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**Lodgment and Details**

Document Lodged: Submissions

File Number: ACT 3 of 2021

File Title: APPLICATION FOR REVIEW OF MERGER AUTHORISATION  
MA 100020 DETERMINATION MADE ON 9 SEPTEMBER 2021

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 6/10/2021 3:57 PM

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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

OUTLINE OF SUBMISSIONS

(Interlocutory application filed on 6 October 2021)

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Filed on behalf of Mr Robert Milliner in his capacity as Chairperson of  
Industry Committee, an unincorporated association

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## A. INTRODUCTION

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1. This outline of submissions is provided in support of an interlocutory application made by Mr Robert Milliner, in his capacity as Chairperson of Industry Committee (**IC**), on 6 October 2021. That interlocutory application seeks an order that the application filed by Controlabill Pty Ltd (**Controlabill**) on 30 September 2021 for review of the Australian Competition and Consumer Commission (**ACCC**)’s determination of 9 September 2021 be dismissed on the basis that Controlabill lacks a “sufficient interest” within the meaning of s 101(1AA)(b) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). Consistent with s 103(1)(b) of the CCA, Mr Milliner seeks to have this application heard at the earliest convenient date to the Tribunal and in advance of any substantive review.
2. The primary grievance raised by Controlabill in its application concerns allegations of patent and copyright infringement and is not apt to be determined in proceedings before the Tribunal. The issues raised by Controlabill relate to a dispute with one of the parties to the merger. Controlabill does not identify a coherent theory of competitive harm or public detriment which is specific to the amalgamation itself. It does not seek relief which could be granted under s 102 of the CCA. There is also a concern, having regard to the basis of Controlabill’s application and the evidence before the Tribunal, as to whether the proceedings are being pursued for a collateral purpose.

## B BACKGROUND

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3. Before turning to the principles that apply in determining whether a person has a “sufficient interest” for the purposes of s 101(1AA)(b), it is necessary to address briefly the background to this interlocutory application and Controlabill’s application.

### B1 ICA’s application for authorisation

4. On 18 March 2021, IC submitted an application pursuant to s 88 to facilitate the amalgamation of BPAY Group Pty Ltd (**BPAY Group**), BPAY Pty Ltd (together, **BPAY Opco**), eftpos Payments Australia Ltd (**EPAL**) and NPP Australia Ltd (**NPPA**).<sup>1</sup>

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<sup>1</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 1, Exhibit p 19, [2.1]. See, also, letters to the ACCC dated 18 June 2021 (Tab 3) and 23 August 2021 (Tab 4).

5. In particular, IC sought authorisation on behalf of its members, which are shareholders of BPAY Group Holding Pty Ltd (**BPAY Holdco**), members of EPAL and/or shareholders of NPPA, and proposed shareholders of a new entity now known as Australian Payments Plus Ltd (**AP+**), for:<sup>2</sup>
  - (a) the existing shareholders and members of BPAY Holdco, EPAL and NPPA to acquire shares in what is now known as AP+; and
  - (b) AP+ to acquire shares in each of BPAY Opco, EPAL and NPPA.
6. Broadly stated, the rationale for the transaction was to enable the three existing payment schemes, whose activities are largely complementary, to:<sup>3</sup>
  - (a) co-ordinate innovations, creating efficiencies for customers, businesses and consumers;
  - (b) reduce the risk of stranded assets from innovations that were not able to succeed due to their inability to achieve network effects in a timely manner; and
  - (c) enable the payment schemes better to compete against existing and future global payment companies, enhancing competition in domestic payment markets.
7. The application filed by IC was supported by a substantial body of evidence, which included:<sup>4</sup>
  - (a) expert reports from Dr Geoff Edwards (providing an economic assessment of likely effects on competition and public benefits and detriments) and Mr Lance Blockley (addressing features of the payments industry in Australia);

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<sup>2</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 1, Exhibit p 19, [2.1]; see also Affidavit of Sharon Henrick dated 6 October 2021 at Tab 10, Exhibit p 308 [1.5]-[1.6].

