

Authorisation applications A91546 & A91547



Submission by Apple
26 February 2017

1. Introduction

In November 2016, the ACCC issued its Draft Determination denying the application of a collection of banks, who represent some 70% of Australian cardholders, to engage in collective negotiations and a collective boycott because the ACCC was not satisfied that doing so is likely to result in a net public benefit.

Since November 2016, the same market dynamics described by the ACCC in its Draft Determination which led to the denial of the application continue to exist – it is a nascent, fast-moving industry exhibiting an extraordinary amount of innovation, as new payment options emerge almost daily as options for consumers alongside the existing contactless presentments methods.

Since November 2016, Apple has not changed its position, Apple will never enter into collective negotiations with the applicant banks to provide direct access by a bank's proprietary issuer digital wallet to the embedded NFC controller because doing so would undermine the simplicity and ease of use as well as the security that consumers expect when using Apple products, not just in Australia, but globally. This has always been Apple's position both publicly and with any bank in the world that has requested that. There has not been, because there cannot be, any evidence presented that would suggest that Apple is going to redesign its products to allow for a less secure and worse customer experience in order to appease a collection of banks in one country.

The only real change since November 2016 is the banks have, once again, altered the conduct they seek to have the ACCC authorise. However, in its Draft Determination, the ACCC accurately determined that the remaining conduct sought by the applicant banks would lead to public detriments and consumer harm.

Therefore, the only effect of granting this application would be to further delay the expansion of Apple Pay in Australia. This delay, as the ACCC correctly pointed out in its Draft Determination, would deny Australian consumers the public benefits that would accrue from its expansion, including increased digital disruption to current contactless presentment methods, which are currently dominated by many of the same applicant banks bringing this application.

Apple urges the ACCC to confirm its Draft Determination of November 2016 not to grant authorisation because it cannot be satisfied in all the circumstances that there is any cogent evidence that the proposed conduct would result or be likely to result in a public benefit that outweighs the likely public detriment.

2. Modified applications remain anticompetitive and will continue to result in substantial consumer harm

The latest strategic modifications made by the Applicants to the conduct for which authorisation is sought, even assuming that those changes have not rendered the application invalid, should not alter the ACCC's decision in its Draft Determination to deny authorisation because:

1. the Commission's Draft Determination did not turn on the issues of collective negotiation that the applicant banks have just recently removed in their application; and
2. the reduction in the period of authorisation sought to 18 months remains a very substantial period, given the Applicants have been effectively giving effect to a boycott since at least April 2016 (a period of 10 months and counting) when ANZ's decision to launch Apple Pay for its cardholders was described as ANZ choosing *"to pull a fast one on their competitors and their joint applicants"*.¹

¹ Lance Blockley, spokesman for the applicant banks, quoted in <http://www.news.com.au/finance/business/breaking-news/anz-pulled-fast-one-on-apple-pay/news-story/f559df72dc610d2e8c7e9fcea10dd571>

By way of example, none of the below observations made by the Commission in its Draft Determination have been addressed or are in any way affected by the Applicants' modifications:

- the existing high level of innovation in mobile payments products and services as well as the rapid entry and exit of new products demonstrating the highly dynamic nature of competition in the market (p69);
- contactless card payments compete with mobile payment solutions (p198);
- the use of NFC tags increased following Apple Pay's launch and represent a competitive response (p244);
- the availability of embedded NFC on Android already exerts a competitive tension on Apple Pay (p252);
- granting the application would "delay the expanded coverage of Apple Wallet, which may lessen the degree of competition between Apple Wallet and issuer digital wallets, which, in turn, may result in slowed development and uptake of digital wallets for the length of any delay" (p267);
- the magnitude of any benefits of NFC access are mitigated by existing opportunities available to the applicant banks to compete (p291);
- granting the application would lead to less competition between group participants (p298), which benefits the development of issuer wallets over non-issuer wallets (p322);
- the delay of Apple Pay will lead to reduction in consumer choice and consumer welfare and a distortion of competition between Apple and other mobile operating system providers (p331; pp335-342).

It is clear that the application for authorisation has already interrupted the commercial operation of the market and delayed the potential disruption to those banks' control of the traditional presentment methods they make available to their cardholders by collectively boycotting Apple Pay during the application process itself. The Applicants sought and obtained a 3 month extension to the 6 month statutory timetable for final determination ostensibly to be able to address matters raised more comprehensively and yet, other than modify the scope of the conduct for which authorisation is sought, the Applicants proffered no persuasive new evidence or arguments in support of their application during that 3 month period that undermines the ultimate conclusion of the Draft Determination.

