

17 July 2024

Public Version

To

Registrar
Commerce Commission
PO Box 2351
Wellington 6140

Copy to

Andrew Ngoi
Principal Investigator, Competition Branch

From

Emily Tyler
Tony Dellow

By Email

registrar@comcom.govt.nz
[REDACTED]

Dear Registrar

Payments NZ Authorisation: Payments NZ Limited's response to the Draft Determination

1. This letter sets out the response of Payments NZ to the Commerce Commission's Draft Determination dated 1 July 2024 regarding Payments NZ's application for authorisation for the Proposed Arrangement (as described in paragraph 8 of Payments NZ's application).
2. All defined terms included in this letter have the meaning set out in the Draft Determination, unless stated otherwise.

Summary

3. In summary, Payments NZ:
 - (a) in relation to the seven conditions the Commission proposes to impose on the authorisation (set out in paragraphs 200.1 to 200.5 of the Draft Determination):
 - (i) agrees to the conditions proposed in paragraphs 200.1.1, 200.1.3, 200.1.4 (with some alternative wording suggested for clarity), 200.2.3, and 200.5.1;
 - (ii) in relation to the condition proposed in paragraph 200.3.2, Payments NZ acknowledges the Commission's concerns in relation to the perception of a conflict of interest and suggests an alternative approach that, where any part of the Proposed Arrangement requires the approval by the Payments NZ Board, that decision is delegated to the three independent directors, one of the directors appointed by a bank that is not an API Provider (for example, HSBC), and one director appointed by a bank that is an API Provider; and
 - (iii) in relation to the condition proposed in paragraph 200.4.2, Payments NZ considers that the Commission should reconsider the proposed condition, which creates risk of potential detriment to competition. It instead suggests an alternative approach where

an exemptions regime is maintained, but that all decisions on exemptions be made by the API Council using the decision-making process that will operate for the adoption of the Accreditation Scheme and Standard Terms and Conditions or by directors of the Payments NZ Board who have been delegated decision-making powers in relation to the Proposed Arrangement;

- (b) remains of the view that the proposed period for the authorisation should be 5 years, and considers that an authorisation period of 18 months will mean that the proposed benefits of the Proposed Arrangement may not be able to be fully realised;
- (c) submits that the Commission does have jurisdiction to authorise under section 61(8) of the Act, and reiterates that it seeks authorisation under sections 58(6B) and (6D) of the Act as well as sections 58(1) and (2) of the Act;
- (d) considers that the Commission has erred in its view that "benefits to consumers" are not relevant to its assessment of the Proposed Arrangement, and that such benefits are relevant to the Commission's assessment; and
- (e) considers that the Commission has erred in its view to not place any weight as a benefit on Payments NZ's submission 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.

4. Each of these points is addressed separately below.

Proposed conditions in relation to the Accreditation and Partnering Working Group

Establishment and composition of the Accreditation and Partnering Working Group

- 5. Payments NZ agrees with the condition proposed by the Commission in paragraph 200.1.1 of the Draft Determination that:
 - (a) 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
 - (b) each Standards User is entitled to appoint a member to the Accreditation and Partnering Working Group.
- 6. This is consistent with what Payments NZ proposed in its application (paragraph 102(a)). Payments NZ made that proposal in order to minimise the likelihood that Standards Users cannot agree on the Accreditation Scheme or the Standard Terms and Conditions, and it is pleased that the Commission agrees with Payments NZ's approach.

Majority support of the Accreditation and Partnering Working Group

- 7. Payments NZ agrees with the condition proposed by the Commission in paragraph 200.1.3 of the Draft Determination that, 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.
8. This is consistent with what Payments NZ proposed in its application (paragraph 102(b)) in order to minimise the likelihood that Standards Users cannot agree on the Accreditation Scheme or Standard Terms and Conditions, and Payments NZ is pleased that the Commission agrees with Payments NZ on this point.

