



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation A91546 & A91547

lodged by

Bendigo and Adelaide Bank Limited
Commonwealth Bank of Australia
National Australia Bank Limited
Westpac Banking Corporation

in respect of

a proposal to engage in limited
collective bargaining and collective boycott
with Apple in relation to Apple Pay

Date: 29 November 2016

Authorisation numbers: A91546 & A91547

Commissioners:
Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC proposes to deny authorisation for Bendigo and Adelaide Bank, Commonwealth Bank, National Australia Bank and Westpac (**the Applicants**) and other potential participants to engage in limited collective bargaining and limited collective boycott with Apple in relation to Apple Pay.

The ACCC is not satisfied, on balance, that the proposed conduct is likely to result in public benefits that would outweigh likely public detriments constituted by any lessening of competition or that the proposed conduct is likely to result in such a benefit to the public that it should be allowed to take place.

The ACCC will seek submissions in relation to this draft determination before making its final decision.

The proposed conduct

The Applicants on behalf of themselves and potentially other payment card issuers (together, **the Group Participants**) have sought authorisation to collectively bargain with Apple in respect of two issues (**the relevant issues**). The relevant issues are:

1. access to Apple iPhone's embedded Near-field Communication (**NFC**) controller, in order for the Group Participants to provide their own digital wallets with embedded NFC on Apple devices without relying on Apple Pay for mobile payment processing, as well as to allow their digital wallets to be distributed from Apple's App Store without any unreasonable prohibitions, unreasonable terms, or unreasonable approval delays from Apple; and
2. the ability to pass through Apple Pay fees to cardholders.

The Applicants have also sought authorisation to agree not to sign up to Apple Pay while participating in the collective negotiation. This means that they will not individually reach agreement with Apple to allow their cardholders to load their cards on to Apple's Wallet app (**Apple Wallet**) while participating in the collective negotiation. However, they would be entitled to withdraw at any time from the collective negotiation and enter into an individual agreement with Apple.

Authorisation is sought for three years.

Industry background

This application relates to digital wallets, which are applications on mobile devices that perform some of the functions of a physical wallet, such as storing payment cards for making mobile payments and, in some cases, storing other cards such as loyalty cards. Digital wallets are a relatively new development and the relevant markets are characterised by rapid change and innovation, with new products and developments being announced regularly. Digital wallets can be offered by banks (**'issuer digital wallets'**) or a third party such as Apple (**'non-issuer digital wallets'**).

Apple Wallet (previously called Passbook) using Apple Pay as the mobile payment mechanism was developed by Apple for its iOS platform. Apple Pay was launched in Australia in November 2015 with American Express cards. In April 2016, ANZ signed up to Apple Pay. Apple Pay will soon be available to customers of 31 smaller banks and credit unions represented by Cuscal. No other card issuers in Australia have reached agreement with Apple to offer Apple Pay.

Globally, Apple Pay is available to cardholders of 3,500 banks across 12 countries. Apple has stated that it has adopted a global approach to the Apple Pay service, which is offered to banks as an integrated hardware and software service. This means that Apple does not offer third party access to the NFC controller in iPhones, but instead offers banks the ability to allow their cardholders to use Apple Wallet. Banks may also provide their own digital wallet on iPhones to make mobile payments, provided the wallet uses the Apple Pay mobile payment mechanism to make payments.

Alternatively, banks can offer digital wallets on iPhones without using Apple Pay by allowing their customers to make mobile payments through the use of an external NFC tag/sticker ('**NFC tag**') affixed to the back of the phone. CBA and NAB currently offer digital wallets on iPhones using an NFC tag.

On the other major mobile operating system which competes against Apple, Android, there are currently two 'non-issuer digital wallets' available – Android Pay and Samsung Pay. Of the Applicants, only Bendigo and Adelaide Bank has currently signed up for its cardholders to have access to Android Pay, with Westpac cardholders expected to soon have access. At this stage, none of the Applicants have signed up for Samsung Pay for their cardholders. The major three Applicants also supply their own digital wallets on Android devices, directly accessing the NFC controller to allow mobile payments. Through this application, the Applicants essentially seek to achieve a similar level of access to the NFC controller in Apple devices as they currently have on Android devices.

Alternative technologies may also be available to consumers, such as those used by Plastic and Coin 2.0 that allow loading of multiple payment cards into one device which is capable of some similar functionalities to payments made on Apple and Android devices.

ACCC assessment

The ACCC has received submissions from over 30 interested parties on this matter, including a number of supporting submissions and economist reports from the Applicants and several opposing submissions and economist reports from Apple.

The Applicants have claimed that there is a significant imbalance of bargaining power between the individual Applicants and Apple and that the proposed conduct seeks to address this by increasing the Applicants' bargaining power in order to place pressure on Apple to depart from its global position on the relevant issues.

The ACCC notes that Apple is not a monopoly supplier of mobile devices on which mobile payments can be made. Apple faces competition from a range of other handset manufacturers and from Google's Android operating system to offer mobile hardware and software with competitive functionalities. The ACCC estimates that iPhones accounted for around 36 per cent of Australian smart phone sales in recent years.

In addition, mobile payments are in their infancy and, in Australia, consumers are very used to making tap and go payments with payment cards, which provide a very quick and convenient way to pay. It is therefore uncertain how digital wallets and mobile payments will

develop in the face of current strong substitutes in payment cards and possible future innovations.

While Apple is vertically integrated from device hardware to operating system software through to mobile application software, the Applicants are vertically integrated from issuing payment cards through to the provision of digital wallets.

The ACCC considers that, in negotiations between Apple and the individual Applicants regarding mobile payments on Apple devices, both Apple and the individual Applicants need each other, to some extent, in order to succeed. The Applicants need to access Apple's NFC controller in order to provide consumers with their own digital wallets with embedded NFC mobile payments without relying on Apple Pay for mobile payment processing (or alternatively, the Applicants need to sign up to Apple Pay or use external NFC hardware). In addition, Apple needs the Applicants (or some of them) to agree to allow their payment cards to be provisioned into Apple Wallet to enable Apple Pay to expand in Australia. This is particularly so in the case of the three major Applicants, who together make up around 70 per cent of credit card use in Australia.

However, given the global nature of Apple's business and its global stance on the relevant issues, it is clear that on these two issues Apple has significant bargaining power as compared with each individual Applicant. The ACCC accepts that the opportunity for the Applicants to collectively negotiate and boycott would place the Applicants in a better negotiating position with Apple on the relevant issues relative to individual negotiations by each party. The key issue for the ACCC is whether allowing such conduct would result in a net public benefit.

In general, the ACCC must not grant authorisation unless it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

Public benefits

Accessing the NFC controller

The Applicants submit that the proposed conduct would increase their likelihood of being able to offer their own digital wallets to iPhone users without relying on Apple Pay for making mobile payments. The Applicants claim this would lead to the following public benefits:

1. increased competition and consumer choice in digital wallets in Australia
2. increased innovation and investment in digital wallets and other mobile applications using NFC technology, and
3. greater consumer confidence leading to increased adoption of mobile payments in Australia.

The ACCC has not been provided with information about the terms on which access to the App Store is available and any likely public benefits in addition to those submitted by the Applicants that are likely to arise from the increased likelihood of being able to access the NFC controller.

The ACCC considers that there is likely to be some public benefit in increased competition and consumer choice in digital wallets resulting from the Applicants collectively negotiating and engaging in a boycott to seek access to the embedded NFC controller in iPhones and to

seek reasonable App Store access. However, the magnitude of this benefit is limited to some extent by existing opportunities that enable the Applicants to compete with Apple Wallet, including:

- their ability to sign up to Apple to offer an issuer digital wallet that incorporates Apple Pay as the mobile payment mechanism
- use of NFC tags or external NFC hardware
- their ability to offer competing digital wallets on other operating systems.

The ACCC considers that the option for the Applicants to sign up to Apple Pay to provide an issuer digital wallet that uses Apple Pay already allows the Applicants to compete with Apple Wallet and other digital wallets. Based on the information provided, the extent of any further increase in competition in digital wallets if the Applicants were able to directly access the NFC controller on iPhones, is not yet clear.

However, the ACCC recognises that this ability to compete does not include any direct competition with Apple Pay in relation to making mobile payments using the NFC controller on iPhones. Despite being able to provide digital wallets that compete with Apple Wallet, issuers would still be unable to provide payment processing features on Apple devices that compete directly with Apple Pay. Apple Pay would remain the only mobile payment service for Apple devices (aside from the option of using an NFC tag).

The option of using an NFC tag allows the Applicants to bypass the use of Apple Pay on iPhones and represents a competitive response from some of the Applicants and indicates that NFC tags are a partial substitute. However, the ACCC recognises that NFC tags have disadvantages, including operational disadvantages and appear to provide an inferior user experience for consumers. In addition, the ACCC notes that a variety of NFC technologies exist globally that can be implemented to introduce new functionalities to external NFC tags, such as the technologies used in mobile payment devices offered by Plastic and Coin 2.0.

Although there may be significant costs to consumer switching between Android and iOS platforms, the ACCC considers that the availability of issuer and non-issuer digital wallets with embedded NFC mobile payment functionality on the Android platform will exert some competitive tension on Apple.

The ACCC therefore considers that there is a likely public benefit from the proposed conduct to seek access to the embedded NFC controller in iPhones and reasonable App Store access. However, the magnitude of this benefit is limited to some extent by the existing opportunities that enable the Applicants to compete against Apple Wallet.

The ACCC considers that there is a potential benefit of increased innovation and investment in digital wallets and other mobile apps using NFC technology if the Applicants were successful in negotiating access to the NFC controller. However, given the uncertainty in how these markets are likely to develop, the ACCC is not satisfied on the information provided by the Applicants that any such benefit would be significant.

The ACCC considers that there would be a small public benefit from the proposed conduct making it more likely that Group Participants obtain better information from Apple and thereby may make more informed decisions as to whether to enter into an agreement with Apple.

The ACCC is not satisfied that the other claimed benefit of increased adoption of mobile payments is likely to result from the proposed conduct.

Pass through of fees

The ACCC accepts the general principle that transparency of fees is likely to result in better informed consumer choices and increased pricing efficiency. The ACCC considers that there is likely to be benefit from letting market forces determine whether issuers pass on the Apple Pay fees to consumers and by how much. Moreover, the threat of such pass through is likely to constrain Apple in setting the size of these fees.

The ACCC recognises there is a risk that allowing issuers to pass through fees may provide the Applicants with the scope to discriminate against Apple Pay and Apple Wallet in favour of their own digital wallets in a way which would distort competition. However, this risk may be somewhat mitigated by Apple in any agreement with an individual issuer. In addition, the fees may not be passed on even if the Applicants were entitled to do so, given the likely relative size of the fees and competition between card issuers.

Given these competing factors, on balance, the ACCC considers that the size of this benefit is uncertain.

Public detriments

The Applicants are seeking authorisation for the Group Participants to engage in conduct that would or might be cartel conduct, an exclusionary provision and/or conduct that would or might have the effect of substantially lessening competition.

The ACCC considers that the proposed conduct is likely to result in public detriments relating to reductions or distortions in competition in a number of areas:

- between issuers
- digital wallets
- mobile operating systems.

Reduction in competition between issuers

The ACCC considers that there is a likely detriment caused by the proposed conduct because it could weaken competition between the Group Participants (and with other issuers) in a range of markets.

The proposed conduct is likely to reduce the competitive tension between issuers individually concluding negotiations with Apple for Apple Pay. This is likely to reduce competition between Group Participants in relation to the supply of mobile payment services for consumers with NFC-enabled iPhones. It would reduce the competitive tension between Group Participants to make Apple Pay available for their cardholders for the duration of the collective negotiations and collective boycott (which could be up to three years).

The extent of this detriment is limited by the competitive tension created from those issuers who individually agree to offer Apple Pay, as ANZ, Amex, and certain clients of Cuscal Ltd have already done.

The ACCC also notes that the conduct could reduce competition between the Applicants in the provision of payment card services. Non-issuer digital wallets such as Apple Wallet have the potential to be a disruptive technology that may increase competitive tension between payment card issuers by increasing the ease of consumer switching at point of sale and

limiting any 'lock in' effect issuer digital wallets may cause. To the extent the proposed conduct artificially biases the development of issuer digital wallets over non-issuer digital wallets, these potential benefits may be lost. The ACCC is seeking submissions on these issues to better inform its final view.

Reduction in competition in digital wallets

The ACCC considers that there are likely detriments to competition in digital wallets caused by the proposed conduct.

The Applicants have requested authorisation for three years but submitted that negotiations will be conducted quickly. However, the authorisation sought would allow the Group Participants to agree not to sign up to Apple Pay for up to three years which the ACCC considers is a significant period of uncertainty.

Given the differentiating characteristics of Apple Pay and other mobile payments, a delay in being able to access Apple Pay functionality during the proposed conduct is likely to result in some public detriment in the form of decreased choice for affected consumers. This may also have a flow-on effect of lower take-up and acceptance of digital wallets and mobile payments by Australian consumers. Although the period of any such delay is uncertain and will depend on the conduct of the collective negotiations, the ACCC notes that the next two to three years are likely to be important to consumer adoption of digital wallets.

The ACCC also considers that, given the commercial incentives of the Applicants, as competitors in the supply of digital wallets, to favour their own wallets over non-issuer digital wallets, the proposed conduct has the potential to result in a reduction in competition in digital wallets. This could be due to the potential for the Applicants to seek to 'lock in' their customers to their own digital wallets if they gained access to the NFC controller in Apple devices.

Distortion in competition in mobile operating systems

The ACCC considers that there is a likely detriment in a distortion to competition between mobile operating systems caused by the proposed conduct. Apple's iOS platform is a differentiated offering that competes globally against other mobile operating systems, such as Android, in the services and features each operating system provider offers to consumers.

One of the features offered by mobile operating systems is mobile payment services and digital wallets that are available on competing systems. To the extent that the proposed conduct leads to an alteration of the offering that Apple is able to make available on the iOS platform, the proposed conduct may distort competition between these operating system providers. Apple's integrated approach to phone hardware and software has generated significant customer loyalty and has provided an important point of product differentiation that Android and other platform providers compete against.

While the ACCC is not satisfied on the information available that third party access to the NFC would necessarily compromise Apple's offering or the security of Apple Wallet and Apple Pay, the ACCC is concerned that the Applicants' objective of securing direct access to the NFC controller in iPhones may impact on the consumer experience offered by Apple's competitively differentiated approach to offering an integrated smartphone platform.

Conclusion

Based on the material before the ACCC, while some public benefit is likely to arise from the proposed conduct, the ACCC is not satisfied that the proposed conduct is, on balance, likely to result in public benefits that would outweigh likely public detriments or that the proposed conduct is likely to result in such a benefit to the public that it should be allowed to take place.

Next steps

The ACCC now seeks submissions in response to this draft determination. The Applicants or an interested party may also request that the ACCC hold a conference to discuss the draft determination.

Contents

Summary	i
The proposed conduct	i
Industry background	i
ACCC assessment	ii
Public benefits	iii
Public detriments	v
Conclusion	vii
Next steps	vii
Contents	1
Glossary	3
The applications for authorisation	6
The proposed conduct (as amended)	7
The collective bargaining	7
The limited collective boycott	8
Duration	8
Rationale	9
Background	9
Digital wallets	9
Mobile payments	13
Mobile operating systems	25
Payment card services	28
Consultation	31
Submissions on the likely future with and without	32
Future without	32
Future with	33
Submissions on public benefits	33
Addressing bargaining power imbalance between Apple and the Applicants	33
Access to NFC and reasonable App Store access	35
Ability to pass through Apple Pay fees to consumers	37
Other claimed public benefits	38
Submissions on public detriments	38
Competition between issuers	39
Competition in the supply of digital wallets	39
Competition in mobile operating systems	41
Potential for collusion between the Applicants	43
ACCC assessment	43
Relevant areas of competition	43
The supply of digital wallets in Australia	44
The supply of mobile payment services in Australia	44
The supply of smartphone operating systems in Australia	45
The supply of payment card services in Australia	45
Future with and without	46
Consideration of claimed public benefits	46
Increased bargaining power	47
Access to NFC and App Store	48
Ability to pass through Apple Pay fees to consumers	58
Other claimed public benefits	60
ACCC conclusion on public benefits	61

Consideration of claimed public detriments	62
Reduced competition between issuers	62
Reduced competition in the supply of digital wallets	66
Distortion in competition in the supply of mobile operating systems	68
ACCC conclusion on public detriments	69
Balance of public benefit and detriment	70
Draft determination	70
The applications	70
The net public benefit test	70
Next steps	71
Attachment A - Public benefit tests in CCA	72

Glossary

acquirer	a financial institution that receives payment card payments on behalf of a merchant and may also provide other services to merchants, e.g. supply of point of sale equipment
ADI	Authorised Deposit-taking Institution
API	an application programming interface (API) means to a way for software to interact with other software, e.g. an interface for a mobile application to communicate with a mobile operating system
app	a software application running on a smart mobile device
Apple Pay	Apple's digital payment service that makes: <ul style="list-style-type: none"> • mobile payments at the point of sale in a retail store, if the terminal accepts NFC payments, and • online payments within other apps and on websites in Safari¹
App Store	an online platform for distribution and purchase of software applications and mobile apps for computers and mobile devices. <ul style="list-style-type: none"> • The Apple App Store is the only platform on which apps for Apple devices can be distributed. • The Google Play Store is one of several platforms available for distributing apps for Android devices.
Apple Wallet	The Wallet app (previously known as Passbook) that is pre-installed on iPhones. Apple Wallet holds passes for flights, coupons, tickets, etc., and also allows payment cards to be added and used for online payments and mobile payments via Apple Pay for iPhone 6, iPhone 6 Plus or newer devices ²
Biometric authentication	methods of authentication used in most smart mobile devices such as fingerprint identification, an eye scan or a heart rate sensor
Capital One	a large bank based in the United States of America. It offers financial products and services to consumers, small businesses and commercial clients in the US, Canada and the UK
card scheme	a payment network in which financial institutions can participate in order to facilitate card payments between cardholders and merchants, e.g. Visa, MasterCard, American Express

¹ <https://support.apple.com/en-au/HT201239>

² <https://support.apple.com/en-au/HT204003>

digital credit cards	an electronic payment device that resemble a payment card but are equipped with in-built processors and other hardware that allows to perform functions like store multiple credit, debit, gift, loyalty and membership cards, make point of sale payments, perform biometric identification, provide proximity alerts, etc.
digital wallet	an app on a mobile devices that performs some of the functions of a physical wallet, including storing payment cards for making mobile payments and, in some cases, storing other cards such as loyalty cards
HCE	Host Card Emulation (HCE) allows sensitive data to be stored in the cloud, or a database external to the device. This means that the device itself does not hold any sensitive information that could be stolen along with the device
issuer	a financial institution that issues a credit or debit card to a cardholder
issuer digital wallet	a digital wallet that is offered by an issuer for that issuer's payment cards, e.g. Commbank app, ANZ Mobile Pay app, NAB Mobile Banking app.
mobile payment	a payment performed using a digital wallet on a smart mobile device to at point of sale terminals in a retail store
MST	Magnetic Secure Transmission (MST) is a technology that emits a magnetic signal that mimics the magnetic strip on a traditional payment card
NFC³	<p>Near-Field Communication (NFC) is a set of technology standards and protocols for controller communications over a short distance, typically 4cm or less. Contactless cards and certain mobile devices can transmit payment information via NFC to compatible point of sale terminals (the means by which a merchant processes a payment).</p> <p>This draft determination distinguishes between:</p> <ul style="list-style-type: none"> • digital wallets with embedded NFC, which refers to digital wallets that can access the NFC controller embedded in a mobile device and therefore do not require an external NFC tag, and • digital wallets using NFC tag, which refers to digital wallets that do not have access to any in-device NFC controller and require an external NFC chip to make mobile payments
NFC-enabled device⁴	an NFC-enabled device has an NFC controller embedded in its hardware.
NFC tag⁵	a chip that can store information that can be read by an NFC-enabled device, often in the form of a sticker that can be attached to the back of a smartphone
non-issuer digital wallet	a digital wallet that is not offered by an issuer for that issuer's payment cards, e.g. Apple Wallet app, Android Pay app, Google Wallet app, etc.

3 <http://nfc-forum.org/what-is-nfc/resources/glossary/#n>

4 <http://nfc-forum.org/what-is-nfc/resources/glossary/#n>

5 <http://nfc-forum.org/what-is-nfc/resources/glossary/#n>

non-issuer wallet provider	a provider of non-issuer digital wallets such as Apple, Google, Samsung, PayPal, etc.
online payments	payments performed over the internet to facilitate the sale and purchase of goods and services online
payment card	a debit or credit card issued in Australia
peer-to-peer payments	payments involving the direct transfers of funds between two individuals' bank accounts
QR Code	A 'Quick Response Code' (QR Code) is a two-dimensional evolution of the traditional barcode which allows complex information to be encoded in visual form. QR Codes may be displayed on a mobile phone screen and scanned by a QR Code-enabled point of sale terminal
SCCIs	Specialist Credit Card Institutions, which are a new class of Authorised Deposit-taking Institutions that developed in 2004
Secure Element	a chip built into a mobile device that is isolated from other hardware components with a restricted access interface and strong encryption. This chip only stores a single customer's credentials and cryptographic information, which limits its value to prospective hackers
tokenisation	a process by which the actual credit card number is removed and replaced with a randomly generated number (the 'token') that is usually only valid within limited parameters

The applications for authorisation

1. On 26 July 2016, Bendigo and Adelaide Bank (**Bendigo Bank**), Commonwealth Bank of Australia (**CBA**), National Australia Bank (**NAB**) and Westpac Banking Corporation (**Westpac**), (the **Applicants**), lodged applications for authorisation⁶ (A91546 and A91547) with the ACCC. The Applicants sought authorisation on behalf of themselves and potentially other credit and debit card issuers to engage in limited collective negotiation with providers of third party digital wallet services on three issues described as relating to 'competition, best practice standards, and efficiency and transparency'. The Applicants also sought authorisation to enter into a limited form of collective boycott in relation to third-party digital wallets while collective negotiations with that provider were ongoing. The collective boycott would not be formally monitored or enforced. The Applicants sought authorisation for three years.
2. On 30 September 2016, the Applicants amended the proposed conduct for which authorisation was sought, in response to interested party submissions, as follows:
 - a. the focus for collective bargaining is to be Apple
 - b. the scope of the issues for collective bargaining was to include access to the NFC controller in iPhones, security standards, and the ability to charge fees for the use of Apple Pay, and
 - c. the potential collective bargaining group could include both payment card issuers and retailers.
3. On 27 October 2016, the Applicants further amended the proposed conduct for which authorisation was sought, as follows:
 - a. the target for collective bargaining was narrowed to only Apple
 - b. the collective bargaining group includes only entities offering credit or debit cards, being the Applicants and other financial institutions and retailers who have their own or co-branded credit cards
 - c. the scope of the issues for collective bargaining was narrowed to remove the issue of security standards, which will be left to individual negotiations
 - d. the scope of the collective negotiation in respect of fees relates to removal of any 'no pass through' restriction, and does not include the fees to be charged by Apple or by individual issuers
 - e. the scope of the collective negotiation includes access to NFC as well as the ability to provide competing digital wallets without Apple unreasonably impeding or preventing this, for example through mechanisms such as unreasonably prohibiting access to the App Store, providing access to the App Store on unreasonable terms or unreasonably delaying the approval of the app and its availability in the App Store.

