

Non-Confidential

Proposed Amalgamation of BPAY, eftpos and NPPA

Applicants' response to submissions from interested third parties

1 Context

- 1.1 On 18 August 2021, the Commission published 13 submissions from interested parties.¹
- 1.2 The submissions from interested parties responded to the draft undertaking offered by the Applicants and published by the Commission on its public register on 5 August 2021.

2 Applicants' Response to the submissions

- 2.1 The Applicants have considered the submissions and wish to respond to them as follows.²
- 2.2 The submissions do not raise any new concerns. The Applicants believe they have already more than adequately responded to these concerns through the information they and others have provided to the Commission, most of which is not subject to a claim for confidentiality and that is available on the Commission's public register.
- 2.3 The Applicants believe that the Conduct will not be likely to have the effect of substantially lessening competition in any market (however defined and irrespective of which counterfactual scenario is adopted) and the Conduct will be likely to give rise to a net benefit to the Australian public. The Applicants believe the Commission should grant authorisation to the Conduct without any conditions or subject to the draft undertaking they have already offered to the Commission.
- 2.4 However, to assist the Commission's decision-making, the Applicants have amended the undertaking they are prepared to offer to the Commission pursuant to section 87B of the Act. A copy of the amended undertaking (in mark-up) is **attached** to this submission.
- 2.5 The Applicants submit that the amendments to the undertaking more than adequately address any residual concerns raised by interested parties.
- 2.6 **Table 1** below outlines the amendments to the undertaking.

Table 1: response to key issues

#	Concern raised by interested parties	Applicants' response
1	The 3-year duration of the proposed undertaking is too short. Some submissions suggest that the proposed undertaking should be 7 years or longer.	The Applicants will offer a 4-year duration. The Applicants ask the Commission, and others, to note that the duration of the undertaking which the Commission accepted from Visa AP (Australia) Pty Limited and Visa Worldwide Pte Limited on 9 March 2021, to address the Commission's concerns that Visa's conduct Visa may have limited competition in relation to debit card acceptance through its dealings with large merchants, was only 3 years.

¹ The ACCC has indicated that it is still processing one further submission.

² Unless mentioned otherwise, defined terms in this document have the same meaning as in the Application.

#	Concern raised by interested parties	Applicants' response
2	The proposed undertaking does not impose any obligations on issuing and acquiring banks to offer or actively promote LCR to merchants.	<p>The Applicants have added '<i>and promote</i>' to the existing undertaking about AP+ procuring that eftpos will do all things in its control to make available least cost routing. See revised undertaking.</p> <p>The Major Australian Banks have already made LCR available or offered it to the over 95 per cent of their eligible small business merchants.</p> <p>The Applicants refer the Commission to the ABA's and the RBA's submissions in relation to this Application.</p> <p>For the benefit of interested parties, the Applicants note that the RBA (being the regulator responsible for payments policy and regulation) expects to publish a conclusions paper and final standards on LCR within the next 2 months.</p> <p>https://www.rba.gov.au/media-releases/2021/mr-21-16.html</p>
3	There should be an independent external auditor appointed by the ACCC.	The Applicants have included language in the undertaking to allow for the appointment of an independent external auditor.
4	Small businesses should be given real input into AP+'s decisions, for instance by appointing 2 small business representatives on the AP+ Board. Submissions from small businesses do not consider it sufficient that AP+ proposes to establish a subcommittee in which small businesses could participate in providing input into decisions made by AP+.	The Applicants have included an additional undertaking which will oblige AP+ to ensure that 1 of the 4 independent directors appointed to its board will have substantial small business experience.
5	eftpos will cease to have an ability to set its own pricing independently.	The Applicants reject this concern. Further information on this is provided below.

3 Small business representation

3.1 With respect to the decision-making process of AP+'s board, the Applicants submit that:

- (a) AP+'s End-User Committee will represent the interests of the end-users of BPAY, eftpos and/or NPPA, including small businesses, small retailers, fintechs and consumers, ensuring that AP+'s board has a strong understanding of the issues and concerns of end-users; and
- (b) AP+'s decision-making process in that regard will be substantially more transparent than any version of the counterfactual scenario because:
 - (i) the End-User Committee will be required to report on its work publicly and on an annual basis;
 - (ii) the End-User Committee may make any other public statement relevant to its work that it sees fit; and

- (iii) the directors of the AP+ Board will be required to respond publicly and as soon as possible to the End-User Committee's annual reports and other public statements.³
- 3.2 The Applicants submit that those factors, coupled with the additional undertaking referred to above, should allay any residual concerns about the participation of small business representatives on the AP+ Board, the End-User Committee and AP+'s decision-making process.
- 3.3 The Applicants further submit that these arrangements — and the benefits for small business to which they will give rise — exist neither today nor in any version of the counterfactual scenario. For example, the current governance arrangements of BPAY, eftpos and NPPA do not include any mechanisms that require their respective boards to consider the views of small business, or to impose any obligations on them to do so transparently, or to appoint any directors with small business experience.
- 3.4 Moreover, currently, there are three independent directors on eftpos' board. Following the amalgamation, there will be four independent directors on eftpos' board.

4 eftpos' pricing

- 4.1 Pricing decisions will remain with eftpos under AP+'s governance arrangements.
- 4.2 The Applicants submit that, following the amalgamation, the directors of eftpos will also be directors of AP+ and will have directors' duties in relation to eftpos in addition to their obligations to AP+. The Applicants submit that those directors will not have the incentive or ability to allow eftpos to cease being a low-cost provider of card-based debit payment services.
- 4.3 This is because the Constitutional objects of AP+ will place a legally binding obligations on AP+ to ensure that payment services are offered which are "*cost effective*."
- 4.4 It is also because the objects will place a legally binding obligation on AP+ to facilitate "*the provision of low-cost solutions for retailers, other businesses and their customers*".
- 4.5 As discussed in the Applicant's submission of 18 June 2021, eftpos will continue to set the prices for its services. To the extent that eftpos, or a committee established by eftpos, or in accordance with the operating rules of eftpos currently makes decisions under eftpos' operating rules, following the amalgamation, eftpos or the committee (as the case may be) will continue to do so in accordance with eftpos' operating rules.⁴

5 Prescribed Services in Schedule 1 of the undertaking

- 5.1 Following eftpos' board meeting of 10 August 2021, the following changes have been made to the description of Prescribed Services 2 (Make real-time payments into customer account via debit card CNP) and Prescribed Service 8 (Make real-time payments into customer account via debit card (resolve for time-bound exceptions for CP) in the undertaking:
 - (a) the effective date of the mandate for Prescribed Service 2 is 31 May 2022;
 - (b) the effective date of the mandate for Prescribed Service 8 is 31 May 2023.

³ See article 9.10 of AP+'s Constitution.

⁴ Please see the Applicants' response to Questions 1.3 and 4 of the Commission's request for information (filed by the Applicants on 18 June 2021) for additional information about how eftpos makes its own pricing decisions and will continue to do so following the amalgamation.

6 Eftpos' QR code service

6.1 Eftpos has informed the Applicants that it is proceeding with its QR Code service.