

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

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



A handwritten signature in blue ink, appearing to be "R. M.", is written below the seal.

REGISTRAR

Dated: 6/10/2021 3:57 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.

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, Sharon Louise Henrick, of Level 61, Governor Phillip Tower, 1 Farrer Place, Sydney, New South Wales, say on oath:

1. I am a partner of King & Wood Mallesons (**KWM**). I have carriage of this matter for Industry Committee (**IC**), an unincorporated association, and its Chairperson, Mr Robert Milliner. I am authorised to make this affidavit on behalf of Mr Milliner.
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 s 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. Although I have authority to make this affidavit on behalf of Mr Milliner, I am not authorised to waive privilege on his behalf and nothing in this affidavit should be construed as involving a

Sharon Louise Henrick

Witness

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

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waiver of privilege. To the extent that anything in this affidavit may be construed as involving a waiver of privilege, I withdraw and do not rely on that part of this affidavit.

5. Exhibited to me at the time of making this affidavit and marked “**Exhibit SLH-1**” is a folder of documents divided by numbered tabs. Where I refer to a document by a tab number in this affidavit, I am referring to the document behind the corresponding tab in Exhibit SLH-1.

IC’s application to the ACCC

6. On or around 18 March 2021, IC submitted an application to the Australian Competition and Consumer Commission (**ACCC**) in relation to the proposed amalgamation of BPAY Group Pty Ltd (**BPAY Group**), BPAY Pty Ltd (together, **BPAY Opco**), eftpos Payments Australia Ltd (**EPAL**) and NPP Australia Ltd (**NPPA**). A copy of the non-confidential authorisation application (omitting annexures) is at **Tab 1** of Exhibit SLH-1.
7. The application referred to above at [6] was accompanied by an Executive Summary document. A copy of the Executive Summary document is at **Tab 2** of Exhibit SLH-1.
8. Based upon my review of the webpage maintained by the ACCC in relation to the application and accessible at the time of making this affidavit at <<https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/proposed-amalgamation-of-bpay-eftpos-and-nppa>> (**Proposed Amalgamation Webpage**), I believe that the ACCC accepted the application on 22 March 2021.
9. On or around 18 June 2021, I caused a letter to be sent to Mr Mark Basile (Director, Merger Investigations, ACCC) regarding the inclusion of BPAY Group Holding Pty Ltd (**BPAY Holdco**) in the proposed amalgamation. A copy of that letter is at **Tab 3** of Exhibit SLH-1.
10. On or around 23 August 2021, I caused a letter to be sent to Ms Sophie Mitchell (Assisting Director (a/g), Competition Exemptions Branch, ACCC) in relation to the scope of the conduct for which authorisation was sought. A copy of that letter is at **Tab 4** of Exhibit SLH-1.

Controlabill’s submissions to the ACCC

11. Based upon my review of the Proposed Amalgamation Webpage, I am aware that Controlabill provided a number of documents to the ACCC during the course of its review. In particular, the following documents are available on the Proposed Amalgamation Webpage:

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- (a) A document entitled “*Proposed amalgamation of BPAY, eftpos and NPPA – MA1000020 a submission by Controlabill Pty Ltd*” dated 21 April 2021. A copy of that document is at **Tab 5** of Exhibit SLH-1.
 - (b) A document entitled “*An additional submission and comment by Controlabill Pty Ltd*” dated 21 April 2021 but, based on the date recorded on the Proposed Amalgamation Webpage, apparently received by the ACCC on or around 11 May 2021. A copy of that document is at **Tab 6** of Exhibit SLH-1.
 - (c) A document entitled “*Proposed Amalgamation of BPAY, eftpos and NPPA – MA1000020. a second submission by Controlabill Pty Ltd*” dated 18 June 2021. A copy of that document is at **Tab 7** of Exhibit SLH-1.
 - (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, based on the date recorded on the Proposed Amalgamation Webpage, was apparently received on or around 17 August 2021. A copy of that document is at **Tab 8** of Exhibit SLH-1.
12. On or around 26 May 2021, after reviewing the documents referred to above at [11](a) and (b), I caused a letter to be sent to Mr Basile. A copy of that letter is at **Tab 9** of Exhibit SLH-1.

