



Draft Determination

Application for revocation of
A91548 and A91549
and the substitution of
authorisation AA1000552
lodged by
Gateway Network Governance Body Ltd

Date: 3 September 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to grant re-authorisation to enable the Gateway Network Governance Body Ltd (GNGB) to make and give effect to certain clauses of the revised Memorandum of Understanding between itself and Gateway Operators, concerning the stewardship arrangements for the Superannuation Transaction Network (the Network).

The GNGB is an industry owned, not-for-profit organisation that manages the integrity of the Network. The Network ensures the exchange of superannuation data between employers and superannuation funds in a manner that meets government regulations. Gateway Operators operate the entry/exit points of the Network on behalf of employers and super funds, and range from large banks to small business operators and fintechs.

This conduct has been previously authorised by the ACCC since December 2016 and is substantially the same in the current application. However, there are material amendments to the clauses that prescribe GNGB's role, GNGB's powers and remedies in respect of default events, and the dispute resolution processes.

The ACCC proposes to grant re-authorisation for 5 years.

The ACCC invites submissions by 17 September 2021 in relation to this draft determination before making its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 29 April 2021, Gateway Network Governance Body Ltd (**GNGB**), on behalf of itself and current and future Gateway Operators, lodged an application to revoke authorisations A91548 and A91549 and substitute authorisation AA1000552 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. GNGB seeks re-authorisation to continue to make and give effect to certain provisions of clauses 2 to 11 of the revised Memorandum of Understanding (**Revised MoU**), concerning the stewardship arrangements for the Superannuation Transaction Network (**Network**).
- 1.3. GNGB seeks re-authorisation for 5 years. This application for re-authorisation AA1000552 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.4. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicant

- 1.5. GNGB is a not-for-profit industry sponsored body, established by key stakeholders in the Network. GNGB's primary role is to provide governance oversight of the network for transmission of electronic data messages in the superannuation environment in

Australia – known as the ‘Superannuation Transaction Network’ – and its operators (known as Gateway Operators). GNGB manages the security and availability of the Network through the Revised MoU (a contract between GNGB and Gateway Operators), and through the Gateway Standard that Gateway Operators must adhere to.

- 1.6. GNGB's members are organisations representing key stakeholders in the Network, including sponsoring industry associations and Gateway Operators.
- 1.7. A Gateway Operator is any person or entity that operates or supplies functions and services in relation to a Gateway, including gateway-related data and messaging services within the Network. They are intermediaries that facilitate the transfer of electronic data messages compliant with the *Superannuation Data and Payment Standards 2012 (Data and Payment Standards)*. For example, an employer sending information about super contributions for an employee to their superannuation fund. The Current Gateway Operators (that is, current signatories to the Revised MoU) are:
 - (a) ClickSuper
 - (b) GBST
 - (c) IRESS Pty Ltd
 - (d) MessageXchange
 - (e) Oban Pty Ltd
 - (f) Ozedi
 - (g) Sunsuper
 - (h) SuperChoice, and
 - (i) Westpac Institutional Bank.
- 1.8. These Gateway Operators range from large bank supported organisations or subsidiaries, to small business operators and fintechs.¹

The Proposed Conduct

- 1.9. GNGB seeks re-authorisation on behalf of itself, and current and future parties (Gateway Operators) who agree to join the Revised MoU, to make and give effect to the Revised MoU, and in particular the following provisions:
 - the role of the Revised MoU as binding on each Gateway Operator (**clause 2**)
 - requirements for Gateway Operator applicants to be recognised and to agree to comply with the Revised MoU (**clause 3**)
 - the role and rights of GNGB, being taking steps to promote certain goals (**clauses 4 and 7**)
 - the rights and obligations of Gateway Operators (**clause 5**)
 - the conduct and attendance of GNGB and Gateway Operators at meetings (**clause 6**)

¹ Gateway Network Governance Body, '[Gateway Operators](#)', viewed 25 August 2021.

