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[Confidential to Mastercard]

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

Mastercard submission to the ACCC

April 2021

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1. Executive summary

1.1 This submission is made by Mastercard in response to the Application to the Australian Competition and Consumer Commission (**ACCC**) by the Industry Committee, on behalf of its members who are shareholders and/or members of BPAY, eftpos and/or NPP, to amalgamate under NewCo dated 18 March 2021 (**Application**).[1]

1.2 Mastercard is a technology company in the global payments industry that connects consumers, financial institutions, merchants, governments, digital partners, businesses and other organisations worldwide, enabling them to use electronic forms of payment instead of cash and cheques. As the developer and operator of digital payments technology, Mastercard makes extensive and ongoing investments in security, not only to protect our proprietary assets but across the payments ecosystem, supporting cardholders, merchants and financial institutions. Mastercard's significant investments in technology drive consumer benefit and choice, greater sales for merchants and safer transactions, resulting in a more resilient network with enhanced functionality. To maintain the security of our ecosystem, Mastercard offers integrated products and services that prevent, detect and respond to fraud and cyber-attacks and to ensure the safety of transactions made using Mastercard products along the entire payments value chain.

1.3 Mastercard's success is dependent on both an expansive payments ecosystem and the success of the participants in that ecosystem, and Mastercard has supported numerous new entrants to the payments system in Australia, whether as issuers, acquirers, payment facilitators or otherwise. Mastercard is a 'B2B2C', 'B2B2B' or 'B2B2G' organisation, providing its products, services and API access to these issuers, acquirers and payment facilitators. Mastercard generally does not provide services directly to consumers.

1.4 Mastercard has partnered with domestic payment networks, and in some markets provides the infrastructure for domestic payment network providers – for either card and ACH payments. In Australia, Mastercard has proactively engaged domestic payment schemes to integrate Mastercard platform services to enable increased payment innovation, such as online/e-Commerce and Digital Identity. We remain open to partnering with any payments service provider in Australia where there is payment system integrity, security and innovation that works for all parties and Australian consumers and businesses.

1.5 Mastercard has been at the forefront of developments in the payment system in Australia, whether through the development, introduction and funding of functionalities like contactless and mobile payments, and the continued development of the Australian payment system benefits from Mastercard's participation, not through Mastercard's exclusion.

1.6 The proposed merger of BPAY, eftpos and NPP (the **Merger Parties**) will result in a fundamental and permanent change to the structure of payments markets in Australia. This will have long term, adverse consequences for competition in those markets.

1.7 Mastercard considers that there are serious issues with the arguments put forward in support of the Application and the Applicants have not made out their case for authorisation. In light of the significance of the proposed change to payments markets in Australia, our view is the merger should not be authorised in the absence of compelling evidence that it will not substantially lessen competition or that it will result in real benefits to the public that outweigh the detriments.

1.8 Mastercard believes in competition, it drives innovation, best solutions and best pricing. A particular concern Mastercard has with the proposed merger is that the ability to compete fairly will become impaired. For example, if a financial institution (including any of the

[1] Terms used in this submission are as defined in the Application.

Applicants) is required (via a rule, mandate or otherwise) or otherwise feel compelled (due to the financial commitments they have made) to implement, enable and utilise products, services and/or capabilities of any of BPAY, eftpos or NPP which are inferior to a third party's capability (whether Mastercard's, "Big Tech's" or another entity's):

(a) then competition and innovation between the financial institutions to bring the best payment solutions to the market may be diminished, and it may also prevent those superior third party solutions achieving the necessary network effect, both of which are likely to negatively impact Australian businesses and consumers;

(b) this also has the potential to foreclose competition from superior products, services or capabilities offered by third parties, or act as a deterrent to implement and utilise these superior products, services or capabilities of third parties; and

(c) may also mean, contrary to the claimed benefits of the merger, that those financial institutions are less able to compete with "Big Tech" and their ‘closed loop’ products, services and capabilities given that they have a direct relationship with the financial institutions' customers.

1.9 Each of the Applicants or other participants in, or users of, any of the Merged Entities products, services and or capabilities should be able to choose how they meet the needs of consumers and businesses most effectively.

1.10 Before turning to the public benefits and detriments, there are a number of matters in relation to the proposed structure and governance of NewCo that warrant attention. The Application proposes that each of BPAY, eftpos and NPP become wholly owned subsidiaries of NewCo, a company owned by the current shareholders of each of BPAY, eftpos and NPP. The proposed ownership of NewCo and the governance structures of NewCo are largely opaque due to the Applicants’ confidentiality claims. As such, Mastercard is not in a position to comment on the proposed governance arrangements in any detail. Careful scrutiny should be given to the adequacy of the proposed governance arrangements for NewCo and each OpCo to ensure that no single entity or group of entities has control of, or undue influence over, the operation of the payment services.

1.11 However, based on the available information, Mastercard notes that there appears to be potential issues with the structure.

1.12 The proposed merger will increase the scope and level of coordination between businesses that would ordinarily compete with each other. This coordination will take place through the NewCo board and also at a shareholder level when there are issues put to shareholder vote. While the current arrangements for each of BPAY, eftpos and NPP currently permit such coordination between their shareholders and members, that coordination is limited to the specific activities of each of these entities. Under NewCo, there will be coordination between competitors over the combined activities of each of BPAY, eftpos and NPP.

1.13 Once the merger is approved, each of the OpCos will become related bodies corporate and will be able to collaborate and coordinate their businesses as they wish. This is the purpose of the Application. While the Application maintains that each of BPAY, eftpos and NPP will continue to operate separately there is no guarantee that this will continue to be the case once NewCo is created.

1.14 Furthermore, BPAY and eftpos are both currently operated on a commercial basis but following the merger, NewCo will be economically self-sustaining and will not be profit maximising. Any dividends at the OpCo level will be paid to NewCo and the Board of NewCo will determine what dividends are paid, but there is no expectation that dividends will be paid.

1.15 Consideration should be given as to whether this non-profit maximising structure combined with the reduced competition resulting from the merger will promote productive, allocative, and dynamic efficiency.

1.16 In assessing the Application, it is important to be aware of the role the shareholder banks and financial institutions play in payments markets in Australia. They are essentially the “gatekeepers” to payments markets and competition in those markets. While BPAY, eftpos and NPP are dependent on these institutions to enable their capabilities, so is Mastercard (and Visa). These institutions, who will have significant influence over NewCo and the OpCos, will have a greater incentive to enable a BPAY / eftpos / NPP capability over a Mastercard (or Visa) capability following the merger.

1.17 In terms of public benefits, one of the major claimed public benefits of the proposed merger is the creation of a national payments champion.

1.18 The Blockley report, prepared on behalf of the Applicants, refers to the sovereign risk that, without the eftpos domestic debit card scheme, retail payments in Australia would be in the control of foreign owned entities. Enabling the domestic payment systems to better compete with international payment networks like Mastercard, Visa and “Big Tech” is positioned as a means for ensuring some Australian ownership and control in the sector. However, this overlooks that:

(a) eftpos, as well as NPP, have key services provided by international technology companies;

(b) of the 21 proposed shareholders, six are affiliates of international banks/financial institutions; and

(c) the majority of the Applicants are global organisations that operate substantial businesses outside of Australia.

1.19 There are other issues with the claimed public benefits that the Applicants claim will likely result from the merger. For example, the benefits are:

(a) not specific to the merger and could occur through discrete collaborations, such as enhanced engagement and more efficient deployment of capital and increased innovation;

(b) only arise due to the lessening of competition, such as increased innovation and the reduction in risk of stranded assets due to reduced uncertainty; or

(c) are unclear or unlikely to arise, such as enhanced voting rights of smaller participants, import substitution and potential synergies.

1.20 The ACCC should not be satisfied on the information provided by the Applicants that there will be no substantial lessening of competition. The Application understates the extent of existing competition between BPAY, eftpos and NPP and in particular, the likely future competition between BPAY, eftpos and NPP in terms of both competing payments services as well as innovation. Contrary to the Application itself, the statements provided by each of BPAY, eftpos and NPP clearly evidence the current and likely future competition between them that will be lost if the merger is authorised.

1.21 Further, the Application does not really address the potential adverse impact on competition arising out of the increased vertical integration as a result of the merger. In particular, combining NPP’s underlying account to account (**A2A**) infrastructure with BPAY and eftpos, who are likely to seek to provide services using that infrastructure in the future, has the potential to foreclose competition in competing payments services that rely on this infrastructure.

1.22 For the reasons explained further in this submission and the attached paper from Oxera, Mastercard submits that the authorisation test has not been satisfied and the Application should not be granted by the ACCC. If the ACCC was to grant the Application then conditions should be imposed to mitigate against the likely adverse impacts on competition. In particular, conditions could be imposed that:

(a) ensure third party access to the NPP infrastructure on open and non-discriminatory terms;

(b) mitigate any potential conflicts of interest flowing from the merger;

(c) ensure the use of mandates does not require members or users to incur substantial cost to implement, enable and utilise products, services or capabilities which provide limited benefit or are inferior to third party products, services or capabilities;

(d) ensure the continued separation of the three domestic payment systems do remain separate.

1.23 Mastercard also submits that the merger, coupled with the regulatory protection that is currently afforded to the domestic payment systems, and eftpos in particular, will create a very unlevel playing field. Mastercard has identified specific recommendations that the ACCC could make to the Treasury and/or the RBA to be implemented before the ACCC grant of authorisation for the merger comes into effect.

If you would like to discuss any aspect of this submission further, please contact Rama Lingard, Senior Managing Counsel on [redacted] or by email to [redacted].

[redacted]

Richard Wormald
Divisional President Mastercard

2. About Mastercard

2.1 Mastercard is a technology company in the global payments industry that connects consumers, financial institutions, merchants, governments, digital partners, businesses and other organisations worldwide, enabling them to use electronic forms of payment instead of cash and checks. We make payments easier and more efficient by providing a wide range of payment solutions and services using our family of well-known brands, including Mastercard®, Maestro® and Cirrus®. We are a multi-rail network that offers customers one partner to turn to for their domestic and cross-border payment needs.

2.2 Through our unique and proprietary global payments network, which we refer to as our core network, we switch (authorise, clear and settle) payment transactions and deliver related products and services. We have additional payment capabilities that include automated clearing house ("ACH") transactions (both batch and real-time account-based payments). We also provide integrated value-added offerings such as cyber and intelligence products, information and analytics services, consulting, loyalty and reward programs and processing. Our payment solutions offer customers choice and flexibility and are designed to ensure safety and security for the global payments system.

2.3 A typical transaction on our core network involves four participants in addition to us - account holder (a person or entity who holds a card or uses another device enabled for payment), issuer (the account holder's financial institution), merchant and acquirer (the merchant's financial institution). We do not issue cards, extend credit, determine or receive revenue from interest rates or other fees charged to account holders by issuers, or establish the rates charged by acquirers in connection with merchants' acceptance of our products. In most cases, account holder relationships belong to, and are managed by, our financial institution customers.

2.4 We generate revenues from assessing our customers based on the gross dollar volume ("GDV") of activity on the products that carry our brands, from the fees we charge to our customers for providing transaction switching and from other payment-related products and services. It is of vital importance to note that Mastercard does not earn revenue from Interchange.

3. Introduction

3.1 Technological trends are reshaping the payments landscape and enabling new entry into the Australian market, which is a mature payments market. The proliferation of new entrants is, at least in part, helping drive competition in that market.

3.2 Competition is also creating more ways to pay for consumers, and more ways to accept payment for merchants. We have seen the growth of buy-now, pay-later (BNPL) schemes over the last few years. We have also seen the quick adoption of digital wallets, giving consumers a more convenient way to pay as well as greater confidence in the safety of their transactions. Importantly, consumers have more choice in which solutions to use and merchants have choice in which solutions they accept.

3.3 At the same time as new entrants emerge in the market, investment from Mastercard in technology drive consumer benefit and choice, greater sales for merchants and safer transactions, resulting in a more resilient network with enhanced functionality. Innovations like contactless payments have enhanced customer and merchant sales experiences, particularly in high-traffic stores where fast transaction times are desirable.

3.4 The development of secure digital payments technology has allowed businesses and consumers to safely buy and sell goods and services online. As online transactions grow in size and volume, there is a need for more advanced and complex tools, leveraging tokenisation, biometrics and machine learning technologies, to protect businesses and consumers. Mastercard's implementation of tools which drive down fraud and improve security reduce the significant costs associated with fraud in the system. This enables business to maximise opportunities to sell more products and participate in the global marketplace. More information about Mastercard's safety and security products and services can be found at Appendix A.

3.5 Mastercard's success is dependent on both an expansive payments ecosystem and the success of the participants in that ecosystem, and Mastercard has supported numerous new entrants to the payments system in Australia, whether as issuers, acquirers, payment facilitators or otherwise.

