Competition and Consumer Amendment (Payment Surcharges) Bill 2015

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Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.

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Purpose of the Bill
The purpose of the Competition and Consumer Amendment (Payment Surcharges) Bill 2015 (the Bill) is to amend the Competition and Consumer Act 2010 (CCA) to establish a legislative and regulatory framework to ban excessive card surcharging and establish the Australian Competition and Consumer Commission (ACCC) as the primary enforcement agency for the ban.2

Background

Use of credit cards
According to the Reserve Bank:

In recent decades there have been significant changes in the way that individuals, businesses and government agencies make and receive retail payments. The use of non-cash payment methods has increased strongly, with debit and credit cards playing an increasingly important role in the payments system. They are now the most frequently used non-cash payment method, accounting for around two-thirds of the number of non-cash payments in Australia in 2014/15 (though only around 3 per cent of the value, given the small size of card transactions compared with some other payment methods such as electronic funds transfers). Over the past financial year, Australian personal and business cardholders made around 6.2 billion card payments, with a total value of $503 billion. Credit card payments accounted for 2.2 billion payments with a total value of $285 billion.3

Payment systems
A payment system means a funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system.4

The figure in Appendix 1 to this Bills Digest shows the cycle of potential fees and charges involved in payment systems. For each transaction they accept, merchants pay merchant service fees to merchant service providers, which in turn pay interchange fees to customer service providers. Customer service providers can then pass some of this revenue on to customers in the form of reward points and other benefits.

Merchants can complete this cycle by surcharging their customers to recoup their transaction acceptance costs. However, this can be difficult when the system provider has high market penetration, as surcharging can cause the customer to switch to another merchant that does not surcharge. Merchants can either absorb the costs of high-reward payment methods (involving high interchange fees and therefore high merchant service fees) or pass them on to all customers in the form of higher prices. Interchange fee caps restrict this cycle by limiting how much revenue customer service providers can pass on to customers using higher-cost payment methods, in the form of reward points or other benefits.5 [emphasis added]

Current regulation of surcharges
In 2010, the New South Wales Government commissioned the Australian Consumers’ Association, Choice, ‘to prepare a comprehensive report on credit card surcharges in Australia because of widespread concern in the community about surcharges and the perception that many of them appear to be excessive.’6 The main findings of the research were:

• widespread disapproval of and opposition to surcharges—68% of survey respondents believed that retailers and other businesses should not be allowed to charge customers extra when they pay with their credit card
• people do not understand the reason for the surcharges and the benefits have not been properly explained

2. Explanatory Memorandum, Competition and Consumer Amendment (Payment Surcharges) Bill 2015, p. 6.
3. Reserve Bank of Australia (RBA), Submission to the Senate Economics References Committee, Inquiry into matters relating to credit card interest rates, August 2015, p. 5, accessed 10 December 2015.
6. NSW Fair Trading, ‘Credit card surcharging in Australia 2010’, NSW Fair Trading website; Choice, Credit card surcharging in Australia, report prepared on behalf of NSW Fair Trading, [2010], both accessed 14 December 2015.
• industries where credit card surcharges were most often experienced were in air travel, telecommunications, holiday travel, restaurants, utilities, taxis and petrol stations
• there is a need for retailers to fully disclose their surcharges upfront
• it is very difficult for consumers to know if the surcharges are fair and reasonable and
• even the credit card companies believe that some merchants are surcharging over and above the cost of accepting a credit card.7

The Payment Systems (Regulation) Act 19988 (PSR Act) sets out the rules which regulate payment systems. The Reserve Bank is empowered to designate a payment system if it considers that doing so is in the public interest.9 For example, MasterCard and Visa are designated systems.10 Further, the Reserve Bank may establish standards to be complied with by participants in the system.11

In March 2013, following a review by the Reserve Bank of Australia, standards for both MasterCard12 and Visa13 were established under which a merchant is allowed to recover part or all of the reasonable cost of acceptance of those credit cards by way of a surcharge on the credit card holder.14 One year later it was claimed that this reform ‘was not working’.15 According to Choice, ‘no government agency has the responsibility for enforcing the rules, and surcharges remain a “sneaky” way of raising revenue’.16

Of particular concern has been the conduct of airlines, Qantas and Virgin which are alleged to ‘gouge passengers with the surcharges they levy on fares paid by credit and debit card’.17

