DEALING WITH EXCESS: REGULATORY PERSPECTIVES ON SURCHARGING FOR PAYMENT

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I INTRODUCTION

This article discusses the regulatory response to the problem of excessive surcharging by merchants for payment by credit and debit cards in Australia. Excessive surcharging occurs when merchants charge consumers a fee for paying by a particular payment instrument and the fee exceeds the merchant's cost of accepting payment by that instrument. Surcharging for payment was unknown in Australia until 2003 when reforms by the Reserve Bank of Australia ('RBA') opened the door to surcharging. Unexpectedly the practice quickly constituted a new economic norm post regulation and some merchants took advantage of the new rules to use surcharging as an additional revenue source.[1] Excessive surcharges often came at the end of the purchase transaction leaving consumers with little option but to pay them. This behaviour attracted the attention of consumers, consumer advocates and regulators, culminating in 5,000 submissions to the Financial System Inquiry on the subject.[2] The RBA acted in 2012 issuing a Guidance Note that attempted to deal with excessive surcharging but the Guidance was problematic and there were difficulties of enforcement. Accordingly, in 2016 the RBA issued a new standard on surcharging[3] and the *Competition and Consumer Act 2010* (Cth) ('*CC Act*') was amended to prohibit excessive surcharging and to deal with the problems of enforcement.

This article examines the RBA's new standard and the amendments to the *CC Act* made by the *Competition and Consumer (Payment Surcharges) Act 2016* (Cth). It also places Australia's response within an international context, discussing the most recent position in Europe and the United States. The article focusses on surcharging for payment by card, as this is the key area at issue in Australia. The discussion applies to any mechanism by which a card payment could be made, such as in person, over the internet, by telephone or mobile wallet, such as ApplePay. The article does not focus on surcharging for cash, cheque, or other payment instruments, although it is inherent in any discussions about the European regulation and is mentioned in passing in relation to Australia.

The article is in three parts. Part I sets the scene, outlines the problem, and briefly sketches the previous regulatory solution in Australia to provide a point of comparison for the discussion of the current Australian position in Part III. Part II discusses the United States' ('US') and European position and in particular looks at how the United Kingdom ('UK') has implemented European Union ('EU') directives and regulations on this issue. Part III critically analyses the new approach to regulation of excessive surcharging by the new RBA standard on surcharging and the recent amendments made to the *CC Act.*

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[1] Ann Wardrop, 'Surcharging for payment: Payment systems regulation and the constitution of a new economic norm' (2015) 26(4) *Journal of Banking and Finance Law & Practice* 290, 301.

[2] Financial System Inquiry, *Financial System Inquiry Final Report* (Australian Government, 2014).

[3] *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions*.

II THE PROBLEM

Prior to 2003, the terms of merchants' contractual arrangements to accept international credit, charge, and debit cards prevented them from charging extra (surcharging) if a customer paid by one of those cards. This was so even though it might cost the merchant more to accept payment by credit card than by debit card, thereby reducing the merchant's profit on credit card transactions. In 2003 two standards were issued by the RBA under the *Payment Systems (Regulation) Act 1998* (Cth) requiring the removal of these provisions from the MasterCard and Visa credit card systems and from January 2007 from the Visa debit system.[4] American Express ('Amex'), Diners Club, and MasterCard (in relation to MasterCard debit) gave voluntary undertakings to remove no-surcharge rules.[5] The RBA initiated this regulatory intervention because it was concerned that consumers were paying with expensive scheme[6] credit or debit cards rather than by the cheaper eftpos system. It was also concerned that the most expensive card, the credit card, was being chosen over either scheme debit or eftpos.[7] Consumers were choosing these cards over the lower cost eftpos system, for various reasons, but mainly because of generous loyalty points that were offered for their use.[8] High interchange fees[9] funded the reward or loyalty programs in these systems. The inability of merchants to send price signals to consumers about the cost of different payment methods by surcharging together with other anti-competitive aspects of card scheme rules, prevented merchants from placing

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[4] *Payment Systems (Regulation) Act 1998* (Cth) *Standard No 2, Merchant Pricing for Credit Card Purchases* (2003) (for each of MasterCard and Visa) and *Payment Systems (Regulation) Act 1998* (Cth), *Standard: The 'Honour All Cards' Rule in the Visa Debit and Visa Credit Card Systems and the 'No Surcharge' Rule In the Visa Debit System* (2007).

[5] Amex and Diners Club gave voluntary undertakings in 2002 in exchange for the RBA not designating their systems under the *Payment Systems (Regulation) Act 1998* (Cth). MasterCard gave voluntary undertakings in relation to MasterCard debit in 2006. There was no need to include the eftpos system in the regulation as it did not have contractual provisions preventing surcharging. 'eftpos' is the brand name of a proprietary system developed by Australian banks and large merchants that allows funds transfers at point of sale. The capitalised version 'EFTPOS' is some times used in the literature and is generally used internationally as an acronym for funds transfer systems at point of sale.

[6] 'Scheme' credit or debit cards refer to the four-party payment schemes of Visa and MasterCard or the three-party schemes of Amex and Diners club as compared to eftpos, which until 2014 operated on the basis of bilateral agreements. In four-party schemes an authorised deposit-taking institution (usually a bank) issues a card subject to the rules of the scheme (set by Visa or MasterCard). The merchant's bank (known as the merchant acquirer) provides payment processing services (e.g., providing facilities for merchants to authorise payments, facilitating clearing and settlement of payments received from the merchant's customer's bank (the card issuer)). Amex and Diners Club traditionally had direct contractual relationships with the card-holder (customer) as issuers of their cards and with merchant acquirers, so that three parties were involved. They are sometimes referred to as 'closed-loop' systems. Today they sometimes co-brand with banks.

[7] Reserve Bank of Australia, *Review of Card Payments Regulation Issues Paper* (2015) 7, especially Graph 2.

[8] Ibid 7.

[9] Interchange fees are fees paid by the merchant's bank to the issuer of the debit or credit card. The cost of interchange fees is passed on to the merchant through the merchant service fee that is paid by the merchant for the payment processing services provided by the merchant's bank. For an overview of interchange fees see Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia: A Consultation Document* (2001) 3-4.

downward pressure on pricing structures in the payments industry. These added costs in Australia's payments system, together with other problems in the organisation of scheme debit and credit cards,[10] had led to the RBA's view that Australia's retail payments system was 'inefficient' in various respects. The result of an inefficient system for Australia was, among other things, higher costs for merchants and, as the RBA theorised, higher prices for goods and services overall.[11] The RBA's intervention to remove bans on merchants' surcharging was part of a comprehensive set of reforms that sought to improve competition and lower prices in the retail payments system.[12] Removal of the bans on surcharging (and indeed many of the other reforms to the retail payments system) was met with strong resistance from the four-party schemes (Visa and MasterCard), and also by Amex, and Diners Club (three-party schemes) but were welcomed by some merchants and consumer groups.[13]

By the time of the RBA's 2007 review of its intervention in the payments system, the reforms had been successful in slowing the growth of credit card usage and increasing the number of debit card transactions.[14] This is a trend that has continued today with recent RBA data showing that the growth in number and value of debit card transactions exceeds growth in credit card transactions.[15] One unexpected result of the removal of the ban on surcharging (at least from the RBA's perspective) was the arrival of excessive surcharging beyond cost by some merchants, and the dampening of price signals because of blended surcharging.[16] Blended surcharging is the practice of applying the same surcharge for payment by different cards (e.g. Amex, Visa, and MasterCard) even though the costs of accepting payment by these cards were different for the merchant. For example, taking the merchant service fee as a proxy for the cost of acceptance, as at March 2017 Amex and Diners Club charge merchants fees on average 1.58% and 1.08% respectively of the value of transactions compared with the MasterCard and Visa average charge of 0.72%.[17] The merchant service fee is the fee paid to the merchant's bank for processing payment services. Blended surcharging also occurs where the same surcharge is applied to different types of cards within a scheme, for example, a standard versus a platinum card even though the merchant service fee is different for each.

