FEDERAL COURT OF AUSTRALIA

ALDI Stores (A Limited Partnership) v EFTPOS Payments Australia Ltd [2011] FCA 1114

Citation:	ALDI Stores (A Limited Partnership) v EFTPOS Payments Australia Ltd [2011] FCA 1114
Parties:	**ALDI STORES (A LIMITED PARTNERSHIP) ABN 90 196 565 019 v EFTPOS PAYMENTS AUSTRALIA LIMITED ACN 136 180 366**
File number(s):	NSD 1531 of 2011
Judges:	**JACOBSON J**
Date of judgment:	29 September 2011
Catchwords:	**TRADE PRACTICES** – misleading and deceptive conduct – publication of media release, newspaper article and clarification statement concerning forthcoming changes to the payment of interchange fees in EFTPOS transactions – whether respondent engaged in misleading and deceptive conduct by making statements that changes to the interchange fees regime would not be passed onto consumers – whether the respondent had reasonable grounds for making its statements
Legislation:	*Australian Consumer Law*, ss 4, 18 & 232 *Competition and Consumer Act 2010* (Cth), sch 2
Cases cited:	*Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 applied *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 applied *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 applied *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 applied *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 cited *McGrath v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230 cited
Date of hearing:	21, 22 September 2011
Place:	Sydney

Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	107
Counsel for the Applicant:	Mr N C Hutley SC with Mr P J Brereton SC and Mr T W Marskell
Solicitor for the Applicant:	Baker & McKenzie
Counsel for the Respondent:	Mr R M Smith SC with Mr S Nixon
Solicitor for the Respondent:	Gilbert + Tobin Lawyers

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1531 of 2011**

BETWEEN:	**ALDI STORES (A LIMITED PARTNERSHIP) ABN 90 196 565 019** **Applicant**
AND:	**EFTPOS PAYMENTS AUSTRALIA LIMITED ACN 136 180 366** **Respondent**
JUDGE:	**JACOBSON J**
DATE OF ORDER:	**29 SEPTEMBER 2011**
WHERE MADE:	**SYDNEY**

THE COURT DECLARES THAT:

1. By issuing and publishing the documents being Annexures "A", "B" and "C" to the Originating Application, the Respondent engaged in misleading or deceptive conduct in contravention of the *Australian Consumer Law*.

THE COURT ORDERS THAT:

2. Pursuant to s 232 of the *Australian Consumer Law*, the Respondent publish an advertisement in a newspaper circulating nationally and in another newspaper circulating in the capital city of each State and Territory in the terms set out below:

> There has been a range of comments in the media about EFTPOS' interchange fees. ePAL, the company that manages the EFTPOS debit payment system, wishes to clarify aspects of planned changes to EFTPOS interchange fees and to correct statements made in a media release dated 12 August 2011, a column in the Herald Sun on 12 August 2011, and a media release dated 8 September 2011.
>
> ePAL is aware that some acquirers are intending to pass part or all of these fee changes on to some retailers. It remains to be seen what such retailers may do in relation to their consumers as a result of these changes. ePAL is also aware that other acquirers do not intend to pass on any of these fee changes to retailers.
>
> It is therefore premature to state with certainty what impact the planned changes will have at a retail level.

3. The Respondent pay the Applicant's costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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JUDGE:	**JACOBSON J**
DATE:	**29 SEPTEMBER 2011**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 The Applicant ("Aldi") is a well known operator of supermarkets. In the parlance of the retail trade, it is known as a merchant or a retailer.

2 The Respondent ("ePAL") manages the EFTPOS payment system used by Aldi and other retailers for the receipt of payment for goods purchased. The EFTPOS payment system involves the use by customers (described in the trade as consumers) of debit cards, issued to consumers by banks or financial institutions, for the payment of goods or services.

3 These proceedings concern claims made by Aldi that ePAL has released three publications containing misleading statements about the effect on consumers and retailers of charges soon to be introduced to the way in which "interchange fees" are levied between banks or financial institutions that process the EFTPOS payments.

