# Draft Determination

**Application for revocation of A91473 & A91474 and the substitution of authorisation AA1000678**
**lodged by**
**Australian Payments Network Limited**
**in respect of**
**conduct concerning provisions of the Bulk Electronic Clearing System Regulations**
**Authorisation number: AA1000678**

5 December 2024

Commissioners: Keogh
Carver
Williams
Ridgeway

# Summary

**The ACCC proposes to grant authorisation to enable Australian Payments Network Limited to give effect to the termination and suspension provisions in the Bulk Electronic Clearing System (BECS) Regulations which govern membership of the Bulk Electronic Clearing System. This conduct (or substantially similar conduct) has been previously authorised since 1994 and is not significantly changed in the current application.**

**The ACCC proposes to grant authorisation for 10 years.**

**The ACCC considers that the public benefits of the provisions by way of ensuring the security and integrity of BECS outweighs any potential detriment by way of excluding a participant from BECS.**

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

# 1. The application for revocation and substitution

1.1. On 29 August 2024, Australian Payments Network Limited (**AusPayNet**) (the **Applicant**) lodged an application to revoke authorisations A91473 and A91474 and substitute authorisation AA1000678 for the revoked authorisations with the Australian Competition and Consumer Commission (the **ACCC**). The Applicant seeks authorisation for conduct to give effect to termination and suspension provisions in the Bulk Electronic Clearing System (**BECS**) Regulations which govern membership of the BECS for 10 years. The conduct has been authorised by the ACCC (or its predecessor, the Trade Practices Commission) since 1994.

1.2. This application for revocation and substitution was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so 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 that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct (ss 90(7) and 90(8) of the Act (the **authorisation test**).

## The Proposed Conduct

1.3. The Applicant is seeking authorisation for itself and members of the BECS Framework and persons who may become members of the BECS Framework to agree to and to give effect to provisions in the BECS Regulations which govern suspension and

termination of membership of BECS. The specific provisions for which authorisation is sought are listed below:

- Regulation 4.19 – Suspension: permits the BECS Management Committee to suspend a member for a number of reasons, including if requested by any relevant prudential supervisor; by agreement with the member; if the member no longer satisfies the membership requirements; for a disabling event; for insolvency; and for breach of obligations without a satisfactory explanation or rectification.

- Regulations 4.20 – 4.24 – effect of suspension: provides for the consequences of a suspension of BECS membership. Suspended members are not entitled to participate in BECS, clear and settle items in accordance with the BECS Regulations and Procedures, vote at any BECS meetings or be represented on the BECS Management Committee. In lieu of suspending a member, the BECS Management Committee may impose conditions of membership on the member, including changing the capacity in which the member can participate in BECS or varying the procedures relating to the exchange of items addressed to, or initiated by, the member.

- Regulation 4.25 – termination: establishes the circumstances and processes by which a member of BECS ceases to be a member. In particular, the Board may terminate a membership of BECS if a suspension event has occurred and not been remedied, 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.

- Regulation 4.26 – effect of termination: provides for the consequences of a termination of BECS membership. Any member who resigns or whose membership is terminated is not entitled to effect exchanges in accordance with the BECS Regulations and Procedures.

- Regulation 11.10 – Financial Claims Scheme Processing Requirements: sets out the processing requirements when a declaration has been made under section 16AD of the *Banking Act 1959* (Cth), and a suspension event is taken to have occurred.

- Regulation 12.5 – failure to settle – suspension: provides for the automatic suspension of BECS membership if a member fails to settle

(the **Proposed Conduct**).

# 2. Background

## Payment systems in Australia

2.1. In Australia, payment organisations such as banks, credit unions and other payment service providers provide a means for individuals and businesses to make payments

to one another and thus transfer financial assets of value. The infrastructure within this is referred to as the payments system, which carries payment messages via payment instruments such as cash, credit cards, cheques and other electronic funds transfers.

