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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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Important information

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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

SUBMISSIONS IN REPLY

(Interlocutory application filed on 6 October 2021)

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

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A. INTRODUCTION

1. On 11 November 2021, the applicant in these proceedings (**Controlabill**) filed three affidavits in relation to Mr Milliner's interlocutory application of 6 October 2021. These submissions are filed in reply to those materials, including those aspects of Controlabill's evidence which are in the nature of submissions. In summary, Controlabill's materials:

   (a) Identify and are directed towards an incorrect test for the "sufficient interest" requirement under s 101(1AA)(b) of the CCA.

   (b) Fail to disclose an interest capable of meeting the standard which *has* been applied by the Tribunal in the previous cases identified in chief.

   (c) Leave unaddressed a number of the submissions in support of Mr Milliner's application.

   (d) Identify and are directed towards private interests of its directors and shareholders to earn a return on their investments in Controlabill from a payment from NPPA for alleged infringements of Controlabill's intellectual property rights. The amalgamation of NPPA with the two other payments companies (EPAL and BPAY HoldCo) under AP+ will not affect Controlabill's ability to pursue its claims against NPPA. NPPA balance sheet and cash reserves are substantial and there is no evidence to suggest that they will be depleted as a result of the amalgamation.

   (e) Fail to identify:

      (i) any market that would be affected by the amalgamation;

      (ii) any substantive concerns about whether the amalgamation would be likely to have the effect of substantially lessening competition in any market;

      (iii) any substantive analysis of whether the amalgamation would be likely to give rise to a net benefit to the public of Australia.

2. These submissions adopt the defined terms used in Mr Milliner's submissions in chief (**MS**) and refer to the affidavits of Mr Bernard John Wright (**Wright**), Mr Stephen Bruce Coulter (**Coulter**) and Mr Gavan Hugh Farley (**Farley**).

B APPLICABLE TEST

3. The materials filed by Controlabill identify, and then proceed upon, an incorrect test for the "sufficient interest" requirement under s 101(1AA)(b). Each of the affidavits states that "*[i]t is understood sufficient interest does not mean a mere intellectual or emotional concern*" and that "*[f]or sufficient interest the person must be likely to either gain some advantage or suffer some disadvantage, other than a sense of grievance or debt for costs, if his action fails*".[1] As is evident from MS [20]-[27], that is not the applicable test.

4. The test which Controlabill urges upon the Tribunal is derived from authorities concerning the "person aggrieved" standard under ss 5(1), 6(1), 7(1) and 7(2) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**)[2] and standing for equitable remedies in public law. Reliance is placed upon Gummow J's reasons in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 (***AIMPE***) at 132-3 and aspects of *Re Wylie* (as to which see MS [23]).[3]

5. As is observed at MS [21], the Tribunal has previously rejected arguments that seek simply to import tests developed in the context of judicial review remedies into the unique statutory context of s 101. In *Re Wakeman*, after referring to the equitable and ADJR Act tests of standing and setting out the passage of Gummow J's reasons in *AIMPE* extracted in Coulter at [8](b), the Tribunal observed (at p 11; [42,635]):

> These statements of principle in decisions in other branches of the law as to what constitutes a sufficient interest to bring proceedings are helpful, but not decisive. What is in issue here is the meaning and content of the expression "sufficient interest" in s 101(1) of the Act, not the meaning attributed to similar expressions in other statutes or in cases under the general law … 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 imposes on the power of the Tribunal to review a determination of the Commission.

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1 Wright at [7]; Coulter at [7]; Farley at [8].
2 The content of which is affected by s 3(4).
3 Coulter at [8].

6. In *Re Wakeman*, the Tribunal proceeded to identify three reasons why it was inappropriate for general law and statutory standing tests to be imported, without modification, into s 101 (at p 12; [42,635]):

   (a) *First*, insofar as the rationale for a broad and flexible test for general law and ADJR Act standing depended upon a recognition that the remedies under consideration apply to a broad range of situations and statutes, that consideration did not apply to s 101.

   (b) *Secondly*, in circumstances where Courts exercising a judicial review jurisdiction had the power to award costs and summarily dismiss proceedings which are vexatious, frivolous or an abuse of process, there is no policy reason why rules as to standing should act as a control against unmeritorious claims.

   (c) *Thirdly*, having regard to the text of the provision, the circumstance that s 101 "*expressly adds the further threshold of 'sufficient interest' indicates that a more stringent test than 'special interest' is intended*".