⁶ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013.

4. While submissions were received covering the original scope of the conduct, only aspects of submissions relevant to the amended proposed conduct (as set out in more detail in the next section) have been included in this draft determination. The description of the proposed conduct below reflects the amendments received by the ACCC to date.
5. The Applicants also requested interim authorisation to enable them to engage in the proposed conduct while the ACCC is considering the substantive applications. The ACCC decided not to grant interim authorisation on 19 August 2016.⁷

The proposed conduct (as amended)

6. The Applicants seek authorisation, for themselves and for other issuers of credit or debit cards who wish to join, to:
 - a. collectively bargain with Apple on the issues identified below in paragraph 9, and
 - b. enter into a limited form of collective boycott as described below in paragraphs 12 to 14(collectively referred to throughout as the **proposed conduct**).
7. The applications are made on behalf of the Applicants as well as other issuers of payment cards in Australia (collectively referred to as the **Group Participants**). The Group Participants include other financial institutions as well as potentially large retailers who have their own or co-branded credit cards.
8. In effect, the Applicants are seeking authorisation for the Group Participants to engage in conduct that would or might be cartel conduct, an exclusionary provision and/or conduct that would or might have the effect of substantially lessening competition.

The collective bargaining

9. The issues on which the Applicants wish to collectively negotiate with Apple (**the relevant issues**) are:
 - a. the ability to offer competing digital wallets with access to NFC and reasonable App Store access; the Applicants wish to collectively negotiate with Apple to allow their digital wallets:
 - i. to access the in-device NFC controller built into iPhones (**access to NFC**), and
 - ii. to be distributed from Apple's App Store without any unreasonable prohibitions, unreasonable terms, or unreasonable approval delays from Apple (**reasonable App Store access**)
 - b. **fees**: the Applicants wish to collectively negotiate to enable the pass through of fees charged to issuers by Apple. This does not include the amount of fees to be charged to individual issuers.⁸

⁷ The ACCC's decision regarding interim authorisation dated 19 August 2016 can be viewed at <http://registers.accc.gov.au/content/index.phtml/itemId/1197444/fromItemId/278039/display/acccDecision>.

10. The Applicants submit that information sharing protocols will apply to prevent any exchange of confidential or commercially sensitive information other than as necessary for the specific purposes of collective negotiation of the issues.⁹
11. Additional payment card issuers may elect to participate in the collective negotiation after it has commenced, on the understanding that any decisions made prior to a party joining will not be open to reconsideration.

The limited collective boycott

12. The Applicants propose that participants in the collective bargaining group will agree not to sign up to Apple Pay (i.e., will not individually reach agreement with Apple to allow their cardholders to load their cards on to Apple Wallet) while participating in the collective negotiation. However, participants are free to negotiate individually with Apple on all issues other than the relevant issues above at any time, including during the period of collective negotiation.¹⁰
13. The Applicants expect participants in the collective negotiation not to conclude individual negotiation with Apple until the collective negotiation has been concluded.¹¹ However, this is not a requirement.
14. The Applicants expect any participant who wishes to withdraw from the collective negotiation group to notify the group. No penalties will apply for withdrawal.¹²

Duration

15. The Applicants seek authorisation for three years.
16. The Applicants expect to commence collective bargaining as soon as possible and no later than a month after authorisation is granted.
17. Once commenced, any collective bargaining and limited collective boycott would continue for a maximum of 12 months, unless extended by the agreement of the collective negotiation group, up to a maximum period of three years from authorisation.
18. The collective negotiation will continue until the parties are satisfied with the result or conclude that there is no value in continuing the collective negotiation, in which case the Applicants expect the participants to revert to individual negotiations with Apple.¹³

8 Applicants' letter to ACCC re Scope of Proposed Conduct, received 27 October 2016, page 1.

9 Information regarding the proposed collective negotiation framework is set out in Applicants' submission in response to interested party submissions, received 7 October 2016, page 45, Applicants' letter to ACCC re scope of proposed conduct, received 27 October 2016, and Applicants' letter to ACCC re provision of further information, received 5 September 2016.

10 Applicants' submission in response to interested party submissions, received 7 October 2016, page 6.

11 Applicants' letter to ACCC re scope of proposed conduct, received 27 October 2016, page 4.

12 Applicants' letter to ACCC re scope of proposed conduct, received 27 October 2016, page 4.

13 See Applicants' letter to ACCC re provision of further information, received 5 September 2016; and Applicants' letter to ACCC re provision of further information, received 30 September 2016.

Rationale

19. The Applicants submit¹⁴ that the proposed conduct is necessary to reduce the disparity in bargaining power between Apple and each of the Applicants individually in Apple Pay negotiations on the relevant issues, thereby increasing the likelihood of achieving their objectives. They argue that this would result in net public benefits including increased competition, customer choice and confidence, innovation and investment in digital wallets and mobile payment services in Australia.
20. The Applicants submit that Apple has particularly significant bargaining power in these negotiations due to its ownership of and control over the operating system, mobile hardware and permissible mobile software on iPhones, which means Apple has the ability to control digital wallet access for iPhone users, who represent a key segment of the addressable market for digital wallet providers.
21. The Applicants submit that Apple's bargaining power is illustrated by the introduction of Apple Pay in other countries on an 'exclusive basis' on the iPhone platform, i.e. Apple has not provided third party apps with access to the NFC controller of its devices.
22. The Applicants submit that Australia remains a small market compared to the United States of America (US) and the United Kingdom (UK), and Australian banks have much less bargaining power in dealings with Apple, compared with the major overseas banks. The Applicants submit that collective negotiation and boycott will be required in Australia to overcome the disadvantages the Applicants will face in individual negotiations with Apple.
23. The Applicants submit that Apple is also not subject to the same regulatory obligations and restrictions as banks in relation to the fees and charges that can be imposed for transactions. The Applicants also submit that Apple is unlikely to lose iPhone customers if the Applicants do not sign up to Apple Pay. The Applicants consider that these factors further increase Apple's bargaining power.

Background

Digital wallets

Meaning of 'digital wallets'

24. The Applicants have broadly defined a digital wallet as an app or service that facilitates mobile payments and may also store other cards such as loyalty cards, boarding passes, event tickets, coupons, and identification and membership cards.¹⁵
25. In this draft determination, where the term '**digital wallet**' is used, it refers to an app on a mobile device that performs some of the functions of a physical wallet, including storing payment cards for making mobile payments, making payments at the point of sale and, in some cases, storing other cards such as loyalty cards.

¹⁴ Applicants submission in response to interested party submissions, received 7 October 2016, pages 9-19.

¹⁵ Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 17.




26. Examples of digital wallets include the Apple Wallet app, the Android Pay app, and issuer-branded apps such as the Commbank App and the Westpac Mobile Banking app. Apple Pay is not included in the ACCC's definition of a digital wallet but is instead considered to be a mobile payment service (as discussed below).
27. '**Non-issuer digital wallets**' refer to digital wallets that are not offered by an issuer for that issuer's payment cards, e.g. Apple Wallet app, Android Pay app, Google Wallet app, etc. A 'non-issuer wallet provider' accordingly refers to a provider of non-issuer digital wallets such as Apple, Google, Samsung, PayPal, etc. '**Issuer digital wallets**' refer to digital wallets offered by an issuer for that issuer's payment cards, e.g. Commbank app, ANZ Mobile Pay app, NAB Mobile Banking app.

Digital wallets in Australia

28. There are currently three non-issuer digital wallets able to make NFC-enabled mobile payments in Australia:
 - a. **Apple Wallet using Apple Pay** was developed by Apple for the iOS platform only and launched with American Express (**Amex**) in Australia in November 2015, with ANZ in April 2016, and will soon to be available on cards issued by some of Cuscal's members.¹⁶ Apple Pay uses biometric authentication in the form of a fingerprint ID. Apple Pay also uses tokenisation and a dynamic cryptogram to generate single-use payment tokens transmitted to merchants instead of a user's real credit card number. Apple does not allow third party app developers to access the NFC controller on Apple devices, which means issuers cannot create their own apps that provide mobile payment services in competition with Apple Pay.
 - b. **Android Pay** was developed by Google for the Android platform only and launched in Australia in July 2016 with support for cards issued by ANZ, Amex, Macquarie and a number of regional banks and credit unions. Access to the NFC controller on Android devices is provided by a documented Application Programming Interface (**API**). Android Pay requires the device to be unlocked before use, which can be done by a passcode, pattern or biometric authentication, depending on device capability and user preference. Android Pay uses tokenisation to create a virtual credit card number and keep actual card data hidden from merchants.
 - c. **Samsung Pay** was developed by Samsung for the Android platform and for specific Samsung devices only. It launched in Australia in June 2016 for cards issued by Amex and Citibank. Access to the NFC controller on Samsung devices is provided by the standard Android **API**. Samsung Pay also uses a passcode or biometric authentication such as fingerprint ID or (in limited models) a retina scan. It uses tokenisation to ensure that credit card information is not stored on the device or sent to the merchant terminal.

¹⁶ Cuscal's 31 clients which made Apple Pay available to their cardholders on 15 November 2016 are: Bank Australia, Bank of Sydney, Beyond Bank Australia, Big Sky Building Society, Australian Unity, CAPE Credit Union, Central West Credit Union, Illawarra Credit Union, Catalyst Money, Community First Credit Union, Northern Beaches Credit Union, Credit Union Australia (CUA), Credit Union SA, Defence Bank, EECU, First Option Credit Union, Goldfields Money, Goulburn Murray Credit Union Co-Op, Holiday Coast Credit Union, Horizon Credit Union, Intech Credit Union, Laboratories Credit Union, My State Bank, The Rock, Northern Inland Credit Union, People's Choice Credit Union, Police Bank, Customs Bank, QT Mutual Bank, Select Encompass Credit Union, South West Slopes Credit Union, Sydney Credit Union, Teachers Mutual Bank, UniBank, The Mac (Macarthur Credit Union), Warwick Credit Union and Woolworths Employees' Credit Union.

29. At present, the Applicants are able to offer their own banking app on iOS alongside Apple Pay, but cannot access the NFC controller contained in Apple devices. They can only therefore offer contactless payments via their own apps by using an NFC tag or by agreement with Apple on terms for use of Apple Pay in their app (with no such agreements currently existing in Australia between issuers and Apple).
30. The Applicants offer a combination of digital wallet and mobile banking services:¹⁷
- Bendigo and Adelaide Bank (Bendigo Bank)** offers a digital wallet and loyalty rewards using QR code technology at selected retailers for both iPhones and Android phones. Bendigo Bank also offers Android Pay to enable mobile payments using embedded NFC for Android devices.
 - Commonwealth Bank of Australia (CBA)** offers mobile banking and mobile payments through its CommBank app for smartphone. The CommBank app allows mobile payments to be made on NFC with the embedded NFC on compatible Android devices and via an NFC tag for iPhone devices. CBA has not signed up to offer its cardholders the ability to use Android Pay.
 - National Australia Bank (NAB)** offers mobile banking and mobile payments on its NAB Pay app for both iOS and Android phones. NAB Pay allows mobile payments using NFC technology using the embedded NFC controller on Android phones and using an NFC tag on iPhones. NAB also has not made its payment cards available on Android Pay.
 - Westpac Banking Corporation (Westpac)** offers mobile banking and payments through its Westpac Mobile Banking app, which enables mobile payments using the embedded NFC controller on compatible Samsung smartphones.¹⁸ Westpac has announced that it will soon make its payment cards available on Android Pay.
31. The below table summarises the digital wallet options currently available:

	Android platform			iOS platform	
	Android Pay ¹⁹ 	Samsung Pay ²⁰ 	Issuer digital wallet with NFC mobile payments?	Apple Wallet ²¹ 	Issuer digital wallet with NFC mobile payments?
Amex	Yes.	Yes.	No.	Yes.	No.
ANZ	Yes.	No.	ANZ Mobile Pay.	Yes.	No.
CBA	No.	No.	CommBank app.	No.	CommBank app with PayTag.
NAB	No.	No.	NAB Mobile Banking	No.	NAB Mobile Banking app




17 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 2-3.

18 <https://www.westpac.com.au/personal-banking/online-banking/support-faqs/supported-devices/>.

19 <https://support.google.com/androidpay/answer/6314169?hl=en>

20 <http://www.samsung.com/us/samsung-pay/compatible-cards/>

21 <http://www.apple.com/au/apple-pay/banks/au/en-au.html>,

	Android platform			iOS platform	
	Android Pay¹⁹ 	Samsung Pay²⁰ 	Issuer digital wallet with NFC mobile payments?	Apple Wallet²¹ 	Issuer digital wallet with NFC mobile payments?
Westpac	Yes, launch pending.	No.	app. Westpac Mobile Banking app (only some Samsung models). ²²	No.	No. with PayTag.
Bendigo Bank	Yes.	No.	No.	No.	No.
Other issuers	Macquarie Bank Citibank, Various Cuscal Ltd (the same 31 smaller banks and credit unions as recently signed up to Apple Pay) Also ING Direct, Macquarie Bank, Maritime, Mining & Power Credit Union, Queenslanders Credit Union Limited, Wyong Shire Credit Union Limited			Cuscal Limited (31 smaller banks and credit unions) agreed, launch pending. ²³ Various	

32. Digital wallets are new to the payments landscape in Australia and globally and there is a high level of development with announcements of new offerings appearing frequently. Upcoming initiatives in Australia involving digital wallets include the following:
- Transport for NSW has announced a trial of an 'open loop' alternative to the public transit smart card which would allow passengers to tap on and off with their credit or debit card or digital wallet.
 - The NSW government has announced a digital license program that will see a number of common licenses available in digital form and a digital driver's license by 2018. These could potentially be held in apps or in a digital wallet.
 - The Commonwealth Government has begun to provide digital versions of concession cards such as Health Care Cards and Pensioner Concession Cards

²² Compatible devices include Samsung Galaxy S4, S5, S5 mini, S6, S6 edge, S6 edge+, S7, S7 edge, Galaxy Alpha, Note 3, Note 4, Note 5, Note edge and Note 7: <https://www.westpac.com.au/personal-banking/online-banking/support-faqs/supported-devices/>.

²³ See further <https://www.cuscal.com.au/apple-pay-coming-soon>.

through its Centrelink Express Plus mobile app. These could potentially be held in a digital wallet.

33. A growing number of digital wallets are also being introduced overseas, e.g. in the United States, the United Kingdom, and Canada.²⁴

Substitutability of digital wallets

34. From a consumer's point of view, whether one digital wallet is a close substitute for another will depend on a number of factors.
- a. For a consumer who has multiple payment cards from different issuers, it may be important to have a digital wallet that allows for the provision of all of these cards. For this type of consumer, digital wallets that only allow use of one bank card may not be good substitutes for non-issuer digital wallets that offer a range of card options.
 - b. For a consumer with a single or predominant relationship with one bank, that issuer's digital wallet may be a good substitute for other non-issuer wallets that offer use of the issuer's cards.
35. However, for most consumers, particularly those with a single relationship with one bank, substitutability between issuer digital wallets is likely to be limited (e.g. for a NAB cardholder, the CBA digital wallet is not likely to be very useful unless the customer is willing to switch banks, as discussed below).
36. Competition between digital wallets is also limited by two main barriers to switching:
- a. *device compatibility*: a consumer's ability to access different digital wallets is limited by the software and hardware on their mobile device. For example, Apple Pay is available only on iPhones and Android Pay is available on devices running the Android operating system. Therefore, in many cases, for consumers to switch between non-issuer digital wallets (i.e., from Apple Pay to Android Pay) would also require them to switch mobile device. Consumers' willingness and ability to switch between different mobile devices is discussed in the following section on mobile devices.
 - b. *participating issuers*: a consumer's ability to switch between different digital wallets will also depend on whether they have a payment card that can be provisioned onto the digital wallet. Currently, Amex is the only issuer who allows their cards to be loaded on to each of Apple Pay, Samsung Pay and Android Pay, whilst ANZ allows their cards to be loaded on to Apple Pay and Android Pay.

Mobile payments

Meaning of 'mobile payments'



37. The Applicants have described mobile payments in a broad way to mean payments or transfers of money initiated on a mobile device such as a mobile phone or tablet, including.²⁵

²⁴ See Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 51-56.

- a. online shopping on an app or mobile website
 - b. peer-to-peer payments between a user and another user's bank account
 - c. mobile banking apps for iOS, Android and Windows Phones
 - d. online wallets where users can transfer funds to an online account and use those funds to make online purchases or initiate peer-to-peer payments (e.g. PayPal)
 - e. payments using QR Codes
 - f. payments using NFC technology.
38. For the purposes of this draft decision, the ACCC uses the term '**mobile payment**' in a more narrow sense to mean a payment performed using a digital wallet on a smart mobile device at point of sale terminals in a retail store. This is the type of payment the Applicants wish to offer by accessing the NFC controller in a smart device.
39. Mobile payments are accordingly distinguished from other types of payments able to be made from digital wallets, such as:
- a. **online payments**, which refer to payments performed over the internet to facilitate the sale and purchase of goods and services online. Online payments tend not to use NFC technology.
 - b. **peer-to-peer payments**, which involve the direct transfers of funds between two individuals' bank accounts. Peer-to-peer payments tend not to incur interchange fees.
40. In addition to making mobile payments, both digital wallets and mobile payment services can be capable of making other types of payments. For example, Apple Pay (used by Apple Wallet) is an example of a mobile payment service, but Apple Pay can also make online payments through the Safari browser and issuer-branded digital wallets will often allow peer-to-peer payments, which involve the direct transfers of funds between two individuals' bank accounts.
41. A further function of digital wallets is to hold airline or event tickets, loyalty cards, store value cards, coupons, transport cards, identification and membership cards, etc., depending on the availability of participating retailers or transport providers.










Use of mobile payments in digital wallets

42. The table below sets out the mobile payment services currently available in Australia and the digital wallets that use them:

Provider	Digital Wallet	Mobile Payment Service
Apple	 Apple Wallet app ²⁶	Apple Pay 

25 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 16-17.

26 <https://support.apple.com/en-au/HT204003>

Provider	Digital Wallet	Mobile Payment Service
Google	 Android Pay app ²⁷	Android Pay 
	 Google Wallet app ²⁸	No mobile payment services, peer-to-peer payments only
Samsung	 Samsung Pay app ²⁹	Samsung Pay 
ANZ	 ANZ Mobile Pay app ³⁰	ANZ Mobile Pay ³¹
CBA	 CommBank app ³²	CommBank Tap & Pay ³³
Westpac	 Westpac Mobile Banking app ³⁴	Westpac tap and pay ³⁵
NAB	 NAB app ³⁶	NAB Pay ³⁷

43. The ACCC notes that the provider of a digital wallet and the provider of the mobile payment service are not always the same. For instance, in the US, the Capital One Wallet app allows customers to make mobile payments using Apple Pay from within the Capital One digital wallet.³⁸
44. The ACCC understands that Capital One has signed up with Apple to allow its cardholders' cards to be loaded onto Apple Wallet. In addition, Capital One cardholders can use Capital One's separate digital wallet to perform a range of functions such as receive instant purchase notifications, lock their cards, digitise gift cards or capture receipts,³⁹ as well as make payments using Apple Pay's payment

27 <https://play.google.com/store/apps/details?id=com.google.android.apps.walletnfcrel>

28 <https://play.google.com/store/apps/details?id=com.google.android.apps.walletnfcrel>

29 <https://play.google.com/store/apps/details?id=com.samsung.android.spay>

30 <https://play.google.com/store/apps/details?id=com.anz.mobilepay>

31 <http://www.anz.com/personal/ways-bank/mobile-banking/mobile-pay/>

32 <https://play.google.com/store/apps/details?id=com.commbank.netbank>

33 <https://www.commbank.com.au/personal/online-banking/commbank-app/tap-and-pay.html>

34 <https://play.google.com/store/apps/details?id=org.westpac.bank>

35 <https://info.westpac.com.au/personal-banking/mobilepayments/>

36 <https://play.google.com/store/apps/details?id=au.com.nab.mobile>

37 <http://www.nab.com.au/sites/personal/accounts/nab-pay>

38 <https://www.capitalone.com/applications/mobile/apple-pay/>

39 <https://www.capitalone.com/applications/mobile/wallet/?Log=1&EventType=Link&ComponentType=T&LOB=MTS%3A%3AM4YBT15&PageName=Capital+One+and+Apple+Pay+New&PortletLocation=4%3B16-col%3B1-1-2-1&ComponentName=capital+one+and+apple+have+joined+forces%3B32&ContentElement=2%3BLearn+>

function. A cardholder can view all pending and posted transactions from the last 30 days, whether made from within the Capital One wallet or using Apple Wallet.⁴⁰

Mobile payment services in Australia

45. Two key features of mobile payments in Australia are that:
- a. mobile payments in Australia tend to require NFC technology to interact with point of sale merchant terminals (see further section on *Mobile payment technologies* below), and
 - b. open-loop mobile payments in retail stores involve a debit or credit card scheme and involve a network of transaction fees paid to and from the parties of the card scheme (see further section on *Fees for mobile payments* below).
46. Australia has a high penetration of contactless-enabled terminals, high levels of smartphone ownership, and widespread use of contactless payments, but low use of mobile payments.
47. Prior to the introduction of any non-issuer digital wallet in Australia in November 2015, it was estimated there were around 400,000 to 500,000 contactless mobile payment users spending around \$8 million per month (around 8 per cent of smartphone owners had made a mobile payment).⁴¹
48. Despite the currently small percentage of mobile payments, this is an area of potentially rapid innovation and growth in Australia.⁴² For example, the Canadian Payments Association has found that the compound annual growth rate from 2008 to 2011 for the value of digital wallet and peer-to-peer transactions was 43.5 per cent and for prepaid cards it was 46.9 per cent.⁴³

Mobile payment technologies

49. To make mobile payments, wireless technology is required to enable communication between the mobile device and the payment terminal.
50. Near-Field Communication (**NFC**) technology is a set of technology standards and protocols for controller communications over a short distance, typically 4cm or less.⁴⁴
51. NFC technology is already widely used to make contactless payments through payment cards in Australia, with Visa estimating that there are 100,000 contactless terminals with merchants and over 1 million contactless transactions made per day.⁴⁵

more+about+the+app.&TargetLob=MTS%3A%3AM4YBTv15&TargetPageName=Capital+One+Wallet&referer=https%3A%2F%2Fwww.capitalone.com%2Fapplications%2Fmobile%2Fapple-pay.

