

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 14/09/2018 3:55:01 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Concise Statement
File Number:	VID885/2018
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v CLA TRADING PTY LTD (TRADING AS EUROPCAR)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 14/09/2018 3:55:07 PM AEST

A handwritten signature in blue ink, which appears to read "Warwick Soden".

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Concise Response

No. VID885/2018

Federal Court of Australia  
District Registry:  
Division: General

### **Australian Competition and Consumer Commission**

Applicant

### **CLA Trading Pty Ltd (ACN 082 220 399) (trading as Europcar)**

Respondent

By way of response to the Applicant's Concise Statement dated 24 July 2018, the Respondent (**Europcar**) says as follows:

- 1 Europcar conducts a business of renting vehicles to customers in Australia. In the alleged Relevant Period, Europcar permitted customers to pay for rental services by way of Visa and MasterCard credit and debit cards and incurred costs in connection with accepting those cards for payment. Europcar charged most customers who chose to use those payments methods an amount in addition to the price for its rental services (**payment surcharge**).

#### **The Standard**

- 2 Europcar agrees that its payment surcharge was for a kind of payment covered (for the purpose of s 55B of the *Competition and Consumer Act 2010*) by the Reserve Bank of Australia's *Standard No 3 of 2016* (**Standard**) with effect from 1 September 2016.
- 3 The Standard provided that:
  - (a) the Permitted Surcharge at any time was an amount not exceeding the Cost of Acceptance applicable at that time (cl 4.1);
  - (b) the Cost of Acceptance applicable at a time was (cl 4.2):
    - (i) either as calculated for a 12 month period that ended not more than 13 months before that time; or

---

Filed on behalf of	CLA Trading Pty Ltd trading as Europcar, Respondent
Prepared by	Neil Hannan
Law Firm	Thomson Geer
Tel	03 80803855
Address for Service	Level 39, Rialto South Tower, 525 Collins Street, Melbourne Vic 3000
Ref	NH:PWP: 4166907
	Fax 03 80803599

- (ii) if the calculation was not reasonably ascertainable, an estimate of the average cost of acceptance of Cards of the Scheme for a period of 12 months calculated by the Merchant in good faith;
  - (c) Cost of Acceptance meant, in relation to the Merchant's acceptance of a Card of the Scheme, the average cost per Card Transaction calculated as follows (cl 5.1):
    - (i) by adding applicable Merchant Service Fees and other fees; and
    - (ii) expressing the total as a percentage of the total value of Card Transactions; and
  - (d) Card was defined as meaning a Credit Card, Debit Card or Prepaid Card (cl 2.3).
- 4 Further, the Standard provided that, from 1 July 2017:
- (a) all Debit Cards issued in Australia by a participant in a Debit Card Scheme must be issued with a Bank Identification Number (**BIN**) that allows them to be electronically identified as Debit Cards (cl 6.1); and
  - (b) an Acquirer that Acquires both Credit Card Transactions and Debit Card Transactions for a Merchant must provide to the Merchant, or publish, lists of BINs that permit the Merchant to separately identify Credit Card Transactions and Debit Card Transactions, and of each applicable Scheme, electronically (cl 6.2).

### **Europcar's costs**

- 5 Europcar had a Merchant Agreement with National Australia Bank Ltd (**NAB**) by which NAB acted as Acquirer of transactions made with credit and debit cards issued by participants of both Visa and MasterCard Schemes (and other cards and schemes) (**NAB Merchant Agreement**).
- 6 Under the NAB Merchant Agreement, Europcar was charged Merchant Fees which differed, not by reference to credit and debit cards, but according to whether the card was designated as a Standard or Premium card. A Premium card included overseas cards and business, platinum, gold and other premium cards sold in the domestic market. Each of Visa and MasterCard credit and debit cards could be designated as either a Premium or a Standard card under the NAB Merchant Agreement (depending

on the issuance). Accordingly, the cost charged to Europcar for Visa and MasterCard credit and debit cards varied according to the designation under the NAB Merchant Agreement.

- 7 Europcar also incurred costs under the NAB Merchant Agreement in respect of separate facilities, stationery, imprinter fees, access fees, card issuer fees, service fees, voice authorisation fees, chargeback fees and other matters.

### **Europcar's estimates of Costs of Acceptance**

#### ***Period from 1 September 2016***

- 8 For the purpose of determining permitted payment surcharges from commencement of the Standard on 1 September 2016, Europcar was not able to obtain detailed information from NAB as to the rates being charged separately for Visa and MasterCard credit and debit cards. Accordingly, Europcar estimated a payment surcharge by calculating in good faith an average cost, using known and estimated costs for Premium and Standard cards over a preceding 12 month period, of 1.43% (including GST).
- 9 Europcar was entitled pursuant to cl 4.2 of the Standard, properly construed and consistently with interpretative advice published by the Reserve Bank of Australia, to apply this surcharge rate for a period of 12 months.
- 10 On that basis, Europcar determined to apply a payment surcharge from 1 September 2016 in respect of all Visa and MasterCard credit and debit card transactions of 1.43% (including GST).

