
Response to ACCC's Preliminary Views

In relation to the Application to the Australian Competition and Consumer Commission for Authorisation of the Proposed Amalgamation of BPAY Group Pty Limited and BPAY Pty Ltd, eftpos Payments Australia Limited and NPP Australia Limited

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1. INTRODUCTION

1. I have been asked by King & Wood Mallesons, acting for Industry Committee Administration (ICA), to prepare a response to the ACCC's preliminary views and issues about which it is seeking information, issued on 4 June 2021 (Preliminary Views).
2. I have previously provided an expert economic opinion on the application to the Australian Competition and Consumer Commission (ACCC) for authorisation of the amalgamation of BPAY Group Pty Ltd and BPAY Pty Ltd (together, BPAY), EFTPOS Payments Australia Limited (eftpos) and NPP Australia Limited (NPPA), which was submitted to the ACCC on 2 April 2021. I have also previously provided a report in response to the Oxera submission on behalf of Mastercard titled "Initial economic assessment of the proposed amalgamation of BPAY, eftpos and NPPA".

2. POTENTIAL HORIZONTAL EFFECTS

3. In its Preliminary Views the ACCC expresses that it is not yet "satisfied that the amalgamation would not have the effect, or be likely to have the effect, of substantially lessening competition in a market or markets relating to payment services" (para 2.13) and that it "seeks further information on whether the amalgamation could remove incentives to compete (or for NewCo to invest in new/innovative services that could compete) where payment services overlap, or are likely to overlap in the future, between eftpos, NPPA and BPAY" (para 2.12).
4. The Preliminary Views identifies existing and/or potential overlaps in a number of low value payment service segments, specifically:
 - a. Person-to-business point-of-sale electronic payments (which I understand to mean in-store retail electronic payments);
 - b. Online retail, bill and invoice payments (including one-off and recurring payments);
 - c. Person-to-person, person-to-business and business-to-business payments; and
 - d. Business-to-person and government-to-person payments.
5. These payment service segments are more or less the same as the segments that I proposed as useful frameworks for assessing the issues in question in my expert economic opinion (see Section 3.3.2 of that opinion) and that I used as frameworks for my assessment of the likely effects of the proposed amalgamation (see Section 6 of my opinion), with two exceptions.
 - a. The ACCC's "online retail, bill and invoice payments" segment combines two distinct segments that I proposed in my expert economic opinion: online retail payments (including one-off and irregular recurring retail payments and online payments for in-store purchases) and bill and invoice payments (including one-off and regular recurring bill and invoice payments including subscriptions to online and in-app services). In my opinion, these two distinct segments provide distinct useful frameworks for assessing the issues in question. However, there can be a number of useful frameworks for assessing effects and likely effects of a proposed amalgamation, and ultimately the frameworks used should not be of great consequence, as the assessment itself should pay close attention to the nature and extent of competition between the amalgamating entities and constraints on NewCo.

- b. In my expert economic opinion, I proposed assessing person-to-person (P2P) payments as a separate segment. By contrast, in its third segment the ACCC includes “person-to-business” and “business-to-business” payments with “person-to-person” payments. It is not clear to me how “person-to-business” and “business-to-business” payments listed in the ACCC’s third segment are distinct from “bill and invoice” payments listed in the ACCC’s second segment. If the ACCC considers that they are not distinct, the ACCC might find that its third segment collapses to P2P payments.
6. The remainder of the ACCC’s preliminary views on potential horizontal effects in payment service segments consists of: (i) a brief overview of comments of other stakeholders and ICA submissions on the level of existing and potential future overlap between the amalgamating entities; (ii) identification of “a degree of overlap” or “some overlap” between services of the amalgamating entities in each of the identified segments and of a “degree of competitive constraint” imposed by other payment services; and (iii) an invitation to comment on these overlaps and the likelihood of the proposed amalgamation having the effect of substantially lessening competition in a relevant market in connection with these overlaps.
7. All of these overlaps were identified in Section 6 of my expert economic opinion, together with a careful analysis of the likely effects of the proposed amalgamation in each segment based on the available evidence. I concluded as follows:
- While there are today a number of overlaps in segments between the services offered by the three entities, and there are likely to be more overlaps in the future, careful consideration of these overlaps and of competition in each segment reveals that any loss of competition would be marginal at worst, and a substantial lessening of competition is not likely.¹*
- [...]
- While there may be some loss of competition between the amalgamating entities, I do not consider this likely to be substantial: overlaps between them are and are likely to remain limited and following amalgamation they will continue to be constrained by more significant competitors that remain outside of the amalgamation.²*
8. The ACCC’s Preliminary Views does not contain a similar analysis or comment on or advance beyond my analysis, and so it is not possible for me to contribute further on the overlaps and likely effects in payment services segments beyond the analysis and conclusions I have already contributed in my expert economic opinion. In particular, it is not clear which parts of my analysis the ACCC does not accept, nor why the ACCC at this stage remains “not satisfied that the amalgamation would not have the effect, or be likely to have the effect, of substantially lessening competition in a market or markets relating to payment services”. The simple identification of overlaps is of course not a sufficient basis for finding a substantial lessening of competition: as the ACCC is aware, overlaps can exist between services of amalgamating entities without there being any substantial lessening of competition or other significant competition concerns.