3.6 Mastercard has been at the forefront of developments in the payments system in Australia, whether through the development, introduction and funding of functionalities like contactless and mobile payments, or the establishment of its Global Tech Hub and Innovation Centre in Sydney in 2017. The Tech Hub in particular is a global Research and Development centre, focused on designing the future of commerce by using technology and data-driven insights to deliver solutions that empower and transform how Australians interact with technology. It has tried, tested and proven methodologies for our partners and Mastercard to co-create and fast-track the best ideas from concept through prototype, pilot and into commercialisation. As a consequence, the continued development of the Australian payment system benefits from Mastercard's participation, not through Mastercard's exclusion.

3.7 Mastercard technology and infrastructure powers many domestic payment systems and schemes around the world, and Mastercard has made similar offers in the Australian market.

3.8 The proposed merger of BPAY, eftpos and NPP will result in a fundamental and permanent change to the structure of payments markets in Australia. This will have long term consequences for competition in those markets.

3.9 Given the significance of the proposed change to market structure, the merger should not be authorised by the ACCC without careful scrutiny and consideration, including giving interested parties adequate time to consider and respond to the Application and the supporting material.

3.10 Mastercard and other interested parties to the Application have however had only a very limited time to review the Application and the extensive submissions, reports and other documentation information provided in support of the Application. Mastercard notes that:

(a) while the Application is listed on the ACCC's merger authorisation register as having been lodged on 22 March 2021, the public consultation process did not commence until 30 March when the non-confidential version of the Applicants' Application *without* the annexures was made available;

(b) the non-confidential annexures to the Application (which run to thousands of pages) were not made available until the afternoon of Thursday 1 April 2021, being the day before the Easter long weekend and meaning that interested parties had only 9 business days to review this material and prepare their submission before the closing date of 16 April 2021;

(c) the expert report from Dr Geoff Edwards dated 18 March is described as a summary only with a supposedly more detailed report to be provided to the ACCC (in the midst of the consultation period) by 2 April 2021 but has not yet been made available; and

(d) substantial material has been redacted from the non-confidential version of the Application and annexures which prevents an informed critique of many important aspects of the Application.

3.11 While Mastercard is appreciative of the ACCC granting it a four business day extension to provide this submission, given the very limited time allowed to interested parties, Mastercard's review and analysis of the Application and supporting materials has been necessarily limited and accordingly the comments set out in this submission should be read in light of that.

3.12 For the reasons set out in this submission, Mastercard considers that there are serious issues with the arguments put forward in support of the Application and the Applicants have not made out their case for authorisation. Consequently, in light of the significance of the proposed change to payments markets in Australia, in Mastercard's view the merger should not be authorised unless there is compelling evidence presented to the ACCC that it will not substantially lessen competition or that it will result in benefits to the public that outweigh the detriments.

3.13 This submission has been prepared with the assistance of parties such as Oxera, a global economics and finance consultancy that advises companies, policymakers and regulators on economic issues connected with competition, finance or regulation.[2] Oxera have also prepared a separate document that accompanies this submission (**Oxera submission**). The Oxera submission provides commentary on whether the transaction is likely to lead to a substantial lessening of competition. In this Oxera look both at the current and future product offerings of the parties. It also highlights how a number of the benefits that are attributed to the merger appear to stem from a lessening of competition between the Merger Parties.

3.14 Before turning to the claimed benefits and impact on competition, Mastercard has identified some potential issues with the proposed structure of NewCo.

4. Proposed amalgamation

Governance of NewCo

4.1 The Application proposes that each of BPAY, eftpos and NPP become wholly owned subsidiaries of NewCo, a company owned by the current shareholders of each of BPAY, eftpos and NPP. The proposed ownership of NewCo and the governance structures of NewCo are largely opaque due to the Merger Parties' confidentiality claims. As such, Mastercard is not in a position to comment on the proposed governance arrangements in any detail. However, based on the available information, Mastercard notes that there appears to be potential issues with the structure.

4.2 First, while the Application emphasises that the major Australian banks will have less influence than they currently do in relation to each of the entities, it is apparent that they will continue to have a significant degree of influence. Further, the extent of this influence is not clear from the information provided. Specifically:

(a) it is not disclosed what representation the major Australian banks will have on the boards of each of the OpCos and what decision-making powers these boards will have regarding their respective operations;

(b) it is not disclosed what the major Australian banks' position will be with respect to Special Majority Band Resolutions for each of the payment services and whether they

[2] https://www.oxera.com/

(alone or together with other authorised deposit-taking institutions) will hold a majority for any of these or have veto power with respect to any of these (noting the 75% threshold); and

(c) what influence they may have via funding arrangements (the method for which is yet to be determined).

4.3 If the aim is that the governance arrangements for NewCo and each OpCo be structured in a way such that no single entity or group of entities has control of, or undue influence over (or the ability to acquire control of, or undue influence over), the operation of the payment services, then in assessing the adequacy of the proposed governance arrangements, regard should be had (but not be limited) to:

(a) the voting arrangements in respect of the Special Majority Band Resolutions and director appointments (including how shareholders will be banded together for the purposes of appointing directors, the threshold required to appoint a director and what constitutes a "fundamental change" to a Payment Service);

(b) the structure and composition of the board of each OpCo, and what their individual decision-making ability will be;

(c) the admission of new shareholders to NewCo and how any capital contribution is to be calculated (noting that this may be a barrier to entry);

(d) the ongoing funding arrangements for NewCo;

(e) the circumstances in which redeemable preference shares held by a shareholder of NewCo can be redeemed (in particular, whether the shares may be redeemed at the election of NewCo and, if so, what approval(s) may be required of the board or shareholders prior to any such redemption);

(f) the approval(s) required to vary the proposed governance arrangements from those outlined in the Application (including in respect of the variation or rights attached to each class of redeemable preference share); and

(g) how the payment of rebates, refunds and other financial arrangements by the payment services will be determined.

4.4 Mastercard notes however that if each of the shareholders will in fact have an equal level of influence over the activities of NewCo and the OpCos, then it is difficult to understand how the merger will meet the stated rationale. The Application states that a rationale for the merger is to overcome issues that exist because of competing interests of the financial institutions investing in payment services. However, it's not clear from the Application how creating a larger consortium of 21 businesses as the shareholders of NewCo will address this issue.

4.5 Second, the proposed merger will increase the scope and level of coordination between businesses that would ordinarily compete with each other. This coordination will take place through the NewCo board and also at a shareholder level when there are issues put to shareholder vote. While the current arrangements for each of BPAY, eftpos and NPP currently permit such coordination between their shareholders and members, that coordination is limited to the specific activities of each of these entities. Under NewCo, there will be coordination between competitors over the combined activities of each of BPAY, eftpos and NPP.

4.6 The ACCC previously rejected an application for authorisation by various banks in relation to Apple Pay where the ACCC was concerned that this was likely to reduce the competitive tension between the banks in the supply of payment cards. If authorisation is granted in relation to this Application it is likely to reduce the competitive tension between participating financial institutions in relation to their payments offerings.

4.7 In contrast to the present application, where the ACCC has previously granted authorisation to financial institutions to work together this has been in very specific circumstances, for example in response to COVID-19 and subject to conditions to ensure transparency where coordination is required by the banks.[3]

4.8 Third, if the merger is authorised, each of the OpCos will become related bodies corporate. Accordingly, under the *Competition and Consumer Act 2010* (Cth) (**CCA**) they will be able to collaborate and coordinate their businesses as they wish. This is the purpose of the Application. While the Application maintains that each of BPAY, eftpos and NPP will continue to operate separately,[4] there is no guarantee that this will continue to be the case once NewCo is created.

4.9 Fourth, BPAY and eftpos are both currently operated on a commercial basis[5] but following the merger, NewCo will be economically self-sustaining and will not be profit maximising.[6] Any dividends at the OpCo level will be paid to NewCo and the Board of NewCo will determine what dividends are paid, but there is no expectation that dividends will be paid.[7] Consideration should be given as to whether this non-profit maximising structure combined with the reduced competition resulting from the merger will promote productive, allocative and dynamic efficiency.

Role of financial institutions in payments markets and innovation

4.10 The financial institutions who will be influential board members and shareholders are effectively the 'gatekeepers' to payments markets in Australia. The Application relies heavily on the competitive constraint imposed by Mastercard and Visa however Mastercard and Visa depend on the financial institutions to be able to compete in payments markets:

(a) like BPAY, eftpos and NPP, Mastercard accesses the network of businesses (merchants) and consumers (cardholders) through its issuer and acquirer customers respectively, which include many of the proposed shareholders. Mastercard depends on these institutions to make its products and services available to businesses and consumers, and specifically on the willingness of these institutions to enable Mastercard's products or solutions.

(b) as NPP noted, in order for a payment service to be successful it needs to have network effect.[8] To have network effect it is critical that the major financial institutions, ANZ, CBA, NAB and Westpac, enable any solution and, like BPAY, eftpos and NPP, Mastercard currently faces many of the same hurdles and barriers to entry. This includes competition for investment dollars, getting onto the institution's IT development roadmap, and the "chicken-and-egg"/"wait and see" issues in relation to new developments. In addition, there is the current issue of being deprioritised in favour of internal or external competing products from BPAY, eftpos and/or NPP, which is likely to be intensified with the merger.

4.11 The above issues:

[3] AA1000482-1 Authorisation granted with conditions to the Australian Banking Association and member banks on 14 August 2020.
[4] Application by Industry Committee on behalf of its members dated 18 March 2021 (**Application**), section 7.9 (Exhibit 2).
[5] Application, sections 11.3 and 12.2.
[6] Application, section 2.2.
[7] Application, section 7.5.
[8] Annexure 95, Non-confidential statement by NPP Australia Limited dated 16 March 2021, at [51].

(a) limit the extent to which Mastercard is currently able to compete with other payment platforms, such as BPAY and NPP. This is acknowledged by eftpos, which notes in its submission that Visa and Mastercard's P2P products, Visa Direct and Mastercard Send, have very limited enablement across banks and the decision to enable remains in the banks' control.[9] This is discussed further at 9.13 below. In addition, cash out at sale is highlighted as being a differentiator for eftpos when compared to the limited scale of Visa or Mastercard,[10] which is due to the reluctance of certain of the Applicants, such as **[Confidential to Mastercard]**, to enable cash out on either Mastercard or Visa, preferring to have cash out undertaken through eftpos in which they are a shareholder.

(b) are likely to be exacerbated by the merger. NewCo's financial institution shareholders are inherently likely to prefer the solutions offered by NewCo (solutions they are likely to have agreed to via their participation in NewCo's governance) over solutions put forward by Mastercard and other third parties. This will further hamper Mastercard's ability to bring new competing payments services to market, as well as to continue offering competing payment services to the market. For example, the eftpos submission refers to its development of Co-brand Debit eftpos cards which, if implemented by Applicants, would remove Mastercard (and Visa) as a primary processor for domestic card present transactions, as well as card not present domestic transactions other than those not processed by eftpos. As eftpos notes, Mastercard is a driver of new offerings, so relegating Mastercard to being a secondary network only means the pace of innovation will be determined by NewCo and the Applicants if the merger proceeded.

5. National champion

5.1 One of the major claimed public benefits of the proposed merger is the creation of a national payments champion. The Blockley report refers to the sovereign risk that, without the eftpos domestic debit card scheme, retail payments in Australia would be in the control of foreign owned entities. Whilst one of the rationales of the merger is to enable the domestic payment systems to better compete with international payment networks like Mastercard and Visa and "Big Tech", and is positioned as a means for ensuring the payments remain Australian-owned and controlled, this overlooks the fact that:

(a) of the 21 proposed shareholders, six are affiliates of international banks/financial institutions[11];

(b) the majority of the Applicants are global organisations that operate substantial businesses outside of Australia;

(c) Mastercard is not an enemy, whether to Australia or to the Applicants, and describing Mastercard as an International Card Scheme (ICS) in the Application seeks to relegate Mastercard to a small sector of the payments ecosystem when the reality is that Mastercard is a technology company with all forms of electronic payment at its core;

(d) despite being competitors, Mastercard has continued to provide support to eftpos for many years, for example by continuing to enable eftpos functionality on Mastercard-branded Debit Cards, and supporting eftpos' inclusion in transit and online;

[9] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, at 50 and Table 4 (p 30).
[10] Ibid, at paragraphs 20(a)(i) and (ii) 50 and Table 4 (p 30).
[11] Adyen, Citigroup, Fiserv, HSBC, ING and Windcave – paras 5.1 and 5,2 of the Application

(e) unlike Visa, Australia is one of Mastercard's six global technology hubs, with Mastercard having invested substantial resources in operating and staffing its technology operations across its sites in Australia, in particular at its Tech Hub and Innovation Centre in Sydney, and Mastercard's workforce in Australia is over **[Confidential to Mastercard]** the size of the combined BPAY/eftpos/NPP workforce, before any rationalisation of this workforce following the merger;[12] and

(f) much of the Australian payments infrastructure utilised by these domestic payment systems, as well as the banking and processing systems operated by the Applicants, are powered by international providers.