3. Validity of the applications

There is also a question over the validity of the applications for authorisation themselves under section 88 of the Competition and Consumer Act 2010 (CCA), owing to:

1. the ambulatory nature of the conduct that is the subject of the application, which has been amended in multiple material respects on three occasions; and
2. the fact that the remaining collective bargaining conduct for which authorisation is now sought is not the conduct for which authorisation was formally sought under the applications lodged by the Applicants on 25 July 2016.

Ambulatory nature of the conduct for which authorization is sought

The conduct the subject of the application has been amended in multiple material respects on no less than three occasions during the course of the Commission's review of the application, without the application itself being formally varied and, with the exception of the most recent of those changes (which was disclosed publicly to Apple and other interested parties on 13 February 2017), without the relevant changes being directly brought to the attention of interested parties.

The continual modification of the conduct for which authorisation is sought calls into question the validity of the application, given the provisions of Part VI have not been able to operate such that interested parties have not been afforded a full and proper opportunity to respond to the issues accordingly.

Proposed conduct for which authorisation is now sought goes beyond the scope of the conduct that is the subject of the applications for authorisation

The remaining collective bargaining conduct for which authorisation is now sought, apparently directed only at seeking access to the NFC controller in Apple devices and reasonable App Store access, does not relate to matters that are relevant to, nor addressed in any way by, the terms of the Apple Pay Issuer Agreement that would be the subject of the proposed collective negotiation with Apple.²

The terms and conditions of the Apple Pay Issuer Agreement do not address NFC controller access nor the App Store terms and conditions, as these are not matters that are relevant to the Apple Pay platform that Apple undertakes to make available to the issuer under that Agreement.

4. Speculative nature of the claimed public benefits

Even if the applications are valid, the Commission must not grant authorisation under s 90(5B) of the CCA unless it is satisfied in all the circumstances that the proposed conduct would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.

"...for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating. It is not enough that the benefit or detriment is speculative or a theoretical possibility. There must be a commercial likelihood that the applicants will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit or the lessening of competition giving rise to the public detriment. We must be satisfied that the benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory", to use the words of the Tribunal in Re Rural Traders Co-operative (WA) Ltd (supra) at 263."

Qantas Airways Limited (2005), ACompT 9 at [156]

No commercial likelihood or real chance of collective negotiations achieving the public benefits the applicants banks are claiming related to NFC controller access

There is simply no evidentiary basis to conclude that there is a commercial likelihood or real chance, that collective negotiations in respect of NFC controller access could be successful in the face of Apple's clearly articulated and repeatedly documented public position that it will not modify its global approach to the Apple Pay platform to provide direct access by a bank's proprietary issuer digital wallet to the embedded NFC controller because doing so would lead to a less secure, less seamless experience for consumers globally and require Apple to invest significant resources to design a new, different platform that is compatible with open NFC access but demonstrably suboptimal in terms of consumer security and user experience.

Apple's position will not change, whether the Applicants are granted authorisation to negotiate collectively or not. The applicants have no evidence to suggest that the consistent position taken

² See the Applicants' description of the conduct to be authorised on page 4 of the 25 July 2016 submission accompanying their applications for authorisation.

by Apple with respect 3,500 of the world's banks would alter at the collective request of the applicant banks in Australia.

As articulated by the Australian Competition Tribunal in *Qantas Airways Limited*, it is not enough that the claimed public benefit is speculative or a theoretical possibility. The Applicants must be able to establish a causal nexus between the proposed authorised conduct and the public benefits being achieved.

Were the proposed conduct to be authorised:

1. in a hypothetical world in which the Applicants could, contrary to all other evidence, convince Apple to redesign its products as a result of collective negotiations, the public benefits claimed by the Applicants would be weak at best in comparison to the clear detriments and significant consumer harm flowing from the dampening of competition and innovation, as described by the Commission in its Draft Determination;
2. in the real world in which Apple is not going to engage with the Applicants for the conduct which they are seeking, none of the public benefits claimed by the Applicants could materialise while, at the same time, an innovative alternative presentment method that offers consumers a simple and secure payment process (and lead to increased overall competition) would be denied to 70% of cardholders in Australia for at least an additional 18 months.

In these circumstances, the Commission must deny authorisation to the Applicants.

No commercial likelihood or real chance of collective negotiations achieving any public benefits with respect to changes to terms and conditions of App Store

As outlined in Apple's submission of 23 January 2017. Apple has in place, and publishes publicly, a universal set of terms and conditions of access to the Apple App Store that aim to ensure that apps conform to Apple's technical and consumer experience requirements and minimum standards. This is also made clear in Apple's App Store Review Guidelines, published at <https://developer.apple.com/app-store/review/guidelines/>.

It is unclear on what basis the Applicants apprehend that reasonable access to the Apple App Store would be denied to them and there is no nexus between the terms and conditions of access to the Apple App Store and the Apple Pay platform.

