

Draft Determination

Payments NZ Limited

The Commission: Dr John Small
Anne Callinan
Bryan Chapple

Summary of application: Payments NZ Limited has applied for authorisation to facilitate the joint development and, if successful, implementation of a partnering framework, between API Providers and Third Parties.

Determination: The Commerce Commission's draft decision is to grant authorisation subject to conditions for a period of 18 months as it is satisfied that the proposed arrangements (with conditions) will in all the circumstances result, or be likely to result, in such a benefit to the public that the conduct should be permitted.

Date of determination: 1 July 2024

Confidential material in this report has been removed. Its location in the document is denoted by [].

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Introduction

1. On 16 January 2024, the Commerce Commission (**Commission**) received an application (the **Application**) from Payments NZ Limited (**Payments NZ**) seeking authorisation to facilitate the joint development and, if successful, implementation of a new partnering framework by the API Centre, API Providers and Third Parties. The partnering framework would include the following elements:
 - 1.1 an accreditation scheme (including accreditation criteria) for Third Parties; and
 - 1.2 default standard terms and conditions on which API Providers and Third Parties who meet the accreditation criteria contract for the use of application programming interfaces (APIs).¹

(the Proposed Arrangement)

2. Payments NZ has applied for authorisation under sections 58(1), 58(2), 58(6B) and 58(6D) of the Commerce Act 1986 (**the Act**).² Payments NZ is seeking authorisation for an initial period of five years.
3. Payments NZ states in its Application that the Proposed Arrangement will help facilitate the development of a more well-utilised, secure and innovative open banking framework.³
4. The Proposed Arrangement is described in more detail at paragraphs 25 to 31 below.

Draft Determination

5. The Commission's preliminary view is that it is not satisfied that the expected public benefits from the Proposed Arrangement would arise, due to the risk of a conflict of interest arising from the decision making processes for the Proposed Arrangement inhibiting the realisation of those benefits. We consider that the conflict of interest could prevent the realisation of all the potential benefits identified in this Draft Determination arising from the Proposed Arrangement.

¹ An API is a set of routines, protocols, and tools for building software applications and specifying how software components should interact.

² The Application at [1], available at:
https://comcom.govt.nz/_data/assets/pdf_file/0026/340586/Payments-NZ-Limited-Authorisation-application-16-January-2024.pdf.

³ 'Open banking' is a system which enables consumers to use third parties such as fintechs to send payments from their bank account, and use their banking information (eg, transaction histories) in new ways such as improved budgeting and personal finance tools. The purpose of open banking is to increase competition and innovation in banking, payments and financial data services, leading to better products and services for customers.

6. However, the Commission considers that, if certain conditions were to be imposed, the benefits would likely outweigh the detriments such that authorisation could nevertheless be granted, but for a period of 18 months only (rather than the five years requested in Payment NZ's Application). As such:
 - 6.1 we propose conditions detailed in paragraph 7 to minimise the conflict of interest arising from decision making processes associated with the Proposed Arrangement, which may inhibit the realisation of any potential benefits, by ensuring neutral and balanced voting processes are used for the Proposed Arrangement, that all decisions and justifications for such decisions in relation to the Proposed Arrangement are recorded, that such records are retained for a minimum period and to ensure all Standards Users participate in the Proposed Arrangement; and
 - 6.2 we propose that the authorisation is granted for a period of 18 months, recognising that the Applicants expect their discussions to take around 12 months, and that after 18 months we consider that the benefits arising from the Proposed Arrangement are likely to decrease due to the introduction of legislation such as the Customer Product and Data Bill and the potential designation of an interbank payments network under the Retail Payment System Act 2022.
7. The proposed conditions to minimise the conflict of interest inhibiting the realisation of any potential benefits arising are:
 - 7.1 **In relation to the Accreditation and Partnering Working Group:**
 - 7.1.1 We consider that representation on the Accreditation and Partnering Working Group needs to be open to all Standards Users.

Hence, we make it a condition that, as proposed in paragraph 102(a) of the Application, an Accreditation and Partnering Working Group which makes recommendations and puts matters to the API Council is established to develop the terms of the Proposed Arrangement and each Standards User is entitled to appoint a member to the Accreditation and Partnering Working Group.
 - 7.1.2 We consider that any matter or recommendation concerning the Proposed Arrangement should receive majority support from the Accreditation and Partnering Working Group before it goes to the API Council.

Hence, as proposed in paragraph 102(b) of the Application, before any matter or recommendation concerning the

Proposed Arrangement is put to the API Council for a vote, that matter or recommendation must first receive the support of:

- (a) the majority of the Accreditation and Partnering Working Group, being 70% of those in attendance (with a quorum of two-thirds of all members); and
- (b) the votes of at least half of the API Providers and half of the Third Parties (who are not also API Providers) represented on the Accreditation and Partnering Working Group.

7.1.3 We consider that it is important to the quality and robustness of API Council decision making that it is provided with a written record of the dissenting views of any members of the Accreditation and Partnering Working Group. Hence, we also make this part of the Proposed Arrangement a condition.

7.2 In relation to the API Council:

- 7.2.1 In order to mitigate the actual or perceived conflict of interests we propose three changes at this level, to 1) increase the number of independent members who need to support any resolution from one to two; 2) increase the number of Third Parties who support the resolution from two to three; and 3) increase the number of API Providers who support the resolution from two to three.
- 7.2.2 We propose the above changes to the existing API Council voting process in order to increase the number of votes in favour of a resolution before that resolution is passed. In doing so, we seek to increase the diversity of views required to pass a resolution and to mitigate the risk of dominant Third Parties (whose incentives may be more similar to the API Providers than other Third Parties) aligning with the API Providers to decide a vote.
- 7.2.3 To give effect to this we propose to make it a condition that where any part of the Proposed Arrangement requires the approval of the API Council, each member of the API Council, including the Chair, shall have one vote and any resolution will be answered in the affirmative if 70% of those in attendance cast their votes in favour of the resolutions, and representatives from at least three API Providers, three Third Parties (who are not also API Providers) and two independent members cast their votes in favour of the resolution.

7.3 In relation to the Payments NZ Board:

7.3.1 To address the central concern about the conflict of interests at the Payments NZ Board level inhibiting any benefits arising from the Proposed Arrangement, we consider it important for decisions on matters relating to the Proposed Arrangement to be made by the independent Board members only. We note Payments NZ told us that it was at least conceivable that it would be able to delegate authority to the independent Board members in respect of decisions relating to the Proposed Arrangement.

7.3.2 Hence, we make it a condition that where any part of the Proposed Arrangement requires approval by the Payments NZ Board, decision making will be delegated to the independent members of the Board.

7.4 In relation to the API Centre's existing exemptions regime:

7.4.1 We consider that there is a risk that the API Centre's existing exemptions regime may be used by API Providers to circumvent the application of any Accreditation Scheme and Standard Terms and Conditions jointly developed under the Proposed Arrangement. This would inhibit any benefits arising from the Proposed Arrangement.

7.4.2 To prevent this, we propose a condition that Standards Users will not be able to apply for exemption (including under the API Centre's existing exemptions regime) in relation to any Accreditation Scheme and Standard Terms and Conditions jointly developed and applied under the Proposed Arrangement.

7.5 To ensure that any benefit to future regulation arising from the Proposed Arrangement is realised:

7.5.1 We propose a condition that Payments NZ keep the following documents as record of the Proposed Arrangement for seven years:

- (a) detailed minutes of all meetings of the Accreditation and Partnering Working Group, API Council and Payments NZ Board;
- (b) recommendations made to the API Council and/or Payments NZ Board by the Accreditation and Partnering Working Group;
- (c) copies of any decision made by the API Council and/or Payments NZ Board (including the reasoning for that decision); and

- (d) copies of all written communications (if any) from the Payments NZ Board and/or the API Council to the API Council and/or the Accreditation and Partnering Working Group.
- 8. The Commission's current intention is to authorise the Proposed Arrangement under sections 58(1) and (2) of the Act, subject to the above conditions, for a period of 18 months. We do not currently intend to authorise the Proposed Arrangement under sections 58(6B) or (6D) of the Act. Our preliminary view is that we do not consider we have jurisdiction to assess the Application under those provisions.
- 9. Our preliminary view is based on our assessment of the likely benefits and detriments on the evidence available to us at this time.

Next steps

- 10. The Commission now seeks written submissions on the draft determination. Submissions should be received by the Commission by close of business on 15 July 2024. The process for making a submission is discussed from paragraphs 208 to 212.

Assessment procedure

- 11. In making this draft determination the Commission reviewed submissions and correspondence, including:
 - 11.1 the Application;
 - 11.2 submissions responding to our Statement of Preliminary Issues;⁴
 - 11.3 interviews with interested parties; and
 - 11.4 responses to our voluntary requests for information.

Background

Participants

Payments NZ

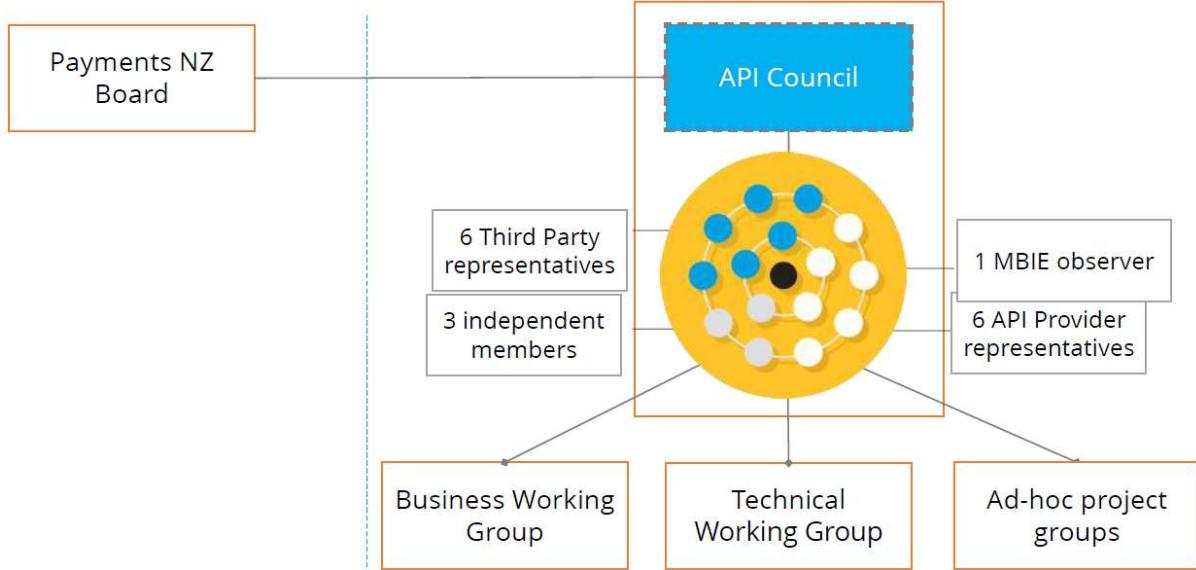
- 12. The role of Payments NZ is to govern and manage payment system rules and standards, and promote interoperable, innovative, safe, open, and efficient

⁴ Commerce Commission, Statement of Preliminary Issues: Payments NZ Limited, Application seeking Authorisation to further develop its open banking framework (12 February 2024), available at: https://comcom.govt.nz/_data/assets/pdf_file/0025/343285/Payments-NZ-Limited-Statement-of-Preliminary-Issues-12-February-2024.pdf

payments systems.⁵ Payments NZ is owned by eight banks, including the four major banks – ANZ, ASB, Westpac and BNZ.⁶

13. Payments NZ has a business unit called the API Centre, which develops, maintains and publishes API Standards (in partnership with API Providers and Third Parties), and governs the use of the API Standards by registered API Providers and Third Parties.⁷ API Standards are intended to enable the development of standardised APIs so that Third Parties can connect with API Providers in a consistent way, avoiding the need for Third Parties to customise their integration with each API Provider.⁸
14. Figure 1 below summarises the governance structure of the API Centre:⁹

Figure 1: API Centre governance



15. The Payments NZ Board consists of eight directors appointed by its bank shareholders and three independent directors. The Payments NZ Board has a number of roles with respect to the API Centre, including approving the API Centre's annual workplan and budget, and approving amendments to the API Centre Terms and Conditions.¹⁰
16. The Payments NZ Board has delegated to the API Council day-to-day governance of the API Centre as well as the ability to approve the

⁵ The Application at [22].

⁶ ANZ Bank New Zealand Limited (ANZ), ASB Bank Limited (ASB), Bank of New Zealand (BNZ), Citibank, N.A. (Citibank), The Hongkong and Shanghai Banking Corporation Limited (HSBC), Kiwibank Limited (Kiwibank), TSB Bank Limited (TSB), and Westpac New Zealand Limited (Westpac).

⁷ The Application at [32].

⁸ The Application at [2(b)].

⁹ The Application at Appendix 3.

¹⁰ The Application at [35].

development, maintenance, and publication of the API Standards (including the release of new API Standards).¹¹

17. The API Council has, to date, established two working groups to assist it in its development and maintenance of API Standards – the Business Working Group and the Technical Working Group. Both working groups consist of representatives from API Providers and Third Parties. The role of the working groups is to provide recommendations to the API Council in accordance with the roles and responsibilities set out in each group's respective terms of reference.¹² If authorisation is granted, an Accreditation and Partnering Working Group is proposed to be established to discuss and develop the Proposed Arrangement.¹³

Standards Users

18. Payments NZ seeks authorisation for the Proposed Arrangement on behalf of the following parties:¹⁴
 - 18.1 API Providers (ie, banks, current and future), being financial institutions that issue bank accounts to customers, that want to use standardised APIs developed using Payments NZ's API Standards to provide API Services to Third Parties, and are registered as an API Provider with Payments NZ.¹⁵ There are currently seven registered API Providers,¹⁶ and
 - 18.2 Third Parties (current and future), being entities that want to use APIs developed using Payments NZ's API Standards, provided by registered API Providers, and who are registered as a Third Party with Payments NZ. Some API Providers may seek to receive API Services from other API Providers and may therefore be considered Third Parties in that context. There are currently 17 registered Third Parties.
 - 18.3 (API Providers and Third Parties are collectively referred to as **Standards Users**.)

Industry background

19. API Providers such as ANZ, BNZ, Westpac, ASB, Kiwibank, TSB, and Heartland Bank provide banking services (eg, loans, transaction accounts) to their customers.¹⁷ Consequently, API Providers gather large quantities of

¹¹ The Application at [36].

¹² The Application at [41].

¹³ The Application at [42].

¹⁴ The Application at [2].

¹⁵ API Services refers to the ability to initiate payments on behalf of customers or access customer data through standardised APIs.

¹⁶ Being ANZ, BNZ, ASB, Westpac, Kiwibank, TSB, and Heartland Bank Limited (Heartland Bank).

¹⁷ The Application at [122].

