Australian Competition Tribunal

Application by Controlabill Pty Ltd [2021] ACompT 6

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| Review of: | Merger authorisation MA 1000020 determination made on 9 September 2021 |
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| File number: | ACT 3 of 2021 |
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| Tribunal: | **JUSTICE O'BRYAN (Deputy President)****DR D ABRAHAM (Member)****PROF K DAVIS (Member)** |
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| Date of judgment: | 6 December 2021 |
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| Catchwords: | **COMPETITION** – application for review of merger authorisation granted by the Australian Competition and Consumer Commission under s 101 of the *Competition and Consumer Act 2010* (Cth) – proceeding listed for hearing of question whether applicant has a “sufficient interest” within the meaning of s 101(1AA)(b) – application for leave to withdraw application for review – leave granted  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 91(1A), 101(1)(a), 101(1AA)(b), s 103(1)(a)  |
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| Cases cited: | *Application by New South Wales Minerals Council (No 4)* [2021] ACompT 5*Re Country Television Services Limited* (1984) 73 FLR 68*Re Nursing Agencies Association of Australia* [2003] ACompT 2; 175 FLR 423*Re Football Queensland Limited* [2012] ACompT 15*Re Lakes R Us Pty Ltd* [2006] ACompT 3; 200 FLR 233  |
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| Number of paragraphs: | 42 |
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| Date of hearing: | 6 December 2021  |
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| Representative for Controlabill Pty Ltd: | Mr Gavan Farley, the Chairman of Directors of Controlabill Pty Ltd |
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| Counsel for Mr Milliner in his capacity as Chairperson of Industry Committee: | Dr R C A Higgins SC with Mr M T Sherman |
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| Solicitor for Mr Milliner in his capacity as Chairperson of Industry Committee: | King & Wood Mallesons |
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| Counsel for the ACCC: | Ms P P Thiagarajan |
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| Solicitor for the ACCC: | Johnson Winter & Slattery |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |
| ACT 3 OF 2021 |
| RE: | **APPLICATION FOR REVIEW OF MERGER AUTHORISATION MA 1000020 DETERMINATION MADE ON 9 SEPTEMBER 2021** |
| APPLICANT: | CONTROLABILL PTY LTD  |

DETERMINATION

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| TRIBUNAL: | JUSTICE O’BRYAN (Deputy President)DR D ABRAHAM (Member)PROF K DAVIS (Member) |
| DATE: | 6 december 2021  |

THE TRIBUNAL DETERMINES AND DIRECTS THAT:

1. The applicant, Controlabill Pty Ltd, be given leave to withdraw its application for review to the Tribunal.
2. Industry Committee has leave to uplift from the Tribunal’s file the confidential version of the affidavit of Robert Ian Milliner sworn 19 November 2021 and that document is to be removed from the Tribunal’s file.

REASONS FOR DETERMINATION

THE TRIBUNAL:

## Introduction

1. On 30 September 2021, Controlabill Pty Ltd (**Controlabill**) filed an application with the Tribunal under s 101 of the *Competition and Consumer Act 2010* (Cth)(**Act**) seeking review of an authorisation granted by the Australian Competition and Consumer Commission (**ACCC**) in respect of a proposed merger (merger authorisation MA 1000020 granted on 9 September 2021).
2. On 5 December 2021, Controlabill sought leave to withdraw its application for review.
3. For the following reasons, the Tribunal is satisfied that it has power to grant leave and that it is appropriate to do so. In accordance with s 42 of the Act, the reasons below concerning the power of the Tribunal to grant leave to withdraw have been prepared by O’Bryan J as the presiding member, whereas the balance of the reasons have been prepared by the Tribunal as a whole.

