

Date: 2 December 2024

Communications Department
Reserve Bank of Australia
8 Chifley Square
Sydney, NSW 2000

By email only to: rbainfo@rba.gov.au; pysubmissions@rba.gov.au

Dear Sir/Madam,

Re: Review of Merchant Card Payment Costs and Surcharging

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers, representing over 20,200 members of the Victorian legal profession, as well as individuals who work with them. The LIV has a long history of contributing to, shaping, and developing effective state and federal legislation and policies.

The LIV welcomes the opportunity to provide feedback to the Reserve Bank of Australia (**RBA**) in response to the Merchant Card Payment Costs and Surcharging Issues Paper (the **Issues Paper**). The LIV notes that the Issues Paper forms part of the RBA's Review into Retail Payment Regulation, which aims to examine the costs merchants face when accepting card payments and the RBA's surcharging framework.

This letter is informed by the views and expertise of members of the LIV's Competition & Consumer Law Committee and Business & Corporate Law Committee. These Committees comprise legal professionals with substantial experience in advising and representing both consumers and businesses across a wide range of matters. Their collective knowledge spans key areas of consumer protection, competition law, and business regulation, providing a robust foundation for the perspectives shared in this submission.

Executive Summary

The LIV advocates for a balanced approach that recognises the need for merchants to recoup costs associated with card payments, that provides genuine protections for consumers, and that allows for other 'no costs' payment mechanisms. The LIV submits that these costs should not be passed on to the consumer through surcharges, especially with regard to debit card transactions, which are the most commonly used method of payment.

General Comments

Post-COVID, digital payments have become the dominant transaction method in Australia (and sometimes the only method available), accounting for billions of dollars in transactions annually.¹ However, owing to current cost of living pressures, concerns have emerged about the transparency and

¹ 'Mobile wallet transactions skyrocket to \$93 billion, as 98.9% bank interactions take place digitally', *Australian Banking Associations* (Web Page, 7 June 2023) <<https://www.ausbanking.org.au/mobile-wallet-transactions-skyrocket-to-93-billion-as-98-9-of-bank-interactions-take-place-digitally/>>.

fairness of card payment costs, particularly as they impact consumers and small merchants. The current card payment costs system is complex, unclear, and lacks transparency, and the presence of compounding fees such as interchange fees, scheme fees, and surcharge costs disproportionately affect small merchants due to their lack of market power to negotiate these costs as compared to the large retailers.

One of the core challenges faced by small-scale merchants, many of whom are under significant financial pressure due to the rising cost of doing business, lies in the lack of transparency and the complex web of hidden, fluctuating fees that merchants face, particularly when processing card payments. In addition, interchange fees charged by banks and card networks have a particularly harmful impact on small merchants. These fees are often non-negotiable and can vary greatly, making it difficult to manage the costs of running a business. The impact of such fees is further exacerbated by opaque scheme fees payable to card networks, which are largely unregulated and make up a significant portion of the overall costs of accepting card payments. Without proper disclosure of these fees from the banks and card networks, unfair pricing practices can go unchecked - increasing financial strain on small merchants.

The LIV supports the lowering of interchange fees, as well as the regulation and proper disclosure of scheme fees. The LIV considers that transparent fee structures will help create a fairer playing field for small merchants and promote competition within the payment services industry and may potentially avoid consumers bearing the costs for merchant card payments in an attempt for the merchants to reduce their costs. In addition, the LIV supports the RBA encouraging Least Costs Routing practices, which can assist lower overall card payment costs. Finally, the LIV encourages the RBA to consider current reforms in the United Kingdom and European Union to ban the practice of surcharging customers to cover for their merchant costs.

Responses to Consultation Questions

Interchange Fees

Q1: Is there a case for lowering the level of interchange benchmarks or caps? Should the difference between the interchange fees paid by big and small businesses be limited in some way?

