

Australian Securities and Investments Commission

Submission to the Inquiry into the Australian Securities and Investment Commission (Fair Bank and Credit Card Fees) Amendment Bill 2007

1. ASIC's consumer protection role

Background

- 1.1. The Australian Securities and Investments Commission (ASIC) enforces and regulates company and financial services laws to protect consumers, investors and creditors.
- 1.2. ASIC administers various pieces of legislation, regulations, instruments and codes that impose consumer protection requirements on the financial services industry. The two principal pieces of consumer protection regulation that we administer and enforce are the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and the *Corporations Act 2001* (Cth).
- 1.3. The ASIC Act contains provisions that are modelled on the consumer protection and unconscionable conduct provisions in the *Trade Practices Act 1974* (Cth). These provisions apply to the provision of financial products and services, including credit facilities and services relating to credit.
- 1.4. The *Corporations Act 2001* provides licensing, disclosure and quality of advice requirements that apply to most consumer financial products and services including securities, managed investments, superannuation, insurance products, bank accounts and financial advice.
- 1.5. Providers of these regulated financial services must generally hold an Australian financial services (AFS) licence or be a representative of an AFS licence holder, and comply with the conditions of the licence. One important condition is that licensees must be a member of an ASIC-approved external dispute resolution scheme.
- 1.6. However, these Corporations Act requirements do not apply to credit products or services (such as advice relating to credit products).

Regulation of fees

- 1.7. The principal regulatory measure in relation to fees for financial services, both at state and federal level, is the mandating of disclosure. Currently, ASIC's jurisdiction to ensure the proper disclosure of fees by banks, credit unions and other Authorised Deposit-taking Institutions (ADIs)

varies depending on the class of financial product or service. Many financial products (for example, insurance and superannuation) are regulated by the Corporations Act and require a product disclosure statement (PDS). A PDS must set out, amongst other things, the information a consumer would reasonably require to make a decision about whether to acquire a financial product (specifically including the cost of a product).

- 1.8. However, some financial products otherwise regulated under the Corporations Act, including basic deposit products such as everyday transaction accounts, have been exempted from this PDS requirement. In addition credit products, such as credit cards, are not regulated by the Corporations Act and so do not require a PDS. Specific disclosure requirements for credit products exist at state level under the Uniform Consumer Credit Code.
- 1.9. In summary, the financial products and services the subject of the current public debate on default fees (that is, retail transaction accounts and credit cards) do not require a PDS. For such products, ASIC's jurisdiction is limited to ensuring that product providers do not engage in misleading, deceptive or unconscionable conduct, either by act or omission.
- 1.10. Properly disclosed fees are not otherwise circumscribed by any legislation administered by ASIC, and ASIC does not have the jurisdiction to prohibit or prevent the charging, or regulate the amount of, any default fees.
- 1.11. The common law doctrine of penalties, which renders some contractual provisions in relation to damages for breach of contract unenforceable, affects the rights and obligations of the parties to a contract. Such rights can only be enforced by individual consumers seeking relief under the common law and are not enforceable by ASIC.

2. Overseas developments

- 2.1. The United Kingdom Office of Fair Trading (UK OFT) has a broad role in relation to the regulation of bank fees under its jurisdiction to conduct market studies and to ensure compliance with the Unfair Terms in Consumer Contracts Regulations (UK) 1999 (UTCCRs). The UTCCRs prohibit unfair contract terms generally, rather than specifically prohibiting penalty fees.
- 2.2. In April 2006, the UK OFT announced that its enforcement policy would be to assume that any default fee on credit card accounts above £12 (approximately A\$30) was likely to be unfair, in breach of the UTCCRs. In response, it appears that institutions in the UK have limited their credit card default fees to no more than £12.

