



SUBMISSION TO ACCC RE: DRAFT 87B UNDERTAKING

16 Aug 2021

Mr Daniel McCracken-Hewson
General Manager – Merger Investigations
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2600

Via email: mergerauthorisations@accc.gov.au

Dear Mr McCracken-Hewson

Re: COSBOA – MA1000020 – Submission re proposed undertaking – Proposed amalgamation of BPAY, eftpos and NPPA

On behalf of the Council of Small Business Organisations Australia (COSBOA) we appreciate the opportunity to respond to the ACCC's 6 August 2021 letter to interested parties seeking feedback on an undertaking proposed to be given pursuant to section 87B of the *Competition and Consumer Act 2010* (the Act) (the proposed undertaking) by Australian Payments Plus Ltd (AP+). We note the purpose of the proposed undertaking is to address part of the ACCC's competition concerns in relation to the proposed amalgamation of BPAY, eftpos and NPPA (proposed amalgamation). Specifically, the ACCC's concern that the proposed amalgamation may result in the major banks or AP+ reducing support for eftpos and a decrease in the availability of least-cost routing (LCR).

COSBOA is a federation of industry associations that works collaboratively to address issues of concern to Australian small businesses. Unlike other business organisations that advance representation of small business on a geographic basis or sectoral basis, COSBOA's advocacy positions are advanced based on issues that are seen as a priority across multiple industry segments. These segments include grocery retailing, hair and beauty, pharmacy, lotteries and newsagents, meat industry retailing, and fuel retailing – a number of these process a large number of lower value retail transactions.

The proposed undertaking

If the proposed amalgamation is allowed, the market will undergo a significant structural change which will have long-term effects on Australian businesses and consumers. A remedy that proposes to address those effects through a three-year behavioural undertaking is in our view, inadequate.

The proposed undertaking does not address the ACCC's stated competition concern that the proposed amalgamation may result in the banks or AP+ reducing support for eftpos and a decrease in the availability of least-cost routing (LCR). As a result, there is a real risk that an amalgamation would mean that eftpos is less able to compete with Visa and Mastercard, with the flow-on impact of reduced choice and higher debit card transaction fees for small businesses.

There are three fundamental flaws with the proposed undertaking that together mean that it fails to mitigate the competition risks identified by the ACCC:

- it does not bind AP+ and the banks, which are the applicants in the Authorisation Application, to take the necessary actions that will practically ensure that least-cost routing continues to be actively provided to small business merchants, both at point-of-sale and in the card-not-present online environment.
- the very short duration (of three years) is clearly insufficient to ensure that the availability of least-cost routing is not reduced in the medium to long-term, including in relation to digital wallets and for online transactions.
- it is a poorly crafted behavioural undertaking with numerous technical deficiencies, including a lack of clear deliverables, inadequate governance, compliance, auditing, complaints handling and dispute resolution processes, which together mean that it would be effectively impossible for the ACCC or the Courts to monitor and enforce its ineffectual commitments.

Key elements of an effective undertaking

The proposed amalgamation poses a significant risk to competition that cannot be resolved without an effective remedy that ensures a long-term solution. COSBOA considers that if an undertaking was to be accepted by the ACCC as a remedy it should, at a minimum, contain certain key elements. Specifically:

- The undertaking should be clear in setting out the obligations and deliverables that will address any potential competition harms.
- It should define the key parties who will carry out those obligations and be bound by the undertaking, particularly ensuring those whose conduct can potentially influence market dynamics in the future commit to, and are bound by, the undertaking.
- Ideally, to ensure competition is maintained in the long run, the undertaking should include a structural remedy that retains the competitive dynamics and incentives.

- The undertaking should set out a robust governance, monitoring, independent audit, and reporting framework.
- It should provide a voice for key stakeholders.
- A mechanism for addressing complaints and resolving disputes should be included.
- The undertaking should be able to be enforced.