Dissenting views of the Accreditation and Partnering Working Group

9. Payments NZ agrees with the condition proposed by the Commission in paragraph 200.1.4 of the Draft Determination that the API Council is provided with a written record of the dissenting views of any members of the Accreditation and Partnering Working Group.
10. This is consistent with what Payments NZ proposed in its application (paragraph 102(b)) in order to minimise the likelihood that Standards Users cannot agree on the Accreditation Scheme or Standard Terms and Conditions. Payments NZ agrees with the Commission that this will improve the quality and robustness of the API Council decision-making, and it aligns with Payments NZ's rationale for its initial proposal.
11. For clarity and consistency with Payments NZ's initial proposal in paragraph 102(b) of its application and the Commission's proposed condition in paragraph 200.1.4 of the Draft Determination, Payments NZ submits the wording of the condition be drafted as follows:

If some of the members of the Accreditation and Partnering Working Group do not support a recommendation from the Accreditation and Partnering Working Group to the API Council, then the views of those members must be provided to the API Council in writing alongside the Accreditation and Partnering Working Group's recommendation to the API Council.

Proposed conditions in relation to the API Council

12. Payments NZ agrees with the condition proposed by the Commission in paragraph 200.2.3 of the Draft Determination that, where any part of the Proposed Arrangement requires the approval of the API Council:
- (a) 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
 - (b) 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.

13. Paragraph 12(a) is already reflected in the API Council Charter. Payments NZ does not have any concerns about increasing the number of supporting votes from API Providers, Third Parties, or independent members in order for a resolution to pass (where any part of the Proposed Arrangement requires the approval of the API Council) in the manner described in paragraph 12(b). For completeness, Payments NZ's understanding of the proposed condition is that this increase in the number of supporting votes will be limited to matters relating to the Proposed Arrangement that require approval from the API Council, and will not otherwise apply to the API Council's decision-making processes.

Proposed condition in relation to the Payments NZ Board

14. In relation to the condition proposed by the Commission in paragraph 200.3.2 of the Draft Determination (that, where any part of the Proposed Arrangement requires the approval by the Payments NZ Board, decision-making will be delegated to the independent directors of the Payments NZ Board):
- (a) Payments NZ does not accept that the existing decision-making process of the Payments NZ Board would result in any actual conflicts of interests. The members of the Payments NZ Board are required by law to act in the best interests of Payments NZ, there is a robust consultative governance process in place for the API Centre Terms and Conditions to be amended,¹ and amendments can only be made if the Payments NZ Board considers it necessary or desirable to promote the integrity, security and efficiency of the API Centre or the integrity, security and efficiency of Standardised APIs. Indeed, as noted by the Commission, to date the Payments NZ Board has not declined a recommendation made by the API Council in consultation with the relevant working group. Payments NZ submits that its record of making decisions that affect competition and the ability for competitors to enter the payments markets with which it is concerned shows that the model under which it is governed is appropriate for ensuring impartial and pro-competitive outcomes, while recognising the need for integrity and security in those markets;
 - (b) in any event, Payments NZ reiterates that the Payments NZ Board's approval will only be required:
 - (i) if the application of the Accreditation Scheme and Standard Terms and Conditions involves the procurement of outsourced providers to operationally manage and assess applications for accreditation. Payments NZ does not intend to procure outsourced providers for the development of the Accreditation Scheme and Standard Terms and Conditions; and
 - (ii) if amendments to the API Centre Terms and Conditions are required to either incorporate or enforce the Proposed Arrangement. The mechanism by which Standard Users will be bound by the Accreditation Scheme and Standard Terms and Conditions (to give effect to the Proposed Arrangement) has not yet been determined, and is

¹ The Board will only amend the API Centre Terms and Conditions after consulting with the API Council. The API Council will only recommend to the Board that the API Centre Terms and Conditions be amended after consulting with Standards Users.

something that will be considered by the Accreditation and Partnering Working Group when developing the Accreditation Scheme and Standard Terms and Conditions;

