



Australian Government

The Treasury



Credit card surcharges and non-transparent transaction fees

A study

July 2013

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Australian Government
Commonwealth Consumer
Affairs Advisory Council

Mr Colin Neave AM
Chair of CCAAC
25 July 2013

Dear Minister for Competition Policy and Consumer Affairs,

The Commonwealth Consumer Affairs Advisory Council (CCAAC) is pleased to enclose the study undertaken into credit card surcharges and non-transparent transaction fees. Credit card surcharges that reflect the reasonable costs of card acceptance are generally beneficial to consumers as they support wider acceptance of payment options that are convenient for Australian consumers while facilitating efficient outcomes within the payments system. CCAAC notes that since the removal of the 'no-surcharging' rules in 2003, there has been a significant reduction in the service fees applied to merchants upon a consumer's use of their credit card.

CCAAC welcomes the recent changes to the Surcharging Standards made under the *Payment Systems (Regulation) Act 1998*. These changes allow card schemes to limit surcharges to the reasonable costs of card acceptance. It is CCAAC's expectation that this approach is likely to provide consumers with appropriate protection from excessive surcharging in most circumstances.

Nonetheless, this study finds that surcharges and fees can lead to consumer detriment resulting from the misleading nature of a surcharge or fee as well as increased search and information costs for consumers. In addition, CCAAC has found that consumers are concerned about the surcharging practices of businesses operating online, particularly in those industries where competition is limited.

In accordance with the study's terms of reference, CCAAC has identified a range of better practice principles to improve the transparency of surcharges and fees. When applying surcharges and fees, CCAAC considers that businesses should:

- adopt simpler pricing methods;
- improve the practicality of surcharge and fee-free options;
- avoid use of minimum pricing;
- improve the clarity of prices with clear, prominent and timely disclosure; and
- ensure that surcharges and fees are accurately described, including by avoiding terms that are ambiguous to consumers.

With regard to preventing excessive surcharging, CCAAC is of the view that enforcement of the current card scheme rules may be difficult in some of the more egregious examples that have been brought to CCAAC's attention. In many cases, the actual costs incurred by merchants are not observable by the card schemes. Further, the nature of scheme merchant agreements provides a disincentive for card schemes to impose penalties against merchants who are their own customers.

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Accordingly, CCAAC considers that there may be scope to improve the card schemes' ability to enforce their card scheme rules by providing greater objectivity and transparency over what may constitute the reasonable costs of card acceptance. However, CCAAC does not advocate any amendment to the Standards or to the RBA's Guidance Note. The current regime is the result of extensive consideration by the RBA, and it would be premature at this stage to recommend amendments. It is noted that the RBA will undertake ongoing monitoring of the impact of the amended Standards, and is the best placed body to do so.

In addition to these findings, CCAAC is of the view that there may be a role for public enforcement action where card scheme rules and their enforcement mechanisms are insufficient to restrict surcharges and fees that are applied in a manner that causes consumer harm. CCAAC considers that further consultation would be beneficial to support policymakers in determining the need for additional or amended consumer laws to facilitate public enforcement action. Policy makers may also wish to consider how the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*) could ensure that consumers are provided with clear and transparent pricing information or whether a specific policy response is required for surcharges applied to transactions that are processed online.

Given that recent changes to the Surcharging Standards came into effect on 18 March 2013, policymakers may wish to allow an appropriate period of time to pass, in order to assess the need for further action.

I offer my thanks to and acknowledge the expertise and commitment of the CCAAC members in undertaking this study. Work on this inquiry was led by Ms Carolyn Bond AO, with support and contributions from other colleagues. I also thank those who provided submissions to CCAAC as well as those who met with CCAAC throughout the consultation period.

Yours sincerely



Colin Neave
Chairman, Commonwealth Consumer Affairs Advisory Council.

EXECUTIVE SUMMARY

The Assistant Treasurer, the Hon David Bradbury MP, has requested CCAAC to undertake a study into the experiences of Australian consumers when they encounter credit card surcharges and transaction fees. This study examines credit and debit card surcharges (card surcharges) and transaction fees through a consumer policy lens.

Australia's consumer protection framework provides Australian consumers with a set of basic rights and responsibilities to allow them to engage confidently within the marketplace, and to support them in making their own purchasing decisions. In essence, consumer policies are intended to ensure that consumers get what they pay for. This study is distinguished from earlier review processes through its focus on the consumer impacts of surcharges and transaction fees, including the manner in which they are applied, and whether there are any implications for consumer policy settings.

We note, however, that consumers' ability to benefit from, and activate, competition is a key contributor to efficient markets – and is necessary to obtain the full benefits of the 'reasonable cost surcharging' reforms. The study provides an opportunity to consider how the consumer policy framework can support broader efficiency considerations, including by enabling consumers to benefit from competition.

CCAAC has undertaken this study in light of recent amendments to the Surcharging Standards (the Standards), made under the *Payment Systems (Regulation) Act 1998* (Regulation Act), that allow card scheme rules to limit surcharges to the reasonable cost of card acceptance. The Reserve Bank of Australia (RBA) has specific responsibilities under the Regulation Act. The RBA's Guidance Note identifies the reasonable costs associated with card acceptance as including: merchant service fees; other costs payable to acquirers; costs payable to other payment service providers; merchants' own costs related to card acceptance; fraud costs related to card acceptance; and any fixed equipment, systems or development costs not captured in the above.

The removal of the 'no-surcharge' rules has allowed merchants to pass on the cost of credit and scheme debit card transactions to their customers via a surcharge. The purpose of this reform was to improve the efficiency of the payments system by improving price signals to cardholders about the relative costs of different payment methods.

While the average fees paid by merchants to their acquirers or the credit and debit card schemes (card schemes) have been in decline since removal of no-surcharge rules, consumer organisations and participants in card schemes have expressed concern about the enforcement of card scheme rules that limit credit card surcharges. During consultations, card scheme participants raised a number of difficulties they face in enforcing the surcharging limits allowed under the current Standards. Chief among these is their inability to monitor many of the merchant costs outlined in the RBA Guidance Note. This lack of transparency may make it difficult for card schemes or their participants to form a view on the acceptable level of surcharges. A further difficulty for the card schemes may be the limited incentive for acquirers to take action against merchants. While penalties for excessive surcharging can be built into contractual arrangements with merchants, the

commercial nature of the relationship appears to create a disincentive to card scheme participants imposing penalties against merchants who are in fact their own customers.

In addition to card scheme rules, consumers are provided with a safety net of consumer rights that are based on generic principles that apply across all industries, businesses and to all consumers. These rights are provided for through the Australian Consumer Law (ACL)¹ and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Specific protections applying to merchants applying surcharges and fees include: the prohibition of misleading or deceptive conduct, the prohibition of false or misleading representations, and the obligation for businesses to display the minimum quantifiable price when making a price representation about part of the price that must be paid (through the component pricing provision). These protections do not resolve all of the concerns raised by consumers. For example, consumer laws do not generally prevent businesses from applying surcharges or fees, even where they appear excessive, in circumstances where they are unlikely to mislead consumers.

The Australian Competition and Consumer Commission (ACCC) is the independent statutory agency responsible for enforcing the ACL and for the administration of the *Competition and Consumer Act 2010* (CCA). The ACCC's powers and functions in enforcing the ACL include the power to investigate possible breaches and, where appropriate, bring proceedings against those alleged to have breached the ACL.

The Australian Securities and Investments Commission (ASIC) is the independent statutory authority with specific responsibility for enforcing the ASIC Act. The ASIC's powers and functions include the power to investigate suspected breaches of the law, and where appropriate, issue infringement notices, commence prosecutions, or seek civil penalties from the courts in relation to alleged breaches of some laws.

Internationally, some jurisdictions provide specific restrictions on surcharging through consumer laws. In some jurisdictions this takes the form of a ban on surcharging, and in others, surcharges are limited to the costs of card acceptance.

CCAAC notes that consumers have singled out the surcharges and fees applied by airlines as evident in a Survey conducted by CCAAC on its website (the Survey) (see Appendix 1 for a summary of results). The Survey's respondents overwhelmingly identified airlines as applying the highest surcharges and transaction fees. Surcharging in the online environment also appeared to be the subject of considerable consumer dissatisfaction. There are a range of consequences associated with the application of surcharges and fees.

CCAAC identifies that surcharges and fees can lead to increased transaction costs for consumers and consumer detriment resulting from the misleading nature of a surcharge or fee. Consumers have raised a number of other frustrations relating to the imposition of surcharges or fees, including the actual costs associated with paying the amount of the surcharge or fee and the lack of fairness associated with surcharges and fees that cross-subsidise other business activities.

¹ Schedule 2 of the *Competition and Consumer Act 2010*.

CCAAC has identified a range of better practice principles and policy measures that may reduce transaction costs by supporting easier price comparison, and eliminate consumer misunderstanding. When applying surcharges and fees, CCAAC considers that businesses should:

- adopt simpler pricing methods;
- improve the practicality of surcharge and fee-free options;
- avoid use of minimum pricing;
- improve the clarity of prices with clear, prominent and timely disclosure; and
- ensure that surcharges and fees are accurately described, including by avoiding terms that are ambiguous to consumers.

While CCAAC does not propose any specific amendments to the ACL, there could be some benefit in giving further consideration as to how the ACL could provide consumers with clear and transparent pricing information. CCAAC notes that other consumer protections, including the prohibition of misleading or deceptive conduct, may apply in some circumstances.

In general, where surcharges are clearly disclosed and where there is a widely available and equally convenient alternative to a surcharged payment method, concerns about excessive surcharging are likely to be greatly diminished. However, in the absence of those conditions further consideration may be given to how surcharges can be restricted to acceptance costs. Therefore, CCAAC finds that there is likely to be a public benefit associated with a consumer regulator being capable of ensuring that credit card surcharges are limited to the reasonable costs of card acceptance. Consumer expectations are unlikely to be met if a business were able to apply surcharges that go beyond the reasonable cost of card acceptance, simply by describing them by using different and ambiguous terms. Further consultation would support policymakers in determining the need for additional or amended consumer laws to facilitate public enforcement action.

Policymakers may also wish to consider whether a specific policy response is required for surcharges applied to transactions that are processed online.

CCAAC does not advocate any amendment to the Standards or to the RBA's Guidance Note. The current regime is the result of extensive consideration by the RBA, and it would be premature at this stage to recommend amendments. It is noted that the RBA will undertake ongoing monitoring of the impact of the amended Standards, and is the best placed body to do so.

FINDINGS

- At the time of this study, some of the card schemes have updated their scheme rules in light of the amended standards.
- Internationally, merchant obligations vary with some jurisdictions banning credit card surcharges while other jurisdictions restrict their application.
- While surcharging is not a universal practice, it is more common in industries typically seen to lack strong competitive pressures.
- Consequences of surcharges and fees that are not transparent include an increase in consumers' transaction costs when comparing the price of goods and services, as well as potential consumer detriment resulting from the misleading nature of a surcharge or fee.
- Consumers are concerned at the additional costs imposed by surcharges and fees as well as the lack of fairness associated with excessive surcharges and fees that cross-subsidise other business activities.
- CCAAC finds that there is likely to be a public benefit associated with a consumer regulator being capable of ensuring that credit card surcharges are limited to the reasonable costs of card acceptance.
- Terms such as 'service fee', 'transaction surcharge', 'administration fee', and 'processing fee' are taken by consumers to mean a range of things. CCAAC encourages industry participants to provide clear and easily understood information to consumers on the meaning of these terms.

RECOMMENDATIONS

- CCAAC does not propose any specific amendments to the ACL but considers that policymakers may wish to consider further consultation on:
 - possible amendments to require a representation to be made about any fees that are applied on a per-transaction basis whenever a representation is made about the price of a good or service;
 - possible amendments requiring the upfront disclosure (in a clear and prominent manner) of any fees or surcharges that a consumer may or may not incur in purchasing a good or service;
 - amendments requiring the prominent disclosure of the availability of different types of payment methods; and
 - the need for further clarification as to how the component pricing provision applies in circumstances where the availability and useability of surcharge or fee-free options are limited.

- CCAAC considers that any amendments to the ACL should be complementary to the card scheme arrangements currently monitored by the RBA.
- CCAAC considers that it would be appropriate for the ACCC to investigate transactions processed online more broadly, including the application of credit card surcharges given it accords with the ACCC's publicly-stated priority concerning online trading.
- CCAAC has identified a range of better practice principles that could improve surcharge and fee-transparency. It considers that the application of the identified best practice principles should occur firstly through industry efforts supplemented by any enforcement mechanism that policymakers may choose to implement as also recommended by this study.
- In amending the Standards, the RBA committed to monitoring its effects on an ongoing basis and acting if it deems further action to be in the public interest. CCAAC encourages the RBA to give full consideration to the interests of consumers in its ongoing monitoring. However, given that recent changes to the Standards came into effect on 18 March 2013, CCAAC considers that policymakers may wish to allow an appropriate period of time to pass, in order to assess the need for further action.

THE COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL

CCAAC TERMS OF REFERENCE

CCAAC is an expert advisory panel, which provides advice to the Minister for Competition Policy and Consumer Affairs on consumer policy issues.

CCAAC's terms of reference are to:

- consider issues, reports and papers referred to it by the Minister and report to the Minister on their consumer policy implications, and in doing so take account of the need for well-functioning markets with confident consumers;
- identify emerging issues affecting Australian markets and consumers and draw these to the attention of the Minister; and
- when considering consumer policy issues, take account of their competition and other relevant economic implications.

Membership

The membership of CCAAC consists of:

- Mr Colin Neave AM (Chair);
- Ms Carolyn Bond AO;
- Professor Stephen Corones;
- Ms Lynda Edwards;
- Ms Deborah Healey;
- Mr Peter Kell;
- Mr Gordon Renouf;
- Dr Rhonda Smith; and
- Mr Ray Steinwall.