#### ***Period from 19 July 2017 to 31 August 2017***

- 11 In July 2017, the information statement provided by NAB in respect of charges under the NAB Merchant Agreement (**July 2017 statement**) set out charges for transactions for Premium and Standard cards. It also (for the first time, and without notice or explanation) purported to set out Europcar's average cost of acceptance for the 12 month period ending 30 June 2017 of payments made with each of Visa and MasterCard credit and debit cards, as follows (including GST):
  - (a) 1.18% for Visa credit card payments;
  - (b) 0.78% for Visa debit card payments;

- (c) 1.24% for MasterCard credit card payments; and
  - (d) 0.82% for MasterCard debit payments.
- 12 From 19 July 2017, Europcar considered this information, which needed to be analysed and checked. Europcar also took steps to incorporate the information into its estimate of costs of acceptance for the 12 month period beginning from the anniversary of its earlier estimate, on 1 September 2017.
- 13 In August 2017, NAB provided a further monthly statement of charges under the NAB Merchant Agreement which also purported to set out Europcar's average cost of acceptance for payments made with each of Visa and MasterCard credit and debit cards (**August 2017 statement**).
- 14 Europcar's analysis of the information in the July and August 2017 statements found discrepancies between the costs imposed under the NAB Merchant Agreement for accepting transactions for Premium and Standard cards, and the purported allocation in those statements of costs according to credit and debit cards of each scheme. Debit cards issued prior to 1 July 2017 had not been required to be identified electronically with a BIN. Europcar does not admit that the information set out in the July and August 2017 statements (allocating costs of transactions with credit and debit cards before 1 July 2017) was an accurate reconciliation of charges under the NAB Merchant Agreement to card transactions of different kinds provided by the Standard.
- 15 During this period leading up to 1 September 2017 (the anniversary of its previous estimate of costs of acceptance), Europcar retained its existing surcharge based on its previous good faith estimate of the costs of acceptance, while developing a refreshed estimate for introduction from that date.

***Period from 1 September 2017 to 6 November 2017***

- 16 Accordingly, in August 2017, Europcar made an estimate in good faith of the average cost of acceptance, based on all the information in NAB's July and August 2017 statements, and determined to apply payment surcharges (including GST) of:
- (a) 1.18% for Visa Credit card payments;
  - (b) 0.79% for Visa debit card payments;
  - (c) 1.24% for MasterCard Credit card payments; and

(d) 0.82% for MasterCard debit payments.

- 17 However, having made the estimate, Europcar ascertained that its global reservation system (called **Greenway**) could distinguish between schemes (Visa, MasterCard, American Express and Diners Club cards), but did not have the functionality to distinguish between debt and credit cards.
- 18 Europcar took steps to have modifications made to Greenway. Local changes attempted in September and early October were unsuccessful. Eventually a global modification was implemented with effect from 6 November 2017.
- 19 Europcar also requested NAB to provide BIN range data, as required by the Standard, but it was not published and not immediately available.
- 20 In the meantime, from 1 September 2017 to 5 November 2017, Europcar charged customers the new credit card surcharge rate applicable for the scheme (as set out in paragraphs 16(a) and (c) above), on the basis that it would refund those customers who had used a debit card (once the BINs identifying those customers were provided by NAB). Europcar accepts that, in doing so, having estimated a lower debit card surcharge rate, it charged (in advance of refund) an excessive payment surcharge to those customers using a Visa or MasterCard debit card.
- 21 On 9 November 2017, NAB informed Europcar that (contrary to the provisions of cl 6.2 of the Standard), it was unable to provide Europcar with BIN ranges capable of electronically identifying debit cards. On 18 December 2017, NAB provided to Europcar a listing of BIN ranges.
- 22 In January 2018, Europcar used the BIN range data to run data matching programs over all of the transactions in the period from 1 September 2017 to 5 November 2017, and identified 22,602 customers who had paid by debit card and the card scheme relevant to that transaction.
- 23 Europcar then refunded those customers the difference between the applicable debit and credit card payment surcharges, with amounts of refunds ranging from \$0.01 to \$18.33. The total of refunds paid by Europcar was \$20,294.

#### **Response to alleged contravention**

- 24 Europcar denies that it contravened s 55B in respect of payment surcharges imposed in the period 19 July 2017 to 31 August 2017. The nature of the information in the July

2017 statement and the time required by Europcar to process that information mean that the cost of acceptance was not reasonably ascertainable within the meaning of cl 4.2(b) of the Standard. During this period, Europcar applied a payment surcharge based on an estimate made by it in good faith in compliance with the Standard.

25 Europcar accepts that it imposed payment surcharges in the period 1 September to 5 November 2017 in excess of its good faith estimate of its average costs of acceptance of debit cards. However, it did so in circumstances where:

- (a) it had made a separate estimate of its costs of acceptance of debit cards;
- (b) its global reservation system did not provide the functionality capable of discretely charging for debit cards;
- (c) it immediately took steps to develop suitable functionality, and in the interim applied a single surcharge with the intention of making refunds to affected customers; and
- (d) it took immediate steps to promptly refund all customers identified as having been affected as soon as it had the data that allowed it to do so.

26 Europcar denies the relief claimed.

Date 14 September 2018

This Concise Response was prepared by C M Archibald of counsel and N Hannan, solicitor.



---

Signed by Neil Hannan

**Thomson Geer**

Lawyer for the Respondent