

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: ACCC's Outline of 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: 26/11/2021 5:12 PM

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.



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

ACCC'S OUTLINE OF SUBMISSIONS IN RELATION TO INTERLOCUTORY APPLICATION FILED ON 6 OCTOBER 2021

26 November 2021

A. INTRODUCTION

1. On 18 March 2021, Industry Committee submitted an application for merger authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) in respect of the proposed amalgamation of BPAY Group Pty Ltd (**BPAY Group**), BPAY Pty Ltd, eftpos Payments Australia Ltd (**EPAL**) and NPP Australia Ltd (**NPPA**).
2. On 9 September 2021, the ACCC issued a determination authorising the proposed amalgamation (the **Determination**), after accepting a court enforceable undertaking (the **Undertaking**) from Australian Payments Plus Ltd (**AP+**), which will be the holding company after the amalgamation. A number of parties made submissions to the ACCC, including Controlabill Pty Ltd (**Controlabill**) which were considered by the ACCC in making the Determination.¹
3. On 30 September 2021, Controlabill filed an application for review of the Determination.
4. On 6 October 2021, Mr Milliner, in his capacity as Chairperson of Industry Committee (**IC**) filed an interlocutory application seeking an order that Controlabill's application be dismissed on the basis that Controlabill lacks a "sufficient interest" within the meaning of s 101(1AA)(b).
5. Further to the directions of this Tribunal, the ACCC files these submissions to assist the Tribunal determine the issues in this application. The ACCC considers that there is a real question as to whether Controlabill has sufficient interest in the subject matter of the authorisation but it makes no submissions on the merits of Controlabill's application.

B. MATERIAL FILED

6. The following material has been filed:
 - a) application to the Tribunal by Controlabill dated 30 September 2021 (**Controlabill Application**);

¹ Determination by ACCC dated 9 September 2021 (**Determination**), see for example, Submission by Controlabill dated 17 August 2021 referred to at footnote 63, [6.15] and footnote 100.

- b) application by Mr Milliner on behalf of IC seeking the Application for Review be dismissed dated 6 October 2021 (**Interlocutory Application**);
- c) outline of submissions in support of the Interlocutory Application dated 6 October 2021 (**Milliner Submissions**);
- d) affidavit of Ms Sharon Henrick in support of the Interlocutory Application dated 6 October 2021 (**Henrick Affidavit**);
- e) affidavit of Mr Bernard Wright in support of Controlabill dated 11 November 2021 (**Wright Affidavit**);
- f) affidavit of Mr Stephen Coulter in support of Controlabill dated 11 November 2021 (**Coulter Affidavit**);
- g) affidavit of Mr Farley in support of Controlabill dated 11 November 2021 (**Farley Affidavit**);
- h) submissions in reply in support of the Interlocutory Application dated 19 November 2021 (**Milliner Reply Submissions**); and
- i) affidavit of Mr Milliner in support of the Interlocutory Application dated 19 November 2021 (**Milliner Affidavit**) (confidential and non-confidential versions filed).

C. LEGAL FRAMEWORK

7. Under s 101(1)(a), a person who is dissatisfied with a determination by the ACCC under Division 1 of Part VII in relation to an application for an authorisation, may apply to the Tribunal for a review of the determination.
8. Under s 102(1), the Tribunal is empowered to affirm, set aside or vary an authorisation. The Tribunal's review is to occur within the applicable relevant period under s 102(1AC) (either 90 or 120 days).
9. There are a number of threshold conditions which must be fulfilled under s 101(1) before the Tribunal is required to conduct a review of the determination. Firstly, there must be an application by "a person dissatisfied" with the determination. Secondly, the person must make an application as prescribed and within the time prescribed. Thirdly, the applicant must either be the applicant for the authorisation or a person who the Tribunal is satisfied has a "sufficient interest" (s 101(1AA)).
10. Accordingly, where an application for review is made by a person other than the applicant for authorisation, it is necessary for the Tribunal to be satisfied that the person who has applied for a review has a "sufficient interest" before it can proceed to review the determination.

D. SUFFICIENT INTEREST UNDER S 101(1AA)(b)

11. The concept of a “sufficient interest” is not defined in the CCA. However, it has been considered in a number of cases. A summary of the relevant principles is set out below.
12. First, it is necessary to construe the meaning of “sufficient interest”. It is trite law to state that the central focus of statutory interpretation is on the text of the provision.² In some previous cases, the Tribunal has considered whether the “sufficient interest” test imports a “real and substantial” requirement. The ACCC submits that this inquiry does not assist the construction of the “sufficient interest” requirement in s 101. Rather, it introduces a concept that may convey a different standard to the statutory language. Similarly, statements of principles from other areas of law (for example, the test for “person aggrieved” in respect of administrative law proceedings) are of limited value, if any, and have been held to be, at most, “helpful, but not decisive”.³
13. The ACCC submits that whether an applicant has a sufficient interest falls to be determined by reference to the statutory context, the nature of the proceeding before the Tribunal and the nature and extent of the applicant’s interest.⁴ To that end, ““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 imposes on the power of the Tribunal to review a determination of the Commission”.⁵
14. Secondly, a purpose of the threshold requirement of “sufficient interest” is to act as a filter to ensure the review procedure is not misused or abused so as to ensure vexatious and unmeritorious claims are not pursued.⁶ However, this is not to impose an “unduly high”⁷ burden on the applicant, although the ACCC submits that this does not go further than that an applicant for review need not demonstrate an interest that is direct and obvious in order for the interest to be sufficient.
15. Thirdly, the test’s focus is on the applicant’s interest in the subject matter of the authorisation, as opposed to its merits. That said, “[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”.⁸
16. Fourthly, the words “sufficient interest” indicates a more stringent test than “special interest” is intended.⁹