Given the global nature of the Apple App Store, and the array of financial apps that do not utilise Apple Pay in any way, it is beyond speculative to suggest that Apple would amend its App Store terms and conditions for the sake of individually impeding or preventing banks in Australia from making mobile payment apps available via the App Store. The applicants have advanced precisely zero evidence of the likelihood of this occurring despite numerous examples of apps competitive with Apple's apps being among the most popular on Apple devices.

In these circumstances, the Commission must deny authorisation to the Applicants.

5. Claimed public benefits, even if they could arise as a result of authorisation, are not material and are substantially outweighed by the resulting public detriment and significant consumer harm

Apple has detailed in previous submissions the detrimental impacts that would result if it granted direct access by a bank's proprietary issuer digital wallet to the embedded NFC controller.

The Applicants have provided no reliable objective evidence to dispute these detriments and rely in large part in their most recent submission on survey evidence, the objective basis for which has not been disclosed. As confirmed by the Federal Court of Australia Survey Evidence Practice Note (GPN-SURV), issued 25 October 2016, "*Survey evidence can give rise to a number of problems which may result in it not being admitted into evidence or being given little or no weight*".

Section 4.2 of the practice note details a long list of issues that commonly undermine the reliability of survey evidence, including the use of irrelevant and ambiguous questions. Without knowing the format and manner in which the survey was conducted, little weight can be given to its results.

To the extent that the Applicants have provided any new or relevant information in their latest 54 page submission, much of that information is, at best, unsubstantiated and often inaccurate.


Given the time that interested parties have been afforded to respond to the Applicants' latest submission, Apple has not had an opportunity to thoroughly assess each of the claims made by the Applicants in that submission. Of note, however, are the following clear inaccuracies:

Applicants' Claim	Reality
<p>The Applicants claim, in respect of developing their own apps with direct NFC access on Apple devices, that they will seek to maintain the seamless user experience that Apple customers demand and that they will work with Apple to ensure that they can co-exist on the iPhone and switching between them is simple and convenient.</p>	<ul style="list-style-type: none"> • Apple has previously set out in significant detail how this would undermine the simplicity and ease of use of the Apple Wallet. • The only way to create a "seamless" payment experience is through the Apple Wallet, directly paired with the NFC controller for payments. • If, as stated by the Applicants, the goal is to maintain a seamless user experience, then the Applicants should work with Apple to develop innovative bank apps that take advantage of the Apple Pay platform for the actual presentment of cards but otherwise include as many non-payment features as the banks can come up with for their own apps in competition with one another and with the Apple Wallet.
<p>The Applicants claim that they already offer multiple-issuer wallets such as Android Pay or are in negotiations to offer multiple-issuer wallets and that, to the extent they have not launched Android Pay or Samsung Pay, this is because they are in "genuine negotiations" on terms rather than the "take it or leave it" proposition that Apple is offering</p>	<ul style="list-style-type: none"> • The Applicants' claims paint a misleading picture of the number of their cardholders to whom Android Pay has actually been made available to distract the ACCC from the reality, even though there are vague promises it is "coming soon", the major applicant banks do not currently offer multiple-issue wallets, even with firms that have always provided what the banks have claimed they are seeking with this application. • Bendigo, the smallest of the Applicants by a significant margin, is the only one that offers Android Pay through its main card channel. • Android Pay is available through Westpac only for Westpac MasterCard customers and is not available to Westpac's other cardholders nor to MasterCard customers of Westpac's subsidiaries. • CBA has made Android Pay available only

	<p>to customers of its BankWest subsidiary.</p> <ul style="list-style-type: none"> • NAB has not made Android Pay available to any customers. • The Applicants' claim that they have not launched Android Pay and Samsung Pay because they are in "genuine negotiations" with Google and Samsung is simply not credible. Android Pay was launched just after Apple Pay in the last quarter of 2014 and started business development not long after in Australia, announcing in December 2015 that they were launching in early 2016 and actually launching some banks in July 2016. That is a significant period within which the Applicants could have come to terms with Google to launch Android Pay on their major card channels. • It is also false to suggest that Apple Pay is offered on a "take it or leave it" basis. Apple has negotiated the Apple Pay Issuer Agreement with a number of issuers now in Australia, with those negotiations varying in length and complexity.
The Applicants claim that ANZ cannot offer an issuer solution to those iPhone customers who would prefer this option	<ul style="list-style-type: none"> • ANZ has the opportunity to offer its own proprietary solution like Capital One has done on iPhone should it wish to do so. • Apple has provided details previously of banks in other jurisdictions, such as Capital One, developing issuer solutions on iPhone. • The Capital One example is one example that demonstrates the features that Capital One has decided to offer its customers through its own app on iPhone and has invested in innovation to do so. However, there are numerous wallet features and app functionalities that banks can develop and implement within a proprietary banking app on iPhone using the Apple Pay platform only for the purpose of routing the actual payment in a secure and convenient manner.
The Applicants claim that the Capital One Wallet is the only example of an Apple Pay issuer offering a proprietary app on iPhone	<ul style="list-style-type: none"> • As Apple has enumerated previously, there are a number proprietary payment apps supported on the iPhone, including Chase Pay, AliPay, WeChat Pay and many others. • Apple is aware of several other banks who are under development with apps containing features similar to the Capital One Wallet and who plan to launch those