<sup>3</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 1, Exhibit p 19, [2.1] and p 20 [2.4].

<sup>4</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 1, Exhibit pp 3 - 8.

- (b) statements provided by executives of BPAY Opco, EPAL, NPPA, the Commonwealth Bank of Australia, National Australia Bank Limited, Westpac Banking Corporation, Australia and New Zealand Banking Group Ltd, Coles Group Ltd, Woolworths Group Ltd and Cuscal Ltd; and
  - (c) documentary evidence addressing policy initiatives directed at reform of the Australian payments environment, the regulatory framework for payments systems, annual reports of various participants in payment systems, and documents regarding the commercial rationale for the proposed amalgamation.
8. The application and its supporting documents were received by the ACCC on 22 March 2021 at which point it commenced its consideration of the application.

## **B2 ACCC's review and determination**

9. During the course of the ACCC's consultation on IC's application, it consulted with competitors, industry associations, academics, consultants, transaction solutions providers and the Reserve Bank of Australia (RBA) and received a number of submissions.<sup>5</sup> In the context of that consultation process, Controlabill provided a number of documents to the ACCC, including:
- (a) A document entitled "*Proposed amalgamation of BPAY, eftpos and NPPA – MA1000020 a submission by Controlabill Pty Ltd*" dated 21 April 2021.<sup>6</sup> This submission addressed a number of matters, including a claim that NPPA had infringed certain patents owned by Controlabill, a claim that AP+ would be ungovernable, a claim that IC's solicitors (King & Wood Mallesons (KWM))<sup>7</sup> appeared to have a conflict of interest and complaints about the sufficiency and availability of information in supporting the application. The submission attached a lengthy submission to an Inquiry into Future Directions for the Consumer Data Right, which had previously been submitted by Controlabill,

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<sup>5</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 10, Exhibit p 318, [2.1].

<sup>6</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 5, Exhibit pp 216 - 269.

<sup>7</sup> We note for completeness that KWM rejected any allegation of a conflict of interest: Affidavit of Sharon Henrick dated 6 October 2021 at Tab 9, Exhibit p 289.

together with other documents. After outlining a number of objections, the submission ended with the sentence “*Controlabill remains open to discussions re licencing and IP acquisition with any interested organisations*”.<sup>8</sup>

- (b) A document entitled “*An additional submission and comment by Controlabill Pty Ltd*” dated 21 April 2021 but apparently received by the ACCC on or around 11 May 2021,<sup>9</sup> which raised concerns about various matters, including KWM’s involvement in the application, the absence of any existing competition in payments markets and a suggested breach of the “*four pillars legislation as enacted by the Keating government in 1990*”. The submission concluded by seeking “*a private discussion with the ACCC regarding sections 45 and 46*”.<sup>10</sup>
- (c) A document entitled “*Proposed Amalgamation of BPAY, eftpos and NPPA – MA1000020. A second submission by Controlabill Pty Ltd*” dated 18 June 2021.<sup>11</sup> This submission contained claims that NPPA had infringed Controlabill’s patents and copyright. The submission contained allegations of abuse of market power and unconscionable conduct, together with various other allegations including allegations made against the RBA. The submission contained the following statement:<sup>12</sup>

Advice from our legal counsel is such that we should now seek an interim injunction which may affect this application. Perhaps, Newco may be dissuaded from acquiring the MPS [Mandated Payment Service] under this arrangement, because of a potential contingent liability and high likelihood of extensive reputational damage spreading across multiple Financial Institutions and Regulators who have all been involved and informed.

The letter concluded by observing that “*the current structures such as a separate NPPA entity offer Controlabill a clear legal remedy from a company with a revenue stream*” and “[*w*]e are concerned that a decision by the ACCC to allow the merger into

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<sup>8</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 5, Exhibit p 223.

<sup>9</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 6, Exhibit pp 271-272.

<sup>10</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 6, Exhibit p 272.

<sup>11</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 7, Exhibit pp 274-279.

<sup>12</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 7, Exhibit p 275.

