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ABN 37 136 180 366



8 April 2022

Australian Competition and Consumer Commission

Via email: - digitalmonitoring@acc.gov.au

Digital Platform Services Inquiry

Thank you for the opportunity to provide a submission to this important inquiry in response to the Discussion Paper for Interim Report No.5: Updating competition and consumer law for digital platform services issued by the Commission in February 2022 (**Inquiry**).

eftpos Payments Australia Limited (**eftpos**), a member of the Australian Payments Plus Limited group (**AP+**) group, is not motivated by profit and promotes choice and competition in payments and beyond payments into digital experiences in the Australian market. AP+ comprises the following businesses:

- (a) eftpos Payment System – Australia’s debit payment system providing payment services at the point of sale and online;
- (b) Beem It – Australia’s digital wallet and peer to peer payment service;
- (c) connectID – an Australian digital identity exchange;
- (d) BPAY – Australia’s bill payment and delivery service; and
- (e) National Payments Platform (**NPP**) – Australia’s faster payment service providing instant settlement of payments.

As the only Australian-owned separately designated debit payments system supporting retail payments, eftpos is an essential part of the national payments infrastructure. The AP+ Group is committed to providing efficient, safe, cost-effective and market-specific payments solutions for the benefit of all Australians.

eftpos’ Purpose is simple – to do good for Australia.

To that end, eftpos believes it can greatly assist the Australian finance sector and broader economy to thrive and grow by providing low cost access to our network and payments capability over our national, real time processing infrastructure. Low cost access, mobile payments capability, our ability to issue tokens, and the work we are doing with industry around real time digital payments and a ubiquitous Digital Identity solution, have the potential to bring many FinTech solutions to life in the current environment, particularly through mobile payments.

eftpos has invested deeply in the mobile ecosystem, having purchased Beem It, the Australian payments App that enables consumers to send and receive money using their phone in seconds, in November 2020 to help diversify the eftpos business and move further into the digital ecosystem. eftpos also processes millions of mobile NFC payments a month via mobile Pays such as Apple Pay, Google Pay and Samsung Pay, and operates a tokenisation service (**eftpos TSP**), to generate tokens for secure mobile payments. Each of BPAY and NPP have also invested many millions of dollars in developing and rolling out digital payment capability, known as OSKO and PayTo.

As a key component of the nation’s payments ecosystem and infrastructure, eftpos will remain wallet agnostic and work with a wide range of FinTechs and other digital partners to offer a fully digitised payments rail that supports a

variety of competing digital wallets and other digital applications to encourage further innovation. To that end, eftpos is already supporting Apple Pay, Samsung Pay and Google Pay and we have seen eftpos mobile transactions grow rapidly year-on-year across all supported mobile ecosystems.

eftpos' *Product Roadmap 2021 Update* aims to drive payments competition and improve consumer experiences in Australia's fast-growing digital economy. The Roadmap follows the release of the company's digital and technology strategy in December 2020. It has five key elements:

- Mobile Wallets;
- eCommerce;
- Digital Identity – connectID;
- APIs and FinTech access; and
- QR Acceptance & Experiences Platform.

Australians are increasingly turning to shopping online, and businesses are looking to digital innovation to improve productivity and efficiency as the nation continues to deal with COVID-19 and recovery.

Further information on the eftpos Roadmap can be found here:

<https://www.eftposaustralia.com.au/sites/default/files/2021-09/eftpos-product-roadmap-update-sept-2021-s.pdf>

Response to Inquiry paper

eftpos congratulates the ACCC on a well-reasoned and comprehensive Inquiry Paper which has identified the competition and consumer harms and presents a wide variety of measures to address them. As such, eftpos does not propose to respond specifically to questions 1, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

eftpos is also broadly supportive of proposals for regulation of large digital platforms that seek to extend their control of the market through acquisitions and movement into adjacencies and tie ins. As such, eftpos does not propose to respond specifically to questions 6 and 7 other than to say we agree with EU model which is based on high and persistent thresholds of turnover, user numbers and entities that enjoy an entrenched and durable position in its operations i.e. that perform a gatekeeper role with restrictive terms of participation.