5.2 In particular, the Application and Blockley report do not address the fact that Australian payment technology is heavily dependent on international providers. Unless BPAY, eftpos and/or NPP cease using these international providers to provide key infrastructure, any actual sovereign risk remains and any claim to national championship lacks legitimacy and does not remove Australia's dependence on imports for its payments infrastructure. Please also see "Import Substitution" in the Table at 8.9 below.

5.3 Certain of the domestic schemes have also sought to style themselves as Australian organisations, such as eftpos incorporating "Good for Australia" in their logo. It should be noted however that of the main infrastructure and technology deployed by eftpos for its payment systems, the eftpos Hub, tokenisation solutions, disputes and chargeback tools, and 3DS services are provided by the international payments services providers of Fidelity Information Services (**FIS**), Visa, American Express and Modrium MDpay or their affiliates respectively.[13] In addition, eftpos shares its customer's personal information with overseas entities and has service providers based overseas including database hosting in the United States of America (**US**), the United Kingdom (**UK**) and The Netherlands, product and application testing in Taiwan, payment process service providers in the US and chargeback service providers in The Netherlands and the UK, project collaboration in Germany and the US, internal business process database hosting and support services (e.g. finance, expense management and payroll tools) in Canada, India, the Philippines and several countries in the European Union.[14] Although describing itself as a "homegrown FinTech"[15], eftpos would be better described as a white-label provider of others technology that was grown outside of Australia. It is also worth noting that SWIFT operates the basic infrastructure of the NPP.[16]

5.4 It should also be noted that identifying Mastercard, Apple, Facebook, Google and Visa as threats to national sovereignty seems out of line with the close partnership between the Australian and US governments, and the mutual understanding between the governments regarding the benefits of free and fair trade. In this regard, it is important to recall that Australia (including through the ACCC) is under an obligation to abide by its international treaty commitments, including the competition-related commitments in Chapter 14 of the US-Australia Free Trade Agreement and the national treatment obligations in the WTO General Agreement on Trade in Services.

[12] According to the Application, BPAY, eftpos and NPP are relatively small employers in Australia, employing 132, 188 and 20 employees respectively, with the likelihood that the aggregate 270 employee will be reduced following merger in order to achieve the stated benefit of material efficiency gains through the eliminating duplicative resources and management.
[13] Appendix 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, paragraph 12.
[14] https://www.eftposaustralia.com.au/privacy-policy.
[15] https://www.eftposaustralia.com.au/about/good-for-australia.
[16] Application, section 13.5;
Appendix 95, Non-confidential statement by NPP Australia Limited in support of application for authorisation, paragraph 2.2.

6. Counterfactual: likely future without the merger

6.1 In order to assess an application for authorisation against the statutory test in section 90 of the CCA it is necessary to compare the state of competition and the public benefits and detriments likely to arise in the future where the merger occurs, against the future in which the merger does not occur. This assists in identifying the impact of the merger on competition and public benefits and detriments, from changes that would occur in any event. There are however significant issues with the counterfactual in light of the information provided by the Applicants.

6.2 First, the Application and supporting materials present an alarmingly contradictory view on the likely counterfactual. The discrepancies in narrative around the counterfactual for eftpos is particularly remarkable. The expert reports of Dr Edwards and Mr Blockley both consider that absent the amalgamation, the challenges of coordinating investments across different financial institutions would limit the success of eftpos, and could even result in eftpos being an unviable business within 10 years. On the other hand, eftpos refutes this view in its submission, highlighting that the Application is based on "material and fundamental misunderstandings", and that absent the merger it would likely maintain or increase its position and relevance in the market.[17]

6.3 Discrepancies are also apparent in the reported closeness of competition expected in the counterfactual. For example, BPAY highlights that, absent the merger, it will potentially be a *closer* competitor with eftpos and NPP in the future.[18] As picked up by the press, the BPAY submission not only highlights the tensions between the management of BPAY and NPP, it also highlights the emerging spheres of competition between the merging parties.[19]

6.4 Second, the fact that NewCo will be committed to the Merger Parties' individual roadmaps means that many of the services that will be provided by NewCo under the factual are likely to be the same as those that would be provided by each of BPAY, eftpos and NPP under the counterfactual, at least in the short term. Accordingly, the benefits of these services should be discounted when assessing the benefits of the proposed merger application as they do not flow from the merger. This is discussed further below.

6.5 However, beyond the roadmap, the proposed merger might result in incentives to block or stop developing incremental innovation. This is discussed further at 8.5 below and in the Oxera submission.

6.6 Finally, the Application itself does not recognise a valid counterfactual as being one where BPAY, eftpos and NPP collaborate on discrete projects and seek ACCC authorisation as appropriate to facilitate this collaboration. NPP in its supporting statement acknowledges that this was an option, for instance in relation to online payments or QR codes, but does not further discuss this option. This would achieve the same public benefits claimed for the merger, without raising the concerns that emerge from the permanent change to the market structure that is currently proposed.

7. Adverse impacts on competition

7.1 The ACCC should not be satisfied on the information provided by the Applicants that there will be no substantial lessening of competition.

[17] Appendix 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, paragraphs 180 and 122 respectively.
[18] Appendix 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, paragraphs 51 and 53 respectively.
[19] Banking Day (2021), '[BPAY Group claims strategy shift at NPPA helped trigger Osko write-down](#)', 8 April.

7.2 First, the Application understates the extent of existing competition between the Merger Parties and in particular, the likely future competition between the Merger Parties in terms of both competing payments services as well as innovation.

7.3 Second, the Application does not really address the potential adverse impact on competition arising out of the increased vertical integration as a result of the merger. In particular, combining NPP's underlying A2A infrastructure with BPAY and eftpos who are likely to seek to provide services using that infrastructure in the future, has the potential to foreclose competition in competing payments services that rely on this infrastructure.

7.4 Third, the Application does not address the potential conglomerate effects arising out of the merger and specifically the ability of NewCo to bundle services across BPAY, eftpos and NPP.

7.5 Finally, the Application relies heavily on the fact that Mastercard and Visa, as well as "Big Tech", will impose an ongoing competitive constraint. While Mastercard is currently a strong competitor for card payments, it is not a strong competitor across all payments. As discussed, Mastercard and other participants rely on NewCo's shareholders to be able to get their products and solutions to market. NewCo's shareholders will naturally be incentivised to prefer NewCo's offerings to those provided by its competitors or potential competitors. There is no reason why NewCo's shareholders would invest in and support a new Mastercard service that could be a new competitor to an NPP or BPAY service that they have already invested in or committed to invest in.

7.6 The anti-competitive detriments are discussed further below in section 9 and in the Oxera submission.

8. Claimed public benefits

8.1 As part of the statutory test for authorisation, the ACCC considers whether the public benefits, including as one of its principal elements gains in efficiency, outweigh the public detriments, including those from any lessening of competition. Such efficiency considerations typically include an assessment of allocative efficiency (the effective allocation of resources), productive efficiency (reached when goods and services are produced with the least use of resources) and dynamic efficiency (the increased ability and incentive to innovate).[20]

8.2 The Applicants outline a number of benefits that they state will likely arise as a result of the merger. However, as explored in the Oxera submission, the potential efficiency gains, and therefore public benefits, are not likely to outweigh the detriment from the lessening in competition. This is because a number of the benefits:

(a) are not specific to the merger;

(b) only arise due to the lessening of competition, and

(c) are unclear or unlikely to arise.

8.3 The Oxera submission also notes that there are a number of instances where the benefits are likely to accrue to shareholders, rather than to end-users, and therefore less weight should be attributed to such benefits.[21]

[20] ACCC (2018), 'Merger Authorisation Guidelines', section 8.
[21] This is consistent with the decision of the Australian Competition Tribunal, Qantas Airways Limited (2005) ACompT 9, for example paragraph 189.

8.4 Taking these points in turn:

8.5 First, a number of benefits stated in the Application would likely arise in the absence of the merger. The listed benefits of enhanced engagement with payment ecosystem participants, more efficient deployment of capital and increased innovation – both from the perspective of third parties and collaboration among the three payment schemes, are not merger-specific. This is because collaboration between the entities is possible in the absence of the merger. Indeed, eftpos highlight examples of such collaboration in their submission, pointing to Beem It as one such case.[22] Further, the ACCC has the ability to authorise specific, discrete types of conduct that would allow collaboration for certain decisions, and therefore promote innovation. Were it to be established that more coordination could benefit innovation across the industry, achieving that coordination through the amalgamation would remove incentives to compete and therefore be likely to reduce overall innovation. Thus these benefits (if they in fact exist) are only likely to be achieved through alternative discrete collaborations, rather than full amalgamation.

8.6 Second, a number of the benefits listed by the Applicants appear only to arise as a result of a lessening of competition. While the Applicants state that no substantial lessening of competition will arise from the merger, some of the benefits listed, such as increased innovation and the reduction in risk of stranded assets due to reduced uncertainty appear to be the result of a lessening in competition. The source of that current uncertainty is the current competition in the market, hence the Application ties these alleged benefits to the removal of this uncertainty and therefore competition. Indeed, this reduction in competition is recognised by the entities' own submissions. For example, eftpos point out that there is "clearly overlap" in the roadmaps of the three different entities. [23] This is also supported in other submission evidence.[24] This therefore points to the elimination of competition arising from the amalgamation, and undermines the stated position of no substantial lessening of competition, but also undermines the alleged benefits from increased innovation, since competition is a spur to these.

8.7 Third, some of the other benefits mentioned by the Applicants, such as enhanced voting rights of smaller participants, import substitution and potential synergies, are either unclear or unlikely to arise. For example, it is not clear how enhanced voting rights of smaller participants is beneficial, unless it is seen to translate to a different balance when making investment decisions (which does not appear to be the case). Further, reductions in transaction costs and benefits arising from synergies are likely to be small, if present at all, and could potentially be only a benefit to shareholders given their fixed nature, and as such should be given the appropriate weight. Lastly, benefits from reducing import substitution are unlikely to arise given that there appears to be no suggestion to change the mix to increase the use of Australian-owned services in the value chain of NewCo (which currently rely on global value chains that provide benefits to Australian consumers). An overly simplistic positioning of this as protecting national business does not reflect the benefits that accrue from trade.

8.8 As a result, Mastercard considers that the potential efficiency gains and other benefits generated by the merger, do not constitute an overall public benefit that outweigh the public detriment from the lessening of competition.

[22] Appendix 93, Non-confidential statement by eftpos Payments Australia Limited in support of application for authorisation, paragraph 180.
[23] Ibid, paragraph 180.
[24] For example, BPay BPAY highlight that there is potential overlap between BPAY and NPP, and BPAY and eftpos: Appendix 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, paragraphs 51, 53 (a) and (b).

8.9 The table below summarises Mastercard's comments on the different benefits claimed by the Applicants.

Benefit of merger (Section 27.2)	Comments
Benefits are not merger specific	
Increased ease for third parties to develop more payments innovation by allowing them to access A2A and cards infrastructure	This is not a merger-specific benefit and could be achieved even without the amalgamation.[25] While this benefit is listed in section 27.2 of the Application, it is not expanded on elsewhere in the documents. As such, no mechanism is presented to explain how this benefit is actually expected to arise for third parties. In fact the amalgamation raises potential vertical issues which actually undermine these alleged benefits. Incentives need to be carefully designed to ensure that owners (the schemes, retailers or big banks), do not have the incentive to prevent rivals from getting access to the infrastructure, or to give rivals access on worse terms.
Enhanced engagement with small businesses and other participants in the Australian payments ecosystem[26]	This benefit is not merger specific and could be achieved even without the amalgamation. Further, in their submission, eftpos flag that the benefit of advisory groups having a voice is unlikely to occur because "there are too many parties covering too many topics for too many schemes in forums with their competitors".[27]
Benefits are not merger specific, not well-evidenced and appear only to arise due to the lessening of competition	
Reduction in uncertainty allowing for more efficient deployment of capital, sooner	These benefits are not necessarily merger specific. The basis for these benefits is not well-explained. They appear to be predicated on an assumption that NewCo will share information more effectively across the boards of the three entities, and this will drive investment and innovation. The reference to 'reducing uncertainty' as a benefit implies that this information sharing will lead to a reduction in competition, since the uncertainty is around whether the other entities will bring other services forward that will compete with each other's offerings. This is problematic in two ways: first it acknowledges that the amalgamation will reduce competitive activities and, second, it assumes that competition
Enhanced speed to market of innovations developed by Australia's three payment schemes	
Increased likelihood of hybrid and targeted local innovation	

[25] For example, third parties can develop and use Application Programming Interfaces (API) to access A2A and cards infrastructure.
[26] Mastercard also notes the following press article quoting the Council of Small Business Organisations Australia (COSBOA) https://www.smartcompany.com.au/finance/criticism-banks-plan-merge-eftpos-bpay-npp-australia/#:~:text=%E2%80%9CSmokescreen%20for%20monopoly%E2%80%9D%3A%20Small,eftpos%2C%20BPAY%20and%20NPP%20Australia&text=The%20banking%20sector's%20plan%20to,to%20higher%20fees%20for%20businesses
[27] Appendix 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, paragraph 181.