- information relating to their customers (eg, financial position, behaviours, and transaction details).¹⁸
20. The ability to access customer account data and/or initiate payments on behalf of API Providers' customers is a key input which most Third Parties require to offer a viable product or service to end customers.¹⁹ For example, access to customer account data (eg, bank account transaction history) would allow Third Parties to create budgeting applications.²⁰
 21. We understand that the preferred method for Third Parties to access customer account data and/or payment initiation services (**API Services**) is via standardised APIs with API Providers.²¹
 22. In order to achieve sufficient market coverage to ensure they can offer a viable product or service to consumers, Third Parties must receive API Services from multiple API Providers (at minimum, the four or five largest API Providers in New Zealand).²² The inability of a Third Party to access API Services from just one major bank would significantly reduce the viability of their product or service.
 23. Currently, Third Parties can access API Services by entering into bilateral partnering arrangements with each API Provider, however this involves the use of non-standardised APIs. Evidence suggests that the process of bilateral partnering has several associated issues in practice (eg, the use of non-standardised APIs). As a result, we understand that only a limited number of Third Parties currently receive API Services from API Providers via bilateral partnering.²³ We also understand that, to date, no Third Party has been able to access API Services (via standardised APIs) from all of five of the largest banks.
 24. While accessing API Services directly from API Providers is considered the ideal method for Third Parties, there are the following 'sub-optimal' alternatives:²⁴
 - 24.1 Screen scraping and reverse engineered bank app API access. These methods require consumers to provide their online banking username and password to a third party to access services.²⁵ This is considered

¹⁸ The Application at [123].

¹⁹ The Application at [126].

²⁰ [] .

²¹ See 'Retail Payments System, Payments between Bank Accounts' (31 July 2023) (https://comcom.govt.nz/_data/assets/pdf_file/0016/323602/Retail-Payment-System-Payments-Between-Bank-Accounts-Request-for-views-paper-31-July-2023.pdf), Figure 3.1.

²² The Application at [72]. Also see for example Akahu submission in response to Statement of Preliminary Issues (26 February 2024) at page 3, [] , [] .

²³ The Application at [75].

²⁴ See 'Retail Payments System, Payments between Bank Accounts' (31 July 2023) at [3.14].

²⁵ See 'Retail Payments System, Payments between Bank Accounts' (31 July 2023) at [3.21] and [3.23].

sub-optimal as requiring a consumer to provide their online banking login details to a third party is usually in breach of their bank's terms and conditions, and introduces the possibility of consumers not receiving redress if a fault occurs.²⁶

- 24.2 Engaging intermediary entities (eg, Akahu). Intermediary entities have, in theory, entered into bilateral partnering arrangements with each API Provider and can serve as a conduit through which other Third Parties can access API Services.²⁷ However, some intermediaries currently screen scrape or reverse engineer bank app API access in relation to certain API Providers they have been unable to bilaterally partner with.²⁸ We also understand that some of these intermediaries charge a premium above what might be expected if Third Parties were to access API Services from an API Provider directly.²⁹

Proposed Arrangement

Scope of the Proposed Arrangement

- 25. Payments NZ is seeking authorisation for:³⁰
 - 25.1 the API Centre and Standards Users to jointly develop a new partnering framework that includes:
 - 25.1.1 an accreditation scheme (including accreditation criteria) for Third Parties (**Accreditation Scheme**);
 - 25.1.2 default standard terms and conditions on which API Providers and Third Parties that meet the accreditation criteria contract for the use of APIs (**Standard Terms and Conditions**); and
 - 25.2 if the joint development of the Accreditation Scheme and Standard Terms and Conditions is successful:
 - 25.2.1 the API Centre and Standards Users will offer the Accreditation Scheme, and apply the accreditation criteria to Third Parties;
 - 25.2.2 API Providers will agree to contract with accredited Third Parties on the Standard Terms and Conditions; and

²⁶ See 'Retail Payments System, Payments between Bank Accounts' (31 July 2023) at [3.21] and [3.23].

²⁷ [], [].

²⁸ [].

²⁹ [], [].

³⁰ The Application at [81].

- 25.2.3 API Providers will apply the Standard Terms and Conditions unless both parties (ie, the relevant API Provider and Third Party) agree to use/apply different terms.
26. Payments NZ is seeking authorisation with regards to both current and future API Providers and Third Parties.³¹ It seeks authorisation for an initial period of five years.³²
27. In effect, the Proposed Arrangement is a development process whereby:
- 27.1 API Providers and Third Parties will come together to try to jointly develop an Accreditation Scheme and Standard Terms and Conditions; and
 - 27.2 if the API Providers and Third Parties can agree on the Accreditation Scheme and the Standard Terms and Conditions, they will apply the Accreditation Scheme and the Standard Terms and Conditions to partnering.
28. Payments NZ has stated that “[it] is not seeking authorisation for the specific accreditation criteria or standard terms and conditions themselves.”³³ We have therefore carried out our assessment on the basis that the specific content (ie, the substantive wording and terms) of the Accreditation Scheme and Standard Terms and Conditions are themselves outside the scope of the Application and, therefore, our assessment. Once developed by the parties, the Accreditation Scheme, including the specific accreditation criteria and Standard Terms and Conditions, would be subject to Part 2 of the Act in the usual way.
29. It follows that, for the purposes of our analysis, we are assessing the benefits and detriments arising from a joint development process and, if that joint development process is successful, the benefits and detriments arising from the application of the Accreditation Scheme (including accreditation criteria) and the Standard Terms and Conditions that are developed for partnering between API Providers and Third Parties (but API Providers and Third Parties remain free to agree alternative terms).
30. Importantly, we are not making any assessment about what the Accreditation Scheme or the Standard Terms and Conditions may contain, or whether any part of the specific or substantive content produced by the processes for which authorisation is sought may contravene Part 2 of the Act. If the Proposed Arrangement is successful, Payments NZ will need to consider their

³¹ The Application at [82]. See also the Payments NZ website for further information regarding criteria for becoming a registered Third Party (<https://www.apicentre.paymentsnz.co.nz/join/api-standards-user/third-party-criteria/>) and registered API Provider (<https://www.apicentre.paymentsnz.co.nz/join/api-standards-user/api-provider-criteria/>).

³² The Application at [85].

³³ The Application at [84(a)].

compliance with the Act, including whether a further authorisation or collaborative activities clearance should be sought.

31. Consequently, we consider the Application is distinct from previous cases where authorisation has been granted under sections 65AA(2) and (3) of the Act (now sections 58(6B) and (6D)) such as *News Publishers' Association of New Zealand Incorporated (NPA)*³⁴ and *The New Zealand Tegel Growers Association Incorporated (Tegel)*.³⁵ In those cases, small, competing suppliers were seeking authorisation to collectively bargain with a large purchaser in order to increase their bargaining power and improve overall outcomes, specifically in relation to remuneration.³⁶ In *Tegel* and *NPA*, the scope of the arrangements sought to be authorised by the respective applicants also included any successfully collectively negotiated agreement – which was defined as containing the matters for which the parties sought authorisation to collectively negotiate (ie, the specific contents of the agreement).

How we assess authorisations

Statutory framework

32. Under section 58 of the Act, the Commission can grant authorisation for restrictive trade practices. This includes authorising conduct that may breach section 27 (contracts, arrangements or understandings substantially lessening competition prohibited) and/or section 30 (contracts, arrangements, understandings or covenants containing cartel provisions prohibited) of the Act.
33. A three-stage assessment is undertaken in any authorisation application under section 58 of the Act:³⁷
 - 33.1 First, confirming:
 - 33.1.1 for applications pursuant to sections 58(1) and (2) (which are **competition authorisation sections**), whether section 27 might apply to the agreement; or

³⁴ *News Publishers' Association of New Zealand Incorporated* [2022] NZCC 35, available at: https://comcom.govt.nz/_data/assets/pdf_file/0025/306772/2022-NZCC-35-News-Publishers-Association-of-New-Zealand-Incorporated-Authorisation-Final-Determination-2-November-2022.pdf

³⁵ *New Zealand Tegel Growers Association Incorporated* [2022] NZCC 30, available at: https://comcom.govt.nz/_data/assets/pdf_file/0024/290319/2022-NZCC-30-New-Zealand-Tegel-Growers-Association-Incorporated-Authorisation-final-determination-2-August-2022.pdf

³⁶ See *Tegel Final Determination* at [26.1.1] and *NPA Final Determination* at [29.1.1]. The present application differs significantly from Tegel and NPA because both sides of the commercial negotiation (the API Providers and Third Parties) are seeking to negotiate jointly as opposed to parties with limited market power coming together to negotiate with an entity with market power.

³⁷ See our *Authorisation Guidelines* at https://comcom.govt.nz/_data/assets/pdf_file/0012/91011/Authorisation-Guidelines-June-2023.pdf.

- 33.1.2 for applications pursuant to sections 58(6B) and (6D) (the **cartel authorisation sections**), whether the agreement might contain a cartel provision.³⁸
- 33.2 Second, establishing whether the Commission has jurisdiction to authorise (the **jurisdictional threshold**) under:
 - 33.2.1 section 61(6) of the Act for the competition authorisation sections; or
 - 33.2.2 section 61(8) of the Act for the cartel authorisation sections.
- 33.3 Third, assessing whether the associated benefits mean that authorisation should be granted (the ‘public benefit test’). We take into account any conditions we may impose at this point.

Jurisdictional threshold

- 34. Payments NZ has applied for authorisation under:³⁹
 - 34.1 sections 58(1) and (2) of the Act, which are competition authorisation sections relating to section 27. These sections set out that a person who wishes to:
 - 34.1.1 enter into a contract, arrangement or understanding (section 58(1)); or
 - 34.1.2 give effect to a provision in a contract, arrangement or understanding (section 58(2)),

to which section 27 would or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation; and
 - 34.2 sections 58(6B) and (6D) of the Act, which are the cartel authorisation sections relating to section 30. These sections set out that a person who wishes to:
 - 34.2.1 enter into a contract, arrangement or understanding or covenant that contains a provision that is, or might be, a cartel provision (section 58(6B)); or
 - 34.2.2 give effect to a provision of a contract, arrangement, understanding or covenant that is, or might be, a cartel provision (section 58(6D)),

³⁸ Section 61(9) of the Act.

³⁹ The Application at [1].

may apply to the Commission for authorisation to do so, and the Commission may grant authorisation.

35. Under competition authorisation sections, the Commission has jurisdiction to consider an application for authorisation where the proposed contract, arrangement or understanding is likely to lessen competition. This arises from section 61(6) of the Act, which requires the conduct defined in the application to, in all the circumstances result, or be likely to result in a lessening of competition. Section 61(6A) of the Act specifies that a “lessening of competition” includes a lessening of competition that is not substantial (which is a lower threshold than would apply under section 27 of the Act).⁴⁰
36. Under the cartel authorisation sections, the Commission’s jurisdiction arises from section 61(8) of the Act. Section 61(9) of the Act further clarifies that under section 61(8), for the purpose of the cartel authorisation sections, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision providing there are reasonable grounds for believing that it might be.⁴¹

Public benefit test

37. Although the jurisdictional thresholds differ under the competition and cartel authorisation sections,⁴² the public benefit test is materially the same.
38. The Commission can authorise an arrangement if it is satisfied that a proposed arrangement will, in all the circumstances:
 - 38.1 in relation to the competition authorisation sections, be likely to result in a benefit to the public which would outweigh the lessening of competition;⁴³ or
 - 38.2 in relation to cartel authorisation sections, be likely to result in such a benefit to the public that the matter should be permitted.⁴⁴
39. Where courts have previously considered the various types of authorisation decisions allowed for in the Act, there has been overall consistency in the approach taken to the assessments of public benefit (ie, a facts-based assessment of the benefits and detriments, adopting a quantitative approach where possible).⁴⁵ Courts have also confirmed the use of a qualitative

⁴⁰ Section 61(6A) of the Act states that a lessening of competition for the purposes of section 61(6) includes a lessening of competition that is not substantial.

⁴¹ Section 61(9) of the Act.

⁴² Sections 58(1) and (2), and sections 58(6B) and (6D) of the Act.

⁴³ Section 61(6) of the Act.

⁴⁴ Section 61(8) of the Act.

⁴⁵ See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (HC) (Air New Zealand) at [33] and also *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) (Godfrey Hirst (No 1)) at [88]-[90].

assessment of all the benefits and detriments from a proposed agreement, including those that cannot be quantified in monetary terms.⁴⁶

40. In each case, the Commission needs to investigate the nature, likelihood and magnitude of any benefits and detriments that might arise from the proposed arrangement.
41. The benefits and detriments which are balanced in the public benefit test must arise from the proposed arrangement for which authorisation is sought.⁴⁷ To determine whether the benefits and detriments are specific to the proposed arrangement, we assess:
 - 41.1 what is likely to occur in the future with the arrangement (the factual); and
 - 41.2 what is likely to occur in the future without the arrangement (the counterfactual).
42. Once we have identified all likely benefits and detriments, we then assess the value of those benefits and detriments. When making that assessment, factors we may take into account include how the conduct could affect:
 - 42.1 allocative efficiency – whether the conduct would raise or lower margins; and whether it would reduce or improve quality, choice or other elements of value to consumers;
 - 42.2 productive efficiency – whether the conduct could improve or worsen the cost of production processes; and
 - 42.3 dynamic efficiency – whether the conduct could assist or hinder efficient innovation in products or processes.
43. The Commission is not limited to considering efficiencies. New Zealand courts have recognised efficiencies are not the only benefits and detriments which are relevant to the Commission's assessment.⁴⁸ Ultimately, the Commission seeks to assess what benefits accrue to the public in the circumstances of any given case.⁴⁹
44. Having assessed the value of benefits and detriments, if we are satisfied that the benefits of the arrangement likely outweigh the detriments, we will grant authorisation. If we are not satisfied, we will not grant authorisation.⁵⁰

⁴⁶ *Authorisation Guidelines* at [7].

⁴⁷ *Authorisation Guidelines* at [43].

⁴⁸ *NZME Ltd & Ors. v Commerce Commission* [2018] NZCA 389 at [81].

⁴⁹ *Authorisation Guidelines* at [42].

⁵⁰ *Authorisation Guidelines* at [49].

Conditions and time period of authorisation

- 45. We can authorise agreements subject to conditions and for a time period we consider appropriate.⁵¹
- 46. If we decide to impose conditions on an authorisation, these must be consistent with the Commerce Act.⁵² We may include conditions that remove or lessen the detriments arising from an agreement or unilateral conduct or conditions that create or enhance the benefits.⁵³
- 47. When considering whether to impose behavioural conditions, we are mindful that they can carry their own costs. In assessing potential conditions, we will have regard to:⁵⁴
 - 47.1 how well they achieve their objectives, while minimising the risk of unintended negative consequences;
 - 47.2 the likely cost of monitoring and enforcement; and
 - 47.3 the likely compliance costs for the firms involved.

Relevant markets

- 48. We have considered submissions made by Payments NZ and industry participants on the relevant market(s).
- 49. Payments NZ submits that there are three broad categories of markets that will be affected by the Proposed Arrangement:
 - 49.1 markets for the provision of banking services (eg, home loans, transaction accounts) to end customers (**Banking Services Market**);
 - 49.2 a market for the provision of customer account data and payment initiation services to Third Parties (**API Services Market**); and
 - 49.3 a market for the provision of open banking services to end customers (**Open Banking Services Market**).
- 50. Stakeholders generally agree with Payments NZ's characterisation of the markets in which competition may be lessened by the Proposed Arrangement.⁵⁵
- 51. It is not necessary (or statutorily required) that we conclude on markets in our determination. In this case, we consider that the outcome of our

⁵¹ Section 61(2) of the Act.

⁵² Section 61(2) of the Act.

⁵³ *Authorisation Guidelines* at [32].

⁵⁴ *Authorisation Guidelines* at [34].

⁵⁵ See for example [], [], [].

assessment will likely be substantially the same irrespective of the precise scope of the markets submitted by Payments NZ. We therefore do not find it necessary to precisely define the scope of any relevant market(s) to assess this authorisation.

