

Your Reference: A91546 & A91547



**Small Business  
Commissioner**  
SOUTH AUSTRALIA

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Dear Ms Camilleri

**Re: A91546 & A91547 - Bendigo and Adelaide Bank & Ors – Authorisation -  
Submission of an interested party**

I write to you in my capacity as the South Australian Small Business Commissioner ("the Commissioner"). In that role, I convene the Office of the Small Business Commissioner (OSBC) – an independent statutory office set up under *Small Business Commissioner Act 2011* (SA). I outline my role in greater detail at Annexure 'A'.

Regarding the Application seeking an Authorisation, together with an Interim Authorisation ("the Applications") from Bendigo and Adelaide Bank, Commonwealth Bank, NAB and Westpac ("the Applicants"), I submit that as the South Australian Small Business Commissioner, I have a real and substantial interest in the application, and therefore I am an "interested person" pursuant to Section 90A(12) of the Act.

The Commonwealth Bank of Australia, National Australia Bank, Westpac Banking Corp and Bendigo and Adelaide Bank (the Applicants) have jointly asked the ACCC to grant them an Authorisation (or an Interim Authorisation at least) to allow them to collectively negotiate (as a cartel) with Apple.

**Overview and summary of my position as the Small Business Commissioner**

**At the outset, I signal my opposition to the Applications being granted – on an interim basis, or at all.**

I will set out the reasons underpinning that opposition more fully within these submissions, but the nub of my objection turns on the fact that most, if not all transactional costs incurred by banks, including those that are currently being paid

by ANZ to *Apple Pay*, will inevitably be passed on to consumers and/ or merchants by way of bank fees.<sup>1</sup>

The Applicants are seeking that the ACCC permits them to collectively “muscle up” to take on the world’s largest company, Apple.

The Applications raise a number of other concerns for me, including:

1. I note that this is the first time globally a group of financial institutions has sought authorisation from a competition regulator to negotiate as a bloc against Apple.

If, as I will argue, the outcome of this clash of commercial giants is inevitable, how do these Applications fall within the purpose of Part VII, Division 1 of the the *Competition and Consumer Act 2010* (Cth) (the Act)?

Put another way, did the Parliament contemplate that the ACCC’s Authorisation powers under subsections 88(1A) and 88(1) of the Act, would assist a cartel of commercial Goliaths to settle their turf wars? In my submission, it did not.

2. A question that follows, is whether there is in fact, any actual impediment at all that needs to be overcome by way of an Authorisation? In my submission, there is not.

In my view, this is simply a case whereby powerful banks are simply not used to having to accede to another, more powerful organisation – Apple - a global company that has the smarts and the resources to be able to simply ignore the banks’ demands.

3. The Applicants are seeking that the ACCC grants an (Interim) Authorisation as a matter of urgency. I submit that cannot be the case. The CBA already has identified and implemented a practicable and effective “work around” solution.<sup>2</sup> Therefore, where is the urgency?
4. Another significant concern to be weighed by the ACCC is the overall effect of the granting of an Authorisation of the negotiations between the parties.

Commentators have noted that it is by no means clear whether Apple will even consider entering negotiations with the banks if the ACCC grant the Interim Authorisation. The prospect of collective boycott mechanisms is unlikely to be welcomed by the world’s largest company.<sup>3</sup> Put simply, the Authorisation sought by the Applicants might backfire on the Applicants – perhaps in a spectacular way.

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<sup>1</sup> Particularly given the ANZ’s recent win in the High Court.

<sup>2</sup> CBA has developed a work-around solution by asking its customers who carry iPhones and want to use its digital wallet to affix a sticker on the back of their phone to act as an antenna, however it is understood that this has not been widely adopted by CBA customers.

<sup>3</sup> I note media reports that Apple are refusing to comment in this regard and that commentators report that this Application reflects a growing unease among businesses about the power of Apple, and its “all-or-nothing” approach to commercial negotiations.

5. As the SA Small Business Commissioner, my interest arises when the ructions between corporate giants begins to impact upon business, particularly the flow-on impacts of such Applications onto small and micro businesses.<sup>4</sup>

Coming hot on the heels of the recent High Court win for the banks, I cannot help but note that the Applicants have elected to endeavour to obtain open access to *Apple Pay* through a collective boycott – one that would be sanctioned by the ACCC.

In adopting that stance, the Applicants have deliberately avoided the thorny issue of fee negotiations from their ACCC Applications.

To me, the Applicants' reluctance to agitate the fees that they may need to pay to Apple (or how those fees might need to be recouped for their shareholders), is a telling indicator of the Applicants' reluctance to shine any light on issues that may have the potential to cause them public discomfort.

