



NCR Australia Group

Proposed merger of Armaguard and Prosegur

Submission to the Australian Competition and Consumer Commission regarding the Applicants' proposed undertaking and submission of 9 March 2023

PUBLIC VERSION

6 April 2023

1. INTRODUCTION

- 1.1 NCR Australia Group welcomes the opportunity to provide its views on the proposed undertaking (**Proposed Undertaking**) offered by Linfox Armaguard Pty Ltd (**Armaguard**) and Prosegur Australia Holdings Pty Limited (**Prosegur**) (together, the **Applicants**) in support of their proposed merger (**Proposed Transaction**), and accompanying *Submission to the ACCC – Response to Statement of Preliminary Views*, dated 9 March 2023 (**Applicants' Submission**).
- 1.2 As the Proposed Undertaking and Applicants' Submission were only made available to NCR Australia Group on 21 March 2023, NCR Australia Group has, in the time available, addressed only key issues in this submission. NCR Australia Group continues to have significant concerns regarding the Proposed Transaction, notwithstanding the Proposed Undertaking, for the reasons set out in this submission.
- 1.3 The ACCC's Statement of Preliminary Views of 21 December 2022 (**SOPV**) expressed preliminary, but significant, concerns regarding the Proposed Transaction in relation to three areas of competition: the supply of integrated wholesale and retail cash in transit (**CIT**) to the major banks; the supply of full-service CIT services for retail customers; and the supply of some types of ATM services where vertical issues may arise.¹ Relevantly, the SOPV raised the following key concerns (with which NCR Australia Group agrees):
- (a) if there is a transition from two major suppliers of integrated wholesale and retail CIT services and "full-service" retail CIT services, to one major supplier, then:
 - (i) the remaining smaller scale suppliers of CIT services would not constrain the sole major supplier, and there would be a lack of substitutes available to large customers who require a breadth or scope of service that smaller suppliers are unlikely to be able to provide;
 - (ii) the major supplier would likely have the ability and incentive to substantially raise prices from current levels to customers requiring these services; and
 - (iii) there would likely be a decrease in service quality from current levels, due to the removal of each Applicant's closest competitor;²
 - (b) barriers to entry for a new supplier of integrated wholesale and retail CIT services appear high;³
 - (c) the potential constraints identified by the Applicants would be unlikely to significantly constrain a single major supplier of integrated wholesale and retail CIT services and full-service retail CIT services;⁴ and
 - (d) the Proposed Transaction could result in a public detriment in the form of a reduction in the level of CIT services or an increase in prices in regional areas compared with if the Proposed Transaction did not proceed.⁵
- 1.4 The SOPV also stated that the ACCC's preliminary view is that, if it were satisfied that the Proposed Transaction **did** result in a substantial lessening of competition in the supply of

¹ SOPV, [2.20]-[2.40].

² SOPV, [3.13].

³ SOPV, [3.26].

⁴ SOPV, [3.69].

⁵ SOPV, [4.92].

retail CIT services,⁶ then a substantial lessening of competition in markets downstream and adjacent to the supply of CIT services would likely follow.⁷

1.5 The substance of the Applicants' response to the SOPV is that:

- (a) the relevant counterfactual involves a disorderly exit by one or other of the Applicants in the near term, and the Proposed Transaction will not substantially lessen competition when assessed against that counterfactual;
- (b) the Applicants' merged entity (**Merged Entity**) would continue to be effectively constrained by the factors identified by the Applicants (despite the Commission's view to the contrary); and
- (c) in any event, the Proposed Undertaking offered by the Applicants addresses the Commission's concerns.

1.6 Based on the public materials put forward by the Applicants and our observations as a market participant, competitor and customer,⁸ NCR Australia Group continues to be sceptical about the Applicants' assertions that:

- (a) they have exhausted all commercially realistic alternatives to the Proposed Transaction;
- (b) in the absence of the Proposed Transaction, one of the Applicants will exit the market in the near term and that such exit would be disorderly and disruptive; and
- (c) there is no other credible buyer of the assets. [REDACTED]

[REDACTED]

1.7 Accordingly, NCR Australia Group disagrees with the Applicants' Submission in respect of the counterfactual, and we urge the ACCC to closely test the Applicants' assertions. NCR Australia Group remains of the view that there is a realistic prospect of alternative counterfactuals in which there would continue to be two national suppliers of CIT services. Alternative counterfactuals that have a real chance of occurring should be taken into account by the ACCC in its assessment of the Proposed Transaction.

1.8 NCR Australia Group considers that the Proposed Undertaking will be an ineffective and inadequate remedy for the competition issues that have been identified and will arise from the Proposed Transaction.

1.9 NCR Australia Group continues to believe that the Proposed Transaction would give rise to significant vertical effects, and be likely to substantially lessen competition in downstream and adjacent markets. We consider that the Merged Entity's market power in the supply of

⁶ As part of integrated wholesale and retail CIT services or full-service retail CIT services.

⁷ SOPV, [3.81]-[3.82].

⁸ We note that the Applicants' Submission is heavily redacted and NCR Australia Group has not been privy to the Applicants' confidential information.

CIT services will provide it with the ability and incentive to engage in vertical foreclosure strategies such as:

- (a) refusing to supply CIT services to downstream rivals (including NCR Australia Group) that compete with Merged Entity in the supply of ATM deployment services and ATMaas / ATM access arrangements;
- (b) supplying downstream rivals on unfavourable terms (by increasing prices, reducing service quality or de-prioritising work requests), preventing, restricting or limiting their ability to compete effectively with the Merged Entity;
- (c) bundling CIT services with ATM deployment services (for example, offering discounted CIT services to merchants who also obtain ATM deployment services from the Merged Entity), on terms that cannot be met by downstream rivals because of their inability to secure CIT services, or do so on competitive terms; or
- (d) refusing to supply related services, such as first-line maintenance (**FLM**) and guarding services, thus preventing rivals from being able to put together a competitive bundle to financial institutions that are seeking to outsource their ATM networks.

1.10 The Proposed Undertaking does not appear capable of removing the Merged Entity's ability and incentive to engage in the above-mentioned foreclosure strategies.

1.11 NCR Australia Group considers that the only adequate remedy for the vertical issues that would arise from the Proposed Transaction would be to remove the Merged Entity's incentive to discriminate against customers who are also rivals. This could be achieved by means of a structural undertaking to divest the Applicants' ATM businesses and assets (and a behavioural undertaking not to acquire similar assets / businesses in the future). However, even if vertical concerns were addressed through a structural undertaking, we do not consider that an undertaking is capable of addressing the broader competitive harms that would result from a merger between the Applicants.