52. However, to assess jurisdiction and to provide context and inform our assessment of the benefits and detriments likely to arise from the Proposed Arrangement, we have considered the relevant interactions between the various participants, banking products and services in our assessment of the potential benefits and detriments of the Proposed Arrangement below.

Our assessment of jurisdiction

53. As stated above, Payments NZ has applied for authorisation under competition and the cartel authorisation sections of the Act (sections 58(1), (2), and (6B) and (6D), respectively).

Sections 58(1) and (2)- competition authorisation sections

54. We consider we have jurisdiction to assess the Application under the relevant competition authorisation sections of the Act.
55. We consider that the Proposed Arrangement is likely to lessen competition in three ways:
 - 55.1 First, the joint development and, if successful, application of the Accreditation Scheme (including accreditation criteria) and Standard Terms and Conditions could lessen competition by having an exclusionary effect on at least some Third Parties. If a potential Third Party does not meet the accreditation criteria, it cannot automatically contract with an API Provider on the Standard Terms and Conditions. Therefore, the Third Party is excluded from the API Services Market and potentially also from the Open Banking Services Market (via inability to access the partnering framework), resulting in a lessening of competition.
 - 55.2 Second, a lessening of competition arises if, as a result of not being accredited to automatically contract with an API Provider, the Third Party becomes delayed in its bilateral negotiations with an API Provider to enter the API Services Market and Open Banking Services Market. We consider that this delay in and of itself results in an additional lessening of competition.
 - 55.3 Third, the application of the Standard Terms and Conditions could lessen competition because Third Parties and API Providers would be limited in their ability and incentive to negotiate terms that may be

more innovative and enhance competition in open banking services markets.⁵⁶

56. For the purpose of assessing jurisdiction, we are of the opinion that the above conclusions can be reliably drawn without seeing the precise accreditation criteria.⁵⁷

Sections 58(6B) and (6D)-cartel authorisation sections

57. We do not consider that we have jurisdiction to assess the Application under the cartel authorisation sections as we do not consider the Proposed Arrangement involves a provision that is, or might be, a cartel provision.
58. As noted, the Commission has jurisdiction to consider the Application under the cartel authorisation sections if the Proposed Arrangement involves entering into a contract, arrangement or understanding that contains a provision that is, or might be, a cartel provision; or giving effect to a provision in a contract, arrangement or understanding that is, or might be, a cartel provision. The Commission does not need to decide if a particular provision is a cartel provision if there are reasonable grounds for believing that provision might be a cartel provision.⁵⁸
59. A cartel provision is a provision contained in a contract, arrangement, understanding or covenant (together, an **arrangement**)⁵⁹ among two or more competitors that has the purpose, effect or likely effect of either price fixing, restricting output or market allocating, in relation to the supply or acquisition of goods or services in New Zealand.⁶⁰
60. Payments NZ considers the cartel provisions are potentially applicable because Standards Users are in competition on a number of levels relevant to the Proposed Arrangement including:
 - 60.1 the Banking Services Market where API Providers compete with each other to provide banking services to end customers;
 - 60.2 the API Services Market where API Providers compete with each other to provide API Services to Third Parties, and where Third Party intermediaries also compete with API Providers to some extent; and

⁵⁶ The Application at page 34.

⁵⁷ The Commission notes that specific nature of any accreditation criteria under any Accreditation Scheme developed under the Proposed Arrangement is still subject to the Act, and we can investigate if we are concerned that the extent of the exclusion is a breach of the Act. The test at this point is whether there is, or is likely to be, a substantial lessening of competition, whereas for this jurisdictional assessment we need only be satisfied that competition is, or is likely to be, lessened.

⁵⁸ Section 61(9) of the Act.

⁵⁹ In other contexts, the Commission abbreviates this to “agreement”. Given the authorisation relates to an arrangement, however, we use “arrangement” in this draft determination.

⁶⁰ Section 30A(1) of the Act.

- 60.3 the Open Banking Services Market where Third Parties and API Providers compete with each other to provide open banking services to end customers.⁶¹
61. We agree that Standard Users are in competition with each other and go on to consider each type of potential cartel provision (price fixing, output restriction and market allocation) below.

Price fixing

62. Price fixing means, as between the parties to an arrangement, fixing controlling, maintaining or providing for the fixing, controlling or maintaining of the price for goods or services that any two or more parties to the arrangement supply or acquire in competition with each other, or any discount, allowance, rebate or credit in relation to goods or services that any two or more parties to the arrangement supply or acquire in competition with each other.⁶²
63. The Supreme Court in *Lodge Real Estate Ltd v Commerce Commission*⁶³ confirmed that price fixing is conduct that interferes with the competitive setting of price.
64. Payments NZ has stated that the Proposed Arrangement will involve competing API Providers and competing Third Parties (facilitated by Payments NZ) setting a pricing structure and pricing principles under the Standard Terms and Conditions.⁶⁴ However, the charges themselves will not be agreed, and parties will still be required to negotiate price bilaterally within the bounds of any pricing principles and pricing structure set under the Standard Terms and Conditions.⁶⁵
65. Payments NZ has provided high level examples of the pricing principles and structures that may be discussed, and how they may apply in practice.
- 65.1 In relation to pricing principles, this may include guidance on the appropriate degree of transparency for prices, and how pricing fairness and sustainable value exchanges should be considered (in relation to pricing principles).⁶⁶ Payments NZ has confirmed that pricing principles would be a contractual obligation that API Providers would have to comply with and the dispute resolution provisions would apply if the principles were not adhered to when setting prices.⁶⁷

⁶¹ The Application at [111]-[112].

⁶² Section 30A(2) of the Act.

⁶³ *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25.

⁶⁴ The Application at [9(b)].

⁶⁵ The Application at [97].

⁶⁶ The Application at [99]-[100].

⁶⁷ Payments NZ response to request for information (17 April 2024) at page 3.

- 65.2 In relation to pricing structure, this may include different types of pricing structures such as pay-per-consumption based charges or fixed monthly charges.⁶⁸ If the Proposed Arrangement is authorised, Payments NZ states that the merits of such models could be discussed.⁶⁹
66. As noted above, in order to be satisfied of jurisdiction under the cartel authorisation sections, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision, provided there are reasonable grounds for believing that it might be.⁷⁰
67. The test was met in both *Tegel* and *NPA* because the scope of the proposed arrangements included provisions to set a price:
- 67.1 in *NPA*, on the basis that horizontal arrangements between competitors to collectively set a price likely amounts to cartel conduct;⁷¹ and
 - 67.2 in *Tegel*, on the basis that there were reasonable grounds to believe that some of the provisions to be collectively negotiated would set the price of chicken growing services and therefore might have the effect of fixing price.⁷² In *Tegel*, in particular, this conclusion was drawn on the basis that the proposed arrangement constrained the scope of the authorisation to matters related to growing chickens, including among other things, the price of chicken growing services.⁷³
68. Here, the Proposed Arrangements do not include the final price on which API Services will be provided, which distinguishes the current application from *NPA* and *Tegel*.
69. Nor does the Proposed Arrangement include anything more than high level options as to what pricing framework or principles might be discussed and agreed. At this very early stage, we cannot conclude that there are reasonable grounds for believing that there might be a price fixing arrangement created by the pricing principles and pricing structure. More detail as to the proposed pricing principles and structure would be necessary for us to conclude whether they might interfere with the competitive setting of prices for API Services (per *Lodge*), particularly when the final price itself remains to be agreed on a bilateral basis.
70. We do not rule out the possibility that the final pricing principles and pricing structure might breach section 30 of the Act; however, at present, this is

⁶⁸ The Application at [99]-[100].

⁶⁹ Payments NZ response to request for information (17 April 2024) at pages 2-3.

⁷⁰ Section 61(9) of the Act.

⁷¹ *NPA* at [43].

⁷² *Tegel* at [46].

⁷³ *Tegel* at [57].

simply not a matter on which we have sufficient information to reach a view on for the purpose of the current application.

Restricting output

71. Restricting output means preventing, restricting or limiting or providing for the prevention, restriction or limitation of:
 - 71.1 the production or likely production by any party to an arrangement that any two or more of the parties to the arrangement supply or acquire in competition with each other;
 - 71.2 the capacity or likely capacity of any party to an arrangement that any two or more parties to the arrangement supply or acquire in competition with each other;
 - 71.3 the supply or likely supply of goods or services that any two or more parties to an arrangement supply in competition with each other;
 - 71.4 the acquisition or likely acquisition of goods or services that any two or more parties to an arrangement acquire in competition with each other.⁷⁴
72. Although the Accreditation Scheme sets the entry conditions for Third Parties to partner with an API Provider and determines who API Providers will (and will not) automatically provide API Services to on the Standard Terms and Conditions, parties who do not meet the accreditation criteria will still be able to partner with API Providers via bilateral negotiations (outside the scope of the partnering framework).
73. On the face of it, the Proposed Arrangement does not restrict or limit competing API Providers from supplying API Services to parties who do not meet the accreditation criteria – each API Provider is still able to compete to service a party who does not meet the accreditation criteria (though we acknowledge that API Providers may prefer to use the partnering framework).
74. Likewise, the Proposed Arrangement does not restrict or limit Third Parties who are competing for API Services from acquiring API Services from API Providers if they do not meet the accreditation criteria as they will still be able to commence bilateral negotiations for those services with API Providers and potentially partner with an API Provider outside of the partnering framework.
75. Moreover, the intention of the Proposed Arrangement does not appear to be to restrict output of API Services by API Providers – the Application states that the purpose of the Proposed Arrangement is to facilitate the development of open banking in New Zealand and address the inefficiencies of the bilateral

⁷⁴ Section 30A(3) of the Act.

partnering model.⁷⁵ In other words, the Proposed Arrangement seeks to increase the ability of Third Parties to access API Services and provide open banking services to consumers. As Payments NZ states, the overall purpose of open banking is to increase competition and innovation, leading to better products and services for consumers.⁷⁶

76. As discussed above, we consider that automatic accreditation may ultimately lessen competition, as those that do not automatically qualify for accreditation are delayed, and potentially fail, in reaching terms with API providers. However, we do not consider, based on the evidence before us at this time, that we have reasonable grounds for believing that the provision itself might be a cartel provision. At this time, there is no indication of an agreement among any parties to the Proposed Arrangement that they will not negotiate or reach agreement with those that are not automatically accredited. Our view could change in future, however, depending on how the provision is drafted and how it operates in practice.

Market allocation

77. Market allocation means allocating between any two or more parties to an arrangement, or providing for such an allocation, of the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other and/or the geographic areas in which the parties supply or acquire goods or services in competition with each other.⁷⁷
78. We do not consider that the implementation of the Accreditation Scheme amounts to competing API Providers allocating between themselves which of the Third Parties (or parties who have been unable to meet the accreditation criteria) they will or will not contract with.

With and without the Proposed Arrangement

79. In reaching our preliminary view below we have considered all submissions and evidence received on the likely situations that would arise with and without authorisation being granted for the Proposed Arrangement.
80. In assessing the situation with and without the Proposed Arrangement, the Commission is necessarily engaging in a future-focussed assessment. As such, there is scope for there to be a range of factuals, as well as a range of counterfactuals.

⁷⁵ The Application at [8].

⁷⁶ The Application at [4].

⁷⁷ Section 30A(4) of the Act.

The situation without the Proposed Arrangement – bilateral partnering and potential regulatory intervention

Payments NZ's submission

81. Payments NZ submits that in the absence of the Proposed Arrangement, API Providers and Third Parties would continue to contract with one another using a bilateral partnering model.⁷⁸ Payments NZ submits there are a number of inefficiencies associated with the bilateral partnering model that serve as a barrier to Standards Users entering into partnering arrangements (attributing this largely to a lack of consistency and transparency regarding the criteria that Third Parties need to meet to partner with API Providers).
82. In addition to the bilateral partnering model, other sub-optimal methods to obtain API Services would continue, eg, screen scraping or reverse engineered bank application access. Payments NZ submits that, in respect of payment initiation, electronic credit and debit card payments would continue to be alternative payment methods.⁷⁹
83. Payments NZ also submits that the potential introduction of legislation and/or regulation is possible which could potentially bring at least some (but not all) of the benefits associated with the Proposed Arrangement:⁸⁰
 - 83.1 In July 2023, the Government released an exposure draft of the Consumer and Product Data Bill (**CPD Bill**). Under the CPD Bill, data holders within a designated sector (the first of which is proposed to include banking) would be required to provide accredited requestors with data and regulated data services. For banking, this would include API Providers providing Third Parties with customer account data and payment initiation services.
 - 83.2 In July 2023, the Commission published a paper titled "Retail Payment System: Payments Between Bank Accounts" which, among other things, sought views on a proposal by the Commission to introduce regulation giving the Commission the ability to require API Providers to disclose information (eg, about terms and conditions for partnering or pricing methodologies), or establish an access regime to the interbank payment network (**network designation**).
84. Payments NZ submits that the timeframes for and/or certainty of these legislative and regulatory solutions are unclear at this stage, and that it is also unclear as to whether these legislative and regulatory solutions would achieve all the objectives of the Proposed Arrangement or meet Payments NZ's thresholds for performance and availability.⁸¹

⁷⁸ The Application at [16].

⁷⁹ The Application at [130] – [137]; [138] – [150].

⁸⁰ The Application at [151] – [154].

⁸¹ The Application at [175].

85. Payments NZ ultimately submits that in the counterfactual, it is unlikely to be able to deliver any other initiative that could facilitate more efficient partnering without the need for authorisation.⁸²

Interested parties' submissions

86. Views expressed by interested parties regarding the counterfactual were broadly consistent with Payments NZ's submissions, including that bilateral partnering would persist with concomitant inefficiencies, screen scraping, reverse engineered bank app access or via intermediaries.⁸³
87. Some interested parties indicated a view that potential regulatory intervention (ie, the CPD Bill and/or network designation) could pose an alternative counterfactual altogether. In other words, bilateral partnering would be superseded by such regulatory intervention.⁸⁴

Our assessment

88. The evidence we have gathered to date indicates that absent the Proposed Arrangement, the status quo of bilateral partnering would likely continue until regulatory intervention occurs. That is to say, Third Parties could, in the counterfactual:
- 88.1 negotiate bilaterally with API Providers to access API Services;
 - 88.2 use screen scraping or reverse engineered bank app access; and
 - 88.3 use services provided by intermediaries.
89. In relation to regulatory intervention, the evidence we have gathered indicates that there is uncertainty around regulatory intervention being a sole alternative counterfactual to the Proposed Arrangement and superseding bilateral partnering models [], due to the current proposed timing and scope associated with each regulatory intervention.⁸⁵
90. In relation to the CPD Bill, the Minister of Commerce and Consumer Affairs introduced the Bill in Parliament on 16 May 2024:
- 90.1 The timeframes for later stages of the process which relate to the application of the consumer data right framework under the CPD Bill to banking (eg, any banking designation, development of associated regulations) are still relatively uncertain at this stage.
[]
[].⁸⁶

⁸² The Application at [150].

⁸³ For example, see [].

⁸⁴ See for example [], [].

⁸⁵ Transcript of MBIE interview (11 March 2024) at page 6-7.

⁸⁶ Transcript of MBIE interview (11 March 2024) at page 6.