TERMS OF REFERENCE

Consumer stakeholders have raised concerns about credit card surcharges and non-transparent transaction fees, particularly the extent to which they:

- hide the true cost of goods and services where a surcharge or fee is a significant amount of the total cost;
- are inadequately disclosed, including where they are only revealed at the point of payment; and
- are levied in circumstances where there are no practical alternative payment options.

Consumers are afforded protections aimed at ensuring transparency in the display of prices for goods and services. This includes the general prohibition against misleading and deceptive conduct and the single price provision of the Australian Consumer Law (which forms Schedule 2 of the *Competition and Consumer Act 2010*), and the mirror protections under the *Australian Securities and Investments Commission Act 2001*. There are also standards that promote efficiency and competition in the Australian payments system, including the recently amended Surcharging Standards made under the *Payment Systems (Regulation) Act 1998*, that allow card scheme rules to limit surcharges to the reasonable cost of card acceptance.

CCAAC is requested to commence a study into the experiences of Australian consumers when they encounter credit card surcharges and non-transparent transaction fees. CCAAC is also requested to provide advice as to the prevalence of merchants applying surcharges or fees that appear excessive and where they hide the true cost of goods and services where a surcharge or fee is a significant amount of the total cost. As part of this study, CCAAC should:

- investigate consumer experiences with credit card surcharges or transaction fees, including where consumers could be misled about the true cost of a good or service;
- examine the obligations of merchants when applying credit card surcharges or transaction fees, including how these obligations are enforced; and
- identify best practices to improve the transparency of credit card surcharges or transaction fees, including the use of consistent terminology and disclosure practices.

CCAAC is asked to provide its report to the Assistant Treasurer by the end of July 2013.

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GLOSSARY

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
Acquirer	An institution that provides a merchant with facilities to accept card payments, accounts to the merchant for the proceeds and clears and settles the resulting obligations with card issuers.
ASIC	Australian Securities and Investments Commission
CALC	Consumer Action Law Centre
Card schemes	Institutions (such as American Express, MasterCard and Visa) that establish rules and administer or operate networks that enable payment by credit or debit cards.
CCAAC	Commonwealth Consumer Affairs Advisory Council
Issuer	A financial institution that provides its customers with credit or debit cards.
Merchant	A merchant, such as a retailer, that accepts a credit card or debit card for payment for goods or services.
Merchant service fee	A transaction-based fee (typically a fixed per cent of each transaction) charged to a merchant for acquiring credit or debit card transactions.
PSB	Payments System Board
RBA	Reserve Bank of Australia
Regulation Act	<i>Payment Systems (Regulation) Act 1998</i>
Surcharging Standards	Standards made under the <i>Payment Systems (Regulation Act) 1998</i> and imposed by the Reserve Bank of Australia which govern credit and debit card surcharging rules of card schemes.
Survey	The Survey conducted on the Commonwealth Consumer Affairs Advisory Council's website in relation to this study.

PART I — INTRODUCTION AND CONTEXT

The Assistant Treasurer, the Hon David Bradbury MP, requested CCAAC to undertake a study into the experiences of Australian consumers when they encounter credit card surcharges and transaction fees. This study examines credit and debit card surcharges and transaction fees through a consumer policy lens.

Australia's consumer protection framework provides Australian consumers with a set of basic rights and responsibilities to allow them to engage confidently within the marketplace, and to support them in making their own purchasing decisions. In essence, consumer policies are intended to ensure that consumers get what they pay for. This study is distinguished from earlier review processes through its focus on the consumer impacts of surcharges and transaction fees, including the manner in which they are applied, and whether there are any implications for consumer policy settings.

We note, however, that consumers' ability to benefit from, and activate, competition is a key contributor to efficient markets — and is necessary to obtain the full benefits of the 'reasonable cost surcharging' reforms. The study provides an opportunity to consider how the consumer policy framework can support broader efficiency considerations, including by enabling consumers to benefit from competition.

This study has been informed by responses to a consumer survey conducted on the CCAAC website (see **Appendix 1** for a summary of results), submissions by industry and consumer stakeholders (see **Appendix 2** for an overview of the consultation process), ACCC complaints (see **Appendix 3** for an overview of ACCC complaints) and other research.

OVERVIEW OF COMMUNITY CONCERNS

This study's terms of reference notes that consumer stakeholders have raised concerns about credit card surcharges and non-transparent transaction fees, particularly the extent to which they:

- hide the true cost of goods and services where a surcharge or fee is a significant amount of the total cost;
- are inadequately disclosed, including where they are only revealed at the point of payment; and
- are levied in circumstances where there are no practical alternative payment options.

CCAAC has undertaken this study in the light of recent amendments to the Standards,² made under the Regulation Act that allows card scheme rules to limit surcharges to the reasonable cost of card acceptance. Consumer organisations and card schemes have

² Including *Standard No. 2, Merchant Pricing for Credit Card Purchases*; and *The 'Honour All Cards' Rule in the Visa Debit and Visa Credit Card Systems and the 'No Surcharge' Rule in the Visa Debit System*.

expressed concern about the enforcement of card scheme rules that limit card surcharges.³ CHOICE has suggested that further action is required given a lack of change in the surcharging practices of some Australian businesses.⁴

In its submission, CHOICE highlighted commissioned research findings that 44 per cent of people who had used their credit card in the three months to May 2013 reported paying a surcharge.⁵ Of those 44 per cent of respondents, around 40 per cent reported that they did not know how much the surcharge was and 44 per cent reported that they were not offered or made aware of another payment method that did not attract a surcharge.

The Consumer Action Law Centre (CALC) highlighted that poor disclosure and excessive surcharging can make it harder for consumers to compare prices between merchants, induce consumers into spending more time and money searching the market than is efficient, and can lead to consumers being misled about the actual prices of products.⁶

Consumer respondents to the Survey indicated a general dissatisfaction with the surcharging practices of certain industries including airlines, ticketing agencies, cinemas and theatres, taxis, telecommunications and utility providers, and accommodation and tourism providers. Approximately 43 per cent of the Survey's respondents indicated that they often encounter surcharges and fees above 2.5 per cent. Some respondents reported paying surcharges of around 33 per cent. It is also evident that consumers are concerned about the disclosure of surcharges and fees, particularly where they cannot be easily avoided.

OTHER REVIEWS AND CONSULTATIONS

Credit card surcharging has recently been the subject of an extensive review process. Consultations undertaken by the RBA have included the following consultation documents:

- *Review of Card Surcharging* (June 2011);⁷
- *A Variation to the Surcharging Standards* (December 2011);⁸
- *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement* (June 2012);⁹ and
- *Guidance Note: Interpretation of the Surcharging Standards* (November 2012).¹⁰

³ See submissions by CHOICE and Visa.

⁴ See submission by CHOICE.

⁵ Ibid.

⁶ See submission by CALC.

⁷ RBA 2011, *Review of Card Surcharging: A Consultation Document*, June 2011, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/publications/consultations/201106-review-card-surcharging/index.html>>.

⁸ RBA 2011, *A Variation to the Surcharging Standards: A Consultation Document*, December 2011, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/publications/consultations/201112-variation-surcharging-standards/index.html>>.

⁹ RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, June 2012, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

Previous reviews of card surcharging, including those undertaken by the RBA, have examined them within the context of the payments system. An efficient payments system is important to facilitating economic exchange within the Australian economy. Previous reviews of card surcharging have benefited Australian consumers by supporting their ability to transact efficiently within the Australian economy.

A number of submissions raised issues relating to the efficiency implications of credit card surcharging. While these considerations are important, CCAAC notes that it is the Payments System Board (PSB) of the RBA that oversees the payments system in Australia and that this study does not concern broader policy settings that relate to the payments system.

STRUCTURE OF THIS REPORT

Part II examines the regulatory framework and other merchant obligations, including those provided for through card scheme rules, as well as obligations applying to businesses operating overseas. Part III examines the consumer experience in context, including the consumer impacts of surcharges and fees. Part IV provides an overview of better practice principles that could improve the transparency of surcharges and fees as well as policy measures for consideration. Part V provides CCAAC's concluding remarks.

¹⁰ RBA 2012, *Guidance Note: Interpretation of the Surcharging Standards*, Reserve Bank of Australia, Sydney, November 2012, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201211-var-surcharging-stnds-guidance/guidance-note.html>>.

PART II — THE REGULATORY FRAMEWORK AND MERCHANT OBLIGATIONS

Merchants that apply card surcharges are subject to a range of obligations including contractual arrangements with their acquirers or card schemes, as well as Australia's consumer protection framework. Additional obligations apply to merchants applying surcharges in international markets.

CARD SCHEME RULES

The PSB of the RBA is responsible for promoting greater competition, efficiency and stability in the payments system. In 2012, the PSB announced changes to the Standards, which govern credit and scheme debit card surcharging rules applied to merchants (referred to herein as 'card scheme rules'). The changes, which came into effect in March 2013, allow the schemes to limit credit and scheme debit card surcharges to the reasonable cost of card acceptance, should they choose to do so.

This followed the PSB's initial reforms in 2003 which required the removal of no-surcharge rules that had been imposed by these card schemes. A similar standard was imposed on the Visa Debit system in 2007 and other international card schemes have provided voluntary undertakings to remove their equivalent rules.¹¹

Approximately 33 per cent of the Survey's respondents indicated that they were aware of recent changes to the Standards or the effect of those changes.

The impact of introducing credit and scheme debit card surcharging

The removal of no-surcharging rules has allowed merchants to pass on the cost of credit and scheme debit card transactions to their customers via a surcharge. The purpose of this reform was to improve the efficiency of the payments system by improving price signals to cardholders about the relative costs of different payment methods. This has encouraged consumers to use lower-cost payment methods and has reduced the cross-subsidies that flow from those using low-cost payments to those using high-cost methods if all acceptance costs are built into prices of goods and services. The ability to surcharge has also been used as a negotiating tool by some merchants to put downward pressure on their costs of accepting card payments.

Average fees paid by merchants to their acquirers have been in decline since removal of the no-surcharging rules.¹² However, in recent years some surcharging practices have arisen that potentially distort price signals, such as surcharging in excess of card acceptance costs and

¹¹ RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, June 2012, Reserve Bank of Australia, June 2012, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

¹² See RBA data, *Average Merchant Fees for Debit, Credit and Charge Cards – C3*, viewed 9 July 2013. <http://www.rba.gov.au/statistics/tables/index.html#payments_system>.

‘blending’¹³ surcharges across card schemes. This has the potential to reduce the effectiveness of the surcharging reforms as surcharges in excess of the cost of acceptance can cause consumers to underutilise a particular payment mechanism.

Box 1 — Types of card schemes

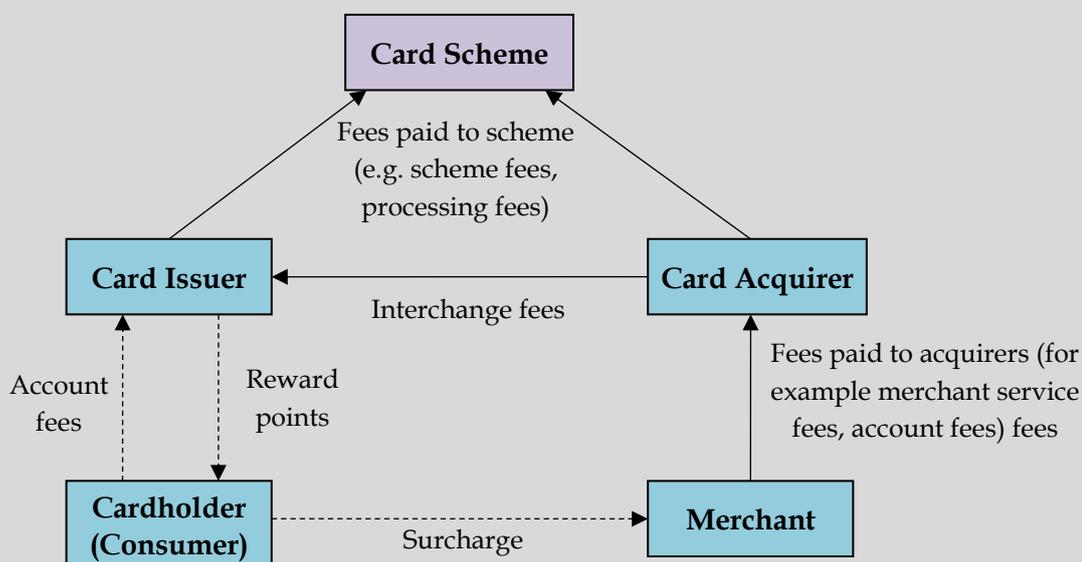
There are two main types of card schemes arrangements in Australia — ‘four-party’ and ‘three-party’ schemes.

The four-party arrangement is used by the two major card schemes — Visa and MasterCard. The four parties are the cardholder (consumer), the financial institution issuing the card to the consumer (the card issuer), the retail merchant, and the merchant’s financial institution (the card acquirer). The network (which is the card scheme) then coordinates monetary transfers and the transmission of information between the issuer and the acquirer.

In a three-party scheme arrangement, the network acts as both issuer and the acquirer. So the three parties in the arrangement are the consumer, the merchant and card scheme.

A typical transaction in a four-party arrangement occurs as follows (see Figure 1). The consumer makes a purchase from the merchant by presenting their card to the merchant. A request with the dollar value of the purchase and the cardholder’s identity is sent from the merchant to the acquirer, then to the network. The network forwards the information to the issuer. Assuming that the consumer has the funds to make the purchase, the issuer then authorises the payment and this information is relayed back to the merchant.

Figure 1: A four-party transaction



¹³ This occurs when a merchant charges a single surcharge fee or rate, regardless of the debit or credit card scheme chosen by the customer and is discussed further in Part II.

