

**NON CONFIDENTIAL VERSION**

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Dear Daniel, Mark, Sophie and Alex

**Application for merger authorisation MA1000020 – Response to Statement of Preliminary Views**

This letter sets out the Applicants' response to the Statement of Preliminary Views published by the Commission, on 4 June 2021, in relation to the application for authorisation to amalgamate BPAY, eftpos and NPPA under NewCo (**Proposed Amalgamation**).<sup>1</sup>

The Applicants consider that the Commission should authorise the Proposed Amalgamation, under the effects and benefits limbs, and provide additional information below in response to the Commission's Statement of Preliminary Views.

**Payments innovations will be brought to market sooner**

In its Statement of Preliminary Views, the Commission has asked how the Proposed Amalgamation will enable the Major Australian Banks to reach decisions and commit to proposals for new payments services

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<sup>1</sup> Unless mentioned otherwise, defined terms in this document have the same meaning as in the Application. As indicated to the Commission, BPAY HoldCo, BPAY Group and BPAY Pty Limited will be included in the Proposed Amalgamation. For the purposes of this letter, references to BPAY OpCo should be taken to include all or some of BPAY HoldCo, BPAY Group and BPAY Pty Limited, as the context requires.

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sooner given their commercial strategies, available funds, their need to consider other competing proposals from the ICS and their need to deploy technical resources to develop their own service offerings.

This section responds to the Commission's question.

*Current processes for making decisions to invest in payments innovations*

Currently, decisions to progress and seek investment on payment initiatives are made separately by each of BPAY, eftpos and NPPA, with separate input from their shareholders and members, as the case may be, as well as through separate consultations with other stakeholders. Their investment proposals are put to the Major Australian Banks and other participants in an uncoordinated way.

This results in users of the schemes' services, including the Major Australian Banks (who are an integral part of the Australian payments industry) being unable to compare the different investment proposals of the three schemes in a timely or an informed way.

This is largely due to the fact that there are different understandings within organisations and across the industry about the current and upcoming state of play for payments innovations. This makes it difficult for individual organisations to take a coordinated approach to their internal prioritisation and the way in which they, as members and shareholders, contribute to any of the priority discussions of the three schemes. We understand, for example, that this occurred in relation to **[CONFIDENTIAL TO BPAY]**, the early days of BPAY's Osko 2 and Osko 3 services, the early days of NPPA's MPS, eftpos' Account Based Transactions & Recurring Payments, eftpos online and a range of other service ideas proposed by eftpos which did not materialise.

Further, as set out in the Final Economic Expert Report of Dr Geoff Edwards, the lack of co-ordination between the three payment schemes (and the lack of a consequential unified payments innovation roadmap) complicates the ability of financial institutions to invest in payment innovations. Each financial institution is unclear on which proposal will be preferred by the other institutions and, therefore, achieve ubiquity necessary for its success. In many cases, delay is the most plausible response until it is clear which initiative will prevail.<sup>2</sup>

In some cases, there are competition law reasons which would preclude an agreed industry-wide innovations roadmap.

These factors have resulted in inefficient levels of adoption of some payments services,<sup>3</sup> with the consequence that they have not achieved timely widespread deployment.<sup>4</sup>

The Proposed Amalgamation would address all of these challenges because it would provide an efficient and lawful forum for the payments schemes and their owners to agree an innovations roadmap, following consultation with other key stakeholders.

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<sup>2</sup> See Final Economic Expert Report of Dr Geoff Edwards, [287].

<sup>3</sup> See, eg, the statement of CBA in support of the application for authorisation, [14].

<sup>4</sup> See Final Economic Expert Report of Dr Geoff Edwards, [288].



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*How the Proposed Amalgamation will improve the current processes for making decisions to invest in payments innovations*

The Proposed Amalgamation is not intended to, and cannot, overcome the funding and resource constraints faced by any investor in the payments sector, be they a Major Australian Bank or otherwise.

Rather, the Applicants submit that a single, unified innovations roadmap will create more certainty for investors, including the Major Australian Banks and payments aggregators who between them service hundreds of smaller financial institutions<sup>5</sup>, about the steps they need to take, and when they need to take them, allowing them to better prioritise their limited funds and resources to bring payments innovations to market sooner than would otherwise be the case, ultimately to the benefit of consumers and merchants.

A unified roadmap will benefit all industry participants, including retailers and non-banks, as it will allow the industry to plan and implement payments innovations more cohesively. Each of the Major Australian Banks and Woolworths has prepared a submission about how the Proposed Amalgamation will, amongst other things, streamline their respective investment implementation processes. These submissions are contained in **Annexure A** to **Annexure E**.

As can be seen from the submissions, each of the Major Australian Banks and Woolworths expect the Proposed Amalgamation will allow payments innovations to be brought to market sooner than is currently the case notwithstanding their respective funding and resource constraints.

*The Prescribed Services provide a real-life example of the improvements*

The Prescribed Services demonstrate how a co-ordinated approach will result in payments innovations being brought to market sooner.

As part of the process to proceed with the Proposed Amalgamation, subject to authorisation from the Commission, the Industry Committee agreed that the Prescribed Services, each of which is payments innovation, would be implemented as follows should the Proposed Amalgamation proceed. As the Commission will see, most of the Prescribed Services will be implemented by NewCo.

**[Confidential to the Parties]**

The Applicants wish to draw the following two matters to the attention of the Commission.

First, the Prescribed Services provide an actual example of the benefits the Proposed Amalgamation is expected to deliver, in terms of bringing an agreed pipeline of payments innovations to market sooner than would otherwise be the case, in accordance with an agreed timeframe. The industry-wide support for NewCo's commitment to deliver the Prescribed Services would not have been achieved in the absence of the proposal to amalgamate the three payment schemes under NewCo.

Consistent with the requirements in the Transition Plan in relation to Prescribed Services referred to above, the mandate of those Prescribed Services was intended to be conditional upon the completion of the amalgamation.

The Applicants acknowledge that each of the Prescribed Services could have been brought to market in the absence of the Proposed Amalgamation. However, the point is that they would not

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<sup>5</sup> See the Statement of Cuscal in support of the application for authorisation; also the Customer Owned Banking Association

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have been brought to market in accordance with an agreed timeline and they would have been brought to market later than is provided for in the timeline for the Prescribed Services. Also, not all Applicants would have been ready to support those Prescribed Services at the same time.

Secondly, of the 11 Prescribed Services described above, nine of them are proposed by eftpos, will benefit the members of eftpos and, in turn, will deliver new services not previously available from eftpos to merchants and consumers. This contradicts those submissions made by interested parties expressing concerns that the Proposed Amalgamation will diminish eftpos' capability.

The inclusion of nine (out of 11) payments innovations in the Prescribed Services that will benefit eftpos members provides direct and compelling evidence of the Applicants' desire to support eftpos and to ensure that it remains a vigorous and effective competitor to the ICS and continues to enable merchants to benefit from Least Cost Routing (**LCR**).

*The Proposed Amalgamation will give effect to the Reserve Bank of Australia's policy in support of greater payments innovation*

Bringing payments innovations to market sooner will give effect to the Reserve Bank of Australia's (**RBA**) and the Federal Government's respective policies for more innovation in the Australian payments industry.

The policy is apparent from the following statement of the RBA:

*"The Payments System Board has a long standing interest in promoting innovation in the Australian payments system."*<sup>6</sup>

The Australian Government has also identified the need to ensure more productivity-enhancing innovation and competition in the payments system to achieve its goal to be a world-leading digital economy and society by 2030.<sup>7</sup>

*"Continued innovation of this key economic infrastructure will be central to lowering transaction costs, reducing the cost to doing business and supporting the economic recovery."*<sup>8</sup>

**A better informed, more diverse decision-making process for developing the payments innovation roadmap**

This section responds to the Commission's comments about the enhanced engagement with small businesses and other participants.

*Consultations with smaller participants in the status quo*

The directors and each scheme's management team consult with smaller participants on an ad hoc basis. This falls short of a positive obligation to regularly consult with smaller participants through sub-committees reporting directly to the board and a positive obligation to consider reports prepared by the sub-committees.

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<sup>6</sup> Reserve Bank Governor Philip Lowe, Address to the Australian Payments Network, "Innovation and Regulation in the Australian Payments System", available at: <https://www.rba.gov.au/speeches/2020/sp-gov-2020-12-07.html>

<sup>7</sup> <https://digitaleconomy.pmc.gov.au/strategy/foreword>

<sup>8</sup> <https://treasury.gov.au/sites/default/files/2020-11/c2020-129951-issues-paper.pdf> p 2



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*Consultations with smaller participants with the Proposed Amalgamation*

Under the Proposed Amalgamation, NewCo will establish two advisory committees, being:

- 1 an End-User Committee to represent the views of end-users of the BPAY, NPP and eftpos systems, being individual consumers, small businesses, big businesses, industry associations, charities, corporations, fintech operators and government departments; and
- 2 a PSP Committee to represent the interests of the payment service providers and other organisations in the payments ecosystem (e.g., Token Servicers and Digital ID Service Providers).

Each Committee will be established with clear terms of reference and guiding objectives. The structure of the Committees will be developed with reference to the express objectives of the Committee.

For further detail, please refer to **Annexure F**, being a Confidential copy of NewCo's Constitution,<sup>9</sup> and **Annexure G**, being the New Shareholder and Committee Principles.

The Proposed Amalgamation will also result in decisions about payments innovations across all three schemes being made in the same forum, at the same time, and being informed by a wider pool of directors than is currently the case.

*Current board composition of the three schemes*

The boards of each of the three schemes currently comprise:

- 1 **In BPAY's case**, BPAY's Board is comprised of four directors, one nominated by each of the shareholders. The Boards of BPAY HoldCo and the two OpCos have the same composition as BPAY's Board.
- 2 **In eftpos' case**, eftpos' Board has 12 directors – three Independent Directors, the CEO and eight nominee directors nominated by a mixture of large and small institutions and retailers – four nominated by the major banks, two by the major retailers and two others representing aggregate groups of members being smaller institutions and aggregator bodies. Different directors are allocated different weightings of votes, depending on transaction volumes.
- 3 **In NPPA's case**, NPPA has 13 directors – three Independent Directors, the CEO, a Director representing the Reserve Bank of Australia's Settlement Department, a Director representing each of four High-band shareholders (the major banks), and four Directors elected from eight Small or Medium shareholders. Each Director (except the CEO) has one vote each.

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<sup>9</sup> **[Confidential to the Parties]** A non-confidential version will be provided in the coming days.

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*Composition of NewCo's board*

In contrast to the composition of the boards of the three schemes, NewCo's board will comprise: 13 Directors including the Chairperson. Of those:

- 1 four Directors, including the Independent Chairperson of NewCo, will be Independent Directors (**Independent Directors**); and
- 2 nine Directors will be nominated by NewCo's shareholders (**Representative Directors**).

Of the nine Representative Directors:

- 1 four Directors will be nominated by NewCo's shareholders who each hold more than 15% of the total number of NewCo's shares. **[Confidential to the Parties]**; and
- 2 five Directors will be nominated by NewCo's other shareholders as follows:
  - a. two Directors will be nominated by shareholders who are ADIs and who hold 15% or less of NewCo's shares. These shareholders will include **[Confidential to the Parties]**; and
  - b. three Directors will be nominated by shareholders who are not ADIs. These shareholders will include **[Confidential to the Parties]**.

Critically, the governance structures within NewCo and NewCo's one vote : one director structure means that NewCo's board will be more diverse. For example, the Major Australian Banks and/or the major retailers will be unable to control the NewCo board as is the case for BPAY and eftpos today.

*Criteria for selecting NewCo's Independent Directors*

NewCo's Independent Directors will be accomplished leaders with notable executive achievement and reputation with express regard to board skills, personal attributes and the following criteria for independence:

*'The person is not currently, and has not within the last two years, been employed by,<sup>10</sup> or acted in a material way, as: a professional adviser, consultant, supplier or customer to; nor had a substantial holding in, an existing shareholder of one of the three operating companies being consolidated (NewCo)<sup>11</sup>; or, a Related Body Corporate of a Shareholder of NewCo within the meaning of the Corporations Act.'*

The criteria are also outlined in NewCo's Constitution at clause 8.3 and the proposed clause 10.8. For further information about the criteria, please refer to **Annexure H**, being the Skills Matrix and **Annexure I**, reflecting the NewCo Chair and NED Appointment Process. **[Confidential to the ICA]**.

