

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged:	Affidavit of Stephen Bruce Coulter
File Number:	ACT 3 of 2021
File Title:	APPLICATION FOR REVIEW OF MERGER AUTHORISATION MA 1000020 DETERMINATION MADE ON 9 SEPTEMBER 2021
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 11/11/2021 10:19 AM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA



Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Number: ACT 3 of 2021

File Title: APPLICATION FOR REVIEW OF MERGER AUTHORISATION MA 1000020
DETERMINATION MADE ON 9 SEPTEMBER 2021

Applicant: Controlabill Pty. Ltd.

AFFIDAVIT

I, Stephen Bruce Coulter, of 18 Cockle Crescent, Point Lonsdale, Victoria, say on oath:

1. I am Co-Founder and major shareholder of Controlabill Pty Ltd.
2. I make this affidavit in relation to an interlocutory application filed by Mr Milliner on 6 October 2021 for an order that the application for review be dismissed on the ground that the applicant, Controlabill Pty Ltd (Controlabill), is not a person with a sufficient interest within the meaning of section 101(1AA) (b) of the Competition and Consumer Act 2010 (Cth).
3. I have personal knowledge of the facts and matters referred to in this affidavit, except where otherwise indicated. Where I refer to information that is not within my personal knowledge, I identify the source of the information and believe it to be true.
4. This matter arises as Mr Robert Milliner, represented by King & Wood Mallesons, sought to have Controlabill's application for review dismissed by an interlocutory injunction on the grounds Controlabill is not a person of sufficient interest.
5. Mr Milliner's attempt at the inter locutory injunction on October 6 was reviewed, resulting in a decision by Justice Middleton it can only be heard by a full panel of the Australian Competition Tribunal.

A handwritten signature in black ink, appearing to be "SBC", is written over a horizontal line.

Stephen Bruce Coulter

A handwritten signature in black ink, appearing to be "R. Milliner", is written over a horizontal line.

Witness

6. This Affidavit sets out the credentials of Controlabill to establish its sufficient interest in the matter so the review can continue to 2022.
7. The Act does not define what is meant by sufficient interest. It is understood sufficient interest does not mean a mere intellectual or emotional concern. For sufficient interest the person must be likely to either gain some advantage or to suffer some disadvantage, other than a sense of grievance or debt for costs, if their action fails.
8. These observations give rise that sufficient interest should be established if one or more of the following are accepted:
 - a. The person has knowledge and expertise beyond that of the general-public as is relevant to the subject matter of the review application, in this case, payments.
 - b. The person has financial interests which will be affected by the outcome of the review. In the words of Gummow J, who concluded:

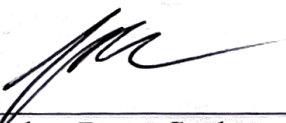
"...a danger and peril to the interests of the applicant that is clear and imminent rather than remote, indirect, or fanciful, and the applicant has an interest in the matter of an intensity and degree well above that of an ordinary member of the public."

Justice Gummow of the Australian Federal Court made this conclusion in Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124.

After a review of relevant authorities in other fields his Honour said, at 132-133:

"The result is that there is a measure of broad agreement as to locus standi both for legal and equitable remedies in public law and in that situation it would be a strange result if the ADJR Act posited, by use of the concept of grievance, some narrower criterion. It also has to be borne in mind that the ADJR Act is ambulatory in its operation and draws within its scope a diverse and extensive collection of decision-making processes, truly an unclosed class. Too rigid a criterion of locus standi will threaten to stultify the utility of the procedures the ADJR Act offers.

Hence the force of the observations (frequently adopted in this Court) by Ellicott J in Toohey's case [Tooheys Ltd v Minister for Business and Consumer Affairs] (1981) 54 FLR 421 at 437-438 to the effect that the meaning of 'a person aggrieved' is not encased in any technical rules and that much depends upon the nature of the


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particular decision and the extent to which the interest of the applicant rises above that of an ordinary member of the public."

Comment: I am clearly not an ordinary member of the public and have expert knowledge, insights, and financial consequences from the merger.

