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29 November 2010

Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Mr Hawkins,

**Senate Economics Committee Inquiry—  
'Competition within the Australian banking sector'**

Please find enclosed our submission for the 'Competition within the Australian banking sector' inquiry (the **Inquiry**).

Maurice Blackburn is a leading Australian plaintiff law firm with significant litigation experience in consumer protection matters. In conjunction with IMF Australia Ltd, we are conducting a series of class actions against 12 banks in relation to unfair 'exception' fees, also commonly known as penalty fees.

Amongst other matters, the enclosed submission deals with the fees and charges levied by authorised deposit-taking institutions (**ADIs**) and finance companies on products available in the marketplace.

Maurice Blackburn notes the relevance of, and supports, the policy statement entitled 'A Consumer Plan for Australian Banking' released by the Consumer Action Law Centre on 8 November 2010. The document is available for download from the CALC website.

Please contact \_\_\_\_\_ if you have any questions in relation to Maurice Blackburn's submission. We would appreciate an opportunity to appear before the Committee.

Yours faithfully

**Ben Slade**  
**NSW Managing Principal**  
**MAURICE BLACKBURN**

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## Submission to the 'Competition within the Australian banking sector' inquiry (the Inquiry)

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### Introduction

Maurice Blackburn is a leading Australian plaintiff law firm with significant litigation experience in consumer protection matters.

We are conducting a series of class actions against up to 12 banks in relation to unfair 'exception' fees, also commonly known as penalty fees, charged on transactional accounts and credit cards (the **Bank Fees Class Actions**).

This submission is in response to the 'Competition within the Australian banking sector' inquiry (the **Inquiry**) being conducted by the Senate Economics Committee (the **Committee**).

This submission deals with matters falling under three of the Inquiry's stated terms of reference:

1. the products available and fees and charges payable on those products;
2. how competition impacts on unfair terms that may be included in contracts; and
3. any other related matter.

Specifically, this submission considers:

- (a) the unfair impost of exception fees charged by ADIs and finance companies;
- (b) the effect of a failure of competition upon the proliferation of harsh and oppressive terms and conditions governing banking and credit products; and
- (c) the limitations of disclosure as a consumer protection mechanism.

### Overview

Bank fees have long been the subject of significant community debate.

Current regulation of ADIs and finance companies as it pertains to consumers is based on disclosure, with the objective of ensuring that consumers can be fully informed of their rights and obligations.

However, disclosure of fees and charges, and the circumstances in which they are incurred, does not assist those vulnerable or disadvantaged consumers who may incur fees due to financial difficulties, whether they be single people on low incomes, families with high costs of living and raising children, or small businesses running into periodical troubles.

The very real experience of countless Australians is that telling them when they will be hit with a fee makes no difference, no matter how well they manage their money: if the money is not there when it needs to be, the exception fees will start to roll in.

There also remain high actual and perceived barriers to switching, mitigating one of the benefits that disclosure was supposed to confer.

In addition, current banking contracts often contain terms that are unfair to customers. The lack of competition in the industry, and the consequential lack of substantive consumer bargaining power, means that customers are at the mercy of the financial services sector. While the recent introduction of the Australian Consumer Law should help address this imbalance, it will require active enforcement by a well-resourced regulator.

Our submission recommends:

- the publication by ASIC, Treasury and/or the ACCC of guidelines on equitable and efficient pricing of exception fee charges and fair and reasonable contractual terms;
- the enforcement of such guidelines, and of existing statutory provisions by ASIC and/or the ACCC to ensure equitable and efficient pricing of exception fee charges and fair and reasonable contractual terms;
- detailed analysis of an appropriately targeted legislative response to unfair and excessive exception fees, and the costs and benefits of any such legislative response—moving beyond the dependence on disclosure as the primary form of consumer protection.

## Bank fees are a matter of public importance

Bank fees are a matter of strong public interest. They are the subject of regular commentary in the popular media and by decision-makers.

The Reserve Bank of Australia has reported that in the 2009 financial year, banks charged \$12.7 billion in bank fees to their household and business customers. Of this amount, \$1.2 billion were exception fees.<sup>1</sup> There is little publicly-available information in respect of prior years (the Reserve Bank published similar figures only for 2008), but there is no doubt that exception fees are a significant cost to customers.