The problem of excessive surcharging from a consumer perspective was exacerbated by lack of transparency about the fees and the practice of 'drip pricing'. 'Drip pricing' is where unavoidable additional fees and charges are added

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10 These other problems included: restrictions on access to the schemes, e.g., issuer and acquirers were required to have a banking licence; the honour all cards rule e.g. a merchant had to accept all Visa cards, even ones that they did not want to accept because the costs of acceptance were too high. See generally Reserve Bank of Australia, *Reform of Australia's Payment Systems: Preliminary Conclusions of the 2007/2008 Review* (2008).

11 For more detail on this argument see Wardrop, above n 1, 291-293.

12 Ann Wardrop 'Co-regulation, Responsive Regulation and the Reform of Australia's Retail Electronic Payments Systems' in Ann Wardrop (ed) *Banking and Finance: Perspectives on Law and Regulation* (2014) 197.

13 For the difficulties of achieving reform, see ibid.

14 Reserve Bank of Australia, above n 10, 9.

15 Reserve Bank of Australia, *Payments System Board Annual Report* (2016), 24 (Table 2 and Table 3).

16 CHOICE, *CHOICE Report: Credit Card Surcharging in Australia: Prepared on behalf of NSW Fair Trading* (2010), 3.

17 Reserve Bank of Australia, Payments Data: *Average Merchant Fees for Debit, Credit and Charge Cards* <www.rba.gov.au>.

incrementally throughout the purchase process.[18] The advertised price can therefore be misleading. In 2017 the Federal Court ordered Jetstar and Virgin to pay $200,000 each for false or misleading representations about airfares advertised in 2013 and 2014.[19] The court had found in 2015 that there was a failure adequately to disclose fees paid for booking by credit card or Paypal and, in the case of Virgin, also in relation to debit card.[20]

The problems caused by the RBA's prohibition of no-surcharging rules were noted by various government and consumer reports,[21] and since 2012 the RBA has been seeking ways to overcome them. It issued a standard in 2012 commencing in 2013 that varied the prohibition on no surcharging rules to allow schemes and merchant acquirers[22] a limited right to ban surcharges by merchants that exceeded the 'reasonable cost of acceptance'.[23] 'Reasonable cost of acceptance' was not defined but was set out in a Guidance Note issued by the RBA.[24] I have discussed in detail elsewhere the difficulties with the 2012 Standard and the Guidance Note.[25] For the purposes of this article, and to frame the discussion of the regulation that replaced the 2012 standard, I will briefly note my conclusions about the problems with the RBA's approach in 2012.[26]

There were two main difficulties. The first was the regulation's dependence on decentred regulation for enforcement.[27] While the RBA could ensure that the schemes had the correct contractual provisions relating to surcharging in their contractual arrangements with participants, it had no power to bring action against merchants who breached those contractual arrangements. Policing of the standard therefore relied on enrolling the schemes or merchant acquirers as regulators to regulate through enforcement of their contractual provisions relating to surcharging. Notwithstanding

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[18] Australian Competition and Consumer Commission, *Drip pricing* (2017) <https://www.accc.gov.au/consumers/online-shopping/drip-pricing>.

[19] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* (No 2) [2017] FCA 205; *Australian Competition and Consumer Commission v Virgin Australian Airlines Pty Ltd* (No 2) [2017] FCA 204.

[20] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263. This case also included the decision in relation to Virgin.

[21] See eg, CHOICE Report, above n 16; Commonwealth Consumer Affairs Advisory Council, *Credit Card surcharges and non-transparent fees: a study* (2013); *Taxi Industry Inquiry Final Report: Customers first, safety, service, choice* (2012) in particular Ch 14 'Paying for taxis'; Financial System Inquiry, *Financial System Inquiry Final Report* (Australian Government, 2014) 168-176.

[22] The merchant acquirer or merchant service provider is the entity that processes payments on behalf of the merchant, see Wardrop, above n 1, 292 for detail of the various parties involved in a typical four-party credit or debit card scheme.

[23] *Payments Systems (Regulation) Act 1998* (Cth) 'Standard No. 2 Merchant Pricing for Credit Card Purchases' (as amended); *Payments Systems (Regulation) Act 1998* (Cth) 'Standard "The 'Honour All Cards" Rule in the Visa Debit and Visa Credit Card Systems and the "No Surcharge" Rule in the Visa Debit System' (as amended). See, Reserve Bank of Australia, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement* (June 2012).

[24] Reserve Bank of Australia, *Guidance Note: Interpretation of Surcharging Standards* (12 November 2012) (2012 Guidance Note).

[25] Wardrop, above n 1.

[26] Ibid, 297-298.

[27] Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2002) 54 *Current Legal Problems* 203. 'Decentred regulation' relies on gatekeepers to perform regulatory functions that in command and control type regulation would be performed by the regulator.

the international card companies' disapproval of surcharging, they had a vested interest in not pursuing the issue too strongly because they relied on the merchants' banks (the 'merchant acquirers') for distribution of their cards.[28] Placing pressure on merchant acquirers to pursue their merchant customers for non-compliance had little to recommend itself (except perhaps in the most blatant cases of non-compliance). The Australian Securities and Investments Commission ('ASIC') and the Australian Competition and Consumer Commission ('ACCC') could only pursue merchants if there was a breach of the consumer laws, for example if there had been misleading or deceptive conduct, as was the case in the *Jetstar* and *Virgin* case referred to above.[29]

Second, the RBA's Guidance Note on what were 'reasonable costs' took a broad-brush approach and contained a number of subjective elements. For example, cl 2(d) allowed the merchant to include in the costs of acceptance 'the transaction value of any fraud-related chargebacks or chargeback fees charged by the acquirer or a payment service provider', provided the merchant had 'adopted generally available fraud mitigation procedures'.[30] There was room for significant debate around whether or not a merchant had adopted these procedures in mitigation – this was particularly significant because merchants could include fraud losses in their costs of acceptance. There was also a catch-all provision that allowed costs relating to various items that had not been specifically referred to.[31] The question of what items should be comprised in 'reasonable costs of acceptance' is one of the great difficulties that has exercised regulators and stakeholders both in Australia and internationally. All in all, there were significant problems in its interpretation as well as hurdles to enforcement. Accordingly, the RBA and the government moved away from the self-regulatory and decentred mode of regulation in 2016. The RBA issued a new standard on excessive surcharging[32] (so no longer a Guidance Note) and the *Competition and Consumer (Payment Surcharges) Act 2016* (Cth) was passed to give ACCC/ASIC power to bring action against merchants whose surcharges did not comply with the new standard.

Before moving to a discussion of this latest iteration of surcharging regulation in Australia, this article will place the debates and solutions implemented in Australia around this issue in an international context. Two jurisdictions have been selected. The first is the US. The US is of interest for two reasons. The first is that the international card companies, while now globalised, multinational companies, originated in the US and are headquartered there. There has, therefore, been a long history of interaction with regulatory authorities and litigants around the possible anti-competitive aspects of the card company rules, including the no-surcharge rule. Second, it is an example of a jurisdiction that has had to rely on competition law for the most part to manage issues around card company rules. This provides a counterpoint for the Australian position that has the choice of dealing with these issues through competition law or though the RBA's powers under the *Payment Systems (Regulation) Act 1998* (Cth). The second jurisdiction is Europe, where a supra national regulator, the European Commission, proposes policies and legislation for the EU and relevantly, has been active around competition and consumer issues concerning payments regulation. The UK's implementation of EU directives and regulations concerning payments and surcharging

[28] Wardrop, above n 1, 298.
[29] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263.
[30] Reserve Bank of Australia, *Guidance Note: Interpretation of Surcharging Standards* (2012), 2(d).
[31] Ibid 2(e).
[32] *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions.*

provides an example of how a jurisdiction may go about implementation and is discussed.