- c. This was reinforced by Justice Lockhart in *Application by Wylie Steel Pty Ltd for review of grant of authorization to Broken Hill Proprietary Company Ltd* (1980) 3 ATPR 40-170. That determination concerned an application under s 101 to review a determination of the Commission granting authorisation to the acquisition by Broken Hill Proprietary Company Ltd ("BHP") of shares in John Lysaght (Australia) Ltd held directly or indirectly by another company. BHP challenged whether Wylie Steel had a "sufficient interest" to require the Tribunal to conduct a review under s 101. Lockhart J, sitting as the Deputy President of the Tribunal (then the Trade Practices Tribunal), said at 42,344:


"It is not necessary to define the various categories of persons who may have a 'sufficient interest'; but they include a person who establishes that his business interests or prospects could be adversely affected by the proposed merger."


And later at 42,345

"...subsec. 101(1) requires that before proceeding with the review of the determination of the Commission, the Tribunal must be satisfied that the applicant, not being the applicant for the authorisation, has made out a prima facie case that it has a 'sufficient interest'. The test is not an unduly high one. If it were, it may involve determining the very questions that will loom large in the hearing on the merits of the determination including the allegations of Wylie Steel to which we have referred. These are hardly matters that fall for determination at this stage. If it emerges during the course of the hearing that the applicant in truth may not have a 'sufficient interest' the Tribunal may then review the locus standi of the applicant and consider the future course of the application for review."

9. In this affidavit I set out the sufficient interest evidence of Controlabill in five parts:

- a. My credentials and expertise as a financial services and payments expert.


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- b. My financial exposure which will be clearly and imminently disadvantaged by the merger.
 - c. Controlabill's interest and the detrimental impact of the merger.
 - d. The NPPA's own actions which prove they regard Controlabill of sufficient interest.
 - e. The Public Interest and potential for detrimental outcomes based on my expertise referred to in paragraph 9 a.
10. My credentials and expertise as a financial services and payments expert are:
- a. A degree in Business, majoring in Accounting from RMIT University.
 - b. As a Head Office Manager of financial products at ANZ from 1985 to 1988.
 - c. As the strategic lead for Mass Market segments at NAB from 1989 to 1991 including being the Bank's representative on the MasterCard Australia marketing committee, a payments business.
 - d. As Manager of Corporate and Large Businesses Segments of NAB's Business Bank from 1991-92 including business payments.
 - e. As Head of All Personal Customer segments at NAB from 1992 to 1995 encompassing all consumer payments.
 - f. As Head of Online Commerce at NAB from 1995 to 1997, where I spent two years working globally with NAB investigating and developing global online payments strategies and solutions. This role was at the forefront of internet payments globally and involved many trips to Silicon Valley, New York and London dealing with the world's leading payments and online organisations, including TIBCO, Oracle, CyberCash and News Corporation.
 - g. As Strategy Consultant for NAB in New York in 1997 working with McKinsey on NAB's global strategy, of which payments was one of the pillars.
 - h. As Head of NAB's Consumer Bank, based in Hong Kong, identifying best financial strategies for domestic and international customers in South-East Asia of which payments are a key requirement.



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- i. As General Manager of Personal Customers at Commonwealth Bank from 1998 to 1999 in which period I oversaw Netbank through my team and developed payment solutions for our customers.
- j. As General Manager of Global eCommerce at Commonwealth Bank from 1999 to 2001 further developing Commonwealth's online leadership position. During this period, I did and led many trips to Silicon Valley including to PayPal, Microsoft, Sun Microsystems, Oracle, Tibco and others. Payments was a key area of investigation and partnership discussions through this period.
- k. As Group General Manager Payments, Telecommunications and Payments Technologies at Pinpoint – now Mastercard. This role with the world's leading loyalty company leveraged payments data and technologies for delivering loyalty programs to major banks in Australia, New Zealand Asia.
- l. Contracting to ANZ Bank from 2005 to 2006 establishing their consumer segment management team and core value propositions. Extensive work into payments as part of consumer solutions was part of this role.
- m. Since October 2005 when Controlabill started, I have continued to leverage and further develop my payments expertise through the development of the Controlabill strategy, personally writing the technical brief for the patents and working with Griffith Hack to finalise, submit and ultimately address all issues resulting in the approval of Controlabill's patents around authority/mandate management, bill payments, bill smoothing and budget management. In my roles at Controlabill, I continued to explore payments and fintech's globally with many trips to the USA to meet potential partners, technology companies and speak at Fintech conferences.
- n. Since 2015 I have been applying and developing my payments expertise to the transportation industry with further payment strategies and solutions for emerging Mobility-as-a-Service and shared mobility solutions in Australia, New Zealand, Latin America, North America, and Europe. This involved working with Mastercard Latin America in Mexico and Miami in 2017/18 and associated payment services.

