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# ***Businesses banned from charging excessive surcharges***

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## ***In brief***

The *Competition and Consumer Amendment (Payment Surcharges) Bill 2015* (Cth) (the Bill) was passed by both houses of Parliament on 22 February 2016. The Bill amends the *Competition and Consumer Act 2010* (Cth) (CCA) by prohibiting a corporation, in trade or commerce, from charging an excessive payment surcharge.

The Bill is intended to ensure that payment surcharges:

- are not excessive; and
- reflect the cost of using the payment methods for which they are charged.

Whether a surcharge will be deemed excessive is dependent upon whether there is a Reserve Bank of Australia (RBA) standard or regulation in place. The RBA is currently consulting on a standard and is due to make a decision in May 2016. The Bill will not become operative until the standard is in place. Clients who impose credit card surcharges should monitor these developments carefully.

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## ***In detail***

The Bill amends the CCA by inserting a new part: *Part IVC – Payment surcharges*.

The object of *Part IVC* is:

- to ensure that payment surcharges:*
- (a) are not excessive; and*
  - (b) reflect the cost of using the payment methods for which they are charged.*

Section 55B will prohibit a corporation, in trade or commerce, from charging an excessive payment surcharge. A *payment surcharge* is defined in s 55A as:

- (a) an amount charged, in addition to the price of goods or services, for processing payment for the goods or services; or*

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(b) an amount (however described) charged for using one payment method rather than another.

What constitutes an *excessive* payment surcharge is provided for in s 55B(2):

*A payment surcharge is excessive if:*

(a) the surcharge is for a kind of payment covered by:

(i) a Reserve Bank standard; or

(ii) regulations made for the purposes of this subparagraph; and

(b) the amount of the surcharge exceeds the permitted surcharge referred to in the Reserve Bank standard or the regulations.

A failure to comply with s 55B may result in a penalty under s 76 of the CCA by a court order to pay a pecuniary penalty; or alternatively, the Act authorises the Australian Competition and Consumer Commission to issue an infringement notice. If an infringement notice is issued it will impose a penalty of 600 penalty units (\$108,000) for a listed corporation and 60 penalty units (\$10,800) for a body corporate that is not a listed corporation.

The legislative provisions will only have effect once the RBA sets a new standard or the Governor-General makes regulations regarding the permitted surcharge for a payment method.

In December 2015 the RBA published a consultation paper addressing its standard. The paper concluded that competition and efficiency in the payments system could be enhanced by ‘moving away from a limit on surcharges based on ‘the reasonable cost of acceptance’ to one based on fees paid by a merchant to its acquirer (or payment facilitator), and obliging the provision to merchants of information on average acceptance costs for each system.’ Annexed to the consultation paper was a set of proposed draft standards. *Draft Standard No. 3* provided that merchants may make a charge for accepting payments of a particular type, but this charge must reflect the cost to the merchant of accepting that payment type.

The RBA sought industry views on issues raised in the consultation paper and the proposed draft standards by 3 February 2016. Forty-three substantive submissions were received which revealed widespread support for the proposed changes. The major concern expressed was from financial institutions who argued providing statements to merchants on average acceptance costs for each payment system would be difficult, particularly in instances where an organisation’s billing process relies on multiple or third-party systems. It was also submitted that providing annual statements to merchants would be a significant change. These concerns resulted in some stakeholders advocating for a significant implementation delay before the proposed changes take effect.

During the *Payments Innovation 2016 Conference* held on 23 February 2016 the RBA reported that while it recognises an implementation period will be necessary, it will be exploring options for ensuring the standards take effect as soon as possible. A final decision by the RBA on any regulatory change is expected in May 2016.

### ***The takeaway***

While merchants will still be able to surcharge different payment methods, the surcharge will be limited to the merchant’s service fee and any additional fees the merchant is required to pay its payments service provider. This will require information from banks and financial institutions about the actual cost of accepting certain payment methods, and an understanding of the new RBA standard.

If your business charges payment surcharges the new regime has important implications for you. You

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should monitor developments in this area and review your payment acceptance practices. At PwC our staff have the expertise to conduct a systematic review of your payment acceptance practices to ensure your business is compliant with any of the forthcoming requirements.

### ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

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