PUBLIC REGISTER VERSION

RESTRICTION OF PUBLICATION OF PART CLAIMED

Confidential information marked in red on pages 3, 4, 10, 11, 12, 13, 15 and 23

Authorisation applications A91546 & A91547

Submission by Apple

23 January 2017

Contents

1. Introduction

Apple welcomes the Draft Determination published by the Commission on 29 November 2016 proposing to deny authorisation for four of Australia's largest banks and other potential issuers who may wish to join in, to negotiate jointly with Apple the terms of access to Apple Pay and to jointly boycott Apple Pay during the period of such negotiation.

Apple:

- agrees with the ACCC's conclusion that detriments by way of significant consumer harm will inevitably result from an authorisation of cartel conduct of the kind proposed by the applicant banks; but
- does not agree that there is reliable evidence demonstrating that any of the speculative "benefits", as required by the statutory test, claimed by the applicant banks are "likely to arise" or could not be achieved without the relevant collective conduct which would otherwise be unlawful.

Apple's previous submissions have provided clear evidence that:

- the outcomes sought by the applicant banks, assuming these are the banks' true objectives, would undermine the security and simplicity that customers expect when using Apple products to make payments;
- the granting of authorisation will not lead to any changes in Apple's stance in respect of the matters in relation to which the applicant banks seek to negotiate, and therefore can not lead to any of the public benefits claimed by the applicant banks;
- the true outcome of authorisation will be to further delay, or even block, the expansion of Apple Pay to the 65-70% of Australian cardholders represented by the applicant banks and deny those cardholders the ability to use, or at least discourage those customers by way of discriminatory fee structures from using, the Apple Wallet app to easily select between cards of competing issuers at the point of sale, as well as to deny access to the Apple Wallet app's higher security and ease of use, and to many non-payment features.

Apple does not seek to repeat those submissions here.

Rather, Apple has reviewed the Draft Determination and, in the balance of this submission, has sought to respond to the issues on which the Commission has specifically sought further information and evidence or on which further clarification could assist the Commission.

2. Recent Developments [confidential]

[redacted]

[redacted]

[1] [redacted]

[redacted]

[redacted]

[redacted]

3. Specific comments in response to Draft Determination

3.1. Authorisation will result in reduced competition in the provision of payment card services

> ***"The ACCC seeks submissions on these issues, including specifically on:***
>
> ***a. the role of non-issuer digital wallets in facilitating consumer switching and competition between payment cards from different issuers***
>
> ***b. the costs to consumers of switching digital wallets, particularly relative to other barriers to consumer switching such as re-establishing direct debits***
>
> ***c. the ability and incentive of issuers to charge their fees to artificially discourage their cardholders from using Apple Pay" [308]***

> ***"The ACCC also considers that, to the extent the proposed conduct artificially biases the development of issuer digital wallets over non-issuer digital wallets, the potential benefits of increased competitive tension between payment card issuers that may be promoted through non-issuer digital wallets, may be lost. The ACCC is seeking submissions on these issues to better inform its final view" [322]***

Multi-issuer apps like the Apple Wallet app enhance the capacity of smaller card issuers to compete against larger card issuers

Unlike larger card issuers (such as the applicant banks), smaller card issuers are limited in their ability to develop their own proprietary digital wallets. Multi-issuer apps like the Apple Wallet app enable those smaller card issuers to compete with the power of the larger card issuers in the digital space by giving their customers an avenue through which to present their card digitally, set that card as the default transaction card within the multi-issuer app, and choose between that card and any other cards they have stored in the multi-issuer app at the point of sale.

If the applicant banks are granted authorisation to continue to block or delay the expansion of Apple Pay to greater numbers of cardholders in Australia, this will have a significant impact on smaller card issuers who already, or could in the future, rely upon Apple Pay as a means of securing a digital presence in competition with the big banks.

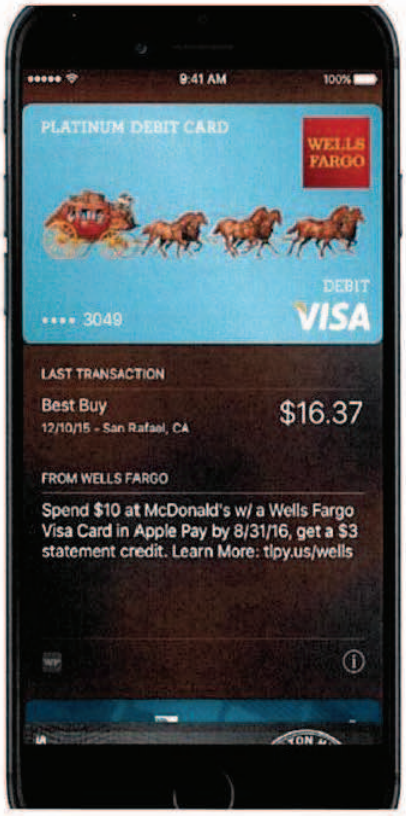
The table at **Annexure 1** shows the number of smaller card issuers who have not developed their own issuer digital wallet and instead rely on one or more of Apple Pay, Android Pay and Samsung Pay to provide their customers with a digital wallet service. The table also demonstrates, as has been submitted previously, the clear preference amongst the applicant banks for their own proprietary issuer digital wallets, with many not offering Android Pay or Samsung Pay despite making it clear during the course of this authorisation application that the issues raised by the applicant banks as obstacles to them agreeing terms with Apple to make their cards available to customers through Apple Pay do not apply to Android Pay or Samsung Pay (eg Samsung and other Android-based devices already offer the applicant banks embedded NFC access for proprietary issuer digital wallets).

Evidence of competition among issuers offering Apple Pay

Apple Pay fosters competition between payment card issuers at the point of sale due to the ease with which customers can switch between cards within the Apple Wallet app. This is not possible within the banks' own proprietary issuer digital wallets, which limit the choice for the customer to only payment cards issued by that bank.

The examples below of issuer marketing materials show issuers in the United States, United Kingdom, and Canada offering promotions to card holders for using Apple Pay. It is easy for consumers to set a certain payment card as the "default" card and switch between payment cards, so card issuers offer consumers discounts and promotions to convince consumers to use their payment cards in Apple Pay. Apple expects that, with a range of payment cards available in Wallet in Australia, the same increase in competition between issuers for payment services is likely to occur in Australia as has been evident in these other jurisdictions.

US Examples:



citi | American Airlines AAdvantage

EARN
2X AMERICAN AIRLINES AADVANTAGE® MILES
on purchases through 06/30/15[1] up to 2,500 miles

OR

USE CITI® CARDS WITH APPLE PAY™ TO EARN
10X AMERICAN AIRLINES AADVANTAGE® MILES
on purchases through 06/30/15[1] up to 2,500 miles

Enroll with one click >

See Offer Details

citi Pay

ENROLL

It's easy to sign up.