]87

- 90.2 The scope of the CPD Bill (in particular, what constitutes “mandatory data”⁸⁸) under the consumer data right may be narrower than the data that could be accessed via the Proposed Arrangement. As such, the CPD Bill might not enable the same breadth of functionality and use cases envisaged under the Proposed Arrangement.⁸⁹
91. In relation to network designation, the Commission is currently consulting on a proposal to recommend network designation to the Minister:⁹⁰
- 91.1 This process is subject to a number of future decisions (eg, whether the Commission decides to recommend network designation following its consultation process, and whether the Minister subsequently agrees with the Commission’s recommendation) and is therefore subject to a degree of uncertainty.
 - 91.2 If the required future decisions are made, we estimate that network designation could potentially occur relatively quickly [], although we note that network designation, in and of itself, would not automatically impose any regulations on participants. If and when network designation occurs, the Commission may still rely (at least initially) on the industry to develop detailed processes, rather than moving directly to develop regulations under the designation.⁹¹ The timing for the development of regulations is uncertain but may involve overlapping timeframes with the Proposed Arrangement.
 - 91.3 In respect of scope of the network designation, we understand it would include payment initiation APIs, but it is unclear as to whether it would extend to cover customer account data APIs.
[]

⁸⁷ Transcript of MBIE interview (11 March 2024) at pages 6 – 7.

⁸⁸ The Exposure Draft of the CPD Bill currently defines both “designated customer data” and “designated product data” as data that would be required to be provided by a data holder if requested under “regulated data services”. See sections 8, 9, 10 and Part 2 of the Exposure Draft, available at: <https://www.mbie.govt.nz/assets/exposure-draft-customer-and-product-data-bill.pdf>

⁸⁹ Transcript of MBIE interview (11 March 2024) at page 4.

⁹⁰ See ‘Retail Payment System: Consultation on our proposal to recommend designation of the interbank payment network’ (27 March 2024) (https://comcom.govt.nz/_data/assets/pdf_file/0022/348070/Retail-Payment-System-Consultation-on-our-proposal-to-recommend-designation-of-the-interbank-payment-network-27-March-2024.pdf).

⁹¹ See “Retail Payment Systems: Consultation on our proposal to recommend designation of the interbank payment network” (27 March 2024) at [X13] and [X14].

92. The above said, we consider it is likely that, in the absence of the Proposed Arrangement, regulatory intervention will occur [] through the introduction of the CPD Bill by MBIE and/or potential network designation by the Commission (and the subsequent development of regulations under the network designation). We consider that:
- 92.1 an accreditation regime created under the CPD Bill could serve as an alternative counterfactual to the bilateral partnering, at least in relation to Third Party access to “mandatory data”. Although there is a degree of uncertainty associated with the timeframes for later stages of the CPD Bill, we consider that there is a realistic likelihood of an accreditation regime under the CPD Bill coming into effect []; and
- 92.2 while the Minister could recommend network designation by [], any network designation in and of itself would not automatically impose any obligations on participants.⁹² Should the Minister recommend network designation on the current timeline, development of regulations may occur on potentially similar timeframes to the Proposed Arrangement.
93. Consequently, we consider that the likely counterfactual for the next 18 months to be bilateral partnering and regulatory intervention via CPD Bill and network designation.

The situation with the Proposed Arrangement – joint development process and Accreditation Scheme

Payments NZ's submissions

94. As discussed above, Payments NZ submits that if the Commission authorises the Proposed Arrangement, Standards Users would engage in the joint development process in order to reach agreement on an Accreditation Scheme (including accreditation criteria) and Standard Terms and Conditions. Payments NZ further submits that if agreement is reached in relation to these matters, API Providers and Third Parties will apply what has been jointly developed (although authorisation is not being sought for specific accreditation criteria or Standard Terms and Conditions).
95. Payments NZ submits that a wide range of benefits that could arise because of the Proposed Arrangement being authorised. The potential benefits include benefits to the API Centre and Standards Users, benefits to end customers, and benefits to the development of regulatory initiatives.⁹³ These

⁹² See “Retail Payment Systems: Consultation on our proposal to recommend designation of the interbank payment network” (27 March 2024) at [X10] and [X12.1], where we note that the CPD Bill is unlikely to resolve our concerns relating to timely delivery (given the time it will likely take for a banking designation to come into effect), and that a designation would be the minimum reasonable intervention required to encourage timely delivery and adoption of a thriving API enabled payment ecosystem.

⁹³ The Application at [161] – [166].

benefits will be discussed in detail as part of our assessment of benefits and detriments.

Interested parties' submissions

- 96. All parties generally indicated that it would be difficult to conclude on the extent to which parties involved in the joint development process are likely to reach agreement on the Accreditation Scheme (including accreditation criteria) and Standard Terms and Conditions. A range of views were expressed as to the success of the joint development process, including:
 - 96.1 the joint negotiation, after being authorised, may not result in any agreement that is likely to be:⁹⁴
 - 96.1.1 viable for Third Parties due to misaligned incentives between Third Parties and API Providers; and/or
 - 96.1.2 reached within a reasonable timeframe (eg, within a year as suggested by Payments NZ at paragraph 105 of the Application);
 - 96.2 the joint negotiation may result in agreement on some elements of the Proposed Arrangement (and would likely be viable for at least some Third Parties) within reasonable timeframes, but agreement may not be reached on more contentious issues such as liability allocation and the pricing structure and principles;⁹⁵ and
 - 96.3 the joint negotiation may result in agreement on most (or all) elements of the Proposed Arrangement (and would likely be viable for at least some Third Parties) within reasonable timeframes.⁹⁶

⁹⁴ For example, see

[
],
[

], and Akahu submission in response to Statement of Preliminary Issues (26 February 2024) at page 3 – Akahu submitted that the API Centre's process to agree standard terms would be lengthy (requiring multiple levels of approval, including from Payments NZ's board which makes the final decision to approve or reject major API Centre decisions) and uncertain (there is no certainty that banks and Third Parties would reach agreement on standard terms, and even if the terms are agreed there is no certainty they would be economically viable for Third Parties).

⁹⁵ For example, see

[
].

⁹⁶ For example, see

[
].

Our assessment

- 97. If we authorise the Proposed Arrangement, the evidence before us suggests that there are three potential factual scenarios:
 - 97.1 **No success:** parties not reaching agreement on sufficient elements of the Accreditation Scheme and Standard Terms and Conditions for the Proposed Arrangement to be implemented within a reasonable timeframe, which in our view is within 18 months.⁹⁷ As discussed at paragraphs 150 to 153 below, the conflict of interest arising from the Proposed Arrangement's decision making processes increases the risk of no success;
 - 97.2 **Minimum elements agreed:** parties reaching agreement on sufficient elements (ie, at least on the minimum requirements) of the Accreditation Scheme and Standard Terms and Conditions for the Proposed Arrangement to be implemented within 18 months (ie, API Providers would be required to contract with accredited Third Parties using the Standard Terms and Conditions); and
 - 97.3 **All elements agreed:** parties reaching agreement on all elements of the Accreditation Scheme and Standard Terms and Conditions, such that the Proposed Arrangement is implemented within 18 months (ie, API Providers would be required to contract with accredited Third Parties using the Standard Terms and Conditions).
- 98. While the benefits and detriments discussed in this draft determination are likely to vary in magnitude (ie, the more elements of the Proposed Arrangement parties reach agreement on, the more pronounced the likely benefits and detriments will be), we consider that our analysis of benefits and detriments is unlikely to fundamentally change as long as parties reach sufficient agreement for the Proposed Arrangement to be implemented.
- 99. As such, we have assessed the potential benefits and detriments arising from the Proposed Arrangement on the basis that sufficient agreement is reached. For completeness, at the end of our assessment of benefits and detriments, we also briefly consider the "no success" alternative factual scenario – where parties do not reach sufficient agreement for the Accreditation Scheme and Standard Terms and Conditions to be applied. However, ultimately, it is out of scope for us to make assumptions as to the outcome of the negotiation (ie, whether the Proposed Arrangement is successful or not), or in respect of the specific terms of any jointly negotiated agreement.⁹⁸

⁹⁷ Payments NZ in The Application at [85] envisages that the Accreditation Scheme and Standard Terms and Conditions could be jointly developed and agreed to within 12 months. We make an allowance of an additional 6 months.

⁹⁸ Application by Port of Newcastle Operations Pty Limited (No 2) [2022] ACompT 1, at [42] – [52].

Our assessment of benefits and detriments

100. The Commission will grant authorisation if it is satisfied, on the evidence before it, that the proposed conduct will result, or will be likely to result, in a benefit to the public that would outweigh the lessening in competition and/or effect of any cartel provision.⁹⁹ In making this assessment, the Commission considers the quality of the evidence and makes judgements about how much weight to give to the evidence.
101. In *Godfrey Hirst*, the Court of Appeal observed that the Commission must consider a broad range of benefits and detriments in applications for authorisation. This may include efficiencies and non-economic factors.¹⁰⁰
102. In particular, the Court of Appeal indicated that the Commission must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits. The Court stated that “[w]here possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform quantitative analysis of qualitative variables.”¹⁰¹
103. The Commission’s approach is to quantify benefits and detriments to the extent that it is practicable to do so.¹⁰² Regarding the weight that can be given to qualitative factors, the Court of Appeal said in *Godfrey Hirst* that “[q]ualitative factors can be given independent and, where appropriate, decisive weight”.¹⁰³
104. The Court of Appeal in *NZME* confirmed that the Act allows the Commission to apply a ‘modified total welfare’ approach but does not require us to do so. A modified total welfare approach can take into account the distributional effects of benefits and detriments within a community.¹⁰⁴ In this case, no party has proposed to depart from the total welfare approach and the Commission does not propose to do so of its own motion given that it does not appear that it would affect our decision to grant authorisation.
105. Detriments arise if a market experiences a loss in allocative, productive or dynamic efficiency:

⁹⁹ Authorisation Guidelines at [14.2].

¹⁰⁰ *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 (CA) at [24] and [31] (*Godfrey Hirst*).

¹⁰¹ *Godfrey Hirst* at [36].

¹⁰² *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447; Air New Zealand at [319]; and *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington API68/96 (16 December 1996) at [47] to [48].

¹⁰³ *Godfrey Hirst* at [38].

¹⁰⁴ *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA) at [75]; and see Authorisation Guidelines at [84].

- 105.1 Allocative efficiency is lost when inefficient (higher) prices result in less preferred alternatives for consumers or to the purchase of smaller quantities by consumers.
- 105.2 Productive efficiency is lost when resources are inefficiently employed in production, typically increasing costs above efficient levels. This could manifest in higher fixed or unit costs.
- 105.3 Dynamic efficiency is typically lost when the incentive or the ability to efficiently innovate/invest is reduced.

Potential benefits

- 106. Payments NZ submits that a wide range of benefits could arise as a result of the Proposed Arrangement being authorised. Payments NZ groups the potential benefits into three categories:
 - 106.1 **benefits to the API Centre and Standards Users:** the Proposed Arrangement if authorised is likely to facilitate a more well-utilised, secure, and innovative open banking framework in New Zealand;¹⁰⁵
 - 106.2 **benefits to consumers:** the Proposed Arrangement if authorised would bring benefits to consumers in the form of open banking, which would, among other things, allow Third Parties to offer a wider variety of open banking services;¹⁰⁶ and
 - 106.3 **benefits to the CPD Bill:** the Proposed Arrangement if authorised could help provide insights (eg, clarify the policy context) that could be beneficial for further regulation.¹⁰⁷
- 107. We do not consider that the “benefits to consumers” in the form of open banking are relevant to our assessment of the Proposed Arrangement as they are too remote:
 - 107.1 The Proposed Arrangement includes a joint negotiation process that, if successful, will help facilitate open banking, but the Proposed Arrangement in and of itself cannot claim the benefits of open banking.
 - 107.2 Further, the Proposed Arrangement seeks to improve the efficiency of the API Services Market in anticipation that consumers will benefit from open banking services. We agree that open banking can deliver significant consumer benefits; however, the question is over the extent to which the Proposed Arrangement will deliver those benefits more directly. Our view is that it will (only) do so if there is more competition in the API Services Market. We consider it is therefore

¹⁰⁵ The Application at [161] – [166].

¹⁰⁶ The Application at [167] – [172].

¹⁰⁷ The Application at [173] – [177].

sufficient to focus on the API Services Market as this approach avoids the risk of double counting benefits as they pass through from API Services and Open Banking Services Markets to final consumers.

108. On the basis that there is agreement on at least minimum elements of the Proposed Arrangement, we consider that there are potential benefits largely based on productive efficiencies. We have grouped these benefits under the remaining categories identified by Payments NZ above:

108.1 With regards to benefits to the API Centre and Standards Users:

- 108.1.1 reduced transaction costs due to increased speed and certainty of the partnering process;
- 108.1.2 the development of better quality contract terms;
- 108.1.3 increased speed and certainty of the partnering process; and
- 108.1.4 improved bargaining power for Third Parties.

108.2 With regards to benefits to regulatory intervention (including the CPD Bill):

- 108.2.1 reduced costs and/or increased effectiveness of regulatory intervention.

Benefit to the API Centre and Standards Users - Reduced transaction costs and increased speed and certainty of partnering

Payments NZ's submissions

109. Payments NZ submits that the Proposed Arrangement, if authorised, will:

- 109.1 facilitate an increase in partnering between Standards Users and mitigate issues of inconsistency between different bilateral agreements;¹⁰⁸
- 109.2 increase the transparency, speed and certainty of the partnering process, and by enabling Third Parties to be involved, “understand what they need to do, where they need to be ... work through their costing [and] how long it will take them to get used to [the accreditation] criteria and follow secure business cases”;¹⁰⁹ and
- 109.3 speed up the subsequent adoption of APIs by Standards Users because, if successful, it will lead to an automatic binding

¹⁰⁸ The Application at [164].

¹⁰⁹ [].

agreement¹¹⁰ between an accredited Third Party and an API Provider.¹¹¹

- 110. We understand Payments NZ's submissions to mean that the Proposed Arrangement, if authorised, would reduce transaction costs associated with negotiating bilateral partnering arrangements due to efficiencies related to the joint development process for the Accreditation Scheme and Standard Terms and Conditions.
- 111. Payments NZ further submits that the Commission has previously authorised similar conduct in the context of collective bargaining and the Proposed Arrangement is analogous in that Third Parties and API Providers will collectively negotiate the terms and conditions on which Third Parties can access APIs from API Providers.¹¹²

Interested parties' submissions

- 112. Overall, most interested parties are of the view that the Proposed Arrangement will likely reduce transaction costs due to the increased speed and certainty of partnering even though parties say it is difficult to accurately quantify the exact transaction cost savings in dollar terms.
- 113. With regards to estimates of transaction costs incurred during bilateral negotiations:
 - 113.1 [] required
[
].¹¹³
 - 113.2 [] also notes the difficulty in estimating the transaction cost of the partnerships it reached with Third Parties. However,
[
].¹¹⁴
 - 113.3 [] estimates
[
] and
the cost is likely to increase. Negotiating and finalising terms and

¹¹⁰ API providers are expected to contract with accredited Third Parties on default terms unless both parties agree to deviate from the default terms.

¹¹¹ [].

¹¹² The Application at [86(b)].

¹¹³ [].

