



Draft Determination

Application for revocation of A91497 and A91498 and the substitution of authorisation AA1000495

lodged by

Australian Payments Network Limited

in respect of

the certification, suspension, and termination provisions of the Issuers and Acquirers Community Regulations and Code Set

Authorisation number: AA1000495

5 June 2020

Commissioners:

Keogh

Rickard

Court

Ridgeway

Summary

The ACCC proposes to grant re-authorisation to Australian Payments Network Limited for the certification, suspension and termination provisions of the Issuers and Acquirers Community (IAC) Regulations and Code Set.

The IAC is responsible for the framework managing ATM and EFTPOS payments. The framework has been authorised by the ACCC since 2000 and the framework has not materially changed since it was last authorised in 2015.

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

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

1. The application for authorisation revocation and substitution

- 1.1. On 6 April 2020, Australian Payments Network Limited (**AusPayNet**) lodged an application for the revocation of authorisations A91497 and A91498 and the grant of authorisation AA1000495 in substitution for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). AusPayNet is seeking re-authorisation for the certification, suspension, and termination provisions of the Issuers and Acquirers Community (**IAC**) Regulations (**Regulations**) and Code Set (**Code**) for five years. This application for re-authorisation AA1000495 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

The conduct

- 1.3. The IAC Regulations and Code (together, the **IAC Framework**) is a payment clearing and settlement system created by AusPayNet to set minimum standards for conduct and settlement procedures for transactions between banks carried across ATM and card payment networks (including Visa, Mastercard, American Express and eftpos).
- 1.4. The conduct that AusPayNet is seeking to have re-authorised relates to those provisions of its Regulations and Code that set minimum requirements for participants and enable participants to be fined or excluded for non-compliance. AusPayNet submits that such provisions are necessary to protect the integrity of the EFTPOS and ATM networks.
- 1.5. The [Regulations](#) and [Code](#) are available on [AusPayNet's website](#). The specific provisions for which AusPayNet has sought authorisation are described below:

Regulations

- Clause 4.1(c): Eligibility for Membership: members are required to comply with certification requirements set out in the Code and Regulations. Certification includes the requirement that all devices, solutions and Point of Interaction technologies (which include point of sale devices and solutions provided to a merchant to undertake card payments and ATMs) used by the issuer and acquirer participant (**IA Participant**) must be approved by AusPayNet

(Certification Requirements). In order to be an IAC Framework Participant, a person must be able to comply with any applicable laws, AusPayNet's Constitution, the Regulations and Code. Prospective IA Participants must be able to comply with the Certification Requirements (subject to clause 4.2 which gives the Issuer and Acquirer Forum (**IAF**) the ability to allow a prospective IA Participant that is unable to comply with the Certification Requirements to become a member subject to certain conditions).

- Clause 5.1(b): Obligations for Framework Participants – Compliance with Certification Requirements: IA Framework Participants must comply with the Code, including, without limitation, any Certification Requirements (if applicable). This provision was amended on 1 January 2020 limiting its application to IA Participants, being the only Framework Participants who are required to comply with Certification Requirements.
- Clause 6.3: IAC Membership – Suspension: The IAF may suspend a member for reasons including:
 - if requested by any relevant prudential supervisor;
 - by agreement of the member;
 - if the member no longer satisfies all applicable requirements for membership;
 - for insolvency (other than insolvency events that result in automatic termination);
 - for breaches of membership obligations (if the member fails to rectify or adequately explain the breach within 30 days of a request from the Secretary of IAF);
 - if the member's membership of an approved card payment system is suspended or terminated;
 - if the approved card payment system of which the Framework Participant is a member has its approval withdrawn and they are not a member of any other approved card payment system; or
 - if the member acts in a manner contrary to the interests of the IAC.
- Clause 6.4: Effect of Suspension: Suspended members that are IA Participants are not entitled to exchange ATM transactions with any other IA Participant. Suspended members are also not entitled to vote at any IAC meeting (unless approved by the IAF) or to have their nominee to the IAF vote at meetings of the IAF (but may continue to attend and participate in such meetings). The IAF can in its discretion remove any certification granted to the suspended member.
- Clause 6.5: Termination: The Board may terminate a membership of the IAC if a suspension event has occurred and not been remedied, the IAF has recommended terminating the membership, the Board has consulted with any relevant prudential supervisor and the member has had an opportunity to make submissions to the Board regarding the termination. The Board is not required to give any reasons for such a decision. Membership can also be terminated where a member resigns, becomes insolvent, is wound up, dissolved or otherwise ceases to exist.
- Clause 6.7: Financial Claims Scheme Processing Requirements – Suspension: Automatic suspension of IAC membership for any member is subject to a declaration made by the Minister under section 16AD of the *Banking Act 1959*

