

Non Confidential Version

Proposed Amalgamation of BPAY, eftpos and NPPA

Applicants' response to additional submissions from interested third parties

1 Context

- 1.1 On 14 May 2021, the ACCC published eight submissions from interested parties. On 19 May 2021, the ACCC published a further four submissions from interested parties. The 12 submissions are referred to as the **Additional Submissions**.
- 1.2 The Applicants have considered the Additional Submissions and wish to respond to them as follows.¹

2 Applicants' Response to the Additional Submissions

2.1 *The Additional Submissions do not identify any new concerns*

- (a) The Additional Submissions do not raise any substantive concerns with the Proposed Amalgamation that have not been raised in earlier submissions from interested parties.
- (b) The Applicants submit that the Additional Submissions relate to one or more of the four themes identified in paragraph 3.3 of the Applicants' response² to the previous submissions made by interested parties. Those four themes relate to:
- (i) Least-cost routing (**LCR**).³
 - (ii) The viability of eftpos and de-prioritisation of eftpos' innovations.⁴
 - (iii) Safeguarding open access.⁵
 - (iv) The influence or incentives of the Major Australian Banks.⁶
- (c) The Applicants' previous submissions comprehensively address each of those themes:
- (i) LCR will not be affected by the Proposed Amalgamation.⁷ The deployment and take-up of LCR will be the same in any version of the counterfactual scenario and the factual scenario. The Applicants note the Review of Retail Payments Regulation Consultation Paper May 2021 issued by the Reserve Bank of Australia (**RBA**) which states that "*[t]he Board does not see a need for explicit regulatory requirements regarding the provision of LCR at this stage. This reflects the progress that has already been made by acquirers and payment facilitators on developing this functionality and the other policy actions being taken to address specific threats to the viability of LCR.*"⁸

¹ Unless mentioned otherwise, defined terms in this document have the same meaning as in the Application.

² Except for the two submissions provided by Controlabill Pty Ltd on 21 April 2021 and 11 May 2021.

³ See Quest Submission, page 1 to 2; COSOA Submission, page 1; AACS Submission, page 1; MGA Submission, page 1; Benchmark Submission, page 1; Dr Singh and Professor Sultana Submission, pages 1 and 2.

⁴ See Quest Submission, page 1 to 2; ARA Submission, page 1.

⁵ See Dr Nicholls Submission, page 1.

⁶ See MGA Submission, page 2; COSBOA Submission, page 2; Benchmark Submission, page 1; Controlabill Submission, pages 1 and 2.

⁷ See Initial Response at [2.5(k)] and [6.4]–[6.14].

⁸ See page 2.

Further, the Proposed Amalgamation is expected to lead to an increase in the volume of transactions and, in turn, reduce overhead costs, which has the potential to lower transaction costs.⁹

- (ii) The Proposed Amalgamation will secure the long-term viability of eftpos by facilitating more efficient and effective competition with the international card schemes.¹⁰ Pooled resources and more efficient investment will allow innovations by the three payment schemes, including eftpos, to achieve the necessary ubiquity and network effects faster than in any version of the counterfactual scenario.¹¹ In this regard, the Applicants note the Review of Retail Payments Regulation Consultation Paper May 2021 issued by the RBA which confirmed that “[t]he Bank notes that discussions about the possible consolidation of EPAL with BPAY and NPPA have been underway over the past year. In their recent application to the ACCC, the applicants (including the major banks, the two large retailers and a number of mid-sized entities) have committed to ongoing support for the roadmap for developing new functionality for the eftpos system. The Board has not viewed the consolidation discussions as material to the Review, except insofar that a consolidation could result in more streamlined decision-making by the three systems and their individual members which is likely to improve EPAL’s ability to compete with the two large international debit schemes.”¹²
 - (iii) NewCo will not have any incentive to make decisions that will result in increased transaction costs.¹³ That would be contrary to NewCo’s objectives as enshrined in its Constitution, including its objective to be not profit maximising.¹⁴
 - (iv) NewCo’s governance structure provides for broader representation than currently exists and in any version of the counterfactual scenario, with clear and effective checks and balances for users of each of the three payment schemes and mechanisms to consult various participants in the payments industry.¹⁵
 - (v) The Major Australian Banks’ influence will be diminished compared to their current influence over each of the three payment schemes and their likely influence in any version of the counterfactual scenario.¹⁶
 - (vi) The Proposed Amalgamation will not result in any changes to scheme’s existing rules for open and non-discriminatory access.¹⁷
- (d) Some of the Additional Submissions query the manner in which confidential information has been redacted and submit that the approach to redaction brings into question the value of the Application and expert reports.¹⁸ The Applicants do not agree with this assertion and it has no regard to the confidentiality provisions of the *Competition and Consumer Act 2010* (Cth) and their proper administration by the Commission.

⁹ See Initial Response at [2.5(k)].

¹⁰ See Initial Response at [3.1]–[3.19].