- the liability of Gateway Operators to comply with obligations under the Revised MoU and Gateway Standards (**clause 8**)
- the requirement on Gateway Operators to comply with the Revised MoU procedures governing disputes between Gateway Operators (**clause 9**)
- the requirement on Gateway Operators to comply with the Revised MoU procedures governing disputes between a Gateway Operator and GNGB (**clause 10**)
- the powers and remedies available to GNGB for Default Events (**clause 11**) and
- the requirement for Gateway Operators to share costs and pay fees (**clauses 5 and 12**).

(the **Proposed Conduct**)

1.10. Gateway Operators have agreed with each other and GNGB to be bound the above standards in the Revised MoU for their participation in the Network – including minimum entry requirements, and remedies for breach such as probation and termination – the enforcement of which may could exclude or limit the ability of certain Gateway Operators to compete to supply superannuation messaging services.

Previous authorisation

- 1.11. On 19 December 2016, the ACCC granted applications for authorisation A91548 and A91549 lodged by the Association of Superannuation Funds Australia (**ASFA**) (the **2016 Authorisations**). The ACCC granted authorisation for ASFA to make and give effect to certain provisions of the Memorandum of Understanding between the newly-established GNGB and the Gateway Operators regarding participation in the Network, until 10 January 2022.
- 1.12. In late 2016, GNGB entered into the Current Memorandum of Understanding (**Current MoU**) with each of the Gateway Operators.
- 1.13. In 2020, certain minor changes were made to the Current MoU resulting in Version 5 of the MoU (**Revised MoU**). These revisions included simplifying the provisions dealing with disputes and remedies, and enabling the GNGB Board to expand the scope of its activities in the future (as detailed in **Table 1** below).
- 1.14. GNGB now seeks revocation of the 2016 Authorisations and replacement with a new authorisation to enable GNGB and current and future Gateway Operators to make and give effect to the relevant provisions of the Revised MoU for a period of 5 years.
- 1.15. The current application for revocation and substitution has been lodged with the consent of the original applicant ASFA. ASFA submits that it continues to provide support for the governance of the Network being implemented by the industry-owned governance body GNGB. ASFA considers the public benefits in support of the current application remain broadly consistent with the public benefits identified for the 2016 Authorisations.

2. Background

Superannuation Transaction Network and governance arrangements

- 2.1. In December 2010, the Commonwealth Government announced the SuperStream reforms, which required that all superannuation transactions be sent electronically. These measures to digitise transactions were intended to reduce the costs and complexity arising from manual processing, lack of standardised formats, and poor and incomplete data. The ATO was tasked with developing a set of common rules (the Data and Payment Standards) for sending messages carrying information regarding superannuation fund members' registration, rollover or contributions (**Messages**) electronically over a network.
- 2.2. This network, the 'Superannuation Transaction Network', consists of a number of 'Gateways', which are network entry and/or exit points, that are operated by the Gateway Operators for the purpose of receiving, routing, switching and packaging the mandated data required in (see **Figure 1**). These Gateways connect employer data transaction flows to super funds; and also connect one super fund to another where a member's account information needs to be transferred. Gateway Operators do not process money, which is transferred through the banking system.
- 2.3. GNGB submits that given the frequency and volume of the Messages exchanged (for example, 165 million in the year to December 2020), it is not feasible or practical for superannuation funds to establish bilateral arrangements with the thousands of employers and hundreds of other funds across Australia to exchange these Messages. This necessitates that some type of network is utilised; and if this network is to be managed and funded by industry, then a body like GNGB is required to monitor and ensure the network is secure, efficient and assists industry to meet its compliance obligations.

