

## **Restriction of publication of part claimed**

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# **Bendigo and Adelaide Bank and others applications for authorisation A91546 & A91547**

Submission in response to draft determination

6 February 2017

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## Executive summary

In this submission, the Applicants provide further information and evidence to demonstrate that:

- NFC access enables the delivery of **substantial public benefits** to Australian consumers;
- the significance of these benefits is greater than that assessed in the finely balanced Draft Determination;
- the weight given to the perceived public detriments is not supported by market evidence or competitive dynamics, and in any case the assessment of these detriments has been made based on factors which the Applicants are willing to remove and limit (as appropriate). In particular:
  - limiting the authorisation term to 18 months – half the original three year term sought; and
  - removing the ability to negotiate on the pass-through of fees (ie, collective negotiation will be in relation to NFC access alone).
- NFC access is required to enable **real choice and real competition for consumers, and to facilitate innovation and investment in the digital wallets** available to Australians. All customers benefit from real competition. With NFC access, a customer could have in their phone:
  - Apple Pay and a mobile wallet from the bank or issuer of their credit/debit card;
  - Apple Pay and mobile wallets from several banks or issuers (if the customer has more than one credit/debit card);
  - Apple Pay, mobile wallets from several banks or issuers and any number of available third party mobile wallets (eg, from retailers, fintechs, payment companies, etc).
- These wallets could compete with one another using features such as reward points, specific offers, additional functions, facilities and services, and the like. **This competition is not possible without NFC access.**

The ability to “link” to the Apple Wallet, or to use NFC stickers or similar technology is not a substitute for NFC access, and does not provide the benefits to consumers outlined above. Having wallets available in other phone platforms is also not enough to provide a competitive constraint on Apple Pay.

**Smaller issuers are not negatively impacted** by the proposed conduct. Currently, smaller issuers have the option of signing with Apple Pay (and many have chosen to do so). The authorisation only broadens those options to also include the possibility of becoming part of the collective negotiation group.

Interested party submissions do not provide any information or evidence to alter the fact that there are net public benefits of authorisation. Assertions that the proposed conduct is about delaying Apple Pay or about fees are fundamentally wrong.

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## Overview of submission

### Draft Determination and context of submission

Although the ACCC accepted that the collective negotiation and boycott would:

- place the Applicants and other participant payment card issuers in a better negotiating position with Apple in relation to relevant issues compared with individual negotiations; and
- be likely to enable public benefits including increased competition and consumer choice, increased innovation and investment in digital wallets and other mobile apps using NFC technology and the ability to obtain better information from Apple to make more informed decisions,

it issued a Draft Determination proposing, on balance, to deny authorisation.

The ACCC media release regarding the Draft Determination noted that it was a “finely balanced decision” and that the ACCC was not currently satisfied, on the information provided, that the likely benefits from the proposed conduct outweighed the likely detriments.


The Applicants welcome the opportunity to provide further information which demonstrates that the conduct to be authorised will provide substantially greater public benefits, and fewer detriments, than the ACCC has found in its Draft Determination and will tip the balance in favour of authorisation.

### NFC access will provide substantially more choice and competition in mobile wallets than existing alternatives, and in a broader range of services beyond payments

While recognising the benefits of choice and competition in mobile wallets, the Draft Determination considers that access to the NFC function in iPhones will not substantially increase the level of choice and competition that would otherwise be available. Unfortunately, this conclusion fails to appreciate:

- the limitations of existing opportunities to compete; and
- the possibilities that NFC access would enable.

The Draft Determination draws a distinction between mobile wallets (such as the Apple Wallet) and mobile payment services (such as Apple Pay). However, this is an artificial distinction in the present context and appears to have led to some unfounded conclusions, in particular the assumption that Apple Pay is available to mobile wallets other than the Apple Wallet. This is not the case.

While Apple allows other wallets to display a *button* showing the  Pay logo, tapping on this button simply launches the Apple Wallet. This hardly amounts to the provision of a “mobile payment service” (as the Commission was led to believe) and does not facilitate any competition with the Apple Wallet. It simply provides feeder traffic and yet another benefit to the Apple Wallet. It is difficult to see on what reasonable basis it

would be said to provide choice and competition for customers.

**NFC access would allow competition in mobile payment services**

The Draft Determination acknowledges that without NFC access, Apple Pay would remain the only NFC mobile payment service that can be used on Apple devices. Despite this, it appears that the Draft Determination fails to take into account the public benefit that would result from an increase in competition in mobile payment services.

This competition will provide a material increase in choice for consumers. It is not just that there will be more mobile payment services available in the market, the competitive tension between mobile payment services will also promote innovation and differentiation that can be used to further differentiate mobile wallets, including for example:

in the loading or “on boarding” of payment cards;

the potential for location-aware and intelligent selection and presentation of payment cards;

new security and authentication options;

the potential for rich information to be delivered over the contactless interface;

provision for additional card schemes including local payment networks and new payment platforms;

additional payment methods and NFC applications beyond payments, including building and vehicle access, identification and licensing, transit and ticketing services.

For Apple to suggest that mobile payment services are not open to differentiation or improvement is short-sighted and reflects a failure to imagine any way of doing things other than Apple’s way.

**External NFC tags and wallets limited to a single smartphone platform will not provide sufficient competition**

The Draft Determination recognises the limitations in external NFC tags, though it still makes reference to external NFC tags as a mobile payment method. NFC tags are simply a smaller size version of a regular contactless payment card. They are not a mobile payment method any more than a contactless card or even a \$20 note placed in a mobile phone case are “mobile” payment methods.

Some of the electronic wallets identified by the Draft Determination may be considered mobile payment methods to the extent that they can genuinely interact with a mobile phone through another interface such as Bluetooth. However, they are expensive, often promised but rarely brought to market, and no substitute for integrated NFC access, with NFC now almost ubiquitous at merchant points of sale in Australia. The rapid entry and exit of new products may demonstrate the dynamic nature of competition, or it may demonstrate that this segment of the market is unappealing to customers.

Similarly, while it may in some circumstances be commercially viable to develop digital wallets limited to platforms other than the iPhone – particularly where these wallets build off an existing mobile banking application – there will be far greater competition between mobile wallets that are available on all platforms than between mobile wallets that are available on different platforms. This is simply a function of allowing access to the greatest number of available customers. Access to the universe of smartphone users will allow for greater investment in mobile wallets and will allow providers to reach a critical mass of users, merchants and – in the case of multiple-issuer mobile wallets – issuers. This will drive innovation and differentiation in mobile wallets and further increase competition, providing clear public benefits over the alternative future without authorisation.

**Removing restrictions on pass-through will constrain Apple's fees**

The Draft Determination recognises that allowing issuers to pass through the costs of participating in Apple Pay would result in public benefits through pricing efficiency and a constraint on Apple's fees, particularly over time. These public benefits would arise whether issuers passed through these fees or not.

However, the Draft Determination raises a concern that if issuers did pass through these fees, they could do so in a way that privileges their own mobile wallets over Apple Pay, in particular by setting cardholder fees well in excess of their costs. This concern fails to take into account the revision of the proposed Collective Negotiation Framework that the Applicants provided on 27 October 2016, which was intended to make clear that the participants would only seek to pass through some or all of the costs of participating in Apple Pay, and certainly no more than those costs.

The point of the proposed conduct is to enable real choice and real competition for consumers and to facilitate innovation and investment in the digital wallet functionality available to Australians.

Apple is completely wrong in its assertion that the proposed conduct is about fees and not about access.

To make this point abundantly clear, the Applicants are willing to limit collective negotiation to NFC access alone (ie, the ability to collectively negotiate for the removal of the pass-through restriction will be taken off the table).

**No reduction of competition in mobile payment services**

The Draft Determination suggests that authorisation would reduce competition in the supply of mobile payment services by reducing the competitive tension between participants to make Apple Pay available during the collective negotiation period. However, there is already substantial competitive tension from ANZ, American Express and the 37 other institutions who currently offer Apple Pay to their customers (noting that this number has only increased since the Draft Determination was released).

If any reduction in tension arises, it will be limited to the period of collective

negotiation, which the Applicants are willing to limit to 18 months.

**No reduction of competition in payment card services or digital wallets**

The Draft Determination raises a concern that authorisation would reduce competition between the Applicants in the supply of payment card services, and between the Applicants and other providers in the supply of digital wallets. The Draft Determination assumes that issuers have the incentive and ability to anti-competitively prefer or favour their own mobile wallets and will avoid participating in digital wallets that accept the cards of multiple issuers.

If NFC access on the iPhone is granted then competition between mobile wallet apps will be increased, in both card payment product features and promotions and in non-payment features and consumer offerings.

The Applicants embrace this increased competition and have no reason to avoid multiple-issuer wallets. The Applicants already offer multiple-issuer wallets such as Android Pay (including subsidiaries, 75% of the Applicants already offer Android Pay) or are in negotiations to offer multiple-issuer wallets, just as thousands of banks with their own mobile wallets have done in Australia and around the world. Ultimately, the purpose of the application is to participate in Apple Pay on terms which allow Australian consumers to have real choice no matter what mobile phone platform they prefer.

**No reduction or distortion of competition in mobile operating systems**

Finally, the Draft Determination expresses a concern that providing NFC access may impact on the consumer experience offered by Apple's competitively differentiated approach to offering an integrated smartphone platform. In fact, the Applicants seek to maintain the seamless user experience that Apple customers demand, and not compromised with clumsy workarounds like linking to the Apple Wallet or relying on NFC tags. They will work with Apple to ensure that NFC apps can co-exist on the iPhone and that the user experience in switching between them is simple and convenient for any user who wishes to install a competitive mobile wallet. Of course, if a user only wants to use Apple Pay, they will find their experience entirely unchanged and perfectly integrated.

**Denying authorisation creates a greater risk of net detriment than authorisation**

As a result, the Applicants remain of the view that the authorisation would provide substantial public benefits that easily outweigh any public detriments. Conversely, refusing to grant authorisation on the basis of a theoretical risk to competition in the short term (which the Applicants submit is unlikely to materialise) would remove the ability to deliver material public benefits to customers over the longer term.

**Interested party submissions do not provide any information or evidence to alter the net public benefits of authorisation**

None of the Interested party submissions alter the fact that there are substantial net public benefits to be gained from NFC access. Apple's submission in particular, contains incorrect assertions and arguments underpinned by false assumptions as set out at a high level in the table below.



Apple's assertion	Comment
The proposed conduct is about fees not NFC access	This is incorrect. The key aim of the application has always been about the ability to offer real consumer choice and competition made possible through NFC access. Accordingly, the Applicants are willing to take the pass-through restriction off the negotiating table and make NFC access the only issue for collective negotiation.
<p>Promotions for the use of particular cards in Apple Pay show how Apple Pay is responsible for fostering competition between payment cards.</p> <p>Competition is created by the ease of switching cards in Apple Pay.</p>	<p>Apple wants to attribute to itself the strong level of competition in payment cards that already exists between issuers. There is nothing unique or innovative about the promotions that Apple cites as examples of "competition" "facilitated" by Apple Pay.</p> <p>In contrast, the aim of the authorisation is to allow cardholders to have the choice of Apple Pay and other mobile wallets – <b>allowing greater competition not only between cards but also between wallets</b> and the distinct features those wallets may compete on. Customers will have the option of multi-issuer and single issuer wallets and will be able to switch easily between cards at the point of sale whether those cards are held in one app or in different apps.</p>
Banks have not made EFTPOS payments available through their own wallets because they prefer consumers to use credit cards (due to the higher interchange fees)	<p>This is misleading. As the RBA has noted, there is a complex set of rules that are likely to limit the ability of issuers to enable eftpos mobile payments. The RBA has already engaged in a consultation process to try to address these issues.<sup>1</sup></p> <p>It should also be noted that the applicants have enabled debit scheme cards on their NFC wallets although the interchange fees are substantially lower than credit cards (and are subject to the same interchange fee regulation as eftpos cards).</p>
Smaller issuers relying on Apple Pay will be negatively impacted by the authorisation	<p>It is not clear how this could be true.</p> <p>37 smaller issuers are already signed up to Apple Pay. This option will continue to be available if authorisation is granted.</p>

<sup>1</sup> RBA, Dual-network cards and mobile wallet technology, December 2016, at page 8.



<p>NFC access offers no customer experience advantages compared to an app that links to Apple Pay</p>	<p>This is blatantly incorrect. A button that links to Apple Pay is not the same (and cannot offer the same competitive benefits) as having a competitive mobile wallet.</p> <p>NFC access allows real competition and real choice for consumers. If the customers ultimately prefer to use the Apple Pay wallet they can. The point of the authorisation is that consumers should be allowed to make that choice – not Apple. Further, consumers should be able to take advantage of the benefits of different wallet providers competing for their business and not be locked-in to the one choice.</p> <p>NFC access is not just about payments, but can encompass loyalty programmes, coupons, member access and merchant-customer interactions etc. Having access to the NFC function on the iPhone allows a greater deployment of applications that combine multiple of these functions, such as payment and loyalty programmes so consumers have the opportunity to pay for purchases in real dollars or in loyalty reward points.</p>
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## Part A: Authorisation enables more public benefits than assessed in the Draft Determination

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### 1 NFC access will substantially increase choice and competition

#### 1.1 Overview

In the Draft Determination, the ACCC accepted that the authorisation would likely result in public benefits from increased competition and consumer choice in digital wallets.

