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Application to the ACCC for the proposed amalgamation of BPAY, eftpos and NPPA

Mastercard response to the ACCC's Statement of Preliminary Views

June 2021

1. Executive summary

1.1 This submission is made by Mastercard in response to the Australian Competition and Consumer Commission (**ACCC**) statement of preliminary views and issues about which it is seeking further information dated 4 June 2021 (**Statement of Preliminary Views**) in relation to the Application to the ACCC by the Industry Committee, on behalf of its members who are shareholders and/or members of BPAY, eftpos and/or NPPA, to amalgamate under NewCo dated 18 March 2021 (**Application**).

1.2 Oxera has also prepared a separate report that is provided with this submission (**Second Oxera Report**). The Second Oxera Report provides commentary on both certain matters raised by the ACCC in the Statement of Preliminary Views and points raised by Dr Edwards in the response to Oxera report dated 31 May 2021 (**CRA Response**).

1.3 For the reasons set out below and in Mastercard's April 2021 submission (**Mastercard's First Submission**), together with the reports by Oxera, Mastercard remains concerned that the proposed merger will have an adverse impact on competition and that the public benefits will not outweigh the detriments.

2. Introduction

2.1 In this submission, Mastercard responds to the following matters which the ACCC raises or seeks further information on in its Statement of Preliminary Views:

(a) least cost routing;

(b) the likely anti-competitive effects of the proposed merger;

(c) foreclosure risks and access to the NPP infrastructure;

(d) the extent to which the proposed merger will result in public benefits, particularly benefits arising from import substitution; and

(e) the relevance of overseas payments consolidation to the proposed merger.

2.2 Mastercard also addresses in this submission a number of "corrections" raised by the Applicants in their response to submissions from interested third parties dated 19 May 2021 (**Applicants' Response**) in relation to Mastercard's First Submission.

2.3 Before turning to these matters, Mastercard first makes some observations regarding the relevance of the Reserve Bank of Australia's (**RBA**) current Review of Retail Payments Regulation and the preliminary findings which were published in May 2021 to the Application.

3. Future with and without the proposed merger

Review of Retail Payments Regulation

3.1 In applying the authorisation test, the ACCC compares the likely future with the proposed acquisition that is the subject of the authorisation to the likely future in which the proposed acquisition does not occur.[1] In considering the Application and the future with and without the proposed merger it is important to take account of the RBA's current Review of Retail Payments Regulation is being undertaken.[2]

3.2 The RBA released in May 2021 its Consultation Paper on the Review of Retail Payments Regulation (**Consultation Paper**). The Consultation Paper provides the preliminary

[1] ACCC, Determination Application for merger authorisation lodged by AP Eagers Limited in respect of its proposal to acquire Automotive Holdings Group Limited, MA1000018, 25 July 2019 at [6.46]
[2] https://rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/consultation-paper-202105/executive-summary.html

conclusions of the Payments System Board (**Board**) following the public consultation process undertaken after the release of the Issues Paper in November 2019. The Consultation Paper notes that the Board expects to reach its final conclusions in the second half of 2021.[3]

3.3 The preliminary conclusions set out in the Consultation Paper will clearly impact payments markets and the applicable regulatory framework, including for domestic debit payments. Mastercard considers that the ACCC needs to take account of these changes to the regulatory framework as proposed in the Consultation Paper in assessing the proposed merger.

3.4 The Consultation Paper sets out changes to the policy and regulatory landscape being considered by the RBA that, if implemented, will further entrench and protect eftpos's position in the debit payments market.[4] In particular, one of the Board's proposals in relation to the framework for Dual Network Debit Cards (**DNDCs**) is that major banks would be required to continue to issue DNDCs, with both schemes to be provisioned in all relevant form factors offered by the issuer (i.e. mobile wallets as well as physical cards).[5] The Consultation Paper also considers measures to promote LCR for card not present transactions.

3.5 The ACCC should carefully consider the Consultation Paper and the impact of the proposed regulatory framework in relation to DNDCs and LCR on the proposed merger. Mastercard is concerned that the RBA Review will not be complete while the ACCC is considering the proposed merger and so it will not be in a position to consider the merger in the context of the likely regulatory environment.

