties to a transaction within a payment system maintain accounts with different banks/credit unions, a payments clearing and settling process is required between those payment organisations. The clearing and settling process allows changes in customers' accounts to be reflected, and to pass value between those accounts to reflect the net value of the transaction.
7. Clearing involves the cross-institutional exchange of individual payment messages for the purpose of obtaining settlement. Settlement is the exchange of value between institutions. Clearing in Australia is primarily governed by rules set out by the Australian Payments Clearing Association (APCA) under its various clearing systems. Settlement between financial institutions in Australia is achieved through transfers of their exchange settlement account (ESA) balances held with the Reserve Bank of Australia.
8. There are four existing payment systems currently administered by APCA. These systems relate to cheques (APCS), direct entry (BECS), cards in certain circumstances (IAC) and high value (HVCS). Relevant provisions of the regulations governing each of these payment systems have been authorised by the ACCC.

### **The New Payments Platform**

9. As noted, the NPP is the new infrastructure for Australia's low-value payments. The NPP will be an open access infrastructure for fast payments, which will work using real time line-by-line settlement, where participants' ESAs are debited and credited at the time of clearing, rather than deferred net settlement.
10. The NPP is being developed via industry collaboration to enable households, businesses and government agencies to make simply addressed payments, with near real-time funds availability to the recipient, on a 24/7 basis. The NPP infrastructure will support multiple 'overlay' services that can be independently developed to offer payment services through NPP Participants to end-users.
11. The legal framework for the operation of the NPP includes:
  - the NPP Regulations (that govern the rules of access and participation in the NPP, including high level obligations in relation to basic infrastructure, clearing transactions and settlement), and
  - the NPP Procedures (covering operational or technical practices, procedures, standards and specifications, detailing how obligations in the NPP Regulations are to be met).
12. The NPP Regulations and NPP Procedures have been developed by NPPA with the support of APCA. APCA has been involved in the coordination of the industry effort to establish NPPA, and develop the NPP and the NPP Regulations. NPPA has now appointed its management personnel and assumed administrative responsibility for development of the NPP Regulations.
13. The NPP consists of 'basic' infrastructure and multiple 'overlay' services.
14. The basic infrastructure consists of network services between platform Participants, a switch or routing service, and an addressing service. NPPA has contracted Society for Worldwide Interbank Financial Telecommunication (SWIFT), a provider

of secure financial messaging services, to design, build and operate the basic infrastructure of the NPP.

15. The NPP infrastructure will support multiple 'overlay' services that can be independently developed to offer payment services through NPP Participants to end-users. Its first overlay service, the Initial Convenience Service (ICS) is to be provided by BPAY. ICS will enable three types of service: "peer to peer" payments (e.g. deployed through mobile channels), payments made with an accompanying document, and a "request to pay" service.
16. The ICS is planned to be launched in 2017 and will allow consumers to send payments in real-time to someone's mobile phone number or email address, include more information with payments and allow Government departments and businesses to include documentation with payments.

### **NPP Australia Limited (NPPA)**

17. NPPA was established in August 2014 as a joint venture company. NPPA is responsible for the oversight of the NPP program. NPPA's objectives include establishing and operating the NPP in a manner that:
  - ensures the safe, reliable and efficient operation of the NPP
  - facilitates fair access to the NPP as a mutually owned utility infrastructure, and
  - ensures ongoing investment in the NPP to meet the changing needs of financial institutions and users of Australian payments systems.
18. The NPPA Board was formed in December 2014 and is composed of:
  - four "High-banded" shareholder representatives – Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia, National Australia Bank Limited and Westpac Banking Corporation
  - the RBA
  - three elected directors (from Cuscal Limited, Bendigo & Adelaide Bank Limited and Citigroup Pty Limited – each of whom are "Medium-banded" shareholders)
  - the chief executive officer of APCA (as the industry business sponsor), and
  - an independent Chair.
19. Each director, except for the chief executive officer, has one vote and decisions will be passed by a 66 per cent majority. The different bands of shareholding are determined based on the funding / subscription that those members invest in the NPP.
20. The current members and shareholders of the NPPA include the company's 12 founding members (Australia and New Zealand Banking Group Limited, Australian Settlements Limited, Bendigo and Adelaide Bank Limited, Citigroup Pty Ltd, Commonwealth Bank of Australia, Cuscal Limited, Indue Ltd, ING DIRECT,

Macquarie Bank Limited, National Australia Bank Limited, Reserve Bank of Australia and Westpac Banking Corporation) and HSBC Bank Australia Limited.