## Background

### Application for authorisation

1. On 18 March 2021, Industry Committee, an unincorporated association, submitted an application to the ACCC pursuant to s 88 of the Act on behalf of its members who are shareholders and/or members of BPAY Group Holding Pty Ltd (**BPAY HoldCo**), eftpos Payments Australia Ltd (**EPAL**) and NPP Australia Ltd (**NPPA**). The application sought authorisation of the proposed amalgamation of two wholly owned subsidiaries of BPAY HoldCo, BPAY Group Pty Ltd and BPAY Pty Ltd, with EPAL and NPPA (the **proposed amalgamation**). The proposed amalgamation is to be effected by:
2. a newly formed company, Australian Payments Plus Ltd (**AP+**), acquiring the shares in each of BPAY Group and BPAY Pty Ltd (together **BPAY Opco**), eftpos and NPPA; and
3. the existing shareholders and members of BPAY Holdco, eftpos and NPPA being issued shares in AP+.
4. BPAY, EPAL and NPPA, through their respective payment schemes, provide a number of payment services that are utilised every day by Australian consumers and businesses. BPAY primarily operates a domestic electronic bill payment service that enables users to make payments through a financial institution’s online, mobile or telephone banking facilities to organisations which are registered billers. EPAL’s main business is facilitating electronic payments from customer bank accounts to merchant bank accounts at the point of sale. EPAL owns and operates the eftpos debit card scheme and associated infrastructure (**eftpos**). eftpos is most commonly associated with the use of plastic debit cards as a payment method for the purchase of goods and services. However, eftpos also facilitates some online debit card payments and debit card withdrawals at automatic teller machines. The New Payments Platform (**NPP**) was launched in February 2018 and is an open access infrastructure used to facilitate real-time payments between bank accounts within Australia. It is a more modern version of the existing Direct Entry infrastructure used in transferring money between bank accounts.
5. In broad terms, the stated rationale for the proposed amalgamation is to enable the three existing payment schemes, whose activities are largely complementary, to:
6. co-ordinate innovations, creating efficiencies for customers, businesses and consumers;
7. 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
8. enable the payment schemes to compete better against existing and future global payment companies, enhancing competition in domestic payment markets.
9. The members of Industry Committee on whose behalf the application for authorisation was made comprise the following entities:
10. Australia and New Zealand Banking Group Limited;
11. Australian Settlements Limited;
12. Bendigo and Adelaide Bank Limited;
13. Commonwealth Bank of Australia;
14. Coles Group Limited;
15. Cuscal Limited;
16. First Data Network Australia Limited trading as Fiserv;
17. HSBC Bank Australia Limited;
18. Macquarie Bank Limited;
19. National Australia Bank;
20. Tyro Payments Limited;
21. Westpac Banking Corporation; and
22. Woolworths Group Limited.
23. For the purposes of s 88(2) of the Act, the following additional entities will receive the benefit of the authorisation:
24. EPAL, EPAL foundation shareholders, BPAY Holdco, NPPA and persons who are members of EPAL and/or shareholders of NPPA;
25. the Reserve Bank of Australia;
26. AP+; and
27. the individuals directly involved in the administration and oversight of Industry Committee, including the Chairperson and the Secretary of Industry Committee.
28. The proposed amalgamation is conduct to which the provisions of s 50 of the Act might apply. Section 50 prohibits the acquisition of shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market. As such, the authorisation is defined in the Act as a “merger authorisation” to which statutory time limits are applicable in respect of the decision of the ACCC (by s 90(10B) and related provisions) and the decision of the Tribunal on review (by ss 102(1AA) and related provisions).
29. Under s 90(7), the ACCC was empowered to grant authorisation if, relevantly:
30. the ACCC is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
31. the ACCC is satisfied in all the circumstances that:
	1. the conduct would result, or be likely to result, in a benefit to the public; and
	2. the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

### ACCC authorisation

1. On 9 September 2021, the ACCC granted authorisation for the proposed amalgamation of BPAL, EPAL and NPPA, subject to an undertaking from AP+ given under s 87B of the Act (the **Undertaking**), and published its determination (**ACCC Determination**).
2. In relation to the competition test in s 90(7)(a) of the Act, the ACCC observed that the key aspects of the ACCC’s competition analysis were:
3. the likely effect of the amalgamation on the future availability of eftpos and least-cost routing (**LCR**);
4. the overlap between current BPAY, EPAL and NPPA services;
5. the loss of potential competition between BPAY, EPAL and NPPA in the future; and
6. the likely effect of the amalgamation on third party access to the NPP.
7. The ACCC expressed the following conclusions in relation to its competition analysis:

Taking into account the Undertaking from AP+, the ACCC is satisfied that the amalgamation is unlikely to result in a substantial lessening of competition in relation to the routing of debit card payments. The Undertaking imposes obligations on AP+ aimed at ensuring that eftpos services are maintained, that eftpos facilitates and promotes the availability of LCR for 4 years and requires investment in and the development of the Prescribed Services, some of which facilitate eftpos online payment services.