3.6 The Consultation Paper shows that the long-term future of eftpos will be protected by the RBA regardless of whether the proposed merger proceeds. While it is clear from eftpos's own evidence that it does not require the proposed merger, the Consultation Paper further shows that the proposed merger is not required to ensure that eftpos remains an effective competitor in debit markets and that its position will be protected by the regulatory framework. This is consistent with the ACCC's observation at [2.73] of the Statement of Preliminary Views in relation to the claimed public benefits of a strong domestic payments company that the government and the RBA will have a role in relation to these matters.

Least Cost Routing

3.7 In the Statement of Preliminary Views[6], the ACCC states that it considers Least Cost Routing (**LCR**) to be relevant to its assessment of how consolidation of the three domestic payments systems is likely to affect competition, and affect the incentives to pursue LCR and implementation of eftpos initiatives.

3.8 As part of this consideration, it is worth noting that unlike other jurisdictions (such as Europe) where similar initiatives are in place, the consumer is not able to influence this decision.[7] In Europe, the introduction of the Interchange Fee Regulation (**IFR**) places the decision over the choice of processing infrastructure in the hands of the consumer.[8]

[3] Consultation Paper on the Review of Retail Payments Regulation, p 1.
[4] Note that eftpos in its submission to the RBA dated 31 January 2020 highlights that there are now more than 50 million eftpos-enabled cards in the market and as such "eftpos is currently well placed to deliver real-time and secure payments to almost all Australians with a bank account" (see p 3).
[5] Consultation Paper on the Review of Retail Payments Regulation, p 2.
[6] See 2.43.
[7] For card present transactions, the consumer is only able to exercise a choice over routing at the point of sale by 'dipping' their card. Many consumers are unlikely to be aware of this.
[8] Article 8, Regulation (Eu) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions

3.9 From a consumer protection perspective, the absence of this choice may result in consumers being directed down the route that is less service rich, resulting in consumers having less protection than they initially thought when the transaction was initiated.

3.10 While the RBA has proposed some principles in the Consultation Paper to address this,[9] it stops short of providing consumers with decision-making powers.

4. Proposed merger is likely to reduce competition

4.1 In the Statement of Preliminary Views, the ACCC identifies a number of existing and potential overlaps between NPP, BPAY and eftpos in relation to low value payment segments. Mastercard agrees that there is the potential for the proposed merger to have an adverse impact on competition in the areas of overlap identified by the ACCC.

4.2 In relation to these areas of overlap, the ACCC notes that it is further considering the extent to which international payments service providers, including the international card schemes, will impose a competitive constraint on the merged entity. While both Mastercard and Visa are strong competitors in relation to card payments, they are not as strong competitors in a number of low value payments segments identified as areas of concern and further the proposed merger is likely to inhibit their ability to compete.

4.3 As set out in Mastercard's First Submission, the financial institutions who will be influential board members and shareholders in NewCo are effectively the 'gatekeepers' to payments markets in Australia. Mastercard and Visa depend on the financial institutions to be able to compete in payments markets. Mastercard is concerned that post-merger it may be limited by the extent to which it is able to enable its services or new capabilities across financial institutions as this will be in the banks' control.

4.4 While in their Response, the Applicants deny preferential treatment will be given to eftpos due to shareholder status, they nonetheless state that "*[a] decision by any Applicant not to expend the significant effort required to enable the international scheme offerings is understandable given the proposed functionality is already being provided to the Applicant's end users (eg through NPP)*".[10] The fact financial institutions which are shareholders in NewCo will not want, as the Applicant states, to expend significant effort to enable additional offerings clearly evidences the competition concerns raised by the proposed merger. It shows that Mastercard and Visa currently face significant hurdles when seeking to expand their offerings and that they will be limited in the extent to which they are able to compete with the Merger Parties across the various low value payment sectors identified as areas of concern by the ACCC.

4.5 Mastercard refers to 9.12 and 9.13 of Mastercard's First Submission and the additional information provided therein regarding these issues.

4.6 In their Response, the Applicants note that Mastercard now operates an account to account (A2A) platform called Vocalink.[11] While Mastercard does offer A2A capability in other countries, such mandates are either awarded by central banks/payments authorities or by individual banks/financial institutions. **[Confidential to Mastercard]**.

4.7 Mastercard is concerned that if the Application is granted, NewCo will have the ability to prevent or delay implementation of similar services for other competitors, thereby hindering innovation and future competition particularly in the low value payment segments where there has been limited competition to date. If the Application is granted, the ACCC should consider imposing conditions in order to ensure there is a framework in place so that competing third party solutions are not locked out. This is discussed further below in section 9.

