

Chapter 8

Conclusion and Recommendations

Contents

| | | |
|------------|---|------------|
| 8.1 | Conclusion | 495 |
| 8.2 | Recommendations..... | 498 |
| 8.2.1 | Recommendations on product and price comparison and switching | 498 |
| 8.2.2 | Recommendations on costing and pricing | 501 |
| 8.2.3 | Recommendations on penalty fees | 502 |
| 8.2.4 | Recommendations on ATMs and direct charging..... | 503 |
| 8.2.5 | Recommendations on payment cards and interchange | 505 |
| 8.2.6 | Recommendations on access to the payment system | 508 |
| 8.3 | Signatures of Panel | 510 |

8.1 Conclusion

In conclusion, it is appropriate to refer to the Competition Act to remind ourselves of what the Legislature anticipated in promulgating the Act. The Preamble to the Competition Act stipulates that:

The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.

In fitting with the Preamble, the main objectives of the Competition Act are set out as follows:

The purpose of this Act is to *promote and maintain* competition in the Republic in order –

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.¹

The recommendations of the Enquiry contained in this report are an attempt to introduce or encourage changes in the South African banking sector, which will be in line with the objectives of the Competition Act.

The recent developments in overseas markets in respect of the banking sector which have been referred to in this report – such as the shift to a direct charging model for ATMs in Australia, the investigations into payment card interchange in a number of jurisdictions and the opening up of payment systems to non-bank payment service providers in Europe and Australia – cannot be ignored and they call for concerted intervention by the South African regulators.

¹ See Section 2 of the Act. (Own emphasis) Subsection (f) is unique to South African competition law (see *Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and another* 2004 (6) SA 196 at 206F (CAC)).

Some of the contemplated changes have been canvassed with the banking sector and other stakeholders during the hearings and through consultations between the Enquiry Technical Team and relevant stakeholders. As can be expected, there was not a meeting of minds in respect some of the recommendations.

It is apparent from the objectives of the Act that promoting efficiency, developing the economy and providing consumers with competitive prices and product choices should be the goal of any government or regulator which seeks to protect consumers in a developing economy.

Section 21(1) of the Competition Act gives the Competition Commission the responsibility to implement measures to increase market transparency. Section 21(2)(b) empowers the Commission to enquire into and report to the Minister of Trade and Industry on any matter concerning the promotion and maintenance of competition in the Republic.

Our Constitution, the supreme law of the country, enjoins us to strive for a democratic and open society. Transparency and accountability are values enshrined in our constitution. Banking customers should benefit from these values as well. Traditionally banking has been a secretive industry, and this was manifest at times during the Enquiry. Nevertheless, and despite participation in the Enquiry being voluntary, a great deal of information was provided and examined in public.

Some of the issues addressed in this report were highlighted but not conclusively dealt with in two previous investigations into competition in the banking sector. We have had the benefit of considering some of the issues raised in the Task Group (Falkena III) and FEASibility reports.² The work in these two reports has been invaluable to us. We have had the further benefit of receiving submissions (both verbal and written) directly from the banks and other stakeholders. All interested persons and stakeholders, including the banks, were invited to respond to the FEASibility report and voluntarily to provide detailed information and answers on relevant questions to the Enquiry.

The Competition Commission has not initiated any specific complaint and has accordingly not invoked its formal powers to compel the production of information and answers to question in connection with this enquiry. We therefore appreciate the voluntary co-operation of the banks, regulators and the other stakeholders who took trouble to prepare and make submissions to the Enquiry. The conclusions and recommendations contained in this report are based in large part on those submissions.

² See Chapter 1 for a summary of these reports.

The Banking Enquiry Report is the beginning of a process which will assist the Commissioner in deciding whether to initiate a formal investigation into any of the current practices in the banking sector. Whilst this Enquiry (within the limits of its terms of reference) examined the banking sector generally and was a voluntary process, the Commissioner may follow a different process based specifically on the powers given to him by the Competition Act and our constitutional legal framework.³ In our analysis of the submissions, and in making recommendations, we have always been guided by this fact. It is in this context that this report must be read.