By comparison, interchange fees are set by credit card issuing institutions according to categories of transaction with a schedule of interchange rates.18 For card schemes which are subject to Reserve Bank regulation, ‘interchange rates cannot exceed a weighted average of 0.5 per cent’.19

Financial Services Inquiry

In the lead up to the 2013 Federal election, the then Shadow Treasurer Joe Hockey promised to undertake a major financial system inquiry in the event that the Coalition was to win the election.20 As Treasurer, Joe Hockey subsequently announced the terms of reference for a financial system inquiry in December 2013.21 The Financial System Inquiry concluded in December 2014 when the final report (FSI report) was published.22

Amongst other things, the Financial System Inquiry considered the issue of surcharging. It took the view that regulation should ensure that merchants can surcharge to reflect their relative costs of accepting different

7. Ibid.
16. Ibid.
22. D Murray (Chair), Financial System Inquiry: final report, op. cit.
payment methods—but that ‘this could be better achieved by providing merchants with clearer surcharging limits, which could reduce over-surcharging and improve enforceability’.23

Ultimately, the FSI report recommended that surcharging regulation be improved ‘by expanding its application and ensuring customers using lower-cost payment methods cannot be over-surcharged by allowing more prescriptive limits on surcharging’.24

**Ongoing Reserve Bank action**

As part of its ongoing functions, the Reserve Bank commenced a review of the regulatory framework for card payments with the release of an issues paper, *Review of Card Payments Regulation* in March 2015.25 The review covered a number of issues including the widespread perception that card surcharges remain excessive in certain industries.26

In December 2015 the Reserve Bank issued a consultation paper which proposes options with respect to surcharges such as:

- a three-tiered surcharging system, consistent with the recommendations contained in the FSI report, to reduce cases of excessive surcharging by providing merchants with clearer surcharging limits that will reduce problems with enforcement in the current system
- in the alternative:
  - allowing low-cost system providers to prevent merchants from surcharging, to encourage consumers to use low-cost payment methods
  - allowing medium-cost providers to limit surcharges to limits set by the Board
  - allowing high-cost providers to limit surcharges to the reasonable cost of acceptance and
- targeted changes to reduce particular cases of excessive surcharging—in particular to the taxi and airline industries.27

Submissions to the consultation paper may be made until 3 February 2016. Once the consultation is complete the Reserve Bank will establish new standards for the purposes of the ban on excessive card surcharging which will operate after this Bill is enacted.

**Committee consideration**

**Selection of Bills Committee**

At its meeting of 3 December 2015, the Selection of Bills Committee deferred consideration of the Bill to its next meeting.28

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing this Bills Digest, the Senate Standing Committee for the Scrutiny of Bills had not published any comments about the Bill.

**Policy position of non-government parties/independents**

The Senate Economics References Committee (the Committee) conducted an inquiry into matters relating to credit card interest rates in 2015.29 The report of the inquiry states:

One of the committee’s primary concerns in relation to interchange fees is the lack of transparency in how they are levied and, in turn, how the costs are passed through to merchants and consumers. The committee therefore

23. Ibid., p. 169.
24. Ibid., recommendation 17, p. 168.
29. Senate Standing Committee on Economics, *Interest rates and informed choice in the Australian credit card market*, op. cit.
welcomes the RBA’s consideration in its current review of the regulatory framework for card payments on the decline in transparency for some end users of the card systems.  

At the time of writing this Bills Digest neither the independents nor members of non-government parties had made specific comments in relation to the Bill.

Position of major interest groups

Opposition to, or support for, credit card surcharges may be gleaned from some of the submissions to the Senate Economics References Committee (the Committee) inquiry into matters relating to credit card interest rates.  

Arguments against surcharges

According to the Consumer Action Law Centre and Financial Rights Legal Centre:

It is clear that excessive surcharging is a major concern for consumers, with the Financial System Inquiry panel receiving over 5,000 submissions in relation to credit card surcharges. We are concerned that particular industry sectors continue to charge above the “reasonable costs of acceptance” for credit cards, particularly the airline and ticketing industries.

Over-surcharging will continue despite targeted changes unless a regulator is made responsible for enforcement. Without regulatory oversight, rules designed to limit surcharging are likely to be widely ignored. We recommend that a regulator, preferably ASIC or the Australian Competition and Consumer Commission, be given responsibility for enforcing payment surcharging rules. The regulator would need to enforce these rules robustly in order to send a clear message to merchants that the days of excessive surcharging are over. The regulator should prioritise enforcement activity on sectors that are known for excessive surcharging, such as the airline and taxi industries.