Could it be that issues pertaining to bank fees might not play well with the public?

6. Given the recent High Court decision supporting the ANZ Banks's right to charge fees in excess of its costs in providing a service, it is my strong submission that regardless of whether the Authorisation is granted by the ACCC or not, all of the banks, including the ANZ, will inevitably seek to recoup any fees or charges that they do have to give up to Apple (or anyone else for that a matter).<sup>5</sup>

## DETAILED DISCUSSION

### The Application

I understand that on 26 July 2016, the Applicants sought authorisation on behalf of themselves and potentially other credit and debit card issuers, through Novantas' Mr Lance Blockley, (representing the Applicants).

As four of Australia's largest banks, the Applicants are seeking the ACCC's permission to join forces and collectively negotiate with Apple (in this instance Apple through its *Apple Pay* NFC payments system) to opening up its 'tap-and-pay' technology to other iPhone apps (i.e. the banks' own apps).<sup>6</sup>

The mode selected by the Applicants is to enter into a limited form of collective boycott (sanctioned by the ACCC) regarding a third-party mobile wallet provider while collective negotiations with that provider are ongoing.

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<sup>4</sup> According to the Australian Bureau of Statistics, South Australia has a total of 143,585 businesses, of which 140,087 are either non-employing or employ 19 or less people. The same ABS statistics indicate that almost 90,000 of these businesses have an annual turnover of \$200,000 or less.

<sup>5</sup> According to RateCity.com.au, banks take in \$4.3 billion in fees in 2015 – cash that consumers could have avoided paying out. \$1.5 billion of that was in the form of annual fees, late payment fees and cash advance fees.

<sup>6</sup> It is of note that ANZ had initially lined up for what Mr Blockley said was the first attempt anywhere by banks to negotiate *en masse* with Apple, but then reneged on that position and joined with Apple Pay. This allowed ANZ to steal the march on the other banks and to commence these e-services in April 2016.

Noting ANZ Bank's split from the collective<sup>7</sup>, it seems that the Applicants have formed the view that more people will be inclined to pay for things by 'tapping' their mobile phones, rather than 'tapping' their various cards.<sup>8</sup> The UK experience in 2015 indicates that this is a reasonable view to hold.<sup>9</sup>

As I understand it, the Applicants are arguing that Apple's refusal to allow any other 'app' access to its NFC (near field communication) chip inside of iPhones, *"restricts consumer choice, transparency and innovation across the industry."*

It seems to me that the Applicants have been frustrated by the world's biggest company's strategy of locking third-party providers of digital wallets off of the iPhone platform, in favour of its own *Apple Pay*. Fees to Apple for such access would potentially erode the millions of dollars the big banks can earn in interchange fees.<sup>10</sup>

It would also seem the world's largest company, Apple, seems unmoved by the pleas of the Applicants – hence the Applications.

I submit however that the determination of banks to pass on fees and other costs to consumers, including small businesses, can readily be seen in the recent High Court decision in favour of ANZ.<sup>11</sup> As the test-case lead, ANZ claimed that the maximum cost to banks of late payments should consider making provisions for bad loans, holding capital and debt collection costs as well as other costs. A majority of the High Court agreed with the ANZ's proposition.

Given that small business comprises around 96% of Australian businesses, I submit that the costs of the actions taken by the banks, whether the Applications are granted or not, will be borne by consumers, including small businesses.

The inability for small businesses to absorb or to pass on those costs to their customers in the current constrained economy – especially in the South Australian

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<sup>7</sup> It is of note that ANZ had initially lined up for what Mr Blockley said was the first attempt anywhere by banks to negotiate *en masse* with Apple, but then reneged and joined with Apple Pay. Whilst it is understood to have to pay over some of its fees to Apple, this did allow the ANZ to steal the march on the Applicant and to commence those e-services in April 2016.

<sup>8</sup> Although all the big Australian banks have applications that can be downloaded by iPhone users to conduct mobile banking, Apple lets only Apple Pay access the handset's NFC (near-field communications) antenna.

<sup>9</sup> See note 5 above where in July 2015 it was estimated that UK Customers made an estimated 400,000 contactless payment terminals in total. In that month, Visa Europe [reported more than one billion transactions made in the UK last year](#), while Visa cardholders spent €1.6 billion in March 2015 alone.

<sup>10</sup> The lack of iPhone access seems particularly frustrating for the Applicants, as they have invested heavily in their own efforts to put payments innovation onto the phones of millions of customers. ANZ have taken the plunge and allied with Apple through Apple Pay. Unlike phones that run on an Android operating system, on iPhones the bank's own apps are limited to internet-banking functions.