4 Under the regime presently in place between the banks and financial institutions that are party to the EFTPOS scheme, the consumer's bank, that is to say the bank or institution which issued the debit card to the customer, pays a fee to the retailer's bank for processing the payment. The fee is set by the Reserve Bank of Australia and is fixed at an amount of

between 4¢ and 5¢ per transaction. The consumer's bank is described in the trade as the "issuing bank" or "issuer". The merchant's bank is described as the "acquiring bank" or "acquirer".

5 Under the new regime, which is to come into effect on 1 October 2011 (subject to the entitlement of the banks or other members of ePAL to opt into the scheme, or to continue to operate under existing bilateral arrangements) the flow of funds payable by way of interchange fees will be reversed (subject to certain exceptions).

6 Instead of the issuing bank paying the interchange fee to the acquiring bank, the acquiring bank will pay the interchange fee to the issuing bank. The regime applying between banks involved in the EFTPOS direct debit payment system will therefore resemble the regime applicable to the processing of payments made to merchants under credit cards.

7 The exceptions to the new regime for EFTPOS interchange fees are concerned with purchases of less than $15 and purchases which involve the withdrawal of cash by a customer.

8 For purchases under $15 there will be no fee. For cash withdrawals, the issuing bank will continue to pay an interchange fee to the acquiring bank, although the amount of the fees will be greater than those that are presently in force.

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9 The three publications of which Aldi complains were released in August and September 2011. The first was a media release dated 12 August 2011. The second was a column written by Mr Bruce Mansfield, the Managing Director of ePAL, published in the Herald Sun newspaper on 12 August 2011. The third was a media release dated 8 September 2011 published by ePAL as a "clarification" of the earlier media release. The relevant paragraphs of each of those publications is set out at [50]–[53] below.

10 It is sufficient to say, by way of introduction, that the effect of the statements in the 12 August media release and the column in the Herald Sun was that consumers should not face new charges as a result of changes made to interchange fees which do not involve direct charges to consumers or retailers.

11 The effect of the relevant part of the clarification statement of 8 September 2011 was that it remains to be seen whether acquiring banks will pass part or all of any fee changes through to retailers and what retailers may do to their customers as a result of any changes in the interchange fees.

12 The short issue which arises in the proceeding is whether by publishing the three statements described above, ePAL engaged in misleading or deceptive conduct in contravention of the (somewhat inconveniently numbered) s 18 of the *Australian Consumer Law* which is found in sch 2 of the *Competition and Consumer Act 2010* (Cth) (formerly s 52 of the *Trade Practices Act 1974* (Cth)).

13 Some parts of the statements contain representations with respect to future matters. The provisions of s 4 of the *Australian Consumer Law* (formerly s 51A of the *Trade Practices Act 1974* (Cth)) are therefore engaged. The question which arises is, accordingly, whether ePAL had reasonable grounds for making the representations. The question turns upon whether certain evidence given by Mr Mansfield constitutes sufficient evidence of reasonable grounds for the purposes of s 4.

Background to the EFTPOS payment scheme

14 EFTPOS is apparently the most widely used debit card payment system in Australia, accounting for 83% of debit card transactions. More than 5 million EFTPOS transactions are made each day, comprising some $285 million in purchases and $40 million in cash withdrawals. In 2010, Australian consumers carried out more than 1.9 billion EFTPOS transactions at 389,000 merchants using more than 700,000 EFTPOS terminals.

15 The EFTPOS payment system was in place prior to the incorporation of ePAL in 2009. ePAL was established with the support of the Reserve Bank of Australia and the 14 direct participants in the EFTPOS system.

16 ePAL is wholly owned and funded by its 14 founding members who include the four major Australian banks (CBA, NAB, Westpac and ANZ) and two leading retailers (Woolworths and Coles). The other members consist of four other banks (Bank of Queensland, Bendigo and Adelaide Bank, Citigroup and Suncorp Metway) and four credit unions and building societies (or their representatives). Aldi is not a member.

17 Except in the case of Woolworths and Coles, an EFTPOS transaction typically involves four parties as follows:

- First, the consumer who buys goods or services from a retailer. The consumer pays for the goods or services using an EFTPOS card issued to the consumer by a bank or financial institution, that is to say, the issuer.
- Second, the retailer or merchant who receives payment from the consumer through the retailer's bank, that is to say the acquirer, which collects payment from the issuer.
- Third, the issuer that issued the card to the consumer.
- Fourth, the acquirer that collects payment from the issuer.