(Cth). This provision relates to claims made under the Financial Claims Scheme, designed to protect depositors of authorised deposit-taking institutions (banks, building societies and credit unions) and policyholders of general insurance companies from some potential losses due to the failure of these institutions.

Code

- Volume 1, clause 3.1: Compliance with applicable requirements for Framework Participants: By completing the relevant checklists (see clause 3.4 below), an applicant or IA Participant confirms, for the benefit of all IA Participants and AusPayNet, that when it operates in the IAC with other IA Participants it meets the applicable requirements in force at that time.
- Volume 1, clause 3.4: Certification of Prospective IA Participant: Each applicant must arrange for certification as part of their membership application, including completing the relevant New IA Participant Certification Checklist and the relevant Annual Security Audit.
- Volume 1, Annexure A: Annual Security Audit Checklist: Acquirers and Issuers must meet the mandatory requirements relating to general procedures and controls associated with the management of PINs and the associated cryptographic practices. Numerous amendments were made to the Annual Security Audit since the ACCC made its determination in connection with the Authorisations in 2015 reflecting technical changes to the security requirements and standards.
- Volume 1, Annexure B: New IA Participant Certification: IA Participant applicants must warrant that they satisfy the relevant requirements

(the certification, suspension and termination provisions, or the **Conduct**).

- 1.6. AusPayNet submits that the certification, suspension and termination provisions have not changed substantially since 2015, when they were last authorised, although AusPayNet submits that it has made a number of changes to increase the transparency, security and effectiveness of the broader IAC Framework.
- 1.7. The ACCC first authorised aspects of AusPayNet's regulations for managing ATM and EFTPOS payments in 2000 and reauthorised those aspects in 2004, 2009 and 2015.

2. Background

- 2.1. AusPayNet, formerly Australian Payments Clearing Association (**APCA**), is the industry association and self-regulatory body for the Australian payments industry. AusPayNet manages and develops regulations, procedures, policies and standards governing payments clearing and settlement in Australia. Individual institutions are responsible for their own clearing and settlement operations and are required to conduct their operations according to AusPayNet's rules as set out in the regulations and procedures for each of AusPayNet's frameworks (see below).
- 2.2. The board of directors of AusPayNet is comprised of three independent directors (including the Chair), one director appointed by the Reserve Bank of Australia (**RBA**), the CEO of AusPayNet (non-voting) and a number of directors appointed and an equal number of directors elected by AusPayNet members (currently eight directors are appointed or elected by AusPayNet members).