My payments expertise is extensive and more than qualifies me to comment and have sufficient interest in this matter.


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11. My personal financial exposure, as co-founder, major shareholder, and former Managing Director of Controlabill will be disadvantaged by the matter.
- a. As co-founder and Director I made Directors Loans of more than \$150,000, which are still outstanding.
 - b. I also worked for no salary from October 2005 to May 2015 for Controlabill on the basis my efforts would be rewarded through the ultimate partnerships and royalties achieved from Controlabill's IP and Patents. My only income from Controlabill in this period was \$5,000/month for 12 months after we secured some investor funding.
 - c. From 1998 to 2005 my annual salary and benefits had been more than \$300,000 per year. I forewent this significant income due to my commitment to Controlabill's future success.
 - d. Should the NPPA, BPay, EFTPOS merger go ahead unchallenged, my ability to recover Director's loans, let alone the potential value of my shares will be virtually impossible due to the new organisation offering competing services and controlling access terms to the new payments platform.

On a personal interest basis, I have a very sufficient interest in progressing this matter.

12. Controlabill itself has a sufficient interest in this matter, which will be detrimentally affected.
- a. Controlabill since registering as an Australian Company in early 2006 has invested hundreds of thousands of dollars in developing intellectual property and securing extensive patents around payment authorities/mandates, management, bill smoothing, bill payments and budgeting.
 - b. Controlabill has net liabilities of more than \$300,000 and accumulated losses of more than \$600,000. The merger will remove any opportunity of achieving income to offset these losses and repay shareholders and directors their direct contributions, let alone any potential for growth in value for their money, time and patience.
 - c. Controlabill raised \$300,000 from angel investors and a similar amount in grants from the Australian Government. The shareholders will be disadvantage by the merger.
 - d. Affidavits by other Controlabill shareholders and Directors will also show their sufficient interest in this matter and therefore further prove Controlabill's sufficient interest.


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- e. Controlabill's intellectual property and patents will be detrimentally affected if the merger goes ahead and NPPA delivers its Mandate Payment Service – which directly competes with Controlabill and in our analysis, blatantly breaches our patents. We have based this opinion after reviewing in detail the NPPA's published documentation on the Mandate Payment Service, scheduled for launch in July 2022. A copy of the NPPA's April 2020 "Mandated Payments Service" capability development document from April 2020 is attached in **Schedule A**. All major shareholders of NPPA, BPay and EFTPOS have received detailed briefings on Controlabill's IP under mutual nondisclosure agreements. To have our own IP abused and used against us to our detrimental interest is particularly affronting. Even Deputy Chair of the ACCC, Delia Rickard, was given private briefings on Controlabill and its IP in her former role at ASIC.
- f. Controlabill's core service is around Authority or Mandate Management. This is the service NPPA are planning to launch in 2022, which our analysis shows is a blatant patent breach.

The NPPA chose not to engage with Controlabill through the merger process even though Controlabill was one of 74 submissions with concerns regarding the merger. It is remarkable that only one organisation (Controlabill) of the 74 organisations/people lodged a request for review, after the merger approval was announced on 9 September 2021.

NPPA engaged with others who made submissions of concern, made concessions and encouraged shareholder banks to provide financial incentives to secure industries' support for the merger. Evidence of this is the merger participant's undertaking on 8 September 2021 regarding Least Cost Routing (Attached Schedule F). This was negotiated with multiple industry associations to gain their support for the merger. The negotiation involved seeking banks to provide financial benefits to secure the industries' support. Commonwealth Bank is one such example, who announced \$10 million in fee concessions around least cost routing on 23 September 2021, included as Schedule G. While the Commonwealth Bank "spins" this as a COVID initiative, it was negotiated as part of the merger acceptance by Industry groups.