We are aware of the fact that some of the banks have implemented some changes during the course of the Enquiry with the view to addressing some of the issues which were its subject matter. In considering these changes, the Commissioner will have to consider their sustainability and the context in which they were undertaken.

We are also aware of the proposed new developments in so far as the powers of the Competition Commissioner are concerned. The Department of Trade and Industry, we are advised, is contemplating an amendment to the Competition Act, which will enable the Commissioner to set up other enquiries similar to this one, with more powers than is currently the case.

In our view, there is no better way to end this Report than with the quote:

It is not the strongest of the species that survives, nor the most intelligent, but rather the one most adaptable to change.⁴

The Competition Act seeks to introduce changes in the manner in which we as South Africans do business. Those businesses which don't want to change will encounter challenges in the South African market.

The *Business Report* of 15 November 2006 stated that:

The Reserve Bank Governor, Mr Tito Mboweni, said yesterday that it was appropriate for the Competition Authorities to investigate high fees in the banking industry...

The necessity for the Enquiry has been confirmed by the public and stakeholders' support, for which we are grateful.

³ See Sections 46 to 51 of the Competition Act.

⁴ Attributed to Clarence Darrow in *Improving the Quality of Life for the Black Elderly: Challenges and Opportunities*: Hearing before the Select Committee on Aging, House of Representatives, One Hundredth Congress, first session, 25 September 1987.

8.2 Recommendations

The recommendations of the Enquiry aim to address the concerns raised by various stakeholders. In particular, and of chief concern, has been the experience that consumers have brought to the attention of the Enquiry. Moreover, the concerns raised by merchants, non-bank service providers and small banks have also been examined by the Enquiry with a view to making appropriate recommendations.

The recommendations of the Enquiry set out below are summarised from the various chapters of the report. Those chapters should be referred to directly for more detail.

8.2.1 Recommendations on product and price comparison and switching

The report identified a clear need for measures aimed at improving the ability of bank customers to compare product offerings and prices and switch providers with a minimum of cost and difficulty.

In order to achieve these objectives the Enquiry recommends:

Standards and criteria for transparency and disclosure

The Banking Association should develop a set of minimum standards for the disclosure of product and price information to be included in the Banking Association Code of Banking Practice.⁵

This code should at least include criteria regarding:

- Standardisation of terminology and a “plain language” requirement
- Communication and provision of information to clients
- A requirement for at least certain minimum information to be included in bank statements
- A summary and breakdown of charges and interest (both debit and credit) on every account
- Advance notice of new charges and altered charges
- A regular rights reminder to customers.

The code on transparency and disclosure should be subject to a process of periodic review.

⁵ After consultation with the Ombudsman for Banking Services, consumer protection agencies and organisations, the regulatory authorities, the Competition Commission and other relevant bodies.

The provisions of the code should be incorporated by reference into banks' standard customer contracts, so that the protection which they afford to customers become part of the customer's contractual rights capable of being enforced with the assistance of the Ombudsman for Banking Services. Although membership of the Banking Association is not compulsory for banks, and its code is therefore not binding on every bank, all the major banks are members and would be bound by changes to its code. Should this position change, or should the provisions of the voluntary code prove inadequate for the purpose described, a legislative or regulatory intervention would be warranted to impose appropriate standards on all banks.

Measures to reduce search costs and improve the comparability of banks' product offerings and prices

While improvements in transparency and disclosure of product and price information should help reduce search costs, the Enquiry found that more direct and proactive measures are needed to simplify comparisons between the prices and product offerings of different banks.

Therefore the Enquiry recommends that:

- Generic customer profiles be drawn up and publicised to facilitate comparison shopping. In this regard, a "profile" is essentially a typical combination of customer needs.