1.12 In summary, we believe that the Proposed Undertaking **would not**:

- (a) provide appropriate price constraints for CIT services that reflect efficient costs and reasonable returns over time;
- (b) be sufficient to prevent reductions in service quality or coverage that would arise from loss of competition between the Applicants;
- (c) remove the incentives or ability for the Merged Entity to foreclose on or discriminate against independent ATM providers;
- (d) prevent potential distortion of markets over the life of the Proposed Undertaking; or
- (e) operate effectively or be the subject of effective oversight or enforcement.

1.13 Accordingly, we believe that the Proposed Transaction should not be authorised on the basis that the behavioural undertaking offered by the Applicants will mitigate the likelihood that the merger will substantially lessen competition.

2. **THERE ARE ALTERNATIVE COUNTERFACTUALS**

2.1 The Applicants' Submission invites the Commission to assess the Proposed Transaction on the basis that the relevant counterfactual involves disorderly exit in the near term by one of the Applicants, on the basis that:

- (a) it is not sustainable to continue to operate two national CIT providers;

- (b) there is no path to profitability (ie all alternatives to the Proposed Transaction have been exhausted);
- (c) no party has indicated that it would buy either Applicant's entire business to facilitate head-to-head competition for national CIT customers; and
- (d) absent the Proposed Transaction, a disorderly exit of one of the Applicants is "unavoidable" and "reputational factors will not mitigate any decision in relation to exit".⁹

2.2 In relation to the suggestion that this is the appropriate counterfactual and a disorderly exit is "unavoidable", NCR Australia Group refers to paragraphs 1.5–1.13 of its supplementary submission dated 19 January 2023 (**Supplementary Submission**), and to the materials referred to in those paragraphs. In short, NCR Australia Group submits that:

- (a) the Commission should not accept the Applicants' counterfactual unless it is satisfied that there is **not** a real commercial likelihood of the following alternative counterfactuals occurring:
 - (i) neither of the Applicants exiting the market in the next two years (or later);
 - (ii) if one of the Applicants seeks exit, an alternative buyer acquiring the exiting Applicant's business or assets and continuing to compete with the remaining Applicant on a national level; or
 - (iii) the Applicants pursuing an alternative arrangement short of a full merger that would help reduce costs of supplying CIT services while preserving competition between them;
- (b) these alternative counterfactuals are, in NCR's view, more likely than the counterfactual advanced by the Applicants;
- (c) the Applicants' Submission does not demonstrate otherwise, because:
 - (i) although the Applicants state that their most recent financials continue to show that the CIT businesses of both Applicants are loss-making,¹⁰ the relevant question is whether one or other Applicant is in "imminent danger of failure and is unlikely to be successfully restructured without the merger",¹¹ which is not consistent with conduct previously identified by NCR Australia Group which is suggestive of longer-term commitment to the Australian market. In this regard, we emphasise paragraph 7.8 of our submission dated 28 October 2022 and paragraphs 2.21 to 2.24 of the Supplementary Submission, namely that:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ Applicants' Submission, p 14.

¹⁰ Applicants' Submission, [17].

¹¹ ACCC's Merger Guidelines, [3.23].

- 2.4 The SOPV also refers to submissions from other interested parties regarding other available options, such as an infrastructure sharing arrangement.¹⁶
- 2.5 In response to the SOPV, the Applicants submit that "they have exhausted all commercially realistic options and the evidence is overwhelming that no such commercially viable alternative exists".¹⁷ In support of this statement, the Applicants explain how:
- (a) the Applicants have exhausted all avenues for cost-cutting that will have an appreciable impact on their business;¹⁸
 - (b) subcontracting proposals (in which Armaguard subcontracts to Prosegur or vice versa) "were not commercially feasible" and "would necessarily be one of the parties operating at a loss to the benefit of the other party";¹⁹
 - (c) the Applicants have explored subcontracting arrangements with third-party providers but "these efforts have achieved limited results";²⁰ and
 - (d) the Applicants do not consider a joint venture in remote and regional areas to be a viable alternative to the Proposed Transaction, for a number of reasons.²¹
- 2.6 NCR Australia Group submits that the evidence put forward in the Applicants' Submission falls significantly short of demonstrating that "they have exhausted all commercially realistic options and the evidence is overwhelming that no such commercially viable alternative exists."²²
- 2.7 Significantly, the Applicants' Submission argues that a "joint venture in remote and regional areas" would not be viable, including because "the magnitude of the Applicants' operating losses are in fact greater in metropolitan areas than they are in remote or regional areas" and "most of the synergies from the Proposed Transaction come from the deduplication of the Applicants' metropolitan operations (and related corporate functions)."²³ These comments relate to the viability of a joint venture arranged on a geographic basis only. The Applicants' Submission, and their previous submissions, do not refer to or address the possibility of a joint venture arranged on a functional basis.
- 2.8 NCR Australia Group understands the reference to "deduplication" to refer to the "synergies" identified in paragraph 75 of the Application. These synergies relevantly include:
- (a) **cash processing synergies**, which would "enable the Applicants to reduce duplication and excess capacity in the ACC network ... avoiding the wasteful and heavily underutilised duplicative infrastructure while operating at an improved level of capacity"; and
 - (b) **cash transportation synergies**, as "there is currently a similar duplication and excess capacity in the Applicants' transport networks", whereas "the Applicants propose that the Merged Entity will operate two transport hubs which will facilitate more efficient cash transportation runs".

¹⁶ SOPV, [3.114], in reference to submissions from Next Payments.

¹⁷ Applicants' Submission, [40].

¹⁸ Applicants' Submission, [39].

¹⁹ Applicants' Submission, [43], [48].

²⁰ Applicants' Submission, [49].

²¹ Applicants' Submission, [52].

²² Applicants' Submission, [40].

²³ Applicants' Submission, [52](a), (c).