2.2. As part of this infrastructure, a payments clearing and settling process is used by payment organisations to reflect changes in their customers' accounts. This process enables value to pass between payment organisations to reflect the net effect of transactions on the value of financial assets held by each payment organisation. Clearing refers to the cross-institutional exchange of payment messages for the purpose of obtaining settlement, which is the exchange of value between institutions. Settlement is achieved through transfers of Exchange Settlement Account balances held with the Reserve Bank of Australia (**RBA**).

2.3. Arrangements for clearing most payment instruments in Australia are coordinated by AusPayNet.[1] Payment clearing systems independent of AusPayNet include credit cards, the domestic debit card system (eftpos) and BPAY.[2] In 2018, the New Payments Platform was launched, which includes the Fast Settlement Service, allowing transactions to be settled individually on a 24/7 basis in close to real time.[3]

## The RBA and payment systems

2.4. The RBA is the primary payments system regulator. It is required to control risk and promote efficiency and competition in the payments system. The RBA has a presumption in favour of self-regulation and it only intervenes where the industry is unable to address a public interest concern.[4] The RBA's payment system policy is determined by the Payments System Board.

2.5. The RBA's role is to oversees the safety and stability of payment systems that are systemically important since they handle high-value payments for key financial market infrastructures. There are only 2 "systemically important" payment systems in Australia.[5] In 2023 the RBA's oversight was extended to include prominent payment systems, where an outage could cause significant economic disruption and damage confidence in the financial system. BECS, the New Payments Platform, eftpos, Mastercard and Visa are all prominent payment systems.

2.6. Under the *Payment Systems (Regulation) Act 1998* (Cth), the RBA can designate a payment system.[6] Amongst other things this means the RBA can impose an access regime on the participants in the payment system. BECS is not a designated system[7] and is essentially self-regulated by AusPayNet.

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[1] Reserve Bank of Australia, 'Payments System' accessed 15 November 2024.

[2] Reserve Bank of Australia, 'Payments System' , accessed 21 October 2024.

[3] Reserve Bank of Australia, 'The New Payments Platform,' accessed 15 November 2024.

[4] Reserve Bank of Australia, Approach to regulation, accessed 21 October 2024.

[5] The RBA has designated 2 payment systems as systemically important: the Reserve Bank Information and Transfer System (RITS) and CLS Bank International (CLS). Reserve Bank of Australia, Payments System Board Annual Report 2024, page 17 accessed 21 October 2024.

[6] Section 10, *Payment Systems (Regulation Act) 1998* (Cth).

[7] Designated payment systems: Mastercard, Mastercard prepaid, Visa, Visa prepaid, Visa Debit system, EFTPOS, EFTPOS prepaid, and the ATM system. The Reserve Bank of Australia Regulation accessed 22 October 2024.

## The BECS payment system

2.7. The BECS was established in 1994 and is the framework of systems and procedures contained in the Bulk Electronic Clearing Systems Regulations. The essential characteristic of BECS is that payment instructions are exchanged electronically in bulk.

2.8. The BECS Regulations (and the procedures in the BECS Regulations) have the effect of a contract under seal between AusPayNet and each Framework Participant, and between the Framework Participants. The BECS Regulations include membership criteria, suspension and termination provisions, representation arrangements, fees, the committee of management, member meetings, settlement and dispute resolution, and processes to deal with situations where an institution fails to settle.

2.9. The Proposed Conduct (or substantially similar conduct) has been authorised since 1994.

2.10. The primary object of BECS is to co-ordinate, manage and ensure the implementation and operation of effective systems, policies and procedures for the conduct and settlement of exchanges of debit and credit payment instructions between Framework Participants and all aspects of the related clearing cycle including, without limitation the preservation of the integrity and efficiency of such exchanges and specifications for the debit and credit payment instructions to be exchanged, delivery procedures, the conduct of exchanges, the settlement of obligations arising out of exchanges and the return or rejection of invalid debit and credit payment instructions.

