



21 July 2011

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*cc: Dr Malcolm Edey, Assistant Governor (Financial System)*  
*cc: Mr Darren Flood, Senior Manager, Payments Policy Department*

Dear Dr Kent

## **REVIEW OF CARD SURCHARGING SUBMISSION**

Visa welcomes the Reserve Bank of Australia (RBA) *Review of Card Surcharging* (the Review).

We are concerned that surcharging in Australia has reached excessive levels that are negatively and unfairly impacting on Australian's cost-of-living. As such, we feel that a sensible point has arrived to undertake reforms to improve the current arrangements.

Our submission sets out our views on how the Visa International Operating Regulations can be used to either prevent or limit surcharging.

Again, we thank you for the opportunity to participate in the Review and should you have any further questions about the submission, please feel free to contact Adam Wand, Visa's Head of Public Affairs at 02 9253 8890.

Yours sincerely

**Vipin Kalra**  
Country Manager



**Reserve Bank of Australia  
Review of Card Surcharging**

July 2011



# Review of Card Surcharging

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## 1. Summary of Issues for Consultation

In the Review Consultation Paper, the Reserve Bank of Australia (RBA) has listed the following seven questions as summary issues to guide consultation.

Visa's detailed position is contained in the body of this submission, but our threshold responses to each of these issues are set out below.

RBA Question	Visa's Response
<b>Is there a case for modifying the Standards to allow schemes to limit surcharges?</b>	Yes, in light of the maturity of the spread of surcharging and the concerning rise in excessive and blended surcharging, we believe reform is necessary. Our preferred position is to modify the RBA Standards to allow the reinsertion of the No Surcharging rule into scheme rules. If this is not acceptable to the Payments System Board (PSB), then the RBA Standards should be modified to allow schemes to limit surcharging to the actual cost of card acceptance determined at the scheme level.
<b>Is a surcharge cap best implemented by the Board setting a transparent and specific permissible cap that is specified in the Standards, and may then be imposed in scheme rules? Or, should the Standards allow scheme rules to limit surcharges to an amount that is either reasonably related, or equal, to each particular merchant's cost of card acceptance?</b>	We support the RBA Standards allowing scheme rules to limit surcharging to a fair portion of the actual cost of acceptance, where the actual cost of acceptance is defined, at the maximum, as the Merchant Service Fee (MSF) calculated at the scheme average. We believe, however, that merchants receive substantial benefits from card acceptance and that the maximum surcharge should ideally also be reduced by the level of these benefits. We do not support the inclusion of concepts of "reasonableness" as the MSF provides a clear, exact and industry-wide understood measurement.

<p><b>Should there be some level of tolerance allowed around any surcharge cap?</b></p>	<p>We feel that this will become an unnecessary consideration once a clear, exact and industry-wide understood measurement is put in place. Some parties may argue for a wider definition of the cost of card acceptance but Visa strongly maintains that a MSF-based limit is the fairest and most accurate definition.</p>
<p><b>Is the merchant service fee an appropriate measure of the cost of card acceptance (that can be applied consistently across all merchants)?</b></p>	<p>Yes, although we believe the application of any MSF-based limitation should also reflect the substantial benefits merchants receive from card acceptance.</p>
<p><b>Should the no-surcharge Standards clarify that, notwithstanding any surcharging cap, scheme rules cannot prohibit merchants from applying a surcharge that is either a blended rate for each card scheme or the cost of accepting each card <i>within</i> a card scheme? Are there alternative ways to allow for differential surcharging?</b></p>	<p>No. We feel that surcharging practices should track the approach taken on interchange regulation, which forms the proposed core of the MSF-based limit on what could be passed onto cardholders.</p>
<p><b>Should the no-surcharge Standards require acquirers to pass on information about the merchant's cost of acceptance for each different card type if it is requested by the merchant? And, for those on 'interchange-plus' pricing, should the no-surcharge Standards require acquirers to pass on information about the weighted average merchant service fee if it is requested by the merchant?</b></p>	<p>No, if the scheme average MSF is used as the primary basis of determining the actual cost of card acceptance, this data is already collected and published by the RBA.</p>

**Is there a case for disclosure of the cost of card acceptance by merchants? Or, would it be sufficient for the Bank to collect and publish more detailed data on merchant service fees, such as the range and average of merchant service fees across merchant categories for each card scheme?**

Yes, there is a case for additional consumer disclosure at point-of-sale but this in itself will not deliver the necessary reforms to prevent excessive and blended surcharging. We support the use of scheme rules to deliver additional transparency. We also support additional measures by the RBA to increase the level of transparency available to the community in relation to surcharging.