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[9] See Consultation Paper from p 16-18.
[10] Applicants' Response p 12.
[11] Applicants' Response at p 14.

4.8 Mastercard also refers to section 2 of the Oxera submission which considers the anti-competitive effects of the proposed merger.

5. Foreclosure risks and access to the NPP infrastructure

5.1 In its Statement of Preliminary Views, the ACCC notes the concerns that have been raised regarding access to the NPP infrastructure.

5.2 As noted in Mastercard's First Submission, the RBA and the ACCC recognised in their New Payments Platform Functionality and Access: Conclusions Paper dated June 2019 that there were a number of access issues that could present barriers to entry for new participants. In their response, the Applicants point to the NPP's supplementary response to the RBA's Conclusions Paper which outlines NPP's progress, including to access issues.

5.3 The position remains that only ADI entities are able to participate in both the clearing and settlement of NPP payments.[12] In the Applicant's response, it points to the fact that in the two years prior to the response, that the NPP received no applications for direct access to use the NPP infrastructure and that it considered this was the case because of the 500 organisations that it was interacting with in this period, many of these organisations found indirect access via a financial institution that offers NPP-enabled payments and services.[13]

5.4 Even if as the Applicants state that NPP will continue post-merger to operate substantially in accordance with its current rules, this does not resolve the concerns raised that Mastercard and other third parties which do not satisfy the NPP Regulations in order to apply for access to the NPP infrastructure directly, rely on others, particularly financial institutions in order to have indirect access to the platform.

5.5 This means that those institutions will essentially be the "gatekeepers" to the NPP infrastructure. As noted above, while the Applicants deny preferential treatment will be given to the Merger Parties due to shareholder status, they accept that a decision by the Applicants not to expend the significant effort required to enable an international scheme offering is understandable if the proposed functionality is already being provided to the Applicant's end users.

6. Public benefits

Claimed benefits are unclear and uncertain

6.1 The ACCC in its Statement of Preliminary Views states that the extent and significance of the claimed benefits that are likely to result from the proposed merger is unclear. Mastercard agrees that the benefits are unclear and also considers that they are uncertain.

6.2 As noted in Mastercard's April 2021 submission, the proposed merger will result in a fundamental and permanent change to the structure of the payments market in Australia with the potential for long-term and adverse consequences for competition in those markets. In addition, as noted above, the RBA is currently undertaking its Review of the Retail Payments Market which will likely result in further change to the structure of the payments market.

6.3 Given these significant changes it is difficult to see how the Applicants can satisfy the ACCC to the requisite standard that the claimed public benefits will, or will be likely to, exist in the future based on a "real chance" if the authorisation were granted[14] and that these will

[12] NPP response dated 30 October 2019, p 4: https://nppa.com.au/wp-content/uploads/2020/12/RBA-Functionality-and-Access-consultation-recommendations_NPPA-Response_October-2019-updated-response2.pdf
[13] NPP response dated 30 October 2019, p 4.
[14] See *Re Queensland Independent Wholesalers Ltd* (1995) 132 ALR 225; *Re Qantas Airways Ltd* [2004] ACompT 9; *Re VFF Chicken Meat Growers Boycott Authorisation* [2006] ACompT 2; *Re Application by Medicines Australia Inc* [2007] ACompT 4; *Re Macquarie Generation and AGL Energy Ltd* [2014] ACompT 1.

outweigh the likely detriments. While the claimed benefits are not required to be quantified in precise terms, there must be a factual basis for concluding that the public benefits are likely to result from the conduct under consideration: *Re Sea Swift Pty Ltd* [2016] ACompT 9.

6.4 A number of the claimed benefits are hypothetical at best and Mastercard shares the ACCC's concern that it is unclear whether they are benefits that will result if the authorisation is granted, and therefore meet the requisite standard. For example, this includes benefits such as the reduced uncertainty which will allow for more efficient deployment of capital because NewCo will be able to co-ordinate and direct investments, enhanced speed to market of innovations, increased likelihood of hybrid and targeted local innovations and a reduced risk of stranded payments assets.

6.5 In addition, as noted by the ACCC, the Applicants are unable to identify what innovations may result from NewCo that would otherwise not take place. Given this, it cannot be said that the proposed merger is necessary for those innovations to take place. This will necessarily depend on the nature of the proposed innovation and the requisite collaboration. There are many lawful collaborations between competitors that do not require a merger to take place, whether they are effected through a joint venture, other structure or even a targeted ACCC authorisation.