However, the ACCC considered that the magnitude of this benefit is limited 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; and
- their ability to offer competing digital wallets on other operating systems.

The analysis in the Draft Determination substantially overestimates the opportunities (and effectiveness of existing opportunities) to 'compete' with the Apple Wallet. As evidenced and discussed in more detail below, these so called "opportunities" to compete are largely ineffective and will not deliver the real and effective choice and competition that the authorisation can.

#### 1.2 Commercial rationale

The commercial rationale for the authorisation is to enable the provision of better customer offerings and banking and payments solutions in order to compete with other issuers and institutions. The Applicants want to be able to provide customer choice regardless of phone type so they can compete by offering their customers convenience in how they bank, manage their finances and access funds to pay for goods and services – including mobile payment solutions. This rationale is pro-competitive and relevant to the public benefits and detriments assessment.

#### 1.3 Customer preferences and current options without the authorisation

##### (a) Customer preferences

Australian customer research conducted by RFi:

- supports the commercial rationale for the authorisation

***The authorisation is about customer choice and addressing Australian customer preferences***

**[C-i-C]**

- shows that the situation without authorisation is inferior

As shown in Figure x, iPhone holders being locked-in to or have no choice but Apple for these services does not match or address the preferences of these customers [C-i-C].









- supports the public benefit of choice derived from NFC access. Australian customers want choice of provider regardless of their mobile handset which is enabled by the authorisation.









### [C-i-C]

Neither the Capital One model, NFC tags, nor the fact that choice is available on the Android platform addresses this existing limitation on the preferred choices of Australian customers.

The Capital One model, NFC tags and the fact that choice is available on the Android platform also do not allow the other public benefits associated with authorisation, such as real competition in integrated digital wallets not only against Apple but also between all other suppliers; increased opportunities and incentives for investment and innovation; enhanced pressure on Apple to price competitively and innovate for Australian consumer preferences and uses and better price-quality outcomes for Australian customers.

### (b) Current Options in Australia without authorisation

Android Platform	iOS Platform	Comment
<div>   </div> <p>Other wallets with NFC payment capability including wallets from financial institutions)</p> <div>   </div> <div>   </div>	<div>  </div>	<p>iPhone users account for ~60% of mobile banking transactions.</p> <div>  <p>■ Android ■ iOS</p> </div> <p>iPhone users have no choice in integrated NFC wallets – the only option is Apple Pay.</p> <p>However, [C-i-C] % of iPhone users would prefer a financial institution rather than a technology company such as Apple providing these products. Only [C-i-C] % prefer a technology company providing these products.</p>









Bendigo and Adelaide Bank			<p>Bendigo and Adelaide Bank estimate that currently they are unable to offer [C-I-C]% customers a mobile wallet option. [C-I-C]</p>  <p>Bendigo and Adelaide Bank does not currently have its own wallet on either platform. [C-I-C] Bendigo and Adelaide Bank sees customer choice as crucial and this application as necessary for the future of Australian payments.</p>
CBA		<p>CBA mobile banking app (with no NFC payment capability)</p> <p>PayTag</p>	<p>[C-I-C]</p> <p>CBA launched its PayTag in December 2013. NFC tags are no substitute for NFC access from a customer perspective and do not provide real competition to Apple Pay. This is demonstrated by the [C-I-C] demand and usage of these products [C-I-C].</p>
CBA			<p>Bankwest launched Android Pay in November 2016.</p> <p>[C-I-C]</p>
Westpac	  	<p>Westpac mobile banking app</p>	<p>Westpac cannot offer a mobile wallet solution to its iPhone holding customers which make up [C-I-C]% of their mobile digital customers.</p> <p>[C-I-C]</p> <p>St George offers Tap &amp; Pay on Android devices but cannot offer this to its iOS using customers. The St George website also notes that it is currently working closely with Google towards participating in Android Pay.<sup>2</sup></p> <p>Bank of Melbourne offers Tap &amp; Pay on Android devices but cannot offer this to its iOS using customers. The Bank of Melbourne website also notes that it is currently working closely with Google towards participating in Android Pay.<sup>3</sup></p> <p>Bank SA offers Tap &amp; Pay on Android devices but cannot offer this to its iOS using customers. The Bank of Melbourne website also notes that it is currently working closely with Google towards participating in Android Pay.<sup>4</sup></p>
NAB		<p>NAB Mobile banking app</p> <p>NAB PayTag</p>	<p>[C-I-C]</p> <p>Due to the tags limited functionality, customers can only have one sticker per card and one sticker per device. This prevents customers from being able to easily pay from the account of their choosing or issuer of their choosing. Further, the tag might clash with the NFC controller, again removing or limiting customer choice as to which card will be used to pay at the point of sale.</p>

<sup>2</sup> <https://www.stgeorge.com.au/online-services/mobile-banking/mobile-banking-faqs/android-pay-faqs>

<sup>3</sup> <https://www.bankofmelbourne.com.au/online-services/mobile-banking/mobile-banking-faqs/android-pay-faqs>

<sup>4</sup> <https://www.banksa.com.au/online-services/mobile-banking/mobile-banking-faqs/android-pay-faqs>



ANZ	 	 ANZ Mobile banking app	ANZ cannot offer an issuer solution to those iPhone customers who would prefer this option. ANZ does not offer NFC Tag/sticker or other similar technologies to address this.
AMEX	 		
Other Issuers	Various other issuers offer  and their own wallets Citibank offers 	See list of participants in Annexure A	Customers who wish to access Apple Pay sign up with one of the many and growing issuers offering this product. ANZ Bank cards with access to Apple Pay take 5 minutes to apply for and 60 seconds to get a response.

The Capital One model is not yet being used in Australia. Interestingly, of all the issuers that have signed up to participate in Apple Pay around the world, this appears to be the only issuer that seems to have this option. As discussed further below, this solution redirects traffic to the Apple Wallet rather than competes with it and in any event provides a less seamless and more cumbersome payment process than the Apple Wallet or that available in the Android version.

#### 1.4 Mobile payments and mobile wallets

At paragraph 25 of the Draft Determination, the ACCC defines 'digital wallet' as;

*...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. [emphasis added]*

The ACCC then draws a distinction between mobile wallets and mobile payment services.

The Applicants agree that mobile wallets have a range of functions other than mobile payments, which may include other forms of payment; holding tickets, receipts, loyalty cards, transport cards, identification and membership cards; and further functionality such as budgeting and personal finance tools, bill payment reminders, and price comparison and product information services.

However, the distinction drawn between mobile wallets and mobile payment services, and separation of those components which form the ACCC's own definition of a digital wallet, is artificial and mischaracterises the competitive dynamics of these services.

Mobile payments are a defining feature of mobile wallets. There is a reason the word 'Pay' tends to appear in the name of these apps. An app that does not offer mobile payments cannot properly be considered to be a mobile wallet of the kind that is contemplated by this application. Critically, a mobile wallet that can only provide a

significantly inferior or degraded mobile payment function cannot effectively compete with a mobile wallet that is not subject to the same limitations.

That is, a mobile wallet must have a meaningful access to a mobile payment service in order to function and compete against other mobile wallets. Critically, this access must allow for a seamless and frictionless payment experience as fast and convenient as paying with a contactless card.

Apple has argued that this experience is critical for the adoption of Apple Pay:

*This simple user experience is critical for consumers and any friction in that process inhibits consumer adoption, particularly given the fact that Apple Pay is new and consumers are only now starting to use their Apple devices, instead of their physical cards, to perform these tasks.<sup>5</sup>*

The same applies to any mobile wallet. In fact, a simple and frictionless user experience is even more critical for any mobile wallet that hopes to compete with Apple Pay, given the many advantages that the Apple Wallet enjoys as the pre-installed, default mobile wallet on the iPhone with the ability to prompt iPhone holders to use Apple Wallet at any time, including during non-related activities such as every system upgrade.

However, to the extent that wallets other than the Apple Wallet can access NFC payments on the iPhone they can only do so in ways that appear to be designed to *increase* friction and reduce adoption – with the Capital One wallet being a perfect example of this (see discussion below). In continuing to deny access to the iPhone's NFC function, Apple is ensuring other mobile wallets are burdened with the friction it is so careful to avoid for itself.

### 1.5 Is there a separate supply of mobile payments?

While a mobile payment service may in principle be supplied separately from a mobile wallet, the Applicants are not aware of any circumstances in which this has occurred in practice. Thus the Draft Determination includes a key factual misunderstanding:

*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.<sup>6</sup>*

In fact, this is incorrect. Customers cannot make mobile payments using Apple Pay from within the Capital One Wallet. This is not a trivial error – as discussed below, this is an important point that has a significant impact in the assessment of the alleged 'existing opportunities for competition' that follow from Apple's (alleged) supply of a "mobile payment service".

To be clear, tapping on the "Apple Pay" button within the Capital One Wallet simply launches the Apple Wallet, which once activated can be used by the customer to make

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<sup>5</sup> Apple's submission to the ACCC dated 26 October 2016, at p 6.

<sup>6</sup> Draft Determination, 29 November 2016, at [43].



payments using Apple Pay. The only difference between this and any other method of launching the Apple Wallet is that the relevant Capital One payment card is pre-selected instead of the user's default payment card.

Once the Apple Wallet has been launched from the Capital One Wallet, the user can access all of the usual features of the Apple Wallet, including selecting different payment and loyalty cards and passes. Once a payment has been made, the user will be left within the Apple Wallet and will need to manually return to the Capital One Wallet.

The specific details of this option – including a button marked “Apple Pay” that simply launches the Apple Wallet app – suggest that Apple does not observe a distinction between the Apple Pay payment service and the Apple Wallet application. In dealing with issuers such as Capital One, Apple does not provide access to an Apple Pay payment service. It simply provides another way to launch the Apple Wallet, which itself retains exclusive access to the Apple Pay payment service.

#### **1.6 As a separate “supply” of “payment services”, the Capital One option is profoundly discriminatory**

If Apple is to be considered to provide the “Apple Pay payment service” to other mobile wallets, it is clear that it is doing so in a profoundly discriminatory way that offers only a limited and degraded version of the service it provides to itself, and thereby prevents other mobile wallets from competing in any sense with the Apple Wallet.

That is, while Apple Pay is directly integrated with the Apple Wallet, other mobile wallets are unable to integrate Apple Pay in any meaningful sense and can only access Apple Pay indirectly through the Apple Wallet. This lack of integration presents serious disadvantages to any mobile wallet that seeks to compete effectively with the integrated Apple Wallet. These disadvantages begin with the installation of a mobile wallet and continue through every stage of a mobile payment, as set out below.

### (a) Installation

The Apple Wallet comes pre-installed on all iPhones and cannot be uninstalled. Whenever a user sets up a new iPhone or upgrades to a new version of the operating system, the system prompts them to add payment cards to Apple Pay, and reminds them to do so at regular intervals until they add their first payment card.

By contrast, if a person wants to use any other mobile wallet, the user must make a deliberate choice and effort to seek out a mobile wallet on the App Store and download and install it.



The value in having a default app pre-installed on a mobile device is perhaps best illustrated by the replacement of Google Maps with Apple Maps as the default mapping app on the iPhone in 2012. Although Google Maps had been the iPhone default since the iPhone's launch in 2007, was familiar to users and was seen as superior to Apple Maps in many respects, by 2015 Apple Maps was used by 3.5 times as many iPhone users as Google Maps.<sup>7</sup>

Any mobile wallet competing with the Apple Wallet would have a great deal to overcome even if it had access to the same resources as the Apple Wallet.

### (b) Launch

The Apple Wallet is launched automatically whenever an iPhone is brought near an NFC payment terminal, whether the iPhone's screen is on or off, whether the iPhone is locked or unlocked, and no matter what application is running at the time – even if it is another mobile wallet.<sup>8</sup> This is the fastest and simplest way to launch any application on the iPhone.

The Apple Wallet can also be launched by double-clicking the iPhone's home button when the iPhone's screen is off or the iPhone is locked, or by selecting the Wallet application from the iPhone's home screen. Finally, it can be



<sup>7</sup> Tim Cook, Worldwide Developer Conference Keynote, 8 June 2015.

launched from another application that offers an “Apple Pay” button that a user can select in connection with a particular payment card.

No mobile wallet other than Apple Pay can currently be configured to launch automatically when the iPhone is brought near an NFC payment terminal or by double-clicking the home button. No other mobile wallet can be launched when the iPhone’s screen is off or the iPhone is locked.

In order to launch a mobile wallet other than Apple Wallet, a user must take a number of additional steps including waking and unlocking the iPhone with a PIN or Touch ID fingerprint, finding and selecting the mobile wallet, and in the case of most mobile wallets unlocking the wallet using an additional PIN or Touch ID fingerprint.

#### (c) Payment

If the Apple Wallet is launched by bringing the iPhone near an NFC payment terminal while the user’s finger is resting on the Touch ID sensor, the payment will be made immediately. This is the fastest and simplest way to complete a mobile payment using the iPhone’s NFC function. It is the method emphasised by Apple and issuers in their advertising and demonstration videos,<sup>9</sup> and most closely approximates the process and speed of paying with a contactless card.