## 2. Executive Summary

- Surcharging is not an efficient tool; it results in significant disincentives against the use of electronic payments and has not made the Australian payments system more efficient or more competitive.
- There is no evidence that surcharging has led to any reduction in prices charged by merchants.
- Ultimately we feel schemes should be allowed to reinsert the no surcharge rule in their respective governing rules.
- We feel that, if surcharging is to remain in operation in Australia, reforms are now urgently needed.
- In Australia, excessive surcharging is adding to cost-of-living pressures.
- The Visa International Operating Regulations (Visa Rules) provide a workable framework to facilitate reforms of surcharging practices.
- Surcharging should be prohibited in the Card-Not-Present environment.
- Surcharges should be limited by a relationship to the actual transaction cost of accepting a card transaction and nothing else.
- The Merchant Services Fee (MSF) is the best calculation of cost of card acceptance.
- However, merchants should be permitted to pass on only a portion of the MSF to consumers in order to reflect the distribution of benefits from card transactions between merchants and consumers and the fact the cost of non-card payment options are already included in the base price of goods and services.
- Several important principles would also need to apply to a MSF-limited arrangement, namely:

- surcharges should only be calculated and applied at the scheme level; and
- surcharge limits should differ between scheme-level credit and debit transactions.
- Visa can develop clear and workable enforcement procedures that would operate through our acquiring financial institution clients and we believe would deliver an effective outcome.
- In addition to the above, surcharging transparency at point of sale by merchants needs to be considerably improved.



### 3. Surcharging in Australia

#### Appropriate time for review

The Payments System Board (PSB) reforms required the removal of the 'no surcharge' rule from the scheme operating rules of Visa and MasterCard in relation to credit cards in 2003. This was affected through an RBA Standard. Other schemes voluntarily agreed to apply the same arrangement.

This removal requirement was extended, also by RBA Standard, to Visa Debit in 2007, with MasterCard Debit voluntarily agreeing to the same arrangement.

It has now been close to a decade since the original reforms and when the incidence and level of surcharging practices are assessed we feel that the operation of surcharging in Australia has reached a point of maturity. This should allow a proper system-wide assessment which in turn will allow sensible reforms to be put in place to ensure that surcharging practices operate as the RBA, and indeed to the Federal Parliament who explicitly provided the RBA the authority to issue such standards, intended.

We feel that this assessment must be conducted through the prism of fairness, efficiency and cost-of-living awareness.

#### Extent of surcharging

##### Clear data from multiple sources

There is now available clear data from multiple independent sources that show the incidence of surcharging is now widespread in certain sectors. There is also data to show that surcharging of Visa cardholders is frequently excessive.

As was captured very clearly in the 15 November 2010 CHOICE report entitled *Credit Card Surcharging in Australia 2010* which was commissioned by the New South Wales Government, cardholder exposure to surcharging in Australia is now very high, with 88 percent of 1,374 survey respondents reporting paying a credit card surcharge in the previous year.

The findings of East & Partners six-monthly *Merchant Acquiring and Cards Markets* research program, also illustrates the incidence of surcharging today, as well as high level of merchant consideration of surcharges. This research is based on direct interviews with 2,294 Australian merchants. In its associated press materials, East & Partners indicated that the research, conducted at the end of 2010, had found:

*“that 28.3 percent of all merchants are currently applying a surcharge, a substantial increase from 3.7 percent recorded at the end of 2005. An additional 52.2 percent of all merchants are planning to introduce or are actively considering adding surcharges, up from 34.7 percent in 2005.*

Accordingly, the research found that between 2005 and 2010, there has been a 764 percent rise in the prevalence of actual surcharging..

Visa also recently commissioned UMR Research to undertake consumer research on the incidence of, and community attitudes to, surcharging. This research, conducted in May 2011, found that 68 percent of consumers had paid a credit or debit card surcharge.

