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Commonwealth Consumer Affairs Advisory Council
C/O- The Treasury
Langton Crescent
PARKES ACT 2600

Dear Council Members

Study into Credit Card Surcharges and Non-Transparent Transaction Fees

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to contribute to the Commonwealth Consumer Affairs Advisory Council's (**CCAAC**) study into Credit Card Surcharges and Non-Transparent Transaction Fees.

We believe the key problems in this area are that:

- merchants are failing to disclose surcharges upfront or include card surcharges in headline prices, even where paying by card is the only option, or only practical option. Although this may breach single pricing requirements under section 48 of the Australian Consumer Law, this law does not appear to be enforced in this situation;
- merchants charge surcharges that are significantly higher than what appears reasonable. In particular this occurs in the airline, ticketing and taxi industry. It is not clear if there is any real incentive for card schemes to enforce the recent RBA rule that surcharges should not exceed the reasonable cost of accepting card payments; and
- there is no simple, accessible mechanism for consumers to complain about unreasonable surcharges and no clear mandate for either the ACCC or ASIC to police poor surcharging practice.

This causes the following types of harm to consumers:

- it is harder for consumers to compare prices between merchants, which weakens competition;
- consumers spend more time and money searching the market than is efficient;
- consumers being misled about the actual prices of products and being frustrated at being asked to 'pay for paying' where surcharges are inescapable.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides **Consumer Action Law Centre**

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financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Recent changes to the surcharging standards

Questions

- *What incentives (economic or otherwise) regulate the behaviour of card schemes, acquirers and merchants with respect to the application and enforcement of card scheme rules regarding credit card surcharges?*
- *To the extent that card scheme rules limit credit card surcharges to the reasonable cost of card acceptance:*
 - *what processes have been put in place by card schemes, acquirers and merchants to ensure that credit card surcharges are limited to the reasonable cost of card acceptance (including with reference to guidance issued by the Reserve Bank of Australia); and*
 - *how are such rules enforced and are there any circumstances where these rules would be selectively enforced (i.e. where the rules would be more aggressively enforced for some merchants and not enforced for others)?*
- *To the extent that card scheme rules **do not** limit credit card surcharges to the reasonable cost of card acceptance:*
 - *what processes, if any, have been put in place, or are being prepared by card schemes, to adopt rules to limit credit card surcharges to the reasonable cost of card acceptance?*
- *What mechanisms are available for consumers to report credit card surcharges that appear excessive and that may be in breach of card scheme rules?*

We question whether there is an economic or other incentive on card schemes to enforce the new Reserve Bank of Australia (**RBA**) rules on surcharging¹ given the lack of active response by the schemes. While VISA appears to have changed its scheme rules to limit surcharging to what it reasonably costs a retailer to accept a VISA,² Mastercard has not (although we understand this is in train).

Visa states it has also changed its rules to ensure that consumers are clearly informed of the amount or percentage of any surcharge before they make a purchase and have the ability to cancel the transaction without penalty.³ Despite this, we have not seen significant changes in retailer practices, so we question whether the action will be effective.

The most significant problem relates to enforcement of these new requirements. There does not appear to be any particular regulator responsible (or at least there is no regulator which states

¹ A variation to the surcharging standards (which commenced 18 March 2013), allows card schemes to limit merchant surcharges to the reasonable cost of card acceptance. See for example RBA Media Release 2012-34 *Card Surcharging Restrictions – Guidance Note and Commencement Date*: <http://www.rba.gov.au/media-releases/2012/mr-12-34.html>

² See Visa's *Consumer Fact Sheet: Understanding Card Surcharging* http://visa.com.au/ap/au/include/Consumer_Fact_Sheet_Surcharging2013.pdf

³ Visa, *Consumer Fact Sheet: Understanding Card Surcharging*

that it has responsibility for this issue). While the RBA makes the rules on card surcharges, it is not a regulator and does not accept complaints. Indeed, the RBA does not consider that it has a 'consumer protection' mandate; rather its interest in this area is around efficiency in the payments system.⁴

Consumers are not in a position to enforce the rules themselves. Even a particularly large surcharge will still be far too small an amount to justify challenging the fee in a court or tribunal and there is no simple mechanism for consumers to make a complaint about surcharges.

The card schemes are effectively the regulator under the new RBA rules but as we have said, we are not convinced the schemes have the incentive to enforce the rules. They are not required to consider consumer complaints (as a government regulator would) and their advice seems limited to suggesting consumers shop elsewhere if they find high surcharges.⁵ As outlined below, this ignores the reality of consumer contracting in these situations and is unlikely to result in systemic change to surcharging practices.

CCAAC should consider the extent to which ACCC and ASIC have responsibility for responding to surcharging practices under other consumer protection provisions, namely those regarding single pricing law, unfair contract terms and misleading or deceptive conduct.

