



**EFTPOS Access Regime
Process of Institutional Review**

Submission by:

Australian Institute of Petroleum

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1 Introduction

The Australian Institute of Petroleum (AIP) was established in 1976 as a non-profit industry association. AIP's mission is to promote and assist in the development of a sustainable, internationally competitive petroleum products industry, operating efficiently, economically and safely, and in harmony with the environment and community standards.

AIP and its member companies support the process of consultation on the EFTPOS Access Regime. The AIP is pleased to make this submission on behalf of the following member companies:

- BP Australia Pty Ltd,
- Caltex Australia Ltd, and
- Mobil Oil Australia Pty Ltd.

The AIP has been an active member of the EFTPOS Access Working Group (EAWG) and is now participating in the process of Institutional Review of the draft EFTPOS Access Regime.

This submission to the Australian Payments Clearing Association (APCA) discusses various issues that have been identified during this process.

The AIP believes that the Australian payments market will benefit greatly from increased competition over time, and that the EFTPOS system is a key component of that market. An Access Regime that allows new entrants to join and participate on equal terms, without compromising the stability or security of the system, is essential.

For prospective new acquirers and self-acquirers, this EFTPOS Access Regime is a necessary complement to the Credit Card Access Regime already put in place by the Payments System Board of the Reserve Bank of Australia.

The Access Regime being reviewed comprises the following elements:

- EFTPOS Access Code, draft 3A, 29 November 2004,
- Constitution of Access Company Limited, draft 2, 15 November 2004,
- CECS Regulations, amended 10 November 2004, and
- CECS Manual, amended 1 October 2004.

2 Identified Issues

2.1 Bilateral Interchange

The draft Access Regime does not allow for a bilateral interchange fee. APCA has consistently refused to discuss or consider this matter. The negotiation process (which includes negotiating a bilateral Access Charge and a bilateral Access Agreement) should include a bilateral interchange fee. If the EFTPOS system should move to a multilateral interchange fee in the future, then this is easily removed.

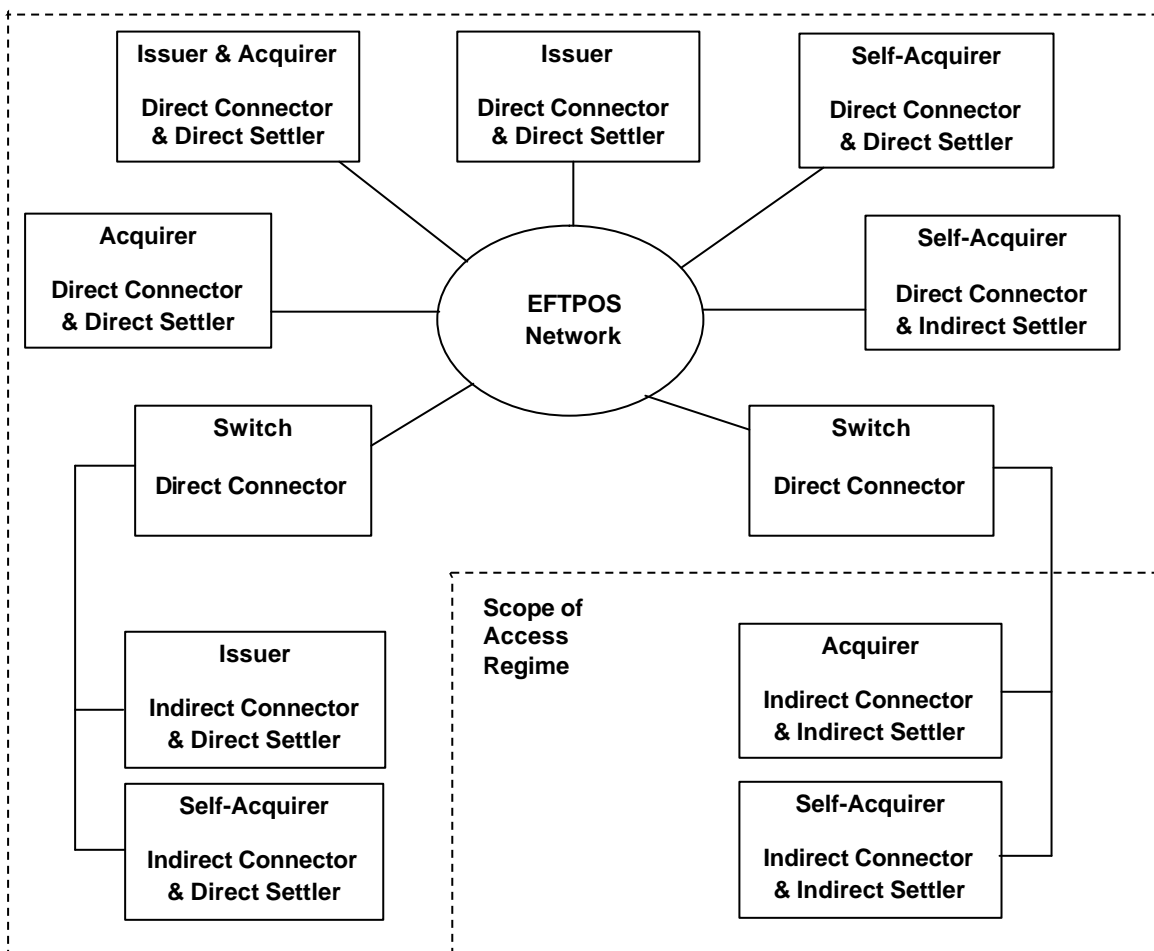
The reality of the Australian EFTPOS market is that it currently operates, and has always operated, on the basis of bilateral interchange fees. It is impractical to have an Access Regime that does not allow for this situation to continue.