II The International Experience And Solutions

Australia has not been alone in grappling with the operation of the international card schemes in the payment sector. The anti-competitive aspects[33] of international card companies' rules have been the focus of regulators world-wide (particularly competition regulators) for several decades, although the focus has been most intense over the past twenty years. The responses by various national and supra-national regulators (e.g. the European Commission) have been varied, inconsistent and marked by reversals over time. This section will look at the situation in the United States and the EU.[34]

A *United States*

In the United States, private and state anti-trust litigation has been a feature of struggles surrounding the card companies' business model from the 1960s.[35] The regulatory picture there is particularly fragmented. What is described below is an overview as there is not sufficient space to detail all the ins and outs of government and private anti-trust, and constitutional litigation surrounding this issue in the US. One of the reasons for the fragmentation is the complex relationship between government and private class actions in relation to the card payment cases, which together can bind members of a class with or without consent.[36] Having said that, a broad-brush picture can be given, providing insight into the regulatory position there in relation to surcharging.[37]

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[33] There are a range of possible anti-competitive aspects of the scheme rules in addition to the no-surcharging rules: possible price fixing in relation to the setting of the interchange fees; the rule that merchants must accept all cards of a scheme; anti-steering rules (that a merchant can't steer customers to lower cost cards), the honour all cards rule – that merchants must accept all cards by the particular scheme, access issues: rules that issuers and acquirers must hold a banking licence.

[34] For a survey of the position in other countries as at 2010 see, *CHOICE Report,* above n 16. This is out of date in some respects; however, it gives a sense of how various countries were dealing with this issue. See also, London Economics and Iff in association with PaySys, *Study on Impact of Directive 2007/64/EC on Payment Services in the Internal Market and on the Application of Regulation (EC) No 924/2009 on Cross-Border Payments in the Community,* Table 23 (European Commission, 2013).

[35] *United States, et al v American Express Co et al*, 838 F 3d 179, 186-187 (2nd Cir, Ct App, 2016). Various other anti-trust suits include: *Wal-Mart Stores, Inc. v Visa U.S.A, Inc,* 396 F 3d 96, 101-02 (2nd Cir, 2005); *United States v Visa USA, Inc,* 344 F 3d 229, 234-37 (2nd Cir, 2003); *In re Visa Check/MasterMoney Antitrust* Litigation, 280 F 3d 124, 129-31 (2nd Cir, 2001).

[36] See generally, Steven Semeraro, 'Settlement Without Consent: Assessing the Credit Card Merchant Fee Class Action' (2015) *Columbia Business Law Review,* 186.

[37] The focus of this section is on regulation and court cases directly relevant to the ability of merchants to surcharge for different payment types, in particular credit cards. Accordingly regulation at the wholesale level that caps interchange fees charged to retailers by banks for processing debit card transactions such as the Durbin amendment to the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* is not discussed.

Consumers began attacking no surcharge/no cash discount rules[38] in 1974 when consumer groups brought a restraint of trade case against Amex. The case was settled with Amex agreeing that merchants could offer cash discounts, thereby leaving Amex's no surcharge rule in place.[39] This heralded a distinction drawn by regulators in the US between surcharging for payment (on the whole 'bad') and allowing discounting for cash (on the whole 'good'). This was so even though a surcharge and discount can be economically equivalent.[40] After the settlement with Amex (and others) from 1974 onwards, federal law allowed cash discounts capped at 5% under Truth-in-Lending regulation for payment by credit card and from 1976 banned surcharging for credit cards.[41] It is not clear why Congress banned surcharging at that time but it later explained surcharging should be prohibited because of its potential to mislead consumers – the problem of advertising a low headline price and then imposing fees and charges at the cash register.[42] The legislation banning surcharges lapsed in 1984 and this remains the case today.[43] It is not clear why it was allowed to lapse. Upon lapse, nine state legislators banned credit card surcharges from the early to mid 1980s and a further three states did so in the 1990s.[44] At this stage the US position was that the card companies retained contractual bans on credit card surcharging with merchants that was backed up by state legislation in 12 states (collectively referred to as 'the no surcharge states').[45] But in 2005, merchants and trade associations launched a class action against Visa, MasterCard and various financial institutions alleging

38 In addition to litigation discussed in the body of the text, there has also been litigation about the following issues: The Department of Justice successfully challenged Visa and MasterCard exclusivity rules that prohibited member banks from issuing other cards in 2001, affirmed on appeal in 2003: *United States v Visa USA, Inc* 163 F Supp 2d 322, 340-42 (SDNY, 2001), affirmed 344 F 3d 229 (2nd Cir, 2003), certiorari denied, 543 US 811 (2004); and the 'Honor all Cards' rule class action litigation in the 1990s, this was settled in 2003 when MasterCard and Visa amended their rules: *In re Visa Check/MasterMoney Antitrust Litigation* 297 F sup 2d 503 (EDNY 2003).

39 Edmund W Kitch, 'The Framing Hypothesis: Is it Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?' (1990) 6(1) *Journal of Law, Economics, and Organization* 217.

40 If the 'regular price' is $100 a surcharge for credit card customers of $3.00 is the same economically if the 'regular price' was $103 for payment by credit card but a discount was given for payment by cash or other payment instruments.

41 For the detail of why federal regulation was needed to allow cash discounts for credit cards (or other types of credit), see Adam J Levitin, 'The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit' (2005) 3(1) *Berkeley Business Law Journal* 265, 277. In short, the problem related to the inability of credit card companies or merchants to comply with cost of credit disclosure requirements if they wished to offer cash discounts.

42 United States Senate Committee Report, S Rep 97-23, 301 (1981) cited in Levitin, ibid 278.

43 Todd L Zwicki, Geoffrey A Manne, and Kristian Stout, *Behavioural Law & Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Law*, International Center for Law & Economics, Financial Regulation Research Program White Paper Series 2016-1, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2883428>.

44 Adam J Levitin, 'Priceless, The Economic Costs of Credit Card Merchant Restraints' (2007-2008) 55 *University of California, Los Angeles Law Review* 1321, 1381-1382.

45 These are: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas who all prohibit merchants from surcharging on credit cards. Minnesota prohibits sellers who have their own customer credit card from surcharging if a customer elects to use the seller's credit card: see National Conference of State Legislatures, 'Credit or Debit Card Surcharges Statutes' (2016) <http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-statutes.aspx>.

conspiracy to fix interchange fees in violation of § 1 of the *Sherman Act*.[46] As part of this class action ('Visa/MasterCard class action'), the no surcharge rules were brought into question. The case was settled, with Visa and MasterCard agreeing to pay merchants in the order of US$7.25 billion and to amend their rules in various respects ('Visa/MasterCard settlement'). The terms allow merchants to apply a blended surcharge (e.g. the same charge to all Visa or MasterCard credit card transactions) or a surcharge at the product level (e.g. different charges for Visa Classic Card, etc) but subject to various caps.[47] The operation of the caps and other limitations means the right to surcharge under the terms of the 2013 settlement is significantly limited.[48] In particular, the right of a merchant to surcharge a Visa or MasterCard credit card was limited by the fact it could only surcharge to the extent that it also 'surcharges other payment products of equal or greater cost of acceptance'. This meant that as Amex had a higher cost of acceptance, and prohibited surcharging, many merchants were precluded from surcharging Visa and MasterCard products.[49] Further, state bans on surcharging still applied in the no surcharge states. The Visa/MasterCard settlement did not apply to debit or pre-paid cards, leaving Visa and MasterCard free to continue to prohibit surcharges on these cards. The United States Court of Appeals for the Second Circuit, however, has vacated the District Court's certification of the Visa/MasterCard settlement because it found that the classes were not properly represented. The Court held the classes were inadequately represented because the same counsel represented separate classes that had claimed conflicting relief.[50] Supporters of the settlement have petitioned the Supreme Court to hear the case.[51] At the time of writing the Supreme Court has not delivered its judgment.