2.11. The system has the role of managing the conduct of the exchange and settlement of bulk electronic low value transactions. BECS covers direct entry payments, which allows approved organisations to make arrangements with their financial institution to debit or credit a large number of customer accounts on a regular basis. Examples of these include payroll, recurring payments to merchants, and one-off account to account transfers. While BECS does not process payments itself, in the 2022/23 financial year, BECS was responsible for processing approximately 75% of the total value of non-cash payments.

2.12. BECS membership is voluntary and on a functional basis – that is, members must be 'senders' and 'receivers' of payment instruments that are cleared under the Regulations.[8] Members participate as either Tier 1 framework participants, who directly clear and settle, or Tier 2 framework participants, who indirectly clear and settle via a representative who does so on their behalf. The BECS regulations apply to current BECS members and future BECS members.

2.13. Due to BECS' age and associated technical limitations, and the development of the New Payments Platform, Australia's fast payments system, use of BECS has been in gradual decline. The New Payment Platform offers numerous advantages that BECS lacks, including 24/7 real-time payments, data-rich payments and support for meeting transaction monitoring obligations, and the use of the PayID system to reduce mistaken payments and vulnerability to scams.[9] AusPayNet has publicly announced

[8] Bulk Electronic Clearing System (CS2) REGULATIONS, Clause 4.11(c) The Management Committee shall accept for membership an applicant which complies with the conditions for membership specified in these Regulations. Accessed 22 October 2024.

[9] The Australian Government the Treasury, "A Strategic Plan for Australia's Payments System" June 2023, p.20, accessed 15 November 2024.

that it has set a target end-date of June 2030 for the closing of the BECS Framework. The Australian Government has supported an industry-led phased transition away from BECS as part of Treasury's Strategic Plan for Australia's Payments System.[10]

## AusPayNet as the administrator of BECS

2.14. AusPayNet manages and develops regulations, procedures, policies and standards which govern a number of payments clearing and settlement systems in Australia, including BECS. Each system, including BECS, is managed by a committee of management with delegated powers and responsibilities. Along with BECS, these systems include:

- the Australian Paper Clearing System, which deals with processing of payments made using paper instruments, primarily cheques
- the High Value Clearing System, which relates to the exchange of high value payments between financial institutions, and
- the Australian Cash Distribution and Exchange System, which governs the exchange and distribution of wholesale cash.

2.15. Amongst the committee of management's powers and responsibilities are dispute resolution and approval of membership applications.[11] The BECS committee of management includes a non-voting director nominated by the Board, a nominee of the RBA, a nominee of each BECS Framework Participant with at least 5% BECS market share, and up to 5 persons elected in a ballot by other BECS Framework participants who otherwise are not entitled to nominate or elect a committee of management member.

## Other regulation

2.16. The regulatory framework for Australia's payments system is determined by the Government, regulators, and key industry bodies. Many of the BECS Framework Participants are regulated by the Australian Prudential Regulation Authority in some way, for example if they are an authorised deposit taking institution. Other regulators include ASIC, AUSTRAC and the ACCC.

# 3. Consultation

3.1. The ACCC invited submissions from a range of potentially interested parties including BECS Members and participants (including the RBA), relevant industry associations, consumer groups and regulatory bodies.

[10]. The Australian Government the Treasury, "A Strategic Plan for Australia's Payments System" June 2023, Annexure 1: Regulatory Framework accessed 22 October 2024.

[11] The BECS regulations state "The Management Committee shall accept for membership an applicant which complies with the conditions for membership specified in these Regulations." Bulk Electronic Clearing System (CS2) REGULATIONS, Clause 4.11(c), accessed 22 October 2024.

3.2. The ACCC received no submissions from interested parties in relation to the application.

3.3. The public submission by the Applicant in support of its application is on the public register for this matter.

# 4. ACCC assessment

4.1. The Applicant has sought authorisation for the Proposed Conduct in relation to Division 1 of Part IV of the Act (cartel conduct), section 45(1) of the Act (contracts, arrangements or understandings that restrict dealings or affect competition), section 46 of the Act (misuse of market power) and section 47 of the Act (exclusive dealing).