1 Expert Economic Opinion, paragraph 116.

2 Expert Economic Opinion, paragraph 334.

9. The Preliminary Views also states that the ACCC “is not satisfied that the amalgamation would not have the effect, or be likely to have the effect, of substantially lessening competition in a market or markets relating to payments infrastructure” (para 2.37) and that the ACCC “seeks further information” regarding this. Horizontal overlaps in payments infrastructure were identified in my expert economic opinion, and analysis was undertaken there of the likely effects of the proposed amalgamation in relation to payments infrastructure (see Section 6.9 of my expert economic opinion). As explained there, in my opinion substantial unilateral effects on prices or quality at the infrastructure level are not likely for a number of reasons. The ACCC’s Preliminary Views again does not contain a similar analysis or comment on or advance beyond my analysis, and so it is not clear which parts of my analysis the ACCC does not accept, nor why the ACCC at this stage remains “not satisfied”.

3. NEWCO’S ABILITY OR INCENTIVE TO REMOVE OR DIMINISH EFTPOS’ CAPABILITY

10. Section 7 of my expert economic opinion addressed this concern and so I refer the ACCC to the analysis and considerations regarding ability and incentives of NewCo contained there.
11. The Preliminary Views states that “the NPP will require more volume and investment to be viable” (para 2.38). Regarding volume, it is not my understanding that the NPP’s viability will require volumes to be shifted from eftpos (and the ICS). My understanding is that the business plan for the NPP has been based on migrating “pay anyone” direct credits (largely now migrated to the NPP), direct debits, and bulk credits (i.e. bulk G2P and B2P payments), all from the Direct Entry system. Regarding investment, my understanding is that the development by the NPP of the MPS for direct debits and category purpose code business services for G2P and B2P payments is largely complete, and the remaining investments required are mainly on the side of financial institutions, not the NPP.
12. Moreover, a strategy of weakening eftpos in retail payment segments to favour the NPP is unlikely to be rational for NewCo because the vast majority of foregone eftpos volume is likely to divert to the ICS rather than to the NPP.
13. More generally, it is not clear why NewCo would have incentives to favour one of the three entities over another, rather than promote and develop the most efficient solutions for each payment segment, particularly given the shareholders of NewCo are its major customers (including the two largest retailers in Australia) and NewCo will face significant competition including from the ICS.

4. LEAST COST ROUTING

14. The amalgamation-specificity of concerns regarding the future of least cost routing (LCR) is not apparent. The Preliminary Views does not take a view on this and the submissions of stakeholders (including submissions that respond to ACCC questions directed at whether LCR concerns are amalgamation-specific) have not provided any compelling amalgamation-specific argument.

5. POTENTIAL VERTICAL EFFECTS

15. The Preliminary Views explains that the ACCC is “considering whether combining NPPA’s infrastructure with BPAY and eftpos, which operate in downstream markets [...] could result in NewCo having the ability and incentive to foreclose competition and reduce innovation in competing payments services that rely on the NPP infrastructure” (para 2.45). The ACCC clarifies that this concern is “in particular in relation to BPAY whose Osko service is an overlay on the NPP infrastructure” (para 2.45).
16. This potential concern was addressed in Section 9 of my expert economic opinion and also in Section 3.2 of my response to the Oxera report, and I therefore refer the ACCC to those previous submissions. In particular, in relation to third party payment services that might compete downstream with BPAY’s Osko services, see paragraphs 45-47 of my response to the Oxera report.