Running alongside the Visa/MasterCard class action, were various individual merchant actions against Amex that were consolidated into *In Re American Express Anti-Steering Rules Antitrust Litigation* ('Amex class action').[52] In this class action merchants are asking for, among other things, an unfettered right to impose surcharges on all Amex transactions. Many of the merchants in this litigation are also involved in the Visa/MasterCard class action. Settlement of the Amex class action has been proposed and the terms of that settlement interact with the Visa/MasterCard settlement such that it means that merchants could apply only parity surcharging for credit cards or no surcharging at all (depending on the circumstances). As a district judge pointed out, the interaction of the two settlements as drafted 'effectively determine[d] for the

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[46] *Sherman Act,* 15 USC § 1 (2017); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 986 F Supp 2d 207 (EDNY, 2013) but see subsequent judgment vacating the district court's certification of settlement of the class action: *In re Payment Card Interchange Fee and Merchant Discount Litigation*, 827 F 3d 223 (2nd Cir, Ct App , 2016).

[47] *Class Settlement Agreement, In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* No 05-MD-172) (JG) (JO), § 43 (Visa) and § 55 (MasterCard), available at the Official Court-authorised settlement website: <https://www.paymentcardsettlement.com/en>. For an overview of the settlement terms and criticisms of the settlement, see Steven Semeraro, 'Settlement Without Consent: Assessing the Credit Card Merchant Fee Class Action' (2015) *Columbia Business Law Review* 186.

[48] Semeraro, ibid 210.

[49] *In Re American Express Anti-Steering Rules Antitrust Litigation* 2015 US Dist Lexis 102714, 65; 2015-2 Trade Cas (CCH) P79, 252.

[50] *In re Payment Card Interchange Fee and Merchants Discount Antitrust Litigation* 827 F 3d 223.

[51] Alison Frankel, 'Should SCOTUS review nixed $7.2 billion credit-card antitrust settlement?', *Reuters* (online), 23 February 2017 <http://www.reuters.com/article/us-otc-creditcard-idUSKBN1622KE>.

[52] *In Re American Express Anti-Steering Rules Antitrust Litigation* 2015 US Dist Lexis 102714; 2015-2 Trade Cas (CCH) P79, 252.

entire credit card industry whether parity, differential or no surcharging would occur'.[53] The district court has refused to approve the Amex class action settlement because of 'egregious conduct' by the plaintiffs' Co-Lead Class Counsel, a Mr Freidman.[54] Friedman had been in frequent and constant contact with counsel for MasterCard who had acted in the Visa/MasterCard class action settlement, and the court was of the view that this contact involved breaches of possible confidential/and or privileged communications. Given the interaction between the two settlements, the court found there was a conflict of interest and the class had not been properly represented.[55] The Amex class action is therefore continuing and a single federal court judge has held that a reasonable jury could find that the no-surcharge rules amounted to an anti-trust violation.[56] So at this point, it is still open for a court to find that Amex's no-surcharge rules are anti-competitive or it could be settled.

While this litigation was wending its way through the courts, in 2010 the federal Department of Justice ('DOJ') filed its own antitrust suit against Visa, MasterCard, and Amex in relation to their anti-steering rules ('the government action').[57] The DOJ argued that the inability of merchants to steer customers to cheaper payment cards inhibited price competition on the interchange fee and the merchant service fees. These were similar arguments that were used by the RBA to justify standards requiring amendment to the no-surcharge rules and other anti-steering provisions. Interestingly, however, the DOJ's action *did not* involve an attack on the no-surcharge rule. It is unclear why the DOJ did not include the no-surcharge rules in its 2010 anti-trust suit, when in Australia, and elsewhere, the no-surcharge rules are seen as a significant contributor to the inability of merchants to place competitive pressure on the schemes to lower interchange fees and costs.[58] It has speculatively been suggested the reason was fear of political fallout from consumers against the Obama Administration if it was seen to be imposing surcharges on consumers, and that this had influenced the DOJ decision.[59] The DOJ settled the government action with MasterCard and Visa, but its action continues against Amex. While the government action against Amex does not specifically deal with the no-surcharge rule, it is possible that the court's analysis of the anti-steering rules under consideration[60] could affect the reasoning of a

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53 For the detail of the interaction between the two settlement agreements see, *In Re American Express Anti-Steering Rules Antitrust Litigation* 2015 US Dist Lexis 102714, 21-25, 64-65; 2015-2 Trade Cas (CCH) P79, 252.

54 Ibid 52.

55 Ibid 73.

56 Ibid 85. His Honour, however, left it open for Amex to seek leave to renew a motion for summary judgment if the decision of the Appeal Court in the government action in *United States, et al v American Express Co et al,* 838 F 3d 179 (2016, 2nd Circuit App Cases) affected the analysis of the no-surcharge rule: at 85. Summary judgment was claimed on other grounds, not relevant to this discussion. See the following paragraph for a discussion of the government action.

57 Department of Justice, 'Justice Department Sues American Express, Mastercard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and Mastercard' (Press Release, 4 October 2010).

58 See, e.g., Reserve Bank of Australia, *Reform of Australia's Payment Systems*, above n 10, [3.2.1].

59 Myriam Gilles, 'Can John Coffee Rescue the Private Attorney General? Lessons from the Credit Card Wars Entrepreneurial Litigation: Its, Rise, Fall, and Future' (2016) 83 *Chicago Law Review* 1001, 1034.

60 The anti-steering rules are provisions barring merchants 1) offering cardholders any discounts or nonmonetary incentives to use cards that are less costly for merchants to accept, 2) expressing preferences for any card, or 3) disclosing information about the costs to merchants of different

court in the merchants' Amex class action, discussed above.[61] The current position regarding the Government action against Amex is that a US Court of Appeals for the Second Circuit has reversed a lower court's decision in 2016. The appeals court held that in the absence of evidence of the net effect of Amex's anti-steering rules on both merchants and cardholder, those rules *did not* violate § 1 of the *Sherman Act*.[62]

Accordingly, given the limited ability to surcharge as a result of the DOJ's failure to pursue the issue, the possible application of the Visa/MasterCard class action settlement and the Amex class action settlement, and state legislation banning surcharges, merchants recently attacked state legislation on constitutional grounds. In *Expressions Hair Design v Schneiderman*[63] petitioners argued, among other things, that a New York law prohibiting surcharges on credit cards violated the First Amendment because it regulated how they *communicate* their prices.[64] The merchants won at first instance, and lost on appeal.[65] In 2017 the Supreme Court overturned the Court of Appeals' decision that the legislation regulated *conduct* not speech (therefore the First Amendment was relevant), and has remanded the case to the Court of Appeals to decide the constitutional question.[66] There are also constitutional challenges to no surcharge legislation in Florida and Texas, and California has ceased to enforce its no surcharge ban after a federal court held the statute was unconstitutional.[67] Ultimately the Supreme Court will most likely be called upon to decide whether similarly worded state legislation banning surcharging violates the First Amendment.

Finally, in relation to other forms of payment in the US, ten states have legislation that allows merchants to give discounts for payment other than by credit or debit card.[68] US merchants cannot surcharge for debit or prepaid Visa, MasterCard or Amex card transactions as those contractual rules still stand.[69]

The position in the United States therefore is inconsistent and complicated – it has been referred to as a 'cloud of confusion'.[70] Depending on the state, surcharges might be permissible for Visa and MasterCard credit cards under the terms of the

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cards: *United States, et al v American Express Co et al,* 838 F 3d 179, 183 (2016, 2nd Circuit App Cases).