There is no way for any other mobile wallet to make a payment with anything approaching this speed and convenience. Even after they have taken the additional steps necessary to launch and open another mobile wallet, the only way that they can make a payment is to launch the Apple Wallet by tapping the “Apple Pay” button and then bring the iPhone near the NFC payment terminal and validate the payment using a PIN or Touch ID.

If they launch another mobile wallet and then bring the iPhone near an NFC payment terminal without tapping the “Apple Pay” button, the Apple Wallet will launch – but with the user’s default payment card selected, rather than the payment card associated with the “Apple Pay” button.

The process of launching another wallet and then making a payment through the Apple Wallet accordingly takes many more steps and substantially more time – that is, it involves much more “friction” – than the process of launching and making a payment with the Apple Wallet:

- Launching and making a payment with the Apple Wallet can be achieved in the single motion of placing a thumb on the Touch ID sensor and placing the iPhone near an NFC payment terminal.
- Launching and making a payment with the Capital One wallet – which to the Applicants’ knowledge is still the only mobile wallet that uses this approach – requires at a minimum the following steps:

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<sup>8</sup> It is possible for developers to request permission from Apple to suppress the activation of the Apple Wallet when applications are required to stay in the foreground when operating near NFC or other RF readers. The applicants understand that the Capital One Wallet does not have this entitlement.

<sup>9</sup> See for example <http://www.apple.com/apple-pay/> and <https://www.youtube.com/watch?v=D0OS6WVe0xw>

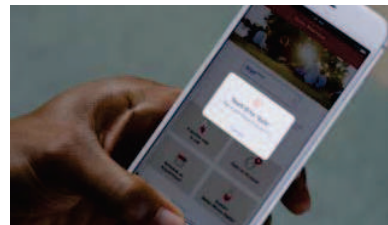
- placing a thumb on the Touch ID sensor and then clicking to unlock the iPhone;



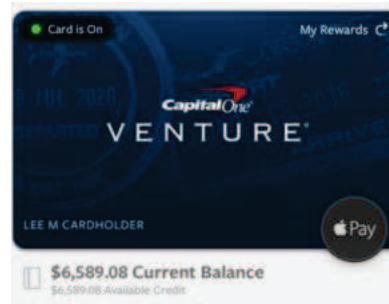
- locating and launching the Capital One Wallet;



- placing a thumb on the Touch ID sensor to unlock the Capital One Wallet;



- pressing the Apple Pay button to **launch the Apple Wallet**; and



- placing a thumb on the Touch ID sensor and placing the iPhone near an NFC payment terminal.

Since each of these steps take around the same time, making a payment through the Capital One Wallet can be expected to take at least five times as long as making a payment directly through the Apple Wallet.



(d) Information

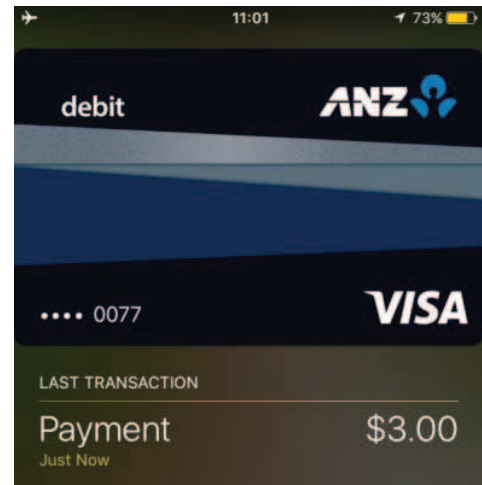
The Apple Wallet receives direct information about the transaction – whether it has been attempted and successfully submitted, the amount of the payment and the merchant identifier – from the NFC interface through the Apple Pay payment service. It also receives information that has been passed through the payments network to the issuer and then over the data network to the user's iPhone and the Apple Wallet application.

Other mobile wallets do not receive any information about the transaction from the Apple Pay payment service: they cannot know that a payment has been attempted via the NFC interface and will only find out if a payment has been successfully attempted when the issuer is requested to authorise the payment through the POS acquiring payment network and then notifies the mobile wallet app through the data network.

This limitation imposes a particular disadvantage when the data network is not available, in which case a mobile wallet can receive no information about a transaction from any source. This situation may arise if a user is overseas and has turned off their data connection to avoid roaming charges; when the user has a prepaid account mobile that has run out of credit; when the user is on a flight and wishes to make a purchase; or when the user is in a mobile black spot or is affected by a data network outage.

In all of these situations the Apple Wallet could still receive basic information from the NFC interface through Apple Pay, but no other mobile wallet could receive any information. For example, the screen image to the right shows the result of an Apple Pay transaction completed with an iPhone in flight mode and unable to receive any information about the transaction except through the NFC interface.

The value of the transaction is still shown, and although the name of the merchant is not shown the Applicants understand that a merchant identifier is available through the NFC interface but needs access to the mobile network to associate that identifier with a name.



Although this is only basic information about a transaction, it is still information that an application can use, particularly when combined with other information available through the payments network when a data connection is available. Further, as discussed in section 2.3(d) below, in the future more and richer information may be provided directly through the NFC interface between compatible terminals and devices. Issuers and acquirers are in a strong position to collaborate with merchants to upgrade terminal software to enable this additional communication, but there is no guarantee that Apple would enable this rich information in the Apple Wallet or pass any of it through to other apps.

(e) After payment

Where the Apple Wallet has been launched from the home screen or from another application, following a payment the user will remain in the Apple Wallet for further interactions, for example with loyalty cards. Where a user has launched the Apple Wallet

by tapping the “Apple Pay” button in another mobile wallet and then made a payment, they will need to manually return to the other mobile wallet in order to engage in further interactions, such as presenting a loyalty card or scanning a receipt. In these circumstances the Apple Wallet will have an advantage over any other wallet in capturing those further interactions.



Given all of these disadvantages, the Applicants consider that customers would very rarely if ever launch the Apple Wallet from within an issuer app in order to make a mobile payment, and it is difficult to see how any mobile wallet that relies on the ability to launch the Apple Wallet to make mobile payments could provide any effective competition to the Apple Wallet.

As previously mentioned, Apple has argued that providing access to the NFC function would compromise the simple user experience associated with the Apple Wallet if it required a user to go into the device settings every time they wanted a different application to access the NFC function:

*This simple user experience is critical for consumers and any friction in that process inhibits consumer adoption, particularly given the fact that Apple Pay is new and consumers are only now starting to use their Apple devices, instead of their physical cards, to perform these tasks.<sup>10</sup>*

While there is no reason why a user would have to change a device setting every time they wanted a different application to use the NFC function – and that is not the case on the Android system – changing such a device setting would require fewer steps and less friction than making a payment through the Capital One Wallet.

Such a requirement would critically compromise the user experience and inhibit adoption of the Apple Wallet – with all the other advantages that Apple reserves for the Apple Wallet – then the greater friction imposed by the requirement to launch the Apple Wallet to make a payment can only be fatal to the prospects of any mobile wallet that relies on this approach.

### 1.7 The public benefits of the Capital One option are negligible

The Capital One model allows customers to launch the Apple Wallet from inside an issuer's app with a particular payment card selected. It does not allow customers to make payments from within the issuer's app, and it does not allow issuers to incorporate the Apple Pay payment service into their apps. It does not allow other mobile wallets to compete in any meaningful sense with the Apple Wallet and allows no competition with the Apple Pay payment service, including competition on price and features that would

<sup>10</sup> Apple's submission to the ACCC dated 26 October 2016, at p 6.



further promote innovation and competition in mobile wallets. The public benefits provided by the ability to launch the Apple Wallet from another application are negligible, and the additional public benefits of open NFC access on the iPhone and meaningful competition are substantial.

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## 2 There are significant public benefits associated with increased competition in mobile payment services

### 2.1 Introduction

The Draft Determination acknowledges that any ability for other issuers to compete with the Apple Wallet by linking their mobile wallets to Apple Pay 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).<sup>11</sup> (Emphasis added)*

As explained above, it is difficult to see on what meaningful basis other mobile wallets would be able to compete effectively with Apple Wallet since:

- apps other than the Apple Wallet app can only link to the Apple Wallet app, and cannot integrate Apple Pay in any meaningful sense; and
- the ability of other apps to make mobile payments through this mechanism is so degraded, cumbersome and creates so much friction, compared to the ability of the Apple Wallet to make mobile payments through Apple Pay, that no other mobile wallet is likely to offer a meaningful competitive constraint.

The Applicants agree that there is currently no potential for competition with the Apple Pay payment service on the iPhone platform. However, the Draft Determination does not appear to recognise or take into account any public benefits that could be associated with providing this competition; the Draft Determination does, however, consider the detriment caused by the potential for collective negotiation to increase the time taken to sign up to Apple Pay.

The Applicants submit that enabling competition with the *Apple Pay payment service* (as defined by the ACCC) would provide a number of distinct public benefits associated with the conduct to be authorised and should be assessed as such in the ACCC's final determination.

### 2.2 Providing a competitive constraint on the fees charged for Apple Pay

With the NFC lockout and the pass-through restriction, Apple's ability to unilaterally increase the fees it charges to issuers, small and large alike is relatively unconstrained.

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<sup>11</sup> Draft Determination, 29 November 2016, at [237].

Competition with the Apple Pay payment service would constrain the fees charged by Apple for Apple Pay, promoting efficiency in pricing and in the provision of payment services. At a minimum, this would be a public benefit even if additional payment services were functionally identical to Apple Pay. However, as set out below, there are many dimensions on which mobile payment services can innovate and differentiate themselves (thus expanding the scope of public benefits even further).

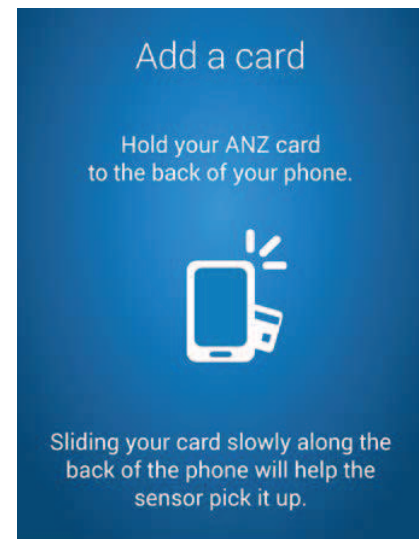
**[C-I-C]**

**2.3 Promoting innovation and differentiation in the key elements of a mobile payment service**

Competition with the Apple Pay payment service would also promote innovation and differentiation in the key elements of a mobile payment service such as Apple Pay, including:

- (a) **loading or “on-boarding” payment cards:** competing payment services could provide a number of additional features promoting security and convenience in the on-boarding of payment credentials, for example:

- an issuer app already has access to details of a user's payment cards and can tokenise those cards without requiring additional input from the user, such as scanning the card with a phone camera (which only works for cards with raised or embossed numbers) and becomes less effective over time as the embossing wears down or typing in the card details manually. A number of the Applicants' customers report that they first used NFC payments on their Android devices when they realised that they had left their wallets at home and so had opened or downloaded their issuer's mobile wallet and were able to use their payment cards immediately;<sup>12</sup> and
- access to the NFC function would allow other contactless cards to be read directly via the NFC interface (which is the method by which ANZ loads payment cards on the Android platform).



- (b) **selection of payment cards:** competing payment services could provide a range of additional features increasing convenience and intelligence in the selection of payment credentials at the point of sale, for example by automatically presenting a particular payment card, store card and/or loyalty card:

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<sup>12</sup> Apple Pay now allows cards to be on-boarded via a mobile banking app without the need for a physical card, but only a handful of the thousands of issuers that participate in Apple Pay have implemented this option, and it still involves additional steps to on-board and begin using a card.

- for a particular merchant based on user instructions or past user behaviour (for example, a corporate or business account card for taxis during office hours, a personal card for the coffee shop, a credit card that offers cashback for a particular merchant, a store card at the relevant retailer, and any associated loyalty cards); or
- based on current and historical information about account balances, credit limits, upcoming bills, spending patterns and incoming payments (for example, using a debit card if there is enough in the user's transaction account to maintain a positive balance until payday given the bills scheduled to be paid; and otherwise using a credit card).

Further, the wallet could select the relevant card within the store and automatically offer the choice of paying in dollars or reward points to the cardholder where the payment card, store card and/or loyalty card permits the use or redemption of reward points to fund purchases at the point of sale. For example, some payment card issuers operate their own proprietary rewards programmes with the ability to fund purchases through points.