Respond by 05/31/15.

See Offer Details

Enroll with one click >

EARN

It's fast and easy to earn 2X AAdvantage® miles.

Use your Citi® / AAdvantage® Gold American Express® card to earn **2 miles per $1 spent** on everything you buy, including purchases[1] like:

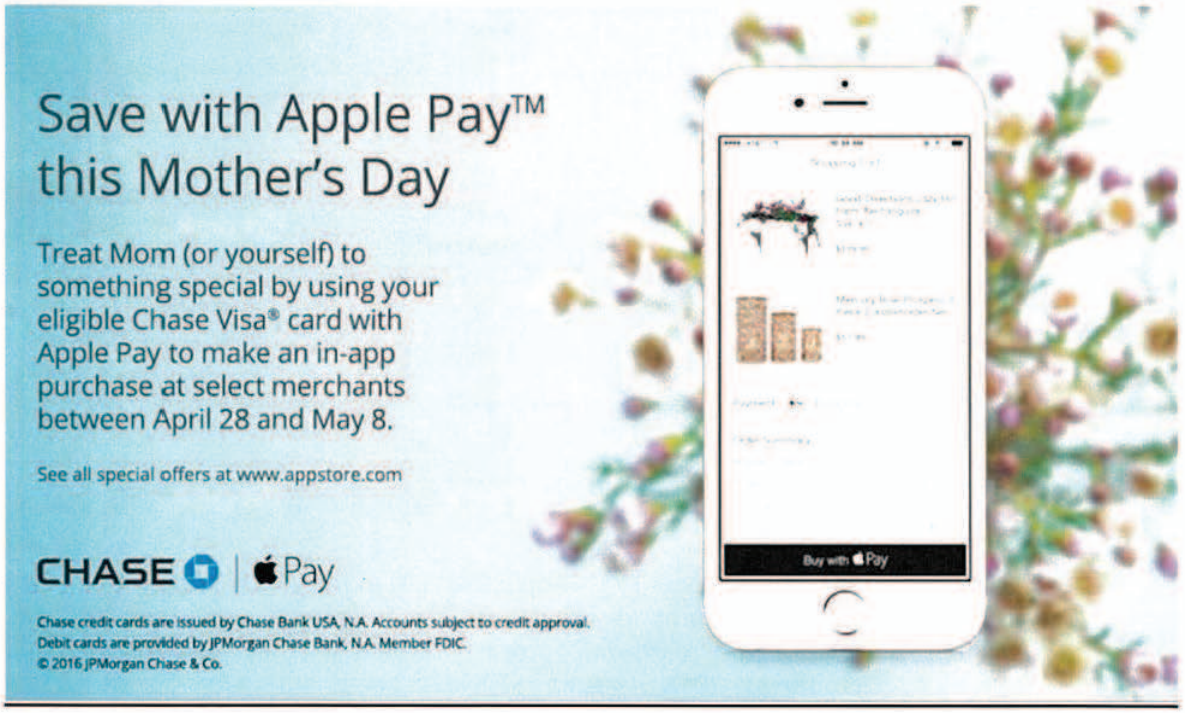
Dining | Shopping | Groceries | Travel

and everything else!

BONUS - If you use Apple Pay™ with your Citi® / AAdvantage® Gold card you can earn a total of **10 AAdvantage® miles per $1 spent** on purchases.

Earn up to 2,500 AAdvantage® miles through 06/30/15.

It's just another great way to get more out of what you buy with your card.



Canadian Examples:

CIBC | Pay

Use your CIBC Aventura credit card with Apple Pay*.
Problems viewing this email? Click here.

Make 5 purchases using your CIBC Aventura credit card with Apple Pay and get a <$20> cash bonus**.

Using your CIBC card with Apple Pay is even more rewarding with this exclusive, limited-time offer! Make 5 purchases using your CIBC Aventura credit card with Apple Pay between October 1, 2016 and October 31, 2016 to earn a <$20> cash bonus**!

Where can you use Apple Pay?

Pay with confidence using your CIBC Aventura credit card* with Apple Pay to make in-store and in-app purchases at participating merchants. Apple Pay can be used anywhere contactless payments are accepted.

CIBC with Apple Pay - simple and secure, it's the easy way to pay

Learn more about Apple Pay.

UK Example:

TSB with Apple Pay. The new, secure way to pay plus 5% cashback.

Earn 5% cashback on your first £100 of contactless spending on your Plus account every month.
Plus 5% cashback on your first £100 of Apple Pay spending every month, if you have an eligible Credit Card.

TSB | Pay

Further examples are provided in **Annexure 2** to this submission.

By contrast, in the absence of the competitive pressures which arise as a consequence of the ease of switching between cards using Apple Pay, each of the applicant banks' own proprietary issuer digital wallet on Android devices requires the user to set that app as their default NFC payment app before a transaction can be completed.

The default wallet app solely controls the NFC radio in the device. This means that:

- only the card(s) of one issuer will be available to the user at the point of sale (unless the user goes through the additional steps required to recalibrate the default app settings prior to making a further purchase), and

- the user will no longer have the ability to take advantage of the automatic presentment of non-payment card functionalities of multi-issuer wallets like the Apple Wallet app, as explained in section 3.6 below.

The video material enclosed with this submission demonstrate the ease with which consumers can switch between cards of competing issuers at point of sale using Apple Pay, which is in stark contrast to the difficulties facing consumers who wish to do so using the current apps offered by the applicant banks on Android.

Ability and incentive of issuers to charge fees to discourage Apple Pay usage

Apple has previously demonstrated the clear incentives for the applicant banks to artificially bias the development of their own proprietary issuer digital wallets and discriminate against the use of Apple Pay by imposing transaction fees on Apple Pay transactions while not charging fees for alternative payment methods provided by the banks.

Put simply, the applicant banks have the

- means;

- motive; and

- opportunity,

to disadvantage Apple Pay by pricing Apple Pay transactions above transactions made using their own proprietary issuer digital wallets to dissuade cardholders from using Apple Pay. Any rational economic player would be expected to take advantage of that opportunity.

Apple Pay transaction fees as a Trojan Horse?

Apple has been puzzled by the applicant banks' logically inconsistent argument that they wish to have the ability to charge consumers per transaction fees for using Apple Pay, but are unlikely to be able to do so owing to competition from other issuers like ANZ who do not.

Perhaps the explanation might be that this is perceived by the applicant banks as a way of introducing and then proliferating a new revenue stream in the digital payments age.

It may well be that the applicant banks have taken the view that customers may be more willing to pay fees to use Apple Pay because of the ease and security of using Apple Pay and, on that basis, see an opportunity to introduce and condition the market to transaction fees for the use of Apple Pay, with the longer term view to setting a precedent for charging for mobile payments on other digital wallets, in the future, including the banks' own proprietary wallets.