- 2.3. The UK OFT had foreshadowed that similar principles could apply in relation to default charges on other ADI accounts. In March 2007, under the headline “OFT announces ‘quick fix’ on bank charges will disadvantage consumers”, it announced an in-depth market study of retail bank pricing to sit alongside a formal investigation into the fairness of bank current account charges, to be completed by the end of 2007.
- 2.4. In addition to the in-depth study, the UK OFT announced in July 2007 that it is commencing a test case in the UK High Court (equivalent to Australia’s Federal Court) for a declaration on the application of the UTCCRs in respect of unauthorised overdraft charges. It has stated that this action is in response to tens of thousands of complaints received by the County Courts and the Financial Ombudsman Service. The main financial institutions have cooperated with the OFT to get the test case before the Courts, and in the meantime the Financial Ombudsman Service has agreed to suspend handling individual consumer claims. The OFT considers that a quick determination of this point of principle will assist in securing a clear and orderly resolution of the claims concerning the fairness of these charges.
- 2.5. During this period, individual UK banks have also made announcements in relation to default fees. For example, in September 2006, HSBC plc announced a “Fair Fees” policy for its UK account holders. This policy has introduced lower overall default fees, a sliding scale for the fees, and various grace periods and thresholds.¹

3. Australian developments

ABA proposal

- 3.1. Following growing public debate and after discussions with ASIC, the Australian Bankers’ Association (ABA) announced in May 2007 that it would provide the public with more information on ADI default fees (called “exception fees” by the ABA).
- 3.2. As a first step in July 2007, ABA member banks published new information on prevailing default fees, including the circumstances in which such fees arise and how consumers can avoid them. As a second step, at the end of July 2007 the ABA published a fact sheet summarising the position on default fees charged by its member banks on concession accounts (accounts available to consumers with a Commonwealth concession card) and containing links to material on each of its member bank websites. As a third step, the ABA indicated that individual banks would review their terms and conditions on relevant products by the end of July 2007.

¹ While HSBC plc’s default fees are now around the lowest among major UK banks, HSBC plc still charges a £25 default fee in certain circumstances. It remains for the UK OFT to determine the threshold at which it will commence enforcement proceedings against default fees on bank accounts, having set the threshold for credit card default fees at £12.

ABACUS announcement

- 3.3. The industry association for credit unions and building societies, ABACUS, announced in May 2007 that it would be meeting with representatives from consumer groups (including CHOICE and the Consumer Action Law Centre) to discuss the consumer groups' proposal for an industry-wide review of default fees. ABACUS also noted that default fees charged by its members are on average lower than the comparable fees charged by the ABA's members.

ADI announcements

- 3.4. A number of banks have dropped the fees charged on concession accounts to between \$0 (such as the National Australia Bank) and \$10 (including ANZ, Westpac, St George and BankSA). Others have stated explicitly that the fees may be waived by a branch manager on a case-by-case basis.
- 3.5. ANZ has also announced² new default fee policies, including a simplification of its fee structure, providing customers with additional methods of avoiding default fees (including 'switching off' the ability to overdraw a transaction account), and a 'fairness' policy (including not charging a customer for the first default fee they incur and not charging more than one credit card overlimit fee in any one monthly statement cycle).
- 3.6. ASIC notes that a number of banks are yet to introduce concessional default fees, and also that some low income consumers will not hold the concession cards necessary to take advantage of the accounts offering concessional fees.

ASIC's role

- 3.7. ASIC continues to monitor the disclosure of default fees and the policy changes being announced by ADIs. We will be working with the industry to ensure that the disclosure of default fees, the circumstances in which they arise, and the manner in which they can be avoided, are disclosed as clearly as possible to consumers.
- 3.8. ASIC considers, in the context of the public debate on this issue and recent initiatives announced by some ADIs, that there is significant momentum for change that will be beneficial. It seems likely that the changes to date will provoke further announcements by other ADIs. The distinctive positions adopted by some institutions on fees and the public focus on the issue has enhanced the potential for greater competition.

² Media release of 28 August 2007.

ASIC regards this competition based in clearer disclosure as a positive development that is likely to draw attention to the issue of fees and enable consumers to make better-informed decisions about their bank and credit accounts and how to use them. For lower-income consumers, and specifically those with concession eligibility, the development of low-fee or no-fee concessional accounts should be especially beneficial.

4. Australian Securities and Investment Commission (Fair Bank and Credit Card Fees) Amendment Bill 2007

- 4.1. The purpose of this submission is to provide the Committee with a factual background on the prevailing legislative position, ASIC's role, developments overseas and the recent steps taken by key stakeholders in Australia.
- 4.2. ASIC has no specific comments to make in relation to the measures proposed in the Bill. The introduction of such measures is a matter for Government, its central policy agencies and ultimately the Parliament.

Australian Securities and Investments Commission
30 August 2007