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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: corporations.joint@aph.gov.au

Dear Secretary

ACCC submission to the Inquiry into mobile payment and digital financial services

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Corporations and Financial Services' *Inquiry into mobile payment and digital wallet financial services*.

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The ACCC recognises the value and convenience that mobile payment and digital wallet financial services offer to consumers, and is interested to ensure that there is effective competition in the supply of these services to maximise the benefits for consumers.

This submission provides an overview of the ACCC's previous consideration of related issues and, in particular:

- the ACCC's 2016 decision regarding Bendigo and Adelaide Bank, Commonwealth Bank, NAB and Westpac's application for authorisation
- the ACCC's recent report under the Digital Platform Services Inquiry (published April 2021) which examined the competition and consumer issues associated with app marketplaces (e.g. the Google Play Store and the App Store).

The mobile payments sector has developed rapidly in the period between the two major pieces of work outlined below. In this context of rapid technological change and evolving markets, ensuring effective competition becomes all the more important.

In addition to the specific work below which is relevant to this Committee, the ACCC continues to engage closely with financial regulators, such as the RBA, APRA and ASIC. Such engagement may encompass issues relating to mobile payments and digital wallets.

Bendigo and Adelaide Bank, Commonwealth Bank, NAB and Westpac's application for authorisation

In 2016, the ACCC assessed an application for authorisation in relation to Apple Pay from Bendigo and Adelaide Bank, Commonwealth Bank of Australia, National Australia Bank, Westpac Banking Corporation (the Applicants).¹ The Applicants sought to engage in limited collective negotiation with Apple regarding access to Apple iPhone's embedded near field communication (NFC)² functionality to provide their own digital wallets (without relying on Apple Pay), and to allow their digital wallets to be distributed from Apple's App Store without any unreasonable prohibitions, unreasonable terms or unreasonable approval delays from Apple.

The banks argued that authorising collective negotiation with Apple to secure access to the iPhone's NFC functionality would allow them to offer competing wallets on the iOS platform, providing the following public benefits:

- increased competition and consumer choice in digital wallets and mobile payments in Australia
- increased innovation and investment in digital wallets and other mobile applications using NFC technology
- greater consumer confidence in mobile payment technology.

Collective negotiation by competitors is likely to breach the CCA, but the authorisation regime allows parties to seek authorisation from the ACCC for such conduct. The ACCC authorises such conduct when it is satisfied the conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

The ACCC decided to deny authorisation in this instance. The ACCC agreed with the Applicants that public benefits would potentially arise in terms of greater competition from the banks for digital wallets, but found a number of public detriments that outweighed any public benefit, including:

- the distortion to competition between Apple and Android; as if the applicants were successful in obtaining access to NFC functionality on iOS devices it would have affected Apple's current integrated strategy and how it competes with Google's mobile operating system
- a lessening of competition between banks, as having Apple wallets rather than bank-specific digital wallets is likely to lessen customers' switching costs when changing banks
- distortions to a technology market, which was then in its infancy.

¹ See - <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/bendigo-and-adelaide-bank-ors-authorisation-a91546-a91547>

² NFC allows devices within a few centimetres of each other to exchange data wirelessly, and is used, amongst other things, to facilitate 'tap-and-go' (contactless) payments through an app on a mobile device.

These markets continue to evolve rapidly, particularly with regard to the prevalence of NFC-based payment systems and broader issues around potential foreclosure of rival apps and app marketplaces by Apple and Google. The ACCC continues to consider these issues through the Digital Platform Services Inquiry.

Digital Platform Services Inquiry – March 2021 Interim Report

On 28 April 2021, the ACCC released its second interim report as part of its five-year inquiry into markets for the supply of digital platform services - the Digital Platform Services Inquiry (DPSI).

This report considered competition and consumer protection issues associated with app marketplaces in Australia, namely the Apple App Store and the Google Play Store.³ The report set out the ACCC's concerns with Apple's and Google's market power in app marketplaces, including the ability of both companies to favour their own related businesses at the expense of other businesses using their app marketplaces. The report also identified, as recommended measures, steps that Google and Apple should take to address the competition and consumer concerns raised by their app marketplaces.

The ACCC will revisit the issues associated with app marketplaces in subsequent reports during the course of the five year DPSI. As noted in the report, regulation may be required if Apple and Google fail to take steps to remedy the competition and consumer concerns the ACCC identified.