The amalgamation will soften competition to some extent between BPAY, EPAL and NPPA in relation to several services. The amalgamation may also lessen competition between the 3 parties to innovate and develop new infrastructure and services, because development decisions will be made centrally by AP+. However, it is important to consider these potential competitive effects in the context of the markets in which they may arise. In this regard, the ACCC considers that AP+ will continue to face significant competitive constraints, most significantly from Mastercard and Visa. Given the level of complementarity between the services provided by EPAL, NPPA and BPAY and the substantial constraints that would remain on the merged entity, the ACCC considers that any loss of competitive tension between the 3 entities is not likely to be substantial.

The ACCC is satisfied that third party access to the NPP is unlikely to materially change as a result of the amalgamation, and that there are sufficient constraints to mitigate the risk of third parties being foreclosed access following the amalgamation.

In all the circumstances, including the Undertaking from AP+, the ACCC is 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.

1. The ACCC observed that, under s 90(7), it may grant an authorisation if it is satisfied in all the circumstances that no substantial lessening of competition is likely. Since the ACCC was satisfied that no substantial lessening of competition is likely from the amalgamation (when assessed with the Undertaking), the ACCC was not required to consider whether net public benefits are likely to arise from the amalgamation. Nevertheless, the ACCC stated that, in light of the interest in and concerns raised by interested parties about the amalgamation and the fact that this is an application for merger authorisation, it was appropriate for the ACCC to provide its view on the “net public benefit” limb of the authorisation test. In that regard, the ACCC expressed the following conclusions with respect to public benefits:

The ACCC considers that the primary benefit of the amalgamation is that a single overarching body could enable information sharing, coordination and alignment of roadmaps across the 3 parties. This is likely to result in a more unified roadmap for AP+, and greater clarity of proposals for consideration by AP+ shareholders. The efficiencies arising from the single roadmap will primarily benefit the banks, but more timely and efficient investment in new or innovative services is likely to constitute a public benefit.

The amalgamation will enable the 3 schemes to combine their respective strengths and work collaboratively to consider what hybrid products could be offered to a greater extent than would be the case without the amalgamation (as they will no longer be competing with each other). The amalgamation will also provide greater clarity and confidence for AP+ shareholders to agree to initiatives sooner, and with a greater degree of confidence that the other major banks will support that initiative, than what is possible without the amalgamation.

Notwithstanding that the banks will continue to make their own decisions to implement payment initiatives, the amalgamation will likely enable the banks to better coordinate their own adoption of payment initiatives and this may reduce the risk of stranded payment assets.

The ACCC considers that improved coordination and alignment of payments initiatives through the amalgamation, together with AP+’s commitment to the EPAL Prescribed Services in the context of the Undertaking, are likely to result in increased ability for eftpos (as a part of AP+), or AP+, to compete against Mastercard and Visa and international technology companies. The ACCC considers that this represents a public benefit that is tangible, but also notes that any such benefit is not readily quantifiable.

The ACCC has considered a number of other public benefits the applicants (represented by Industry Committee) claim are likely to result from the amalgamation. The Undertaking provided by AP+ includes a commitment that one of the 4 independent directors appointed to the AP+ Board will have substantial small business experience. The amalgamation, together with AP+’s commitment, is likely to result in some public benefit in the form of increased engagement with small business and other participants.

While the amalgamation is likely to result in some cost synergies, reduced transaction costs and reduced compliance obligations, they are not likely to be substantial. The ACCC is not satisfied, based on the information available, that the claimed public benefit of improving payments system resilience is likely to arise from the amalgamation.

The ACCC considers that the amalgamation is likely to result in a material public benefit.

1. In relation to public detriments, the ACCC noted that it had considered the public detriments arising from the amalgamation in the context of a lessening of competition arising from the amalgamation and that its overall conclusion was that it 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.
2. The ACCC Determination specified that, if no application for review were made to the Australian Competition Tribunal, the authorisation would come into force on 1 October 2021, and be valid for a period of 12 months, until 1 October 2022. As discussed in the next section, Controlabill filed its application for review on 30 September 2021. As a result, and by virtue of s 91(1A) of the Act, the authorisation granted by the ACCC did not come into effect but will take effect from the date of the Tribunal’s determination of the application or any earlier withdrawal of the application.

