

Mr Daniel McCracken-Hewson
General Manager, Merger Investigations
Australian Competition & Consumer Commission
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17th August 2021

Dear Mr McCracken-Hewson

Proposed Undertaking for BPay, eftpos and NPP Merger (MA 100 00 20)

Thank you for the 06 August 2021 invitation to respond to a proposed undertaking in relation to the application for merger authorisation between BPAY, eftpos and NPPA.

This is a joint submission by the Australian Association of Convenience Stores (AACS) and the Australian Lottery and Newsagents Association (ALNA) to the proposed undertaking.

The Australian Association of Convenience Stores (AACS) represents the interests of businesses within the Australian convenience store channel and the Australian Lottery and Newsagents Association (ALNA) advocates for the largest non-franchised family-owned business sector in Australia.

Collectively we represent thousands of small merchants. Both organisations provided initial and supplementary comments on the Application and statement of preliminary views. Both organisations have members that extensively rely on low-cost payment services.

Background: AACS

Established in 1990, the Australian Association of Convenience Stores (AACS) is the peak body for the convenience industry in Australia. Nationally, the industry employs over 74,000 people in over 7,000 stores. The majority of these stores operate as small, family-run businesses, often under licence or a franchise agreement, or with independent ownership. They regularly employ family members and people from the local communities in which they operate. The AACS represents the interests of these small businesses - their owners, staff, suppliers and customers.

Background: ALNA

The Australian Lottery and Newsagents' Association (ALNA) is the national industry body representing Lottery Retailers and Newsagents' who represents small businesses in almost every rural town, regional centre, urban and metropolitan shopping centre in Australia. There are over 4000+ Lottery Retailers and Newsagents' in Australia. They are an important and trusted part of Australian

communities and approximately 35% of the Australian population visit them at least once a week (source RDG Insights study). Our members therefore make a significant contribution to the Australian economy, employing over 20,000 people

Both AACS & ALNA are long-standing members of the ACCC's Small Business & Franchising Consultative Committee.

Our Submission

We have previously both shared the view that the proposed authorisation has some fundamentally anti-competitive aspects that concern us. As such, adopting the draft undertaking without substantial changes to further address these issues and to make much clearer the intent, could lead to substantially lessening competition in the future. The public (consumer and small business) detriments will likely outweigh any public benefit arising.

With that explicitly noted, we make the following comments on the proposed undertaking.

Payment systems are an important issue to firms in our industry sectors. Individual stores are typically characterised by a large number of small-value transactions, an increasing number of which are now done via a payments system rather than in cash.

The average sale transaction in a convenience store for example is \$10.42, and the average number of daily transactions is 468 per shop.¹

Each year the AACS commissions an independent body to measure key metrics in the sector, which is published as the *State of the Industry Report*². Turnover in the convenience industry in Australia was valued at approximately \$35.6 billion annually in 2020, the latest figure for which data is available. This consisted of \$9.2 billion in merchandise sales, and a further \$26.4 billion in petrol sales.

In Newsagents and Lottery agents, the avg transaction is a little higher at closer to \$16 and 60-70% of transactions are now done by credit, debit or mobile wallet transactions.

This authorisation is therefore of concern to us because almost all the individual businesses, and, in our experience, almost all other Australian businesses, are effectively reliant on the provision of affordable electronic payments services of which these companies are all heavily involved.

¹ AACS (2019) *State of the Industry Report*, Melbourne: Convenience Measures Australia.

² The report contains the most comprehensive information available on the convenience industry in Australia. We have also recently commissioned research on how consumers have used the convenience channel over the course of the COVID-19 pandemic; we would be pleased to provide both of these to the Commission if this will assist any decisions or actions to be taken.

Specific Concerns

In addition to the other broader issues already noted, we think the undertaking is loose to the advantage of the parties. A section 87B undertaking needs to be able to be enforced in a Court and hence must be tight in drafting. We address specific concerns below:

- ***Three years is insufficient.***

The proponents suggest that only three years be provided in which it needs to provide least cost routing (LCR). This is a major concern.

We acknowledge that this is a rapidly changing industry, nonetheless this is the case also for small businesses, and we are exposed to potential escalation in merchant costs. Such a short period is insufficient to encourage businesses to switch to LCR and more banks to adopt and promote it. It takes time for businesses to switch technologies and to understand them and their advantages, and few businesses will do so if they are led to believe that any new service may only operate for a maximum of 36 months. Much more time needs to be provided.

If the maximum period is only 3 years, dragged out processes and changes, may effectively render the amount of time spent on promoting LCR to be much less than this.

We recommend AP+ give consideration to a minimum of 7 years in any undertaking instead, and that they should adopt an intent for this to then roll to an industry code.

- ***This is a behavioural not structural undertaking, and difficult to enforce.***

The proposed written commitments proffered in this undertaking are essentially behavioural in nature not structural, requiring the staff and directors of AP+ only to attempt to do certain things or undertake particular actions. There are few discrete, measurable or objective yardsticks provided.

We know that the ACCC has accepted behavioural undertakings in the past, even if they are not the preference. As the ACCC will be well aware, behavioural undertakings are extremely difficult for regulators to police and enforce if a suspected breach occurs. Moreover, the courts have often given companies the benefit of the doubt when an alleged behavioural breach occurs. We doubt that much of this undertaking will be enforceable so the intent of AP+ should be much clearer in their commitments and this should extend to independent audit so that small businesses can be more confident that the undertakings will be adhered to, and competition issues will be resolved.