### **Participation criteria**

21. Participation in the NPP is voluntary and there are three levels of participation.

- NPP Participants, of which there are three types: Full Participant, Clearing Participant and Settlement Participant:
  - Clearing Participants are connected directly to the NPP Basic Infrastructure for the purpose of sending and receiving NPP Payments and Non-Value Messages, but have not been authorised by the RBA to use the Fast Settlement Service (FSS) the RBA has developed to settle NPP Payments (and therefore use the services of another NPP Participant to settle NPP Payments)
  - Settlement Participants are not connected to the NPP Basic Infrastructure but are authorised by the RBA to use the FSS for settlement of NPP Payments, and
  - Full Participants are those that are connected to the NPP Basic Infrastructure and authorised by the RBA to use the FSS for settlement of NPP Payments
- Connected Institutions – being institutions that are connected to the NPP Basic Infrastructure solely for the purpose of sending and receiving Non-Value Messages, and which may also be an Overlay Service Provider. Connected Institutions are not ‘Participants’ as defined in the NPP Regulations, and
- Overlay Service Providers – being institutions authorised by NPPA to provide an Overlay Service, which is a payment service or payment-related service using the NPP Basic Infrastructure, to be provided by the Overlay Service Provider to Overlay Service Subscribers. Overlay Service Providers are not ‘Participants’ as defined in the NPP Regulations.

22. Participation in the NPP is currently limited to authorised deposit-taking institutions (and the RBA) and those connecting directly to the NPP system and/or those using their own ESA with the RBA to settle NPP transactions. Such companies also need to be shareholders in NPPA. However, NPPA submits that:

- access to the NPP is and will continue to be available to potential Participants on reasonable and clearly understood terms. The NPP is also intended to be a new platform rather than an augmentation or extension of other existing clearing systems and therefore Participants can continue to use the other systems in lieu of the NPP
- the NPP does not discriminate between different institutional types. Banks, non-bank financial institutions and other bodies corporate can participate provided they meet the required terms and conditions, and
- a secondary market will be developed following the establishment of the NPP. That is, institutions will be able to offer their services to others that, for whatever reason, are unwilling or unable to operate as NPP Participants.

Therefore, the NPP will be highly accessible and may be used by institutions that do not actually connect to the system.

## Proposed conduct

### Suspension and termination provisions

23. The suspension and termination provisions are set out in provisions 9.2 – 9.5 of the NPP Regulations. These provisions enable NPPA to suspend or terminate a Participant in certain circumstances. NPPA submits that the suspension and termination provisions are effectively “last resort” steps to be contemplated only if a Participant’s continuing participation would impair the efficiency and / or integrity of the system. The suspension and termination provisions have the effect of excluding the institution concerned from participating in, and receiving services through, the NPP. These provisions might therefore constitute an exclusionary provision, would or might be a cartel provision and have the effect of substantially lessening competition within the meaning of the *Competition and Consumer Act 2010* (Cth) (the CCA).
24. Suspension can occur if a member’s prudential supervisor requests suspension or if a member agrees to suspension. The circumstances in which NPPA can unilaterally suspend a Participant are:
- if a Participant no longer satisfies the participation criteria
  - if a Participant is in material breach of its obligations under the NPP Regulations or the NPP Procedures and fails to rectify the breach or provide a satisfactory explanation within a prescribed time period
  - if a Participant suffers an insolvency event, or
  - if a Participant engages in conduct reasonably regarded by the NPPA Board to be contrary to the interests of NPPA or which may adversely affect the NPP Basic Infrastructure.
25. In lieu of suspending a Participant, NPPA may impose conditions on the participation of that Participant (including changing the capacity in which that Participant may participate in the NPP). The rights and obligations of that Participant will then be subject to any such conditions or variations, which may be varied or revoked at any subsequent time by NPPA.
26. Termination can occur if a breach of the NPP rules leading to a suspension is not remedied and the Participant has been provided with the opportunity to make submissions to the NPP Board regarding termination and the Participant has been given written reasons for the termination.

### Eligibility criteria

27. Provisions 4.3(a), 4.3 (c), 4.4(a); 4.6(h) of the NPP Regulations require Full Participants, Clearing Participants or Connected Institutions to:
- become a SWIFT User or Domestic SWIFT User and a BIC11 (SWIFT Bank Identification Code) Holder, and

- enter into a network connection and services agreement with at least two network connectivity service providers.