18 Woolworths and Coles are not issuers. They act only as self-acquirers. Two of the smaller institutions (representatives of credit unions or building societies) mentioned above act only as issuers.

19 In the case of a retail EFTPOS transaction involving Woolworths or Coles, there are only three parties, namely the consumer, the issuer and Woolworths or Coles which act as both retailer and acquirer.

20 Other than Woolworths, Coles and the two small institutions, the remaining ten members of ePAL (including the four major banks) are either net issuers or net acquirers. That is to say, they derive more income from issuing than acquiring, or the reverse. Whether a particular member falls into one category or the other, as a net issuer or net acquirer, is confidential.

21 ePAL does not receive or pay interchange fees which are only payable between issuers and acquirers. However, the members of ePAL pay another type of fee to ePAL. That fee is known as a scheme fee.

22 The scheme fees payable by members of ePAL were increased with effect in January 2011. The new interchange fees will become effective on 1 October 2011 for members who opt in to the new regime by that date or at a later date for members who elect to opt in at a later point of time.

The new interchange fee model

23 In February 2011 ePAL decided to introduce a multilateral interchange fee regime to replace the existing bilateral arrangements.

24 There will be no interchange fees between acquirers and issuers for transactions involving payments to a registered charity or for Medicare refund payments. Otherwise, for those members of ePAL which opt into the new multilateral interchange fee model, the following fees will apply:

- for all purchases of less than $15 (where no cash is withdrawn) there will be no interchange fee between issuers and acquirers;
- for all purchases of $15 and over, the acquirer will be required to pay the issuer $0.05;
- for each cash withdrawal (whether combined with a purchase or not) the issuer will be required to pay the acquirer $0.15.

25 Although not stated explicitly in Mr Mansfield's affidavit, it would seem that the effect of the new regime where there is a purchase of $15 or more, combined with a cash withdrawal, will be that the issuer will be required to pay the acquirer 10 cents.

26 The overall effect of the adoption of the new multilateral interchange fee model is that, other than in low value transactions (and excluding cash withdrawals), the acquirer is 9¢ to 10¢ worse off than it was under the old regime. This is because the acquirer must now pay 5¢ on each transaction to the issuer under the new regime whereas the acquirer was previously paid 4¢ to 5¢ per transaction by the issuer.

Background to the "misleading" statements

27 ePAL announced the new multilateral interchange fee model in a media release dated 8 March 2011.

28 The media release announced the new interchange fees which I have set out above at [24. It said that the new interchange fees should "be considered alongside the separate scheme fees".

29 The release also contained a "note to editors". It is not clear whether this formed part of the material included in the release as issued. The note included a colour diagram which indicated that:

Interchange Fee	+	Network Fee	+	Internal Costs & Pricing	=	Merchant Service Charge

30 On the day of the 8 March media release, Mr Mansfield sent an email to the board of directors of ePAL about the release. He said he had attached for "INTERNAL USE only" a series of questions and answers and frequently asked questions that may assist if the directors were asked to comment on the release.

31 One of the suggested answers in the draft questions and answers, dealing with a possible question about a shift in revenue in favour of the banks was:

> The effect of the new fees on individual retailers will vary depending on the types of transactions they generally handle. When the zero interchange fee transactions and negative interchange fee for cash-out are factored in, the net cost of processing EFTPOS transactions under the new model for many retailers will be neutral.

32 The suggested answer to a question as to "How do you expect retailers to absorb this charge, given the pressures they face?" was:

> We don't know what direct impact this will have on retailers in the short term.

33 In mid-March 2011, shortly after the announcement of the new interchange fees, there was an exchange of emails between Mr Ross Ianello of the National Australia Bank and Mr Mansfield which sheds some light on Mr Mansfield's knowledge of the effect of the new regime.

34 In his email to Mr Mansfield dated 16 March 2011, Mr Ianello said:

> Net Net the position for NAB is we are worse off by supporting the ePAL scheme mandates. Comments like ....it was a matter for Banks that processed merchant transactions as to how much, if any, of the cost they chose to pass on.... is a cop out.