### *Excessive surcharging*

While Visa believe that the costs to Australian consumers and to the payment system of surcharging clearly outweigh any claimed benefits, Visa is particularly concerned by the spread of surcharges that go beyond a merchant recouping the genuine costs of accepting card payments. This occurs through the inclusion of a growing range of other normal business costs as a justification for a higher surcharge level as well as merchants simply using surcharging as an additional revenue stream. These ‘add-in’ costs are often only marginally related, if at all, to the true costs of accepting electronic payments.

We believe that the implementation of surcharging was never meant to become a source of extra profit for merchants. The abovementioned East & Partners *Merchant Acquiring and Cards Markets* research program also found that “the average surcharge applied has also increased over the past five years from 1.4 percent to 2.5 percent”. As is captured in RBA data, there has been no increase in the cost of accepting payments over that time period.

Indeed, the RBA has itself reported in the 2008 *Australia’s Payments System* that, in some cases, merchant surcharges ‘appear considerably higher’ than the actual costs.

It is Visa’s view that it could not have been the intention of the surcharging regime to facilitate such a situation, and this is confirmed in the Review Consultation Paper where it is stated that “in recent years, it has become apparent that merchants have increasingly been adopting a number of surcharging practices that have the potential to distort price signals and thereby reduce the effectiveness of the surcharging reforms.”

## Surcharging should be prohibited

We believe that surcharging is not an economically efficient tool to deliver the stated goals of allowing merchants to recoup the costs of card acceptance, nor as a means of allowing merchants to “direct” cardholders to other payment forms. Rather, surcharging has significant negative impacts on consumers by increasing consumer costs and negatively impacting on rising cost-of-living pressures while failing to provide any relevant “signal” to the cardholder.

We also feel that the cost of accepting a payment card is no different from other costs such as cash handling or electricity, and like these costs should be absorbed into the overall costs of the business.

Allowing retailers to surcharge forces consumers to pay for the substantial benefits that merchants receive from accepting cards, which include greater pools of customers and increased sales, increased security of payment, lower physical security costs and faster payment acceptance and settlement times, while generally shifting more than 100 percent of the cost of electronic payments to consumers, with no regard to these merchant benefits.

Furthermore, surcharging only one payment method – card payments – has the net effect of completely muting the true cost of other payment methods. Considering the widely held industry view that the true cost of accepting payment methods such as cash and cheque are higher or considerably higher than electronic payment methods, we feel that selective surcharging in the manner permitted in Australia is deeply problematic.

Australians paying with a card and paying a card usage surcharge are effectively also paying the cost of that business accepting other payment methods, such as cash, which have been absorbed into the business running costs and thus already form part of the base price of the good or service that the card surcharge is added to. This is inequitable, unfair and amounts to an economy wide disincentive to the electronification of payments.

Finally, we feel that the way that the application of surcharging has now evolved in Australia is problematic, due especially to the high incidence of excessive and blended surcharging. As a result of these practices, when merchants surcharge Visa cardholders pay far more than 100 percent of the costs associated with Visa acceptance and payment processing.

Given the harm to consumers from surcharging and the absence of offsetting benefits, Visa believes permitting the relevant cards schemes

to reinstitute the 'no surcharge' rule would be the best policy outcome for Australian consumers and economic efficiency.

We note that many legislatures around the world support this view and have passed laws that prohibit surcharging outright. These include bans in France, Italy, Austria, Taiwan, Korea, Argentina and Brazil, as well as bans in numerous United States state-level jurisdictions including the three largest US states, California, New York, and Texas.

### **Recommendation 1**

The relevant RBA Standard should be modified to allow the reinsertion of the no surcharging rule in to scheme rules.

#### **4. Reform of surcharging**

Should the reinsertion of the no surcharging rule be unsupported by the PSB, and subject to our strong and ongoing view that surcharging is inefficient and negatively impacts on Australian's cost-of-living, we offer the below views on how surcharging practices could be most efficiently and effectively reformed in Australia.

##### **Limited RBA powers**

The RBA has stated several times that it does not possess the authority to regulate merchant activities. Comments made by Assistant Governor Dr Malcolm Edey at the 2011 Payments and Cards Australasia Conference in Sydney, recognise that the RBA's authority to regulate merchant- surcharging practices is either very limited or non-existent.

Most recently in the Review Consultation Paper the RBA confirmed that "the Bank has no direct influence over merchant pricing".

Based on this, Visa welcomes consideration of the use of scheme rules, in our case the Visa International Operating Regulations (Visa Rules), as a means to enable reform of the operation of surcharging in the Australian market.