These provisions may therefore constitute third line forcing within the meaning of the CCA.

28. In the process of developing the NPP, NPPA signed a 12-year contract with SWIFT to design, build and operate the basic infrastructure. Specifically, SWIFT will build, deliver and support the networking services and switching services.
29. NPPA states that while SWIFT will build the NPP infrastructure on a stand-alone basis, membership of SWIFT is needed because some services and components of the broader SWIFT network will be relied upon to facilitate participation in the NPP. For example, by becoming SWIFT members, Participants will be able to be provisioned on the SWIFT network to send and receive financial messages, to gain access to the SWIFT management portal, to gain access to global case management tools, to gain access to reporting tools, etc.
30. NPPA states that having two network connections is necessary to ensure the communications infrastructure is highly available and highly resilient (i.e., the second line will provide redundancy services).

#### **Settlement obligations**

31. Provisions 7.1 and 7.3, 3.5(c), 4.3(f), 4.4(b), and 4.5 of the NPP Regulations provide that cleared NPP Payments must be settled via the FSS operated by the RBA using ESAs. Therefore:
  - Full Participants and Settlement Participants must be, and must remain, authorised by the RBA to use the FSS for settlement of Cleared NPP Payments, and
  - Clearing Participants must enter into a proprietary arrangement with an authorised NPP Participant for settlement of their NPP Payments.

These provisions may therefore constitute third line forcing within the meaning of the CCA.

32. NPPA states that the RBA has developed the FSS specifically to settle NPP payments and as such it is an integral part of the arrangements that will allow NPP payments to be processed.
33. The FSS is a service forming part of the Reserve Bank Information and Transfer System (RITS). It is therefore expected that direct users of the FSS will be RITS members and as a result bound by the RITS Regulations. In this context, certain NPP Participants are required to also become RITS members and be bound by these rules.
34. ESAs are used to give effect to final and irrevocable settlement of obligations in RITS. Having an ESA is a requirement associated with RITS' participation (and membership of RITS is compulsory for all ESA holders).
35. Given this, the NPP Regulations require certain Participants in the NPP to either operate their own ESA or use another ESA holder as their settlement agent.

## Consultation

36. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
37. The ACCC invited submissions from potentially interested parties, including banking institutions, consumer groups, major retailers, relevant industry associations or peak bodies, the RBA and the APRA.<sup>4</sup> The ACCC also published the applications for authorisation on its [public register](#).
38. The ACCC received three public submissions supporting authorisation - from National Australia Bank (NAB), Commonwealth Bank and Australian Settlements Limited. All three are Participants in the NPP and shareholders in NPPA.
39. Two confidential submissions raising concerns about the applications for authorisation were received. The ACCC wrote to NPPA summarising the concerns raised in these submissions. The ACCC's letter, and NPPA's response, is on the public register. A summary of these submissions, and NPPA's response, follows.
40. The ACCC notes that not all the concerns raised in these submissions, as summarised below, relate to the specific provisions of the NPP Regulations for which authorisation is sought. However, the ACCC considers that each of the concerns raised is relevant to the ACCC's assessment of the public benefits and public detriment likely to result from the provisions of the NPP Regulations for which authorisation is sought.
41. The confidential submissions submit that the NPPA Board comprises primarily of incumbent market participants who may have a conflict of interest between the goals of the NPP (increasing adoption for the benefit of consumers), which would include allowing new entrants to participate in the NPP, and benefiting their own organisations by restricting access by new entrants to the NPP.
42. In response, NPPA submits that its governance arrangements have been structured to avoid and manage potential conflicts of interest. Allegations of potential conflicts of interest fail to take into account:
  - the independence and transparency built into assessments of new applications for participation that ensure the process is clear and transparent, and has built-in safeguard mechanisms
  - the directors' legal obligation to act in the best interests of the company. Failure to do so could have serious repercussions for the individuals involved
  - the composition of the Board helps minimise any questions or risks of conflict of interest. The NPPA Board provides appropriate representation for all shareholders
    - a) especially for minority shareholders, at a level that is appropriate for, and commensurate with, their investment
    - b) the RBA is represented on the Board (and has been involved throughout the NPP's development), and

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<sup>4</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register: [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister)