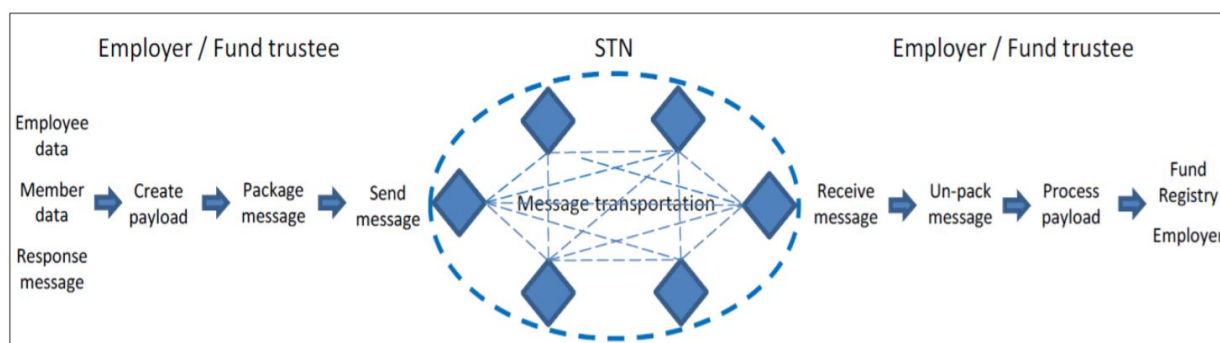


Figure 1: The Superannuation Transaction Network

- 2.4. Employers and superannuation funds are required to comply with the Data and Payment Standards (which is delegated legislation under the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**)), and are regulated by the ATO and APRA respectively. The Data and Payment Standards mandate that superannuation data regarding registration, rollovers (fund-to-fund transfers) or contributions (employer-to-fund payments) must be sent and/or received in a prescribed electronic format. In order to comply with these obligations, employers and superannuation funds use the Network to pass messages between Gateway Operators – although they are not precluded from making other arrangements in order to comply.
- 2.5. However, the Data and Payment Standards do not mandate operating or security standards for members of the Network. Furthermore, Gateway Operators, who are

intermediaries in this process, are not regulated by the *SIS Act* or the Data and Payment Standards. Instead, Gateway Operators work cooperatively with each other through a consensual arrangement, being the Revised MoU.

- 2.6. Under the Revised MoU, Gateway Operators make certain commitments to each other regarding various matters, including compliance with 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 sent or received in connection with superannuation transactions, to ensure ongoing interoperability across the Network enabling compliance by funds and employers.
- 2.7. GNGB submits that the Current/Revised MoUs do not make any changes to the Gateway Standard, but create an additional layer of compliance oversight, design enhancements and procedures for enforcement of the Gateway Standard with the aim to enhancing adherence to the standard.
- 2.8. Prior to the adoption of the Current MoU and GNGB's incorporation, the Australian Taxation Office (**ATO**) was the steward of the Network and oversaw the activities of the Gateway Operators, on an interim basis. In 2016, the ATO was tasked with working with industry to hand over this role to GNGB – a specially formed self-regulated, industry-funded governance body – to provide this governance on a permanent basis.

GNGB's role, structure and membership

- 2.9. GNGB is incorporated as a not-for-profit, public company, limited by guarantee with a constitution setting out the powers, objects and structure of the company.
- 2.10. Clause 4 of the Revised MoU states that GNGB may undertake initiatives or take steps to promote various goals, including: the efficiency and effectiveness of the Network; using the Revised MoU and Gateway Standard to ensure compliance with Network governance arrangements, the security of the Network, and rules for access by Gateway Operators; and engaging with industry and government bodies and stakeholders.
- 2.11. GNGB submits that clauses 4(i) and 4(j) have been inserted into the Revised MoU to allow GNGB to broaden the scope of its activities under specific circumstances, allowing the GNGB Board to determine when it is appropriate to incorporate new initiatives that GNGB should be responsible for or involved in. GNGB notes that any additional activities are in the context of GNGB executing its overarching obligation to manage the integrity of the Network.
- 2.12. GNGB maintains the same legal structure as proposed in the 2016 Authorisation. The Board comprises of nine directors, all with equal voting rights, broken down as:
 - superannuation funds – 3 directors
 - Gateways Operators – 3 directors
 - software providers – 1 director
 - employers – 1 director, and
 - an independent Chair.