[61] When denying an application for summary judgment in the Amex class action, a District Court judge left it open for Amex to seek leave to renew a motion for summary judgment if the decision of the Appeal Court in the government action in *United States, et al v American Express Co et al,* 838 F 3d 179 (2016, 2nd Circuit App Cases) affected the analysis of the no-surcharge rule, see *In Re American Express Anti-Steering Rules Antitrust Litigation* 2015 US Dist Lexis 102714, 85.

[62] *Sherman* Act, 15 USC § 1 (2017); *United States, et al v American Express Co et al,* 838 F 3d 179 (2016, 2nd Circuit App Cases); rehearing denied, *United States, et al v American Express Co et al,* 2nd US Circuit Court of Appeals, No 15-1672 (2017); 2017 US APP Lexis 702.

[63] 1077 L Ed 2d 442.

[64] *United States Constitution* amend. 1.

[65] *Expressions Hair Design v* Schneiderman, 975 F sup 2d 430 (SDNY, 2013); *Expressions Hair Design v* Schneiderman, 808 F 3d 118 (Ct App, 2nd Cir, 2015).

[66] Ibid.

[67] See, e.g., *Rowell v Pettijohn* 816 F 3d 73 (Ct App, 5th Cir, 2016) (Texas); *Dana's Railroad Supply, et al v Att Gen, State of Florida* 809 F 3d 1282(Ct App, 11th Cir, 2016) (Florida); *Italian Colors Restaurant, et al v Harris* 99 F Supp 3d 1199 (2015, ED Cal).

[68] National Conference of Legislatures, above n 45; the states are California, Colorado, Connecticut, Maryland, Massachusetts, Nevada, Oklahoma, Washington, Wisconsin and Wyoming.

[69] See, e.g., Mastercard US, *What merchant surcharge rules mean to you* (2017) <https://www.mastercard.us/en-us/merchants/get-support/merchant-surcharge-rules.html>.

[70] See the US credit card comparison website CreditCards.com, <http://www.creditcards.com/credit-card-news/merchants-add-card-surcharges.php>.

Visa/MasterCard settlement (if ultimately approved) but with all the limitations that that entails.[71] In particular, if they also accept Amex credit cards whose rules currently do not allow surcharge, then the Visa/MasterCard settlement means they cannot surcharge for Visa and MasterCard credit cards. Visa and MasterCard are also entitled to directly negotiate with merchants to prohibit credit card surcharging under the terms of the Visa/MasterCard settlement.[72] The card companies' rules can prohibit surcharging for credit cards in the no-surcharge states but that right awaits superior court decisions on the constitutionality of these statutes (or settlement of the cases). Finally, Visa, Amex, and MasterCard can prohibit surcharging for debit and prepaid cards. Given the amount of litigation that is not resolved in the US, the position is particularly uncertain at this time.

One thing that stands out from an Australian perspective is the initial antipathy to surcharging by Congress, and the consistent antipathy of some of the most populous states in the US (e.g. California, Texas, Florida and New York). The reasons for this appear, in part, to be related to consumer protection concerns. The strength of lobbying by the card companies can also not be overlooked, as they have always been opposed to surcharging.[73] Antipathy to surcharging by regulators has not been a feature of Australian regulation, unlike the EU, which has now arrived at the position where surcharging will be a thing of the past for most consumer debit and credit cards in the Member States. The following section, therefore, will discuss the EU's current position regarding surcharging, looking at the supra national position and then discussing how it has been implemented in the UK as a Member State.

B *European Union*

The EU position on the no-surcharge rules initially reflected a flexible approach to the various international scheme rules that attracted consumer and merchant disapproval in the US described above. This attitude has hardened over time. Originally Visa obtained a comfort letter from the European Commission in 1977 that allowed various scheme rules that could have had an anti-competitive effect, including its no surcharge rule. Subsequently the Commission re-opened its investigation of these rules in 1985. By 2001 it was still able to give a 'negative clearance' to Visa's no-surcharge rule because of a 'lack of appreciable effects' in light of the market surveys carried out at the Commission's request.[74]

Competition enforcement actions by the EU against MasterCard and Visa focussed on the interchange fees and the honour all cards rule.[75] By 2007, however, when the first *Payments Services Directive* ('PSD1')[76] was adopted, the EU had reached a half-way house on the question of the surcharging rules. PSD1 provided in

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[71] See text accompanying above nn 47, 48 & 49..

[72] Class Settlement Agreement, above n 47, § 42 (Visa); § 55 (MasterCard).

[73] See eg, Samuel J Merchant, 'Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes' (2016) 68(2) *Oklahoma Law Review* 327, 329. Lobbying around interchange fee regulation of the Durbin amendment to the *Dodd-Frank* Act: 15 USC § 1693o-2, and see Senator Dick Durbin's comment about card company lobbying: Dick Durbin, 'Swipe Fee Reform' (Press Release, 10-03-2011) <https://www.durbin.senate.gov/newsroom/press-releases/swipe-fee-reform>.

[74] Visa International Decision, OJL 293-24 of 1—11-2001, [11-12] and [54-58].

[75] European Competition Network, *Information Paper on Competition Enforcement in the Payments Sector* 11-18 (European Union, 2012).

[76] *Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and repealing Directive 97/5/EC* [2007] OJ L 319/1.

Article 52(3) that payment service providers could *not* prevent payees from seeking a charge or giving a discount to payers for use of a payment instrument. The EU, however, allowed Member States to forbid or limit the right to request charges, taking into account the need to encourage competition. This recognised that many Member States already had in place national legislation that prohibited surcharging over the years. Because of the problems with excessive surcharging, the amount merchants could surcharge was later limited by the Directive on Consumer Rights ('CRD').[77] Article 19 of the CRD provides that Member States must prohibit traders from surcharging for payment if the fees 'exceed the cost borne by the trader for use of ' the payment instrument. The CRD only applies to consumer contracts, and commercial payments are not affected.[78] It applies to all forms of payment (including cash) and certain sectors are exempted from its operation for various reasons, mostly because other regulation already comprehensively regulated the sector. These sectors are not insignificant. [79] There is no definition of excessive cost and it is up to the Member States to decide how this is to be implemented. This presents the problems of definition referred to earlier in this article. The inability effectively to deal with the definitional problems was one of the significant criticisms levelled against the RBA's attempts at dealing with the surcharging problem in its Guidance Note of 2012. As already mentioned, the definition of permitted costs in the Note was too subjective and presented problems of enforcement.[80]

An example of a Member State's attempts at defining the costs that could be included is found in the UK's Regulation on payment surcharges that implements the CRD ('the surcharge regulation'). [81] To some extent current Australian regulation seems based on the UK approach (discussed below). Prior to the commencement of the CRD, the UK was already dealing with the issue because examples of egregious overcharging had been brought to the attention of UK regulators by consumer advocate Which? in its super-complaint to the then Office of Fair Trading ('OFT').[82] The UK moved to implement the CRD early, and like the RBA, the Department of Business Innovation Skill ('BIS') issued Guidance on the surcharge regulation in 2013.[83] The Guidance provided that only 'direct costs to a trader' were recoverable. It provided examples of the sorts of direct costs that could be recovered, which included items

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77 *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* [2011] OJ L 304/64 (PSD1). See Preamble [27].

78 The definition of consumer by member states 'should cover natural persons who are acting outside their trade, business, draft or profession' see *Consumer Rights Directive*, Preamble [17], ibid.

79 For a convenient list of the sectors excluded in the Consumer Rights Directive, see Department for Business Innovation & Skills, *BIS Guidance on: The Consumer Rights (Payment Surcharges) Regulation 2012* (August 2015), 9-13 (*Updated BIS Guidance 2015*). See also Department of Business, Innovation and Skills, *Consultation On The Early Implementation Of A Ban On Above Cost Payment Surcharges* (2012), [46].

80 Reserve Bank of Australia, *Guidance Note*, above n 24.

81 *The Consumer Rights (Payment Surcharges) Regulations 2012,* 2012 No 3110 (UK).