- c) the broader payments industry (i.e., CEO and independent Chair with a second independent director to be appointed in October 2017).
43. Further, NPPA submits that there are strong safeguards in place to ensure that NPPA's eligibility criteria will not be applied in a manner that disadvantages prospective NPPA members. RBA oversight as the payments system regulator and through its Board membership and ongoing observer status also serves to strengthen the existing balances and checks in place. The requirement that NPPA provides reasons and a right to review for any adverse decision highlights the transparency and accountability of the decision making process.
  44. Concerns were also raised that the requirement for NPP Participants to pay fees, costs, charges and expenses could be onerous for Participants in the early stage of business development or with little capital and may constitute a barrier to entry with the effect of excluding new innovations and/or Participants.
  45. The NPPA submits that it is funded privately and needs to be financially viable to operate. As such, fees and charges need to be levied to cover the company's costs of building the infrastructure as well as ongoing operation costs. However, there are a variety of fee structures and options which the NPPA submits provide an adequate balance in terms of securing the financial viability of the business while at the same time ensuring that fees and charges are not excessive and do not create unnecessary or anti-competitive barriers to entry.
  46. NPPA also contends that Participants in the NPP must have a degree of financial viability to be able to operate. Enterprises with no finance or those that cannot afford to pay for the basic infrastructure they need to operate may not be best placed to offer payment services as they could create material risks for consumers relying on them. In this context, having sufficient funds to be able to afford paying for the basic infrastructure that a business will need in order to provide its services (such as the NPP) is not an anti-competitive barrier to entry but rather a necessary condition to be a viable commercial enterprise in the first place.
  47. Further, NPPA states that there is a range of alternative mechanisms by which interested parties may connect to the NPP via agency solutions provided by an NPP Participant, enabling them to either defray or avoid costs which might be levied on them directly as an NPP Participant.
  48. One confidential submission also questions why NPP Participants are required to be an Authorised Deposit-taking Institution (ADI). This submitter argues that NPPA's application for authorisation focuses on NPP Participants obtaining an ESA and being authorised by the RBA to utilise the FSS and not on the requirement for the NPP Participants to be an ADI.
  49. NPPA submits that the 'ADI requirement' is necessary to ensure that relevant Participants have the technical, operational and legal capability to perform the NPP's Core Functions (as set out in the Real-Time Payments Committee proposal accepted by the RBA's Payment Systems Board in February 2013) – which is the purpose for which the NPP basic infrastructure has been created. A Participant that is not an ADI, and that is not prudentially supervised, would not have or be able to provide the requisite level of counterparty assurance that it has the technical, operational or legal capability to perform the Core Functions or manage contingency settlement risk, data security or fraud risks and meet associated liabilities.

50. NPPA argues that in any case, the NPP has been designed to enable participation by non-ADIs (as Connected Institutions and Overlay Service Providers) in a way that promotes flexibility, competition and innovation in the public interest, and facilitates open access to entrants who wish to deliver services on the NPP to end-users in the absence of the capacity to deliver the Core Functions. NPPA submits that the ADI requirement is therefore not excessive and in fact facilitates the provision of services by non-banks and other service providers.
51. All public submissions are available from the ACCC's public register.<sup>5</sup>

## ACCC assessment

52. The ACCC's assessment of the Proposed Conduct is conducted in accordance with the net public benefit tests contained in the CCA.<sup>6</sup> The ACCC has taken into account:

- the application and submissions received from the Applicant and interested parties
- the likely future without the conduct for which authorisation is sought.<sup>7</sup> In particular, the ACCC considers that absent authorisations the NPP could continue to operate, but without eligibility requirements and suspension and termination provisions. This is due to the risk that making and giving effect to these regulations may breach the CCA. However, as discussed at paragraph 55, the effectiveness of the NPP is to some extent dependent on the ability to self-enforce standards and compliance, including through the eligibility requirements and suspension and termination provisions. Without the settlement obligations changes to the design and operation of the NPP would likely be necessary.
- the relevant areas of competition likely to be affected by the applications. NPPA seeks authorisation for provisions of the NPP regulations concerning eligibility requirements and settlement provisions, and termination and suspension of NPP Participants. On this basis the ACCC has confined its assessment of the Proposed Conduct to the clearing and settlement of low value payments.
- that NPPA has requested authorisation for five years in relation to the suspension and termination provisions and in perpetuity for the eligibility requirements and settlement provisions.