The LIV notes that the RBA's 2019–2021 Review of Retail Payments Regulation (the **Review**)² found no strong public policy case for lowering interchange benchmarks, despite the Productivity Commission's recommendation on eliminating all card interchange fees by the end of 2019 to mitigate payment choice distortions and related costs to merchants.³ In its Review, the RBA maintained that there was no rationale for significant interchange fee payments in a mature card system,⁴ but it refrained from

² Reserve Bank of Australia, 'Review of Retail Payments Regulation – Conclusions Paper' (Web Page, October 2021) <<https://www.rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/conclusions-paper-202110/pdf/review-of-retail-payments-regulation-conclusions-paper-202110.pdf>>.

³ Productivity Commission, 'Competition in the Australian Financial System – Overview and Recommendations' (Report 89, 29 June 2018) 35.

⁴ Reserve Bank of Australia, 'Review of Retail Payments Regulation' (Conclusions Paper, October 2021) 3 ("the 2021 Review").

further regulating the interchange fees given the then-recent implementation of the interchange fee schedule only four years prior.⁵

However, the LIV is concerned about the effect interchange fees are having on small businesses. In particular, the LIV is concerned that small merchants will bear the costs of high interchange fees on debit card payments as the corollary effect of the recent announcement made by the Australian Government on banning surcharges on debit cards from 1 January 2026, which is subject to the RBA's current review.⁶ Additionally, revenue from interchange fees on debit cards, which make up the majority payment type, are being used to fund consumer rewards programs for credit card schemes. This practice raises concerns around equity and fair distribution of processing costs.

For these reasons and given the current economic pressures facing small merchants and the fact that interchange fees remain high, the LIV submits that the RBA must consider a model where smaller merchants benefit from lower interchange fees to ensure they are able to sustain their business and not resort to practices like surcharging consumers.

Q2: Should interchange regulation be extended to foreign card transactions in Australia?

The LIV is of the opinion that interchange regulation for foreign card transactions is not currently a significant concern, given that foreign-issued cards continue to make up a very low percentage of total card payments in Australia.⁷ The LIV submits that the RBA's focus should be on maintaining transparency of the interchange fees, and on ensuring these continue to be made public to encourage competition.

Q3: Is there a case for reducing the complexity, and/or enhancing the transparency, of interchange fees? If so, how?

The LIV is of the view that a strong case exists for reducing the complexity and enhancing the transparency of interchange fees.

As mentioned above, the current system is complex, lacks transparency, and does not ensure best practice for small business merchants – rather, it is more advantageous to large scale retailers, providing them with strategic interchange rates that are not typically available to small merchants. The complexity of interchange fee schedules, particularly when a small merchant is on an unblended plan, prevents merchants from understanding their costs properly - resulting in them bearing compounding costs that are often only realised much later.

For these reasons, the LIV submits that interchange fee schedules *should* prioritise simplicity and clarity, and that their transparency should be enhanced, to ensure merchants understand and have greater control over their choices.

⁵ Ibid.

⁶ Prime Minister of Australia, 'Reducing card surcharges for Australians and small businesses' (Media Release, 15 October 2024) <[Reducing card surcharges for Australians and small businesses | Prime Minister of Australia](#)>.

⁷ See above n 4 at p 41.

Scheme Fees

Q4: Is there a case for further transparency of scheme fees to promote efficiency and competition? If so, what additional information would be beneficial?

The LIV agrees that further transparency of scheme fees would promote efficiency and competition and refers to the RBA's findings in the 2021 Review that meaningful disclosure of scheme fees could solve some of the concerns relating to lack of transparency and complex fee structures.⁸

The LIV considers that scheme fees should be transparent and publicly available to ensure fair competition in the market. The current practice of scheme fees lacking proper oversight may be contributing to rising scheme fees that put additional pressure on payment costs to both merchants and consumers. As surcharges on debit transactions are currently being reviewed, and potentially banned, other forms of competitive pressure should be put on scheme fees to ensure they do not unfairly burden small merchants.

The LIV acknowledges that the purpose of the card networks' charge scheme fees is to cover costs associated with services like refunding customers who do not receive goods purchased, and refunding the merchants who fund the refunds via 'chargebacks', and other protections against fraud.⁹

The LIV is also aware that RBA's consideration of restricting the amount card network companies can charge was met with a resounding threat to halt providing refunds to defrauded customers.¹⁰ Additionally, the LIV is aware that card networks have refused to allow the RBA to publish full data it has acquired on the scheme fees, claiming commercial sensitivity. However, the LIV submits that ensuring transparency and fair competition must be the key focus and must outweigh the claims of commercial sensitivity. Scheme fees should be transparent and public, which would assist to apply competitive pressure and drive down these costs.