<sup>11</sup> This High Court (test case) decision was handed down on 26 July 2016. It effectively means that all of Australia's big banks have scored a significant win over consumers by way of the largest consumer-driven class action in Australian history. A full bench of the High Court dismissed an appeal in the long-running bank fees test case, fully indicating the importance of fees to the banks and also their resolve to win such actions at all costs. The action also demonstrated the banks' limitless reserves to fund legal action. In its majority decision, the High Court upheld a 2015 Federal Court decision that found ANZ was justified in levying late payments fees on customers. The decision means that ANZ and other major banks will not have to compensate customers up to \$500 million for collecting late fees since the 1990s.

context, has been well ventilated to the Australian Competition and Consumer Commission (the ACCC) in the past and is, in my submission, severely limited.

My arguments are predicated on the fact that the outcome of this clash between the Applicants and Apple is a foregone conclusion. Looking at the 2015 experience in the UK it seems beyond doubt that the Applicants will do whatever they have to do to obtain access to *Apple Pay*, just as the ANZ already has – and just as the majority of UK banks have done. Customer demand will simply require that this becomes the case.

Accordingly, it is my submission that this entire Application is purely and simply about how much the Applicants will have to pay to Apple to obtain that access, and when that access will occur. It is also my submission that the Applicants do not require Authorisations from the ACCC to be able to deliver that inevitable outcome.

### **My concerns as the SA Small Business Commissioner**

As the SA Small Business Commissioner, I would otherwise have very little interest in this clash of commercial giants,<sup>12</sup> companies that are well able to resource and agitate their 'virtual' turf war.

As I have noted above, my interest does become piqued when these ructions overflow and impact upon business, particularly the flow-on impact of this Application on small and micro businesses.<sup>13</sup>

These are the very businesses which are using every available resource available to them to survive and grow. Indeed, the South Australian State Government and my office are actively encouraging all businesses to explore options to expand their business and that includes conducting transactions electronically.

In this regard I note specifically that the thorny issue of fee negotiations has been excluded from the Applicant's ACCC Application.

I note that the Application appears to have been lodged on 25 July 2016. This was one day prior to the High Court handing down its majority decision in favour of the banks in the (test) case regarding ANZ's right to levy a range of fees and payments on customers in excess of what it costs the bank to perform those functions.

So none of the Australian banks would have known of the High Court's attitude in that regard at the time the Applications were lodged; nor that the High Court would sanction the banks charging fees and charges that significantly exceed the costs actually incurred by them. It is not surprising therefore that these were not agitated in the Applications.

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<sup>12</sup> "Firstly we've got to get Apple to the negotiating table - they may refuse to come - and once they're at the table they may refuse to negotiate." Mr Lance Blockley of Novantas, advocate for the Applicants.

<sup>13</sup> According to the Australian Bureau of Statistics, South Australia has a total of 143,585 businesses, of which 140,087 are either non-employing or employ 19 or less people. The same ABS statistics indicate that almost 90,000 of these businesses have an annual turnover of \$200,000 or less.

However the fact that the banks threw millions of dollars in resources to take that matter to the High Court, after multiple proceedings in the lower Courts, does give an inkling of how attached the banks are to fees and charges in their relentless pursuit of profits.<sup>14</sup>

Given the recent High Court decision, it is my strong submission that regardless of whether the Authorisation of the Applicants are granted by the ACCC or not, all of the banks, including the ANZ, will more than likely seek to recoup any fees or charges that they will have to pay to Apple (or anyone else for that a matter).

I believe that the banks will seek to recover these from merchants, consumers or both. The recent High Court decision will have only have firmed the banks' resolve in this regard. The massive profits that are earned by the banks year in and year out appear to be sacrosanct to them and no doubt will be protected at all costs.<sup>15</sup>

Whilst the Applicants have declined to include fee negotiations in its Application, it is my submission that this is an extremely relevant matter which should properly be within the contemplation of the ACCC in its deliberations.