COSBOA considers that the above critical elements are not contained in the proposed undertaking. COSBOA is concerned that an undertaking that relies on future behaviour to address competition harm will be ineffective, particularly where that undertaking lacks the necessary rigour, oversight, and enforceability.

The proposed undertaking does not address the competition harm

COSBOA notes in the ACCC's preliminary view, it was not satisfied the proposed amalgamation would not substantially lessen competition. The proposed undertaking does not resolve that issue. The proposed amalgamation will result in the structural removal of a significant and effective competitor or at least diminish eftpos' capability. The result of removing eftpos as an independent entity would be to remove its incentive to innovate. This undertaking does not address that issue and provides no comfort that an important competitive pressure (LCR) will be retained in the long run.

The proposed undertaking commits eftpos to do all things in its control to make available LCR; to maintain its infrastructure, payments scheme and related services; and to develop certain Prescribed Services under its existing Mandate Frameworks, all for a period of three years. An industry wide QR payments standard would be agreed and the feasibility of developing certain service would be explored.

Under the proposed undertaking, LCR technically might be available. However, as history has clearly shown, its practical benefits are dependent upon a combination of the actions taken by acquirers and issuers and an independent and focused eftpos, which is enabled and committed to competing head-to-head with Visa and Mastercard on debit card fees.

To date, the overwhelming evidence is that acquirers and issuers, many of which are the applicants behind the proposed amalgamation have been slow and, on occasions, downright obstructionist in maximising the availability of LCR, even with a fully committed, resourced, active and vocal eftpos management team trying to create an environment for change. Acquirers have taken an excessively long time to ensure their terminals, pricing regimes and systems are LCR compatible. They have done little to market LCR to their customers. They have hidden the benefits of LCR behind confusing and opaque pricing arrangements, favouring more profitable arrangements with the international card schemes, which have been able to put additional barriers in the way of LCR in the online environment. Some issuers are taking eftpos off their debit cards, removing the opportunity for LCR altogether.

The proposed undertaking makes no commitments on behalf of the applicants behind the amalgamation, whose attitudes and behaviours are a primary reason for the slow rollout and low take-up of LCR and the lack of practical headway in extending LCR into the digital environment. These behaviours are entirely logical as it is more profitable for acquirers and

issuers if merchants are paying the higher transaction fees of the international card schemes.

With these in-built financial incentives, why would the applicants suddenly become committed to competing strongly with the international card schemes on debit cards with a potentially weaker and less resourced eftpos management team, when they have been resisting doing this for years? Or will amalgamation mean their demonstrated attitudes and behaviours will become more entrenched, reducing the competitive pressure from eftpos – both on the banks and the international card schemes – lessening the merchant benefits of LCR across all form factors, both card-present and card-not-present, both at point of sale (including mobile) and online?

The clue to answering these questions lies in a combination of what we know about the positions of the amalgamation proponents and what one would expect in the proposed undertaking if it was serious about responding to the ACCC's concerns about AP+ and the major banks reducing support for eftpos and a loss of availability of LCR.

What do we know about the future of LCR and eftpos' ability to continue competing with the international card schemes under an amalgamation scenario?

- The major acquiring and issuing banks will have significant influence over the amalgamated entity.
- The amalgamated entity will not have the singular focus that eftpos has in driving competition in debit against the international card schemes.
- eftpos will no longer be a stand-alone entity and will report to the board of an amalgamated entity which will have different priorities.
- There is a lack of small business representation on the amalgamated entity and a lack of recognition that merchants are a core payments system stakeholder.
- The commitments to LCR and eftpos services in the proposed undertaking are for only three years.
- The AP+ expert adviser does not see a future in debit cards or that eftpos is financially sustainable in the longer term.
- In the UK, where the domestic debit payments provider ceased to exist, merchants ended up incurring significantly higher debit transaction costs.
- The CBA has not addressed the fact one of its main point-of-sale terminals and a number of its pricing plans are not LCR capable, and certain issuing banks are moving to single network debit cards which do not allow LCR.

