

Concise Statement

No. NSD of 2022

Federal Court of Australia
District Registry: NSW
Division: General
National Practice Area: Economic Regulator, Competition and Access Sub-area

Australian Competition and Consumer Commission
Applicant

Mastercard Asia/Pacific Pte Ltd and another
Respondents

IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. This proceeding concerns conduct by Mastercard Asia/Pacific Pte Ltd (**Mastercard Singapore**) and Mastercard Asia/Pacific (Australia) Pty Ltd (**Mastercard Australia**) (together **Mastercard**) in the period from 6 November 2017 to at least 5 November 2020 (**Relevant Period**) when Mastercard had a substantial degree of power in the market for the supply of credit card acceptance services.
2. During the Relevant Period, Mastercard Australia sought to and did retain or obtain debit card processing volumes by making available to particular merchants, through contracts known as strategic merchant agreements (**SMAs**), more favourable prices on the processing of Mastercard-branded credit card transactions provided the merchants processed all or most of their debit card transactions through Mastercard. This meant that the merchants would not process any or any significant debit card volume through the eftpos network owned by Eftpos Payments Australia Limited (**EPAL**).
3. During the Relevant Period, EPAL was the only supplier other than Mastercard of debit card acceptance services for dual Mastercard-efpos debit cards and did not offer credit acceptance services. EPAL could not provide discounts on both credit and debit services of the types offered by Mastercard which are the subject of these proceedings.
4. A substantial purpose of Mastercard's conduct was to harm or interfere with the competitive process for the supply of debit card acceptance services and thereby prevent or hinder competition by:
 - (a) deterring merchants from acquiring from EPAL, and hindering EPAL from supplying to merchants, debit card acceptance services for dual Mastercard-efpos debit cards, in circumstances where EPAL was or was likely to be the lowest cost stand-alone provider of those services; and/or
 - (b) enabling Mastercard to secure or retain a substantial proportion of the contestable debit volume even where Mastercard was offering those services at a higher price than EPAL.

Filed on behalf of (name & role of party)	Australian Competition and Consumer Commission, Applicant		
Prepared by (name of person/lawyer)	Aldo Nicotra and James Love (Ref: C7408)		
Law firm (if applicable)	Johnson Winter & Slattery		
Tel	+61 2 8274 9555	Fax	+61 2 8274 9500
Email	aldo.nicotra@jws.com.au; james.love@jws.com.au		
Address for service (include state and postcode)	Level 25, 20 Bond Street, Sydney NSW 2000		

5. The ACCC alleges that, by their conduct, Mastercard Singapore and Mastercard Australia contravened s 46(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**); Mastercard Singapore contravened s 47(1) (or alternatively s 45(1)(a) and (b)) of the CCA; and Mastercard Australia was an accessory to Mastercard Singapore's contravention of s 47(1) (or alternatively s 45(1)(a) and (b)) of the CCA by aiding, abetting, counselling or procuring, inducing or being knowingly concerned in, or a party to, those contraventions as specified in ss 76(1)(c), (d) and/or (e) of the CCA.

Mastercard and its substantial market power in credit card acceptance

6. Mastercard Singapore is a body corporate incorporated in the Republic of Singapore. It is a subsidiary of Mastercard Incorporated (**Mastercard Inc**), a Delaware corporation listed on the New York Stock Exchange which owns and operates the Mastercard network. Mastercard Singapore is a trading corporation within s 4 of the CCA and, since at least 1 July 2017, has carried on business in Australia by providing payment card services through the Mastercard network to Australian issuers, acquirers and merchants.
7. Mastercard Australia is a corporation incorporated in Australia, a trading corporation within s 4 of the CCA, and a subsidiary of Mastercard Inc. Since at least 1 July 2017, it has employed people in Australia, and operates as the local agent or representative of Mastercard Singapore, to promote and sell the Mastercard network to Australian issuers, acquirers and merchants.
8. Mastercard is one of the two major suppliers in Australia offering both credit card and debit card services; the other is Visa. Mastercard deals, on the card issuing side, with persons, predominantly banks, who issue Mastercard-branded credit cards and debit cards to cardholders. Most Mastercard-branded debit cards issued in Australia are dual branded with eftpos. Mastercard deals, on the card acceptance side, with acquirers and merchants to facilitate merchant acceptance of Mastercard credit and debit cards.
9. Generally, merchants pay a higher price for the provision of Mastercard credit card acceptance services than for Mastercard debit card acceptance services. These prices are paid by merchants to acquirers and include three components: an interchange fee (set by the card scheme and payable by the acquirer to the issuer), the acquirer scheme fee (set by the card scheme and payable by the acquirer to the card scheme operator) and an acquirer margin (set and retained by the acquirer).
10. At all relevant times, Mastercard had substantial market power in the market in which credit card acceptance services are supplied to merchants because Mastercard-branded credit cards are a 'must have' form of payment for many merchants given their ubiquity among cardholders and their widespread acceptance by other merchants. There is limited rivalry between Mastercard and Visa for merchant credit card acceptance, given their revenue complementarity for merchants. Mastercard faces limited rivalry from American Express, which operates a smaller and more costly scheme. EPAL does not supply credit card acceptance services. There are high barriers to entry and expansion, including for EPAL, in establishing and operating a credit card scheme.