By its actions NPPA again demonstrated its intent to buy industry support, but avoid negotiating with an IP protected competitor technology. Despite the NPPA and Shareholder organisations all having extensive knowledge of Controlabill, they deliberately did not engage around Controlabill's submission regarding the merger proposal. This demonstrates



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the NPPA regarded Controlabill to have sufficient interest, but engagement would have further proved Controlabill's credentials and sufficient interest.

Controlabill's documented financial, investment and IP history clearly demonstrates it has sufficient interest in this matter.

13. Actions by the NPPA and associated banks and entities prove they regard Controlabill as having sufficient interest in the matter. Why else would they make such actions and consume significant resources and legal costs against an *insufficient* person? Actions by the NPPA and related parties which demonstrate they regard Controlabill as having sufficient interest include:
 - a. Every major bank and other major industry players had multiple meetings with Controlabill over multiple engagement periods from 2006 to 2019. A single meeting would indicate token interest. Extensive multiple meetings prove continued interest by major NPPA shareholders proving they regard Controlabill of sufficient interest. **(Attached in Schedule B is a sample of engagements over time proving this point. An extensive list of all institutions, executives, meeting dates and content will be provided for the full proceedings in 2022)**
 - b. On September 30, 2021, less than an hour after Controlabill lodged its request to review the merger, the NPPA served a cease-and-desist order (**Schedule C**) on Controlabill threatening to seek to have our patents revoked. If NPPA are unconcerned by our patents, why would they seek to go to the significant cost of seeking their revocation? My interpretation of this action is that at best it is intimidation and bullying, at worst it is unconscionable conduct and abuse of market power. Either way, it shows they regard Controlabill as having sufficient interest.
 - c. The NPPA's attempt to seek an inter locutory injunction based on Controlabill not being of sufficient interest, further proves the NPPA's concerns and that they do regard Controlabill of sufficient interest.
 - d. The Australian Competition Tribunal's acceptance of Controlabill's Request for Review after analysis by their relevant administrator(s) is further evidence there was no doubt it was a valid request by an affected and sufficiently interested organisation.



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14. The General Public's interest will not be served without a review of the merger. Acting on behalf of the public, Controlabill has sufficient interest and expertise. Potential public detriment is substantive and coherent. It relates to:

- a. Costs
- b. Control
- c. Competition
- d. Commitment
- e. Collusion
- f. Concentration
- g. Clarity
- h. Conduct

We will be addressing each of these in our evidentiary material should we proceed beyond the sufficient interest hearing.

15. A corporate or organisational entity does not make decisions of itself. People have motives, biases, integrity (or otherwise), conscience and empathy (or not). As such the motives of people are as important as the decisions they make on behalf of the organisations they represent.


All decisions are made by people, human beings -appointed within organisations to make decisions. A corporate or organisational entity does not make decisions of itself.


While NPPA attempt to humanise the merger by referring to decisions made by companies and Controlabill as a "person" in their affidavit, they neglect that human behaviour comes with human biases and interpretations.

Regarding the merging entities and the shareholder banks, profit is a fundamental motive, fuelled by growing salaries and bonuses. Increasing price, lowering operating costs, and locking in customer revenue streams are all consistent with the executives' profit motive.

The actions by people driving NPPA and related entities are more proof Controlabill (and its people) do have sufficient interest, as Controlabill's actions threaten Industry profit opportunities.

Conversely, those protecting the market and consumer interest such as administrators of reviews in the ACT are people focussed on fairness and seeking to protect vulnerable people, businesses, and the wider community. Their bias will be to ensure protection, being aware of what


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consequences may ensue. It is these people who have accepted Controlabill's request to review the ACCC outcome, as they understand Controlabill's submission highlights real risks to the payment system, potentially detrimental to businesses, individuals, and communities.

The actions by the people within the Australian Competition Tribunal are more proof Controlabill (and its people) do have sufficient interest, as the Merger threatens costs and competition for consumers – and Controlabill's request for review will bring this to attention.


