
Adjudication

Authorisations

The Commission has the function, through the authorisation process, of adjudicating on proposed mergers and certain anti-competitive practices that would otherwise breach the Trade Practices Act.

Authorisation provides immunity from court action and is granted where the Commission is satisfied that the practice delivers offsetting public benefits.

Determinations

Australian Payments Clearing Association Limited

In relation to its proposed regulations and procedures for the consumer electronic clearance system (A30176-7, A90620)

- Draft determination issued on 20 August 1997.
- Draft determination issued on 5 July 2000.
- Final determination issued on 16 August 2000.

On 6 September 1996 the Australian Payments Clearing Association Limited (APCA) applied for authorisation of its proposed regulations and procedures for the consumer electronic clearing system (CECS) for payment arrangements for debit card transactions generated with ATM and EFTPOS networks.

On 20 August 1997 the Commission issued a draft determination proposing to deny authorisation but indicated that if the CECS arrangements were amended as indicated, the Commission would be likely to conclude they would result in a benefit to the public. APCA subsequently amended the proposed CECS arrangements.

Credit card arrangements, comprising the rules of the Visa, MasterCard and Bankcard schemes, also fall within the category of 'consumer electronic'. However, these arrangements are not under APCA's jurisdiction, did not form part of the applications for authorisation, and were not considered by the Commission in this determination. These credit card scheme arrangements are not currently authorised, and so are not protected from court action under the Trade Practices Act.

The ATM and EFTPOS networks

ATMs provide customers of financial intermediaries with an electronic means of withdrawing cash from their accounts, transferring funds between their own accounts and inquiring about their available balances. EFTPOS provides customers with an electronic payment mechanism for the supply of goods and services at a merchant's point of sale (many merchants also offer a 'cash out' service). The four parties who usually contribute to an EFTPOS transaction are:

- the issuer who operates the account from which funds are withdrawn and who issues a transaction card to its customer;
- the customer/cardholder who makes the payment using the card;
- the merchant who exchanges goods or services for the customer's card details and consent to make the payment; and
- the acquirer who supports the merchant's participation in EFTPOS, pays the merchant and forwards the transaction to the issuer for settlement.

There are three essential parties to an ATM cash withdrawal transaction — the issuer, cardholder and the acquirer/owner of the ATM who acquires the transaction and dispenses the cash.

Issuers and acquirers provide the payment services in the ATM and EFTPOS networks. There is no central ownership of the networks. Issuers' cardholders are able to undertake debit card transactions through the ATM and EFTPOS facilities owned or supported by individual acquirers because of a series of bilateral interchange agreements (which facilitate the clearing or exchange of payment instructions, and the settlement of payment obligations) between the issuers and acquirers. Interchange fees are payable by issuers to acquirers for ATM and EFTPOS debit card transactions. (The Commission and the Reserve Bank recently concluded a joint study into both debit and credit card interchange fees.)

The bilateral interchange agreements, which include standards for ATM or EFTPOS facilities as well as clearing, settlement and interchange fee arrangements, form the core of the ATM and EFTPOS networks. For an organisation to participate in the ATM or EFTPOS networks as an issuer it would need to enter into bilateral interchange agreements with the acquirers in the networks, or enter into an arrangement with a 'gateway' issuer that has bilateral interchange agreements with the acquirers.

Traditionally merchants have been end-users of the payment services provided by acquirers in the EFTPOS network. However, should a merchant enter into interchange agreements with issuers, or enter into a 'gateway' arrangement with an acquirer that has such agreements with the issuers, the merchant could provide its own acquiring services and be a direct participant in the EFTPOS network.

The object of CECS is to coordinate and manage standards and procedures to facilitate the conduct and settlement of exchanges of ATM and EFTPOS payment instructions between CECS members and all aspects of the related clearing cycle. These standards and procedures are set out in the CECS manual and will be mandatory when CECS members engage in the exchange of ATM or EFTPOS transactions with other CECS members. However, any two CECS members may agree to apply divergent standards and procedures, provided they satisfy the CECS management committee this will not reduce the integrity, security or efficiency of CECS. However, no CECS member may require any other member

or prospective member to apply standards and procedures in ATM or EFTPOS interchanges other than those in the CECS manual.