- 2.9 NCR Australia Group considers that an infrastructure sharing arrangement, or joint venture in relation to the operation of ACC networks and/or transportation infrastructure, would be reasonably likely to realise a material portion of these synergies by rendering the duplication of assets no longer necessary. In circumstances where the Applicants are offering, as part of the Proposed Undertaking, to commit to giving third-party CIT service providers access to their ACC networks, it is not clear to NCR Australia Group why a similar arrangement *between* the Applicants would not permit them to:
- (a) achieve similar costs savings as the Proposed Transaction in relation to the deduplication of assets; and
 - (b) optimise the utilisation of their assets.
- 2.10 NCR Australia Group submits that the Commission should not authorise the Proposed Transaction on the basis of a counterfactual involving impending exit by one or other of the Applicants, where it is not apparent that other arrangements short of a full merger have in fact been identified and ruled out. In particular, NCR Australia Group considers that the Commission should regard with suspicion an assertion that impending disorderly exit is the most likely counterfactual, where other viable alternatives have not been explored.

There is a real chance of an acquisition of some or all of an Applicant's business

- 2.11 The SOPV states that the Commission is considering whether, if one Applicant ceases supplying CIT services, purchasers other than the other Applicant will acquire the business or assets of the outgoing Applicant and continue to operate at a scale required to compete with the remaining Applicant.²⁴
- 2.12 In response, the Applicants' Submission states:

While the ACCC is considering whether, if one Applicant ceases supplying CIT services, there is a real commercial likelihood that one or more purchasers other than the other Applicant will acquire the business or assets of the outgoing Applicant, and some smaller CIT suppliers have expressed a level of interest in acquiring some assets; not surprisingly, no party has indicated that it would buy the entire business to facilitate ongoing head to head competition for national CIT customers. Nor would they, in light of the incontrovertible fact of the declining and impaired industry.²⁵

- 2.13 The Applicants' Submission does not address the point raised at paragraph 1.10 of NCR Australia Group's Supplementary Submission, which questioned whether the ACCC can be satisfied that there is no alternative buyer for one of the Applicants' CIT businesses / assets if there have only been limited attempts by the Applicants to sell those businesses / assets to third parties or to seek expressions of interest from potential buyers.²⁶
- 2.14 The Applicants submit that the threat of sponsoring new entry or in-sourcing by major banks would be a material constraint on the Merged Entity, with or without the Proposed Undertaking.²⁷ In other words, the Applicants consider that, if the Merged Entity sought to increase prices or decrease service quality, major banks (whose CIT services are required on a national scale) could credibly threaten to incur the significant investment required to sponsor a new CIT business, notwithstanding the Commission's view that doing so would involve "substantial up-front fixed costs (much of it sunk once incurred)".²⁸ Simultaneously,

²⁴ SOPV, [3.120].

²⁵ Applicants' Submission, [54].

²⁶ The only evidence in this regard is paragraph 337 of the RBB Report, which is redacted.

²⁷ Applicants' Submission, [125]–[134], [147]–[149]. The Applicants' Submission suggests that "significant restraints will remain" and will merely be "reinforced" by the Proposed Undertaking.

²⁸ SOPV, [3.19]; Applicants' Submission, [126].

the Applicants argue that, if one of the Applicants were to exit, there would be no credible purchaser of the outgoing Applicant's business to compete for national CIT customers. NCR Australia Group does not consider that both of these propositions can be true.

2.15 NCR Australia Group instead considers that it is much more likely that, if one of the Applicants were genuinely to exit the market, there is likely to be interest from major national CIT customers in exploring the possibility of acquiring assets to operate on a national scale, especially given that (in that context) the exiting party would have an incentive to sell assets even at minimal prices, and the purchasing party would have an opportunity to acquire those assets at minimal cost and thus protect itself from the remaining Applicant becoming a monopoly service provider. In that scenario, the purchaser would also have an opportunity to compete for the exiting firm's customers. Conversely, if the Proposed Transaction proceeds, the sponsoring new entry at that point will face prohibitive obstacles, because:

- (a) it would likely involve significantly greater expense (compared to the discounted sale of assets by an exiting firm);
- (b) it would likely involve considerable lead time to establish an operational business, including because of the following key tasks that would take a significant amount of time to complete:
 - (i) securing sites for cash centres across Australia;²⁹
 - (ii) applying for RBA accreditation;
 - (iii) acquiring a vehicle fleet and all of the other relevant specialised assets and equipment to carry out the activities; and
 - (iv) hiring experienced staff required to perform both the administrative "head office" function of managing and overseeing a CIT business and the workforce to carry out the manual labour activities in the field (which may be in short supply given the dominance of the Merged Entity in this area); and
- (c) it would be significantly more challenging for the new entrant to achieve efficient scale and operate profitably, given that the Merged Entity would already be servicing both Applicants' former customers.

2.16

[REDACTED]

²⁹ Assuming that the entity is not able to, or decides not to, seek access to the Merged Entity's ACC network under the Proposed Undertaking. We address the shortcomings of that commitment in paragraphs 3.29–3.30 below.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

2.17 The Applicants' Submission also states that the commitment in the Proposed Undertaking to offer third party access to the Merged Entity's ACC network "will likely be a more attractive solution for market participants rather than acquiring any of the Applicants' CIT assets."³⁰ This is a misleading comparison between an option that is available if the Proposed Transaction does **not** proceed and an option that the Applicants are only offering if it does proceed. Further, access to the Merged Entity's ACC network is only of utility to businesses that have already commenced supplying CIT services, whereas the possibility of acquiring CIT assets from an exiting firm is an option that would potentially also be of interest to firms that acquire, but do not already provide, these services.

The benefits of continued competition

2.18 Even in the event that no firms are willing to purchase the business or assets of one the Applicants, NCR Australia Group considers that there are potentially significant long-term benefits from allowing the competitive process to continue without the Proposed Transaction.

2.19 [REDACTED]

³⁰ Applicants' Submission, [55].

³¹ Applicants' Submission, p 14; [7(c)], [14]–[16].



3. THE PROPOSED UNDERTAKING IS INADEQUATE

- 3.1 NCR Australia Group submits that the Proposed Undertaking is unlikely to be effective in addressing the competition concerns it has identified, which have been echoed by others, including the ACCC in the SOPV.
- 3.2 As a preliminary issue, NCR Australia Group considers that a behavioural undertaking is not an appropriate means of addressing harm to competition and consumers arising from a proposed transaction that will result in a monopoly service provider and is likely to substantially lessen competition in downstream and adjacent markets.
- 3.3 We understand that competition regulators generally regard behavioural undertakings as undesirable and inadequate for addressing competition concerns for the below reasons:
- (a) **Monitoring and enforcement risks:** Behavioural undertakings are difficult to monitor because of information asymmetries between suppliers and customers,³² lack of day-to-day regulatory oversight,³³ and susceptibility to evasion.³⁴ These undertakings also require high resource intensity to oversee.³⁵
 - (b) **Specification risks:** Behavioural undertakings are at risk of being outdated as market conditions change,³⁶ including changes to services and supply arrangements. It is difficult to specify behavioural undertakings that will be effective from the outset and for the duration of the undertaking,³⁷ with the risk that they become ineffective or redundant in the future.
 - (c) **Circumvention risks:** Behavioural undertakings do not typically address the underlying causes of the competition concerns identified – instead they seek to manage market outcomes by controlling the behaviour of the merged entity for a period of time.³⁸ Behavioural undertakings are less likely to recreate the pre-merger competitive intensity of the market,³⁹ or encourage new entrants and investment,⁴⁰ compared with structural undertakings.