40 <https://www.capitalone.com/applications/mobile/apple-pay/>.

41 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 26.

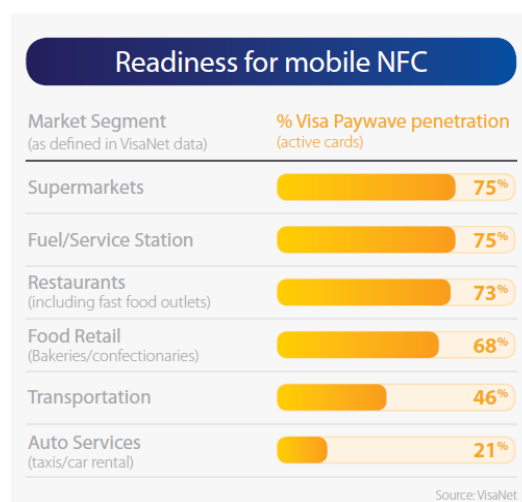
42 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 15.

43 Department of Finance Canada, Balancing Oversight and Innovation in the Ways We Pay: A Consultation Paper, date modified: 13 April 2015: <https://www.fin.gc.ca/activty/consult/onps-ssnp-eng.asp>.

44 <http://nfc-forum.org/what-is-nfc/>.

45 <http://blog.apca.com.au/prospects-mobile-contactless-payments-australia/>.

52. The figure to the right shows the widespread availability of NFC terminals in Australia:⁴⁶
53. Digital wallets can use NFC technology to make mobile payments at NFC enabled point of sale terminals, by using either:
- the **embedded NFC controller** in a mobile devices, or
 - a **NFC tag** affixed to a device.
54. Mobile devices embedded with an NFC controller were introduced with the release of the Nexus S running the Android platform in 2010 and the iPhone 6, 6 Plus and SE running the iOS platform in September 2014.
55. Quick Response Codes (**QR Codes**) are a two-dimensional evolution of the traditional barcode which allows complex information to be encoded in visual form.⁴⁷ QR Codes may be displayed on a mobile phone screen and scanned by a QR Code-enabled point of sale terminal.
56. QR code payments are not as ubiquitously or widely accepted by Australian merchants and consumers as NFC payments.⁴⁸ This differs from the situation in some overseas countries. Notably, in China, non-issuer digital wallets using QR code technology include Alipay and WeChat Pay, both of which are popular in urban China where the use of QR codes at the point of sale is widespread.⁴⁹
57. In Australia, the only digital wallet currently using QR codes to enable point of sale mobile payments is provided by Bendigo and Adelaide Bank through their mobile app 'redy Shopping'.
58. Samsung Pay uses Magnetic Secure Transmission (**MST**), a technology that emits a magnetic signal that allows MST-enabled Samsung phones to mimic the magnetic strip on a traditional payment card to make mobile payments at any terminal that reads magnetic stripe credit cards.⁵⁰
59. Other wireless technologies, such as Bluetooth and Wi-Fi, can also be used to allow communication between devices. These are not commonly used for point of sale payments in Australia.
60. As discussed in *Relevant Areas of Competition* below, as a result of the significant prevalence of NFC technology in the Australian payments infrastructure, the ACCC focuses on NFC-enabled mobile payments in this draft determination.



46 The Visa-RFi Group Australian Payments Report: The changing payments behaviour of Australian consumers and the impact on banking relationships, June 2015, page 31.

47 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 17, footnote 39.

48 Applicants submission in response to interested party submissions received 7 October 2016, page 21.

49 See, e.g., <http://mobilebusinessinsights.com/2016/05/how-qr-code-became-popular-among-mobile-users-in-china/>.

50 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 53.

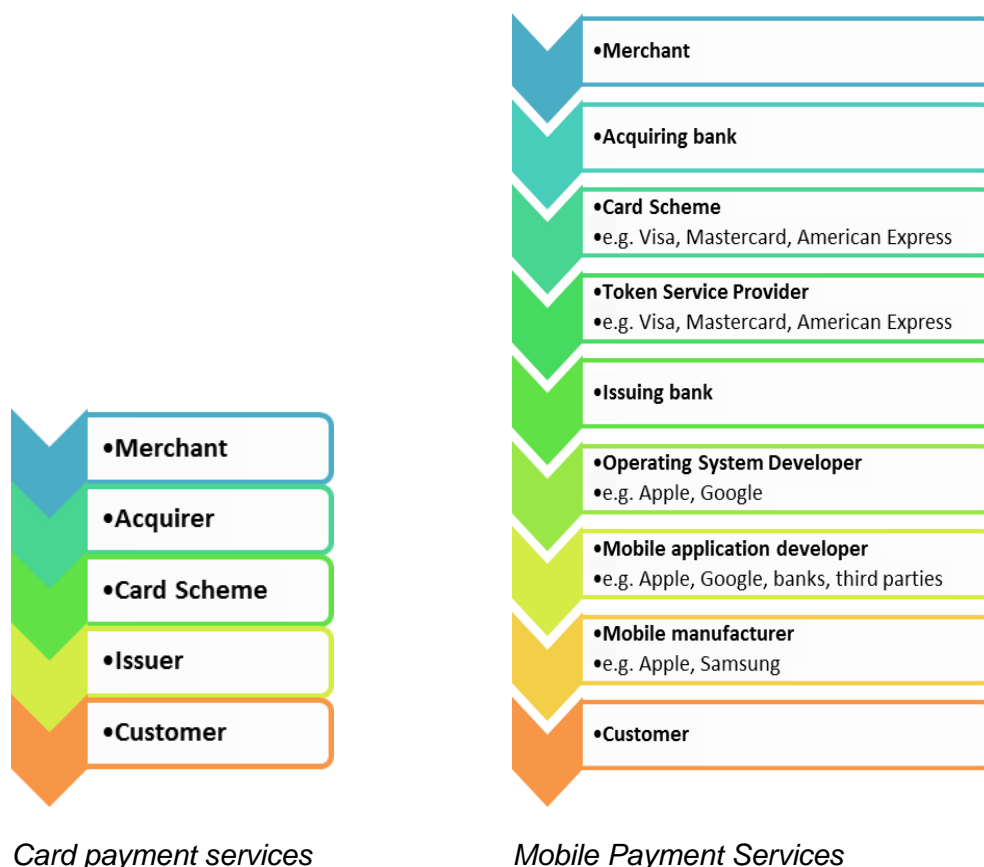
Key inputs for mobile payments using NFC

61. There are a number of key inputs for NFC-enabled mobile payments, including:
- a. **NFC-capable hardware**, e.g. an embedded NFC controller in a mobile device or a separate NFC chip
 - b. **operating system software** to manage and operate any embedded NFC hardware
 - c. **mobile application software** to perform the specific functions of the digital wallet, and
 - d. **payment cards** able to be provisioned on to the digital wallet.
62. There are differing levels of vertical integration between different providers of digital wallets and mobile payment services (the implications of this are discussed in paragraph 218 below). Of the non-issuer digital wallets, Apple has a significant degree of vertical integration, as a manufacturer of the device hardware, and the developer of both the operating system software and mobile application software.
- a. Apple designs, manufactures and markets mobile communication and media devices, personal computers and portable digital music players, and sells a variety of related software, services, accessories, networking solutions and third party digital content and applications.
 - b. Apple is the world's largest publicly traded company by market capitalisation, with a market value of \$US533 billion at 2 February 2016.⁵¹ Its 2015 revenues were \$US234 billion worldwide.⁵² It has been considered the world's most valuable brand since 2012 with an estimated brand value of \$US143 billion.⁵³
63. Issuers are vertically integrated as the developer of application software as well as the issuer of the payment cards to be provisioned on to the digital wallets.
64. Other relevant parties include card schemes such as Visa, MasterCard and Amex, who may have a role in 'tokenisation' of transactions and in distributing the interchange fee received by the issuer.
65. The value chain for traditional card payments as compared with the value chain for mobile payment services is shown in the diagram below:

51 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 41, citing Financial Times Global 500, 2015.

52 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 42, citing Forbes, "The world's most valuable brands", 2015.

53 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 42, citing Forbes, "The world's most valuable brands", 2015.



Innovations in mobile payments

66. As discussed in the previous section, one of the key inputs for NFC-enabled mobile payments is NFC-capable hardware. This hardware can be in the form of either an NFC controller embedded in a mobile device or an external NFC chip separate to the mobile device. In Australia, the use of external NFC hardware for mobile payments is currently limited to NFC chips such as those used in the Commbank PayTag or the NAB PayTag.
67. Mobile payments using external NFC hardware is not limited to these relatively simple NFC tags. More advanced hardware with NFC capability has been deployed in new products such as digital credit cards, which are electronic payment devices that resemble a payment card but are equipped with in-built processors and other hardware that allows a consumer to perform functions like store multiple credit, debit, gift, loyalty and membership cards, make point of sale payments, perform biometric identification, provide proximity alerts, etc. Some of these functions are often provided by digital credit cards through an accompanying smartphone app.
68. Examples of digital credit cards include:
 - **Plastc**, launched in April 2016, contains a magnetic stripe and an EMV chip, as well as NFC hardware to enable contactless payments. Plastc has a touch screen and requires a 4-digit PIN to be unlocked or for the user to switch cards. The Plastc smartphone app offers features such as 'left behind' alerts when the

Plastic card is a certain distance away from your phone and a 'remote wipe' feature for erasing the stored information.⁵⁴

- **Coin 2.0** also uses both magnetic stripe technology and NFC technology to allow contactless payments at compatible terminals.⁵⁵ Coin 2.0 replaces the NFC-incompatible Coin 1.0 launched in 2013.⁵⁶ Coin announced in May 2016 that no more Coin 2.0 cards will be sold and that its wearable payments assets will be sold to Fitbit, Inc.⁵⁷
- **Swyp**, Swyp has a magnetic stripe and an EMV chip, but no NFC technology. The Swyp app can also scan barcodes.⁵⁸
- **Stratos Card**, launched in May 2015, uses the same magnetic stripe technology as traditional magnetic stripe cards with no NFC-capability.⁵⁹ It uses Bluetooth technology to communicate with the Stratos smartphone app. The Stratos Card was discontinued in December 2015.⁶⁰

69. The above examples demonstrate the high level of innovation in mobile payments products and services as well as rapid entry and exit of new products demonstrating the highly dynamic nature of competition in this market.

Security features of mobile payments using NFC

70. Mobile payments are arguably more secure than card-based payments due to two additional security features of digital wallets:

- a. **Tokenisation** is a process by which the actual credit card number is removed and replaced with a randomly generated number (the 'token') that is usually only valid within limited parameters.
 - i. For mobile payments made via NFC, a token is sent from the device to the merchant. The underlying credit card information of the cardholder is not transferred, which means this information will not be compromised if the merchant's system is breached.
 - ii. Each of Visa, MasterCard and Amex supply tokenisation services to protect the credit card information of consumers making mobile payments.
- b. **Biometric authentication** such as fingerprint identification, an eye scan or a heart rate sensor, is used in most smart mobile devices for authentication. This provides an additional layer of security for digital wallets. On iPhones, Apple Pay uses a Touch ID for consumers to unlock their phone and activate the NFC-hardware to enable purchases through Apple Pay. Whilst fingerprint sensors are

54 <https://plastic.com/>

55 <https://onlycoin.com/>

56 <https://www.nerdwallet.com/blog/credit-cards/stratos-coin-plastic-swyp-sizing-multiaccount-cards/>

57 <http://www.businesswire.com/news/home/20160518005325/en/Fitbit-Acquires-Wearable-Payments-Assets-Financial-Technology>

58 <https://www.swypcard.com/>

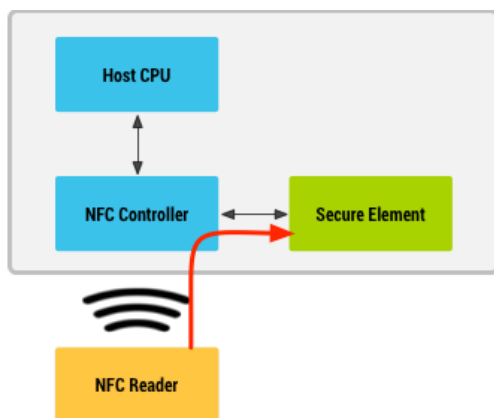
59 <https://stratoscard.com/>

60 <https://techcrunch.com/2015/12/21/stratos-card-to-shut-down-just-six-months-after-launching/>

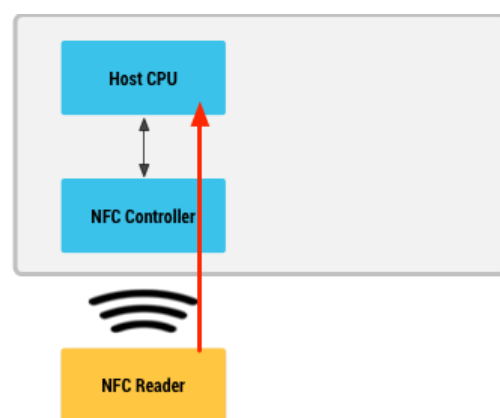
still vulnerable to forgery, it is considerably more costly to replicate a fingerprint than to forge a signature or catch sight of a PIN.⁶¹

71. Whilst mobile payments made by each of Apple Pay, Android Pay and Samsung Pay all feature tokenisation and biometric recognition, they differ in whether they use hardware or software to perform the NFC payment:
- a. Apple Pay uses hardware in the form of a **Secure Element** chip.⁶² A Secure Element is a chip built into a mobile device and is isolated from other hardware components with a restricted access interface and strong encryption. This chip also only stores a single customer's credentials and cryptographic information, which limits its value to prospective hackers.⁶³
 - b. Android Pay has previously also used a Secure Element, but has recently changed to using software in the form of **Host Card Emulation (HCE)** to perform an NFC payment.⁶⁴ HCE allows sensitive data to be stored in the cloud, or a database external to the device. This means that the device itself does not hold any sensitive information that could be stolen along with the device.⁶⁵ The Commbank App also uses HCE to perform NFC payments on Android devices.⁶⁶
72. The below simplified diagram shows the difference in the transmission of information with a Secure Element (via the Secure Element chip) and with Host Card Emulation (directly between the reader and the host central processing unit).⁶⁷

Secure Element model



Host Card Emulation model



73. Apple submits that it has designed Apple Pay 'to provide the required level of security with tight integration of hardware, software, and services' and that 'Apple does not provide banks access to the NFC radio because doing so would undermine the security our customers expect when using Apple devices to make payments'.

61 <http://www.csoonline.com/article/2687372/data-protection/iphone-6-fingerprint-scanner-found-accurate-enough-for-apple-pay.html>

62 <https://developer.android.com/guide/topics/connectivity/nfc/hce.html>

63 <http://www.sequent.com/secure-elements-vs-cloud-based-hce-secure-nfc-mobile-payments/>

64 <https://developer.android.com/guide/topics/connectivity/nfc/hce.html>

65 <http://www.sequent.com/secure-elements-vs-cloud-based-hce-secure-nfc-mobile-payments/>

66 http://www.smartcardalliance.org/downloads/HCE_Webinar_FINAL_061815.pdf

67 <https://developer.android.com/guide/topics/connectivity/nfc/hce.html#SupportedProtocols>

74. The Applicants dispute that providing access to the iPhone's NFC functionality could undermine the security of Apple Pay or otherwise decrease its competitiveness, because.⁶⁸
- Apple's claims are not supported by facts, and
 - other technology companies offer access to NFC without compromising security.
75. Apple counters that 'Android devices, which provide open access to their NFC controllers to banks, have been shown to be susceptible to external attacks that can compromise the customer's card information',⁶⁹ to which the Applicants have responded that:
- 'While Apple does not go so far as to say that Android devices are susceptible to these attacks because they provide access to their NFC controllers, it invites the ACCC to draw such a conclusion. While such a potential vulnerability does appear to have been demonstrated in highly controlled conditions, it is not at all clear that the vulnerability Apple is referring to has anything to do with the provision of third party access to Android's NFC functionality.'*⁷⁰
76. The Applicants' response was followed by submissions from two consumers noting the perceived security advantages of Apple Pay over alternative mobile payment methods that permit greater access to hardware.⁷¹ The Applicants provided a further submission reiterating their view that allowing NFC access does not raise particular security concerns.⁷²
77. The ACCC accepts the view of both the Applicants and interested parties (including Apple) that mobile payments are generally safer than card-based payments due to the use of tokenisation and other security measures possible on a smart device. The ACCC does not consider it necessary to form a view on the relative security of using a Secure Element over using Host Card Emulation, but notes that the two approaches represent competing models to the provision of mobile payment services, which may each come with distinct advantages and disadvantages.

Fees for mobile payments

78. In a typical retail transaction involving a debit or credit card scheme, such as a consumer making a purchase at a shop with their plastic card, there are a number of fees and charges payable by the parties participating in the transaction:
- the cardholder may pay a surcharge to the merchant
 - the merchant pays a merchant service fee to the acquirer
 - the acquirer pays an interchange fee to the card scheme
 - the card scheme passes the interchange fee to the issuer after deducting any network fees it charges the acquirer and the issuer

68 Applicants' submission in response to interested party submissions received 7 October 2016, pages 28-29.

69 Submission from Apple Pty Ltd, received 26 August 2016, section 4.2.

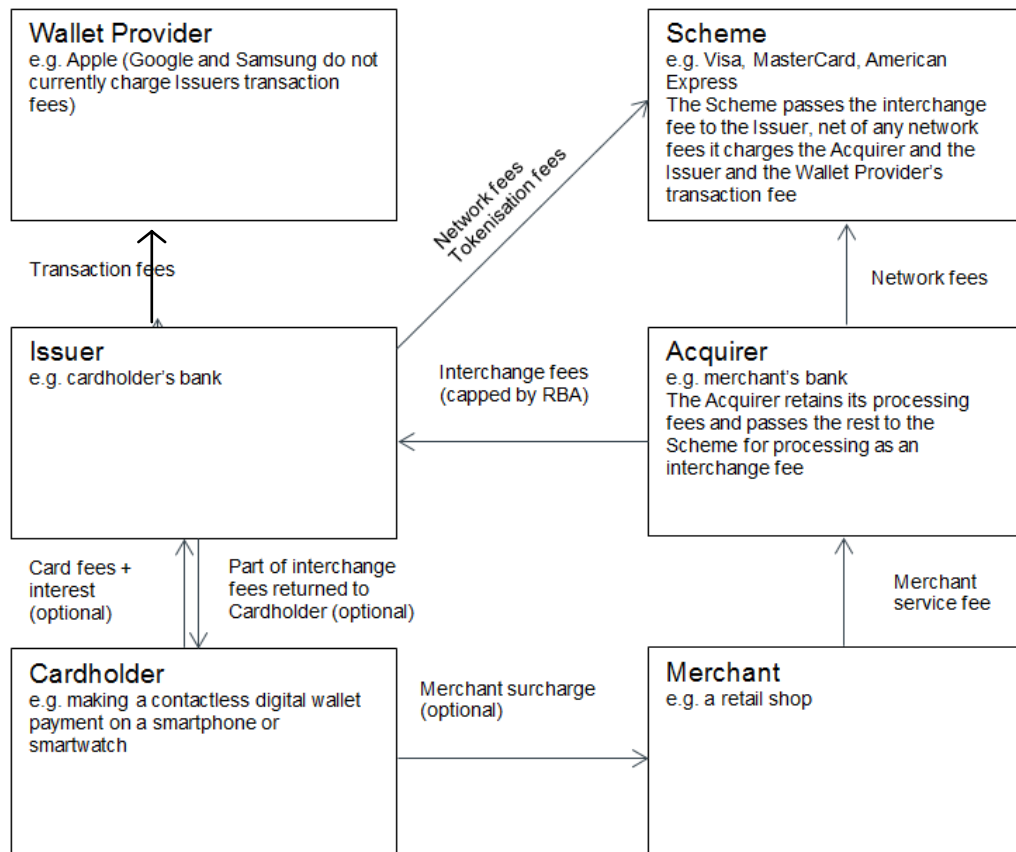
70 Applicants' submission in response to interested party submissions received 7 October 2016, page 29.

71 Submission from Brian Tran, received 13 September 2016; Submission from John Montagu, received 18 October 2016.

72 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, pages 21-25.

- e. the issuer may use some of the interchange fee to fund cardholder benefits (e.g. through reward points or other benefits).

79. The diagram below (which is based on a figure provided in the Applicants' submission in support of the applications) shows the parties involved in a mobile payment transaction and some of the fees paid (assuming the non-issuer wallet provider charges issuers a transaction fee). Note that the flow of fees below shows the parties that ultimately pay and receive the fees; however, the distribution of fees is mostly conducted via the card scheme.



80. The flow of fees is much the same as for any other retail credit/debit transaction, other than that the non-issuer wallet provider may charge a fee (which is collected by the card scheme). The interchange fee paid by the acquirer to the issuer (via the card scheme) is therefore net of the acquirer's processing fees, the card scheme's network fees and the non-issuer wallet provider's transaction fee (the card scheme distributes the transaction fee to the non-issuer wallet provider). In this way, the issuer ultimately pays any non-issuer wallet provider's transaction fees.
81. Banking apps, device manufacturers' digital wallets and software providers' digital wallets are typically offered to customers without an explicit fee. Fees charged to banks by Visa and MasterCard are not usually charged to cardholders. In the same way, Apple submits that its charges to issuers are akin to the fees charged by the card schemes, and it is consistent with market practice for these fees not to be passed on to cardholders.