- 1 Consequently, the Applicants submit that the Proposed Amalgamation will result in a better informed, more diverse decision-making process for developing NewCo's payments innovation roadmap: NewCo's board will be more diverse than is the case for any of the three scheme's boards today; and

<sup>10</sup> Excluding Independent Directors of eftpos Payments Australia or NPP Australia.

<sup>11</sup> In this context NewCo means NewCo, eftpos Payments Australia Limited, BPAY Group and NPP Australia.



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- 2 NewCo's board will be obliged to consult on a regular basis with representatives of small business and other stakeholders who are not shareholders of NewCo (through the End-User Committee and PSP Committee) and will be obliged to take their views into account when making decisions about NewCo's payments innovation roadmap.

**Strengthening eftpos' capabilities**

This section addresses the Commission's comments about the concerns expressed by representatives of small business regarding the Proposed Amalgamation diminishing eftpos' capability.

*No reasons in support*

None of the submissions available on the Commission's public register set out why the Applicants would have any incentive to diminish eftpos' capability or provide reasons in support their concern.

*No regard to the abilities and incentives in the status quo*

The submissions do not recognise that under the status quo, the Applicants with ownership interests in eftpos currently have, if anything, greater control over eftpos' capability. However, they have not taken any steps to diminish eftpos' capability because there is no incentive for them do so. The Proposed Amalgamation will not create any new ability or incentive for them, or other Shareholders in NewCo, to diminish eftpos' capability, in fact, the Proposed Amalgamation will strengthen eftpos' capability.

In the absence of the Proposed Amalgamation, eftpos would not have certainty regarding its future roadmap. eftpos' board has not previously agreed to mandate eftpos' roadmap. As noted above, the Proposed Amalgamation, through commitment to the Prescribed Services, has secured the certainty of eftpos' roadmap beyond what was available prior to the amalgamation process.

Additionally, in the status quo / counterfactuals, eftpos' transaction volumes will continue the current trajectory of transferring to the ICS. As set out in the Final Economic Expert Report of Dr Geoff Edwards<sup>12</sup> and in the Expert Industry Opinion of Mr Lance Sinclair Blockley,<sup>13</sup> eftpos' market share in the debit card market has fallen dramatically over the past 10 years. Although eftpos' recent position may have stabilised, eftpos has been losing its market share to the ICS-Visa and Mastercard. Mr Blockley attributes eftpos' decline, in part, to the fact that it remains in 'catch-up mode' with the ICS. That is, investing in capabilities that have already been deployed by the ICS.<sup>14</sup>

Consistent with the expert evidence, concerns that eftpos transaction volumes could be shifted to the NPP are not warranted. NPP's volumes will derive primarily from migration from the direct entry system. As eftpos has acknowledged, the NPP does not have the speed, capability or support of merchants that would enable a shift of transactions volumes from eftpos to the NPP.

eftpos' ability to innovate and diversify remains in doubt in the status quo. While eftpos has outlined an ambitious roadmap to innovate and diversify, eftpos' past track record indicates that its ability to deliver is uncertain, demonstrated by delays in the delivery of contactless payments, tokenisation services, transit open loop payments, and online payments several years after Mastercard and Visa.

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<sup>12</sup> Confidential version of the Final Economic Expert Report of Dr Geoff Edwards at [181].

<sup>13</sup> Confidential version of the Expert Industry Opinion of Mr Lance Sinclair Blockley at Appendix V.

<sup>14</sup> Confidential version of the Expert Industry Opinion of Mr Lance Sinclair Blockley at [452] to [455].

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*Amalgamation will enable eftpos to compete with the ICS*

Amalgamation will strengthen eftpos' ability to compete with the ICS in the medium to long term.

Mastercard and Visa are focussed on extending and expanding their functionality beyond cards to mobile, account to account, online and subscription payments as well as identity verification.

While eftpos' roadmap attempts to match some (but not all) of these capabilities, as eftpos has acknowledged, the success of that strategy is dependent on the investment and implementation by members, none of which are guaranteed to be successful.

The ICS have balance sheets that can easily accommodate unsuccessful investments – however, if eftpos pursues activities and investments not related to its core rails<sup>15</sup> which are unsuccessful, it has comparatively less capacity on its balance sheet to absorb those losses.

Amalgamation will support delivery of the roadmap through more efficient deployment of capital and access to broader stakeholder support from the wider NewCo membership base. As outlined above, under NewCo, innovations will be brought to market faster, enabling eftpos to better keep pace with the ICS when compared to eftpos' current rate of delivering a number of products to market years after the ICS have brought the same solutions to market.

Improved speed to market will improve eftpos' competitiveness with the ICS, as well as allow it to monetise its roadmap and innovations significantly sooner than it otherwise would, bringing forward the transition from burning capital to becoming revenue accretive.

The ICS are investing heavily in A2A payment capabilities for C2B and P2P. eftpos will not be able to compete on this basis without the benefit of NPPA's functionality.

Mr Blockley's expert industry opinion has identified a number of potential hybrid services that may arise under amalgamation that would enable eftpos to compete against the 'multi-rail' strategy that is being pursued by the ICS. Additionally, instead of 'like for like' competition with the ICS, amalgamation will enable eftpos to compete through differentiation by offering locally targeted payments solutions.

*The Applicants want to enhance eftpos' capability*

None of the Applicants want eftpos to lose capability. The Applicants want to enhance eftpos' ability to compete with the ICS (noting eftpos' capabilities are currently lagging behind those of the ICS, e.g., CNP and fraud scoring). They understand that eftpos plays a critical role in Australia's payments industry, including because they rely on eftpos as a critical pricing wedge against the ICS. They want, and need, that to continue.

The Applicants' commitment to the nine eftpos Prescribed Services (out of the 11 in total which we have discussed above) is further evidence of the Applicants' desire (and need) to support eftpos. Around six of these Prescribed Services relate to bringing eftpos' capability in line with that of the ICS.

The Applicants consider that rather than diminishing eftpos' capability, the Proposed Amalgamation will assist to secure eftpos' long-term viability. It will do so by facilitating more efficient and effective competition with the ICS, ensuring merchants continue to enjoy the benefits of LCR, consistent with

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<sup>15</sup> Lance Blockley Supplemental Report 16 June 2021, [13]



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the RBA's policy on LCR.<sup>16</sup>

Amalgamation will enhance eftpos' capability through:

- 1 The synergies of bringing the three schemes together in terms of both resources, skills and talent. Further, the ability to share resources across the three platforms will enhance the schemes' ability to attract new talent and retain that talent.
- 2 Access to A2A and bill payment functionalities that will allow it to match the ICS multi-rail strategy and adapt to changing payment behaviours. As noted in the initial application, the markets served by the three schemes are dynamic.
- 3 Access to a broader range of stakeholders to support innovations to generate the necessary ubiquity and network effects faster
- 4 Improved ability to keep pace with ICS innovations through more efficient deployment of capital enabling faster time to market.
- 5 Creating alignment which would reduce the need for it to pursue investments in activities which are unrelated to its core business which, if unsuccessful, put its low-cost positioning at risk.

*eftpos members will enjoy protections that they do not currently enjoy*

Further, the Special Majority Band voting protections will offer protection for eftpos' capabilities.

If, for example, a decision were made by NewCo's Board to use funds generated from eftpos' payment services to provide funding for NPPA's current or future payment services, or to shut down one of eftpos' Payment Services, then any two directors of NewCo could request that this be ratified by a Special Majority Band Resolution.

The decision would then require a resolution supported by at least 75% of NewCo's shareholders, by number, who are participants in eftpos' payment scheme at that point in time. Based on the current users of eftpos, this would mean that 15 of the 19 users of eftpos would need to support the resolution, a much higher bar than is currently the case.

The Special Majority Band Resolution will have the effect of placing the decision in the hands of the users of eftpos who are shareholders of NewCo at that point in time, each of which have one vote regardless of the number of NewCo shares they hold.

eftpos does not enjoy any similar protection in the status quo and is unlikely to do so in any of the other counterfactuals.

Compared to the status quo, the governance arrangements under the Proposed Amalgamation will increase transparency. The diagrams annexed at **Annexure J** compare the decision-making process in the status quo with the decision-making process with the Proposed Amalgamation in the following scenarios:

- 1 A decision to redirect cash from eftpos to another scheme.
- 2 A decision to admit new members to the NPP.

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<sup>16</sup> Reserve Bank of Australia, "Least-cost Routing of Debit Card Transactions", available at: <https://www.rba.gov.au/payments-and-infrastructure/debit-cards/least-cost-routing.html#:~:text=What%20is%20least%20cost%20routing,also%20known%20as%20merchant%20routing>).

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- 3 A decision to remove BPAY view.
- 4 A decision to change eftpos' scheme fees.
- 5 A decision to change BPAY's capture reimbursement fee.
- 6 A decision to set the pricing for NPPA's PayTo (MPS) service.
- 7 A decision to issue a mandate.
- 8 The principles for admitting new shareholders to NewCo.

The diagrams demonstrate the operation of the Special Majority Band Resolution, the ability of the OpCos to retain control over the prices of the Payment Services and other important matters.

### Greater import substitution

This section addresses the Commission's comments about whether the Proposed Amalgamation will result in greater import substitution.

#### *Reserve Bank of Australia's recent statement*

The RBA recently stated:

*"[t]he Bank notes that discussions about the possible consolidation of EPAL with BPAY and NPPA have been underway over the past year. In their recent application to the ACCC, the applicants (including the major banks, the two large retailers and a number of mid-sized entities) have committed to ongoing support for the roadmap for developing new functionality for the eftpos system. The Board has not viewed the consolidation discussions as material to the Review, except insofar that a consolidation could result in more streamlined decision-making by the three systems and their individual members which is likely to improve EPAL's ability to compete with the two large international debit schemes."<sup>17</sup>*

The RBA's statement indicates that it considers that the Proposed Amalgamation and the agreed roadmap of payments innovations is likely to improve eftpos' ability to compete with the two large ICS. The Applicants submit that improving eftpos' ability to compete with the ICS will result in greater import substitution.

Visa and MasterCard have R&D budgets that significantly outweigh all the banks combined. They are continually looking to innovate and have massive scale that makes this R&D affordable. This puts any Australian infrastructure at risk of not being able to keep up from a technology and innovation perspective.

Further, the voice of the Australian consumer is difficult to be heard at the investment and planning table of the ICS. As the 12th largest economy in the world, the appeal and incentive for the ICS to tailor offerings for the Australian domestic market is minimal.

It is critical that there is no duplication or inefficiency in the build out of the three domestic systems and the best people are working on the right initiatives. Only by combining resources, talent and infrastructure and differentiating with locally tailored solutions will an Australian scheme have some chance of effectively competing with Visa and Mastercard.

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<sup>17</sup> See footnote 7 on page 13 of the Review of Retail Payments Regulation Consultation Paper May 2021.



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*How the import substitution will occur*

The Applicants believe that without the Proposed Amalgamation, in a payments landscape which will continue to see the growth and expansion of the two large ICS, eftpos would be likely to find it increasingly difficult to maintain its current market share, even as it positions itself online to catch-up with innovations the ICS launched some years ago.

The Applicants submit that the import substitution which will occur under the Proposed Amalgamation will be represented by the incremental volume that eftpos will be able to secure because it will be better able to compete with the two large ICS, compared to the counterfactual.

It is challenging to quantify the volume of import substitution that will occur from the Proposed Amalgamation and there are likely to be different opinions about its magnitude. Suffice to say that the greatest growth in payments will continue to be in the online space. As outlined above, for eftpos to benefit from that growth and give effect to the potential import substitution, it must build out its roadmap with haste, the success of which is maximised by the Proposed Amalgamation and accompanying Prescribed Services.

The Applicants ask the Commission to give proper weight to the absence of any statutory or policy requirement for all (or any) benefits to be quantified when assessing an application for authorisation. The Commission has ample power to acknowledge that import substitution will be increased in the factual compared to the counterfactual, even if it cannot be quantified, and to give weight to that likelihood.

**Least cost routing**

This section addresses the Commission's comments about LCR

*Least Cost Routing is primarily a matter for the RBA*

The RBA has released its preliminary conclusions and draft standards from its Review of Retail Payments Regulation.