- 2.3. AusPayNet has over 130 members, including financial institutions, card schemes, merchants such as Coles and Woolworths, new digital banks such as Volt, Xinja and Judo, and other payments industry stakeholders such as PayPal and Google.
- 2.4. In 2015, AusPayNet established the IAC Framework, composed of the Regulations and Code, which:
- (a) manages ATM and EFTPOS payments;
 - (b) enables the multilateral settlement of amounts owing to or by financial institutions and IA Participants involved in ATM and EFTPOS transactions;
 - (c) engages in card payments industry policy development;
 - (d) admits a broad range of members (including entities that are not directly involved in the making of, or giving effect to, ATM and EFTPOS transactions, but are otherwise involved with the card payments industry); and
 - (e) seeks to actively monitor and manage IA Participants' compliance with security standards and requirements.
- 2.5. The IAC Framework replaced a previous framework for managing ATM and EFTPOS payments: the Consumer Electronic Clearing System (**CECS**), also established and managed by AusPayNet's predecessor, APCA. The CECS payment settlement and clearing system was first authorised by the ACCC in 2000. The main differences between the CECS framework and the IAC Framework is that the IAC Framework has a stronger focus on the matters listed in paragraph 2.4 (b) through (e) above.

Payment frameworks

- 2.6. AusPayNet is currently responsible for five payment frameworks:
- the Issuers and Acquirers Community (**IAC**), formerly the Consumer Electronic Clearing System (**CECS**), framework, which provides minimum standards to protect and enhance the security, integrity and efficiency of ATM and EFTPOS transactions;
 - the Australian Paper Clearing System (**APCS**) relating to exchanges of paper-based payment instructions, primarily cheques;
 - the Bulk Electronic Clearing System (**BECS**) relating to bulk direct entry low value transactions, allowing businesses to make arrangements to direct debit and/or credit large numbers of customers' accounts on a regular basis;
 - the High Value Clearing System (**HVCS**) established as part of the development of real time gross settlement in Australia to provide an efficient and secure electronic payments mechanism for the finance industry; and
 - the Australian Cash Distribution and Exchange System (**ACDES**), which governs the exchange and distribution of wholesale cash.
- 2.7. With the exception of the ACDES, relevant provisions of the regulations governing the operation of each of these payment clearing systems—predominantly relating to membership criteria, suspension and termination of membership—have been authorised by the ACCC.

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 relevant industry associations, consumer groups, federal government agencies, industry stakeholders and relevant regulatory bodies.
- 3.3. The ACCC received four submissions from interested parties in relation to the application. Commonwealth Bank of Australia (**CBA**), Australian Banking Association, eftpos Payments Australia and the RBA provided submissions in support of the application. Submissions are available on the ACCC's [public register](#).

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. AusPayNet 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 Act¹, 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).

Relevant areas of Competition

- 4.3. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. AusPayNet seeks authorisation for provisions of the IAC Framework concerning certification requirements and provisions for termination and suspension. On this basis, the ACCC has confined its assessment of the application to the clearing and settlement of consumer electronic payments.

Future with and without the Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Conduct to the likely future in which the Conduct does not occur.
- 4.6. The ACCC considers that absent authorisation IAC members could continue to collectively set minimum standards to protect and facilitate the conduct and settlement of exchange of consumer electronic messages resulting from EFTPOS and ATM transactions, but without the suspension and termination provisions or certification requirements that provide for the exclusion of organisations that do not meet the technical, operations and security requirements.
- 4.7. The ACCC also notes that absent the ability to enforce minimum standards through the IAC framework, members could choose to conduct settlement through bilateral arrangements to ensure the security of these settlements.

Public benefits

- 4.8. 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**)

¹ See subsection 91C(7).

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.²

4.9. The ACCC has considered the following public benefits:

- protection of the security, efficiency and integrity of the IAC Framework; and
- transaction cost savings.

4.10. AusPayNet submits that the certification, suspension and termination provisions and requirements remain fundamentally important in maintaining the integrity and efficacy of the IAC Framework and reducing risk in the payments system. AusPayNet submits that these benefits can only be realised if members act in accordance with the Regulations and Code.

4.11. AusPayNet submits that without the ability of IAC members to self-enforce compliance with the IAC standards (through the ability to set minimum requirements for entry and fine participants and/or suspend or terminate membership for non-compliance), the operational efficiency of the IAC could be reduced, confidence of members would fall, and risk would be introduced to the payments system and its end users. AusPayNet submits that, in addition to the impact upon security in the payments system, at the extreme, this could compromise the industry's ability to centrally coordinate the clearing and settlement of EFTPOS and ATM transactions.