35 Mr Mansfield replied to Mr Ianello by email dated 17 March 2011 in which he stated, relevantly:

> [W]e are under tremendous pressure from a number of media outlets to defend the

> significant EFTPOS fee increase that merchants will now have to pay from October 2011.

36 During May and June 2011, St George Bank notified a number of its merchant customers that the fees payable by them on debit card transactions would increase by a significant percentage with effect from 1 October 2011. The notifications seem to have been given to smaller business entities such as newsagents.

37 St George is not a member of ePAL but its parent company, Westpac Banking Corporation is a member of the scheme. Aldi does not contend that ePAL was aware of the communications between St George and its customers in May and June but Aldi points to the communications as evidencing what Aldi submits to be the inevitable consequence of the new interchange fee regime.

38 Aldi refers to an email from Mr Andrew Manning of 7-Eleven stores to Mr Mansfield dated 9 June 2011 as evidence of ePAL's knowledge of these consequences. The email was sent following upon a meeting between Mr Manning and Mr Mansfield. Mr Manning said:

> Obviously the regulatory changes have turned the traditional business models – for both acquiring and issuing – on their head. It therefore seems to me that, in the short term, the principal impact on 7-Eleven will be the change to our cost and revenue structures that must inevitably follow as the banks adjust to the new reality.

39 In July 2011 Mr Mansfield received an email from Sarah Craig of Sefiani Communications Group (a media company which represents ePAL) about an enquiry from the NSW Office of Fair Trading. The email was dated 21 July 2011 and stated that the Minister's office had

> received an inquiry from Jason Morrison from 2GB, who is receiving complaints from merchants about the charges they are being forced to pay for eftpos, which is higher than the charges for credit card transactions.

40 That same day, Mr Mansfield forwarded Ms Craig's email to Mr Axel Boye-Moller of Westpac. Mr Boye-Moller sits on the board of ePAL. Mr Mansfield commented on Ms Craig's email as follows:

> Please see below - 2GB has picked up on the above issue and merchant complaints re eftpos merchant re-pricing by Westpac and St. George.
> ...
> Before we revert with any comment, we would appreciate you making contact with... Choice... and the Minister's Office.

Can you please follow up and let me know when you have done so.

41 In cross-examination, Mr Mansfield said he could not recall hearing back from Mr Boye-Moller about the enquiries which Mr Mansfield had requested.

42 On the morning of 9 August 2011, Mr Temogen Hield, the Chief Operating Officer of ePAL, sent an email to Mr George Lawson of Westpac. The email referred to "a bit of a media storm brewing" about some of St George's "re-pricing". Mr Hield asked Mr Lawson whether he was able to "share the facts around the re-pricing activity" and in particular the relationship between EFTPOS and credit cards.

43 The media storm to which Mr Hield referred was reflected in an interview conducted on 2GB that morning by Mr Jason Morrison of the NSW Minister for Fair Trading and Mr Mansfield. A transcript recording the relevant part of the interview was tendered in evidence and Mr Mansfield was cross-examined about it.

44 Mr Mansfield made a number of concessions in the course of cross-examination by Mr Hutley SC about the state of his knowledge of the effect of the new interchange regime as at the date of the interview on 9 August 2011.

45 First, Mr Mansfield conceded that he believed as at 9 August 2011 that both Westpac and St George had notified some of their merchant customers that they (Westpac and St George) proposed to pass on to the customers part or all of the 5 cent interchange fee as from 1 October 2011.

46 Second, Mr Mansfield believed that the fee increases or "pass-on" by Westpac and St George were not going to be limited to the three individuals he had heard about at the time of the interview.

47 Third, he accepted that the object of the new interchange fee regime was to move to the standard model adopted in credit card transactions and that part of that model was for acquiring banks to pass on the fee to the merchants.

48 The following exchange then took place:

MR HUTLEY: And you knew, as night followed day, that that standard model

would be followed by any bank who signed up for this exercise, didn't you.

MR SMITH: At what point is that?

MR HUTLEY: At the point to which I'm directing the questions, as the witness well knows.

THE WITNESS: It was up to the individual acquirers, but, yes.