### Controlabill’s application for review

1. On 30 September 2021, Controlabill filed an application with the Tribunal under s 101 of the Act seeking review of the ACCC Determination. In its application for review, Controlabill states its grievance with the ACCC’s Determination in the following manner:

Controlabill owns Patented intellectual property regarding “authority/mandate” management services for all forms of customer authorised payments. Patents were granted in 2012 by the Australian Patents Office.

All the major banks including the RBA are aware of our IP, including granted patents, and have executed NDAs with Controlabill dating back to 2007.

Controlabill’s 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 (MPS now called PayTo), wherein it proposes to centralise customer authorities in the same manner covered in our patents and is claiming the same functionality. 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.

The payment system is characterised by push and pull transactions. Examples of Push transactions are eftpos and Bpay where the account holder sends money to service provider and directly authorises the transaction. Pull transactions are exemplified by Direct Debit, Credit Card Direct Debits and Subscription services and now by the NPPA PayTo service. Each of these transactions must be pre-authorised and the service provider must get permission from the customer in the form of a standing authority or mandate.

Authorities are the driver of BECS direct debit, recurring credit card payments and soon to be NPPA PayTo and cover around 70% of all household expenditure and even more in dollar volume when small business is rolled in. The party that controls these authorities between the billers and the customers controls the payments system. We have said this should reside in a competitively neutral party such as Australia Post or some other entity such as the CDR. Controlabills (sic) invention was to make managing these authorities across all of the pull payment systems easy to manage and to switch. The ACCC decision as it stands embeds NPPA with price competitive parties and enables cross subsidisation of revenues and costs that enable anti-competitive conduct. This merger as it has been approved may allow NPPA pull systems to exist where because of it (sic) inherent costs it would fail to compete with Direct Debit. There is a lack of clear econometric modelling and price forecasting in the ACCC decision to analyse this potential matter.

Also, we maintain the theft of our patented IP by a party to the merger is an example of abuse of market power and unconscionable conduct. We believe this behaviour should have led to a different outcome for the MPS or Payto service under the ACCC decision.

Controlabill has raised this grievance with the ACCC and the RBA without response at this time.

As a result of 13 financial of Australias (sic) largest service companies being the owners of NPPA, potential customers for the Controlabill service have evaporated.

Consequently, this has catastrophic financial damage in the millions of dollars. This anti-competitive behaviour should not be allowed by the ACCC.

1. It can be seen that Controlabill’s core grievance is an allegation that NPPA is infringing Controlabill’s intellectual property rights. What is not explained in the application is how the proposed amalgamation (which is the conduct the subject of the authorisation) will affect Controlabill’s asserted intellectual property rights or its dispute with NPPA. In that regard, the Tribunal notes from the ACCC’s authorisation that NPPA is a joint venture entity the membership of which is similar to the proposed membership of AP+. It follows that the proposed amalgamation will not materially alter the ownership or governance of NPPA. The proposed amalgamation will merely bring NPPA, BPAY and EPAL under the same common ownership. In its application, Controlabill does not contend that it competes with BPAY or EPAL or that BPAY or EPAL are infringing its intellectual property rights. Nor does Controlabill contend that its competitive position in any market is affected by the proposed amalgamation.

### Sufficient interest application

1. On 6 October 2021, Mr Milliner, in his capacity as Chairperson of Industry Committee, filed an interlocutory application with the Tribunal seeking a determination by the Tribunal that the application filed by Controlabill be dismissed on the basis that Controlabill is not a person with a “sufficient interest” within the meaning of s 101(1AA)(b) of the Act. The application was supported by an affidavit of Sharon Henrick dated 6 October 2021 and outline submissions of that date. Ms Henrick is a partner at King & Wood Mallesons, solicitors for Industry Committee and its Chairperson, Mr Milliner. Industry Committee sought to have this application heard at the earliest convenient date to the Tribunal and in advance of any substantive review.
2. On 15 and 20 October 2021, the President of the Tribunal, Justice Middleton, made directions timetabling the interlocutory application to a hearing on 6 December 2021. The directions provided for the filing of affidavits and written submissions.
3. In accordance with those directions, on 11 November 2021 Controlabill filed three affidavits:
4. an affidavit of Gavan Farley, who is a director and chairman of Controlabill, dated 11 November 2021;
5. an affidavit of Bernard Wright, who is a director and shareholder and described as a co-founder of Controlabill, dated 11 November 2021; and
6. an affidavit of Stephen Coulter, who is a shareholder and described as a co-founder of Controlabill, dated 11 November 2021.
7. Controlabill did not file any written submissions.
8. On 19 November 2021, Industry Committee filed an affidavit of Robert Milliner sworn that day and reply submissions. Industry Committee sought confidentiality orders in respect of parts of Mr Milliner’s affidavit and, accordingly, filed a confidential version and a public version which redacted the confidential parts.
9. On 26 November 2021, the ACCC filed written submissions in respect of the interlocutory application.
10. On 3 December 2021, Industry Committee filed a further affidavit of Mr Milliner to update certain matters referred to in Mr Milliner’s earlier affidavit.