By doing so collectively, the applicant banks can ensure that they are not at a disadvantage in relation to an aggregate 70% of the cards on issue in Australia if they all decide, with the ACCC's authority, to charge customers fees for use of Apple Pay and then choose individually to tacitly extend the imposition of those fees to any digital wallet transaction as a new revenue source justified as a "transparent price signal". The incentive to compete away these fees at the retail level is reduced or removed if there is an ACCC authorised ability to impose Apple Pay transaction fees which provides shelter for their own such fees. There is a capacity for the competitive

process to be substantially stifled by allowing the mutual reassurance to remove the necessity to compete on fees for digital payment transactions.

Further, the Reserve Bank cost data presented in section 3.5 of this submission demonstrates that if the applicant banks were truly interested in charging fees to reflect the true cost of each transaction, they would be charging transparent-based fees for credit card transactions at much higher levels than for EFTPOS debit transactions, for example. However, the banks do not do this, because they prefer consumers to use credit cards for transactions where the banks earn higher interchange fees. Presumably for the same reason, none of the applicant banks have made EFTPOS payments available through their own proprietary issuer digital wallets.

[redacted]

3.2. Impact on issuers not part of the group

"A relevant consideration, however, is whether ANZ and Amex were aware of the potential collective bargaining group before entering and concluding negotiations with Apple. If they were aware and decided to pursue individual negotiations anyway (as Cuscal has decided to do, for example), this suggests they considered this a preferable approach" [313]

Apple understands that ANZ was initially part of the applicant group, but decided to negotiate individually with Apple, as acknowledged by a spokesman for the applicant banks in April 2016 who stated in respect of ANZ having reached agreement with Apple on the terms of offering Apple Pay: *"They chose to pull a fast one on their competitors and their joint applicants earlier this year when they withdrew from the group of applicants and decided to negotiate separately with Apple".*[2]

[redacted]

The willingness of non-applicant issuers to agree terms with Apple demonstrates the reasonableness of those terms and the desire of those issuers to take advantage of the benefits available through Apple Pay and offer those benefits to their customers, rather than seek to conduct a further public negotiation under the auspices of an authorisation application to achieve commercial gain of no value to their customers. A willingness on the part of these non-applicant issuers to reach a commercial compromise by, for example, agreeing to pay a small fee of only [redacted] in exchange for access to the Apple Pay platform for the benefit of their customers does not, however, negate the fact that these issuers may be competitively disadvantaged if authorisation is granted to the applicants to pursue their own commercial agenda (at the expense of consumers), as observed by the ACCC at paragraph 312 of the Draft Determination.

[2] 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/f559df72dc610d2c8c7c9fcca10dd571

3.3. Potential for collusion between issuers

> ***"Overall, the ACCC considers that there may be the potential for tacit collusion beyond the proposed conduct, for example in relation to each Applicants' approach to its digital payment offerings. The ACCC does not have evidence before it that suggests such coordination is likely" [319]***

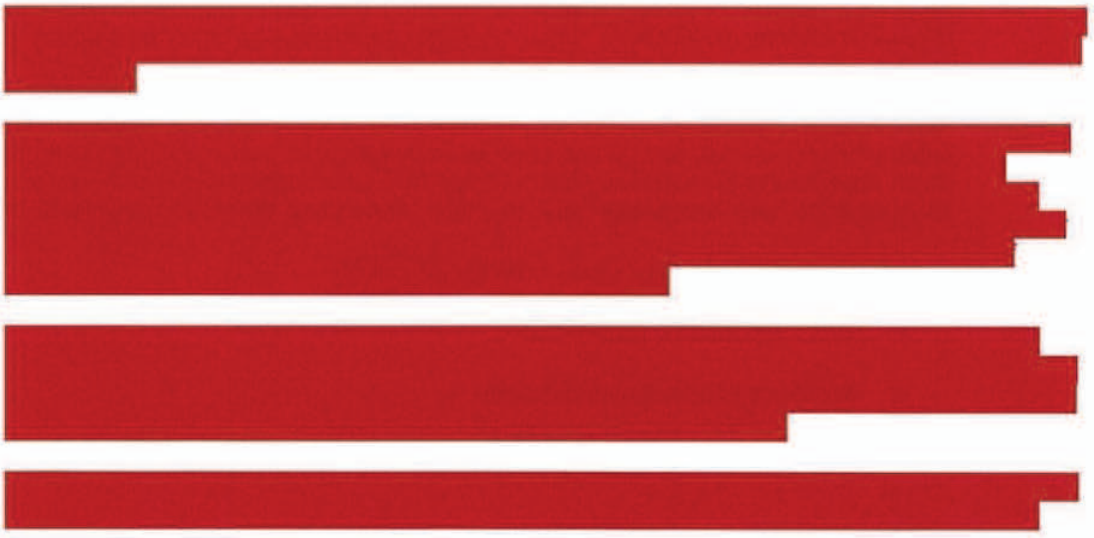
The risk of tacit collusion of the kind described by the ACCC in its Draft Determination occurring will be significant if the proposed conduct is authorised.

The conduct of the applicant banks during the application process itself has indicated the significance of this potential given that the applicant banks appear to have used the process itself to refine their demands and conduct a public negotiation under the auspices of an authorisation application.

Indeed, the scope and subject matter of the authorisation application itself has been "refined" by the applicant banks on several occasions. By way of example:

- **change in targets of the conduct**: the application was initially made in respect of negotiations with multiple mobile non-issuer wallet providers but has subsequently narrowed to relate only to negotiations with Apple;
- **removal of key subject matter of collective conduct**: the application was initially made in respect of perceived security issues but has since narrowed to remove that issue;
- **addition of key subject matter of collective conduct**: the application has recently expanded to also raise concerns with a new, unrelated issue of "reasonable App Store access" which the applicants have not substantiated in any way and which have never been raised by any applicant bank with Apple to date.

The grant of authorisation would provide ongoing mutual reassurance to the applicant banks in circumstances where they have already demonstrated little willingness to negotiate in good faith with Apple and a clear desire to simply delay the further expansion of Apple Pay in Australia to the significant detriment of the 65-70% of Australian cardholders that they collectively control.



[3] 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

[redacted]

The potential damage resulting from any collusion between the applicant banks, tacit or otherwise, is great when a group of competitors in a concentrated market meet to discuss *commercial terms* (as opposed to a less competitively-sensitive topic like industry standards) such that the potential public detriments resulting from such joint conduct should not be dismissed lightly.