##### **Cap set by the Payments System Board**

The Review Consultation Paper has raised the possibility of any reform to 'cap' surcharging being enacted in one of two ways. The first of these is through the development of a cap by the PSB that would then be imposed by schemes. This would be the lowest cap that schemes could impose.

Such an approach to reform would be less appealing to allowing schemes to limit surcharges to the cost of acceptance (see below). That said, we believe the use of cap set by the RBA/PSB would nevertheless be a superior outcome compared to the current arrangements in which no limitations or controls exist in relation to surcharging.

##### **Principles**

If the PSB were to employ a cap set by itself, we would highlight several critical principles that we submit would need to govern how such a cap should work.

First, it would be critical that the cap bear some relationship to the actual cost of card acceptance, as determined at the scheme level.

Secondly, and building on the above point, the cap arrangement should enshrine differential rates as between schemes. That is, there would need to be multiple and different surcharge caps in order to reflect significant differences in the cost of card acceptance between different card schemes, as opposed to one blended cap that was applicable to all payment schemes

Thirdly, we submit that differential caps would be needed as between credit and debit.

### Issues

Whilst Visa maintains that a PSB-set cap is a superior outcome compared to the current arrangements in which no limitations or controls exist in relation to surcharging, we would highlight two high level concerns with how such a cap might impact surcharging behaviour.

A PSB-set cap is very likely to lead to merchants moving surcharge rates closer or exactly to the new cap, even if current surcharge levels are below the cap. This would have a negative impact on both economic efficiency and Australians' cost-of-living pressures – both issues we feel should benefit not suffer from any surcharging related reforms.

We are also concerned that this approach would effectively “lock-in” in a surcharge rate. This would mean that where a merchant's costs of acceptance decline, these benefits would not necessarily be passed onto consumers through matching lower surcharges.

### **Recommendation 2**

A PSB-set cap on surcharging is a less preferred option for reform when considered against limiting surcharges to the actual cost of acceptance and should be considered only as a fall back option for reform.

If it was to be employed it would be critical that it bear some relationship to the actual cost of card acceptance, that it enshrine a differential rate as between schemes and as between credit and debit and that it involve all schemes.

The second 'capping' policy option raised in Review Consultation Paper involves an approach based on utilising scheme rules. This is discussed in detail the following section.

## 5. Use of Visa Rules

The most effective means of limiting surcharging in Australia, thereby boosting fairness and economic efficiency and reducing cost-of-living pressures, is to allow schemes to use their rules to limit surcharging to the actual cost of card acceptance.

Before outlining how Visa submits such an arrangement would operate, we wish to make an important distinction between how we propose surcharging should operate differently in the ‘Card Not Present’ (CNP) and ‘Card Present’ (CP) environments.

### Card Not Present environment

If a core part of the rationale behind why surcharging has been implemented is to seek to make the costs of different forms of payment transparent and in turn to allow merchants to “direct” their customers to other payment forms or to allow customers to choose alternatives, we believe there is less of a role for surcharging when there are limited alternative payment options for customers to be directed to choose from and the potential for merchant abuse is high.

Where alternative non-electronic payment options do not exist, or exist only nominally and not in a practical and usable way, then allowing surcharging on electronic payments cannot fully deliver on the steering outcomes the RBA is seeking, yet also opens the door for particularly problematic merchant surcharging practices.

We believe that the CNP or online environment represents just such a situation. Consumers have either less, or in some cases currently no useable choices when they shop online. As such, this absence of a cash benchmark means imposing any additional costs on non-cash payment methods such as cards is less valuable in light of the more limited steering opportunities while at the same time more subject to abuse by merchants.

This concern has been supported in submissions to various inquiries by a variety of bodies, including the submission by the Consumer Action Law Centre (CALC) on 30 June 2008, to the RBA’s own review into aspects of the payments system. In their submission the CALC wrote:

*“...we believe that the RBA may need to consider how it can reformulate its standards and other regulatory measures to prevent surcharging being used in an anti-competitive way by merchants in concentrated markets.*

*In certain markets that rely on online payment (such as the low-cost airfare market), there is no practical*



*alternative but to pay by credit or scheme debit (eg. Visa debit)."*

The Review Consultation Paper also specifically notes that "the incidence of surcharging is much higher for online purchases than those made in person" and that industry participants and consumers have both expressed concerns over surcharging practices where there is a "lack of genuine payment alternatives when credit card surcharges are applied online".