4.2. Consistent with subsections 90(7) and 90(8) of the Act,[12] the ACCC must not make a determination granting 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 that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

## Relevant areas of competition

4.3. At a broad level BECS is only one of many payment options made available by financial institutions. Further, the payments system ecosystem is undergoing considerable change, with new technologies and new participants providing more payment options.

4.4. The ACCC considers the relevant area of competition likely to be affected by the Proposed Conduct is confined to the clearing and settlement of bulk direct entry electronic low value transactions.

## Future with and without the Proposed Conduct

4.5. 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.

4.6. The ACCC considers that the likely future without the Conduct is that BECS members could continue to collectively set minimum standards to protect and facilitate the conduct and settlement of bulk electronic low value transactions, but without the suspension and termination provisions, due to the risk that these could breach the Act.

## Public benefits

4.7. 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 in considering public benefits:

[12] See subsection 91C(7)

*…we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.*[13]

4.8. The ACCC has considered the following public benefits:

- The provisions contribute to the integrity and efficacy of the BECS Framework for participants and customers generally.

## Integrity and efficacy of the BECS Framework

4.9. AusPayNet submits (as it did for the previous authorisations) that the suspension and termination provisions result in a benefit to the public by contributing to the integrity and efficacy of the Framework.

4.10. It submits that the Australian economy requires the secure and efficient processing of transactions between financial institutions through a clearing framework of the sort constituted by the regulations and procedures within BECS. This Framework:

- reduces risk within the payments system
- contributes to the efficiency with which payments are cleared with timeliness and certainty for its customers
- reduces transaction costs as agreements between payments organisations for bulk electronic clearance would otherwise need to be negotiated bilaterally.

4.11. AusPayNet submits further that this can only function properly if members operate in accordance with the Regulations and that the suspension and termination provisions function as a 'last resort' to ensure compliance. Without the sanctions, the efficacy and integrity of BECS would be diminished and confidence of its participants would be reduced.

## ACCC conclusion on public benefit

4.12. The ACCC considers that the Proposed Conduct is likely to result in public benefits through the protection of the security, efficiency and integrity of BECS. The ACCC accepts in particular that the ability to suspend or terminate membership for non-compliance is an important element in terms of maintaining confidence in BECS amongst its participants.

4.13. The ACCC also considers that to the extent that the collective setting of standards for clearing and settlement requirements results in lower transaction costs as compared to bilateral negotiations between participants, this will result in transaction cost savings which are likely to constitute a public benefit.

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

# Public detriments

4.14. 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.*[14]

4.15. The ACCC has considered the following public detriments:

- Potential reduction of competition by excluding an institution from participation in the BECS Framework.

## Potential reduction of competition via exclusion

4.16. If a participant in BECS was suspended or terminated from the Framework under the Regulations, it would be a significant hurdle to that institution carrying out the exchange and settlement of bulk electronic low value transactions. Processing these transactions would require bilateral arrangements with other participants outside of BECS.

4.17. This would be significantly more costly and difficult than participating in BECS, and as such the ACCC considers that exclusion would have a significant adverse effect on the institution concerned. Without appropriate checks and balances on the use of the suspension and termination provisions, there is potential to result in anti-competitive detriment.

4.18. However, this potential detriment is mitigated by a number of factors, including that the suspension and termination provisions, in the ACCC's view, do not place unreasonable requirements on members, and their use is subject to sufficient checks and balances. These include that the provisions can only be invoked in limited circumstances, including where requested by a relevant prudential supervisor; by agreement with the member; if the member no longer satisfies the membership requirements; where the member is insolvent, or where there has been a breach of obligations without satisfactory explanation or rectification.

4.19. Additionally, BECS is one of a number of competing payments platforms. Participants have other options for the exchange and settlement of transactions, including the New Payments Platform which is replacing the use of BECS due to its superior features (see paragraph 2.13 above).