Mastercard's response to the "least cost routing" reforms

11. Mastercard's conduct was its response to an initiative endorsed by the Reserve Bank of Australia (the **RBA**) to encourage "merchant choice routing" or "least cost routing" (**LCR**) for debit card transactions. The rollout of technology to facilitate LCR by merchants (which commenced in early 2018 starting with some of the larger merchants and is being progressively enabled for other merchants) was, and was seen by the RBA as, an initiative to increase competition in the supply of debit card acceptance services. EPAL was, and was seen by Mastercard and the RBA to be, typically the lowest cost provider of debit card acceptance services for merchants.
12. In anticipation of increased competition from EPAL as LCR was rolled out to merchants (initially for 'card present' transactions but also for 'card not present' transactions in anticipation of EPAL developing capability to process such transactions), Mastercard Australia developed a strategy in late 2017, and implemented that strategy over the Relevant Period, to neutralise merchants' incentives to route transactions using Mastercard-eftpos debit cards to the eftpos network (the **Credit Leverage Strategy**). The strategy involved one or more of the following:
 - a) identifying and then targeting significant merchants that Mastercard believed were at greatest risk of routing debit card transactions away from the Mastercard network and through the eftpos network or which had commenced routing debit card transactions through the eftpos network (the **strategic merchants**), who generally had large volumes of 'card present' transactions;
 - b) offering or making available to the strategic merchants substantially lower prices for credit card acceptance services (typically in the form of lower strategic merchant interchange rates and, in some cases, rebates on scheme fees) provided those merchants routed all or almost all of their Mastercard-eftpos debit card transactions through the Mastercard network for two to five years;
 - c) procuring the entry by Mastercard Singapore into SMAs with strategic merchants giving effect to these offers.
13. During the Relevant Period, Mastercard also reduced interchange rates and scheme fees for 'card present' debit card transactions but not to the extent that it was or was intending to be lower cost than EPAL on a standalone basis. It also adjusted prices for credit card acceptance services such that, while strategic merchants received lower interchange rates on credit card transactions, Mastercard maintained its weighted average credit interchange rate across its scheme at, or close to, the maximum allowed under RBA interchange regulation throughout the Relevant Period.
14. Mastercard Australia formed an internal Strategic Merchant Council (the **SMC**) which operated informally from 1 October 2017, and formally from August 2018. The role of the SMC was to determine and implement the Credit Leverage Strategy including:
 - (a) to identify which merchants to target;
 - (b) to formulate the offers to be made to those merchants including the lower prices to

be offered for credit card acceptance services provided the merchants agreed to route all or almost all of their Mastercard-efpos debit card transactions through the Mastercard network;

- (c) to oversee the discussions and negotiations of SMAs with the strategic merchants;
- (d) to recommend to and procure Mastercard Singapore entering into particular SMAs.

Mastercard's SMAs

15. During the Relevant Period, Mastercard Australia implemented the Credit Leverage Strategy to counter LCR by:

- (a) only offering to supply, or supplying, credit card acceptance services to the strategic merchants referred to in Part 1 of the Schedule of SMAs provided by the ACCC to Mastercard (**SMA Schedule**) at more favourable prices where the merchants routed all or almost all of their Mastercard-efpos debit card transactions through the Mastercard network; and
- (b) negotiating and procuring the entry into SMAs by Mastercard Singapore with the strategic merchants set out in Part 1 of the SMA Schedule.

Mastercard Singapore implemented the Credit Leverage Strategy developed by Mastercard Australia by entering into the SMAs with the strategic merchants.