The Commission considered that the setting of minimum mandatory standards and procedures for interchange would have a positive effect on access to the ATM and EFTPOS networks for issuers, acquirers and merchants who provide their own EFTPOS acquiring services (merchant principals under the proposed CECS arrangements). This is because the respective interchange partners of such issuers, acquirers and merchant principals would not be able to insist they meet more stringent and unjustified standards and procedures.

Thus, although CECS members and prospective members will be required to comply with the CECS standards and procedures in their ATM and EFTPOS interchange arrangements, such compliance will not ensure they obtain access to the ATM or EFTPOS networks as either an issuer, acquirer or merchant principal. It will continue to be necessary for CECS members or prospective members to enter into bilateral interchange agreements or 'gateway' arrangements for them to obtain such access. (This will also be the case for organisations that are not members of CECS.)

The Commission noted that for an industry association to require its members to contract with other members or with non-members that meet certain criteria would be to exceed what is generally required under the competition provisions (part IV) of the Act. The Commission considered that, to require as a condition of authorisation of the proposed CECS arrangements that members enter into ATM or EFTPOS interchange agreements with other members or non-members that are able to satisfy the proposed interchange standards and procedures under CECS, would not be justified. To do so would be to impose upon CECS, through the authorisation process, elements of a comprehensive access regime for the ATM or EFTPOS networks. In the Commission's view, should such an access regime be considered necessary it should be established under the appropriate legal provisions of part 111A of the Act or by the Payments System Board under the Payment Systems Regulation Act.

CECS membership will be confined to organisations that are issuers or acquirers in the

ATM or EFTPOS networks, or are merchant principals in the EFTPOS network. The CECS management committee, which is drawn from CECS members, will set the ATM and EFTPOS minimum interchange standards and procedures. The composition of the management committee, and voting rights of members of the committee, will depend upon the ATM and EFTPOS transaction volume of relevant CECS members.

The Commission noted that membership of CECS will not be required for an organisation to participate in the ATM or EFTPOS networks as an issuer, acquirer or merchant principal. Central to the Commission's evaluation of the proposed membership and management committee criteria, was the privilege of CECS membership identified by APCA — of being able to contribute to the setting of ATM and EFTPOS minimum interchange standards and procedures.

The Commission observed that should merchants not structure their EFTPOS arrangements so they would qualify as merchant principals, or should other non-traditional participants not enter the ATM or EFTPOS networks as acquirers (in particular) or issuers, the membership of CECS and its management committee will be dominated by authorised deposit taking institutions (ADIs). It was argued that should ADIs determine the procedures and standards for the ATM and EFTPOS networks, it may not be in their commercial interest to further develop these networks to the detriment of other systems (e.g. the credit card system).

The Commission noted its concern about the possibility of ADIs manipulating the procedures and standards for the ATM and EFTPOS networks under the proposed CECS membership and management committee arrangements. However, the Commission considered there would be a number of impediments to such manipulation in practice. These included the Commission's power to revoke any authorisation granted in respect of the CECS arrangements, and the Payments System Board's power to designate a particular payment system and to set standards and procedures in respect of that system.

The Commission concluded that the minimum standards and procedures and the certification process for acquirers and merchant principals of the proposed CECS manual would be likely to

result in net benefit to the public by enhancing the security and integrity of the ATM and EFTPOS networks.

The Commission concluded that in all the circumstances the proposed CECS arrangements are likely to result in net public benefit. On 16 August 2000 it issued a final determination granting authorisation for three years. However, the authorisation was granted on the conditions that:

- proposed regulation 4.1(b) be amended so that CECS members may not require non-members (including relevant merchants) to meet interchange standards and procedures other than those set out in the CECS manual; and
- proposed regulation 2.11 be amended so that no CECS member may refuse on technical, operational or security grounds to engage in ATM or EFTPOS interchanges with either member or non-member acquirers (including relevant merchants) that have APCA certification.

The Textile, Clothing and Footwear Union of Australia and The Council of Textile and Fashion Industries Limited

In relation to the Homeworkers Code of Practice (A90722-5)

- Draft determination issued 6 June 2000.
- Final determination issued 31 July 2000.