Benefit of merger (Section 27.2)	Comments
	hampers innovation. There is significant evidence that this type of competitive pressure in fact *improves* innovation incentives. The Application has thus not provided a suitable foundation for its claim that reducing competition between the three entities will enhance innovation. BPAY's and eftpos's submissions support these concerns. eftpos highlights that "demand should drive innovation, not funds available to invest", raising concern over "how effective or targeted innovation will be" as a result of the merger.[28] In its submission, BPAY notes that the merger may even reduce its ability to offer new services to the market as it will be "faced with the challenge of competing with other priorities within NewCo...".[29] In the counterfactual (absent the merger) if, as submitted by the Merger Parties, ICS, "Big Tech" and Fin Tech are innovating and expanding their services in the Australian market, then the three schemes would still have strong incentives to innovate in a timely fashion.
Benefits only arise due to the lessening of competition	
Reduction in the risk of stranded payments assets from innovations which fail to achieve network effects and ubiquity	An innovation that fails due to limited customer uptake (i.e. limited network effects) is the result of a poor commercial offer or a more competitive offer available. Thus, by seeking to protect from this threat, NewCo is seeking to protect itself from competitive pressures that would otherwise give each entity the incentive to enhance its offering to increase the chance of success. Absent this pressure, incumbents will want to protect existing assets, which may be stranded by their own innovation. Competition can force that innovation by incumbents, to ensure they are not left behind. By removing this pressure, it is not clear that post-amalgamation shareholders would have an increased incentive to innovate and cannibalise their existing service offerings.
Benefit is unclear/ unlikely to arise	
Enhanced voting rights of smaller participants	It is not clear how this is a benefit, unless it is seen to translate to a different balance when making investment decisions.

[28] Appendix 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, paragraph 114.
[29] Appendix 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, paragraph 76(b).

Benefit of merger (Section 27.2)	Comments
	Despite the one shareholder-one vote rule, it appears to be the case that investment decisions will be taken by those who will have to fund it.
Import substitution	One of the major claimed public benefits of the proposed merger is the creation of a national payments champion. The Blockley report refers to the sovereign risk that, without the eftpos domestic debit card scheme, retail payments in Australia would be in the control of foreign owned entities.[30] However, international providers play a crucial role in ensuring the integrity and resilience of Australia's payment technology. Global value chains provide benefits to Australian consumers. As noted in at 5.2above: ▪ SWIFT operates the Basic Infrastructure of the NPP;[31] ▪ of the main infrastructure and technology deployed by eftpos for its payment systems, the eftpos Hub, tokenisation solutions, disputes and chargeback tools, and 3DS services are provided by FIS, Visa, American Express and Modrium MDpay or their affiliates respectively.[32] As a result, the Applicants' overly simplistic positioning of this as protecting national business does not reflect: ▪ that much of the domestic payments systems, as well as the systems operated by the proposed shareholders, are powered by international providers, meaning imports are still indirectly undertaken; and ▪ the benefits that accrue from trade. Thus, limited weight should be given to any alleged benefits arising from import substitution.
Reduction in transaction costs for the three Payments Schemes and their Scheme Members	It is not obvious from the Applicants' assessment that these will feed through to pricing, since they appear to mostly be fixed cost savings.
Potential for synergies	The benefits articulated predominantly relate to fixed cost synergies, which are unlikely to be passed on to consumers. A number of the synergies listed are not merger specific. Importantly, eftpos highlight that the material efficiency gains from the merger are likely to be low, "unless platforms converge, which is unlikely with

[30] Appendix 87, Expert industry opinion of Lance Sinclair Blockley, paragraph 16.
[31] Application, section 13.5 and Appendix 95, Non-confidential statement by NPP Australia Limited in support of application for authorisation, paragraph 2.2.
[32] Appendix 93, Non-confidential statement by eftpos Payments Australia Limited in support of application for authorisation, para 12.

Benefit of merger (Section 27.2)	Comments
	very low change of a viable business case then cost savings will be low". They also add that shared services "will save very little in the scheme of things".[33]
Other	
Enhanced ownership interests of smaller participants	Less weight should be placed on this benefit given that it accrues to shareholders, with little or no explanation of how these benefits would be passed-on to end-users.

Oxera provide a more detailed critique of the stated benefits in their submission at section 3.

9. Anti-competitive detriments

9.1 The Application suggests that each of BPAY, eftpos and NPP provide complementary services with (almost) no overlap. In fact, a major theme in each of the submissions provided by these entities, particularly the submission by eftpos, to the ACCC in relation to the proposed merger refutes that there is minimal overlap in the services they provide, or will provide in the future. In particular:

(a) eftpos considers that there are currently material overlaps in the products and services it offers to those offered by Visa, Mastercard, BPAY and NPP and these overlaps will increase (particularly with NPP and BPAY) in the short and medium term.

(b) BPAY considers there is overlap between BPAY Payments and NPP's MPS service and BPAY's Okso service 1 and NPP's Single Credit Transfer and that the overlap between NPP's business services and BPAY's overlap services is increasing as NPP continue to expand the range and functionality of their business services.[34]

(c) BPAY also considers that subscription and recurring debit payments are an area of overlap with NPP and eftpos which is likely to continue post-amalgamation but it is unclear what the extent of this competition will be if the amalgamation goes ahead given the uncertainty of NewCo's strategy beyond the short term.[35]

(d) NPP has identified actual and potential competitors for its services but Mastercard cannot comment on these because of NPP's confidentiality claims. However, there is clearly potential for increased future competition between NPP and BPAY as NPP states in its submission that it is developing business services to process transactions on the NPP infrastructure to be broadly available to the market.[36] This would compete with BPAY's Osko overlay service. This emerging area of competition has also been recently reported on.[37]

9.2 Given this, careful consideration needs to be given to not just the actual competition but the potential competition between BPAY, NPP and eftpos that would be lost as a consequence of the merger and whether this is likely to result in a substantial lessening of competition.

[33] Ibid, paragraph 181.
[34] Appendix 89, Non-confidential statement of BPAY Group Pty Ltd and BPAY Ltd dated 16 March 2021, paragraphs 53-55.
[35] Appendix 89, Non-confidential statement of BPAY Group Pty Ltd and BPAY Ltd dated 16 March 2021, paragraph 58.
[36] Appendix 95 Non-confidential statement by NPP Australia Limited in support of application for authorisation, paragraphs 56-57.
[37] Banking Day (2021), 'BPAY Group claims strategy shift at NPPA helped trigger Osko write-down', 8 April.

The Chairman of the ACCC has recognised the importance of potential competition, stating in a recent speech that "insufficient weight is placed on the risks to competition, such as potential competition being lost, barriers to entry being raised or competitors being foreclosed".[38]

9.3 The contradictory views among the different entities in the amalgamation reveal the inherent tension in the investment incentives of the Applicants and how this tension will likely increase after the transaction. Contrary to the submissions of the Merger Parties, by bringing together three current and potential competitors, the transaction removes the incentives to continue to innovate both the eftpos services, as well as NPP or BPAY, as an investment in one of the three would likely cannibalise the volumes run on the other schemes owned by the NewCo.

9.4 As set out in the Oxera submission at section 2, the transaction is likely to give rise to both horizontal and vertical anti-competitive effects in the market. Key points from the Oxera submission are outlined below.

Horizontal effects

9.5 At a high-level, the parties overlap in the market for the provision of upstream payment infrastructure and in the market for downstream payment services. In the time available, Oxera has not been able to comment in detail on the proposed market definition and associated market shares. However, outlined below are a number of inconsistencies that lead to an underestimation of the current and future position of the Applicants in the relevant markets and as a result an underestimate of the loss of competition arising from the merger.

9.6 First, as explained above, the market shares as set out by the Merger Parties fail to reflect the likely future position of the Merger Parties, and they underplay the significant reduction of players in the Australian market, which would effectively reduce from six to four (or even to three, as the DE system continues to be subsumed by the NPP).

9.7 Second, the market shares presented ignore the migration of payments authorised and cleared in Direct Entry System which will migrate to NPP in the next 5-10 years, as acknowledged by the Merger Parties.[39] These payments account for over 80% of the total value of non-cash payments in the market, according to the PSB Annual Report (2020), and as such constitute the main arena for future competition in this market.

9.8 The replacement of the legacy DE system for batch payments provides a battleground and an opportunity for other players in the market to enter or expand their services, in order to capture part of these migrating customers. This has two implication for the assessment of the merger. First, it implies that the market position of the Merger Parties is much bigger than the Application suggests. Second, it provides an additional incentive for NewCo to increase barriers to entry and expansion to protect its position in capturing these volumes, leading to a loss of future competition in the market and the prospect of vertical effects, as discussed below. This will make it more difficult for Mastercard and the other international payments networks to compete.

Vertical effects

9.9 As discussed in section 2B of the Oxera submission, the amalgamation unequivocally reduces the incentives to make the system more open, and provides further incentives to foreclose access to third parties. In fact, post-merger the Merger Parties would operate both the infrastructure at the upstream level of the market, and a number of downstream payment services. This vertical integration could harm competition, since post-merger the Merger

[38] https://www.accc.gov.au/speech/accc-2021-compliance-and-enforcement-priorities.
[39] Application, para 25.2 (page 93).

Parties have the ability and incentives to foreclose third party providers of payment services, by refusing them access to the infrastructure, making access to the overlay services more costly or reducing some of the quality aspects of third parties' products.

9.10 In the Australian market, concerns about the openness of the market had already been raised in the June 2019 RBA consultation paper, where a number of stakeholders, particularly fintechs, highlighted the need to facilitate access by increasing the use of application programming interfaces (APIs), which third parties can use to communicate in a standardised and secure way with a bank's systems to access NPP functionality.[40] The proposed amalgamation will magnify these concerns, as it unequivocally reduces the incentives of NewCo to provide access to the infrastructure to third parties who compete with NPP, eftpos or BPAY in the downstream part of the market. While NPP would potentially have the incentive to foreclose access to its infrastructure where it was considering introducing downstream services, it may have been attracted to support a new third party downstream service that would increase volumes over the NPP system. Being amalgamated with two entities that already are active in this downstream space, and with all three entities having active plans to develop these services in the future, means the incentive to refuse to support a third party service will increase.

9.11 This issue is worsened by the fact that any new third party development will need to get agreement from a critical mass of the Australian banks to develop the new service offering. Given these banks are the ultimate owners of NewCo, they will have the ability and incentive to restrict new third party developments. There are various mechanisms that the amalgamation could adopt in order to make access more difficult for third parties. Some examples are described below based on Mastercard's experience, although we do not exclude that other foreclosure mechanisms would also be possible.

9.12 First, the amalgamation removes any incentives for banks to invest in solutions designed by third party providers, when these solutions compete with one of the services offered by the NewCo. **[Confidential to Mastercard]**

9.13 Second, post-merger, NewCo could make it harder for third parties to obtain access to the infrastructure and/or to operate as an overlay service in the market. **[Confidential to Mastercard]**

9.14 Third, post-merger the NewCo could gain knowledge of competitors' commercial strategies, giving it an unfair commercial advantage. In the 2019 consultation, a number of fintechs had already raised serious concerns with respect to the sharing of business plans and intellectual property to NPP in the process of applying to be an overlay provider. The concerns was that this information could then be accessed by their potential competitors on the Board of the NPP, and potentially used to their advantage.[41] While these concerns existed prior to the merger, it is clear that allowing the transaction would make them even more prominent and relevant, increasing the number of situations in which NewCo could use this information to its advantage.

9.15 Therefore, our understanding of the market is consistent with NewCo having the ability and incentives to foreclose third parties after the merger, contrary to the Merger Parties' submission. The prospect of vertical foreclosure would not only reduce competition in the market, but also reduce innovation in the future, as new entrants will be deterred or will find it more difficult and costly to enter and develop new services.

[40] RBA (2019), 'NPP Functionality and Access Consultation: Conclusions Paper', page 15.
[41] ACCC/RBA (June 2019), NPP Functionality and Access Consultation: Conclusions Paper, page 15.

10. Potential conditions of authorisation

10.1 For the reasons set out above, Mastercard is concerned that if the merger authorisation is granted it will have an adverse impact on competition. While Mastercard does not consider that these anti-competitive detriments will be outweighed by the public benefits, if the ACCC is minded to grant the authorisation then the authorisation should be subject to conditions to increase the likelihood of the claimed public benefits eventuating and to reduce the detriments resulting from the merger.