82. Google and Samsung do not currently charge issuers transaction fees for participation in Android Pay and Samsung Pay.⁷³ They use free tokenisation services from the Visa Digital Enablement Program and the MasterCard Digital Enablement Program. In the case of Apple Pay, issuing banks periodically pay Apple the Apple Pay transaction fees (in conjunction with the credit card transaction or interchange fees associated with these payments) and provide Apple with aggregated data and statistics relating to their Apple Pay activity.⁷⁴
83. The Applicants submit that it has been reported that Apple's fees are as follows:
 - a. In the US, issuers pay 0.15 per cent of the transaction amount for credit card transactions and 0.5 cents for each debit card transaction, via the relevant card scheme.⁷⁵ Issuers must also pay Visa 7 cents or MasterCard 50 cents for each card tokenised and provisioned onto a digital wallet.⁷⁶
 - b. In the UK, Apple may receive a few pence per £100 transaction from banks using Apple Pay.⁷⁷
 - c. In China, issuers pay 0.07% (deferred for two years)⁷⁸
 - d. Canadian banks might be asked to pay between 0.15 per cent and 0.25 per cent of the value of credit card transactions to Apple.⁷⁹
84. The level of interchange fees in Australia is capped by regulation imposed by the Reserve Bank of Australia. The weighted average benchmark for credit cards is 0.50 per cent of the transaction value, while the benchmark for debit cards is 8 cents per transaction.⁸⁰ Total interchange fees in Australia are around \$3 billion per year.⁸¹

73 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 52-53.

74 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 61-62

75 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 20, citing John Stewart, "Issuers' Apple Pay Pact Assigns Remarkable Authority to Card Networks As Well As Apple", Digital Transactions, 27 October 2014.

76 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 61, citing John Stewart, "Issuers' Apple Pay Pact Assigns Remarkable Authority to Card Networks As Well As Apple", Digital Transactions, 27 October 2014.

77 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 20, citing Martin Arnold, Andrea Felsted and Daniel Thomas, "UK banks put squeeze on Apple Pay fees", Financial Times, 14 July 2014.

78 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 20, citing "Chinese Banks to Pay Much Smaller Fees to Apple Pay than US Counterparts", Caixin, 22 February 2016.

79 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 62, citing "Visa and MasterCard cut Canada fees amid State pressure", Bloomberg, 5 November 2014.

80 Submission from Heritage Bank, received 18 August 2016, page 6.

81 Reserve Bank of Australia, Review of Card Payments Regulation Consultation Paper, December 2015, page 31 footnote 22.

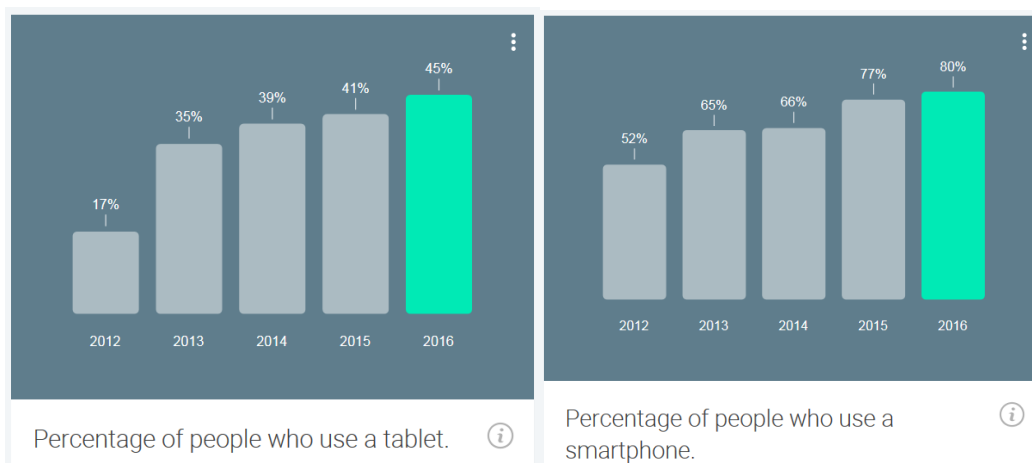
Mobile operating systems

Meaning of 'mobile operating systems'

85. Smart mobile devices are mobile devices such as mobile phones, tablets or watches that are equipped with an operating system that is capable of running downloaded mobile applications such as digital wallets.
86. This is enabled through the mobile operating system, of which there are two key suppliers in Australia: Google's Android operating system and Apple's iOS operating system.

Key suppliers of mobile operating systems

87. Australia is characterised by widespread use of smartphones and increasingly widespread use of tablets. According to Google's Consumer Barometer, 80 per cent of Australians use a smartphone and 45 per cent use a tablet. Smart wearable devices such as smart watches or fitness trackers are now used by more than 2 million Australians.



88. Smartphones and other mobile devices are typically touchscreen devices running one of a number of operating systems, the most popular of which are:
- Android**, developed by Google and licensed free of charge to any manufacturer. The Google Play store sells Android apps. Android allows apps to be installed from outside the Google Play store, including through app stores developed by device manufacturers. 52.6 per cent of handsets in Australia run on Android.⁸²
 - iOS**, developed by Apple and only available on Apple devices. Apple's App Store sells iOS apps. Apple's App Store is generally the only way to distribute and install apps on Apple devices. 41.2 per cent of smartphones in Australia are Apple devices.⁸³ Apple does not provide public API for access to the NFC controller.

⁸² Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 18, citing Kantar WorldPanel data for the three months to January 2016.

⁸³ Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 18, citing Kantar WorldPanel data for the three months to January 2016.

- c. **Windows Phone**, developed by Microsoft and available primarily on its Microsoft Lumia handsets and licensed free of charge to other device manufacturers. Microsoft's Windows Phone Store sells Windows Phone apps. Windows Phone provides public APIs that facilitate access to the NFC controller. 5.4 per cent of handsets in Australia run on Windows Phone.⁸⁴
89. Apple and Google have different competitive strategies in relation to their mobile operating systems. Apple tightly integrates its hardware and software wishing to maintain control over how the consumer experiences its devices, the sale of which constitute the majority of Apple's revenue. In the third quarter of 2016, Apple reported revenue of \$24.05 billion from sale of iPhones alone, which represented 56.77 per cent of its total revenue for that quarter.⁸⁵
90. In contrast, Google's main revenue stream is advertising revenue. In the third quarter of 2015, Google's advertising revenues were around \$16.8 billion, approximately 89.84 per cent of its total revenue.⁸⁶ Google's advertising services are enhanced by Google's data collection through its various free services such as Google Maps, Gmail and Google Search. Google's open-source Android operating system is also provided for free, which has been a key factor in its rapid adoption by manufacturers.

Product differentiation

91. In respect of digital wallets on smartphones, Apple operates a different business model from its competitors, offering an integrated mobile device, operating system and digital wallet.
92. Consistent with this model, it has offered Apple Wallet as a preinstalled app on iPhones. In contrast, Android Pay is offered by Google on Android devices as an open-source platform in line with Google's general approach to software.

Dynamic nature of platform competition

93. As software platforms, both Apple's iOS operating system and Google's Android operating system are driven by the goal of attracting more users, developers and (for Android) handset manufacturers.⁸⁷ There is often strong competition for market share, which tends to be fluid and subject to rapid change.⁸⁸
94. Despite Apple and Google currently holding strong global positions in the market for smartphone operating systems, it is a highly dynamic market marked by the frequent emergence of new players and rapid shifts in market share.⁸⁹ As an example, the Android operating system in 2012 had a global market share of around 40 per cent.⁹⁰

84 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 18, citing Kantar WorldPanel data for the three months to January 2016.

85 Apple Inc., Q3 2016 Unaudited Summary Data, <http://images.apple.com/newsroom/pdfs/q3fy16datasum.pdf>.

86 Marketing Land, 'Alphabet (Google) Q3 Beats With \$18.7 Billion, Mobile Search Revenues "Strong"', 22 October 2015, <http://marketingland.com/alphabet-google-q3-beats-with-18-7-billion-mobile-search-revenues-strong-148303>.

87 Organisation for Economic Co-operation and Development, Working Party on the Information Economy: The App Economy, 17 December 2013, page 17.

88 Organisation for Economic Co-operation and Development, Working Party on the Information Economy: The App Economy, 17 December 2013, page 18.

89 Organisation for Economic Co-operation and Development, Working Party on the Information Economy: The App Economy, 17 December 2013, pages 20-21.

90 Organisation for Economic Co-operation and Development, Working Party on the Information Economy: The App Economy, 17 December 2013, page 19.

By October 2016, Android is estimated to have a record 88 per cent global market share.⁹¹

95. In addition, developments in other dynamic and high-technology markets, such as the smartphone manufacturing or mobile application development, may also impact competition between mobile operating systems. For instance, the highly-publicised recalls of Samsung's Galaxy Note 7 in September and again in October 2016 occurred shortly before the release of Apple's iPhone 7 and 7 Plus and may allow the iOS operating system to gain some market share over Android.⁹²
96. The dynamic nature of the market may be partly attributed to the rapid pace of technological advances leading to relatively short product life cycles for smartphones: for instance, the average user in some OECD countries switch smartphones more often than once every two years.⁹³

Consumer stickiness to operating systems

97. Consumers face significant costs in switching operating systems. As Apple does not licence its operating system to other manufacturers, switching between the iOS and the Android platforms requires a user to change smartphones.
98. Consumers may also face substantial sunk costs in paid software or digital content (e.g. movies, music) that is tied to a particular platform.⁹⁴

Market concentration

99. Apple both manufactures the hardware and develops the iOS operating system for its iPhones and Apple Watches. In contrast, Google is a software developer and provides the Android operating system for devices manufactured by third parties, such as Samsung, HTC, Huawei and Sony.
100. The Applicants submit that Apple currently has the largest share of smartphones sales in Australia (41.2 per cent), followed by Samsung (30 per cent), which mostly run on Android.⁹⁵
101. Another source describes Apple's Australian market share by number of units sold as slightly lower, at 32.5 per cent. In either case, it appears that the market for smartphones is dynamic and characterised by frequent and rapid changes in market shares. Other mobile devices include Sony, HTC, Blackberry, Motorola and Huawei.
102. Of the major smartphone operating systems (iOS, Android and Windows Phone), Australian sales of smartphones show that, since January 2014, 56.8 per cent of

91 Business Wire, 'Strategy Analytics: Android Captures Record 88 Percent Share of Global Smartphone Shipments in Q3 2016', 2 November 2016.

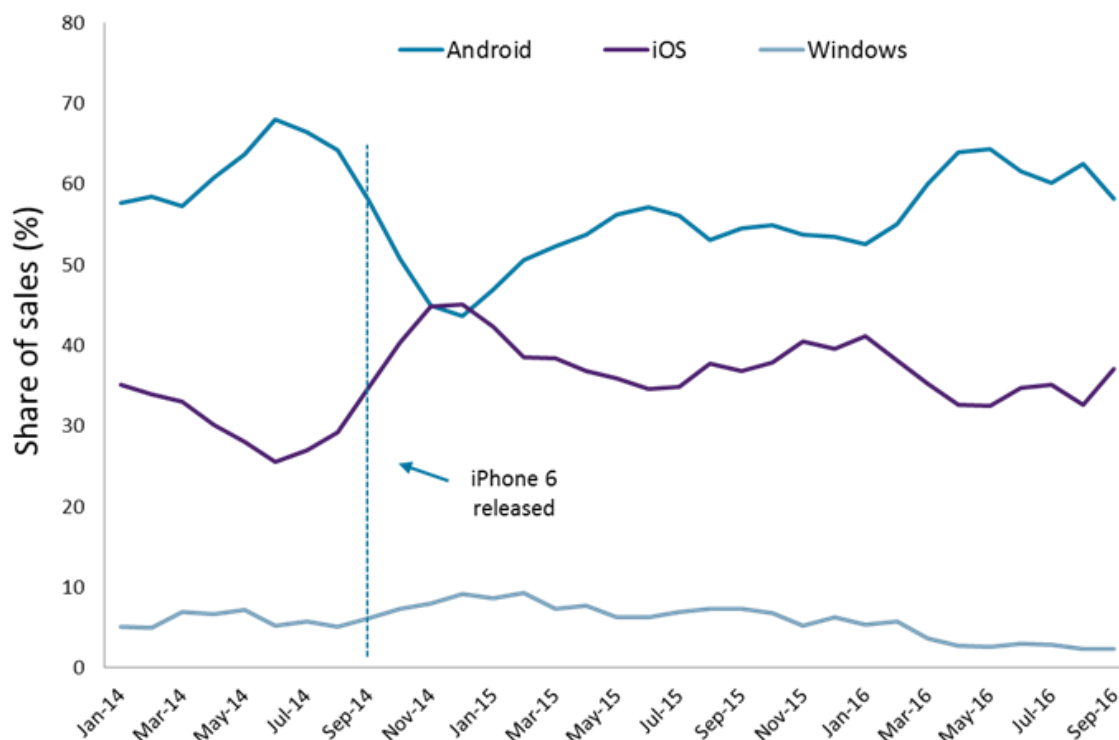
92 EFT Daily News, 'Samsung's Debacle Could Turn the Tide for Apple's Smartphone Market Share', 16 October 2016, <http://etfdailynews.com/2016/10/16/samsungs-debacle-could-turn-the-tide-for-apples-smartphone-market-share/>.

93 Organisation for Economic Co-operation and Development, Working Party on the Information Economy: The App Economy, 17 December 2013, page 20.

94 Organisation for Economic Co-operation and Development, Working Party on the Information Economy: The App Economy, 17 December 2013, pages 35-36.

95 Applicants submission: "Kantar OS stats: Apple leads as top brand in US, China but Android grows in US, Europe", IT Wire, 27 January 2016.

phones sold use Android, 35.8 per cent use iOS, and 5.9 per cent use Windows Phone (see chart below).⁹⁶



103. The ACCC further notes research from Telsyte from March 2016 showing that around half of iPhone users have yet to upgrade to NFC-enabled iPhone models.⁹⁷ Accordingly, the share of Australian consumers able to use Apple Pay at present may be only around half of Australian iPhone users.

Payment card services

Card issuers and acquirers

The Applicants and other potential Group Participants

104. The applications are made on behalf of the Applicants and other potential Group Participants, which includes other issuers of payment cards in Australia.
105. The Applicants issue credit and debit cards to customers, which can be loaded onto digital wallets on smartphones and other devices (e.g. certain watches) that allow the customer to make mobile payments from their devices instead of using their payment card.

⁹⁶ Sales since the three months ending January 2014, using sales data from Kantar WorldPanel, <http://www.kantarworldpanel.com/global/smartphone-os-market-share/> (sample: January 2014-September 2016).

⁹⁷ <http://www.afr.com/business/banking-and-finance/anz-apple-pay-users-hit-250000-20160829-gr3p0e>, citing Telsyte research. See also <https://www.telsyte.com.au/announcements/2016/3/15/lwyakigaympj35g2khr66j9lw5rr1>.

106. The Applicants are large Australian retail banks offering a range of financial services and Commonwealth Bank of Australia, Westpac and National Australia Bank represent the first, second and fourth largest banks in Australia by profit (see table at paragraph 123).
107. The Applicants account for 66 per cent of the issued and available credit in Australia, 67 per cent of total household lending, and 70 per cent of total household deposits.⁹⁸ Commonwealth Bank of Australia recently announced yearly profits of \$9.5 billion, National Australia Bank reported half year profits of \$3.3 billion and Westpac reported half-year profits of \$3.9 billion.⁹⁹
108. Other issuers of debit and credit cards that may be invited to join the group include banks that issue cards in Australia or retailers that issue cards. This would further increase the size of the bargaining group.

Non-participating issuers already signed up to Apple Pay

109. Issuers who are already signed up to Apple Pay will not join the collective bargaining and collective boycott group. Non-participating issuers include ANZ, Amex, and 31 smaller financial institutions represented by Cuscal Ltd.
110. Amex was the first to sign up to Apple Pay in Australia in November 2015, allowing cardholders to load cards directly issued by Amex onto their Apple Wallet apps. This excluded Amex companion cards that are linked with Visa or MasterCard. Amex also issues a number of credit cards co-branded with David Jones or linked with Qantas or Virgin rewards programs.¹⁰⁰
111. ANZ was the first Australian bank to sign up to Apple Pay in April 2016. In August 2016, ANZ announced that around 20 per cent of its eligible base of Apple Pay cardholders have loaded their cards onto Apple Pay.¹⁰¹
112. On 9 November 2016, Cuscal Ltd announced that Apple Pay will be enabled for 31 of its clients, who are smaller banks and credit unions.¹⁰²

Multi-homing of payment cards

113. Australians hold an average of 2.18 credit cards each,¹⁰³ which suggests that many cardholders are likely to hold cards from more than one financial institution.
114. For these cardholders, non-issuer digital wallets may be a better substitute for a physical wallet than issuer digital wallets, because non-issuer digital wallets such as Apple Wallet and Android Pay support the ability for users to hold cards from multiple issuers.

98 Submission from Apple Pty Ltd, received 26 August 2016, section 4.5, citing APRA Monthly Banking Statistics, June 2016, reissued 10 August 2016.

99 Submission from Apple Pty Ltd, received 26 August 2016, section 4.5.

100 See <https://www.americanexpress.com/au/content/all-cards/>.

101 Australian Financial Review, 'ANZ Apple Pay users hit 250,000', 30 August 2016, <http://www.afr.com/business/banking-and-finance/anz-apple-pay-users-hit-250000-20160829-gr3p0e>.

102 The full list is available at: <https://www.cuscal.com.au/apple-pay-coming-soon>.

103 As of June 2015, according to data from ASIC and the RBA: <http://www.creditcardfinder.com.au/credit-card-statistics>.

115. In contrast, issuer digital wallets tend to be limited to cards issued by that issuer. For instance, the digital wallets offered by each of CBA, NAB and Westpac on Android devices do not allow users to upload cards from other financial institutions.

Substitutability of payment cards

116. The credit card issuers compete on a number of dimensions including interest rates, interest-free periods, fees and rewards. Consumers may have cards with just one provider or may hold cards with multiple issuers and so may switch between providers (full switching) or choose between their existing cards (multi-banking).
117. Non-issuer digital wallets may facilitate greater competition between payment cards. For example, non-issuer digital wallets may make it easier to 'carry' multiple cards and switch between them. Similarly, the digital wallets provided by card issuers will be a factor in consumer decisions on which payment card(s) to acquire.
118. Historically, consumers have faced high switching costs in the market for deposit accounts.¹⁰⁴ Better access to information on financial products and services via the internet has significantly increased the ease of switching in recent years,¹⁰⁵ though the practical costs and inconvenience associated with switching payment cards would vary widely between different consumers.
119. For instance, consumers who have loan accounts bundled with transaction accounts, or consumers who have many direct debits and credits linked to an account, would be considerably more 'sticky' to their issuer than consumers who do not.¹⁰⁶
120. In 2014, Roy Morgan Research estimated that 3.2 per cent of consumers switch their main financial institution each year.¹⁰⁷

Market concentration

121. The personal credit card industry in Australia represents an estimated total credit card liability of \$41.129b as at June 2016.¹⁰⁸ The Applicants account for approximately 66 per cent of this total. The credit card issuance industry has estimated revenue of \$11.0b and profit of \$827.1m in 2016-17.¹⁰⁹
122. In Australia, credit cards may be issued by Authorised Deposit-taking Institutions (**ADIs**) such as the Applicant banks and also, since 2004, a new class of ADIs,

104 Sharpe SA, 'The Effect of Consumer Switching Costs on Prices: A Theory and Its Application to the Bank Deposit Market', Review of Industrial Organization, 12(1) 1997, pages 79-94 and Zephirin MG, 'Switching Costs in the Deposit Market', The Economic Journal, 104(423) 1994, pp 455-461.

105 Reserve Bank of Australia, RBA submission to the inquiry into Competition in the Banking and Non-Banking Sectors, 2008, page 17.

106 Reserve Bank of Australia, RBA submission to the inquiry into Competition in the Banking and Non-Banking Sectors, 2008, page 17.

107 Roy Morgan Research 2014, data provided to the Financial System Inquiry, viewed at http://fsi.gov.au/publications/interim-report/02-competition/banking-sector/#P207_37245. Note: the statistic refers to the Australian population aged 18 years and over that switched their main financial institution in the 12 months before April 2014..

108 Australian Prudential Regulation Authority, Monthly Banking Statistics, July 2016 (issued 31 August 2016), Table 2: Loans and advances on Australian books of individual banks, page11.

109 IBISWorld Industry Report X0009, Credit Card Issuance in Australia, July 2016, . The industry issues credit cards (e.g. Visa and MasterCard cards) and charge cards (e.g. American Express cards) to businesses and consumers. These cards provide users with a line of credit to use for purchases or cash advances. These statistics do not include debit cards.

Specialist Credit Card Institutions (**SCCIs**). There are currently around 30 major credit card issuers in Australia, with a large number of smaller players.¹¹⁰ The four Applicant banks are card issuers. Apple does not issue cards.

123. As shown in the table below, four major banks account for a significant share of Australian commercial banking and the credit card industry, with a combined profit of over \$30b in 2015 and 84 per cent of credit card liability.¹¹¹ The Applicants make up around 65 per cent of the total credit card liability in Australia.

	Gross credit card liabilities (July 2016)¹¹²	Share of gross credit card liabilities (July 2016)¹¹³	Statutory profit 2015
CBA	\$11,265 million	27.4%	\$9,063 million ¹¹⁴
Westpac	\$9,622 million	23.4%	\$8,012 million ¹¹⁵
ANZ	\$8,022 million	19.5%	\$7,216 million ¹¹⁶
NAB	\$5,767 million	14.0%	\$6,338 million ¹¹⁷
Citigroup Pty Limited	\$4,017 million	9.8%	\$17,200 million (globally) ¹¹⁸
Bendigo Bank	\$3,17 million	0.7%	\$423.9 million ¹¹⁹

Consultation

124. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.

110 Asia-Pacific Banking & Finance, 'Coles, CBA corner credit card competition', 1 May 2014, <http://www.australianbankingfinance.com/banking/coles--cba-corner-credit-card-competition/>

111 Over the past two decades, the level of concentration in the commercial banks industry has increased, with several major mergers and acquisitions being undertaken by large banking corporations (such as Westpac and Bank of Melbourne in 1997, Westpac and St George Bank in 2008, ANZ and National Bank of New Zealand in 2003 and Commonwealth Bank of Australia's and Bankwest in 2008). From IBISWorld Industry Report K6221a, National and Regional Commercial Banks in Australia, September 2016.

112 Australian Prudential Regulation Authority, Monthly Banking Statistics, July 2016 (issued 31 August 2016), Table 2: Loans and advances on Australian books of individual banks, pages 8-11.

113 Australian Prudential Regulation Authority, Monthly Banking Statistics, July 2016 (issued 31 August 2016), Table 2: Loans and advances on Australian books of individual banks, pages 8-11.