Fees are paid at each step of the transaction. These fees are often not transaction-based but arrive as an annual fee, or a monthly fee in the case of debit cards linked to transaction accounts.

Limiting surcharges to the reasonable cost of card acceptance

After extensive public and industry consultation,¹⁴ the amendments to the RBA's Standards came into effect on 18 March 2013. The RBA also released a finalised Guidance Note to assist parties to determine the appropriate level of card surcharges.¹⁵ The effect of the varied standards is to allow the card schemes to limit merchant card surcharges to the reasonable costs incurred on acceptance of a particular card. The RBA's Guidance Note identifies the reasonable costs associated with card acceptance as including:

- merchant service fees;
- other costs payable to acquirers;
- costs payable to other payment service providers;
- merchants' own costs related to card acceptance;
- fraud costs related to card acceptance; and
- any fixed equipment, systems or development costs not captured in the above.¹⁶

Most submissions to this study recognised that it is not necessary or appropriate to apply a surcharge or fee beyond the recovery of costs. There were differences, however, in the interpretation of 'reasonable costs'. Some merchants noted that the overall cost of accepting cards is significantly more than the merchant service fees, as acknowledged by the RBA's Guidance Note. Others claimed that merchants themselves benefit from customer use of card schemes.¹⁷ In consultations with CCAAC, some industry participants suggested that the costs of card acceptance are a business cost (just like rent or staffing costs), and should be included in the purchase price of goods and services.

Submissions from card schemes noted that the full scope of these costs are difficult for the schemes or their participants to monitor and only truly transparent to the merchants themselves.¹⁸ This makes enforcement of the card schemes' rules on surcharging more difficult. It was noted that the limit on surcharging should be clear, quantifiable and commonly understood by all parties; so that all market participants operate according to a

¹⁴ RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, June 2012, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

¹⁵ RBA 2012, *Guidance Note: Interpretation of the Surcharging Standards*, Reserve Bank of Australia, Sydney, November 2012, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201211-var-surcharging-stnds-guidance/guidance-note.html>>.

¹⁶ Ibid.

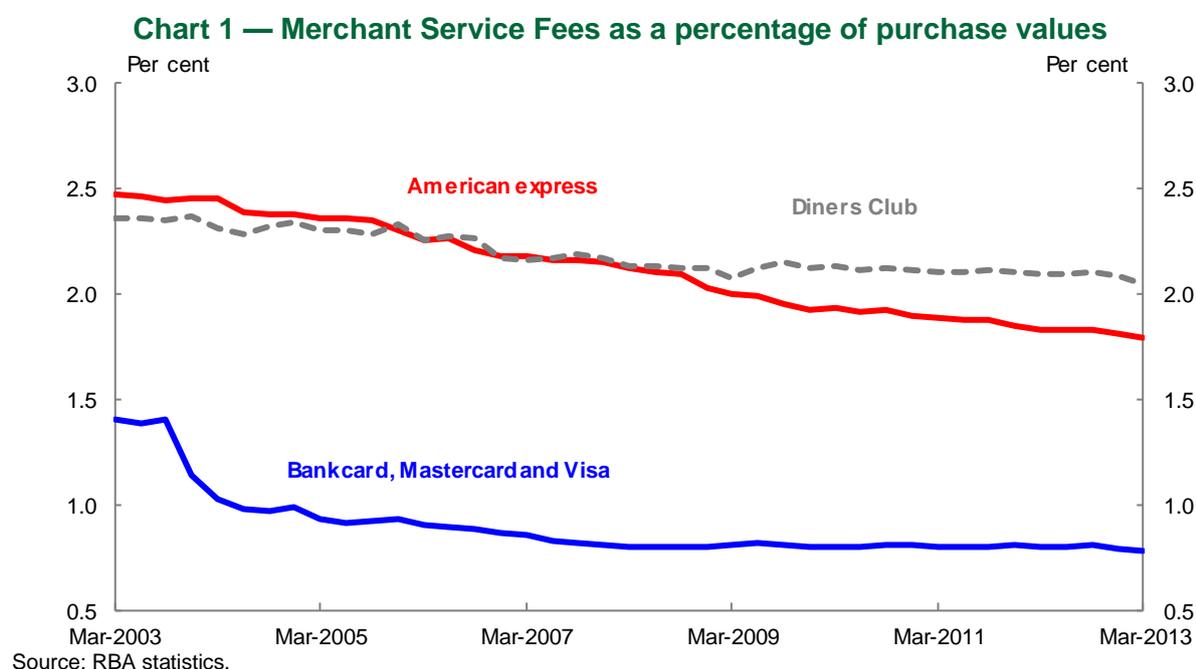
¹⁷ See submissions by the Commonwealth Bank of Australia and Visa.

¹⁸ See submissions by Visa and American Express.

consistent and readily calculable definition.¹⁹ Noting these factors, submissions from some card schemes proposed a return to the pre-2003 no-surcharging environment.²⁰

This argument must be weighed against the positive impact of credit card surcharging on the efficiency of the payments system. This impact, beginning with the implementation of the Standards requiring the removal of no-surcharge rules in 2003, alongside other RBA reforms, can be seen in Chart 1. Consumers ultimately benefit from a more efficient payments system through lower cost payment services, but this benefit may be diminished if excessive surcharging prevents accurate price signals in some cases. It is important that any further changes to the surcharging regime take full account of the benefits that the reforms have achieved.

Others expressed the sentiment that it may be more appropriate to address directly the competition issues in these selected industries, for example, where the nature of the industries in which consumer concerns over surcharging are concentrated.²¹



Blended Surcharging

Concerns were also raised about the impact of blended surcharging. This occurs when a merchant charges a single surcharge fee or rate, regardless of the debit or credit card scheme chosen by the customer. Where merchants adopt this approach, the price signal provided by surcharging is dulled as there may be an incentive for card holders to use higher-cost card schemes for which there is no differentiated price, particularly where the higher cost reflects more generous cardholder rewards.

The impact of the recent RBA rule changes on blended surcharging is not yet clear.

¹⁹ See submissions by Visa.

²⁰ See submissions by Visa and American Express.

²¹ See submissions by Carfare and the Australian Payments Clearing Association.

Enforcement of card scheme rules

Like the no-surcharge rules that existed until 2003, limits on surcharges will be established by the rules of any card scheme that chooses to adopt them. The three-party schemes – American Express and Diners Club – have a direct relationship with merchants and will be able to impose and enforce limits directly through their merchant agreements.

Conversely, the two four-party schemes – MasterCard and Visa – can operate through their members (which include the acquiring banks). The acquirers, which have a direct relationship with the merchant, are responsible for ensuring that merchants are compliant with card scheme rules, and may be subject to escalating sanctions from the card schemes (which can be passed on to the merchant) for rule breaches, such as ‘excessive’ surcharging.

In practice, this means that individual card schemes will determine how the limit will be applied, if they choose to apply it. In doing so, they will in practice be guided by the RBA Guidance Note. Importantly, the amended Standards do not oblige the schemes to impose and enforce surcharging limits, although they have an incentive to do so because excessive surcharging discourages the use of their product. At the time of this report, one of the four-party schemes has updated its scheme rules in the light of the amended Standards, and the other has indicated that it is working towards amending its own rules. American Express, the leading three-party scheme, has updated its merchant terms and conditions.

During consultations, card schemes raised a number of difficulties they face in enforcing the surcharging limits allowed under the current Standards. Chief among these is the inability for the four-party schemes to directly monitor merchant costs outlined in the RBA Guidance Note.

This lack of transparency makes it difficult for a four-party scheme to form a view on the acceptable level of surcharges, meaning that it must put in place other mechanisms to do so, with the assistance of the acquiring banks.

In its Regulation Impact Statement (RIS) on the 2012 changes to the Standards, the RBA acknowledged the practical difficulty in defining the cost of card acceptance, and considered the approach of defining the cost of acceptance as being equal to the merchant service fee.²² Such an approach would provide an objective and transparent, though imperfect, price signal as to the differing costs of payment methods.

Considerations against this approach included the range of costs of card acceptance in addition to merchant service fees, which may differ from merchant to merchant, and the countervailing pressures on acquirers to artificially increase (for merchants) or lower (for schemes) the costs included in the merchant service fee.

The costs of these considerations must be weighed against the difficulties in enforcement caused by the non-transparency of other merchant card acceptance costs.

²² RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, June 2012, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

A further difficulty claimed by the card schemes is the limit in their ability to enforce the Standards. While penalties for excessive surcharging can be built into card scheme-merchant agreements, the commercial nature of the relationship is a disincentive to card schemes imposing penalties against merchants who are in fact their own customers. Further, the nature of the four-party schemes is that they rely on the acquiring banks of the merchants to play the enforcer role, as they have no direct relationship with merchants. Nonetheless, it is worth noting that the four-party schemes rely on this mechanism for all restrictions on merchants, including the no-surcharge rules that previously applied in Australia and continue to apply and be enforced in many countries around the world. At the time of writing, Visa was in the process of rolling out such an enforcement mechanism for surcharge caps in Australia.²³

As a consequence of these difficulties, a number of submissions, including from card schemes and consumer organisations, called for public enforcement of the surcharging limit.²⁴ Some submissions pointed to the Office of Fair Trading (UK), which is tasked with this role in the United Kingdom. Under the current Australian regime, neither the RBA, nor ASIC, nor the ACCC is positioned to act as an independent referee in the enforcement of the Standards. The regime introduced by the March 2013 changes was outlined in card scheme submissions to the RBA's consultations on the proposed changes. The RBA's RIS noted that '...both the four-party card schemes indicated that a limit on surcharging could be implemented through scheme rules and that these changes would be implemented and enforced through acquiring institutions...'.²⁵

It was noted in submissions that reliance on regulator intervention may be heavy-handed given the concentration of excessive surcharging in particular industries and payment channels, and that while reliance on the card scheme's rules is not ideal, it may represent a more pragmatic and flexible approach.²⁶

A number of submissions pointed out that as the amended Surcharging Standards were only introduced in March 2013, it is likely too early to assess the efficacy of the current regime, and that it would be difficult to draw strong conclusions in any direction.²⁷

AUSTRALIA'S CONSUMER PROTECTION FRAMEWORK

In competitive markets, there are market incentives that regulate participants' behaviour, such as reputation and customer loyalty. In some circumstances, market incentives are insufficient to ensure that consumer needs are met. Where markets are less competitive, market incentives may be less effective at promoting consumer interests.

Consumers are provided with a safety net of consumer rights that are based on generic principles that apply across all industries, businesses and to all consumers. The ACL, set out

²³ See submission by the Commonwealth Bank of Australia.

²⁴ See submissions by CHOICE, CALC and Visa.

²⁵ RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, p 12, June 2012, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

²⁶ See submission by APCA.

²⁷ See submission by APCA and Cabfare.

in Schedule 2 of the CCA, is Australia's principal consumer protection law applying to the sale of consumer goods and services. The ACL includes:

- core consumer protection provisions prohibiting misleading or deceptive conduct, unconscionable conduct and unfair contract terms;
- specific prohibitions or regulation of unfair practices, including particular instances of misleading or deceptive conduct, pyramid selling, unsolicited supplies of goods and services, component pricing and the provision of bills and receipts;
- a national legal framework for unsolicited selling, including door-to-door trading and telephone sales;
- a national law for consumer product safety;
- a system of statutory consumer guarantees; and
- strengthened enforcement and consumer redress provisions.

Commonwealth, state and territory consumer agencies have responsibilities for the enforcement of the ACL. At a Commonwealth level, the ACCC is the responsible agency. The ACCC is an independent statutory authority that is responsible for administration of the CCA whose powers and functions in enforcing the ACL include the power to investigate possible breaches and, where appropriate, bring proceedings against those alleged to have breached the ACL.

Approximately 77 per cent of the Survey's respondents indicated that they were aware that the ACL prohibits businesses from misleading consumers about the price of goods and services.

Consumer protection and financial products

Section 131A of the CCA provides that the ACL does not apply to the supply, or possible supply, of services that are financial services, or of financial products. However, consumers are afforded similar protections when engaging with suppliers offering financial products — as defined by the *Corporations Act 2001* — through the ASIC Act. The ASIC is an independent statutory authority with specific responsibility for enforcing the ASIC Act. The ASIC's powers and functions include the power to investigate suspected breaches of the law, and where appropriate, issue infringement notices, commence prosecutions, or seek civil penalties from the courts in relation to alleged breaches of some laws.

Payment systems as defined by the Regulation Act are subject to a specific exclusion from the definition of a financial product. In terms of administration, the PSB of the RBA is responsible for the stability and efficiency of the payments system in Australia. However, the ACCC and the RBA both have legislative responsibilities for access and competition policy in the payments system. Both have a role in arbitration of disputes over access. The ACCC has general responsibility for these issues under the CCA and the RBA has specific responsibilities under the Regulation Act.

CCAAC notes the legislation administered by the ACCC, the ASIC and the RBA is intended to ensure that there is no regulatory overlap.

Consumer protections applying to surcharges and fees

A range of consumer protections are capable of protecting consumers from circumstances where surcharges and fees may have a detrimental effect on consumers. Consumer laws do not prevent businesses generally from applying surcharges or fees, however, when businesses do so, consumer laws require that they act honestly and in a manner that is not likely to mislead consumers.

While a range of consumer provisions from both the ACL and the ASIC Act may be capable of protecting consumers encountering surcharges and fees, CCAAC identifies and focuses on three areas where consumer laws provide specific protections to consumers, including:

- the prohibition of misleading or deceptive conduct provided to consumers of goods and services, as well as financial products, through section 18 of the ACL and section 12DA of the ASIC Act;
- the prohibition of false or misleading representations provided to consumers of goods and services, as well as financial products, through section 29 of the ACL and section 12DB of the ASIC Act; and
- the obligation for businesses to display the minimum quantifiable price when making a price representation about part of the price that must be paid, through section 48 of the ACL.

