



By email

4 August 2016

Ms Lyn Camilleri
Director, Adjudication
Australian Competition & Consumer Commission
23 Marcus Clark Street
CANBERRA ACT 2601

Attention: Fei Wu

Dear Ms Camilleri

Authorisation Applications A91546 and A91547

Apple appreciates your invitation to express its views regarding the application for interim authorisation by four of Australia's largest banks to form a cartel to jointly negotiate the terms and conditions with third party mobile wallet providers, including Apple, and institute a joint boycott during those negotiations. Apple recognises this is neither the time nor the place to address all of the factual and legal misstatements in the banks' application. We will provide a separate and comprehensive submission to the Commission at a later date. However, Apple's inability to fully and squarely address all of the misstatements in the application should not serve as a basis on which to grant the application for interim authorisation.

Apple strongly urges the Commission to reject the request of the applicants for interim authorisation. If granted, the request would harm consumers, lead to less competition and less innovation, and create a troubling precedent. As the Commission is aware, Commonwealth Bank, National Australia Bank and Westpac are three of the four biggest banks in Australia. Collectively, the applicants account for 66% of credit card balances in Australia, 67% of total household lending, and 70% of total household deposits (based on the most recent figures from APRA). Given their scale and market share, the applicants are essential to Apple's ability to offer Apple Pay on a meaningful basis within Australia.

Apple Pay is a new entrant to the Australian market having launched its service in November 2015 with American Express. Apple has struggled to negotiate agreements with the Australian banks and only recently signed an agreement with ANZ. ANZ recognised the potential benefits of working with Apple Pay. Unfortunately, and based on their limited understanding of the offering, the applicants perceive Apple Pay as a competitive threat. These banks want to maintain complete control over their customers. The present application is only the latest tactic employed by these competing banks to blunt Apple's entry into the Australian market.

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The applicants rely on innuendo and misstatements to support their application. Most have little direct insight into Apple Pay or Apple's terms (case in point, one applicant bank has refused to even enter into a confidentiality agreement with Apple to allow for preliminary discussions about the terms under which it would participate in Apple Pay). Now they ask the ACCC for explicit permission to negotiate with Apple as a collective group. The goal of which is to force Apple and other third party providers to accept their terms, allow them to charge consumers that choose to use Apple Pay, and force Apple to undermine the security of its mobile payment service by opening access to the NFC antenna, placing at risk the consumer experience of a simple, secure, and private way to make payments in store, within applications, or on the web.

A boycott among competitors constitutes a cartel, which is a hard-core breach of the *Competition and Consumer Act*. The request by the applicant banks would slow innovation and reduce choices by protecting members of the cartel from competition with each other for the next three years. The banks would have little incentive to compete amongst themselves to develop the best and most innovative payment services for their customers.

As the Australian Competition Tribunal has said in relation to a previous authorisation application to permit a collective boycott by competitors in the agricultural sector:

In the thirty-two years of the life of the Act, the ACCC and its predecessor have never before authorised a collective boycott. Collective boycotts have the capacity to inflict great damage not only on the targets but also on employees, related businesses, consumers and the boycotters themselves. If a market was workably competitive to begin with, it is highly unlikely that providing suppliers with the ability to collectively boycott their customers could be shown to produce benefits to outweigh the quantum of these likely detriments.

It is this conduct for which the Cartel Applicants have sought ACCC approval on "public interest" grounds.

We cannot identify any public benefits that could arise from the boycott. Interim authorisation requires the banks to demonstrate that, if a collective boycott is permitted, the market outcomes likely to follow will deliver significant benefits for the Australian economy that will not be achieved if no boycott is permitted. The application lacks any proper evidence that could safely be relied on to substantiate such benefits, much less quantify them in a meaningful way. Indeed, many of the public benefits enumerated by the applicants are actually undermined by the relief requested in the application. For example, a stated goal of allowing collective bargaining in this instance is to force Apple to provide access to its proprietary hardware and software related to the NFC antenna found in certain Apple products. Apple upholds very high security standards for our customers when they use Apple devices to make payments. Our hardware, software and services are built in a deeply integrated manner so we can provide the highest possible security. Providing simple access to the NFC antenna by banking applications would fundamentally diminish the high level of security Apple aims to have on our devices.