*Newco may interfere with that remedy given there is no detail as to the intentions of Newco toward the MPS*".<sup>13</sup> (This issue is addressed below at [31]).

- (d) A document entitled "*Breach of approved patents by NPPA. Controlabill's formal complaint raised to the ACCC and to the RBA Payment Systems Board*", which is undated but was apparently received on or around 17 August 2021.<sup>14</sup> The submission outlined a number of concerns which were said to relate primarily to alleged patent infringement by NPPA, alleged misuse of market power, unconscionable conduct, misleading and deceptive conduct, infringement of copyright and breach of non-disclosure agreements, together with other matters. Controlabill also expressed the view that it should be impossible to pass any merger in the absence of an agreed governance model.
10. As is evident from a review of the submissions provided by Controlabill in connection with the ACCC's review, while there are passing references to matters concerning competitive harm and public benefits (particularly in the context of complaints about existing industry structure), the documents largely consist of a range of serious and unsubstantiated allegations against participants in the payments system, including NPPA. Controlabill does not develop a coherent theory of competitive harm, including in relation to its business or interests, which it contends would or would be likely to arise as a result of the amalgamation. The alleged harms identified in its submissions essentially relate to the conduct of one of the parties to the merger and whether or not that conduct has infringed Controlabill's intellectual property rights.
11. On 9 September 2021, the ACCC authorised the proposed amalgamation, subject to an undertaking from AP+ under s 87B of the CCA.<sup>15</sup> In all the circumstances, including the undertaking from AP+, the ACCC was satisfied that the amalgamation would not have the effect, or would not be likely to have the effect of substantially lessening competition in any market.<sup>16</sup> It also identified a number of public benefits associated with the amalgamation, including more timely and efficient investment in new and innovative

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<sup>13</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 7, Exhibit p 277.

<sup>14</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 8, Exhibit pp 281-287.

<sup>15</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 10, Exhibit pp 291-447.

<sup>16</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 10, Exhibit p 305.

payment services, a potential reduction in the risk of stranded payment assets, an increased ability for eftpos to compete against Mastercard, Visa and international technology companies, and increased engagement with small business and other participants.<sup>17</sup> The determination named the Chairperson of IC, Mr Milliner, as an individual directly involved in the administration and oversight of IC, as a person for the purposes of s 88(2) of the CCA.<sup>18</sup>

### **B3 Controlabill and its dispute with NPPA**

12. Controlabill has previously described its business in submissions provided to the ACCC.<sup>19</sup> Those materials state that Controlabill's business involves "*a solution allowing payment 'authorities' to be managed centrally and electronically by the customer or any authorised system in the payment system.*"<sup>20</sup> This solution is known as the "Authority Management System" or "AMS". Controlabill has stated that it operates "*in a payments adjacency (it makes no payments)*" and that its solution "*never touches the payment system*".<sup>21</sup> It appears from Controlabill's submissions that its business consists of the alleged ownership of certain intellectual property, which it seeks to have acquired, licensed or otherwise utilised.<sup>22</sup>
  
13. As is evident from the application to the Tribunal and a number of the submissions referred to above at [9], Controlabill's primary grievance with the ACCC's decision and the proposed merger appears to involve an allegation that NPPA infringed certain patents held by Controlabill and has refused to "*engage with us to discuss settlement of the issue*".<sup>23</sup> For the reasons developed below in Part D, this grievance is not a matter which is apt to be determined by the Tribunal as part of an application for review under s 101 of the CCA.

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<sup>17</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 10, Exhibit pp 305-306.

<sup>18</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 10, Exhibit pp 308-309, [1.9].

<sup>19</sup> See, eg, Affidavit of Sharon Henrick dated 6 October 2021 at Tab 5, Exhibit p 234 and p 250; Tab 7, Exhibit pp 278-279; Tab 8, Exhibit pp 286-287.

<sup>20</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 7, Exhibit p 278.

<sup>21</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 5, Exhibit p 234.

<sup>22</sup> See, in particular, Affidavit of Sharon Henrick dated 6 October 2021 at Tab 8, Exhibit pp 286-287.

<sup>23</sup> Application, p 1 [2].