In relation to the provision of LCR functionality, the RBA has outlined policy options to promote the provision and awareness of LCR that should assuage any concerns that LCR could be neglected or abandoned under NewCo. The RBA can mandate LCR and the Government can legislate if it believes that the new structure is not delivering in a way that is fostering competition. The Applicants submit that LCR is primarily a matter for the RBA, in terms of regulatory policy. The implementation of LCR depends on delivery by acquirers (and, in the case of online transactions, gateways) and uptake by merchants. eftpos (and potentially in the future NewCo) can encourage and influence these parties to utilise LCR. However, neither NewCo or eftpos have the ability to directly deliver or increase the availability of LCR.

Payments is a highly regulated industry and government intervention is common. Payments is a critical element to continuing to build productivity gains into the Australian economy. If the combined entity is somehow holding back innovation, efficiency or competition then it would be fully expected that the Government would intervene. This risk is real and it creates a strong incentive for NewCo to act in a way that is consistent with the national interest.

*Relationship between eftpos and Least Cost Routing*

The acquirer delivery of the Prescribed Services is critical for the extension of LCR into the fast-growing online payments segment. As set out above, delivery of the Prescribed Services is

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dependent on consolidation, and will ensure LCR is made available for online payments, which will ultimately account for the majority of transactions.

The Applicants ask the Commission to note that eftpos will benefit from the Prescribed Services, especially in the area of digital payments (online and in mobile wallets) which will be beneficial for LCR and have been described above. Further, LCR on MNDC becomes moot if eftpos is no longer viable and MNDC cease to exist.

**Access to the NPP**

This section addresses the Commission's comments about access to the NPP.

Some interested parties have expressed concern that the Proposed Amalgamation will create an incentive, that does not exist in the status quo and would not exist in any of the counterfactuals, for NewCo to frustrate access to the NPP. The incentive is said to be created by the increased degree of vertical integration that will result from NewCo being related to the NPPA, which owns and operates the NPP payment rails, and BPAY which owns and operates the Osko 1 payment service that runs over the NPP payment rails.

This concern is contradicted by the following critical factors.

First, NPPA has in place a transparent and non-discriminatory access regime for the NPP. There are no intentions to change this.

Secondly, NPPA's core strategy is to grow volumes in order to lower transaction and operating costs and, hence, drive further volume. As NPP competes with other payment schemes such as BECS and cheques on the basis of cost and efficiency, it will, therefore, derive greater benefit from growing volumes through increased participation by fintechs. The rich data features of the NPP will be leveraged by fintechs playing an important orchestration role to enable innovative data rich payment experiences for business customers (such as e-invoicing, single-touch payroll and superannuation clearing).

Thirdly, it is not mandatory for any organisation to subscribe to Osko. An organisation wanting to send fast payments could send an SCT payment, as many organisations do today, including through the use of the PayID addressing service. This now includes SCT payments which are Category Purpose Code Payments, or in the future the Mandated Payment Service.<sup>18</sup> Many organisations today, including Identified Institutions such as Azupay, Monoova, Assembly Payments and Split Payments do this today, without having to use Osko, or any other overlay service.

Other organisations who are not Identified Institutions, such as Superhero, BTC Markets, Chubb Insurance, and PayPal, connect indirectly to the NPP and can also support payment innovation without necessarily having to use Osko, or any other overlay service.

When MPS commences operation, any number of third-party organisations will be able to initiate payments using the MPS service, connecting indirectly to the infrastructure via a sponsor or potentially connecting directly as a Connected Institution, again without having to use Osko or any other overlay service.

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<sup>18</sup> See the Final Economic Expert Report of Dr Edwards and Dr Edwards' Response to the ACCC's Statement of Preliminary Views, which addresses potential vertical effects.



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The Proposed Amalgamation is not expected to change NPPA's transparent and non-discriminatory access regime; NPPA's core strategy; the voluntary nature of Osko, or the ability to connect indirectly to the NPP via third parties.

The Applicants submit there is no evidence to support a concern that the Proposed Amalgamation would give NewCo an incentive or ability to frustrate access to the NPP that does not exist in the status quo or any version of the counterfactual.

Further, key provisions of the NPP Regulations such as eligibility criteria, and suspension and termination are the subject of an authorisation by the ACCC. Any amendment to those provisions (as would be required to change the access terms) would require an application to revoke and substitute the existing authorisation. The authorisation in respect of the eligibility criteria is perpetual. In effect, this results in the ACCC having some oversight over access to the NPP already.

### Other forms of collaboration will not give rise to the same benefits

This section addresses the Commission's comments that the benefit of collaborative innovation among competing payments rails (or between competing payments rails and payments service providers) could not be achieved without the Proposed Amalgamation.

#### *The examples of alternative collaboration cited by the Commission*

In the Commission's Statement of Preliminary Views, the Commission has queried whether one-off collaborations such as NPPA's and BPAY's commercial partnership to develop and launch of BPAY's Osko 1 services on the NPP could give rise to the same collaborative innovation as the Proposed Amalgamation. It is, however, important to bear in mind that this overlay service was the result of a competitive tender process, involving 18 different parties over a number of months and one that was facilitated by APCA (now AusPayNet).

The Commission has also observed that eftpos has indicated it would continue to engage with other parties including competitors in non-competing activities that are of mutual commercial interest, irrespective of the Proposed Amalgamation.

The Applicants are not contending that one-off, limited forms of collaboration do not result in innovation. They sometimes do. However, they cannot do so to the extent necessary to improve the speed to market of a pipeline of new payments innovations in a rapidly changing industry. This is because they are one-off collaborations that do not address the market failures which characterise the investment decision-making process that are described above, in the statements filed in support of the Application for Authorisation and in Dr Edwards' Report.

Further, the Proposed Amalgamation will significantly lower barriers to collaboration and can be expected to increase collaboration compared to any likely counterfactual.

#### *AusPayNet and the Australian Payments Council*

It has been observed that the Australian Payments Council or AusPayNet might be suitable forums to co-ordinate payments innovations in the counterfactuals.

**NON CONFIDENTIAL VERSION**

The Applicants respect the important roles of the Australian Payments Council and AusPayNet and they are active participants in both organisations. However, the Australian Payments Council and AusPayNet are not organisations established to make investment decisions about payments innovations.

The Australian Payments Council's role is to coordinate industry efforts to:

- 1 Drive the strategic agenda for the Australian payments system.
- 2 Engage with the Payments System Board on setting and achieving strategic objectives.
- 3 Identify strategic issues and emerging trends through constant scanning of the payments environment.
- 4 Generate common industry positions for action and adoption by the industry with the endorsement of the Payments System Board.
- 5 Identify and remove any barriers to innovation through collaboration.

The Council's role is focussed on policy. This is evident from its published focus areas which are: systemic resilience; combatting financial crime; social accessibility and inclusion; interoperability, and sustainable innovation.<sup>19</sup>

AusPayNet's role<sup>20</sup> is to enable competition and innovation, promote efficiency, and control and manage risk to deliver improvements for all users of the payments system.

With a strong focus on collaboration, its role includes:

- 1 Inspiring innovation.
- 2 Facilitating self-regulation.
- 3 Coordinating system-wide standards (including recent initiatives such as TrustID framework, facilitating an open loop system for NSW transport, CNP Fraud Mitigation framework and migration of the RTGS system to ISO20022).
- 4 Policy development.

*Other forms of collaboration to agree a roadmap of payments innovations may require authorisation from the Commission*

Any collaboration to agree a roadmap of payments innovations across the industry, including lesser roadmaps than will be achieved with the Proposed Amalgamation, may require authorisation from the Commission if participants and members of the schemes compete in respect of the collaboration.

The Applicants submit that lesser roadmaps will not achieve the same magnitude of benefits as the Proposed Amalgamation because they will create less certainty over time and will give rise to

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<sup>19</sup> Please see the Table of Contents at: <https://australianpaymentscouncil.com.au/wp-content/uploads/2021/02/APC-Payments-Plan-2019.pdf>

<sup>20</sup> See <https://www.auspaynet.com.au/about>



## NON CONFIDENTIAL VERSION

greater transactions costs than the Proposed Amalgamation because they would need at least one, if not multiple authorisations from the Commission.

Further, those who favour other forms of collaboration seem to place no weight on the fact that the Proposed Amalgamation will involve a re-organisation of existing ownership interests.

### Synergies arising from the Proposed Amalgamation

There are synergies of bringing the three entities together in terms of both resources, skills and talent.

There is limited exceptional talent in Australia in the payments space capable of ensuring that the local infrastructure can continue to compete with global players. Having this expertise spread across three separate entities without the ability for them to collaborate in meaningful way is not in the national interest.

Further, the ability to share resources across the three platforms will assist to attract new talent and retain that talent.

### Other matters raised in the Statement of Preliminary Views

The Applicants acknowledge that the Commission has raised other matters in its Statement of Preliminary Views. However, with a very small number of exceptions, those matters are comprehensively addressed by the Expert Reports of Mr Lance Blockley and Dr Geoff Edwards. Both Dr Edwards and Mr Blockley have prepared supplementary reports that address the very small number of exceptions which will be filed separately with the Commission.

### Claim for confidentiality

Some information in this letter and its attachments is confidential to the Applicants and could cause commercial harm to the Applicants if disclosed. The Applicants respectfully asks the Commission to treat that information as confidential.

The applicants consider that the confidential information relates to the Commission's core statutory function of administering and enforcing the *Competition and Consumer Act 2010 (Cth) (Act)*. As such, the Applicants consider that the information comprises "protected information" as defined by section 155AAA(21) of the Act.

The Applicants understand that:

- (a) there will be no restriction on the internal use, including future use, the Commission may make of the confidential information consistent with its statutory functions;
- (a) the confidential information may be viewed by the Commission's external consultants (for example legal, economic and industry advisers) on the condition that each such consultant will be informed of the obligation to treat the information as confidential; and
- (b) the Commission will not disclose the confidential information to any third parties (other than its external consultants) unless compelled to do so by law or in accordance with section 155AAA of the Act.

Should the Commission be compelled by law to disclose the confidential information, or any part of it, the Applicants ask the Commission to, where possible, give as much notice as possible to the Applicants before disclosing the confidential information, or any part of it, so that the Applicants may consider seeking an order from the Court to protect the information and documents from disclosure.

**NON CONFIDENTIAL VERSION**

Yours sincerely



**Sharon Henrick | Partner | Competition Law and  
Regulatory Team  
King & Wood Mallesons**

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**Christopher Kok | Senior Associate | Competition  
Law and Regulatory Team  
King & Wood Mallesons**

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**This communication and any attachments are confidential and may be privileged**



## Annexure A – ANZ’s submission

### ACCC Statement of Preliminary Views

**Question v: *The ACCC invites submissions on how the proposed amalgamation will enable the banks to reach decisions and commit to proposals to support payment initiatives sooner.***

- 1 ANZ considers that a unified industry pipeline of proposals will provide it with the certainty and confidence required to commit to new payments proposals sooner, notwithstanding other constraints.
- 2 As a result of the Proposed Amalgamation, ANZ expects that the unified long range product roadmap committed by NewCo will greatly improve the time taken for ANZ and others in the industry to make a decision, to reach a technical solution design and to mobilise end-to-end delivery resources.