3.4. Access to NFC and App Store

> ***"The Applicants have not made any submissions directed at the issue of reasonable App Store access. In particular, they have not submitted that there are any separate public benefits likely to arise from this element of the proposed conduct. The ACCC also notes that interested parties, in particular Apple, have not provided any submissions in relation to potential benefits or detriments of collective negotiation on this issue" [223]***

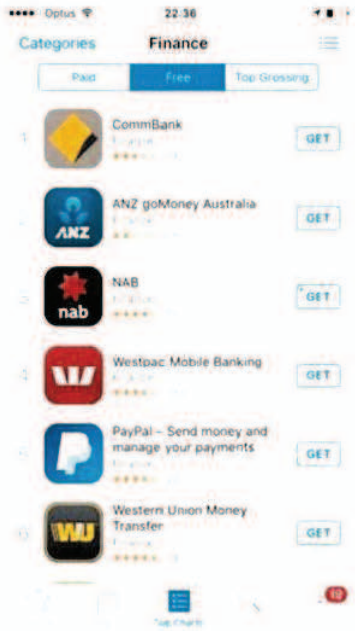
The link between the applicant banks' desire to access the embedded NFC radio and "the ability to provide competing mobile wallets without Apple unreasonably impeding or preventing this through other mechanisms" has not been made clear in any material submitted by the applicants and had not been raised before November 2016 immediately prior to the issue of the Draft Determination. It has also not been raised as a concern by any applicant bank in communications with Apple (such as they have been). Therefore it is difficult for Apple to respond to a concern that has not been articulated.

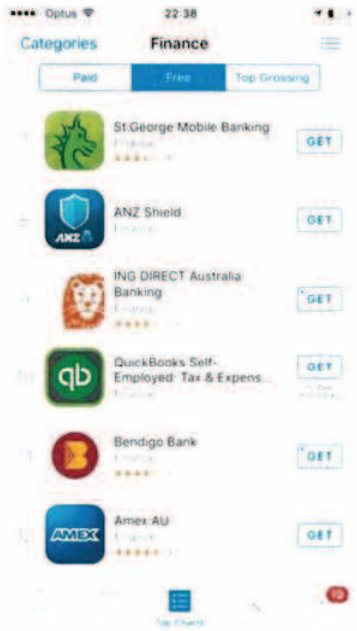
It is clear from the terms and conditions of access to the Apple App Store (which are publicly available) that Apple's aim is to ensure that apps conform to Apple's technical and consumer experience requirements and minimum standards. This is also made clear in Apple's App Store Review Guidelines, published at https://developer.apple.com/app-store/review/guidelines/.

It is also unclear on what basis the applicant banks apprehend that reasonable access to the Apple App Store would be denied to them, particularly in circumstances where each of the applicant banks already has an approved app available to its customers on the App Store, for which Apple does not charge any fees. In fact, the current apps of each of the applicant banks are among the most downloaded apps on the Australian App Store, with downloads to date of:

- Commonwealth Bank's app totalling [redacted] million
- NAB's app totalling [redacted] million
- Westpac's app totalling [redacted] million
- Bendigo's app totalling [redacted].

Within the Finance category, the popularity (and availability) of the applicant banks' apps is even clearer:





Apple currently permits competing digital wallet apps on the App Store in other parts of the world, eg ChasePay, Paylib, CapitalOne, Alipay, WeChat Pay, RBC Wallet, Walmart Pay, and there is nothing to suggest Apple would act any differently with respect to the banks' digital wallet apps in Australia.

If the speculative concern being advanced by the applicant banks for the first time is that Apple would, in response to granting NFC access following collective negotiation, retaliate by making access to the Apple App Store more difficult or by restricting the availability of the applicant banks' apps, there is no evidence of any kind of Apple conducting itself in that manner with respect to App Store access which could provide any foundation for such a concern.

Put simply, there is no nexus between the terms and conditions of access to the Apple App Store and the Apple Pay platform. The Apple Pay Issuer Agreement already on offer to the applicant banks (bar [redacted] which has declined to execute a confidentiality agreement which would allow it to receive a copy) does not refer to the App Store nor the terms and conditions of access to the App Store. These are two completely separate issues and, given the global nature of the Apple App Store and the array of non-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 impeding or preventing four banks in Australia from making mobile payment apps available via the App Store.

In short, there is simply no evidence to suggest that Apple would deny or impede access in any way to the applicant banks' digital wallets on the App Store.

3.5. Ability for applicant banks to charge consumers fees for using Apple Pay

> ***"Transaction-based fees are charged in other parts of the payments industry, and the ACCC is not aware of other instances where pass through is prevented" [274]***

Apple cannot comment on whether the confidential terms as between parties in the payments industry permit the pass through of fees imposed between them in respect of access to new technologies or payment platforms or otherwise.

However, there are many transaction-based fees involved in the use of credit and debit cards. It is not industry practice for the applicant banks to explicitly pass these fees through in the name of transparency. Moreover, unlike the many other transaction fees associated with these payment cards, the applicant banks have an incentive to charge fees to consumers for using Apple Pay to steer consumers towards their proprietary payment apps.

Apple can perceive no benefit to the public of enabling the applicant banks to charge consumers for using Apple Pay where the myriad other fees and transaction costs incurred by banks are not made transparent or passed through to consumers. The only benefit is the private benefit to the applicant banks to enable them to impose such fees as a means of discouraging use by customers of particular presentment methods such as Apple Pay.

Applicant banks do not pass through other credit and debit card fees

The applicant banks are arguing that it is in the public interest for them to charge transaction fees to consumers that reflect the precise cost of each transaction. But the applicant banks do not charge consumers transaction fees for making routine credit and debit card payments that reflect each input cost used in each transaction.

For example, the applicant banks currently impose annual credit card fees of varying amounts to cardholders which in no way reflect, for example, the frequency with which the cardholders use their cards or whether the cardholders use their cards to make online payments or in-store contactless payments or in-app transfers using a bank's mobile app, and do not impose transaction-specific fees which reflect, for example, processing costs including third party fees charged in respect of those transactions. The exception to this is typically transactions in a foreign currency, where foreign currency fees are often charged. In addition, despite the significant differences in the per average transaction costs of different payment methods, banks do not charge customers fees on a transaction by transaction basis to reflect those cost differentials.

In the absence of charging input fees on that basis in the case of non-Apple Pay transactions, the applicant banks cannot credibly cite the public interest for why they are seeking to jointly negotiate the ability to charge consumers for Apple Pay. The more plausible explanation is that the applicant banks want this ability to discriminate against Apple Pay in the marketplace, which cannot be in the public interest.

