

## Restriction of publication of part claimed

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### Bendigo and Adelaide Bank and others applications for authorisation (A91546 & A91547) – Response to request for further information dated 21 September 2016

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- 1. Please list the issuers that the Applicants will invite to participate in the collective negotiations, along with: the number of their Australian cardholders; and the proportion of card customers in Australia that each participant represents.**

Submissions to the ACCC suggest that Heritage Bank Limited and other members of Australian Settlements Limited would wish to participate in any collective negotiations, and those issuers would be invited to participate along with any other issuers who indicated an interest before the collective negotiation was due to begin.

The applicants would expect to invite other major card issuers in Australia other than the applicants, ANZ Bank and American Express (though it is unclear how many would accept that invitation). A list of those issuers and the estimated number of their Australian credit and debit cardholder accounts are set out in Confidential Annexure A.

- 2. Aside from Apple, can you confirm whether the Applicants intend to engage in the collective negotiation and collective boycott conduct in relation to any other third party wallet providers?**

At present, the applicants only intend to engage in collective negotiation (and collective boycott conduct) with Apple in relation to Apple Pay.

- 3. If so:**
  - a. Please specify the identity of these parties.**
  - b. Please justify, for each such party, the rationale for the proposed conduct. That is, what problems are currently being experienced and how would the proposed conduct remedy the situation? For example, Google's submission states that access to Android's NFC interface is unrestricted, Android Pay's fraud prevention measures are consistent with the APCA guidelines, and Google does not charge issuers for participation in Android Pay.**
  - c. Are each of the issues identified for collective negotiation relevant for each identified party? If so, please explain why for each party.**
  - d. If the party is not yet identifiable, please provide as much detail as you can on your reasons for requiring authorisation to engage in collective negotiation in relation to that general group of parties.**
  - e. Would the Applicants be impacted if the proposed conduct was narrowed to Apple only? If so, please explain how.**

See response to question 2.

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4. Do the Applicants intend to collectively negotiate on issues of access to any hardware or software aside from the NFC functionality on Apple devices? If so, please specify the hardware or software in relation to which the Applicants propose to engage in collective negotiations and the party in control of the hardware or software and explain why collective negotiation and boycott are needed.

No. The applicants only intend to collectively negotiate on issues of access to the hardware and software necessary for them to offer competing mobile wallet or mobile payment services using the NFC functionality on Apple devices.

5. In relation to the issues the Applicants seek to collectively negotiate on, specifically the second element under the heading 'competition' – 'otherwise preventing or impeding card issuers from developing, deploying or participating in any other mobile payment or mobile wallet services or Third Party Wallets on any mobile devices or platforms' – is this conduct that the Applicants consider is currently taking place? If not, do the Applicants expect this conduct to take place and, if so, what is the justification for this expectation?

The applicants are concerned to ensure that they are not prevented by either technological or any other means from offering competing mobile wallet or mobile payment services on iPhone devices. At present the applicants are prevented from doing so by Apple's decision to block access to the iPhone's NFC functionality (which essentially operates as a technical lockout). The applicants believe this conduct is currently taking place in Australia and indeed around the world.

The applicants are also concerned that Apple might in the future provide access to NFC functionality, but may use other means to exclude or disadvantage apps that would compete with Apple Pay. For example, it may do so by refusing to allow competing apps on the App Store, or by requiring banks to agree not to provide any competing apps as a condition of participation in Apple Pay. The applicants expect that this conduct may take place in the future on the basis that Apple has clearly expressed its preference to exclude competing mobile banking and mobile payment apps from iPhone devices and may seek to do so by contractual or other means if they no longer do it by technological means.

6. In relation to the identified issues which the Applicants seek to collectively negotiate on in the context of negotiations with Apple:

- a. In the event that the Applicants were successful on gaining access to the NFC function on Apple devices in order for the Applicants to offer their own NFC-enabled digital wallets on Apple devices, would they still seek to negotiate on the other issues?
- b. In the event that the Applicants were not successful on gaining access to the NFC function, would they still seek to negotiate on the other issues?
- c. Regarding each issue specified as the subject matter of the collective negotiations, if agreement is unable to be reached on the objective specified (for example, under 'efficiency and transparency', if agreement is not reached on a third party wallet provider not restricting the ability of issuers to pass through any fees or charges imposed on issuers), will the collective negotiations cover any alternative resolutions on these issues? For example, in relation to pass through of fees, could it encompass a period of waived fees?
- d. Could the group decide to abandon some of the collective negotiation issues in favour of others? In other words, could the group 'trade off' some issues for others – e.g. decide to accept exclusivity of NFC-chip access for Apple Pay if Apple agreed to transparency of fees?

