

16 August 2021

Mr Daniel McCracken-Hewson
General Manager – Merger Investigations
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2600

Via email: mergerauthorisations@accc.gov.au

Dear Mr McCracken-Hewson,

Australasian Convenience & Petroleum Marketers Association: MA1000020 (Submission on proposed undertaking for Proposed amalgamation of BPAY, Eftpos and NPPA)

Reference is made to your letter of 6 August 2021 inviting interested parties to make submissions on the proposed undertaking to be given – pursuant to Section 87B of the Competition and Consumer Act (2010) - by Australian Payments Plus Limited (AP+) in respect of the proposed merger of BPAY, Eftpos and NPPA.

This representation is made against the background of ACAPMA's previously stated concerns about the proposed merger, as outlined in our letter to the Commission on 16 April 2021.

1. About ACAPMA

ACAPMA is the national peak body representing fuel wholesale and fuel retail businesses in Australia. As indicated in our previous letter of 16 April 2021, our industry is a major user of payment services with an estimated with an estimated 310M transactions processed each year – and an estimated aggregate annual cost of more than \$116M for the processing of card transactions alone.

Fuel retail businesses (and their customers) are therefore heavily exposed to the Australian electronic payments market and are vulnerable to deficiencies in market competition.

ACAPMA's industry advocacy and direct engagement with key stakeholders in the Australian card payments agenda over the past 5 years has highlighted:

- a) the importance of maintaining Australia's dual rail system for the processing of electronic payments.

- b) the importance of the Least Cost Routing (LCR) mechanism in promoting competition within a national payments services market that is complex, oligopolistic, and populated by market offerings that are opaque in nature.
- c) The limitations in the efficacy of national payment regulations, notwithstanding the current reviews of these Regulations being undertaken by Australian Treasury and the Reserve Bank of Australia.

2. General concerns on the proposed undertaking

ACAPMA does not believe that the proposed undertaking is sufficient to mitigate against the risk of business (and consumer) harm that was identified in our original submission in respect of this merger. Specifically, we believe that the proposed undertaking has three distinct deficiencies, namely:

- a) The undertaking does not bind either the merged entity nor the banks (as owners of the new entity and the applicants of the Authorisation application) to undertake the actions needed to ensure that Least-Cost Routing (LCR) continues to be made available to all Australian businesses in all payment forms as the electronic payments market continues to develop (i.e. in-person, online, mobile and digital wallets).
- b) The undertaking is behavioural in nature only giving rise to serious concerns about the degree to which this undertaking can be practically enforced in the future. Key deficiencies include a lack of clear deliverables, inadequate governance, a lack of external accountability/audit, and absence of a clear complaints handling and dispute resolution process.
- c) The short duration of the undertaking (i.e. 3 years) is wholly insufficient. Such a duration fails to recognise that LCR will be required in all payment forms (i.e. in person, online, mobile and digital wallet) and that some of these forms are largely at market infancy, with a likely gestation period of 7-10 years. Within this context, the current duration largely only binds the applicant to maintenance of LCR for in-person payments and will fail to require continuation of LCR in digital forms.

3. Specific concerns on the proposed undertaking

3.1 Ineffective against likely future harm of the merger

The proposed amalgamation will result in the structural removal of a significant and effective competitor or at least diminish Eftpos' capability. The result of removing Eftpos as an independent entity would be to remove its incentive to innovate. This undertaking does not address that issue and provides no comfort that an important competitive pressure (LCR) will be retained in the long run.

The proposed undertaking commits Eftpos to do all things *in its control* to make available LCR; to maintain its infrastructure, payments scheme and related services; and to develop certain Prescribed Services under its existing Mandate Frameworks, all *for a period of three*

years. An industry wide QR payments standard would be agreed and the feasibility of developing certain service would be explored.

Under the proposed undertaking, LCR technically might be available. However, as history has clearly shown, its practical benefits are dependent upon a combination of the actions taken by acquirers and issuers and an independent and focused Eftpos, which is enabled and committed to competing head-to-head with Visa and Mastercard on debit card fees.

To date, the overwhelming evidence is that acquirers and issuers, many of which are the applicants behind the proposed amalgamation have been slow and, on occasions, downright obstructionist in maximising the availability of LCR, even with a fully committed, resourced, active and vocal Eftpos management team trying to create an environment for change.