49 Mr Hutley went on to put to Mr Mansfield that he understood, as at 9 August 2011, that Westpac and St George had adopted a policy of passing on the interchange fees in whole or in part. Mr Mansfield said he was not aware of that and, after a lengthy pause, that he had not been advised of a policy.

The 12 August media release

50 The relevant parts of the 12 August media release are as follows:

> **eftpos says no charge to consumers in planned changes**
>
> ***Sydney, 12 August 2011*** – Australian consumers should not face new charges following planned changes to eftpos interchange fees, according to eftpos Payments Australia Limited (ePAL), the company that manages Australia's most popular debit system.
>
> ePAL Managing Director, Bruce Mansfield, said the changes to come into effect later this year affected financial institutions on either side of eftpos transactions, and did not involve direct charges to either consumers or retailers.
>
> "The changes to eftpos include an incentive for retailers to accept eftpos for purchases under $15, potentially making minimum eftpos amounts a thing of the past, and will not result in any increase in consumer bank fees. That's very good news for consumers," Mr Mansfield said.

The Herald Sun column

51 The relevant part of Mr Mansfield's column which appeared in the Herald Sun on 12 August 2011 are as follows:

> In March, eftpos announced changes to fees flowing between financial institutions on either side of eftpos transactions. These fees are not paid to eftpos, nor do they affect retailers or consumers directly

The "clarification" statement of 8 September 2011

52 On 8 September 2011 ePAL put out a media release stating that it wished to clarify aspects of its planned changes to the EFTPOS interchange fees as described in its media release dated 12 August 2011.

53 The relevant paragraphs of the 8 September statement are:

> The planned changes to eftpos interchange fees will commence to be implemented from 1 October 2011. It remains to be seen whether acquirers will pass part or all of any fee changes on to retailers and what retailers may do in relation to their consumers as a result of any changes.
>
> It is therefore premature to state with certainty what impact the planned changes will have on retailers or then upon their consumers.

Mr Mansfield's thinking process

54 Mr Mansfield endeavoured to set out his thinking process in relation to the publications referred to above in his affidavit sworn on 19 September 2011.

55 He dealt with his column in the Herald Sun which he said he approved on 5 August 2011. Mr Mansfield said that when he approved the column, he believed that the interchange fee would be paid between the issuer and the acquirer and that it was not a charge directly to either the consumer or a retailer. He went on to say:

> For that reason I did not think that the new multilateral interchange fees affected retailers or consumers directly.

56 Mr Mansfield adopted the same reasoning process in approving the 12 August release but he added a number of further steps to his thinking process.

57 Some of the steps in Mr Mansfield's thought process were set out in a confidential exhibit, Exhibit BAM-A, to his affidavit of 19 September 2011. Mr Mansfield accepted in cross-examination that two of the steps set out in paragraph 3 of his confidential exhibit were false.

58 Both of those steps seem to me to have been important parts of Mr Mansfield's thought processes. It was not suggested that the statements were deliberately false and I do not consider that he made the statements in his affidavit dishonestly but I will refer to the effect of his concessions at [85]ff.

59 It will also be necessary to take into account that Mr Mansfield said in cross-examination that the question he addressed when considering the effect of the new interchange charge was limited to new charges levied by banks on consumers. He said he did not intend his thought processes to extend to the question of whether consumers would face new charges as a result of the pass through by banks to merchants and then on to consumers.

60 This qualification therefore extends to his statement of belief that consumers using the EFTPOS system should not face new charges by financial institutions because of:

> (i) My knowledge that the majority of acquirers at that time had not opted in to the new multilateral interchange fee arrangements commencing 12 August 2011;
> (ii) My knowledge that for those acquirers who had elected to opt in to the new multilateral interchange agreements, one acquirer did not have plans to increase merchant fees at that time; and
> (iii) My view that, if a member is a net issuer, the net flow of multilateral interchange fees is likely to be in their favour and they would be unlikely to raise fees to their customers.

61 Mr Mansfield then turned in his affidavit to his thinking process in approving the 8 September release. He took into account a number of matters including those stated in paragraph 4 of the confidential exhibit to his affidavit. But the matters identified in paragraph 4 incorporated those in paragraph 3 which included the matters that he acknowledged under cross-examination to be false.