### Public benefit

#### *Suspension and termination provisions*

53. NPPA submits that the scope of the application of the suspension and termination provisions is limited to the minimum necessary to protect the efficiency and integrity of the NPP system. The ability to suspend or terminate a Participant is critical for ensuring that a clearing system can avoid systemic failure, and maintain efficiency and integrity of the system. Moreover, suspension and termination provisions are

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<sup>5</sup> [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister)

<sup>6</sup> Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8).

<sup>7</sup> For more discussion see paragraphs 5.16-5.23 of the ACCC's Authorisation Guide.

effectively “last resort” steps to be contemplated only if a Participant’s continuing participation would impair the efficiency and / or integrity of the system.

54. NPPA adds that as in any set of rules or laws, sanctions are an important mechanism to foster compliance. Without these safeguards, the efficacy and integrity of the NPP would be diminished and the confidence of Participants about the NPPA would be reduced. At the extreme, this would compromise NPPA’s ability to centrally coordinate standards for clearing and settlement of NPP transactions.
55. The ACCC considers that the suspension and termination provisions are likely to result in public benefits through the protection of the security, efficiency and integrity of the NPP. In particular, the ACCC considers that without the ability to enforce compliance with the standards established by NPPA (through the ability to suspend or terminate membership for non-compliance) the operational efficiency of the NPP could be undermined.

#### *Eligibility requirements*

56. NPPA submits that by appointing SWIFT to build the NPP basic infrastructure they were able to leverage SWIFT’s existing infrastructure capabilities thereby developing optimal technologies cost effectively. NPPA submits that having two network connections is necessary to ensure the communications infrastructure is highly available and highly resilient.
57. The ACCC notes that the efficient operation of a payments platform such as the NPP necessarily requires a communications infrastructure. While SWIFT will build the NPP infrastructure on a standalone basis, some components of the broader SWIFT network will be relied on to facilitate participation in the NPP.
58. The ACCC considers that this approach, and the consequential requirement for Participants to be SWIFT members, obviates the need for NPPA to duplicate these systems and services which is likely to result in a public benefit.
59. The ACCC considers that requiring Participants to have two network connections is likely to result in a public benefit by improving the reliability of the NPP.

#### *Settlement obligations*

60. NPPA submits that settlement via an ESA is integral to the design and operation of the NPP, and to ensuring that payments can be settled in a fast and secure manner. NPPA submits that without these requirements the NPP would not function properly, if at all, and a fundamental change to the design and operation of the NPP would be required. The ESA requirement provisions therefore generate the public benefits that are derived from having the NPP and operating it in a secure manner.
61. The ACCC considers that a common set of requirements for effecting settlement is necessary for the efficient operation of the NPP. Settling low-value payments through the FSS operated by the RBA using ESAs is likely to be an efficient and reliable means of achieving settlement and is likely to result in a public benefit.

### **Public detriment**

#### *Suspension and termination provisions*

62. NPPA submits that, if triggered, the suspension and termination provisions have the effect of excluding the institution concerned from participating in, and receiving

services through, the NPP. However, NPPA notes that similar suspension and termination provisions in other clearing systems managed by APCA have not been used since APCA's establishment. NPPA submits that the suspension and termination provisions do not place unreasonable requirements on Participants and that to the extent that any anti-competitive detriment may arise in respect of a particular Participant, this anti-competitive detriment does not affect competition itself, given the number of competing providers of such services.

63. The ACCC notes that suspension or termination from being an NPP Participant does not preclude the financial institution from having low-value payments cleared and settled through the NPP. The institution would not be able to directly clear and settle payment. However, the institution would still be able to enter into an agreement with an NPP Participant for clearing and settlement. That is, institutions do not need to connect to the NPP to be able to use it.
64. In this respect, NPPA submits that it expects the market for 'sponsored' access to the NPP to be highly competitive. NPPA states that from the launch of the NPP, it estimates that approximately sixty financial institutions (ADIs and corporates) will connect to the NPP via a number of NPP Participants whose business models are focused on providing agency services. NPPA submits that it also understands that a number of NPP Participants offering agency solutions to the market also expect to provide indirect NPP connection solutions to corporate customers enabling them to have practical use of all of the technical functionality available to NPP Participants.
65. The ACCC considers that exclusion from the NPP system would not preclude an institution from establishing other direct messaging and settling arrangements outside the NPP. However, the institution would likely need to negotiate agreements with other participants outside of the NPP arrangements to do so. Given that major banking institutions plan to operate under the NPP system, it would likely be significantly more difficult for institutions excluded from the NPP to negotiate such agreements outside of the NPP 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 the NPP.
66. Therefore, the ACCC considers that exclusion from the NPP would have an adverse effect on the financial institution concerned and could potentially make it very difficult for the institution to directly clear and settle low-value payments. Absent appropriate checks and balances on the use of the suspension and termination provisions this has the potential to result in anti-competitive detriment.
67. However, the ACCC considers that the suspension and termination provisions do not place unreasonable requirements on NPP Participants and contain adequate checks and balances on the manner in which they are employed, including:
  - the representation of the RBA on the NPPA Board
  - the suspension and termination provisions can only be invoked in limited circumstances, namely if the Participant no longer satisfies the membership criteria, is in material breach of its obligations under the NPP Regulations or NPP Procedures and fails to rectify the breach, is insolvent or engages in conduct reasonably regarded by the NPPA Board to be contrary to the interest of NPPA or which may adversely affect the NPP basic infrastructure, and