10.2 There are a number of different conditions that could be imposed to reduce the impact of the likely detriments.

Operational separation of NPP business

10.3 In order to ensure that there is third party access to the NPP infrastructure on open and non-discriminatory terms there should be operational and functional separation of NPP from the rest of NewCo, given that NPP will have the only infrastructure in Australia to allow fast and flexible A2A payment messages.

10.4 Operational separation of monopoly infrastructure and the services provided using that infrastructure is not unique where access is important for competition in downstream markets. By way of example, the nbn was deliberately established as a wholesale-only owner of infrastructure that was required to offer open and non-discriminatory access to all retail service providers. This structure was implemented having regard to the concerns that past vertical integration in relation to fixed line telecommunications networks had stifled competition.[42] Further, in recognition of the fact that there should be functional separation of wholesale and retail businesses even for smaller superfast broadband networks the ACCC has also recently put in place a regime providing for deemed functional separation undertakings for these networks.

10.5 The NPP is an important piece of payments infrastructure and, having regard to the costs involved in its development, is likely to be the monopoly infrastructure providing real-time A2A payments for the foreseeable future. Notwithstanding this, what is proposed by the Application is that ownership of this infrastructure be merged into an entity that will also own two firms that currently (and increasingly in future) will be competing in downstream markets that rely on access to this infrastructure.

10.6 The RBA and ACCC in the "New Payments Platform Functionality and Access: Conclusions Paper" dated June 2019 recognised even then that there were a number of access issues that could present barriers to entry for new participants. It was recommended that NPP make certain changes and that there be a further review in July 2021. It is not clear what if anything has happened to address those concerns.

10.7 If the Application is to be granted then in order to reduce the foreclosure risks arising from this vertical integration, consideration should be given to an operational separation undertaking being put in place to reduce the potential harm to competition in downstream payments markets, and further that appropriate measures be put in place to facilitate third party access.

10.8 NewCo should provide an undertaking to the ACCC:

(a) to give effect to operational separation of NPP from the other NewCo businesses;

[42] Explanatory Statement, Telecommunications Act 1999, *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014*.

(b) measures should be implemented to open direct access to the NPP to other payment service providers on non-discriminatory terms, with appropriate dispute resolution mechanisms included to ensure that access disputes can be resolved;

(c) subject to the above, the NPP should otherwise be prevented from changing the NPP Regulations in a manner that could restrict access to third parties;

(d) any tender process for the provision of an overlay service on the NPP should be an open and competitive tender process.

Separation of NewCo from shareholders

10.9 Potential conflicts of interest need to be managed and mitigated. For example, board representation of eftpos is currently made up of representatives from the Big 4 bank's acquiring arms, which also set merchant pricing for acquiring services, including separate pricing for eftpos vs bundled pricing for Mastercard/Visa (including card present/card not present, debit/credit, domestic/international). Consideration should be given to segregation of board members for NewCo (as well as BPAY, eftpos and NPP currently) so they are not involved in the commercial operations within their organisations, in particular ensuring pricing of services for international payment networks does not subsidise pricing of domestic networks.

10.10 This would see the introduction of arms-length treatment. While one of the primary aims of the merger is to secure investment from the schemes' owners, to counteract this, a possible solution would be that the shareholders commit a certain amount of funding to / capital investment in NewCo, up until a certain point.

Mandates

10.11 BPAY, eftpos and NPP currently have the ability to each mandate the implementation and utilisation of their own product, services, capabilities or technology. This is not unusual in itself, as many payment networks have the ability to issue mandates to ensure the effective and secure operation of their networks. Following the merger, the NewCo and/or BPAY, eftpos and/or NPP could issue mandates that compel Applicants or other members or users of BPAY, eftpos and/or NPP to undertake technical builds, changes or upgrades to their information technology systems or to implement, enable and utilise products, services, capabilities of each other. The risk with such mandates is that they may:

(a) benefit each of NewCo, BPAY, eftpos and/or NPP more than the organisations required to comply with the mandate, their customers or consumers;

(b) not provide any material benefits to the organisation or their customers that justify the costs to be incurred with such implementation and, given the issues highlighted with legacy systems in the Application, such costs may be substantial;

(c) provide no consumer benefits; and/or

(d) have the potential to effectively foreclose competition from superior products, services or capabilities offered by third parties, or act as a deterrent to implement and utilising these superior products, services or capabilities of third parties, including Mastercard.

10.12 Consequently, conditions should be imposed on the ability of the merged entities to issue mandates, and in particular on those that require organisations implement a new product, service or capability which does not provide a public benefit. For example, all new products, services or capabilities should be optional for Applicants or other members and enable such organisations to either ‘opt-in’ or ‘opt-out’ of implementing, enabling and utilising such products, services or capabilities except in certain specified circumstances.

Membership

10.13 As noted earlier, while the Application maintains that each of BPAY, eftpos and NPP will continue to operate separately[43,] there is no guarantee that this will continue to be the case once NewCo is created. It is conceivable that NewCo and/or each of BPAY, eftpos and NPP could introduce requirements or conditions that in order to be a member or user of the products, services or capabilities of one of the domestic payment systems, that organisation must become a member of, and/or implement, enable and utilise the products, services and capabilities of the other two domestic payment systems.

10.14 To ensure that such separation remains in effect, conditions should be imposed to ensure that participation in, or use of one domestic payment schemes products, services or capabilities, does not require the Applicants or any other organisation to become participants in, or to implement, enable and utilise the products, services or capabilities of either or both of the two domestic payment systems.

11. Other regulatory considerations

11.1 The Application has been filed during the period in which two reviews of the regulation of the payments sector are being undertaken, the RBA’s Review of Retail Payments Regulation[44] and the Treasury’s Review of the Australian Payments System[45]. Although potentially outside the scope of what the ACCC can directly require, the following could form part of recommendations by the ACCC to the RBA and/or the Treasury to be implemented before the ACCC grant of authorisation for the merger comes into effect.

11.2 First, the regulatory protection that is currently afforded to eftpos should be lessened. The Applicants have recognised that a consequence of the Conduct is that regulation by the RBA in relation to DNDC’s in order to protect eftpos’ position in the market will no longer be necessary. The Application states that the “Conduct will not have any effect on the regulation of the Australian payments industry other than, potentially, to…remove the need for regulation to support eftpos’ ability to compete with the ICS, as in the case of LCR”.[46] It follows that the undertakings given by Mastercard and the other international card schemes to the RBA, which are to the effect that the schemes should not prevent eftpos debit functionality or the display of an eftpos logo on a Dual-Network Debit Card (DNDC), would no longer be necessary as these were given for the sole purpose of protecting eftpos’ position in the market.

11.3 Second, Mastercard considers that either the RBA should cease any form of regulatory mandate or support (whether express or tacit) for DNDCs and multi-network credit cards, so that single network Debit and Credit cards are able to be issued with Australia without another network’s functionality being present on that card, or expressly permit all issuers to select a secondary network other than eftpos on their DNDC.

11.4 Third, despite BPAY, eftpos and NPP each falling within the definition of “payment system” under the *Payments Systems (Regulation) Act 1988* (Cth) (**PSRA**), only eftpos has been designated by the RBA as a payment system, even though BPAY and NPP each process a higher total value of payments (according to the PSB Annual Report (2020)). NPP in particular has faced criticism that it does not provide an appropriate mechanism for non-

[43] Application, section 7.9 (Exhibit 2).
[44] https://www.rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/
[45] https://treasury.gov.au/review/review-australian-payments-system
[46] Application, section 19 at pp 86-87.

members to participate, whereas if the NPP had been designated then the PSRA provides a mechanism for the RBA to impose an access regime on NPP. Consequently, BPAY and NPP should become “designated payment systems” under the PSRA so that the RBA is able to regulate these players where it considers it to be in the public interest to do so.

APPENDIX A – MASTERCARD PRODUCTS AND SERVICES

Mastercard provides a wide variety of integrated products and services that support payment products that bank customers can offer to their account holders. These offerings facilitate transactions on our core network among account holders, merchants, financial institutions, businesses, governments and other organisations in markets globally.

1.1 Core Products

Consumer Credit. We offer a number of programs that enable issuers to provide consumers with credit that allow them to defer payment. These programs are designed to meet the needs of our customers around the world and address standard, premium and affluent consumer segments.

Debit. We support a range of payment products and solutions that allow our customers to provide consumers with convenient access to funds in deposit and other accounts. Our debit and deposit access programs can be used to make purchases and to obtain cash in bank branches, at ATMs and, in some cases, at the point of sale. Our branded debit programs consist of Mastercard (including standard, premium and affluent offerings), Maestro (the only PIN-based solution that operates globally) and Cirrus (our primary global cash access solution).

Prepaid. Prepaid programs involve a balance that is funded prior to use and can be accessed via one of our payment products. We offer prepaid payment programs using any of our brands, which we support with processing products and services. Segments on which we focus include government programs such as Social Security payments, unemployment benefits and others; commercial programs such as payroll, health savings accounts, employee benefits and others; and reloadable programs for consumers without formal banking relationships and non-traditional users of electronic payments.

We also provide prepaid program management services, primarily outside of the United States, that manage and enable switching and issuer processing for consumer and commercial prepaid travel cards for business partners such as financial institutions, retailers, telecommunications companies, travel agents, foreign exchange bureaus, colleges and universities, airlines and governments.

Commercial. We offer commercial payment products and solutions that help large corporations, midsize companies, small businesses and government entities. Our solutions streamline procurement and payment processes, manage information and expenses (such as travel and entertainment) and reduce administrative costs. Our card offerings include travel, small business (debit and credit), purchasing and fleet cards. Our SmartData platform provides expense management and reporting capabilities. Our Mastercard In Control™ platform generates virtual account numbers which provide businesses with enhanced controls, more security and better data.

Additional Platforms. In addition to the switching capabilities of our core network, we offer additional platforms with payment capabilities that extend to new payment flows:

- We offer commercial payment products and solutions, such as the Mastercard B2B Hub, which enables small and midsized businesses to optimise their invoice and payment processes.
- With Vocalink, we offer real-time account-based payments for ACH transactions. This platform enables payments between bank accounts in real-time and provides enhanced data and messaging capabilities, making them particularly well-suited for B2B and bill payment flows.

1.2 Value-Added Products and Services

We provide additional integrated products and services to our customers and stakeholders, including financial institutions, retailers and governments that enhance the value proposition of our products and solutions.

Safety and Security. We offer integrated products and services to prevent, detect and respond to fraud and cyber-attacks and to ensure the safety of transactions made using Mastercard products. We do this using a multi-layered safety and security strategy:

- The "Prevent" layer protects infrastructure, devices and data from attacks. We have continued to grow global usage of EMV chip and contactless security technology, helping to reduce fraud. Greater usage of this technology has increased 13 the number of EMV cards issued and the transaction volume on EMV cards. While this technology is prevalent in Europe, the U.S. market has been adopting this technology in recent years.
- The "Identify" layer allows us to help banks and merchants verify genuine consumers during the payment process. Examples of solutions under this layer include Mastercard Identity Check™, a fingerprint, face and iris scanning biometric technology to verify online purchases on mobile devices, and our recently launched Biometric Card which has a fingerprint scanner built in to the card and is compatible with existing EMV payment terminals.
- The "Detect" layer spots fraudulent behaviour and cyber-attacks and takes action to stop these activities once detected. Examples of our capabilities under this layer include our Early Detection System, Decision Intelligence and Safety Net™ services and technologies.
- The "Experience" layer improves the security experience for our stakeholders in areas from the speed of transactions, enhancing approvals for online and card-on-file payments, to the ability to differentiate legitimate consumers from fraudulent ones. Our offerings in this space include Mastercard In Control, for consumer alerts and controls and our suite of digital token services available through our Mastercard Digital Enablement Service ("MDES").

We have also worked with our financial institution customers to provide products to consumers globally with increased confidence through the benefit of "zero liability", or no responsibility for counterfeit or lost card losses in the event of fraud.

Loyalty and Rewards. We have built a scalable rewards platform that enables financial institutions to provide consumers with a variety of benefits and services, such as personalised offers and rewards, access to a global airline lounge network, concierge services, insurance services, emergency card replacement, emergency cash advances and a 24-hour account holder service centre. For merchants, we provide campaigns with targeted offers and rewards, management services for publishing offers, and accelerated points programs for co-brand and rewards program members.

Processing. We extend our processing capabilities in the payments value chain in various regions and across the globe with an expanded suite of offerings, including:

- Issuer solutions designed to provide customers with a complete processing solution to help them create differentiated products and services and allow quick deployment of payments portfolios across banking channels.
- Payment gateways that offer a single interface to provide e-commerce merchants with the ability to process secure online and in-app payments and offer value-added solutions, including outsourced electronic payments, fraud prevention and alternative payment options.
- Mobile gateways that facilitate transaction routing and processing for mobile-initiated transactions.