62 It is unnecessary to set out the non-confidential matters which Mr Mansfield identified in paragraph 54 of his affidavit as the matters he took into account. It is sufficient to say that the matters included his belief that each institution makes its own decision and his expectation was "that a number of acquirers would absorb part or all of these changes.

The Principles

63 There was no dispute as to the applicable principles. They were stated by McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [102]–[103], [109] ("*Butcher v Lachlan Elder*"). His Honour's observations were endorsed by Gummow, Hayne, Heydon and Kiefel JJ in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102] ("*Campbell v Backoffice*").

64 The effect of what the High Court has said in determining the proper scope and application of s 52 of the *Trade Practices Act* (now s 18 of the *Australian Consumer Law* which is found in schedule 2 of the *Competition and Consumer Act 2010* (Cth)) is that conduct is not confined to "representations" and the section requires the Court to examine the impugned conduct as a whole, not in isolated parts.

65 Also, the conduct must be examined in the light of the relevant surrounding facts and circumstances. The question is one of fact. It is an objective question that the court is required to determine for itself. The effect of any relevant statements or any silence in the context of a single course of conduct must be deduced from the whole course of conduct: *Butcher v Lachlan Elder* at [109]; *Campbell v Backoffice* at [102].

66 A distinction is to be drawn between the approach to characterisation of conduct as misleading or deceptive when the conduct involves the public, on the one hand, or dealings between individuals, on the other. When the conduct is directed to members of a class in a general sense, then the inquiry is to be made with respect to a hypothetical individual "isolate[d] by some criterion" as a "representative member of that class": *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102]–[103]; *Campbell v Backoffice* at [26] per French CJ.

67 In *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at [105], Keane CJ (with whom Emmett and Finkelstein JJ agreed) adopted as the relevant test that where a representation is made to the public, or to a section of the public, it will be misleading or deceptive if, viewed as a whole, it has a tendency to lead an ordinary or reasonable member of the class in question into error.

68 Where a representation is made with respect to a future matter and the person making the representation does not have reasonable grounds for making it, the representation is taken to be misleading: see s 4(1) of the *Australian Consumer Law*, formerly s 51A of the *Trade Practices Act 1974* (Cth).

69 Where the representor adduces evidence attesting to reasonable grounds, it will be a matter for the Court to determine whether the evidence establishes reasonable grounds. The section does not place any onus on the person who made the representation to prove that the

person had reasonable grounds: see s 4(3) of the *Australian Consumer Law*; see also *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [127] per Keane JA; see also *McGrath v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230 at [191] per Allsop J.

Whether the 12 August media release was misleading

70 The substance of the submissions made in closing address by Mr Brereton SC for Aldi was that the press release is directed at Australian consumers generally rather than at consumers in their capacity as the holders of debit cards issued by banks or other financial institutions and that it was also directed to retailers.

71 Mr Brereton submitted that a reasonable reader, being a member of that class or classes, would read the release as meaning that there would be no charge to consumers as consumers. That is to say, there would be no extra charge to them at the retail level or checkout counter when their card is used at retail stores.

72 He drew attention in this regard to the breadth of the word "charge" or "charges". He submitted that where the release speaks of direct charges to consumers or retailers, it is plainly directed to consumers purchasing goods or services from retailers. He submitted that accordingly the word "charge" or "direct charge" is broad enough to include charges in the nature of a merchant service fee such as the surcharge commonly charged at retail outlets for use of some (or all) types of credit card.

73 The substance of Mr Brereton's submission was that the heading and the first and second paragraphs of the release, when read in this way, are misleading because the whole purpose underlying the new interchange fees is to reverse the previous regime so that acquirers will bear the cost which they will pass on, in whole or in part, to retailers who will inevitably pass that cost on to consumers.

74 Senior Counsel for ePAL, Mr R M Smith SC, submitted that when the release is read as a whole, it is plainly directed at consumers with EFTPOS debit cards and retailers who use the EFTPOS payment system.

75 Mr Smith drew attention, in particular, to the third paragraph of the release which includes the words "will not result in any increase in consumer bank fees." He therefore submitted that, when read in its full context, the relevant charges to which the release refers are consumer bank charges.