In some circumstances there may be ambiguity as to whether the relevant provisions are contained within the ACL or the ASIC Act. CCAAC considers that the more important question is whether or not conduct is in breach of a consumer law obligation. Therefore, CCAAC takes a general approach by considering how the principles of Australia's consumer protection framework are capable of applying where surcharges and fees are applied. However, CCAAC notes that the ACL would be the relevant law unless the conduct specifically relates to a financial product.

General protection: misleading and deceptive conduct

The prohibition of misleading or deceptive conduct requires businesses to ensure that they do not act in a manner that is capable of leading people into error. For conduct to be misleading or deceptive, it is irrelevant whether the person who engages in conduct intended to mislead or deceive, or whether the conduct has actually misled or deceived a person (except if a person is seeking damages for an alleged contravention of the prohibition).

Businesses cannot make misleading representations about the purpose of a surcharge or fee, or apply surcharges or fees in a manner that is likely to mislead consumers about the price of related goods or services. For example, the prohibition of misleading or deceptive conduct may apply where:

- the term 'credit card surcharge' is used to imply that the surcharge is applied to recover a business' costs, however, this is not the purpose of the surcharge; and
- a consumer is attracted by a low price and purchases a product only to learn that it is not such a good deal upon the application of a surcharge or fee.

The prohibition of misleading or deceptive conduct does not resolve all of the concerns raised by consumers. For example, if a surcharge or fee is properly disclosed in a manner that is unlikely to mislead a consumer, the prohibition of misleading or deceptive conduct may not prevent a business from charging customers excessive surcharges or fees. Even where the prohibition is capable of applying, it may be difficult to establish that conduct is likely to mislead consumers, particularly where there is ambiguity around the circumstances.²⁸

Misleading or deceptive conduct may lead to civil remedies including injunctions, declarations, damages, compensatory orders, orders for non-party consumers and non-punitive orders. Consumer protection agencies can accept court-enforceable undertakings, and issue substantiation and public warning notices. Fines and criminal sanctions do not apply, however, penalties may apply if the conduct breaches the ACL in other ways.

Specific protections: false and misleading representations and component pricing

Australia's consumer laws provide specific protections against unfair practices. For example, consumer laws prohibit the making of specific types of false or misleading representations, including those made about the price of, or the need for any goods or services. This means that businesses must ensure the accuracy of representations made about the amount of a surcharge or fee, as well as a consumer's need to pay the surcharge.

The component pricing provision specifically addresses circumstances where suppliers make representations about the price of individual components of a good or service. A business must not make a representation about an amount that, if paid, would constitute part of the consideration for the supply of goods or services unless the business also specifies, in a prominent way and as a single figure, the total price for the goods or services. In effect, this requires businesses to display prices that are inclusive of any compulsory surcharges or fees that can be quantified at the time the price representation is made.

The component pricing provision does not require businesses to include, as part of a price representation, a surcharge or fee that can be avoided, or a surcharge or fee that cannot be quantified at the time the price representation is made. For example, if a surcharge-free payment method can be used by a consumer, a business would not be required to display prices that are inclusive of any surcharges that apply to other payment methods.

The ACL provides enforcement measures for provisions relating to unfair practices, including false and misleading representations and the component pricing provision. These enforcement measures include civil penalties of up to \$1.1 million for corporations and \$220,000 for individuals, as well as disqualification orders for directors and officers of companies. Other civil remedies include injunctions, damages, compensation, orders for non-party consumers, corrective advertising orders, adverse publicity orders, and disqualification orders. Consumer protection agencies can accept court-enforceable undertakings, issue infringement notices, substantiation notices and public warning notices.

²⁸ Such as where the business' reasonable costs of card acceptance cannot be established.

INTERNATIONAL MERCHANT OBLIGATIONS

Card schemes rules are provided for through rules and regulations that apply internationally, except where local laws and regulations restrict their application. For example, MasterCard maintains merchant rules that establish minimum standards of acceptable conduct.²⁹ Broadly speaking, merchants operating in other countries are subject to the same card scheme rules as are applied to Australian merchants. International card scheme rules typically prohibit or restrict merchants' abilities to apply merchant surcharges. As discussed earlier, in Australia, the Standards restrict the ability of card schemes to prohibit merchant surcharging. Accordingly, card scheme rules that ban surcharging do not apply to Australian merchants. In its submission, Visa noted that most countries do not oppose card scheme rules that prohibit merchants from applying credit card surcharges.³⁰

Some jurisdictions provide additional restrictions on surcharging through consumer laws. In some jurisdictions this takes the form of a ban on surcharging, and in others, surcharges are limited to the costs of card acceptance. Examples of these approaches can be found in Box 2.

Box 2 — International approaches to surcharges and fees

European Union

A European Union Directive³¹ of 25 October 2011 (the Consumer Rights Directive) requires member states to prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.³²

The Consumer Rights Directive requires member states to adopt and publish, by 13 December 2013, the laws, regulations and administrative provisions that are necessary to achieve compliance with the Directive.

²⁹ MasterCard 2011, *MasterCard Rules*, July 2011, viewed 9 July 2013.

<http://www.mastercard.com.au/merchant/_assets/docs/merchants/BM-Entire_Manual_public.pdf>.

³⁰ See submission by VISA.

³¹ A directive is a legislative act of the European Union, which requires member states to achieve a particular outcome without dictating how that outcome should be achieved.

³² Directive 2011/83/EU of the European Parliament and of the Council, of 25 October 2011, *on 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*, viewed 9 July 2013. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>>.

Box 2 — International approaches to surcharges and fees (continued)

An example of where the Consumer Rights Directive has been implemented is provided by the *Consumer Rights (Payment Surcharges) Regulations 2012* (the Regulations) of the United Kingdom. The Regulations came into effect on 6 April 2013 and prohibit traders from applying above-cost surcharges. The Explanatory Memorandum to the Regulations notes that:³³

Excessive payment surcharges cause detriment to consumers in two ways. First, they can add a significant amount to the total cost of the transaction which consumers, particularly those purchasing online, may have no realistic way of avoiding.

Second, and particularly where consumers are not made aware of the payment surcharge at the same time as they are informed of the headline price, surcharges can make it more difficult for consumers to calculate the final price they will pay and compare that price with the price of competing products.

The Regulations provide a range of exemptions for certain excluded contracts including for social services, health services, certain financial services, residential accommodation rentals, and a range of other services. The Regulations also provide a temporary exemption for existing micro-businesses as well as new businesses. In the event that the merchant obligations with respect to excessive surcharges are not met, the Regulations provide that any excess amount of a surcharge is to be repaid to the consumer.

Enforcement of the Regulations is undertaken by the United Kingdom's Office of Fair Trading. The Regulations provides that enforcement authorities³⁴ must consider any complaint made to it about a contravention of the Regulation unless the complaint appears to be frivolous or vexatious.³⁵ An enforcement authority may apply for an injunction or any other appropriate relief or remedy against a contravention of the regulation.³⁶ Furthermore, if a business is in contravention of the Regulation, the excess charged must be repaid to the consumer.³⁷

United States

In the United States, credit card surcharges are subject to regulation at the state level. More than half of the states either ban merchants from applying surcharges to credit card transactions or are considering proposals to place restrictions on surcharges. The states that are considering further bans on surcharges are doing so in the light of a recent litigation settlement deal incorporating a revision of card scheme rules that restrict surcharging.³⁸

³³ The Department for Business, Innovation and Skills (UK) 2012, *Explanatory Memorandum to the Consumer Rights (Payment Surcharges) Regulations 2012*, 2012 no. 3110, viewed 9 July 2013. <http://www.legislation.gov.uk/uksi/2012/3110/pdfs/uksiem_20123110_en.pdf>.

³⁴ Enforcement authorities are every local weights and measures authority in Great Britain (within the meaning of section 69 of the Weights and Measures Act 1985(7)) and the Department of Enterprise, Trade and Investment in Northern Ireland.

³⁵ Regulation 7.

³⁶ Regulation 8.

³⁷ Regulation 10.

³⁸ See submission by Visa.

SUMMARY OF FINDINGS

A range of obligations apply to merchants applying credit card surcharges.

Card schemes are allowed to limit credit and scheme debit card surcharges to the reasonable cost of card acceptance, in accordance with the RBA's Standards, should they choose to do so. At the time of this study, some of the card schemes have updated their scheme rules in light of the amended Standards.

Consumer laws are capable of applying in some circumstances. For example, merchants are required to ensure that surcharges and fees are not applied in a manner that is likely to mislead or deceive consumers. Other specific consumer protections apply, and are subject to penalties of up to \$1.1 million for a corporation. These include consumer protections relating to false and misleading representations as well as the component pricing provision.

Internationally, merchant obligations vary. Some jurisdictions ban credit card surcharges while other jurisdictions restrict their application. In general, card scheme rules that restrict merchants' ability to apply credit card surcharges are applied internationally, except where contradicted by local laws and regulations.

PART III — THE CONSUMER EXPERIENCE IN CONTEXT

THE USE OF CREDIT CARD SURCHARGES AND TRANSACTION FEES

The ability of merchants to charge a credit card surcharge has the potential to benefit consumers to the extent that doing so reduces consumers' share of the financial costs of inefficiency within the payment system (for example by reducing the cross-subsidy of some consumers by other consumers). However, consumer stakeholders have raised concern that the practice of applying surcharges and fees has, in some circumstances, been detrimental to consumers.³⁹ In particular, consumer stakeholders are of the view that some businesses are using surcharges and fees as an additional profit centre, and that they are applied in a manner that is confusing, ambiguous and unclear.

Credit card surcharges

Respondents to the Survey indicated that consumers were more likely to encounter a surcharge when using their credit card than for other payment methods such as cash, cheque or BPAY. Consumers benefit from the cost-efficiencies provided to the payments system by credit card surcharging. Credit card surcharges that are limited to the reasonable costs of card acceptance allow merchants to recover any additional costs associated with a consumer's choice about their method of payment. In addition, credit card surcharges that cover reasonable costs encourage consumers to use payment methods that are less costly for the business to accept while facilitating acceptance of a range of payment methods.

A number of stakeholders expressed concern about where it is suspected that credit card surcharges go beyond the recovery of costs associated with card acceptance. In these circumstances, surcharges act as an additional profit centre for the business and may cross-subsidise other business activities. It is noteworthy that concerns were concentrated on industries typically seen to lack strong competitive pressures (see Box 3).

The amount of a credit card surcharge may be calculated in a number of ways. Businesses may choose to apply surcharges as a percentage of the transaction amount (also referred to as an *ad valorem* surcharge) or as a fixed amount on a per-transaction basis. Some airlines have adopted the practice of applying a credit card surcharge on a per-passenger basis. While surcharges of this kind are not always called a credit card surcharge, they are nonetheless applied upon a consumer's use of a credit card. Further examples of credit card surcharges can be found in Box 3.

³⁹ See submissions by CHOICE and CALC.

Box 3 — Examples of credit card surcharges

Respondents to the Survey highlighted a number of examples of how credit card surcharges are applied throughout the market.

Airlines

Credit surcharges applied by airlines were mentioned by approximately 84 per cent of respondents to the Survey. It is common practice for airlines to apply surcharges as a fixed amount on a per-passenger basis. The amount of a credit card surcharge can be as high as between \$7-8.50 per passenger, however, in some cases, passengers may be charged up to \$17 where the surcharge is applied twice for a return flight. Terms such as 'card payment fee' and 'booking and service fee' are used, however, these surcharges or fees are payable upon a consumer's use of a particular credit card. While surcharge-free payment methods are made available to consumers, they may not always be obvious.

Taxis

Credit card surcharges applied by taxis were mentioned by approximately 13 per cent of respondents to the Survey. Customers processing card payments through the Cabcharge Fareway EFTPOS System must pay a 10 per cent service fee. The Cabcharge website advises that the 10 per cent service fee is applicable on all approved cards and on the same terms and conditions.⁴⁰ Customers can avoid paying the service fee by choosing to pay by cash. The Victorian Government announced on 28 May 2013 that it would reduce the credit card surcharge charged by the Victorian taxi industry from 10 per cent to 5 per cent.

Telecommunications and utility providers

Credit card surcharges applied by telecommunications and utility providers were mentioned by approximately 13 per cent of respondents to the Survey. Customers that wish to pay an invoice from a telecommunications or utility provider will often have to pay a surcharge as a percentage of the transaction amount. Consumers are typically able to pay such a bill through BPAY without incurring a surcharge. Some respondents complained that it was not possible to pay by cash or that a surcharge was applied upon doing so.

Bricks-and-mortar retailers, cafés and restaurants

CCAAC observes that it is not universal practice for bricks-and-mortar retailers, cafés and restaurants to apply credit card surcharges. Where they are applied, they are usually calculated as a fraction of the transaction amount or as a fixed value of the purchase. For example, on its website, ALDI indicates that there is a 0.5 per cent surcharge on all credit card purchases to cover the cost of the service.⁴¹ The Survey's respondents did not indicate that surcharges of this kind were a source of consumer dissatisfaction (relative to other surcharge types). Through the consultation process, retail organisations also revealed that the ability to surcharge is an important mechanism through which Australian retailers are able to negotiate lower merchant service fees.

⁴⁰ See Cabcharge website, viewed 9 July 2013. <<http://www.cabcharge.com.au/benefits/default.aspx#costs>>.

⁴¹ See Aldi website, viewed 9 July 2013. <<https://www.aldi.com.au/en/shopping-at-aldi/customer-information/faqs/payments/>>.

Transaction fees

As part of the study's terms of reference, CCAAC has also been asked to consider non-transparent transaction fees. For the purposes of this study, CCAAC considers a transaction fee to include any charge that is applied when purchasing a good or service, in addition to its purchase price.