14. The dispute between Controlabill and NPPA appears to have arisen in around February 2020, and there has been some correspondence between the parties since that time, including the following communications:
- (a) on 3 February 2020, Mr Wright of Controlabill wrote to Ms Chapman and Mr Masina of NPPA regarding NPPA's Consent and Mandate System (CMS) raising concerns about alleged intellectual property infringement;<sup>24</sup>
  - (b) on 4 February 2020, Ms Chapman wrote to Mr Wright and rejected any suggestion that the CMS infringed intellectual property owned by Controlabill or that NPPA had been involved in any misuse of confidential information;<sup>25</sup>
  - (c) on 30 June 2020, Mr Wright wrote to the board of NPPA regarding allegations of intellectual property infringement;<sup>26</sup>
  - (d) on 31 July 2020, KWM wrote to Mr Wright regarding Controlabill's allegations regarding intellectual property infringement;<sup>27</sup>
  - (e) on 4 September 2020, Mr Wright wrote to KWM in response to its letter of 31 July 2020;<sup>28</sup>
  - (f) on 12 October 2020, Mr Wright wrote to the Governor of the RBA, the RBA's Head of Payments Policy and Head of Payments and Settlements;<sup>29</sup>
  - (g) on 21 October 2020, the RBA's Head of Payments Policy responded to Mr Wright's correspondence of 12 October 2020;<sup>30</sup>

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<sup>24</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 11, Exhibit pp 449-450.

<sup>25</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 12, Exhibit p 452.

<sup>26</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 13, Exhibit pp 454.

<sup>27</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 14, Exhibit pp 468-470.

<sup>28</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 15, Exhibit pp 472-503.

<sup>29</sup> Annexures to Controlabill's Form I Application, PDF pp 76-78.

<sup>30</sup> Annexures to Controlabill's Form I Application, PDF pp 79-80.

- (h) on 7 August 2021, Mr Wright wrote to Mr Milliner.<sup>31</sup> In that letter, Mr Wright threatened certain regulatory complaints and invited discussions with IC regarding an acquisition of Controlabill and its IP assets;
  - (i) on 13 August 2021, Mr Milliner responded to Mr Wright's letter of 7 August 2021 by email; and<sup>32</sup>
  - (j) on 7 September 2021, Controlabill wrote to the Governor of the RBA and members of the Payments Systems Board in relation to Controlabill's intellectual property grievance.<sup>33</sup>
15. As is noted above at [9], between April and mid-August 2021, Controlabill made several submissions, which contained allegations concerning intellectual property matters against NPPA.
16. On 30 September 2021, NPPA wrote to Controlabill demanding that it cease and desist from making any further unjustified threats in relation to infringement by NPPA of any patents owned by Controlabill and attached a draft originating application and statement of claim.<sup>34</sup>
17. The communication from NPPA to Controlabill was posted by registered post on the afternoon of 30 September 2021 at around 3.49 pm.<sup>35</sup> It appears that Controlabill's application to the Tribunal was filed on the same afternoon at around 3.18 pm (having regard to the time stamp on the cover page). At the time NPPA's letter was posted, NPPA was unaware of Controlabill's application to the Tribunal.<sup>36</sup>

## **C APPLICABLE PRINCIPLES**

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18. As the Tribunal is aware, s 101(1)(a) provides that a person who is dissatisfied with a determination by the ACCC under Div 1 of Pt VII in relation to an application for an

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<sup>31</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 16, Exhibit pp 505-508.

<sup>32</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 17, Exhibit p 510.

<sup>33</sup> Annexures to Controlabill's Form I Application, PDF pp 70-75.

<sup>34</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 18, Exhibit p 521.

<sup>35</sup> Affidavit of Sharon Henrick dated 6 October 2021 at [16].

<sup>36</sup> Affidavit of Sharon Henrick dated 6 October 2021 at [17]-[18].

authorization may apply to the Tribunal for a review of the determination. In the present case, the ACCC's authorisation was granted under s 88 of the CCA, which appears in Part VII, Div 1.