¹¹⁴ [].

conditions, especially around liability will likely involve several rounds of negotiations and revised terms being exchanged.¹¹⁵

- 113.4 [] estimates that the costs associated with ongoing negotiations with [] range between []
 []
]¹¹⁶

114. In relation to percentage estimates regarding transaction cost reductions that may arise with the Proposed Arrangement:

- 114.1 [] estimates that the Proposed Arrangement will reduce the costs of partnering with all API Providers by 60-80%. The cost reduction is largely arising from saving legal fees and opportunity costs as staff time can be committed to other activities. Utilising Standard Terms and Conditions (if their joint development is successful) will also make the process of partnering with an API Provider simpler, leading to further cost reductions.¹¹⁷
- 114.2 [] estimates that the Proposed Arrangement will result in transaction cost reduction of 50%. [] further estimated that the Proposed Arrangement coupled with regulatory developments in future (such network designation and/or the CPD Bill) will lead to reductions in transaction costs by [].¹¹⁸
- 114.3 [] estimates that a 40% reduction in operational costs will be realised with the implementation of the Proposed Arrangement, if successful, compared to the bilateral partnering model. [] estimate assumes that the Proposed Arrangement will streamline negotiations and integration efforts, reducing the need for bespoke solutions and lengthy discussions.¹¹⁹
- 114.4 Other Third Parties such as [] also believe that the Proposed Arrangement will lead to reduced costs for partnering (eg, legal fees, time spent on negotiations). However, no estimates of transaction cost reductions were able to be provided.¹²⁰ Equally, API Providers [] expect the Proposed Arrangement to bring about transaction cost savings due to partnering

¹¹⁵ []

[].

¹¹⁶ []

[].

¹¹⁷ []

[].

¹¹⁸ []

[].

¹¹⁹ []

[].

¹²⁰ []

[], [], [], [], [], [].

[]

[].

[]

[].

being easier and more efficient, however, they were also unable to provide specific estimates of transaction cost reductions.¹²¹

- 114.5 [] notes that if joint development is successful, the Accreditation Scheme and Standard Terms and Conditions could standardise a lot of processes and make it easier for Third Parties to meet the base level of accreditation. [] overall views the Proposed Arrangement as a slight improvement to the status quo in relation to transaction costs.¹²²
- 114.6 [] note that the joint development process may speed up access to APIs by Third Parties.¹²³ [] notes specifically that the existence of Standard Terms and Conditions may speed up API uptake (as a result of a more efficient partnering process).¹²⁴

Our assessment

- 115. We consider, that in the absence of the Proposed Arrangement, the high transaction costs and inefficiencies of bilateral partnering would persist in the counterfactual.
- 116. The Proposed Arrangement facilitates a single negotiation process which all Standards Users can participate in. This should reduce transaction costs incurred by all parties (including legal costs, resourcing costs such as staff time and opportunity costs such as the ability to prioritise other innovative initiatives) and allow parties to achieve economies of scale in transacting by reducing duplicative negotiating scenarios.
- 117. A single, standard set of accreditation criteria could give Third Parties assurance that they will be entitled to partner with all the registered API Providers if they meet those criteria, thereby improving the speed of partnering and leading to reduction in overall transaction costs.
- 118. We consider that any reduction in transaction costs generated by the Proposed Arrangement would be most beneficial to Third Parties who have limited resources to conduct negotiations. With the Proposed Arrangement, these resources could instead be focussed on developing innovative products and services for consumers.

¹²¹ [], [], [].

¹²² [].

¹²³ [], [], [], [].

¹²⁴ [].

- 119. We acknowledge that in the bilateral partnering and regulatory intervention counterfactual, Third Parties may be able to access customer account data and/or payment initiation services via a banking designation under the CPD Bill or industry-led solution facilitated by network designation, which could serve as alternatives to bilateral partnering. However, as set out above, the CPD Bill is likely to be narrower in scope than the Proposed Arrangement as it only requires data holders to provide access to “mandatory data”¹²⁵. It is also unclear as to whether the scope of a network designation would extend to cover customer account data APIs.
- 120. As such, while the regulatory intervention in the counterfactual may generate some reduction in transaction costs incurred by both Third Parties and API Providers parties, the reduction in transaction costs would be delayed and less pronounced than with the Proposed Arrangement. In the absence of the Proposed Arrangement, Third Parties and API Providers would likely still be required to negotiate bilaterally on the elements that fall outside of the scope of regulation (eg data other than “mandatory” data and/or customer account data APIs). As such, the Proposed Arrangement would likely reduce transaction costs even when considering the potential of regulatory intervention occurring in the counterfactual.

Benefits to the API Centre and Standards Users – Transparent development of better quality contract terms

Payments NZ’s submissions

- 121. Payments NZ submits that the Proposed Arrangement will improve transparency in the partnering process as Third Parties will not face the same concerns around partnering in the factual compared to the counterfactual. In particular, Payments NZ submits that in the counterfactual, a Third Party raising complaints about an API Provider’s terms or processes could result in access to APIs being refused. It submits that in the factual, with the Proposed Arrangement, Third Parties will be able to confidently advocate for changes to the ecosystem without the fear that this could result in an API Provider refusing to partner with them.¹²⁶

Interested Parties’ submissions

- 122. Interested parties indicated that the joint development process would allow Standards Users to share their experiences and knowledge as a group, improving transparency and the quality of agreed contract terms.

¹²⁵ Includes both “designated customer data” and “designated product data” as data that would be required to be provided by a data holder if requested under “regulated data services”. See sections 8, 9, 10 and Part 2 of the Exposure Draft, available at: <https://www.mbie.govt.nz/assets/exposure-draft-customer-and-product-data-bill.pdf>

¹²⁶ The Application at [165].

- 122.1 [], [], and [] note that knowledge sharing will lead to a more collective industry driven solution that benefits from each firm's unique knowledge.¹²⁷
- 122.2 [] and [] note that through a collective process the views and circumstances of both Third Parties and API Providers will be better reflected within the contract terms while also making these more comprehensive.¹²⁸
- 122.3 [] and [] note that the joint negotiation leading to common standards help promote trust and certainty in the joint development process helping with predictability and consistency.¹²⁹
- 122.4 [] and [] both note that better standards are likely to be developed through the joint process.¹³⁰

Our assessment

123. We note and agree with interested parties that, if a minimum number or all elements are successfully agreed, the Proposed Arrangement will give rise to benefits including better and more transparent and predictable partnering terms, as compared to the bilateral partnering and regulatory intervention counterfactual. This is because:
- 123.1 the Proposed Arrangement will be industry led and therefore more comprehensive and consistent than individually negotiated bilateral partnering arrangements; and
- 123.2 when regulatory interventions are introduced, due to their scope, parties may still be required to negotiate bilaterally with regards to accessing API Services that fall outside the ambit of any regulation. For the same reason set out at paragraph 123.1, we consider that the Proposed Arrangement would likely result in the development of better quality contract terms compared to those that may be negotiated to complement regulatory interventions.
124. We consider that smaller Third Parties are particularly likely to benefit from better quality contract terms arising from the Proposed Arrangement as they may lack the ability, knowledge, or resources to effectively bilaterally negotiate partnering terms.

¹²⁷ [], [], [].

¹²⁸ [], [].

¹²⁹ [], [].

¹³⁰ [], [].

Benefits to the API Centre and Standards Users – Improved bargaining power for Third Parties

Payments NZ's submissions

125. Payments NZ submits that the Proposed Arrangement will provide a more level playing field on which Third Parties can compete and confidently advocate for changes to the open banking ecosystem without fear that this could result in an API Provider refusing to contract with them.¹³¹

Interested Parties' submissions

126. Some parties indicated that the Proposed Arrangement would reduce any imbalance in bargaining power between API Providers and Third Parties:

- 126.1 [], an API Provider with [] bilateral agreements with Third Parties, notes that the Proposed Arrangement gives Third Parties more bargaining power compared to bilateral negotiations. [] view is that the Proposed Arrangement leads to a transparent process and visibility over standard terms and conditions by all parties, which leads to more robust conversations between parties than bilateral contracts which are subject to non-disclosure agreements.¹³²
- 126.2 [] notes that a group environment should reduce the bargaining power of any single bank. [] view is that a group setting should counter banks' own commercial incentives as it believes that no bank wishes to be seen making unreasonable demands in front of other industry members.¹³³

127. However, other parties informed us that the imbalance of bargaining power between the API Providers and Third Parties will become entrenched if the Proposed Arrangement is authorised:

- 127.1 Akahu and [] submit that the inherent conflict of interest in Payments NZ's governance structure creates a significant risk that the interests of the API Providers are over-represented during the development of standardised terms.¹³⁴ Allowing open banking initiatives to be overseen by a conflicted Payments NZ will increase the power imbalance in favour of API Providers (ie, because there is an assumption held by these parties that the Payments NZ Board may be required to ultimately approve recommendations from the API Centre – which could include approving the Accreditation Scheme and Standard Terms and Conditions).¹³⁵

¹³¹ The Application at [165].

¹³² [].

¹³³ [].

¹³⁴ Akahu submission in response to Statement of Preliminary Issues (26 February 2024) at page 2, [].

¹³⁵ [].

- 127.2 Akahu further told us that it is difficult for Third Parties to advocate strongly on points that are not aligned with the banks' interests as doing so may jeopardise their ability to successfully negotiate a bilateral contract with each bank.¹³⁶
- 127.3 Akahu, [] and [] are of the view that banks have considerable resources (financial, legal, personnel, time) available to contribute to API Centre forums, whereas most Third Parties have limited resources. The outcome of the discussions consequently may inherently favour the banks compared to Third Parties, due to banks' having significantly more resource, and therefore, ability to have their views represented.¹³⁷ [] withdrew its involvement from the API Centre and API Council as it was difficult to influence banks at the API Centre level.¹³⁸
- 127.4 PaySauce, Squirrel, [], [] and [] note that the imbalance in bargaining power will continue (in favour of the banks) with the Proposed Arrangement as Third Parties are always at a disadvantage as banks are more vocal and likely to get what they want.¹³⁹

Our assessment

128. We acknowledge interested parties' differing opinions in how bargaining power between API Providers and Third Parties might change due to the Proposed Arrangement.
129. A traditional collective bargaining scenario usually involves a number of smaller entities grouping together to collectively bargain with a larger entity. In this scenario, there is usually a strong argument that this would likely result in a lessening of the imbalance of bargaining power between the parties.
130. However, we consider the Proposed Arrangement to be factually different from collective bargaining. Instead of allowing a number of Third Parties to group together and collectively bargain with individual API Providers (as would be the case under traditional collective bargaining), the Proposed Arrangement involves API Providers and Third Parties alike coming together to negotiate a partnering framework as an industry. The overall impact that

¹³⁶ Akahu submission in response to Statement of Preliminary Issues (26 February 2024) at page 3.

¹³⁷ Akahu submission in response to Statement of Preliminary Issues (26 February 2024) at page 2, [], and [].

¹³⁸ [].

¹³⁹ []; [], Squirrel submission in response to Statement of Preliminary Issues (26 February 2024) at page 2 and 3, PaySauce submission in response to Statement of Preliminary Issues at page 2, and [].

the Proposed Arrangement would have on the balance of bargaining power between parties is therefore unclear.

131. We currently understand:

- 131.1 There are inherently diverging incentives between Third Parties and API Providers.¹⁴⁰ We consider that the Proposed Arrangement is unlikely to change the inherently risk-averse approach which some API Providers take towards partnering with Third Parties (eg, setting relatively onerous criteria/terms).¹⁴¹
 - 131.2 API Providers often have more resources to participate in, and be heard at, negotiations while Third Parties often need to divert key staff away from their substantive work to participate.
 - 131.3 There is the potential for the Accreditation Scheme and Standard Terms and Conditions to be made API Standards (discussed further below).¹⁴² If this occurs, the API Centre Terms and Conditions will need to be amended. Given that only the Payments NZ Board can amend the API Centre Terms and Conditions, if the Accreditation Scheme and Standard Terms and Conditions became API Standards, their final approval would effectively need to be provided by the Payments NZ Board, which primarily consists of API Provider representatives.
 - 131.4 With the Proposed Arrangement, pricing will still need to be negotiated bilaterally between Third Parties and API Providers. This means that Third Parties may not be able to have a free and frank discussion of what they need from the partnering framework due to fear of retaliation by API Providers when pricing is eventually negotiated.
132. Based on the above, it is unclear whether, and if so how, the imbalance in bargaining power would likely change with or without the Proposed Arrangement under the joint development process. We therefore do not propose to place any weight on this as a benefit or detriment.

¹⁴⁰ []; [].

¹⁴¹ [].

¹⁴² Payments NZ response to request for information (21 May 2024), at page 2.

Benefits to future regulation (eg, CPD Bill) - Reduced costs and/or increased effectiveness of regulatory interventions

Payment NZ's submissions

- 133. Payments NZ submits that the CPD Bill process will benefit from the Proposed Arrangement because:¹⁴³
 - 133.1 it will result in a framework that would co-exist alongside or be complementary to the requirements implemented under the CPD Bill;
 - 133.2 it will help provide initial insights for the drafting of legislation based on developed industry standards; and
 - 133.3 even if the Proposed Arrangement is unsuccessful, key issues will have been identified and discussed during the joint development process, which could provide a basis for targeted intervention.¹⁴⁴

Interested Parties' submissions

- 134. Interested parties such as [], [] and []¹⁴⁵ consider the Proposed Arrangement to be complementary to any regulatory intervention introduced in the future (eg, by generating information which regulators could use for targeted intervention).

Our assessment

- 135. We agree with interested parties that the joint development process under the Proposed Arrangement is likely to be beneficial for any future regulatory intervention by reducing associated regulatory costs and/or increasing the effectiveness of any intervention, compared to the likely counterfactual where regulatory intervention would occur in the absence of the joint development process.
- 136. Under network designation, the Commission may have the ability to make changes to improve or remedy issues identified with any Accreditation Scheme and Standard Terms and Conditions created by industry.
- 137. With the Proposed Arrangement, regardless of the extent to which parties can reach agreement during the joint development process, any existing material will likely provide a good platform for regulators to advance their future work and may remove or reduce the need for regulators to consult as extensively on issues already identified, discussed and/or agreed to by the parties to the Proposed Arrangement. We consider that these benefits inherently arise out of the parties' participation in the joint development

¹⁴³ The Application at [173] – [177].

¹⁴⁴ The Application at [166].

¹⁴⁵ [], [], [], [].

process itself and will likely accrue whenever future regulatory interventions are substantively progressed.

Potential detriments

- 138. Interested parties have raised the following detriments in their submissions:
 - 138.1 the potential conflict of interest arising from the decision making processes associated with the Proposed Arrangement;
 - 138.2 delays in and/or reduced effectiveness of future regulatory intervention; and
 - 138.3 the scope of Proposed Arrangement does not cover the prices that Third Parties will be charged.
- 139. Payments NZ submits that there are two broad detriments to the public that could arise as a result of the Proposed Arrangement being authorised:
 - 139.1 Standards Users gaining insight into their competitors' business strategies;¹⁴⁶ and
 - 139.2 reduced incentive of API Providers to innovate and compete in relation to partnering criteria and terms and conditions.¹⁴⁷
- 140. We also consider additional detriments to be:
 - 140.1 the Proposed Arrangement has the potential to exclude Third Parties that fail to meet the accreditation criteria under the Accreditation Scheme from participating in the API Services Market; and
 - 140.2 Third Parties that do meet the accreditation criteria may still be subject to exclusion from the API Services Market through an API Provider applying for an exemption from applying the Accreditation Scheme and Standard Terms and Conditions to a Third Party, via the API Centre's exemption regime.
- 141. We consider the above detriments to be broadly categorised under allocative/productive inefficiencies and we discuss each of the detriments below.

¹⁴⁶ The Application at [157(a)].

¹⁴⁷ The Application at [157(b)].