Similarly, representatives of both Visa and MasterCard told the Committee that they did not support surcharging. According to David Masters of MasterCard, that organisation considers surcharging to be ‘abhorrent’ for consumers.

Stephen Karpin, on behalf of Visa told the Committee:

Our strong preference is to have a ban on surcharging; however, in the event that it is to be returned in Australia, there must be clear limits related to cost recovery only, backed with the enforcement of a government agency. We do not have that happening right now.

Arguments for surcharges

The Qantas Group stated that it is among Australia’s largest merchants with over $8.5 billion in credit card payments received in the 2014–15 financial year. It stressed:

… the cost of credit card acceptance to merchants is material. It goes beyond merchant service fees (which varies between card types) and includes processing costs and fraud prevention measures as well as substantial investments in ever-developing technology which benefit consumers as well as merchants and the overall payment system and are legitimately offset through surcharging.

Despite claims often cited in the media, Qantas recovers less than its total cost of card acceptance through surcharges.
Financial implications
According to the Explanatory Memorandum the financial impact of the Bill will be nil.37

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. Whilst it was acknowledged that the Bill may engage Article 17 and Article 14 of the International Covenant on Civil and Political Rights, the Government considers that the Bill is compatible with human rights because:

the only potential limitations that [it] imposes relate to the right to privacy and criminal process rights and they are reasonable, necessary and proportionate in achieving the Bill’s legitimate policy objective of banning excessive payment surcharging.38

Parliamentary Joint Committee on Human Rights
At the time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights had not published any comments about the Bill.

Key issues and provisions
Item 3 of the Bill inserts proposed Part IVC—Payment surcharges into the CCA. The object of the new Part IVC is to ensure that payment surcharges are not excessive and that they reflect the cost of using the payment methods for which they are charged.39

Prohibition on excessive surcharges
In order to achieve this object, proposed section 55B of the CCA prohibits a corporation, in trade or commerce, from charging a payment surcharge which is excessive.40

Proposed section 55A of the CCA defines the term payment surcharge as either an amount charged, in addition to the price of goods or services, for processing payment for the goods or services; or an amount (however described) charged for using one payment method rather than another.

The primary Constitutional basis for the CCA is the corporations power in section 51(xx) of the Constitution.41 However, section 6 extends the operation of the CCA (or particular parts of that Act) to entities that are not corporations, by relying on various other Constitutional powers, such as the trade and commerce power at section 51(i) of the Constitution and the territories power at section 122. Section 6 has been described as a:

machinery provision which is designed to expand the operation of the Act, while at the same time preserving the legislation from constitutional invalidity if any of the provision of the section transgresses the boundaries of constitutional competence.42

Item 2 of the Bill inserts proposed subsection 6(2F) into the CCA which operates so that a reference in the new Part IVC to a payment surcharge may be read as a reference to a payment surcharge charged for processing a payment made by means of a postal, telegraphic, telephonic, or other like service (including electronic communication) and that each reference to a corporation may be read as including a person who is not a corporation. That is, the amendment provides an alternative source of Constitutional power (in addition to the corporations power) for new Part IVC—the postal and telegraph power at section 51(v) of the Constitution.

37. Explanatory Memorandum, Competition and Consumer Amendment (Payment Surcharges) Bill 2015, p. 3.
38. The Statement of Compatibility with Human Rights can be found at pages 17–20 of the Explanatory Memorandum to the Bill.
42. RV Miller, Miller’s Australian competition and consumer law annotated, 37th edn, Thomson Reuters, Pyrmont, 2015, p. 281.
A payment surcharge is defined as excessive if the surcharge is for a kind of payment covered by a Reserve Bank standard under the PSR Act, or relevant regulations, and the amount of the surcharge exceeds the amount permitted by that standard or those regulations.\(^{43}\) As stated above, the Reserve Bank has entered into a public consultation in relation to surcharges and will establish a new standard to operate once this Bill is enacted.

The Bill inserts the definition of a surcharge participant into the CCA. A corporation is a surcharge participant if, in trade or commerce, the corporation either charges a payment surcharge or processes a payment for which a payment surcharge is charged.\(^{44}\) Under the Bill, the Australian Competition and Consumer Commission (ACCC) has the power to give a surcharge participant a written notice called a surcharge information notice.\(^{45}\) In accordance with the notice, the participant is required to give the ACCC information or documents which provide evidence of either the amount of a payment surcharge, or the cost of processing a payment in relation to which a payment surcharge was paid, or both.\(^{46}\) This will provide the ACCC with the information it needs to determine whether the surcharge participant is charging a payment surcharge which is excessive.

