

**21 September 2012**

Payments Policy Department  
(Dr Tony Richards)  
Reserve Bank of Australia  
BOX 3947  
**SYDNEY NSW 2001**

Dear Dr Richards,

**RE: PAYMENT SYSTEMS ISSUES: GUIDANCE NOTE FOR THE VARIED SURCHARGING STANDARDS**

The Payment Systems Board (Board) has sought comments from parties impacted by the revised Guidance Note the Board published on 23 August 2012. The Note was seen as assisting all participants (Merchants, Acquirers, and Schemes) in the implementation and on going interpretation of the proposed Surcharging Standards scheduled to come into effect on 1 January 2013.

National Billing Group (NBG) has reviewed the latest Draft Guidance Note. NBG believes that the revised Draft contains the potential for some unintended policy consequences not present in the earlier guidance note. NBG believes that if these issues are addressed then the Draft Note will be enhanced and still meet the Board's concerns with its Draft of 12 June 2012.

In releasing the Draft, the Board has outlined in the Draft Guidance Note that:

1. It is responding to "industry" demands for a more prescriptive regime;
2. It is of the view that Costs that should be borne as a normal cost of doing business are excluded from a surcharge;
3. Compliance costs will be reduced by a more detailed view on what is a Merchant's reasonable cost of card acceptance.

Importantly the Board reiterates that the:

*"costs of card acceptance extend beyond the merchant service fee charged by acquirers", as the critical tenet underpinning the revised "Rules".*

NBG believes that the core assumption underlying the Board's position of 23 August 2012 is that:

*The application of a surcharge is a "byproduct" of a business's principal undertaking and that a surcharge is used as a mechanism to supplement revenues.*

Viewing surcharges as a "byproduct" fails to address the situation such as that of NBG where the normal business is that of being a Merchant and a Specialist Payment Service Provider. For most Merchants, the Acquirer also provides the services of a Payment Service Provider. But there are a group of Merchants who are not only a Merchant but also a Payment Service Provider. That is, they incur as direct costs the costs normally absorbed by the Acquirer as part of its business which is then passed through to the Merchant as part of their merchant service fees. The costs associated with this business process are not considered in the current draft and arguably

should be covered by the Guidance Note as Reasonable Costs for those Merchants who are also a provider of payment services.

Specifically, NBG offers merchant aggregation and payment services to specialist markets for parties who are disenfranchised by the Schemes; or for whom there are specific payment system requirements and the cost of meeting these for an individual service provider are too high; or for whom the costs of regulatory compliance are too high<sup>1</sup>. NBG assumes these costs and risks and prices them into the surcharge paid by the purchaser of the good or service. NBG's target market is drivers and operators in the Taxi Industry.

The Board's Draft Guidance Note of 23 August 2012 does not accommodate a business such as that which NBG operates unlike the Draft of 13 June 2012. In its current form there is an unacceptable business risk posed by the current drafting of Clause 2 (b) and 2(c) which NBG believes needs to be addressed.

### **Recovery of Terminal Costs and Maintenance Costs where the Merchant is also a Payment Service Provider to Third Parties.**

The Board's new Tests do not accommodate the case of those Merchants (such as NBG) who purchase and maintain a fleet of terminals and is also a specialist payment service provider. In this situation the Merchant owns and operates the terminal fleet for third parties. This contrasts with the situation of most merchants who "rent" a terminal supplied by their Acquirer who funds the acquisition and maintenance of the terminal fleet. The Guidance Note allows those Merchants to claim the terminal rental cost as a Reasonable Cost under Clause 2a.

The current Draft prohibits Merchants (such as NBG) who invest in the ownership and operation of a terminal fleet for use by third parties from recovering a return on the asset base.

Clause 2a of the Guidance Note therefore imposes an unacceptable limitation on those Merchants who are also a specialist payment service provider. Such merchants will be unable to recover their efficient costs. In the long term this Merchant category must have an expectation that it will be able to recover efficient costs both to remain solvent and to encourage further investment in technology and innovation in its payment systems and remain in business.

Usefully the Australian Competition Tribunal has on two occasions (in 2007 and 2010) provided clear direction as to the pricing methodology that is in the long-term interests of consumers (end users) in this situation. It did this in the context of discussing an access price for telecommunication services<sup>2</sup>. The Tribunal explained that the long-term interests of consumers is met at the point *where pricing recovers the costs of efficient investment including a normal return*.