Analytics Insights and Consulting. We provide proprietary analysis, data-driven consulting and marketing services solutions to help clients optimise, streamline and grow their businesses, as well as deliver value to consumers.

Our capabilities incorporate payments expertise and analytical and executional skills to create end-to-end solutions which are increasingly delivered via platforms embedded in our customers' day-to-day operations. By observing patterns of payments behaviour based on billions of transactions switched globally, we leverage anonymised and aggregated information and a consultative approach to help our customers make better business decisions. Our executional skills such as marketing, digital implementation and staff augmentation allow us to assist clients implement actions based on these insights.

Increasingly, we have been helping financial institutions, retailers and governments innovate. Drawing on rapid prototyping methodologies from our global innovation and development arm, Mastercard Labs, we offer "Launchpad," a five-day app prototyping workshop. Through our Applied Predictive Technology business, a software as a service platform, we can help our customers conduct disciplined business experiments for in-market tests.

1.3 Digital Enablement

Leveraging our global innovations capability, we work to digitise payment services across all channels and devices:

- ***Delivering better digital experiences everywhere.*** We are using our technologies and security protocols to develop solutions to make digital shopping and selling experiences, such as on smartphones and other connected devices, simpler, faster and safer for both consumers and merchants. We also offer products that make it easier for merchants to accept payments and expand their customer base and are developing products and practices to facilitate acceptance via mobile devices. The successful implementation of our loyalty and reward programs is an important part of enabling these digital purchasing experiences.

- ***Securing more transactions.*** We are leveraging tokenisation, biometrics and machine learning technologies in our push to secure every transaction. These efforts include driving EMV-level security and benefits through all our payment channels.

- ***Digitising personal and business payments.*** We provide solutions that enable our customers to offer consumers the ability to send and receive money quickly and securely domestically and around the world. These solutions allow our customers to address new payment flows from any funding source, such as cash, card, bank account or mobile money account, to any destination globally, securely and in real time.

- ***Simplifying access to, and integration of, our digital assets.*** Our Mastercard Developer platform makes it easy for customers and partners to leverage our many digital assets and services. By providing a single access point with tools and capabilities to find what we believe are some of the best-in-class Application Program Interfaces ("APIs") across a broad range of Mastercard services, we enable easy integration of our services into new and existing solutions.

- ***Identifying and experimenting with future technologies, start-ups and trends.*** Through Mastercard Labs, our global innovation and development arm, we continue to bring customers and partners access to thought leadership, innovation methodologies, new technologies and relevant early-stage fintech players.

Initial economic assessment of the proposed amalgamation of BPAY, eftpos and NPPA

Oxera submission on behalf of Mastercard

Prepared for
the ACCC

22 April 2021

NON-CONFIDENTIAL VERSION: This document contains confidential information to Mastercard which is indicated as follows:

[Confidential to Mastercard]

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1 Introduction

1.1 Mastercard has asked Oxera to review evidence in relation to whether the proposed merger of BPAY, eftpos and NPPA (the Applicants) into NewCo is likely to lead to a substantial lessening of competition (SLC) or would likely result in a benefit to the public that would outweigh the detriment to the public that would be likely to result. In providing this review, we draw on our extensive experience in analysing payment services markets in various jurisdictions. This document sets out our findings.

1.2 Given the short time available, as part of our assessment, we have focused on reviewing six key documents, rather than all the material provided in the annexures. These are as follows.

- Application by Industry Committee, on behalf of its members who are shareholders and/or members of BPAY, eftpos and/or NPPA, to amalgamate under NewCo ('Main Application')
- Annex 86 – Non-confidential version of Dr Geoff Edwards, Charles River Associates, Proposed Amalgamation of BPAY, eftpos and NPPA, Summary Economic Assessment of Likely Effects on Competition and Public Benefits and Detriments, dated 18 March 2021
- Annex 87 – Non-confidential version of Mr Lance Sinclair Blockley, Expert Industry Opinion in relation to Application to the Australian Competition and Consumer Commission for Authorisation of the amalgamation of BPAY, eftpos and NPPA, dated 18 March 2021
- Annex 89 – Non-confidential statement of BPAY Group Pty Ltd and BPAY Ltd in connection with application for authorisation, dated 16 March 2021
- Annex 93 – Non-confidential statement by eftpos Payments Australia Limited in support of application for authorisation, dated 17 March 2021
- Annex 95 – Non-confidential statement by NPP Australia Limited in support of application for authorisation (with non-confidential Exhibit AL-2, including Tabs 1 to 6), dated 16 March 2021

1.3 The proposed merger will bring together three players that, between them, are active in both the upstream market for payment infrastructure and the downstream market for payment services.

1.4 To assess whether the merger is likely to result in a SLC and to understand its net public benefit, it is necessary to compare the state of competition, public benefits and detriments likely to arise in the event that the acquisition occurs, against the developments if the acquisition does not occur (‘the counterfactual’). This allows us to disentangle the positive and negative effects of the transaction from changes that would have occurred in any event.

1.5 As part of their submission, the Applicants have set out a number of counterfactual scenarios for the three entities. However, as also described in section 6 of the Mastercard submission, there are various issues with this. Specifically, the supporting material presents contradictory views on the likely counterfactual scenarios, as well as discrepancies in the reported closeness of competition. Given the importance of these two components in assessing the implications of the merger, this raises questions over the validity of the stated benefits and competitive effects that are asserted as arising from the merger. Further details of this are set out in section 6 of the Mastercard submission.

1.6 Given these issues, we consider that the appropriate counterfactual to assess this transaction is one in which BPAY, eftpos and NPPA would have continued to develop their services in the market, according to their individual roadmaps, and would also most likely continue to innovate beyond these current plans. As such, absent the merger, it is plausible to expect that the three parties would have continued on a converging path, becoming stronger competitors to each other and increasing competition and innovation in the Australian market.

1.7 In this document, we focus our comments on whether the merger, relative to this counterfactual, is likely to lead to a SLC and whether the benefits outweigh any likely lessening of competition:

- section 2 provides an assessment of the potential anticompetitive effects of the merger;
- section 3 provides an assessment of the benefits that are stated to arise as a result of the merger.

1.8 To assess the anticompetitive effects of the merger, we have looked at both the current and the likely future product offerings of the Applicants to assess the possible loss of competition that could arise from the transaction—in terms of both the horizontal overlap, and the vertical links between the payment infrastructure (in particular, the NPP system) and the downstream players that require access to the NPP system.

Overview of findings

1.9 Our assessment of the horizontal overlap finds that the merger has the realistic prospect of reducing competition in the market, by reducing post-merger incentives to innovate. It has the potential to affect incentives across all three entities—the eftpos services, as well as NPP and BPAY—as an investment in any one of the three would be likely to cannibalise volumes run on the other schemes. For example, it is possible that, post-merger, the Parties would not have an incentive to invest in developing certain aspects of the eftpos infrastructure, as this would reduce transactions that could be processed on BPAY instead. Equally, investing in BPAY could reduce the debit card transactions on the eftpos scheme, making that investment less profitable for the company overall.

1.10 Furthermore, our assessment of the vertical links between the parties finds that the merger would reduce the incentives to make the NPP system more open, and would provide further incentives to foreclose access to third parties. Post-merger, the merging parties would operate both the infrastructure at the upstream level of the market and a number of downstream payment services. While these incentives are present in the current structure, given NPPA's interest in developing downstream services, the merger would increase them as the range of downstream options that the new entity would be interested in protecting would grow. NewCo would have the ability and incentives to foreclose third-party providers of payment services by refusing them access to the infrastructure, making access to the overlay services more costly, taking advantage of the information on competitors or reducing the quality of service offered to third-party users of NewCo's services.

1.11 The Applicants have outlined benefits that they state would be likely to arise as a result of the merger. A number of these stated benefits appear to arise only because of a lessening of competition among the three parties; however, this balance between the lessening in competition and net public benefits has not been identified or addressed in the Application or by the Applicants. Given the Application does not recognise the lessening in competition in the first instance, the balance between the two has not been addressed. Hence there can be no assurance that the potential efficiency gains and public benefits are likely to outweigh the detriment from the expected lessening in competition.

Further, a number of the benefits outlined are not in fact merger-specific and are unclear or unlikely to arise. As a result, we consider that the potential efficiency gains and benefits generated by the merger would be unlikely to constitute an overall public benefit that would outweigh the public detriment from the lessening of competition.

2 Anticompetitive effects

2.1 The proposed transaction will bring together three players that are active in both the upstream market for payment infrastructure and the downstream market for payment services.

2.2 As outlined above, the appropriate counterfactual to assess this transaction is one in which BPAY, eftpos and NPPA would have continued to develop their services in the market, according to their individual roadmaps, and would also most likely have innovated beyond these current plans.[1] As such, absent the merger, it is plausible to expect that the three parties would have continued their path of convergence, becoming stronger competitors to each other and promoting increasing competition and innovation in developing payment solutions for the Australian market. This counterfactual is also consistent with trends in other jurisdictions, For example, in Europe, various parties have developed retail payment products that use central credit transfer processing infrastructure and directly compete with card-based payment methods.

2.3 In the remainder of this section, therefore, we will consider the possible loss of competition that could arise from the transaction—in terms of both the horizontal overlap, and the vertical links between the payment infrastructure (in particular, the NPP system) and the downstream players that require access to the NPP system.

2A Horizontal effects

2.4 At a high level, the parties overlap in the market for the provision of upstream payment infrastructure and in the market for downstream payment services.

2.5 The Application is not clear regarding current horizontal overlaps, presenting a contradictory picture of the extent of competition between the parties. On the one hand, it suggests that the boundaries are increasingly blurring in the provision of payment services.[2] On the other, the Applicants argues that the merger will not have the effect, or be likely to have the effect, of substantially lessening competition,[3] stating that there are no significant horizontal overlaps

[1] See, for example, Annexure 89, Non-confidential statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, paras 51 and 53.
[2] Application by Industry Committee on behalf of its members dated 18 March 2021, section 22.3, p88.
[3] Application by Industry Committee on behalf of its members dated 18 March 2021, section 2.7, p8.

between the entities, and that they 'do not offer services that are close substitutes for each other'.[4]

2.6 In reality, the proposed amalgamation would bring together three close competitors, as recognised in the eftpos and BPAY submissions and summarised in section 9 of the Mastercard submission. For example, eftpos points out that there is 'clearly overlap' in the roadmaps of the three different entities. It states that while in the past its main competition has been from the ICS, this will not be the case in the future.[5] This therefore points to the elimination of competition arising from the amalgamation.

2.7 In particular, eftpos considers BPAY and NPPA to be its primary competitors, either currently or in the short to medium term in a number of different markets.[6] 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.[7] They also state that:

- there is potential for overlap between BPAY and eftpos with eftpos' 'card on file' service;[8]
- there is potential overlap between BPAY's Osko service 1 and NPPA's SCT;[9]
- there is potential overlap between BPAY Payments and NPPA's MPS service.[10]

2.8 Below, we consider the effect of the merger in the markets where the parties overlap, considering both their current position and market power and

[4] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, , para 181, Section 2.7 under paragraph 'Extent of complementarity'.
[5] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, para. 180.
[6] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, Tables 2–6.
[7] Annexure 89, Non-confidential statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, para. 54 (e).
[8] Appendix 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation.
, para 51.
[9] Appendix 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation.
, para 53 (a).
[10] Appendix 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation.
, para 53 (b).

assessing the dynamic effects of the transaction on future competition and innovation.

2A.1 Current competition

2.9 One useful indicator of the position of a player is its market share. In the time available, we have not been able to comment in detail on the proposed market definition and associated shares; however, we note a number of inconsistencies in the Application's assessment that underestimate the position of NewCo in the market.

2.10 The market shares in volume calculated by the Parties are summarised in the table below. As we explain below, these figures are likely to underestimate the current closeness of competition between the parties and their market position.

Table 2.1 Summary of the market shares of the merger parties (volume)

	BPAY	Eftpos	NPPA	NewCo	Reference
Upstream	redacted	redacted	redacted	16%	Exhibit 20
Downstream					
In store	redacted	redacted	redacted	18%	Exhibit 22
Online/remote	redacted	redacted	redacted	<1%	Exhibit 24
Bill (or invoice)	5–15%	0–10%	0–10%	9–19%	Exhibit 26
P2P	-	0–10%	35–45%	36–46%	Exhibit 27
P2B or G2B	redacted	redacted	redacted	5%	-

Note: For bill (or invoice), Osko is accounted for in the NPP market share; for P2P, NPP is solely Osko, eftpos market shares reflect Beem It.

Source: King & Wood Mallesons (2021), 'Application by Industry Committee, on behalf of its members who are shareholders and/or members of BPAY, eftpos and/or NPPA, to amalgamate under NewCo', 18 March.