76 Thus, Mr Smith submitted that the overall effect of the release is that consumers will not have to pay increased consumer bank fees to their issuing bank and retailers will not have to pay direct charges to their acquiring bank. He submitted that both those statements are accurate.

77 In my opinion, whether the release is directed at consumers generally or consumers who hold debit cards, the release is misleading. The same conclusion applies whether the release is directed at retailers generally or at retailers who use the EFTPOS payment system.

78 It seems to me that to read the release in the sense suggested by Mr Smith is to read it too narrowly. Mr Smith is correct in drawing attention to the reference to consumer bank fees in the third paragraph but, in my opinion, that statement, when read in its full context, is only part of the overall message conveyed by the release.

79 In my opinion, the full context indicates that the release is concerned with the entire range of charges payable by consumers. That is, in my view, the way in which the hypothetical or representative member of the class would read the releases.

80 It is true that the heading is an invitation to read the full release but the use of the words "no charge to consumers" directs attention to the full range of charges. That is borne out by the first paragraph which says that Australian consumers should not face new charges.

81 The second paragraph, which states that the charges affect financial institutions on either side of the transaction and did not involve "direct charges" to consumers or retailers, does not limit the scope of the charges which are the subject of the release. It merely deals with the way in which the charges are to be levied between the banks or financial institutions. To say it did not involve direct charges to consumers or retailers states only part of the message.

82 Similarly, to read the third paragraph in the way in which Mr Smith suggests, is to address only part of the message conveyed by the release. To restrict it in the way Mr Smith submitted would be to apply what, in my respectful opinion, is an overly legalistic approach to the document. That is not the way in which the representative, or ordinary reasonable consumer would read it.

83 In my opinion, the release is misleading because it was established in the evidence that prior to the date of the release, Westpac and St George had adopted a policy of passing some part of the charge levied on the acquiring bank on to a significant number of their retail customers. Moreover, Mr Mansfield was aware of this before he authorised the publication of the release.

84 Mr Mansfield initially suggested that the additional charges were confined to the three retailers who complained to 2GB but he ultimately conceded that he knew the additional charges extended to a much wider range of customers.

85 That the release is misleading is borne out by Mr Mansfield's acknowledgment that the purpose of the new regime is to bring the interchange fee system for debit cards into line with the system for credit cards. The fees charged may be different but the rationale is (subject to certain exceptions) to impose a fee on the acquiring bank.

86 Mr Smith correctly draws attention to the exceptions, namely EFTPOS transactions of less than $15, where no fee is payable, and "cash out", or in traditional parlance, cash withdrawals, where the issuer pays a fee to the acquirer.

87 In practice, this may ameliorate the effect of the fee payable by the acquiring banks on retail transactions over $15. However, Mr Mansfield acknowledged in his evidence that, prior to the August release, he realised it was quite likely that at least some consumers might experience an increase in their costs through the process of pass-through from the acquiring bank to the merchant and then from the merchant to the consumer.

88 Indeed, it seems to me that this concession was one which was correctly made because it was referred to in the note to editors on the original release in March 2011, namely that the interchange fee plus other costs equalled the merchant service fee.

89 So too, Mr Mansfield's email of 8 March 2011 with the draft Questions and Answers, acknowledged the likely effect on at least some retailers.

90 I do not consider that the evidence adduced by Mr Mansfield of his thought processes established reasonable grounds for those parts of the release which contained representations as to future matters.

91 I do not think that Mr Mansfield was a dishonest witness. In my opinion, the reason he took some time to give his answers and in some instances to give answers that were not correct was that he was very cautious, and indeed unduly defensive, in answering Mr Hutley's questions. Mr Hutley's cross-examination was robust but fair. However, Mr Mansfield seemed to be reluctant to make concessions where concessions were due because he was concerned that to do so would impinge upon ePAL's case.

92 Although Mr Mansfield said in his evidence that he had not been advised that Westpac and St George had a policy of pass-through, the effect of his concessions set out at [45]–[47] above was that he was aware, at least as at 9 August 2011, of a probability that Westpac and St George had in place a policy to pass on part of the interchange fees that were announced in March. His statement that he had not been advised of a policy is probably true but it does not detract from the force of his concessions. That there was such a policy must have been clear to Mr Mansfield from his knowledge of the complaints made about Westpac and St George.