2.13. The ATO and APRA are regularly invited as observers to all GNGB Board meetings.

2.14. The GNGB membership structure has three categories of membership:

- **Co-Sponsor members** – made up of the four sponsoring industry association organisations (ASFA, the Australian Business Software Industry Association (**ABSIA**), the Australian Institute of Superannuation Trustees (**AIST**), and the Financial Services Council (**FSC**)), who worked with the ATO in relation to the initial handover of the stewardship of the Network, and agreed to the establishment of GNGB to assume responsibility for the governance and oversight of the Network.
- **Associate Co-Sponsor member** – being Gateway Association Transaction Exchanged (**GATE**), the Industry Association for Gateway Operators, and
- **Gateway members** – Gateway Operators participating in the Network.

2.15. GNGB is funded via an industry-self-funded model, split between APRA regulated funds (85 per cent) and Gateway Operator fees (15 per cent). GNGB has determined the latter fees on a cost recovery basis.

Revisions to MoU

2.16. GNGB submits that the 2020 amendments in the Revised MoU (as detailed in **Table 1**) are aimed at facilitating a more consultative process between GNGB and the Gateway Operators. The most substantive changes are to clause 4 (which allows the Board of GNGB to expand the scope of its activities in future), clauses 9 and 10 (which simplify the disputes process), and clause 11 (which streamlines the process for assessment of Default Events and determination of remedies).

Table 1: Relevant clauses changed in the Revised MoU

Clause and title	Changed / unchanged	Summary of clause	If changed, how and why
Clauses 4 and 7 – The role and rights of GNGB	Changed	GNGB may, in its role in managing the integrity of the Network, undertake initiatives or steps to promote the goals of GNGB that are stipulated.	Two new provisions have been inserted to clause 4 ((i) and (j)) to expand the scope of GNGB's activities in managing the integrity of the Network, namely by: <ul style="list-style-type: none"> • responding to legal or regulatory changes e.g. termination, closure, evolution in scope/function of the Network, and • pursuing further activities to leverage GNGB's capabilities. (See paragraph 4.21 below).
Clauses 9 and 10 - New processes for resolution of disputes with GNGB and with	Changed	Clause 9 details the process for dealing with disputes between Gateway Operators. GNGB notes this new process provides greater flexibility.	Dispute resolution is split into two separate streams, developed with assistance from the Australian Disputes Centre, to simplify the

Gateway Operators		Clause 10 details the process for disputes between Gateway Operators and GNGB, with the inclusion of a compulsory mediation process and provisions relating to legal proceedings. GNGB notes this clause creates an independent avenue for Gateway Operators to raise a dispute with GNGB.	process. The referral of disputes to a resolution sub-committee has been revoked, due to the Resolution Group responsible never being used since its creation. (See paragraphs 4.21 and 4.29 below).
Clauses 11.1, 11.2, 11.3 – Assessment and Notification of Default Events by Gateway Operators	Changed	Details the process for GNGB to receive notification of or identify, assess, and provide notice of Default Events by Gateway Operators. If the Default Event is not resolved, this may lead to termination or probation of the relevant Gateway Operator.	Gateway Operators may now report failures or refusals to give effect to GNGB Board determinations in relation to a dispute. Provides GNGB Board with more discretion where there is a Default Event regarding: <ul style="list-style-type: none"> • using a Risk Assessment framework to determine a proportionate remedy aligned to the risk to the Network • whether to notify regulators (ATO, APRA) and other Gateway Operators.
Clause 11.8 – Powers of termination of participation by Operators that do not comply with Network procedures	Changed	GNGB may (by written notice) terminate a Gateway Operator's participation in the Revised MoU and the Network in certain circumstances (i.e. probation events, fraud, insolvency, or adversely impacting the Network). GNGB must in good faith consider any written submissions from a Gateway Operator as to why they should not be terminated.	Increasing the pending termination period from 15 days to 30 days to include time for a Gateway Operator to appeal the termination to an independent arbitrator (in addition to any written submissions).
Clause 2 – Application and effect of the Revised MoU	Substantively unchanged	Binds each Gateway Operator whose application is accepted by GNGB (in writing).	Minor wording changes to reflect supersession of previous MoU and how it takes effect for new Gateway Operators.
Clause 3 – Matters relating to eligibility for admission as a Gateway Operator and participation in the Network	Substantively unchanged	A Gateway Operator must agree to basic criteria including: complying with the Revised MoU and the Gateway Standards, paying all relevant levies and fees, demonstrating sound and secure business practices, being financially solvent and submitting an application form. The GNGB Board must not unreasonably withhold approval of	Previously clause 4, now clause 3. Minor wording and structure changes.