4.20. The Applicant submits that the management committee has never invoked the regulations since they were first authorised in 1994, and further submits that no concerns with the arrangements has been raised with the ACCC during this time. The ACCC notes no concerns were raised in the consultation process (though no submissions were received). As noted in AusPayNet's submission in support of revocation and substitution, a Framework Participant has been suspended on one occasion after it lost its restricted ADI licence and therefore no longer satisfied

[14] *Re 7-Eleven Stores Pty Limited* (1994) ATPR 41-357 at 42,683.

membership requirements.[15] However, this decision in practice was made by AusPayNet Management, as the management committee had delegated the review of variations to the participant's prudential licence and determination of whether it satisfied membership requirements.

### ACCC conclusion on public detriment

4.21. The ACCC considers that the Proposed Conduct is unlikely to result in public detriments in the form of reduced competition due to exclusion of financial institutions from BECS.

## Balance of public benefit and detriment

4.22. 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 Proposed Conduct.

## Length of authorisation

4.23. The Act allows the ACCC to grant authorisation for a limited period of time.[16] 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.

4.24. In this instance, the Applicant seeks authorisation for 10 years.

4.25. While the ACCC notes that BECS' planned end-date is in 2030 (and as such, the authorisation period sought extends beyond this end date), the ACCC is comfortable with the length of time sought, given that AusPayNet in its application states that this period may be extended as the sector transitions to new technologies and systems.

# 5. Draft determination

## The application

5.1. On 29 August 2024 the Applicant lodged an application to revoke authorisations A91473 and A91474 and substitute authorisation AA1000678 for those revoked. This application authorisation AA1000678 was made under subsection 91C(1) of the Act.

5.2. The Applicant seeks authorisation for conduct to give effect to the termination and suspension provisions in the BECS Regulations (the Proposed Conduct).

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

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[15] See AusPayNet's application for revocation and substitution, section 10, footnote 12.

[16] Subsection 91(1)

# The authorisation test

5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not make a determination granting an authorisation unless it is satisfied in all the circumstances that the Proposed 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 result, or 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 authorisation.

# Conduct which the ACCC proposes to authorise

5.7. The ACCC proposes to revoke authorisations A91473 & A91474 and grant authorisation AA1000678 in substitution.

5.8. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act, section 45 of the Act and section 47 of the Act for AusPayNet to give effect to the termination and suspension provisions in the BECS Regulations, as described below:

- Regulation 4.19 – Suspension: permits the BECS Management Committee to suspend a member for a number of reasons, including if requested by any relevant prudential supervisor; by agreement with the member; if the member no longer satisfies the membership requirements; for a disabling event; for insolvency; and for breach of obligations without a satisfactory explanation or rectification.

- Regulations 4.20 – 4.24 – effect of suspension: provides for the consequences of a suspension of BECS membership. Suspended members are not entitled to participate in BECS, clear and settle items in accordance with the BECS Regulations and Procedures, vote at any BECS meetings or be represented on the BECS Management Committee. In lieu of suspending a member, the BECS Management Committee may impose conditions of membership on the member, including changing the capacity in which the member can participate in BECS or varying the procedures relating to the exchange of items addressed to, or initiated by, the member.

- Regulation 4.25 – termination: establishes the circumstances and processes by which a member of BECS ceases to be a member. In particular, the Board may terminate a membership of BECS if a suspension event has occurred and not been remedied, 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.

- Regulation 4.26 – effect of termination: provides for the consequences of a termination of BECS membership. Any member who resigns or whose membership is terminated is not entitled to effect exchanges in accordance with the BECS Regulations and Procedures.

- Regulation 11.10 – Financial Claims Scheme Processing Requirements: sets out the processing requirements when a declaration has been made under section 16AD of the *Banking Act 1959* (Cth), and a suspension event is taken to have occurred.

- Regulation 12.5 – failure to settle – suspension: provides for the automatic suspension of BECS membership if a member fails to settle.

5.9. The ACCC proposes to grant authorisation AA1000678 for 10 years.

5.10. The proposed authorisation is in respect of the wording of the Relevant Provisions of the BECS Regulations. Any amendments to these provisions and any other clauses in the Regulations would not be covered by the proposed authorisation.

5.11. This draft determination is made on 5 December 2024.

# 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, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.