In this report, the ACCC looked at a number of specific issues affecting the ability of app developers to compete. These included Apple's continued practice of reserving certain device features (including aspects of NFC) for its own apps and restricting access of rival third-party app developers. In particular, the report noted that Apple limits 'tap-and-go' payment functionality to its own Apple Pay app. Financial institutions can have their cards included in the Apple Wallet, which uses Apple Pay, but cannot utilise device features to create their own tap-and-go payment app. This has potential to limit the competitive constraint of existing and potential rival apps due to these product limitations.

While Apple has stated that it limits this access to protect the security of the iPhone, the ACCC noted the same restriction does not exist on Android devices. Since 2013, Android has supported third-party use of NFC functionality on enabled devices, allowing consumers to make 'tap-and-go' payments using Samsung Pay, for example.

The ACCC also noted that Apple's conduct in this regard extends across international jurisdictions. For example, this issue has been discussed in the United States House Report on Competition in Digital Markets⁴ and is currently subject to investigation by the European Commission⁵ and the Authority for Consumers and Markets in the Netherlands.⁶

The ACCC considers that, in general, where app developers do not have access to the same device or operating system functionality for their apps as Apple or Google/Android do, these developers may not be able to compete effectively in downstream markets for apps, to the detriment of innovation and consumer choice.

³ See - <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-march-2021-interim-report> p.59

⁴ See - <https://judiciary.house.gov/issues/issue/?IssueID=14921>

⁵ See - https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075

⁶ See - <https://www.acm.nl/en/publications/acm-launches-investigation-users-freedom-choice-regarding-payment-apps-smartphones>

An extract of this report, most relevant to financial payment apps, has been included at

Attachment A.

The competition concerns arising from restricting the access of rival third-party app developers to certain device features are part of a broader issue regarding the vertical integration of Apple (and separately, the vertical integration of Google/Android) which arises from their control of the relevant operating system, app marketplace and their own first-party apps. The consequences of vertical integration and the risk of self preferencing is a key issue for the ACCC in digital platform markets. The ACCC is continuing to consider the competitive impact of vertical integration and self preferencing conduct during the course of the five-year DPSI.

Conclusion

The ACCC thanks the Committee for the opportunity to make a submission, and would be happy to respond to any areas of interest for the Committee.

Yours sincerely

Rod Sims

Chair

ATTACHMENTS

Attachment A – Relevant extract from the Digital Platform Services Inquiry March 2021 interim report

3.3. Access to device and operating system functionality drives innovation and consumer choice in downstream markets for apps

To enable third-party app developers to build apps for iOS and Android, Apple and Google each provide developers with access to functions of their respective operating systems and device hardware, such as through access to application programming interfaces (APIs) as outlined in box 3.3.

Box 3.3: What are APIs?

APIs enable third-party app developers to interact with the operating system, device hardware, data, and other applications and services of a mobile device, for example, to design and supply mobile apps. Some APIs are essential inputs to mobile apps and are required in order for apps to have basic functionality. For example:

- a camera API enables an app to interact with the camera in a mobile phone to take photos
- a Bluetooth API enables developers to create a mobile app that interacts with a consumer's other devices such as smart watches, headphones, and speakers
- a gestures API enables mobile apps to easily detect and respond to common gestures, such as a user scrolling or swiping on their smartphone screen.

The opening of functionality to third-party app developers has led to the creation of many novel and useful third-party apps for consumers. Apple and Google both offer third-party developers access to a significant number of APIs and functionality to support the creation of vibrant downstream markets for apps.

However, given both Apple and Google set the terms governing access to aspects of the functionality of their devices and/or operating systems, they may be able to use those terms to their advantage. This could lead to negative outcomes for consumers in the event that access is unfairly restricted or denied, due to a dampening of competition and innovation.

As discussed above, the ability of Apple and Google to self-preference is the subject of concern by overseas authorities. In addition to the European Commission's proposed Digital Markets Act,²¹⁵ proposals by the CMA also seek to address the risk of self-preferencing by vertically integrated digital platforms as well as unfair commercial practices.²¹⁶ Further, in January 2021, Germany's competition law was amended to prevent particular platforms that are deemed to be of 'paramount significance for competition across markets' from engaging in certain conduct including self-preferencing behaviour.²¹⁷

3.3.1. Apple may seek to limit third-party access to protect its own apps

Apple, in particular, as the sole device manufacturer and operating system provider for the iOS ecosystem, currently has complete discretion over when and how it opens its systems to third parties. While Apple recognises that the success of its business 'depends on a vibrant

²¹⁵ European Commission, [Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms](#), 15 December 2020, accessed 24 March 2021; European Commission, [Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector \(Digital Markets Act\)](#), 15 December 2020.