### ***Benefit of unified long range product roadmap on ANZ’s decision-making process***

- 3 The single, prioritised roadmap of initiatives proposed by NewCo will enable ANZ to consider and prioritise each proposal in the context of a strategic vision, and at the beginning of ANZ’s annual investment planning cycle. While proposals from NewCo will continue to be considered relative to other business proposals, including from the international card schemes, both customers and regulators demand investment and development in the Australian domestic payments systems. Failure to deliver on the agreed roadmap will result in government and regulatory pressure, as well as reputational damage.
- 4 Compared to the counterfactual, a unified roadmap will place the proposals in the ‘best position’ to obtain investment approval because:
  - a. the proposals included in the roadmap will have the commitment of other industry participants (not only in respect of delivery but also timing of delivery), and therefore a clearer business case and more rapid delivery of customer benefits. The clarity provided by an agreed product delivery roadmap with broad industry commitment removes the hesitation that arises from investing in solutions that risk insufficient network effect, possibly resulting in stranded assets;
  - b. an agreed industry position, which takes into account the needs of users of the payments services (eg consumers, merchants) will mean that the proposals included in the roadmap are likely to have a clearer customer and commercial benefit. As a consequence, the proposals that are part of the roadmap are more likely to align with ANZ’s strategy to constantly deliver products and solutions to customers that allow them to run their businesses better, at lower cost and risk, and to improve their own customer value proposition. Taken together with demands from customers and regulators for investment and development in Australian domestic payments systems, this alignment with ANZ’s strategy means the proposals on the roadmap are more likely to receive Executive Sponsorship, and approval for funding and delivery; and
  - c. there will be clarity on the path forward as well as the expected funding and resourcing requirements, as opposed to multiple, fragmented investment proposals at different points in time from different parts of ANZ.
- 5 Incremental requests for investment that arise in between ANZ’s annual cycle will be fewer and further between, and continue to be managed with BAU capacity. For the same reasons outlined above, having a unified long range roadmap means that these incremental requests for investment are more likely to receive support, and sooner.
- 6 ANZ notes that new payments initiatives not yet on the roadmap that are still at an early, conceptual stage will continue to be considered by representatives within ANZ’s divisions. However, these new payments initiatives will be considered in the context of broader payments industry collaboration,

rather than in operating company silos. This allows ANZ, and others in the industry, to engage more strategically with the operating companies and reach decisions sooner, rather than:

- a. having multiple bilateral conversations between ANZ business divisions and representatives of the different operating companies with separate roadmaps and investment proposals.

For example, in the status quo, ANZ may have weeks, months or even years of conversations in the early stages of considering an investment. These can include discussions between members of the management teams at eftpos, BPAY or NPPA and ANZ product and technical representatives to discuss potential design, feasibility, viability and desirability of new payments services or features. To the extent that each of the entities is considering investments, consultation may occur in parallel, with multiple conversations between ANZ representatives and eftpos, ANZ representatives and BPAY, and ANZ representatives and NPPA.

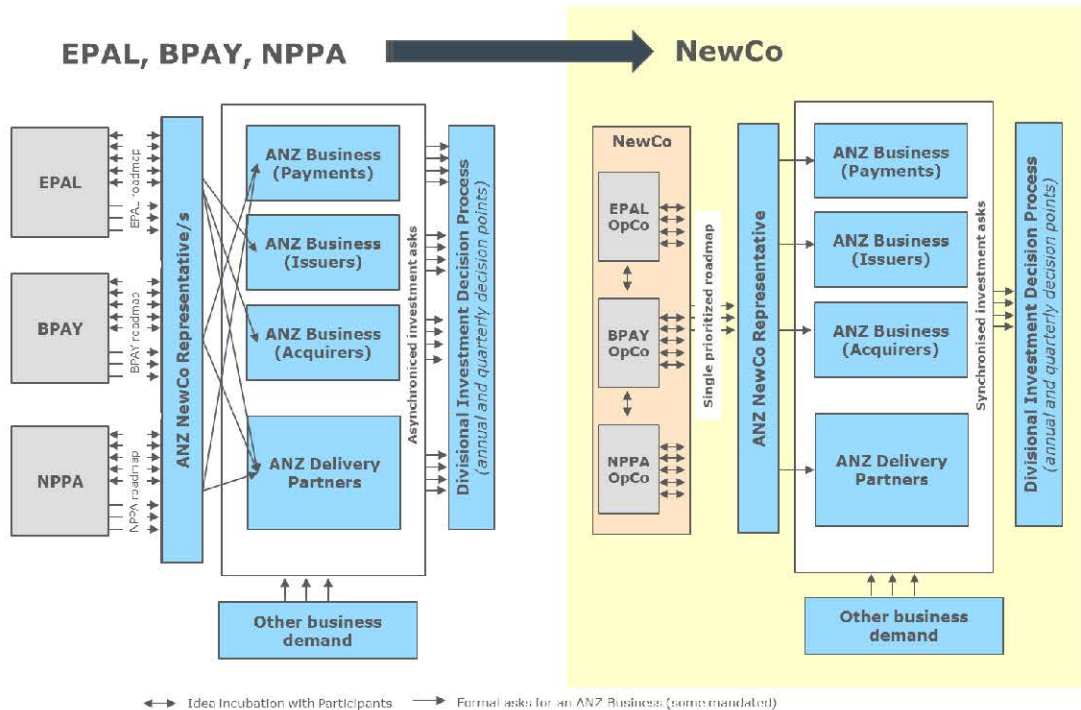
If the Proposed Amalgamation proceeds, this process will be simplified as the periods of consultation will be sequenced, and investment proposals from NewCo or any of the OpCos, will be presented with awareness of the broader payments engagement between NewCo, the OpCos and ANZ; and

- b. conducting a series of ad-hoc assessments on the merits of each proposal in circumstances where ANZ is limited in its ability to make a coordinated evaluation of customer and commercial benefits due to constraints under the competition law, confidentiality obligations (informal or in the form of a non-disclosure agreement, which are not unusual when investment proposals are still at a conceptual stage) and misaligned timing.

**[Confidential to ANZ]**

If the Proposed Amalgamation proceeds, NewCo will enable a more strategic and coordinated approach, at an industry level.

- 7 The following diagram depicts ANZ’s current engagement model and investment decision making process with respect to investment proposals received from eftpos, BPAY and NPPA, compared with the anticipated process following the Proposed Amalgamation:



***Benefit of unified long range roadmap on ANZ’s internal planning and resource allocation***



- 8 The visibility and certainty provided by a unified long range roadmap also means that approved payments projects are more likely to be prioritised and progressed more efficiently. With visibility over the pipeline of initiatives, ANZ can better plan, sequence and mobilise limited business and delivery resources to manage continuous change and deliver quality customer solutions.

## Annexure B – National Australia Bank’s submission

- 1 As set out in the Application for authorisation, the Proposed Amalgamation will re-organise the current shareholders’ existing interests in BPAY Opco, eftpos and NPPA into combined ownership of NewCo. This re-organisation will have two immediate effects:
  - (a) it will pool all resources in NewCo, which will lead to further opportunities for scaled investment, as well as better efficiencies in the spending of available funds for investment; and
  - (b) it will combine the shareholders’ interests into one company, one management team and one Board, which will result in far greater efficiency of decision making (including through the elimination of duplicated bureaucratic processes) and alignment of investment roadmaps, as well as improving timeframes for implementation.
- 2 At its core, the Proposed Amalgamation is intended to increase the pace of delivery of investment and innovation by aligning interests and eliminating inefficiencies at the decision-making, funding and implementation level. Currently, the fragmentation of shareholders’ interests in the three schemes leads to slower and less efficient decision-making and investment roll-outs, as well as high abandonment rates, including because of the time take to align all relevant interests across the ecosystem as well as investment uncertainty. To the extent that the Proposed Amalgamation will reduce this fragmentation, this will increase NewCo’s ability to innovate and bring new investments in its products and services to the market.
- 3 The Proposed Amalgamation will likely lead to investment being undertaken at a greater pace, scale and breadth than in a world without the amalgamation. For example, NAB expects that an amalgamated group will be able to deliver complex cross-industry utility initiatives (including payment initiation to support CDR write access, Digital Identity, and request to pay solutions) more efficiently and sooner than the counterfactual of three separate entities, each operating in a subscale way.



**Annexure C – Westpac Banking Corporation's submission**

**[Confidential to WBC]**

**Enhance clarity of the investment road map**

**[Confidential to WBC]**

**Elimination of silos**

**[Confidential to WBC]**

**Summary**

**[Confidential to WBC]**

## Annexure D – Commonwealth Bank of Australia’s submission

### Overview

- 1 CBA refers to the ACCC’s Statement of Preliminary Views in respect of the Proposed Amalgamation dated 4 June 2021 (**ACCC Statement**).
- 2 CBA has set out its views regarding the Proposed Amalgamation in (i) its confidential statement dated 17 March 2021 (**CBA Statement**); and **[CONFIDENTIAL TO CBA]**.
- 3 In this submission, CBA addresses the point made at paragraph 2.56 of the ACCC Statement that: *'At this time, it is not clear to the ACCC that a more efficient process would result in NewCo shareholders investing to adopt payments initiatives sooner than they would with the proposed amalgamation, thereby increasing the likelihood of payments initiative reaching network effect more quickly than without the proposed amalgamation...'*
- 4 CBA also addresses specific points made in the ACCC Statement regarding the likelihood of the Proposed Amalgamation leading to a substantial lessening of competition.
- 5 By way of summary:
  - CBA’s experience is the current governance structure delays payment initiatives being brought to market. CBA considers that by creating a single governance structure, the Proposed Amalgamation will enable payment initiatives to be brought to market sooner.
  - **[CONFIDENTIAL TO CBA]**.
  - CBA is a user of the infrastructure and services provided by payment schemes (both domestic and international). It is not in CBA’s interests to reduce competition and innovation within the Australian payments system (be that infrastructure or services related). Respectfully, CBA does not share the ACCC’s view that the Proposed Amalgamation is likely to substantially lessen competition because:
    - CBA does not consider BPAY, the NPPA and eftpos to be close competitors;
    - CBA does not consider that BPAY, the NPPA and eftpos will compete to a material degree in the future; and
    - CBA considers that the international card schemes will continue to act as a significant competitive constraint in the Australian payments system.
  - CBA does not consider that the Proposed Amalgamation will reduce eftpos’ capability. Far from diminishing eftpos’ capability, CBA views the Proposed Amalgamation as being critical to eftpos successfully competing with the international card schemes and offering a strong domestic alternative in the medium term. Material aspects of eftpos’ roadmap which have been endorsed by its shareholders (subject to the Proposed Amalgamation proceeding) maximise eftpos’ ability to offer a value proposition that is competitive with the international card schemes.
  - CBA does not consider that the Proposed Amalgamation will result in third party access to the NPP being denied or frustrated.

### Reduced uncertainty allowing for more efficient deployment of capital, sooner

- 6 CBA welcomes the ACCC’s recognition of the efficiencies generated by the Proposed Amalgamation. As the ACCC Statement acknowledges at paragraph 2.55 *'a single overarching body (NewCo) could enable information sharing, coordination and alignment of roadmaps across the three entities to remove overlapping payment initiatives'*.
- 7 In CBA’s opinion these efficiencies will allow CBA and the rest of the industry to take decisions and commit to payments initiatives sooner. These efficiencies will maximise scarce investment resources to develop and deliver maximum value to the Australian consumer.



## Inefficiencies associated with the current governance structure are causing delays

8 The current governance structure, under which the three payment schemes operate separately, is causing delays to payments initiatives being brought to market in the following ways:

- **Lack of coordination between the schemes on payment initiatives.** CBA is constantly asked by each of the schemes to consider and evaluate payment initiatives.<sup>21</sup> CBA dedicates its scarce resources, primarily in the form of the time of the same small number of subject matter experts, to undertake this evaluation. This is time consuming. It commonly involves multiple meetings with the relevant payment scheme during which the scheme will present its proposal, internal consideration and evaluation, follow on engagement with the scheme on the proposal and a formal decision making process within CBA to dedicate resources.<sup>22</sup> Time and resources are inefficiently used when the three schemes separately ask CBA to consider and evaluate proposals that have overlapping use cases.<sup>23</sup>
- **Lack of a single forum for shareholders to evaluate and compare proposals presented by the three schemes.** Currently each scheme has its own governance structure. There is no overarching forum in which the scheme shareholders – the banks and retailers – can evaluate proposals made by each of the schemes. This means the shareholders (who are also the key stakeholders in the payments system that are required to make investments to bring the payment solution to market) are currently evaluating proposals internally and then providing feedback to each of the three schemes separately.<sup>24</sup> CBA dedicates significant time and resources to engaging with the three schemes separately. For example, under the current governance structure:
  - CBA has a representative (and alternate representative) on the Board of each scheme. Each Board representative attends multiple meetings a year. For example, for FY2019-2020 the CBA nominee director for eftpos attended seven board meetings and three subcommittee meetings.
  - **[CONFIDENTIAL TO CBA].**
  - **[CONFIDENTIAL TO CBA].**
- **Lack of clarity as to whether a proposal has industry support.** Before CBA is prepared to invest in a proposal it needs assurance that the proposal will achieve broad industry support. Ubiquity and network effects are vital for any payment solution to be successful.<sup>25</sup> CBA will not invest in a payment solution that cannot be widely used by its merchant or individual customers. The separate governance structures and lack of a single decision-making forum hinders CBA's ability to understand whether a proposal has broad industry support (particularly where schemes are developing proposals with overlapping use cases). Currently there is no requirement for the schemes to obtain comprehensive industry support for use cases, particularly from smaller retailers and participants.