Single pricing provisions (ACL section 48)

These provisions require businesses to, in any advertisement or promotion of goods or services that includes a price, to also include a single price for the goods or services. This law says that the single price is the minimum quantifiable consideration for the supply of goods or services. That is, if certain costs must be paid to purchase the product, those costs must be included in the headline price advertised. Credit card surcharges will generally not have to be included in a headline price as a consumer can usually avoid paying one (for example, by paying cash).

There are many situations where consumers are required to pay surcharges or transaction fees which are not included in the headline price despite being practically unavoidable. For example:

- where ticketing companies charge 'handling fees' regardless of how a consumer pays or decides to pick up their ticket (it is unclear to us what these fees pay for, but we suspect they are, at least in part, credit card surcharges);
- where airlines provide other 'free' payment options through an online transaction (so the surcharge is technically avoidable) but those options are impractical or very rarely used;
- where utilities companies offer discounts for using particular payment methods (direct debit), which effectively impose a surcharge on other methods of payment.⁶

Unfair contract terms provisions (ACL section 23; ASIC Act section 12BF)

We suggest it may be an unfair term of a consumer contract to impose a surcharge that is out of proportion with the cost incurred by the business. The regulators have previously suggested that

⁴ See for example RBA (December 2011) *A Variation to the Surcharging Standards: A Consultation Document – December 2011*, <http://www.rba.gov.au/publications/consultations/201112-variation-surcharging-standards/consultation.html>

⁵ For example, see Visa's *Consumer Fact Sheet: Understanding Card Surcharging*.

⁶ We accept that this practice is somewhat different to surcharging, but we are equally concerned about misleading conduct where prices are quoted inclusive of the discount but where that discount is only available for one form of payment method, which may or may not be widely available.

they would not have power in this area because terms that set the upfront price payable under the contract are unaffected by unfair terms laws.⁷ We disagree—a true surcharge (which is charged only because the consumer chooses to pay in a way that is more expensive than the standard method accepted) is a contingent fee, not part of the upfront price. Contingent fees may be reviewed as an unfair term.⁸ To the extent that a surcharge is considered part of the upfront price, the single pricing provisions should apply and it should be included in that upfront price.

Misleading or Deceptive Conduct (ACL section 18; ASIC Act section 12DA)

It is implicit in the idea of a surcharge that:

- the fee being charged is for something on top of the cost of the normal transaction; an additional cost borne by the trader because the consumer is choosing to pay by a method that is more expensive than usual; and
- the fee covers the costs of accepting the payment and no more.

In our view a trader is engaging in misleading or deceptive conduct if they charge fees that:

- cover costs that are common to any purchase made from that trader; or
- exceed the reasonably ascertainable costs of accepting a particular payment.

Surcharges, fees and operational requirements

Consultation Questions

- *What factors (including with regards to legal, marketing and accounting considerations) do businesses consider when applying separate fees or surcharges to recover particular costs associated with providing the good or service?*
- *To the extent that surcharges or fees are applied that appear to consumers to go beyond the reasonable cost of card acceptance or other transaction costs:*
 - *are there any factors that could explain why a credit card surcharge or transaction fee recovering reasonable costs appears excessive; and*
 - *are there any circumstances where it may be necessary or appropriate to apply a surcharge or fee for purposes beyond the recovery of costs?*
- *What factors do businesses consider when applying and determining credit card surcharges and how do businesses determine how the surcharge should be applied (for example, as a percentage of the transaction or as a fixed amount)?*
- *Aside from credit card fees and transaction surcharges, what other methods can be used to manage the operational needs of businesses offering credit card payment methods (for example, by imposing \$10 minimum amounts for credit card purchases).*

We do not think there are any circumstances where it is necessary or appropriate to apply a surcharge or fee beyond the recovery of costs.

Paying for goods or services is not an additional or optional feature of a product but a necessary pre-requisite intrinsic to the conclusion of a contract. Even when a retailer offers a number of alternative payment methods, that retailer retains a monopoly on the setting of the prices that

⁷ ACL subsection 26; ASIC Act subsection 12BI(2)

⁸ ACL subsection 26; ASIC Act subsection 12BI(2)

the customer will pay for different payment methods. Where additional surcharges applied to customers exceed the differences in cost, retailers are using their monopoly to actually recover the costs of the primary goods or services. As a result, the advertised price excluding these additional fees does not actually reflect the price at which the retailer is willing to sell; and is therefore misleading.

Transparency, disclosure and consumer law

General remarks

A properly functioning, competitive market would ensure that advertised prices reflect an accurate price, both between alternative products or services and between rival retailers. This would allow consumers to make efficient choices between what products and services they wished to consume and also where they wished to purchase them.