Import substitution

6.6 The ACCC in its Statement of Preliminary Views has sought further information on whether the proposed merger is likely to result in a public benefit in the form of greater import substitution by enhancing competition between eftpos and the international card schemes.

6.7 As a preliminary matter, it is relevant to note that the import substitution required to be assessed by the ACCC under section 90(9A) of the *Competition and Consumer Act 2010* (Cth) as a public benefit is a "significant substitution of domestic products for imported goods".[15] The relevant Explanatory Memorandum states that a merger may be said to have produced a substitution of domestic products for imported goods if the total level of consumption of an Australian products rises at the expense of consumption of foreign-produced goods, and this change is attributable to the merger.[16] It should be noted that the Application does not relate to any such benefit. Here, the Application relates to a theoretical import substitution in connection with services rather than goods.

6.8 While the Applicants state that any share won by eftpos against the international card schemes is a form of import substitution because it results in a "domestic" service replacing an "international" one, this is purely a theoretical possibility. There must be a commercial likelihood that the conduct will bring about the public benefit claimed.[17] In this regard, it is clear from eftpos's own evidence that it is growing and expanding its operations independent of the proposed merger. In any event, for the reasons set out in Mastercard's First Submission and discussed further below in section 8, it is not clear that NewCo will result in a substitution of local services for international services given that the Merger Parties (particularly eftpos) rely extensively on international services and technology and further many of Mastercard's services are locally supplied.

6.9 The benefits that may arise from import substitution of services are discussed further in section 3 of the Second Oxera Report.

[15] Section 90(9A)(a)(ii) of the *Competition and Consumer Act 2010* (Cth).
[16] Explanatory Memorandum to the Trade Practices Legislation Amendment Bill 1992 at [64].
[17] *Re Qantas Airways Ltd* (2004) ATPR 42-027; *Re Medicines Australia Inc* (2007) ATPR 42-164; [2007] ACompT 4 at [109].

7. Relevance of overseas payments consolidation experience

7.1 In its Statement of Preliminary Views, the ACCC states that it is interested in gathering views on the experiences of overseas payments consolidation that may be of relevance to this proposed amalgamation.[18]

7.2 **[Confidential to Mastercard]**

7.3 **[Confidential to Mastercard]**[19]

7.4 **[Confidential to Mastercard]**

8. Other considerations

8.1 Mastercard also wishes to address a number of the "corrections" in the Applicants' Response.

8.2 First, despite the Applicants' comments that previous attempts at collaboration and coordination have been unsuccessful and that collaboration is not possible absent the merger,[20] Mastercard considers that this has not been demonstrated and there are likely viable alternatives available to the Merger Parties instead of the merger. The difficulty is that it is unclear what the Merger Parties will do beyond the schemes' existing roadmaps. Given this uncertainty, it cannot be said that the merger is required for potential future collaboration. The lack of clarity around the unified roadmap proposed by NewCo has also been identified by the ACCC in its Statement of Preliminary Views and by other third parties in their submissions.[21]

8.3 As noted above, there are many lawful collaborations between competitors that do not require a merger. Relevantly, some Applicants have a successful track record of collaborating and coordinating. In particular, ANZ, CBA, NAB and Westpac collaborated and coordinated to establish both BPAY and BeemIt, while these same organisations were also founders of eftpos together with Coles and Woolworths. It is difficult to accept the Applicants' comment that it is not able to collaborate absent the merger, when a number of the largest banks and retailers, all of whom have different and competing priorities and commercial imperatives, have successfully done so on specific initiatives.

8.4 By way of further example, Mastercard, Visa, American Express and financial institutions were able to collaborate to effect the successful roll out of mandatory 'PIN@POS' in Australia. This was effected through a targeted authorisation application to the ACCC.

8.5 Second, the Applicants' Response states that most of the Applicants are not global organisations that operate substantial businesses outside of Australia.[22] Schedule 3 to the Application shows that most of the Applicants either have offices, businesses and/or significant customer bases overseas, including the United States, United Kingdom, Europe and elsewhere in Asia Pacific, or are Australian subsidiaries of organisations headquartered outside of Australia.