82 Which?, *Super-complaint: Credit and Debit Surcharges* (UK, 2011). For the text of the complaint and the UK's response see <http://webarchive.nationalarchives.gov.uk /20140402142426/http://www.oft.gov.uk/OFTwork/marketswork/supercomplaints/which-payment-surcharges>.

83 Department for Business Innovation & Skills, *BIS Guidance On: The Consumer Rights (Payment Surcharges) Regulations 2012* (March, 2013) and the *Updated BIS Guidance 2015*, above n 79.

such as the merchant service fee, equipment costs for particular card terminals, costs of fraud detection and prevention and processing fees. The Guidance was permissive and provided that in 'most cases' evidence of costs could be supplied by invoices. Aggregation and averaging of costs was allowed – eg, costs could be assessed on a 'per transaction' or aggregate basis for a particular means of payment.[84]

It seems the regulation was effective in discouraging surcharging for debit cards by many companies in the UK; however, it appears some companies continue to charge above cost for credit cards. This is the case particularly in the travel industry, where large companies have been surcharging 2% or more for payment by credit card. This is above cost if it is assumed that subsequent to the introduction of a 0.3% cap on interchange fees for Visa and MasterCard consumer credit cards in the EU[85] large companies' additional costs above the interchange fee would be around 0.3%.[86] This suggests that the difficulty surrounding the muddied waters of what may or may not represent costs provides opportunities for continued overcharging. It also underscores that there is little possibility of consumers themselves dealing with these issues notwithstanding that the UK's Regulation 10 allows civil redress by consumers in the courts.[87] The regulator in the UK can obtain injunctive relief if there is collective harm to consumers by way of an enforcement action under Pt 8 of the *Enterprise Act 2002* (UK) or by civil injunctions (in this case no collective harm need be shown).[88] The position in the UK then is that the surcharge regulation relies on regulator enforcement or consumer campaigning, as seen by Fairer Finance's most recent campaign.[89]

Eventually, from the EU perspective, these problems will no longer be significant when the rules under the latest payments directive, The Second Payment Services Directive ('PSD2'), come into force on 13 January 2018.[90] Article 62(4) of PSD2 requires Member States to ban surcharging for consumer payments where the payment instrument's interchange fee is regulated under the Interchange Fee Regulation.[91] This applies to MasterCard and Visa but not the three-party schemes such as Amex or Diners Club (as they do not have interchange fees). Why has Europe decided finally to ban surcharging for consumer four-party cards? The Commission justified banning surcharges because interchange fees represented most of the retailers' costs of card acceptance and as they were now to be capped at 0.2% of the value of transactions for debit cards and 0.3% for credit cards, 'retailers costs for card transactions will be substantially reduced and surcharging will no longer be justified'.[92] This does not answer why there should be a ban. It seems the equation is that the risk of excessive surcharging outweighs the small increase that might be made to prices for goods and services and that consumer protection trumps economic theory in the EU in this case. The desire to impose uniformity in the payments market also seems to have formed

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84 *BIS Guidance* (2013), ibid, 13.

85 *Regulation (EU) 2015/751 of the European Parliament And Of The Council of 29 April 2015 on interchange fees for card-based payment transactions* OJ L 12/1 [2015].

86 Fairer Finance, *Red card for card charges* (2017) <https://www.fairerfinance.com/campaigns/red-card-for-card-charges>.

87 *The Consumer Rights (Payment Surcharges) Regulations 2012,* reg 10.

88 See generally *BIS Guidance* (2013) above n 84, 13-14.

89 Fairer Finance, above n 86.

90 *Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC* (PSD2).

91 *Regulation (EU) 2015/751 Of The European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions*, OJ L 123/1 (2015).

92 European Commission, 'New rules on Payment Services for the benefit of consumers and retailers' (Press Release, 24 July 2013) 1.

part of the Commission's reasoning, although if that were a strong reason it is not clear why the ban shouldn't apply to corporate cards.[93] The bans will apply to both domestic and cross-border payments.

In relation to the UK position, Brexit may affect surcharge and interchange regulation. The UK's latest consultation paper on the implementation of PSD2 notes that as the UK remains a full member of the EU it will continue to 'implement and apply EU legislation'. The negotiations for exit, however, will affect how EU legislation will be dealt with post Brexit, and how that will play out is unknown.[94]

While economic theory suggests that sending price signals to consumers by surcharging promotes competition, the EU has elected to take a pragmatic approach to surcharge regulation. It is not concerned that the costs above the interchange fee will be factored into higher prices (compare the RBA's concerns discussed below) preferring rather to make it easier to deal with the problems of excessive surcharging with an outright ban. While it is said that the ban on surcharging will apply to 95% of all card payments in the EU, the picture remains fragmented with the exclusion of corporate cards and also other payment mechanisms from the ban.[95]

III THE RESERVE BANK'S SURCHARGE STANDARD AND PART IVC OF THE CC ACT

A *The RBA's Surcharge Standard*

As noted in the Introduction, Australia has just issued its latest round of regulation regarding surcharging for payment. Australia has not dealt with this issue through competition law, rather it has engaged the powers of the RBA under the *Payment Systems (Regulation) Act 1998* (Cth). The ACCC had originally tried to get the card companies and banks to deal with various competition issues concerning scheme rules (including the no-surcharging rule) but it became clear there was going to be little cooperation. The discussion of the US and EU situation above shows how the international card companies have been fighting these issues internationally for a long time and so it is not surprising their attitude was less than conciliatory in Australia when the same issues came to the attention of regulators in the late 1990s. After the ACCC's initial foray into the issue in 2001, it referred the matter to the RBA to designate the payments systems and to determine standards for them under s 18 of the *Payment Systems (Regulation) Act 1998* (Cth).[96] As set out in the Introduction, by 2007 all the card companies were prohibited from banning surcharging in their rules because of the RBA's intervention, but by 2012 the problem of excessive surcharging was recognised.

After its flirtation with its 2012 Guidance Note indicating what the RBA thought were reasonable costs of acceptance and in the context of consumer criticism, the RBA determined a new standard on surcharging (the Standard).[97] The Standard provides, among other things, that neither the rules of a scheme nor any participant in a scheme can prohibit or deter a merchant from recovering a surcharge except if it exceeds the

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93 PSD2, above n 90, Preamble [66].

94 HM Treasury, *Implementation of the revised EU Payment Services Directive 11* (2017) [1.11].

95 European Commission, *Fact Sheet — Payment Services Directive: frequently asked questions* (8 October 2015) <http://europa.eu/rapid/press-release_MEMO-15-5793_en.htm?locale=en>.

96 For an outline of legislation and the regulators relevant to the payments area and the relationship between them all see King & Wood Mallesons, *Australian Finance Law* (7th ed, 2016) ch2.

97 *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions*

merchant's cost of acceptance for that merchant and that scheme at the applicable time.[98] As noted in the Introduction, the Standard does not provide consumers with a remedy against a merchant if the merchant charges in excess of the permitted surcharge. That is provided for in Pt IVC of the *CC Act* discussed below. The objectives of the Standard are to 'promote: efficiency and competition in the Australian payments system' and while consumer protection may be buried somewhere in the concept of 'efficiency', it is not the main focus of the RBA's action. This is explicable given the emphasis in the *Payment Systems (Regulation) Act 1998* (Cth) on prudential, efficiency and competition issues in the definition of 'public interest' in that Act.[99]

1 *Application of the Standard*

The Standard already applies to large merchants (e.g. a merchant with gross revenue of at least $25 million and with 50 or more employees) and will apply to other merchants from 1 September 2017.[100] MasterCard, Visa, and Amex Companion cards[101] together with eftpos are covered by the Standard. This means that it applies to credit, debit and prepaid card transactions of these firms. Payment of a taxi fare is not included in the Standard as state legislation deals with this issue. The Standard does not apply to cards issued by Amex or Diners Club in the three-party format, nor does it apply to other types of payment instruments. Amex and Diners Club are to provide voluntary undertakings to comply with the new surcharging standard and the RBA is seeking those undertakings from PayPal and UnionPay.[102]

A drawback of this voluntary arrangement is it makes enforcement problematic as the new enforcement provisions in the *CC Act* only apply to card transactions covered by the Standard or by those set out in regulations made under that Act.[103] To date no regulations have been made under the *CC Act* to cover these other payment systems. I assume the RBA did not want to go through the process of 'designating' Amex and Diners Club just to bring them within the enforcement umbrella.[104] The RBA can only issue standards in relation to payment systems that are 'designated'; see s 18 of the *Payment Systems (Regulation) Act.* Amex, Diners Club and the RBA have in the past preferred to deal with issues on a voluntary basis, so it appears it was decided to continue in this way. Preferring a contractual solution, the RBA has suggested that if Amex or any other undesignated system is concerned about excessive surcharging they

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[98] Ibid cll 3,4.