16. Controlabill is concerned about the character of the shareholders and parties associated with the proposed merger. The banking and payments industry does not have a good reputation nor is it trusted by the public. Recent enquires and Royal Commissions are testimony to this fact. This is further evidenced by none of the 50 directors or senior management of NPPA, EFTPOS or BPAY committing to and signing the Banking and Finance Oath. The Oath was established in 2013 in partnership with The Ethics Centre to provide assurance to the market that major financial decision makes would act ethically. The Oath none of the leaders of Australia's payments industry have been prepared to sign is:

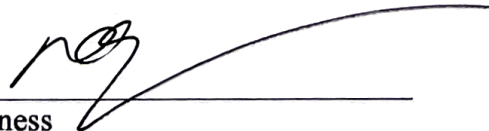
THE OATH

- Trust is the foundation of my profession.
- I will serve all interests in good faith.
- I will compete with honour.
- I will pursue my ends with ethical restraint.
- I will help create a sustainable future.
- I will help create a more just society.
- I will speak out against wrongdoing and support others who do the same.
- I will accept responsibility for my actions.

In these and all other matters, **My** word is my bond.

17. We are highly suspicious and distrustful of a merger run by leaders who are not prepared to personally commit to what is described as an "industry-led" initiative "to improve our society by strengthening the ethical standards of financial services". Controlabill's sufficient interest in this industry gives us ongoing concerns for the welfare of all Australians as well as our personal and business interests.


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18. On 28 October, the **Corporations and Financial Services Joint Committee** of Australia's Federal Parliament, released a report entitled "Mobile payment and digital wallet financial services". This report looked at Australia's payment industry, infrastructure, and public interest.

The fact Controlabill understands the implications, conflicts and negative consequences for Australians is causing NPPA to devote significant resources to block Controlabill's request for review" to proceed – again clearly demonstrating Controlabill has "sufficient interest".

In presenting the report to parliament, the Committee Chair and Federal Member for Fisher in Queensland and Deputy Chair, Mr Julian Hill, Member for Bruce in Victoria, their speech (**Hansard transcript attached in Schedule D**) included the following statements:

- a. "Australia's payment ecosystem is of a foundational importance to Australia's economy and society, supporting around 55 million payments, worth up to \$650 billion, each **day**."
- b. "The committee found that much of the existing legislation governing the payment space is predicated on outstanding structures and systems, while the effectiveness of the multitude of regulators covering the payments ecosystem has been undermined by outdated concepts of what constitutes a payment platform. These gaps have allowed some of the most important players in the system to operate outside the reach of our regulators."
- c. "Evidence before the committee suggested that anti-competitive practices, such as restricting third-party access to key technology, may be jeopardising consumer choice, stifling innovation and driving up payment costs."
- d. "The committee also heard extensive evidence on Least Cost Routing, a process where merchants rout transactions through the card scheme that attracts the lowest costs. This capability is not currently supported for mobile payments, often driving up the costs of acceptance for merchants and, ultimately, consumers."

Comment: The impact on the public and individuals is multiplied – should the manufacture of a product require multiple payments, any increase in costs is multiplied at every transaction – e.g. raw materials purchase, transport, manufacturing costs, transport to points of sale, retailer costs, final point-of sale cost. Should base payment costs increase only marginally, they may be



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incurred ten or more times in producing goods which ultimately unnecessarily increases the end price beyond what it would otherwise be.

- e. "The committee considers: first, that legislation and regulations must be updated to keep pace with practice and become as technology-neutral as possible"

Comment: A monopolistic, predominantly bank-owned platform providing its own overlay services is not technology neutral.

- f. "Whilst we may hope for action, the government is in its ninth year and they've received yet another review but they haven't done anything with the years of reviews they already have"...

..."But the government has received multiple reports over eight years with increasingly urgent recommendations for change yet has implemented few to none of those reforms"...

..."The government's done nothing for eight years with these recommendations"...