- in lieu of suspending a Participant, NPPA may impose conditions on the participation of that Participant (including changing the capacity in which that Participant may participate in the NPP, or varying any provision of the NPP Procedures).
68. The ACCC also considers that even if used, to the extent that suspension or termination may adversely affect the NPP Participant concerned, given the number of competing service providers this may not significantly affect competition more generally.

*Eligibility and settlement processes*

69. NPPA submits that the SWIFT requirement provisions and the ESA requirement provisions are integral to the design and operation of the NPP and do not impose a barrier to admission to the NPP. In particular:
- Becoming a SWIFT member does not impose unreasonable or onerous obligations. The process is reasonably straightforward and many APCA members (which will also become NPP Participants) are already members.
  - Membership of RITS and having an ESA is a common requirement for many payment and clearing arrangements. There is no reason to believe that this requirement will add any unreasonable burden or be a barrier to prospective Participants.
  - The requirement to connect to at least two network connectivity service providers may increase costs to relevant Participants. However contingency redundancy requirements are common features of electronic payment systems to meet availability and resiliency requirements and the benefit of (and requirement for) high availability and resilience far outweighs any public detriment that may arise from the requirement.
70. One confidential submission questioned why NPP Participants are required to be ADIs. NPPA submits that the 'ADI requirement' is necessary to ensure that relevant Participants have the technical, operational and legal capability to perform the NPP's Core Functions. Further, NPPA argues that the NPP has been designed to enable participation by non-ADIs (as Connected Institutions and Overlay Service Providers).
71. The ACCC considers that the requirement for Participants to join SWIFT is unlikely to materially impact the ability for institutions to participate in the NPP. The ACCC also notes that participants in APCA's high value clearing system (HVCS) are also required to join SWIFT and that since that requirement was introduced in 1997 no relevant application to join SWIFT has been denied.
72. Similarly, the ACCC considers that the requirements to be a member of RITS, have an ESA (and be an ADI) and connect to at least two network connectivity service providers do not place unduly onerous obligations on Participants in the context of seeking to ensure that the NPP is operated securely, reliably and efficiently.
73. Further, as discussed, institutions that cannot or do not wish to comply with these requirements are still able to use the NPP by entering into an arrangement with an NPP Participant.

74. Accordingly, the ACCC considers that the public detriment generated from requiring, as a condition of participation, that NPP Participants acquire certain services from nominated third parties is likely to be low.