## The Proposed Amalgamation resolves those inefficiencies

9 The Proposed Amalgamation resolves each of those hurdles:

- **One coordinating and decision-making body to align payment initiative roadmaps.** A single overarching body (NewCo) will coordinate and align roadmaps across the three payment schemes while still preserving the natural strengths of each – for example, NPPA for account to account initiatives, BPAY for bill payments and eftpos for retail and other payments using its card based rails. NewCo will also enable the three Operating Companies

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<sup>21</sup> **[CONFIDENTIAL TO CBA].**

<sup>22</sup> **[CONFIDENTIAL TO CBA].** See also paragraphs 91-93 of the CBA Statement.

<sup>23</sup> See paragraphs 13-16 of the CBA Statement. **[CONFIDENTIAL TO CBA].**

<sup>24</sup> See paragraphs 74-78 of the CBA Statement.

<sup>25</sup> See **[CONFIDENTIAL TO CBA]** and paragraph 113 of the CBA Statement.

to jointly prioritise initiatives based on customer needs and highest likelihood of success. It will further bring together the complementary strengths of each payment scheme that can be used to develop richer multi-rail payment solutions. As the ACCC Statement recognises, the Proposed Amalgamation will remove overlapping payment initiatives.<sup>26</sup> This will in turn remove the need for CBA to spend time and resources evaluating and contributing to the development of overlapping payment initiatives.

- **A single forum for stakeholder evaluation of proposals.** NewCo will provide a single forum in which the shareholders and industry stakeholders will evaluate proposals developed by the three schemes. This avoids the time that is lost by each shareholder and stakeholder independently evaluating overlapping proposals and then providing their feedback via three separate governance structures.
- **NewCo will provide a single interface through which shareholders and industry stakeholders can manage, communicate with, and provide feedback on investment proposals.** As CBA will only be required to appoint a single Board director (and alternate director), the number of personnel that CBA dedicates to scheme Board interactions will reduce. [CONFIDENTIAL TO CBA]. Given the small number of subject matter experts available to assess proposals, the time and resources saved could instead be dedicated to developing and delivering new investment initiatives, which will in turn lead to payments initiatives being brought to market more rapidly.
- **A forum for determining the level of industry support for a proposal.** Under NewCo, [CONFIDENTIAL TO CBA] will provide the board with a clearer line of sight on the likely adoption and hence success of a proposal. A single forum will allow shareholders and stakeholders to discover which proposals are likely to achieve the necessary ubiquity to merit investment. Given the breadth of stakeholder representation on NewCo, agreement at NewCo will be a good indicator that the proposal enjoys broad industry support.

10 CBA acknowledges that there are other factors that determine when a bank will be in a position to make a solution available to customers, such as different investment cycles and funding priorities. Nevertheless, in CBA's view, the Proposed Amalgamation removes one of the key factors that are the cause of delay – the inefficiencies created by separate governance structures.

[CONFIDENTIAL TO CBA]

11 [CONFIDENTIAL TO CBA].

12 [CONFIDENTIAL TO CBA].

13 [CONFIDENTIAL TO CBA]

- [CONFIDENTIAL TO CBA]

14 [CONFIDENTIAL TO CBA].

15 [CONFIDENTIAL TO CBA].

16 [CONFIDENTIAL TO CBA].

**CBA anticipates that the current governance structure will cause delays to QR Code and Digital ID solutions being brought to market**

17 QR Codes and Digital ID are examples of ongoing industry initiatives where alternative solutions have been put forward. CBA anticipates that the same inefficiencies caused by the current governance structure of the schemes will impact the development of these solutions.

- **QR Codes.** [CONFIDENTIAL TO CBA] each of the three schemes has developed or is in the process of developing QR Codes for in person payments. In particular, the NPPA and eftpos are in the process of developing separate QR Code capabilities (which are based on

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<sup>26</sup> See paragraph 113 of the CBA Statement.



different QR Code standards). In CBA's opinion, time will be lost in QR Code payments being adopted if the solutions developed are not based on a single common standard. The NewCo structure would avoid time and resources being spent on developing overlapping solutions and would assist the industry to bring an interoperable solution to market in a shorter timeframe.

- **Digital ID. [CONFIDENTIAL TO CBA]**. In CBA's opinion, the optimal Digital ID solution would be a single solution that enjoys wide adoption and that leverages the information that banks hold about their customers, with anything else unlikely to win its support for investment. The NewCo structure would avoid time and resources being spent on developing overlapping and sub-optimal solutions and would assist the industry to bring a richer solution to market in a shorter timeframe.

#### **Other means of coordination (eg, through Australian Payments Council and AusPayNet) will not be effective**

- 18 CBA notes the ACCC's invitation for submissions on '*other means of coordination between the banks (eg, through Australian Payments Council and AusPayNet), and how effective these would be*'.<sup>27</sup>
- 19 CBA does not consider that other means of coordination, short of the Proposed Amalgamation, will resolve the inefficiencies outlined above. These inefficiencies are caused by the fact that the schemes are three separate entities that operate under three separate governance structures. Only an amalgamation of those governance structures will adequately resolve these inefficiencies.
- 20 In CBA's experience, alternative fora for coordination (eg, the Australian Payments Council and AusPayNet) would not be able to resolve the present inefficiencies.
- 21 The key reason for this is the fact that **these fora do not have the power to compel the schemes to prioritise payment initiatives**. The Australian Payments Council and AusPayNet are not structured to 'govern' the schemes. They are fora for industry consultation, developing rules governing the operations of payment systems, and play an advisory role. This is not sufficient to align the schemes and stakeholders on development roadmaps. The schemes have different interests and incentives. NewCo will be a forum where scheme proposals can be considered and coordinated, and will have the power to take decisions as to which proposals should be prioritised.
- 22 The Australian Payments Council is a forum for the RBA to more closely engage with industry and when necessary direct the industry to co-ordinate on strategic objectives of the Payments System Board. It is not a decision making body and not a body that can compel the payment schemes (or their shareholders) to take actions. **[CONFIDENTIAL TO CBA]**
- 23 AusPayNet is an industry association and self-regulatory body for payments. It sets rules regulating the operation of payment systems that it administers (eg, daily operations of clearing and settlement, or the security of devices for card payments). AusPayNet does not have the power to compel payment schemes to prioritise payment initiatives and does not seek to regulate the provision of payments instruments. **[CONFIDENTIAL TO CBA]**
- 24 **[CONFIDENTIAL TO CBA]**.
- 25 Further **competition law considerations hinder the extent to which the three schemes can coordinate** absent the merger. As separate entities, competition law prevents the schemes from coordinating their payment initiatives. CBA understands that the schemes (or their shareholders) could seek authorisation from the ACCC for such coordination. Seeking authorisation to permit coordination with respect to individual payment initiatives would delay initiatives being brought to market. In considering a request for authorisation, the ACCC would need to conduct the same public benefits evaluation that it is currently undertaking.

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<sup>27</sup> ACCC Statement, p 12.

## Changes in structure, ownership and control of the amalgamation entities

- 26 CBA notes that *'the ACCC is considering how the major banks' control of the three payment schemes will change as a result of the proposed amalgamation'<sup>28</sup> and that 'in considering whether the proposed amalgamation would further consolidate or entrench the influence of the major banks into the future, the ACCC is examining the decision-making processes within the proposed governance structure and the role of the three operating companies'.<sup>29</sup>*
- 27 CBA wishes to confirm that its support of the Proposed Amalgamation is not driven by a desire to *'consolidate or entrench'* the bank's position in the Australian payments system. **[CONFIDENTIAL TO CBA]**
- 28 **[CONFIDENTIAL TO CBA]**.

## Potential competition effects

- 29 CBA notes the ACCC's preliminary view that it is *'not satisfied that the proposed amalgamation will not result in a substantial lessening of competition in a market or markets relating to payments services or infrastructure'*.<sup>30</sup> CBA understands the ACCC to be considering whether the Proposed Amalgamation:<sup>31</sup>
- reduces incentives to compete or invest in the domestic schemes where their payments solutions may overlap in the future;
  - reduces or removes competition between the domestic schemes in relation to their infrastructure;
  - reduces eftpos' capability;
  - will result in third party access to the NPP being denied or frustrated.
- 30 CBA is a user of the infrastructure and services provided by payment schemes (both domestic and international). It is not in CBA's interests to reduce competition and innovation within the Australian payments system (be that infrastructure or services related). As a user of payments infrastructure and services, respectfully, CBA does not share the ACCC's view that the Proposed Amalgamation is likely to substantially lessen competition.

### **CBA does not consider BPAY, the NPPA and eftpos to be close competitors**

- 31 Each of the domestic schemes has focussed on distinct aspects of the Australian payments system: the NPPA on account to account payments; BPAY on bill payments; and eftpos on card based payments.
- 32 The three schemes have developed distinct infrastructure and technology to address those three different focus areas. CBA does not view the three schemes to be competing to for the same types of payments in order to attract transaction volumes to their rails. This is because the infrastructure developed by each of the three schemes is used to make different types of payments.

### **CBA does not consider that BPAY, the NPPA and eftpos will compete to a material degree in the future**

- 33 CBA acknowledges that the domestic schemes are starting to diversify their payments offerings. For example, as outlined above, the three schemes have explored direct debit solutions as well as Overlay Services such as QR Codes and adjacent services such as Digital ID.
- 34 In theory, this suggests that there is the potential for overlaps between the three schemes and therefore competition in the future.

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<sup>28</sup> ACCC Statement, paragraph 2.1.

<sup>29</sup> ACCC Statement, paragraph 2.10.

<sup>30</sup> ACCC Statement, p 1.

<sup>31</sup> ACCC Statement, p 1.



35 In practice, CBA does not believe that there will be material head to head competition between the three schemes in the future. This is because to diversify away from their core competencies the three domestic schemes require know-how, talent, financial resources and the support of their shareholders and stakeholders to bring solutions to market. CBA's experience has been that the three schemes rely heavily on their shareholders to develop and implement new payment solutions. For a payment solution to gain traction it needs to offer a compelling value proposition for users. **[CONFIDENTIAL TO CBA]**. As explained above, CBA's experience has been that when the schemes present overlapping solutions, due to the separate governance structures, CBA spends time and resources to determine which solution to support.

36 If the Proposed Amalgamation does not proceed, CBA does not anticipate that the domestic schemes will have the ability to bring competing services and infrastructure to market. Rather, CBA expects the status quo will continue: CBA will continue to be asked to choose between overlapping requests and CBA will focus its resources on the solution that has most potential and the highest likelihood of industry support. In this regard, it is important to recognise that building infrastructure to support payments is expensive (CBA estimates that the industry has spent over \$1 billion to build the NPP). For payments infrastructure to be economically viable it needs to attract transaction volumes to cover the high fixed costs. In CBA's opinion, the transaction volumes in Australia do not justify investment in multiple pieces of overlapping infrastructure. As explained above, the current governance structure makes it difficult for CBA to effectively prioritise the use of its scarce resources and causes delays in bringing new payment solutions to market.

**CBA considers that the international card schemes will continue to act as a significant constraint in the Australian payments system**

37 The international card schemes are an important presence in the Australian payments system. Visa and Mastercard make significant investments in their payments offerings, drawing on their global expertise and deep financial resources. They are a significant competitive force in the payments system and compete against each of the three domestic schemes.

38 One of the drivers for CBA in supporting the Proposed Amalgamation is the fact that NewCo will be a stronger competitive force against the international card schemes. The domestic schemes face a structural disadvantage as they do not have the global expertise and financial backing that the international card schemes enjoy. The Proposed Amalgamation assists the domestic schemes to overcome that disadvantage by pooling resources and expertise. This is in CBA's interests as it increases the competitive tension that the international card schemes face and puts a downward pressure on the scheme fees that the international card schemes charge CBA.

**CBA does not consider that the Proposed Amalgamation will reduce eftpos' capability**

39 It is in CBA's interests that eftpos continues to operate and contributes to innovation in the Australian payments system. CBA wishes for eftpos to act as a strong domestic and innovative alternative to the international card schemes and a means of putting appropriate commercial tension on the costs of those international schemes.

40 Far from diminishing eftpos' capability, CBA views the Proposed Amalgamation as being fundamental to eftpos' continued viability in the medium to long term.

