

THE BAN ON EXCESSIVE SURCHARGE PAYMENTS

When processing payment types a business may incur costs from their bank or payment facilitator

If the business seeks to recover these fees from its customers by charging a surcharge payment, then the business must be careful to do so correctly because if the surcharge amount charged to the customer is excessive, as defined in the Competition and Consumer Act 2010 (Cth) (CCA), the business will be in contravention of the CCA and may incur penalties.

What is a surcharge payment?

A surcharge payment is an amount charged for using a type of payment method (for example a type of debit card or credit card), or is an amount charged for processing a payment in addition to the price of the goods or service.

What is an excessive surcharge payment?

An excessive surcharge payment is a surcharge payment that is in excess of the surcharge permitted under the Reserve Bank of Australia Standard relating to fees on types of credit card and debit cards.

To put it simply a surcharge payment will be excessive if it is more than the 'cost of acceptance.' This means that if the business charges customers more than the business pays to process the payment, then the charge will be an excessive surcharge. For example, if a business pays 0.5 percent to process a debit card payment but charges customers a one percent surcharge for using a debit card, then the surcharge is excessive.

The excessive surcharge regime applies to Mastercard (debit, credit and prepaid), Visa (debit, credit and prepaid), American Express companion cards, the EFTPOS system and EFTPOS pre-paid.

The 'cost of acceptance' for a payment type is set out on the bank statement received by your business and may include merchant service fees; fees paid for the rental and maintenance of payment card terminals; and any other fees incurred in processing card transactions, including cross-border transactions.

If it can be verified by contract, other costs may also be passed on to the customer but these must be calculated by the business. These may include fees paid to a payment service provider other than your bank or payment facilitator. However, if a business wishes to charge these costs to the customer it is prudent to be certain these costs can be passed on. It should be noted that a business cannot include any of its internal charges, such as the cost of labour or electricity.

If the business is charging a payment surcharge to use payment types it is the responsibility of the business to ensure the charge is not an excessive

surcharge, or in other words, that the business is not charging more than the 'cost of acceptance.' It is important to check your bank or payment facilitator statement and consider if the amount charged by the business exceeds the 'cost of acceptance'. If the amount charged by the bank or payment facilitator changes, then the amount the business charges should change also.

Do I have to charge a surcharge payment?

A business is not required to charge customers a surcharge to use a payment type, but may choose to do so. As an alternative the business may take into account the cost of using payment methods, together with other business costs such as labour, rent and utilities, when setting the price of the products sold by the business.

A surcharge by another name

If an amount is charged to process a payment type, the excessive surcharge regime is applicable regardless of the name given to the charge. In other words, the excessive surcharge regime will apply where an amount is charged to process a payment type, even where the surcharge is called a 'handling fee' or a 'service fee'.

Can I charge a single charge fee for all types of payment?

A business should only charge a single fee for all payment types if the fee does not exceed the lowest cost payment type. This means that a business is likely to be charging an excessive surcharge if the business charges customers the average 'cost of acceptance' across all payment types. For example, if a business accepts only three types of payment, being card A, which carries a one percent 'cost of acceptance', card B, which carries a two percent 'cost of acceptance', and card C, which carries a three percent 'cost of acceptance', then the business may charge customers the single fee of one percent to process the payment for card A, card B and card C. However, if the business charges customers the average 'cost of acceptance' for all three cards, being two percent, then the business is likely to be charging an excessive surcharge (for example, users of card A will be paying more than the 'cost of acceptance' for card A).

A business may choose a flat fee to process payment types, however, it is prudent to do so cautiously. Using a flat fee may result in customers paying too much, especially when processing payment for products with a low cost. For example, Fitness First used a flat fee of 50 cents to process periodic membership payments across all payment types. It was found that for some payment types



the flat fee of 50 cents exceeded the 'cost of acceptance'.

Non-Compliance

For a corporation, non-compliance with the requirement not to impose an excessive surcharge under the CCA may result in:

- The ACCC issuing an infringement notice, which carries a financial penalty of 600 penalty units for a listed corporation (currently totaling \$126,000), 60 penalty units for a corporation (currently totaling \$12,600), and 12 penalty units for an individual (currently totaling \$2,250); or
- A court imposing a financial penalty for each act or omission not exceeding 6,471 penalty units for a corporation (currently being \$1,358,910) or 1,295 penalty units for an individual (currently being \$271,950).

Takeaways

The key takeaways are:

- A business may charge customers for the cost of processing payment types provided it is not an excessive surcharge payment.
- The business may charge the customer the 'cost of acceptance'.
- A business can choose not to charge customers a payment surcharge.
- If charging one amount across all payment types a business must be careful that the charge does not exceed the lowest payment type charge for the business.
- Check the bank or payment facilitator statement for information regarding payment charges.

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