16. The SMAs included provisions which tied the merchant routing all or most of the merchant's Mastercard-efpos debit card transactions through the Mastercard network to the provision of more favourable prices for the processing of transactions using Mastercard-branded credit cards. Mastercard tied the merchants' debit volumes to its network by including provisions in:

- (a) a number of the SMAs listed in Part 1 of the SMA Schedule (being the SMAs with the merchants identified in Part 2 of the SMA Schedule) that expressly precluded the merchant from routing any transactions from Mastercard-efpos debit cards other than through the Mastercard network, and therefore precluded any Mastercard-efpos debit card transactions being routed to the eftpos network (the **Express Clauses**);
- (b) the SMAs listed in Part 1 of the SMA Schedule (other than the SMA identified in item 4 of Part 1 of the SMA Schedule) that required merchants to achieve a specific volume requirement that was set at or close to the total number of transactions that the merchant processed with Mastercard branded cards, and by that requirement precluded any, or any significant volume of, Mastercard-efpos debit card transactions being routed to the eftpos network (the **Volume Clauses**);
- (c) the SMAs listed in Part 1 of the SMA Schedule that permitted and were intended to allow Mastercard Singapore to withdraw the SM rates or terminate the SMA if debit transactions that the merchant processed with Mastercard-efpos debit cards were routed to the eftpos network (the **Termination Clauses**).

17. In the case of the merchant referred to in item 4 of Part 1 of the SMA Schedule, Mastercard offered to enter into a SMA with the merchant in 2018 that included a Volume Clause, but this offer was not accepted.
18. A substantial purpose of the Express, Volume and Termination Clauses, offered with the more favourable prices on credit card acceptance services, was as set out in paragraph 4 above.

RELIEF SOUGHT FROM THE COURT

19. The ACCC seeks the relief in the accompanying Originating Application.

PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

20. The market in Australia affected by Mastercard's conduct in the Relevant Period as set out above (the **Affected Market**) was one of the following:
 - (a) a market for the supply to merchants of debit card acceptance services for debit cards presented to a merchant ('card present' transactions) in which Mastercard, Visa and EPAL were the only suppliers;
 - (b) a market for the supply to merchants of debit card acceptance services for all debit card transactions in which Mastercard, Visa and EPAL were the only suppliers.
21. The market in which Mastercard had a substantial degree of power during the Relevant Period was a market in Australia for the supply to merchants of credit card acceptance services for credit card transactions in which Mastercard and Visa were by far the largest suppliers along with American Express in the Relevant Period (the **Credit Market**).
22. Each of the markets identified in paragraphs 20 and 21 is separate, though interrelated, to a corresponding market which includes the supply of relevant issuing services.
23. Mastercard Singapore and Mastercard Australia (which are bodies corporate related to each other within the meaning of s 4A of the CCA) had a substantial degree of power in the Credit Market individually and/or taken together pursuant to s 46(3), for the reasons set out in paragraphs 8 to 10 above.
24. Mastercard Singapore (by reason of paragraphs 15 to 18) and Mastercard Australia (by reason of paragraphs 12 to 18) each engaged in conduct that has the purpose of substantially lessening competition in the Affected Market in contravention of s 46(1) of the CCA.
25. By reason of paragraphs 15 to 18, Mastercard Singapore has engaged in the practice of exclusive dealing within s 47(2)(b) and/or (c) of the CCA which has the purpose of substantially lessening competition in the Affected Market in contravention of s 47(1) of the CCA.
26. Further or in the alternative to paragraph 25 above, by reason of paragraphs 15, 16 and 18, Mastercard Singapore made one or more contracts containing, and gave effect to, provisions which had the purpose of substantially lessening competition in the Affected Market in contravention of s 45(1) of the CCA.

27. By reason of paragraphs 7, 12, and 14 to 18, Mastercard Australia aided, abetted, counselled or procured, induced or was knowingly concerned in, or a party to, the contraventions of Mastercard Singapore in paragraphs 24, 25 and 26 within the meaning of ss 76(1)(c), (d) and (e) of the CCA.

ALLEGED HARM SUFFERED

28. The conduct of Mastercard was intended to prevent or hinder competition in the Affected Market because it involved the leveraging of power in the Credit Market to reduce or avoid competition in the supply of debit card acceptance services.

Date: 30 May 2022

This Concise Statement was prepared by John Sheahan QC, James Arnott SC and Catherine Bembrick of counsel.

Certificate of lawyer

I, James Love, certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 30 May 2022

A handwritten signature in black ink, appearing to read 'James Love', written in a cursive style.

Signed by James Love
Lawyer for the Applicant