The large number of customers who have registered to take part in Maurice Blackburn's series of Bank Fees Class Actions is a further example of the widespread community dissatisfaction with bank fees. As of 24 November 2010, over 183,000 bank customers have registered to take part in these class actions; of these, over 148,000 are customers of Australia's four largest banks: ANZ, Commonwealth Bank, NAB and Westpac. The Bank Fees Class Actions are specifically targeting the legal basis upon which these banks have been charging exception fees.<sup>2</sup>

While bearing different names throughout the marketplace, exception fees can be divided into four categories:

- **Honour Fees:** charged when an ADI approves a customer's transaction that 'overdraws' their bank account or causes their account balance to exceed any formal pre-arranged overdraft limit;

<sup>1</sup> Reserve Bank of Australia, *Bulletin – June Quarter 2010*, 31-35

<sup>2</sup> IMF, Maurice Blackburn

- **Dishonour Fees:** charged when an ADI rejects a customer's attempt to 'overdraw' their bank account or exceed any formal pre-arranged overdraft limit;
- **Late Payment Fees:** charged when a financial institution receives a payment for a credit card some time after a stipulated due date;
- **Overlimit Fees:** charged when a financial institution approves a customer's transaction that takes them over a pre-arranged credit limit.

Banks have described their recent moves to cut their exception fees as a sign of competition in the sector.<sup>3</sup> Any reprieve for consumers however, may only be pyrrhic, as fee revenue in credit cards and personal loans has since increased.<sup>4</sup>

Further, it is more accurate to describe such moves as a response to the introduction of federal unfair contract terms laws. One may perceive the move to have been a function of regulation rather than market forces.

## Unfair exception fees are a significant burden

The deleterious impact upon individual consumers of the regular charging of high-cost exception fees is plainly evident. The fact that their imposition is triggered almost invariably by a lack of funds on the part of the customer links such negative effects more directly to low-income earners: most specifically those 'working poor' who do not qualify for the various fee-free 'basic' bank accounts offered by ADIs. As a matter of social policy this is clearly an inequitable outcome that burdens the most financially vulnerable in our community with what would appear to be the cross-subsidisation of the cost of payment systems utilised by virtually all Australians.

Less immediately apparent however are the economic inefficiencies inherent in the price structures underlying exception fees. Such matters were identified as far back as 1995 by the Prices Surveillance Authority in its *Inquiry into Fees and Charges Imposed on Retail Accounts by Banks and Other Institutions and by Retailers on EFTPOS Transactions* (the **PSA Inquiry Report**), which noted that:

- fees and charges which exceed average underlying costs associated with those fees and charges are commonly imposed in connection with so-called 'services' where the customer has no choice of provider, such as cheque dishonour fees;<sup>5</sup>
- indeed, the customer is 'captive' in many such situations, which leads to an absence of competitive pressure on exception fees and scope for monopoly pricing;<sup>6</sup>
- charging more than average cost is clearly contrary to efficient pricing principles;<sup>7</sup>
- the quantum of exception fee charges such as cheque dishonour fees are not driven by underlying costs;<sup>8</sup>

<sup>3</sup> Australian Bankers Association, 'Banking debate needs facts not rhetoric' (Media Release, 4 November 2010) <<http://www.bankers.asn.au/default.aspx?ArticleID=1513>>; Australian Bankers Association, 'Little change in cost of banking for households' (Media Release, 10 June 2010) <<http://www.bankers.asn.au/Little-change-in-cost-of-banking-for-households/default.aspx>>.

<sup>4</sup> CHOICE, *CHOICE reviews Bank Penalty Fees* (10 June 2010) CHOICE Online, <[http://www.choice.com.au/reviews-and-tests/money/banking/saving-money/bank-penalty-fee-income/page/\\$1%20billion%20in%20penalties.aspx](http://www.choice.com.au/reviews-and-tests/money/banking/saving-money/bank-penalty-fee-income/page/$1%20billion%20in%20penalties.aspx)>.

<sup>5</sup> Prices Surveillance Authority, *Inquiry into Fees and Charges Imposed on Retail Accounts by Banks and Other Institutions and by Retailers on EFTPOS Transactions*, Report No 65, 30 June 1995, 205.

<sup>6</sup> Ibid 208.

<sup>7</sup> Ibid 206.

- (e) the similarity of the quantum of exception fee charges levied by the 'big four' banks indicate the absence of a competitive environment;<sup>9</sup>

The PSA Inquiry Report concludes that the inefficient pricing structures evidenced above impose a burden not only on customers, but upon financial institutions and the financial services marketplace generally, by failing to promote the efficient allocation of resources.<sup>10</sup>

The current high levels of certain exception fees are not only socially inequitable, but economically inefficient.