6. PUBLIC BENEFITS

6.1. Reduced uncertainty allowing for more efficient deployment of capital sooner and enhanced speed to market of innovations

17. The Preliminary Views accepts that NewCo “could enable information sharing, coordination and alignment of roadmaps across the three entities to remove overlapping payment initiatives”, that this “may result in a more unified roadmap” and “greater clarity of proposals for consideration by NewCo shareholders”, and that “these efficiencies may constitute a public benefit” (para 2.55).
18. However, the Preliminary Views states that “[w]hile the proposed amalgamation may create a more certain environment for investment coordination among banks to occur (due to a unified roadmap and removal of contention for support from the three entities), it is not clear to the ACCC that the proposed amalgamation will likely enable the banks to reach decisions and commit to proposals sooner in all circumstances than without the proposed amalgamation” (para 2.57).
19. The reason for this view appears to be that there are “other factors impacting on banks’ willingness to support particular proposals from the three payment schemes” including “the commercial strategy for each financial institution, the investment cycles and available funding, consideration of other competing proposals (such as from the international card schemes), and other priorities such as technical development of the banks’ own service offerings” (para 2.57). The Preliminary Views states that “[t]aken together, the ACCC’s preliminary view is that these factors are likely to mean that there will continue to be challenges to the banks’ coordination and adoption of payments initiatives, with or without the proposed amalgamation” (para 2.57).
20. In short, the ACCC’s preliminary view appears to be that other factors are likely to preclude more effective coordination between the NewCo shareholders under amalgamation even if there is a single coordinated roadmap of domestic payment initiatives to be rolled out across them.
21. In my view, while there will be other factors in play, the proposed amalgamation will remove a barrier to effective coordination of industry investment in domestic payment initiatives. Ultimately it is then a factual question whether removal of the contention for financial institution support over three uncoordinated roadmaps, and replacement of this situation

with a unified roadmap and a more certain environment for investment coordination, will make a material difference to the amount and speed of rollout of domestic payment initiatives.

22. The ACCC currently appears to take the view that whether it will make a material difference is unclear. It is not clear from the Preliminary Views what the evidential basis for this view is. A number of the statements of major financial institutions emphasise the need for a single coordinated roadmap and sequencing of activity for domestic payment initiatives in order to achieve widespread deployment of each initiative.³ This is the evidence on which I formed my opinion that the proposed amalgamation is likely to give rise to a public benefit of improved coordination of adoption of domestic scheme initiatives by financial institutions, leading (among other things) to:
- a. Enhanced speed to market of domestic payment initiatives;
 - b. More and more successful rollouts by financial institutions of domestic payment initiatives;
 - c. More and more successful rollouts by financial institutions of payment initiatives tailored to local demand; and
 - d. Fewer instances of wasted investments and stranded assets.⁴
23. A final observation is that public benefits should not be rejected unless amalgamation would enable the banks to reach decisions and commit to proposals sooner "*in all circumstances*". If the amalgamation were to enable the banks to reach decisions and commit to proposals sooner *even in just one circumstance*, this would represent a public benefit, and whether that circumstance alone would represent a significant public benefit would depend on the nature of the proposal.

6.2. Increased likelihood of hybrid and targeted local innovations

24. The Preliminary Views states that "[i]t is currently unclear to the ACCC that the benefit of collaborative innovation among competing payments rails (or between competing payments rails and payment service providers) could not be achieved without the merger" (para 2.62). The Preliminary Views refers to the commercial partnership between NPPA and BPAY around BPAY's Osko services provided over the NPP infrastructure and to eftpos' intention to continue in the counterfactual to engage with other parties in activities of mutual commercial interest.
25. In my view, the relevant question is not whether collaboration and hybrid services would or would not be achieved in some circumstances in the counterfactual, but rather whether it is likely that collaboration would occur and hybrids would be developed *more often or sooner* under amalgamation. For the reasons that I gave in Section 10.2 of my expert economic opinion I consider this is likely. As I said there, by combining the R&D divisions of the three entities, as well as their marketing divisions, information barriers will be lowered and the result is likely to be both additional innovations compared to the counterfactual and

³ See footnote 297 of my expert economic opinion for references to these statements. A further observation in the ANZ statement is that the proposed amalgamation would remove a further barrier to effective industry coordination in the form of the confidentiality obligations currently imposed by each of the three entities, which limit the ability of financial institutions to coordinate internally in relation to the various initiatives of the three entities.