Small business would have much more confidence if a combination of undertaking and conditions were adopted as these will enforce themselves and assist to overcome detriment.

- ***Any effort in regards to LCR is limited to eftpos only.***

Clauses 5.1 and 5.2 - both use words which are too vague.

We note with concern that clause 5.1 of the proposed undertaken states only that:

5.1. AP+ will procure that eftpos will do all things in its control to make available least cost routing.

There is no ongoing commitment or structural processes in the undertaking to ensure that eftpos and LCR will be permitted to compete effectively with credit cards in future. The proposed undertaking simply allows eftpos to continue offering its existing products for a limited time (three years) into the future.

This is a minimal degree of effort and, importantly, does not require any other part of the merged entity, or the central management/directors of AP+, to also do all things in their control to make LCR available both at point-of-sale and digitally, and actively promote it to their customers. It is limited only to the operations which eftpos (not AP+) controls. If only one part (minority) part of the merged entity is required to promote LCR, there is a good chance its endeavours will be swamped or ignored by the rest of the organisation.

We recommend that this clause be amended to read:

5.1. AP+ will ensure that all of the merged entity (including, but not limited to, eftpos) will do all things in their collective control to promote and encourage the uptake of least cost routing by retailers and consumers, both at point-of-sale and online.

- ***There may be substantial consumer detriment.***

We are also concerned that Australian consumers will potentially be forced by this consortium of payment providers to use international card schemes instead of their own funds.

This is because eftpos generally charges less fees than international card schemes; it is a less profitable product for AP+ to offer. AP+ may be incentivised to favour international card schemes over eftpos.

If eftpos is not offered the opportunity to be a genuine, long-term internal competitor to credit card services also provided by AP+, then the public may increasingly find that their payment options are being directed (limited) to international card schemes and other high-fee transaction tools.

It is consumers at the end of the day that pay for higher transaction fees. If the merger means that eftpos is less able to compete directly and strongly with Visa and Mastercard, overseas payments system experience and competition principles dictate that transaction fees will rise over time. Those higher transaction costs will be to the ultimate detriment of consumers and of smaller merchants who are less able than big business to enter into favourable bespoke arrangements with their banks or to even pass on costs.

- ***There is no genuine independent voice for small retailers in future decisions relating to LCR.***

Despite concerns raised in the original round of consultations by AACS, ALNA and other industry bodies representing small retailers, there is no commitment in this document to ensuring that AP+ will provide a genuine, meaningful voice for small retailers in its internal decision-making. In fact, it is entirely absent.

If this proposal is accepted by the ACCC, then small retailers may have no future means of being heard or listened to by AP+. Nor will small retailers be involved in measuring compliance with and auditing the undertakings, which will effectively be undertaken internally by AP+. The Commission will have given the green light for small business to be ignored.

To address this, we believe that AP+ should adopt in its undertaking the clear intent that a majority of the directors of the entity (and of any subsidiaries) be independent directors. These should be persons with substantial director experience and formal AICD qualifications, and a substantial knowledge of small businesses and regulatory issues. To ensure directors are genuinely independent of AP+, they should be drawn from a pool of potential candidates developed by the peak voice for small firms, the Council of Small Business Organisations Australia (COSBOA).

As an added safeguard to ensure that small firm directors are not surreptitiously reduced in future, we also recommend that the undertaking include a commitment that all director appointments will be subject to formal approval of the ACCC.

Additionally, Clause 6- monitoring should be external with a small businessperson or persons involved. Any compliance report should go onto ACCC website, see Clause 8.1.

- ***Signalling strong intent***

Several clauses are either opaque or leave considerable wiggle room or don't signal intent clearly enough. AP+ should consider stronger commitments that signal strong intent across the whole undertaking.

Clause 5.7- "will explore to see if feasible"- weak words without intent.

Clause 7.1- why the legal professional privilege exception, this leaves room for games.

Clause 9- again 'procure', this is an industry that is full of related bodies and the obligation should be more than to 'procure'.

Clause 11.1 (b) should be 'only agree to a change of Control" not implement – it might be a bit late then.

Clause 12- why not pay other costs, such as small businesspersons involved in compliance and any ongoing ACCC costs flowing from the authorisation.

Conclusion

There are several areas where the undertaking is either insufficient or imprecise in addressing some of the concerns that we have raised with the authorisation, due to a

very flexible or opaque approach to the language in the undertaking that does not clearly signal intent.

As we touched on in our previous submission, we wish to enhance the obvious public benefits of lower costs to customers and improved services to customers. We believe it would be preferable that AP+ voluntarily improved the language in the undertaking to signal their strong intent and that they give consideration as well to entering into some preauthorisation conditions with the ACCC along with this undertaking that,

- The applicants have successfully implemented an effective and wide ranging LCR model during the term.
- That eftpos will be well supported for the long term
- There be appropriate small business representation on all New Co Committees and even the ICA.

We would be happy to expand on these ideas further, if required.

Once again, thank you for the opportunity to comment on this proposal. Should you require any further information, please do not hesitate to contact us.

Yours sincerely



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Australian Lottery and
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