- (c) Payments NZ acknowledges the importance of mitigating perceived conflicts of interest. Payments NZ's focus has always been working across the industry to put the right foundations in place so that API Providers and Third Parties can deliver open banking, and to achieve its goal of accelerating open banking and overcoming barriers to the industry reaching its full potential; and
 - (d) that said, it is also important that decision-making processes in relation to the Proposed Arrangement involve appropriate representation from banks, as only such representatives can have a full understanding of the challenges faced by API Providers (such as in relation to scams, fraud, and cybersecurity threats) and how those challenges are addressed in practice.
15. To address the Commission's concerns in relation to perceived conflicts of interest, and in light of Payment NZ's confidence that there are no actual conflicts of interest, Payments NZ proposes that the Commission considers amending the proposed condition so that, where any part of the Proposed Arrangement requires the approval by the Payments NZ Board, decision-making will be delegated to the three independent directors of the Payments NZ Board as well as one of the directors appointed by a bank that is not an API Provider (for example, HSBC, which is not an API Provider and is unlikely to become one in the future given that it does not provide retail banking), and one director appointed by a bank that is an API Provider.
16. Payments NZ's view is that this alternative approach (where a majority of independent directors' votes will still be required) addresses the Commission's concerns about perceived conflicts of interest, while ensuring that decision-making process retains the necessary relevant knowledge and experience to make decisions relating to open banking.

Proposed condition in relation to the API Centre's existing exemptions regime

17. Payments NZ considers that the Commission should reconsider the condition it has proposed in paragraph 200.4.2 of the Draft Determination that Standards Users will not be able to apply for exemptions (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.
18. Payments NZ acknowledges the Commission's concern that the availability of exemptions could be seen as a means to frustrate the operation of the Proposed Arrangement, although it is confident that the process for consideration of applications for exemptions would not allow that to occur in practice.
19. It is important, however, that the Commission understands that this proposed condition may result in detrimental impacts on competition. There are two main ways in which this could occur:
- (a) without the flexibility of an exemptions regime, there is a risk that the Accreditation Scheme that is developed will be more conservative than it otherwise would have been with an

exemptions regime. That is, if there is no opportunity for Standards Users to be exempted from the Accreditation Scheme or Standard Terms and Conditions, then the Accreditation Scheme may need to be more prescriptive in scope to cover potential risks that will be unable to be addressed through an exemptions regime. Such a situation would have flow on effects that may be detrimental for competition, including taking longer for the Accreditation Scheme to be developed, and increased costs for Third Parties to meet the accreditation criteria of a more conservative Accreditation Scheme; and

- (b) the proposed condition does not account for the fact that the Proposed Arrangement will be developed and operated in a market environment that is novel, dynamic, constantly changing, and unpredictable. While Payments NZ acknowledges the Commission's point about the risk that API Providers may use the exemptions framework as a way to prevent an accredited Third Party from accessing its APIs, the proposed solution to prevent exemptions in relation to any Accreditation Scheme and Standard Terms and Conditions jointly developed and applied under the Proposed Arrangement has the potential to leave the API Centre with no way to deal with situations where exemptions may be necessary or helpful to facilitate competition. Preventing all exemptions creates an environment where Standards Users have no recourse to navigate unexpected or exceptional situations. Third Parties will either not be able to contract on the Standard Terms and Conditions because they do not meet a minor, technical aspect of the proposed accreditation criteria or, if Standards Users cease being able to meet a minor, technical aspect, then they will be in breach of the Standard Terms and Conditions.

This risk is illustrated in the following example:

An accredited Third Party or API Provider is able to meet most of the Standard Terms and Conditions. However, due to operational, business or technology reasons, it will be unable to meet a minor, technical aspect of the Standard Terms and Conditions for a given period of time (for example, SLAs, performance, or reporting). This minor, technical aspect of the Standard Terms and Conditions will not greatly impact the interest or security of any Standards Users. However, if the accredited Third Party or API Provider is not able to fully comply with that minor, technical aspect, then it may be prevented from partnering. This would mean that the services offered to consumers in competition with other Third Parties and API Providers are stalled, which could have a detrimental impact on competition.