- None of the major banks are actively looking to implement LCR in mobile, despite the CBA saying mobile wallets will soon account for 50% of transactions.
- The major banks may not take forward eftpos' online debit solution, instead preferring an NPPA solution which cannot offer LCR on debit cards and cannot compete directly with international card schemes in card payments which dominate the market.
- eftpos' merchant centric QR payments solution is missing from the proposed undertaking and could be replaced by a MasterCard and Visa standard.

All these actualities heighten concern that the amalgamation would result in a reduced focus on LCR and a loss of support for eftpos, making it even more telling that the proposed undertaking is bereft of any direct commitments by the applicants or AP+ itself. If the amalgamation proponents were genuine about addressing the ACCC's competition concerns, the proposed undertaking would include commitments that would make a real difference, such as:

- A commitment by the applicant acquirers to
 - ensure that LCR is available and actively promoted to all merchants at point of sale and digitally (including online and using mobile wallets);
 - upgrade their terminals in designated timeframes; and
 - maintain transparent competitive pricing offerings that support LCR.
- A commitment by the applicant issuers to maintain dual network cards for all their cards, ensuring that LCR is accessible at point of sale and online.
- A commitment by the AP+ that eftpos will retain total managerial discretion over its pricing decisions, operating at arm's length from non-independent AP+ board members, to drive competition and encourage maximum take-up and use of LCR.
- A commitment by AP+ and the applicants to continue delivering the full array of eftpos' existing and agreed future services in its public Roadmap, and to actively promote those services to merchants and consumers.
- A commitment by AP+ and the applicants to implement in full the Prescribed Services relating to LCR and to actively promote them to merchants in an agreed timeframe, rather than the tacit commitment to make them available for use.
- A commitment by AP+ and the applicants to comply fully with eftpos Mandates in the agreed timeframes to enable timely delivery of the enhancements required to deliver LCR in the digital environment.

Critically, if the amalgamation proponents were serious about not reducing LCR and competition in debit card payments, the proposed undertaking would continue for at least

seven years to provide the necessary time to enable and fully implement LCR functionality in the fast-growing mobile wallet and online transaction channels.

Without any of these meaningful commitments tying AP+ and the applicants, and from what we know about the history of LCR and the commercially logical intentions of those associated with AP+, COSBOA has no choice but to conclude that the amalgamation will provide the means for the major banks to reduce LCR and eftpos' ability to compete against the international card schemes. This will be to the detriment of small businesses and their customers, because they will end up paying higher debit fees, at point of sale and online, putting them at a disadvantage to larger operators which are able to negotiate special arrangements with their banks.

Additional concerns about the proposed undertaking

If the ACCC considers an appropriately drafted undertaking could be a means of allowing the amalgamation, it would in COSBOA's view, need to be strengthened significantly. COSBOA considers the proposed undertaking should contain a comprehensive governance framework, a greater level of independent oversight, and a greater voice for those impacted by the proposed amalgamation including small businesses. Further, the proposed undertaking contains no independent external governance or oversight, nor regulatory oversight to ensure compliance with the obligations.

The obligations as drafted do not provide assurances that eftpos will be maintained in the longer term as an effective, ongoing concern, and that such obligations can be effectively monitored or enforced.

Governance, monitoring and audit

The party proposed to give the undertaking is AP+. However, the relevant applicants behind the Authorisation Application who collectively have ownership and control of the amalgamation parties will remain key parties to the proposed amalgamation. Their ongoing role and commitments to address the ACCC's competition concerns have not been clarified or captured in the proposed undertaking.

COSBOA considers the proposed undertaking should include commitments by the applicant acquirers and issuers to ensure transparency about their roles and demonstrate their commitment and accountability for the commitments made. The proposed undertaking should also clearly set out the governance structures that AP+ will have in place to enable it to achieve its commitments under the proposed undertaking.

Any proposed undertaking should also allow greater stakeholder input including formalising a means for small business stakeholders to provide their views (for example, mandating two small business representatives, selected independently from the applicants, on the board).