The standard Access Offer made to the Access Seeker by the Access Provider should include an initial interchange fee price in addition to the other items already defined by the Access Code. The negotiation of the interchange fee will follow the same process as the negotiation of the Access Charge.

There is no need for a “benchmark” interchange fee as the current range of such fees is in the public domain.

2.2 Access Regime Scope

The Explanatory Memorandum contains a diagram which appears to be potentially misleading. It purports to show the scope of the Access Regime, but it excludes all indirect connectors. As some of these may be direct clearers, they are covered by the Access Regime. An alternative diagram is offered below:



In the diagram above, the entities connected to each other via the EFTPOS Network are all Direct Connectors. The lower left entities are connected via a Switch but settle directly with other members (Direct Clearer/Settlers).

The two lower right entities are not covered by the Access Regime.

2.3 Direct Clearer-Settlers

2.3.1 Eligibility Criteria

Clause 2.2(b) of the Access Code refers to “the eligibility requirements for Direct Clearer/Settlers as set out in the CECS Regulations.”

While the CECS Regulations define what a Direct Clearer/Settler is, there do not appear to be any specified eligibility criteria.

A Direct Clearer/Settler is required to have an Exchange Settlement Account (ESA) with the Reserve Bank, and perhaps the gaining of this account could be considered sufficient grounds for eligibility as these accounts are not easy to obtain.

2.3.2 Standard Direct Clearing Service

Clause 3.1(c) of the Access Code states that “the standard direct clearing/settlement service ... is defined in the CECS Manual, as amended from time to time.”

The current draft of the CECS Manual does not seem to contain this definition.

2.3.3 Access Charge

The amount of the Access Charge to be paid by a new Direct Clearer-Settler is referred to in the CECS Regulations at 4.13C, but no amount is stated, and therefore this amount is completely unknown at this time. It appears this will be some fixed amount, and not variable as for the Direct Connection Access Charge.

2.3.4 Obligations / Volume Requirement

The obligations of a Direct Clearer-Settler are described at clauses 4.13A through 4.13D of the CECS Regulations.

There is no obligation for a Direct Clearer-Settler to offer the Standard Direct Clearing Service until the Access Seeker has already achieved at least 0.5% of the National Transaction Volume. As each transaction is counted twice (once by the Acquirer and once by the Issuer) a new Acquirer would have to gain at least 1% of the EFTPOS acquiring market before it would be guaranteed direct clearing status. In today’s market, this would be around 10 million EFTPOS transactions per annum.

An issuer has to be licensed to take deposits, and therefore is already subject to stringent prudential regulation and oversight. A new general acquirer needs to be an ADI or an SCCI, and would need to gain an Exchange Settlement Account to be a Direct Clearer. This also requires close prudential regulation and oversight. A self-acquirer already has some level of merchant transaction volume but could not gain an ESA without first satisfying the Reserve Bank as to their financial position and stability. Therefore it does not seem necessary to have a volume requirement to make sure that Direct Clearers are “credit worthy”.

It does not seem to be appropriate to deny equal status to smaller new entrants if they are able to satisfy APRA and the Reserve Bank as to their prudential status. It is therefore recommended that the minimum volume requirement be removed.

2.3.5 Access Code

The issues listed above as they relate to new entrants seeking to become Direct Clearer/Settlers, should be dealt with in the Access Code document, and not within the CECS Regulations. These are:

- eligibility criteria,
- definition of the Standard Direct Clearing Service,
- access charges, and
- rights and obligations.

These matters all relate directly to access and are not technical or operational standards in relation to processing transactions, clearing and settlement, or security.

It is impractical to have these items overseen by CECS and the Access Code separately overseen by the Access Company. The Access Company will be responsible for all the above matters in relation to Direct Connectors and should have the same responsibility with regard to Direct Clearer/Settlers.

2.4 Direct Connectors

2.4.1 Access Charge

The initial cost of direct connection is unknown, but the indications to date are of the order of \$200,000 per connection, for the “initial benchmark” figure. For connection to six other direct connectors (say 5 major issuers plus a switch), the connection cost or Access Charge alone would be \$1.2 million plus all the associated system development, certification, and implementation costs.