Decision making processes resulting in an actual or perceived conflict of interest which may inhibit the benefits of the Proposed Arrangement

Payments NZ's view

- 142. Payments NZ submits that the proposed decision-making process for the Proposed Arrangement involves the following steps:¹⁴⁸
 - 142.1 The establishment of a new Accreditation and Partnering Working Group (which does not exist in the counterfactual) to jointly discuss, develop, and make recommendations in relation to the Accreditation Scheme and Standard Terms and Conditions. It is proposed that each Standards User (currently 17 Third Parties and seven API Providers) be eligible to appoint a representative.
 - 142.2 The draft terms and reference for the Accreditation and Partnering Working Group state:¹⁴⁹
 - 142.2.1 while the working group will assist the API Council and act on the instructions of the API Council, it has no decision making powers; and
 - 142.2.2 the Accreditation and Partnering Working Group will act on the instructions of the API Council as project sponsor.
 - 142.3 Recommendations made by the Accreditation and Partnering Working Group are put to a vote.
 - 142.4 Recommendations which receive majority support are escalated to the API Council:
 - 142.4.1 majority support means that the recommendation has been supported by 70% of those in attendance (with a quorum of two-thirds of all members), including at least half of the API Providers and half of the Third Parties; and
 - 142.4.2 if some Accreditation and Working Group members do not support a recommendation, the views of those members will be provided to the API Council, alongside majority's recommendation.
 - 142.5 The API Council will resolve matters for which it has been delegated authority or escalate matters for which it has not been delegated authority to the Payments NZ Board. The API Council currently consists of six Third Parties (two of whom are Visa and Mastercard), five API Providers, and three independent members.¹⁵⁰ However, up

¹⁴⁸ The Application at [102] and Confidential Appendix 11.

¹⁴⁹ The Application at Confidential Appendix 11, at page 11.

¹⁵⁰ The Application at Appendix 7.

to six registered API Providers, six registered Third Parties, and three independent members (one of whom is the chair) may be appointed to the API Council.¹⁵¹

142.6 Under the API Council Charter:¹⁵²

- 142.6.1 the API Council has been delegated authority from the Payments NZ Board for all matters in relation to the API Standards – including API development, API use by Standards Users, due diligence processes and the current template for bilateral partnering;
 - 142.6.2 the API Council does not have delegated authority in relation to the procurement of major outsourced providers or matters that require the API Centre Terms and Conditions to be amended;
 - 142.6.3 resolutions put to the API Council will be passed if (1) 70% of those in attendance cast their votes in favour of the resolution, and (2) representatives from at least two API Providers, two Third Parties and one Independent Member cast their votes in favour of the resolution; and
 - 142.6.4 any matter where there is an identified conflict of interest will be decided on by the three independent members of the Council.
- 142.7 the Payments NZ Board will resolve matters for which the API Council does not have delegated authority. Payments NZ has submitted that directors on the Payments NZ Board are required to act in the best interests of Payments NZ.¹⁵³
143. Payments NZ has told us that the application of both the Accreditation Scheme and the Standard Terms and Conditions could involve the procurement of outsourced providers to operationally manage and assess applications for accreditation. The Board would have ultimate responsibility for approving these outsourced providers (on recommendation from the API Council).
144. In addition, should the Standard Terms and Conditions and Accreditation Scheme become API Standards, the Payments NZ Board would be required to amend the API Centre Terms and Conditions to be in line with the new standards.¹⁵⁴ In essence this would mean that the Payments NZ Board is

¹⁵¹ With regards to the independent members of the API Council, we note that these members are appointed by the Payments NZ Board, however they are required, under the API Council Charter, to be suitably qualified and have no interest in any API Standards User and must be impartial.

¹⁵² API Council Charter.

¹⁵³ The Application at [26].

¹⁵⁴ Payments NZ response to request for information (21 May 2024) at page 2.

required to effectively approve the Standard Terms and Conditions and Accreditation Scheme.

145. Payments NZ has emphasised that for any amendment to be made to the API Centre Terms and Conditions there is a robust consultation process (the Board will only amend the terms after consulting with the API Council, or upon the recommendation of the API Council who will have, in turn, consulted with Standards Users), and a high threshold (the amendment must be necessary or desirable to promote the integrity, security and efficiency of the API Centre or the integrity, security and efficiency of Standardised APIs).¹⁵⁵
146. In response to interested parties' concerns about decision making processes, Payments NZ has told us:¹⁵⁶
 - 146.1 The Payments NZ Board consists of three independent directors, and eight shareholder appointed directors who are employees of the banks. Currently, all major decisions of the API Centre require Board approval before implementation. However, it is conceivable that the Board could delegate some of its functions, for example, requiring the three independent directors (only) to make decisions when necessary.¹⁵⁷
 - 146.2 The Board is bound by the Payments NZ constitution to act in the best interest of Payments NZ and not their own organisations.
 - 146.3 There has been no reported instance to date in which the Payments NZ Board has turned down a recommendation made by the API Council in consultation with the relevant working group. Under the Proposed Arrangement, the API Council will make recommendations to the Board in consultation with the Accreditation and Partnering Working Group.¹⁵⁸
 - 146.4 All Accreditation and Partnering Working Group members will sign a letter, binding them to the terms of reference for that working group, and accordingly will understand their obligations in respect of the joint development process. Under the current draft terms of reference for the Accreditation and Partnering Working Group, members must act in what they believe to be the best interests of the API Centre, act in accordance with the overall API Centre Terms and Conditions, and not make improper use of their position or information acquired as a result of their position to gain a direct or indirect advantage for

¹⁵⁵ Payments NZ response to request for information (21 May 2024) at page 2.

¹⁵⁶ Transcript of Payments NZ interview (19 March 2024) at pages 3 and 6.

¹⁵⁷ Transcript of Payments NZ interview (19 March 2024) at page 16.

¹⁵⁸ The Application at [37].

themselves or any other person or to cause detriment to Payments NZ or the API Centre.¹⁵⁹

Interested Parties' submissions

- 147. We received mixed evidence in relation to the decision making processes arising from the Proposed Arrangement.
- 148. The following parties are of the view that conflicts of interest may likely arise as between the Payments NZ Board, the API Council and/or within the Accreditation and Partnering Working Group:
 - 148.1 Numerous Third Parties such as [], [], [], [], [], [], Akahu, PaySauce and Dosh note that the Proposed Arrangement will legitimise and entrench the role of Payments NZ as an arbiter of disputes in the open banking ecosystem. They do not consider that this is ideal as the Payments NZ Board is already perceived to align itself with API Providers due to most Board members being employees of the banks. As a result, these Third Parties perceive Payments NZ to be conflicted.¹⁶⁰ Dosh, [] and [] note that an independent party/organisation should be appointed to oversee centralised accreditation.¹⁶¹
 - 148.2 [].¹⁶²
 - 148.3 [] notes that Visa and Mastercard, which are on the API Council, should be differentiated from other Third Parties as they are incumbents with incentives which are aligned more with the banks than the other fintech Third Parties (ie, Visa and Mastercard are not incentivised to promote competition and innovation from fintechs).¹⁶³
 - 148.4 Akahu and [] note that if standardised terms developed through the API Centre end up being adopted in consumer data rights

¹⁵⁹ The Application at Confidential Appendix 11, page 10.

¹⁶⁰ [], [], [], Akahu submission in response to Statement of Preliminary Issues (26 February 2024) at page 2; [], [], [], Dosh submission in response to Statement of Preliminary Issues at page 3, PaySauce submission in response to Statement of Preliminary Issues at page 2, [].

¹⁶¹ Dosh submission in response to Statement of Preliminary Issues at page 2; []; [].

¹⁶² [].

¹⁶³ [].

regulation, or other open banking-related regulation, the banks’ “over-influence” over these standard terms would persist.¹⁶⁴

149. However, the following interested parties are not concerned with either the decision making processes arising from the Proposed Arrangement or the associated governance structure of Payments NZ giving rise to a conflict of interest which may inhibit the benefits of the Proposed Arrangement:

149.1 [], a fintech, notes that it has not found any evidence that the API Council has done anything detrimental to Third Parties or made any decisions that favour the banks. It is satisfied to some extent with its current engagements with the API Centre as decisions or recommendations are made using moral suasion.
 []¹⁶⁵

149.2 Two API Providers [] told us that the Payments NZ Board acts in the best interest of Payments NZ (not the banks).¹⁶⁶ [] further notes that the presence of an independent chair and two independent directors are sufficient to deal with the perception of bias (which it considers does not exist).¹⁶⁷ [] also notes that the membership of the API Council is made up of different individuals from those making the decision around API onboarding on the banks’ side and that discussions within the API Council are not socialised back to the respective banks.¹⁶⁸

149.3 An API Provider and a fintech [] and [] concede that the governance structure has issues from a “perception perspective” and that concerns are “optically valid” but that Payments NZ is operationally impartial.¹⁶⁹

Our assessment

150. In the counterfactual, decision making processes and the governance structure of Payments NZ are not relevant due to bilateral partnering being an independent process where the negotiating parties have relative contractual freedom. However, the Proposed Arrangement introduces the Accreditation and Partnering Working Group whose recommendations must be considered by the API Council and/or the Payments NZ Board. We consider

¹⁶⁴ Akahu submission in response to Statement of Preliminary Issues (26 February 2024), at page 2;
 [].

¹⁶⁵ [].

¹⁶⁶ [] and [].

¹⁶⁷ [].

¹⁶⁸ [].

¹⁶⁹ [] and [].

that the actual or perceived conflict of interest arising from decision making processes may inhibit any potential benefits arising from the Proposed Arrangement and therefore result in a detriment.

151. Payments NZ's existing governance structure can be summarised as follows:

- 151.1 Payments NZ is owned by banks/API Providers.
 - 151.2 Payments NZ's shareholders (ie, its bank/API Provider shareholders) appoint its Board of Directors which currently consists of eight directors representing each of its bank shareholders and three independent directors. The Payments NZ Board makes final decisions in relation to recommendations for which the API Council does not have delegated authority. We understand, in relation to the Proposed Arrangement, that this could include the appointment of an outsourced provider to assess accreditation applications under the Accreditation Scheme and may also include effective final approval of the Accreditation Scheme and Standard Terms and Conditions. This is because, if the Accreditation Scheme and Standard Terms and Conditions are defined as API Standards (which is one option being considered by Payments NZ), the API Centre Terms and Conditions will need to be amended, and only the Payments NZ Board has authority to amend the API Centre Terms and Conditions.
 - 151.3 The Payments NZ Board of Directors makes appointments to the API Council and approves the annual business plan of Payments NZ (ie, has decision making powers over Payments NZ's planned strategic direction).
 - 151.4 The API Council has delegated authority from the Board in relation to the day-to-day activities of the API Centre.
 - 151.5 Standards Users are able to appoint representatives and participate in discussions in working groups at the API Centre (eg, business, technical). However, while these working groups support the work of the API Council, they do not have any actual decision making power.¹⁷⁰
152. The decision making process under the Proposed Arrangement creates risks that:
- 152.1 There may be a conflict of interest within the Payments NZ Board (ie, it may favour API Provider interests) when making decisions relating to the Proposed Arrangement (for example, which outsourced provider to appoint to assess accreditation applications, or when applying the threshold for amending the API Centre Terms and

¹⁷⁰ The Application at Confidential Appendix 11, at page 11; Business Working Group Terms of Reference, at page 3; Technical Working Group Terms of Reference, at page 3.

Conditions – ie, that the amendment needs to be necessary or desirable to promote the integrity, security and efficiency of the API Centre or the integrity, security and efficiency of Standardised APIs);

- 152.2 Third Parties may not have the confidence to participate fully in the development of the Accreditation Scheme and Standard Terms and Conditions under Proposed Arrangement, due to belief that the Payments NZ Board may favour the API Providers when making decisions. This creates a risk that the joint development of the Accreditation Scheme and/or Standard Terms and Conditions might stall or be unduly delayed, which in turn undermines the benefits that would otherwise flow from the Proposed Arrangement.
- 152.3 Third Parties may not be satisfied with the outcomes of the Proposed Arrangement and may choose not to become accredited in favour of continuing to bilaterally negotiate with API Providers. As a consequence, the benefits of the Proposed Arrangement may not be realised.
- 153. Payments NZ's decision making processes (and associated governance structure) therefore generate a concern that the Payments NZ Board (and to a lesser extent the API Council) may be conflicted and therefore unlikely:
 - 153.1 to initiate or agree to proposals relating to the Proposed Arrangement that may not be in the best interests of the API Providers; and/or
 - 153.2 to use the Proposed Arrangement as an avenue to block or frustrate (eg, by delaying) proposals relating to the partnering framework that are not aligned with API Providers' incentives.
- 154. While Payments NZ has set out some measures to provide balanced representation and voting rights within the Accreditation and Partnering Working Group, that group does not have any actual decision making power (consistent with how other working groups are treated). The decision making power for the Proposed Arrangement lies with the Payments NZ Board and/or the API Council. Specifically, Payments NZ has confirmed that the API Council does not have delegated authority from the Board in relation to the procurement of major outsourced providers or matters that require the API Centre Terms and Conditions to be amended. It has further stated that:
 - 154.1 the Board may be required to appoint an outsourced provider, at least in relation to the Accreditation Scheme; and
 - 154.2 should the Accreditation Scheme and Standard Terms and Conditions be made API Standards (which is one option being considered by Payments NZ), the Board would have effective final approval over the

scheme and terms due to the API Centre Terms and Conditions requiring amending to reflect the new API Standards.¹⁷¹

- 155. While we understand that there have to date been no reported instances of the Payments NZ Board not approving recommendations made by the API Council or other existing working groups in the counterfactual, we consider that the potential recommendations to be made to the Board under the Proposed Arrangement are likely to be significantly more contentious than recommendations made by the Business Working Group or Technical Working Group. For example, we understand that existing working groups have not discussed matters such as liability allocation to date due to perceived risks under the Act.
- 156. Under the Proposed Arrangement, there may be a higher likelihood of a conflict of interest arising through the decision making process because decisions will be required to be made by both the Payments NZ Board and the API Council as a result of recommendations from the Accreditation and Partnering Working Group (which would not exist in the counterfactual). The conflict of interest also increases the risk that recommendations made by the Accreditation and Partnering Working Group may be blocked or delayed by the decision-making bodies favouring API Providers. As a result of this conflict of interest, it appears that API Providers have control over final decisions made with regards to the partnering framework, and Third Party interests may not be sufficiently taken into account when compared to the counterfactual. This could inhibit the benefits that would potentially arise from the Proposed Arrangement.
- 157. In the counterfactual, any due diligence process and terms would be negotiated between the relevant API Provider and Third Party, without Payments NZ having final say over the entry threshold (ie, the accreditation criteria) and terms to be automatically applied to partnering.
- 158. We understand regulatory interventions may either remove or remedy the conflict of interest currently associated with the Proposed Arrangement. Accordingly, we anticipate there being a significant reduction in this detriment once regulation is introduced, which we anticipate to be []. For example, we understand that Payments NZ may not have a formal role under the CPD Bill, and the CEO of MBIE would have to sign off on any API Standards created.¹⁷²

Exclusion of Third Parties via the accreditation criteria and API Centre's existing exemption regime

¹⁷¹ Transcript of Payments NZ interview (19 March 2024) at pages 13 and 16.

¹⁷² Transcript of MBIE interview (11 March 2024) at page 11.