## **Unfair terms remain in banking and credit contracts**

Like all traders with large retail customer bases, financial institutions rely upon standard form contracts to regularise its relationships with its customers. This is an inevitable incidence of modern commerce, however inherent in such a scenario is an invalidation of many of the classical assumptions that underlie legal theory regarding formation of contracts. There is no genuine agreement arising out of negotiation between equal parties. Rather, such contracts are prepared by the financial institution and presented to the customer on a take-it-or-leave-it basis.

This is an important element of any pragmatic analysis of Australian retail banking practices.

Unfortunately, financial institutions are prone to exploiting this imbalance of power. Contracts are customarily littered with harsh and onerous provisions preserving a financial institution's unilateral right to:

- vary any term of the contract;
- terminate the contract for any reason whatsoever;
- vary the price of services provided; and
- vary the nature or quality of services provided;

The unfair contract terms provisions of the new Australian Consumer Law are important steps towards curbing such excesses, however as with all consumer protection legislation, it is important that such legislation is enforced by an adequately-resourced regulator.

## **The limitations of disclosure**

The traditional approach to the regulation of financial products relies on the proposition that disclosure of information by financial services providers can help consumers make informed choices. For example, there are statutory requirements mandating the provision of Financial Services Guides and Product Disclosure Statements to customers wishing to open accounts with them.<sup>11</sup> Exception Fees must generally be specifically disclosed to the customer.

Yet despite the disclosure requirements, which theoretically arm customers with the knowledge of how they can avoid those fees, exception fee revenue is extremely high.

A consumer protection regime for banking products that is premised on disclosure, at least in the current regulatory framework, is inadequate:

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<sup>8</sup> Ibid 206.

<sup>9</sup> Ibid 208.

<sup>10</sup> Ibid 209-10.

<sup>11</sup> See eg *Corporations Act 2001* (Cth), ss 941A, 1012C.

- For some customers, exception fees are sometimes unavoidable, no matter what level of disclosure has occurred.
- Disclosure documents tend not to be read at all, even when written in “plain English”.
- Barriers to switching remain.

The limitations of disclosure as a panacea have been recognised by the introduction of valuable unfair contract terms regulation in the Australian Consumer Law, however the central tenets of industry-specific regulation in the financial services sector still evidence a more traditional reliance on disclosure.

**Exception Fees are sometimes unavoidable, no matter what level of disclosure has occurred**

Banking is an essential service. Most, if not all, Australians have at least one bank account, and the prevalence of credit cards is also high, with an average of approximately one card for every adult.<sup>12</sup> Further, with electronic transactions steadily increasing in preference over cash transactions, customers are beginning to rely more on access to banking services.

Perhaps the strongest illustration that shows why disclosure is ineffective is the fact that exception fees are sometimes simply unavoidable, even if disclosure has been objectively clear and straightforward. The participants in our Bank Fees Class Actions include many people who were in economically vulnerable circumstances when they were charged exception fees. There are examples of:

- a person who repeatedly incurred late and overlimit fees because they used their credit card to fund their gambling addiction, even though it should have been apparent to the bank based on ATM withdrawal locations and habits that the card was being used in this way;
- several people who have unsuccessfully tried to negotiate alternative refinancing options with their banks so that they could manage their credit card debts, only to have their refinancing proposals refused and for late and overlimit fees to continue being charged;

People in these situations are so precariously placed that they have little ability to avoid exception fees, regardless of the level of disclosure.

Additionally, while most contracts governing customers’ bank accounts typically confer a discretion on the ADI to waive these fees, our experience is that they are rarely waived. In the small proportion of cases where they are, they typically benefit those customers who have a large amount of wealth deposited with the ADI. Financially disadvantaged customers — who have a low-value relationship with the ADI — suffer these fees without any waiver, and certainly without any personal banker with whom they can take up their issue. It is also notable that very few ADIs offer exception fee concessions to those that the Government itself recognises as financially disadvantaged (for example, those in receipt of income support payments). No amount of additional disclosure can help customers stuck in such ‘credit traps’, or prevent them from getting caught in the first instance.

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<sup>12</sup> Credit cards and charge cards combined: Reserve Bank of Australia, *C1 Credit and Charge Card Statistics*, 12 October 2010 <<http://www.rba.gov.au/statistics/tables/xls/c01hist.xls>>.

Our Bank Fees Class Actions have also revealed examples where exception fees have been levied in such ways so as to facilitate double-dipping. For example, customers have been charged a Late Payment Fee, which then put their accounts over their credit limits, enabling the charging of a further Overlimit Fee. Disclosure does not prevent this unconscionable practice. Other examples of double-dipping include fees charged on accounts that are simply in an overdrawn state, even though they would have already been charged a fee upon being initially overdrawn (known by names such as 'irregular account fees' and 'overdrawn account fees').