Furthermore, in a CNP situation where no, or almost no, real and useable choices other than electronic payments exist to process payments and where there is a regulated level of permissible interchange (as is the case in Australia), the alleged concern that a merchant has to take a card at any price is removed.

This issue was again highlighted in the RBA's June 2011 *Strategic Review of Innovation in the Payments System: Results of the Reserve Bank of Australia's 2010 Consumer Payments Use Study* (Study). The Study included consumers being asked to respond to different in-store or CP environment hypothetical scenarios but went on to note the different circumstances in operation in a CP and CNP environment in relation to surcharging. It stated that "consumers have less ability to use alternative payment methods when faced with a surcharge for remote payments". Visa fundamentally agrees with this position and believes surcharging rules should also capture such a distinction.

Visa understands that one of the RBA's additional policy objectives in permitting surcharging was to create downward pressure on card acceptance costs, and on interchange in particular. However this pressure is already in place through the RBA's limitations on the credit and debit interchange that may be applied to all domestic Visa transactions. Having opted for regulatory controls to reduce acceptance costs, an environment has developed where merchants can quite easily apply surcharges *above* their cost of acceptance. This is most easily done in the CNP channel, where consumers have fewer payment options and thus are more willing to endure the surcharge, even at high levels.

For these reasons, Visa feels that in the CNP environment, surcharging should not be permitted. It may be the case that if this recommendation was acted on, this arrangement could reasonably be subjected to a review within a three or four year period to determine if no practical alternative still exists for payment in the CNP environment.

### Recommendation 3

Surcharging should not be permitted in the Card Not Present environment.

#### Card Present environment

In the CP environment we submit that the Visa Rules could be used to deliver measures to stop excessive surcharging, to boost transparency for consumers and to implement a successful enforcement and compliance process to ensure merchants meet the arrangements set out in any amended Visa Rules.

Visa is prepared to bear the costs of this arrangement in order to deliver the improvements for consumers and efficiency.

#### Actual cost of card acceptance

Visa submits that surcharges in the CP environment should be limited to the actual cost of card acceptance.

Further, we do not believe that concepts such as a “reasonable relationship” are either agreeable or necessary. We submit that if used, a “reasonableness” concept would simply reintroduce a high degree of doubt into any new arrangement that would very likely see unfair and excessive surcharging re-emerge. “Reasonableness” would not act as an adequate control to prevent excessive surcharging of Australian consumers. Rather, we feel that a clearly defined formula could be developed to establish what can be passed on by merchants to consumers by way of surcharge.

The Review Consultation Paper raises the issue of whether “some level of tolerance should be allowed around any surcharge cap”. We feel that this will become an unnecessary consideration once a clear, exact and industry-wide understood measurement is put in place (see below).

We would also note at that in other key jurisdictions there have been recent legislative moves that follow a similar ‘cost of acceptance’ limitation approach. For example, on 23 June 2011, the European Parliament adopted the proposal for a Directive of the European Parliament and the Council on Consumer Rights<sup>1</sup>. At Article 19, the Directive states:

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<sup>1</sup> COM(2008)0614-C6-0349/2008-2008/0196(COD)

*“Fees for the use of means of payment*

*Member States shall 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.”*

We are advised that this Directive is aimed at the online environment and the next step in its passage is formal approval by the Council of Ministers which is expected to take place in July. This Directive is binding in its entirety on European Union Member States and obliges them to transpose this particular surcharging limitation into national law within a maximum of two years.

We would also note that some EU Member States such as Spain, already have such laws in full operation.

**Recommendation 4**

Surcharges should be limited to the actual cost of card acceptance and no concepts of reasonableness should be, or need to be, incorporated into this approach.

*Merchant Service Fee cap*

We believe any cost of acceptance formula should be based on the Merchant Service Fee (MSF), which is a well understood cost benchmark to all payments system parties. However, merchants also enjoy substantial benefits as a result of their accepting cards. These benefits include greater pools of customers and increased sales by way of credit facilities provided by card Issuers, increased security of payment, lower physical security costs and faster payment acceptance and settlement times.

Allowing retailers to shift 100 percent (or as we have seen, even more than 100 percent) of the cost of card payments to consumers is not reflective of the flow of benefits resulting from the presence and prevalence of card transactions.