Significance of Apple Pay fees

As described by the Reserve Bank in its 2014 review of the Evolution of Payment Costs in Australia (which relied on data provided to the RBA by the applicants and other banks), there are significant per transaction costs in making credit and debit card payments:

Table 2: Per Transaction Direct Costs and Account Overheads

Dollars per average-sized transaction

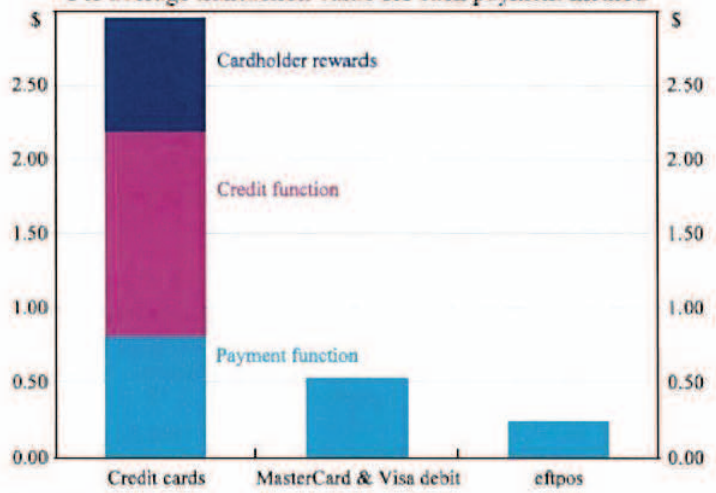
Payment instrument	Direct costs			Account overheads of financial institutions	Total
	Merchants	Financial institutions	Total		
Total	**0.24**	**0.31**	**0.55**	**0.15**	**0.70**
Cash[a]	0.28	0.20	0.48	0.03	0.51
eftpos	0.22	0.23	0.45	0.24	0.70
MasterCard & Visa debit cards	0.19	0.51	0.70	0.24	0.94
Credit cards[b]	0.22	0.72	0.94	0.41	1.34
Cheques	1.85	3.26	5.12	0.25	5.37
Direct entry	0.13	0.03	0.16	0.25	0.41
BPAY	0.03	0.41	0.45	0.28	0.73
Memo item: total (2006)	*0.27*	*0.25*	*0.52*	*0.21*	*0.72*

Notes: (a) Direct costs to financial institutions for cash transactions include costs incurred by the public sector
(b) Does not include the costs of the credit function and rewards

Sources: Authors' calculations based on survey data; Schwartz *et al* (2008)

Figure 2: Financial Institutions' Private Costs of Card Payments

Per average transaction value for each payment method



Note: Excludes account overheads

Source: Authors' calculations based on survey data

Within the context of these other costs borne by banks, merchants and cardholders for credit card transactions in particular, the fees [redacted] sought by Apple as payment for access to the Apple Pay platform, and sought to be made "transparent" by the applicant banks, are miniscule by comparison with the other costs of credit and debit card transaction related costs.

Apple's position on fees is clear: while Apple should be entitled to receive payment from an issuer in exchange for Apple granting that issuer access to the Apple Pay platform in which Apple has made significant investment, issuers should not be entitled to pass on those costs to consumers in the form of additional per transaction fees or otherwise in circumstances where issuers do not levy such fees to recover other costs incurred in making services available to consumers. In addition, issuers should not be entitled to charge merchants for accepting Apple Pay: in the four party model there is no precedent or capability for issuers to charge fees to merchants directly, because interchange fees are the mechanism of transferring value from merchants to issuers. The outcome sought by Apple is no more than seeking to ensure that consumers and merchants should not have to pay extra fees to banks to use Apple Pay to make secure, convenient

payments and to prevent banks from discriminating against Apple Pay in favour of their own proprietary issuer digital wallets to the detriment of consumers.

3.6. Alternative NFC payment apps

"The Applicants submit that the linking of a banking app with the Apple Pay payment mechanism, while useful and an improvement from the customer's perspective, cannot substitute for direct NFC access or provide the same public benefits." [233]

The assertions made by the applicants as to the linking of a banking app with the Apple Pay payment mechanism not being a substitute for embedded NFC radio access, as summarised at paragraph 233 of the Draft Determination, are without foundation.

The applicant banks claim that embedded NFC radio access on iPhones will accelerate innovation in mobile payment services in Australia and will improve customers' experiences by providing faster and more convenient mobile payments. However, the applicant banks currently have embedded NFC radio access on Android devices and have not utilised that access to provide apps to consumers that facilitate more innovative, faster or more convenient mobile payments than are available without embedded NFC radio access.

Each of the claims by the applicant banks, as summarised in paragraph 233 of the Draft Determination, are inaccurate:

Applicants' Claim	**Reality**
a. [Linking of a banking app with the Apple Pay payment mechanism] would not allow for any real competition with Apple Pay and would give Apple control over when it offers the option for integration with Apple Pay, slowing down innovation in mobile payment services in Australia. There is no way for the user to select any application other than Apple Pay to launch automatically when a phone is placed by an NFC payment terminal. It would not allow direct competition between the various digital wallets, each of which may be more attractive to some customer segments than others. Also, it would not assist other possible NFC functions, such as public transport payments, building access and stored value cards.	• Apple and the Applicants have each previously identified numerous competitive mobile payment wallets and contactless presentment options that already exist - see further in section 3.7 below. • Since Apple Pay has launched, numerous issuers have developed increasingly innovative mobile wallets on iOS and Android. • Significant innovation in alternative NFC solutions has also accelerated since the launch of Apple Pay globally and within Australia. • Apple's Wallet has also been the catalyst for significant non-payment and alternative payment scheme innovation using NFC technology, such as the deployment of loyalty cards (for example, by Walgreens and Kohls in the US) and the deployment of Japan's JR East Suica card. • Whereas the wallets launched by each of the applicant banks on Android feature only their own respective cards and no other cards that leverage NFC at all, Apple's Wallet allows seamless and automatic presentment of a range of cards from competing issuers, as well as other services such as transit cards, gift cards and loyalty cards, which in turn can

	facilitate further competition in other adjacent retail markets.
b. [Linking of a banking app with the Apple Pay payment mechanism] is not as quick and convenient as a mobile payment with direct NFC access (e.g. the customer may have to enter their PIN/fingerprint twice to open the app to check their balance and then to verify the payment). Further, a banking app with NFC access will be able to tell the user whether a payment has been successfully initiated.	• Any use of NFC which provides secure transactions requires authentication. • Within Apple Pay, the authentication happens at the operating system level and uses biometrics or passcodes. • For banking apps on Android, even with "open access to NFC", in order to authenticate the user, some connection to the app must be made to validate authentication. The only way to achieve an experience as streamlined as Apple Pay's using a third party bank app on Android is to not require any validation at all, which would make the transaction less secure and unauthenticated. • Existing banking and payment systems receive and approve all transactions initiated through Apple Pay. They also have the capability to send confirming notifications to customers once a transaction is completed. In that sense, it is incorrect to say that the banking app is unaware that a payment has been successfully made via Apple Pay.
c. it is not clear that Apple Pay returns any information to the banking app via NFC, such as whether the payment was successfully submitted or the value of the payment (although this information is available to the banking app through the payment and mobile networks, but is slower)	• All Apple Pay transactions are approved/declined by the issuer and the issuer systems have the capability to route that information to their apps directly (or not). • Nearly all banks which utilise Apple Pay integrate transaction history into their banking apps. This comment by the banks shows that they do not understand how Apple Pay works and, in fact, how NFC works. NFC does not have a capability to provide information back to the phone NFC radio on status of the transaction itself in a single transaction. That status is provided through the standard payment and POS rails back to the banking systems. Those same rails are utilised, whether the transaction is initiated from within a bank's app with embedded NFC radio access or from within a bank's app linked with Apple Pay. • It is actually the payment terminal that is the point of truth for a transaction being successfully conducted/completed - once the merchant gets confirmation of a successful transaction, the goods are