For this purpose, the Banking Association should initiate and support an independent process to establish a limited number of generic profiles that would apply to various typical customers of all banks in the middle market segments.⁶

Once the profiles are established, and publicised by the Banking Association, the different banks can reveal in their own advertising and other information whether, how and to what extent they accommodate them, and their respective prices in that regard. Misleading advertising could then be combated via the Advertising Standards Authority, or with the assistance of the Ombudsman for Banking Services.

A regular review would also be needed:

- To account for changes in technology and consumer behaviour
- To monitor the effectiveness of the process in facilitating comparability and stimulating price competition

⁶ This will not be a simple task, as banks themselves apply somewhat different criteria when deciding on the segmentation of their product market. Thus the profiles must be constructed from the point of view of various typical customers, and not from the point of view of particular banks. To the extent, say, that some customers may typically prefer a product bundle emphasising electronic payment channels, and others the facility of branch and paper-based transactions, that would have to be taken into account in deciding on the range of appropriate profiles.

- To determine whether any changes to profiles and/or the process is necessary in order to achieve the stated objectives.
- Establishment of a centralised banking fee calculator service. This should provide an accessible facility for consumers to input their own product requirements – with assistance if necessary – and obtain (without cost) an automatic, objective indication of where they could obtain those services and for what prices.⁷
- The Competition Commissioner should propose to the Minister of Trade and Industry that serious consideration be given to permitting comparative advertising that would allow banks to compare their own prices and product offerings directly and explicitly with those of their rivals.
- If, after two or three years, the recommendations put forward to improve comparison and switching have not been implemented or (once implemented) have not had the desired effect of increasing price competition and bringing prices down significantly, then the Competition Commissioner should revisit the idea of obliging the banks to provide one or more “basic banking products” with similar content, capable of being simply and directly compared. This would enable customers, whose needs would be satisfied by such a particular product, to compare price and choose their bank accordingly. That in turn would intensify price competition, and cut across the existing segmentation of the market at least to the extent that segmentation has been contrived by banks in order to maintain market power.

Measures to reduce switching costs and assist consumers switching

Easier product and price comparison will not help consumers much if it remains too expensive or troublesome to switch banks. Measures to reduce switching costs and assist bank customers in switching are therefore of crucial importance.

- Code of switching practice
We recommend that the Banking Association develop a set of criteria for a switching code to be included in the Banking Association Code of Banking Practice. This code should include criteria regarding:
 - The provision of sufficient information and documentation by banks to new and existing customers explaining the process of switching in their branches.
 - A schedule in terms of which the old bank is to provide the new bank with information on standing orders and direct debits within a specified period of time of

⁷ It would be up to the banks to make available reliable product and pricing data (open to public inspection and to audit and correction by the Banking Association in the event of dispute), if they wish their services to be included in the answers supplied by the calculator service.

receiving the request to do so.

- A schedule in terms of which the balance on the account, standing orders and direct debits, net of any charges and interest but including any interest due, will be transferred from the old bank directly to the new bank, and the account with the old bank closed, within a specified period of time.
- Provision to be made for customers to be exempt from paying, or be refunded, any fees and/or interest charges which are incurred within a specified period after the new account is opened as a result of a failure in the switching process.

The code on switching should also be subject to an independent process of periodic review.

- We recommend that the National Treasury encourage and pursue the notion of a central FICA information “hub” in consultation with the banking industry, to see whether it could be established as a central repository of customer information used to facilitate compliance with FICA and operated in a manner that is consistent with the anti-money laundering objectives of FICA.

Expand the mandate of the Ombudsman for Banking Services

We recommend that the role of the Ombudsman for Banking Services be expanded to include enforcement and monitoring of compliance with the proposed codes of conduct for information disclosure and switching.