		an applicant who fulfils the eligibility criteria.	
Clause 7 – Amendment of MoU and Gateway Standard	Substantively unchanged	<p>GNGB may amend the MoU or the Gateway Standard provided it obtains approval of the GNGB Board (75% majority) and provides at least 6 months' notice to Gateway Operators.</p> <p>The Gateway Standard may also be amended by a Gateway Operator proposing a change which is accepted by a 75% majority at a Gateway Operator meeting, and ratified by GNGB.</p>	Minor wording changes.
Clauses 11.4, 11.5, 11.6, 11.7 – Powers of probation of participation by Operators that do not comply with Network procedures	Substantially unchanged	GNGB has powers under the Revised MoU to place a non-compliant Gateway Operator on probation for a specified or indefinite period of time. Gateway Operators must demonstrate the Probation Event has been sufficiently remedied.	Minor wording changes and renumbering of clauses.
Clause 5 – Rights and obligations of Gateway Operators	Unchanged	<p>Gateway Operators must:</p> <ul style="list-style-type: none"> • comply with applicable laws, the Revised MoU and the Gateway Standard • pay all relevant fees • not adversely affect the integrity or security of the Network • supply GNGB with information reasonably required. 	N/A
Clause 6 - Meetings of GNGB and Gateway Operators	Unchanged	Meetings are held with such frequency as determined by GNGB, having reasonable regard to the submissions of each Gateway Operator.	N/A
Clause 8 - Further matters concerning governance and liability	Unchanged	Parties to the MoU warrant to each other Gateway Operator that they have the authority to enter into and comply with the duties / obligations under the Revised MoU and Gateway Standard.	N/A
Clauses 5.1(b) and 12	Unchanged	Gateway Operators must pay GNGB an annual operating fee representing a pre-determined share depending on the anticipated costs of administering the Revised MoU over the relevant period.	N/A

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including superannuation funds, Gateway Operators, the ATO, AFCA and APRA.
- 3.3. The ACCC received one submission from the Australian Financial Complaints Authority (**AFCA**) in support of the application. AFCA noted the importance of governance in the industry, and the expanded MoU provisions, particularly relating to dispute resolution. AFCA supports the continued role of GNGB in overseeing Gateway Operators and its collaboration with other regulators in relation to related matters.
- 3.4. As noted in paragraph 1.15 above, GNGB has obtained the consent of the original applicant, ASFA, to lodge the application for revocation and substitution. GNGB has also obtained letters in support of their application from two of the Co-Sponsor (industry association) members of the GNGB, namely:
 - the Australian Institute of Superannuation Trustees (**AIST**). AIST submits that GNGB plays a key role in ensuring the security, integrity and efficiency of the Network. AIST submits that the GNGB delivers greater accountability to industry stakeholders for continuous improvement and efficiency, and a range of security initiatives that benefit industry and ultimately the millions of Australians with superannuation accounts. AIST considers that the public benefits in support of the application remain broadly consistent with the public benefits identified for the 2016 Authorisations.
 - the Financial Services Council (**FSC**). The FSC submits that the industry governance model has proven efficient; promotes ownership and responsibility among stakeholder organisations; has resulted in good outcomes for stakeholders and the broader community, while reducing administrative burden and the need for Government oversight. The FSC also submits that the public benefits of the current application are consistent with those identified for the 2016 Authorisations, and these benefits have been seen in practice over the period of GNGB's operation.
- 3.5. Public submissions by GNGB and interested parties are on the [Public Register](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. GNGB has sought authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act,² the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

² See subsection 91C(7).

Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. GNGB submits that the application relates to the following markets, which are national in scope:
- The supply of retail superannuation services by Australian superannuation funds to fund members, who will benefit from the enhanced Network in terms of greater efficiency of rollover and other messages, and
 - The supply by Gateway Operators of messaging services to Australian Superannuation funds and employers, who will directly participate in and benefit from the Network.
- 4.5. The ACCC considers that the relevant area of competition most likely to be impacted by the Proposed Conduct is the latter of those proposed by the Applicants, namely the supply of messaging services (services for the routing, switching and packaging of data comprised in Messages about superannuation registrations, rollovers and contributions) passing between employers and Australian superannuation funds. As noted in paragraph 4.25 below, the Proposed Conduct may have a secondary impact on the market for the supply of retail superannuation services by Australian superannuation funds to fund members.

Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. GNGB submits that without the Current MoU, governance of the Network would not have adequate oversight and enforcement provisions. It submits that without the Revised MoU, in particular:
- the protections for funds and employers in the transfer of funds by Gateway Operators will be less effective, as the governance framework (including disciplinary measures like probation and termination) provides additional incentives for Gateway Operators to comply, and
 - there would be less oversight and accountability of Gateway Operators, which may lead to inefficiencies or weaknesses, or reduced confidence in the integrity and safety of the Network – which could potentially increase the governance burden for government.
- 4.8. GNGB also notes that employers and superannuation funds use Gateway Operators under the Network to provide these messaging services in order to comply with the Data and Payment Standards, which mandate that super transactions be sent/received in a prescribed electronic format. However, they note that nothing precludes employers or superannuation funds from establishing other arrangements outside the Network to comply with the Data and Payment Standards.
- 4.9. As noted in paragraph 2.5 above, Gateway Operators are not directly regulated by the *SIS Act* or the *Data and Payment Standards*, but have decided to work cooperatively through the Revised MoU.

- 4.10. In these circumstances, the ACCC considers that, in the likely future without the Proposed Conduct, the GNGB would not use the Revised MoU (being the agreement between GNGB and Gateway Operators) to govern the compliance of Gateway Operators with the Gateway Standard. That is, the additional layer of compliance oversight and procedures for enforcement of the Gateway Standard that is provided by the Revised MoU, would be removed.
- 4.11. However, the Gateway Operators would continue to be regulated by the Gateway Standard – the minimum technical standards and operating requirements for Gateway Operators – as this will not change as a result of the Proposed Conduct. Therefore, the electronic transfer of messages via the Network and the benefits from the electronic transfer of messages are likely to continue with or without the Revised MoU and the stewardship of the Network by the GNGB.
- 4.12. Additionally, without the Proposed Conduct, employers and funds could still establish other arrangements outside the Network in order to comply with the Data and Payment Standards (that is, the requirement that super transactions be sent/received in a prescribed electronic format).

Public benefits

- 4.13. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*³

- 4.14. 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 over the Network from both employers to funds and inter-fund transfers, to drive down costs for superannuation members
 - greater overall responsibility for industry stakeholders through an industry-sponsored governance regime, reducing need for government oversight
 - a more formal sustainable self-funded structure, better able to drive additional efficiency enhancements in future, and
 - a more formal structure to provide for better consultation with stakeholders.
- 4.15. GNGB advises that they are not aware of any complaints in relation to the Revised MoU, and that since GNGB began operations, there have been no data breaches or leakages from the Network.
- 4.16. GNGB also submits that the Revised MoU will have the following multiple beneficiaries:

³ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 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, and
- Gateway Operators through increased confidence in their products and the efficiency of their services.

4.17. The ACCC has considered the following public benefits:

- Increased likelihood of compliance with the Gateway Standard by Gateway Operators, and
- Improved operational efficiency of the Network and potential cost savings.

Increased likelihood of compliance by Gateway Operators

4.18. The introduction of the Network in 2014 and the facilitation of the electronic transfer of Messages between funds and employers aimed to increase the efficiency of the system. The minimum technical standards and operating requirements for participation in the Network (the Data and Payment Standards) were developed by the ATO and are not part of the Revised MoU, and are not part of the Proposed Conduct for which authorisation is sought.

4.19. The clauses of the Revised MoU that are the subject of the application 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 GNGB is the mechanism by which this is intended to be achieved. The ATO continues to be responsible for the administration and enforcement of the Data and Payment Standards.