	<p>apps shortly.</p> <ul style="list-style-type: none"> Where other banks have chosen not to pursue the same implementation path as Capital One, this is likely because they consider the direct payment experience offered through Apple Wallet to be a superior experience.
<p>The Applicants claim that the Capital One Wallet does not offer users a truly integrated experience and that users in fact must exit the Capital One Wallet to use Apple Wallet to make a payment</p>	<ul style="list-style-type: none"> As Apple has previously demonstrated to the Commission, the user experience in making a payment from within the Capital One Wallet is almost identical to the user experience in making a payment from within a proprietary bank app on an Android device with direct access to the NFC controller. The only relevant difference, which is not relevantly detectable by the user and does not degrade the user experience, is that the payment itself in the Capital One model is routed via the Apple Pay platform and the user can be seamlessly returned to the banking app once the payment is completed. It is likely that banks are objecting to this implementation not because the user experience is less "truly integrated" but because such an experience requires the bank to incur a fee.
<p>The Applicants claim that the Apple Wallet receives direct information about a transaction from the NFC interface that is not available to issuer wallets on the iPhone</p>	<ul style="list-style-type: none"> This reflects a lack of understanding on the part of the Applicants about how the Apple Pay platform operates and can interact with bank apps with Apple Pay functionality and, indeed, how Apple Pay interacts with NFC technology. Apple has previously detailed the flow of transaction information through the Apple Pay platform on page 17 of its 23 January 2017 submission and reiterates that that transaction information can be made available through any bank app such as the Capital One Wallet on iPhone. By way of supplement to the information previously provided, Apple uses minimal information provided by the NFC controller directly within Apple Pay. The "rich" transaction data is provided through the issuer and network data networks and in fact, does not pass through Apple servers. All of the rich transaction data available to Apple Pay on the device is available to the issuer through the data networks (in the same way it is provided to Apple Pay on the device). The data that Apple uses

	<p>from the NFC controller is primarily data related to communicating to the user that NFC communication started and ended. The terminal (and NFC controller) does not return any data to suggest a transaction is successfully completed or authorised (as the Applicants suggest). In addition, the data that Apple Pay uses to indicate to the user that a transaction is successfully initiated is exactly the same experience that can be utilized by the banking apps in initiating a payment through the banking apps. Said another way, the data used in the presentment of the transaction status in the Capital One Wallet is exactly the same that is used and presented in the Apple Wallet. There is no discriminatory behavior.</p>
<p>The Applicants claim that customers prefer a financial institution rather than a technology company such as Apple providing NFC payment solutions</p>	<ul style="list-style-type: none"> • This demonstrates a fundamental flaw in the survey conducted by the Applicants as it reflects a misunderstanding or misrepresentation as to how the Apple Pay platform operates. • Apple Pay is offered to cardholders by their bank, so it is in fact a bank-supported wallet. • Apple Pay does not exist separately from the existing card payment ecosystem. • Apple Pay is a secure presentment method. It provides a service to the issuer to enable existing credit cards issued by the issuer to be presented digitally in a secure, tokenized form and using a single use dynamic cryptogram. This provides optimum security and privacy for the user in the presentment of his or her card payment details to the merchant. • The payment itself is routed through the existing card network system, and it is the financial institution rather than Apple that is processing the payment itself, as is the case in existing card transactions.
<p>The Applicants claim that the prevalence of issuer marketing initiatives, in particular those offering promotions to card holders for using their cards in Apple Pay (over other issuers' cards) does not evidence increased competition amongst credit card issuers driven by the advent of Apple Pay as a multiple card app because issuers are required by Apple to promote Apple Pay in order to drive adoption.</p>	<ul style="list-style-type: none"> • It is true that Apple often negotiates marketing commitments from larger issuers as a means of promoting the availability of Apple Pay generally. However: <ul style="list-style-type: none"> ○ the form of advertising adopted by issuers clearly demonstrates the desire of those issuers to offer incentives to customers to use their cards within Apple Pay over

	<p>other cards, rather than merely advertising the availability of Apple Pay in itself</p> <ul style="list-style-type: none">o 
--	--