8.6 Third, the majority of Mastercard's workforce in Australia is **[confidential to Mastercard]** Mastercard's Australian workforce is over **[confidential to Mastercard]** larger than the workforce of the Merger Parties (see section 4.1(e) of Mastercard's First Submission) and is likely to only continue to be **[confidential to Mastercard]** larger than the Merger Parties post-

[18] ACCC (2021), 'ACCC's preliminary views and issues about which it is seeking further information', 4 June 2021, question viii.

[19] **[Confidential to Mastercard].**

[20] See Applicants' Response at p 13 and 14 (in relation to Mastercard's First Submission at paragraphs 6.6 and 8.5).

[21] ACCC Statement of Preliminary Views, 2.62; see submission from Benchmark Analytics dated 14 May 2021.

[22] Applicants' Response at p 12 (in relation to comment in Mastercard's First Submission at 5.1(b)).

merger given the services that the Applicants propose be shared, including functions such as strategy, finance, legal, communications and incident management.[23]

8.7 Fourth, the Applicants' Response states that Mastercard's comment (in 9.11 of Mastercard's First Submission) that any new third party development will need to get agreement from a critical mass of Australian banks is incorrect. Mastercard continues to believe critical mass would be necessary to introduce new products and services to market in Australia. For instance, as referred to in paragraph 4.6 above, Mastercard would need **[confidential to Mastercard]** in Australia. In addition, the Applicants contradict themselves as the Application clearly states that for capabilities rolled out by the Merger Parties, "*a sufficient network would need to be made available by a critical mass of financial institutions before it can be used effectively*".[24]

8.8 Fifth, the Applicants' Response make a number of comments in relation to Mastercard's submission that Mastercard has continued to provide support to eftpos for a number of years.[25] The undertakings given by Mastercard (and both Visa and eftpos) to the RBA do reflect a commitment by Mastercard to support eftpos to allow issuers to include applications from two networks on the same card and chip. Further, Mastercard has and continues to support eftpos in a number of ways. For example, **[confidential to Mastercard]**

9. Potential conditions of authorisation

9.1 For the reasons set out above and in Mastercard's First Submission, Mastercard is concerned that the proposed merger will have an adverse impact on competition. While Mastercard does not consider that the Applicants have established that the authorisation meets the relevant test, if the ACCC grants the authorisation then it should be subject to the conditions set out in section 10 of Mastercard's First Submission in order to reduce the impact of the likely detriments.

9.2 In addition, in this context, the ACCC should also give consideration to:

(a) the proposed regulatory reforms proposed in the RBA's Consultation Paper and discussed above in section 3; and

(b) whether, as discussed above, appropriate measures should be put in place so that third parties are not prevented from being able to introduce new capabilities and competing with NewCo in light of the Applicants' observation that it is understandable that NewCo's shareholders may only want one capability such as those provided by the Merger Parties.

23 See 27.12 of the Application.

24 Applicants' Response at pp 15-16; Application at 14.6 and 14.8.

25 Applicants' Response at p 12 (in relation to Mastercard's First Submission at 5.1(d)).

Oxera annex to the Mastercard submission

Prepared for the ACCC

18 June 2021

1 Overview

1.1 This document sets out Oxera's assessment of whether the proposed merger of BPAY, eftpos and NPPA (the 'Merger Parties') into NewCo is likely to lead to a substantial lessening of competition (SLC), or would likely result in benefits to the public that would outweigh the detriments to the public that would be likely to result.

1.2 This statement builds on the assessment set out in Oxera's submission to the ACCC on behalf of Mastercard in relation to the proposed merger, dated 22 April,[1] and follows our review of the publication of the following documents:

- ACCC (2021), 'ACCC's preliminary views and issues about which it is seeking further information', dated 4 June 2021;
- Dr Edwards, CRA (2021), 'Response to Oxera', dated 31 May 2021 ('**CRA Response**');
- King & Wood Mallesons (2021), 'Applicants' response to submissions from interested third parties', dated 19 May 2021.

[1] Oxera (2021), 'Initial economic assessment of the proposed amalgamation of BPAY, eftpos and NPPA: Oxera submission on behalf of Mastercard', 22 April, pp. 30–56.

1.3 Having reviewed these recent publications, we maintain the assessment that there is a reasonable prospect that the proposed merger is likely to give rise to a SLC. In addition to the anticompetitive elements of the proposed merger, the claimed merger benefits do not appear to be merger-specific, are unclear, and/or appear to stem from a lessening of competition.