**Time for complying with the notice**

The surcharge information notice must specify the kinds of information or documents which are required by the ACCC and the period in which they are to be given.\(^{47}\)

The Bill is silent on the period within which information and documents are to be given. However, the Bill provides for granting an extension of time—provided that the participant applies in writing to the ACCC within 21 days after the surcharge information notice was given to the participant. In that case the ACCC has the discretion to extend the time for complying.\(^{48}\) The Bill does not set a limit on any period of extension.

**Offences**

Offences may arise in relation to a surcharge information notice. First, the Bill creates an offence of strict liability in the event that a surcharge participant who has been given a surcharge information notice fails to comply with the notice.\(^{49}\) The maximum penalty for the offence is 30 penalty units.\(^{50}\)

Secondly, offences may arise under sections 137.1 and 137.2 of the Criminal Code.\(^{51}\) Subsection 137.1(1) provides that a person is guilty of an offence if the person gives information to another person in compliance with a law of the Commonwealth, knowing that the information is false or misleading or that the information omits any matter or thing, without which, the information is misleading. Section 137.2(1) provides that a person is guilty of an offence if the person produces a document to another person in compliance with a law of the Commonwealth, knowing that the document is false or misleading.\(^{52}\) In either case, the maximum penalty for the offence is 12 months imprisonment.\(^{53}\)

**Enforcement**

Part VI of the CCA sets out various enforcement actions and remedies which are available to the ACCC for a breach of that Act. The Bill amends various sections contained in Part VI of the CCA to ensure that a number of those remedies also apply where a corporation, in trade or commerce, charges a payment surcharge which is excessive.

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43. Competition and Consumer Act 2010, proposed subsection 55B(2).
44. Competition and Consumer Act 2010, proposed subsection 55C(2). Note that the effect of the amendment to section 6 of the CCA by item 2 of the Bill is that each reference to ‘corporation’ in new Part IVC may be read as including a reference to a person who is not a corporation.
45. Competition and Consumer Act 2010, proposed subsection 55C(3).
46. Competition and Consumer Act 2010, proposed subsection 55C(1).
47. Competition and Consumer Act 2010 proposed subsection 55C(4).
49. Competition and Consumer Act 2010, proposed section 55E. The imposition of strict liability means that a fault element does not need to be satisfied, but the offences will not criminalise honest errors and a person cannot be held liable if he, or she, had an honest and reasonable belief that they were complying with relevant obligations.
50. Section 4AA of the Crimes Act 1914 provides that the value of a penalty unit is $180. This means that the maximum penalty is equivalent to $5,400.
52. "The common law privilege against self-incrimination will protect a natural person complying with a notice to disclose information or documents under a notice to produce or attend, unless the privilege is expressly or impliedly overridden" by legislation: Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328, [1983] HCA 5.
53. Criminal Code Act, subsections 137.1(1) and 137.2(1).
Amendments to existing provisions

In particular, item 4 of the Bill amends current section 75B of the CCA to capture a person who has aided, abetted, counselled or procured the contravention, has induced the contravention, has been knowingly concerned in, or party to, the contravention or has conspired with others to effect the contravention.

Section 76 of the CCA provides that a court may order a person to pay to the Commonwealth a pecuniary penalty, in respect of certain acts or omissions by the person.\(^{54}\) The Bill operates to bring a contravention of proposed section 55B—that is the prohibition against charging a payment surcharge which is excessive—within that section. The amount payable is the amount the Court determines is appropriate having regard to all relevant matters.\(^{55}\) However, the maximum penalty payable by a body corporate for each act or omission is 6,471 penalty units—being equivalent to $1,164,780.\(^{56}\) Further, the maximum penalty payable by a person other than a body corporate for each act or omission is 1,295 penalty units—being equivalent to $233,100.\(^{57}\)

Part VI of the CCA currently allows the ACCC to apply to a court for an injunction which could require a person to commence taking certain action or cease taking certain action. Under the Bill, the Court may grant an injunction in such terms as it determines to be appropriate where the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of proposed section 55B—that is the prohibition against charging a payment surcharge which is excessive.\(^{58}\)