### **Disclosure documents tend to not be read at all**

More often than not, consumers do not read the voluminous product disclosure statements and terms and conditions booklets provided with banking products. And why should they? These documents are lengthy and complex and, most importantly, they impose largely similar terms and fees, no matter which financial institution in the market place a consumer approaches. In such circumstances, it is arguably economically rational to save oneself the time of reading the documents when there is no significant discernable differentiation between the various banking products.

If policy makers acknowledge the reality that people do not necessarily read disclosure documents, a more robust regulatory solution is clearly suggested. This solution is readily at hand in the new unfair contract terms regulations – consumer advocates will be keen to observe how effectively those regulations are enforced.

### **Barriers to switching remain**

Even if disclosure could be perfected, it would be of limited protection to customers if they are unable to switch banks. Indeed, leaving aside all the practical problems of a disclosure system discussed above, a disclosure regime would only work if, with customers fully apprised of all the conditions governing the accounts available in the marketplace, they are able to take advantage of disclosure and switch to a bank that suits them best.

In this respect, we note that although the government has recently introduced mechanisms to facilitate switching, very few customers have actually used it.<sup>13</sup> This would indicate that other barriers to switching still remain. A recent internal ASIC survey reportedly showed '40% of 1,207 respondents couldn't be bothered switching banks because of the hassle, 10% said there was no point changing because all banks are the same and 10% found switching too hard a process'.<sup>14</sup>

More generally, Australian retail banking is, by world standards, an extremely concentrated industry, leaving few alternatives to which customers can turn.

## **Recommendations**

The lack of competition articulated above in respect of exception fees, and in respect of the 'fine print' terms and conditions of banking and credit products, is justification for further government action.

<sup>13</sup> 'Swan can't nominate bank-switch number', *Business Spectator* (online), 20 October 2010 <<http://www.businessspectator.com.au/bs.nsf/Article/Swan-cant-nominate-number-AM7RD>>.

<sup>14</sup> Patrick Stafford, 'Too hard to switch banks, despite government push', *Smart Company* (online), 12 July 2010 <<http://www.smartcompany.com.au/finance/20100712-too-hard-to-switch-banks-despite-government-push.html>> 'Too hard to change banks: poll', *Ballinna Advocate* (online), 4 November 2010 <<http://www.thechronicle.com.au/story/2010/11/04/still-too-hard-to-change-banks-survey/>>.

A valuable way of rectifying the information asymmetry that fosters the current anti-competitive environment in respect of exception fees is to require all financial institutions to adopt equivalent nomenclature and terminology when describing exception fees, in order to enable consumers to genuinely compare banking products with ease.

We note also that some financial institutions have granted customers the option to set 'hard' caps on credit cards and transactional accounts which are not able to be exceeded. Such an option is a valuable method of allowing consumers to take positive steps to minimise exception fees and should be made available by all financial institutions in respect of all accounts which charge exception fees.

However as demonstrated above, disclosure alone is an inadequate mechanism to protect consumers.

The unfair contract terms regulations in the new Australian Consumer Law has already conferred many relevant powers upon the Australian Securities and Investments Commission, and Australian consumers would benefit from the robust involvement of ASIC in enforcement of the new laws.

Further study and analysis should also be directed towards the costs and benefits associated with passing legislation which specifically targets unfair and excessive exception fees, and the form which such legislation should take.

Accordingly, this submission recommends:

- the publication by ASIC, Treasury and/or the ACCC of guidelines on equitable and efficient pricing of exception fee charges and fair and reasonable contractual terms;
- the enforcement of such guidelines, and of existing statutory provisions by ASIC and/or the ACCC to ensure equitable and efficient pricing of exception fee charges and fair and reasonable contractual terms;
- detailed analysis of an appropriately targeted legislative response to unfair and excessive exception fees, and the costs and benefits of any such legislative response — moving beyond the dependence on disclosure as the primary form of consumer protection;
- the universal availability of 'hard' caps which prevent the exceeding of credit limits on credit card accounts, and unauthorised debit balances on transactional accounts;
- financial institutions issue, at the time that a transaction for which an exception fee will be charged is authorised, a warning to customers that the transaction will incur an exception fee;
- financial institutions adopt equivalent nomenclature and terminology when describing exception fees in contracts, product disclosure documents and advertising material.