³² <https://www.gov.uk/government/speeches/uk-merger-control-in-2023>.

³³ Competition & Markets Authority, *Merger Remedy Evaluations* (Report, 18 June 2019) 3 (**CMA Merger Remedy Evaluations Report**), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811252/Merger_remedy_evaluations_2019.pdf.

³⁴ Federal Trade Commission, *The Evolving Approach to Merger Remedies* (Public Statement, 1 May 2000), available at: <https://www.ftc.gov/news-events/news/speeches/evolving-approach-merger-remedies>.

³⁵ CMA Merger Remedy Evaluations Report, p 4.

³⁶ ACCC, Competition & Markets Authority and Bundeskartellamt 'Joint Statement on Merger Control Enforcement' (Joint Statement, 20 April 2021) 4 (**Joint Statement on Merger Control Enforcement**), available at: <https://www.accc.gov.au/publications/joint-statement-on-merger-control-enforcement>.

³⁷ OECD, *Merger Control in Dynamic Markets* (Report, 2020) 33 (**OECD Merger Control in Dynamic Markets Report**), available at: <https://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf>.

³⁸ Competition & Markets Authority, *UK merger control in 2023* (Speech, 27 February 2023), available at: <https://www.gov.uk/government/speeches/uk-merger-control-in-2023>.

³⁹ Joint Statement on Merger Control Enforcement, p 4.

⁴⁰ Rod Sims, 'Address to the 2019 Competition Law Conference' (Speech, 2019 Competition Law Conference, 25 May 2019), available at: <https://www.accc.gov.au/speech/address-to-the-2019-competition-law-conference>.

As behavioural undertakings generally do not deal with the source of competition concerns, this creates the potential for other adverse forms of behaviour,⁴¹ such as self-preferencing and customer discrimination.

- (d) **Distortion risks:** Behavioural undertakings may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs.⁴² Behavioural undertakings may encourage circumvention behaviour (as mentioned above), or result in overriding of market signals.⁴³ For example, implementation of a revenue cap may result in reduced motivations to innovate and provide better offerings for customers.

3.4 The ACCC has stated that:

"Behavioural remedies are rarely appropriate on their own to address competition concerns..."

Generally, behavioural undertakings are only likely to address the ACCC's competition concerns if they foster the development or maintenance of enduring and effective competitive constraints within a short and pre-specified period of time. It is particularly rare for the ACCC to accept behavioural remedies that apply on a permanent basis due to the inherent risk to competition combined with the monitoring and enforcement burden such remedies create."⁴⁴

- 3.5 Yet, the Proposed Undertaking is intended to apply on a permanent basis; it will not foster the development or maintenance of enduring and effective competitive constraints; and it will impose a significant monitoring and enforcement burden. If the ACCC intends to depart from its long standing approach to behavioural undertakings, the ACCC should be satisfied that the Proposed Undertaking will be effective in addressing competition concerns and will not lead to unintended consequences.

The Proposed Undertaking does not adequately address vertical concerns

- 3.6 NCR Australia Group has significant concerns with the vertical integration of the Merged Entity and has made extensive submissions to the ACCC on this issue previously.⁴⁵ In summary, NCR Australia Group considers that the Proposed Transaction is likely to substantially lessen competition in one or more downstream (or adjacent) markets because:

- (a) the Merged Entity will effectively become a monopoly provider of CIT services, and its market power in the upstream market for CIT services will provide it with the ability to foreclose rivals in downstream markets that are reliant on access to those services;
- (b) the Merged Entity will have substantial interests in downstream (or adjacent) markets that rely on access to CIT services including markets for the deployment of ATMs to merchants, ATM access arrangements and ATMaas to financial institutions and ATM maintenance services to financial institutions;

⁴¹ CMA Merger Remedy Evaluations Report, p 25.

⁴² CMA Merger Remedy Evaluations Report, p 26.

⁴³ Competition & Markets Authority, *Merger Remedies* (Report, 13 December 2018), pp 53, 60, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf.

⁴⁴ ACCC Merger Guidelines, pp 59 and 61.

⁴⁵ See NCR Australia Group's submission to the ACCC dated 28 October 2022, [10.1]-[10.8]; HoustonKemp Report, [152]-[159]; NCR Australia Group's Supplementary Submission, [2.8]-[2.25].

- (c) the Merged Entity will have an incentive to expand its presence in downstream (or adjacent) markets because services provided in those markets attract a healthy margin; and
- (d) as a result:
 - (i) the Merged Entity will have a strong incentive to leverage its market power in the upstream market for CIT services into downstream or adjacent markets, to capture margins in those markets;
 - (i) it is likely that the Merged Entity will pursue a vertical foreclosure strategy;
 - (ii) the Merged Entity's rivals in downstream and/or adjacent markets will be prevented from competing effectively; and
 - (iii) barriers to entry and expansion in downstream and/or adjacent markets will increase.⁴⁶

3.7 Possible vertical foreclosure strategies include:

- (a) refusing to supply competing independent ATM deployers (including NCR Australia Group) with required CIT services, which are a key input into ATM deployment services;
- (b) supplying competing independent ATM deployers on unfavourable terms (by increasing prices or reducing service quality) that do not enable them to compete effectively with the Merged Entity; or
- (c) bundling CIT services to merchants with ATM deployment services (for example, offering discounted CIT services to merchants who also obtain ATM deployment services from the Merged Entity).

