AUSTRALIAN ASSOCIATION OF CONVENIENCE STORES

Ms Simone Warwick
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Australian Competition & Consumer Commission
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16th April 2021

Dear Ms Warwick

Proposed Amalgamation of BPay, eftpos and NPPA (MA 100 00 20)

Thank you for your letter of 30 March 2021 inviting the AACS to comment on this application for authorisation.

In this brief submission, we have addressed our comments in the following manner, under four fields:

1. Background on AACS and the relevance of this proposal to our members;
2. Some general comments on the payments market, its definition and function;
3. Specific comments addressing some individual elements of the applicants' submission; and
4. Our suggestions as to what future steps the ACCC should take.

In summary, we believe that the application should be rejected. The proposed amalgamation is likely to substantially lessen competition in future if it is approved. Moreover, we also believe that the public (consumer and small business) detriments will outweigh any likely public benefit arising from an amalgamation.

1. AACS

Established in 1990, the Australasian Association of Convenience Stores (AACS) is the peak body for the convenience industry in Australia. Nationally, the industry employs over 40,000 people in approximately 7,000 stores. The majority of these stores operate as small, family-run businesses, often under licence or a franchise agreement, or with independent ownership. They regularly employ family members and people from the local communities in which they operate. The AACS represents the interests of these small businesses - their owners, staff, suppliers and customers.

AACS is also a long-standing member of the ACCC's Small Business & Franchising Consultative Committee.

Each year the AACS commissions an independent body to measure key metrics in the sector, which is published as the *State of the Industry Report*[1]. Turnover in the convenience industry in Australia was valued at approximately $43.8 billion annually in 2019, the latest figure for which data is available. This consisted of $8.8 billion in merchandise sales, and a further $35 billion in petrol sales.

Payments system are an important issue to firms in this industry sector. Individual stores are typically characterised by a large number of small-value transactions, an increasing number of which are now done via a payments system rather than in cash. The average sale transaction in a convenience store is $9.69, and the average number of daily transactions is 498 per shop.[2]

This amalgamation is of concern to us because almost all the individual businesses that AACS represents, and, in our experience, almost all other Australian businesses, are effectively reliant on the provision of electronic payments services.

Few, if any, businesses today can legitimately operate on a purely "cash only" basis – even if they want to do so, they still need to participate in an electronic payments system in order to do their own banking, pay employees, disburse their ATO and superannuation obligations, and so on. Participation in an electronic payments system is now, effectively, mandatory for most businesses in Australia. This is especially the case for convenience stores.

2. General Comments

We believe that there are a number of issues which the ACCC should take into account when analysing the market, its operations, the likely actual behaviour of the applicants if authorisation is granted, and any counterfactuals put forward for testing.

Market definition. The most suitable framework to determine the market is to treat all of Australia as one marketplace. Payment services are provided electronically, so it is appropriate to regard the country as one market.

Consumers and small businesses. Both of these groups share some similarities, but still also experience some significant differences in regards to their participation in the payments system. On the one hand, both groups essentially have no choice but to participate in a payments system on a "take it or leave it" basis – neither consumers nor individual small firms can negotiate with their payments provider for a different payments arrangement or fees compared to any other consumer or small business. Services are not individually curated by payment providers for any one person or any single small business.

[1] The report contains the most comprehensive information available on the convenience industry in Australia. We have also recently commissioned research on how consumers have used the convenience channel over the course of the COVID-19 pandemic; we would be pleased to provide both of these to the Commission if this will assist any decisions or actions to be taken.
[2] AACS (2019) *State of the Industry Report*, Melbourne: Convenience Measures Australia.

However, Australia's 2.3 million small businesses[3] also experience an additional burden, in that they pay a much higher cost to participate in the payments sector than do consumers. While consumers may pay a small fractional cost to transfer, withdraw or otherwise use money in the payments system, small businesses typically pay much more, with substantial merchant fees accounting for up to several percent of each transaction. Under the current system, eftpos has shown itself to be a low-cost payments provider, whilst credit card services offered by banks typically charge small businesses much more to use their services.