2 Theories of harm: anticompetitive effects

2.1 We continue to hold the view that the merger has the realistic prospect of giving rise to anticompetitive outcomes, from both a horizontal and vertical perspective. This section examines such anticompetitive effects through the lens of potential theories of harm.

2A The proposed merger reduces future competition between the Merger Parties and future incentives to innovate

2.2 An assessment of the dynamic effects of the transaction on future competition and innovation is an important consideration. In contrast to Dr Edwards' statements on the lack of closeness of competition between the entities in the CRA Response,[2] in the absence of the merger, eftpos considers both BPAY and NPPA to be primary competitors in the future (moving from their current position of secondary competitors).[3] A similar observation is made by BPAY, which states that the overlap between NPPA's business services and BPAY's overlay services is increasing, as NPPA continues to expand the range and functionality of its business services.[4] BPAY also states that:

- there is potential for overlap between BPAY and eftpos with eftpos' 'card on file' service;[5]
- there is potential overlap between BPAY's Osko service 1 and NPPA's SCT;[6]
- there is potential overlap between BPAY Payments and NPPA's MPS service.[7]

2.3 While we agree that the existence of an overlap is not sufficient on its own to give rise to a SLC, the fact that the Merger Parties themselves recognise these

[2] See, for instance, CRA Response, para. 17.
[3] Annexure 93, 'Non-confidential statement by eftpos Payments Australia Limited', dated 17 March 2021, Tables 2–6.
[4] Annexure 89, 'Non-confidential statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation', para. 54 (e).
[5] Appendix 89, 'Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation', para. 51.
[6] Ibid., para. 53 (a).
[7] Ibid., para. 53 (b).

competitive dynamics and expect them to grow is a clear sign that the proposed merger is likely to reduce future competition between the Merger Parties, as well as future incentives to innovate.

2.4 The merger is likely to reduce the incentives for innovation and competition both for the Merger Parties and for other players in the market in several areas—for example, on developing solutions for the use of the credit transfer infrastructure for retail payments in Australia.

2.5 We note that Dr Edwards in the CRA Response states that the 'NPP infrastructure is not designed for, and for a number of reasons is not well suited to, retail payments'.[8] This is at odds with the desired NPP capabilities, as set out in its 'Roadmap'.[9] Indeed, Osko is a retail payment product that runs on the NPP structure. Future development of overlay services will further enable the use of credit transfer infrastructure to support retail products. Similar infrastructure has already been used successfully to support retail payments in Europe for a number of years. For example, Trustly was one of the first providers to make the existing interbank processing infrastructure available for online retail payments. Other examples include Sofort (acquired by Klarna in 2014), as well as a number of banks that have introduced credit transfer-based payment methods themselves.[10]

2.6 The very fact that the NPP is now being positioned such that it is not possible to use it for retail purposes, despite comparable developments taking place internationally, is a sign that the merger and subsequent proposed direction of travel is hampering the range of innovations that could be contemplated in the future.

2.7 Further, examples from Europe do indeed show that *card* infrastructure is not always a suitable substitute to open credit transfer processing infrastructure.[11] This is because credit and debit cards are integrated retail products already, and, as a result, there is no need to develop added overlay services.

2B The proposed merger reduces competitive dynamics in the market

2.8 Following the merger, existing competitive dynamics between the three Merger Parties will be lost. While acknowledging that competition 'between initiatives

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[8] CRA Response, para. 35.
[9] NPP (2020), 'New Payments Platform Roadmap: Enhancing the platform's capabilities', 30 October.
[10] Such as iDEAL in the Netherlands.
[11] In response to Dr Edwards, CRA (2021), 'Response to Oxera', 31 May, para. 45.

to be favoured in the allocation of scarce resources within financial institutions' would reduce,[12] Dr Edwards in the CRA Response suggests that this would result in a public benefit through improved investment coordination. Such coordination is not well described as a 'public benefit' since it is realised only as a result of reducing dynamic competition from entities that are currently competing to get their technology adopted.

2.9 The subsequent response by the Applicants, dated 19 May 2021, demonstrates that the merger will reduce competitive activities for non-NewCo payment participants. This lessening of competition and innovation is acknowledged by the Applicants in their statement that:[13]

> A decision by any Applicant not to expend the significant effort required to enable the international scheme offerings is understandable given the **proposed functionality is already being provided to the Applicant's end users**. [emphasis added]

2.10 This indicates that there is limited scope for competition and innovation in instances where BPAY, eftpos and NPPA already provide an existing service. The transaction will in turn reduce the incentive to compete and innovate among the Merger Parties even further.