² See eg *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39], quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), where the High Court said “This Court has stated on many occasions that the task statutory construction must begin with a consideration of the [statutory] text.’ So must the task of statutory construction end.”

³ *Re Wakeman* [1999] ATPR ¶41-675 (**Re Wakeman**), [42,635].

⁴ See for example, *Telstra Corporation Ltd* (2001) ATPR ¶41-812, [19].

⁵ *Re Wakeman*, [42,635].

⁶ *Re Wakeman*, [42,635].

⁷ *Re Wakeman*, [42,636], citing Lockhart J in *Application by Wylie Steel Pty Ltd for review of grant of authorization to Broken Hill Proprietary Company Ltd* (1980) ATPR ¶40-170 (**Re Wylie Steel**), at [42,345].

⁸ *Re Wakeman*, [42,637].

⁹ *Re Wakeman*, [42,635].

17. Fifthly, in interpreting the words “sufficient interest” it is not necessary for the various categories of persons who may have a “sufficient interest” to be defined, but it includes “a person who establishes his [or her] business interests or prospects could be adversely affected by the proposed merger”.¹⁰ However, simply having long-standing commercial activities in a market might not be enough to establish a “sufficient interest” when the evidence about the effects of a proposed merger are examined.
18. Sixthly, a distinction has been drawn between parties whose commercial interests are “directly affected” by an ACCC determination and persons whose interests are “less direct or less immediate or of a different character”.¹¹ In those cases in the latter category, “the Tribunal may need to consider whether the interest asserted is one that is sufficient to warrant putting those involved to the review to the time, effort and expense that a review involves”.¹² The following factors may be relevant:¹³
- a) 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 previously presented to the ACCC;
 - b) the character of the asserted interest, and the extent to which that interest is or may be affected by the ACCC decision;
 - 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 matters sought to be raised.
19. In assessing whether the interest is sufficient to warrant the time, effort and expense of a review, it is also important to bear in mind that a determination in relation to an authorisation is concerned with “wide public interests rather than the private interests of a particular individual”.¹⁴

E. ISSUES FOR CONSIDERATION

20. The ACCC submits that there is a real issue as to whether the interests identified by Controlabill and evidence filed in support constitute a “sufficient interest” for the purposes of commencing a review by the Tribunal.
21. The affidavits of Messrs Wright, Coulter and Farley (**Executives**) filed by Controlabill largely comprise submissions made in support of Controlabill.
22. Each of the Executives submits that it will be virtually impossible for the directors and former directors of Controlabill to recover their loans and for the Controlabill shareholders to recover the value of their shares “due to the new organisation offering competing services and controlling access terms to the

¹⁰ *Re Wylie Steel*, [42,344].

¹¹ *Re Independent Contractors* (2015) 292 FLR 80 (*Re Independent Contractors*), [42].

¹² *Re Independent Contractors*, [43].

¹³ *Re Independent Contractors*, [44].

¹⁴ *Re Wakeman*, [42,636].

new payment's platform".¹⁵ In this regard, each appears to assert that they personally have a sufficient interest because of their personal financial interests on Controlabill, and the alleged impact of the transaction on Controlabill's future financial position.

23. Controlabill is the applicant to these proceedings and accordingly, it is the "person" whose interest must be sufficient in order to satisfy the requirements of s 101(1AA)(b). It is submitted that the Tribunal will need to assess whether the evidence filed is probative or responsive to the question of Controlabill having a "sufficient interest" or whether that material goes instead solely to the potential impact on its individual directors and shareholders. While the alleged impact of the transaction on Controlabill may be a matter to be taken into account in assessing whether Controlabill has sufficient interest, it is open to the Tribunal to find that the personal interests of the Executives are not relevant to this assessment.
24. The three affidavits then deal with the interests of Controlabill.
25. First, the Executives submit that a sufficient interest arises because NPPA's behaviour and intended future conduct will be in breach of Controlabill's intellectual property rights in respect of "authority/mandate" management services for all forms of customer authorised payments".¹⁶ The Executives each state "Controlabill's intellectual property and patents will be detrimentally affected if the merger goes ahead and NPPA delivers its Mandate Payment Service (Pay To) – which directly competes with Controlabill and in our analysis, blatantly breaches our patents".¹⁷
26. Controlabill also submits that its "issue remains with NPPA's behaviour toward us and their intended and now deliberate and publicised breach of our Patents and Copyright materials via its Mandated Payment Service".¹⁸
27. In relation to the allegations that NPPA has and will breach Controlabill's intellectual property rights, the ACCC submits that it is open to the Tribunal to conclude that Controlabill's interest in the dispute over intellectual property rights is unrelated to the merger that is the subject of the authorisation and does not provide Controlabill with a sufficient interest as required by s 101. This is particularly the case given the availability of other, arguably more appropriate, rights of action in other forums in which Controlabill can pursue its interests.
28. To test the relevance of the intellectual property dispute, the ACCC submits that consideration of the following questions may assist the Tribunal in determining whether or not Controlabill has a sufficient interest:
 - a) Are the matters of complaint raised by Controlabill matters which can properly influence the outcome of the review of the Determination?