It is a concern that the potential cost for early new entrants may be too high and it is also a concern that the costs are still unknown. Some more certainty is required to ensure that cost does not become a barrier to entry.

The Access Code proposes to keep the “Benchmark Price” confidential until after an Access Seeker has submitted an application form. There appears to be no reason for this secrecy and this figure should be published by the Administrator and given out on request. Potential new entrants should have a clear picture of likely costs to allow them to establish a business plan and a budget that is realistic.

2.4.2 Timetable

Schedule 2(d) of the Access Code states that “the time when the Access Seeker tests its systems with the systems of the Access Provider must ... allow for at least nine (9) months to pass between the time when Access Seeker lodges the Application Form and the time when testing begins.”

This appears to be an unreasonably long period of time. If the Access Offer is accepted without negotiation, then there should not have to be a protracted delay before testing can commence. Each Access Provider should be required to make its test system available during each Testing Window and therefore there appears to be no reason why testing should not commence during the next Testing Window after the Access Agreement is executed between the Access Seeker and the Access Provider.

A long lead time is a barrier to access in the same way that a very high cost is also a barrier.

2.4.3 Testing Windows

At 6.7(b) the Access Code states that "Access Providers must use their reasonable endeavours to make their systems available for testing during the Testing Windows." This is not good enough as it may lead to protracted lead times for an Access Seeker to complete the implementation process. All Access Providers must make their test systems available for testing during the Testing Windows. If they fail to do so, there must be some financial compensation to all affected Access Seekers, or some other suitable sanction. In the current draft, there is no genuine penalty for non-compliance.

The amendments suggested by Gilbert & Tobin to satisfy the RBA's concerns are insufficient.

2.4.4 Certification

The certification of the interchange systems operated by existing CECS members is to be undertaken by themselves and signed off by their internal auditor. This is not a sufficient test of technical and operational compliance. Each member should be independently audited and certified at least every three years.

Each existing direct connector will have to implement the new standard interchange message format when making their first connection to a new entrant. This new implementation should be independently certified at this time, just as the new entrant's systems will also be independently certified.

2.5 Drafting

2.5.1 Definition of Access Seeker

The definition of Access Seeker should be redrafted by substituting '*person*' for '*Member*'.

Access disputes will arise when an Access Seeker is seeking to negotiate the terms of access, which is well before the person seeking access would become a Member of the Access Company. A person cannot be a Member until they have entered into an Access Agreement (or at the date of incorporation of the Access Company is or expects to be a Direct Connector and/or a Direct Clearer/Settler under the Access Code).

2.5.2 Dispute Resolution Provisions

The dispute resolution provisions should be amended; at the moment they apply only to Members.

We suggest the words '*between Access Seekers and Members and*' be added at the beginning of clause 8(1)(a)(i) and '*Access Seekers and*' be added after '*obligations of*' in that sub clause.

In clause 8.4 the words '*Access Seeker or*' should be added after '*Any*'.

Clause 8.6.2(c)(iii) allows the arbitrator to terminate the arbitration without making a final decision if a party to the dispute has not engaged in negotiations in good faith. This provision should be reviewed, as it could operate to prejudice the innocent party.

2.5.3 Self-Acquirer

The references to “Merchant Principal” in the CECS Manual should be amended to read “Self-Acquirer” to be consistent with the other documents.

2.5.4 Eligibility Criteria for Direct Clearer/Settlers

While the eligibility criteria for an Access Seeker is set out in the Code the eligibility requirements for Direct Clearer/Settler is stated to be set out in CECS Regulations. In our view the Access Code should be the code, and therefore the definition of any eligibility criteria for Direct Clearer/Settlers should be set out in the Code, and subject to variation only as provided by the Code.

2.5.5 Confidentiality Deed

The terms of the Confidentiality Deed (Schedule 1) should be 'beefed up' to ensure that the fact that an Access Seeker is seeking connection does not leak to those Access Provider employees who will be competing with the Access Seeker once access has been provided.

3 Implementation

Once the Access Regime has been approved, all existing direct connectors and direct clearers should agree to comply with the code as soon as possible.

A new certification process will need to be established as Evaluation Facilities and independent auditors, approved by APCA, are not currently in place.

For the first new direct connector, the new standard interchange message format and security procedures will have to be implemented by each party they wish to connect to. This is going to take some time, but some agreement should be reached as to a reasonable timeframe for doing this work, to ensure that the first new entrant does not face a very lengthy process while waiting for this work to be done.

When an Access Provider makes its test system available during a Testing Window, it must also make technical support resources available, and provide some minimum level of up-time. It is important that Access Seekers are genuinely able to complete the required testing without being delayed by “technical difficulties” or lack of genuine support.