Transaction fees may be applied for a range of reasons; however, their purpose is often not apparent to the consumer. CCAAC distinguishes between transaction fees and other more specific charges such as postage costs and charges for additional services or add-ons that can be purchased for a good or service. Transaction fees are often applied as an amount per transaction, rather than as a percentage of the value of purchases. An example can be found in Box 4.

Box 4 — Ticketing agencies, cinemas and theatres

Surcharges and fees applied by ticketing agencies, cinemas or theatres were mentioned by approximately 15 per cent of respondents to the Survey. It is common for ticketing agencies, cinemas and theatres to apply a transaction fee on bookings made online. Booking fees may be applied in addition to credit card surcharges. For example, Ticketek apply a 1.95 per cent credit card surcharge in addition to a 'service/delivery fee' of varying amounts. While the amount of the 'service/delivery fee' is made known to customers at the same time representations are made about the price of tickets, CCAAC observes that the actual amount that must be paid is often higher than the represented amount. Transaction surcharges are typically applied irrespective of how a consumer chooses to receive tickets (including if they are delivered through electronic means or printed by a consumer).

INDUSTRY CONDITIONS THAT ENCOURAGE USE OF SURCHARGES AND FEES

The practice of applying credit card surcharges and transaction fees is not widespread across the economy. However, there are a number of industries where surcharges and fees appear to be more prevalent. CCAAC observes that surcharges or fees are more likely to occur in industries where:

- cash is not accepted as a form of payment, including in the online environment;
- consumers have limited alternatives if they wish to purchase a good or service from a different supplier;
- price comparison (particularly online) is easy, such that businesses have a greater incentive to advertise lower prices that may not be inclusive of costs associated with accepting certain payment methods; and
- credit cards tend to be used for payment because there is a need to reserve funds to cover unanticipated costs, e.g. hotels and car rentals.

Further, some businesses may apply surcharges and fees because it is a common industry practice such that they may be subject to a competitive disadvantage if they do not adopt similar practices.

CCAAC notes that consumers have singled out the surcharges and fees applied by airlines. The Survey's respondents overwhelmingly identified airlines as applying the highest surcharges and transaction fees. Approximately 84 per cent of respondents specifically mentioned an airline or airlines in general, as charging the most for credit card surcharges or transaction fees. Air transport providers represent approximately 35 per cent of ACCC contacts relating to surcharges and fees. Both the CALC and CHOICE specifically identified the surcharging practices of airlines as a concern.

The prevalence of complaints made about airlines is a part of the broader subset of complaints relating to businesses that maintain a significant online presence. The most complained-of industries, with the exception of taxis, are unique in that they maintain an online presence with a high proportion of transactions processed online.

THE PRICE SIGNAL, TRANSACTION COSTS AND CONSUMER DETRIMENT

The price signal

Consumers make purchasing decisions based on a range of factors, including price. When comparing alternative products, consumers are interested in the amount that must be paid to receive a good or service of a particular characteristic. This amount is a measure of all those things that must be forgone in order to purchase a particular good or service (that is, the consumer's opportunity cost).

All-inclusive pricing involves charging consumers a single amount for all of the constituent components of a good or service, including costs associated with accepting a customer's payment. Credit card surcharges and transaction fees are, in effect, a separate amount charged for services rendered upon a consumer's purchase of a related good or service, for instance, a consumer's use of a particular payment method. Many businesses adopt all-inclusive pricing with respect to the recovery of costs associated with processing a consumer's transaction, and therefore do not apply credit card surcharges or transaction fees. While this approach may be simpler and easier to understand, it may also generate inefficiency and more limited choice in certain circumstances.

Credit card surcharges and efficiency

It has been suggested that costs associated with accepting credit cards should be included as part of the price of goods or services in the same manner as other business inputs such as rent, electricity and the cost of goods sold.⁴² This suggestion does not take into consideration that credit card surcharges are applied in accordance with consumer choices about how they purchase goods or services.

Surcharges or fees may be beneficial to consumers where they allow consumers to make decisions on payment methods based on appropriate price signals (that is prices that are closely aligned with the costs of accepting a payment). This would minimise costs associated with processing customer payments and limit any cross-subsidies between consumers choosing to pay by different means. For example, credit card surcharges ensure that

⁴² See submission by American Express.

customers using less costly payment methods are not required to pay for additional costs associated with providing credit card facilities.

While there may be benefits associated with credit card surcharges and transaction fees, these benefits are muted where they are applied in a manner that does not enhance consumer choice or efficiency. For example, where credit card surcharges cross-subsidise other business activities, consumers may be encouraged to use other payment methods even though they would be prepared to pay the reasonable costs incurred by the business.

Surcharges, fees and representations about the amount that must be paid

Where costs associated with processing consumer payments are included as part of an all-inclusive price, the amount that must be paid by the consumer is equivalent to the price of the good or service. Where surcharges or fees apply, it is more difficult to make representations about the total price of a good or service, as that amount will vary between consumers depending on choices made about how they purchase a good or service. For example:

- a surcharge levied on a consumer's use of a particular credit card may not be payable by consumers who use alternative payment methods; and
- a transaction fee that is levied across a transaction will be smaller on a per-item basis where multiple items are purchased within the transaction.⁴³

Difficulties associated with representing the total price of a good or service can mean that credit card surcharges and transaction fees have the potential to impose barriers to a consumer's ability to observe and compare prices. These barriers have the potential to increase transaction costs, such as through increased search and information costs.

Consequences of surcharges and fees for consumers

There are a range of consequences associated with the application of surcharges and fees that are not fully transparent. In particular, CCAAC identifies that such surcharges and fees can lead to:

- a lack of informed decision making by consumers;
- increased transaction costs for consumers; and
- consumer detriment resulting from the misleading nature of a surcharge or fee.

Transaction costs

An environment where transaction costs are high is an environment where it is more expensive for consumers to locate goods or services that are appropriate to their needs.

For the purposes of this study, a consumer's transaction costs are taken to include all costs associated with purchasing a good or service in addition to the cost of the good or service

⁴³ For example, a \$5 transaction fee applied across five tickets to a concert works out to be \$1 per ticket, whereas if only one ticket is purchased, the transaction fee would work out to be \$5 per ticket.

itself. Transaction costs may include both monetary and non-monetary costs. For example, a consumer's time may be a transaction cost to the extent that it is valued by the consumer (such as where the time could be used for other purposes).

Search and information costs have the potential to be a significant component of a consumer's transaction costs. Many consumers will undertake research and price comparisons prior to making a purchasing decision. For example, when purchasing flights, a consumer may undertake research on a range of factors including the prices of alternative carriers. Search and information costs may be higher where a consumer is required to assess a greater amount of information to inform their purchasing decisions. The application of fees or surcharges can mean that pricing information is not relevant to all consumers as some consumers may be unable to avoid the surcharge or fee. This exposes consumers to informational 'noise' which increases the task complexity of comparing prices.

Consumer detriment

Consumer detriment arises when market outcomes fall short of their potential, resulting in welfare losses for consumers.⁴⁴

Suppliers have an obligation to ensure that they do not mislead or deceive consumers, including where they do so through the omission of important information. In this regard, surcharges and fees have the potential to cause consumer detriment where they mislead consumers about the true cost of goods or services. For example, surcharges and fees may induce consumers into decision making error such that they purchase goods or services that are not appropriate to their needs or wants, including with regards to the cost of a good or service.

Where a consumer is not properly informed about a surcharge or fee, the consumer may also be induced into expending time and effort to progress the transaction (where they would not otherwise do so), prior to being informed about the surcharge or fee. Even where a consumer is eventually informed about the surcharge or fee and decides not to complete the transaction, the consumer may have already wasted time and effort due to its misleading nature.

The potential for surcharges and fees to cause consumer detriment is higher where they are not observable at the time consumers are searching between alternative goods or services. Even where a consumer is notified about a surcharge or fee before the point of final payment, consumers may be susceptible to overlooking the surcharge or falsely assuming that it is negligible. Approximately 26 per cent of respondents to the Survey indicated that they continued to pay a credit card surcharge even where alternative fee-free payment methods were available.

The manner in which information is presented and the way that choices are framed can significantly influence marketplace choices, sometimes in ways that are not in the best

⁴⁴ The Treasury 2011, *Consumer Policy in Australia: A companion to the OECD consumer policy toolkit*, Canberra, viewed 14 June 2013.
<http://www.consumerlaw.gov.au/content/consumer_policy/downloads/Companion_to_OECD_Toolkit.pdf>.

interests of consumers.⁴⁵ In this respect, consumer detriment can be minimised or even avoided where consumers are properly informed about the presence of a surcharge or fee.

Other consequences of fees or surcharges

Consumer stakeholders have raised a number of other frustrations relating to the imposition of surcharges or fees, including:

- the actual costs associated with paying the amount of the surcharge or fee; and
- the lack of fairness associated with excessive surcharges and fees that cross-subsidise other business activities.

An amount paid in the form of a fee or surcharge forms part of the total price that a consumer pays to receive a good or service. Where a consumer is fully informed about a surcharge or fee, it is up to the consumer to decide whether or not they are willing to pay it. Furthermore, surcharges and fees represent part of the price for which a business is willing to supply a good or service. Even if a surcharge or fee were not applied, the amount of the fee or surcharge would likely be recovered through the purchase price of the good or service. While doing so may have other associated benefits, a key implication is that consumer welfare would not be improved by an amount that is equivalent to the surcharge or fee.

Cross-subsidies can produce inefficiency in markets and may be perceived by consumers as unfair. Cross-subsidies mean that a higher price is charged for one good or service so as to facilitate a lower price for a subsidised good or service. Inefficiency can arise where there is an undersupply of the more expensive good or service while there is an oversupply of the cheaper good or service. While surcharges and fees that cross-subsidise other business activities have the potential to be distortionary, surcharges and fees do not necessarily produce consumer detriment of themselves.⁴⁶ However, credit card surcharges and transaction fees that go beyond cost recovery may cause consumer detriment where they are used as a mechanism to hide the true cost of a related good or service.

A sceptical consumer might conclude that some businesses apply surcharges and fees to cross-subsidise related goods or services so as to attract customers with an apparently cheaper price. However, considerable data on business costs would be required to determine whether costly cross-subsidies are in place. Whilst acknowledging the concerns of consumers, CCAAC is not in a position to assess the validity of those concerns.

SUMMARY OF FINDINGS

While surcharging is not a universal practice, it is more common in certain industries. Consumers are particularly concerned at the manner in which surcharges and fees are applied by airlines, ticketing agencies, cinemas and theatres, taxis, telecommunications and utility providers, and accommodation and tourism providers.

⁴⁵ OECD 2010, *Consumer Policy Toolkit*, OECD Publishing, p 10.

⁴⁶ An exception to this is where cross-subsidies produce anti-competitive effects which leads to higher prices and reduced choice for consumers.

Consumers make purchasing decisions based on a range of factors including price. The application of surcharges and fees can make it more difficult to make an assessment of the amount that must be paid to purchase a good or service. Consequences of surcharges and fees that are not transparent include an increase in consumers' transaction costs when comparing the price of goods and services, as well as potential consumer detriment resulting from the misleading nature of a surcharge or fee.

Consumers are concerned at the additional costs imposed by surcharges and fees as well as the lack of fairness associated with surcharges and fees that cross-subsidise other business activities. CCAAC considers that this may be an issue that could be appropriate for the ACCC to investigate.

PART IV — IMPROVING THE TRANSPARENCY OF SURCHARGES AND FEES FOR CONSUMERS

CCAAC is tasked to identify best practices to improve the transparency of credit card surcharges or transaction fees, including the use of consistent terminology and disclosure practices. In Part III, CCAAC identified consequences of fees or surcharges that may be of concern to consumer policymakers. In particular, CCAAC identified that surcharges and fees that are not transparent can lead to increased transaction costs for consumers as well as consumer detriment resulting from the misleading nature of a surcharge or fee. In Table 1, CCAAC proposes a range of better practice principles and policy measures that could be adopted in order to improve the transparency of surcharges and fees. They have been identified to retain the efficiency benefits associated with allowing businesses to apply a surcharge on more expensive payment methods, while:

- reducing transaction costs by supporting easier price comparison and practical surcharge- or fee-free alternatives; and
- minimising consumer misunderstanding by improving the clarity of the application of surcharges and fees.

This study has identified how complex pricing has the potential to increase a consumer's transaction costs. CCAAC considers that there are significant benefits associated with clearer pricing that supports easier price comparison. To achieve this, consumers must have access to price information that is relevant to their own personal circumstances and that conveys accurate information about the total amount that they must pay.

Similarly, this study has identified where surcharges and fees could mislead consumers and the consequences of where this occurs. To avoid consumer misunderstanding about surcharges and fees, it is essential that information about surcharges and fees is provided to consumers in an accurate, timely and prominent manner. CCAAC notes that consumers are generally familiar with the practice of applying surcharges and fees with around 78 per cent of the Survey's respondents indicating that they often or always make sure that they find out whether a surcharge or fee applies. However, some merchants are applying surcharges and fees in a manner that is not clear leading to confusion for consumers.

Box 5 — ACCC v Nonchalant Pty Ltd (in liquidation)

In a recent Federal Court case,⁴⁷ the Federal Court ordered Nonchalant Pty Ltd, a past operator of Abel Rent a Car in Brisbane, to pay penalties of \$30,000 following action by the ACCC for misleading advertising in regard to the disclosure of fees and charges.

⁴⁷ *ACCC v Nonchalant Pty Ltd (in liquidation)* [2013] FCA 605.

Box 5 — ACCC v Nonchalant Pty Ltd (in liquidation) (continued)

The ACCC investigated after a complaint from a consumer that when they picked up a car from Abel Rent a Car, they had to pay more than the price they were quoted online.

