VISA – of payments and penalties

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Authors: Murray Deakin, Yolanda Chora

In brief

On 4 September 2015, Wigney J in the Federal Court ordered that Visa pay a penalty of $18 million plus the Australian Competition and Consumer Commission's (ACCC) costs of $2 million for its role in restricting those who provide currency conversion gaining access to Visa's payment card network.

The issue of substantive liability was resolved through an agreement between the ACCC and Visa on the eve of the trial by an admission from Visa that it breached the exclusive dealing provisions (s.47(2)) of the Competition and Consumer Act (CCA).

Following the CFMEU Case it was no longer open for the ACCC and Visa to put a proposed penalty before the Court for its consideration. The maximum penalty was calculated by reference to annual turnover of the relevant Visa entity during the 12 months prior to the contravention.

The case presents some interesting lessons on selecting the appropriate party for liability and whether the value of the benefit of the contravening conduct can be determined.

In detail

The substantive issues

In brief, the substantive issues involved actions by Visa in curtailing the activities of Dynamic Currency Conversion (DCC) providers. DCC providers are independent of Visa and supply acquirers (financial institutions servicing merchants) with services which enable acquirers to convert a cross-border transaction into the currency of the country in which the payment card was issued at the point of sale and prior to the transaction being submitted to the international electronic payment card network.

This can only occur if the network supplier (in this case Visa) permits DCC services to be offered by the acquirer. In Australia, acquirers had to comply with a number of specific conditions in their agreement with Visa including registering themselves, their merchant outlets and their DCC provider prior to offering DCC services. An annual registration and monitoring fee of US$20,000 was payable. As at April 2010, over 20,000 merchant outlets in Australia had been registered.

On 27 April 2010, Visa modified its rules relating to DCC services requiring all acquirers to re-register their existing DCC providers and merchant outlets. However, only acquirers, DCC providers and merchant outlets already actively offering DCC services as at 30 April 2010 were eligible to re-register.

Re-registration was required by 1 June 2010 and an annual registration fee of US$45,000 was payable per acquirer per country. New receipt requirements were also imposed.

The new rules effectively prevented acquiring banks and DCC providers from offering DCC services on the Visa payment card network to new merchant customers and restricted expansion of DCC services on the Visa card network in Australia. The changes were notified in Australia on or about 28 April 2010.

Following the changes, a number of concerns were raised with Visa and competition law authorities. On 7 October 2010, Visa announced it was lifting its 'moratorium' on the registration of new merchants. Therefore the contravening conduct was effective for approximately 5 months.

The ACCC brought proceedings against a number of Visa entities[1] and the trial was to commence on 31 August 2015. On the eve of the trial, the ACCC and Visa reached an agreement to resolve the liability aspects of the trial whereby Visa Worldwide, being the company which relevantly contracted with financial institutions in Australia in relation to their participation in the Visa payment card network, admitting that its conduct in implementing and enforcing the restrictive conditions involving the use of DCC in relation to point of sale payment transactions amounted to a contravention of s.47(2)(d) and (10) of the CCA. The ACCC had originally alleged contraventions of section 46, the misuse of market power provisions, as well as section 47.

Section 47 relevantly provides:

> (2) A corporation engages in the practice of exclusive dealing if the corporation:
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> (a) supplies, or offers to supply, goods or services;
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> (b) supplies, or offers to supply, goods or services at a particular price; or
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> (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation;
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> on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:
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> (d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
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> (10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a corporation engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:
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> (a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
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> (b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

In his decision, Wigney J made a declaration in the terms sought by the ACCC and consented to by Visa Worldwide to the effect that Visa Worldwide had contravened section 47(2).