4.20. As noted in paragraph 2.7 above, however, the Revised MoU between the GNGB and Gateway Operators creates an additional layer of compliance oversight and procedures for enforcement of the Gateway Standard. The ACCC understands that this does not extend to Gateway Operators committing to adopt standards or protections that go *beyond* what is explicitly required by applicable laws and standards.

4.21. The ACCC considers that the Revised MoU, with its compliance and enforceability provisions, is likely to result in public benefits by increasing the likelihood of compliance with the Gateway Standard by Gateway Operators. The original MoU (under the ATO's stewardship) contained no disciplinary measures to enforce compliance with the Gateway Standard, whereas compliance provisions, such as probation and termination of Gateway Operators for non-compliance are included in the Revised MoU. These include new amendments which provide:

- Clause 4(i), 4(j): a new ability for the GNGB Board to expand the scope or function of GNGB's activities in the Network (for example, to respond to legal or regulatory changes) or pursue further activities that leverage GNGB's capabilities where it is in the interests of members and Gateway Operators. The ACCC notes GNGB's submission that any such additional activities will be in the context of GNGB executing its overarching obligation to manage the integrity of the Network; and that such determinations must be made by GNGB's Board, which comprises of parties representing stakeholders from across in the Network.

- Dispute resolution: simplified processes for resolving disputes, developed with the aid of the Australian Disputes Centre. Two separate streams have been created for resolving disputes between –
 - Gateway Operators (clause 9): amended to simplify the process to encourage a timely and low-cost alternative for Gateway Operator disputes; and give GNGB greater flexibility to consider if a dispute is within its purview and the method of escalation required, and to seek advice from a subject matter expert to aid its determination.
 - GNGB and a Gateway Operator (clause 10): amended to create an independent avenue for Gateway Operators to raise such disputes and remove any perceived/actual conflict in GNGB administering disputes where it is a party; and to include compulsory mediation and provisions regarding legal proceedings and injunctive/declaratory relief.
- Clause 11: a streamlined remedies process (discussed in paragraph 4.29 below).

4.22. The ACCC considers that these compliance and enforceability provisions (in addition to the entry requirements noted in paragraph 4.29) are likely to result in a public benefit by increasing the likelihood of greater compliance with the Gateway Standard by Gateway Operators, therefore enhancing the security and integrity of the Network and improving the safeguarding of personal information.

Improved operational efficiency of the Network

4.23. GNGB submits that the Proposed Conduct has resulted in the efficient transfer of data over the Network from both employers to funds and inter-fund transfers, through a set of standards for Gateway Operator behaviour, to drive down costs for superannuation members. It notes that the SuperStream Benefits Report found that the emergence of a network of messaging gateway providers sits at the core of the Superstream's benefits. It submits that without GNGB's role in overseeing the Network and ensuring operational efficiency, it is unlikely the reforms would have realised as significant savings as they have (i.e. efficiencies of approximately \$800 million per year for employers and funds, and an estimated \$2.4 billion savings annually for members).

4.24. GNGB notes that most of this efficiency will be derived within the funds, given that inter-fund transfers and rollovers can now be processed within 3 days using electronic messages, rather than 6 weeks. This allows funds to be quickly reinvested into investments in receiving funds, and therefore assists to deliver significant benefits to super fund members.

4.25. The ACCC considers that to the degree the Proposed Conduct contributes to the efficient transfer of data and payments links over the Network – as opposed to this resulting merely from the introduction of electronic messages and the Network itself – this is likely to constitute a public benefit.

Public detriments

4.26. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴

⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.27. GNGB submits that the changes to the Revised MoU do not materially impact the underlying role or functions of the GNGB, nor give rise to any additional conduct that may have the effect or purpose of substantially lessening competition. GNGB submits that the Proposed Conduct will not pose any significant detriments because it:

- will not increase barriers to entry, given that application by new Gateway Operators to be a party to the Revised MoU is not materially restricted or difficult. Access to the Network and GNGB arrangements will be open to all relevant Gateway Operators that are solvent, reputable and commit to comply with the Gateway Standards. GNGB has not rejected any applications from Gateway Operators that meet these criteria and demonstrate interoperability. Further, since GNGB began its operations, three members have left the Network (one did not begin transacting, one outsourced the function to another existing Gateway Operator, and one did not comply with audit requirements and voluntarily left during the probation period), and
- does not prevent or restrict Gateway Operators from competing for the business of providing data services to funds, or preclude employers and funds from establishing other arrangements outside the scope of the Network.