#### *Cost of participation*

75. Concerns have been raised that the requirement for NPP Participants to pay fees, costs, charges and expenses could be onerous for Participants in the early stage of business development or with little capital and may constitute a barrier to entry with the effect of excluding new innovations and/or participants.
76. The ACCC notes that prospective NPP Participants are required to be members of, and subscribe to shares in, NPPA. The level of capital funding the Participant is required to contribute is determined by their size, market capitalisation and significance to the Australian payments system (i.e. whether they are a high, medium or low band member). The funding they are required to contribute is equivalent to that contributed by other NPP Participants in the same governance band.
77. NPPA provided details of these fees to the ACCC confidentially. NPPA also provided public estimates of the direct investment each of the NPP's 13 Participants have incurred in each building back office capability to integrate banking IT systems with the NPP. NPPA estimated the collective costs incurred by the 13 Participants at \$1 billion. The ACCC notes these costs, which far exceed the capital funding that these institutions have had to contribute to become NPP Participants, are the primary cost of becoming an NPP Participant.
78. In addition, the NPP Regulations provide for the ongoing collection of fees to cover operating costs. For example, NPP Participants, Connected Institutions or Overlay Service Providers may be required to pay an annual administration fee to cover the cost of operating the NPP basic infrastructure. In addition, NPP Participants and Overlay Service Providers may be required to pay a participation application fee and NPP Participants and Connected Institutions may be required to pay transaction fees, fees for NPP componentry (i.e. to establish connectivity to the NPP) and address service usage fees.
79. The level of these fees are yet to be established. The ACCC notes that they will be somewhat dependent on the level of take up of NPP services and ongoing operational costs. The ACCC also note NPPA's submission that fees will be directed at covering operating costs rather than maximising profit. In this respect the ACCC considers that it is appropriate to seek to recover the costs of operating the NPP from users.
80. The ACCC also notes that in order to ensure the success of the NPP, NPPA has strong incentives to maximise the number of users and transactions undertaken. Further, as discussed at paragraphs 63 and 64 there are likely to be a range of options for parties to connect to the NPP through agency solutions provided by NPP Participants.

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

81. 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.

82. The ACCC considers that the suspension and termination provisions, eligibility criteria and settlement obligations in the NPP Regulations contribute to the security, efficiency and integrity of the NPP system and are likely to result in a benefit to the public.
83. The ACCC also considers that the public detriment, including anti-competitive detriment, likely to result from the relevant provisions in the NPP Regulations is limited. In particular, the ACCC considers that:
- there are checks and balances around the use of the suspension and termination provisions
  - the eligibility criteria and settlement obligations do not place unduly onerous obligations on institutions that elect to directly participate in the NPP, and
  - institutions that cannot or do not wish to comply with these requirements are still able to use the NPP by entering into an arrangement with an NPP Participant.
84. Accordingly the ACCC is satisfied that the relevant net public benefit tests are met.

## Length of authorisation

85. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>8</sup> 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.
86. NPPA seeks authorisation for the suspension and termination provisions for five years and in perpetuity for the eligibility criteria and settlement obligations. In seeking authorisation in perpetuity for the eligibility criteria and settlement obligations NPPA notes that these provisions, which may constitute third line forcing within the meaning of the CCA, can be conferred legal protection in perpetuity through lodging an exclusive dealing notification. NPPA submits that it has only sought authorisation for this conduct, rather than lodging notifications, because authorisation is being sought in relation to the suspension and termination provisions. NPPA submits that there is no reason not to grant the same legal protection for this conduct as would be afforded through the notification process.
87. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC proposes to grant authorisation for five years in relation to the suspension and termination provisions.
88. With respect to the eligibility requirements and settlement obligations, while it is the ACCC's usual practice to grant authorisation for a limited period of time, in this instance, having regard to the nature of the conduct for which authorisation is sought, the ACCC proposes to grant authorisation in perpetuity.

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<sup>8</sup> Subsection 91(1).

## Draft determination

89. On 18 October 2016, NPP Australia Limited lodged applications for authorisation A91560 – A91562 with the ACCC. Application A91560 was made using Form A, A91561 using Form B and A91562 using Form E of Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under subsections 88(1), 88(1A) and 88(8) of the CCA for authorisation of the following provisions of the NPP Regulations:

- 3.5(c) – rights and obligations of NPP Participants
- 4.3 – eligibility – full Participants
- 4.4 – eligibility – clearing Participants
- 4.5 – eligibility – settlement Participants
- 4.6(h) – eligibility – connected institutions
- 7.1 – FSS
- 7.3 – settlement of NPP payments
- 9.2 – suspension
- 9.3 – effect of suspension
- 9.4 – conditions of suspension
- 9.5 – termination

90. Authorisation is sought as the Proposed Conduct may involve making and giving effect to agreements that contain a cartel provision, 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 or constitute third line forcing within the meaning of section 47 of the CCA.

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

## The net public benefit tests

92. For the reasons outlined in this draft determination, the ACCC considers 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.

93. The ACCC also considers 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 which the ACCC proposes to authorise**

94. The ACCC proposes to grant authorisation to the Proposed Conduct as outlined in paragraph 89.
95. The ACCC proposes to grant authorisations A91560 and A91561 for five years.
96. The ACCC also proposes to grant authorisation A91562 in perpetuity.
97. This draft determination is made on 8 March 2017.

## **Next steps**

98. The ACCC now seeks submissions in response to this draft determination. 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 CCA.