- (c) **security and authentication:** while Apple Pay's Touch ID fingerprint sensor provides more security than a contactless card and more convenience than entering a PIN, it may still be vulnerable to attacks (such as cloning a fingerprint from the prints on a screen) which, while cumbersome at present, may become more widely available in the future. Other forms of authentication may provide a more attractive combination of security and convenience for particular users over time, such as the facial identification or "selfie pay" of MasterCard Identity Check,<sup>13</sup> retina or iris scans or voiceprint analysis, and some users may wish to have the ability to make low-value payments without any authentication – as is the case with contactless cards – knowing that in most cases the issuer rather than the user will be responsible for unauthorised payments;<sup>14</sup>
- (d) **rich information:** the NFC interface currently provides limited information in the course of a contactless transaction, as it was initially designed to interact with plastic cards that have limited capacity to make use of this information. However, as mobile wallets become more widespread, NFC payment terminal software may be updated to provide and receive richer information through the NFC interface at the point of sale. This information might include itemised electronic receipts, loyalty program information, coupons, and warranty information. Since most card issuers also provide card acceptance service to merchants, they are in an ideal position to develop and roll out these additional functions;
- (e) **additional card schemes:** in Australia, Apple Pay currently works with the Visa, MasterCard and American Express card schemes. It does not currently work with the Diners Club, UnionPay or JCB card schemes in Australia, though it supports these schemes in other countries. Competitive mobile payment services could

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<sup>13</sup> MasterCard, "MasterCard Identity Check to Simplify and Strengthen Online Shopping", Press Release, 6 October 2016. Available at <http://newsroom.mastercard.com/press-releases/mastercard-identity-check-to-simplify-and-strengthen-online-shopping/> (Accessed 14 December 2012).

<sup>14</sup> Apple's submission dated 23 January 2017 suggests that security measures could be implemented by requiring customers to first launch another mobile wallet, authenticate within that wallet, and then launch the Apple Wallet and authenticate again. This would allow *additional* security – at a considerable cost to convenience – but not *alternative* security options which may present a more suitable balance of security and convenience for some or many users.

differentiate themselves by supporting a wider range of schemes, particularly local schemes such as eftpos (whether single-network or different dual-network options), the New Payments Platform, digital currencies, and cashless welfare cards of the kind being trialled by the Commonwealth government;

- (f) **additional payment methods:** access to the NFC function can facilitate payments that do not require the intermediation of a card scheme. For example, NAB Flik allows users with Android devices to complete peer-to-peer payments by tapping their devices together. As payments clearing becomes more instantaneous, and with the development of the New Payments Platform, payments of this kind are likely to become more popular;
- (g) **beyond payments:** although mobile payments are a defining characteristic of mobile wallets, the NFC interface is capable of many functions beyond payments. Competitors to the Apple Pay payment service could facilitate additional features for digital wallets such as home, office, hotel, car park, vehicle and locker access; digital identification and licensing credentials; both open-loop and closed-loop transit cards, boarding passes, event tickets; loyalty programmes and discount coupons.

## 2.4 More effective and less distorted competition between mobile wallets

Given the extremely limited and indirect opportunities for mobile wallets other than the Apple Wallet to make use of the Apple Pay payment service, and the highly discriminatory basis on which Apple offers these opportunities to other mobile wallets when compared to its own Apple Wallet, allowing additional payment services to compete with Apple Pay would also permit the development of mobile wallets that provide a far richer and wider range of functions and features than is possible at present, and would allow these mobile wallets to truly compete with the Apple Wallet.

While the ACCC's and the Applicants' analysis has focused on the addition of mobile payment functionality to single-issuer banking apps, the implications of providing competition to the Apple Pay payment service through the granting of access to the NFC function are much broader. Although an issuer-branded banking app may not be the most appropriate location for cards from multiple issuers, a payment service that allowed integrated NFC access for payments and other functions could – depending on the terms negotiated with Apple – allow one or more of the issuers to provide additional wallets that would not be branded to any issuer but would allow the loading of payment credentials from multiple issuers as well as retailers, transit providers, government agencies and others.

These additional wallets would take the approach of Suretap in Canada or Semble in New Zealand but would have the distinguishing advantage of access to all smartphone users, including iPhone users, and would have an unprecedented chance of successfully competing with the Apple Wallet and the wallets provided by Google and Samsung in the Australian context.

For example, PayPal has announced that it is working with Visa and MasterCard to develop in-store NFC payment functionality for its app.<sup>15</sup> It has launched NFC payments

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<sup>15</sup> "PayPal and MasterCard Announce New Strategic Partnership", *PYMTS*, 6 September 2016; and "Visa/PayPal and the Future of Payments", *PYMTS*, 25 July 2016.

through the Vodafone Wallet on the Android platform in Spain<sup>16</sup> – where Android has more than 90% market share – but is likely to face difficulties in territories where iPhone customers are more prominent.

The Applicants would hope that access to the iPhone's NFC function would not only apply to themselves or to participants in the collective negotiation, but would be extended to other developers such as financial and other technology start-ups including those who are not card issuers. However, even if other developers were not granted access to the NFC function – again depending on the terms negotiated with Apple – participants in the collective negotiation could partner with these developers to add further functionality to issuer or multiple-issuer wallets, provide standalone apps together and potentially even to provide alternative mobile payment services that could be genuinely integrated into other applications to the full extent permitted by the operating system.

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### **3 There are material public benefits in allowing real competition with Apple (and between wallet providers)**

#### **3.1 Introduction**

The ACCC's discounts, or does not seem to take into account, the benefits of increased competition and choice available via NFC access due to the perception of a number of existing opportunities that enable the Applicants to 'compete' against Apple. For the reasons set out above, these perceived opportunities for 'competition' are flawed, limited at best (and not meaningful in an economic sense).

Authorisation and NFC access will allow for real consumer choice and much greater competition with Apple and between other wallet providers (in terms of the functionality and features introduced) than Issuer digital wallets using an Apple Pay Button to re-direct users to the Apple Wallet, banking apps with NFC tags or the applications available by switching to a smartphone with a completely new brand proposition and mobile operating system.

#### **3.2 NFC tags or external NFC hardware do not provide the consumer choice and competition that authorisation can**

As noted by the ACCC in the Draft Determination,<sup>17</sup> NFC tags have disadvantages, including operational disadvantages, and provide an inferior user experience for consumers.

However, 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.<sup>18</sup>

The assessment presented in the Draft Determination fails to take into account that NFC tags are not widely offered. Of the Applicants, only CBA and NAB offer NFC tags.

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<sup>16</sup> "MWC 2016: PayPal Unveils new Partnerships and Product Updates", PayPal media release, 22 February 2016.

<sup>17</sup> Draft Determination, 29 November 2016, at page iv

<sup>18</sup> Draft Determination, 29 November 2016, at [244]

Neither company, nor their customers see them as optimal solutions or real alternatives to NFC access.

CBA introduced the PayTag in December 2013, and announced and launched its Android wallet application in 2013 and 2014 respectively. Apple did not introduce NFC capabilities to the iPhone until 2014. NAB Pay was launched in January 2016 and the NAB PayTag was launched in September 2016. The launch of these products cannot really be seen as a competitive response to Apple Pay or a substitute for NFC access. They are at best a temporary workaround.

The sub-optimal nature of these products is exhibited in the [C-i-C] demand and usage of these products by customers.

### [C-i-C]

NFC tags are effectively a resized contactless payment card which operates independently of the mobile device. They are typically stuck to the customer's phone but, like contactless payment cards, do not need to be in order to operate.

Importantly, they do not allow customers real choice or provide real competition in digital wallet offerings.

- not all customers have this option - only CBA and NAB offer it, [C-i-C] and even then not all iOS customers who use these banks have decided to get the PayTag.
- NFC tags offer no real benefit over plastic cards
- the use of this technology actually **limits choice compared to integrated wallets**
  - **users can only have one sticker/tag per card account, and one sticker per mobile device.** This limits the customer's ability to choose to use the accounts they want, from the issuers they want, when they want to make contactless payments. For example, if the sticker was a Visa or MasterCard credit card, the payment will be made using that card and have the associated transaction cost even if the customer used a mobile banking app to change the account linked to that card to select a less costly payment method
  - there may be "card clash" between the sticker and the iPhone's NFC controller/antenna which removes choice from the customer as the merchant terminal (rather than the customer) will choose which NFC system it will communicate with. The stronger (powered) signal of the integrated NFC antenna will tend to prevail over the sticker.
- For reliable results on which card will be used for payment, **a customer will have to decide whether to use Apple Pay or an NFC sticker. They cannot use both.**
- NFC tags do not deliver a long term viable offering to provide consumers with seamless, convenient merchant-consumer experiences.
- NFC tags can more easily be lost, stolen or damaged compared to the card information or NFC functionality of an integrated NFC wallet with in-device NFC functionality.



- NFC tags stuck to a customer's phone impair, or at least change, the aesthetics of the handset they are attached to. This can be reason enough for customer's not to see these products as viable substitutes for NFC access. A major part of the iPhone's brand proposition and appeal to certain of its customers is its clean design. Apple seek to produce a "pristine, mirror-like surface" and describe the iPhone 7 handset design as "the most deliberate evolution our original founding design" where "an aluminium body and formed sheet of glass describe a singular shape" and "each refinement serves to bring absolute unity and efficiency to the design". Sticking an external NFC tag sticker to this design is not compatible with the design ethos expressed by Apple, or the customer appeal generated by this design.
- NFC tags are limited in the extent of innovation and functionality that can be provided compared to in-device NFC functionality. For example, in relation to security and innovation around customer verification, unlike an integrated NFC wallet, NFC tags do not have the ability for meaningful two-way communication between the application and the NFC controller or the ability to be updated with a new token if the old one is compromised or expired or if the customer wishes to add another card to the tag.

As implicitly recognised by the ACCC, NFC tags or external NFC hardware do not provide the consumer choice and competition that authorisation can.

### **3.3 The ability to offer competing digital wallets on Android will not provide an effective constraint on Apple, nor will it offer iPhone holder customers the choice that authorisation can**

The ACCC recognises that the competitive tension provided by wallets on Android is not equivalent to the increased competition and choice available under the authorisation. As noted at 252 of the Draft Determination:

*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. [emphasis added]*

Smartphones are used for a multitude of functions and the choice of handset is not determined by an individual app. Once a customer becomes part of the Apple ecosystem, switching becomes difficult, inconvenient and expensive (eg, the costs associated with a new handset, data transfer, lost in-app purchases and unfamiliarity with a different operating system). As a result, competition between handsets cannot be relied on to provide competitive constraint and better price-quality outcomes in mobile wallets.

As noted by Apple CEO Tim Cook, iPhone loyalty rates are almost twice as strong as the next-highest brand. Australians also exhibit this brand loyalty in their smartphone consumption patterns and the decision to purchase an iPhone is not made in relation to its comparative mobile payment option or in relation to any one particular app.

### **3.4 The magnitude of these accepted public benefits are greater than assessed**

For all the reasons stated above, there are substantial public benefits enabled by authorisation and the size of these benefits is much greater than assessed in the Draft Determination.

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## 4 NFC access allows and fosters increased innovation and investment

### 4.1 Overview

In the Draft Determination, the ACCC accepted that the authorisation will result in the potential public benefits of increased innovation and investment in digital wallets and other mobile apps using NFC technology.

However, the ACCC noted, based on the information provided and the uncertainty in how these markets are likely to develop, it was not satisfied that these benefits were likely to be significant.

As set out in further detail below, these benefits are not only substantial, they also lead to greater competition, choice and better product and service offerings for consumers. Any uncertainty in how the market will develop over the next 3 years does not negate the existence or significance of these benefits. In fact, the current stage in market development and mobile payment evolution, and Australia's widespread NFC infrastructure and acceptance of NFC payments makes access to NFC functionality and these benefits all the more critical.

### 4.2 Access to customers on the iOS platform is critical for continued Australian wallet provider success and the ability to provide the best wallet product quality and functionality

Without access to customers on the iOS platform, mobile wallet providers lose access to around 60% of the mobile digital banking customer base. These are customers who tend to spend more, more often, adopt technology more readily, are more interested in mobile banking and payments functionality and expect certain technology offerings from banks when vying for their business.

The Applicants compete for all customers regardless of phone type and want to be able to provide a consistent and coherent offering across their customer base. 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.

Developing successful product solutions and innovations to enhance a bank's product offering takes time, resources and significant investment. The business case for investment in product enhancements involve cost-benefit analyses, and the larger the reach of the investment in terms of the customer base, the more the benefits are likely to justify the costs. The banks have already invested significant resources in solutions they currently offer and the ability to realise returns across a broader customer base (including the customer relationship benefit of actually being able to offer enhanced products and services to customers they cannot effectively reach without NFC access) will greater enable future investment in digital wallet features and capabilities.

**[C-i-C]**

## eftpos Case Study

eftpos is Australia's only domestic debit payment scheme and is an important payment option for Australian consumers.<sup>19</sup>

eftpos is available in both proprietary cards (ie, eftpos-only cards) and dual network cards. Dual network cards (which represent almost two third of all debit cards in Australia<sup>20</sup>) are debit/ATM cards that allow one physical card to make two types of transactions (ie, an eftpos transaction and a scheme debit transaction). That is, dual-network debit cards can route transactions either via the eftpos network (if the cardholder pushes the 'cheque' or 'savings' button) or via the networks of MasterCard or Visa (the 'credit' button). Unfortunately, it is not possible for customers to make this choice when using the card to "tap and pay", as these contactless payments automatically turn the transaction into a MasterCard or Visa payment. In order to consciously choose eftpos, the customer would need to choose not to 'tap' and instead insert or swipe the card and press CHQ or SAV. As a consequence, there has been a steady decline in the market share of debit transactions handled by the domestic eftpos system, and an increase in the share of the MasterCard and Visa debit systems.<sup>21</sup>

In this context, eftpos has been looking for options to be able to operate in a mobile environment (where the consumer may once again be given a meaningful choice of eftpos versus international scheme for a contactless payment), although as noted by the RBA, there have been obstacles to doing so.

