

# Blake Dawson

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15 December 2011

### Federal Court debits EFTPOS as ALDI cashes in

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#### In brief

- On 29 September 2011, the Federal Court of Australia ordered EFTPOS Payments Australia Ltd (ePAL) to publish corrective advertisements in relation to statements made on its behalf by its Managing Director concerning the effect on consumers and retailers of changes to interchange fees payable on EFTPOS transactions.
  - Justice Jacobson found that the statements made by ePAL amounted to misleading and deceptive conduct in contravention of section 18 of the Australian Consumer Law (ACL).
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#### ***ALDI Stores (A Limited Partnership) v EFTPOS Payments Australia Ltd [2011] FCA 1114***

On 29 September 2011, Justice Jacobson of the Federal Court of Australia held that EFTPOS Payments Australia Ltd (ePAL) had engaged in misleading and deceptive conduct in contravention of section 18 of the *Australian Consumer Law* (ACL) (contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).

His Honour made a declaration that ePAL had engaged in misleading and deceptive conduct and ordered it to publish corrective advertising in major newspapers in all Australian States and Territories. While refusing to grant an injunction in favour of ALDI Stores (ALDI) which initiated the proceeding, his Honour ordered ePAL to pay ALDI's legal costs.

#### **Background**

The proceeding was brought by discount supermarket operator ALDI against ePAL, the company which manages the EFTPOS debit payment system (EFTPOS System). The EFTPOS System is the most widely used debit card payment system internationally and allows retailers to receive payment for goods and services from customers who pay by debit card. ePAL is wholly owned and funded by its fourteen founding members, which include the four major Australian banks (ANZ, CBA, NAB and Westpac) and the two major Australian supermarket retailers (Coles and Woolworths). ALDI is not a member of ePAL.

The conduct in question were statements made by ePAL's Managing Director, Mr Bruce Mansfield, in two media releases and an advertisement in the *Herald Sun* (Relevant Publications) concerning the effect on consumers and retailers of proposed changes to the EFTPOS System's interchange fees.

#### **Interchange Fees under the EFTPOS System – Time for regime change**

Under the previous bilateral interchange fee model (Bilateral Model) between banks and financial institutions which use the EFTPOS System, a consumer's bank (ie the bank which issued the consumer with a debit card) would pay the retailer's bank an interchange fee for the processing of payment. The fee was set by the Reserve Bank of Australia and was fixed at an amount of between 4 and 5 cents per transaction.

On 8 March 2011, ePAL announced a new multilateral interchange fee model (Multilateral Model),

which commenced on 1 October 2011. Under the Multilateral Model, which resembles the interchange fees payable on credit card transactions, the flow of funds was to be reversed, so that the retailer's bank would pay the interchange fee to the consumer's bank. As the Court noted, the overall effect of the Multilateral Model is that, in most cases, the retailer's bank would be 9 to 10 cents worse off, as it now has to pay 5 cents on each transaction to the consumer's bank, whereas it previously received 4 to 5 cents from the consumer's bank.

As Coles and Woolworths are members of ePAL, they are not subject to the Multilateral Model and therefore their consumers are not exposed to the risk of paying additional fees for debit card transactions. However, ALDI which is not an ePAL member has to pay the interchange fees under the Multilateral Model, meaning that ALDI consumers might be exposed to the risk of these fees being passed on to them.

### **Misleading and deceptive statements by ePAL's MD**

The effect of the statements in the Relevant Publications was that consumers should not face new charges as a result of the Multilateral Model as the changes did not involve direct charges to either consumers or retailers. Further, the effect of the statements was that it remained to be seen whether retailers' banks would pass part or all of any fee changes through to retailers and that it remained to be seen whether retailers would in turn pass those fees on to their customers.

ALDI submitted that the statements were directed at Australian consumers and retailers generally and that a reasonable Australian consumer would understand the effect of the Relevant Publications to mean that there would be no extra charge to consumers when their debit card was used at retail stores. On the other hand, ePAL contended that the statements were aimed at consumers with EFTPOS debit cards and retailers who use the EFTPOS payment system.

Justice Jacobson held that ePAL's interpretation was "an overly legalistic approach" and "not the way in which the representative, or ordinary reasonable consumer would read it". In fact, his Honour held that this approach was "more akin to a process of construing the language of a contract than to the ordinary reading of a media release to consumers and retailers".

In considering whether the statements were misleading and deceptive, Justice Jacobson held that ePAL's statements needed to be examined objectively, in the context of the whole course of conduct and in the light of the relevant surrounding facts and circumstances, rather than in isolated, single parts.

His Honour held that the Relevant Publications were misleading and deceptive no matter which target audience they were directed to, being Australian consumers and retailers generally or Australian consumers and retailers who used the EFTPOS System. ePAL's statements had a tendency to lead an ordinary or reasonable Australian consumer or retailer into error.

His Honour came to this view because ePAL's Managing Director was aware prior to the release of the Relevant Publications of a probability that Westpac and St George had adopted a policy of passing on the interchange fees in part to a significant number of their customers.

### **Reactions to the decision**

Australia's only independent electronic payments provider, Tyro Payments, welcomed Justice Jacobson's decision on the basis that it promotes "a culture of transparency and fairness in banking".

In a media release two days after the judgment was handed down, ALDI stated that it would not place any surcharge on EFTPOS transactions within its stores.

### **Lessons**

- When examining whether conduct is misleading or deceptive, courts will assess whether that

conduct has a tendency to lead into error an ordinary or reasonable person in the class to which the conduct is directed.

- In determining whether a statement is misleading or deceptive, courts will examine the statement objectively, in the context of the whole course of conduct and in the light of the relevant surrounding facts and circumstances, rather than in isolated, single parts.
- Individuals and organisations should be prudent in drafting media releases, advertisements and other statements to ensure that their contents are not inconsistent with any fact which a person authorising the statement has prior knowledge of.

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