20. To address the potential risks of the condition proposed by the Commission, Payments NZ suggests an alternative approach: that an exemptions regime be maintained, but that all decisions on exemptions be made by the API Council using the decision-making process that will operate for the adoption of the Accreditation Scheme and Standard Terms and Conditions described in paragraph 12 above, or by directors of the Payments NZ Board who have been delegated decision-making powers in relation to the Proposed Arrangement (whether that be the three independent directors of the Payments NZ Board if the Commission decides to impose the condition proposed in paragraph 200.3.2 of the Draft Determination, or the three independent directors, one directors

appointed by a bank that is not an API Provider, and one director appointed by a bank that is an API Provider as proposed by Payments NZ in its suggested alternative approach outlined in paragraph 15).

21. This approach addresses the Commission's concern that the availability of exemptions could be seen as a means to frustrate the operation of the Proposed Arrangement, while mitigating the risks described above and allowing for the flexibility provided by an exemptions regime (which is necessary in a constantly changing and unpredictable environment). Given that the Commission is comfortable with the decision-making process (as amended by the Commission's proposed condition) by the API Council in relation to the Accreditation Scheme and Standard Terms and Conditions, and given the Commission's view that decisions made by the Payments NZ Board by the three independent directors is sufficient to address its concerns about conflicts of interest, Payments NZ submits that it should be comfortable that the proposed process provides sufficient checks and balances to ensure that only appropriate exemptions are granted.

Proposed condition in relation to record keeping

22. Payments NZ agrees with the condition proposed by the Commission in paragraph 200.5.1 of the Draft Determination that Payments NZ keep the following documents as a 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.
23. If Payments NZ's suggestion about retaining exemptions and applying the decision-making process set out above is adopted, Payments NZ suggests that this condition is also applied to consideration of applications for exemptions (if any).

Proposed period for authorisation

24. The Commission has proposed that the authorisation is granted for a period of 18 months. In the Commission's reasoning, it states that:
 - (a) this recognises the fact that the Payments NZ expects the discussions to take around 12 months; and
 - (b) the anticipated timing of regulatory interventions that would likely deliver some of the same potential benefits as the Proposed Arrangement.
25. Payments NZ is strongly of the view that the authorisation should be granted for the period of 5 years as sought in its application.

26. As a starting point, the Draft Determination provides that Payments NZ states in its application at paragraph 85 that the Accreditation Scheme and Standard Terms and Conditions could be jointly developed and agreed to within 12 months. This is not accurate. Payments NZ addresses indicative target timeframes at paragraph 105 of its application, which states that:

If authorisation is granted in early 2024, Payment NZ's indicative target timeframes are for the accreditation scheme and standard default terms and conditions to be developed and agreed in 2024, and implementation milestones to start to be met in the second half of 2024.

Further, Payments NZ understands that the timeframes were discussed in its voluntary interview with the Commission on 19 March 2024.

27. If the authorisation is granted for the proposed period of 18 months, Payments NZ's understanding is that:

- (a) within 18 months, the API Centre and Standards Users would work together to jointly develop the Accreditation Scheme and Standard Terms and Conditions, and the Accreditation Scheme and the Standard Terms and Conditions would be implemented (ie, Third Parties would apply for accreditation under the Accreditation Scheme and API Providers and accredited Third Parties would enter into contracts on the Standard Terms and Conditions);
- (b) at the end of the 18 month period, API Providers would no longer be required under the API Centre Terms and Conditions to enter into contracts with accredited Third Parties on the Standard Terms and Conditions. At that point (ie, one day after the 18 month authorisation period expires), the only way in which the Accreditation Scheme and Standard Terms and Conditions could be imposed on API Providers would be through regulation or extension of the authorisation for a further period. Anything that is not covered by regulation will not be able to be covered by the Proposed Arrangement, and Standards Users would have to revert to the status quo (the bilateral model) which, as noted by the Commission in paragraph 23 of the Draft Determination, has several associated issues in practice. The likely limits of regulatory intervention compared with the Proposed Arrangement are discussed below in paragraph 28;
- (c) if any Third Parties are unable to meet the accreditation criteria in the Accreditation Scheme within that 18 month period, then they will not have an automatic right to enter into a contract with API Providers on the Standard Terms and Conditions (even if they have made changes and would now meet the accreditation criteria); and
- (d) the Accreditation Scheme and Standard Terms and Conditions could not continue to be developed using the joint industry process to reflect changing circumstances or otherwise be amended to improve on aspects that may not have worked well during implementation.