4.12. The CBA, RBA and eftpos Payments Australia submit certification, suspension and termination provisions provide a public benefit by setting minimum standards for participation and mechanisms to enforce compliance with IAC rules, which help facilitate the ongoing safe and reliable clearing and settlement of card transactions.

4.13. The ACCC considers that the certification, suspension and termination provisions are likely to result in public benefits through the promotion of the security, efficiency and integrity of the IAC Framework, and thus the ATM and EFTPOS payments system. In particular, the ACCC considers that without the ability of IAC members to self-enforce compliance with IAC standards, the operational efficiency of the IAC could be reduced, which would compromise the industry's ability to efficiently centrally coordinate the clearing and settlement of EFTPOS and ATM transactions. At the extreme, this could result in a return to less efficient arrangements of clearing and settlement arrangements being subject to bilateral negotiation between individual organisations.

4.14. The ACCC also considers that, to the extent that the collective setting of clearing and settlement requirements for ATM and EFTPOS transactions results in lower transactions costs than bilateral negotiation of these requirements, such transaction cost savings are likely to constitute a public benefit.

Public detriments

4.15. 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:

² 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.

*...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.*³

- 4.16. AusPayNet notes that, if set at an inappropriate level, minimum mandatory standards and procedures could potentially stifle innovation by network participants by potentially raising barriers to entry to the ATM and EFTPOS networks.
- 4.17. However, AusPayNet submits that its minimum standards do not increase barriers to entry, noting the introduction of the non-standard device approval process in 2017, which has enabled AusPayNet to promote and support secure innovation through a risk-based approach to the evaluation of devices and solutions that are outside the paradigm of current security standards.
- 4.18. AusPayNet further submits that the Regulations and Code also allow IA Participants to bilaterally agree to divergent standards from those established by the IAC, provided the integrity, security and efficiency of the IAC overall is not diminished.
- 4.19. AusPayNet submits that the effect of suspension is that an IA Participant is not able to exchange ATM transactions with IA Participants and is not entitled to vote at IAC and IAF meetings (if a member of the IAF) but is entitled to attend. The need to invoke the suspension provisions is, however, tempered by the ability of IA Participants to apply for exemption from compliance with certain obligations for a limited period of time and by the ability to impose a fine on an IA Participant for non-compliance with the Code.
- 4.20. AusPayNet submits that there are very limited circumstances where membership of an IA Participant may (or would be) terminated and, in each instance, termination is subject to:
- (a) the requirement that the IA Participant first be suspended and provided the opportunity to remedy the suspension event;
 - (b) the IAF's recommendation; and
 - (c) the Board providing the Framework Participant with the opportunity to make submissions.
- 4.21. AusPayNet notes it has never suspended or terminated an IA Participant, and the significance of such measure means that termination would only be used as an option of last resort.⁴
- 4.22. The RBA submits that the IAC's membership requirements have been set to facilitate a wide range of participants and that there has been a broadening of membership over recent years. The Bank does not consider that the re-authorisation of the specific provisions would cause any material lessening of competition or other public detriment.
- 4.23. The ACCC notes that refusal of certification or termination of IAC membership does not preclude the financial institution from participating in the EFTPOS or ATM system. Currently, most, particularly small, financial institutions do not process their own transactions. Rather, these financial institutions enter into agreements with an IAC member to process their transactions and clear and settle transactions on their behalf.

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

4 AusPayNet has, however, terminated the membership of one Affiliate Member (i.e. a member who is not involved in the processing of transactions), further details of which can be found in footnote 22 of AusPayNet's application. In 2019, AusPayNet also issued its first, and to date only, two fines for non-compliance with the requirement to hold an annual security audit.