7. In *Re Independent Contractors*, the Tribunal also emphasised the nature of the review function undertaken by the Tribunal and the need for the "*sufficient interest*" requirement to be construed in light of the specific review functions conferred upon it. In judicial review proceedings, the Court is required to consider whether an administrative decision falls within the scope of the statutory authority conferred upon a decision-maker. By contrast, in proceedings before the Tribunal, it is required to review the determination of the Commission for the purpose of affirming, setting aside or varying that determination: see s 102(1). Even in merger authorisation cases, such as the present one, where sub-ss 102(8), (9) and (10) operate to limit the information to which the Tribunal may have regard, the exercise of the Tribunal's review function involves fact and resource-intensive merits review.

8. In many cases, including the present one (see MS [7] and [38]), a review will require consideration of a substantial body of complex evidence. It will also generally require the participation of both the applicant for authorisation and the ACCC and the deployment of substantial resources by at least those parties. As was noted in

Re Independent Contractors at [43] (see MS [24]), in that context the requirement for a "sufficient interest" may require consideration of whether the interest that is claimed by the applicant in the subject matter of the merger review is "*sufficient to warrant putting those involved in the review to the time, effort and expense that a review involves*".

9. For the reasons outlined above at [3]-[7], the Tribunal should not apply the general law standing test propounded by Controlabill and should instead approach the determination of the application by reference to the principles identified at MS [18]-[27].

C INTERESTS IDENTIFIED BY CONTROLABILL

10. Controlabill's materials fail to disclose an interest which is "sufficient" for the purposes of s 101(1AA)(b). The materials advance five asserted bases upon which Controlabill contends that it may be said to have a sufficient interest. None of those bases satisfies the standard under s 101(1AA)(b). Moreover, Controlabill's materials fail to address a number of the arguments advanced in support of the present interlocutory application in Mr Milliner's submissions in chief at MS Part D.

C1 Credentials of directors and shareholders

11. The evidence advanced by Controlabill contains a description of the credentials and experience of Mr Wright,[4] Mr Coulter,[5] and Mr Farley.[6] Those credentials are said to allow Mr Wright and Mr Farley to "comment at a high level" on the payments sector,[7] and to qualify Mr Coulter to "comment".[8] It is unclear when Mr Wright held executive positions in the banking, energy and telecom sectors. Mr Coulter appears to have ceased his involvement with ANZ in around 2006, though refers to more recent experience "working with Mastercard Latin America in Mexico in Miami in 2017/18". It is not clear whether he has recent experience in the Australian domestic payments industry, aside from his involvement in Controlabill. Mr Farley's experience is summarised as that of "a general management executive".

4 Wright at [9]-[10].
5 Coulter at [10].
6 Farley at [10]-[12].
7 Wright at [10].
8 Coulter at [10].

12. The practical experience of Controlabill's directors and shareholders is of limited relevance to the question of whether Controlabill has a sufficient interest. In circumstances where the relevant interest that must be assessed is Controlabill's and the test to be applied is not the "special interest" test that applies in relation to standing for legal and equitable remedies in public law, the background of Controlabill's directors and shareholders is, at best, of marginal relevance.

C2 Financial exposure of directors and shareholders

13. Each of the affidavits filed by Controlabill provides details as to the value of personal financial contributions made by the directors and shareholders to Controlabill.[9] The evidence also provides a partial description of Controlabill's financial position, in that it identifies, in general terms, Controlabill's net liabilities and accumulated losses but no other aspects of its financial position.[10] There are at least four difficulties with Controlabill's reliance upon this evidence:

    (a) *First*, the financial contributions made by Mr Wright, Mr Coulter and Mr Farley are of limited relevance to the question of whether Controlabill's interest is sufficient. It is Controlabill which is identified in the Form I application as the applicant for review. Mr Wright, Mr Coulter and Mr Farley are not parties to the proceedings. In circumstances where Controlabill is the applicant, it is the "person" whose interest must assessed for purpose of s 101(1AA)(b).

    (b) *Secondly*, the evidence fails to explain how the financial interests of Controlabill or its directors and shareholders could be affected by the application for review. As was observed at MS [30]-[32], the grievance raised by Controlabill is not apt to be determined by the Tribunal and is unrelated to the amalgamation which would be the subject of the review proceedings. Moreover, as is noted at MS [33], Controlabill does not seek relief from the Tribunal which could be granted under s 102. The evidence does not grapple with these deficiencies in the application and (for reasons developed below in

[9] Wright at [11]-[12]; Coulter at [11]; Farley at [13]-[14].
[10] Wright at [14]; Coulter at [12](b) and (c); Farley at [15](b) and (c).