28. In relation to paragraph 27(b) above, it is clear that regulatory intervention (being the CPD Bill and/or network designation) is not an alternative counterfactual to the Proposed Arrangement, and that the scope of the Proposed Arrangement is wider than that of potential regulatory intervention. More specifically:

- (a) the CPD Bill may not cover the Standard Terms and Conditions and would not enable API Providers and Third Parties to agree to an arrangement to contract for the use of APIs on the Standard Terms and Conditions. Paragraph 92.1 of the Draft Determination states that "*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'*". However, that the CPD Bill could potentially provide for an accreditation regime is not a substitute for the Proposed Arrangement. The Proposed Arrangement includes the development of the Standard Terms and Conditions and an obligation on API Providers to contract with accredited Third Parties on those Standard Terms, which is not something that the CPD Bill provides for; and
- (b) the potential regulation under the Retail Payment System Act 2022 as set out in the Commission's paper titled "Retail Payment System: Payments Between Bank Accounts" only relates to payments (not account information), and would not enable API Providers and Third Parties to agree to an arrangement to contract for the use of APIs on standard terms and conditions.

29. This is recognised by the Commission in its Draft Determination, where it noted that:

- (a) "*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*" (paragraph 88);
- (b) "*The scope of the CPD Bill (in particular, what constitutes "mandatory data") 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*" (paragraph 90.2); and
- (c) "*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*" (paragraph 91.3).

30. In contrast, in the 5 year authorisation period proposed by Payments NZ in its application:

- (a) the Accreditation Scheme and Standard Terms and Conditions would be jointly developed by the API Centre and Standards Users and, if that joint development is successful, then the Accreditation Scheme would be implemented and API Providers would be required to enter into contracts with accredited Third Parties on the Standard Terms and Conditions for the entire 5 year authorisation period (including any new Third Parties who become accredited during that time period);
- (b) to the extent that any regulation is introduced that covers anything the Accreditation Scheme and Standard Terms and Conditions do not cover, then Standards Users would need to comply with such regulation in addition to the Accreditation Scheme and Standard Terms and Conditions (in other words, the regulation would take precedence over the Accreditation Scheme and Standard Terms and Conditions);

- (c) the Accreditation Scheme and Standard Terms and Conditions would be able to be reviewed, amended to reflect changes in circumstances, or improved to reflect learnings during their initial development and implementation. This would, in turn, bring continuous benefit to the ongoing future development of regulatory interventions by providing insights (for the same reasons as proposed in relation to the Proposed Arrangement); and
 - (d) at the end of the 5 year authorisation period, Payments NZ could assess whether it is necessary to apply for further authorisation (for example, whether changes in market circumstances or the introduction of regulation during that 5 years mean that the Proposed Arrangement is no longer necessary) as well as the scope of any such authorisation that it applies for.
31. Payments NZ also submits that, contrary to the view expressed by the Commission in paragraph 204.1 of the Draft Determination and in light of the fact that the scope of the Proposed Arrangement is broader than potential regulatory intervention (as described in paragraphs 28 and 29 above), it is not the case that the benefits from the Proposed Arrangement will likely be significantly reduced once regulatory intervention is in place or that regulatory intervention would likely deliver the benefits attributable to the Proposed Arrangement.
32. There is no evidence to suggest that regulatory intervention will "significantly reduce" the benefits of the Proposed Arrangement. In fact, this view is inconsistent with the Commission's own assessment of the benefits of the Proposed Arrangement. More specifically:
- (a) in relation to the "benefits to the API Centre and Standards Users - Reduced transaction costs and increased speed and certainty of partnering", the Commission states in paragraph 120 that:

"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"; and
 - (b) in relation to the "benefits to the API Centre and Standards Users – Transparent development of better quality contract terms", the Commission states in paragraph 123.2 that:

"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".