8.2.2 Recommendations on costing and pricing

The pricing initiatives said to be aimed at reducing the fee-burden on customers – such as *ad valorem* pricing, banded fee options and appropriate bundled packages – which were highlighted by the banks during the course of the Enquiry, do not appear to be generally offered to lower-income customers. It is puzzling that the benefits of such initiatives do not accrue to those who most need them. Building on from our recommendations on product and pricing comparison and switching, we recommend that together with improving transparency, standardising terminology and educating customers, the Banking Association should encourage the appropriate application of these pricing initiatives to entry level accounts.

The Mzansi initiative, which is making considerable progress in extending banking services to the previously unbanked, also needs constant scrutiny to ensure that the structure of its bundling and pricing is truly pro-poor.

Consideration should also be given to ensuring that recipients of social grants are not disadvantaged by the cost of receiving and accessing their grants through bank accounts.

8.2.3 Recommendations on penalty fees

Both the level and the volume of the fees charged for rejected debit orders by the major banks provide grounds for grave disquiet. Payment by debit order is routinely required nowadays for all manner of regular services which have become an essential part of everyday life. Reliance on debit orders is widespread throughout the mass market served by banks, and it is notable that debit order facilities have recently been added to the basic Mzansi account offerings.

Analysis of the banks' data revealed that the average rate at which debit orders are rejected, and thus attract a penalty fee, is roughly twice as high for basic savings or transmission accounts as for all PTAs taken together. In other words, in accounts typically held by lower income customers, a relatively high proportion of debit orders presented for payment are dishonoured for insufficient funds. This means that the burden of penalty fees is falling disproportionately on those least able to afford them. Where detailed data has been provided, indications are that *as much or even more* revenue is earned by banks from rejected debit orders on these accounts than from the processing of successful debit orders.

Many ordinary bank customers are not in a position to pad their bank accounts with funds that are surplus to their immediate needs. They face the situation where, when credits such as salary payments are delayed, this causes the debit orders which they have signed in good faith to “bounce” for insufficient funds. It is not a matter of neglect, or irresponsibility, but of circumstances beyond their control. Yet the penalty fee is applied per debit order item, so that a customer may face multiple penalties to add to the primary misfortune of getting paid late. Customers on low incomes, with tight credit margins, can readily find themselves lacking sufficient funds without having had any intention of defaulting on their payments or of breaching their undertakings to the bank.

It seems to us quite unacceptable that a bank should recover more than the cost incurred in processing the rejections in such cases. It is no answer for banks to say that, on application, they might reverse the penalty fee in a deserving case. Very many consumers – even if they were assured of the possible indulgence – would suffer in silence rather than muster the confidence, or find the time, to challenge the debit when it appears on their account.

We recommend that a cap be imposed on the price of processing rejected debit orders at approximately R5 per dishonoured item. We have no reason to believe that, currently, banks

would be unable fully to recover their costs ordinarily incurred in respect of rejected debit orders within such a cap.

Such a cap should be imposed by regulation. It should apply both to savings and current accounts, and to ordinary as well as early debit orders. Banks, which incur additional expenses or losses in particular cases through their customers' default in respect of debit orders, can terminate those customers' accounts and/or sue for damages.

The regulatory remedy should also include a provision to ensure that the re-presentation of dishonoured items cannot itself amount to an abuse.

Whether such price regulation should be imposed using existing regulatory powers of the SARB, or by way of section 9(1) of the Sale and Service Matters Act 25 of 1964 (as amended), or by other existing or special legislation is a matter on which we are not best placed to express an opinion.

In our view, if the necessary regulatory intervention is not forthcoming within a reasonable time, the Competition Commissioner should recommend to the Minister of Trade and Industry that he consider directing the Consumer Affairs Committee established under the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (as amended) to conduct a full-scale investigation into dishonour fees in respect of debit orders charged by the four major banks.

Should the latter Act be replaced by the enactment of the Consumer Protection Bill, 2007, now before Parliament, then the necessary investigation could be initiated or continued as may be appropriate under the new Act.

We also recommend that systems should be put in place by the banks, which will enable customers to cancel any direct debit instruction at any time by phone, internet, or over the counter at a branch (subject to written confirmation by the customer where necessary). This would not alter the customer's contractual obligation to the creditor in respect of payment arrangements.