²¹⁶ In the UK, if Apple and Google are found to have strategic market status in relation to their respective app marketplaces, they could be required to act in accordance with a Code of Conduct based on the objectives of 'fair trading', 'open choices' and 'trust and transparency'. See CMA, [A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce](#), 8 December 2020, p 36.

²¹⁷ See D'Kart, [German Act against Restraints of Competition \(Unofficial translation\)](#), 14 January 2021, pp 3–4.

offering of popular and innovative third-party apps',²¹⁸ it also notes the need to balance access with the security and privacy of its users.²¹⁹ However, as discussed below, this rationale may be used to justify potential self-preferencing behaviour.

In contrast, Android is an open source operating system, which means that in general third-party developers do not need to be granted access to certain functionality in the same way they do for iOS.

Some app developers have expressed frustrations with Apple delaying or denying access to certain functionality for third-party apps, and in some cases, limiting this functionality to first-party apps. Two examples of the potential impact of such behaviour on competition in downstream app markets are discussed in box 3.4.

²¹⁸ Apple, [Submission to the ACCC Digital Platform Services Inquiry Second Interim Report](#), 2 October 2020, p 2.

²¹⁹ Apple, [Submission to the ACCC Digital Platform Services Inquiry Second Interim Report](#), 2 October 2020, p 2.

Box 3.4: Apple's ability to restrict access to functionality for third-party app developers

Near field communication (NFC)

NFC allows devices within a few centimeters of each other to exchange data wirelessly, and is used, amongst other things, to facilitate 'tap-and-go' (contactless) payments through an app on a mobile device.²²⁰

Since 2013, Android has supported third-party use of NFC functionality on enabled devices, allowing consumers to use 'tap-and-go' payments on Google Pay and Samsung Pay, for example.²²¹

In contrast, while Apple has gradually rolled out various aspects of NFC functionality to third-party developers, it continues to reserve some aspects, such as 'tap-and-go' payment functionality for its own Apple Pay app.²²² Apple has stated that it limits this access to protect the security of the iPhone.²²³ Similar issues do not appear to exist with Android devices.²²⁴

By reserving functionality in this way, Apple is able to differentiate its own app (Apple Pay) to attract users and may limit the potential competitive constraint of existing and potential rivals due to these product differences. For example, iOS users in India are able to install Google Pay on their iPhone, but they are not able to use 'tap-and-pay' for in-store transactions (whereas they can use this feature on Apple Pay).

This conduct extends across international markets, and has been noted in the *US House Report on Competition in Digital Markets*, which identified that Apple is able to preference its own services by reserving access to APIs and certain device functionalities for itself, such as in regards to Apple Pay.²²⁵

Further, in 2020, the European Commission,²²⁶ and the Netherlands ACM,²²⁷ both launched investigations into payment apps' access to NFC functionality. Executive Vice-President Vestager noted that '[i]t is important that Apple's measures do not deny consumers the benefits of new payment technologies, including better choice, quality, innovation and competitive prices.'²²⁸

Ultra wideband (UWB)

UWB is considered the 'next-step' from Bluetooth and facilitates accurate, short-range proximity tracking (including better spatial awareness) and data transfer.

Apple was the first to include this technology in a smartphone with the iPhone 11 in 2019. From June 2020, Apple provided third-party developer access to UWB to use in apps that share the users' physical position or location with another UWB-enabled iPhone device.²²⁹

However, Apple has declined to provide third-party access to additional functionality, for example, allowing the iPhone device to communicate with a non-iPhone device that uses UWB technology, such as through a tracking key tag.²³⁰ This functionality could enable an app to communicate with tracking devices placed on objects such as keys, remote controls and hand bags to make them easier to find. There are a number of existing device tracking apps and tags available to consumers that use Bluetooth such as 'Tile'.

Apple is reportedly planning to use UWB in a new product 'Air Tags',²³¹ which will work with its existing 'Find My' app.²³²

There are also a wider array of potential use cases for UWB technology, such as for the Internet of Things.²³³ As such, limiting third-party app developers' access to this technology (and other emerging technologies) could have wider consequences for future innovation and reduce the potential benefits for consumers and products available.²³⁴

²²⁰ NFC has many applications and uses. For example, apps running on supported devices can use NFC scanning to read data from electronic tags attached to real-world objects. For instance, a user can scan a toy to connect it with a video game, a shopper can scan an in-store sign to access coupons, or a retail employee can scan products to track inventory. One function enabled by NFC is known as 'card emulation' which allows mobile apps to act as a payment, transport or access card, for example, and facilitate contactless transactions without the need to use a physical card. See Android

Apple may be able to foreclose potential future rival apps by denying access to certain functions, or benefit from time to test the market before releasing access to third-party app developers. Developers may also have less incentive to invest in research and development for an app that uses a new iOS or hardware feature if they perceive a risk that Apple will limit or frustrate access, which may result in less innovation in downstream markets. These outcomes may lead to poor outcomes for consumers such as lower quality apps, restricted choice of apps (if Apple is the only option), and fewer innovative new apps.