3.8 The Commission is aware that NCR Australia Group occupies a unique position as an actual (or potential) competitor, customer and supplier of each of the merger parties across various levels of the cash distribution supply chain. For clarity, NCR Payments currently has a contract with Prosegur for the supply of CIT services in Australia. NCR Banking offers ATM monitoring, maintenance and repair services to large banking customers with national networks, and needs to partner with an upstream CIT provider (currently Prosegur) in order to provide a "full service" solution to financial institutions. Critically, Armaguard also supplies downstream ATM maintenance services through its Integrated Technology Services (ITS) division, which NCR Banking regards as its main competitor. Post-merger, both Prosegur and ITS would form part of the vertically integrated Merged Entity which would have substantial interests in downstream (or adjacent) markets that rely on access to CIT services. As both an upstream customer and a downstream competitor, this leaves NCR Australia Group especially vulnerable to vertical foreclosure strategies pursued by the Merged Entity.

3.9 The Proposed Undertaking seeks to address vertical foreclosure concerns raised by NCR Australia Group through the following behavioural commitments:

- (a) the Proposed Undertaking, including the "Pricing Process" detailed in Appendix 1; and
- (b) the commitment to supply CIT services to independent ATM deployers in clauses 4.35 and 4.36.

⁴⁶ NCR Australia Group's submission to the ACCC dated 28 October 2022, [10.6]; HoustonKemp Report, section 4.

3.10 NCR Australia Group's submissions on the adequacy of the Pricing Process and the commitment to supply CIT services to independent ATM deployers are set out below in paragraphs 3.17 and 3.23 respectively.

3.11 Even if a combination of the measures identified in paragraph 3.9 successfully disincentivised the Merged Entity from employing discriminatory pricing against, or refusal to supply to, its competitors in the downstream and adjacent non-CIT markets, NCR Australia Group considers that the Proposed Undertaking does not adequately address the full range of foreclosure strategies that the Merged Entity could profitably pursue.

(a) **Bundling/tying**

A significant deficiency of the Proposed Undertaking is that it does not address the Merged Entity's increased ability to engage in profitable bundling and tying strategies which provide it with a material competitive advantage over NCR Australia Group. NCR Australia Group has previously submitted that the Merged Entity has no incentive to partner with NCR Banking to provide the CIT component of a "full service" ATM and related services solution, because it will be more lucrative for its vertically integrated ITS division to provide a "Complete Line Maintenance" (CLM) model to customers. The CLM model is inclusive of first-line maintenance (FLM), second-line maintenance (SLM) and CIT services as a bundled offer. [REDACTED]

[REDACTED] The Proposed Undertaking does not prevent the Merged Entity from offering to bundle/tie its CIT and ATM services, including where a "full service" ATM and related services solution is outside of the scope of the relevant RFP.

(b) **Worsening the terms for the provision of ATMaaS**

A potential foreclosure strategy available to the Merged Entity may be to refuse to partner with NCR Banking to provide ATMaaS (or other ATM services), or to offer NCR Banking terms for partnering with it that were substantially worse than those it provides in combination with its own business, ITS. NCR Banking does not have CIT capability in Australia, and must contract with third party providers, such as Armaguard or Prosegur, to provide the CIT component of ATMaaS solutions. While the Proposed Undertaking is intended to impose pricing constraints (see paragraph 3.17), oblige the Merged Entity to offer ATM Specific Services to independent ATM deployers (see paragraphs 3.23 to 3.28) and prevent it from reducing service levels (see paragraphs 3.18 to 3.20), there is nothing to prevent it from self-preferencing in practice or providing an uncompetitive offer for CIT services to NCR Australia Group as part of a partnership compared to the vertically integrated offer it provides to customers.

3.12 Even if the Proposed Undertaking were amended to capture the scenarios identified above, the Merged Entity's continued operation of a downstream network will inherently incentivise it to find ways to circumvent the Proposed Undertaking in order to realise favourable profit margins in this level of the cash distribution supply chain. NCR Australia Group considers this is especially likely given the Applicants' Submission that the consolidation of the Applicants' ATM networks is a key synergy to be realised from the Proposed Transaction.⁴⁷

3.13 The only way for the vertical foreclosure concerns to be addressed would be to remove the incentives for the Merged Entity to discriminate against its competitors in downstream markets for ATM services. This could potentially be achieved by a structural remedy – namely a divestment by the Merged Entity of its ATM businesses / ATM fleets to a purchaser

⁴⁷ Applicants' Submission, [57].

or purchasers approved by the ACCC and an undertaking that the Merged Entity must not have an interest in ATM businesses or operate ATM fleets in the future.

- 3.14 In its "Synergy Assessment" of the Proposed Transaction (which the Applicants refer to briefly in their Submission, but which is otherwise heavily redacted) Deloitte predicts that approximately 25% of expected synergies from the Proposed Transaction can be attributed to combining ATM assets.⁴⁸ Because of this, the Applicants submit that "[s]uch a divestiture would undermine the synergies of the Proposed Transaction and undermine the ability of MergeCo to compete in the cash industry."⁴⁹ NCR Australia Group submits that the claimed synergy is a private, not a public benefit.⁵⁰ The failure to realise this synergy, while commercially undesirable for the Applicants, is not a compelling reason for dismissing a structural remedy.
- 3.15 Even if a divestment of the Applicants' ATM businesses and exclusion from ATM markets could mitigate the vertical concerns, NCR Australia Group considers that the remaining behavioural commitments in the Proposed Undertaking are not capable of addressing the broader competition issues arising from the Proposed Transaction. NCR Australia Group's position remains that the most pro-competitive and publicly beneficial outcome for market participants and end customers would be for the Proposed Transaction not to proceed.
- 3.16 NCR Australia Group's specific concerns with the Proposed Undertaking are set out below.

The price of CIT services

- 3.17 The Proposed Undertaking contains a complex pricing mechanism, which is superficially modelled on access undertakings that include revenue and price regulation provisions. Access undertakings of that kind typically seek to ensure that the access provider has an opportunity to earn a reasonable return on a capital investment over the economic life of the capital that appropriately reflects risks, and recover operating and overhead costs. However, the Proposed Undertaking is generous to the Applicants, and deficient in (at least) the following respects:
- (a) The Merged Entity will set "Target Operating Expenditure" based on the average of what the Merged Entity actually spent and forecast expenditure. If the Merged Entity spends more, the target increases. There is no oversight of the accuracy or reasonableness of forecasts. Rather, the undertaking relies on historical expenditure to balance out the impact of a forecast (and vice versa). The Merged Entity retains the financial benefit of any underspending, but is limiting in recovering expenditure that exceeds the Target Operating Expenditure. However, the Merged Entity can mitigate the risk of exceeding the Target Operating Expenditure by increasing its forecasts.
 - (b) Further, the difference between actual expenditure and Target Operating Expenditure is retained in an "unders and overs" account, which provides for further changes in future periods, with the value of that account adjusted by the WACC discount rate. This enables the Merged Entity to recover any excess actual expenditure over time.
 - (c) The Target Operating Expenditure mechanism does not apply to common costs or depreciation. Instead, budgeted depreciation and budgeted common costs are added to Targeted Operating Expenditure to calculate the target revenue on which prices are based.