This approach also neglects to acknowledge that the cost of non-card payment options such as cash are already incorporated into the base price of goods and services and so consumers using card payments are also paying for the cost of non-card options, which is highly

inequitable. Given this, we believe the cap should also be reduced by the value merchants receive from acceptance of card payments.

The widely used industry definition of MSF comprises the total fee levied by an acquirer on a merchant, which may reflect the acquirer's costs of interchange, scheme fees, processing fees for the processing of card payments, and a profit margin. The MSF represents the absolute cost of accepting card payments for all merchants, although, as noted, the actual cost of acceptance that is able to be passed on through surcharging should be offset according to the distribution of benefits.

Costs in addition to this clearly defined charge either do not relate to card payment acceptance and form a part of the general cost of conducting commercial business or relate to the acceptance of multiple payment channels and, as such, also fall within the category of the general costs of conducting a business. Specifically on terminal costs, card acceptance terminals process more than just scheme credit and debit cards and the costs of other payment acceptance terminals, such as cash registers, are not passed on in surcharges to customers, so we see no case for this to occur in relation to card acceptance terminals.

In the Review Consultation Paper the MSF is described as "a more transparent and consistent alternative" to including definitions of 'other costs'. In relation to the concept of 'other costs', Visa rejects any assertion that many of these other costs are fairly or solely related to the cost accepting card payments. They relate to the general functioning of a business.

By simply defining what the cost of acceptance is for card transactions, we feel that merchants will still be able to pass on their legitimate card acceptance costs. We do not believe that surcharging has been or will be a proper or effective way of sending price signals to consumers, or that sending such price signals has improved competition in any way. Nevertheless, to the extent that the RBA believes that surcharging is a way of sending price signals to consumers and that this is desirable, defining the cost of acceptance to exclude other overhead costs would deliver on the RBA's core policy objectives.

This simple definitional approach would also operate to exclude a range of other costs of doing business that merchants have claimed as the basis for their surcharges. These additional costs range from communications expenses and administration and staff training costs through to contingencies and fraud costs. Each of these costs either does not relate specifically to card payment acceptance and is also incurred across other payment forms, or does not relate to card payments in any way at all.

To preserve the fair commercial confidentiality of acquirer-merchant relationships, as captured in the specific merchant's MSF rate, and to avoid a scenario where potentially hundreds of thousands of different MSF rates are being used as the surcharge limitation, we feel that the scheme average MSF as collected and published by the RBA, is the best way to employ the MSF as a surcharge limitation.

This again reflects the basket averaged approach employed by the RBA to regulate interchange and will preserve a simple and consumer-friendly single MSF level for each network.

We feel this approach is simple and clear, closely reflects pre-existing industry concepts and could be easily included in the Visa Rules.

#### **Recommendation 5**

Actual cost of acceptance should be defined as the scheme-level average Merchant Service Fee (MSF) but only a portion of this benchmark should be able to be passed on as a surcharge to consumers.

#### *Principles to govern how MSF limit operates*

In addition to the proposed MSF portioned approach to surcharging in the CP environment, we believe several important principles should govern how the formula is applied.

##### *(i) No differential surcharging within schemes*

We do not support differential surcharging within a scheme, that is, different rates of surcharging for different card product types within a scheme, such as between Gold and Platinum. We feel that surcharging practices should track the approach taken on interchange regulation, which forms the proposed core of the surcharge that would be passed onto cardholders.

The RBA manages interchange in Australia through a weighted average basket that ensures, despite different card products attracting different interchange fees, a basket average of 50 basis points at the scheme level (i.e. Visa Credit) or 12 cents (i.e. Visa Debit). We feel that surcharges should follow the same model. The RBA also reflects this in how it captures and publishes MSF rates presently, that is, at the scheme level. We feel this is appropriate.

It is also worth noting that significant resources have been invested by the industry to meet the RBA's weighted basket interchange approach and our proposal seeks to leverage this significant investment with a continuation of what are now well understood processes.

Further, to differentially surcharge at the product level could theoretically lead to hundreds of different surcharge rates, reflective of the number of different card products (and therefore MSF rates) in the Australian market. This would in turn lead to significant technology issues for acquirers and merchants and considerable confusion for consumers on the costs associated with card usage.