On 15 November 1999 the Council of Textile and Fashion Industries and the Textile, Clothing and Footwear Union of Australia applied for authorisation of arrangements that comprise the Homeworkers Code of Practice (the code). The code is a voluntary self-regulatory scheme and provides for accreditation of parties along the garment manufacturing and retail chain. The code also provides for commercial sanctions, which retailers and manufacturers may apply to parties further down the production chain if they do not comply with the provisions of the code, that is, a secondary boycott of persons who breach the arrangements.

The code is designed to supplement the outworker provisions of the Clothing Trades Award 1982, which is an award of the Australian Industrial Relations Commission made

in accordance with the provisions of the *Workplace Relations Act 1996*.

The applicants submitted that the aim of the code is to redress difficulties encountered by outworkers or homeworkers and attached two reports by the Senate Economics References Committee to their application. These were a 1996 report *Outworkers in the garment industry* and a 1998 report *Inquiry into outworkers in the garment industry*. Two key recommendations arising from the reports were:

...an industry Home Workers Code of Practice should be adopted by all participants in the garment retailing and manufacturing process; and that the industry

...adopt an agreed label declaring that the employment conditions under which the garment was made complied with legislative requirements.

While the Commission recognised the arrangements may have the potential to constrain suppliers, it concluded that the arrangements would not substantially affect participating parties' ability to compete. It considered that anti-competitive effect caused by trading sanctions would be minimised by current safeguards.

The Commission was satisfied that the arrangements would benefit the public by:

- lessening the risk of exploitation of a disadvantaged group;
- providing information to homeworkers so that they are in a better position to understand their entitlements;
- facilitating compliance with statutory requirements;
- helping ensure a satisfactory employment option for women who chose to stay at home;
- promoting improved occupational health and safety outcomes by providing more standardised working conditions for homeworkers; and
- improving the social environment of children of homeworkers by providing standardised working conditions for their parents.

On 31 July the Commission granted authorisation for five years subject to the parties complying with obligations set out by the Privacy Commissioner.

Notifications

Notifications finalised

The following have been allowed to stand.

Australian Energy Services Pty Ltd (N90800) Proposing an offer to a customer who will acquire electricity from the nominated supplier (third line forcing).

AMP General Insurance Limited (N31018) Proposing to offer domestic workers compensation insurance in home contents insurance policies in ACT and WA. This cover will be underwritten by GIO General Limited (third line forcing).

Dingo Blue Pty Ltd (N31019) Proposing to offer to customers a loyalty program in association with a range of financial services which will be co-branded with various established financial service providers (third line forcing).

Heritage Management Ltd (N90801) Proposing to supply investment trust management services to investors on condition investors maintain a cash deposit with MLC MasterKey cash management trust operated by MLC Investment Ltd to cover costs (third line forcing).

Australia and New Zealand Banking Group Ltd (N90803) Proposing a 'partnership program' with accountants — clients referred to ANZ and who obtain certain ANZ services will receive Qantas Telstra Visa Card reward points (third line forcing).

Visa (N30904-16) Proposing to offer upgrades, complimentary goods and services, discounts or other benefits to customers who use Visa platinum card to make payments (third line forcing).

Australian College of Cosmetic Surgery Limited (N90799) Proposing to initiate a policy relating to admission of members on the basis of accreditation training and insurance requirements (third line forcing).

Masdor Pty Ltd (N90804) Proposing to supply or offer to supply a lease on the condition that the lessee will/has acquired petrol from the supplier (BP Australia) (third line forcing).

Mobil Oil Australia Ltd (N40327) Proposing to offer a discount from Mobilcard with price related to purchase by Toll of petroleum products from participating stores (third line forcing).

ACACIA International Hotel Pty Ltd (N70178) Proposing to, under the RAC Reward and Recognition Program, offer to supply goods, services or discounts to RAC members (third line forcing).

HealthHabitat (N90805) Proposing to grant licences for Indigenous housing on the condition that the licensee engage a single HealthHabitat appointed manager for the licence who is also named on the licence (third line forcing).

National Australia Bank Ltd (N40414) Proposing to supply National products to National employees only if they acquire a personal computer or Internet access services from specified third parties (third line forcing).

Molex Premise Networks (N90798) Intending to provide a 20-year warranty if all components used in the computer cabling are manufactured by Molex and are installed by Molex approved body (third line forcing).