41 Based on its historical performance, CBA is concerned that eftpos will not be a strong viable domestic counter to international card schemes in the medium to long term. In this regard, CBA does not consider that eftpos will be able to keep pace with the offerings from its closest competitors – the international card schemes.

42 **[CONFIDENTIAL TO CBA]**

**[CONFIDENTIAL TO CBA]**

**CBA does not consider that the Proposed Amalgamation will result in third party access to the NPP being denied or frustrated**



43 As outlined above, there are high fixed costs associated with establishing and maintaining payments infrastructure. Key to the NPP's continued viability is the need to attract and grow transaction volumes to cover the fixed costs. Fintechs deliver innovative payment solutions directly to business users, or develop Overlay Services, such as the Osko services developed by BPAY. These services attract transaction volumes to the NPP. It is therefore in the NPPA's interests and core to its strategy to allow fintechs to connect to its rails in an effort to grow volumes and bring down the average cost of an NPP transaction.

## Annexure E – Confidential Woolworths’ submission

Woolworths considers that many of the potential concerns raised in the key Preliminary Views are **not** contingent on the Proposed Amalgamation. Rather, the basis for these potential concerns (to the extent they are valid) exists in the present state and would continue to arise in a counterfactual scenario absent the amalgamation. They are therefore not relevant considerations for the purposes of the authorisation application. We set this out in further detail in respect of specific key Preliminary Views below.

Woolworths also notes that its ability to express views on a number of these points is relatively limited as Woolworths is only currently a shareholder of eftpos (not BPAY or NPPA) and does not use BPAY or NPPA’s services. Woolworths’ comments below are therefore based only on Woolworths’ understanding of eftpos’ activities, and general understanding of the proposed governance structure under NewCo.

**The key Preliminary Views are whether, compared to the counterfactual scenario, the amalgamation will be likely to:**

- 1. Reduce the incentives for the three payment schemes to compete in 4 service markets:**
  - a. Person-to-business point-of-sale electronic payments (where eftpos and NPPA compete);**
  - b. Online retail, bill and invoice payments (including one-off and recurring payments) (where BPAY, eftpos and NPPA compete);**
  - c. Person-to-person, person-to-business and business-to-business payments (where BPAY, eftpos and NPPA compete); and**
  - d. Business-to-person and government-to-person payments (BPAY, eftpos and NPPA).**

Woolworths considers that eftpos does not currently compete with NPPA and BPAY in any of the four markets identified by the ACCC. Rather, any potential competition between the three payment schemes in these areas is contingent on future development and innovation. For example, eftpos only currently operates in the first “market” identified by the ACCC, being person-to-business point-of-sale electronic payments. As far as Woolworths is aware, NPPA does not currently compete in this “market”.

In any event, Woolworths does not consider that the amalgamation will result in any meaningful change in the incentives to compete compared to the counterfactual scenario. This is because in the current state (and in the counterfactual), many of the shareholders of BPAY, NPPA and eftpos are common (e.g. the major banks). These common shareholders already have to consider competing priorities when making investment decisions. It is therefore not clear to Woolworths how the amalgamation, in which the common shareholders will remain largely unchanged, would lead to the suggested reduced incentives to compete.

- 2. Reduce competition in payments infrastructure markets by creating an ability to prevent third party service providers from accessing NPP’s rails**

Woolworths is not a current NPPA shareholder and does not currently use NPPA’s services or NPP’s rails. Woolworths is not aware of any intention for NPPA or NewCo to prevent third party service providers from accessing NPP’s rails. Woolworths understands that as part of the amalgamation, NewCo has made a commitment to embrace new shareholders and expand its membership as part of its governance structure. This is likely to have the effect of further opening access to NPP’s rails.

**3. Reduce eftpos' capability through:**

- a. deprioritising eftpos' initiatives as a result of investment proposals from BPAY and NPPA, thereby diminishing eftpos' ability to compete with the ICS and increasing merchants' costs; and**
- b. migrating eftpos' volumes to the NPP**

In relation to (a), Woolworths does not believe that the amalgamation will result in eftpos' initiatives being deprioritised and/or diminish its ability to compete with the ICS.

Rather, in Woolworths' experience, **[CONFIDENTIAL TO WOOLWORTHS]**.

Secondly, as stated in Woolworths' statement, Woolworths considers that it is both critical for eftpos' viability, and in Woolworths' and other retailers' interests, for eftpos to be a viable domestic competitor to the ICS. Should the amalgamation proceed, **[CONFIDENTIAL TO WOOLWORTHS]**. Woolworths considers that the amalgamation will actually enable eftpos to be a more effective competitor to the ICS by:

- enabling eftpos to expand its services to the online space, which is a critical development to ensure effective competition against the ICS, given that there is an increasing number of online transactions in Australia and the ICS are already online;
- providing eftpos with a stronger balance sheet and pooled resources, and therefore increased support for it to deliver innovations; and
- increased focus on strategic direction from a common member base, as opposed to the current state of play where the payment schemes' common members must navigate competing priorities.

In relation to (b), Woolworths' view is that **[CONFIDENTIAL TO WOOLWORTHS]**.

**4. Result in LCR being neglected or abandoned**

Woolworths does not agree that the amalgamation will result in LCR being neglected or abandoned. LCR will not be affected by the amalgamation as LCR is not currently implemented by eftpos, BPAY or NPPA, and will not be implemented by NewCo post-amalgamation. Rather, LCR must be implemented by the banks and payment processors with the RBA's oversight.

As the ACCC has stated in its Statement of Preliminary Views, the RBA has persuaded the major banks to offer LCR to merchants in recent years and is likely to continue to support LCR initiatives. Accordingly, Woolworths believes that insofar that the RBA continues to support the rollout of LCR, LCR will not be neglected or abandoned post-amalgamation.

In relation to eftpos specifically, Woolworths notes that a key part of eftpos' strategic roadmap (which will apply should the amalgamation proceed) is to continue to provide low cost services, which will be of benefit to users of LCR.

Woolworths view is that LCR has a better chance of succeeding in a combined entity, as this has streamlined and guaranteed key digital components in the eftpos roadmap that can further enable digital LCR (currently not available).

**5. Result in decisions being dominated by the Major Australian Banks and Retailers due to the OpCos having limited influence or control over their future roadmaps**

The future roadmaps of the three payment schemes are currently driven by the shareholders of these entities, many of whom are Major Australian Banks and Retailers. This would continue to be true in a counterfactual scenario.



Further, the proposed governance structure of NewCo means that, should the amalgamation proceed, the decision-making power of the Major Australian Banks and Retailers will be reduced compared to the current state. This is because NewCo's proposed governance structure is intended to ensure that the NewCo Board is representative of a broader range of payments stakeholders than is currently the case for any of the three payment schemes. Additionally, all NewCo shareholders will have one vote at General Meetings regardless of their shareholding size.

**6. Result in NewCo's shareholders investing to adopt new payment proposals sooner (noting the ACCC is asking how this result will occur having regard to NewCo's shareholders' individual commercial strategies, available funds, need to consider alternative proposals (including from the ICS) and need to use IT and other technical resources to develop their own service offerings)**

Woolworths considers that the amalgamation will result in the adoption of new payment proposals sooner as the amalgamation will:

- enable NewCo's shareholders to streamline decision making regarding the adoption and implementation of new proposals. **[CONFIDENTIAL TO WOOLWORTHS]**. These efficiencies will allow new proposals to be achieved faster; and
- provide an opportunity for BPAY and NPPA to more quickly and better innovate **[CONFIDENTIAL TO WOOLWORTHS]**.

**7. Reduce the risk of stranded assets (noting the ACCC has asked for examples of stranded assets, other than BPAY's Osko 3 service)**

As far as Woolworths is aware, eftpos has no stranded assets. Woolworths is not privy to the existence or nature of any stranded assets of BPAY or NPPA, as Woolworths is not a shareholder of, or user of the services of, BPAY or NPPA.

**Annexure F – Revised NewCo Constitution**

**[Confidential to the Parties]**

**Annexure G – New Shareholder and Committee Principles**



# New Shareholder and Committee Principles

## 1 New shareholders

The principles regarding new shareholders include the following:

- (a) **(representation of stakeholders)** The Board of NewCo should seek to expand the shareholder base such that it adequately represents the stakeholder community from time to time.

In doing so, the Board of NewCo:

- (i) should establish an appropriate balance between the number of shareholders necessary to reflect the stakeholder universe and the need to ensure that each shareholder has a meaningful role;
- (ii) should bear in mind that the takeover provisions in Chapter 6 of the *Corporations Act* may apply to NewCo if it has 50 or more shareholders at any time (and that it is not workable for the takeovers provisions to apply); and
- (iii) should consider the application of laws such as the *Foreign Acquisitions and Takeovers Act* and the *Security of Critical Infrastructure Act* in the context of considering an application by an entity which is not incorporated and/or domiciled in Australia to become a shareholder of NewCo.

- (b) **(shareholder criteria)** There should be a transparent application process and criteria that need to be met in order to become a shareholder.

The shareholder criteria should require the following (subject to any determination by the Board of NewCo to the contrary):

- (i) **(eligibility)** the applicant must be either:
  - (A) a “Participant Member” for the purposes of the Business Rules and Operating Procedures applicable to the BPAY Scheme;<sup>1</sup> or
  - (B) an “NPP Participant” or “Connected Institution” for the purposes of the NPP Regulations applicable to the New Payments Platform; and/or
  - (C) a “Direct Connector” or “Direct Settler”<sup>2</sup> for the purpose of the eftpos Scheme Rules applicable to the eftpos Payment Scheme; and
- (ii) **(active engagement)** the applicant must intend to be actively engaged with the governance of NewCo, including with issues such as:
  - (A) the roadmap and future direction for the development of payments services;
  - (B) promoting innovation in payments; and
  - (C) enhancing connectivity between, and integration of, the BPAY, NPP and eftpos systems.

<sup>1</sup> Capitalised terms used in this document have the meaning given in the draft Constitution for NewCo, unless the context requires otherwise.

<sup>2</sup> The reference to these terms will be considered further when the limited proposed changes to the eftpos Scheme Rules due to the amalgamation are finalised.

There should also be a requirement that each new shareholder make a capital contribution of a fixed amount of A\$50,000.

The Board of NewCo could consider asking a shareholder that ceases to meet those criteria to consider requesting that NewCo redeem the preference shares held by it in accordance with the constitution of NewCo.<sup>3</sup>

## 2 Input from interested stakeholders<sup>4</sup>

### 2.1 Establishment of the committees

NewCo should establish two advisory committees, being:

- (a) an End-User Committee to represent the views of end-users of the BPAY, NPP and eftpos systems, being individual consumers, small businesses, big businesses, industry associations, charities, corporations, fintech operators and government departments (ie the “**End-Users**”); and
- (b) a PSP Committee to represent the interests of the payment service providers (“**PSPs**”) and other organisations in the payments ecosystem (eg Token Servicers and Digital ID Service Providers).

The draft NewCo Constitution should be updated to include a new article 9.10 and associated definitions of the Committees, as extracted below.<sup>5</sup>

#### 9.10 End-User Committee and PSP Committee

The End-User Committee and PSP Committee will report annually and publicly on their work, and may make such other public statements relevant to their work as they see fit. The Directors shall respond publicly and as soon as possible to the annual reports and other public statements made by the End-User Committee and PSP Committee.

**End-User Committee** means the end-user advisory committee, as formed from time to time by the board.

**PSP Committee** means the payment service provider committee, as formed from time to time by the Board.

### 2.2 Terms of reference of the Committees

The terms of reference for each Committee should be developed by reference to the following objectives:

- (a) ensuring the Board of NewCo has a strong understanding of the issues and concerns of End-Users and of PSPs. For example, the Committees could:
  - (i) identify priority areas for consideration and resolution including:
    - (A) changes to practices and products that could result in better outcomes for end-users or PSPs (as applicable); and
    - (B) specific issues related to some End-Users or PSPs, for example in the case of the End-User Committee, low income and/or vulnerable individuals;
  - (ii) develop responses and solutions for resolving priority areas including:
    - (A) information sharing and explanation of practices; and

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<sup>3</sup> The constitution provides that the redemption amount for each preference share redeemed will be A\$0.01.