As noted in the recent RBA Consultation paper on dual-network cards and mobile wallet technology:

*In particular, stakeholders report conduct that has sought to prevent or deter Australian issuers of dual-network cards from provisioning those cards to enable eftpos mobile payments. Stakeholders have raised concerns with the Bank about two types of actions:*

- *Scheme rules or policies of a network that prevent or hinder Australian card issuers from provisioning a competitor network for mobile payments (either expressly or through policies or restrictions that achieve that outcome in practice). In particular, stakeholders have raised concerns that issuers with existing dual-network cards might be prevented from enabling both networks on those cards for mobile payments.*
- *Contractual terms for tokenisation services that could penalise an Australian issuer for provisioning a competitor network for mobile payments. In particular, stakeholders have raised*

<sup>19</sup> eftpos is widely recognised as an important payment option for Australian consumers. Not all customers can or want to get credit and some customers may prefer the security of using eftpos cards (given it operates as a debit card), these customers should be provided with a meaningful way of accessing eftpos as a payment option (but those options are very limited in a "tap and go" environment). Furthermore, eftpos transactions are cheaper for merchants and the economy than other schemes such as Visa and MasterCard.

<sup>20</sup> As of mid-2015, of the 32 million debit-only cards on issue in Australia, 20 million (almost two thirds) were dual-network and 12 million were proprietary eftpos cards - RBA, Dual-network cards and mobile wallet technology, Consultation Paper, December 2016.

<sup>21</sup> The RBA also notes that increased issuance of international scheme debit cards by banks, plus the online and contactless functionality of scheme cards, are likely to have contributed to the shift in market shares.  
<https://www.rba.gov.au/publications/annual-reports/psb/2016/retail-payments-trends.html>

concerns that contractual terms may allow a scheme to increase the price of tokenisation services for issuers that choose to also enable a network other than that scheme.

**[C-i-C]**

The implementation of PIN-free transactions over \$100, which is a possibility on the integrated NFC mobile wallet (but not with a tag), is another example of an investment or innovation that is unlikely to take place without NFC access. Banks that need to offer both integrated and non-integrated “solutions” to reach the majority of their customers have incentives not to innovate in this area but to maintain consistent thresholds for all contactless payments in order avoid customer and merchant confusion.

Around the world, access to iPhone customers is critical to successful app development (that is for any app, not just payment apps). This is because of the high fixed costs of app development and the attractiveness of the iPhone-user demographic in terms of its tendency to early adoption and high spending.

As Dr Susan Athey notes in her report:

*Restricting competition in iPhone mobile payment apps will cause lower innovation in Android apps as well. Most developers work on apps on the expectation of reaching both sets of consumers, and many would not invest as much (or at all) if they could only reach the Android market. Even though the consumer base on each platform is distinct, the incentives to invest are determined by the aggregate size of the market. Apps have some shared investment and some incremental costs to port to different platforms; the market as a whole determines the incentives to invest. Among the two platforms, the iOS platform has substantially more valuable consumers in terms of demographics and commercial activity.*

*As evidence of the superior desirability of the iPhone user base, the application Instagram was available in on the iPhone for 18 months before the Android version was released. The application built up a user base of 30 million on iOS, and focused on developing a high-quality experience for iPhone users, before making an application for Android phones. This illustrates the value of the iOS audience in motivating innovation.*

*iPhone users are the most satisfied with their smartphone among Australian consumers. Restricting developers’ access to this highly engaged, tech-savvy and satisfied group of smartphone users will reduce the incentive to develop advanced mobile payment apps for the Australian market...*<sup>22</sup>

*Access to the large, wealthy pool of iPhone users is needed in order to ensure that developers have sufficient incentive to invest the large sums needed to produce successful, high-quality mobile payment apps.*<sup>23</sup>

The tendency for smartphone app developers to address the maximum customer base by developing for multiple platforms, in circumstances where consumers tend to adopt a single smartphone platform, is recognised as an equilibrium allocation where platforms in two-sided markets compete with each other:

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<sup>22</sup> Expert report prepared by Dr. Susan Athey, at [99]-[100].

<sup>23</sup> Expert report prepared by Dr. Susan Athey, at [103].

*In one equilibrium allocation all consumers single-home, whereas all firms multi-home. This equilibrium configuration always exists and it mirrors what is seen in the market for smartphones: virtually all consumers use only one smartphone, and almost all apps are available across smartphone providers.<sup>24</sup>*

Apple's insistence on exclusive access to NFC functionality prevents mobile wallet providers from "multi-homing" – that is, making their apps available on multiple platforms – in turn preventing them from reaching the smartphone users they need to make continued investment in these apps worthwhile.

As previously noted, there are several case studies of digital wallets (eg, Semble in New Zealand, Suretap in Canada, CurrentC in the US, and Paymit in Switzerland) that failed or were prevented from reaching their potential by Apple's refusal to provide access to the NFC functionality.

At 260 of the Draft Determination, the ACCC notes that:

*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.*

As discussed in the section above, while there may be additional costs involved and differences in developing for the iOS platform, that does not remove the increased incentives for app developers (across the iOS and Android platforms) to invest due to the larger addressable market that will be allowed with NFC access. This is supported by the Expert report prepared by Dr. Susan Athey which notes at paragraph 63 of page 20 that:

*Developers multi-home to reach consumers, despite significant additional costs.*

Obviously, for some of the Applicants the purpose of this application is to allow the potential to provide choice on the iOS platform by investing in and developing an issuer wallet available to iPhone users as well as Android users which is able to make NFC payments at the point of sale. Therefore, NFC access will directly increase investment in that sense.

As noted above, the commercial rationale for offering the product is also relevant to the investment decision. The banks want to be able to provide a consistent user experience for their customers. Such was the drive for this that some of the Applicants invested in the NFC sticker or tag option as a workaround to not having access to this functionality on the iPhone.

There are also certain costs that would be sunk or common across both platforms (eg, the costs involved in the back-end infrastructure to support the solution, defining the solution, customer research and testing design features). Each of the Applicants already has resources relating to each of the platforms due to the banking apps that have been

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<sup>24</sup> Thomas D Jeitschko and Mark J Tremblay, "Platform competition with endogenous homing", 11 February 2015, available at: [http://econweb.umd.edu/~sweeting/EndogHoming\\_DC-IO-Day.pdf](http://econweb.umd.edu/~sweeting/EndogHoming_DC-IO-Day.pdf) (accessed 17 October 2016).

developed on both the iOS and Android platforms. Given the strategic importance of iPhone customers in terms of their share and characteristics any additional costs or differences involved in developing for the iOS platform will be more than met by incremental revenues and other benefits and will not remove the increased incentives and opportunities for investment and innovation available with NFC access.

The Applicants have invested significantly in NFC infrastructure in Australia, and it is in their interests to encourage investment and innovation that maximises the benefits from that investment. For example, greater merchant productivity through increased efficiency and speed of payments with more convenient integrated NFC wallets is good for merchants, good for consumers and allows the banks to better recover their NFC infrastructure investment. Further, access to NFC will also allow fintechs and retailers greater ability to drive innovation to meet customer needs.

#### **4.3 Similarly, investment and innovation in other mobile applications will be greater with NFC access**

In the Draft Determination, the ACCC accepted that open access to NFC would enable other mobile applications using NFC to be developed for iPhone devices. However, it seemed to discount the significance of these benefits due to uncertainty in how markets will develop and the fact that there are strong investment incentives on Apple to ensure that its devices are competitive with those running on the Android platform.

Annexure B provides examples of the various NFC applications beyond mobile payments that could become available and used by consumers during the course of a day.

It is certain that NFC access will create opportunities to invest in NFC capabilities that that did not exist without access. A greater number of players considering, testing and developing ideas allows the conditions for a greater quantity, breadth and depth of innovation across applications and the conditions for innovation at a greater pace.

Particularly in a relatively small market like Australia, the larger addressable market provided by NFC access on the iPhone platform increases the incentives to invest, reducing the cost and risk of failure and enhancing the likely chances of success. This will in turn, also: reduce the cost and risk of failure and enhance the likely chances of success. This will in turn, also:

- enhance existing incentives of Apple to invest and innovate; and
- allow innovation in areas that may be important to Australian consumers but not priorities of the global Apple company to occur, occur at a faster pace and occur in a way that meets customer or jurisdiction specific needs.

#### **4.4 The application is not about the present but about the future**

Apple's submission dated 23 January 2017 compares the Applicants' current mobile wallets on the Android platform and concludes that they are not superior to Apple Pay. While this is hardly an objective assessment, it is also not pertinent to the question of authorisation.

The Applicants who have developed NFC mobile wallets have done so in a context where use of these mobile wallets – and, critically, investment in these wallets – is limited by the fact that [C-i-C]% of the Applicants' mobile customers use iPhones.



As a result, the NFC capabilities of the mobile wallets offered by the Applicants at present are not indicative of the mobile wallets that could be offered by the Applicants and others if they had access to the iPhone's NFC function.

The Applicants acknowledge that the NFC capabilities of their mobile wallets are not as well developed as many of the other features of those wallets such as payments, transaction histories and overall ease of use. The latter features are available to all customers and have been successively refined and improved through additional investment and a high volume of customer feedback, which has resulted in a relatively high degree of customer satisfaction as reflected in app store ratings and reviews.

If NFC features were available to iPhone customers as well as Android customers, they would be improved, refined and extended through the same processes, allowing what are now largely mobile banking apps with basic NFC capability to become true mobile wallets combining payments with personal finance services, loyalty cards, identification and licensing credentials, transit cards, building and vehicle access and other applications.

The Applicants are confident that these new mobile wallets – whether individual issuer mobile wallets or multi-issuer mobile wallets developed by the Applicants or others – could be at least as attractive as Apple Pay to some and perhaps many customers.

#### **4.5 The size of this public benefit is greater than assessed in the Draft Determination**

Compared to the situation without authorisation and access to the NFC functionality, public benefits in the form of increased innovation and investment in relation to mobile wallets and beyond will not only be significant but substantial.

To discount this benefit by noting that there are some incremental costs to developing across both platforms and that Apple already has incentives to ensure its features or applications are competitive with those running on the Android platform disregards the market reality of app development, success and the importance of the iPhone customer segment.

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## **5 Reasonable access to the App Store is also necessary to ensure these public benefits are achieved**

Apple's submission dated 23 January 2017 queries the need for collective negotiation on access to the App Store. To be clear, the Applicants have included this aspect of NFC access to avoid any uncertainty and ensure that, if access to the iPhone's NFC function is granted, this access will not be undermined by any unreasonable restrictions on issuers distributing NFC-enabled mobile wallets through the App Store, which is the only way for users to install applications on their iPhones.

The Applicants recognise the intention of the App Store guidelines but also understand that Apple's discretion in rejecting apps is nonetheless broad, and that it has rejected applications for duplicating iPhone features or functionality (such as voice calls or podcasts) and has recently rejected a Samsung Pay app for unreported reasons.

Apple could also restrict applications from the App Store without changing the global terms and conditions by requiring issuers who wished to participate in Apple Pay to agree to additional terms in relation to the App Store. Although there may be no such terms in the current Apple Pay agreement, Apple may introduce such terms in the event that NFC

access is granted. Of course, if it does not attempt to do so then there will be no need for collective negotiation on this issue.

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## **6 Removing Apple's pass-through restriction provides a constraint on Apple's fees while still allowing Apple to compete on its merits**

In the Draft Determination, the ACCC accepted that the opportunity to negotiate for the removal of any restriction on pass through of fees was likely to result in public benefits through increased pricing efficiency and the constraint it would provide on Apple's fees (including reducing the incentive for Apple to increase its fees over time, which is especially important given the potential for unconstrained increases once Apple Pay is offered and increasingly used by customers).

As previously noted, without NFC access or the ability to pass-through fees, iPhone customers are locked-in to Apple's wallet without the benefit of Apple facing effective competition in relation to pricing or the same degree of competition in relation to product service offering that could be achieved under the authorisation.

However, while these benefits were accepted in principle, their size was assessed as uncertain for the following reasons:

- it was uncertain whether the fees in practice would be passed on to consumers. In fact, the ACCC considered it likely that fees may not be passed on; and
- at the same time, passing on the fees Apple charges for its services may give the Applicants scope to discriminate against Apple and limit it from competing on its merits by setting cardholder fees for using Apple Pay well in excess of the costs.

The Applicants maintain that the *ability* for issuers to pass through Apple's fees, in and of itself, will result in clear public benefits in constraining Apple's fees and avoiding competitive distortions. It is enough for Apple to know that in the event of a significant increase in Apple's fees, issuers would be able to pass some or all of those fees on to customers – and the higher the fees, the more likely they are to be passed on.

Further, the ACCC's concern that Applicants could set cardholder fees well in excess of the costs does not appear to take into account the clarification of the proposed Collective Negotiation Framework that the Applicants have provided, which makes it clear that the Applicants would seek the ability to pass through *some or all of the costs* of participating in Apple Pay, but not the ability to charge fees in excess of those costs.