The ACCC recognises there are risks associated with releasing functionality to third parties in certain circumstances. For example, before the technology is ready for broader distribution, or where there are security or privacy concerns. Where there are legitimate privacy or security concerns with allowing access to certain functionality, these issues should be clearly and timely communicated to third-party developers, including detailed reasons why Apple apps may have access to functionality that is restricted to third parties, to avoid potential misunderstandings.

3.3.2. Google maintains control over Android despite its open-source model

Google's self-stated goal for Android is to 'avoid any central point of failure in which one industry player can restrict or control the innovations of any other player'.²³⁵ Google also states that Android's 'open-source model encourages innovation by giving device makers

Developers, [Host-based card emulation overview](#), 27 December 2019, accessed 24 March 2021; Apple, [Human Interface Guidelines: Near Field Communication](#), *Apple Developer*, accessed 24 March 2021.

²²¹ Reserve Bank of Australia, [Review of Retail Payments Regulation – Issues Paper](#), November 2019.

²²² Apple first released NFC in the iPhone 6 in 2014 and restricted its use to the Apple Pay app. Third-party apps were given some access over time, including NFC 'read' access for third-party apps (on iPhone 7 devices and above) from 2017 in iOS11 and NFC 'write' access from 2019 in iOS13. A consumer may have a Google Pay app on their iPhone, but they cannot use the 'tap-and-go' feature that uses NFC for contactless payments in store.

²²³ Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, [Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations](#), 6 October 2020, p 355.

²²⁴ S McKeith, ['Google's Tap-And-Go 'Android Pay' Is Now Available In Australia'](#), *HuffPost*, 15 July 2016, accessed 24 March 2021.

²²⁵ Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, [Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations](#), 6 October 2020, p 354.

²²⁶ European Commission, [Antitrust: Commission opens investigation into Apple practices regarding Apple Pay](#), 16 June 2020, accessed 24 March 2021.

²²⁷ ACM, [ACM launches an investigation into users' freedom of choice regarding payment apps on smartphones](#), 4 December 2020, accessed 24 March 2021.

²²⁸ European Commission, [Antitrust: Commission opens investigation into Apple practices regarding Apple Pay](#), 16 June 2020, accessed 24 March 2021.

²²⁹ S Warwick, ['iOS 14: Developers can now take advantage of the U1 chip thanks to new 'Nearby Interaction' framework'](#), *iMore*, 24 June 2020, accessed 24 March 2021.

²³⁰ Tile, [Responses to Questions for the record from Kristen Daru with Tile](#), *House Committee on the Judiciary*, 30 March 2020, p 24.

²³¹ D Lumb and M Swider, ['Apple AirTags release date, price and how it'll compare to Tile'](#), *TechRadar*, 13 November 2020, accessed 24 March 2021.

²³² J Rossignol, ['Kuo: 'Apple Tags' to Feature Ultra-Wideband Technology, Likely Far More Precise Than Tile's Trackers'](#), *MacRumors*, 6 September 2019, accessed 24 March 2021. This has been followed up with consistent articles. See, for example, I Campbell, ['Tile is prepping an AirTags competitor that could let you find lost items through walls'](#), *The Verge*, 5 January 2021, accessed 24 March 2021; B Mayo, ['Kuo: Ultra-wide band chip production ramp predicts Q3 2020 launch for Apple AirTags'](#), *9to5Mac*, 18 February 2020, accessed 24 March 2021.

²³³ L Mearian, ['Ultra Wideband \(UWB\) explained \(and why it's in the iPhone 11\)'](#), *Computerworld*, 31 December 2019, accessed 24 March 2021.

²³⁴ Reports in November 2020 indicated that Google would add a UWB API to Android. See, for example, D Lee, ['Google embraces the future with Ultra-Wideband APIs for Android'](#), *Android Central*, 11 November 2020, accessed 24 March 2021. However, recent reports have emerged that suggest that access to UWB will be limited to pre-installed system applications at this stage and remain inaccessible to third-party apps. See K Vyas, ['Google has added an Ultra-wideband \(UWB\) API in Android'](#), *XDA Developers*, 25 January 2021, accessed 24 March 2021.

²³⁵ Google, [Android is for everyone](#), *Android*, accessed 24 March 2021.