⁴ See generally Section 10.1 of my expert economic opinion and in particular paragraphs 296-297.

innovations better targeted to local Australian user needs and that differentiate better domestic payment services from the services of the ICS. Hold-up barriers to collaboration and hybrid services would also be removed.

26. The Preliminary Views states that "ICA has not provided any examples about the types of medium or long-term hybrid innovations that are likely to arise as a result of the proposed amalgamation (aside from one example of developing an interoperable QR code standard across the three payments schemes)" (para 2.63). It seems to me difficult for anyone including the ICA to identify at this point in time the hybrids that will develop in the future (whether in ten years or two years from now) under effective collaboration between the three entities, precisely because that collaboration is not occurring at the moment. Innovations are by their nature not identifiable before the fact. This should not be a reason to deny the public benefit.
27. Mr Blockley's expert industry opinion has identified a number of potential hybrid services that may arise under amalgamation. On their face these seem to me more likely to arise (or arise sooner) under amalgamation than in the counterfactual, even if they are not currently in the consideration of the three (currently separate) entities. The actual incremental innovation under amalgamation may be very different to these, but the point is that by combining the R&D and marketing divisions of the three entities, and removing hold-up issues, there is likely to be additional collaboration and hybrid services compared to the counterfactual.

6.3. Reduced risk of stranded payments assets

28. The Preliminary Views states that "the ACCC's preliminary view is that the partial impairment of Osko 3 appears to be attributable to a subsequent change in circumstances and the NPP participants' priorities, rather than to a lack of coordination among the participants or network effects" (para 2.65). In footnote 4 the ACCC explains the change in circumstances and the NPP participants' priorities in the following terms:

In around September 2015, BPAY secured commitment from NPP participants (including the four major banks) to fund all three Osko services. BPAY completed its design for Osko 3 in 2017, before the NPP went live. In 2018, numerous NPP participants withdrew their support to implement Osko service 2 and 3 due to: work associated with the initial NPP program and later work on the MPS taking priority (MPS was mandated by the NPPA Board and supported by the RBA); overlapping capabilities of Osko 3 and MPS; and challenges in securing funding.

29. The Preliminary Views does not explain why amalgamation would not have avoided the "change in circumstances" and priorities by providing all financial institutions (including the four major banks) with a single clear roadmap for investments in the NPP and Osko overlay services that would have ensured that the Osko 3 rollout would have been completed by all financial institutions, or alternatively ensured that BPAY not waste resources in developing Osko 3.
30. It is also not clear what the evidential basis is for the ACCC reaching its preliminary view that "it is not sufficiently clear that the proposed amalgamation is likely to reduce the risk of stranded assets" (para 2.66). As explained in Section 10.1 of my expert economic opinion, I consider that enhanced coordination over a single roadmap of investments in domestic payment initiatives is likely to result in fewer instances of wasted investments and stranded assets. This follows from reduced uncertainty in the industry so that investments in domestic payment services are undertaken in the context of a greater likelihood of widespread deployment among financial institutions and network effects.

6.4. Greater import substitution and policy benefits from a stronger domestic payments company and reduced dependency on foreign payment service providers

31. For the reasons explained in Sections 10.1, 10.2 and 10.3 of my expert economic opinion, the proposed amalgamation is likely to enhance the competitiveness of the domestic payment system with international payment service providers including the ICS.
32. It follows that the amalgamation is likely to increase the volume of payments conducted via domestic payment services instead of foreign payment services and reduce reliance on the ICS and other foreign payment service providers. In addition to the benefit of import substitution flowing from this,⁵ there is a potentially significant public policy benefit, as there are growing risks for Australia of reliance on entities that are obligated to act at the behest of foreign governments, as other countries have witnessed first-hand. For further details, see Section 10.4 of my expert economic opinion.

⁵ Every additional transaction processed via domestic payment services (including eftpos) under amalgamation compared to the counterfactual represents import substitution, even if the domestic payment service *share* of payments were to decline under amalgamation.