⁴⁸ Applicants' Submission, footnote 130.

⁴⁹ Applicants' Submission, [57].

⁵⁰ As far as it can determine, given that the explanation of the synergy is heavily redacted.

- (d) The Proposed Undertaking allows the Merged Entity to add a 10% "EBIT Margin" on all expenditure (ie Target Operating Expenditure, budgeted depreciation and budgeted common costs after inflation adjustment) and recover that amount. It appears that the Merged Entity can recover a 10% margin on budgeted depreciation and common costs, the latter of which are capitalised and build in a return. This appears to allow for double recovery. Although the Applicants cite a Deloitte valuation that "a sustainable EBITDA margin (as observed historically and in different markets) [is] 15%", it is not clear that historical figures in other jurisdictions are an appropriate benchmark for Australia, particularly given the changes in consumer behaviour / use of cash over recent years. NCR Australia Group urges the ACCC to scrutinise the data referenced by the Applicants and whether the application of a 10% margin, on a permanent basis going forward, is reasonable.
- (e) While the regime provides for an independent auditor to review the price setting process, that auditor "will not be required to make subjective assessments as to the prudence of expenditures, the appropriateness of the allowed rate of return or the accuracy of forecasts".⁵¹ Rather, the Applicants submit that the regime will provide a "self-executing incentive mechanism that are compatible with efficient outcomes" (ie the incentive to spend less than the Target Operating Expenditure).⁵² The independent auditor's role appears to be limited to confirming compliance with the formula / mechanisms in the Proposed Undertaking, as opposed to any real scrutiny / audit of the prudence of expenditure, the appropriateness of the allowed return or the accuracy of forecasts.
- (f) The Proposed Undertaking endeavours to set a ceiling on the Merged Entity's price increases – effectively, in any given year, prices for an individual customer cannot increase by more than inflation plus 5%, or inflation plus a volume change adjustment for large customers who have a substantial volume decline, of 15% or more. We have the following concerns with this:
- (i) The Merged Entity's customers that require national CIT services will have effectively no bargaining power once their current contracts expire because they have no alternative to the Merged Entity. It is likely that those customers (to whom the ceiling applies) will face annual price increases of up to the ceiling.
 - (ii) The volume change adjustment for large customers could disincentivise large customers from trialling alternative sources of supply and make expansion by small CIT suppliers or new entry even less likely.
 - (iii) The Pricing Process relates to "Prices" and "CIT Services". Those terms are defined as follows:
 - "Price means the schedule of charges MergeCo levies on Customers for the supply of CIT Services".*
 - "CIT Services means services for the transportation, storage and processing of cash by MergeCo for Customers including:*
 - (b) cash collection and delivery services;*
 - (c) cash processing services;*
 - (d) cash administration services; and*

⁵¹ Applicants' Submission, Annexure A Remedy, [3.5].

⁵² Applicants' Submission, Annexure A Remedy, [3.5].

(e) cash storage;

but does not include the supply of precious cargo services, security services, the supply of vending and safe products, transaction services, payment solutions or ATM Maintenance Services."

"ATM Maintenance Services means services to maintain the ongoing operation of ATMs and related hardware and includes fixing operational faults as well as repairing and replacing parts, conducting diagnostics and loading new software".

- (iv) It is not clear that the Pricing Process applies to all of the services that NCR Australia Group (and likely some other customers) acquire from the Applicants as part of their CIT contracts. Accordingly, it is not clear whether the Applicants could increase the prices of those services beyond the ceilings applied by the Pricing Process provisions.
- (v) Related to the point above, the Proposed Undertaking provides that the Merged Entity will offer "ATM Specific Services" to independent ATM Deployers, and that those services consist of:
 - (A) cash supply and replenishment;
 - (B) reconciliation and re-bank; and
 - (C) packing the ATM cash cassette.

It is not clear whether "ATM Specific Services" fall within the category of "CIT Services" or are separate, and therefore not subject to the "special pricing constraints that ... prevent price shocks for customers".

- (vi) For independent ATM deployers, the Proposed Undertaking provides at paragraph 4.16 that "The revenue that MergeCo assesses to be earned from its Internal Customer must be no less than if it charged itself the highest Price it charges to any of the 3 largest independent ATM deployers for the supply of CIT Services".⁵³ While this appears intended to ensure that the Merged Entity's ATMs business is not charged lower prices than independent ATM deployers, it would not prevent the Merged Entity from implementing a margin squeeze – that is, charging higher prices for "ATM Specific Services" (to all independent ATM deployers, including its own Internal Customer) making it uncommercial for independent ATM deployers to offer a competitive price in the downstream market.
- (vii) Additionally, the pricing mechanism also does not take into account the size of the Internal Customer relative to other independent ATM deployers, which may change over time. For example, if the Internal Customer is materially "smaller" than the three largest independent ATM deployers, it should, all things equal, pay a higher price.
- (viii) However, if total revenue is below the cap (for example, 75% of the cap), the Merged Entity could charge significantly higher prices to new customers or existing customers whose contracts come to an end.
- (ix) Under paragraph 3.16 of the Proposed Undertaking, if the Merged Entity under-recovers Target Revenue as of 1 January 2029 by more than 50% (cumulatively), customer specific constraints described above would no longer

⁵³ The Internal Customer is defined as "the business division within MergeCo that operates an ATM network and charges a fee on transactions that occur on ATMs which are part of its network". It is not clear to us whether this definition captures the totality of the Applicants' ATMs businesses, including ATMx / Precinct and ATMaaS offerings.

apply. This appears to protect the Merged Entity at the expense of customers. It is not clear whether the paragraph 3.16 carveout also applies to the special pricing requirement that applies to independent ATM deployers.