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Each of the three issues identified for collective negotiation will be negotiated together, such that success in gaining access to the NFC function on the iPhone will not of itself mean that negotiations on security and pass-through would cease; indeed negotiations would continue until the parties are satisfied with the result or conclude that there is no value in continuing the collective negotiation. The outcome of the negotiations is unknown but will be influenced by the relative bargaining position of the applicants in relation to Apple, in particular the pressure faced by the applicants to offer Apple Pay to their customers and the risk that some of the applicants or other banks may conclude individual agreements with Apple despite the collective boycott. The applicants will therefore attempt to secure the best result they can (as quickly as they can) in the circumstances.

### **7. On the issue of unrestricted access to payment functionalities:**

#### **a. What is meant by 'partially exclusive' (p30 of submission) or 'relaxation of exclusivity'? (p23 of CRA report).**

A relaxation of exclusivity could take a number of forms, including:

- access to the iPhone's NFC functionality for mobile banking apps but not for other third-party mobile wallets (i.e. wallets that competed more directly with Apple Pay by storing the cards of multiple issuers); or
- access to the iPhone's NFC functionality for mobile banking apps that had already been developed, but not for new mobile banking apps.

However, the applicants would strongly argue for access to the iPhone's NFC functionality for all applications that conformed with appropriate security standards in order to maximise the benefits of competition, choice and innovation for consumers.

### **8. The Applicants submit that Apple has significantly greater market power in negotiations than each of the Applicants individually.**

#### **a. Please explain how Apple's market power in smartphones provides it with significantly greater bargaining power than each of the Applicants in relation to negotiations regarding Apple Pay.**

This issue is fully explored in the applicants' submission, the independent expert economic report prepared by Charles River Associates and the expert report being prepared by Dr. Susan Athey.

The applicants do not rely on Apple having market power in smartphones. However, the applicants need access to Apple's customers to be able to provide a successful mobile payment service to all of their own customers, and in order to do that they need access to the iPhone's NFC functionality.

Apple does not need the customers of any individual applicant for Apple Pay to be successful – Apple Pay is already available in Australia (free to consumers) and switching costs for customers who want to access the service are very low (i.e. they just need to get a payment card from ANZ Bank or American Express to use the service; there is not a need to switch their primary banking relationship in order to achieve this). Customers are far more likely to get an additional payment card in order to be able to use Apple Pay than they are to switch from an iPhone to a Samsung phone just to be able to use a mobile wallet.

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**9. Regarding the objective of requiring industry standards or negotiating best practice principles and technical standards, please detail your specific security concerns in relation to Apple Pay that you hope to address through collective negotiations. In particular, please respond to Apple's statement that the issuing banks are in control of the verification process when adding cards to Apple Pay. If you disagree with Apple's statement, please detail how the Applicants think the process for a customer to add their payment cards works.**

See Annexure A of the applicants' response to interested party submissions (under the heading "security"). If Apple comes to the collective negotiations with a proposal that is consistent with the framework set out in Annexure A, then the applicants will consider that no further negotiations in relation to that issue will be needed.

**10. Given the limited scope of the issues for collective negotiation, and that each issuer will be negotiating with the relevant mobile wallet provider in any event if they want to reach an agreement, to what extent would the proposed collective negotiations reduce transaction costs?**

Although the collective negotiation will be limited to three issues, these are all critical issues for the applicants and negotiations in relation to these issues are expected to be more contentious and complex than the other issues remaining for individual negotiation. The collective negotiation process will allow participants to pool their resources to deal with these issues (and will allow the issues to be addressed only once, as opposed to having to address them in each individual negotiation).

**11. You mentioned in your letter to the ACCC dated 5 September 2016 that strict information sharing protocols will be put in place. Please provide as much detail as possible on these proposed protocols.**

Proposed protocols will specify at a minimum that:

- Discussions will be limited to the issues identified in the determination granting authorisation.
- The group must not discuss, negotiate or agree on the commercial aspects of any potential agreement with Apple Pay that are beyond the scope of the authorisation, and in particular must not discuss:
  - the level of any fees that Apple may charge issuers for participation in Apple Pay; or
  - the intentions of issuers to pass through or not pass through any of the costs of their participation in Apple Pay.
- Participants are free to conduct individual negotiations with Apple on any of the commercial aspects relating to their participation in Apple Pay that are outside the scope of the collective negotiation, but:
  - must not conclude any individual negotiation until the collective negotiation has been concluded; and
  - must not discuss the progress or content of any individual negotiation with the group.
- Agendas will be prepared in advance of any negotiation and detailed minutes prepared afterwards and confirmed by the group.

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- Negotiations will be conducted in the presence of legal advisers responsible for ensuring compliance with these protocols.

**12. If authorisation were granted for the 3-year period sought, it has been submitted that this may result in delayed uptake of digital wallets. What impact do you consider this will have on consumers? Why is a 3-year term necessary?**

The applicants do not consider that collective negotiation will result in delayed uptake of mobile wallets. The applicants have strong incentives to conduct collective negotiations on an expedited basis and have prepared a negotiation framework to assist with this process.

See further discussion in section 5.4 of the applicants' response to interested party submissions.

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**Confidential Attachment A**

**Estimates of non-applicant credit and debit card issuers**