

2 December 2024

Head of Payments Policy Department
Reserve Bank of Australia
GPO Box 3947
Sydney NSW 2001

By email: pysubmissions@rba.gov.au

Dear Sir or Madam

RBA Review of Retail Payments Regulations – Submission in response to Consultation Paper dated October 2024

This submission has been prepared by the Financial Services Committee within the Business Law Section of the Law Council of Australia (the **Committee**) in response to an issues paper released in October 2024 by the Reserve Bank of Australia (**RBA**). In this paper, entitled *Merchant Card Payment Costs and Surcharging* (**Consultation Paper**), the RBA Board has sought submissions from interested stakeholders on certain issues related to pricing of card payments.

The Committee monitors developments in the laws and regulations governing financial services and seeks to actively contribute to public consultation on changes to these laws. The Committee's areas of interest include financial services and credit licensing and conduct regulation, consumer credit protection, banking, anti-money laundering, personal property securities and payments regulation. Members of the Committee include legal practitioners from private practice, corporates, financial institutions and banks. The Committee regularly hosts observers from key regulators, including the RBA.

Background

The Committee thanks the RBA for the opportunity to provide feedback on the Consultation Paper. Terms and expressions used in this submission have the same meaning as in the Consultation Paper.

Many of the subjects raised by the RBA in the Consultation Paper raise questions of policy that are primarily economic in nature and concern how the costs of providing payment systems are best allocated between market participants and consumers. The Committee does not seek to comment on those questions, as they fall outside Committee members' expertise.

Rather, the Committee is limiting its observations to matters which it considers likely to produce an informed market so that consumers and merchants are provided with choices that should lead to minimisation of costs of payment services and appropriate allocation of those costs among market participants.

Submissions

The Committee's responses to specific relevant questions in the Consultation Paper, and other related matters, are set out below.

Q1. Lowering interchange benchmarks or caps

The Committee's view is that, when the RBA formulates policies on this subject, it should aim to ensure that there will not be an indirect cross subsidy of consumers who use higher cost cards (and reward schemes) by consumers who opt for lower cost card mechanisms. For this reason, the Committee would encourage even more widespread adoption of Least Cost Routing (**LCR**), and increased transparency in the cost of payments (which the Committee has elaborated on below).

However, when considering interchange benchmarks or caps, the Committee submits that the RBA should also set a goal of enabling PSPs and market participants to maintain Australia's high standards of effectiveness and security in its payments systems.

Q3. Reducing the complexity and/or enhancing the transparency of interchange fees

The Committee submits that the RBA should set a goal of ensuring that there is adequate disclosure (and availability) of interchange fees by PSPs to all merchants and consumers.

Q4. Transparency of scheme fees

The Committee notes that scheme fees are a material component of costs of acceptance of card payments. The Committee considers that it would be strongly desirable for more information about these fees to be published. This could include breaking down scheme fees by card type and into categories of expense such as network costs, management of fraud risk, security and so on. The Committee believes this would enable a better explanation of surcharging (where applicable) and could help develop some constructive competitive tension between schemes.

Q7. Assessing the function and effectiveness of LCR for in-person transactions

The Committee submits that the RBA could consider requiring a PSP to publish information about:

- (a) the features of any LCR solution that it makes available; and
- (b) the levels of merchants' adoption of the relevant LCR solution.

The Committee believes such a measure could incentivise PSPs and merchants to ensure that LCR solutions are even more widespread for the benefit of consumers.

Q8. Greater transparency for fees, wholesale costs and market shares

The Committee would support any steps designed to increase competitiveness for the benefit of merchants and consumers provided such steps would not compromise quality of payment services.

If there was to be greater transparency, the Committee submits that it could:

- (a) differentiate between fees and costs for debit card transactions when compared with credit card transactions; and
- (b) provide information about passing on the benefit of LCR to consumers.

Q9. PSPs providing individual merchants detailed information on their regular statements

The Committee considers that a PSP should provide each individual merchant with detailed information on its regular statements, which may include a summary of interchange and scheme fees organised by key categories, as well as the volume and cost implications of LCR.

Q10. Publishing standardised information on pricing and services for merchants

If each PSP was required to publish standardised information about its prevailing or average rates, then the Committee would expect that a merchant would be in a better position to negotiate market rates with its PSP.

Q13. Implications for changes to the surcharging framework

If changes were made to the rules limiting surcharging to costs of acceptance (as presently understood), and if the permitted costs for surcharging were reduced in scope, then the Committee notes that the cost of providing the payment service would need to be met by schemes, PSPs, merchants or other participants in the payments chain. The Committee expects that the most likely scenario would be that merchants would bear such costs, and notes that this would then trigger a need for pricing changes which would be embedded in the cost of goods or services to the consumer.

Q15. Issues or implications that the RBA should be aware of when designing a regulatory response

The Committee would encourage the RBA and other participating government agencies to adopt the following general principles if and when legislative changes are to be proposed:

- (a) relevant stakeholders should be consulted and given a fair and reasonable time to respond to the consultation material;
- (b) stakeholder feedback should be carefully and thoroughly reviewed before any proposed legislative change is put before the Parliament;
- (c) an appropriate transition period must be allowed to ensure that there is adequate time for the relevant business processes and systems changes to be implemented by those who are affected; and
- (d) where any proposed legislation seeks to impose penalties, there should be proportionality between the gravity of the relevant compliance failure and the potential maximum penalty that can be imposed.

In this context, we particularly draw attention to the *Australian Government Guide to Policy Impact Analysis*,¹ produced by the Department of Prime Minister and Cabinet's Office of Impact Analysis (OIA), which emphasises that proper consultation delivers better policy outcomes. It recognises that the best consultation processes are: continuous; broad-based; accessible; not burdensome; transparent; subject to evaluation and review; not rushed; and a means rather than an end.²

The companion OIA *Best Practice Consultation*³ guide elaborates upon these points. It particularly draws attention to exposure draft legislation as an expected element of a good lawmaking process, as this verifies that stakeholders clearly understand how the law will apply to them, and their legal rights and obligations.⁴

It is, in the Law Council's view, essential that all agencies give effect to these important expectations.

¹ Department of Prime Minister and Cabinet, Office of Impact Analysis, [Australian Government Guide to Policy Impact Analysis](#) (March 2023), 32.

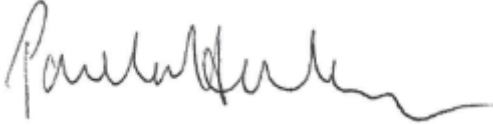
² *Ibid*, 36-37.

³ Department of Prime Minister and Cabinet, Office of Impact Analysis, [Best Practice Consultation](#) (July 2023).

⁴ *Ibid*, 6, 11.

Thank you again for the opportunity to comment. The Committee would be happy to have further involvement in the process. To discuss further, please contact one or both of the Co-Chairs of the Committee, Ms Pip Bell (committeechairfsc@gmail.com) or Mr James Moore (jmoore@hwle.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Pamela Hanrahan', with a long, sweeping underline.

Professor Pamela Hanrahan
Chair
Business Law Section