

170. The screen for whether a credit or charge card system should be subject to a ban on no-surcharge rules should be based on market power. If a system does not have market power, then that system acting on its own will not be able force merchants to accept inefficient no-surcharge rules because the merchants will be able to turn to other payment mechanisms to meet consumers' payment needs. This point is also relevant for the assessment of whether distortions would arise if no-surcharge rules were banned for some systems but not others. If no-surcharge rules were forbidden for all systems with market power, competition from these systems could be expected to force card systems without market power to abandon their no-surcharge rules in situations where the rules were inefficient.

171. A full analysis of market power in the Australian market for credit and charge card systems is beyond the scope of this report. There is, however, one issue that deserves mention here. By itself, the finding that credit and charge cards issued on the American Express or Diners Club networks comprise small shares of total cards or support small shares of total card-based transactions does not prove that these systems lack market power in the sense relevant for the analysis of no-surcharge rules. For example, if business travelers using American Express corporate cards were required to use those cards when traveling for business purposes in order to qualify for reimbursement by their employers, then this requirement might generate market power for American Express with respect to merchants, particularly merchants catering to business travellers, such as airlines, hotels, and restaurants. Visa also argues that American Express cardholder rewards programs could have similar effects for other consumers.¹⁶⁷

2. “Voluntary” No-Surcharge Agreements

172. American Express attempts to draw a distinction between mandatory and optional no-surcharge rules. Specifically, American Express argues that “card issuers and/or merchant acquirers should be permitted to offer incentives or differential pricing to merchants who do not surcharge.”¹⁶⁸ This proposal, as stated, is meaningless. Under the present system merchant acquirers offer differential pricing to merchants who do not surcharge—those who do not surcharge pay the standard merchant service fees and those who wish to surcharge are, in effect, charged punitive merchant service fees (*i.e.*, they are denied admission to the acceptance network). Without constraints on the nature of the incentives or price differentials, there might be no practical difference between a voluntary and mandatory rule.

VIII. CONCLUSION

173. The issues addressed by the *Joint Study* are complicated ones, but they are amenable to careful theoretical and empirical economic analyses. Perhaps the most central finding of these analyses is that, while network effects are a prominent feature of credit and charge card markets, there are multiple mechanisms through which these effects may be internalized.

¹⁶⁷ *Delivering a Level Playing Field* at 32.

¹⁶⁸ *American Express Submission* at 11.