Darling Range Brewing Co Pty Ltd (N70177) Proposing an agreement between the brewer and the purchaser — where a minimum purchase each week during the term of the agreement is required (third line forcing).

AGL Gas Company Limited, AGL South Australia Limited, AGL Electricity Limited, AGL Retail Energy Limited (N90809-12) Proposing to offer a range of interest-free repayment options to customers who acquire selected appliances from AGL's retail partners (third line forcing).

PricewaterhouseCoopers (N90806) Proposing to purchase a range of business-related goods and services by members of a purchasing consortium known as e.conomy (third line forcing).

MLC Investments Ltd (N90808) Proposing to supply investment trust management services to

investors on condition investors keep cash deposit with MLC MasterKey Cash Management Trust (third line forcing).

Dell Computers Pty Ltd (N31021) Proposing to enter into deals with VISA — where Dell will offer a discount, allowance, rebate or credit to a client paying by VISA credit card (third line forcing).

ANZ Banking Group (N90807) Proposing to offer a private package to members of targeted organisations — and refusing to do so if a person is not a member of the organisations targeted by ANZ (third line forcing).

ANZ Banking Group Ltd (N40415) Proposing to require a customer to use ANZ e*trade to trade in shares funded by their margin loan account in order to receive the 'margin lending' and 'portfolio management' services (third line forcing).

St George Bank Ltd (N90813) Proposing to replace cheque Bpay and direct debit as payment methods for quicktrade customers with quicktrade customers holding a St George account (third line forcing).

HP JDV Limited (N70179) Proposing to offer certain stockbroking services in connection with Suncorp-Metway share trade service at a discounted rate for Suncorp-Metway customers (third line forcing).

Camec Pty Ltd (N40391) Proposing with Marley Plastics to be the exclusive distributor to sell goods to the caravan, recreational vehicle and marine industries in Australia and New Zealand.

Marley Plastics Ltd (N90802) Agreeing to appoint Camec Pty Ltd as the exclusive distributor to sell goods to the caravan, recreational vehicle and marine industries in Australia and New Zealand.

One.Tel Dealers (N30917-N31011) Proposing to offer discounts on mobile phones to customers who purchase the phone in connection with digital mobile telco services provided by One.Tel or One.Tel Networks Pty Ltd (third line forcing).

Malpass Enterprises Pty Ltd (N50121) Proposing to enter into a promotion whereby customers of Willow Shoppingtown will be

rewarded with fuel vouchers for fuel discounts at Malpass Mobil sites (third line forcing).

STV and CTV's agent (Austar Entertainment Pty Ltd) (N31025-6)

Proposing to offer a discount of fees/price to customers purchasing AUMPL Mobile services if they also purchase either pay TV or Internet access (third line forcing).

One.Tel dealers (N31012-7, N31022-4, N310304) Proposing to offer discounts on mobile phones to customers who purchase the phone in connection with digital mobile telco services provided by One.Tel Networks (third line forcing).

The National Australia Bank Ltd (N40416) Proposing to offer national product (Ansett Visa corporate cards) to customers only if they acquire an Ansett travel account from Ansett (third line forcing).

Optus Vision Pty Ltd, Optus Networks Pty Ltd, Optus Mobile and Optus Internet (N90815-18) Proposing to bundle packages at discounted prices (third line forcing).

St George Bank Ltd, Australian Stockbroking Pty Ltd (N31027-8) Proposing to offer ShareTrade customers one of two account types which must be held if the customer executes online trades (third line forcing).

AlintaGas Sales Pty (N70180) Offering bonus reward points to customers who hold and pay by QTC or TVC Visa card during a specified time on specific purchases and from a particular supplier (third line forcing).

Getonboard (N31029) Supplying discounted ISP services if Gateway PC also purchased (third line forcing).

JB Were Asset Management Ltd (N90814) Providing management services to clients with self-managed superannuation on the condition they also invest in cash management products offered by JB Were and Were firms (third line forcing).

JB Were Equity Finance (N90819) Proposing to offer loan facilities to clients if the clients also acquire sponsoring by JB Were Stockbroking (third line forcing).

Biggie Best Pty Ltd (N40181) Proposing to enter into agreement with Australian companies so that companies must purchase Biggie Best products from Mahogany (third line forcing).