Visa uses differential product and acceptance interchange rates within the interchange basket to achieve important system benefits. For example, a higher interchange rate may be used to drive innovation in new product development, just as lower interchange, such as through specific rates for certain Merchant Category Codes, can be used to open new acceptance categories and channels. Allowing merchants to surcharge at product level would effectively end this important nuance in how interchange operates in the Australian payments system, thereby negatively impacting the roll out of payment innovations.

We understand there have been views expressed in support of allowing different surcharges at the product level but we feel the practical implications of implementing this approach are very significant. We think our proposal would be simpler, more consumer friendly and better reflect the RBA's existing scheme-level regulation of interchange

#### **Recommendation 6**

Surcharges should only be calculated and applied at the individual scheme level.

(ii) *Different limits for credit and debit surcharging reflecting different costs*

In relation to credit and debit, we support an arrangement under which different surcharges limits operate for credit and debit, reflective of the different costs of both payment methods. This approach again replicates that employed by the RBA in relation to interchange which recognises the differences between credit and debit by imposing differing interchange basket caps.

The costs of accepting credit and debit cards are different, yet we increasingly see the presence not just of surcharging on debit

transactions but the same flat surcharge being imposed on both debit and credit transactions. This means debit transactions are being significantly blended upwards, which destroys price transparency for a lower cost payment tool.

We understand that merchants may, in some cases, be paying a flat blended credit/debit MSF. However, merchants can and do negotiate with acquirers for unblended credit and debit rates, and would be free to do so if they wished to surcharge and could not surcharge at the same level for credit and debit.

### **Recommendation 7**

Maximum limits on permissible surcharges for credit and debit transactions should remain separate, reflecting the different costs of acceptance for both.

#### *Acquirer/Merchant Agreements*

The Review Consultation Paper raises the issue that under the current RBA Standards “acquirers and merchants may come to an agreement that the amount of the surcharge will be limited to the costs of card acceptance”. The Review Consultation Paper goes on to state that it is not clear to what extent this has been used in practice.

Anecdotally Visa understands that in relation to four-party schemes MSFs at least, this mechanism has been used in only a very limited way, and possibly not at all. In the CHOICE surcharging report, it was stated “it seems these parties [merchants and acquirers] are unwilling to agree to limit surcharging. Banks may fear attempts to do so would cause their merchants to look for another acquiring bank that doesn’t try to limit its surcharges... And it is easy to see why retailers wouldn’t want to put a cap on their credit-card revenue”<sup>2</sup>.

If the suggestion is that this mechanism may provide the sole means to deliver changes to the operation of surcharging in Australia, we would submit that it is an insufficient tool. We do not support further use of this mechanism as an effective means to deliver the important policy outcome of limited surcharging to the actual cost of acceptance.

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<sup>2</sup> CHOICE p 17, CHOICE Report into Credit Card Surcharging in Australia; 2011

It is important to note however that if reforms are endorsed to occur via changes to scheme rules, these reforms will need to be reflected at some stage in acquirer/merchant agreements. In this mode, such agreements will play an important role.

### **Recommendation 8**

By themselves, Acquirer/Merchant agreements will not provide a successful mechanism through which to deliver an actual cost of acceptance limit on permissible surcharges, but such agreements will form an important component of a scheme rules-based solution..

#### *Other issues: Honour All Cards Rule*

Visa would also take this opportunity to make a further point we feel is related to the issue of surcharging. If surcharging is to continue to be permitted in Australia – even in the manner proposed in this submission – we feel that a corollary of this should be a genuine reconsideration of the issue of honouring all cards.

Namely, if a merchant is able to levy a cost recovery charge for accepting all types of card payments, a compelling case exists in our view for a matching rule that all types of card payments should be accepted. This was the impact of the previously permitted ‘Honour All Cards’ rule which was also required to be removed from the Visa Rules as a result of the RBA Standards. The dual removal of both this rule and the ‘No Surcharge’ rule has fundamentally altered the merchant’s position in a way that we feel is seriously detrimental to consumer choice.

#### *Compliance and enforcement measures*

The final part of the proposed Visa Rules framework in relation to surcharging relates to both compliance and enforcement measures to ensure the amended Visa Rules are being adhered to.

Under the Visa Rules, merchant enforcement is largely undertaken by acquiring financial institutions in a manner established under the Visa Rules. We would propose that this well established approach be continued in relation to the enforcement of any new Visa Rules in relation to surcharging.