Part C2) it does not identify how it is that a decision of the Tribunal — acting in accordance with its statutory functions — would affect the financial interests of Controlabill's directors and shareholders.

(c) *Thirdly*, the evidence appears to be premised upon an entitlement on the part of Mr Wright, Mr Coulter and Mr Farley to recover directors' loans, equity and labour contributed to Controlabill.[11] In Mr Farley's case, the relevant investment appears to have been made as part of an investment group or syndicate known as "Sydney Angels".[12] In investing financial resources and labour in Controlabill, each of the directors and shareholders of Controlabill assumed a risk that their investment would not yield returns. The possibility of an absence of return on investment, without more, is not an adequate foundation for a "sufficient interest".

(d) *Fourthly*, when read with Controlabill's evidence as a whole, the evidence of the directors and shareholders continues to suggest that the present application is directed towards the objective of achieving a private return on investment from the assertion of infringement of intellectual property rights.

C3 Controlabill's specific interest in the subject matter of the review

14. As is noted above at [13(b)], MS [30]-[33] advanced a number of arguments concerning the grievance raised by Controlabill and the Tribunal's ability to address that grievance in the proper exercise of its statutory functions. Controlabill's evidence fails to grapple with those arguments and serves to emphasise that they are well-founded.

15. Controlabill's substantive interest in prosecuting the application for review is identified in Wright [15], Coulter [12](e), and Farley [16]. In those passages, it is stated that "*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*". Mr Wright additionally alleges in the relevant paragraph of his affidavit that NPPA's Mandated Payment

[11] See, eg, Wright at [11]-[12]; Coulter at [11]; Farley at [13]-[14].
[12] Farley at [13](a).

Service would breach NPPA's "*agreement with the ACCC regulator re overlay services*". Mr Coulter and Mr Farley do not appear to make that claim.[13] Mr Wright and Mr Coulter each state that "*[t]o have our own IP abused and used against us to our detrimental interest is particularly affronting*".[14] All directors refer to briefings on Controlabill's IP under non-disclosure agreements.[15] Mr Wright additionally refers to the "*new organisation offering competing services and controlling access terms to the new payment's platform*".[16]

16. The evidence served by Controlabill suggests that its substantive interest in prosecuting the application for review is an insufficient one for four reasons:

(a) *First*, the gravamen of the Controlabill's specific interest in the subject matter of the review continues to be a concern regarding patent infringement. It is Controlabill's "*intellectual property and patents"* that *"will be detrimentally affected if the merger goes ahead*". For the reasons outlined in MS [30]-[31], that is not a claim the Tribunal can determine. Controlabill has had ample opportunity to bring proceedings in the Federal Court to have its allegations determined since they were first raised and responded to in February 2020 (MS [14](c) and (d)). It has not brought proceedings to make good its allegations. On the evidence before the Tribunal (MS [14]), it is plain that NPPA regards the allegations as lacking substance. Indeed, it has drafted an originating process and statement of claim and told Controlabill that it may commence proceedings if Controlabill does not cease and desist (MS [16]). Moreover, even if Controlabill were to succeed in patent proceedings:

(i) On the evidence before the Tribunal, the proposed amalgamation would not affect Controlabill's capacity to recover against NPPA, which will continue to exist following the merger (MS [31]). As is evident from description of the transaction in respect of which authorisation is sought,[17] NPPA will continue to exist following the

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13 Compare Wright [15] with Coulter [12](e), and Farley [16].
14 Wright [16], Coulter [12](e).
15 Wright [16], Coulter [12](e), and Farley [17].
16 Wright [13](c).
17 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].

amalgamation. As is evident from NPPA's accounts, NPPA's balance sheet and cash reserves are substantial and there is no evidence to suggest that they will be depleted as a result of the amalgamation.[18]

(ii) In any case, the availability of private law remedies to Controlabill is not a matter which is germane to the exercise of the Tribunal's functions in reviewing a merger authorisation.

(b) *Secondly*, Controlabill's specific interest in the proceedings concerns *one* of the parties to the amalgamation and is not an interest which is particular to the amalgamation itself. For the reasons outlined in MS [32], such an interest is insufficient. The evidence filed by Controlabill is substantially directed at a service that NPPA proposes to offer rather than the competitive effects of the amalgamation. The evidence addresses at length alleged conduct of NPPA (e.g., Coulter at [12]-[13]) without offering an explanation as to how the amalgamation would impact upon any legitimate interest of Controlabill.