8.2.4 Recommendations on ATMs and direct charging

ATM cash withdrawals are a common activity for most bank customers. In 2006 around 1 billion ATM transactions were made through the network, generating gross revenues in excess of R4 billion for banks. We have come to the conclusion that pricing arrangements between banks have served to shelter the provision of ATM services from effective price competition, and that this situation needs to be changed.

In particular, we are concerned with the pricing arrangements that are currently in place when a customer of one bank uses the ATM of another bank. While only 15 per cent of ATM transactions are of this kind (i.e. off-us transactions), analysis shows that they have been unduly restricted and that the pricing arrangements in respect of them have had and continue to have repercussions for all cash withdrawal transactions made at an ATM.

The consumer is typically charged a substantially higher fee for off-us transactions, and for an average sized cash withdrawal a substantial part of this fee is retained by the issuing bank although it has not provided the cash dispensing service. The fee that is paid by the issuing bank to the service provider (that dispenses the cash) for an ATM transaction is generally referred to as carriage. Carriage is a fee agreed upon between banks – i.e. an inter-bank fee. Not only is carriage itself sheltered from competitive forces; the consumer is not free to shop around for ATM services but – also by inter-bank arrangement – treated as belonging to the issuing bank in all ATM transactions. Accordingly banks' own ATM services to their customers are also significantly sheltered from competition.

If the carriage fee is abolished and the cash provider instead charges the consumer *directly* for the cash dispensing service (i.e. if the direct charging model is adopted), price competition can become more effective.

We recommend that the current inter-bank pricing system of carriage be replaced with a model of direct charging in the ATM stream as soon as possible.

For the direct charging model, the carriage fee would be replaced by a direct charge, set by each ATM service provider. Instead of recovering costs from the issuing bank through a carriage fee, the ATM service provider would be recovering costs directly from the customer (who uses the payment card). The basic obligation to pay the ATM service provider would shift from the issuing bank to the customer, and so carriage would altogether fall away. In this instance – i.e. an off-us transaction – any existing basis for a “cash withdrawal fee” charged by the issuing bank would also fall away. **We recommend that the necessary compensation to the issuer in respect of its own processing and related service to its customer for an off-us ATM transaction, be obtained through the issuer levying its own charge directly on its customer, whether as a separate charge or in any other manner.**

Our recommendation is that the change to a direct charging model should be accompanied by a regulatory prohibition – whether by way of PCH clearing rules or otherwise – against any ATM service provider discriminating in price between customers using cards issued by other firms. It appears to be commonplace that where direct charging

(as opposed to surcharging) is adopted elsewhere in the world, such a rule of non-discrimination on the basis of issuer holds. This has been raised as a concern by smaller banks in the hearings.

If the recommendations which we make in this chapter regarding a change to a direct charging model for ATM transactions are not adopted by the banks within a reasonable time, then it would be appropriate in our view for the Competition Commissioner to begin a formal investigation into whether or not the continuing practices of the banks regarding inter-bank carriage fees contravene section 4 of the Competition Act.

The implications of having direct charging for mini-ATMs have not been fully considered by this study and there may be other issues which require further consideration. If carriage is to be retained in relation to mini-ATMs, then the appropriate carriage fee should be determined through an independent process, comparable with that which is proposed for the setting of interchange. (See recommendations below.)

Given the infancy of cash-back at point of sale (POS), and the dearth of information available to us in regard to this service, we are not in a position to draw conclusions as to whether carriage could effectively be replaced by a direct charging model in this context.

We therefore recommend that the Competition Commission revisit the question once adequate experience has been obtained of direct charging in ATM services and consider at that stage the case for and against extending the direct charging model to cash-back at POS and mini-ATMs.

8.2.5 Recommendations on payment cards and interchange

We recommend that an independent, objective and transparent regulatory process for determining interchange in the payment card and other relevant payment streams be effected and enforced as soon as practicable.