The Merchant Payment Service Provider (such as NBG) is in this position and needs to recover a normal return on its asset base. The current drafting results in a Zero Return on the asset base. This is a clear unintended consequence of the current drafting and exposes these Merchants to an unacceptable business risk.

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<sup>1</sup> In the industries in which NBG operates there are specific regulatory requirements imposed by the ATO and State based regulators not found in other industries. A significant part of the business of the Merchant Aggregator is to meet these requirements for its customer base.

<sup>2</sup> The characteristics of the telecommunications product, functional/technical, and geographic markets and particularly the access issues reflect those of Card Payment Systems so the approach of the Australian Competition Tribunal (ACT) provides a useful guide for payments and the interface between Schemes, Acquirers and Merchants.

## **Suggested Amendments to Draft Guidance Note of 23 August 2012**

NBG believes that the Board needs to consider the following matters in order to address the unintended policy consequences that have emerged in the Draft Guidance Note published on 23 August 2012. These are:

1. **Amend Clause 2a of the Guidance Note to accommodate the situation where a merchant acquires its own equipment so that the Merchant can recover a normal return on its investment.**

As currently drafted, Clause 2a envisages that a Merchant “rents” a terminal from an Acquirer as part of its Merchant Agreement. However, in the circumstances where the Merchant is a provider of Payment Services and that Merchant owns and maintains the terminal fleet for third parties there is no Rental paid to an Acquirer. Clause 2a needs to be revised to allow for the circumstance where a Merchant owns and maintains a terminal fleet and enable these Merchants to recover their costs of efficient investment including a normal return on the terminal fleet.

2. **Amend Clause 2b of the Guidance Note to accommodate the situation where a Merchant is also the provider of a Payment Services.**

As flagged above there are a small number of situations where the costs normally absorbed into an Acquirer are actually incurred by a Merchant. This occurs where the Merchant is also the provider of Payment Services to third parties. Currently the Guidance Note is unclear that these costs can be construed as Reasonable Costs that can be recovered by a Merchant. Clause 2b needs to be redrafted to provide clarity that where the Merchant is also the provider of a payment services then these costs can be recovered as part of a Surcharge as a Reasonable Cost.

3. **Amend Clause 2c of the Guidance Note to accommodate the situation where a Merchant is also the provider of a Payment Services**

As a corollary to the amendment at Clause 2b, then it will be necessary to make consequential amendments to Clause 2c to again cover the situation where the Merchant is also the payment service provider in relation to the costs incurred under 2a and 2b.

4. **Reinsert the explicit exclusion on Internal Transfer pricing included in the Guidance Note of 12 June 2012.**

NBG is of the view that it would assist the Board to achieve its objective of ensuring that costs which form part of the broader business are excluded from the Reasonable Costs of Surcharging if there was a clear and unequivocal statement in the Guidance Note excluding transfer pricing of fees paid to related and associated entities .

5. **Inclusion of a Waiver Provision based on the purpose of the business.**

It may be prudent to include a provision for the Board to provide an ability for a Merchant to obtain from the Board a waiver from compliance for some of the elements of the Guidance Note where it can demonstrate to the Board that although its costs fall outside of the scope of the Guidance Note the costs are still “Reasonable” for that merchant given the purpose of their business.

**Implementation Timeframe:**

NBG wishes to flag that given the delays in finalising the Guidance Note, its previous commitment to meet the 1 January 2013 commencement date needs to be withdrawn. It recommends that the Board push back the commencement date to 1 April 2013 to allow systems and business process development by all parties impacted by the Rules to be finalized ahead of commencement.

Further, we can flag that if the amendments we have proposed cannot be incorporated, then NBG will require a longer timeframe in which to develop new business models given the unacceptable business risks contained in the current proposal.

**In Summary:**

NBG believes that the Draft Guidance Note of 23 August 2012, if pursued in its current form, will give rise to a number of unintended policy outcomes for those firms who operate as a Merchant and a Payment Service Provider.

The Guidance Note is capable of remedy in the manner outlined in this submission. If the changes we have outlined are implemented, the Guidance Note will provide a flexible regulatory regime with a clear and simple compliance structure; reduced costs to the parties, reduced potential for disputation and deliver an equitable outcome that meets the long-term needs of both the Merchant and end user.

We are available to meet with the Board to discuss any element of this submission in further detail.

Yours sincerely,



**David R. Hamilton**  
General Manager  
Strategy and Regulation