Other matters

Commission's jurisdiction – cartel authorisation sections

33. Payments NZ considers that the Commission does have jurisdiction to assess the application under sections 58(6B) and (6D). Section 61(9) of the Act provides that:
- "For the purposes of section 58(6B) to (6D) and subsection (8)(a) to (c), 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**" (emphasis added)*
34. If there are reasonable grounds for believing that the Proposed Arrangement might include a cartel provision, then it has jurisdiction under the Act to assess whether authorisation should be granted under the cartel authorisation sections. In Payments NZ's submission, the low threshold set in section 61(9) of the Act by the use of both "*reasonable cause*" and "*might*" is a clear indication that Parliament does not intend that the Commission decline jurisdiction lightly. In fact, the threshold is such that the Commission should not decline jurisdiction without a positive finding that no cartel conduct could be involved in the arrangements to which an application relates.
35. The Commission does not have jurisdiction to adjudicate on the question of whether the provisions of the Act prohibiting cartel conduct are breached. In other words, by deciding that it does not have jurisdiction to consider an application for authorisation, the Commission is not absolving the applicant from liability if a court later decides that conduct does breach those provisions, in which case the applicant would not have had the opportunity of having the public benefits of its proposed conduct assessed. The relevant public benefits, which may have resulted in an authorisation having been granted, cannot be used as a defence in an action for breach of the provisions of the Act prohibiting cartel conduct.
36. In view of the above, and in light of the points made below, Payments NZ submits that the Commission should review its application of section 61(9), and find that it has jurisdiction under sections 58(6B) and (6D).
37. The Commission agrees that Standard Users are actual or potential competitors in relation to a number of different markets. As such, the relevant question is whether the Proposed Arrangement contains a provision that might be a cartel provision. "Cartel provision" is defined in section 30A of the Act.
38. In relation to price-fixing:
- (a) that the Commission has reasonable grounds for believing that it cannot "rule out the possibility that the final pricing principles and pricing structure might breach section 30 of the Act" (as per paragraph 70 of the Draft Determination), it follows that it has reasonable grounds for believing that the Proposed Arrangement might involve price-fixing; and
 - (b) the Commission has focused its assessment of its jurisdiction on pricing structure and pricing principles. However, the examples of proposed terms that may be included in the Standard Terms and Conditions include allocation of liability as between API Providers and Third

Parties who partner with them. It is axiomatic that the allocation of liability will have an effect on pricing that API Providers will individually set for the provision of API Services.

In *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* [1999] FCA 954, (1999) 92 FCR 375, Lindgren J said when referring to the then Australian equivalent of section 30 (section 45A of the Trade Practices Act 1974) at [168]:

"The word 'control' is not defined in the [Trade Practices] Act. Its natural or ordinary meaning is 'to exercise restraint or direction over' (the Macquarie Dictionary) or 'to exercise restraint or direction upon the free action of' (the Oxford English Dictionary) a person or thing. There are degrees of control and there may be control although the 'restraint' or 'direction' is not total. An arrangement or understanding has the effect of 'controlling price' if it restrains a freedom that would otherwise exist as to a price to be charged."

This was referred to by the Supreme Court in *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25 when considering the Commission's argument that an arrangement that interfered with the competitive setting of price by constraining, in some way, the parties' pricing freedom had the effect of controlling price for the purposes of section 30. The Supreme Court stated at [145] that the authorities (including the passage from *CC (NSW)* above and others) as to what amounts to "controlling" prices are longstanding and it saw no reason to depart from them. In relation to the facts at hand, it concluded at [146] that:

"What this means is that the Commission was required to prove only that the arrangement had the purpose or effect of restraining a freedom that would otherwise have existed as to the price to be charged by the Hamilton agencies to customers."