Acquirers have taken an excessively long time to ensure their terminals, pricing regimes and systems are LCR compatible. They have done little to market LCR to their customers. They have hidden the benefits of LCR behind confusing and opaque pricing arrangements, favouring more profitable arrangements with the international card schemes, which have been able to put additional barriers in the way of LCR in the online environment. Some issuers are taking Eftpos off their debit cards, removing the opportunity for LCR altogether.

The proposed undertaking makes no commitments on behalf of the applicants behind the amalgamation, whose attitudes and behaviours are a primary reason for the slow rollout and low take-up of LCR and the lack of practical headway in extending LCR into the digital environment. These behaviours are entirely logical as it is more profitable for acquirers and issuers if merchants are paying the higher transaction fees of the international card schemes.

With these in-built financial incentives, why would the applicants suddenly become committed to competing strongly with the international card schemes on debit cards with a potentially weaker and less resourced Eftpos management team, when they have been resisting doing this for years? Or will amalgamation mean their demonstrated attitudes and behaviours will become more entrenched, reducing the competitive pressure from Eftpos – both on the banks and the international card schemes – lessening the merchant benefits of LCR across all form factors, both card-present and card-not-present, both at point of sale (including mobile) and online?

The clue to answering these questions lies in a combination of what we know about the positions of the amalgamation proponents and what one would expect in the proposed undertaking if it was serious about responding to the ACCC's concerns about AP+ and the major banks reducing support for Eftpos and a loss of availability of LCR.

Within this context, the likely future of LCR - and Eftpos' ability to continue to compete with the international card schemes - under an amalgamation scenario could reasonably be summarised as follows:

- a) The major acquiring and issuing banks will have significant influence over the amalgamated entity.
- b) The amalgamated entity will not have the singular focus that Eftpos has in driving competition in debit against the international card schemes.
- c) Eftpos will no longer be a stand-alone entity and will report to the board of an amalgamated entity which will have different priorities.
- d) There is a lack of small business representation on the amalgamated entity and a lack of recognition that merchants are a core payments system stakeholder.
- e) The commitments to LCR and Eftpos services in the proposed undertaking are for only three years.
- f) The AP+ expert adviser does not see a future in debit cards or that Eftpos is financially sustainable in the longer term.
- g) In the UK, where the domestic debit payments provider ceased to exist, merchants ended up incurring significantly higher debit transaction costs.
- h) The CBA has not addressed the fact one of its main point-of-sale terminals and a number of its pricing plans are not LCR capable, and certain issuing banks are moving to single network debit cards which do not allow LCR.
- i) None of the major banks are actively looking to implement LCR in mobile, despite the CBA saying mobile wallets will soon account for 50% of transactions.
- j) The major banks may not take forward Eftpos' online debit solution, instead preferring an NPPA solution which cannot offer LCR on debit cards and cannot compete directly with international card schemes in card payments which dominate the market.
- k) Eftpos' merchant centric QR payments solution is missing from the proposed undertaking and could be replaced by a MasterCard and Visa standard.

The above observations suggest that the amalgamation would result in a reduced focus on LCR and a loss of support for Eftpos. Even more telling, is the fact that the proposed undertaking does not elicit any direct commitments of AP+ itself or the applicants of the merger application.

3.2 Insufficient governance, monitoring and audit requirements

The party proposed to give the undertaking is AP+. However, the relevant applicants behind the Authorisation Application who collectively have ownership and control of the amalgamation parties will remain key parties to the proposed amalgamation. Their ongoing role and commitments to address the ACCC's competition concerns have not been clarified or captured in the proposed undertaking.

The proposed undertaking should include commitments by the applicant acquirers and issuers to ensure transparency about their roles and demonstrate their commitment and

accountability for the commitments made. The proposed undertaking should also clearly set out the governance structures that AP+ will have in place to enable it to achieve its commitments under the proposed undertaking.

Any proposed undertaking should also allow greater stakeholder input including formalising a means for small business stakeholders to provide their views (for example, mandating two small business representatives, selected independently from the applicants, on the board).

The proposed undertaking should have effective mechanisms in place to monitor and report on compliance. It should set out clear lines of defence that include internal monitoring, and external independent auditing.

The requirements currently set out in clause 6 should be described as ‘monitoring’ and would need to be significantly strengthened to provide a more comprehensive framework that would ensure compliance with any obligations ultimately accepted by the ACCC. A clause should be added to set out an auditor function, performed by an independent, ACCC approved auditor.