Therefore, we would encourage the Commission to bear in mind that public benefits and detriments experienced by small firms may be different to those encountered by the general population of consumers.

Countervailing power. Given the "take it or leave it" system of payment service choices, neither consumers or small businesses have any significant degree of power to counterbalance the market power of payment providers. If dissatisfied with a payments system, a consumer or a small business cannot create their own payments system; in reality, it is also extremely difficult for them to opt out and only use cash, as use of cash is declining markedly in Australia, and is now likely to constitute less than 10% by value of all consumer payments[4].

This is exacerbated by the "stickiness" of financial services products: notwithstanding any recent policy attempts by government to improve portability, it still remains the case that once a business has chosen to bank with a particular financial services provider, it is extremely time consuming, difficult and confusing to shift to another provider, and few attempt to do so. Once signed up, many small businesses are thus effectively permanently trapped with the same financial services provider. Their only possible recourse is to add another payment method, but this exacerbates the problem, rather than solving it.

Low level of regulatory compliance within the Australian financial services sector. As the Hayne Royal Commission[5] identified, there is a strong and persistent culture in many parts of the nation's financial providers of non-compliance with regulator requirements, coupled with an endemic culture that frequently overlooks or downplays public benefit in favour of private individual or corporate gain. As such, it may not be appropriate to approve an amalgamation (such as this one) that involves almost all members of the banking industry and promises a number of vague promises as to public benefit.

Proponents may stymie Least Cost Routing. Many of the banks party to this application are already long-standing beneficiaries of one of the most insidious payments practices currently in operation – the refusal to embrace Least Cost Routing (LCR)[6]. Whilst a stand-alone Eftpos has long sought to maximise access to LCR, the rate of progress has been unacceptably slow

[3] Australian Bureau of Statistics (2021), *Counts of Australian Businesses, Including Entries And Exits,* Cat.no.8165.0, Canberra, Datacube 1 Table 13a ("Businesses by Annualised Employment Size Range, June 2016 – June 2020")
[4] For a detailed discussion, see Caddy, C.; Delaney, L. & Fisher, C. (2020) *Consumer Payment Behaviour in Australia: Evidence From The 2019 Consumer Payments Survey,* Sydney: Reserve Bank of Australia, p.3.
[5] Hayne, K.M. (2019) *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Canberra: Commonwealth of Australia.
[6] A system in which the default payment tool is the lowest cost method - typically a debit card payment rather than credit card.

and there is a long way to go, with only a small percentage of total transactions currently being routed. On the other hand, many banks benefit from the current default of credit card routing, which increases their own turnover and card fee income. Along with many other business retailer organisations, we are concerned that an amalgamated NewCo business will not actively support the rollout of LCR, and may indeed have an increased incentive to forestall its wider use. This would be a substantial detriment to both consumers and small businesses.

The Australian financial services sector is already capable of introducing innovation without the amalgamation. Recent developments in the local financial services sector have shown that there are numerous market players who can provide innovation, new services and customer benefits without needing to participate in a "whole of sector" amalgamated entity. One example is the buy-now, pay-later sector, which has provided a raft of innovations for consumers and is now fiercely contested, with almost a dozen active market players. The BNPL sector is characterised by strong growth and high levels of competition, and it is unlikely to have been so dynamic if there were only one amalgamated firm in the sector instead of 12.

Likewise, the applicants' own Osko system has been successfully introduced and adopted without any merger of a payments system.

Finally, eftpos' own *Product Roadmap 2021 Update* (issued late March[7]) foreshadows the stand-alone introduction of a range of product innovations and enhancements (including in-app payments, enhanced fraud protection, a Digital Identity network, mobile wallets, QR Codes). All of this has been done whilst eftpos remains a separate payment scheme provider.