Section 84 of the CCA provides that conduct engaged in by a director, employee or agent of a corporation was engaged in by the corporation itself. The Bill extends this section to apply to proceedings in relation to a contravention of proposed section 55B.\(^{59}\)

Section 87 of the CCA allows the Court to make remedial orders. Items 17 and 18 of the Bill amend section 87 to allow the ACCC to apply to the Court for an order in terms that the Court thinks appropriate on behalf of a class of persons identified in the application who have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 55B.\(^{60}\)

Infringement notices

As an alternative to proceedings for an order to pay a pecuniary penalty under section 76 of the CCA, the Bill provides that, if the ACCC has reasonable grounds to believe that a person has contravened the prohibition against charging a payment surcharge which is excessive, it may issue an infringement notice to the person.\(^{61}\) No more than one infringement notice may be issued in relation to the same alleged contravention.\(^{62}\) The infringement notice must be issued within 12 months after the day that the contravention is said to have occurred.\(^{63}\)

The CCA already provides for the issuing of infringement notices for a breach of a mandatory code of conduct under Part IVB, and for a breach of certain consumer protection provisions of the Australian consumer law.\(^{64}\) The form of the notices as set out in the Bill is in equivalent terms to those existing in other parts of the CCA as is the period within which a person must comply with an infringement notice.\(^{65}\)

Under proposed subsection 55J of the CCA, the penalty for a contravention of the prohibition against charging a payment surcharge which is excessive must be:

\(^{54}\) Competition and Consumer Act 2010, section 76.
\(^{55}\) Competition and Consumer Act 2010, proposed subparagraph 76(1)(ia) inserted by item 5 of the Bill.
\(^{56}\) Item 6 of the Bill.
\(^{57}\) Item 7 of the Bill.
\(^{58}\) Competition and Consumer Act 2010, proposed subparagraph 80(1)(a)(ia), inserted by item 8 of the Bill.
\(^{59}\) Item 11 of the Bill.
\(^{60}\) Competition and Consumer Act 2010, proposed paragraph 87(1A)(baa) and subsection 87(18AA), inserted by item 17 and 18 of the Bill respectively.
\(^{61}\) Competition and Consumer Act 2010, proposed subsection 55G(1).
\(^{62}\) Competition and Consumer Act 2010, proposed subsection 55G(2).
\(^{63}\) Competition and Consumer Act 2010, proposed subsection 55G(3).
\(^{64}\) For example, unconscionable conduct provisions, the unfair practices provisions, certain unsolicited consumer agreement and lay-by agreement provisions, and certain product safety and product information provisions. Source: Australian Competition and Consumer Commission (ACCC), Guidelines on the use of infringement notices, ACCC, Canberra, 2012, accessed 21 December 2015.
\(^{65}\) Competition and Consumer Act 2010, proposed section 55M.
• if the person is a listed corporation—600 penalty units, being equivalent to $108,000
• if the person is a body corporate other than a listed corporation—60 penalty units, being equivalent to $10,800 or
• if the person is not a body corporate—12 penalty units, being equivalent to $2,160.

Where a person to whom an infringement notice has been issued pays the penalty specified in the infringement notice within the stated compliance period and in accordance with the notice, no proceedings (whether criminal or civil) may be started or continued against the person, by or on behalf of the Commonwealth, in relation to the alleged contravention. Where a person fails to pay the penalty specified in the infringement notice within the relevant compliance period the person is liable to proceedings under section 76 in relation to the alleged contravention.

Importantly, a person to whom an infringement notice has been issued under the new Part IVC may make written representations to the ACCC seeking the withdrawal of the infringement notice. In that case, any evidence or information that the person gives to the ACCC in support of their representations is not admissible in evidence against them in any proceedings—with the exception of proceedings for an offence based on the evidence or information given being false or misleading.

Under the Bill if the ACCC is satisfied it is appropriate to do so, it may give the person to whom an infringement notice was issued a written notice that it withdraws the infringement notice.

**Pecuniary penalties vs infringement notices**

According to its Compliance and Enforcement Policy, the ACCC takes legal action where:

> ... having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious ... where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

In contrast, the ACCC may issue an infringement notice where it believes there has been a contravention of the Act that requires a more formal sanction than an administrative resolution but where the ACCC considers that the matter may be resolved without legal proceedings.
Appendix 1

Figure 1: Retail payments system fees and charges

Source: D Murray (Chair), Financial System Inquiry: final report, op. cit., p. 172.
Competition and Consumer Amendment (Payment Surcharges) Bill 2015

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