2.11 In the upstream market, although we have not been given access to the underlying calculated market shares, we note that Direct Entry (DE) accounts for the majority of authorising and clearing low-value payments by value such that the amalgamated entities will have only 16% of the market that includes transactions completed through DE.[11] Reporting shares in this way implies DE is an important constraint on activity in this upstream market; however, as described further below, DE should not be expected to impose a competitive constraint on NewCo. It is a legacy system and payments are expected to migrate over time to NPPA at an increasing pace. As such, even assuming that the market shares of NewCo have been calculated correctly as at today, they

[11] Application by Industry Committee on behalf of its members dated 18 March 2021, p. 93.

are unlikely to provide a good proxy of the market power of the combined entities because of the inclusion of DE volumes in these calculations.

2.12 The Application also understates the merged entity’s likely strength in the downstream market. The Application focuses its attention on the international card schemes (ICS) as strong competitors in this market. While the ICS do indeed provide strong offerings, this depiction does not recognise accurately the strength of NewCo post-merger in all the segments highlighted in the Application. The table above does not effectively address the reality of the retail payments landscape presented in the PSB Annual Report (2020), where the total value of non-cash payments from BPAY and the NPP is larger than the value of all cards payments, and again includes the DE system which accounts for approximately 80% of the market in terms of the value of transactions.[12]

2.13 As for the downstream markets, these reported market shares are unlikely to be a reliable indicator of market strength, given the differing nature of the solutions and the fact that DE cannot be considered a strong constraint on NewCo. Even at the downstream level, it is expected that payments will migrate to NPPA; as such, even if DE currently accounts for a significant number of transactions (for example, 55–65% of bill or invoice payments, and 87% in B2P/G2P payments) its weight is expected to reduce in the near future, as payments migrate to NPPA.[13]

2.14 Regardless of these reported market shares, the transaction would significantly reduce the number of low-value payment schemes in Australia from six main providers to four (inclusive of Mastercard and Visa).[14] This could potentially be reduced to three, as the DE system continues to be subsumed by the NPP system.[15] We note that other, smaller competitors, namely the three-party card schemes, would still operate. As such, the Application’s presentation of market shares underestimates the importance of the competitive interactions among BPAY, eftpos and NPPA, given they currently provide important alternative options to customers.

[12] Payments System Board (2020), ‘Annual report 2020’, Table 2.
[13] Application by Industry Committee on behalf of its members dated 18 March 2021 , p. 98–99.
[14] This characterisation of the market is also consistent with the description of the low-value payment services presented in Dr Edwards report. See Annexure 86, para. 45.
[15] This assessment considers BPAY, eftpos, NPP, DE, Visa and Mastercard as the six main schemes.

2.15 While market shares can inform the static picture of the different parties in a market, a competition assessment of the likely effect of the merger should focus on the closeness of competition between the merging parties. In their submissions, eftpos and BPAY consider each other as well as NPP as primary competitors in a number of markets, either in the short or medium term.[16] Hence the market shares presented will underestimate the closeness of competition of the parties which is the relevant question for understanding the likelihood of a SLC. Overall the Application does not appropriately address the current overlaps of the three entities and therefore the potential for an SLC from the amalgamation.

2A.2 Future competition

2.16 A static assessment of the parties' position in the market also ignores important future developments in the Australian market, which would be likely to change the current market position.

2.17 As explained above, the market shares presented in the Application ignore the migration of payments authorised and cleared in the DE system to NPPA in the next five to ten years, as acknowledged by the Parties.[17] These payments account for over 80% of the total value of non-cash payments in the market and thus constitute the main battleground for future competition in this market.[18]

2.18 Although this migration is not merger-specific, its implications should be taken into account both when considering the current position of the parties and the prospects of future competition. The replacement of the legacy DE system for batch payments provides an opportunity for the three merging entities as well as other players in the market to enter or expand their services, in order to capture part of these migrating customers. BPAY and eftpos could also develop downstream services to compete with NPPA for the services currently provided over DE. In addition, the merger has the prospect of increasing barriers to entry and expansion, making it harder for third parties to develop an alternative infrastructure and enter in the future (discussed in detail in section 3 below). This would lead to a loss of future competition in the market, unless suitable remedies are put in place. As such, the migration of the DE system

[16] These markets include, for example, the provision of business services, the subscription and recurring debit payments, or the provision of overlay services. See Annexure 89, Non-confidential statement of BPAY Group Pty Ltd and BPAY Ltd dated 16 March 2021, paras 53–58.
[17] Application by Industry Committee on behalf of its members dated 18 March 2021, para 25.2, p 93.
[18] Payments System Board (2020), 'Annual report 2020', Table 2

volumes needs to be carefully considered when assessing the current and future positions of the merging parties in this market.

2A.3 Conclusions on horizontal effects

2.19 The proposed amalgamation involves three entities that are close competitors, both in terms of elements of their current service provision, but more importantly in terms of their future services and innovation in the market.

2.20 As a result, the merger has the realistic prospect of reducing competition in the market—by reducing post-merger incentives to innovate both the eftpos services and NPP or BPAY—as an investment in one of the three would be likely to cannibalise the volumes run on the other schemes. For example, it is possible that, post-merger, the Parties would not have an incentive to invest in the eftpos infrastructure (for example to target migrating DE volumes), as this would reduce the transactions that could be processed on BPAY instead. There are also specific areas, such as the deposit and withdrawal functionality, in which eftpos competes directly with NPPA;[19] therefore, an investment in NPPA could reduce transactions that are processed on both eftpos and BPAY. Equally, investing in BPAY could reduce the debit card transactions on the eftpos scheme, making the investment less profitable for the company overall. This tension is also acknowledged by BPAY's submission, which states that the expansion of NPPA into the provision of business services might create conflicting interests on the introduction of new initiatives.[20]

2.21 A number of remedies guaranteeing inter-operability over the systems provided by NewCo might be needed to guarantee the possibility of new players entering the market in the future and providing new services. The threat of this entry would be important to provide additional incentive for the Applicants to continue investing in the future.

2B Vertical effects

2.22 In addition to the horizontal overlap, the proposed amalgamation would bring together parties that operate infrastructure at the upstream level of the market and parties that operate a number of downstream payment services. As such, the vertical integration could harm competition if, post-merger, the merging

[19] As highlighted by the eftpos submission, the NPPA mandated payment service will compete with EPAL's deposit and withdrawal transaction, including at point of sale (e.g. recurring payments for 'card on file' transactions). See Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, Table 2.

[20] Annexure 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, para. 54 (d).

parties were to have the ability and incentive to foreclose third-party providers of payment services by refusing them access to the infrastructure, making access to the infrastructure or overlay services more costly or reducing some of the quality aspects of third parties' products through different service levels.

2.23 In the Australian market, concerns about the openness of the market have already been raised in the June 2019 RBA consultation paper. In that paper several stakeholders, particularly fintechs, highlighted the need to facilitate access by increasing the use of application programming interfaces (APIs), which third parties can use to communicate in a standardised and secure way with bank systems to access NPPA functionality.[21]

2.24 In the sub-sections below, we consider whether the proposed amalgamation is likely to magnify these concerns, by reducing the incentives of NewCo to provide access to the infrastructure to third parties that compete downstream with BPAY, eftpos or NPPA. While NPPA would potentially already have the incentive to foreclose access to its infrastructure where it was considering introducing downstream services, at present it is likely to have some incentive to support a third-party downstream service that would increase volumes over the NPPA system, where the service is distant from those contemplated by NPPA. Even in that situation, concerns are raised currently that NPPA could exploit the information provided by these entrants to direct its own downstream investments. Post-amalgamation, these incentives will be even stronger. NewCo will have two entities that are already active in the downstream space, and with all three entities having active plans to develop these services in the future, the incentive to refuse to support a third-party service would increase. First the third party entrant's service offering is more likely to compete directly with existing offerings or future plans of one of the three entities than NPPA alone; and second, there is more scope for one of the three entities to take advantage of the competitor information provided in directing future developments.

2B.1 Ability to foreclose

2.25 The ability to foreclose depends on whether the merged company 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

[21] RBA (2019), 'NPP Functionality and Access Consultation: Conclusions Paper', p. 15.

solutions. As such, the assessment of ability should focus on the following questions:

- are there alternative routes to market for third parties that would like to develop new payments solutions?
- would NewCo have the technical ability to foreclose third parties?

2.26 With respect to the first question, Dr Edwards' report states that NewCo would not have the ability to foreclose third parties, because of the strong role in the market provided by ICS.[22] This could be true for some organisations using the card infrastructure to process payments, such as PayPal or BNPL schemes; however, this does not apply to a wide range of third parties that need access to the NPPA infrastructure to develop their own payment services, such as bill or invoice payment providers or providers of P2P services.

2.27 The idea behind open credit transfer processing infrastructures such as NPPA is to provide a cost-efficient basic credit transfer service which can be used by other parties to develop their own payment service propositions. Examples from Europe show that access to the credit transfer processing infrastructure (pre and post the Payment Services Directive 2) has enabled various parties to develop their own new and innovative retail payment service propositions. Card infrastructure is not a substitute for these needs.

2.28 We have also considered whether NewCo would have the technical ability to foreclose, given the regulatory framework in Australia and the internal organisational structure.

2.29 Dr Edwards' response to this foreclosure theory of harm focuses on the fact that NPPA was conceived as an open access infrastructure. With open access, there would be likely to be no foreclosure. While there are some proposed changes to the access arrangements to eftpos and NPPA as a result of the amalgamation, we understand that these do not go far enough in ensuring that there would be no ability to foreclose access to infrastructure.

2.30 We understand that currently, direct access to the NPP is only granted to direct participants, which use their own NPP payment gateway to gain access. They are required to be licensed as an authorised deposit-taking institution (ADI) (or restricted ADI), to hold an ESA at the Reserve Bank, and to become a

[22] Annexure 86, para. 146 (a).

shareholder in NPPA, in addition to meeting various technical requirements. Thus ICS cannot gain direct access to this infrastructure without becoming an ADI or restricted ADI. Other participants must be sponsored by a direct participant in order to connect to the NPPA.[23] The ACCC and the RBA previously recommended that the NPPA should assess and report on options for amending the NPP Regulations, and other arrangements, to allow for an entity that is not an ADI to potentially become an NPP Participant.[24]

2.31 Furthermore, Dr Edwards' report states that the fragmented government structure would make it difficult to engage in a foreclosure strategy.[25] This point openly contradicts the benefits claimed from the transaction, as it seems to suggest that having directors from various types of participants would be likely to make the decision-making process less efficient.

2.32 The ability to foreclose could also arise from the fact that most new third-party development would need to obtain agreement from a critical mass of the Australian banks to develop a new service offering. Given that these banks are the ultimate owners of NewCo, they would be able to restrict new third-party developments, if they saw these developments threatening the returns to NewCo investments. Failure to obtain support from a critical mass of the banks would make it impossible for third parties to reach merchants and customers with a new service, therefore providing another illustration of NewCo's ability to foreclose third parties and weaken their competitive position.

2B.2 Incentive to foreclose

2.33 Having concluded that NewCo would be likely to be able to foreclose third parties, we consider whether they would also have the incentive to do so.

2.34 Consider a third party that develops an overlay service to compete with Osko (BPAY's overlay offering). Pre-merger, NPPA would be likely to have an incentive to accommodate this entry and earn profits through processing the transactions of the new player on its infrastructure. Post-merger, however, it will need to consider whether entry by a third party would steal some business from Osko (BPAY) or eftpos, thereby reducing NewCo's profits downstream. To the extent that by foreclosing access to this third party, NewCo would increase its share downstream, it could be profitable to forgo the profits upstream and foreclose new entrants. We understand that the characteristics

[23] Annex 86, para. 146 (b); RBA (2019), 'NPP Functionality and Access Consultation: Conclusions Paper'.
[24] RBA (2019), 'NPP Functionality and Access Consultation: Conclusions Paper'.
[25] Annex 86, para. 146 (c).

of these markets are such that the profits made upstream tend to be smaller in comparison with the profits that could be made in the retail payments markets, hence creating a realistic prospect of a foreclosure strategy being profitable.

2.35 While NewCo states it is not profit-maximising, this does not change these incentives. Its returns will be used to fund future investment to meet its strategic aims and to lower prices for its services, and thus it will still have an incentive to reduce the competitive threat from other players. Furthermore, to the extent that success in foreclosing competitors allows its bank owners to avoid paying for third party services and also pay low prices for NewCo services, those benefits will certainly flow to bank shareholders at least in part.[26]

2.36 There are various mechanisms that the amalgamation could adopt in order to make access more difficult for third parties. Below, we describe a few of them based on our understanding of Mastercard's experience, although we do not exclude the possibility of other foreclosure mechanisms.