Commission’s determination

13. On or around 9 September 2021, the ACCC published its determination of IC’s application. A copy of the determination is at **Tab 10** of Exhibit SLH-1.

Correspondence involving Controlabill

14. I am informed by Ms Suzy Madar (Partner, King & Wood Mallesons) and believe that she has carriage of an intellectual property matter on behalf of NPPA concerning Controlabill. Ms Madar has provided me with copies of the following documents, which she has informed me were provided to her by NPPA, caused to be sent by her to Controlabill, or were received by her from Controlabill:
- (a) An email from Mr Bernard Wright of Controlabill to Ms Vanessa Chapman and Mr Bob Masina of NPPA dated 3 February 2020, a copy of which is at **Tab 11** of Exhibit SLH-1.
 - (b) A letter from Ms Chapman to Mr Wright dated 4 February 2020, a copy of which is at **Tab 12** of Exhibit SLH-1.

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- (c) A letter from Mr Wright to the board of NPPA apparently sent on 30 June 2020 (but dated 30 June 2019), a copy of which is at **Tab 13** of Exhibit SLH-1.
 - (d) A letter from Ms Madar to Mr Wright dated 31 July 2020, a copy of which is at **Tab 14** of Exhibit SLH-1.
 - (e) A letter from Mr Wright to Ms Madar dated 4 September 2020, a copy of which is at **Tab 15** of Exhibit SLH-1.
15. I am informed by Mr Milliner and believe that on or around:
- a. 7 August 2021, he received a letter from Mr Wright, a copy of which is at **Tab 16** of Exhibit SLH-1.
 - b. 13 August 2021, he caused an email to be sent to Mr Wright, a copy of which is at **Tab 17** of Exhibit SLH-1.
16. I am informed by Mr Adrian Lovney, the Chief Executive Officer of NPPA, and believe that on 30 September 2021 at around 3.49 pm, he caused a letter to be sent by registered post to each of the directors of Controlabill and to Controlabill's registered office. I am informed by Mr Lovney that those letters were in the same or similar form, save for the address. A copy of the letter which was sent to Controlabill's registered office is at **Tab 18** of Exhibit SLH-1, together with its enclosures and a copy of the registered post lodgement receipts for the letters sent to Controlabill and its directors.
17. I am informed by Mr Adrian Lovney and believe that, at the time the letter referred to in [16] above was posted, he was unaware of Controlabill's application commencing these proceedings.
18. I first became aware of Controlabill's application commencing these proceedings on 1 October 2021 at around 1.45 pm, when I received an email from the Registry of the Australian Competition Tribunal attaching a sealed copy of Controlabill's application filed on 30 September 2021, a copy of which is at **Tab 19** of Exhibit SLH-1.
19. On 5 October 2021, I caused an ASIC search to be conducted for Controlabill. A copy of an ASIC company extract for Controlabill is at **Tab 20** of Exhibit SLH-1.

Mr Milliner

20. As I have stated above at [1], Mr Milliner is the Chairperson of IC, an unincorporated association. IC applied for the authorisation which is the subject of Controlabill's application for review to the

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Tribunal. The determination names the Chairperson of IC, as an individual directly involved in the administration and oversight of IC, as a person for the purposes of s 88(2) of the *Competition and Consumer Act 2010* (Cth) at Tab 10, page 308-309, [1.9] of Exhibit SLH-1.

Sworn by the deponent)
at Sydney)
in New South Wales)
on 6 October 2021)
Before me:)

.....
Signature of deponent

.....
Signature of witness

Name of witness: _____
Solicitor of the Supreme Court of New South Wales

Sharon Louise Henrick

Witness