However, as noted above, in order to remove any concern that pass-through could somehow be used as a way to discriminate against Apple, the Applicants are willing to remove pass-through as an issue for collective negotiation and focus solely on issues of NFC access in order to ensure choice and competition for their customers.

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## **PART B: Assessment of public detriments**

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### **7 Overview of public detriment assessment**

#### **7.1 Introduction**

The ACCC identified public detriments in relation to reductions or distortions in competition:

- between issuers (in relation to the supply of mobile payment services and the provision of payment card services);
- in the supply of digital wallets; and
- in the supply of mobile operating systems.

The ACCC was not satisfied, on the information provided, that these detriments would be outweighed by the public benefits and sought further information and submissions to inform its final decision.

A key factor in the assessment of public detriments was that the term of the authorisation was for a three year period and, although collective negotiations may end up concluding more quickly, the potential was there for collective negotiations of up to three years.

Another factor was a concern that through pass-through there would somehow be an ability to discriminate against Apple by charging customers fees in excess of costs.

The Applicants submit that the public benefits are larger than assessed in the Draft Determination. Further, discussion on the detriments associated with the term of the authorisation is set out below.

#### **7.2 Term of authorisation**

Any assessment of the authorisation term leading to public detriments is in effect limited to the period of collective negotiation.

The Applicants consider that it is better (and in the public interest) to have an opportunity to meaningfully sit at the table and negotiate within a shorter authorisation term than not to have that opportunity at all. In the circumstances, the Applicants are willing to reduce the term of authorisation to 18 months.

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### **8 No competition reduction in the supply of mobile payment services**

At paragraph 298 of the Draft Determination, there is a suggestion that the authorisation would reduce competition in relation to the supply of mobile payment services for consumers with NFC-enabled iPhones by reducing the competitive tension between group participants to make Apple Pay available during the negotiations and boycott (which could be up to three years).

The authorisation will not result in reduced competition in relation to the supply of mobile payment services for consumers with NFC-enabled iPhones. To the contrary, it will enable increased and more effective competition by enabling the provision of a choice in payment service providers other than one and only option currently available to these consumers – Apple Pay.

There is, and will continue to be during the authorisation, substantial competitive tension and pressure to make Apple Pay available.

Participants can leave the collective negotiation at any time without penalty.

As noted by the ACCC at 299:

*...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.*

As noted by ANZ Chief Executive Officer Shayne Elliott:

*... our leadership in launching Apple Pay and Android Pay in Australia has seen us attract significant numbers of new to bank retail customers and helped deepen relationships with our existing customers.<sup>25</sup>*

Further, ANZ reported that Apple Pay sparked a “surge in applications for credit cards and deposit accounts” noting a 20% increase in online credit card applications and a doubling in online deposit applications immediately after its launch.

On that day, online deposit applications were the highest on record – more than double the average – Mr Elliott said and “that higher level [is] continuing”. Traffic to the bank’s main anz.com website has also been 6 per cent higher than average since the launch.

Apple is popular and its customers are loyal. Not providing Apple Pay exposes the banks to significant consumer backlash (as happened in Hong Kong and the United Kingdom). For example, submissions by interested parties such as Richard Thorek, Wayne Pulbrook, Dr Grischa Meyer and Trevor Long demonstrate a willingness and ability of consumers to switch to another bank that offers Apple Pay.

There is also some evidence of customers having switched financial institutions since the Apple Pay launch, though many customers will first apply for a new card account from a new bank without closing an existing card account. That process is easy, though the results hard to quantify – an ANZ Bank card suitable for Apple Pay takes five minutes to apply for and 60 seconds to get a response.

A list of the growing number of issuers participating in Apple Pay is provided at Annexure A.

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<sup>25</sup> ANZ, ANZ Trading Update - 9 Months to 30 June 2016.

Moreover, as noted above, the Applicants are incentivised and committed to starting and ending negotiations quickly. The commercial reality is that the collective negotiation will not last for three years.

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## 9 No competition reduction in the provision of payment card services or the supply of digital wallets

### 9.1 Introduction

The Draft Determination notes a concern that the proposed conduct could reduce competition between the Applicants in the supply of payment card services, as well as competition between the Applicants and other providers in the supply of digital wallets. Both of these concerns are predicated on an assumption that card issuers have the incentive and ability to anti-competitively prefer or favour their own mobile wallets and will avoid participating in digital wallets that accept the cards of multiple issuers.

It is hard to see how this assumption reflects commercial reality given:

- the experience of ANZ, one of the major four banks [and payment card issuers] which offers an issuer digital wallet – ANZ Mobile Pay and non-issuer digital wallets which can load the cards of multiple issuers Android Pay and Apple Pay;
- the Applicants' experience with, and offerings of, issuer and non-issuer digital wallets including the fact that:
  - Bendigo and Adelaide Bank does not currently have, and will not prior to the negotiation have, its own issuer digital wallet;
  - Bendigo and Adelaide Bank, Westpac and Bankwest, a subsidiary of Commonwealth Bank, have all launched Android Pay; and
- the inability for issuers to anti-competitively favour or lock-in customers to issuer digital wallets and, in particular, the lack of any ability to discriminate against Apple Pay when Apple controls the operating system, the handset, the software able to be installed on its devices, the default settings and the access of customers to that software.

#### [C-i-C]

To better inform its final view in relation to this concern, the ACCC specifically asked for information on:

- the role of non-issuer digital wallets in facilitating consumer switching and competition between payment cards from different issuers;
- the costs to consumers of switching digital wallets, particularly relative to other barriers to consumer switching such as re-establishing direct debits; and
- the ability and incentive of issuers to charge their fees to artificially discourage their cardholders from using Apple Pay.

The Applicants set out responses to the first two bullet points below. The Applicants' response to the last bullet point is set out in section 6.

## 9.2 Switching and competition between payment cards from different issuers

As set out in the Applicants' submission dated 21 November 2016, issuers already face, and will continue to face, vigorous competition in the supply of payment card services, in relation to both physical cards and mobile payments.

It is not significantly easier or faster to switch between payment cards in a mobile wallet than it is to switch between physical cards in a physical wallet or between different issuers' mobile wallets on a mobile phone. As noted by the ACCC in the Draft Determination, the potential for the Apple Wallet to play a role in promoting competition between payment cards due to its nature as a non-issuer wallet:

*...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.*

Mobile wallets also have the potential to be more differentiated and competitive with each other than cards in a single mobile wallet (as discussed in more detail in section 9.2(c)).

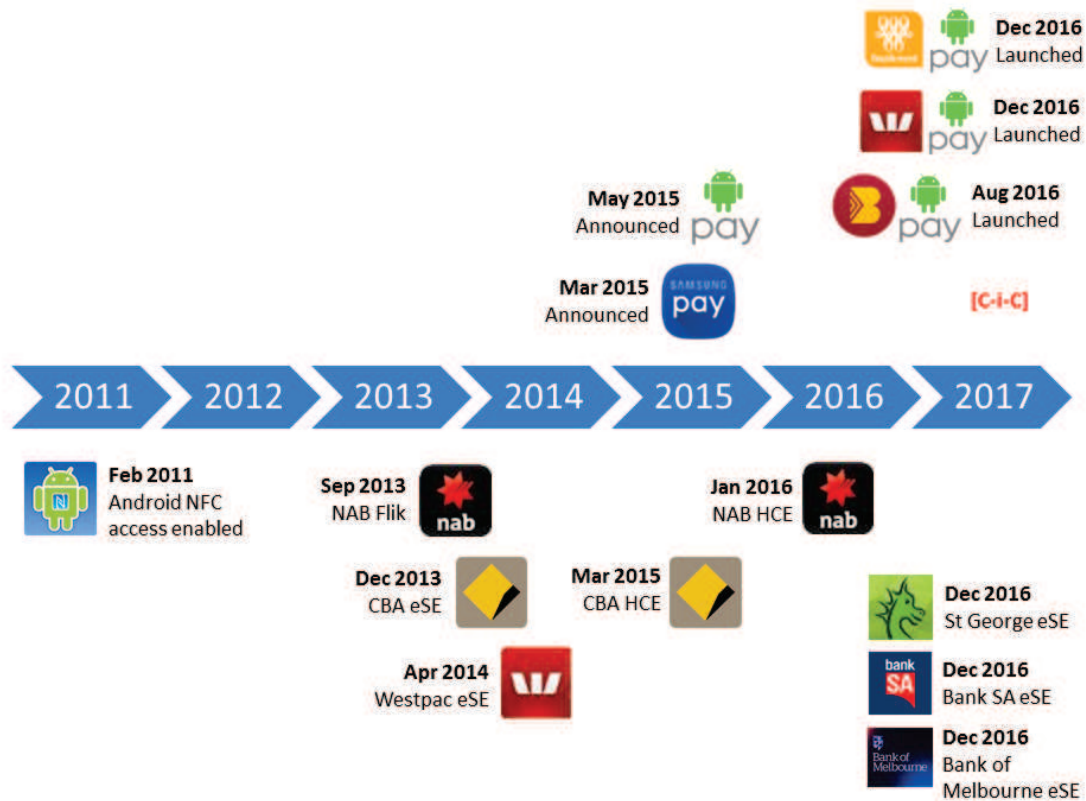
As a result, there is no incentive for issuers to avoid or anti-competitively delay multiple-issuer mobile wallets even if they have their own mobile wallets. This reflects actual market outcomes in terms of the offerings of issuers with their own mobile wallets and the fact that all of the Applicants are evaluating or are in negotiations to participate in Android Pay and/or Samsung Pay, and Westpac, Bendigo and Adelaide Bank and CBA-owned Bankwest have all now launched with Android Pay.

Where issuers have launched their own mobile wallets before participating in multiple-issuer wallets on the Android platform, this is attributable to the time taken to negotiate and implement multiple-issuer solutions (including building the necessary infrastructure to support these products) and the fact that the opportunity to develop their own mobile wallets arose years before Android Pay and Samsung Pay were announced and made available in Australia, as set out in the timeline below.<sup>26</sup>

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<sup>26</sup> "eSE" means a mobile banking app that uses an embedded Secure Element and is available on compatible Samsung mobile phones. "HCE" means a mobile banking app that uses software Host Card Emulation and is available on all recent NFC-enabled Android mobile phones. NAB Flick is a peer-to-peer payment service that uses NFC to communicate.





The Applicants consider that their incentives are no different from the many banks (including ANZ) in Australia and throughout the world that have developed their own mobile wallets as well as participating in multiple-issuer wallets, and that there is no reason to think that they have the ability or incentive to avoid or delay Apple Pay.

(a) Most mobile payments will not offer the opportunity to switch between cards

The Applicants anticipate that most customers will make most of their payments with one preferred card and one preferred mobile wallet, whether it is an issuer mobile wallet or a multiple-issuer mobile wallet.

By paying with their default card through their default wallet, customers will maximise the speed and convenience of making a payment with their preferred contactless card. This process may be as simple as holding their phone to a mobile payment terminal while their thumb is resting on the fingerprint sensor, and will be completed near-instantly without offering the opportunity to switch between payment cards. That is, in relation to the majority of payments a multiple-issuer wallet will provide no additional competition between payment cards at the point of sale.

- (b) Switching between mobile wallets is as easy as switching between cards in a mobile wallet

If a user wishes to pay with a card other than the default, additional steps are introduced into the process which will necessarily slow it down, and will turn a process that is very simple and fast into one that is much slower.

Even if the default NFC application is a multiple-issuer wallet that can be launched without unlocking the phone, the single step needed to pay with the default card – touching the phone to the reader with a thumb on the fingerprint sensor – becomes a minimum three step process: launching the default app, selecting a non-default card, and then touching the phone to the reader with a thumb on the sensor.

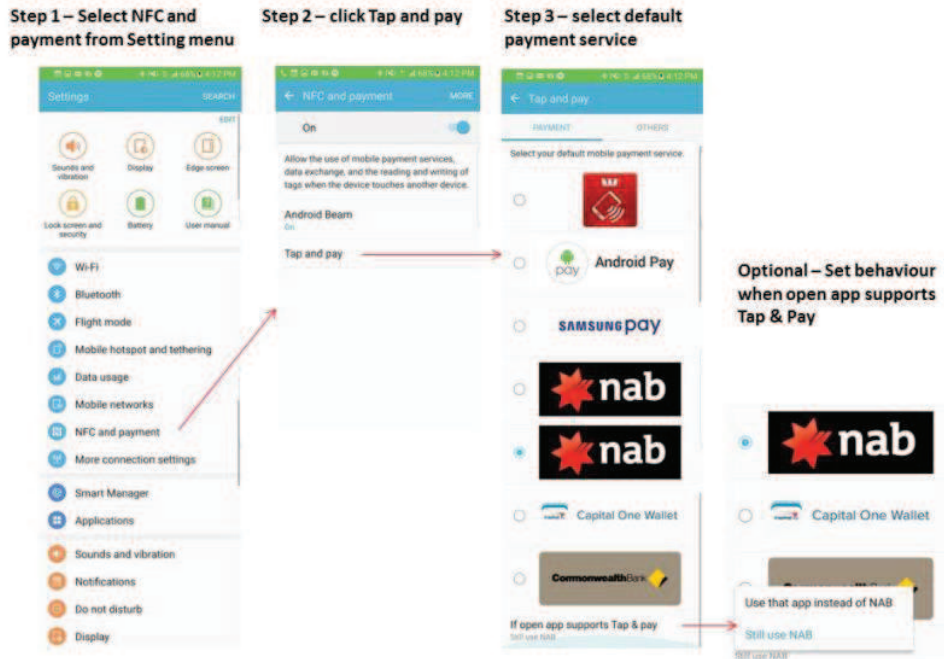
Paying with an issuer mobile wallet that is not the default wallet could also be achieved in three steps (and just as quickly): unlocking the phone, launching a different app, and touching the phone to the reader.