[1] Visa Inc, Visa Worldwide Pte Ltd, Visa U.S.A. Inc and Visa AP (Australia) Pty Ltd

Parties and penalties

Visa Inc is the ultimate parent company of the main operating Visa entities, including Visa Worldwide. Visa Worldwide is a Singapore incorporated and based company. Since 2009, Visa Worldwide has been the Visa entity responsible for contracting with financial institutions in Australia in relation to their participation in the Visa payment card network. It has also been the Visa entity responsible for enforcing, in relation to Australian financial institutions, the relevant rules that regulate the operation of the Visa payment card network. In the year ending 20 September 2010, Visa earned global revenue of US$8.06 billion. Visa Worldwide's annual turnover during the period of 12 months ending at the end of the month in which the contravening conduct occurred was AU$331 million.

Section 76(1A)(b) of the CCA specifies the maximum penalty for a contravention of s.47 located of the CCA:

> (b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:
> (i) $10,000,000;
> (ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;
> (iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the act or omission occurred;

The parties agreed it was not possible to determine the value of any benefit that Visa Worldwide (or any of the Visa entities) obtained directly or indirectly from the conduct. His Honour stated:

> "It is common ground that, in 2010, the revenue at stake from currency conversion and fees arising from cross-border transactions in Australia was somewhere in the vicinity of US$14.1 million and US$22.34 million. Nonetheless, it is not possible to even speculate about how much of this revenue may have been lost by Visa to DCC if the restrictions were not put in place."[2]

Therefore, Wigney J accepted that the maximum penalty payable by Visa Worldwide was AU$33.1 million.

The parties had provided joint submissions that addressed the principles applicable to the fixing of an appropriate pecuniary penalty and the application of those principles to the facts of the case. In accordance with the decision of the Full Federal Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 (*The CFMEU Case*)[3], the parties did not submit or propose any particular penalty or range of penalties as being the appropriate pecuniary penalty or range of penalties.

There is no reference in the judgement to the parties having put examples of the monetary amount of penalties awarded in previous cases before His Honour. In the CFMEU Case, the Full Court made clear that the "parties are entitled to make submissions as to the relative seriousness of the relevant misconduct and to explain the relevant principles. They may also refer to comparable decisions."[4] However, the Full Federal Court noted in relation to the dearth of reported penalty cases "the situation reflects the extent to which these matters have been resolved by consent. Where a penalty has been fixed in that way, the

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[2] At para. 102.

3 Note, the CFMEU Case is currently on appeal before the High Court with a hearing date of 13 October 2015.

[4] At para. 182.

decision may not be treated as helpful in future cases, save to extent that it indicates a position adopted by a regulator to which it should be held in later cases."[5]

With a starting point of $33.1 million, Wigney J then noted the joint submission of the parties that the matter is in the mid-range of seriousness and that a penalty somewhere in the middle of the available range of penalties would in all the circumstances be appropriate. After canvassing principles of the general and specific deterrent effect of penalties, His Honour made the following observations:

- the conduct caused potential harm or loss to DCC providers, who did not know that the rule change might be temporary. The announced changes no doubt gave rise to uncertainty as to whether DCC providers would ever be able to expand their customer base. This was likely to have had an adverse impact on investment decisions made by DCC providers during the period where the changed rules were in force;[6]

- the contravening conduct was deliberate;

- a strong message needs to be sent to corporations in the position of Visa Worldwide that they should not, and indeed, cannot, respond to even legitimate corporate concerns by imposing conditions on their supplies, in the nature of exclusive dealing, which have the likely effect of substantially lessening competition in markets in Australia. Such a response is never an appropriate response;[7]

- neither the rule change nor the information that accompanied it made it clear that the rule change may only have been temporary. The so-called moratorium was only lifted after a number of acquirers and DCC providers in the Asia Pacific region voiced concerns to Visa, and after the ACCC and other competition authorities in the Asia Pacific region commenced inquiries into the issue;[8]

- companies that are responsible for the Australian operation of multinational groups must be deterred from putting into effect or enforcing global decisions made outside Australia if the global decisions have the effect, or are likely to have the effect, of substantially lessening competition in a market or markets in Australia[9]. The penalty imposed in this matter should send a clarion call to large multinational corporations that have operations in Australia that whatever decisions may be made globally, Australia will not tolerate conduct that contravenes its competition laws and will not tolerate conduct that is likely to have the effect of substantially lessening competition in Australian markets;[10]