If any additional charges are to be introduced during the transaction, for payment method or other mandatory services, these should reflect only the reasonable additional costs incurred by the retailer as a result of the specific choice of payment method. This is because, under these conditions, both consumers and retailers expect and compete on the basis that advertised prices reflect the actual price that will be paid for the key elements of the goods or services offered. In efficient markets, reasonable additional costs incurred by retailers for particular payment methods should be the same or similar among retailers or businesses—so any additional surcharge shouldn't impact decision-making about the underlying good.

However, the use of surcharges appears to evade the single pricing requirement in section 48 of the Australian Consumer Law, and also contribute to market distortions. As outlined above, single pricing is a consumer protection designed to facilitate effective competition.

In terms of market distortions, it has been established that 'price framing', the way in which prices are presented or revealed to consumers, has a material impact on consumers' ability to judge value and make like-for-like comparisons. This is because consumers are subject to behavioural biases—the fact that we rely upon rules of thumb and 'mental short-cuts' to make judgements that can lead to, from an economic perspective, irrational behaviour. These behavioural biases can result in consumers being misled over the relative or absolute value of goods or services. It can lead to an outcome in which retailers do not compete on the basis of the clearest or most complete price offered to consumers, but actively obfuscate and misrepresent their prices. The example of the airlines, which all charge large and varying surcharges, is a case in point.

Even if consumers act economically rationally, the current practice of omitting practicably unavoidable charges from the advertised prices increases consumers' transaction costs. Often, the actual price is only revealed once consumers have committed themselves to the purchase. This incurs sunk costs—the time and effort spent searching one retailers' price offer and which must be repeated before being able to compare rival price offers (think of going through the whole online process of purchasing airline flights to discover the surcharge, then having to repeat that process with other airlines to compare their surcharges). It also results in opportunity costs where consumers face time-limited offers, such as for scheduled service, where they may lose out on an offer while taking the time to search the market fully. This makes it more costly,

and so less efficient, for consumers to search the market. It may also discourage effective (or any) searching by consumers, or innovations such as effective price comparison services, therefore sustaining an inefficient market dynamic.

Consultation questions

How do merchants ensure that consumers are informed about the application of credit card surcharges or transaction fees?

Many merchants do not properly inform consumers of surcharges or transaction fees. In particular, online transactions frequently avoid disclosing surcharges until the late stages after a consumer has chosen between competing products based on the partial price advertised (the price less the surcharge) and entered personal details. This reduces the ability of consumers to shop around and make like-for-like comparisons.

Alternatively a 'transaction' or 'handling' fee may be charged without any indication of what the fee is paying for, why it is required or how it could be avoided. This is common when purchasing tickets, where an unexplained handling fee applies regardless of payment method. At times this handling fee can be charged per ticket—that is, it will be charged twice for two tickets, even if bought in the one transaction. It is hard to see how this can be justified.

What approaches could be taken to improve the transparency of credit card surcharges and transaction fees that:

- *are a significant component of the total cost such that they have the potential to mislead consumers about the true cost of a good or service;*

These fees should be either included in the headline price, or (at a minimum) disclosed alongside the headline price at least as prominently as the headline price.

- *are applied to certain payment methods or across a single transaction such that it cannot be quantified as part of the unit price of a good or service; and*

At a minimum, the existence of any such fee should be disclosed as prominently as any headline price and as early as possible. Even if the exact fee cannot be quantified, we do not see why an indication of the size of the fee or a possible range cannot be given.

- *cannot be easily avoided where practical surcharge and fee-free payment methods are not available?*

In our view, ACL section 48 would require this kind of fee to be included in the headline price. Even where fee-free payment methods are available, where this method is not prominent or commonly used, we think that the surcharge-inclusive cost should be part of the 'minimum quantifiable amount' as defined by section 48. This may require legislative amendment.

Are there any circumstances where credit card surcharges and transaction fees:

- *cannot be displayed prior to the final stages of a checkout or an online payment form (for example at the final stage where consumers are required to confirm that they want to purchase the goods or services).*

- *cannot be made known to consumers in a manner such that they are of equal prominence to the purchase price, including with respect to the time at which it is disclosed and its visibility.*

Not that we are aware of.

Is there a need for additional protections to ensure the transparency of credit card surcharges or fees?

There is a need for a simple complaints mechanism and a clearer mandate for either ACCC or ASIC to respond to excessive surcharges through existing consumer law provisions regarding single pricing, unfair contract terms and misleading or deceptive conduct.

There may also be a need for further reform to respond to questionable surcharging practice currently in the market:

- online transactions which do not include card surcharges in the headline price or do not at a minimum disclose surcharges prominently upfront;
- higher than average surcharges in some industries like airlines, taxis and ticketing.

If current arrangements cannot address these practices—or at least force the traders involved to give clear, public explanations for why their current practice is justified—then current regulation cannot be considered to be working and should be reviewed.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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