



Law Council  
OF AUSTRALIA

6 September 2007

Committee Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**Email:** [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Sir/Madam,

**Supplementary Submission on the Inquiry into the Australian Securities and Investments Commission (Fair Bank & Credit Card Fees) Amendment Bill 2007**

At the request of Senator Steve Fielding, the Australian Consumer Law Committee (the Committee) of the Law Council of Australia has prepared the following supplementary submission on the Inquiry into the Australian Securities and Investments Commission (Fair Bank & Credit Card Fees) Amendment Bill 2007.

This supplementary submission contains draft legislative provisions. Due to the complex nature of legislation the Committee submits these draft provisions as a guideline only, and would recommend that they be reviewed by a suitably experienced legislative draftsman.

Due to time constraints, this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Webb'.

Peter Webb  
**Secretary-General.**

CC: Senator Steve Fielding ([senator.fielding@aph.gov.au](mailto:senator.fielding@aph.gov.au))

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**Supplementary Submission to the  
Inquiry into the Australian  
Securities & Investment  
Commission (Fair Bank and Credit  
Card Fees) Amendment Bill**

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Senate Standing Committee on Economics

6 September 2007

**Supplementary Submission to the Senate Economics  
Committee**  
**Inquiry into the Australian Securities & Investments  
Commission (Fair Bank and Credit Card Fees) Amendment Bill**

Following the receipt by the Senate Economics Committee of the submission of the Australian Consumer Law Committee (“**the Consumer Law Committee**”) of the Law Council of Australia, Senator Steve Fielding has requested that the Consumer Law Committee provide the Senate Economics Committee with redrafted provisions of the *Australian Securities & Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill*. These redrafted provisions are below.

**Subdivision F – Fees and charges connected with provision of financial services**

In this subdivision:

“**consumer default**” means a breach by a consumer of a term of a contract between a financial service provider and the consumer.

“**default charge**” means a pre-determined fee or charge of any kind in a contract between a financial service provider and a consumer where that fee or charge is payable by the consumer in the event of a consumer default.

**12FA Default charge to be genuine estimate of damage**

- (1) A financial service provider must not include a default charge in a contract with a consumer for the provision of financial services, unless the default charge is at or below a genuine pre-estimate of the damage likely to be suffered by the financial service provider resulting from the consumer default.
- (2) Any provision of any contract relating to the provision of financial services that purports to allow a default charge in contravention of subsection (1) is void.
- (3) If, in contravention of subsection (1), a financial service provider includes a default charge in one or more contracts that is higher than a genuine pre-estimate of the damage likely to be suffered by the financial service provider resulting from a consumer default and the financial service provider has been

paid monies in accordance with the default charge, the financial service provider must, within a reasonable time after becoming aware of the contravention, refund the consumer the difference between the default charge and the amount equal to a genuine estimate of the damage that was in fact suffered by the financial service provider.

#### **12FB Valid default charge**

- (1) ASIC may require a financial service provider to produce to it, within 2 months of the commencement of this section or within 2 months of the use of contracts that impose default charges, the information and methodology relied on by the financial service provider to calculate any default charges in contracts used by the financial service provider.
- (2) ASIC may, after receipt of the information and methodology referred to in subsection (1), request that further information related to the calculation of default charges be produced to ASIC.
- (3) A financial service provider must comply with a request by ASIC pursuant to subsection (2) within a reasonable time after the receipt of that request.
- (4) ASIC may, after receipt of the information and methodology referred to in subsections (1) and, if relevant, (2), determine a valid default charge that, in all the circumstances, is the default charge that ASIC considers equal to a genuine pre-estimate of the damage suffered by the financial service provider resulting from a consumer default.
- (5) Without limiting the matters that ASIC may consider for the purpose of determining a valid default charge as referred to in subsection (4), ASIC may take into account the following:
  - (a) whether the default charge reflects a genuine pre-estimate of the additional administrative costs that might reasonably be expected to result from the consumer default, reduced by costs that are not able to be identified with reasonable precision and an amount that takes account of the ability of the financial service provider to mitigate the loss it suffers resulting from consumer defaults;

- (b) whether the default charge reflects a fair attribution of costs between defaulting consumers; and
  - (c) whether the default charge is based on a genuine estimate of the total numbers of expected instances of consumer defaults in a relevant period.
- (6) ASIC may, after review of the information and methodology referred to in subsections (1) and, if relevant, (2), require that the financial service provider alter a default charge to the valid default charge referred to in subsection (4).
- (7) A financial service provider may apply to the Court for a review of a decision made under subsection (6). If such a review application is made the onus is on the financial service provider to prove that a default charge is at or below a genuine pre-estimate of the damage likely to be suffered by the financial service provider resulting from the consumer default.

#### **12FC Fees when consumer default results from a third party default**

- (1) A financial service provider must not impose a fee or charge of any kind on a consumer for presenting a cheque to it for payment that is dishonoured.

#### **12FD Enforceable undertakings**

- (1) ASIC may accept a written undertaking given by a financial service provider in connection with default charges.
- (2) Without limiting the generality of subsection (1), such an undertaking may include provisions relating to:
- (a) the maximum amount of a default charge to be imposed for a consumer default; and
  - (b) the maximum total of default charges to be imposed on a consumer for consumer defaults in a 12-month period.
- (3) The financial service provider may withdraw or vary the undertaking at any time, but only with the consent of ASIC.

- (4) If ASIC forms the reasonable view that the financial service provider has breached any of the terms of the undertaking, ASIC may apply to the Court for:
- (a) an order directing the financial service provider to comply with the term that has been breached; or
  - (b) any order that the Court considers appropriate directing the financial service provider to compensate any person who has suffered loss or damage resulting from the breach; or
  - (c) any other order that the Court considers appropriate.
- (5) ASIC must keep a record of the full text of the undertaking.

**12FE ASIC to produce copy of information**

- (6) ASIC must, upon request by any person, produce information received by ASIC pursuant to section 12FB or 12FD, but ASIC must not produce information:
- (a) that the financial service provider has asked it not to release; and
  - (b) that ASIC is satisfied:
    - (i) is commercial in confidence; or
    - (ii) should not be disclosed because it would be against the public interest to do so; or
    - (iii) contains personal details of an individual.
- (7) If ASIC produces information that has certain information deleted from it, the copy must include a note stating that information has been deleted.