Q5: Is there a case for regulatory action to reduce the complexity or growth of scheme fees? If so, what form should this take?

The LIV agrees that a case exists for regulatory action to reduce the complexity and/or growth of scheme fees.

The LIV considers the current practice of card networks having multiple fees within their schemes that are regularly adjusted, removed, or added exacerbates the complexity of the payment system and complicates payment costs for merchants and consumers alike.

The LIV submits that the RBA should take regulatory action to reduce the complexity and/or growth of scheme fees, including by setting clear guidelines relating to the disclosure of scheme fees.

⁸ See above n 4 at p 4.

⁹ James Eyers, 'Payment Giants threaten to halt refunds for fraud' *Australian Financial Review* (Online, October 17 2024) <[Mastercard, Visa in pre-emptive attack on RBA card fee restrictions](#)>.

¹⁰ James Eyers, 'Payment giants threaten to halt refunds for fraud' *Australian Financial Review* (online, 17 October 2024) <<https://www.afr.com/companies/financial-services/mastercard-visa-make-pre-emptive-attack-on-rba-card-fee-restrictions-20241016-p5kin0>>.

Q6: What other regulatory action should the RBA consider to increase the competitive pressure on scheme fees?

The LIV notes that following the 2021 Review, card networks have been required to share their scheme fee schedules with the RBA. However, aggregate data on the same has not been made public due to card networks concerns that they contain commercially sensitive information.¹¹ The lack of clarity and disclosure of current scheme fees is the foremost concern, particularly if these schemes are changed often, resulting in complicated fees for merchants that are then passed on to the consumer.

The LIV agrees with and highlights the RBA's assessment that scheme fee transparency specifically could lead to several benefits and that disclosure requirements could discourage any changes to fee schedules or related rules that may be anti-competitive or could have the effect of circumventing the interchange fee regulations.¹² The LIV submits that these scheme fees should be made public or, at the very least, that aggregate data should be publicly disclosed.

Least Cost Routing (LCR)

Q7: How do stakeholders assess the functioning and effectiveness to date of LCR for in-person transactions? Is further regulatory intervention needed? What might that look like?

The LIV is aware that the RBA has encouraged LCR in recent years and that there has been a significant uptake in the amount of Payment Service Providers (**PSPs**) who utilise this. The LIV submits that the RBA should continue to encourage LCR by continuing to set explicit expectations that PSPs offer and promote LCR in more common payment types. To further this, the LIV suggests that the RBA consider offering financial incentives or subsidies to small businesses implementing LCR, which will allow them to shift to this practice and level the playing field against larger retailers.

Payment Service Providers (PSPs)

Q8: Is there a case for greater transparency of fees, wholesale costs and market shares for some payment services? If so, what form should this take? What benefits or drawbacks might arise from implementing any of these measures?

The LIV is of the view that a strong case exists for greater transparency of fees, wholesale costs, and market shares for some payment services. In line with the overall position that the payment services system should be more transparent, the LIV submits that transparency of fees, wholesale costs, and market shares for payment services would benefit small merchants and consumers alike.

¹¹ See above n 4 at p 8.

¹² See above n 4 at p 45.

Q9: Should PSPs be required to provide individual merchants more detailed information on their regular statements (or through other channels)? How could this information be presented without creating additional complexity for merchants?

The LIV agrees that PSPs should be required to provide individual merchants with more detailed information on their regular statements; merchants need visibility into the fees they are paying, including a breakdown of what those fees cover, to make informed decisions and manage their costs effectively.

The information should be presented clearly and simply by adopting a standardised summary format, as occurs in the United Kingdom, in regular statements. This would provide essential details in a clear and concise manner, such as total fees charged, the proper breakdown of fees (e.g. transaction fees, service fees, etc.), pricing structure (e.g., flat rate, percentage of transaction, tiered pricing) and, if applicable, comparison of previous periods

By focusing on standardised, easy-to-understand categories and avoiding excessive technical jargon, merchants would have a transparent view of the costs they are incurring without being overwhelmed by excessive details. This approach ensures transparency while maintaining simplicity for merchants.