Such a process, under compulsory regulation, should:

- Be based on a transparent methodology
- Have objective criteria established for each relevant payment stream through a participatory process and justified in public
- Have the resulting appropriate levels of interchange, where applicable, independently assessed on the basis of audited data
- Have the integrity of the process verified under regulatory oversight

- Have the levels of interchange so determined, thereafter enforced.

Details on this process are set out in the chapter on Payment Cards and Interchange.

We recommend that certain rules restricting the participation of duly qualified institutions as acquirers in the payment card schemes be abolished. If the schemes do not voluntarily – both formally and in practice – abandon these restrictions forthwith, then the matter should be addressed either by the initiation of formal complaints and investigations by the Competition Commission, or by regulatory intervention, or by both. The rules in question include:

- Visa’s general international requirement that acquirers be authorised to take deposits is, in our view, too restrictive in the South African context (and indeed is likely increasingly to be challenged around the world).

However, if a proper regulatory and supervisory framework for non-bank acquirers were established here, schemes could – in terms of their own rules requiring compliance with local laws – be brought into line where necessary. To ensure this, the regulatory and supervisory framework would have to oblige the relevant card schemes to accept as eligible, without discrimination, those banks and non-banks meeting the domestic requirements.⁸

- The rules or practice of restricting acquiring to institutions which issue scheme cards, and indeed which issue them on a significant scale, in our view are clearly restrictive of competition on the acquiring side. Such restrictions on acquiring have no legitimate basis. Acquiring should not be limited to issuers.

Regarding other rules of the payment card schemes, we do not recommend any interference with the card schemes’ current rules against merchants “surcharging” customers who use payment cards.

We accept the legitimacy of the “honour all cards” rule (in the narrower sense), but not the “honour all products” rule commonly associated with it. In South Africa, the elimination of the “honour all products” rule would seem most likely to facilitate the acceptance of debit cards, by freeing merchants’ acceptance of these cards from being tied to more expensive credit card acceptance. **If the withdrawal of the “honour all products” rule cannot be negotiated on a voluntary basis with the schemes concerned, then we would recommend a regulation or**

⁸ A provision comparable to section 6A(3) of the National Payment System Act, 78 of 1998 as amended, but tailored for the purpose, is what we have in mind. Non-bank acquiring is dealt with fully in the chapter of this report on Access to the Payment System.

other appropriate statutory intervention to prohibit it. If this is not forthcoming within a reasonable time, we would recommend that the Commissioner give consideration to initiating and investigating a complaint or complaints of possible contraventions of the Competition Act through the application of the “honour all products” rule.

We recommend that the card schemes should be requested by the Competition Commission formally and forthwith to withdraw their prohibitions on pure cash-back at POS, at least to the extent that such transactions are *permitted* under domestic law. Failing satisfactory responses in that regard, we would recommend regulatory measures to correct the situation decisively. If such measures are not forthcoming, then the Commissioner should consider initiating a complaint and investigating the relevant scheme rules for possible contravention of the Competition Act as prohibited restrictive practices.

We make the following recommendations regarding interchange in other payment streams. In our view, even though EFT debit transactions meet the basic criterion of a two-sided market, the actual necessity of interchange in this payment stream has not been demonstrated. We are not in a position to say conclusively, on the basis of the information voluntarily submitted to us, that it has been proved *not* to be necessary. Consideration should therefore be given by the Competition Commissioner to initiating a complaint with reference to section 4(1)(b), and alternatively section 4(1)(a) of the Competition Act, in order formally to investigate a possible contravention or contraventions arising from the past and current inter-bank arrangements in respect of interchange in this stream.

As regards the future, if interchange is to be levied in relation to EFT debit transactions, then we recommend it ought to be included within the regulated process which we set out for interchange generally, and so be subject to the participatory procedures involved in arriving at and implementing an appropriate level of interchange. The first step would be to establish whether the interchange in this stream is necessary at all.