Interim authorisation does not meet ACCC Guidelines

Interim authorisation is inappropriate under the ACCC's Authorisation Guidelines if the proposed conduct has the potential to be significantly anticompetitive, unless the applicant had demonstrated compelling reasons. The banks have failed to provide compelling reasons in this case that would justify the significant risks of anticompetitive outcomes.

First, the banks suggest that interim authorisation is needed to avoid imminent harm to the market. The application fails to articulate that harm in any meaningful way. The banks merely suggest that they will be "forced" to agree to terms that they regard as "unacceptable". However, it is not explained how it is that Australian banks would be "forced" to agree to any terms which they did not wish to, particularly since these banks have not come to terms with Apple since discussions first began in late 2014. The clear



implication of this is that American Express, ANZ and more than 3,000 other banks around the world that offer Apple Pay to their cardholders have been "forced" to agree to unacceptable terms, which is plainly false.

Second, interim authorisation will not maintain the market status quo. Interim authorisation would permanently, or at least for a substantial period, alter the competitive dynamics of the market by impeding the steps that may lead to emerging technologies being available to ordinary Australians. For example, Apple is negotiating with several other banks in Australia to extend its limited coverage in Australia. Those negotiations will likely be stalled pending the outcome of the applicants' request, on the basis that the other banks would not want to be "disadvantaged" as compared to the applicants.

Interim authorisation of a collective boycott will have a lasting and irreversible impact on the adoption of Apple Pay and other third party wallets, and the Australian payment market. Allowing the banks to form a cartel to collectively dictate terms to new business models and services would set a troubling precedent and delay the introduction of new, potentially disruptive technologies. The applicants represent the majority of cards issued to consumers and they collectively have the power to dictate the future of mobile payments. As a practical matter, the proposed boycott will prevent any of the applicants from launching Apple Pay for up to the next three years.

Third, there is no urgency requiring interim authorisation. Negotiations between Apple and the banks both in Australia and in other jurisdictions have been ongoing for a considerable period. There is no impediment to further negotiations between Apple and each of the applicant banks. The three-year period proposed for the boycott seems to suggest that the applicants contemplate that negotiations might take that long in any event. Nor have the applicants identified any other circumstances of genuine urgency, the only change since the negotiations commenced being American Express and ANZ on-boarding Apple Pay.

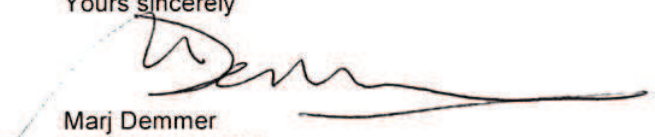
There is no explanation of why this application, if thought to be necessary, was not brought some time ago. The applicants do not explain their delay in seeking authorisation nor why they now consider it to be so urgent so as to warrant abandoning the normal period of consultation and assessment of this serious matter.

The normal 6 month statutory period for assessment is appropriate in this matter as it requires a detailed and appropriate examination of a proposal to engage in boycott/cartel conduct by some of Australian largest financial institutions who together issue credit and debit cards to the vast majority of Australian cardholders. The proposal to engage in collective boycott conduct is unprecedented in these circumstances and has potentially serious consequences as outlined.

Finally, Apple does not believe that the interim authorisation process permits the ACCC to properly form a view, even on an interim basis, as to whether the serious potential effects of the proposed cartel conduct maybe justified on countervailing public interest grounds.

In Apple's view, interim authorisation of the cartel by the ACCC should be refused.

Yours sincerely



Marj Demmer
Apple Pty Limited