### Application for leave to withdraw

1. At 8.49pm on 5 December 2021, Controlabill sent an email to the Registry of the Australian Competition Tribunal applying for leave to withdraw its application for review to the Tribunal.
2. On 6 December 2021, the Tribunal heard Controlabill’s application to withdraw. At the hearing, Controlabill was represented by Mr Farley. Section 110 of the Act provides that, in proceedings before the Tribunal, a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal. The Tribunal approved Mr Farley’s appearance on behalf of Controlabill.

## Power to grant leave to withdraw

1. The Tribunal has granted leave for the withdrawal of an application for review made under s 101 of the Act on a number of previous occasions: see *Re Country Television Services Limited* (1984) 73 FLR 68 (***Country Television Services***); *Re Nursing Agencies Association of Australia* [2003] ACompT 2; 175 FLR 423; and *Re Football Queensland Limited* [2012] ACompT 15.
2. As noted in each of those decisions, there is no express power in Part IX of the Act or the *Competition and Consumer Regulations 2010* (Cth) governing the withdrawal of an application for review made under s 101 of the Act. Section 102 addresses the powers of the Tribunal in respect of the substantive determination of the review and provides that the Tribunal may make a determination affirming, setting aside or varying the ACCC’s determination and, for the purposes of the review, may perform all of the functions and exercise all of the powers of the ACCC.
3. Nevertheless, the Act contemplates that an application for review under s 101 may be withdrawn. Relevantly, and in respect of the authorisation under review in this proceeding, s 91(1A) provides that an authorisation granted by the ACCC comes into force on the day specified for the purpose in the authorisation, not being a day earlier than:
4. where paragraph (b) or (c) does not apply – the end of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation;
5. if such an application is made to the Tribunal and the application is not withdrawn – the day on which the Tribunal makes a determination on the review;
6. if such an application is made to the Tribunal and the application is withdrawn – the day on which the application is withdrawn.
7. The effect of s 91(1A) is that an authorisation granted by the ACCC will not come into force while there is an application for review before the Tribunal, but the authorisation will come into force if the application for review is withdrawn.
8. In each of the Tribunal decisions referred to earlier, the presiding member of the Tribunal concluded that an applicant for review does not have an unfettered right to withdraw an application, but the Tribunal has power under s 103(1)(a) of the Act to grant leave to the applicant to withdraw. Section 103(1)(a) stipulates that, in the conduct of a review, the procedure of the Tribunal is within the discretion of the Tribunal. In *Country Television Services*, Lockhart J observed (at 70):

Rules of court generally provide for the discontinuance of proceedings and they define the circumstances in which a moving party may discontinue as of right or by leave. No such provision appears in the Act or the Trade Practices Regulations governing proceedings before the Tribunal. The withdrawal of applications raises difficult concepts and has been the subject of some discussion by courts in various contexts, including bankruptcy proceedings, where petitioning creditors have sought the court’s leave to withdraw petitions to sequestrate a debtor’s estate, rather than an order of the court that they be dismissed. … Although procedures before courts, including bankruptcy petitions, are different in nature to applications for review before the Tribunal, they nevertheless suggest that caution should be exercised before deciding that an applicant for review has a right to withdraw his application so that, upon the withdrawal taking effect according to its terms, the Tribunal's functions and powers thereupon cease. The proceedings before the Tribunal are not merely *inter partes*: they involve the public interest.