The proposed undertaking should have effective mechanisms in place to monitor and report on compliance. It should set out clear lines of defence that include internal monitoring, and external independent auditing. COSBOA considers that what is currently set out in clause 6 should be described as 'monitoring' and would need to be significantly strengthened to

provide a more comprehensive framework that would ensure compliance with any obligations ultimately accepted by the ACCC. A clause should be added to set out an auditor function, performed by an independent, ACCC approved auditor.

Compliance and enforceability

The use of vague and imprecise language and broad, general commitments to obligations with no specified timeframes could lead to very open and uncertain conclusions. This would make any monitoring and assessment of compliance with such obligations extremely difficult and would make the proposed undertaking unenforceable. See for example, “AP+ will procure that eftpos will do all things in its control...” (clause 5.1); and AP+’s “commitment to explore feasibility of certain services and to develop if feasible.” (Clause 5.7).

Further, clauses setting out the maintenance of eftpos’ infrastructure, scheme, and services, do not specify regular reviews of the effectiveness in meeting that obligation (for example, that reviews be conducted twice per year), not do they specify a framework that will commit to improving and enhancing the infrastructure, scheme, and services.

Further detail is needed to understand clearly the compliance obligations and how they will be monitored and reported. For example, how will progress be reported, and what will be the assessment criteria?

Part of the role for the revised monitoring and audit function should include comprehensive and regular reporting to the board and ACCC about issues and delivery against the obligations.

Timing

COSBOA considers the proposed three-year timeframe for the undertaking is insufficient and provides no long-term certainty for small businesses. Numerous stakeholders would be impacted by the amalgamation and the timeframes needed to develop and evaluate the effectiveness and impact of the new Prescribed Services would alone, extend well beyond three years. With the length of time that it takes to make changes to payment systems, it is likely that the embedding of competition in online and mobile wallet related payments will take between five and seven years. If a three-year timeframe was to be seriously considered, it should only occur if that period is used to develop a more comprehensive long-term, competitive solution that could include a regulatory regime, or potentially a mandatory code of conduct. Any proposed undertaking should also be subject to regular review to ensure its ongoing effectiveness.

Complaint handling and dispute resolution

In addition to providing a greater voice for stakeholders including small businesses, the proposed undertaking should set out a framework for customer complaints and dispute resolution. This would enable issues to be raised in relation to the quality of the services being provided, or in relation to the execution of the deliverable set out in the undertaking.

Such complaints should also form part of the reporting from the independent auditor to the board and ACCC.

Conclusion

COSBOA is of the view that the proposed amalgamation should not be allowed without a remedy that will provide an effective, long-term solution that retains a competitive, dynamic market that will ensure small businesses' cost for using the debit payments system remain low, including through maintenance of the competitive pressure of LCR. The remedy which has been proposed should not be accepted. The proposed undertaking, which offers a short-term behavioural remedy in response to the identified competition risks, would not overcome the competition concerns set out above and previously raised by COSBOA in relation to the future of LCR and the potential financial detrimental impact on small businesses.

Behavioural undertakings require a significant level of ongoing monitoring and scrutiny. Nor do they achieve an effective long-term resolution to maintaining competition as might otherwise be achieved through opposing the amalgamation or proceeding whilst retaining key structural elements in the market (e.g., excluding eftpos from the amalgamation). The remedy proposed gives COSBOA and small businesses no level of comfort that the potential competition harms will not eventuate.

Further, the proposed undertaking does not resolve other concerns raised by the ACCC in its letter dated 4 June 2021, which sets out the potential competition harm and which noted that the claimed public benefits remained unclear.

Final remarks

If the ACCC considers a more appropriately drafted undertaking could be a means of allowing the amalgamation, it would in COSBOA's view, need to be significantly strengthened, taking into account the points raised above. While COSBOA is open to considering a more effective remedy, AP+ and the applicants must recognise that small businesses and their customers need a payments regime which provides certainty and minimises transactions costs at this very challenging time.

Kind regards,



Alexi Boyd
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