19. Section 101(1AA)(b) provides that “[i]f ... the Tribunal is satisfied that the person has a sufficient interest ... the Tribunal must review the determination”. The provision imposes a jurisdictional pre-requisite to any review by the Tribunal. That is, the Tribunal must be satisfied of the applicant's interest before it proceeds to conduct a review of the ACCC's determination.
20. The “sufficient interest” test was most recently considered by the Tribunal in *Re Independent Contractors Australia* (2015) 292 FLR 80; [2015] ACompT 1 (***Re Independent Contractors***), but has also been considered in *Re Wakeman* [1999] ATPR ¶41-675 (42,628); [1998] ACompT 1 (***Re Wakeman***), *Re Wylie Steel Pty Ltd* [1980] ¶ATPR 40-170 (42,338) (***Re Wylie***) and *Re Jools* (2005) 189 FLR 456 (***Re Jools***).
21. The “sufficient interest” requirement has not been approached in a similar way to the “special interest” test for standing in relation to judicial review of administrative decisions, and is “more stringent” than that test: *Re Wakeman* at pp 11-13 (42,633-42,635). As the Tribunal observed in *Re Independent Contractors*, by reference to *Re Wakeman*:

[T]he purpose of the threshold requirement of “sufficient interest” is to act as a filter to ensure that the review procedure is not misused or abused. Von Doussa J [in *Re Wakeman*] explained that because of its role as a filter the existence of a sufficient interest ensures unmeritorious or vexatious claims are not pursued.
22. In *Re Wakeman* at pp 15-16 (42,637), the Tribunal observed that although the test is concerned primarily with the applicant's interest in the subject matter of the authorisation rather than the merits of its contentions:

[I]f the contentions of the applicant are plainly without substance, or are irrelevant to the issues which the Tribunal would be required to consider on a review, the applicant would fail to satisfy the Tribunal that his or her interest was “sufficient” to warrant the Tribunal reviewing the Commission's Determination.
23. It has been said that a person who can establish that their business interests and prospects could be adversely affected by the proposed merger would ordinarily fall

within the category of a person with a “*sufficient interest*”: *Re Wylie* at 42,344. However, as the Tribunal observed in *Re Wakeman*, the decision in *Re Wylie* left open the possibility that longstanding commercial activities in a market might not be enough to establish a “*sufficient interest*” when the effects of the proposed merger were ultimately examined (at p 14 (42,636)).

24. In *Re Independent Contractors*, the Tribunal drew a distinction between parties whose commercial interests would be directly affected by the authorisation issue at issue and persons whose interests are “*less direct or less immediate or of a different character*”: at [42]. It observed, at [43], that in the case of persons with the latter types of interests “*the Tribunal may need to consider whether the interest asserted is one that is sufficient to warrant putting those involved in the review to the time, effort and expense that a review involves*”. It then proceeded to identify a number of matters which may bear upon such consideration, at [44], including:

- (a) the character of the asserted interest, and the extent to which that interest is or may be affected by the ACCC decision;
- (b) whether the person made representations to the ACCC, presented evidentiary material to the ACCC, or intends to present fresh or different evidentiary material to the Tribunal and, if so, why it was not presented to the ACCC;
- (c) the nature and extent of the factual material proposed to be presented on the review; and
- (d) the nature of the submissions proposed to be presented on the review, and in some limited circumstances the nature and strength of the matter or matters sought to be raised.

25. For completeness, it should be noted that there has been some discussion in the cases as to whether the “*sufficient interest*” test imports a requirement that there must be a “*real and substantial interest*”. In *Re Wakeman*, the Tribunal suggested that the words “*sufficient interest*” in s 101(1AA)(b) must be at least a “*real and substantial*” interest, having regard to the use of that phrase in s 90A(12) of the CCA. However, in *Re Jools* (at [35]),

Goldberg J expressed some doubt over the extent to which the procedures imposed upon the ACCC ought to inform the content of the expression “*sufficient interest*” in s 101: see also *Re Independent Contractors* at [37]-[38]. It should be observed that, as a result of s 90A(1), the requirement under s 90A to prepare a draft determination in relation to an application does not apply to a merger authorisation, such that the “*real and substantial*” interest requirement is likely to have limited consequences for the construction of s 101 in the present context.