	released to the customer, for example. This is the case no matter how a transaction is initiated, card or phone.
d. separate marketing would be required for the Android and the iOS versions of the issuer app	• There is no need for issuers to separately market Android and iOS versions of their apps. • This is not common practice in overseas jurisdictions in which issuers have released proprietary wallet apps on Android and iOS devices. • It is also not common practice amongst the applicant banks vis-à-vis the apps they each already make available via the Android, iOS and other mobile operating systems. • For example, CBA currently promotes its "Tap & Pay" functionality as a feature of its mobile banking app. In doing so, CBA does not differentiate in its headline advertising between the customer experiences when using the Android vs iOS versions. Rather, CBA advertises the functionality generically and then directs customers to a webpage which explains how "Tap & Pay" works on different devices:  Tap & Pay Use your iPhone or Android to make contactless purchases in store. Simply tap your phone on any contactless terminal the next time you are shopping.* Find out how Tap & Pay works ›
e. [Linking of a banking app with the Apple Pay payment mechanism] does not allow another wallet to provide a payment mechanism that differentiates itself, nor price competition with Apple Pay. For example, different customer verification methods or options (e.g. users could set different verification methods for different	• If a bank wanted to provide a different authentication method, they would do so by requiring the user to initiate Apple Pay from within their app, and require the user to authenticate into their app (via whatever means they choose), in order to initiate Apple Pay (similar to the Capital One app

cards to differentiate shared or personal accounts)	currently available on iOS in the US). • If banks wanted to provide different verification methods for different cards within their wallet, they could also do so in the same way indicated. • If a bank app has the capability to deliver these features, they could be applied to Apple Pay transactions as well within the bank app.
f. there is a large customer segment that would prefer a financial institution rather than a technology company to be trusted with their payments	• This misrepresents Apple Pay's role in the payment process. • Apple Pay is a service that financial institutions can offer to their customers to enable customers to use that financial institution's payment services in a more secure and convenient way. Apple does not get involved in the payment processing itself, nor in transactions approvals, the movement of funds, the account keeping process, or any other aspect of the existing card payment processes. This is all retained by the financial institution, and when a customer sets up and uses Apple Pay they see their financial institution's card represented on their device, and all notifications and confirmations are sent to them by that financial institution, not by Apple. • Apple is not a bank, not a payment processor, nor a network. The customer's relationship with their bank remains the same. • A customer can only use Apple Pay if it is offered to them and supported by their bank.

Embedded NFC radio access undermines the wider user experience of the Apple Wallet App

While offering no additional benefit on a transaction-by-transaction basis, granting proprietary wallets access to the embedded NFC radio would undermine the simplicity of ease of use that consumers expect when using Apple products.

As Apple has previously explained, the Apple Wallet app allows consumers to store not only credit and debit cards but also a variety of non-payment credentials that use NFC, including loyalty cards, transit cards, and gift cards. NFC technology (on both Apple and Android devices) is designed in such a way that the NFC radio is paired on a one-to-one basis with a particular application which uses the NFC protocol to communicate with a reader. NFC terminals are capable of detecting the types of cards in the consumer's Apple Wallet App so that a consumer will only need to present their device to the NFC terminal and it will automatically select and present the relevant credential in the Apple Wallet App.

Direct access by a bank's proprietary issuer digital wallet to the embedded NFC controller would break the simplicity and ease of use of the Apple Wallet app, particularly with non-payment or closed loop payment card functionality, because if a consumer wanted to present a different card or credential from the default card and application, then the consumer would need to manually change the one-to-one NFC radio setting prior to presenting the device to the NFC reader.

For example, if Apple reaches agreement with relevant transit authorities in Australia to enable transit cards to be stored in and accessed via Apple's Wallet app (as Apple has done in other jurisdictions), in the rush of walking through the turnstiles at a train station or upon boarding a bus, with Apple Pay the consumer can merely present his or her device at the NFC reader in a single motion and have confidence that the reader will automatically select the transit card from Apple Wallet as the payment method. In contrast, if a bank's proprietary issuer digital wallets is granted direct access to the embedded NFC controller such that there will be multiple apps for different functions, such as card payments and transit, each requiring access to the NFC controller to operate, the consumer would need to first ensure the default settings of the device enabled the transit application to access the NFC controller before entering the turnstiles and presenting his or her device at the NFC reader to avoid the payment attempt failing. These cumbersome and complicated steps would significantly impact consumer uptake of this new technology, as well as damaging Apple's reputation for offering products that work seamlessly. Another example is the ability for Apple Wallet to automatically present more than one credential in a single tap at a payment terminal – such as a loyalty or rewards card at the same time as a payment card, all using NFC. This has been implemented in other markets, and there is significant interest from merchants in implementing this capability in Australia given the clear convenience for their customers and business benefits this experience offers. However, the value for merchants of implementing this functionality in Australia is limited while issuers representing 65-70% of the market don't offer Apple Pay to their customers.

Embedded NFC radio access would not lead to an overall improved user experience

There is no evidence to suggest that the banks have developed or will develop better user experiences as a result of having embedded NFC radio access. The applicant banks' own apps on Android do not currently offer an improved user experience or, arguably, even an equivalent user experience to that available through banking apps linked to Apple Pay, let alone Apple's wallet itself.

Apple has previously demonstrated to the Commission the almost-identical processes, in terms of number of steps taken, by which an authenticated transaction using a bank's proprietary issuer digital wallet on Android with embedded NFC radio access and a bank's proprietary issuer digital wallet on an iPhone linked with Apple Pay is performed.

In addition, the user experience is clearly inferior where a user wants to use cards from more than one issuer.

For example, on Android today to change from one proprietary issuer mobile wallet app to another in order to use another issuer's card, the user must either (1) unlock the phone, open the new app, select the 'tap and pay' or equivalent function, select the new app as the default payment method, and then start the payment process; or (2) unlock the phone, go into 'settings', select the new app as the default payment app, go out of 'settings', launch the new app, and then start the payment process.

To achieve the same outcome with Apple Pay requires two quick taps: the user taps the screen once to bring up all the cards they have available, and then taps a second time to select the new card to use.

The video enclosed with this submission demonstrates this user experience.