93 This was sufficient to demonstrate that the 12 August release was misleading and that Mr Mansfield's "thinking process" was flawed by the false statements he made about who had opted in and who had plans to pass on the charges.

94 Although the statements were "false", they were not deliberately so. Rather, they were inaccurate because Mr Mansfield endeavoured to take a somewhat technical and overly defensive approach to the way in which he gave his affidavit and oral evidence.

95 Mr Smith pointed to Mr Mansfield's evidence that, at the time of the August release, approximately 79% "of the acquiring members" were either planning not to pass on any cost increase to merchants, nor had they opted in to the new interchange regime at that time.

96 I do not consider that this is an answer to Aldi's claim. First, Mr Mansfield was apparently addressing the percentage figure on the basis of turnover rather than membership numbers. Second, it overlooks the fact that, at very least, Mr Mansfield knew at the relevant time that Westpac and St George had opted in and had a policy of partial pass through to a substantial number of customers.

The Herald Sun column

97 In my opinion, the column in the Herald Sun was misleading for much the same reasons as the 12 August release.

98 It is true that the impugned statement refers only to the effect of fees on consumers or retailers "directly". But the overall impression conveyed by the statement, read as a whole, is that it is concerned with charges to consumers and retailers.

99 Read in this way, I do not consider that Mr Mansfield's evidence established reasonable grounds for the reasons set out above.

The 8 September 2011 release

100 The statement in the 8 September 2011 release that "[i]t remains to be seen whether acquirers will pass part or all of any fee charges on to retailers" was misleading because, to Mr Mansfield's knowledge, Westpac and St George, had probably adopted a policy of partial pass through as referred to above.

101 I reject ePAL's submission that the statement assumes that acquirers will pass on some part of the charge, but how much is unknown. That is not the ordinary or natural meaning of the statement made in the release. It is not the way in which the hypothetical person or ordinary reasonable member of the class would read it.

102 It is true that the statement does not refer to *any* "part or all of any fee charges". But that is the way to which the sentence would ordinarily be read. The alternative approach, suggested by ePAL, is to read the sentence in a way which, in my view, is 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.

103 The last paragraph of the release does not affect this conclusion. Mr Mansfield did not have reasonable grounds for the reasons stated above.

Other submissions

104 The documents tendered by Mr Smith do not alter the conclusions set out above. It is true that this evidence indicates that the CBA has no plans to increase merchant charges. I would draw the same inference in relation to NAB.

105 But the short answer to this is that the statements are misleading because of the policy adopted by Westpac and St George of which Mr Mansfield was aware when the impugned statements were made.

Corrective advertising

106 In my opinion, there is utility in ordering corrective advertising. The terms of the advertisement should be as follows:

> There has been a range of comments in the media about EFTPOS' interchange fees. ePAL, the company that manages the EFTPOS debit payment system, wishes to clarify aspects of planned changes to EFTPOS interchange fees and to correct statements made in a media release dated 12 August 2011, a column in the Herald Sun on 12 August 2011, and a media release dated 8 September 2011.
>
> ePAL is aware that some acquirers are intending to pass part or all of these fee changes on to some retailers. It remains to be seen what such retailers may do in relation to their consumers as a result of these changes. ePAL is also aware that other acquirers do not intend to pass on any of these fee changes to retailers.
>
> It is therefore premature to state with certainty what impact the planned changes will have at a retail level.

Orders

107 I do not consider that injunctive relief is appropriate. I will make the following declarations and orders:

1. A declaration that by issuing and publishing the documents being Annexures "A", "B" and "C" to the originating application, the Respondent engaged in misleading or deceptive conduct in contravention of the *Australian Consumer Law*.

2. An order pursuant to s 232 of the *Australian Consumer Law* that the Respondent publish an advertisement in a newspaper circulating nationally and in another newspaper circulating in the capital city of each State and Territory in the terms set out above at [106].

3. An order that the Respondent pay the Applicant's costs of the proceeding.

I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 29 September 2011