Attachment 1 sets out eftpos' responses to specific Inquiry questions using the same numbering as in the Inquiry paper.

eftpos is fully supportive of any interventions that ensure a level playing field, support innovation, facilitate competition and guarantee the best outcomes and protections for merchants and consumers in Australia

Thank you again for the opportunity to provide a response to this Inquiry. Should you have any queries – please contact me at [REDACTED]

Yours faithfully,

[REDACTED]

Matt Barr

Managing Director, eftpos Scheme

Attachment 1

Responses to specific questions (using the numbers in the Inquiry Paper)

Chapter 6: Competition and consumer protection law enforcement in Australia

2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

The current Competition and Consumer Act 2010 (CCA) and the Australian Consumer Law (ACL) measures are not sufficient to address the competition and consumer harms that the Commission has identified in the Inquiry Paper. Law reform is needed.

The scope of the existing provisions necessarily leads to narrow investigations which are lengthy, time consuming and expensive for all parties (whether or not they are themselves under investigation) and does not address all the conduct that together cause the harms identified. The ACCC is not resourced to take action in all matters and actions are taken retrospectively, after the competition or consumer harms have occurred. The time taken to finalise investigations, prioritise actions and conclude actions allow for conduct to become entrenched, whether it is the focus of narrow enforcement action or ancillary to it.

The Inquiry seeks comment on other industries where specific legislative reform may be appropriate. *“The characteristics of digital platform markets, such as high barriers to entry due to economies of scale and scope (including in relation to data) as well as significant network effects, have led to and entrench the powerful positions held by some large digital platforms. These market characteristics, in addition to the fast-moving, dynamic nature of digital platform services, have created challenges for traditional competition and consumer protection law enforcement in recent years”* – (page 4 Inquiry Paper). The quoted section could just as easily be referring to the activities of participants in the payments industry (which is also a network industry) as digital platforms, potentially causing similar competition issues and barriers to entry.

Debit payments are the most common way to pay currently, according to the RBA’s published data, and the growing reliance on contactless payments and mobile payments specifically has given rise to increased costs of business facing services which may translate to increased prices for consumers and reduced choice¹

The Inquiry Paper has identified a number of potential reforms and listed overseas examples of law reform to address unfair trade practices, including the comprehensive EU reforms which seem to go a long way towards addressing some of the competition and consumer harms identified.

Chapter 7: Regulatory tools to implement potential reform

You may answer the following questions without prejudice to your view on whether a new regulatory framework is required to address competition and consumer harms arising from digital platform services.

If the Australian Government decided new regulatory tools are needed to address competition and consumer harms in relation to digital platform services:

3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?

Broad principles-based framework should be put in place e.g. unfair practices by those with significant market power to address the full range of systemic issues and ensure flexibility for a fast paced highly innovative market so

¹ <https://www.rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/conclusions-paper-202110/pdf/review-of-retail-payments-regulation-conclusions-paper-202110.pdf>

that constant legislation review is not required (as that is always behind the conduct giving rise to the concern and may not be quick enough to address the conduct before scale and habit are formed).

With the mix of measures proposed, both could be catered for in the law reform. By this we mean, a broad principles-based framework should be put in place in the legislation, such as to address the unfair trade practices by those with significant market power, to address the full range of systemic issues, together with authority to the Commission to set rules to provide flexibility for a fast paced highly innovative market so that constant legislation review is not required (as that is always behind the conduct giving rise to the concern). If considered necessary, an access regime structure could be implemented with authority to the Commission to approve an access regime. The rules (per the EU model and Inquiry paper) could then be implemented to address specific conduct.