¹¹ See Initial Response at [3.7].

¹² See footnote 7 on page 13.

¹³ See Initial Response at [5.11]–[5.17].

¹⁴ See Initial Response at [5.13].

¹⁵ See Initial Response at [2.5(a)], [5.1]–[5.17].

¹⁶ See Initial Response at [2.5(b)] and [4.1]–[4.7].

¹⁷ See Initial Response at [2.5(c)], [7.7].

¹⁸ See for example, Dr Nicholls Submission, page 1.

2.2 **Comments on the Additional Submissions**

- (a) The Applicants wish to respond as follows to a small number of points that were not directly addressed in the Initial Response:
- (i) *The risk of eftpos' transaction volume being diverted to NPPA:* Quest Payments Systems Pty Ltd (**Quest**) raised a concern that “[t]here is a great risk that [under the Proposed Amalgamation], existing eftpos transaction volume will be diverted to support a NPPA that needs more volume and more investment to be viable, therefore hampering eftpos' ability to use that money to innovate”.¹⁹ The Proposed Amalgamation does not involve any proposal to divert volume from eftpos to NPPA, and there is no evidentiary basis for this claim.
 - (ii) *Relative profitability of transactions through Visa/Mastercard and eftpos:* Some of the Additional Submissions claimed that the banks have been ambivalent about promoting eftpos' transactions (and slow to offer LCR) because Visa/Mastercard transactions are more profitable for them than eftpos' transactions.²⁰ The Applicants wish to make two points in response to those claims:
 - (A) The claims ignore the fact that eftpos represents a “critical pricing wedge against the ICS and Big Tech” for the banks and large retailers (as well as the other Applicants), a point that was made in the Application and in the Initial Response.²¹
 - (B) As noted in the Initial Response, the Expert Industry Opinion of Mr Lance Sinclair Blockley attributes eftpos' decline, in part, to the fact that it remains in 'catch-up mode' with the international card schemes. That is, investing in capabilities that have already been deployed by the international card schemes. These catch up capabilities add little to the consumer experience while imposing an investment burden on the Major Australian Banks who are asked, by eftpos, to enable the capabilities on their systems.²²
 - (iii) *Timeframe for guaranteed support of scheme roadmaps is too short:* Benchmark Analytics (**Benchmark**) raised a concern that the Proposed Amalgamation only guarantees the roadmaps of each of eftpos, BPAY and NPPA until mid-2022 which “[i]n the payments industry ... is an extremely short timeframe”.²³ In response, the Applicants submit that support for the roadmaps will be guaranteed for that period under the Proposed Amalgamation. In contrast, the guarantee for the three roadmaps does not exist in the status quo and is not likely to exist in any version of the counterfactual scenario unless mandated (on an unconditional basis).
 - (iv) *The banks do not compete with the ICS and Big Tech:* Benchmark asserts that is “patriotic, but ... wrong” to argue that the Proposed Amalgamation “is needed so Australia can better compete against Visa and Mastercard (and Big Tech)”, on the basis that the banks do not compete with Visa and Mastercard.²⁴ While it is correct to observe that the banks do not compete with the ICS and Big Tech (their services are complementary rather than substitutable), the Applicants' position is that the Proposed Amalgamation will

¹⁹ Quest Submission, page 1.

²⁰ Benchmark Submission, page 1; AACS Submission, page 1; Dr Singh and Professor Sultana Submission, page 1.

²¹ See the Application at 2.9 and the Initial Response and [3.7] to [3.10].

²² See Initial Response at [3.5].

²³ Benchmark Submission, page 1.

²⁴ Benchmark Submission, page 2.

allow the *three payments schemes* (not the banks) to better compete with the ICS and Big Tech.²⁵

- (b) The two further submissions of Controlabill Pty Ltd (**Controlabill**) dated 21 April 2021 and 11 May 2021 predominately raise concerns that are already addressed in evidence before the ACCC. Controlabill does, however, raise concerns around a patent dispute with NPPA.²⁶
- (c) Controlabill's patent dispute with NPPA is not related in any way to the Proposed Amalgamation or to the effects and benefits that are likely to arise from the Proposed Amalgamation. The way the dispute is characterised in Controlabill's submission, including the level of engagement between Controlabill and NPPA, is inaccurate and misleading. We refer to a **confidential** letter from NPPA to the ACCC, dated 29 September 2020, **attached** for convenience.

2.3 *Applicants' position*

- (a) The Additional Submissions do not alter the Applicants' position which remains that the ACCC should authorise the Conduct because:
 - (i) the Conduct will not be likely to have the effect of substantially lessening competition in any market, however defined and irrespective of which counterfactual scenario is adopted; and
 - (ii) the Conduct will be likely to give rise to a net benefit to the Australian public.

²⁵ See the Application, sections 2.4, 14.2, 27.10.

²⁶ See Controlabill Submission of 21 April 2021, page 1 to 2.