2.37 First, as highlighted above, the amalgamation could 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. **[Confidential to Mastercard].**

2.38 Second, post-merger, NewCo could make it more difficult for third parties to obtain access to the infrastructure and/or to operate as an overlay service in the market. **[Confidential to Mastercard].**

2.39 Third, post-merger, NewCo could gain knowledge of competitors' commercial strategies, giving it an unfair commercial advantage. In the 2019 consultation, a number of fintechs raised serious concerns with respect to the sharing of business plans and intellectual property with NPP in the process of applying to be an overlay provider. The concern was that this information could then be accessed by the fintech's potential competitors on the Board of the NPP, and potentially used to those competitors' advantage.[27] While these concerns existed pre-merger, it is clear that allowing the transaction would make them

[26] The question of the extent to which any such benefits would be passed on to end-customers would depend on the nature of competition between the large banks (and also within the retail sector, given the ownership structure). Given not all banks and not all retailers will have these advantages, it is not clear that there would be competitive pressure to pass on any cost savings, even were these to arise.
[27] ACCC/RBA (2019), 'NPP Functionality and Access Consultation: Conclusions Paper', June, p. 15.

even more prominent and relevant, increasing the number of situations in which NewCo could use this information to its advantage.

2B.3 Conclusions on vertical effects

2.40 Overall, our understanding of the market is consistent with NewCo having the ability and incentives to foreclose third parties post-merger, contrary to the Applicants’ submission. The prospect of vertical foreclosure would not only reduce competition in the market, but 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 A critique of the benefits

3.1 We note that as part of the statutory test for authorisation, the ACCC considers whether the public benefits (including as one of its principal elements, gains in efficiency) outweigh the public detriments, including from any lessening of competition.[28] Such efficiency considerations typically include an assessment of allocative efficiency (the effective allocation of resources), productive efficiency (reached when goods and services are produced with the least use of resources), and dynamic efficiency (the increased ability and incentive to innovate).

3.2 The Applicants have outlined a number of benefits that they state will be likely to arise as a result of the merger. However, the anticompetitive elements of the merger outlined in section 2 limit these efficiency gains, and therefore public benefits, of the merger.

3.3 Specifically, some of the benefits outlined by the Applicants:

- are not specific to the merger;
- would only arise due to the lessening of competition;
- are unclear or unlikely to arise.

3.4 We explore each of these in turn. Detailed commentary against each of the stated benefits is also provided in the table in section 8.9 of the Mastercard submission. We also note that there are a number of instances where the benefits would be likely to accrue to shareholders, rather than to end-users, and therefore we understand less weight should be attributed to such benefits.[29]

3.5 As a result, we consider that the potential efficiency gains generated by the merger would be unlikely to constitute an overall public benefit such as to outweigh the public detriment.

3A Benefits are not merger-specific

3.6 A number of benefits stated in the Application are not merger-specific and could arise in the absence of the merger:

[28] ACCC (2018), 'Merger Authorisation Guidelines', section 8.
[29] This is consistent with the decision of the Australian Competition Tribunal, Qantas Airways Limited (2005) ACompT 9. See, for example, para. 189.

- enhanced engagement with small businesses and other participants in the Australian payments ecosystem;
- increased ease for third parties to develop more payments innovation by allowing them to access A2A and cards infrastructure;
- reduction in uncertainty allowing for more efficient deployment of capital, sooner;
- enhanced speed to market of innovations developed by Australia's three payment schemes;
- increased likelihood of hybrid and targeted local innovation.

3.7 We note that the last three benefits listed above, if they arise, would be the result of a reduction in competition. We provide additional commentary on the likely negative effects of this in section 3B below. However, here we set out that, were these benefits seen to be sufficiently strong to compensate for the reduction in competition, this could be achieved in a less restrictive way than via the full amalgamation and hence they are not merger-specific.

3.8 Collaboration between the entities is possible in the absence of the merger and is therefore not merger-specific. This is evidenced in the eftpos submission, which points to Beem It as an example of such collaboration (it is rail-agnostic but currently uses BPAY).[30] Indeed, it is our understanding that the ACCC has the ability to authorise specific, discrete types of conduct that would allow collaboration for certain decisions. NPPA acknowledges this option as an example of coordination with BPAY and eftpos on online payments and QR codes.[31]

3.9 Further, eftpos points out that support from banks is available even absent the merger. Specifically, eftpos says that while in the past, banks were slow to support it, this 'is no longer the case'.[32]

3.10 Were it to be established that more coordination could benefit innovation across the industry, it would be important to consider whether this coordination could be achieved by methods that would be less disruptive to competition and innovation than the proposed amalgamation. To the extent that these benefits

[30] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited in support of application for authorisation, para 180.
[31] Annexure 95, Statement by NPP Australia Limited in support of application for authorisation, para. 113.
[32] Annexure 93, Statement in support of application for authorisation eftpos Payments Australia Limited, para. 180.

exist, it seems likely that they could also be achieved through multi-party collaboration, rather than full amalgamation.

3.11 With respect to the first stated benefit above, in its submission, eftpos flags that the benefit of advisory groups having a voice would be unlikely to occur post-merger because ‘there are too many parties covering too many topics for too many schemes in forums with their competitors’.[33]

3.12 While the benefit of ‘Increased ease for third parties to develop more payments innovation by allowing them to access A2A and cards infrastructure’ is listed in section 27.2 of the Application, it is not expanded on elsewhere in the documents. As such, no mechanism is presented to explain how this benefit is actually expected to arise for third parties. As highlighted in section 2, the amalgamation raises potential vertical issues which would make it unlikely that NewCo would have the incentive to support third parties to deliver these alleged benefits. Incentives need to be carefully designed to ensure that owners (the schemes, retailers or big banks) do not have the incentive to prevent rivals from accessing the infrastructure, or to give rivals access on worse terms.

3B Benefits would only arise due to the lessening of competition

3.13 The Applicants have stated that a SLC will not arise from the merger.[34] However, in contradiction to this, some of the stated benefits are in fact predicated on a lessening of competition. The statement that there is currently uncertainty in the market, due to competition, and that the removal of such uncertainty, and therefore competition, would give rise to benefits implies there is a balancing that should be done, but which the Application has not undertaken. The relevant stated benefits are:

- reduction in uncertainty allowing for more efficient deployment of capital, sooner;
- enhanced speed to market of innovations developed by Australia’s three payment schemes;
- increased likelihood of hybrid and targeted local innovation;

[33] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, para. 181.
[34] Application by Industry Committee on behalf of its members dated 18 March 2021, section 2.7, p 8.

- reduction in the risk of stranded payments assets from innovations which fail to achieve network effects and ubiquity.

3.14 A reduction in competition is recognised by the entities' own submissions, as set out in section 2A.

3.15 It is noteworthy that at the heart of the merger rationale presented by the Applicants is the notion that it is competition between the entities that is hampering innovation. This is contrary to the view (which benefits from widespread support and evidence) that competition encourages innovation when the innovator can then enjoy the benefits resulting from the initial investment. Competition does indeed increase 'uncertainty' for those that compete; it is this dynamic that encourages businesses to take risks and think of new ways to meet end-users' needs, because if they do not, their rivals will.

3.16 Given this, the Applicants do not explain how the merger will improve the stated concerns about pace of change and lack of innovation incentives, given this competitive pressure will be reduced. The Application appears to be predicated on an assumption that NewCo will share information more effectively across the Boards of the three entities, and that this will drive investment and innovation. The reference to 'reducing uncertainty' as a benefit implies that this information sharing will lead to a reduction in competition, since the uncertainty is around whether the other entities will bring other services forward that will compete with each other's offerings.

3.17 This is problematic in two ways: first, it acknowledges that the amalgamation will reduce competitive activities; second, it assumes that competition hampers innovation. The Application has therefore not provided a suitable foundation for its claim that reducing competition between the three entities will in fact enhance innovation. The underlying spur to innovation that will remain according to NewCo appears to be competition with ICS; however, given the entities describe each other as their closest competitors and the scope for foreclosure for third parties, it is likely this competitive pressure will be significantly reduced.

3.18 BPAY's and eftpos' submissions support these concerns.

- eftpos highlights that 'demand should drive innovation, not funds available to invest', raising a concern over 'how effective or targeted innovation will be' as a result of the merger.[35]
- BPAY notes that the merger may even reduce its ability to offer new services to the market as it will be 'faced with the challenge of competing with other priorities within NewCo...'.[36]

3.19 The Application attributes concerns around innovation to the current competition across the three entities for the capital to support innovation. In fact, eftpos disputes the claim that banks currently have large competing investment decisions. In its submission, eftpos points out that banks are net recipients of interchange and scheme fee rebates (from eftpos) and that the costs to support eftpos above these have been low. It highlights that it has itself 'repeatedly asked for justification of this statement'.[37]

3.20 An innovation that fails due to limited customer uptake (i.e. limited network effects) is the result of a poor commercial offer or a more competitive offer available. Therefore, by seeking to protect itself from this threat, NewCo is seeking to protect itself from competitive pressures that would otherwise give each entity the incentive to enhance its offering to increase the chance of success.

3.21 Absent this pressure, incumbents will want to protect existing assets, which may be stranded by their own innovation. Competition can force that innovation by incumbents to ensure that they are not left behind. By removing or relaxing this pressure, it is not clear how, post-merger, shareholders would have an increased incentive to innovate and cannibalise their existing service offerings.

3.22 The Applicants do not address two other potential sources of a lack of progress on innovation: the inherent conflict that arises from the legacy systems of the banks; and limited commercial incentives from the mutualised/non-profit structure. The amalgamation would not change those market features in any way. Any suggestion that the proposed changes to ownership and governance would rectify any concerns on pace of innovation through changing the banks' incentives are not substantiated, and are even disputed by eftpos itself.

[35] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, para. 114.
[36] Annexure 89, Statement of BPay Group Pty Ltd and Bpay ltd in connection with application for authorisation, para. 76 (b).
[37] Annexure 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, para. 114.

Despite the 'one shareholder, one vote' rule, it seems to be the case that the merger would allow for investment decisions to be taken by those who would have to fund it. It is therefore unlikely that any hold-up issues would be changed significantly.

3.23 The benefits cited are all predicated on an assumption that the merger would change some of the underlying incentives on the main banks. The reliance on legacy systems are highlighted as challenges absent the merger, and would be likely to remain the same after the transaction. Equally, the merger would be unlikely to change the long-term incentive agreements with banks.

3C Benefits are unclear and/or unlikely to arise

3.24 Some of the other benefits mentioned by the Applicants are either unclear or unlikely to arise. In particular:

- enhanced voting rights of smaller participants;
- reduction in transaction costs for the three Payments Schemes and their Scheme Members;
- potential for synergies.

3.25 With respect to the enhanced voting rights of smaller participants, it is not clear how this would be beneficial, unless it is seen to translate to a different balance when making investment decisions. Furthermore, despite the one shareholder, one vote rule, it appears to be the case that investment decisions would be taken by those who would have to fund it.

3.26 Any reductions in transaction costs might not translate into lower pricing, since they appear to be mostly fixed-cost savings. Variable-cost reductions would be more likely to benefit consumers in the form of lower prices than fixed-cost reductions, since, in theory, prices are set with reference to variable costs. Similarly, the synergy benefits articulated predominantly relate to fixed-cost savings, which would be unlikely to be passed on to consumers in the short-run, or where they do not accrue across the whole sector (e.g. retailing).

3.27 Several of the synergies listed are also not merger-specific. Indeed, we note that eftpos highlights that the material efficiency gains from the merger are likely to be low 'unless platforms converge, which is unlikely with very low change of a viable business case then cost savings will be low'. It also adds that shared services 'will save very little in the scheme of things'.[38] As such, these savings are likely to be small, could potentially only benefit shareholders, and as such should be given the appropriate weight.

3.28 We note that less weight should be placed on the benefit of 'enhanced ownership interests of smaller participants' given that such a benefit would accrue to shareholders, with little or no explanation of how it would be passed on to end-users.

3D Conclusion

3.29 We have assessed the benefits that the parties claim will arise as a result of the merger. While there may be some benefits, most of them would arise from the anticompetitive nature of the merger, while in other cases, it is not clear how the benefits would arise, if at all. Overall, this is likely to result in an overall negative net effect from this merger.

[38] Annex 93, Non-confidential statement by eftpos Payments Australia Limited dated 17 March 2021, para. 181.

4 Conclusion

4.1 Based on our assessment, we find that the proposed merger is likely to give rise to a SLC.

4.2 Our assessment of horizontal effects finds that the merger has the realistic prospect of reducing competition in the market, by reducing post-merger incentives to innovate both the eftpos services, as well as NPP or BPAY. Our assessment of vertical effects finds that the merger would reduce the incentives to make the NPP system more open, and would provide further incentives to foreclose access to third parties. We note that the merging parties post-merger would operate both the infrastructure at the upstream level of the market and a number of downstream payment services.

4.3 We also note that a number of the stated benefits do not appear to be merger-specific, are unclear, and appear to stem from a lessening of competition between the three parties. 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 detriment.

4.4 A number of measures can be taken to mitigate the impact of the anticompetitive effects. These are outlined in sections 10 and 11 of the Mastercard Submission.

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