



Bendigo and Adelaide Bank, Commonwealth Bank, National Australia Bank & Westpac –  
applications for authorisation A91546 & A91547  
Interim authorisation decision  
19 August 2016

## Decision

The Australian Competition and Consumer Commission (the ACCC) has decided not to grant interim authorisation at this time in respect of the applications for authorisation lodged by Bendigo and Adelaide Bank, Commonwealth Bank of Australia, National Australia Bank and Westpac Banking Corporation (the Applicants) on 26 July 2016.

## The applications for authorisation

The Applicants are seeking authorisation on behalf of themselves and potentially other credit and debit card issuers to engage in limited collective negotiation with Apple and other providers of third-party digital wallet services (third party wallets). The Applicants also seek authorisation to collectively agree not to negotiate individually with third party wallet providers on certain issues while collective negotiations are ongoing (collective boycott).

A digital wallet is a smartphone application or service that facilitates credit and debit card payments and may also store other information, such as merchant stored value or loyalty cards. Apple's digital wallet is known as Apple Pay. Other digital wallets include Android Pay and Samsung Pay, as well as digital wallets offered by some banks.

The Applicants are seeking authorisation to collectively bargain with Apple (and other third party wallet providers) in relation to:

- **Non-exclusivity:** to enable the Applicants to:
  - offer their own digital wallets on Apple and other devices through accessing the necessary hardware components, or
  - participate in other digital wallets or mobile payment services on any mobile devices or platforms
- **Industry standards:** the adoption of agreed industry standards or guidelines, or the agreement of best practice principles and technical standards relating to the safety, security and stability of mobile payments systems in Australia
- **Efficiency and transparency of fees:** the ability to disclose and pass through to cardholders any fees or charges imposed by third party wallet providers.

The collective boycott is intended to prevent the Applicants from negotiating individually with Apple or another third party wallet provider during negotiations with that provider.

## The authorisation process

Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (the Act). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

## Interim authorisation

Section 91 of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.

The ACCC Authorisation Guidelines note that the ACCC will determine whether to grant interim authorisation on a case by case basis taking into account relevant factors including:

- The object of the Act, which includes enhancing the welfare of Australians through the promotion of competition. The ACCC is therefore unlikely to grant interim authorisation to proposed conduct that has the potential to be significantly anti-competitive unless compelling reasons are provided.
- The extent to which the relevant market will change if interim authorisation is granted. Interim authorisation is more likely to be granted when it will maintain the market status quo. Interim authorisation is unlikely to be granted if doing so would likely permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied.
- The urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether an application could have been lodged sufficiently early to have made the request for interim authorisation unnecessary.
- The possible harm, if any, to the applicant if a grant of interim authorisation is denied.
- The possible harm to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied.
- Any possible public benefits or detriments that the ACCC can assess at the time of considering the request for interim authorisation. However, granting interim authorisation does not require the ACCC to determine whether the relevant authorisation test is, or is likely to be, satisfied.

## The application for interim authorisation

The Applicants requested the ACCC grant interim authorisation within 28 days of lodging their application so that they could commence collective negotiations (including the collective boycott) on the matters identified.

The Applicants submitted that:

- Adoption of digital wallets is increasing. It is becoming increasingly difficult for issuers to resist approaches by third party digital wallet providers and increasingly likely that individual issuers (and the industry) will be forced to accept terms and conditions that will limit competition, innovation and investment, efficiency and transparency in digital wallets and mobile payments. Once a critical mass of issuers has agreed to these

terms and conditions, there may not be another comparable opportunity to promote competition and innovation in the industry.

- In the short term, interim authorisation will maintain the status quo and avoid altering the competitive dynamics of the market.
- Interim authorisation will allow a more timely resolution of these important issues.

## Consultation

The ACCC sought submissions on the application for interim authorisation from approximately 80 interested parties, including digital wallet providers, banks, card schemes, major retailers, mobile phone manufacturers, and government, consumer and industry bodies.

Noting that interested parties had a relatively short period to respond, the ACCC received six public submissions regarding interim authorisation. Apple, the South Australian Small Business Commissioner and an individual cardholder oppose the granting of interim authorisation. Tyro Payments Limited and Heritage Bank support the granting of interim authorisation and Indue Pty Ltd does not object.

Further information in relation to the applications for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website [www.accc.gov.au/authorisations](http://www.accc.gov.au/authorisations).

## Reasons for decision

The ACCC has considered the factors relevant to whether to grant interim authorisation in this context and has decided that it is not appropriate to grant interim authorisation for the proposed conduct at this time.

The ACCC considers that the applications raise complex issues for consideration and, at this early stage of the assessment with only limited market consultation, the ACCC does not have sufficient information to form a view on the likely public benefits and public detriments of the proposed conduct or the possible harm to consumers.

The ACCC does not see compelling reasons to support the urgency of the application. In addition, at this stage, the ACCC is concerned the proposed conduct has the potential for continuing impacts on competition, even if any arrangements reached are later unwound.

The ACCC's decision in relation to interim authorisation is not indicative of whether or not a draft or final authorisation will be granted.

## Reconsideration of interim authorisation

The ACCC may reconsider whether to grant interim authorisation at a later date if requested by the Applicants.

## Next steps

The ACCC's draft decision on the applications for authorisation is expected in October 2016.