We recommend that the interchange fees applicable to EDO transactions also be brought within the transparent and objective regulatory scheme which we propose for payment cards and other payment streams. Once again establishing the necessity of interchange for the EDO stream would be fundamental to the process. That exercise will also help clarify the extent to which banks’ pricing to users in these streams is in excess of costs, and whether a specific investigation into excessive pricing, either under the Competition Act or consumer protection legislation, is warranted.

8.2.6 Recommendations on access to the payment system

The existing regulatory regime for the National Payment System does not appear to meet the needs of South African consumers for competitive and technically innovative payment services. The approach of largely ignoring non-bank activities has begun to shift. But persistence in the view that only clearing banks may participate in clearing and settlement is not an approach that will best serve South Africa's interest. We are convinced of the need for a revision of the regulatory approach and the development of an appropriate regulatory regime for payment system activity which is functionally-based, rather than institutionally-based, so as to ensure quality of access. Those participating in payment activity should be adequately regulated, regardless of whether they are clearing banks or not.

We recommend an approach that requires an explicit access policy for banks and non-banks alike.

Our recommendations regarding the regulation of the National Payment System are as follows:

- **An access regime that includes non-bank providers of payment services should be developed so as to allow for their participation, under effective regulation and supervision, in both clearing and settlement activities in appropriate low-value or retail payment streams.** There are international precedents – such as those from Australia and the European Union – that suggest that an access regime of this sort can be designed that does not threaten the systemic stability of the existing system.
- **The National Payment System Act should be revised.** This would allow for non-banks to be clearing and (even) settlement participants, and hence members of PASA. It would allow for different types of participants and membership of PCHs. Once the NPS Act has been redrafted, the associated SARB and PASA position papers and directives would also have to be revised. Obvious examples are the Bank Models position paper, to accommodate the realities of Postbank and Ithala, and the e-money position paper, as well as the directives on system operators and third party providers.
- **The membership and governance of PASA should be revised so as to include qualified non-bank participants.** PASA is the delegated self-regulatory authority of the payments system. In our opinion this position, together with the professed view of the NPSD that their remit and that of the payment system management body extends throughout payment system activity, means that PASA membership should be extended to participating non-banks.

However, this does not necessarily require all members to be on an equal footing. A more nuanced membership of PASA – such as exists in the Australian payment system – would

lead the way to improved governance, as the current (and currently proposed) governance structures are dominated by the biggest banks which have the greatest volume and values through the system.

In an environment where both bank and non-bank members of PCHs can be members of PASA's highest authority – its Council – governance concerns associated with clearing banks regulating non-bank competitors will tend to diminish.

Moreover, a system whereby the executive officer of PASA, rather than the incumbent members of a PCH, takes the decision regarding the entry of new participants, having met the appropriate requirements for a PCH, is also recommended.

The self-regulatory approach of PASA gives it considerable authority in the NPS, which creates a need for a more regular and formal reporting requirement to its overseer, NPSD. We recommend that such a formalised reporting mechanism be put in place.

- **A Payment System Ombud should be established.** This entity would play the role of an Ombud to payment system participants, or prospective participants. The Ombud could assess whether or not applications have been fairly dealt with and whether or not they have been fairly treated in terms of access and the pricing of such access. Included in the remit of such an Ombud would be the entire ambit of the payment arena, and it would include access to the infrastructure of Bankserv, or the relevant PCH operator, access to settlement accounts, processing of membership of PASA, processing of PCH applications, and so on.

The Enquiry recommends that the Competition Commission, together with the Payment System Ombud, keeps Bankserv's pricing practices under observation, given its current dominant position in the industry.

8.3 Signatures of Panel

The work of the Banking Enquiry's has been concluded and we hereby submit our report.

Dated at Pretoria on this the 9th day of June 2008

T.S.B. Jali (Chairperson)

O. Bodibe

T.H. Nyasulu

R.O. Petersen SC