Service offering to ongoing customers

3.18 The Proposed Undertaking contains two commitments on service offerings to "Ongoing Customers":

- (a) a commitment that the Merged Entity will continue to supply CIT Services to its existing customers on the same basis as prior to Proposed Transaction, with any "optimisation" to be agreed between the parties;⁵⁴ and
- (b) a commitment that the Merged Entity work with customers and suppliers to identify, approve and implement "productivity improvements" to benefit all stakeholders, including consumers.⁵⁵

3.19 The first commitment is extremely vague. The terms "standard of service" and "optimisation" are not defined in the Proposed Undertaking. "Standard of service" could presumably cover both price and non-price terms, but may be confined by the Merged Entity to mean consistency of service quality only. In any event, it would be difficult practically to quantify and monitor the Merged Entity's compliance with an obligation to provide consistent quality of service, and the Proposed Undertaking makes no attempt to precisely define this commitment. "Optimisation" could also be limited by the Merged Entity in a similar way to mean commercial negotiations of terms. While this commitment may maintain the status quo in the interim, there are high levels of circumvention risks as there is no real obligation on the Merged Entity to "optimise" services in the customer's favour.

3.20 The second commitment is also vague and non-committal. The inclusion of "approve" suggests that this commitment amounts to little more than a duty to consult with stakeholders, and otherwise it is at the Merged Entity's discretion as to whether it elects to implement any "productivity improvements". The limitation to productivity improvements that would "benefit all stakeholders including consumers" suggests that where the interests of consumers conflict with other competing interests, the Merged Entity may implement changes to the detriment of consumers (but to the benefit of other stakeholders, such as Third Party CIT Providers and ultimately the Merged Entity itself). Alternatively, the Merged Entity could rely on the limitation to resist improvements that are not to its own advantage, on the basis that they do not "benefit all stakeholders" (ie including itself). Accordingly, the Applicants cannot credibly say that the service offering commitments address the Commission's concerns that the increase in market concentration as a result of the Proposed Transaction may reduce service quality. The Proposed Undertaking claims that "Customers can be confident that the Merged Entity will be committed to improving the cost effectiveness of its service delivery"⁵⁶, but it is not clear to us that this is the case.

Geographic coverage

3.21 The Proposed Undertaking contains an undertaking to offer CIT Services to customers on a national basis to existing cash point locations.⁵⁷

3.22 NRC Australia Group is concerned there may be circumvention risks and unintended consequences of this commitment, including:

⁵⁴ Proposed Undertaking, [4.32].

⁵⁵ Proposed Undertaking, [4.33].

⁵⁶ Applicants' Submission regarding the Proposed Undertaking, [4.3].

⁵⁷ Proposed Undertaking, [4.33].

- (a) the Merged Entity reducing frequency of services at particular locations. For example, if a cash point changed from one customer to another customer, it is not clear that the Merged Entity would be required to provide services at the level required by the new customer, old customer, or at anything other than a nominal level; and
- (b) there is no obligation on the Merged Entity to provide services at any new cash points that the Merged Entity does not already service, no matter how close they are to existing cash points (and therefore no obligation to do so in accordance with the terms of the undertaking in the event that the Merged Entity elects to do so).

Supply of CIT Services to Independent ATM Deployers

- 3.23 The Proposed Undertaking requires that the Merged Entity offer ATM Specific Services (defined as cash supply and replenishment, reconciliation and re-bank and packing the ATM cash cassette) to independent ATM deployers in accordance with the terms of the undertaking.⁵⁸
- 3.24 This commitment is similarly vague, and requires only that the Merged Entity "offer" particular services, and does not require the Merged Entity to offer services on reasonable or even competitive terms or conditions. The scope of the services does not clearly encapsulate the full range of ATM-related services that NCR Australia Group acquires from its CIT service provider. Even though services are required to be provided "in accordance with the terms of this Undertaking",⁵⁹ the "Special Pricing Conditions" only relate to existing customers.⁶⁰ New customers are not offered any comparative protections, and the Merged Entity is not constrained from raising prices or reducing the quality of service for these customers. This commitment provides little comfort to NCR Australia Group with respect to its vertical foreclosure concerns.
- 3.25 NCR Australia Group considers that the Proposed Undertaking may be vulnerable to circumvention by the Merged Entity. For example, while the Proposed Undertaking provides for the Merged Entity's Internal Customer to effectively be "charged" the highest price for CIT Services that the Merged Entity charges to the three largest independent ATM deployers, it is not clear to us that this simplistic provision would be effective to prevent discriminatory conduct. The types of services that NCR Australia Group acquires from Prosegur are multi-faceted and have different prices attached to them based on geography and other features – there is not a single price. This makes price comparison difficult, and leaves room for the Merged Entity to argue that it has charged its Internal Customer a price that is equal to the highest price charged to the three largest independent ATM deployers.
- 3.26 "Independent ATM Deployer" is also defined in quite a limited way: "an entity which operates a standalone ATM network and charges a fee on transactions that occur on ATMs which are part of their network". NCR Australia Group does not charge fees on the Allpoint ATM network to cardholders of Allpoint network members. Additionally, it is not clear whether NCR Australia Group's ATMaaS ATM fleets would be covered by paragraphs 4.35-4.36 of the Proposed Undertaking.
- 3.27 Additionally, please see our concerns at paragraph 3.17(f) above, including regarding the ability of the Merged Entity to implement a margin squeeze strategy by inflating the price of CIT services supplied to downstream rivals (and its Internal Customer), while extracting its margin upstream.
- 3.28 Finally, it is not clear to NCR Australia Group that the Proposed Undertaking would prevent the Merged Entity from discriminating against independent ATM deployers in other ways,

⁵⁸ Proposed Undertaking, [4.35]-[4.36].

⁵⁹ Proposed Undertaking, [4.35].

⁶⁰ Proposed Undertaking, [4.12]-[4.16], [12] (definition of 'Special Pricing Conditions').

such as reducing service levels, offering adverse contract terms or offering end-customers preferential terms as a way to circumvent technical compliance with the Proposed Undertaking (e.g. rebates or service level credits), which would make it more difficult for us to compete effectively with the Merged Entity.

Third party access to cash centres

- 3.29 The Proposed Undertaking contains an obligation on the Merged Entity to provide "third party access to cash centres",⁶¹ which the Applicants assert will allow Third Party CIT Providers (any person or organisation other than the Merged Entity, Armaguard or Prosegur which supplies CIT services) to use the Merged Entity's facilities to scale their operations and offer nationwide cash processing and cash supply services in competition with the Merged Entity.⁶²
- 3.30 The Merged Entity will have no real incentive to help foster a rival national CIT provider. The Proposed Undertaking provides, at paragraph 4.40, that the Merged Entity will supply Third Party Cash Services "on reasonable commercial terms and conditions", but there does not appear to be any mechanism for assessing whether terms and conditions offered are "reasonable". It seems to us that the Merged Entity could impose onerous policies and procedures and risk criteria on Third Party CIT Providers, and refuse supply on the basis that they cannot meet some or all of those policies, procedures and risk criteria. It is therefore questionable whether the Proposed Undertaking would in fact enable any third party CIT providers to expand their geographic coverage. It is very unlikely that the Proposed Undertaking would facilitate greater competition in the supply of national CIT services.