[99] See *Payments Systems (Regulation) Act 1998* (Cth) which provides in s 8 that in determining whether something is in the public interest for the purposes of the Act, the RBA is to have regard to 'the desirability of payment systems […] being (in its opinion) i)(financially safe […] and (ii) efficient; and (iii) competitive; and (b) not (in its opinion) materially causing or contributing to increased risk to the financial system'.

[100] For the full definition of 'Large Merchant' see cl 2.3 of the Standard, above n 97...

[101] A bank and not Amex issues an Amex companion card. Amex makes payments to banks to support the issue of the cards and the payments also support generous loyalty schemes. The payments by Amex to a bank play a similar role to interchange fees in a four-party system. These payments were originally unregulated to 'restore competitive neutrality'. The companion card payment system was designated by the RBA and the payments subject to regulation as are interchange fees in the Visa and MasterCard four-party scheme, see Reserve Bank of Australia, *Payments System Board Annual Report – 2016*, 34.

[102] Reserve Bank of Australia, *Review of Card Payments Regulation: Conclusions Paper* (May, 2016), 39.

[103] *Competition and Consumer Act 2010* (Cth) s 55B(2).

[104] This is consistent with the RBA's co-regulatory approach under the *Payments Systems (Regulation) Act 1998* (Cth).

can include a permitted cost of acceptance clause in scheme rules and then require merchants to warrant to consumers that surcharges do not exceed the cost of acceptance.[105] This is a convoluted way of dealing with this issue. It is a return to the decentred regulation model, referred to in Part II, and which is problematic for the reasons mentioned there.[106] One of the virtues of Australia's reliance on the RBA's broad powers, rather than the ACCC's powers under competition law, is that it is easier to provide a consistent and integrated regulatory treatment, thereby avoiding the incoherent mess that is the current position in the US and to a lesser extent, Europe. Leaving gaps such as this undermines this approach. The enforcement lacuna could have been filled by making these systems subject to a prohibition against excessive surcharging under regulations made pursuant to s 55B(1) of the *CC Act*. The government has apparently decided to adopt the RBA's approach. Nonetheless, the mechanism is there to fill these gaps in the event there are 'significant concerns about surcharging on payment methods that are not directly covered by a Reserve Bank standard'.[107] The regulations also allow for the bans on excessive surcharging to be quickly extended to new payment methods, rather than relying on designation of the payment system by the RBA. The *CC Act* is discussed further below.

2 *Permitted Surcharges and the definition of 'Cost of Acceptance'*

Clauses 4 and 5 of the Standard are the key provisions. Together they provide that a Permitted Surcharge in respect of a particular card transaction is the average cost per card transaction in the relevant scheme for a Reference Period calculated by adding together items listed in cl 5 (Permitted Cost of Acceptance Elements) and then expressing the total as a percentage of the total value of card transactions in the scheme for the Reference Period. The Reference Period is the previous 12 months. If it is not possible to reasonably ascertain the costs of acceptance for the previous 12 months, then the merchant must make a good faith estimate of the average costs of acceptance for a 12 month period using only known and/or estimated Permitted Cost of Acceptance Elements and card transaction volumes.[108] This presumably covers the situation where there are no figures for the previous 12 months because the merchant has not been part of the payment system long enough or has just started business.

As the permitted surcharge is calculated by reference to Permitted Cost Elements in a *scheme*, this means the merchant cannot apply a blended surcharge by averaging the costs of acceptance across all payment systems it accepts. The merchant could, however, apply a blended surcharge for all cards it accepts if the surcharge is equal to the average cost of the lowest cost scheme is accepts.

The Permitted Cost of Acceptance Elements cl 5.1 is the attempt by the RBA to provide clarity about what are permitted costs of acceptance as compared with the Guidance Note issued in 2012.[109] Clause 5.1 for the most part removes the subjectivity that was a major criticism of the 2012 Guidance Note. There is no longer a catch-all provision that allows merchants to include fixed equipment costs, systems or (importantly) 'development' costs that were not specifically itemised in the 2012

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[105] Reserve Bank of Australia, *Review of Card Payments Regulation* (2016) above n 102, 39.

[106] See text accompanying above nn 27, 28, 29.

[107] Explanatory Memorandum to the *Competition and Consumer Amendment (Payment Surcharges) Bill 2015* (Australian Government, 2015) [1.26].

[108] *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions,* cl 4.2.

[109] Reserve Bank of Australia, *Guidance Note: Interpretation of Surcharging Standards* (12 November 2012), above n 24.

Guidance. Nor is there an expansive clause dealing with fraud related costs – the Standard is much more circumscribed. This has been achieved first by removing the notion of 'cost' reimbursement from cl 5 of the Standard. It is only 'fees' or 'insurance premiums'[110] that are recoverable provided they are:

- documented or recorded in a contract between the merchant and its acquirer, payment facilitator or payment service provider (all defined in the Standard); or
- in a statement or invoice from either of those entities.

In short 'costs' are only fees or insurance premiums that are in a contract or invoice from another party in the payment scheme. This is a marked improvement on the 2012 Guidance Note, and appears to draw its inspiration from the UK suggestion that 'in most cases' invoices could evidence the cost of acceptance.[111] The RBA has gone a step further and made it a requirement that any of the fees or premiums described in cl 5 must be invoiced or set out in a contract. This provides a significant tool for regulators or consumer groups in any action in relation to excessive surcharging. It would have been preferable if cl 5 referred to a 'written' contract instead of just 'contract' to aid consumer enforcement. In addition, the clause makes it clear that only fees for processing charge-backs and not the actual amount of fraud-related chargebacks can be included.[112] Acquirers (the merchant's bank) must also provide monthly statements to merchants setting out those items of the Permitted Cost of Acceptance Elements that are supplied by the acquirer to the merchant. These provisions aid in providing for transparency of costs and are a significant improvement over the 2012 Guidance Note.

The current position then in Australia is that only fees and premiums set out below and documented in contracts or invoices fall within the definition of 'Permitted Cost of Acceptance Elements'. They are:

- merchants' services fees;
- fees for rental and maintenance of payment card terminals for the particular scheme;
- fees for gateway[113] or fraud prevention services referable to a the particular scheme;
- fees incurred in processing a card transaction in a scheme (including international service assessments or cross-border transactions fees, switching fees, and fraud-related chargeback fees); and
- if the merchant acts as agent for a principal, fees or premiums paid to insure against the risk that the merchant will be liable to a customer

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[110] For example, travel agents insure against the risk they will be liable to reimburse customers for the failure of an airline or hotel in relation to payments made by cards.

[111] See text accompany above, n 84.

[112] *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions*, cl 5.1(a)(iii).

[113] A gateway service provides software to process payments for a merchant, for an explanation of the difference between this and a third party processor (such as PayPal) see <http://www.paymentgatewayaustralia.com>. In a payment gateway the merchant must have a merchant account with a bank, however with companies like PayPal, they do not need such an account.