## FURTHER COMMENTS

Regarding the Applications, I would offer the following further observations for the consideration of the ACCC:

- In my view, the creation of a banking cartel, as the Authorisation would permit, is inappropriate to deal with emerging technology in the current rapidly evolving financial transaction environment.
- The Applications by the Applicants could be seen to be direct and reactive response to the Applicants' frustrations with one of its competitors (ANZ) adopting a first-to-market position with *Apple Pay* and in my view this stance is anti-competitive.
- I am unable to envisage any benefit to the business consumer arising out of the granting of the Authorisations. In my view, cartel behaviour by the Applicants will serve only to entrench a financial arrangement that may ultimately prove disadvantageous to the consumer, including small businesses.
- The Applications fail to outline in sufficient or substantive detail the benefits that will flow to consumers, including small businesses.
- The Applicants concedes that:  
*"The limited collective negotiation and limited collective boycott proposed might be considered to have the purpose, effect or likely effect of substantially lessening competition to the extent that they*

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<sup>14</sup> Forecast major banks profits for the 2016 financial year: CBA - \$9.6bn; Westpac - \$8bn; NAB - \$6.5bn; and ANZ \$6.3bn – totalling \$30.4bn between the 'big 4' banks alone. Source - *The Australian*, page 1 on 4 August 2016.

<sup>15</sup> Ibid.

*affect the markets for the acquisition of mobile wallet or mobile payment services by issuers from third-party wallet providers, the supply of mobile wallet or mobile payment services by issuers to third party wallet providers, or the supply of mobile wallet or mobile payment services to consumers; and might be considered to be cartel provisions to the extent that they have the purpose of preventing, restricting or limiting the supply of any services by issuers to third party mobile wallet providers during the period of any collective negotiation.”<sup>16</sup>*

As such, I submit that it is inappropriate to consider any Interim Authorisation.

Specifically regarding the Application itself, I make the following observations:

- The Application states in terms of chances of success for mobile wallets and the like in Australia, that “... *this potential may not be realised if mobile wallets are introduced in circumstances that restrict consumer choice, security or transparency.*”<sup>17</sup>

I note however that this assertion is not supported with any substantive facts, or similar examples of market failure.

- The banks that form the Applicants are some of the biggest companies in Australia and have a significant level of market power in their own right. This is a very relevant factor for the ACCC to bear in mind when considering the Applications.

In fact it is of significant note that the banks that form the Applicants were party to a failed bid by the *Australian Payments Clearing Association Limited* for the proposed implementation of an industry wide transaction security initiative to mitigate online payments transaction fraud. I opposed those Applications (A91525 & A91526) on the grounds that if authorised, they were likely to impose significant costs upon small businesses and sought to impose a security regime which potentially excluded other participants. It is relevant to note that in those cases, the Applications were withdrawn.

- I further note the Application states:  
“*The applicants wish to ensure they are able to collectively negotiate with third party wallet providers to facilitate competitive outcomes.*”<sup>18</sup>

I question just who will accrue any benefits from competitive outcomes if the Authorisation is granted.

- The Application also states:  
“*...there are some Third Party Wallet Providers who, by reason of their scale and influence, combined with their control of key mobile/*

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<sup>16</sup> Form B of the Application – “*Agreements Affecting Competition or Incorporating Related Cartel Provisions: Application for Authorisation*”, at 2(b).

<sup>17</sup> *Application for authorisation of limited collective bargaining negotiation in relation to mobile wallet and mobile payment systems* (the Application) – Executive Summary at page 1.

<sup>18</sup> *Ibid.*

*hardware and/ or operating systems, could be in a position to negotiate terms that would be likely to result in reduced competition and innovation, and increased risk in the security and transparency of mobile payments.”<sup>19</sup>*

In my view it is laughable for the Applicants to prosecute this argument. My observation would be that as a discreet market segment, Australian banks have relentlessly and robustly exercised their market power for many years and from the cases that have come into my Office I know that they can and do impose unreasonable terms on small business owners. In my view, this current venture will result in another effort to entrench behaviour designed to reduce competition and innovation.

- It is my view that the Applicants’ argument in relation to the rationale for the conduct is illogical:

*“...mobile payments will only succeed if they offer customers, merchants and financial institutions the right combination of convenience, security and cost.*

*In the applicants’ view, these attributes will only be developed in an environment in which vigorous competition drives innovation, efficiency and continuing investment.”<sup>20</sup>*

The development of financial tools for consumers is proceeding at a rapid rate outside of the formal banking system – for example *PayPal* and *Bitcoin*. This is evidence that competition, innovation and continuing investment is occurring. It could be strongly argued that it is the banks that are trying to constrain this innovation with its preferred “one size fits all” solutions.

- The use of the Apple example in the US<sup>21</sup> appears to me to be a reinforcement of the banks’ poor arguments that they have finally met their match in terms of competition. The fact that *Apple Pay* remains the only integrated contactless payment option available on Apple devices in the United States perhaps fails to recognise that it is a good and widely accepted product. The consumer and business owners are driving the change not the Applicants.

