Submission to the

Senate Economic Legislations Committee

Inquiry into the Consumer Credit Protection (Amendment (Fees) Bill 2011

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The Secretary of the Senate Economic Legislations Committee Inquiry into the Consumer Credit Protection (Amendment (Fees) Bill 2011, advised that the Committee is interested in having a submission from me on the proposed Bill. Accordingly, I am making this submission.

The Bill proposes in Schedule 1, amendment of the National Consumer Credit Protection Amendment (Fees) Bill 2011 and in Schedule 2, amendment of the Banking Act 1959. In Schedule I, it is proposed that where a debtor or guarantor makes an application that a credit fee or charge is not reasonable and the ASIC may seek necessary amendment through court. Schedule 2 proposes amendment to the Banking Act 1959 and prohibits some banks from imposing an early termination fee in respect of any loan agreement or mortgage contract.

I have addressed each of these proposals, provided relevant analysis and summarized my opinion.

Schedule 1: amendment of the National Consumer Credit Protection Amendment (Fees) Bill 2011

As for the first proposal in my opinion several issues as under would arise:

a. The Schedule probably refers to the amendment to the National Consumer Credit Protection Act 2009 and not the Bill 2011 so necessary corrections would need to be made.

b. The proposal is basically echoing RG220 of ASIC which is applicable for residential mortgages but extending its scope to all consumer credit contracts.

c. The National Credit Code section 79 (3) already provides that '*In determining whether an establishment fee or charge is unconscionable, the court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract'*. The proposal uses the term 'materially exceeds' which may have a different meaning than unconscionable. Materially exceeding charge may not be necessarily unconscionable (or oppressive) though the intention of the proposal it seems to me is to really do away opportunities for unconscionable conduct.

d. The next question would be defining what 'materiality' in this context is. If we apply the definition of materiality as used in the auditing context, then an amount equal or exceeding 10 per cent of the base amount is generally considered to be material. The proposal is leaving this to the judgment of ASIC. I would support this.

e. An issues that may deserve merit is whether amendment to RG 220 of ASIC so as to include all consumer credit contracts would serve the purpose of the Bill. Amendment to the Act itself may have more force, presumably than the amendment to RG 220 but this is something that legal professionals could comment on.

f. 30 (B 4b) states that 'average reasonable cost' needs to be reckoned by ASIC. I am afraid the credit providers may be disadvantaged by this as lending decisions including fees and charges would be based on 'marginal cost' rather than average cost. This is especially true in the banking world where cost of funds is quite volatile.

g. Another issue is time limit for resolution of such cases. The Bill currently doesn't provide for any such time limit. It may help if a time limit of say one month from the date the complaint found acceptable by ASIC is put for submission of all relevant information by the concerned bank.

Recommendation:

I support the amendment proposed but would like the above considerations taken into account.

Recommendation:

It is recommended that a time limit be put on the bank for providing of information when asked by ASIC. If the case drags on the customer may not be able to take advantage of the competitive rates available from other providers.

Schedule 2: Amendment of the Banking Act 1959

As for the proposal in schedule 2 following issues arise in my opinion.

a. The proposal seeks to prohibit the bank with a market share of more than 10 per cent from imposing an early termination fee for any loan agreement. Market share has been defined as that determined by APRA on the basis of proportion of total deposits. I am of the view that the relevant criteria should really be on the basis of proportion of share in consumer credit.
b. The proposal in section 9 AF (3) states that where a bank which holds more than 10 per cent of market share has majority interest (51 per cent or more) in a subsidiary which is an ADI, then the ADI should also be prohibited from imposing an early termination fee. In my opinion this clause is going rather too far. The whole idea is to prevent banks from using market power. The subsidiaries may be operating in particular geographical areas and posing competition to providers in that area. It may put such a subsidiary at a disadvantage and will not create a level playing field in the geographical area. I wouldn't support this particular clause for that reason.

Recommendation:
Market share may be defined on the basis of share in the consumer credit market rather than on the basis of total deposits.

Recommendation:
I don't support the proposal in section 9 AF (3) of the Bill for reasons indicated above.