2.11 What the Applicants describe as a benefit in the form of coordination among the Merger Parties[14] can also be considered on the other hand as a softening of competition. This can be assessed from both a vertical and horizontal perspective. In relation to the former, if financial institutions are unlikely to consider services and capabilities offered by third parties, this reduces the incentives to innovate and compete for services that are already provided by one of the Merger Parties. In markets where network effects are important, there may be aspects of innovation that do indeed require industry-wide coordination—this 'competition for the market' is discussed by Dr Edwards.[15] However, it is not appropriate to suggest that all innovation requires such coordination. Where this is the case (for example, in the development of overlay services), it is important to ensure that incentives remain in place between players to ensure that competition for that service is strong, and that the best service would ultimately win.

[12] CRA Response, para. 15
[13] King & Wood Mallesons (2021), 'Applicant' response to submissions from interested third parties', 19 May, p. 12.
[14] CRA Response, para. 15.
[15] Ibid., para. 14.

2.12 From a horizontal perspective, if end-user banks are indeed willing to adopt new ideas to compete with other financial institutions, then the amalgamation, by removing this competition for adoption by individual banks, would mean that there is a reduced incentive to innovate in the same space.

2C The proposed merger is likely to give rise to the ability to foreclose

2.13 Our assessment of the post-merger vertical links between the Merger Parties maintains that the merger would likely result in NewCo having both the ability and incentive to foreclose third parties.

2.14 The ability to foreclose depends on whether NewCo controls an input that is important to downstream rivals, such that a lack of access to it weakens their competitive position. In this context, access to the NPP infrastructure is crucial for third parties that want to develop or expand payment solutions.

2.15 As highlighted in the original Mastercard submission,[16] shareholder banks and financial institutions play a central role in the payment market in Australia, and therefore impact competition and innovation in the market. As 'gatekeepers' to the payment markets, third parties are dependent on such institutions to enable their capabilities, in order to compete in the market.

2.16 Following the merger, the shareholders will have a greater incentive to make sure that only one among BPAY, eftpos and NPP develops a certain capability. While such dynamics may currently exist in the market, they are likely to become more pronounced post-merger.

2.17 Concerns about the openness of the NPP had already been raised in the June 2019 RBA consultation paper. While the NPP has published progress on a number of initiatives,[17] the RBA is yet to decide whether their initial concerns have been sufficiently addressed. We understand that this will not be decided ahead of the merger.

2D The merger is likely to give rise to the incentives to foreclose

2.18 Post-merger, the Merger Parties would operate the infrastructure at the upstream level of the market, as well as a number of downstream payment services. While we acknowledge that the existing structure itself may already

[16] See para. 1.16 of Mastercard (2021), 'Initial economic assessment of the proposed amalgamation of BPAY, eftpos and NPPA: Oxera submission on behalf of Mastercard', 22 April.
[17] King & Wood Mallesons (2021), 'Applicants' response to submissions from interested third parties', dated 19 May 2021, see p. 16 and NPP (2019), 'Updated response to the Reserve Bank of Australia's NPP functionality and access consultation: conclusions paper', 30 October.

display some lack of openness to third parties, we disagree with Dr Edwards' assertion that the incentive to foreclosure is not merger-specific.[18] As we understand it, the change in the shares and ownership of the banks post-merger implies that the amalgamation is likely to further remove the incentives for banks to invest in solutions designed by third-party providers, when these solutions compete with one of the services offered by NewCo.

2.19 To the extent that by foreclosing access to a third party, NewCo would increase its share downstream, it could be profitable to forgo the profits upstream and foreclose new entrants. The characteristics of these markets are such that the profits made upstream tend to be smaller than the profits that could be made in the retail payments markets, hence creating a realistic prospect of a foreclosure strategy being profitable. The intuition is that you would typically expect to see the margins on processing being lower than the margins on retail payment products themselves, because the closer you get to the users, the more products are differentiated and the higher margins may be.

2.20 Vertical foreclosure would not only reduce competition in the market, but would also reduce innovation in the future, as new entrants would be deterred or find it more difficult and costly to enter and develop new services.