An additional step might be required if the user wanted to select a card other than the default card for that mobile wallet, but the mobile wallet could be intelligent enough to surface the card that the user is likely to want – for example, based on the card they have most often used at that retailer or at that time of day.

A further step (reflecting a particular wallets balancing of customer preferences around security and speed) might also be required if the mobile wallet needed another fingerprint for authentication, but the user might also have the option to rely on the fingerprint used to unlock the phone – particularly for purchases below a certain value.

The Applicants note that their current Android applications ask to be made the default NFC application on first launch and, in some cases, subsequently as well. This does not require the user to go into the device settings but it does add an additional step. This is because, when they were first developed, NFC payments would not reliably work on all Android devices through applications other than the default application.

As the Android operating system has evolved and more users have upgraded to more recent devices, it is no longer necessary for a mobile wallet to be the default NFC application and the Applicants will take advantage of these developments in future updates. The Applicants expect that if Apple were to provide access to the NFC function it would be on a basis as least as sophisticated as modern Android implementations and would not require an application to register as the default in order to work reliably.



Since switching between cards in a multiple-issuer wallet should be no faster or easier than switching between different mobile wallets, there is:

- no reason for the ACCC's contention that non-issuer wallets provide consumers with the 'additional convenience' of switching between payment cards at the point of sale<sup>27</sup> to play a role in the assessment of public detriments associated with the proposed conduct;
- no reason for issuers to avoid multiple-issuer wallets because of the competition between cards they provide; and
- no reason to assume that issuer wallets create an anti-competitive lock-in effect and non-issuer wallets (through their ability to load the cards of multiple issuers) limit that effect.

(c) Mobile wallets are more differentiated than cards in a mobile wallet

There is also more reason for a customer to choose a different mobile wallet than a different card in a mobile wallet carrying multiple cards. As a result, the competitive tension between payment card issuers may be increased by the ability to load different wallets on to mobile phones rather than the ability to house multiple cards in one wallet.

<sup>27</sup> Draft Determination, 29 November 2016, at [305].

The experience of using a mobile wallet with multiple cards is identical, no matter which card is chosen. There may be different *consequences* of using a different card – such as more or fewer reward points, higher or lower interest rates or international transaction fees, or benefits such as additional insurance or price guarantees, but these are not exposed by any of the current mobile wallets housing multiple cards, which rely on the customer to remember which benefits are associated with each card.

By contrast, issuer mobile wallets can provide a wide range of differentiating features, including notifying customers of the features associated with the cards associated with that issuer. For example, a customer entering a travel agent might receive a notification that one of their credit cards offers free travel insurance, or a wallet used overseas could default to the card that offers free foreign transactions.

This intelligence itself would be a differentiating feature that would drive competition between mobile wallets. Other differentiating features would include intelligence relating to personal finances and planning that would surface the most appropriate card to use in the circumstances; the range of store loyalty programs supported by the wallet; the storage and presentment of non-payment credentials such as licences and membership cards; and potentially the breadth of non-payment applications such as vehicle and building access.

(d) All of the Applicants are committed to multiple-issuer mobile wallets

For these reasons, the Applicants do not consider that competition between payment cards from different issuers will be significantly increased by mobile wallets that accept cards from multiple issuers. They further consider that providing their customers with their choice of mobile wallets, including multiple-issuer wallets, is likely to provide significantly more benefit, in terms of customer satisfaction and the volume and value of payments made using their payment cards, than reducing choice and requiring customers to either use an issuer's mobile wallet, switch issuers or stick to physical cards.

All of the Applicants will participate in Apple Pay as a necessary condition of access to the iPhone's NFC function. To be clear, the Applicants are seeking to collectively negotiate with Apple in relation to limited issues which form part of the *terms on which they will participate in Apple Pay*. Their participation in Apple Pay is the fundamental premise of any collective negotiation.

**[C-I-C]** Westpac, Bendigo and Adelaide Bank, and CBA-owned Bankwest have already launched with Android Pay. **[C-I-C]**

Since every potential user of Samsung Pay – that is, every customer with a Samsung phone – also has access to Android Pay, the imperatives for an issuer to invest in participation in Samsung Pay are different from its imperatives to participate in Android Pay. This is particularly the case in Australia, where the advantages of Samsung Pay – in particular, its compatibility with older magnetic stripe terminals – are reduced compared to other territories where NFC terminal infrastructure is less widespread than in Australia.

Since there are costs to implementing and testing every new mobile payment option, it is not surprising that issuers including the Applicants have tended to prioritise Android Pay over Samsung Pay.

- (e) There is no basis to infer that the Applicants will avoid non-issuer wallets

As set out in the Applicants' submission dated 21 November 2016, the fact that most of the Applicants have developed their own mobile wallets for the Android platform before participating in multiple-issuer wallets such as Android Pay and Samsung Pay does not reflect any intention to privilege their own mobile wallets. It simply reflects the fact that the opportunity for issuers to develop their own mobile wallets arose years before these multiple card mobile wallets were announced and available in Australia.

The Applicants commenced their evaluation and negotiations in relation to non-issuer mobile wallet providers (with the ability to house multiple cards) that did not demand exclusivity on their platforms as soon as they announced their expansion to Australia. Because these are genuine negotiations rather than the "take it or leave it" proposition that Apple is offering, it is taking some time to reach commercial agreement on all the issues. It has also taken time to implement and configure the necessary back-end technologies to support these wallets, and then to field-test these systems ahead of any public launch.

Given the relatively short period since Android Pay and Samsung Pay announced their intentions to expand to Australia, the time necessary to complete negotiations and implement and test these technologies, and the recent launch of Android Pay by three of the four Applicants, there is no basis for any inference that the Applicants are preferring their own mobile wallets over multiple-issuer mobile wallets – or that they would do so in relation to Apple Pay even if they were able to.

In fact, issuers are making considerable investments to ensure that their customers can use the mobile wallet of their choice as easily as possible. **[C-I-C]**

The Applicants do not consider that their incentives in relation to multiple card holding mobile wallets are any different from those of ANZ – who have launched their own mobile wallet and also participate in both Android Pay and Apple Pay – or any of the many issuers around the world who have also developed their own mobile wallets and are similarly participating in Android Pay and Samsung Pay.

All of these issuers appear to believe, as the Applicants do, that they will benefit from offering their customers access to a range of mobile wallets on platforms that allow it. There is no reason to consider that any of these banks – or the Applicants – would behave any differently if the Apple platform were to allow customer choice in mobile wallets by providing access to the NFC function.

**[C-I-C]**

- (f) Apple Pay does not foster greater competition than other alternatives

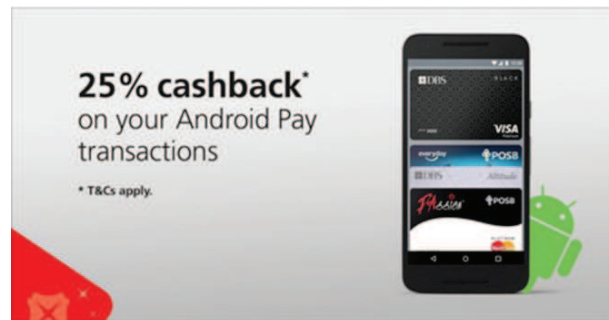
Apple provides examples of a number of promotions offered by card issuers to customers who use Apple Pay, and suggests that the reason for these promotions is that issuers have a particular need to incentivise customers to use their cards, rather than other issuers' cards, in the Apple Wallet due to the ease of switching between cards.

The Applicants suspect that the reason that many issuers offer promotions to customers who use Apple Pay may be that they are required or incentivised by Apple to offer these promotions in order to drive adoption of Apple Pay. While this is a legitimate competitive strategy and beneficial to consumers, it does not suggest that there is anything about the Apple Wallet itself that fosters competition between issuers.

Credit and debit card issuers frequently offer promotions to attract and retain customers. For example, American Express frequently offers cashback promotions for purchases with different retailers. ING Direct, ME Bank and Citi have all offered 2–5% cashback on contactless card purchases. They also compete on interest rates, interest free periods, balance transfers, annual card fees, insurance and reward points.

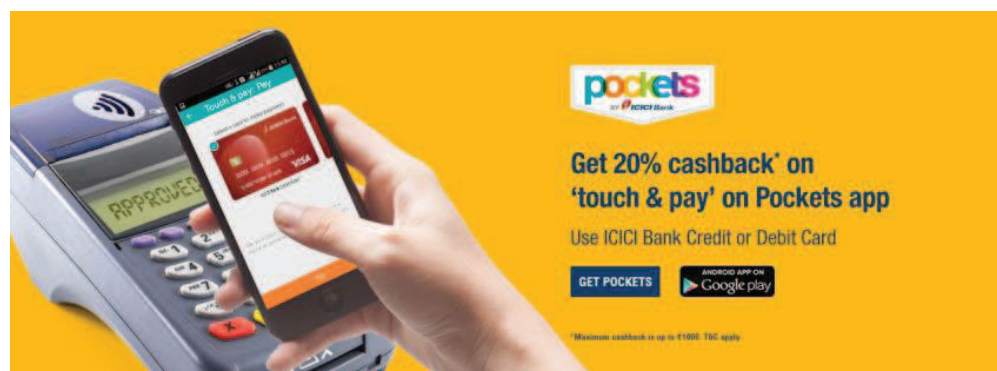
Of course, issuer mobile wallets can also offer promotions and special deals to customers who make payments through those mobile wallets, and the Applicants consider that this will be an important area of competition going forward. Apple argues that competition between issuers is not possible within a single-issuer mobile wallet, but this observation misrepresents the way that competition works. Competition between issuers exists through different single-issuer mobile wallets, through multi-issuer mobile wallets and through plastic cards.

Offers and promotions of the kind identified by Apple are also available on multi-issuer wallets such as Android Pay and Samsung Pay, and the Applicants and other issuers have had no hesitation in participating in those mobile wallets as well as offering their own mobile wallets on the same platform.



The Applicants expect that their customers will have their payment cards in Apple Pay and also in the issuers' mobile wallets – and potentially multi-issuer mobile wallets that are not associated with a phone manufacturer or software provider – and that competition would exist not only between cards but also between mobile wallets. This competition would include promotions and features associated with particular cards and also promotions and features associated with different mobile wallets.

It is not clear whether Apple itself offers promotions associated with the use of Apple Pay or simply requires or incentivises issuers to offer those promotions. If it is the latter, then individual issuers would simply be competing against themselves and the “competition” alleged by Apple would be muted. However, with NFC access, the Apple Wallet could compete on the basis of features such as number and range of payment, loyalty and other cards available and also ease of use; other potential multi-issuer wallets could also compete on the basis of promotions, and individual issuers' mobile wallets would continue to compete with each other.





It is important to note that this competition will not exist if the only way to complete an NFC payment on the iPhone is to launch the Apple Wallet (ie, the so called “Capital One model”). It is not likely that Apple Pay will identify to the issuer whether a payment has been made by launching the Apple Wallet directly or by launching the Apple Wallet from another app, so it will be difficult for an issuer to make this distinction for the purpose of allocating rewards to incentivise use of their own wallet.

More importantly, if the issuer has to pay the same fees to Apple regardless of which app a payment originates from, the incentives to compete with the Apple Wallet through promotions will be greatly reduced.

(g) Smaller card issuers will not be negatively affected

Apple’s submission dated 23 January 2017 suggests that smaller card issuers are limited in their ability to develop their own proprietary mobile wallets, and multi-issuer apps like the Apple Wallet app enable those smaller card issuers to compete in the digital space with larger card issuers.

The Applicants do not agree that smaller card issuers are significantly limited in their ability to develop their own mobile apps and note that Apple recognises that Credit Union Australia, Laboratories Credit Union, Lombard Finance, People’s Choice Credit Union, Police Bank and Heritage all have their own NFC-enabled mobile wallets on the Android platform. The Applicants understand that these issuers use a white-label mobile wallet product (redi2PAY) provided by Cuscal that can easily and cost-effectively be customised and deployed by the smallest issuers if they choose to do so.

However, the Applicants also recognise that some issuers may choose to prioritise multi-issuer wallets over deploying their own mobile wallet apps. For example, Bendigo and Adelaide Bank does not currently have its own proprietary wallet on the Android platform but has launched Android Pay.

The Applicants cannot see how authorising the proposed conduct will affect the ability of smaller card issuers to compete through multi-issuer mobile wallets.