26. It is unlikely to be necessary for the Tribunal to resolve any difference of approach evident in *Re Jools* and *Re Wakeman*. The present question ought to be resolved by reference to the language used in s 101(1AA)(b), construed in context: *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] (*per curiam*); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).
27. As was observed in *Re Telstra Corporation Ltd* (2001) 160 FLR 120 at [18], the Tribunal in *Re Wakeman* correctly concluded that the expression “*sufficient interest*” must be “*interpreted in the context of s 101 and having regard to the purpose of the Act, and to the purpose of the limitation which the expression imposed on the power of the Tribunal to review a determination of the commission.*” In the present case, that purpose relevantly includes the provision’s role as a filter to ensure that unmeritorious or vexatious claims are not pursued, and the applicant’s interests are sufficient to warrant putting the ACCC and IC to the time, effort and expense of a review. It must also be borne in mind, as the Tribunal recognised in *Re Wakeman* (at p 14 (42,636)), that “[t]he grant of an authorisation is concerned with wide public interests rather than the private interests of a particular individual” (see also *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-783 (41,262); [2000] FCA 1381 at [11] (Burchett, Carr and Hely JJ)).

## **D CONTROLABILL’S INTEREST IS INSUFFICIENT**

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28. In light of the nature of the application, this is a case in which the factors identified in *Re Independent Contractors* (above at [24]) are likely to be of assistance. We address each of those factors in turn below.

## D1 Character of Controlabill's interest

29. Controlabill's interest in the proceedings is identified in its application to the Tribunal at paragraph 2(b). Its interest primarily concerns allegations it has made against NPPA regarding patent and copyright infringement. There are several reasons why this interest is insufficient for the purposes of s 101(1AA)(b) of the CCA.
30. *First*, the grievance raised by Controlabill is not apt to be determined in proceedings before the Tribunal. It seeks redress in relation to allegations of patent and copyright infringement which are denied (see above at [14]). The allegations raise issues of patent and copyright law, and conceivably other statutory norms. It is not the Tribunal's function to determine such allegations. In a review under s 101, the Tribunal is required to consider whether the proposed amalgamation would not have the effect, or be likely to have the effect, of substantially lessening competition in any market, and whether the conduct would result, or be likely to result, in public benefits which outweigh any detriments to the public that would result, or be likely to result, from the conduct. The interest which Controlabill seeks to agitate is essentially private in nature and extraneous to the tests the Tribunal must apply.
31. In addition, the amalgamation will not affect Controlabill's ability to commence proceedings in respect of any alleged infringements or to seek to negotiate with NPPA. NPPA will remain in existence following the amalgamation as a wholly owned subsidiary of AP+, as is evident from the description of the conduct that is the subject of the authorisation (see above at [5(b)]).
32. *Secondly*, Controlabill's grievance is unrelated to the amalgamation. Taking the allegations against NPPA (which are denied) at their highest, they concern the conduct of *one* of the entities involved in the amalgamation. Controlabill does not identify a coherent theory of competitive harm or public detriment that is said to flow from the amalgamation. While it contends that there is no real competition in the payments industry,<sup>37</sup> asserts that the amalgamation is anti-competitive or monopolistic,<sup>38</sup> and

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<sup>37</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 6, Exhibit p 272.

<sup>38</sup> Affidavit of Sharon Henrick dated 6 October 2021 at Tab 5, Exhibit p 217; Tab 7, Exhibit p 274.

asserts that the NPPA may be cross-subsidised by the other parties to the merger,<sup>39</sup> it does not identify how the proposed amalgamation will, or will be likely to, substantially lessen competition or result in detriments to the public which will not be outweighed by benefits to the public. Moreover, there is no clear articulation, in either the application or Controlabill's previous submissions to the ACCC, of a theory of harm to Controlabill's business or interests which is said to arise from the amalgamation itself.