Comment: The Banks have repeatedly demonstrated they do not want to implement a payments solution to enable simple bank and account switching by customers. Under both Labour and Liberal governments, Banks have spent an estimated \$1 billion+, amounting to "pocket money for banks" over 13 years feigning interest in bank account switching, but never delivering – continuing to protect their profits with significant barriers to exit for customers.

Examples include:

- Tick and Flick project
- MAMBO
- Consumer Data Right
- NPPA's MPS/Pay To, now making the same noises without any history or integrity in delivery.

- g. "The second point is the need to avoid the politicisation of payments regulation.

Recommendation 1 of the report calls for Treasury to exhibit 'leadership' in the payments space. We're not convinced that payments policy and regulation should be led by Treasury under this Treasurer. We do agree that the Treasury clearly needs to enhance its capability and capacity to engage in this. Their performance at the public hearings was woeful; it really was. But, as the


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chair has kindly written in the report, we'll sheet that home to the systemic issues in Treasury and not the poor bunnies who happened to appear on the day. But we do risk a very different approach under this Treasurer if payments policy is rested off the independent Reserve Bank of Australia, as the government is trying to do. There have been media reports that the well-respected head of payments from the Reserve Bank has quit and that the government's looking to take the entire payments division from the Reserve Bank, where it's been, and put it under the political control of the Treasurer in the Treasury."

Comment: The merger is part of this politicisation and KWM itself is embedded deeply and conflicted by the multiple roles it has played representing NPPA, the Federal Treasurer's Payments Review and the Consumer Data Right., amongst others. While some Law firms attempt to mitigate conflict by using different partners and "Chinese walls", Scott Farrell of KWM has been leading every aspect – whether working for NPPA, the Treasurer or other related parties.


The payment "Boys Club" has got to such a point the Australian Financial Review published an article on August 30 2021(Attached Schedule E) praising the Payments Review by Mr Farrell, with the article written by his boss(for that project), the Treasurer Josh Frydenberg. It is unbelievable such blatant self-promotion and mutual backscratching gets reported as credible news or opinion!

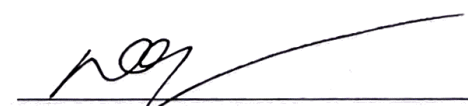
Should this case proceed to a full hearing we shall be seeking to have KWM barred from acting due to conflict of interest.

- h. "...The default position should be a presumption of open access of critical hardware on reasonable commercial terms...

...Sectors such as the railways, telecommunications and ports have long had regulatory architecture and access regimes to promote competition and innovation and prevent unfair or uncompetitive use of market power or dominance. A reasonable analogy, if you like, is the telecommunications network infrastructure where the network cables that send the signals are subject to open access regulation that the parliament has put in place." ...

Comment: Not only will the merger further consolidate power and the collapse the payments value chain, but it will also have the same organisations controlling, platform, overlay services, rules, access rights, fees, services to businesses and services to consumers. It is equivalent to an


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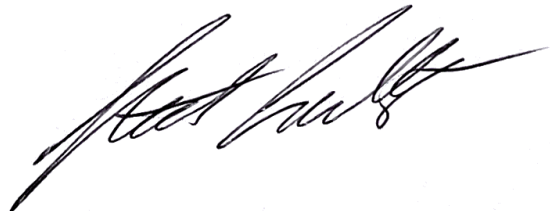

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electricity company owning the coal mines, the generators, the poles and wires, the retail outlets and owning the electrical appliances they sell!

19. I conclude my affidavit by re-emphasising I and Controlabill are of and have sufficient interest to meet the interpretation of sufficient interest applied within the Australian Competition Tribunal for our Request to Review the merger decision and continue to a full hearing.
- a. I am not an ordinary member of the public and have expert knowledge and insights into payments.
 - b. I have direct financial consequences of the merger.
 - c. Controlabill is also of sufficient interest due to the dependency on it for financial outcomes by its founders and shareholders.

Sworn by the deponent
at Point Lonsdale
in Victoria
on 11 November 2021
Before me:

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)
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Signature of deponent

Signature of Witness



Name of witness:

MARTIN GILL

Authorisation Credentials:

CHIEF EXECUTIVE OFFICER
BOROUGH OF QUEENSLIFFE


Stephen Bruce Coulter


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