> for the failure of its principal to deliver goods or services purchased through a card transaction.[114]

There is provision for apportionment of Permitted Cost of Acceptance Elements on a pro-rata basis if the element in question is also used for other payment systems — for example, a fixed monthly rental for equipment that allows card transactions for more than one scheme.[115]

While the Standard is more precise about what may be included it is also complicated to read. This is not something that consumers will be able to easily enforce themselves, as will be discussed below. The following section looks in more detail at the issue of enforcement, as this is crucial to the Standard's effectiveness.

B *Enforcement of Part IVC of the Competition and Consumer Act 2010* (Cth)

The *Competition and Consumer (Payment Surcharges) Act 2016* (Cth) inserts into the *CC Act* a new Pt IVC titled 'Payment surcharges'. It is not contained in the Australian Consumer Law and is situated among the parts of the *CC Act* concerned with restrictive trade practices and industry codes. This is appropriate as the object of the Part emphasises the language of competition. Section 55 of the *CC Act* provides that the object of Pt IVC is to ensure that payment surcharges are not 'excessive' and 'reflect the cost of using the payment methods for which they are charged'.

Section 55B(1) provides 'a corporation must not, in trade or commerce, charge a payment surcharge that is excessive'. A payment surcharge is 'excessive' if it is for a kind of payment covered by a RBA standard, or regulations made under s 55B and the surcharge exceeds the permitted surcharge referred to in the RBA's standard or the regulations.[116] The regulations can exempt a person from the operation of sub-s 55B(1). Consistent with a regulatory approach that escalates up an enforcement pyramid, the ACCC can elect to issue an infringement notice as an alternative to proceedings for payment of a pecuniary penalty under s 76 of the *CC Act* where it has reasonable grounds to believe a person has contravened s 55B.[117] Infringement notices may be issued for 'relatively minor' breaches of the *CC Act*.[118] Failure to comply with an infringement notice will expose the recalcitrant party to penalty proceedings under s 76A. Pecuniary penalties under s 76 for each breach of s 55B can be up to 6,471 penalty units (from 1 July 2017 $1,358,910) for a body corporate or 1,295 penalty units (from 1 July 2017 $271,950) for an individual.[119] The court can grant an

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[114] Provided that risk arises because of payment for the goods and services is effected through a card transaction and the recipient of the premium is not a related body corporate of the merchant as defined in the Standard: *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions* cl 5.1(a)(iv).

[115] *Payment Systems (Regulation) Act 1998* (Cth), *Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit, and Prepaid Card Transactions*, cl 5.3.

[116] *Competition and Consumer Act 2010* (Cth) s 55B(2).

[117] Ibid s 55F.

[118] Australian Competition and Consumer Commission, *Guidelines to the Use of Infringement Notices by the Australian Competition and Consumer Commission* 2 (2013).

[119] *Competition and Consumer Act 2010* (Cth) ss 76(1A)(ba); 76(1B)(aa). Penalty units were increased from $180 to $210 by the *Crimes Amendment (Penalty Unit) Act 2017* effective from 1 July 2017. It will also delay the first automatic Consumer Price Index (CPI) adjustment of the penalty unit until 1 July 2020; and provide for CPI indexation to occur on 1 July every three years thereafter.

injunction on the application of the ACCC or any other person under s 80(1)(a) on such terms as the court thinks fit.

The ACCC's capacity to enforce s 55B is enhanced by the ability to require a 'surcharge participant' to give it information or documents evidencing the amount of a payment surcharge and/or the cost of processing a payment in relation to which a payment surcharge was paid.[120] The ACCC is merely required to give written notice and the section is engaged even though there may be no grounds to suspect a breach of s 55B. If a person complies with an infringement notice no civil or criminal proceedings can be started or continued by or on behalf of the Commonwealth in relation to the alleged contravention.[121] Failure to comply with an information notice is a strict liability offence and attracts a penalty of 600 penalty units (from 1 July 2017 $126,000) for a listed corporation and 60 penalty units (from 1 July 2017 $12,600) for a body corporate or person. A 'surcharge participant' is a corporation who in trade or commerce charges a payment surcharge (e.g. a merchant) or who processes a payment for which a surcharge is charged. The second part of the definition therefore extends the reach of the section beyond merchants to any other parties in the processing of a payment, for example, the merchant's bank (the acquirer), third party processors (e.g. PayPal) or gateway providers such as SecurePay.

A person who has suffered loss because of another person's contravention of the ban on excessive surcharges can bring an action for damages against the defendant under s 82 of the *CC Act* within six years after the day in which the cause of action accrued.[122] This is the case notwithstanding the defendant had complied with an infringement notice, as the stay on civil or criminal proceedings in those circumstances only applies to proceedings by or on behalf of the Commonwealth.[123] The plaintiff, however, still needs to prove the conduct complained of breached s 55B as payment of a penalty in compliance with an infringement notice is not evidence that a person has contravened s 55B.

Finally, s 86C of the *CC Act* applies to contraventions of section 55B so that non-punitive remedies such as orders to undertake community awareness programs or to publish an advertisement can be made by a court. The court also has wide power to make orders under s 87 against a person who has breached s 55B to pay compensation for any loss or damage or otherwise as it thinks appropriate.

The new Pt IVC has set up an effective structure for the ACCC to enforce compliance of the RBA's standard on excessive surcharging should it choose to do so. The penalty amounts are comparable to those found in the Australian Consumer Law for false and misleading representations and for other contraventions. The extent to which consumers will avail themselves of the provisions is debateable, given the complicated nature of the information that is required to make a case about excessive surcharging.

IV CONCLUDING REMARKS

The RBA's intervention in Australia's payment system concerning surcharging led to unintended consequences that were bad for consumers in one particular area – excessive surcharging. This is not to suggest that the RBA's intervention played no part in improving the efficiency of the payments system in another respect. Namely

[120] *Competition and Consumer Act 2010* (Cth) s 55C(1).
[121] Ibid s 55K(3).
[122] Ibid s 82(2).
[123] Ibid s 55K(3).

reducing the use of credit cards as pure payment instruments in circumstances where cheaper debit cards could serve just as well. Ensuring consumers use the cheapest card appropriately contributes to the efficiency of Australia's payments system. Having said that, it is not clear how important surcharge regulation has been in that regard. What was arguably more important in the reduction of credit card use was the RBA's control of interchange fees, which had funded the generous loyalty points for credit card use that Australian consumers were so fond of chasing. That the RBA did not focus on the potential for rent seeking by merchants and how merchants might engage in misleading behaviour when surcharging was allowed is odd in the context of international experience. As we have seen, consumer protection concerns were behind the US's antipathy to surcharging early on, and this concern has continued to this day with the DOJ omitting the no surcharge rule from its antitrust actions against Visa, MasterCard and Amex. The EU has recently banned surcharging, having come full circle in its attitude to surcharging. The rationale there also seems to be based on consumer protection concerns. When weighing up the competing interests of stakeholders, including theories around price signalling, the EU has privileged consumers.

Accepting for the moment that for the foreseeable future the RBA will maintain the course it had embarked upon to facilitate surcharging by merchants, the latest round of regulation is a marked improvement on the previous approach. Arguments about what should or should not be included in the costs of acceptance are made more difficult by the Standard's requirement that the cost elements are documented before they can be included in the calculation of costs of acceptance. The problem of blended surcharging has been dealt with and the new enforcement provisions in the *CC Act* are adequate. However, currently the Standard and Pt IVC of the *CC Act* are only applicable to payment systems that are designated, leaving a number of payment systems outside the regulatory net. While there is provision for private consumer redress, given the relatively small amounts involved individually for each consumer, campaigns by consumer advocates and enforcement by the ACCC will be the most effective methods to ensure compliance.