Payments NZ's submission

- 159. Payments NZ submits that the Proposed Arrangement involves parties that compete on a number of levels agreeing on the entry conditions for Third Parties.
- 160. As such, parties could be excluded from partnering and therefore accessing API Services and participating in the relevant markets in two ways:
 - 160.1 the Accreditation Scheme, which will exclude Third Parties that cannot meet the agreed accreditation criteria,¹⁷³ and
 - 160.2 the use of the API Centre's existing exemption regime,¹⁷⁴ which allows API Providers to apply for an exemption to not partner with Third Parties (for unspecified reasons) who meet the jointly developed accreditation criteria.¹⁷⁵
- 161. Payments NZ further submits that an API Provider could still decide to (but will not be required to) contract with a Third Party who does not meet the accreditation criteria. Such contracting could occur on terms and conditions that the API Provider and Third Party agree.¹⁷⁶

Interested parties' submissions

- 162. Interested parties did not make any submissions in relation to this point.

Our assessment

- 163. As discussed under jurisdiction, we agree with Payments NZ that the Proposed Arrangement has the potential to exclude Third Parties from the API Services Market and potentially also from the Open Banking Services Market via the Accreditation Scheme and/or through an API Provider's use of exemption regime. We consider this to be a detriment.
- 164. In relation to exclusion via the Accreditation Scheme, a Third Party could be excluded through:
 - 164.1 High standards for accreditation being set that may be difficult for most Third Parties to meet.
 - 164.1.1 There is a real chance that high standards for accreditation may be set, as API Providers have significantly more resources, and therefore ability, to have their views represented in the joint development process compared to

¹⁷³ The Application at [10].

¹⁷⁴ The exemption regime states that the API Provider would not have to automatically enter into the jointly developed Standard Terms and Conditions with Third Parties if granted the exemption.

¹⁷⁵ The Application at [88b].

¹⁷⁶ The Application at [101].

- Third Parties (many of whom have limited resources for participation in the process).
- 164.1.2 Additionally, as noted earlier, there are inherently diverging incentives between Third Parties and API Providers.¹⁷⁷ API Providers are incumbents in the provision of banking services while Third Parties are challengers in the respect of some of these services (for example, those relating to the Open Banking Services Market). This competitive tension could be used by API Providers to set high standards for accreditation in order to minimise the potential competitive threat from Third Parties.
- 164.2 The inherent perceived or actual conflict of interest in decision making associated with the Proposed Arrangement not providing sufficient safeguards to mitigate the diverging incentives between API Providers and Third Parties when developing the Accreditation Scheme.
- 164.2.1 If API Providers decide to recommend unduly high standards for the Accreditation Scheme, we consider it unlikely that such a recommendation would be turned down. This is because, should the Accreditation Scheme become an API Standard, the Payments NZ Board would have effective final approval over the scheme due to the API Centre Terms and Conditions requiring amendment. Payments NZ has told us that the threshold for amendment is high (the amendment must be necessary or desirable to promote the integrity, security and efficiency of the API Centre or the integrity, security and efficiency of Standardised APIs) therefore it follows that if the Accreditation Scheme were to become an API Standard, the Payments NZ Board may require the accreditation criteria to be set conservatively.
- 164.2.2 Additionally, we understand that it is the Board who would procure an outsourced provider to assess accreditation applications (due to the API Council not having delegated authority).
- 164.2.3 Consequently, the above is seen as a significant conflict of interest by Third Parties, and we consider that this could ultimately lead to their exclusion from the partnering framework via the Accreditation Scheme.
- 164.3 Having delayed bilateral negotiations with an API Provider due to seeking (but not obtaining) accreditation, some Third Parties who fail to meet the eventual accreditation criteria (ie, who are excluded via

¹⁷⁷ []; [].

the Accreditation Scheme) may subsequently be further excluded. This is due to having delayed progressing their bilateral negotiations with API Providers, while seeking to become accredited.

165. In relation to exclusion via an API Provider's use of the exemptions regime:

165.1 Even if Third Parties meet the accreditation criteria, the API Centre's existing exemption regime may be used by API Providers to exempt them from applying the Accreditation Scheme and Standard Terms and Conditions and to deny accredited Third Parties automatic access to API Services.

165.2 We understand from Payments NZ that an API Provider must apply for the exemption. However, as discussed above, the governance and decision making processes at the API Centre are marred with conflict of interest concerns.

165.3 The ability for API Providers to apply to exemption could serve to discourage Third Parties from:

165.3.1 participating in the Proposed Arrangement – as meeting the accreditation criteria may not in fact guarantee automatic partnering with an API Provider on the Standard Terms and Conditions, if that API Provider has been granted an exemption; and/or

165.3.2 becoming accredited, as Third Parties could invest resources to meet the accreditation criteria but be denied partnering due to an API Provider being exempt.

166. In summary, we consider the exclusion of Third Parties through the Accreditation Scheme and/or the use of exemption regime to be a detriment as:

166.1 conservative accreditation criteria or the exemptions regime may be used to block or frustrate Third Parties from accessing API Services; and

166.2 Third Parties require access to API Services from all the major banks to achieve sufficient coverage and have commercially viable use-cases. If one of the larger API Providers is exempted from providing API services to a Third Party that meets the accreditation criteria, the use-case may become unviable due to lack of scale.

167. Moreover, we consider that this detriment is a further example of how the conflict of interest in the decision making processes associated with the Proposed Arrangement may inhibit the realisation of any potential benefits from the Proposed Arrangement.

Delays in open banking initiatives and/or reduced effectiveness of future regulatory intervention

Payments NZ's submissions

168. Payments NZ did not make any submissions in relation to potential delays to regulatory intervention and open banking initiatives. It considered the Proposed Arrangement as overall beneficial and likely complementary to possible regulatory intervention.¹⁷⁸

Interested parties' submissions

169. We received the following submissions in respect of this point:

169.1 [] and [] told us that authorising the Proposed Arrangement could delay regulatory intervention and open banking initiatives as it might give regulators a false sense of expectation that something is being done regarding API access for Third Parties.¹⁷⁹

169.2 [] and [] raised a concern that undesirable aspects of an industry solution (which might be sub-optimal) might be adopted by regulators as part of future regulatory intervention.¹⁸⁰ [] further notes that Payments NZ's primary focus is on payments, and it would not have the desire or expertise to set efficient standards relating customer account data APIs.¹⁸¹

Our assessment

170. We consider it unlikely that the Proposed Arrangement would be used to delay regulatory intervention or formalise a sub-optimal industry solution as:

170.1 the evidence we have gathered to date indicates that the process and timeframes for the CPD Bill and potential network designation are independent of the Proposed Arrangement and any authorisation;¹⁸² and

170.2 while there is potential for regulatory intervention to consider any existing industry solutions, we understand that the CPD Bill and potential network designation will seek to improve or build upon any industry-led solution, rather than simply adopting what the industry has created.¹⁸³

¹⁷⁸ The Application at [175].

¹⁷⁹ [] and [].

¹⁸⁰ [] and [].

¹⁸¹ [].

¹⁸² [].

¹⁸³ [].

The Proposed Arrangement excluding pricing

Payments NZ's submissions

171. Payments NZ states that the scope of the authorisation involves discussing and agreeing matters that will influence prices such as pricing structure and pricing principles in the Standard Terms and Conditions.¹⁸⁴

Interested Parties' submissions

172. Interested parties informed us that the scope of the Application does not deal with pricing, security and insurance. We understand that within bilateral negotiations, pricing, security and liability/insurance are usually the sticking points and their exclusion may stall effective partnering.
- 172.1 [] and Akahu told us that the exclusion of pricing from the Proposed Arrangement is likely to result in API Providers offering themselves favourable pricing compared to prices offered to fintechs/Third Parties.¹⁸⁵ We understand from the Application that API Providers may also be Third Parties.

Our assessment

173. The Commission's role when assessing applications for authorisation is only to determine whether a proposed arrangement would result in a sufficient public benefit to outweigh the competitive harm arising from the arrangement.¹⁸⁶ The purpose of the authorisation regime is to exempt the conduct defined in the application from certain provisions of Part 2 of the Act. It is the applicant who defines the conduct for which authorisation is sought.¹⁸⁷
174. Payments NZ sets out in its Application that it is not seeking authorisation for the specific content (ie, the substantive wording and terms) of the Accreditation Scheme and Standard Terms and Conditions, eg, price.¹⁸⁸
175. Consequently, while we acknowledge interested parties' concern, we consider that we are unable to consider the exclusion of pricing as a detriment arising from the Proposed Arrangement. This is because the exclusion of pricing arises both with and without the Proposed Arrangement – parties are required to negotiate pricing bilaterally in both the factual and counterfactual. As such, should the exclusion of pricing be a detriment, it does not arise from the Proposed Arrangement. Additionally, we note pricing

¹⁸⁴ The Application at [113(e)].

¹⁸⁵ []; Akahu submission in response to Statement of Preliminary Issues (26 February 2024), at page 3.

¹⁸⁶ *Authorisation Guidelines* at [4].

¹⁸⁷ *News Publishers' Association of New Zealand Incorporated* [2022] NZCC 35, at [75]-[77], adopting the approach taken by the Australian Competition Tribunal in *Application by PNO (No.2)* [2022], at [50]-[52]; *New Zealand Tegel Growers Association Incorporated* [2022] NZCC 30 at [54]-[55].

¹⁸⁸ The Application at [84].

would be a specific provision of the Standard Terms and Conditions – which is outside the scope of the Application and therefore our assessment.

Standards Users gaining insight into their competitors' business strategies

Payments NZ's submissions

176. Payments NZ submits that Standards Users who participate in the joint development process will inevitably get some degree of insight into their competitors' business strategies. Payments NZ submits that this will be limited, but it will be possible for Standards Users to infer, from the positions taken by others in relation to matters that arise, how their competitors might approach aspects of their businesses.¹⁸⁹

Interested parties' submissions

177. Interested parties did not make any submissions in relation to this point.

Our assessment

178. Payments NZ told the Commission that it does not expect any disclosure of confidential or commercially sensitive information to occur as part of the joint development process, referencing the protocols that will govern how parties interact (eg, reminding participants about their obligations under the Act, taking meeting notes and providing competition law advice during meetings).¹⁹⁰
179. While the exchange of commercially sensitive or confidential information between competitors as part of the joint negotiation process would likely constitute a detriment, if Payments NZ employs the protocols described above (and it has indicated will be the case), we consider that the impact of this detriment is likely to be mitigated to some extent. As such, we propose placing less weight on this detriment in our analysis.

Reduced incentive of API Providers to innovate and compete on partnering criteria and terms and conditions

Payments NZ's submissions

180. Payments NZ submits that the Proposed Arrangement could have the potential to dampen the incentive of API Providers to innovate in relation to the criteria and terms and conditions they use to facilitate partnering. For example, Payments NZ submits that currently, API Providers have incentives to offer or negotiate terms to grow third party relationships that will benefit their business (eg, through achieving a return on investment and customer benefit protections) and their customers (eg, protections through offering an

¹⁸⁹ The Application at [157a].

¹⁹⁰ Transcript of Payments NZ interview (19 March 2024) at page 2.

alternative to screen scraping). With the Proposed Arrangement, it submits that these incentives may be reduced.¹⁹¹

Interested Parties' submissions

181. [] informed us that the Proposed Arrangement may result in lower quality APIs being developed due to lack of innovation by banks. Third Parties have to work within the capabilities of API Providers or what banks can allow.¹⁹²

Our assessment

182. We consider that the widespread use of a jointly agreed partnering framework could remove or reduce incentives for API Providers to innovate in relation to offering Third Parties more attractive partnering criteria. Without the Proposed Arrangement, API Providers should theoretically compete to offer Third Parties partnering criteria and/or terms and conditions for partnering.
183. However, we consider that in practice, the Proposed Arrangement is unlikely to result in a significant reduction in API Providers' incentives to innovate and compete in relation to partnering criteria and terms and conditions when compared to the bilateral partnering and regulatory intervention counterfactual. This is because it does not appear that API Providers currently have significant incentives to compete and innovate on their offerings to Third Parties, both in the counterfactual and factual scenarios. [] indicated that
[
] ¹⁹³
184. Moreover, in the bilateral partnering and regulatory intervention counterfactual, once regulation is introduced, there is the potential for regulatory intervention to further reduce innovation and competition in relation to partnering criteria and terms and conditions as parties would be able to rely on any regulation setting out criteria or mandatory terms as a backstop. At this point, any detriment associated with reduced innovation and competition in relation to partnering criteria and terms and conditions would no longer arise from the Proposed Arrangement.
185. In light of the above, we do not intend to place significant weight on this detriment as we consider that is likely to have limited impact when comparing the scenarios with and without the Proposed Arrangement.

¹⁹¹ The Application at [157b].

¹⁹² [].

¹⁹³ [].

Potential benefits and detriments should the joint development process be unsuccessful

- 186. If the joint development process were unsuccessful (ie, no sufficient agreement on terms within a reasonable timeframe of 18 months), we consider it likely that the Proposed Arrangement may still generate benefits with regard to:
 - 186.1 **The development of better quality contract terms:** For all Standards Users, the development of better quality contract terms is a benefit inherently arising out of parties' participation in the joint development process itself, and is therefore not dependent on the success of the joint negotiation process.
 - 186.2 **Knowledge sharing for future partnering:** If the joint development process were unsuccessful, Third Parties would still be able to resume or commence bilateral negotiations with API Providers with the benefit of additional knowledge gained from the joint development process (including with regards to the expectations of API Providers and other Third Parties). However, we note that there would likely have been a stalling of bilateral negotiations while parties participated in the Proposed Arrangement – which would be detrimental compared to the counterfactual. This is discussed further below.
 - 186.3 **Reduced costs and/or increased effectiveness of regulatory interventions:** For regulators, the identification and discussion of issues that can be folded into any eventual legislation or policy if there is sufficient agreement. For example, accreditation thresholds (including insurance levels) and the correct setting for terms such as pricing (including what pricing structure might be appropriate), cybersecurity and liability.
- 187. If the joint development process were unsuccessful, we consider it likely that the Proposed Arrangement may still generate some detriment:
 - 187.1 **in relation to transaction costs:** All Standards Users would have invested their time and resources participating in a joint development process which would, in effect, leave them no better off (or potentially even worse off due to wasted resource) than they would have been in the bilateral partnering with regulatory intervention counterfactual.
 - 187.2 **in relation to conflict of interest:** The detriment arising from this dynamic would not arise because no recommendations would be made for approval by the potentially conflicted Payments NZ Board.
- 188. Ultimately, in the alternative factual scenario where parties do not reach any agreement, we consider both potential benefits and detriments arising from the Proposed Arrangement are likely to be reduced. We have taken this into account in our overall balancing exercise.

Balancing of benefits and detriments

189. On the basis of the available evidence, our preliminary view is that, while we consider that there may be benefits associated with the Proposed Arrangement, we are not satisfied that a net public benefit will likely materialise. This is primarily due to the conflict of interest arising from the Proposed Arrangement's decision making processes and the potential for that conflict of interest to undermine the benefits that might otherwise flow from the joint development of the Accreditation Scheme and the Standard Terms and Conditions.
190. We sought information and data from parties to help us try to quantify the potential benefits and detriments of the Proposed Arrangement in the scenarios where negotiations are at least minimally successful. Some of the information and data we sought included:
- 190.1 how long partnering takes currently (ie, bilateral partnering, reflecting the situation without the Proposed Arrangement) and how long partnering might take should the Proposed Arrangement be successful; and
 - 190.2 the estimated costs of bilateral partnering currently and how such costs (financial, speed of partnering) might be impacted by the Proposed Arrangement.
191. However, the responses we received were relatively limited and we are unable to quantify the benefits or make plausible assumptions to generate quantifiable benefits. Given the different business models of Standards Users, we are not in a position to generalise the transaction cost reduction across the open banking ecosystem. However, it is clear that the reduction in transaction costs is likely to be substantial.
- 191.1 Only three parties provided estimates of the likely benefits of the Proposed Arrangement. For instance, [] estimated a reduction in transaction costs of around 50%-75%; [] estimated a reduction of 60-80% and [] estimated a 40% reduction in transaction costs.¹⁹⁴ Additionally, we note these parties were unable to estimate the exact dollar amount that may be reduced through the Proposed Arrangement and were only able to provide an estimated percentage reduction in transaction costs. Assuming a transaction cost reduction of 40%:

¹⁹⁴ [], [], [].