- 4.24. Similarly, an organisation excluded from the IAC would be likely to continue to have its ATM and EFTPOS transaction cleared and settled through the IAC. However, the organisation would not be able to directly clear and settle its transactions. Rather, the organisation would need to enter into an agreement with an existing IAC member to do so on its behalf.
- 4.25. Further, the ACCC notes that exclusion from the IAC system would not preclude an institution from establishing other direct clearing and settling arrangements outside the IAC arrangements. However, the institution would likely need to negotiate bilateral agreements with other participants outside of the IAC arrangements to do so. While procedures and standards for ATM and EFTPOS interchange were subject to bilateral negotiations between financial institutions prior to CECS being introduced, given that members now operate under the IAC Framework, it would likely be significantly more difficult for institutions excluded from the IAC to negotiate such agreements outside of the IAC 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 IAC.
- 4.26. Therefore, the ACCC considers that exclusion from the IAC would have an adverse effect on the financial institution concerned and potentially could make it very difficult for the institution to directly clear and settle consumer electronic payment instructions. Absent appropriate checks and balances on the use of the suspension and termination provisions, this has the potential to result in anti-competitive detriment.
- 4.27. However, the ACCC considers that the certification, suspension and termination provisions do not place unreasonable requirements on members and that there are adequate checks and balances on the manner in which they are employed including:
- if a member is subject to prudential supervision, the prudential supervisor must be consulted prior to termination of IAC membership;
 - the representation of the RBA on the AusPayNet Board (responsible for membership termination decisions) and the right for the RBA to be represented on the IAF (responsible for certification of members and membership suspension decisions);
 - the suspension and termination provisions can only be invoked in limited circumstances, namely:
 - for suspension - if requested by any relevant prudential supervisor; by agreement with the member; if the member no longer satisfies the membership requirements; for certain insolvency events; for breach of obligations without satisfactory explanation or rectification; if the member's membership of an approved card payment system is suspended or terminated or the approved card payment system of which they are member has its approval withdrawn and they are not a member of any other approved card payment system; if the member concerned acts in a manner contrary to the interests of the IAC; or for failure to settle;
 - for termination - on resignation of the member, the member becoming insolvent, being wound-up or ceasing to be engaged in interchange activities, or if the member has been suspended and the event leading to suspension has not been remedied by the member; and

- the ability of the IAF to impose fines for non-compliance with fundamental requirements under the IAC Regulations or Code Set provides an alternative to suspension and termination of membership in appropriate cases.

4.28. The ACCC also considers that even if used, to the extent that suspension or termination may adversely affect the IAC member concerned, given the number of competing service providers this may not significantly affect competition for the clearing and settlement of consumer electronic payments more generally.

Balance of public benefit and detriment

4.29. For the reasons outlined in this draft determination, the ACCC is satisfied that the 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.

5. Draft determination

The application

- 5.1. On 6 April 2020, AusPayNet lodged an application for the ACCC to revoke authorisation A91497 and A91498 and substitute authorisation AA1000495 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000495 was made under subsection 91C(1) of the Act.
- 5.2. AusPayNet seeks authorisation for the certification, suspension, and termination provisions of the Issuers and Acquirers Community Regulations and Code Set as described at paragraph 1.5 (the Conduct). Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. 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 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 Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the 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 Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisations A91497 and A91498 and grant authorisation AA1000495 in substitution (re-authorisation). The re-authorisation is to enable AusPayNet and its members to give effect to the certification, suspension and termination provisions in the Regulations and Code, as described in paragraph 1.5 and defined as the Conduct.
- 5.7. The 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.

- 5.8. The ACCC proposes to grant authorisation AA1000495 for five years.
- 5.9. The proposed authorisation is in respect of the relevant provisions of the IAC Regulations and Code as they stand at the time authorisation is granted. Any changes to the arrangement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.10. This draft determination is made on 5 June 2020.

6. Next steps

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