39. In relation to restricting output and market allocation:

- (a) the Proposed Arrangement will exclude Third Parties that cannot meet the agreed accreditation criteria or accept the terms and conditions from automatically being able to access API Services. While unaccredited Third Parties may still be able to access API Services through the existing bilateral model, given the numerous issues associated with that model, in practice they will be restricted or limited from the acquisition of API Services compared with accredited Third Parties. The Commission appears to have narrowed the definition of "restricting output" to the "preventing" aspect of the definition, and not considered the broader "restricting" or "limiting" aspects of the definition. Such a narrow interpretation of the definition of restricting output sets a dangerous precedent;
- (b) the Commission has considered it a detriment of the Proposed Arrangement that it "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" (paragraph 140.1), and considered this in its assessment of its jurisdiction under the competition authorisation sections (paragraph 55.1). Payments NZ submits that, given the Commission has accepted 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, it follows that the Proposed Arrangement has the potential to include an arrangement or understanding that restricts or limits, or provides for the restriction or limitation of, unaccredited Third Parties' access to those markets, potentially restricting output of API services to the unaccredited Third Parties; and

- (c) the Proposed Arrangement may also include an arrangement or understanding between competing API Providers not to contract with certain excluded organisations or classes of organisation. Any such arrangement or understanding will quite clearly involve restricting output or market allocation. This possibility has not been addressed by the Commission in its assessment of its jurisdiction.

Benefits to consumers

- 40. The Commission agrees that, if the joint negotiation process of the Proposed Arrangement is successful, that will help facilitate open banking. However, its view is that the Proposed Arrangement in and of itself cannot claim the benefits of open banking. While the Proposed Arrangement cannot claim the benefits of open banking, the fact that the joint negotiation process of the Proposed Arrangement (if successful) will facilitate open banking means that the benefits of open banking will occur earlier than they otherwise would. That is a benefit that is relevant to the Commission's assessment.
- 41. Indeed, the Commission's paper "*Retail Payment System: Payments Between Bank Accounts*" (July 2023) states that the best environment to support innovation in options to make bank transfers is one where open APIs are easily accessible to payment providers on fair and reasonable access terms and conditions, and that this would require all banks to engage with payment providers through an efficient partnering process, including reasonable access terms and conditions which increase certainty for relevant users.
- 42. The Commission's consideration of the benefits to the API Centre and Standards Users does not cover this benefit from open banking occurring earlier than it otherwise would. As such, there is no risk of "double counting benefits" if the Commission were to give weight that benefit.

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

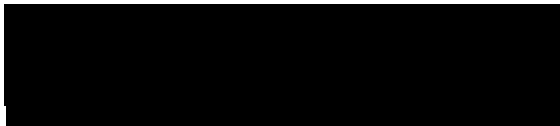
- 43. Payments NZ considers that the Commission has erred in its view that it should not place any weight as a benefit on Payments NZ's submission that the Proposed Arrangement will provide a more level playing field on which Third Parties can compete and confidently advocate for changes to the open banking ecosystem without fear that this could result in an API Provider refusing to contract with them.
- 44. More specifically, the Commission should reconsider the rationale for this position set out in paragraph 131 of the Draft Determination given that Payments NZ has accepted the condition proposed by the Commission to increase the supporting votes required from API Providers, Third Parties, or independent members in order for a resolution to pass, and has proposed an alternative

approach for the decision-making processes of the Payments NZ Board in relation to the Proposed Arrangement to address the Commission's concerns about perceived conflicts of interest.

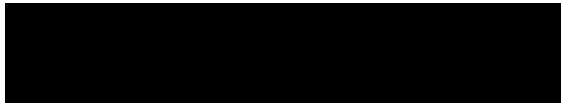
Confidentiality

45. No confidentiality is sought for this submission.

Yours sincerely

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Tony Dellow
Consultant

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