On the current evidence before the Commission, it is clear that the banks' proprietary issuer mobile wallets on Android with embedded NFC radio access do not offer a superior user experience compared with banks' proprietary apps on iPhone linked with Apple Pay for an authenticated transaction, let alone compared to the Apple Wallet app, which also offers superior security and privacy protection.

3.7. Alternative NFC technologies

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

In previous submissions, both Apple and the applicants have identified the many mobile payment and contactless presentment options already available to Australian consumers. For example, in addition to offering the NAB Pay function within its Android app, NAB also offers a PayTag NFC sticker solution for iOS devices. NAB's PayTag sticker solution allows customers to present their device to an NFC payment terminal to make an un-authenticated payment in the same manner as customers can use their plastic card, or the "Quick Pay" option within NAB Pay on Android (which enables transactions to be performed without requiring authentication by the consumer).

In the short period since those initial submissions, there have already been further innovations which underline the dynamic nature of the mobile payments sector and, indeed, that access to NFC-enabled devices is not necessary for a new solution to be competitive.

For example, Chinese mobile payments provider, Alipay, signed a memorandum of understanding with Commonwealth Bank on 30 October 2016 to make its QR Code-based mobile payments service available in Australia through the Commonwealth Bank's Albert terminals, which are capable of reading and processing QR Codes.[4] Press reports indicate that 55,000 Albert point-of-sale terminals are installed in 28,000 merchants.

On 8 December 2016, Alipay further announced a partnership with Quest Payment Systems, an Australian payments provider, to launch Alipay more widely in Australian retail stores that deploy Quest payment terminals.[5]

More alternative NFC-based solutions have also been introduced in response to the introduction and expansion of Apple Pay.

For example, Swatch recently introduced an NFC payment watch[6], as did Fitbit[7]. In August 2016, Visa also made the payment ring it initially released for the Olympics available to all consumers.[8] Other similar wearable solutions have been introduced by Jawbone in partnership with American Express[9] and Orix[10].

Apple believes the further expansion of digital presentment methods, including Apple Pay, in Australia will only further spur these innovations. Conversely, the continued boycott of Apple Pay by the applicant banks will reduce the impetus to innovate.

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[4] http://www.afr.com/technology/cba-in-payments-deal-with-chinas-alipay-20161026-gsas57

[5] Alipay expands to Australia, gunning for Apple Pay and Android Pay - Mobile Commerce Daily (8 December 2016)

[6] http://www.wareable.com/smartwatches/swatch-bellamy-nfc-payment-watch-1813

[7] https://www.wareable.com/fitbit/fitbit-nfc-wearable-payments

[8] https://www.engadget.com/2016/08/23/nfc-ring/

[9] http://about.americanexpress.com/news/pr/2015/amex-jawbone-to-launch-up4-fitness-wearable.aspx

[10] http://www.smartchoice.pk/blog/2015/05/orix-introduces-nfc-payment-solution/

5. Conclusion

Apple has previously detailed why, given the impact on the Apple Pay customer experience and the significant security and privacy concerns that would arise, Apple will not and cannot agree to the terms sought by the banks. As such, the proposed collective bargaining conduct will not achieve any of the public benefits claimed by the applicant banks as "likely to arise", and therefore the application cannot satisfy the statutory test.

While the focus of the applicant banks' submissions and the outcomes sought by the banks have shifted materially over the course of the past six months under the guise of "refinements" to their application, the key issue on which the applicant banks continue to focus is access to the NFC radio in Apple devices for their own proprietary issuer digital wallets.

To be clear, and despite public protestations to the contrary[11]: Apple's view is that this application is not primarily about NFC access. It is fundamentally about the applicant banks avoiding paying Apple fees for use of Apple Pay (despite the significant investments made by Apple in order to develop and make available this technology), or specifically charging their cardholders for that use to discourage consumer use of Apple Pay and thereby reduce competition with their own proprietary wallets. Apple has demonstrated to the ACCC that the customer experience using a bank's proprietary issuer digital wallet utilising Apple Pay's secure element infrastructure without leaving the bank app is equivalent to using a bank's proprietary issuer digital wallet with embedded NFC radio access (such as currently made available on Android devices) thereby meeting all of the requirements of the applicant banks for customer choice, functionality and ease of use. And the costs to providing embedded NFC radio access are significant – including negative effects on consumer security and data privacy, customer choice of payment card at point of sale, and customer experience with other cards (including future functionality of transit cards and retailers' loyalty cards).

Thus, there are no public benefits to providing the applicant banks embedded NFC radio access. The only benefit that would accrue to the banks in that case is a purely private benefit where they would be allowed to continue to free-ride on the significant investments made by Apple in its devices, iOS platform and App Store infrastructure, and specifically in this case on the underlying technology installed on Apple devices to facilitate NFC payments without paying any fees for transactions processed via Apple Pay's secure element infrastructure (as all other banks around the world participating in Apple Pay are willing to do).

Further, Apple is concerned that the banks are using the authorisation process, which will have occupied some ten months to the date of Final Determination, as a device to delay the further expansion of Apple Pay in Australia to some 70% of cardholders and as a stage on which to collectively conduct a negotiation about the fees payable for access to the Apple Pay platform. This not only directly hurts the 70% of cardholders in Australia controlled by the applicant banks, but also the smaller card issuers who already, or could in the future, rely upon Apple Pay as a means of securing a digital presence in competition with the big banks. The applicants' refusal to engage with Apple during the authorisation process provides evidence of the chilling effect of the proposed collective conduct on the benefits of competition through innovation in digital payments offered by over 3,500 banks to millions of consumers in 13 countries.

Apple's concerns are heightened by:

- the exceedingly long period of authorisation of three years sought by the applicant banks;
- the unnecessary nature of the application with respect to the relative bargaining powers of the parties, given that the applicant banks control absolutely access to 65-70% of Australian cardholders and, as at June 2016 it was estimated that Android Pay's eligible

[11] CBA executive M Comyn press statement 8 December 2016: http://www.afr.com/business/banking-and-finance/financial-services/cba-willing-to-pay-apple-for-iphone-payments-20161208-gt6y4k#ixzz4SEWBF5NN

market size was more than double the combined market for Apple Pay and Samsung Pay (by reference to availability of capable devices in market)[12];

- that the applicant banks have made little or no attempt to understand how Apple Pay in fact works and can be utilised by their own proprietary digital wallets to the benefit of their customers;

- that one of the applicant banks has still not signed a standard non-disclosure agreement in order to understand the capabilities of Apple Pay to meet their and their customers' needs. Apple also understands the applicant bank in question has prevented its New Zealand subsidiary from signing Apple's NDA;

- that each of the applicant banks is intent on pursuing solutions utilising the embedded NFC radio which offer no customer experience advantages compared to linking a bank's proprietary issuer digital wallets with Apple Pay, impact the customer experience with respect to the non-payment functions of the Apple Wallet app (eg transit cards) and are less secure than Apple Pay, in an attempt to avoid paying fees to Apple for access to the Apple Pay platform; and

- that neither Commonwealth Bank nor NAB have implemented Android Pay to give customers access to a digital wallet which offers a choice of cards from different issuers at point of sale, while Westpac's very recent launch of Android Pay is limited to its MasterCard portfolio.