33. *Thirdly*, Controlabill does not seek relief from the Tribunal which could be granted under s 102. As is evident from [4] of its application, it seeks to have the merger placed into abeyance pending review of its grievances. It also seeks to have the Tribunal refer its grievances to the enforcement branch of the ACCC, the release of correspondence between the ACCC and AP+ and KWM and that the Tribunal take into account requests made of the RBA. Controlabill does not seek any substantive relief that is consistent with the functions and powers of the Tribunal under s 102 of the CCA, which are directed at affirming, setting aside or varying the determination, following an application of the tests referred to above at [30].
34. *Fourthly*, there is evidence before the Tribunal to suggest that the application is colourable. In the section of the application describing Controlabill's interest it states that *"NPPA will not engage with us to discuss settlement of the issue and Controlabill does not have the resources to take 13 of the largest financial institutions through the Court process at this time."* Controlabill has also:
- (a) previously written to IC coupling threats of regulatory complaints with a request to *"open discussion ... on an acquisition of Controlabill and its IP assets"* (see above at [14(h)]); and
  - (b) raised the spectre of proceedings for an injunction to disrupt the amalgamation in a submission to the ACCC (see above at [9(c)]) without proceeding with an application of that nature; and

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<sup>39</sup> Application at p 2.

(c) written to the RBA and stated that “[w]e have asked the ACCC to stop this merger as at least one party, is involved, in what we believe is criminal behaviour”.<sup>40</sup>

35. In circumstances where Controlabill’s application explicitly references an unwillingness on the part of NPPA to engage in commercial discussions regarding the acquisition of its business, an inability or unwillingness to utilise court processes, and in light of the steps referred to above at [34(a)] to [34(c)], a concern arises that this application is being pursued for a collateral purpose.

## **D2 Representations to the ACCC**

36. As noted above at [9], Controlabill has made submissions to the ACCC during the course of its review. In assessing this factor, it is necessary to consider both the fact that submissions were made and the content of those submissions. As noted above at [9]-[10], Controlabill’s submissions to the ACCC consisted largely of serious and unsubstantiated allegations against NPPA. They did not contain material which is likely to be of assistance to the Tribunal.

## **D3 Nature and extent of factual material to be presented in the review**

37. Controlabill has provided 94 pages of annexures with its application in this proceeding. That material largely consists of documents that were provided to the ACCC, together with other correspondence to the RBA. For reasons similar to those outlined above at [30]-[35] and [36] the nature of the factual material provided by Controlabill to date is such that it is unlikely to inform the Tribunal of matters relevant to the discharge of its statutory function on a review. To the contrary, the factual material that is likely to be presented in support of the application (including the material contained in the annexures) could be expected to traverse a range of subjects that are irrelevant to the Tribunal’s task, for the reasons outlined above.

38. In the event that the Tribunal were to proceed with the review, the evidence that would need to be placed before it in order for it to exercise its review function would be substantial. As noted above at [7], a significant body of expert, lay and documentary

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<sup>40</sup> Annexures to Controlabill’s Form I Application, PDF p 71.

evidence was provided to the ACCC in support of the application. The time and resources involved in a reconsideration of the ACCC's favourable decision are likely to be significant.

#### **D4 Nature of the submissions to be presented**

39. For the reasons outlined above at [30]-[33], [36] and [37], the submissions which Controlabill seeks to present on the review are unlikely to assist the Tribunal having regard to the nature of its grievance, the tests which the Tribunal would be required to apply and the relief sought by Controlabill. Indeed, this is a case where the nature and strength of the matter or matters sought to be raised weigh against a finding that Controlabill has a sufficient interest.

#### **E CONCLUSION**

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40. For the reasons above, the Tribunal could not be satisfied that Controlabill has a sufficient interest for the purposes of s 101(1AA)(b) of the *Competition and Consumer Act 2010* (Cth). The Tribunal ought to dismiss the proceedings on that basis.

**Dated:** 6 October 2021

Ruth C A Higgins

M T Sherman

Counsel for Mr Milliner in his capacity as Chairperson of Industry Committee