- given the size of Visa Worldwide and the global Visa business, only a very sizeable penalty is likely to operate as an effective deterrent. Only a very sizeable penalty is likely to ensure that in the future the risk of incurring a penalty for contravention of the Act will not be treated as a mere cost of doing business in Australia;[11]

- no Visa entity has been found to have contravened the Act in the past;[12]

- it is clear that Visa maintains a substantive compliance and education program in relation to, amongst other things, competition laws. One is left wondering, however, how contraventions such as the one under consideration can occur at the senior management level in the face of such a culture of

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[5] At para. 238.
[6] At para. 103.
[7] At para. 108.
[8] At para 110.
[9] At para 111.
[10] At para 114.
[11] Ibid.
[12] At para 117.

compliance with antitrust and competition laws.[13]

- Visa has co-operated with the ACCC throughout the course of its lengthy investigations from August 2010 to January 2013. That co-operation included, amongst other things, making overseas employees, including senior executives, available for examination, and providing documents requested by the ACCC, even if not strictly compelled to do so;[14]

- the proceedings were conducted by all parties in an efficient, reasonable, sensible and courteous manner. Unusually for such matters, there was a complete absence of pointless interlocutory skirmishes and time wasting tactical manoeuvring and posturing. The parties had reached an agreement in relation to many of the facts which, had the matter proceeded to hearing, would have significantly shortened the hearing. The parties and all their lawyers are to be commended for the efficient conduct of these proceedings. It is a matter that should be taken into account in Visa Worldwide's favour;[15]

- ultimately the liability aspect of the proceedings was resolved by agreement. Visa, through its legal representative and executives, facilitated the settlement by participating in a series of high level discussions with the ACCC. Visa and its lawyers have also assisted in settling the agreed facts and joint submission. Again, the parties and their lawyers are to be commended for arriving at a sensible and reasonable resolution of the matter.[16]

- the settlement saved the ACCC, the Court and ultimately the community the cost and burden of litigating to finality a complex, lengthy and difficult case. The penalty that would otherwise have been imposed in this matter should be, and has been, substantially discounted in recognition of this co-operation and the facilitation of the administration of justice;[17]

- Visa Worldwide's role in reaching a settlement with the ACCC is relevant because it shows contrition and an acceptance of wrongdoing on the part of Visa Worldwide. That contrition is also revealed by Visa Worldwide accepting and joining in the submission that its contravention falls within the mid-range in terms of seriousness and available penalty range. All that said, no senior executive of Visa Worldwide, or any other Visa entity, gave evidence in these penalty proceedings about contrition[18].

Wigney J concluded that the appropriate penalty should be towards the top of the mid-range of penalties available. He determined a pecuniary penalty of $18 million. In addition, the parties had agreed that Visa pay the ACCC's costs in the amount of $2 million.

The takeaway

Since the CFMEU Case, it has not been possible to put an agreed penalty before the court for its consideration. Therefore, the way in which the courts frame their penalty decisions is becoming increasingly important for clients the subject of regulatory prosecutions.

The size of this penalty, being derived from the 10% of turnover rule, should give clients much to consider. Query whether a significantly different quantum would have resulted if:

- another Visa entity had been selected to make the admissions and be subject to pay the penalty; and
- a serious effort had been made to quantify the value of the benefit that Visa obtained from its conduct (noting that the penalty would then be three times that amount).

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[13] Ibid.
[14] At para 118.
[15] At para. 119.
[16] At para. 120.
[17] At para. 121.
[18] At para. 123.

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Let's talk

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

Murray Deakin, Partner
+61 (2) 8266 2448
murray.deakin@au.pwc.com

Tony O'Malley, Partner
+61 (2) 8266 3015
tony.omalley@au.pwc.com

Yolanda Chora, Director
+61 (2) 8266 2471
yolanda.chora@au.pwc.com

Sylvia Ng, Director
+61 (2) 8266 0338
sylvia.ng@au.pwc.com