3.2 Limitations on enforceability

The use of vague and imprecise language and broad, general commitments to obligations with no specified timeframes could lead to very open and uncertain conclusions. This would make any monitoring and assessment of compliance with such obligations extremely difficult and would make the proposed undertaking unenforceable. See for example, “AP+ will procure that Eftpos will do all things in its control...” (clause 5.1); and AP+’s “commitment to explore feasibility of certain services and to develop if feasible.” (Clause 5.7).

The clauses of the undertaking setting out the maintenance of Eftpos’ infrastructure, scheme, and services, do not specify regular reviews of the effectiveness in meeting that obligation (for example, that reviews be conducted twice per year), not do they specify a framework that will commit to improving and enhancing the infrastructure, scheme, and services.

Further detail is needed to understand the compliance obligations and how they will be monitored and reported. For example, how will progress be reported? What assessment criteria will be applied?

Part of the role for the revised monitoring and audit function should include comprehensive and regular reporting to the board and ACCC about issues and delivery against the obligations.

3.3 Insufficient duration of the undertaking

The proposed three-year timeframe for the undertaking is insufficient and provides no long-term certainty for small businesses.

Numerous stakeholders will potentially be impacted by the amalgamation and the timeframes needed to develop and evaluate the effectiveness and impact of the new Prescribed Services would alone, extend well beyond three years. With the length of time that it takes to make changes to payment systems, it is likely that the embedding of competition in online and mobile wallet related payments will take between five and seven years.

If a three-year timeframe was to be seriously considered, it should only occur if that period is used to develop a more comprehensive long-term, competitive solution that could include a regulatory regime, or potentially a mandatory code of conduct. Any proposed undertaking should also be subject to regular review to ensure its ongoing effectiveness.

3.4 Absence of appropriate complaint handling and dispute resolution processes

The proposed undertaking should set out a framework for customer complaints and dispute resolution. This would enable issues to be raised in relation to the quality of the services being provided, or in relation to the execution of the deliverable set out in the undertaking.

Such complaints should form part of the reporting from the independent auditor to the board and ACCC.

4. Proposed remedy of identified deficiencies

ACAPMA strongly believes that the proposed merger should not proceed and that the draft undertaking fails to provide any meaningful protections of the likely competition harm detailed in our submission of April 2021.

If the undertaking was to be advanced, then ACAPMA believes that it would need to be substantially revised to incorporate the following improvements:

- a) A commitment by the applicant acquirers to
 - i. ensure that LCR is available and actively promoted to all merchants at point of sale and digitally (including online and using mobile wallets);
 - ii. upgrade their terminals in designated timeframes; and
 - iii. maintain transparent competitive pricing offerings that support LCR.
- b) A commitment by the applicant issuers to maintain dual network cards for all their cards, ensuring that LCR is accessible at point of sale and online.

- c) A commitment by the AP+ that Eftpos will retain total managerial discretion over its pricing decisions, operating at arm's length from non-independent AP+ board members, to drive competition and encourage maximum take-up and use of LCR.
- d) A commitment by AP+ and the applicants to continue delivering the full array of Eftpos' existing and agreed future services in its public Roadmap, and to actively promote those services to merchants and consumers.
- e) A commitment by AP+ and the applicants to implement in full the Prescribed Services relating to LCR and to actively promote them to merchants in an agreed timeframe, rather than the tacit commitment to make them available for use.
- f) A commitment by AP+ and the applicants to comply fully with Eftpos Mandates in the agreed timeframes to enable timely delivery of the enhancements required to deliver LCR in the digital environment.

If the applicants were serious about not reducing LCR and competition in debit card payments, the proposed undertaking would continue for at least seven years to provide the necessary time to enable and fully implement LCR functionality in the fast-growing mobile wallet and online transaction channels.

Most importantly, it is understood that the three-year term of the proposed undertaking is premised on the assertion that card transactions will largely be phased out in the Australian economy within the next 3-5 years in favour of NPP payments. Such an observation is not supported by any facts nor the experience in any other developed economy in the world – despite many being more advanced than Australia in respect of NPP style payments.

5. Summary of position on merger

ACAPMA believes that the perceived benefits of the proposed merger are contestable, and that the merger presents significant downside risks to Australian fuel retailers (especially small fuel retail businesses) owing to a likely lessening of competition in the Australian payment services market - with likely adverse flow-on consequences for Australian fuel consumers.

The proposed undertaking is not considered to be sufficient to protect against the potential competition harm. Should you require any clarification of the items discussed in this submission, please contact me directly.

Yours sincerely,



Mark McKenzie
Chief Executive Officer