114 Commonwealth Bank of Australia, 2015 Annual Report.

115 Westpac Group, 2015 Annual Report.

116 Australia and New Zealand Banking Group Ltd, 2015 Annual Report.

117 National Australia Bank, 2015 Annual Financial Report, page 5.

118 Citigroup 2015 Annual Report..

119 Bendigo and Adelaide Bank, 2015 Annual Report.

125. The ACCC invited submissions from a range of potentially interested parties including major competitors, suppliers, customers, relevant industry associations or peak bodies, consumer groups, government departments and relevant regulatory bodies.¹²⁰
126. The ACCC has received public submissions from 32 interested parties¹²¹ regarding the applications for substantive and interim authorisation. These consist of:
- a. ten interested parties supporting the applications from payments industry participants (such as Heritage Bank, Coles, Australian Settlements Ltd) and industry bodies (such as APCA, the Australian Retailers Association and FinTech).
 - b. 17 interested parties opposing the applications, including Apple, the South Australian Small Business Commissioner, and nine from individual consumers
 - c. five interested parties not expressing a view but providing general comments regarding the scope of the applications, received from Google, PayPal, Visa, MasterCard and eftpos Payments Pty Ltd. These parties generally support open access to mobile payments technologies.
127. The views expressed in the submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the applications for authorisation. These views are considered by issue below.

Submissions on the likely future with and without

Future without

128. Interested parties share the general view that, in the likely future *without* the proposed conduct, many issuers will eventually offer Apple Pay to their cardholders in Australia on Apple's terms.
129. The Applicants describe the future without as one in which Australian issuers eventually agree to participate on Apple Pay on terms that include exclusivity of NFC-access for Apple Pay and prohibitions on issuers' ability to pass through fees.¹²²
130. Apple does not contest this view of the future without the proposed conduct. Apple submits that, absent the collective bargaining and boycott, Apple is likely to reach agreement with some individual banks to bring Apple Pay to their cardholders (on the basis of no NFC access and no fee pass through). Apple Pay will become widespread in Australia based on its successful adoption in overseas markets.
131. Heritage Bank agrees with this view, submitting that it would be forced to offer Apple Pay to remain competitive with other issuers, irrespective of the cost of doing so.

120 A list of the parties consulted and the public submissions received is available from the ACCC's public register.

121 <http://registers.accc.gov.au/content/index.phtml/itemId/1197444/fromItemId/278039/display/submission>.

122 CRA report supporting Applicant's submissions, page 21.

Future with

132. In the future with the proposed conduct, the Applicants and other participants that join the group will negotiate collectively with Apple in respect of the issues identified above ('the relevant issues') and will engage in a limited collective boycott for the duration of the collective bargaining, which may continue for up to three years following the date of authorisation.
133. The Applicants acknowledge a number of possible outcomes of collective bargaining, but submit that ultimately it is likely that the Applicants and Apple will reach some agreement on the relevant issues, either collectively or individually.
134. In contrast, Apple submits that it will not and cannot accept the Applicants' terms in relation to either of the two issues on which it takes a global approach. The Applicants submit that this is not evidence that there would not be a benefit in allowing those negotiations to take place.

Submissions on public benefits

135. The Applicants submit that the proposed conduct will result in a number of public benefits, as outlined below.
136. Apple submits that the Applicants have not provided evidence of the purported public benefits or any market failure.

Addressing bargaining power imbalance between Apple and the Applicants

137. The Applicants argue that the Authorisation is needed to reduce the bargaining power disparity between Apple and the Applicants in Apple Pay bargaining and result in net public benefits that derive from the Applicants' objectives of open access to NFC and greater transparency of fees.¹²³
138. The Applicants submit that there is a strong disparity in the bargaining position of Apple as compared with the individual Applicants, reflected in Apple's submission in which it makes clear that any adoption of Apple Wallet in Australia will be on Apple's terms. The Applicants agree that:
 - a. Apple controls the operating system, the mobile hardware and the software that can be placed on the iPhone and ultimately controls access to iPhone customers
 - b. increasing consumer appetite to use their mobile phones to make payments requires that the banks provide mobile payment solutions or risk losing their customers
 - c. for as long as Apple restricts access to the iPhone's NFC functionality, Apple Pay will be the only mobile payment solution for iPhone users wanting to use their phones to make contactless payments

¹²³ Applicants submission in response to interested party submissions, received 7 October 2016, pages 9-19.

- d. iPhone customers in particular value the ability to make mobile payments and also represent significant value to issuers, which means that in individual negotiations the banks will have no choice but to provide Apple Wallet on Apple's own terms in order to satisfy customer demand for mobile payment solutions.¹²⁴
139. The Applicants also argue that if they do not have direct access to the NFC controller on iPhones, they will lose some customers rather than the customer switching to an Android device to access the Applicant's digital wallet, because, they argue that:
- a. there are substantial switching costs between mobile devices such that individual app developers have a negligible impact on the market share of iPhones in a relevant time frame¹²⁵
 - b. because Apple Pay is available on iPhones, it provides a substitute to any digital wallets provided by the Applicants.¹²⁶
140. In this regard, the Applicants are suggesting that individual Applicants have little bargaining power in negotiating with Apple.
141. The Applicants argue that a flow-on effect from the claimed competitive bottleneck is that the Applicants face a 'prisoner's dilemma' problem, in that all of the Applicants would benefit if they collectively resisted agreeing to Apple's terms, but that each Applicant individually has the incentive to accept Apple's terms in order to avoid the competitive disadvantage of not being able to offer iPhone users the ability to use Apple Pay when other issuers can.
142. Therefore, the Applicants argue that the cost to Apple of not reaching an agreement with an individual Applicant is small, while the gain from maintaining Apple Pay as the sole digital wallet with embedded NFC access on iPhones is large. They argue that Apple's success is not heavily dependent on Apple Pay or the Australian market. In contrast, an individual issuer faces the cost of losing customers' transaction volumes to its competitors who have signed up to Apple Pay.
143. The Applicants consider that the proposed conduct would solve the prisoner's dilemma problem by increasing the impact on Apple of not agreeing to the Applicants' terms, as the lack of support from the Applicants for Apple Pay would negatively impact the competitiveness of iPhones in relation to Android phones. Android phones will soon offer mobile payment services either through Android Pay or through an issuer digital wallet for the majority of cardholders in Australia.
144. The Applicants submit that, once a critical mass of issuers have individually signed up to Apple's terms, there may not be a comparable opportunity to achieve a better outcome in negotiations and the associated competition and consumer choice benefits.¹²⁷
145. The Applicants submit that, if authorisation is granted, there is a real likelihood that 'significantly improved positions' in relation to the relevant issues will be negotiated

124 Applicants' submission in response to interested party submissions received 7 October 2016, page 11.

125 Applicants' submission in response to interested party submissions received 7 October 2016, page 12.

126 Applicants' submission in response to interested party submissions received 7 October 2016, page 13.

127 Applicants' submission in response to interested party submissions received 7 October 2016, page 15.

(the Applicants point to negotiations overseas which have resulted in Apple offering modified terms).¹²⁸

146. Heritage Bank and Tyro Payments submit that the proposed conduct will increase issuers' bargaining power in negotiations with Apple and improve their input into contracts:
- a. Heritage Bank submits that there are no issuers in the Australian market that can match Apple's size or revenue and that Apple has demonstrated an apparently high degree of bargaining power in overseas negotiations.
 - b. Heritage Bank also argues that a collective boycott is necessary to ensure the parties can negotiate in good faith and will assist in managing the collective negotiations.
 - c. Tyro Payments submits that collective bargaining would bolster the currently weak negotiating position of the Australian banks and prevent Apple from applying a 'divide and conquer' strategy, but also notes that it seems counter-intuitive to permit a cartel between oligopolistic banks.
147. Apple's response¹²⁹ is that, individually, each of the Applicants exerts greater bargaining power than Apple. Apple claims the Applicants have substantial countervailing bargaining power by control of access to their cardholder customers. Apple 'needs' the Applicants to populate Apple Wallet with their cards. Apple argues that its strength and popularity in smartphone manufacturing cannot be leveraged against the Applicants, given that the Applicants control access to a necessary input for the expansion of Apple Pay in Australia. Apple also submits that sales of NFC capable smartphones fluctuate significantly. Apple rejects that it is free-riding off long-standing installed NFC infrastructure and submits that the Applicants in fact wish to free-ride off its investment in the Apple Pay platform.
148. The South Australian Small Business Commissioner supports Apple's submission regarding the relative bargaining power of the Applicants.

Access to NFC and reasonable App Store access

149. The Applicants argue that public benefits arising from direct access to NFC, and the ability to reasonably access the Apple App Store, include greater competition in mobile payments, increased consumer choice of digital wallets, greater incentives for innovation (on both Android and iOS) and more efficient utilisation of existing NFC infrastructure from greater adoption of mobile payment technology.¹³⁰
150. Further, the Applicants submit that competition between digital wallets on Apple devices will increase pressure on Apple to provide competitive pricing and to continuously innovate for the benefit of Australian consumers. The Applicants consider that competition between handsets cannot be relied on for this. The Applicants also

128 Applicants' submission in response to interested party submissions received 7 October 2016, page 9.

129 Submission from Apple Pty Ltd, received 26 August 2016, section 4.7.

130 E.g. Applicants' submission in response to interested party submissions received 7 October 2016, page 6.

note that only Apple can currently determine what additional features are added to Apple Pay and set the price-quality outcomes.¹³¹

151. The Applicants submit that if collective negotiations are successful, issuers will have the option of offering their own digital wallets with embedded NFC on Apple devices alongside Apple Pay. If collective negotiations are partially successful, Apple may be persuaded to some 'relaxation of exclusivity', such as agreeing to a time limit on exclusivity or that the exclusivity be limited to other non-issuer wallet providers.¹³²
152. The following interested parties made submissions that general open access to Apple devices (beyond just access for the Applicants) would result in public benefits:
- a. APCA submits that open access would enhance payment innovation and consumer choice, which delivers tangible benefits to consumers and merchants.
 - b. The Australian Retailers Association noted that NFC technology is particularly widely installed in Australian payment services. Open access would allow for increased competition amongst mobile technologies leading to greater innovation and investment, more consumer choice and increased participation.
 - c. Australian Settlements Ltd supports open access to payment technologies, because this would increase consumer choice and encourage innovation in transit or loyalty cards. It would also create economies of scale if digital wallets developed for Android devices can also be adapted to Apple devices.
 - d. Bluechain Pty Ltd supports open access to mobile hardware interfaces because this would open up Apple devices to allow Bluechain to provide a full range of mobile payment services.
 - e. Coles Supermarkets Pty Ltd supports open access to NFC technology as a key enabler of continued improvements in payment technologies. Consumer choice of digital wallets should not be restricted by a technological lockout.
 - f. eftpos Payments submits that there should not be any technological impediment to the full range of payment functions to be made available on mobile devices, particularly given the widespread adoption of contactless payments in Australia.
 - g. FinTech Australia submits that open access would speed consumer adoption of digital wallets, which are a safer payment method than contactless cards.
 - h. Heritage Bank supports open access to promote effective competition and consumer choice, enhancing growth in mobile payments in Australia.
 - i. MasterCard submits that open access would eliminate friction for the consumer and create interoperability. This would increase competition to provide the best digital wallet and benefit Australian consumers.
 - j. Tyro Payments submits that limiting third party access stifles innovation and competition that may also impact on related markets of transport services,

131 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 2.

132 Applicants' letter to the ACCC responding to request for further information, 30 September 2016, response to Question 7.

passports and many other innovations that currently cannot use the NFC function on Apple devices.

- k. Visa Australia commented generally that technology drives change, innovation and adaptation in mobile payments and that a competitive mobile payments market would provide substantial public benefits.

- 153. However, Apple and a number of other interested parties disagree that open access to the NFC controller on iPhones would result in public benefits.
- 154. Apple submits that this would not result in benefits since the Apple Pay platform already allows issuers to integrate their mobile banking apps with Apple Pay to make NFC-facilitated payments. This allows issuers to offer additional functions, such as account balance checking and funds transfers, to differentiate themselves from other digital wallets.

Ability to pass through Apple Pay fees to consumers

- 155. The Applicants submit that their ability to pass through Apple Pay fees to consumers will result in public benefits arising from the increased transparency of fees in the payments system and the reduced potential for inefficient and inequitable fee recovery.¹³³
- 156. Interested parties were divided on this issue.
- 157. Support for the ability to pass through fees was expressed by the Australian Retailers Association, Coles Supermarkets, eftpos Payments and Heritage Bank. Public benefits of the ability to pass through fees included cost-reflective surcharging that would set price signals for consumers and lead to efficient use of digital wallets.
- 158. Apple opposes the pass through of fees because it is not standard industry practice to charge cardholders for use of digital wallets and other banking services and the Applicants have not demonstrated that the fees they wish to pass through are efficient and conduct-altering. Apple submits that Apple Pay reduces costs to issuers (particularly through fraud prevention) and increases consumer engagement and therefore the Applicants should not have the freedom to charge cardholders for the use of Apple Pay. The Applicant banks also have not taken into account the costs incurred by Apple in developing the Apple Pay service. Apple is also concerned that the Applicants may use the ability to pass through fees to disadvantage Apple Pay by 'directing' their cardholders to their own mobile payment services.
- 159. The Applicants refute that the savings from offering their customers Apple Pay will necessarily outweigh the costs. For example, the rate of fraudulent transactions is very low compared to the fee charged by Apple Pay. The Applicants further submit that it is common to charge for more expensive payment options, either per transaction or as a bundled product.¹³⁴

¹³³ See, e.g., Applicants' submission in response to interested party submissions received 7 October 2016, pages 25-26.

¹³⁴ Applicants Further submission summarising net public benefits and responding to Apple's 26 October 2016 submission received 23 November 2016, page 10.

160. Several other interested parties also expressed opposition to the ability to pass through fees:
- a. Andrew Smith submits that the prices and terms for the Applicants' use of Apple Pay should be a matter for individual negotiation.
 - b. Dr David Glance submits that surcharging negatively impacts the consumer experience and may be used by the Applicants to anti-competitively undermine the use of Apple Pay.
 - c. FinTech Australia opposes collective negotiation on pricing as it will not resolve the fundamental issue of access to iPhone NFC infrastructure.

Other claimed public benefits

161. The Applicants submit that the collective bargaining itself is likely to result in public benefits including increased input into contracts, reductions in information asymmetry, facilitation of market dynamics (in terms of supplying new areas or increasing competition in existing areas of supply) and transaction cost savings.¹³⁵
162. The Applicants further submit that the collective boycott is required to give effect to the collective negotiation and meaningfully bring Apple to the negotiating table. They submit that this is likely to result in public benefits arising from facilitating the collective negotiation, and therefore facilitating the realisation of the benefits associated with the Applicants' objectives on the identified issues.¹³⁶
163. Heritage Bank agreed that collective negotiations will address the problem of information asymmetry, arguing that, even if the collective bargaining does not change the status quo, it will provide a level playing field for all participants in negotiations with Apple. At a minimum, it will allow all participants to receive the benefits associated with such an arrangement that may not have been the case had each participant entered negotiations alone.
164. Other interested parties did not discuss these other public benefits claimed to arise from the proposed conduct.

Submissions on public detriments

165. The Applicants noted some possible public detriments arising from the proposed conduct but concluded that they were not likely to arise. Possible detriments considered were: costs to Apple in developing an API for NFC access (this could be reflected in the commercial terms negotiated); the possibility that Apple Pay would not be introduced in Australia or only on a limited basis if negotiations fail (this is a commercial decision for Apple); anti-competitive information exchange (the scope of the negotiation is limited to the two issues).¹³⁷

¹³⁵ Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 41-44.

¹³⁶ Applicants' submission in response to interested party submissions received 7 October 2016, page 13.

¹³⁷ Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 44-47.

166. Interested parties providing submissions in support were largely silent on the likelihood and scale of any potential public detriments. However, interested parties opposing the applications outlined the following potential public detriments arising from the proposed conduct.

Competition between issuers

167. Apple submits that while it will not agree with the Applicants on the two issues, if it did, it risks distorting competition in the supply of payment cards. As noted above, Apple submits that the Applicants wish to distort competition in favour of their own digital wallets.¹³⁸ If successful, this could have flow-on effects to competition in payment cards. Non-issuer digital wallets, by enabling consumers to load cards from multiple issuers, increase the ease of switching cards at the point of sale. In turn, this is likely to increase competitive tension between card issuers.

Competition in the supply of digital wallets

168. While the Applicants submit that negotiations will run for up to 12 months, the authorisation sought would allow the conduct to extend for three years.
169. Apple submits that the proposed conduct would protect the Applicants from competition with Apple and with each other, slowing innovation and reducing consumer choice in digital wallets.¹³⁹ Apple regards Apple Pay as a new service in Australia whose competitiveness may be stifled by a collective boycott that prevents Apple Pay from being made available to 70 per cent of Australian cardholders. Apple considers that the Applicant banks appear to be extinguishing competition introduced by multi-issuer digital wallets and the Applicants have opposed the introduction of Apple Pay, Android Pay and Samsung Pay. This is to the detriment of consumers.
170. Apple further argues that significant consumer detriment will result from the delay in Apple Pay's availability to consumers over the period of any authorisation granted.
171. While the Applicants also note the potential for the proposed conduct to lessen competition in digital wallets by delaying or blocking the expansion of Apple Pay, they submit that the limited scope of the collective negotiations combined with their own commercial incentives will ensure the negotiations are concluded quickly.¹⁴⁰ The Applicants also note that issuers face significant commercial pressure from consumer demand and ANZ (and other issuers) offering Apple Pay to cardholders not to delay Apple Pay in Australia.¹⁴¹
172. Apple submits that, while it will not agree with the Applicants on the two issues, if it did, it would distort competition in the provision of digital wallets. Apple argues that the Applicants are not interested in promoting competition in mobile payments as evidenced by the apparent reluctance of the major Applicant banks in not offering their cardholders access to either Android Pay or Samsung Pay. Apple argues that the Applicants seem interested in promoting their own digital wallets to the detriment of

138 Submission from Apple Pty Ltd, received 26 October 2016, pages 3-4.

139 See submissions from Apple Pty Ltd, received 26 August 2016 and 26 October 2016.

140 Applicants' submission in response to interested party submissions received 7 October 2016, page 8.

141 Applicants' submission in response to interested party submissions received 7 October 2016, page 27.

non-issuer digital wallets. Apple argues that this will have the effect of distorting competition in digital wallets.¹⁴²

173. The Applicants also dispute that they are unwilling to support other non-issuer digital wallets, such as Android Pay and Samsung Pay, noting that several Applicants have signed up to Android Pay.¹⁴³
174. Submissions from individual consumers also express a view that the applications may be a way for the Applicants to limit competition from non-issuer digital wallets:
- a. Brian Tran submits that the proposed conduct could disincentivise Apple from further innovation in relation to Apple Pay in Australia, e.g. by including transport cards or implementing an NFC rewards system.
 - b. The submission from another Brian Tran notes that, by withholding Apple Pay, the banks are stunting innovation of mobile payments on iPhones as well as on other platforms.
 - c. Dr David Glance submits that the proposed conduct will prevent the Applicants' cardholders from benefiting from the added security of Apple Pay transactions and may also impact the broader eCommerce market by preventing the Applicants' cardholders from using Apple Pay through their Safari internet browser.
 - d. David Thornton submits that the proposed conduct will decrease allocative and dynamic market efficiency by removing competitive pressures on the Applicants to invest in tokenisation processes to protect consumer transactions.
 - e. Dr Grischa Meyer submits that the proposed conduct is targeted at taking away consumers' power to choose the mobile payment method that suits them.
 - f. Jason Discount, an IT professional, submits that granting the authorisation would allow the Applicants to block competition from more technologically competent third parties and restrict consumer choice.
 - g. Martin Cook submits that the applications seek to destroy consumer confidence in the mobile payments industry.
 - h. Matthew Seager submits that Australian consumers are being prevented from using Apple Pay compared to consumers in other countries with widespread contactless payment infrastructure.
 - i. Trevor Long, a technology commentator, notes that the likely benefits are private benefits to the Applicants involving the opportunity to negotiate better terms and potentially delay the launch of competing digital wallet technology.
175. Some of these consumers (e.g. Richard Thorek, Wayne Pulbrook, Dr Grischa Meyer, Trevor Long) have demonstrated a willingness and ability to switch to another bank that offers Apple Pay.

¹⁴² Submission from Apple Pty Ltd, received 26 October 2016, page 3.

¹⁴³ Applicants Further submission summarising net public benefits and responding to Apple's 26 October 2016 submission received 23 November 2016, page 4.

Competition in mobile operating systems

176. Apple submits that providing access to the NFC controller on iPhones would undermine the security of payment services on Apple devices. Apple considers that the NFC controller in its devices is the only hardware permitted to access the Secure Element chip in Apple devices and opening up external access to the NFC controller risked compromising the data residing in the Secure Element chip and exposing Apple iOS devices to security and fraud threats. Apple provided the Europol 2016 Internet Organised Crime Threat Assessment and a number of news articles supporting the claim that its approach to payment security is superior to that used by other devices.
177. The Applicants provided a submission in response strongly disputing that Apple's approach to security is necessarily superior.¹⁴⁴ The Applicants argue that none of the claims about security issues discussed in these articles are directly linked to access to NFC functionality and only incidentally involve Android devices (i.e. not NFC digital wallets on recent models of mobile devices). Apple also has the ability to block an app from being added to the App Store if it considers the app's security is questionable. Additionally, the Applicants note that they also have a financial and reputational incentive to ensure that security of mobile payments is not compromised.
178. Apple further submits that providing direct NFC access to third party applications would undermine the simplicity and ease of use of Apple Pay and therefore the seamlessness of the consumer experience. This is because an NFC controller is designed only to be paired on a one-to-one basis with a particular application. If consumers were to use more than one digital wallet or payment app for their cards and tickets, changing between apps would require consumers to manually change the NFC controller and this would require them to change their NFC controller settings each time they change wallets/payment apps.¹⁴⁵
179. The Applicants responded that Apple would be able to provide a user-friendly governance mechanism. For example, the device could automatically select whichever NFC app the customer has open, or else default to the app the customer has set as their default NFC app, and the governance mechanism could differentiate between different NFC uses.¹⁴⁶ The Applicants submit that seamless switching between digital wallets with embedded NFC is already possible on Android, and there is no technical reason why Apple could not establish a governance mechanism which does the same.¹⁴⁷
180. Apple submits that to implement this would also involve committing 'significant effort, resources and funding' to achieve a sub-optimal outcome for its users.¹⁴⁸
181. The Applicants, however, note that Apple already expends substantial resources on continual updates to its iOS operating system and dispute that providing an API to

¹⁴⁴ Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, pages 21-25.

¹⁴⁵ Submission from Apple Pty Ltd, received 26 October 2016, page 1.

¹⁴⁶ Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 26.

¹⁴⁷ Applicants' further submission summarising net public benefits and responding to Apple's 26 October 2016 submission, received 23 November 2016, page 6.