<sup>4</sup> By way of background, the Payment System Operator Delivery Group Report, Final Report dated 4 May 2017 (the “**PSODG Report**”) considered the then proposed consolidation of domestic payment systems in the United Kingdom. The principles in this section 2 in relation to the establishment, terms of reference and structure of the Advisory Committees were developed taking into account the relevant principles considered in the PSODG Report in relation to an End-User Advisory Council and Participant Advisory Council.

<sup>5</sup> These provisions are based on the provisions in the Pay.UK Limited Articles of Association adopted on 9 September 202 related to its End-User Advisory Council and Participant Advisory Council.



- (B) joint research and reports on specific issues;
- (b) effectively managing interaction between the Board of NewCo and both End-Users and PSPs to ensure that the voices of End-Users and Participants are heard; and
- (c) enabling End-Users and PSPs to provide input to the Board of NewCo on the general strategic context of payments, including:
  - (i) the roadmap for the development of payments services;
  - (ii) promoting innovation in payments; and
  - (iii) enhancing connectivity between, and integration of, the BPAY, NPP and eftpos systems.

## 2.3 Structure of the Committees

The structure of the Committees should be developed by reference to the objectives that the Committees:

- (a) should be independent in their construct and representation, and safeguards should be put in place to manage conflicts of interest. An independent director of NewCo will act as a chair for each Committee;
- (b) should have close links with each other to encourage a broader perspective across both groups within the payments ecosystem. Where appropriate, a representative from the End-User Committee could attend the PSP Committee and vice versa as a non-voting member to facilitate informed debate and decision making and the Committees reaching consensus on key issues, where possible, before the views of each Committee are passed to the Board of NewCo; and
- (c) should include senior representatives of each of BPAY Group Pty Ltd, eftpos Payments Australia Limited and NPP Australia Limited.<sup>6</sup>

Committee members should be required to act honestly and exercise a reasonable degree of care and diligence. One of the criteria to be a member of the Committee should be that the person not have been subject to a finding of, or reprimanded for, misconduct in connection with their employment, whether by their employer (current or previous) or any legal or regulatory body.

The membership of each Committee should be reviewed every two years.

The Board of NewCo should take into consideration the Committees' views to inform decision making, including in relation to the roadmap for the development of services, and the dialogue between the Committees and the Board of NewCo should be two way. As noted above, the End-User Committee and PSP Committee should report annually and publicly on their work, and may make such other public statements relevant to their work as they see fit. The Board of NewCo should respond publicly and as soon as possible to the annual reports and other public statements made by the Committees.

## 2.4 Operation of the Committees

The operations of the Committees should align with their objectives, as set out above. In order to achieve these objectives:

- (a) each Committee will prepare an annual work plan;
- (b) each Committee should meet periodically (to be determined by the Committee); and
- (c) the operation of each Committee is to be reviewed within two years.

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<sup>6</sup> Newco will seek to roll-in existing advisory committees of BPAY, NPPA and eftpos where relevant and appropriate to do so.

### NewCo Independent Non-Executive Directors

There will be four independent Non-Executive Directors appointed to NewCo's Board of 13, one of which will be appointed Chair. Each will be accomplished leaders with notable executive achievement and reputation as per the criteria below.

#### Board skills

- Domain knowledge in payments or related network-type platforms, infrastructure, technology, or operations disciplines in Australia and/or overseas.
- Marketing and consumer experience across a variety of customer and user segments, particularly consumer and small to medium businesses.
- Leadership and influencing skills and a demonstrated ability to build, maintain and manage key relationships with participants, industry, government and regulators.
- Exposure to early stage innovation and development in fintech or platform investments.
- Commitment to regulatory, compliance and governance disciplines in regulated environments.

Ability to contribute positively and actively to development of an inclusive, diverse and accountable Board and operational culture.

#### Personal attributes

- Integrity, personal values and skills appropriate to an industry-based and regulated Board.
- Strong strategic and commercial acumen.
- Can develop and articulate own thoughts in a collegiate manner and receptive to the views of others and complementing the collective strengths of the Board.

#### Term

- The term of appointment will be three years. At establishment of NewCo, the Chair will be appointed for three years and each of the three independents will be appointed for an initial period of 1, 2 or 3 years, decided by vote of the shareholders, with a term of three years on successful re-election.
- Remuneration will be in line with market and be advised in due course.

#### Criteria for independence

Independent directors, under the NewCo Constitution, must meet the following criterion both at appointment and throughout the duration of their term:

- The person is not currently, and has not within the last two years, been employed by<sup>1</sup>, or acted in a material way, as: a professional adviser, consultant, supplier or customer to; nor had a substantial holding in, an existing shareholder of one of the three operating companies being consolidated (NewCo)<sup>2</sup>; or, a Related Body Corporate of a Shareholder of NewCo within the meaning of the Corporations Act.

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<sup>1</sup> Excluding Independent Directors of eftpos Payments Australia Limited or NPP Australia

<sup>2</sup> In this context NewCo means NewCo, eftpos Payments Australia Limited, BPAY Group, and NPP Australia

**Annexure I - NewCo Chair and NED Appointment Process**



## NewCo Chair and NED Appointment Process

Prepared by TAC Secretariat, 08 June 2021

### Background

As outlined in the draft NewCo Constitution, if approved by the ACCC, the NewCo will include an independent Chair and 4 independent Non-Executive Directors (NEDs), alongside a number of representative directors representing share class groups.

As agreed by all Participants (Applicants to the ACCC) and in line with the 'ICA Implementation Agreement', the inaugural NewCo Chair is to be appointed by the Transaction Advisory Committee, and that inaugural NewCo Chair will then support the TAC with appointing the 4 inaugural NEDs.

### Timeline

Date	Progress
29/01/21	[TAC meeting #1] Chair noted that TAC will develop an approach for appointment of Chair and NEDs.
05/02/21	[TAC meeting #2] Chair suggested that a subcommittee structure will be needed to consider appointment of Chair and NEDs.
12/02/21	[TAC meeting #3] Chair proposed that Governance Subcommittee (GSC) should be formed in coming weeks.
19/02/21	[TAC meeting #4] TAC agreed that GSC's primary task will be to recommend to TAC the process and potential candidates for Chair and NEDs. TAC agreed that GSC is to comprise 2 members from major banks, 1 from retailers, 1 from non-major banks, and 1 from other ADIs. TAC takes action to identify these representatives.
26/02/21	[TAC meeting #5] TAC noted GSC Draft Terms of Reference (ToR). TAC noted <b>GSC has been stood up</b> comprising Jim Tate (JT) Westpac (organiser), Nigel Dobson (ND) ANZ, Paul Askew (PA) Coles, Sarv Girn (SG) Cuscal, and Kees Kwakernaak (KK) Fiserv.
04/03/21	[GSC meeting #1] GSC confirmed ToR, began discussions on draft appointment criteria for Chair and NEDs including research into ASX board skills matrices, proposes to engage recruitment firm to conduct independent recruitment process
05/03/21	[TAC meeting #6] Final <b>GSC ToR presented to TAC</b> , TAC noted ongoing discussion on criteria.
10/03/21	[GSC meeting #2] GSC noted that potential NEDs are being proactively suggested already, agreed to establish <b>confidential central register of names</b> put forward.
12/03/21	[TAC meeting #07] GSC advised TAC to provide any suggestions on Directors to central register (instead of to individual GSC members), to later be provided to independent recruitment agency for consideration. GSC presented <b>draft Board Skills Paper (Selection Criteria / Matrix)</b> .
19/03/21	[TAC meeting #08] TAC noted ongoing work of GSC
29/03/21	[GSC meeting #3]
09/04/21	[TAC meeting #09] Chair noted a number of stakeholders have requested seats on the Board, and we have reiterated that membership will be based on ensuring the diversity of skills required for the Board to meet the needs and interests of stakeholders, rather than favouring one or more business organisations.

## Industry Committee Administration Pty. Ltd.

<i>Date</i>	<i>Progress</i>
23/04/21	[TAC meeting #10] GSC noted we will invite existing Independent NEDs of NPP and eftpos to express interest in being considered for the NewCo Board. GSC noted that proposals have been sought from two Executive Search Companies to assist with identifying Directors.
30/04/21	[TAC meeting #11] GST noted proposals have been received from two Executive Search Companies, and invitations have been sent to independent non-executive directors of eftpos and NPPA.
05/05/21	[GSC meeting #4] GSC meets, votes to select Heidrick & Struggles as recruiter, and discusses potential Director Fees and tenure.
14/05/21	[TAC meeting #12] GSC advises TAC of selection of Heidrick & Struggles, and invited all TAC and other nominations for the NED positions to be received by 28/05/21. Need for diversity discussed, along with timing of Chair, NEDs, and Representative Directors appointments.
28/05/21	[TAC meeting #13] GSC noted that 5 of the 6 existing Independent NEDs of NPP and eftpos have expressed interest in being considered for the NewCo Board, and noted that TAC nominations for the NED positions should be received by COB today 28/05/21. GSC noted that <b>a list of 30 candidates for Chair has been received from Heidrick &amp; Struggles</b> , noting we will not proceed with NEDs until the Issues Paper and indication from ACCC.
01/06/21	[GSC meeting #5] GSC discussed timeline for NED appointment, ensuring mix of skills between NEDs and representative directors.
09/06/21	[GSC meeting #6] GSC to discuss process for appointing Representative Directors

**Annexure J – Non Confidential Decision-making process**



**Non Confidential Version**

KING & WOOD  
MALLESONS  
金杜律师事务所

**Annexure J**

**Payments Amalgamation**

**Response to Statement of Preliminary Views**

18 June 2021

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1. The process for deciding the following, under the current status quo and under the amalgamation:
  - To direct cash from eftpos to another scheme
  - To admit new members to the NPP
  - To remove BPAY View
  - To change eftpos' scheme fees
  - To change BPAY's capture re-imburement fee
  - To set the pricing for NPPAs PayTo (MPS) service
  - To issue a mandate
2. The principles for admitting new shareholders to NewCo

# Process for redirecting cash from eftpos to another scheme

## Current

***This would not be possible under the status quo***

**(eftpos Board must act in the best interests of eftpos)**



## Future – under the amalgamation



*Board determination*



*Request to eftpos*



1. Having regard to their fiduciary duties and obligations to act in the best interests of NewCo, the Directors of NewCo would have to decide to redirect cash from eftpos, requiring a majority decision of the Directors present and entitled to vote. They would be obliged to consult and to consider the views of the Board's Committees in that regard.
2. Because the decision would satisfy article 10.5(b) of NewCo's Constitution, any 2 directors may request that the decision requires ratification by a Special Majority Band Resolution.
3. If requested, a Special Majority Board Resolution would be required to ratify the NewCo's Board's decision. The threshold for this decision would be 75% or more of NewCo Shareholders, by number, who are participants in eftpos' payment scheme ie. the users of eftpos. There are currently **[Confidential to Applicants]** users of eftpos who will be shareholders of NewCo. More than **[Confidential to Applicants]** of those users would need to ratify the Resolution before it could take effect thereby providing a protection for eftpos
4. If the Special Majority Band Resolution is passed or is not requested, NewCo would formally request that eftpos re-direct their cash to another scheme. The eftpos Board would comply with the request if it considered it would be in the best interests of NewCo

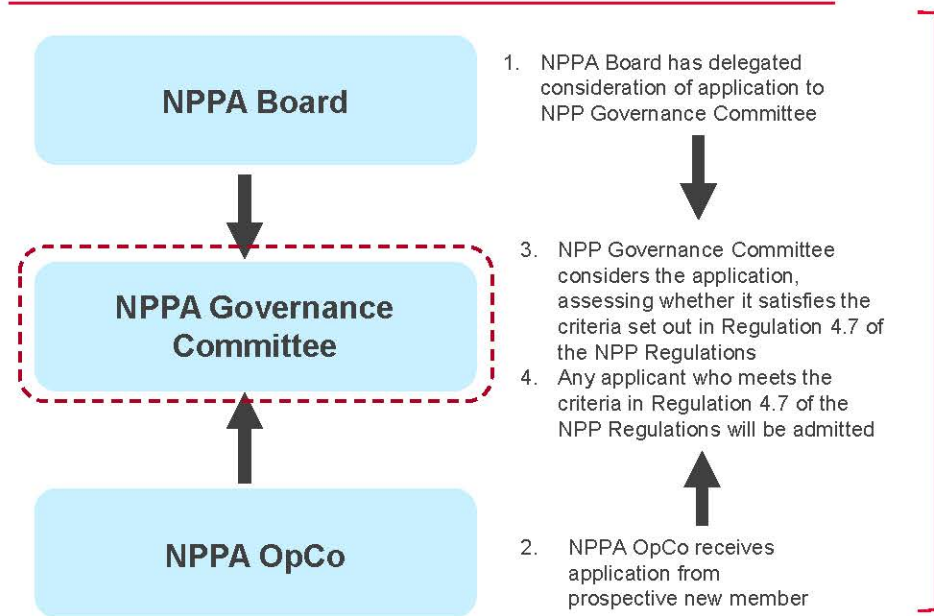
The Proposed Amalgamation is intended to create a governance structure that allows for multi-rail payments initiatives to be brought to market drawing on the strengths of each scheme. It is not intended to favour one scheme over another or to cross subsidise the schemes as this would be counter to the multi-rail strategy. However, if a cross subsidisation measure were proposed, the process is set out below.