The ACCC examined the Abel Rent a Car website and found that vehicles were advertised for hire at a daily rate of \$35 per day but additional mandatory fees were added including a \$5 per day 'vehicle registration recovery fee' and a 7.5 per cent 'administration fee'.

These additional fees meant that the true cost of hiring the car was \$43.54 per day, not \$35 as advertised.

Justice Gordon stated in her judgment that the disclosure of additional fees and charges on subsequent web pages during a booking were not sufficient to negate the effect of misleading representations on the home page of a website.

BETTER PRACTICE PRINCIPLES FOR MERCHANTS

Better practice principles are intended to be considered and adopted by merchants that currently apply surcharges or fees. While they are not intended to form part of a regulatory response to the issues, businesses may wish to consider how these principles can be applied to achieve clearer pricing for consumers. This could, in part, avoid the need for further consideration of a regulatory response, particularly where improvements are made by businesses operating in industries that are the subject of significant consumer dissatisfaction.

The Survey indicated that there is consumer dissatisfaction about the surcharging practices of businesses that maintain a significant online presence. It is noted that the *Australian Guidelines for Electronic Commerce*,⁴⁸ which were prepared in consultation with CCAAC, outline a range of appropriate practices for businesses engaging in e-commerce. There may be an opportunity for these guidelines to be updated to include guidance in relation to how surcharges and fees should be applied within the online environment. These better practice principles could form the basis of this guidance.

⁴⁸ Treasury 2006, *The Australian Guidelines for Electronic Commerce*, Australian Government, Canberra, viewed 9 July 2013. <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1083>>.

Table 1 — Better practice principles and policy measures

	Objective	
	Reducing transaction costs by supporting easier price comparison and practical surcharge- or fee-free alternatives	Minimising consumer misunderstanding by improving the clarity of surcharges and fees
Better practice principle	<p>adopting simpler pricing methods that are more search-friendly, including all-inclusive pricing where appropriate;</p> <p>providing practical surcharge and fee-free options for consumers so that there are reasonable options to avoid them; and</p> <p>avoiding use of minimum pricing such that any fees or surcharges that cannot easily be avoided are included as part of the price representation.</p>	<p>improving the clarity of prices through clear, prominent and timely information about surcharges and fees; and</p> <p>ensuring that surcharges and fees are accurately described and surcharge amounts are limited to the reasonable cost of card acceptance when levied as an additional fee payable for card payments but not for any other payment method.</p>
Policy measures for further consideration	<p>upfront and transparent information where surcharges and fees are applied; and</p> <p>continued monitoring of payments system to ensure that it is competitive and efficient.</p>	<p>public enforcement of obligations limiting credit card surcharges to the reasonable cost of card acceptance.</p>

Adopting simpler pricing methods

The term ‘confusopoly’ has been used to describe a market where businesses with similar products intentionally confuse consumers rather than competing on price.⁴⁹

There is a trade-off between the benefits of choice about how a product is purchased (including through efficiency gains) and increased transaction costs owing to additional price complexity. On the other hand, there are few trade-offs associated with simplifying prices where complexity does not facilitate increased consumer choice or efficiency. For example, where a credit card surcharge cannot be avoided by the vast majority of consumers, any benefits of the surcharge may be limited when compared with increased search and information costs that arise due to additional price complexity.

⁴⁹ Adams, S 1997, *The Dilbert Future: Thriving on Stupidity in the 21st Century*, HarperCollins Publishers, New York.

CCAAC considers that unless a surcharge or fee can be justified on efficiency grounds or as providing additional choice to consumers, the amount of that surcharge or fee should be included in the price of the good or service.

Providing practical surcharge and fee-free options for consumers

When a business advertises a price without also stating that a surcharge or fee applies that price representation is only relevant to those consumers who do not have to pay the surcharge or fee. If there are no practical surcharge and fee-free options for consumers that price representation is unlikely to be relevant to the vast majority of consumers to which the price representation is made. CCAAC is of the view that if a business wishes to advertise prices without also stating that a surcharge or fee applies, they should ensure that it is reasonably easy for a consumer to avoid the surcharge or fee. For example, it is reasonable for an airline to advertise the price of a flight without also stating that a surcharge applies upon use of a particular payment method, as long as practical surcharge-free alternative payment options are also made available.

A key consideration is how to determine whether a particular payment method is practical for consumers. Broadly speaking, CCAAC considers that a payment method can be considered practical if the payment method is:

- easily available and used by the vast majority of consumers who wish to purchase the good or service;
- sufficiently visible such that consumers are aware that the payment method can be used;
- not unduly inconvenient such that there are additional costs to the consumer through their use of the payment method, including significant additional time and effort; and
- processed in a similar manner, including with respect to processing time, as other payment methods.

CCAAC does not consider that businesses should necessarily be required to accept practical payment methods or that businesses should not be allowed to apply surcharges on payment methods that are more expensive for the business to accept. However, CCAAC does consider that if a business wishes to advertise prices without also making it clear that a surcharge applies upon use of a certain payment method, then it must ensure that a practical surcharge-free payment method is readily available to consumers.

During consultations, stakeholders identified that some surcharge-free payment methods offered by some businesses may not be as safe or secure for consumers. In its submission, CHOICE suggested that a minimum benchmark for surcharge-free payment methods could be that it is subject to the ePayments Code. The ePayments Code is a voluntary code regulating consumer electronic payment transactions, including online payments. ASIC is responsible for the administration of the ePayments Code, including compliance.

CCAAC is specifically concerned about the visibility of surcharge-free payment methods made available by airlines. While airlines have varyingly made available payment methods which may allow consumers to avoid a credit card surcharge, many consumers are not aware that those methods exist and it is CCAAC's view that they are not well promoted relative to other payment methods that attract a surcharge (see Box 6). CCAAC considers

that some consumers may be misled into using more expensive payment methods where surcharge-free payment methods are not sufficiently visible to consumers.

Respondents to the Survey revealed that consumers are likely to pay a surcharge rather than find an alternative supplier with 73 per cent of respondents indicating that they had done so in the past. The implication of this is that, even where surcharge-free payment methods are available, a high number of consumers may pay a surcharge if they are not aware of those payment methods.

Box 6 — An example of visibility of surcharge-free payment methods for online flight purchases

CCAAC acknowledges that the surcharge-free payment methods that are made available by some airlines are reasonably accessible by most Australian consumers. However, CCAAC is concerned that these surcharge-free payment methods are not well promoted to customers. Even where surcharge-free payment methods are available to the vast majority of consumers who wish to purchase flights, consumers mistakenly use more expensive payment methods if those surcharge-free payment methods are not sufficiently visible.

For example, the default payment option upon purchasing flights is often a payment method that attracts a surcharge (see Figure 1). However, it may not be clear that a surcharge applies until the user begins to enter their card information (see Figure 2). To access surcharge-free payment methods, users may be required to select a ‘tab’ and it may not be immediately apparent that payment methods within that ‘tab’ do not attract a surcharge (see Figure 3).

Figure 1

The screenshot shows a 'Payment' section with two tabs: 'Credit Card' (selected) and 'Debit Card'. Under 'Credit Card Details', it states 'Your card will be debited on confirmation.' Below this, there is a 'Card Type:' section with six options: Visa, Mastercard, American Express, Diners Club, JCB, and UATP. Each option has a corresponding logo. Below the card type options are three input fields: 'Card Number:', 'Expiry:' (with sub-fields for MM and YY), and 'Card Holder Name:'. At the bottom of the form, a summary table shows 'Flights: \$719.00 AUD' and 'Total Amount to be paid: \$719.00 AUD'. A Cybertrust logo is present at the bottom left, with the text 'Cybertrust protects your information from unauthorised viewing.'

Source: <http://qantas.com.au>

Box 6 — An example of visibility of surcharge-free payment methods for online flight purchases (continued)

Figure 2

Payment

Credit Card Debit Card

Credit Card Details * = required
 Your card will be debited on confirmation.

Card Type: *

 VISA	 Mastercard	 American Express	 Diners Club International	 JCB	 UATP
---	---	---	--	--	---

Card Number: * Expiry: * Card Holder Name: *

 MM YY

Flights:	\$719.00 AUD
Card Payment Fee: (\$7.00 x 1 passenger)	\$7.00 AUD
Total Amount to be paid:	\$726.00 AUD

 Cybertrust protects your information from unauthorised viewing.

Source: <http://qantas.com.au>

Figure 3

Payment

Credit Card **Debit Card**

Debit Card Details * = required
 Your card will be debited on confirmation.

Card Type: *

 VISA	 Mastercard
---	---

Card Number: * Expiry: * Card Holder Name: *

 MM YY

Flights:	\$719.00 AUD
Debit Card Fee: (\$0.00 x 1 passenger)	\$0.00 AUD
Total Amount to be paid:	\$719.00 AUD

 Cybertrust protects your information from unauthorised viewing.

Source: <http://qantas.com.au>

Avoiding use of minimum pricing

Minimum pricing occurs where a business represents the minimum amount that must be paid to receive a good or service rather than the amount that must typically be paid by consumers. Representing the minimum amount that must be paid is appropriate where that

price is relevant to a majority of consumers. For example, it is reasonable for airlines to advertise prices that do not include charges for optional extras so long as those extras are not essential to the service being offered and are not likely to be taken up by a majority of consumers.

In the case of surcharges and fees that cannot be easily avoided, CCAAC considers that it is more appropriate for a business to advertise prices that are inclusive of those surcharges and fees. This approach can be distinguished from all-inclusive pricing as businesses may wish to offer discounts to consumers who meet certain criteria. For example, an airline may wish to offer holders of an airline branded credit card a discount of an amount equivalent to a surcharge that would have otherwise been applied.

Even where different surcharges or fees are applied in different amounts for different purposes, businesses are able to:

- represent the price that is relevant to the most number of consumers (for example, the average price that must be paid);
- offer discounts to those consumers who meet the criteria for a cheaper price; and
- apply a surcharge for consumers who use a more expensive payment option.

The essential characteristic of this approach to pricing is that the price that is advertised to consumers is relevant to more consumers than any other possible representation that can be made about the price. This approach is beneficial for two reasons. Firstly, it allows the majority of consumers that are unable to avoid the surcharge or fee to receive relevant pricing information, and secondly retains the efficiency and choice benefits that may be associated with surcharging.

Improving the clarity of prices

Approximately 67 per cent of the Survey's respondents indicated that surcharges or fees are often made known to them at the final stages of a checkout of an online payment form. Only around 14 per cent of respondents indicated that surcharges or fees were often made known to them at the time of displaying the price of goods and services.

Where surcharges or fees are applied, it is important for merchants to ensure that information about surcharges and fees is provided to consumers in a clear, prominent and timely manner. This approach involves ensuring that consumers are well informed about the existence and nature of any surcharges or fees at the time that a representation is made about a related good or service. For example, if a service fee of \$10 applies to every transaction for the purchase of event tickets, then the ticketing agency would ensure that consumers are told about the fee whenever a representation is made about the price of a ticket. This approach may be particularly useful where:

- the amount of the surcharge or fee cannot be quantified at the time a price representation is made (for example because it is applied as a fixed amount on a transaction that may include multiple items); and
- surcharges and fees are applied, however, the minimum price is the price that most consumers must pay.

The purpose of displaying surcharge and fee information is to ensure that there is no misunderstanding about the amount that must be paid by the consumer. To achieve this, CCAAC considers that information should be provided in a manner that is:

- **clear** such that it is easy to determine whether a surcharge or fee applies as well as its amount;
- **prominent** such that the information can be easily seen and read; and
- **timely** such that the information is provided at a time where it is most useful to a consumer.

Ensuring that surcharges and fees are accurately described

Descriptions about surcharges and fees should not raise any doubt in the consumer's mind as to its purpose. In addition, descriptions about the purpose of a surcharge or fee should be accurate. For example, if a surcharge is labelled as a 'credit card surcharge' a majority of consumers may perceive that to mean that the surcharge covers the reasonable costs of card acceptance. Consumers are unlikely to understand that a 'credit card surcharge' covers costs that are unrelated to the acceptance of the associated credit card.

Less prescriptive terms such as 'service fee', 'transaction surcharge', 'administration fee', and 'processing fee' are not well understood by consumers and should therefore be avoided.⁵⁰ If a surcharge or fee is applied for a purpose that cannot be easily described, then CCAAC considers that additional information about its purpose should be made available to consumers. This information could explain why the surcharge or fee is applied including with reference to the costs that it is intended to cover.

POLICY MEASURES FOR FURTHER CONSIDERATION

CCAAC has also identified a range of policy measures that could be considered by relevant government agencies. These measures may form the basis of further consultation on possible regulatory responses to the issues identified in this study. CCAAC supports the Australian Government's regulatory impact analysis requirements including that a Regulation Impact Statement should be prepared where a decision made by the Australian Government is likely to have a regulatory impact on business. The evidence gathered as part of this study will be made available should a government wish to pursue further work in this area.

Upfront and transparent information

A number of consumer stakeholders identified that to improve outcomes for consumers there may be some scope to amend the component pricing provision of the ACL. The component pricing provision ensures that businesses cannot make a good or service appear cheaper by displaying only a part of the price. However, the component pricing provision

⁵⁰ Respondents were asked whether they knew the meaning of terms such as 'credit card surcharge', 'service fee', 'transaction surcharge', 'administration fee' or 'processing fee' and why they thought those fees were applied and 38.98 per cent of respondents answered 'no'.

does not require a business to include a surcharge or fee as part of a price representation where it:

- cannot be quantified at the time the price representation is made; or
- can be avoided (that is, the surcharge or fee is optional) such that it does not form part of the minimum quantifiable consideration.

Surcharges or fees that are applied on a per transaction basis may not always be quantifiable at the time a price representation is made. This is because a transaction fee that is levied across a transaction will be smaller on a per-item basis where multiple items are purchased within the transaction.