¹⁴⁸ Submission from Apple Pty Ltd, received 26 October 2016, pages 5-6.

allow access of the NFC controller and accompanying governance mechanisms would involve any undue burdens on Apple.¹⁴⁹

182. A number of interested parties agreed with Apple and considered that unrestricted access to NFC hardware would be detrimental:

- a. Andrew Smith submits that Apple's 'Walled Garden' approach to their integrated software and hardware provides significant privacy and security benefits to its customers. These benefits could be threatened by any forced access to Apple's hardware components.
- b. Brian Tran submits that third party access to Apple's secure element chip could create security concerns amongst consumers and slow the adoption and further development of Apple Pay in Australia.
- c. Another individual consumer, another Brian Tran, points to the different Secure Element model used by Apple Pay, noting that this enhances its security, which should not be compromised in order to allow the Applicants to implement their own mobile payment methods on iPhones.
- d. Dr David Glance, director of the University of Western Australia Centre for Software Practice, submits that Apple should be permitted to use the specialised and integrated hardware and software system it has devised to provide Apple Pay in a way that allows Apple to maintain a certain level of security, a uniformity of user experience and overall quality of its product.
- e. David Thornton submits that allowing the Applicants to access NFC may allow them to 'ride on the coattails' of Apple Pay to offer an inferior solution.
- f. John Montagu expressed support for Apple's security rationale for restricting access to its NFC controller, pointing to a Europol comment on instances of hackers exploiting access to the NFC controller to enable fraudulent payments. Mr Montagu also noted that the Applicants can already offer banking applications that perform account management services, which is a distinct offering to the provision of a centralised mobile payment method, which is the function of Apple Pay.
- g. Martin Cook submits that it will not lead to any public benefits to force Apple to modify its hardware and software for third party access. Apple's business strategy is based on integrated devices with programs that work as Apple intended. The launch of Apple Pay has created a competitive mobile payments market in Australia and caused improvements to be made to Android Pay in response.
- h. Richard Thorek submits that a key benefit of non-issuer digital wallets is the provision of streamlined payment services for consumers with increased security.
- i. The South Australian Small Business Commissioner submits that access to the NFC controller in Apple devices is not necessary to drive competition and innovation, noting that new financial tools are rapidly developing outside the formal banking system.

¹⁴⁹ Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, pages 26-27.

- j. Wayne Pulbrook submits that opening up access to the NFC controller may make the payment system vulnerable to attacks by hackers, which has recently happened with competing phones.

Potential for collusion between the Applicants

183. Other interested parties have voiced general concerns regarding potential detriments. For instance:
- a. Jason Discount submits that any cartel of the large banks is potentially dangerous.
 - b. The South Australian Small Business Commissioner considers that creation of a banking cartel is not an appropriate way to deal with emerging technology and will only entrench behaviour designed to reduce competition and innovation.
184. In this regard, the Applicants have stated that they will put in place 'strict protocols and procedures' to make sure that the scope of the matters discussed as part of the collective negotiation is 'appropriate and in compliance with the terms of the authorisation'.¹⁵⁰

ACCC assessment

185. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests¹⁵¹ contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**). The ACCC must not grant authorisation unless it is satisfied in all the circumstances that the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

Relevant areas of competition

186. The ACCC considers that the precise definition of the relevant areas of competition is not required for assessing the proposed conduct. The ACCC can consider the areas of competition in a broad sense when assessing any public benefits or detriments likely to arise from the proposed conduct.
187. Without precisely defining the market, the ACCC considers the following areas of competition to be relevant to its analysis of the likely public benefits and likely public detriments of the proposed conduct.
- a. the supply of digital wallets in Australia
 - b. the supply of mobile payment services in Australia
 - c. the supply of smartphone operating systems in Australia

150 Applicants' letter to the ACCC responding to request for further information, 5 September 2016, response to Question 4.

151 Subsections 90(5A), 90(5B), 90(6), 90(7), 90(8).

- d. the supply of payment card services in Australia.
188. Moreover, the ACCC notes that any changes in the above areas of competition may, in turn, affect other related markets. That is, impacts on competition between digital wallet services and mobile payment services are likely to impact on competition between mobile operating systems; changes to competition in the supply of payment card services is also likely to impact on competition in the supply of retail banking services more generally.¹⁵²
189. To the extent relevant, the ACCC has considered such likely flow-on effects in its assessment of the proposed conduct.

The supply of digital wallets in Australia

190. The Applicants submit that the relevant area of competition impacted by the proposed conduct is the supply of mobile payment and digital wallet services in Australia,¹⁵³ defining mobile payments as ‘a payment or transfer of money initiated on a mobile device’¹⁵⁴ and a digital wallet as ‘a smartphone application or service that facilitates mobile payments and may also store other valuable information’.¹⁵⁵
191. Apple submits that one of the areas of competition affected is the supply of digital wallet services and presentment methods.¹⁵⁶ Other interested parties did not expressly describe relevant areas of competition, although PayPal Australia Pty Ltd commented that the Applicants’ definition of digital wallet is overly broad.
192. As discussed above in the Background section, the ACCC has adopted different definitions for digital wallets and for mobile payments, both of which are relevant areas of competition impacted by the proposed conduct.

The supply of mobile payment services in Australia

193. The ACCC considers that the supply of mobile payment services in Australia is an area of competition impacted by the proposed collective negotiations on the issue of NFC access, which is directed at enabling the Applicants to supply competing mobile payment services for iPhone users.
194. The ACCC notes, however, that the Applicants’ submissions regarding the likely public benefits of collective bargaining on NFC access have largely been focused on increased competition and consumer choice of digital wallet functionalities rather than mobile payments specifically.
195. The submissions provided by the Applicants on the likely public benefits of increasing competition and consumer choice in mobile payment mechanisms include that the ability to provide issuer digital wallets integrating Apple Pay functionality does not allow

152 See, e.g., The Visa-RFi Group Australian Payments Report: The changing payments behaviour of Australian consumers and the impact on banking relationships, June 2015, page 14: ‘For consumers, payments are intrinsically linked to the main financial institution (MFI) relationship’.

153 Applicants’ initial submission in support of the applications for authorisation, received 26 July 2016, page 24.

154 Applicants’ initial submission in support of the applications for authorisation, received 26 July 2016, page 16.

155 Applicants’ initial submission in support of the applications for authorisation, received 26 July 2016, page 17.

156 Submission from Apple Pty Ltd, received 26 August 2016, section 3.1.

‘a payment mechanism that differentiates itself from, or innovates in relation to, the Apple Pay mechanism’.¹⁵⁷

196. While some interested parties such as Dr David Glance are of the view that allowing the issuers to implement their own mobile payment mechanisms using the embedded NFC controller in iPhones is unlikely to result in greater competition or benefits for consumers,¹⁵⁸ the Applicants provide examples of potential innovations, e.g. requiring different fingerprint verifications for different cards or implementing voiceprint verification.¹⁵⁹
197. As discussed above, the use of contactless card payments using NFC technology is already well-established in Australia, providing a fast and low-friction payment method with widespread consumer and merchant acceptance. In addition, market research suggests that consumers who are most likely to transition to mobile payments tend to be consumers who currently use contactless cards rather than consumers who are not aware of or have never made a contactless payment.¹⁶⁰ Therefore, mobile payments are most likely to compete with contactless card payments for users.
198. Accordingly, the ACCC notes that the availability of contactless card payments will also impose some competitive constraint in the supply of mobile payment services in Australia, as there is likely to be a degree of substitutability between mobile payments and contactless card payments.

The supply of smartphone operating systems in Australia

199. The proposed conduct may impact competition between suppliers of smartphone operating systems by affecting the services and features each operating system provider is able to offer to consumers.

The supply of payment card services in Australia

200. The ACCC considers the area of competition in which card issuers provide payment card services to consumers in Australia is relevant to this assessment since it is these payment cards that consumers need to load onto a digital wallet in order to make payments.¹⁶¹
201. The relevant geographic scope is likely to be national, noting that most issuers have a national presence and marketing strategy.
202. The Applicants are all card issuers who compete against each other to attract customers (including via their digital wallet offerings). The proposed conduct would

¹⁵⁷ Applicants’ submission in response to issues raised in relation to access to the iPhone’s NFC function, received 11 November 2016, page 11.

¹⁵⁸ Submission from Dr David Glance, received 9 September 2016, pages 3-4.

¹⁵⁹ Applicants’ submission in response to issues raised in relation to access to the iPhone’s NFC function, received 11 November 2016, page 11.

¹⁶⁰ The Visa-RFi Group Australian Payments Report: The changing payments behaviour of Australian consumers and the impact on banking relationships, June 2015, page 24.

¹⁶¹ There may be other ways to make payments using a digital wallet, such as using stored credit for a particular store. These companies are not card issuers and are not included in the proposed conduct.

allow these competitors to coordinate with one another in their negotiations with Apple on the specified issues.

203. The proposed conduct may also impact competition between card issuers who choose to participate in the proposed conduct and those who do not. For example, ANZ and Amex are unlikely to participate in the proposed conduct, but as issuers of payment cards they may be impacted by the outcome of the collective bargaining.

Future with and without

204. To assist in its assessment of the proposed conduct against the statutory tests, the ACCC compares the likely future with the conduct the subject of the authorisation to the likely future without the conduct the subject of the authorisation. The ACCC compares the public benefits and detriments likely to arise in the future where the conduct occurs against a future where the conduct does not occur.
205. The ACCC considers that with the proposed conduct, the Applicants will enter into a limited form of collective boycott and negotiation with Apple on the issues identified relating to digital wallets, with the period of negotiation potentially extending for three years from the date of authorisation.
206. The ACCC recognises that the outcome of the proposed collective bargaining and boycott is uncertain. However, in considering the likely future with the proposed conduct, the ACCC does not have to predict the likely outcome of the collective negotiations on the relevant issues. Rather, the ACCC has considered whether the opportunity for the Applicants to collectively negotiate and boycott is likely to place the Applicants in a better position in negotiating with Apple than they otherwise would be individually, and whether by doing so, the proposed conduct is likely to result in public benefits or detriments, as discussed below.
207. Without the proposed conduct, the Applicants will either each negotiate separately with Apple or not at all. The ACCC accepts that those Applicants that reach agreement with Apple to make their cards available on Apple Wallet are likely to do so on Apple's standard terms of no NFC access and no fee pass-through.
208. The ACCC's view on the likely future without accords with that of most interested parties. The Applicants submit that most issuers will eventually enter into agreements for Apple Pay on Apple's terms.

Consideration of claimed public benefits

209. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹⁶²

¹⁶² *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

210. Having regard to the submissions of the Applicants and interested parties, the ACCC has considered the claimed public benefits arising from the opportunity for the Applicants to collectively negotiate with Apple and to boycott Apple Pay, thereby placing the Applicants in an improved negotiating position with Apple in respect of achieving:
- a. the ability to offer competing digital wallets or competing mobile payment mechanisms, through NFC access and reasonable App Store access
 - b. the ability to pass through Apple Pay fees to consumers.
211. The ACCC has also considered other claimed benefits, such as improvements in information, facilitation of market dynamics, and transaction cost savings, as claimed by the Applicants.

Increased bargaining power

212. Bargaining power refers to the strength of a party in negotiations with another party. The outcome of negotiations (the terms of supply) will generally depend on the negotiating strengths of both parties. Where negotiating strengths are unequal, one party to the negotiation may be able to unduly influence terms and conditions of supply. Formation of a collective bargaining group may improve the group's collective bargaining strength and may enable more efficient terms of supply to be negotiated than would otherwise be the case.
213. The Applicants submit that Apple has considerable bargaining power in relation to card issuers. In particular, they argue that Apple has significant bargaining power in negotiations relating to Apple Pay due to its control of both a key operating system and key mobile hardware. The Applicants argue that Apple holds a 'competitive bottleneck' whereby Apple competes in the mobile device market to attract a large group of customers and then exercises market power over firms that want to do business with those customers.¹⁶³
214. The Applicants submit that economic theory predicts that Apple should exercise monopoly power over application developers (including the Applicants) by requiring them to pay for access to iPhone consumers.¹⁶⁴ The Applicants submit that in individual negotiations, each Applicant is likely to have to accept Apple's terms if they want to offer Apple Pay to their customers because the only way to access customers of Apple devices is through the Apple platform. The Applicants believe that collective negotiations are necessary in order to achieve satisfactory and efficient outcomes from negotiations with Apple.
215. The ACCC notes that Apple is not a monopoly supplier of mobile devices on which mobile payments can be made. Apple faces competition from a range of other handset manufacturers and faces competitive pressure to offer mobile devices with functionalities that its rivals offer. As noted in paragraph 102, for the past two years iPhone sales averaged around 35.8 per cent of the smartphone market in Australia.
216. The ACCC also notes that, as discussed above at paragraphs 197-198, there is a degree of substitutability between mobile payments and contactless card payments,

¹⁶³ Expert report of Dr Susan Athey, page 9 (attached to Applicants' submission in response to interested party submissions received 7 October 2016).

¹⁶⁴ Expert report of Dr Susan Athey, page 11.

because contactless cards provide a similar service to mobile payments; allowing an NFC-based transaction to be made quickly and easily at the point of sale.

217. The ACCC also notes that not only are the Applicants and Apple all providers—or potential providers—of digital wallets and in this sense are competitors, this area of competition is complicated by the fact that the Applicants and Apple need each other, to some extent, to succeed:
- a. The Applicants need permission to access Apple devices in order to provide consumers with their own digital wallets and mobile payment services that use the iPhone's embedded NFC controller (i.e., in order to bypass agreeing with Apple over the terms of accessing Apple Pay). Alternatively, the Applicants need to reach agreement with Apple in order to be able to offer their customers the ability to use Apple Pay, either through Apple Wallet or through integrating their digital wallets with the Apple Pay payment functionality.
 - b. Apple needs the Applicants to populate Apple Wallet with their cards in order for Apple Pay to reach a substantial proportion of consumers. This is particularly the case for the three major Applicants, who together make up around 70 per cent of credit card use in Australia.
218. In this sense, both Apple and the Applicants have some ability to exclude each other from offering digital wallet and mobile payment services to their customers. As discussed at paragraphs 62 and 63, Apple is vertically integrated from device hardware to operating system software through to digital wallet application software and can exclude issuers from offering digital wallets with embedded NFC on Apple devices. The Applicants are vertically integrated from issuing payment cards through to the provision of digital wallets and can control whether their payment cards can be used via Apple Pay.
219. However, given the global nature of Apple's business and its global stance on the relevant issues, it is clear that on these two issues Apple has significant bargaining power as compared with each individual Applicant. The ACCC considers that the opportunity for the Applicants to collectively negotiate and boycott would place the Applicants in a better negotiating position with Apple on the relevant issues relative to individual negotiations by each party.
220. The ACCC has therefore considered below whether the opportunity to negotiate on the relevant issues is likely to lead to public benefits.

Access to NFC and App Store

221. The Applicants wish to offer their own competing digital wallets that can communicate directly with the iPhone's NFC controller in order to make mobile payments without having to use Apple Pay. Therefore, they have applied for authorisation to collectively bargain with Apple to place the Applicants in a better negotiating position with Apple on the two issues they submit would increase their likelihood of being able to offer competing mobile payment services.¹⁶⁵
222. In addition to collectively bargaining in respect of access to the iPhone's NFC functionality, the Applicants have also requested to collectively negotiate for 'the ability to provide competing mobile wallets without Apple unreasonably impeding or

¹⁶⁵ Applicants' submission in response to interested party submissions received 7 October 2016, page 44.

preventing this through other mechanisms'. For example, this could include Apple prohibiting, delaying or setting unreasonable terms for access to its App Store.

223. While this amended scope of the collective negotiation is consistent with the Applicants' original description of the proposed conduct,¹⁶⁶ the ACCC notes that the Applicants have not made any submissions directed at the issue of reasonable App Store access. In particular, they have not submitted that there are any separate public benefits likely to arise from this element of the proposed conduct. The ACCC also notes that interested parties, in particular Apple, have not provided any submissions in relation to potential benefits or detriments of collective negotiation on this issue.
224. On this basis, the ACCC has at this time adopted the same approach as the Applicants in considering the potential benefits and detriments of reasonable App Store access as not resulting in any additional separate benefits or detriments to those likely from negotiating on NFC access.
225. The Applicants submit that collective negotiations would increase the likelihood of being able to offer competing wallets on the iOS platform, which would lead to the following public benefits:¹⁶⁷
- a. increased competition and consumer choice in digital wallets in Australia
 - b. increased innovation and investment in digital wallets and other mobile applications using NFC technology, and
 - c. greater consumer confidence leading to increased adoption of mobile payment technology in Australia.
226. The ACCC has considered each of these claimed public benefits with regard to submissions by the Applicants and interested parties.

Increased competition and consumer choice in digital wallets

227. The Applicants submit that having the ability to offer digital wallets with embedded NFC to consumers using iPhones is likely to result in:
- a. increased competition in the market for the supply of digital wallet services¹⁶⁸
 - b. increased consumer choice.
228. The ACCC understands that issuers wishing to offer digital wallets with a contactless payment function are currently able to:
- a. offer digital wallets with embedded NFC access on iPhones by integrating Apple Pay functionality into their own banking apps (as 'Capital One' has done in the US), subject to reaching agreement with Apple on acceptable terms to both parties

166 On this issue, the Applicants originally sought to '...collectively negotiate in response to any technological or other exclusivity that a [Non-Issuer] Wallet Provider may seek to impose by...otherwise preventing or impeding card issuers from developing, deploying or participating in any other mobile payment or mobile wallet services or [Non-Issuer] Wallets on any mobile devices or platforms': Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 4.

167 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 31-36.

168 Applicants' submission in response to interested party submissions received 7 October 2016, page 43.

- b. offer digital wallets with an NFC tag (**digital wallets using NFC tag**) to make mobile payments on iPhone devices
- c. offer digital wallets with embedded NFC or digital wallets using NFC tag on Android devices.

Each of these options is discussed in turn below.

Existing competition from the ability to offer issuer digital wallets incorporating Apple Pay functionality

229. In respect of the model adopted by Capital One in the US, Apple states that issuers already have the ability to develop their own digital wallets with embedded NFC on iPhone devices that can make mobile payments via NFC by incorporating the Apple Pay service into the issuer's digital wallets, rather than directly accessing the NFC controller.¹⁶⁹

...the Apple Pay platform already enables each of the applicant banks to set up its proprietary mobile wallet to make NFC-facilitated payments... by integrating its mobile banking application with Apple Pay to enable the bank to securely route payments through Apple Pay's secure element infrastructure. This allows the issuer to provide additional functions, such as account balance checking and funds transfers through their own mobile banking applications on iOS devices, to differentiate themselves from, and compete with, presentment using Apple Pay through the Apple Wallet app and the services offered using apps of each other respective bank also present on the device.¹⁷⁰

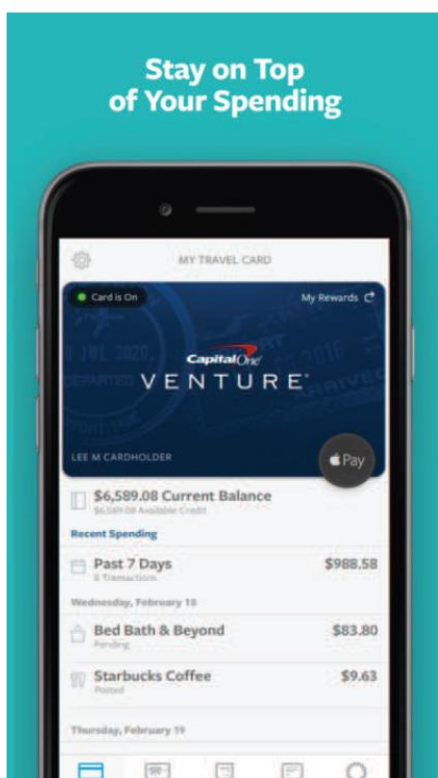
230. This means that, while Apple Pay retains sole access to the iPhone's NFC controller and is the only mobile payment service, an issuer can nonetheless create its own digital wallet that allows consumers to make a mobile payment from within the issuer's digital wallet using Apple Pay (subject to reaching agreement with Apple on terms of use for Apple Pay).
231. The Applicants' submission also recognises this, stating that it is preferable for their apps to offer the same features for both their customers using iPhones and Android devices and that '[t]his is possible for almost every part of a mobile banking app, but not for the NFC function'.¹⁷¹
232. The below screenshots from the Capital One wallet demonstrate both the similarities and differences of the Capital One digital wallet available on iPhones and on Android phones.¹⁷²

169 Expert report of Dr Chris Pleatsikas, page 30 footnote 93, citing <https://www.capitalone.com/applications/mobile/apple-pay/>

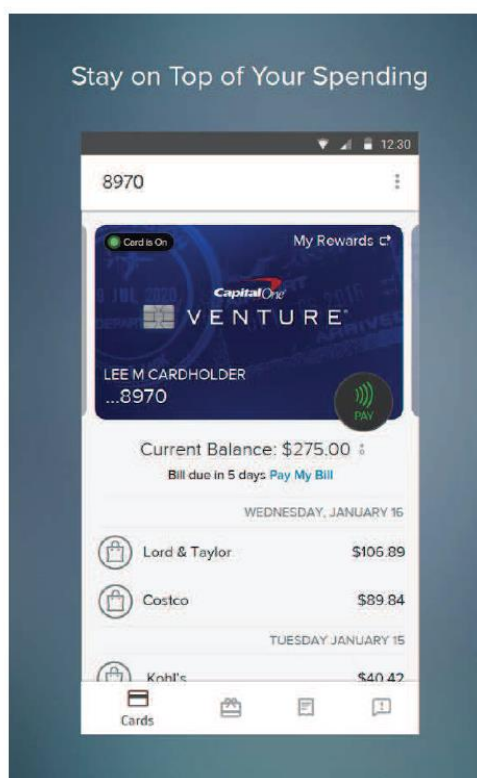
170 Submission from Apple Pty Ltd, received 26 October 2016, page 2.

171 Applicants' further submission summarising net public benefits and responding to Apple's 26 October 2016 submission, received 23 November 2016, page 6.