Exactly how this would be done is open to many permutations, and Visa would remain cognisant of the cost and other impacts on acquirers and merchants in developing and deploying new arrangements. We would also develop such arrangements in consultation with key stakeholders to ensure a workable, streamlined but effective outcome. We currently believe that several automated solutions might be able to be deployed that would deliver reasonable outcomes with minimal ongoing burden.

Without prejudicing such future consultations, in general terms a possible compliance pathway would include elements such as the below:

- following the amendment of the Visa Rules we would need to establish what enforcement and compliance actions acquirers would need to undertake in relation to their merchants;
- we would also establish what auditing and compliance activities Visa itself would undertake;
- actions may include getting acquirers to ensure, that merchant service agreements have been updated to include terms that incorporate the new arrangements;
- acquirers could also need to ensure that merchants are compliant with the new Visa Rules and their own merchant service agreements and report any list of merchants who have not complied;
- in addition to the acquirer provided non-compliant merchant lists, Visa could employ the abovementioned audit program which validates merchant compliance as per the acquirer reporting, with such an audit program comprising a range of measures including online website checks and mystery merchant visits;
- Visa would then provide notification to acquirers for non-compliant merchants detected through such a program, including requests to remedy non-compliance; and
- after a period of time, Visa could conduct a follow-up audit of merchant channels to validate merchant compliance.

Ultimately, as with other areas of the Visa Rules, acquirers would be responsible for ensuring non-compliant merchant are brought back into compliance with Visa Rules and, where non-compliance persists, a graded sanction approach could be imposed on acquirers. Visa would always work with acquirers well in advance of such steps to avoid the

need to arrive at a point of non-compliance that would result in a financial penalty.

The final area to note in relation to compliance and enforcement is that the resources of any compliance and enforcement regime could be, as needed, targeted more (or less) intensively on particular problematic merchant sectors, such as travel and entertainment, and particular payment channels, such as online, where it known excessive surcharging is occurring.

### **Recommendation 9**

Schemes should be permitted to include compliance and enforcement procedures in their rules in relation to the new surcharging arrangements.

## 6. Transparency

Visa submits that at present, the level of transparent and appropriately timed and disclosed information flowing to consumers about surcharging is inadequate.

We feel that the Visa Rules could be amended to require Australian acquirers to ensure that merchants who impose a surcharge under the arrangement proposed in this submission fulfill a minimum disclosure regime in favour of consumers.

We submit that merchants could be required to:

- inform the cardholder that a surcharge is assessed;
- Inform the cardholder that it is the merchants decision to levy a surcharge;
- inform the cardholder of the surcharge amount or rate;
- include notices or signs disclosing that the merchant assesses a surcharge and require that such notices or signs be in a conspicuous location or locations at the merchant's physical point of sale, or, in the absence of a physical point of sale, be displayed prominently or communicated so that it can be reasonably assured that all cardholders presenting a Visa card will be aware of the surcharge; and
- be clearly displayed or communicated in the transaction environment or process, including (if there is a physical point of sale) at the terminal / cashier's desk and be of as high a contrast as any other notices or signs displayed.

There may also be a case for increased disclosure on consumers' printed receipts of the amounts of surcharges paid.

Finally, we would observe that it is likely the case that transparency is an area best supporting by a public regulatory agency having clearer authority to undertake enforcement. This agency, likely to be either the Australian Securities and Investments Commission (ASIC) or the Australian Competition and Consumer Commission (ACCC), should also be adequately funded to undertake such an explicit role, something we feel has not been the case to date.

### **Recommendation 10**

Transparency for consumers in relation to surcharging should be improved, including through the inclusion of new disclosure requirements for merchants to be included in scheme rules and extra and clearer powers and funding for an appropriate public regulatory agency.

## **7. Conclusion**

As set out above, Visa is deeply concerned that surcharging levels in Australia are excessive. This is exacerbating cost-of-living pressures and is a significantly disincentive to the use of efficient electronic payments which are essential for a modern and innovative economy.

Visa believes there is an opportunity to either remove surcharging from the Australian marketplace or use the Visa Rules, as with the scheme rules and similar governing arrangements of other schemes and quasi-schemes, to manage surcharging by ensuring surcharges actually reflect only a fair portion of the cost of card acceptance and strike a fair balance between consumers and merchants.