3 Public benefits

3.1 As set out in the previous Oxera submission,[19] a number of the stated benefits (1) do not appear to be merger-specific and could arise in the absence of the merger in less restrictive ways;[20] (2) appear to stem from a lessening of competition between the three parties;[21] and (3) are unclear or unlikely to arise.[22] As a result, the potential efficiency gains generated by the merger would be unlikely to constitute an overall public benefit that would outweigh the public detriment.

3.2 We understand that the ACCC is specifically interested in understanding whether the proposed merger is likely to result in greater import substitution by

[18] CRA Response, paras 39, 43, and 51.
[19] See section 3 of Oxera (2021), '[Initial economic assessment of the proposed amalgamation of BPAY, eftpos and NPPA: Oxera submission on behalf of Mastercard](#)', 22 April.
[20] Ibid. See section 3A for an assessment of why the benefits are non-merger specific.
[21] Ibid. See section 3B for an assessment of why the benefits would only arise due to the lessening of competition.
[22] Ibid. See section 3C for an assessment of why the benefits are unclear and/or unlikely to arise.

enhancing competition between eftpos and the international card schemes, relative to the counterfactual.

3.3 Import substitution can be generally advantageous, protecting infant industries that are competing against well-established international companies, and allowing domestic companies to gain the scale required for an efficient operation.[23] However, the current regulation on the dual network debit cards (DNDCs) means that eftpos is already in a position that allows it to obtain scale and compete strongly with international card schemes, even absent the merger. As such, given the current regulation in place, it is unclear to what extent the merger would allow eftpos to win market shares from international providers that would not otherwise have been won absent the merger. To the extent that the merger will be necessary and successfully create a stronger domestic player in the payments market, it will be important to consider whether the dual network regulation will still be required in the future.

3.4 In addition, as highlighted above, the merger could result in a foreclosure of third-party providers (including fintechs), which intend to develop retail payment solutions in the Australian market. To the extent that these third parties are Australian-owned companies and fintechs, the merger could therefore have the opposite effects, by making it harder for new domestic providers to grow and displace international providers that are already established in the Australian market.

3.5 Import substitution is generally considered to create employment benefits in labour-intensive industries, or when substituting for a domestic product would imply a reduction of the costs of supply (for example, because of the reduction in transport costs). Neither of these aspects appears to arise in this case, indicating that the prospect of significant import substitution benefits is small. For example, it is not clear to what extent eftpos is creating employment opportunities in Australia, given its reliance on international components to deliver its services. The same could be said for the NPPA given that SWIFT operates its basic infrastructure. Further, in order to achieve the stated benefit of material efficiency gains through the elimination of duplicative resources and management,[24] the merger is, if anything, likely to result in a reduction of the

[23] Krueger, A. O. and Tuncer, B. (1982), 'An empirical test of the infant industry argument', *The American Economic Review*, **72**:5, pp. 1142–52.
[24] 'Application by Industry Committee on behalf of its members', dated 18 March 2021, section 27.12, pp. 114–5.

aggregate employees employed across BPAY, eftpos and NPP, and therefore to reduce employment opportunities in Australia.

3.6 In addition, given that payments are a service, transport costs are not a relevant consideration and no example has been given of the supply cost benefits that would arise from substituting a domestic service (to the extent that this exists and is not itself provided by international businesses, as mentioned above) for an international payments service.

3.7 Finally, it is also worth noting that as a four-party card scheme, many of Mastercard's costs and activities are undertaken locally through its issuing and acquiring services.

4 Conclusions

4.1 Overall, we find that there is a reasonable prospect that the proposed merger is likely to give rise to a SLC.

4.2 There is a realistic prospect of the merger giving rise to anticompetitive outcomes, from both a horizontal and a vertical perspective. The merger is likely to reduce future competition between the Merger Parties and future incentives to innovate, as well as reducing competitive dynamics in the market. We also find that the post-merger vertical links between the Merger Parties is likely to give rise to both the ability and incentive to foreclose.

4.3 In addition to the anticompetitive elements of the proposed merger, the claimed merger benefits do not appear to be merger-specific, are unclear, and/or appear to stem from a lessening of competition. Looking specifically at the stated benefit of import substitution, it is unclear how this will arise given the current regulation in place to protect eftpos, and the impact that the merger would have on new domestic providers given some of the anticompetitive concerns raised, as well as questions over the creation of employment benefits. As a result, we consider that the potential efficiency gains generated by the merger would be unlikely to constitute an overall public benefit that would outweigh the public harm.