The component pricing provision expressly exempts a business from including in the single price for goods a charge that is payable in relation to sending the goods from the supplier to the customer. However, if the business knows the minimum amount of such a charge at the time of making a price representation, then that business must also specify the minimum amount of that charge. This approach would appear to be appropriate for any kind of surcharge or fee that is applied on a per transaction basis. CCAAC considers that consumers ought to be told about a per-transaction surcharge or fee at the same time they are told the price of a related good or service.

In its submission, CHOICE raised concern about the availability and useability of fee-free payment methods. CHOICE considers that there needs to be more definition around what constitutes a fee-free payment option for the purpose of calculating the minimum quantifiable consideration which would ensure that surcharges that are difficult or impractical to avoid must be included as part of this amount. This mirrors CCAAC's view that if a business wishes to advertise prices without also stating that a surcharge or fee applies, then they should ensure that it is reasonably easy and practical for a consumer to avoid the surcharge or fee.

It is not necessarily the case that the component pricing provision is not capable of requiring surcharges or fees to be included in the price simply because they can be avoided by some consumers. The component pricing provision concerns representations that are made in connection with the promotion by any means of the supply to another person. If a representation about a price is made to a consumer, then that consumer ought to be able to purchase the good or service at that price. A price representation that is not inclusive of a surcharge or fee should only be made to those consumers that are not required to pay a surcharge or fee.

Further consultation

CCAAC does not propose any specific amendments to the component pricing provision and considers that further consultation, including with the states and territories,⁵¹ would be a necessary step prior to considering any amendments to the ACL. However, CCAAC considers that policymakers may wish to consider further consultation on:

⁵¹ In accordance with the Intergovernmental Agreement for the Australian Consumer Law.

- possible amendments to require a representation to be made about any fees that are applied on a per-transaction basis whenever a representation is made about the price of a good or service;⁵² and
- the need for further clarification as to how the component pricing provision applies in circumstances where the availability and useability of surcharge or fee-free options are limited.

Continued monitoring of the payments system

The RBA's recent changes to the Standards became effective on 18 March 2013. Implementation by the card schemes is not yet complete, with one of the four-party schemes and the three-party schemes still developing their amended card scheme rules.

In amending the Standards, the RBA committed to monitoring its effects on an ongoing basis and acting if it deems further action to be in the public interest.⁵³ CCAAC encourages the RBA to give full consideration to the interests of consumers in its ongoing monitoring.

Public enforcement of obligations limiting credit card surcharges

CCAAC welcomes the recent changes made by the RBA to the Standards, which benefit consumers through a more efficient payments system. However, in light of the difficulties associated with enforcing card scheme rules, a number of submissions⁵⁴ suggested that there could be a role for public enforcement of obligations limiting credit card surcharges to the reasonable costs of card acceptance.

CCAAC has found that there is potential for surcharges and fees that are not transparent to increase transaction costs for consumers mislead consumers about the true cost of goods or services and to cause consumer detriment. Accordingly, CCAAC considers that there may be a role for consumer regulators to ensure that surcharges and fees are applied in a manner that is unlikely to cause consumer harm, particularly in the online environment. This is to ensure that there is no mismatch between a consumer's understanding about the purpose of the surcharge and its actual purpose. It would also ensure that businesses do not impose credit card surcharges with the intention of creating an additional profit centre such that a related good or service is made to appear cheaper. There are, however, a number of unresolved matters that CCAAC considers should be given further consideration, including:

- whether existing regulatory tools are sufficient to support efficient and effective enforcement action by regulators;
- the basis upon which enforcement action should be taken;

⁵² In a similar manner as required in subsection 48(3) of the ACL.

⁵³ RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, p 22, June 2012, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

⁵⁴ See submissions by Visa, CHOICE and CALC.

- how the law should apply to surcharges or fees applied upon use of a credit card where they are not described as a credit card surcharge; and
- how such an obligation would interact with card scheme rules and how enforcement responsibilities should be shared across Australia's consumer regulators.

Matters for further consideration

As established in Part II, there are a number of obligations that apply to businesses that apply surcharges and fees. The general prohibition of misleading or deceptive conduct empowers consumer regulators to take compliance and enforcement action in circumstances where surcharges or fees are applied in manner that is likely to mislead consumers. However, CCAAC considers that there is some ambiguity as to whether the prohibition is a sufficient basis for a regulator to efficiently and effectively ensure that credit card surcharges are limited to the reasonable costs of card acceptance.⁵⁵

Consumer regulators typically determine their own compliance and enforcement priorities on whether to investigate and take action against an alleged breach of Australia's consumer laws. Regulators' compliance and enforcement policies typically give a higher priority to activities to restrict conduct that is likely to cause widespread and systemic consumer harm. CCAAC considers that any public enforcement of obligations limiting credit card surcharges should be pursued to the extent that, in doing so, a public benefit is gained. Public enforcement action should not be pursued to the benefit of private or commercial interests, such as by unnecessarily passing on costs of enforcing private arrangements to the public where private or commercial interests are better placed to take action.

As a general proposition CCAAC considers it acceptable for a surcharge or fee to be applied so long as it is properly brought to the attention of the consumer in a manner that does not mislead the consumer about its purpose. However, in some cases, surcharges and fees are applied in a manner such that their purpose is ambiguous to consumers. The Survey's results indicated that terms such as 'service fee', 'transaction surcharge', 'administration fee', and 'processing fee' are taken by consumers to mean a range of things. CCAAC acknowledges that consumer expectations would not be met if a business were able to apply surcharges that go beyond the reasonable cost of card acceptance, simply by describing them as something other than a credit card surcharge. CCAAC would encourage industry participants to provide clear and easily understood information to consumers on the meaning of these terms.

The ACCC would be an appropriate agency to consider complaints about surcharging where the conduct relates to a consumer good or service. However, other consumer regulators including ASIC as well as state and territory consumer agencies also have responsibilities for the enforcement of consumer protections depending on the circumstances. Further consideration as to the roles, responsibilities and capabilities of agencies with regards to the enforcement of credit card surcharging, would be beneficial. In addition, further consideration may need to be given as to how public enforcement action would interact with

⁵⁵ Whether conduct is misleading or deceptive will ultimately be dependent on the circumstances surrounding the conduct as determined by a court. In the absence of a court determination, it may not always be clear whether conduct is misleading or deceptive.

the private enforcement of card scheme rules, including where there are overlapping obligations.

Further consultation

CCAAC considers that public enforcement of obligations regarding card surcharges could be facilitated through Australia's consumer laws. This approach would be broadly consistent with the approach taken in the European Union's Consumer Rights Directive and the UK Regulations; however, CCAAC considers that further consultation would be beneficial to support policymakers in determining the need for additional consumer laws to facilitate public enforcement action.

CCAAC has identified a number of matters for further consideration. It would be beneficial to consider these matters at a time where a proper and informed assessment can be made about the outcomes of recent changes (to the Standards) to address excessive surcharging. These changes came into effect as of 18 March 2013, and as some stakeholders have pointed out, it may be premature to evaluate the effectiveness of the recent reforms at this current time.⁵⁶

SURCHARGING IN THE ONLINE ENVIRONMENT

CCAAC has identified that many of the complained about businesses maintain a significant online presence with a high proportion of transactions processed online. There are different costs of accepting card payments in the online environment when compared with bricks-and-mortar retailing. Some factors such as the increased risk of fraud may make it more costly, while other factors such as lower terminal maintenance and infrastructure costs may make it cheaper to accept card payments online.

CCAAC observes that online businesses are able to process transactions through online merchant service providers that can do so at a cost that is significantly lower than what some consumers are currently being charged.⁵⁷ It is not clear what additional costs exist to explain the significant gap between the surcharges paid by some consumers and the merchant service fees paid by online businesses, or why it is common practice for airlines to determine the amount of a surcharge on a per passenger basis.

Policymakers may wish to consider whether a specific policy response is required for surcharges applied to transactions that are processed online. CCAAC consider that it would be appropriate for the ACCC to investigate the issue more broadly given it accords with the ACCC's publicly-stated priority.⁵⁸ The disclosure of surcharges and fees and the prominence of surcharge-free payment methods are particular issues that have caused consumer frustration, but can be relatively inexpensive to resolve for businesses processing online transactions.

⁵⁶ See submission by APCA.

⁵⁷ For example, PayPal processes merchant payments at 2.4 per cent of a transaction amount plus 30 cents per transaction, while eWAY offers yearly plans such as \$799 to process payments at 40 cents per transaction.

⁵⁸ ACCC, *Compliance and Enforcement Policy*, February 2013.

SUMMARY OF FINDINGS

CCAAC has identified a range of better practice principles that would improve surcharge and fee-transparency. These principles could form the basis of further guidance in relation to how surcharges and fees should be applied within the online environment, including through the *Australian Guidelines for Electronic Commerce*. CCAAC considers that the application of the identified best practice principles should occur firstly through industry efforts supplemented by any enforcement mechanism that policymakers may choose to implement as also recommended by this study.

While CCAAC does not propose any specific amendments to the component pricing provisions of the ACL, there could be some benefit in giving further consideration as to the provision's role in ensuring that consumers are provided with clear and transparent pricing information. In addition, CCAAC considers possible amendments requiring the upfront disclosure (in a clear and prominent manner) of any fees or surcharges that a consumer may or may not incur in purchasing a good or service as well as amendments requiring the prominent disclosure of the availability of different types of payment methods could be made. CCAAC notes that other consumer protections, including the prohibition of misleading or deceptive conduct, may apply in circumstances where the component pricing provision does not. CCAAC also notes that any amendments to the ACL would be complementary to the card scheme arrangements currently monitored by the RBA.

CCAAC finds that there is likely to be a public benefit associated with a consumer regulator being capable of ensuring that credit and debit card surcharges are limited to the reasonable costs of card acceptance. Consumer expectations are unlikely to be met if a business were able to apply surcharges that go beyond the reasonable cost of card acceptance, simply by describing them by using different and ambiguous terms. CCAAC would encourage industry stakeholders to provide clear and easily understood information to consumers on the meaning of such terms. Further consultation would support policymakers in determining the need for additional consumer laws to facilitate public enforcement action, including with regards to the matters of:

- whether existing regulatory tools are sufficient to support efficient and effective enforcement action by regulators;
- the basis upon which enforcement action should be taken;
- how the law should apply to surcharges or fees applied upon use of a credit card where they are not described as a credit card surcharge; and
- how such an obligation would interact with card scheme rules and how enforcement responsibilities should be shared across Australia's consumer regulators.

Policymakers may also wish to consider whether a specific policy response is required for surcharges applied to transactions that are processed online, including whether the ACCC should investigate the issue more broadly.

PART V — CONCLUSION

There are few consumer benefits associated with surcharges and fees that go beyond the recovery of costs. Where surcharges and fees go beyond cost recovery, they may be used to subsidise other business activities. While this may benefit those consumers who are able to avoid a surcharge or fee, any benefit is a transfer from one consumer to another. As the fairness of this scenario is for others to judge, CCAAC is concerned that excessive or non-transparent surcharges and fees may be used as a mechanism to weaken price signals for consumers, and to make goods or services appear cheaper than they really are (whether intentionally or not).

CCAAC is concerned that surcharges and fees may be detrimental to consumers where they go beyond the recovery of costs, but recognises that surcharges and fees play an important role in supporting efficient outcomes in some markets. This role is highlighted through the reduction in the overall costs of the payment system following the RBA's capping of interchange fees and its removal of 'no-surcharge' rules in 2003. In this respect, CCAAC supports the ability for merchants to recover costs, in a manner that is consistent with current policy settings.

CCAAC acknowledges that it may be difficult for some businesses to apply surcharges and fees in a manner that precisely reflects the reasonable costs of card acceptance. Many businesses apply 'rules of thumb' that may occasionally produce surcharges that go beyond the recovery of costs. CCAAC is more concerned about circumstances where businesses deliberately apply excessive surcharges and fees that act as a profit centre, as a strategic business decision. As highlighted in the study, this concern arises because of the potential to impose barriers on a consumer's ability to observe and compare prices which in turn may increase transaction costs, such as through increased search and information costs as well as result in consumer detriment from the misleading nature of a surcharge or fee.

Based on the submissions received and the results of the Survey, CCAAC considers that the ACCC would be an appropriate agency to investigate more broadly issues around excessive or non-transparent surcharges and fees. As the Survey indicated, participants consider more enforcement action is warranted in industry sectors that typically lack strong competitive pressures.

Australia's consumer protection laws are capable of applying where surcharges and fees are applied in a manner that is misleading for consumers and generally do not require surcharges or fees to be limited to the recovery of costs — the focus of consumer protection laws is on how this information is represented. CCAAC has also come to the view that there is a role for public enforcement action where card scheme rules and their enforcement mechanisms are insufficient to restrict surcharges and fees that are applied in a manner that causes consumer harm. Policymakers may also wish to consider how the relevant provisions of the ACL could ensure that consumers are provided with clear and transparent pricing information.

Currently card schemes are allowed to limit credit card surcharges, and most do so or are in the process of doing so. Throughout the consultation process, a number of issues relating to the enforcement of card scheme rules were raised by the schemes and their participants.

Accordingly, CCAAC considers that there may be scope to improve the card schemes' ability to enforce their card scheme rules by providing greater objectivity and transparency over what may constitute the reasonable costs of card acceptance.

However, given that recent changes to the Standards came into effect on 18 March 2013, policymakers may wish to allow an appropriate period of time to pass, in order to assess the need for further action.

REFERENCES

Adams, S 1997, *The Dilbert Future: Thriving on Stupidity in the 21st Century*, HarperCollins Publishers, New York.