This brings me to Dr Geoff Edwards’ *Economic Assessment of Benefits and Detriments* appended to the Application and titled “*Collective Negotiation by issuers with Mobile Wallet Providers*” (the Assessment).

- I am extremely concerned at the following statement:  
*“Collective negotiation in relation to exclusivity strengthens the bargaining position of the applicants and increases the likelihood that Apple will agree to waive or relax Apple Pay exclusivity in some way. A waiver or relaxation of exclusivity is likely to bring significant public benefits in the form of greater choice, lower prices, better quality, lower*

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<sup>19</sup> At page 4 of the Application under *Conduct to be Authorised*.

<sup>20</sup> At page 5 of the Application under *Rationale for the conduct*.

<sup>21</sup> At page 10 of the Application – *Case Study: Outcome of Negotiations in the United States*.

*fees for use of Apple Pay and greater investment and innovation in mobile wallet technology.*<sup>22</sup>

I note however, that there is no guarantee of any benefits that may be realised by the Applicants flowing on to consumers, including small businesses. From my perspective, this should be a fundamental consideration for the ACCC in considering these Applications.

- As I have previously noted, in its simplest terms, the banks within the bloc want to form a convenient cartel to better “muscle up” to Apple in a game of catch up on the ANZ.

Under “*The Likely outcome if Collective Negotiations is Authorised*”, Dr Edwards’ Assessment notes:

*“Currently only American Express and ANZ have reached agreements with Apple that (I assume) accept exclusivity for Apple Pay, but in the counterfactual it is likely that, eventually, all of the applicants will also reach agreements with Apple that accept exclusivity for Apple Pay, due to the consequences for their competitive positions if they “hold out”, particularly as mobile payments become more commonplace and give the importance of iOS device users for issuers.”*<sup>23</sup>

With respect to Dr Edwards, it is my strong submission is that the exact same outcome will ensue with or without the ACCC’s Authorisation. As I have submitted above, the outcome of these negotiations is inevitable and the Applicants will reach an agreement with *Apple Pay* to obtain access to the iPhone antennae.

The only variable in play in this negotiation is the price to be paid by the Applicants to Apple for that access to the iPhone antennae.

My assessment of this situation would be that if anything, the Applicants are seeking to restrict competition in the market place whilst enhancing its own competitive advantage.

- Finally, I can only express that I am bemused by the Applicants’ use of the “Prisoners’ Dilemma” as an argument in support of its Applications.<sup>24</sup> To me this would seem to be a strange attempt to justify an argument based upon an interesting theory, as opposed to facts.

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<sup>22</sup> “*Collective Negotiation by issuers with Mobile Wallet Providers*” – prepared by Dr Geoff Edwards of Charles Rivers Associates – *Executive Summary* at page 1.

<sup>23</sup> “*Collective Negotiation by issuers with Mobile Wallet Providers*” – prepared by Dr Geoff Edwards of Charles Rivers Associates – “*The Likely outcome if Collective Negotiations is Authorised*” at paragraph 86.

<sup>24</sup> “*Collective Negotiation by issuers with Mobile Wallet Providers*” – prepared by Dr Geoff Edwards of Charles Rivers Associates – Appendix A – “*Illustration of Prisoners’ Dilemma Payoffs*” at paragraphs 170 to 173.

## CLOSING REMARKS

For all of the reasons that I have set out above, I am firmly opposed the Applications for Authorisation sought by the Applicants (A91546 & A91547).

I further request that this submission also stand as my opposing submission to the Applicants' substantive Application.

For completeness, I advise that I am a personal customer of the ANZ and Bendigo Adelaide Bank, that the Office of the Small Business Commissioner conducts its banking through the Commonwealth Bank of Australia. I am also an iPhone user.

Should you have any further queries in relation to these submissions, please do not hesitate to contact me on (08) 8303 2015 or by e-mail to [John.Chapman@sa.gov.au](mailto:John.Chapman@sa.gov.au)

Yours sincerely,



John Chapman  
**SMALL BUSINESS COMMISSIONER (SA)**

*John* August 2016

### **Functions of the South Australian Small Business Commission**

As the Small Business Commissioner, an important part of my role is to:

- make submissions to relevant inquiries at various levels;
- advocate for the sector;
- make representations to the SA Small Business Minister and other groups as required; and
- provide independent advice and recommendations regarding small business issues to the Government of the day. This may include advice, comments or recommendations on various matters related to small business.

In advocating for the small business sector, it is within my remit to investigate market practices that may adversely affect small business, or the small business sector.