Complaint handling process

- 3.31 The Proposed Undertaking requires the Merged Entity to establish a complaint handling process consistent with the Australian Standard on Complaints Management (AS 10002 2022), and investigate and respond to complaints.⁶³
- 3.32 Without a credible threat to switch to an alternative supplier in the event of unsatisfactory conduct, customers of the Merged Entity will be reliant on the complaint handling process. NCR Australia Group is concerned that this process is insufficient for the following reasons.
- (a) First, the Merged Entity's customers will not be well placed to monitor the Merged Entity's compliance with the Proposed Undertaking, and so may not be able to identify all cases in which they are detrimentally impacted by conduct that does not accord with the Merged Entity's commitments. As a result, they may only be in a position to complain in respect of obvious or blatant non-compliance.
 - (b) Secondly, the complaint handling process is an internal procedure only. Third parties such as independent price experts are not consulted in the event of a pricing dispute, and there is no mechanism for customers to take the matter further if they are unsatisfied with the Merged Entity's response. This leaves the Merged Entity as the final arbiter in all customer complaints.
 - (c) Thirdly, the Merged Entity has a profit-maximising incentive to comply in only the strict sense. While the Australian Standard on Complaints Management sets guiding principles such as accountability, transparency and fairness, there is no requirement for the Merged Entity to act this way or to address the customer's complaint at all –

⁶¹ Proposed Undertaking [4.37]-[4.40].

⁶² Applicants' Submission, Annexure A [1.3(e)].

⁶³ Proposed Undertaking, [4.41]-[4.42].

it would be sufficient under the Proposed Undertaking for the Merged Entity to "respond" in a cursory manner.

- (d) Finally, it will be difficult to detect noncompliance by the Merged Entity. While the Merged Entity is required to provide a description of any complaints every six months,⁶⁴ as further discussed below in paragraph 3.35, this is subject to the Merged Entity's honesty and willingness to make disclosures. This creates a high risk of evasion. Even in the event that the Merged Entity does report complaints accurately and in detail, the Proposed Undertaking is silent on what, if any, action the Commission may take to the compliance report, other than to provide it to the RBA.

- 3.33 The effectiveness of the enforcement and dispute resolution mechanisms are central to the effectiveness of a Proposed Undertaking. Even if the Proposed Undertaking otherwise addressed the concerns raised by the Proposed Merger (which NCR Australia Group considers it does not), the Proposed Undertaking should not be readily accepted unless the ACCC is confident that the behavioural undertaking will be complied with, and that any instances of non-compliance will be promptly identified, rectified and prevented from recurring.

Reporting to the ACCC and the Reserve Bank of Australia

- 3.34 The Proposed Undertaking contains two forms of reporting – a report on compliance every six months, and an annual independent audit.⁶⁵
- 3.35 The report on compliance is a self-reporting model, and, as the report is to include a "description" (prepared by the Merged Entity) of any complaints, its effectiveness is wholly dependent on the Merged Entity's honesty, accuracy and lack of biases. The Merged Entity is not obliged to provide fulsome disclosures to the ACCC. As behavioural undertakings generally impose an obligation on the merging firms to act against their economic interest,⁶⁶ this heightens the risk that customer complaints are missed, and competition impacts are minimised.
- 3.36 Further, as noted above, while the Proposed Undertaking provides that the ACCC may disclose the Merged Entity's report to the RBA,⁶⁷ it is silent on what (if any) action the ACCC or RBA may take in response to the report. There is also no obligation to publish the report, or any summary or response to it.
- 3.37 The effectiveness of the independent audit, which considers the Merged Entity's compliance with the Proposed Undertaking, is dependent on the framing of the undertakings. There is less likely to be meaningful recommendations made where the undertakings are vague and open to interpretation, or allow for "rubber stamping" of obligations. It is difficult to see undertakings such as "have a complaint handling process",⁶⁸ "work with customers and suppliers",⁶⁹ being met with any scrutiny. This creates an additional layer of monitoring responsibilities for the ACCC.
- 3.38 The likelihood of misspecification grows the longer a behavioural undertaking is in place.⁷⁰ As the Proposed Undertaking only requires independent audit reports (containing

⁶⁴ Proposed Undertaking, [4.44].

⁶⁵ Proposed Undertaking, [4.44]-[4.55].

⁶⁶ OECD Merger Control in Dynamic Markets Report, p. 33.

⁶⁷ Proposed Undertaking, [4.44].

⁶⁸ Proposed Undertaking, [4.41].

⁶⁹ Proposed Undertaking, [4.33].

⁷⁰ CMA Merger Remedy Evaluations Report, p. 25.

recommendations) be provided annually,⁷¹ this increases the risk that competition issues are missed, and a time-consuming review of undertakings is required at a later date. Any detrimental impacts on customers which are not adequately addressed may also lead to compounding effects.

Enforcement of undertakings

- 3.39 NCR Australia Group understands that a breach of a s87B undertaking can be pursued by the ACCC in the Federal Court. If the Court is satisfied of a breach, the Court may make a range of orders including directing the person to comply with the undertaking, directing the person to pay to the Commonwealth an amount equivalent to any financial benefit that the person has obtained from the breach, an order directing the person who gave the undertaking to compensate any other person who has suffered loss or damage as a result of the breach and any other order the Court considers appropriate.
- 3.40 Despite the breadth of potential orders, NCR Australia Group considers that even if a breach of the undertaking were uncovered, the enforcement of it is unlikely to be an adequate remedy to harm caused by the breach. For example, if the Merged Entity discriminated against an independent ATM deployer in a way that leads to the independent ATM deployer losing a customer, enforcement of the undertaking will not help the independent ATM deployer win that customer back. It could take years for the ACCC to investigate and bring proceedings, and for the Court to find a breach and make compensation orders or other orders. Those seeking to challenge the Merged Entity's compliance with the Proposed Undertaking face imperfect information, the burden of persuading the ACCC to take action, and delay and uncertainty of outcome. These factors also influence the effectiveness of the Proposed Undertaking in deterring the Merged Entity from engaging in non-compliant conduct in the first place.

⁷¹ Proposed Undertaking [4.54].