Q10: Should PSPs be required to publish standardised information on their pricing and services for merchants (in line with reforms introduced in the United Kingdom)?

As mentioned above, the LIV supports the publishing of standardised information on PSPs pricing and services for merchants, in line with the reforms introduced in the United Kingdom. The LIV notes that in the United Kingdom, PSPs are required to provide merchants with a summary box containing key price and non-price information and to provide an online quotation tool on their website, which enhances transparency for merchants, allowing them to easily access and compare essential pricing details and service offerings across different providers. By making this information more accessible and standardised, it encourages better competition in the market, ultimately benefiting merchants through more informed decision-making and potentially lower costs.

The LIV supports the adoption of this approach in Australia.

Q11: What other regulatory measures should the RBA consider to improve competition between PSPs?

In addition to enhanced price transparency and strengthening consumer protections, the LIV suggests that the RBA consider implementing open data standards for PSPs as a regulatory measure to enhance competition within the industry. By introducing open data standards, PSPs would be required to share certain non-sensitive transaction data with other providers or third parties, which would facilitate better comparison of services, encourage innovation, and promote competition.

However, it is important to carefully balance this approach with the protection of trade secrets and sensitive business information. While non-sensitive transaction data could be shared, PSPs should retain control over proprietary data, such as algorithms, customer insights, and pricing strategies that provide them with a competitive advantage. Clear guidelines would be necessary to ensure that open data standards do not compromise the commercial confidentiality or intellectual property of PSPs, while fostering competition and transparency.

Surcharging

Q12: Is there a case for revising the RBA's surcharging framework? If so, which options or combination of options would best address the current concerns around surcharging? What other options should the RBA consider?

The LIV agrees that there is a case for the revision of the RBA's surcharging framework and that certain changes are long overdue, especially relating to lowering or prohibition on the passing of surcharges to consumers.

The LIV considers that transactions are a part of business, and that fees imposed upon transactions should not be passed on to consumers – especially given that it is becoming increasingly common for merchants to not accept cash, leaving consumers no choice, and results in forcing them to pay using a payment type that requires them to pay a fee. Under the current model, merchants are encouraged not to pass on any surcharge higher than the cost of the transaction - though some merchants still pass on higher surcharges to their consumers in other forms.¹³ There remains to be an issue of the complexity of the fees and the lack of transparency regarding the charging of additional fees for transactions. Businesses are only required to provide proof of purchase for transactions over \$75 (including GST), which contributes to a lack of transparency regarding costs paid by consumers. This issue is especially evident in real-world scenarios, where consumers rarely request proof of purchase leading them to be unaware of costs that are transferred to them.

In the United Kingdom, Regulation 6A of the Consumer Rights (Payment Surcharges) Regulations 2012 expressly prohibits a 'payee' from imposing a surcharge on the 'payer' for using a particular method of payment. The prohibition applies where both the payment service provider of both the payee and the payer are located within the EEA and the surcharge relates to one of the payment methods listed in Regulation 6A(1)(a)-(c).¹⁴

The LIV supports the adoption of this approach in Australia, and it submits the RBA should consider revising its surcharging framework accordingly.

Q13: What are the implications for merchant payment costs from changes to the surcharging framework? Could the RBA address these with other regulatory actions?

The LIV submits that there are likely to be several key implications for merchant payment costs if changes are implemented to the surcharging framework - particularly if surcharges on card payments are more tightly regulated or banned.

If surcharging is banned and there is no reduction in interchange fees or scheme fees, merchants will likely face higher costs. Interchange fees or scheme fees are typically passed on to consumers through surcharges, and banning surcharging could limit merchants' ability to recover these costs, potentially reducing their margins. Merchants may also be discouraged from accepting certain types of card

¹³ Lucas Baird, 'Businesses pass on higher fees to customers for Qantas points' *Australian Financial Review* (online, 14 October 2024) <<https://www.afr.com/companies/financial-services/businesses-pass-on-higher-fees-to-customers-for-qantas-points-20241010-p5kh89>>.