- Authorisation will not prevent smaller issuers participating in Apple Pay or other non-issuer wallets if they choose to do so.
- Thirty-seven smaller card issuers are already participating in Apple Pay – representing the majority of smaller card issuers (and indeed the majority of all card issuers by number) in Australia.
- The argument that smaller issuers will suffer during the time it takes to complete collective negotiations and sign with Apple Pay does not make sense.

Until the Applicants sign with Apple, the smaller issuers that are already participating in Apple Pay have the competitive advantage of being able to differentiate themselves to customers as having the ability to offer integrated NFC payments on the iPhone platform. In fact, the Applicants are aware that their own customers are increasingly acquiring card products from these smaller issuers as well as ANZ and American Express in order to use Apple Pay.

### **9.3 The costs to consumers of switching digital wallets**

The Applicants understand the ACCC’s question to relate to the potential for an issuer mobile wallet to contribute to customer “lock-in” by increasing the cost of switching to a

new provider of payment card services. The Applicants take this as a different question to the ease of switching *between* mobile wallet applications where a customer already has multiple cards with multiple issuers, which is addressed in section 9.2(b) above.

In the Applicants' view, issuer mobile wallets contribute few if any costs to switching to a new provider of payment card services, and certainly no more – and in most cases fewer – costs than those imposed by a multiple-issuer mobile wallet. In both cases, if the customer wishes to use a new card to make mobile payments then that card must be tokenised and added to the mobile wallet, but an issuer mobile wallet can do this automatically, while a non-issuer mobile wallet will in most cases require scanning and verifying the physical card (a necessary security and payment integrity feature).

An advanced issuer mobile wallet that has been configured or has learned to meet the user's preferences may present some switching cost in that the user may have to configure a new mobile wallet or give it time to learn their preferences. However, this is a reflection of competition between wallets through enhanced product offerings to consumers and it is always open for new mobile wallets to collect or learn this information more efficiently than their competitors.

In addition, any mobile application including a mobile wallet may take some time for a new user to become familiar with, but it is equally open to any new mobile wallet to present a user interface that is intuitive and easy to learn. In either case, if a user is not interested in preserving or learning advanced features they will always be able to load their new cards into a non-issuer multiple card wallet such as Apple Pay.

The Applicants cannot conceive of any other switching costs that might be imposed by issuer mobile wallets. They agree with the ACCC that any such costs are unlikely to be significant, particularly compared to other costs such as updating direct debits and automatic payments. However, if the ACCC has any potential switching costs in mind, the Applicants would appreciate the opportunity to evaluate and respond in relation to those costs.

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## 10 The proposed conduct is not directed at stalling Apple Wallet's introduction

The Applicants note that the term of the authorisation seems to feature heavily in the assessment of public detriment. As noted above, the Applicants consider that providing customers with their choice of mobile wallets, including multiple-issuer wallets (such as Apple Pay), is likely to provide significantly more benefit, in terms of customer satisfaction and the volume and value of payments made using their payment cards, than reducing choice and requiring customers to either use an issuer's mobile wallet or else switch issuers or stick to physical cards.

As shown by customer research, customers have different preferences for the entity they want handling their payment transactions. Some customers prefer this to be done by their financial institution but others may wish to use Apple Pay.

Apple's submission dated 23 January 2017 emphasises that Apple is not involved in the payment process itself. However, Apple's role in the process, including whether it handles any aspect of payments and the information that may be exposed to or retained by Apple, is not necessarily well understood by all customers. Customers would incur significant information costs in researching the technical aspects of Apple Pay and

assessing Apple's role in it, and many customers will prefer to avoid these costs by using the mobile wallet of an institution they trust with their payments and personal information. These are the preferences suggested by the customer research and it is not a sufficient response to say that these customers are wrong.

The intention of the application for authorisation is to respond to this customer research and increase customer choice of mobile wallet at a critical point in the evolution of mobile payments in Australia. The scope of the collective negotiation is limited, the Applicants are commercially incentivised to conclude the negotiations quickly, and there is significant commercial pressure from consumers and the potential for those customers to sign up for a card with one of the various other institutions already offering Apple Pay (see Annexure A for participating card issuers).

It is not the intention of the Applicants to 'stall' or prevent the provision of Apple Pay in Australia, nor can the Applicants achieve this. Further, as discussed above, the only way the Applicants can influence cardholders to use their mobile wallet is through providing enhanced service offerings and the Applicants certainly have no ability to lock customers in to the continued use of their wallets as opposed to the range of wallets on offer.

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## **11 Authorisation will not reduce or distort competition in the supply of mobile operating systems**

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 notes a concern that this may impact on the consumer experience offered by Apple's competitively differentiated approach to offering an integrated smartphone platform.

The simpler user experience and clean design of the Apple smartphone is one of the reasons the Capital One model and NFC Tags will not satisfy the iOS customer base or provide them with real choice and competition. Providing NFC access will not compromise the customer user experience or simple design that is essential to the Apple brand. It does not compromise the user experience of the Android platform and simply requires an internal governance mechanism which directs the NFC controller as to which application is making the payment. For example, this governance mechanism could involve a set of decision rules as follows:

- Payment will be made by the NFC application that is open when the phone is presented to the NFC terminal.
- If the user does not have an application open, payment will be made using the application specified as the default NFC application.
- If the user has not specified a default payment application, payment will be made using the Apple Wallet.

Apple's submission dated 23 January 2017 goes into considerable detail about the complexities of different applications accessing the NFC interface for different functions such as payments, transit and loyalty cards. While these issues are not trivial, they are all within Apple's control and are all solvable within a suitable governance mechanism.

This governance mechanism would respect the user's preferences in a simple way – including the preference of any user who prefers Apple's fully integrated approach and will find their experience unchanged from the present experience. The default configuration for all new iPhones would be the Apple Wallet for all NFC applications, and users would only change this configuration if they felt another alternative was worth any additional complexity. If the alternative was unable to match Apple's simple experience, the user would undoubtedly return to the default.

Apple's platform would remain just as integrated as it is now, with Apple continuing to control the mobile hardware, the operating system, the default applications that ship with the mobile phone and the applications that are able to be installed on it. In fact, it is Apple's refusal to allow competition with the Apple Wallet that is anomalous: every other default Apple application has its competitors and has done since the App Store opened in 2008, a year after the introduction of the first iPhone. These applications have greatly enriched the user experience, and truly competitive mobile wallets will do the same.

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## 12 No impact on issuers not part of the negotiating group

With the exception of American Express, the Applicants understand that all issuers currently participating in Apple Pay in Australia were aware of the potential collective bargaining group and decided to pursue individual negotiations anyway.

The Applicants cannot speculate on whether American Express would consider itself to be placed at a disadvantage compared to the collective negotiating group on the issues subject to collective negotiation, but notes that American Express has a different business model as the issuer, acquirer and network operator in a three-party card scheme. They would also hope that if the negotiating group were to successfully negotiate NFC access to the iPhone, Apple would extend this access to other developers in order to maximise competition and consumer choice regardless of the terms initially negotiated.

Contrary to Apple's submission of 23 January 2017, the Applicants do not consider that the number of issuers who have agreed to Apple's terms demonstrates anything about the reasonableness of those terms. Smaller issuers in particular are likely to have very little bargaining power when faced with a "take it or leave it" offer from Apple and are also likely to have felt a great deal of commercial pressure to accept whatever terms Apple was offering in order to allow their customers to make mobile payments with the iPhone.

[C-I-C]

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## Annexure A - Apple Pay participating banks and card issuers in Australia<sup>28</sup>

American Express	Laboratories Credit Union Ltd.
ANZ (American Express credit cards, MasterCard credit cards, Visa credit and debit cards)	Lombard Finance
Bank Australia	Maritime Mining & Power Credit Union Ltd.
Bank of Sydney	MyState Bank Ltd.
Beyond Bank Australia	Northern Inland Credit Union
Big Sky Building Society Ltd.	Once Credit
CAPE Credit Union Ltd.	P&N Bank
Central West Credit Union Ltd.	People's Choice Credit Union
Community Alliance Credit Union Ltd.	Police Bank
Community First Credit Union Ltd.	QT Mutual Bank
Credit Union SA Ltd.	Select Encompass Credit Union Ltd.
CUA	South West Slopes Credit Union
Defence Bank	Sydney Credit Union Ltd.
EECU Ltd.	Teachers Mutual Bank
First Option Credit Union	The Mac
Goldfields Money Ltd.	Warwick Credit Union Ltd.
Goulburn Murray Credit Union	WAW Credit Union
Horizon Credit Union	Woolworths Employees' Credit Union
Holiday Coast Credit Union Ltd.	Wyong Shire Credit Union
Intech Credit Union Ltd.	

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<sup>28</sup> <https://support.apple.com/en-au/HT206638>

## Annexure B – “Day in the life with NFC” slides showing potential everyday NFC applications beyond mobile payments

### A Day in the Life

*With an ever increasing number of NFC applications*



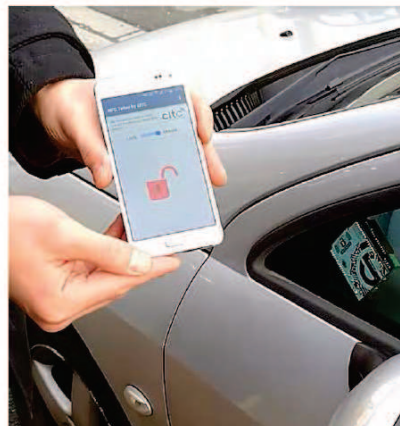
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### Driving to work

*Access Control*



- Car sharing (e.g. GoGet, Car Next Door and Carhood) allows John to rent a car for a short period of time and only pay for his usage. John, uses a mobile application to find, select, reserve and pay for the trip. He'll be dropping it off in the city after his doctor's appointment
- Once at the vehicle, John taps his smartphone on to the NFC reader integrated into the vehicle windshield or door handle, which identifies him and authorises his use, unlocking the vehicle
- Interestingly, the same process is being applied to charging stations for electric vehicles

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## Parking at the office

### *Ticketing*



- John has the benefit of a more streamlined parking experience, and no longer has to worry about losing his parking tickets. He simply taps his smartphone to the ticket machine upon entering the car park and the required details are transferred via NFC
- When John is ready to leave the car park, he holds his smartphone to the terminal or automatic ticket machine to validate his parking period and make the payment. He can also track his usage and receives an electronic receipt



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## Picking Up A Gift

### *Loyalty and Discount Coupons*



- Once John has selected the gift in the store, he seamlessly redeems a coupon (or loyalty points) and pays the balance of his purchase with his personal debit card (his default card), in a single transaction using the NFC interface on his smartphone
- This reduces up to 20 seconds off John's purchasing process when compared to scanning the discount voucher manually, and saves him the trouble of having to remember and search for the correct voucher
- Note: The brand gains information and insight on the retailer collecting the coupon, providing information on your most profitable outlets, redemption times, trends and the market segment



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## At The Doctors

### Claims and Prescriptions



- John uses the Medicare App on his phone to see the doctor. His ID is authenticated using the NFC interface and automatically pays the gap between the doctor's fee and Medicare rebate; he has pre-linked the app to his personal credit card
- All John's medical records including any prescriptions are automatically and securely stored. Payment can be made automatically when the prescription is presented to the pharmacist through the NFC interface

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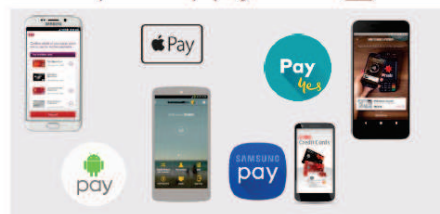
## Train To The Airport

### Transportation Fares

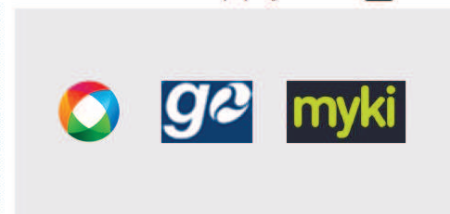


- At the train station, on his smartphone John selects the card with which he wishes to pay and then enters through the ticketing barrier using his smartphone to tap the NFC reader
- John has the option of using the transit authority's own payment app or an open loop card in one of his eWallets (or a tourist coupon that he downloaded when making his travel booking)

#### Open-Loop payments



#### Closed-Loop payments



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## Airport Check-In



### Identification and Membership

- At the airport, a self check-in option is available using the NFC interface on John's smartphone to accurately identify and verify his identity and details at the airline's kiosk
- John is a frequent flyer and has access to his airline's airport lounge via tapping his smartphone on the entrance touchpad with the NFC interface (the airline can also issue virtual passes on to a smartphone device to those passengers it wants to encourage to become lounge members)



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## Taxi To The Hotel



### Payment



- Upon arrival, John takes a taxi from the airport to his hotel. At the end of the journey, he pays for his ride selecting the mobile wallet containing his corporate card that is loaded on to his smartphone
- His company can also issue single-use ride coupons that can be redeemed through his phone's NFC

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## Arriving at Hotel



### *Access Control*

- During his journey from the airport, John checked into his hotel online
- As he arrives at the hotel, John's smartphone (via the hotel app) informs him that his room is available, that he is able to go there directly (bypassing the queue at the check-in desk) and that he can use his smartphone with the NFC reader attached to his room's door to gain access - streamlining his travel experience