172 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 11.



iPhone version



Android version

233. The Applicants submit that the linking of a banking app with the Apple Pay payment mechanism, while useful and an improvement from the customer's perspective, cannot substitute for direct NFC access or provide the same public benefits. This is because:
- it would not allow for any real competition with Apple Pay and would give Apple control over when it offers the option for integration with Apple Pay, slowing down innovation in mobile payment services in Australia. There is no way for the user to select any application other than Apple Pay to launch automatically when a phone is placed by an NFC payment terminal. It would not allow direct competition between the various digital wallets, each of which may be more attractive to some customer segments than others. Also, it would not assist other possible NFC functions, such as public transport payments, building access and stored value cards.
 - it is not as quick and convenient as a mobile payment with direct NFC access (e.g. the customer may have to enter their PIN/fingerprint twice to open the app to check their balance and then to verify the payment). Further, a banking app with NFC access will be able to tell the user whether a payment has been successfully initiated.
 - it is not clear that Apple Pay returns any information to the banking app via NFC, such as whether the payment was successfully submitted or the value of the payment (although this information is available to the banking app through the payment and mobile networks, but is slower)
 - separate marketing would be required for the Android and the iOS versions of the issuer app

- e. it does not allow another wallet to provide a payment mechanism that differentiates itself, nor price competition with Apple Pay. For example, different customer verification methods or options (e.g. users could set different verification methods for different cards to differentiate shared or personal accounts), and
 - f. there is a large customer segment that would prefer a financial institution rather than a technology company to be trusted with their payments.¹⁷³
234. An ability to integrate Apple Pay functionality would allow the Applicants to offer consumers the choice of using their own digital wallet to make contactless payments on Apple devices in competition with other issuers offering a digital wallet incorporating Apple Pay functionality. Each of the Applicants would be able to compete with other providers of digital wallets on the features that are offered in their digital wallets (aside from the mobile payment software), such as ancillary mobile banking functions, notifications for transactions and budgeting tools.
235. This ability would increase competition and consumer choice in digital wallets by allowing the Applicants to create a variety of digital wallets that allow them to realise public benefits from addressing heterogeneous consumer preferences¹⁷⁴ and increasing digital engagement with their cardholders.
236. The ACCC considers that this ability is likely to provide some additional competition in digital wallets. Based on the information provided, the ACCC is not satisfied that there would be any further material increase in competition in digital wallets if the Applicants were able to directly access the NFC controller on iPhones.
237. The ACCC notes, however, that this ability to compete does not include any direct competition with Apple Pay in relation to making mobile payments via the embedded NFC controller on iPhones. Despite being able to provide digital wallet apps that compete with Apple Wallet, issuers would still be unable to compete with Apple Pay, which would remain the only mobile payment service for Apple devices (aside from the option of using an NFC tag). This issue of competition in mobile payment services is discussed further in the next section.

Existing competition from digital wallets using NFC tags

238. The Applicants submit that the lack of access to embedded NFC on iPhone devices is a 'significant limitation on the benefits that can be derived by consumers from a mobile bank application as compared to... Apple Pay'.¹⁷⁵
239. Having direct access to the NFC controller would enable the Applicants to bypass Apple and, importantly, avoid any fees charged by Apple for the use of Apple Pay. This is also related to the ability to pass through Apple Pay fees, which is discussed in the next section.
240. The ACCC recognises that digital wallets with embedded NFC, as discussed above in respect of the Capital One model, are likely to provide a better consumer experience than digital wallets using NFC tag to make mobile payments.

¹⁷³ See, e.g., Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 33.

¹⁷⁴ Expert Report of Dr Susan Athey, page 29.

¹⁷⁵ Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 21, citing Expert report of Charles River Associates dated 12 May 2016, pages 5-6.

241. The Applicants submit that digital wallets using NFC tag are less attractive to consumers than digital wallets with embedded NFC because the external NFC tags 'have to be attached to the user's device, detracting from its aesthetics, and compromising its resale value, and may "clash" with the NFC functionality embedded in the devices'.¹⁷⁶
242. The Applicants further state that a key difference resulting from digital wallets with embedded NFC being able to access the NFC controller in a device is that this access allows direct communication between the digital wallet and the NFC controller to enable a greater range of functionalities. The Applicants submit that only digital wallets with embedded NFC can:¹⁷⁷
- a. store the details of multiple cards and switch between them easily
 - b. secure transactions in particular ways, e.g. with fingerprint identification
 - c. tokenise payment credentials so that merchants do not receive or retain credentials that can be exploited
 - d. preview and confirm transactions on the mobile device and view them as soon as they are completed
 - e. potentially make payments of greater amounts, due to the increased security of the payment method.
243. The Applicants provided further information on these issues to support that NFC stickers/wristbands/key fobs are not a good substitute for direct access to an embedded NFC controller and that such 'work-around' solutions can provide part of the functionality but are less convenient and reliable (and this is reflected in consumer attitudes towards NFC stickers):
- a. these solutions are effectively a resized contactless payment card. Unlike a digital wallet with embedded NFC, a mobile phone cannot send instructions to, or receive any information from, the sticker (the merchant equipment communications with the mobile phone via the mobile network to the issuer's app. Similarly, a customer can deactivate the credit card associated with the sticker from the app). The delay in receiving this information depends on the issuer's payment network and also the quality and coverage of the mobile network. An NFC controller embedded in a mobile device can communicate information to an app without the need to communicate through the payment network or the mobile network. It allows consumers to easily switch cards and use a PIN or fingerprint to verify each transaction. In the future, other merchant functions may be possible in the peer-to-peer and reader/writer NFC modes
 - b. any NFC sticker attached to a phone with an NFC controller can lead to radiofrequency interference or "clash" between the two NFC systems, leading to unpredictable results at merchant terminals. NFC stickers will remain 'live' and cannot be turned off. The location of the NFC sticker on the phone or placing more than one NFC sticker on the phone can also cause usability issues
 - c. only digital wallets with embedded NFC can switch between multiple cards easily, noting that different types of cards and card schemes attract different fees

176 Expert report of Charles River Associates dated 5 October 2016, page 17, footnote 65.

177 Expert report of Charles River Associates dated 5 October 2016, page 5.

and rewards. A sticker can only be connected with one card and one card scheme (although a customer can switch the account linked to that card via the issuer app). Given the option, customers who multi-card may choose to load them into separate issuer digital wallets, rather than loading them all into Apple Pay, if this represents better value in terms of useful information or financial rewards, and

- d. only digital wallets with embedded NFC can easily secure transactions with a PIN or fingerprint for transactions over \$100.

244. The ACCC notes that the increased use of NFC tags following the launch of Apple Pay represents a competitive response from some of the Applicants and indicates that NFC tags may be a partial substitute to direct NFC controller access. However, the ACCC recognises that NFC tags appear to currently provide an inferior user experience for consumers. In addition, the ACCC notes that a variety of NFC technologies exist that can be implemented to introduce new functionalities to external NFC tags, such as the technologies used in mobile payment devices offered by Plastic and Coin 2.0.

Existing competition from digital wallets on the Android platform

245. In addition, it is possible that Apple's approach is subject to a degree of competitive constraint from digital wallets available on Android devices.

246. As discussed in the *Background* section under *Mobile operating systems*, while Apple has a substantial share of the smartphones market in Australia with 35.8 per cent of sales since January 2014, Android devices are more popular in Australia, with 56.8 per cent of new sales over the same period.¹⁷⁸

247. However, the Applicants submit that the demographics of Android and Apple users differ such that 'the iOS platform has substantially more valuable consumers in terms of demographics and commercial activity'.¹⁷⁹

248. For instance:

- a. iPhone users spend almost 2.5 times more on in-application purchases than Android users and were 50 per cent more likely to start spending money on in-application purchases.¹⁸⁰
- b. 'iPhone users are more likely to have a graduate degree, earn household income above \$125,000, hold a professional or managerial job, and agree that they are "addicted" to digital devices, than Android users'.¹⁸¹
- c. Australian download revenues are more skewed towards the iPhone than the worldwide average, with 70 per cent of combined Apple App Store and Google Play Store revenues attributable to the Apple App Store and 60 per cent of

¹⁷⁸ Average sales since the three months ending January 2014, using sales data from <http://www.kantarworldpanel.com/global/smartphone-os-market-share/> (sample: January 2014-September 2016).

¹⁷⁹ Expert Report of Dr Susan Athey, page 30.

¹⁸⁰ Expert Report of Dr Susan Athey, page 60, citing <http://www.androidauthority.com/new-report-reveals-that-ios-users-spend-2-5-more-on-in-app-purchases-thanandroid-users-700983/>.

¹⁸¹ Expert Report of Dr Susan Athey, page 60, citing <http://www.forbes.com/sites/toddhixon/2014/04/10/what-kind-of-person-prefers-an-iphone/#6395b8423e5a> and <http://savvyapps.com/blog/android-vs-ios-which-platform-to-build-for-first>.

mobile banking transactions.¹⁸² This is relevant to the viability of app development (which involves high fixed costs) and app use, including digital wallets, on only the Android platform.¹⁸³

- d. iPhone users tend to embrace mobile payments, digital wallets and new technology and are more attached to their mobile devices than Android users. iPhone loyalty rates are almost twice as strong as the next-highest brand and Australians are brand loyal to smartphones.¹⁸⁴
 - e. Observations about the demographic of iPhones users and their app spending habits are supported by research overseas, such as in the US.¹⁸⁵
249. The Applicants also argue that brand loyalty and high switching costs deter switching between the iOS and the Android platforms.¹⁸⁶ They submit that consumers are unlikely to switch devices and operating systems on the basis of using a different individual application such as a digital wallet, particularly where a substitute already exists in the form of Apple Wallet.¹⁸⁷ In addition, the Applicants submit that switching mobile devices is difficult, inconvenient and expensive.¹⁸⁸
250. Whilst the ACCC accepts that there are some barriers to switching between devices or operating systems, the dynamic global market for smartphone operating systems is characterised by high levels of innovation, fluctuating market shares, and entry and exit.¹⁸⁹ Given the size of contactless payments in Australia¹⁹⁰ and the potential size of the digital wallets market, it appears that it would be commercially viable for digital wallets limited to Android devices to be developed. Indeed, each of CBA, Westpac and NAB have already decided to develop their own digital wallets that only enable mobile payments for Android devices.
251. The ACCC considers that competition between Apple and Google in mobile operating systems impacts competition between digital wallets. If the different approach to access to the NFC controller taken on Android phones results in a better digital wallet offering for consumers than the approach taken by Apple, Apple is likely to face pressure to reconsider its approach.
252. Therefore, although there may be significant costs to consumers switching between Android and iOS platforms, the ACCC considers that the availability of digital wallets with embedded NFC on the Android platform will exert a degree of competitive tension on Apple.

182 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 4.

183 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 4.

184 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 4.

185 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, pages 5-6.

186 Expert Report of Dr Susan Athey, page 19.

187 Expert Report of Dr Susan Athey, page 20.

188 Expert report of Charles River Associates dated 5 October 2016, page 13.

189As discussed above in the section on 'Innovations in mobile payments' at page 19 above.

190 In 2015-16, Australians made around \$538 billion of card payments <http://www.rba.gov.au/publications/annual-reports/psb/2016/pdf/2016-psb-annual-report.pdf>, an estimated \$110 billion of which was made by contactless payment: The Sydney Morning Herald, '£110bn: Australia's contactless boom', 8 August 2016 <http://www.smh.com.au/business/retail/110bn-australias-contactless-boom-20160805-gqmg7j.html>.

ACCC conclusion on claimed public benefit of increased competition and consumer choice in digital wallets

253. The ACCC considers that there is a likely public benefit from the proposed conduct to seek access to the embedded NFC controller in iPhones and reasonable App Store access in the form of increased competition and consumer choice in digital wallets. However, the magnitude of this benefit is limited to some extent by the existing opportunities that enable the Applicants to compete against Apple Wallet.

Increased innovation and investment in mobile applications

254. The Applicants submit that access to the NFC controller in iPhones is likely to result in increased innovation and investment in both digital wallet applications and other mobile applications using NFC functionality.
255. The Applicants submit that it is critical for a digital wallet to be able to access both the Android platform and the iOS platform in order to be successful in Australia due to both Apple's significant market share in smartphones and the distinct demographics of iPhone users compared with Android users (as set out above).

Increased investment in digital wallet applications

256. The Applicants submit that significant investment is required to produce successful, high-quality mobile payment apps.¹⁹¹ The Applicants further submit that the ability to address the valuable consumers on the iOS platform will result in increased incentives for app developers (across both the iOS and Android platforms) and Apple (on the iOS platform) to invest in digital wallet applications (and utilise NFC infrastructure).¹⁹²
257. The Applicants have cited several case studies which it submits illustrate the importance of obtaining access to the NFC function on the iPhone. They submit that digital wallets (Semble in New Zealand, Suretap in Canada, CurrentC in the US, and Paymit in Switzerland) failed or were prevented from reaching their potential by Apple's refusal to provide access to the NFC functionality.¹⁹³
258. The Applicants argue that issuer apps' advertising, marketing, service and support (and even app updates) are all made more efficient where the same features are available to all customers and operate in the same way regardless of the platform.¹⁹⁴
259. However, the Applicants also note that there are significant additional costs and significant differences in developing applications for the iOS and for the Android platforms,¹⁹⁵ which mitigates to some extent the effect of a larger addressable market including iOS users on developers creating applications for Android devices.

191 Expert Report of Dr Susan Athey, page 31 and the Applicants' submission in response to interested party submissions received 7 October 2016, pages 22-24.

192 Expert Report of Dr Susan Athey, page 30 and Expert report of Charles River Associates dated 12 May 2016, page 33.

193 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, pages 18-25.

194 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 6.

195 Expert Report of Dr Susan Athey, page 20.

260. Incentives to invest depend on the difference between incremental costs and incremental revenues. Whilst the ACCC accepts that direct access to the NFC controller in iPhones is likely to increase expected revenues from digital wallet applications, the ACCC also notes that this will be accompanied by higher expected costs of developing apps across both the Android and the iOS platforms. The ACCC has not received sufficient data to be satisfied of a net significant increase in incentives to invest in digital wallet applications.

Increased investment in other mobile applications

261. The Applicants and interested parties supporting the applications further submit that access to NFC will result in the public benefit of increased investment and innovations in other mobile applications that use NFC technology, e.g. access control.
262. Whilst the ACCC considers that open access to NFC would enable other mobile applications using NFC to be developed for iPhone devices, the ACCC also considers that there are strong investment incentives on Apple to ensure that its devices are competitive with those running on the Android platform.

ACCC conclusion on claimed public benefit of increased innovation and investment in mobile applications

263. The ACCC considers that there is a potential benefit of increased innovation and investment in digital wallets and other mobile apps using NFC technology from allowing the Applicants to negotiate with Apple on access to the NFC controller and App Store access. However, based on the information provided by the Applicants and the uncertainty in how these markets are likely to develop, any potential benefit is unlikely to be significant.

Increased adoption of mobile payments

264. The Applicants submit that competition and choice between digital wallets across different smartphones is necessary to facilitate the adoption of mobile payments in Australia and fully realise the benefits and efficiencies from greater digital wallet adoption.¹⁹⁶
265. The Applicants also argue that greater mobile payment adoption will lead to the public benefit of more efficient use of the existing Australian payments infrastructure.¹⁹⁷ It is argued that restricting mobile payments to occur only through Apple Pay may reduce mobile payment adoption and thereby reduce the public benefits that can be derived from the NFC payment infrastructure already paid for by Australian banks and merchants.¹⁹⁸
266. On the other hand, Apple submits that the proposed conduct risks leading to a further delay to the introduction of Apple Pay as a digital wallet for consumers whose payment cards are issued by one of the Applicants or another group member.¹⁹⁹
267. As discussed below under *Public detriments*, the ACCC is concerned that the conduct may result in a delay in expanded coverage of Apple Wallet, which may lessen the

196 Expert Report of Dr Susan Athey, page 9.

197 Applicants' submission in response to issues raised in relation to access to the iPhone's NFC function, received 11 November 2016, page 25.

198 Expert Report of Dr Susan Athey, page 31.

199 Submission from Apple Pty Ltd, received 26 August 2016, section 2.3.

degree of competition between Apple Wallet and issuer digital wallets, which, in turn, may result in slowed development and uptake of digital wallets for the length of any delay.

268. The ACCC also considers that any lower adoption of mobile payments will not necessarily lead to less intensive use of the contactless payment technology installed in Australia, as there is likely to be continued use of contactless payment cards for some time.
269. The ACCC is therefore not satisfied that access to NFC, and negotiation of reasonable App Store access, is likely to result in public benefits from increased adoption of mobile payments nor more efficient use of the existing Australian payments infrastructure.

Ability to pass through Apple Pay fees to consumers

270. Apple does not allow pass through of Apple Pay fees charged to issuers to end consumers. The matters the Applicants wish to collectively negotiate on include that *'Each applicant wants to have the ability to make its own individual decisions as to whether to charge cardholders any fees for the use of Apple Pay'*.²⁰⁰
271. The Applicants submit that the ability for issuers to pass through fees will result in greater price transparency and efficiency in payments. The Applicants also argue that the ability to pass through fees may act as a pricing constraint on Apple's fees.²⁰¹
272. Some interested parties agree that the pass through of fees could result in cost-reflective surcharging and lead to efficient use of digital wallets. Apple submits that the pass through of fees is not standard industry practice for use of digital wallets and the Applicants may use this to disadvantage Apple Pay. Specifically, Apple is concerned that issuers will set cardholder fees for the use of Apple Wallet with the aim of 'directing' the customers to their own digital wallets. Other interested parties do not support the pass through of fees, or collective negotiation on this issue.
273. The ACCC accepts the general principle that restricting pass through of fees could lead to inefficiency. This accords with the view of the RBA, which recently said that:
- The right of merchants to surcharge for expensive payment methods is important for payments system efficiency and helps to hold down the cost of goods and services to consumers generally.*²⁰²
274. Transaction-based fees are charged in other parts of the payments industry, and the ACCC is not aware of other instances where pass through is prevented. Allowing pass through lets the market determine the appropriate rate that is charged explicitly and avoids the inefficiencies that may be created when specific charges are recovered in some way from consumers who are not using the Apple Pay service.

200 Applicants' submission in response to interested party submissions received 7 October 2016, Annexure A – Collective Negotiation Framework, Applicant submission.

201 Expert Report of Dr Susan Athey, page 24.

202 Reserve Bank of Australia, Review of Card Payment Regulation, May 2016, <http://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf>, page 1.

275. Facilitating transparency of transaction costs for consumers of Apple Pay may lead to more efficient choices of the various digital wallets and payment alternatives. Restricting any pass through of fees may be artificially setting the fee at zero, whereas, if issuers were free to decide whether to pass on any fee, the market could determine what each issuer would set the fee at. If the fee is artificially held down, there may be an inefficiently high use of Apple Pay, not reflecting its true cost and thereby distorting competition between Apple Pay and payment alternatives (including other digital wallets).
276. While digital wallets have only recently entered the Australian market, and consumer acceptance may be at an early stage, digital wallets may become increasingly important in consumer choice of smartphone device. Preventing issuers from passing through Apple Pay's fees to users may over time distort consumer choice of smartphone offerings. The ACCC also accepts that removing any restriction on pass through would reduce the incentive for Apple to increase these fees over time.
277. However, the potential benefits from the ability to pass through fees depend on whether issuers would pass through the fees in a cost-reflective way to consumers. The ACCC considers it likely that fees in this case may not be passed on to consumers because of:
- a. the relative size of the fees. The maximum fee purportedly charged²⁰³ by Apple for Apple Pay overseas is 25c per \$100 and any fee charged in Australia may be significantly lower.²⁰⁴ It is unclear whether a charge at such levels would be likely to be passed on directly (as opposed to absorbed into other fees charged to customers)
 - b. competition between card issuers. Even if some issuers initially pass through Apple Pay fees, they may end up matching their competitors' no pass through approach as a result of customer pressure.
278. The ACCC also notes Apple's concern that allowing pass through of these fees may provide issuers with the opportunity to distort competition in digital wallets in favour of their own wallets. The ACCC is concerned that the Applicants have an incentive to favour their own digital wallets in ways that limit Apple Pay from competing on its merits in the supply of digital wallets. The Applicants may seek to charge fees for the use of digital wallets which are designed to discourage their cardholders from using Apple Pay. For instance, the Applicants may set cardholder fees for using Apple Pay well in excess of the costs, which would result in inefficiently low uptake of Apple Pay. While this is theoretically possible, issuers are likely to be constrained by other issuers in charging cardholders for the use of Apple Wallet. If an issuer decided to charge cardholders for the use of Apple Wallet it would risk losing business to other card issuers who do not. In addition, this risk may be somewhat mitigated by Apple in any agreement with an individual issuer.

203 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 62, citing Rita Trichur and Daisuke Wakabayashi, "Apple Pay Plans to Launch in Canada This Fall", Wall Street Journal, 17 April 2015.

204 The Applicants submit that transaction fees for Apple Pay overseas are in the vicinity of 0.07 to 0.25 per cent, with fees in the UK described as a 'few pence' per 100 pounds. Apple submits that it 'maintains relatively consistent fee structures within similar categories of countries that reflect the particular circumstances of the market which Apple Pay is entering': Submission from Apple Pty Ltd, received 26 August 2016). Apple also submits that the regulation of interchange fees by the RBA is, in light of experience in the UK (where interchange fees are regulated) in comparison to the experience in the US (where interchange fees are not regulated) likely to act as a significant constraint on the transaction fees that would be agreed between Apple and the Applicants: Expert Report of Dr Chris Pleatsikas, page 24.

279. Overall, the ACCC considers, whilst it is likely that providing the opportunity to negotiate for removal of any restriction on pass through of fees would increase pricing efficiency, and could act as a constraint on Apple's fees, and is therefore likely to result in some public benefit, the size of this benefit is uncertain because of the uncertainty whether fees would in practice be passed on and because it may give the Applicants scope to discriminate against Apple Wallet.

Other claimed public benefits

280. The Applicants have also referred to other public benefits that may arise from collective bargaining, including.²⁰⁵
- a. improvements in information
 - b. facilitation of market dynamics, and
 - c. transaction cost savings.

Improvements in information

281. Information asymmetry occurs when one party to an exchange has incomplete information about the price and quality of the good or service, which results in that party not being fully informed and able to make rational choices and decisions on price, quantity and quality.²⁰⁶
282. The Applicants argue that non-disclosure agreements prevent issuers from disclosing any information about ongoing or completed negotiations and that it will be particularly difficult for issuers to negotiate with Apple on particular terms without knowing the outcomes of negotiations between Apple and other issuers.²⁰⁷ Further, the Applicants argue that Apple has shown an unwillingness to modify the terms of its non-disclosure agreement.²⁰⁸
283. The ACCC does not consider that non-disclosure on Apple's negotiations with the Applicants' competitors creates any information asymmetry on the price or quality of Apple Pay. However, the collective bargaining may place the Applicants in a better position to obtain additional information regarding the technical operation of Apple Pay and thereby make more informed decisions on whether to participate.
284. The ACCC therefore considers that there would be a small public benefit from the proposed conduct through improvements in information.

205 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, pages 42-44.

206 ACCC guide to collective bargaining notifications, p34.

207 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 43.