4.28. The ACCC notes that GNGB is responsible for considering applications to become a Gateway Operator, and also has the power to withdraw the approval of Gateway Operators. In effect, GNGB can 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 for Gateway Operators. 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 by reducing the ability of Gateway Operators to compete to supply Messaging services.

4.29. However, the ACCC considers that the Proposed Conduct is likely to result in minimal public detriment 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. GNGB cannot unreasonably withhold approval of an application by a prospective Gateway Operator who fulfils these criteria. Gateway Operators are also entitled to challenge a decision by GNGB to not accept their application and lodge a fresh application. The amendments also provide a simplified process for Gateway Operators to appeal their termination to an independent arbitrator, including increasing the pending termination period from 15 days to 30 days to include time for such an appeal.
- GNGB's membership comprises of three Gateway Operators, three superannuation fund representatives (the customers of Gateway Operators), an employer representative, a software provider, and an independent Chair – all of whom have equal voting rights. Any amendment of the Revised MoU requires 75 per cent majority of the GNGB 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.
- Under the amendments to dispute resolution, disputes that cannot be resolved by the parties themselves can be escalated to a body that is uninvolved in the dispute. That is, disputes between Gateway Operators can be referred to GNGB, and disputes between GNGB and a Gateway Operator can be referred to mediation (rather than a GNGB Board sub-committee, as was the case prior to the

amendments). Parties can also seek legal or equitable relief for either category of dispute.

- Under the amendments to remedies, GNGB has more discretion in determining whether a breach by a Gateway Operator constitutes a 'Default Event' and in determining a remedy that is proportionate to the nature and effect of the default. Prior to the amendments, GNGB was required to take a strict liability approach for all (even trivial) breaches.

4.30. The ACCC also notes that the Revised 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.

4.31. Therefore, the ACCC is satisfied that the entry and termination provisions do not place unreasonable requirements on GNGB members and that there are adequate checks and balances on the manner in which they will be employed. The ACCC considers that the Proposed Conduct is not likely to result in public detriment in the form of reduced competition between Gateway Operators, including by increasing barriers to entry into the Network.

Balance of public benefit and detriment

4.32. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

4.33. The Act allows the ACCC to grant authorisation for a limited period of time.⁵ 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.

4.34. In this instance, GNGB seeks re-authorisation for 5 years.

4.35. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC proposes to grant authorisation for 5 years.

4.36. The ACCC invites submissions from GNGB and interested parties on whether a longer authorisation period would be appropriate.

⁵ Subsection 91(1)

5. Draft determination

The application

- 5.1. On 29 April 2021, Gateway Network Governance Body Ltd (**GNGB**), on behalf of itself and current and future Gateway Operators, lodged an application to revoke authorisations A91548 and A91549 and substitute authorisation AA1000552 (referred to as **re-authorisation**). This application for re-authorisation AA1000552 was made under subsection 91C(1) of the Act.
- 5.2. GNGB seeks re-authorisation for the Proposed Conduct in paragraph 1.9.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation authorisations A91548 and A91549 and grant authorisation AA1000552 in substitution. Authorisation AA1000552 enables the GNGB and current and future Gateway Operators to make and give effect to clauses 2 to 11 of the revised Memorandum of Understanding (**Revised MoU**) concerning the stewardship arrangements for the Superannuation Transaction Network), as described in paragraph 1.9 and defined as the **Proposed Conduct**.
- 5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000552 for 5 years.
- 5.10. The proposed authorisation is in respect of the Proposed Conduct as it stands at the time authorisation is granted. Any changes during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.11. This draft determination is made on 3 September 2021.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 17 September 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.