The Department for Business, Innovation and Skills (UK) 2012, *Explanatory Memorandum to the Consumer Rights (Payment Surcharges) Regulations 2012*, 2012 no. 3110, viewed 9 July 2013. <http://www.legislation.gov.uk/uksi/2012/3110/pdfs/uksem_20123110_en.pdf>.

MasterCard 2011, *MasterCard Rules*, July 2011, viewed 9 July 2013. <http://www.mastercard.com.au/merchant/_assets/docs/merchants/BM-Entire_Manual_public.pdf>.

OECD 2010, *Consumer Policy Toolkit*, Organisation for Economic Co-operation and Development, OECD Publishing.

RBA 2011, *Review of Card Surcharging: A Consultation Document*, June 2011, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/publications/consultations/201106-review-card-surcharging/index.html>>.

RBA 2011, *A Variation to the Surcharging Standards: A Consultation Document*, December 2011, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/publications/consultations/201112-variation-surcharging-standards/index.html>>.

RBA 2012, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, June 2012, Reserve Bank of Australia, Sydney, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201206-var-surcharging-stnds-fin-ref-ris/attachment-3.html>>.

RBA 2012, *Guidance Note: Interpretation of the Surcharging Standards*, Reserve Bank of Australia, Sydney, November 2012, viewed 9 July 2013. <<http://www.rba.gov.au/payments-system/reforms/cards/201211-var-surcharging-stnds-guidance/guidance-note.html>>.

Treasury 2006, *The Australian Guidelines for Electronic Commerce*, Australian Government, Canberra, viewed 9 July 2013. <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1083>>.

The Treasury 2011, *Consumer Policy in Australia: A companion to the OECD consumer policy toolkit*, Canberra, viewed 14 June 2013. <http://www.consumerlaw.gov.au/content/consumer_policy/downloads/Companion_to_OECD_Toolkit.pdf>.

APPENDIX 1 — SUMMARY OF SURVEY RESULTS

As part of the study, consumers were invited to respond to a survey to share their views and experiences when encountering credit card surcharges and transaction fees. A total of 9019 responses to the survey were received.

The Survey’s respondents do not represent a random sample of the Australian population. An invitation to respond to the Survey was made available to users that visited the consultation page for the CCAAC study into *Credit card surcharges and non-transparent transaction fees: A study* (located on the CCAAC website). CCAAC is also aware that the survey was directly linked by third-parties that provided consumers with information on surcharging practices prior to completing the survey. Accordingly, the Survey’s results should be interpreted with caution.

On the other hand, CCAAC considers that the volume of responses and the nature of the reported experiences highlight that consumers are dissatisfied with the surcharging practices of certain industries, including the airline industry.

TABLE A1 — SURCHARGES ENCOUNTERED BY CONSUMERS

Respondents were asked how frequently they encountered surcharges of various magnitudes. For surcharges above 2.5 per cent, 43 per cent of respondents indicated that they are often encountered while 2 per cent of respondents indicated that they are never encountered. On the other hand, for surcharges of 0 per cent, 39 per cent of respondents indicated that they are often encountered.

Table A1	How frequently do you encounter credit card surcharges or transaction fees of:		
	0 per cent	below 2.5 per cent	above 2.5 per cent
Often	38.86%	20.49%	42.57%
Sometimes	23.13%	45.89%	41.08%
Rarely	20.68%	25.95%	13.92%
Never	17.33%	7.67%	2.44%

For these questions, respondents were told that rarely is less than 5 per cent of the time, sometimes is between 5 and 50 per cent of the time and often is more than 50 per cent of the time.

SURCHARGE AMOUNTS

Respondents were asked about the most that they have had to pay for a surcharge or fee. The most common complained of surcharge amount was an \$8.50 surcharge applied to an airline per ticket, per flight leg. Examples include a surcharge of \$34 for two return flights and a \$17 surcharge on flights that cost \$49 each way. Other consumers complained about similar surcharges of varying amounts applied by other airlines.

Other examples of surcharges that did not indicate the trader or product type included:

- \$13 surcharge on \$63 purchase;
- \$25.5 surcharge on \$78 purchase; and
- \$20 surcharge on \$60 purchase.

Another type of surcharge that was complained of was a high surcharge on a large purchase, for example:

- \$950 on \$50,000 purchase.

Taxis were also represented with consumers identifying that they had to pay a 10 per cent surcharge. Another consumer identified that they had to pay a surcharge of \$30 at a hotel, but did not nominate what the cost of the purchase was.

INDUSTRIES AND BUSINESSES APPLYING SURCHARGES

Respondents were asked which businesses or industries charge the most for credit card surcharges or transaction fees. A number of businesses and industries were identified as charging the most for surcharges and transaction fees. These included:

- airlines (7600 responses, 84.27 per cent of the sample);
- ticketing agencies, cinemas and theatres (1308 responses, 14.50 per cent of the sample);
- taxis (1135 responses, 12.58 per cent of the sample);
- telecommunications and utility providers (701 responses, 7.77 per cent of the sample); and
- accommodation and tourism providers (657 responses, 7.28 per cent of the sample).

TABLE A2 — DISCLOSURE OF SURCHARGES AND FEES

Respondents were asked about the disclosure of credit card surcharges and transaction fees, and 67 per cent of respondents indicated surcharges and fees are often disclosed at the final stages of a checkout or an online payment form. Approximately 14 per cent of respondents indicated that they were often informed about a surcharge or fee at the time of displaying the price of goods and services.

Table A2 When credit card surcharges or transaction fees are applied to transactions (including online transactions), how often is the surcharge or fee made known to you:

	at the time of displaying the price of goods and services	at the checkout or at the early stages of an online payment form	at the final stages of a checkout or an online payment form
Often	13.73%	14.24%	67.07%
Sometimes	25.06%	40.34%	23.81%
Rarely	35.10%	33.67%	7.33%
Never	26.11%	11.75%	1.80%

For these questions, respondents were told that rarely is less than 5 per cent of the time, sometimes is between 5 and 50 per cent of the time and often is more than 50 per cent of the time.

TABLE A3 — SURCHARGES APPLIED TO PAYMENT METHODS

Respondents were asked about whether they had encountered surcharges or fees in the past 12 months when using certain payment methods. MasterCard and Visa had the highest number of respondents indicating that they had encountered a surcharge with those payment methods, with 61 per cent and 77 per cent (respectively) of respondents indicating so. Cash and cheque had the highest number of respondents indicating that they had not encountered a surcharge with those payment methods, with 71 per cent and 30 per cent (respectively) of respondents indicating so.

Table A3 In the past 12 months, have you encountered a surcharge or fee when using the following payment methods:

	MasterCard	Visa	EFTPOS	Other card schemes	BPAY	PayPal	Cheque	Cash
Yes	61.15%	77.43%	37.76%	33.60%	20.08%	29.83%	8.94%	6.77%
No	5.11%	3.74%	41.32%	11.48%	53.22%	37.35%	29.66%	70.56%
N/A	33.74%	18.84%	20.91%	54.93%	26.70%	32.82%	61.40%	22.66%

TABLE A4 — CONSUMER BEHAVIOUR WITH FEE-FREE ALTERNATIVES

Respondents were asked how they responded when they encountered a surcharge. When fee free payment methods were available, 53 per cent of respondents indicated that they opted to use an alternative fee-free payment method.

Table A4	In the past, when you have been asked to pay a credit card surcharge or transaction fee that you felt was high, and practical fee free alternative payment options were available, did you usually:
Continue with the purchase using your credit card and pay the credit card surcharge or transaction fee	26.32%
Opt to use an alternative fee free payment method;	53.34%
Cancel the purchase and find another supplier; or	11.72%
I have not encountered a credit card surcharge or transaction fee of this description.	8.62%

TABLE A5 — CONSUMER BEHAVIOUR WITHOUT FEE-FREE ALTERNATIVES

Respondents were asked how they responded when they encountered a surcharge. When fee free payment methods were not available, 73 per cent of respondents indicated that they opted to continue with their purchase and pay the surcharge or fee and 24 per cent of respondents opted to cancel the purchase and find another supplier.

Table A5	In the past, when you have been asked to pay a credit card surcharge or transaction fee that you felt was high, and practical fee free alternative payment options were not available, did you usually:
Continue with the purchase using your credit card and pay the credit card surcharge or transaction fee;	73.08%
Cancel the purchase and find another supplier; or	24.44%
I have not encountered a credit card surcharge or transaction fee of this description.	2.48%

TABLE A6 — SURCHARGES AND CONSUMER ATTENTION

Respondents were asked how frequently they pay attention to credit card surcharges and transaction fees when making purchasing decisions. A total of 78 per cent of respondents indicated that they often or always check to see whether a surcharge or fee applies.

Table A6	How frequently do you pay attention to credit card surcharges and transaction fees when making purchasing decisions?
Rarely – I look at the purchase price and assume surcharges or fees are negligible;	5.03%
Sometimes – I pay attention only if prompted by the merchant;	17.25%
Often – I will usually look to see whether a surcharge or fee applies before purchasing; or	35.09%
Always – I make sure that I find out whether a surcharge or fee applies before purchasing.	42.62%

CONSUMER UNDERSTANDING OF TERMS

Respondents were asked whether they knew the meaning of terms such as ‘credit card surcharge’, ‘service fee’, ‘transaction surcharge’, ‘administration fee’ or ‘processing fee’ and why they thought those fees were applied.

Respondents commented that they were generally unclear about what the terms meant, with 3516 respondents (38.98 per cent of the sample) specifically answering ‘no’. While 2317 respondents (25.69 per cent of the sample) specifically answered ‘yes’, many of these respondents noted that they understood these surcharges to be a way to make additional profit, and were not to recover costs.

TABLE A7 — CONSUMER AWARENESS OF MERCHANT OBLIGATIONS

Respondents were asked about their awareness of merchant’s consumer law obligations as well as recent changes allowing card schemes to prevent merchants from applying surcharges that go beyond the reasonable cost of providing credit card payment methods. In relation to the Australian Consumer Law, 77 per cent of respondents indicated they were aware that businesses are prohibited from misleading consumer about the price of goods or services. In relation to card scheme rules, 67 per cent of respondents indicated that they were not aware of recent changes.

Table A7	Are you aware that under the Australian Consumer Law, businesses are prohibited from misleading consumers about the price of goods and services?	Are you aware of recent changes that allow card schemes (such as Visa and MasterCard) to prevent merchants from applying surcharges beyond the reasonable cost of providing credit card payment methods?
Yes	77.24%	33.27%
No	22.75%	66.71%

IMPROVEMENTS TO DISCLOSURE PRACTICES

Respondents were asked to identify any improvements to disclosure practices that could be made to increase the transparency of credit card surcharges or transaction fees. A range of suggestions were provided by respondents. Some suggestions included:

- offering discounts if customers pay via surcharge-free methods;
- increasing public awareness about what surcharges and fees are for;
- notifying consumers that a surcharge or fee applies at the beginning of the transaction;
- banning surcharges and fees altogether;
- compulsory signs in retail outlets;
- including surcharges or fees in the price of goods or services;
- using large or bold print when displaying information about surcharges and fees;
- only allowing merchants to pass on the costs that they incur;
- restricting surcharges to a flat percentage fee on all transactions;
- banning surcharges applied on a per-person or per-item basis; and
- requiring businesses to substantiate a fee or surcharge.

APPENDIX 2 — OVERVIEW OF THE CONSULTATION PROCESS

This study has been informed by the views of consumer and industry stakeholders.

Consumers were invited to respond to a confidential survey about their experiences with credit card surcharges. A total of 9019 responses to the survey were received. CCAAC wrote to consumer organisations and industry stakeholders inviting them to provide a brief submission on the study's terms of reference. On its website, CCAAC extended this invitation to other interested stakeholders.

Written non-confidential submissions are available on the CCAAC website located at <http://www.ccaac.gov.au>. Non-confidential submissions were received by:

<i>Abacus-Australian Mutuals</i>	<i>CHOICE</i>
<i>Accommodation Association of Australia</i>	<i>Commonwealth Bank</i>
<i>American Express</i>	<i>Consumer Action Law Centre</i>
<i>Australian Hotels Association</i>	<i>Visa</i>
<i>Australian Payments Clearing Association</i>	<i>Qantas</i>
<i>Cabfare (National Billing Group)</i>	<i>Tyro</i>

In addition, a series of targeted consultations with key stakeholders were conducted by Ms Carolyn Bond AO and Ms Lynda Edwards. These discussions were held through teleconferences taking place between Tuesday 18 June and Thursday 4 July 2013.

Participant	Date
American Express	18 June 2013
Australian Retailers Association/Australian Merchant Payments Forum	19 June 2013
CHOICE	20 June 2013
Consumer Action Law Centre	20 June 2013
MasterCard	20 June 2013
Qantas	20 June 2013
Visa	21 June 2013
Jetstar	4 July 2013

The CCAAC secretariat liaised with government stakeholders including the RBA, the ACCC and ASIC.

APPENDIX 3 — OVERVIEW OF ACCC COMPLAINTS

CCAAC had the opportunity to review a summary of complaints received by the ACCC in relation to credit card surcharges and transaction fees.

Between 1 January 2011 and 8 March 2013 the ACCC received 331 contacts that raised specific concerns about the imposition of a surcharge as an additional fee to the purchase price of the good or service.

Category	Number	Percentage of contacts in relation to credit card surcharges and transaction fees.
Contacts relating to:		
credit card surcharges	244	73.72%
booking or transaction fees	18	5.44%
surcharges calculated as a fixed amount	149	45.02%
surcharges calculated as a percentage amount	103	31.12%
where the surcharge was identified as being undisclosed	154	46.53%
surcharges of more than \$5	108	32.63%
air transportation businesses	115	34.74%
amusement and other recreational activity businesses	18	5.44%
passenger car rental and hiring businesses	16	4.83%
taxi and other road transport businesses	16	4.83%
telecommunications businesses	10	3.02%
accommodation businesses	5	1.51%