1. The Tribunal respectfully agrees with the conclusions expressed by the Tribunals in each of the decisions referred to above. The Tribunal notes for completeness that a similar approach was taken by the Tribunal in *Re Lakes R Us Pty Ltd* [2006] ACompT 3; 200 FLR 233, but in that proceeding the Tribunal was concerned with the withdrawal of a different type of application, being an application for review of a decision not to declare a service made under Part IIIA of the Act.

## Whether leave should be granted

1. At the hearing, Mr Farley submitted that Controlabill had applied for leave to withdraw its application to review the ACCC Determination because Controlabill had reached a compromise with NPPA in respect of its dispute. Mr Farley submitted that the application for withdrawal had been made late on the evening of 5 December 2021 (immediately prior to the hearing scheduled for 6 December 2021) because the parties had only reached their compromise at that time. As noted above, it is apparent from Controlabill’s application for review filed with the Tribunal that the dispute between Controlabill and NPPA concerns Controlabill’s allegations that NPPA is infringing intellectual property rights claimed to be held by Controlabill.
2. The Industry Committee supported Controlabill’s application for leave to withdraw and made no submissions with respect to the compromise which was the subject of Mr Farley’s submission.
3. The ACCC took no position on the application and assisted the Tribunal with brief submissions concerning the power of the Tribunal to grant leave to withdraw.
4. In circumstances where the only person that had applied to review the ACCC authorisation wished to withdraw their application, and no person opposed that course, there is no reason why the Tribunal should not grant leave.
5. However, the Tribunal wishes to record its disquiet as to the basis of the original application for review filed by Controlabill and the resolution of the application by compromise and withdrawal. As the brief summary above indicates, the proposed amalgamation which is the subject of the ACCC authorisation is a matter of significant public interest, and the ACCC concluded that the proposed amalgamation will give rise to public benefits. The filing of the application for review by Controlabill has caused delay to the ACCC authorisation coming into force and, the Tribunal infers, to the completion and implementation of the proposed amalgamation. The application has also occasioned expense to be incurred by Industry Committee and the ACCC in responding to the application, and public expense by reason of the Tribunal having to be convened to address the application. It is notable that Controlabill’s application for review did not address the primary question with which the ACCC authorisation was concerned, whether the proposed amalgamation would be likely to substantially lessen competition in any market, and failed to identify any error in the ACCC’s conclusion that the proposed amalgamation would not be likely to substantially lessening competition. Instead, the application stated a grievance with respect to alleged intellectual property infringement by one of the merging parties, NPPA. As noted above, the application did not explain how the proposed amalgamation (which is the conduct the subject of the authorisation) would affect Controlabill’s asserted intellectual property rights or its dispute with NPPA.
6. The object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The ACCC’s power to grant authorisation under Part VII of the Act, and the Tribunal’s power to review an authorisation under Part IX, are powers to be exercised in furtherance of the objects of the Act. It would be contrary to the objects of the Act for authorisations to be delayed by, and the Tribunal burdened by determining, applications for review that are frivolous or made for collateral purposes and thereby vexatious. A collateral purpose would include filing an application for the purpose of causing commercial inconvenience to another party with the object of gaining some collateral benefit.
7. The Tribunal notes that it is not empowered to award costs in proceedings commenced under s 101 of the Act. The position can be contrasted with proceedings under s 44K, in respect of which the Tribunal is given power to award costs under s 44KB. As discussed recently in *Application by New South Wales Minerals Council (No 4)* [2021] ACompT 5, the discretion to award costs in that context may be exercised where there is a reason to do so arising out of the nature of the issues raised or out of the conduct of a party in the proceeding. In that context, the power to award costs is available where an application is frivolous or vexatious. The Tribunal observes that the introduction of such a power may be warranted in the context of applications to review authorisation determinations under s 101 of the Act which are decisions of considerable public importance.

## Conclusion

1. In conclusion, the Tribunal gives leave to Controlabill to withdraw its application for review to the Tribunal.
2. Industry Committee also sought a direction that, in lieu of the Tribunal making confidentiality orders in respect of the confidential version of Mr Milliner’s affidavit sworn 19 November 2021, the Industry Committee be permitted to uplift that document from the Registry file. The Tribunal makes that direction as the affidavit was not read or relied upon in the proceeding.

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| I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Determination of the Honourable Justice O'Bryan, Dr D Abraham and Prof K Davis. |

Associate:

Dated: 6 December 2021