191.1.1 [] could potentially save between [] in transaction costs on each bilateral agreement.¹⁹⁵

191.1.2 [] could potentially save [] in transaction costs.¹⁹⁶

191.1.3 [] could save approximately [] in transaction costs for several of its agreements with Third Parties over time.¹⁹⁷

- 191.2 No estimates were provided by regulators in respect of the impact of the Proposed Arrangement on regulatory costs/effectiveness of regulatory interventions. However, based on what we have heard from interested parties, we consider that the joint development process is likely to be beneficial for future regulatory intervention by reducing, for example, costs associated with extensive industry consultation as compared to the counterfactual. Avoiding or minimising some of these types of regulatory costs generate a public benefit as these resources could be productively deployed on other activities.
- 191.3 Parties were also unable to estimate the percentage improvement in the speed at which API Services will be provided as a result of the Proposed Arrangement, compared to the counterfactual. However, the overall view was that the Proposed Arrangement would improve the speed at which API Services may be provided.

- 192. Given the difficulty in producing quantitative estimates for several of the likely impacts of the Proposed Arrangement, we have made our assessment qualitatively in accordance with the Court of Appeal's decision in *Godfrey Hirst* to enable us to reach a view on the likely net public benefit.
- 193. We consider that the Proposed Arrangement could potentially generate the following public benefits (as assessed qualitatively) if the joint negotiation process under the Proposed Arrangement is successful, and the Accreditation Scheme and Standard Terms and Conditions are applied to Standards Users:
 - 193.1 reduced transaction costs and increased speed and certainty of partnering;
 - 193.2 the development of better quality contract terms; and

¹⁹⁵ [].

¹⁹⁶ [].

¹⁹⁷ [].

- 193.3 reduced costs and/or increased effectiveness of regulatory intervention.
194. However, in accordance with our authorisation framework, the public benefits set out above need to be weighed against the detriments arising from the Proposed Arrangement. Based on the evidence we have received, we consider the potential conflict of interest arising from the decision making processes under the Proposed Arrangement creates a significant risk to successful negotiation.
195. The potential conflict of interest from the Proposed Arrangement's decision making processes might lead to API Provider interests being favoured over Third Party interests in the creation of the Accreditation Scheme and Standard Terms and Conditions. Strong concerns about the Proposed Arrangement's decision making processes (including Payments NZ's governance structure) have been raised by Third Parties who are members of the API Centre as well as non-registered organisations [].
196. In undertaking our balancing exercise, we placed weight on the evidence of registered Third Parties as they have witnessed firsthand the deliberations at the API Centre and their participation in the Proposed Arrangement is essential for the joint development process.¹⁹⁸ We have also considered evidence provided by non-registered organisations¹⁹⁹ [],²⁰⁰ who have suggested that the conflict of interest issues arising out of the Proposed Arrangement's decision making processes may act as a disincentive for active participation at the API Centre and in the partnering project.
197. We are therefore not satisfied that the benefits would outweigh the detriments arising from the Proposed Arrangement. This is partly because:
- 197.1 The Payments NZ Board may be required to appoint an outsourced provider to assess accreditation applications. On this basis, it appears likely that the Payments NZ Board will have effective final approval regarding the Accreditation Scheme as well as the Standard Terms and Conditions. Although the scheme and terms will be jointly developed by the Accreditation and Partnering Working Group, we have been told that the scheme and terms may be made API Standards, which would require the API Centre Terms and Conditions to be amended. Given only the Payments NZ Board has authority to amend the API Centre Terms and Conditions, we understand that, ultimately, the

¹⁹⁸ The registered Third Parties include [].

¹⁹⁹ Including [].

²⁰⁰

[].

Board would have effective final decision making in relation to the Accreditation Scheme and Standard Terms and Conditions. The conflict of interest inherent in this decision making process increases the risk that the jointly developed Accreditation Scheme and Standard Terms and Conditions blocked or delayed by a decision making body that may be incentivised to favour API Providers, inhibiting the realisation of any of the potential benefits that would otherwise be expected from the joint development process. As a result of this conflict of interest, it appears that API Providers have control over final decisions made with regards to the partnering framework and Third Party interests may not be sufficiently taken into account when compared to the counterfactual.

- 197.2 There remains a risk that a Third Party may be unable to partner with an API Provider due to that API Provider successfully applying for exemption from the partnering framework under the API Centre's existing exemptions regime. While we understand from Payments NZ that an API Provider must apply for the exemption, as discussed above, the decision making processes at the API Centre are marred with conflict of interest concerns. Given that Third Parties require sufficient coverage for their services to be commercially viable, a successful exemption application by one API Provider impacts negatively on Third Parties' commercial viability. We consider the exemption regime:
 - 197.2.1 has the potential to dissuade Third Parties from participating in the joint development process; and
 - 197.2.2 likely inhibits the benefits from the Proposed Arrangement from being realised.

Proposed conditions

- 198. We must not grant authorisation if we are not satisfied that the public benefits from a proposed arrangement are likely to outweigh the detriments from the arrangement.²⁰¹ However, it is open to the Commission to grant authorisation subject to conditions if the conditions are not inconsistent with the Act and for such period as the Commission thinks fit.²⁰²
- 199. Payments NZ does not consider that there is a risk of conflict of interest arising from its current governance structure and decision making processes.
- 200. On balance, we are not satisfied that the expected benefits from the Proposed Arrangement would arise due to the risk of the conflict of interest inhibiting the realisation of those benefits. Therefore, we propose granting authorisation subject to the conditions set out and discussed below, some of

²⁰¹ Relevant to this draft determination, under sections 61(6) and (8) of the Act.

²⁰² Section 61(2) of the Act.

which entrench processes which have been proposed by the Applicant, and others which enhance the independence of the decision making process associated with the Proposed Arrangement. We consider that these conditions substantially reduce the risk of any actual or perceived conflict of interest within the decision making process associated with the Proposed Arrangement, which could inhibit any benefits identified as arising from the Proposed Arrangement:

200.1 In relation to the Accreditation and Partnering Working Group:

- 200.1.1 We consider that representation on the Accreditation and Partnering Working Group needs to be open to all Standards Users.

Hence, we make it a condition, that, as proposed in paragraph 102(a) of the Application, an Accreditation and Partnering Working Group which makes recommendations and puts matters to the API Council is established to develop the terms of the Proposed Arrangement and each Standards User is entitled to appoint a member to the Accreditation and Partnering Working Group.

- 200.1.2 We consider that any matter or recommendation concerning the Proposed Arrangement should receive majority support from the Accreditation and Partnering Working Group before it goes to the API Council.
- 200.1.3 Hence, as proposed in paragraph 102(b) of the Application, before any matter or recommendation concerning the Proposed Arrangement is put to the API Council for a vote, that matter or recommendation must first receive the support of:

- (a) the majority of the Accreditation and Partnering Working Group, being 70% of those in attendance (with a quorum of two-thirds of all members); and
- (b) the votes of at least half of the API Providers and half of the Third Parties (who are not also API Providers) represented on the Accreditation and Partnering Working Group.

- 200.1.4 We consider that it is important to the quality and robustness of API Council decision making that it is provided with a written record of the dissenting views of any members of the Accreditation and Partnering Working Group. Hence, we also make this part of the Proposed Arrangement a condition.

200.2 In relation to the API Council:

- 200.2.1 In order to mitigate the actual or perceived conflict of interests we propose three changes at this level, to 1) increase the number of independent members who need to support any resolution from one to two; 2) increase the number of Third Parties who support the resolution from two to three and 3) increase the number of API Providers who support the resolution from two to three.
- 200.2.2 We propose the above changes to the existing API Council voting process in order to increase the number of votes in favour of a resolution before that resolution is passed. In doing so, we seek to increase the diversity of views required to pass a resolution and to mitigate the risk of dominant Third Parties (whose incentives may be more similar to the API Providers than other Third Parties) aligning with the API Providers to decide a vote.
- 200.2.3 To give effect to this we propose to make it a condition that where any part of the Proposed Arrangement requires the approval of the API Council, each member of the API Council, including the Chair, shall have one vote and any resolution will be answered in the affirmative if 70% of those in attendance cast their votes in favour of the resolutions, and representatives from at least three API Providers, three Third Parties (who are not also API Providers) and two independent members cast their votes in favour of the resolution.

200.3 In relation to the Payments NZ Board:

- 200.3.1 To address the central concern about the conflict of interests at the Payments NZ Board level inhibiting any benefits arising from the Proposed Arrangement, we consider it important for decisions on matters relating to the Proposed Arrangement to be made by the independent Board members only. We note Payments NZ told us that it was at least conceivable that it would be able to delegate authority to the independent Board members in respect of decisions relating to the Proposed Arrangement.
- 200.3.2 Hence, we make it a condition that where any part of the Proposed Arrangement requires approval by the Payments NZ Board, decision making will be delegated to the independent members of the Board.

200.4 In relation to the API Centre's existing exemptions regime:

- 200.4.1 We consider that there is a risk that API Centre's existing exemptions regime may be used by API Providers to circumvent the application of any Accreditation Scheme and Standard Terms and Conditions jointly developed under the Proposed Arrangement. This would inhibit any benefits arising from the Proposed Arrangement.
- 200.4.2 To prevent this, we propose a condition that Standards Users will not be able to apply for exemption (including under the API Centre's existing exemptions regime) in relation to any Accreditation Scheme and Standard Terms and Conditions jointly developed and applied under the Proposed Arrangement;
- 200.5 To ensure that any benefit to future regulation arising from the Proposed Arrangement is realised:**
- 200.5.1 We propose a condition that Payments NZ keep the following documents as record of the Proposed Arrangement for seven years:
- (a) detailed minutes of all meetings of the Accreditation and Partnering Working Group, API Council and Payments NZ Board;
 - (b) recommendations made to the API Council and/or Payments NZ Board by the Accreditation and Partnering Working Group;
 - (c) copies of any decision made by the API Council and/or Payments NZ Board (including the reasoning for that decision); and
 - (d) copies of all written communications (if any) from the Payments NZ Board and/or the API Council to the API Council and/or the Accreditation and Partnering Working Group.
201. Our preliminary view is that the proposed conditions would significantly reduce the potential for any the decision making process arising from the Proposed Arrangement to give rise to a conflict of interest. This is because the proposed conditions impose a decision making structure that supports the importance of independence with regards to decisions made about the Proposed Arrangement. This in turn is likely to improve the prospects of the potential benefits of the Proposed Arrangements arising as it will ensure the process is more robust and improve the confidence that Standards Users have in the process.

202. Subject to the conditions above dealing with Payments NZ governance structure (together with the period for the authorisation as set out below), our preliminary view is that authorisation of the Proposed Arrangement will result, or be likely to result, in such a benefit to the public that it should be permitted.

Proposed period for authorisation

203. The Commission can grant authorisation for such period as it thinks fit.²⁰³ Payments NZ submits that authorisation for the Proposed Arrangement be granted for an initial period of five years.²⁰⁴ It envisages that the Accreditation Scheme and Standard Terms and Conditions could be jointly developed and agreed to within 12 months.²⁰⁵

204. We are of the view that authorising the Proposed Arrangement for a period of 18 months, subject to the above proposed conditions, is appropriate for the joint development of the Accreditation Scheme and the Standard Terms and Conditions, and, if successful, the application of the Accreditation Scheme and Standard Terms and Conditions by Standards Users. This recognises the fact that the Applicants expect their discussions to take around 12 months as well as the anticipated timing of regulatory interventions (ie, being []) that would likely deliver some of the same potential benefits as the Proposed Arrangement.

204.1 As discussed throughout this document, we consider that regulatory intervention is part of the likely counterfactual. As such, while we see benefits accruing from the authorisation of the Proposed Arrangement subject to the proposed conditions, when the Proposed Arrangement is compared to the counterfactual once regulatory intervention is anticipated to be in place, we consider that the benefits will likely be significantly reduced. This is because, in our view, regulatory intervention would likely deliver the benefits attributable to the Proposed Arrangement. As such, we consider that the proposed 18-month authorisation period accounts for the benefits that would be delivered once regulatory intervention is in place, and would allow us to evaluate the extent to which we see benefits continuing to flow from the Proposed Arrangement over and above those arising from regulatory intervention.

204.2 A number of parties have expressed concerns regarding what they consider to be too long implementation timeframes of the Proposed Arrangement.²⁰⁶ Given Payments NZ has indicated that its indicative target timeframes are for the Accreditation Scheme and Standard

²⁰³ Section 61(2) of the Act.

²⁰⁴ The Application at [85].

²⁰⁵ The Application at [85].

²⁰⁶ See for example [] and [].

Terms and Conditions to be developed and agreed, and implementation milestones to start to be met, within a year of authorisation, we consider that the proposed authorisation period would provide sufficient time for Payments NZ to meet its target timeframes and for the Proposed Arrangement to begin accruing benefits.²⁰⁷

- 204.3 The proposed authorisation period is consistent with the expectation we set out in our Draft Report for the Personal Banking Services Market Study, namely that the Government should set clear deadlines and work with industry to ensure opening banking is fully operational by June 2026.²⁰⁸ We consider that the proposed authorisation period of 18 months would allow us to evaluate the progress made by the API Centre and Standards Users, and the likelihood of the proposed June 2026 timeframe being met.

Draft determination

205. Subject to the conditions specified above, the Commission proposes to grant authorisation for the Proposed Arrangement under sections 58(1) and (2) of the Act for a period of 18 months.

Next steps in our investigation

206. The statutory deadline for the Commission to make a decision on whether or not to give authorisation to the Proposed Arrangement is 22 August 2024. However, this date may change as our investigation progresses.
207. As part of our investigation, we have been contacting parties that we consider will be able to help us assess the application.

Making a submission

208. If you wish to make a submission on the Draft Determination, please send it to us at registrar@comcom.govt.nz with the reference ‘Payments NZ Authorisation’ in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on 15 July 2024.
209. If you would like to make a submission but face difficulties in doing so within this timeframe, please ensure that you register your interest with us at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.
210. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be

²⁰⁷ The Application at [105].

²⁰⁸ See Personal Banking Services Market Study Draft Report (21 March 2024) (https://comcom.govt.nz/_data/assets/pdf_file/0033/349368/5BPUBLIC5D-Draft-report-Personal-banking-services-market-study-21-March-2024-Amended-10-April-2024-.pdf) from [10.21] to [10.27].

publishing the public versions of all submissions on the Commission's website. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.

211. All parties will have the opportunity to cross-submit on the public versions of submissions received from other parties by the close of business on 22 July 2024.
212. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information. If your submission contains information which you consider there is good reason to withhold under the OIA, please identify specifically the information which you consider should be withheld and explain the reasons for that position (preferably with reference to the criteria for withholding information under the OIA).

Dated this 1st day of July 2024

Dr John Small
Chair