(c) *Thirdly*, to the extent that general reference is made to "*the new organisation offering competing services and controlling access terms*" (Wright at [11](c)), the nature and extent of that competition, and the competitive effects of the merger upon it, are not articulated. As was noted at MS [12], Controlabill has stated that it operates in a payments adjacency and that its solution "*never touches the payments system*". There is no evidence before the Tribunal to establish that Controlabill competes, or is likely to compete, with either NPPA or the amalgamated entity in offering payment services. Rather, its efforts to date have been directed towards having alleged IP rights acquired.

(d) *Fourthly*, the materials do not disclose an intention to address the terms of the statutory test which the Tribunal must apply in the context of the proposed amalgamation. Controlabill does not identify any market or markets which would be affected by the amalgamation. It does not identify any arguments that might be made as to whether the amalgamation would be likely to have

[18] Affidavit of Robert Milliner at [33], "Non-Confidential Exhibit RM.3".

the effect of substantially lessening competition in any market. It has not foreshadowed substantive analysis of whether the amalgamation would be likely to give rise to a net benefit to the public.

C4 NPPA's alleged actions

17. Controlabill additionally contends that "*[a]ctions by the NPPA and associated banks and entities prove that they regard Controlabill as having a sufficient interest in the matter*".[19] It then refers to engagements between Controlabill and various persons and entities which are said to evidence "interest", NPPA's cease and desist letter, the present application and the Tribunal's acceptance of Controlabill's request for review.

18. None of the matters upon which Controlabill relies supports the argument that it has a sufficient interest for the purposes of s 101(1AA)(b). The circumstance that Controlabill has previously interacted with participants in the banking and payments industry and made submissions does not confer upon it an interest in the subject matter of the review. Were that to be the standard, a range of persons with no direct material interest in the subject matter of a merger could bring proceedings. Controlabill's reliance on the circumstance that Mr Milliner acted expeditiously to bring the present application after Controlabill filed its application for review is equally misplaced — with respect, the natural inference from that fact is that Controlabill's interest is regarded as insufficient.

C5 Alleged public interest

19. Finally, Controlabill contends that the public interest would not be served without review of the merger. It identifies a range of one word topics which are said to go to public detriment and are asserted to be "substantive and coherent".[20] Mr Coulter also raises generalised concerns about the character of the shareholders and parties associated with the proposed merger, including by reference to the Financial Services Royal Commission and Banking and Finance Oath.[21] He also raises concerns regarding payment costs, the desirability of what he terms "*[a] monopolistic, predominantly bank-*

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19 Wright [17], Coulter [13], and Farley [17].
20 Wright [18] and Coulter [14].
21 Coulter at [16]-[17].

owned platform providing its own overlay services", alleged resistance to a "*solution to enable simple bank and account switching by customers*", the involvement of King & Wood Mallesons and the merger resulting in a further consolidation of power.[22]

20. When regard is had to the nature and extent of the material to be presented in the review and the nature of the submissions to be presented by Controlabill (MS [37]-[39]), those matters weigh against the conclusion that Controlabill has a sufficient interest. Controlabill has failed to identify or articulate submissions or arguments which are likely to be of assistance to the Tribunal or germane to the matters which it is required to consider in discharging its review function. Mr Coulter's evidence, and Controlabill's application, appear to be premised upon the assumption that the Tribunal would conduct a wide ranging review of alleged grievances concerning participants in the payments system and potentially mandate some alternative approach to the development of payments systems. Those matters fall outside the Tribunal's statutory remit of reviewing the ACCC's determination.

D CONCLUSION

21. For the reasons above, and those outlined in MS [18]-[39], Mr Milliner respectfully submits that the application for review should be dismissed on the ground that Controlabill is not a person with a sufficient interest within the meaning of s 101(1AA)(b) of the CCA.

22. Mr Milliner's confidential affidavit addresses matters which are primarily relevant to the timing of the Tribunal's reasons and orders. It is respectfully requested that the Tribunal deliver its orders and reasons in relation to the application as expeditiously as is practicable, consistent with s 103(1)(b) of the CCA.

[22] Coulter at [18].

23. If the Tribunal considers it appropriate, one option available to the Tribunal is the course adopted in *Re Wakeman* of pronouncing orders and delivering reasons separately.

Dated: 19 November 2021

Ruth C A Higgins

M T Sherman

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