3. Some Specific Comments on Applicants' Submission

The applicants' counterfactual submission suggests that, if no amalgamation occurs, the industry will continue to suffer from "splintering," "confusion" and a "wait and see" investment approach. We do not accept this. As mentioned above, there is already a sizeable amount of individual firm innovation, investment and market growth occurring amongst financial services providers in this country.

Many of the claimed public benefits of the proposed amalgamation are questionable and do not stand up to any critical examination.

Efficiency and ownership public benefits. Several of the touted benefits[8] include outcomes which are directly related to member firms voting and cost base:

- "Enhanced ownership interests" for smaller banks and non-banks
- "Enhanced voting rights" for small banks and non-banks
- "Reduction in uncertainty" for member financial service providers
- "Reduction in transaction costs" for scheme members

[7] Eftpos (2021) *eftpos Roadmap Update aims to drive competition and improve consumer experiences as digital innovation takes off*, Media release, March 31.
[8] King & Wood Mallesons (2021) *Summary – Payments Amalgamation – Application To The ACCC For Authorisation*, 18 March, pp.6-7, as lodged on ACCC website.

- “Potential for synergies” amongst scheme members
- “Minimise the regulatory burden” for members

None of these are public benefits. They are private gains which, if realised, will accrue to the member financial service providers, not to the public. The applicants do not even attempt to suggest that any cost savings arising from these measures will be passed on back to the public by way of lower customer fees or small business merchant fees.

Engagement with small businesses as a public benefit. In the same document, the applicants argue that small businesses will gain from “enhanced engagement”, which they later go on to suggest will occur from the creation of an “end-user” committee.[9] Lacking specific details, it appears the committee will seemingly be created and appointed by the NewCo board, and will also contain members or employees of NewCo, which will constrain its independence. Moreover, the proposal suggests that this committee will consist of so many additional different constituencies (charities, not-for-profits, government agencies, fintechs, and big businesses) that any small business voice will be token.

This is a patronising and unsatisfactory suggestion, which relegates the bona fide concerns of millions of traders to a single person sitting on a token consultative committee. We strongly suggest that such a body needs to be recast into a formal determinative body with capacity to limit any price gouging by NewCo (see text following).

4. Next Steps

We believe that, on balance, the applicants’ proposal will substantially lessen competition. It will remove a competitive tension and dynamic between the different payment providers.

Moreover, we believe that there are more likely public detriments than there are public benefits. Any benefits are vague and poorly-defined and explained, and many may never be realised, whilst the detriments appear to be far more likely to occur.

For these reasons, we strongly believe the ACCC should reject the application.

However, in the event that the Commission does authorise the amalgamation, we would urge either or both of the following steps to reduce any likely harm emerging from the proposed NewCo model.

(i) *Authorisation should not proceed until the applicants have successfully implemented an effective, durable and wide-ranging least cost routing model.* If LCR can become widespread, then it will be a practical demonstration that the proponents genuinely have the public benefit as their principal concern. At present this is lacking.
and/or

[9] King & Wood Mallesons, op cit, p.7.

(ii) *NewCo must adopt a formal independent process for making any decisions which results in greater costs for businesses and small businesses.* An amalgamated entity which consists of almost all significant financial services providers will have a strong internal incentive to raise its fees, and is highly likely to attempt to gouge prices. Like almost any other monopolist, it will prioritise its gains over the needs of consumers and small businesses. One way in which this might be dealt with is by the creation of an independent pricing review panel, consisting of consumer and business representatives, whose approval would be needed before any increases in prices could be made. Another alternative is to insert a maximum set of fees in the current authorisation, and then require the applicants to seek ACCC approval if they wish to subsequently increase these.

This is just a brief summary of our suggestions. We would be happy to expand on these ideas further, if required.

Once again, thank you for the opportunity to comment on this proposal. Should you require any further information, please do not hesitate to contact me by email ([redacted]) or phone ([redacted]).

Yours sincerely

[redacted]

Theo Foukkare
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Australasian Association of Convenience Stores