# Process for admitting new members to NPP

## No change to the status quo under the amalgamation

### Current

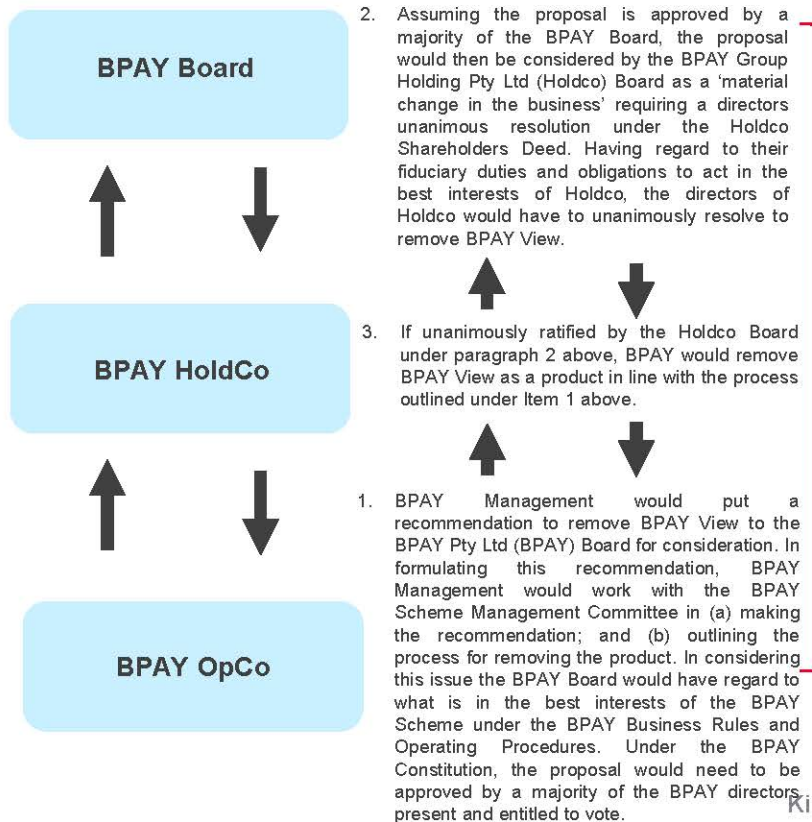


### Future – under the amalgamation

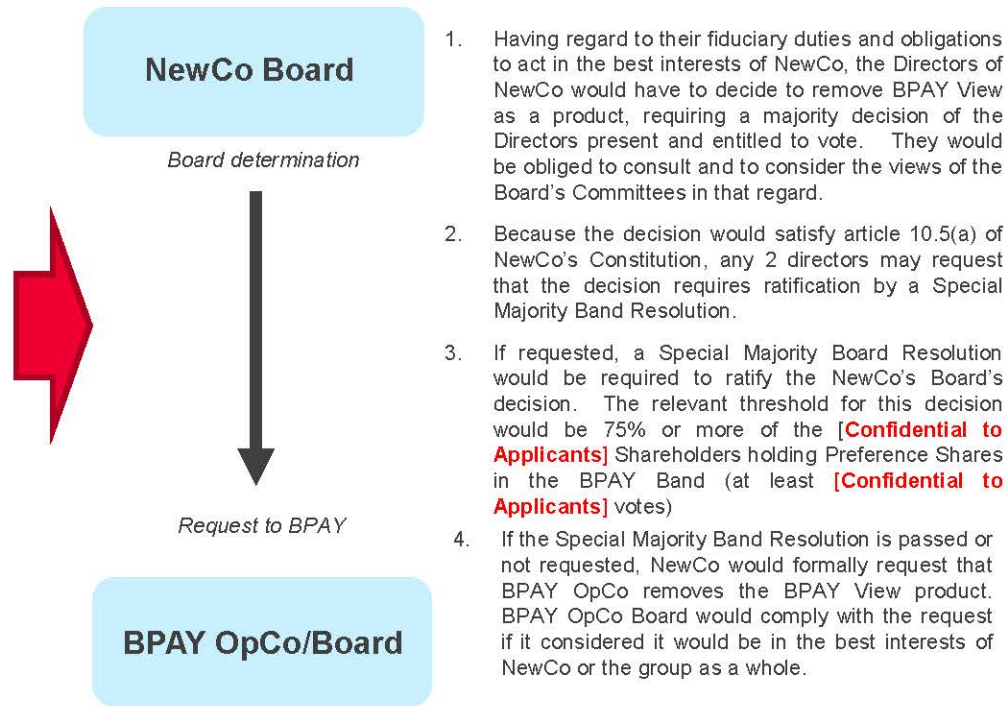
- NPP Governance Committee (as a delegate of the NPPA Board) will continue to make admission decisions regarding the admission of new members to the NPP in accordance with the NPP Regulations (as set out opposite).
- NewCo will not be involved in the decisions to admit new members to the NPP.

# Process for deciding to remove BPAY View

## Current



## Future – under the amalgamation



# Process for deciding to change eftpos' scheme fees

## No change to the status quo under the amalgamation

(eftpos OpCo retains pricing control)

Current



[Confidential to eftpos]

Future

[Confidential to eftpos]



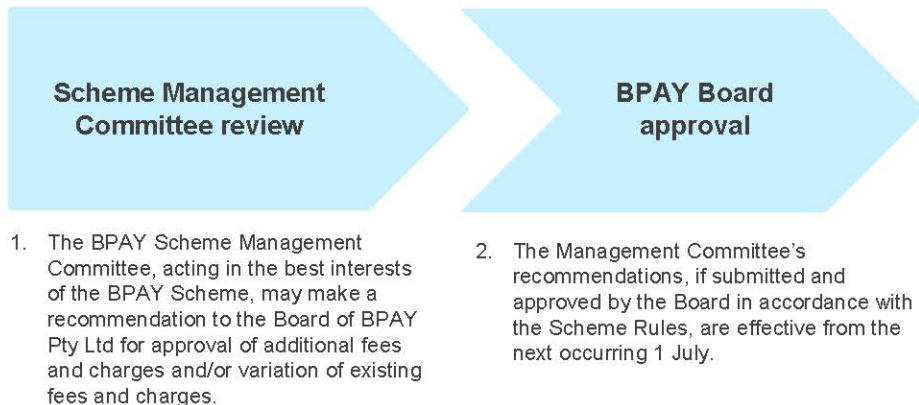
# Process for deciding to change BPAY's pricing and fee schedule

## No change to the status quo under the amalgamation

(BPAY OpCo retains pricing control)

### Current

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### Future

- BPAY OpCo will maintain decision rights over pricing, minimising the risk that payment costs will increase from the status quo.
- Currently, BPAY OpCo (as operator of the BPAY Payment Service) and the BPAY Scheme Management Committee make pricing decisions in accordance with the BPAY Scheme Rules of the BPAY Scheme, and will continue to do so under the amalgamation.

# Process for setting the pricing for NPPA's PayTo (MPS) service

## No change to the status quo under the amalgamation

(NPPA OpCo retains pricing control, exercised through the NPP Governance Committee)

### Current



1. NPPA management prepares a recommendation to the NPP Governance Committee (“NGC”), considering the cost base of NPPA, forecast transaction volumes for the next 12 months and a recommended transaction price which would enable the recovery of NPPA’s cost base relative to expected transaction volumes.

2. The NGC reviews the annual cost base, revenue (and, under the amalgamation, the NPP OpCo’s budget) and management’s recommendation.

3. The NGC makes a fee allocation / pricing decision.

### Future – under the amalgamation

- NPPA will maintain decision rights over pricing, minimising the risk that payment costs will increase from the status quo.
- Currently, the NGC (comprising the independent Chair, independent Directors and the CEO) makes pricing decisions in accordance with the NPP Regulations and on a cost-recovery basis, and will continue to do so under the amalgamation.
- It is envisaged that, at some stage in the future, rather than using a fixed contribution pricing method based on shareholder bands, NPP will implement “per transaction pricing”. This would include the ability for the NPPA to determine pricing based on transaction type if it sees fit (for example, setting different prices for PayTo (MPS) transactions and single credit transfers (SCT)).

# Process for issuing a mandate

## No change to the status quo under the amalgamation

The Proposed Amalgamation is intended to create a governance structure that allows for the alignment of payment initiative road maps between the schemes. This is to avoid overlapping initiatives and to ensure that initiatives can be sequenced to maximise industry take up. Given initiatives approved by NewCo will have broad industry support it is hoped that the imperative for scheme mandates will be avoided. Nevertheless, the process for issuing mandates will remain unchanged.

### Current

#### BPAY

- BPAY Scheme does not mandate take up of particular services by its members. Rather, BPAY mandates that those Members that decide to implement a service do so in line with Scheme Rules and Procedures.

#### eftpos

- **[Confidential to eftpos]**

#### NPP

- When a requirement is considered fundamental to the integrity of the NPP, the Board of NPPA can designate as a Mandatory Compliance Requirement under NPP Regulation 3.8.
- When making a designation decision, the NPPA Board considers the recommendation of the CEO and any impact assessment made by the Change Management Sub-Committee (comprised of representatives of Participants, SWIFT, RBA FSS).
- If the Board decides to designate a requirement it will also set an Effective Compliance Date after which non-compliance with the requirement will be subject to the imposition of Non-Compliance Charges calculated in accordance with the schedule of escalating charges set out in NPP Regulation 3.8(k).



### Future – under the amalgamation

- Neither the Implementation Agreement nor the NewCo Constitution provides NewCo with the power to issue mandates on any current shareholder or member of an OpCo, or any participant in a Payment Services.
- The individual OpCos would determine if a mandate was necessary to achieve the agreed deployment for a particular product/service or functionality that they are looking to deploy
- Any mandate that is issued by the OpCos will need to be linked to a product/service or functionality that is part of the Newco Board approved payments roadmap and strategy (i.e. all OpCo mandates would need to link back to a coherent roadmap of service deployments that is, due to Newco Board oversight, strategically sequenced)
- The process for issuance of a mandate would be consistent with the OpCo's current practice and in accordance with the operating rules of that Payment Service.



# Principles for admitting new shareholders to NewCo following the amalgamation

## Considerations for expanding shareholding

- The Board of NewCo should expand the shareholder base such that it **adequately represents the stakeholder community** from time to time, taking into account the following:

### Balancing shareholding

Appropriately balancing:

- the number of shareholders necessary to reflect the stakeholder universe;
- the need to ensure that each shareholder has a meaningful role.

### Takeover provisions

Bearing in mind that the takeover provisions in Chapter 6 of the *Corporations Act* may apply to NewCo if it has 50 or more shareholders at any time (and that it is not workable for those provisions to apply).

### Relevant legislation

Considering the application of laws such as the *Foreign Acquisitions and Takeovers Act* and the *Security of Critical Infrastructure Act*, in respect of an foreign applicant.



## Application process and criteria

- There will be a **transparent application process and criteria** to become a shareholder, including the following (subject to any determination by the NewCo Board otherwise):

### Eligibility

The applicant must be:

- a “Participant Member” under the BPAY scheme rules; or
- an “NPP Participant” or “Connected Institution” under the NPP Regulations; and/or
- a “Direct Connector” or “Direct Settler” under the eftpos Scheme Rules.

### Active engagement

The applicant must intend to be actively engaged with the governance of NewCo, including with:

- the roadmap and future direction for the development of payments services;
- promoting innovation in payments;
- enhancing connectivity between, and integration of, the payment services .