4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia? eftpos considers that a combination of a), c) (including measures to achieve d)) and e) below would work best to provide the required certainty, flexibility and balance of benefit and burden of regulation.

a) prohibitions and obligations contained in legislation – Prohibitions in the legislation should be broad principles-based and supported by published rules set by the Commission and which allow reasonable cure time before the rules become effective. Ideally guidance would also be published by the Commission for new rules. This approach would provide businesses with the framework within which to work when developing products and services and go to market strategies. Regulator guidance addresses any risks posed by a broad principles-based approach. Any penalties should be reflective of the effect of the conduct. Obligations should be precise enough to effectively prevent harmful conduct, reduce the risk of over-capture and balance the benefit of the regulation with the burden of compliance. Both should not be so narrow that they can be easily circumvented or lead to even more narrow enforcement that does not address the overall conduct. Any unfair trade practices prohibition should consider the overall effect of the specific and surrounding conduct.

b) the development of code(s) of practice – Codes that have a degree of regulatory oversight seem to work better than others, even though they provide some accountability by the industry and flexibility for rapid modification to address inadequacies. However, if regulatory oversight and approval is required to get the best outcome from a code of practice, then it would be preferable to have a conferral of rule-making powers on a regulatory authority.

c) the conferral of rule-making powers on a regulatory authority - this provides greater flexibility and adaptability than amendments to legislation and could apply to a specific conduct or entity if conduct was observed, within principles set out in the legislation. See comments in a) above on the rules making and enforcement process.

d) the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm – It is unclear how this would work in practice (despite box 7.2 page 75). For example, if a finding of competitive or consumer harm is required, then that necessarily requires an investigation which raises the risks, cost and business interruption that occurs now under the existing enforcement measures. Given the scale would already have been achieved from the harm that was investigated, any undertaking or pro-competitive/pro-consumer measure could be countered by subsequent action.

e) the introduction of a third-party access regime, and – Recognising that a change to the legislation is needed first, the Commission's process of the Inquiry could meet the requirements for it to declare these services under Part XIC of CCA and start making standard access obligations on the sector and binding rules of conduct and access determinations.

f) any other approaches not mentioned in chapter 7.

5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?

While there are considerations of encouraging business to be conducted in Australia, alignment with or at least ensuring that Australian law (competition, tax etc) is not inconsistent with or behind law reforms overseas is to be encouraged.

Adequate scrutiny of acquisitions

17. Do you consider that reform is required to ensure that Australia's merger laws can prevent anti-competitive acquisitions by digital platforms? Why/why not?

Yes. Please see our response to question 18 and for the reasons set out in the Inquiry paper with which we agree.

18. Without prejudice to whether reform is required, what are the benefits and risks (including in relation to implementation and potential impacts on incentives for innovation and investment) of the proposals to address anti-competitive acquisitions by digital platforms, identified in this Discussion Paper, including: eftpos supports the reforms referenced in a), b), c), d) and e) below (excluding the absolute prohibition of digital platforms acquiring businesses as a requirement to seek merger approval and prove lack of competition harm should address the issue better than an absolute prohibition). One additional approach could be for a review of the effect of the acquisitions after a period, say 12-24 months, to verify whether any of the considered effects have come to pass and see if pro-competitive undertakings are needed at that time.

a) changing the probability threshold applicable to the assessment of the competitive harm from such acquisitions

b) placing the burden of proof on the merger parties to establish the lack of competitive harm from a proposed acquisition

c) introducing specific merger notification requirements for acquisitions by large digital platforms

d) updating the current merger factors in section 50(3) of the CCA to reflect particular concerns relating to digital platform acquisitions

e) introducing a 'deeming' provision to apply in situations where the digital platform has substantial market power, or meets other pre-identified criteria (whereby an acquisition by such a platform would be deemed to substantially lessen competition if it likely entrenched, materially increased or materially extended that market power)

f) any other approaches to address potentially anti-competitive acquisitions by digital platforms?

19. Which digital platforms should be subject to tailored merger control rules, and what criteria or assessment process could be employed to identify these platforms?

As mentioned, eftpos supports the approach take in the EU, including a thresholds-based definition for those platforms to which the reforms should apply.