¹⁵ Wright Affidavit [11(c)], Coulter Affidavit [11(d)] and Farley Affidavit [13(c)].

¹⁶ Controlabill Application, [2].

¹⁷ Wright Affidavit [15], Coulter Affidavit [12(e)] and Farley Affidavit [16].

¹⁸ Controlabill Application, [2].

- b) Is Controlabill (and its shareholders/directors) able to pursue and enforce its intellectual property rights as against NPPA irrespective of whether or not the merger proceeds and NPPA delivers its Mandate Payment Service?
 - c) Does the merger otherwise impact upon Controlabill's enforcement of its intellectual property rights?
29. Secondly, the Executives submit that, if the merger goes ahead unchallenged, it will be virtually impossible for them to recover their loans and for the Controlabill shareholders to recover the value of their shares "due to the new organisation offering competing services and controlling access terms to the new payment's platform".¹⁹ In relation to the issue of controlling access terms to the new payment's platform, in its Determination, the ACCC dealt with submissions by third parties who raised the concern that combining NPPA's infrastructure with BPAY and EPAL could foreclose competition and reduce innovation in competing payments services that rely on NPP infrastructure.²⁰ In that regard, the ACCC concluded that the ability to foreclose rivals' access to the NPP infrastructure exists without the merger²¹ and that it is not increased by the merger²².
30. The ACCC submits that in assessing whether or not Controlabill has a sufficient interest based on the "access" issue, the Tribunal may be assisted by considering whether:
- a) Controlabill will be likely to seek access to the NPP infrastructure in the foreseeable future;
 - b) because of the merger, the merged entity will have an increased ability and incentive to deny Controlabill that access, or whether the position is the same with and without the merger;
 - c) other remedies may be open to Controlabill if the Tribunal is satisfied that the merger would increase the ability and incentive of the merger entity to deny access; and
 - d) a denial of access to the NPP infrastructure may, if it eventuated and raised competition issues, be the subject of an action or exercise of regulatory authority by the ACCC.
31. The ultimate question is then whether, having considered these issues, the Tribunal is satisfied on the material before it that Controlabill has a sufficient interest as required by s 101(1AA).
32. In considering whether that interest is sufficient in that it warrants the time, effort and expense of a review, there is a public interest in avoiding a protracted review, which in this case would create delay and uncertainty in relation to a significant transaction concerning a major aspect of Australia's payment systems and which has direct impacts on consumers and small business.
33. For completeness the ACCC notes that Mr Wright alleges that NPPA delivering its Mandate Payment Service (Pay To) would breach NPPA's "agreement with the ACCC regulator re overlay services".

¹⁹ Wright Affidavit [11(c)], Coulter Affidavit [11(d)] and Farley Affidavit [13(c)].

²⁰ Determination, [7.360].

²¹ Determination, [7.378].

²² Determination, [7.366].

34. The ACCC is not aware of the agreement to which Mr Wright refers. If the Tribunal is minded to examine this allegation further, then it may be necessary to obtain additional information from Mr Wright, and for the ACCC to have an opportunity to respond at that time.
35. Finally, the ACCC notes that Controlabill has sought that the Tribunal place the Determination authorising the merger into “abeyance” pending consideration of the matters raised in the application, including those explicitly referenced in its paragraph 4. In this regard, the ACCC notes that as a result of the operation of s 91(1A), the Determination does not come into effect until the Tribunal’s review has concluded.
36. That said, the relief sought by Controlabill is not expressly in the form of s 102(1). While Controlabill has not sought relief expressly in terms of variation or setting aside of an authorisation such as the Tribunal is empowered to grant under s 102(1), it appears from the material filed that Controlabill does ultimately seek to have the authorisation set aside and for the merger not be allowed to proceed prior to resolution of issues it has with NPPA. However, this issue is secondary to the question of standing and is a matter that the Tribunal may wish to clarify with Controlabill should it determine that Controlabill has a sufficient interest in the matter.

P P Thiagarajan

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Solicitors for the ACCC