¹⁴ *Consumer Rights (Payment Surcharges) Regulations 2012* (UK) SI 2012/3110, r 6A.

payments (such as credit cards with high interchange fees), which may lead to a shift away from card payments toward cheaper alternatives like debit cards or cash, affecting consumer behaviour and merchant sales.

To ensure that the right balance is struck between protecting consumers and ensuring fairness for merchants, the LIV submits that the RBA should exercise its regulatory authority to implement several actions to simplify the surcharge framework. This could include standardising surcharging rules across payment types and providers and reducing the administrative burden on small merchants. The RBA should continuously and actively regulate the card payment system to influence the rules set by major card schemes (e.g., Visa, MasterCard) to ensure that fees are reasonable and transparent. The RBA could also conduct reviews of the payment system to determine whether the current cost structures currently observed are fair and efficient, particularly if changes to the surcharging framework are to be made.

Other Regulatory Actions

Q14: Are there any other regulatory actions that the RBA should consider taking in response to the issues raised in this paper?

The LIV submits that there are other regulatory actions the RBA should consider taking in response to the issues raised in this paper.

The LIV is particularly concerned about the passing on of transaction costs to consumers by merchants, which puts a strain on the financial capacity of Australians and exacerbates costs of living pressures. To address this issue, the LIV submits that the RBA should consider the following regulatory actions:

- **Implementing stronger transparency requirements:** Greater transparency in merchant pricing practices is needed to reduce ambiguity, prevent the imposition of hidden charges, and to give consumers greater control over their purchasing decisions. Merchants should be required to display the total price of a good or service upfront, including transaction fees, and clearly distinguish between the price of goods or services and any additional fees charged for payment processing, and should be required to facilitate other payment mechanisms that do not involve fees to the consumer.
- **Strengthening maximum surcharge regulations:** Stronger regulations regarding the maximum surcharge merchants are allowed to pass on to consumers are needed. If the complete ban on surcharging is not feasible, the LIV advocates for maximum caps set at a reasonable level that reflects the actual cost to merchants of processing a payment, preventing them from passing on excessive fees. A clearer definition of what constitutes a 'reasonable' surcharge and consistent enforcement could deter merchants from charging disproportionately high amounts.
- **Enhancement of oversight:** the RBA's monitoring mechanisms need to be strengthened to ensure that merchants adhere to pricing regulations and do not unfairly inflate transaction fees. The RBA could collaborate with consumer protection agencies, such as the Australian Competition and Consumer Commission, to conduct audits or take enforcement actions against merchants found to be violating rules. This would help ensure compliance and increase accountability in the retail sector.
- **Implementing educational initiatives:** Educational activities aimed at increasing both merchant and consumer awareness of payment fees and their rights in relation to these charges are needed.

Merchants and consumers alike need to better understand how to identify excessive surcharges and how to file complaints.

- **Improved regulation and review of merchant agreements:** Stronger regulation of the terms of merchant agreements with payment service providers are needed, to ensure that fees are competitive and transparent. The RBA should consider mandating clear, standardised contractual language that makes it easier for merchants to understand what they are being charged for, and for consumers to know if they are being overcharged.

The LIV submits that these regulatory actions could help balance the interests of both consumers and merchants, ensuring a fairer and more transparent payment system while addressing concerns regarding the enforcement of regulations.

Q15: Are there any issues in, or implications for, the broader payments ecosystem that the RBA should be aware of when designing a regulatory response to any of the issues discussed in this paper?

The LIV is not aware of any other issues, besides those discussed above, in the broader payment ecosystem. That being said, the LIV submits that consideration must be given to the rising cost of living pressures that merchants and consumers are currently facing when drafting regulations relating to the merchant card payment costs and surcharging.

The LIV welcomes the opportunity to discuss any issues arising from this letter. Please do not hesitate to contact Fernando Gallieto, Section Lead of the Commercial Law Section on (03) 9607 9333 or at fgallieto@liv.asn.au.

Sincerely yours,



Adam Awty
Chief Executive