208 Applicants' further submission summarising net public benefits and responding to Apple's 26 October 2016 submission, received 23 November 2016, page 3.

Facilitation of market dynamics

285. The Applicants submit that the proposed conduct is directed towards increasing competition by increasing their ability and the ability of others to supply digital wallet services to all potential customers.²⁰⁹
286. The ACCC does not consider that there are any additional public benefits over and above any benefits from increased competition, as considered above.

Transaction cost savings

287. The Applicants submit that the collective negotiations will result in a reduction in the transaction costs of negotiating with Apple in relation to the identified issues, which are likely to be significant, as any negotiations concerning these issues are likely to be protracted and difficult.²¹⁰
288. The Applicants have also submitted that they are under intense pressure to participate in Apple Pay and wish to commence and conclude collective negotiations as quickly as possible.²¹¹
289. The ACCC is not convinced based on the information provided that the collective negotiation would result in cost savings for the Applicants, given that they will each have to negotiate the details of the contract separately in any event.

ACCC conclusion on public benefits

290. Based on the material before it, the ACCC considers that there are likely to be some public benefits associated with the proposed conduct.
291. The ACCC considers that there is a likely public benefit from the proposed conduct to seek access to the embedded NFC controller in iPhones and reasonable App Store access in the form of increased competition and consumer choice in digital wallets. However, the magnitude of this benefit is limited to some extent by the existing opportunities that enable the Applicants to compete against Apple Wallet.
292. The ACCC considers that there is a potential benefit of increased innovation and investment in digital wallets and other mobile apps using NFC technology if the Applicants were successful in negotiating access to the NFC controller. However, based on the information provided by the Applicants and given the uncertainty in how these markets are likely to develop, the ACCC does not consider that any such benefit would be significant.
293. The ACCC considers that providing the Applicants the opportunity to negotiate for removal of any restriction on pass through of fees would likely result in some public benefit. However, the size of the benefit is uncertain.
294. The ACCC considers that there would be a small public benefit from the proposed conduct making it more likely that Group Participants obtain better information from

209 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 43.

210 Applicants' initial submission in support of the applications for authorisation, received 26 July 2016, page 44.

211 Applicants' submission in response to interested party submissions received 7 October 2016, page 3.

Apple and thereby may make more informed decisions as to whether to enter into an agreement with Apple.

Consideration of claimed public detriments

295. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*²¹²

296. Having regard to the submissions of the Applicants and interested parties, the ACCC has considered the potential for public detriments relating to reductions or distortions in competition in a number of areas:

- a) competition between issuers
- b) competition in the supply of digital wallets
- c) competition in the supply of mobile operating systems.

Reduced competition between issuers

297. The ACCC considers that there are likely detriments caused by the proposed conduct because it weakens competition between the Group Participants (and other issuers) in a range of markets.

in the supply of mobile payment services

298. The proposed conduct is likely to hamper competition between Group Participants in relation to the supply of mobile payment services for consumers with NFC-enabled iPhones. It would reduce the competitive tension between Group Participants to make Apple Pay available for their cardholders for the duration of the collective negotiations and collective boycott (which could be up to three years).

299. However, the proposed conduct would not remove this competitive tension altogether, as the Group Participants would remain subject to significant competition from issuers who individually agree to offer Apple Pay, as ANZ, Amex, and clients of Cuscal Ltd have already done.

in the provision of payment card services

300. The ACCC is also concerned that there may be a prospect the conduct could reduce competition between the Applicants in the provision of payment card services.

301. The ACCC considers that any hampering in the expansion of Apple Wallet caused by the proposed conduct may delay or inhibit competition between issuers that may be facilitated through Apple Wallet by its nature of a non-issuer digital wallet.

212 *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

302. As set out in the *Consultation* section, Apple submits that it will not agree with the Applicants and allow open access to the NFC controller on iPhones. Even if it did, Apple submits that it is not necessarily the case that this will increase competition and consumer choice in digital wallets to iPhone users, because:
- a. While Android Pay and Samsung Pay already appear to provide the Applicants with everything they are seeking in this application, none of the major Applicants (CBA, NAB, Westpac) have allowed their customers access to multi-card non-issuer digital wallets. The ACCC notes that Westpac has since agreed to offer Android Pay to its cardholders.
 - b. The only plausible explanation for the Applicants' behaviour is that they are not interested in promoting competition in mobile payments, but instead prefer a situation where the only digital wallets available to customers in Australia are the Applicants' own digital wallets that only provide access to their own respective payment cards.
 - c. If this outcome is repeated for iPhones, iPhone users with a particular payment card wishing to make payments using a digital wallet will have one choice, the digital wallet supplied by their issuer.
 - d. Apple further submits that such an outcome will inhibit competition between payment card issuers that non-issuer digital wallets such as Apple Wallet will likely cause. Apple notes that non-issuer digital wallets have the capacity to permit consumers to rapidly and simply switch between payment cards at point of sale. This ease of switching is likely to promote competition between payment card issuers.²¹³
303. The Applicants have responded to this issue, submitting that non-issuer digital wallets do not provide significantly more competition at the point of sale than already exists and also that their customers are demanding services such as Apple Pay. The Applicants submit that customers can already easily switch between the plastic cards in their physical wallets, and will be able to easily switch between differentiated mobile payment apps on their mobile devices.²¹⁴
304. The Applicants have submitted that the collective negotiation is necessarily predicated on the Applicants' participation in Apple Pay.²¹⁵ However, the ACCC notes that there is nothing in the application that would compel the Applicants to make their payment cards available on Apple Wallet, but that it is open to Apple to persuade the Applicants to do so. The ACCC also notes that Westpac's cards are said to be soon available on Android Pay.
305. The ACCC considers that non-issuer digital wallets provide consumers with the additional convenience of switching at point of sale between payment cards loaded on to the wallet. For this reason, Apple Wallet may play a role in promoting competition between payment cards; although this may not be substantial given multi-bank cardholders could load individual issuer digital wallets onto iPhones if their cards were not available on Apple Wallet.

213 Submission from Apple Pty Ltd, received 26 October 2016, page 3.

214 Applicants' further submission summarising net public benefits and responding to Apple's 26 October 2016 submission, received 23 November 2016, page 4.

215 Applicants' further submission summarising net public benefits and responding to Apple's 26 October 2016 submission, received 23 November 2016, page.4.

306. As noted below, the ACCC is also concerned that the Applicants may have an incentive to favour their own digital wallets in ways that may limit Apple Pay from competing on its merits in the supply of digital wallets. The Applicants may seek to charge fees for the use of digital wallets which are designed to discourage their cardholders from using Apple Pay. For instance, the Applicants may set cardholder fees for using Apple Pay well in excess of the costs. The Applicants may seek to 'lock in' their customers to their own digital wallets to the detriment of non-issuer digital wallets, with any such lock-in also adding to the costs incurred by consumers in changing their provider of payment card services. This may affect competition between payment card issuers. The ACCC recognises that the cost of changing digital wallets may not be substantial relative to other switching costs faced by consumers when changing their provider of payment card services, including the cost of re-establishing any direct debits.
307. The ACCC considers that non-issuer digital wallets such as Apple Wallet have the potential to be a disruptive technology that may increase competitive tension between payment card issuers by increasing the ease of consumer switching and limiting any 'lock in' effect issuer digital wallets may cause. To the extent the proposed conduct artificially biases the development of issuer digital wallets over non-issuer digital wallets, these potential benefits may be lost.
308. The ACCC seeks submissions on these issues, including specifically on:
- a. the role of non-issuer digital wallets in facilitating consumer switching and competition between payment cards from different issuers
 - b. the costs to consumers of switching digital wallets, particularly relative to other barriers to consumer switching such as re-establishing direct debits
 - c. the ability and incentive of issuers to charge their fees to artificially discourage their cardholders from using Apple Pay.

Impact on issuers not part of the group

309. The proposed conduct may put the group at an advantage relative to issuers who are not Group Participants.
310. The collective bargaining may distort competition between group members and other issuers as parties that are not part of the group may not be able to achieve similar terms with Apple, and may therefore be at a disadvantage when competing for customers in the supply of cards and/or digital wallets. Inferior terms may also result in issuers outside of the group being less likely to sign up to Apple Pay and offer it to their customers. Such customers will be harmed if they are denied access to Apple Pay or have to pay higher (indirect) fees for using Apple Pay.
311. The scope of the conduct potentially extends to any eligible Australian issuers. As such, if an issuer considers it is beneficial for them to be part of the group, they are free to join. There is a risk however that if issuers join later in the negotiating process, or if they have different requirements than other group members due to their size or business model, they may not get the same benefit from any collectively negotiated outcome.
312. The ability to join the group is unlikely to assist issuers that have already signed up for Apple Pay. ANZ and Amex have already negotiated individually with Apple for terms for Apple Pay, without the benefit of negotiating as a group or knowing the outcome of

those negotiations. These issuers are likely to be competitively disadvantaged by the proposed conduct.

313. A relevant consideration, however, is whether ANZ and Amex were aware of the potential collective bargaining group before entering and concluding negotiations with Apple. If they were aware and decided to pursue individual negotiations anyway (as Cuscal has decided to do, for example), this suggests they considered this a preferable approach. For example, there may be benefits from being the first issuers offering Apple Pay in Australia.
314. On balance, therefore, the ACCC considers that the proposed conduct is unlikely to have much impact on issuers and retailers outside of the group, noting that they can join the group at any time. ANZ, Amex and the smaller issuers who are clients of Cuscal may experience some disadvantage for the length of their contracts with Apple, but would likely be able to leverage off any changes Apple makes to its standard approach on the identified issues in future contract negotiations and are likely to benefit from being the first issuers to offer Apple Pay in Australia. The ACCC therefore considers that there is no material public detriment.

Potential for collusion between issuers

315. Some interested parties, such as the South Australian Small Business Commissioner and some individuals, consider that the 'big banks' should not be allowed to create a cartel (for any purpose), noting that they are very large players with significant market power in the banking sector. The Applicants submit that there will be no anti-competitive information exchange and there will be protocols in place to ensure this.
316. The collective bargaining conduct involves coordination between three of the four major banks which are otherwise close competitors in a relatively concentrated banking market.²¹⁶
317. If the proposed conduct enhances the potential for coordinated (rather than competitive) responses across the market for payment cards more generally and information sharing beyond that specifically necessary to negotiate on the identified issues, this could result in reduced competition in the markets in which the Applicants compete, including the issuer market generally as well as digital wallets and mobile payments specifically. To the extent that this occurs, this would give rise to public detriment, including detriment to consumers, by causing inefficiency that leads to higher prices, reduced output and reduced quality.
318. However, the ACCC notes that the proposed conduct relates only to the group's negotiations with Apple and only on the specific issues identified, and any information or coordination outside of this would not be covered by the authorisation. It is not intended that the negotiations be used to decide on the specific contractual terms that would apply with respect to NFC access or fees. The Applicants have also noted that information protocols and ring-fencing of negotiations will apply to prevent anti-competitive information exchange.
319. Overall, the ACCC considers that there may be the potential for tacit collusion beyond the proposed conduct, for example in relation to each Applicants' approach to its digital payment offerings. The ACCC does not have evidence before it that suggests such coordination is likely.

²¹⁶ King, Stephen P, *Collective Bargaining By Business: Economic and Legal Implications*, UNSW Law Journal, Volume 36(1), p. 124, citing European Commission guidelines.

ACCC conclusion on reduced competition between issuers

320. The ACCC considers that there are likely detriments caused by the proposed conduct because it weakens competition between the Group Participants (and other issuers) in a range of markets.
321. The proposed conduct is likely to hamper competition between Group Participants in relation to the supply of mobile payment services for consumers with NFC-enabled iPhones by reducing to some extent the competitive tension between Group Participants to make Apple Pay available for their cardholders for the duration of the collective negotiations and collective boycott (which could be up to three years).
322. The ACCC also considers that, to the extent the proposed conduct artificially biases the development of issuer digital wallets over non-issuer digital wallets, the potential benefits of increased competitive tension between payment card issuers that may be promoted through non-issuer digital wallets, may be lost. The ACCC is seeking submissions on these issues to better inform its final view.
323. The ACCC considers that while there is some likely public detriment of negative impacts on issuers outside of the Bargaining Group, such detriment is small. And, while there may be the potential for tacit collusion beyond the proposed conduct, the ACCC does not have evidence before it that suggests such coordination is likely.

Reduced competition in the supply of digital wallets

324. Digital wallets and mobile payments are emerging markets involving high-technology industries and large global and national incumbents. It is uncertain how they will develop and the ACCC notes that authorising the proposed conduct represents an intervention in emerging markets. Any such regulatory interference with market dynamics may have uncertain impacts on the development of the markets in Australia.
325. The ACCC considers that access by the Applicants to the NFC controller in Apple devices has the potential to result in a reduction in competition in digital wallets, given the commercial incentives of the Applicants, as competitors in the supply of digital wallets, to favour their own wallets over non-issuer digital wallets.
326. Some interested parties have expressed concern that the proposed conduct is directed at stalling Apple Wallet's introduction to allow the Applicants to channel their cardholders to use their issuer digital wallets rather than Apple Wallet.
327. The limited collective boycott reduces the incentives of each of the Applicants to individually negotiate and agree with Apple by restricting the number and size of payment card issuers that make their payment cards available on Apple Pay. It provides each of the Applicants with some comfort that other Applicants will not offer their payment cards on Apple Pay while the collective negotiations are continuing. This limits the extent to which each of the Applicants is likely to lose cardholders or card transactions to other Group Participants.
328. While the Applicants have sought authorisation for three years, they have submitted that the limited scope of the collective negotiations as well as their own commercial incentives will ensure the negotiations are concluded quickly.²¹⁷ The Applicants also note that issuers face significant commercial pressure from consumer demand and

²¹⁷ Applicants' submission in response to interested party submissions received 7 October 2016, pages 26-27.

ANZ (and shortly, Cuscal member issuers) offering Apple Pay to cardholders not to delay Apple Pay in Australia.²¹⁸

329. Notwithstanding these arguments, and in light of Apple's consistent global position on the relevant issues for collective negotiation, the ACCC considers that the proposed conduct is likely to prolong individual negotiations between issuers and Apple and delay a decision by any of the Applicants to make their payment cards available on Apple Pay, relative to a situation without the proposed conduct.
330. The length of any delay in the Applicants signing up to Apple Pay could be anywhere from a few months to three years. Each negotiation is anticipated to last up to 12 months, although the Applicants have sought authorisation to engage in collective bargaining and boycott for up to three years, in addition to the time already elapsed in the Applicants seeking authorisation (although during that time the Applicants have been free to pursue individual negotiations, they may have decided not to do so given the pending application for authorisation). On the other hand, the Applicants have some incentive to resolve negotiations and sign up to Apple Pay, particularly if their iPhone customers have a strong desire to access Apple Pay and are willing to switch issuer to get access.
331. If the proposed conduct results in a delay in the Applicants signing up to and offering their customers Apple Pay, this will result in a reduction in consumer choice and availability of digital wallets (and therefore consumer welfare) during the period of delay.
332. Consumer uptake and consumer choice in digital wallets in Australia is expanding (e.g. issuer wallets, Android Pay, Samsung Pay), and Apple Pay appears to be an important new entrant. Delays caused by the proposed conduct may mean that Apple Pay is not available to many bank customers at a critical time for the launch of digital wallets in Australia. For some Apple customers, the ability to make contactless payments on their smart device is very important. At present, Apple Pay is the only mechanism available on Apple devices able to make mobile payment through NFC, and only for ANZ or Amex cardholders (and shortly, cardholders of Cuscal issuers). Some Apple customers might have a strong preference for Apple Pay in particular; for example, consumers who value the interface offered by Apple's own apps. Any delay will be of detriment to this group of consumers.
333. While some cardholders of the Applicants may choose to switch to a different issuer (e.g. Amex, ANZ or one of the 31 smaller financial institutions represented by Cuscal) or to switch to a non-Apple device, there are generally significant costs associated with such switching. If a consumer is switching payment cards in order to access Apple Pay's mobile payment services, they are more likely to switch a card on which they make most of their payments, which is more likely to be linked with key transaction accounts and rewards programs. In addition, it is possible that a consumer may give up some financial or non-financial benefits in switching from their preferred issuer to a different one in order to have the ability to make mobile payments via Apple Pay.
334. Therefore, the ACCC considers that the delayed expansion of Apple Wallet arising from the proposed conduct is likely to result in some public detriment despite the availability of issuers outside the collective bargaining group who offer Apple Wallet to their cardholders and other alternatives available to consumers, such as contactless card payments. A delay in expanded coverage of Apple Wallet may lessen the degree

218 Applicants' submission in response to interested party submissions received 7 October 2016, page 27.

of competition between Apple Wallet and issuer digital wallets, which may result in slowed development and uptake of digital wallets for the length of any delay.

Distortion in competition in the supply of mobile operating systems

335. The ACCC considers that there is a likely detriment in a distortion to competition between mobile operating systems caused by the proposed conduct. Apple's iOS platform is a differentiated offering that competes globally against other mobile operating systems, such as Android, in the services and features each operating system provider offers to consumers.
336. One of the features offered by mobile operating systems is mobile payment services and digital wallets that are available on competing systems. To the extent that the proposed conduct leads to an alteration of the offering that Apple is able to make available on the iOS platform, the proposed conduct distorts competition between these operating system providers. It is not clear that such distortion would be in consumers' interest, as Apple's integrated approach to phone hardware and software has generated significant customer loyalty as well as provided an important point of product differentiation that Android and other platform providers compete against.
337. Apple submits that allowing third party applications to access the NFC controller in iPhone devices could compromise the security of the Secure Element hardware in its devices. Submissions from several individual consumers voice similar concerns.²¹⁹
338. However, the Applicants dispute that providing access to the iPhone's NFC functionality could undermine the security of Apple Pay or otherwise decrease its competitiveness.²²⁰ The Applicants argue that Apple could create a software interface similar to the one in Android devices to allow the Applicants' apps to access the NFC controller embedded in iPhones, noting that:²²¹
- a. the Applicants do not require direct access to the NFC hardware of iPhones, but through a software interface created by Apple that would be expected to meet Apple's own security standards
 - b. Apple should be able to expand its existing governance mechanism that covers Apple Pay to cover other third party applications, as in Android devices
 - c. the availability of bank digital wallets would not compromise the user experience, because consumers with iPhones could still choose to use Apple Pay if they wished.
339. The Applicants submit that 'it is difficult to see how this would be a significant overhaul compared to the other changes to iOS that are made every year, which frequently provide access or increased access to a range of hardware features'.²²²
340. Apple submits that it has adopted a global approach to the Apple Pay platform as an integrated service because it offers a simple, secure and private way for customers to

219 See, e.g. submission from Brian Tran received 13 September 2016, submission from David Thornton, 30 September 2016, submission from Wayne Pullbrook received 27 August 2016.

220 Applicants' submission in response to interested party submissions received 7 October 2016, pages 28-29.

221 Applicants' submission in response to interested party submissions received 7 October 2016, pages 29-32.

222 Applicants' submission in response to interested party submissions received 7 October 2016, page 32.

make payments. It submits that it will not change this approach for Australia because its global position with respect to security and privacy of customer data is in the interests of Apple's users. It also submits that it is unnecessary for Apple to do so, because the Apple Pay platform enables the Applicants the options described earlier in which to offer digital wallets on iPhones.

341. Apple also submits that, in addition to posing serious security and privacy concerns, providing direct NFC access would undermine the simplicity and ease of use of the payment and non-payment functions of Apple Wallet. Apple submits that this simple user experience is critical for consumers and any friction in that process would inhibit consumer adoption.²²³
342. While the ACCC considers that it may be possible for Apple to allow the Applicants to access the NFC functionality in iPhones directly without necessarily compromising the security of Apple Wallet and Apple Pay, it is concerned that this may impact on the consumer experience offered by Apple's competitively differentiated approach to offering an integrated smartphone platform.

ACCC conclusion on public detriments

343. The ACCC considers that the proposed conduct is likely to result in public detriments relating to reductions or distortions in competition between issuers, in digital wallets and in mobile operating systems.
344. The ACCC considers that the proposed conduct will lead to a likely detriment of a lessening of competition between the Group Participants (and other issuers) in relation to the supply of mobile payment services for consumers with NFC-enabled iPhones. The conduct would reduce to some extent the competitive tension between Group Participants to make Apple Pay available for their cardholders for the duration of the collective negotiations and collective boycott (which could be up to three years).
345. The ACCC also considers that, to the extent the proposed conduct artificially biases the development of issuer digital wallets over non-issuer digital wallets, the potential benefits of non-issuer digital wallets in the form of increased ease of switching between payment cards and limiting any 'lock in' effect issuer digital wallets may cause, may be lost. The ACCC is seeking submissions on these issues to better inform its final view.
346. The ACCC considers that the delayed expansion of Apple Wallet arising from the proposed conduct is likely to result in some public detriment in the form of reduced consumer choice for affected consumers and by lessening the degree of competition between Apple Wallet and issuer digital wallets, which may also result in slowed development and uptake of digital wallets for the length of any delay.
347. The ACCC considers that there is also a likely detriment in a distortion to competition between mobile operating systems caused by the proposed conduct.

²²³ Submission from Apple Pty Ltd, received 26 October 2016, pages 4-6.

Balance of public benefit and detriment

348. In general, the ACCC must not grant authorisation unless it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
349. However, as set out above, while the ACCC considers that there are likely to be some public benefits associated with the proposed conduct, the ACCC also considers that the proposed conduct is likely to result in some public detriments.
350. For the reasons outlined in this draft determination, while the ACCC considers that some public benefit is likely to arise from the proposed conduct, it considers that the Applicants have not provided sufficient information for the ACCC to be satisfied that the proposed conduct is, on balance, likely to result in public benefits that would outweigh likely public detriments or that the proposed conduct is likely to result in such a benefit to the public that it should be allowed to take place.
351. Accordingly, the ACCC proposes to not grant authorisation.

Draft determination

The applications

352. Application A91546 was made using a Form A, under subsections 88(1) and 88(1A) of the CCA, and application A91547 was made using a Form B, under subsections 88(1) and 88(1A) of the CCA. Authorisation is sought for the Applicants to engage in limited collective negotiations and a limited collective boycott with respect to negotiations with Apple.
353. Authorisation is sought as the proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.
354. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

355. For the reasons outlined in this draft determination, the ACCC is not satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.
356. For the reasons outlined in this draft determination the ACCC is not satisfied, pursuant to section 90(8) that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the proposed conduct should be allowed to take place.

Next steps

357. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Attachment A - Public benefit tests in CCA

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
 - i. an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - ii. an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or
 - iii. an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.