By contrast, issuers around the world and in Australia which have taken the opportunity to learn about the full functionality of the Apple Pay platform have been willing to agree terms with Apple and to pay Apple's relatively small fees in exchange for the benefits of conducting transactions through the Apple Pay secure element infrastructure.

Apple therefore welcomes the conclusion reached in the Commission's draft determination but submits, based on previous submissions and the further information provided in this submission, that the consequences of the conduct are far from finely balanced and the Commission should conclude that the detriments already being observed over the course of the authorisation significantly and unambiguously outweigh any claimed benefits, such that authorisation must be denied.

[12] Source: Research conducted by Retail Finance Intelligence Pty Limited dated June 2016 .

Annexure 1: Mobile Wallets in Australia

The following table is illustrative and based on publicly available information.

Financial Institution or Processing Group	Third Party Wallets Supported	Bank Proprietary Wallet
'Big 4' Banks		
ANZ	Apple Pay & Android Pay	Yes
CBA	None	Yes
NAB	None	Yes
Westpac Group	Android Pay Only	Yes
Other Financial Institutions/Providers		
American Express	Apple Pay, Android Pay & Samsung Pay	None
Bank of Queensland Limited	None	None
Bankwest	Android Pay Only	
Bendigo and Adelaide Bank	Android Pay Only	Yes
Citibank	Samsung Pay Only	Yes
Cuscal Group - including:		
- AMP Bank	Apple Pay & Android Pay	None
- Australian Military Bank		None
- Bank Australia		None
- Bank of Sydney Ltd		None
- Bankstown City Credit Union		None
- Beyond Bank Australia		None
- Big Sky Building Society Ltd		None
- CAPE Credit Union Ltd.		None
- Catalyst Money		None
- Central Murray Credit Union		None
- Central West Credit Union Ltd.		None
- Community Alliance Credit Union Ltd.		None
- Community First Credit Union Ltd.		None
- Credit Union Australia Limited		Yes
- Credit Union SA Ltd.		None

- Defence Bank		None
- EECU Ltd.		None
- First Option Credit Union		None
- Goldfields Money Ltd.		None
- Goulburn Murray Credit Union		None
- Holiday Coast Credit Union Ltd.		None
- Horizon Credit Union		None
- Illawara Credit Union		None
- Intech Credit Union Ltd.		None
- Laboratories Credit Union Ltd.		Yes
- Lombard Finance Pty Ltd		Yes
- Lysaght Credit Union Ltd		None
- Maritime, Mining and Power Credit Union		None
- MyState Bank Ltd.		None
- Northern Beaches Credit Union		None
- Northern Inland Credit Union		None
- Once Credit Pty Limited		None
- P&N Bank		None
- People's Choice Credit Union		Yes
- Police Bank		Yes
- QT Mutual Bank		None
- Queenslanders Credit Union		None
- Select Encompass Credit Union Ltd.		None
- South West Slopes Credit Union		None
- Sydney Credit Union Ltd.		None
- Teachers Mutual Bank		None
- The Broken Hill Community Credit Union		None
- The Mac		None
- The Rock		None
- Warwick Credit Union Ltd.		None

- WAW Credit Union		None
- Woolworths Employees' Credit Union		None
- Wyong Shire Credit Union		None
Heritage	None	Yes
HSBC	None	None
IMB	None	None
Indue	None	None
ING	Android Pay Only	None
Latitude Financial Services	None	None
Macquarie Bank	Android Pay Only	None
ME Bank	None	None
Newcastle Permanent Building Society	None	None
Rabobank	None	None
Suncorp	None	None

Annexure 2: Examples of competing issuer promotions

Discover Cashback Promotion

Earn with Every Purchase

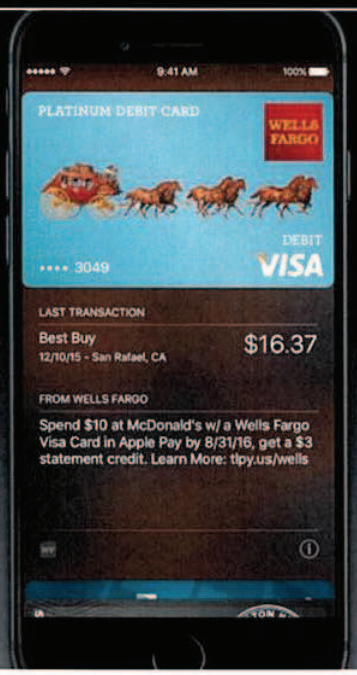
Paying with Apple Pay™ is easy. Using it with Discover allows you to earn rewards on every purchase - just as you would with your card.

- You'll earn on every purchase you make
- As always, your rewards never expire[1]

Citi American Airlines Rewards Incentive

TSB Cashback Promotion

Wells Fargo Front-of-Card Messaging/McDonald's Promotion

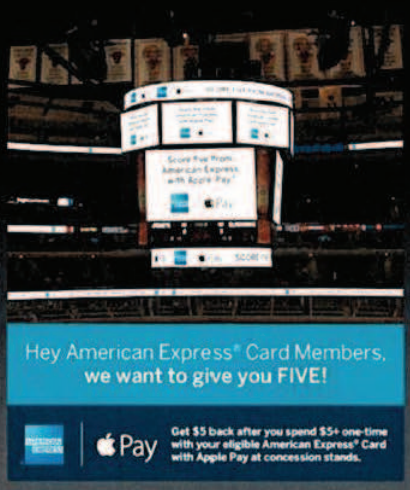


Chase David Guetta and Eric Clapton Music Promotions

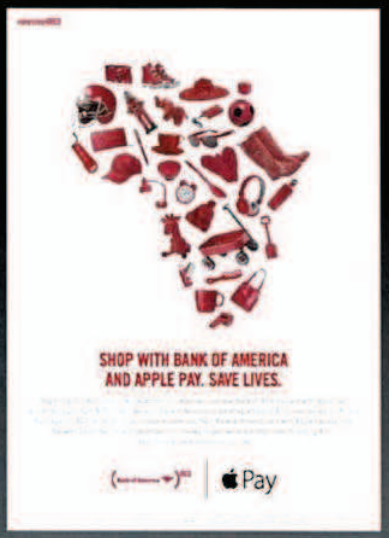
Scotiabank 10% Cashback Promotion

CIBC $20 Cash Bonus Promotion

Amex "Spend 5 to Get 5" Promotion



Bank of America (RED) Charity Campaign



Chase Mother's Day Apps Promotion

Discover 2% Grocery Cashback Promotion