The Senate

Standing Committee on Economics

Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008

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Senate Standing Committee on Economics

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TABLE OF CONTENTS

Chapter 1

Introduction

The Reference

1.1 The Australian Securities and Investments Commission (Fair Bank and Credit Charges) Amendment Bill 2008 (hereafter the ASIC bill) was referred to the Senate Economics Committee on 19 March 2008 on the recommendation of the Selection of Bills Committee. An earlier version of the bill had been referred to the committee in 2007, but the committee was unable to present a final report on that bill because the 2007 general election intervened. The Committee presented an interim report to that effect on 11 February 2008.

The Bill

1.2 The ASIC bill is a private senator's bill that was introduced by Senator Fielding on 14 February.

1.3 The bill proposes to amend the Australian Securities and Investments Commission Act 2001 to: limit banking and credit card penalty fees by ensuring fees are for cost recovery only; prevent fees being charged for third party dishonoured cheques; and enhance the powers of the Australian Securities and Investments Commission to monitor penalty fees and investigate customer complaints.[1]

Submissions and Conduct of the Inquiry

1.4 The reference was advertised in the press on 26 March 2008 and on the Committee's website. The Committee also contacted a number of organisations to notify them of the inquiry and to invite them to make submissions. The Committee received several form letters and twenty-nine submissions in relation to the bill. The Senate also authorised the Committee to take account of the evidence submitted in relation to the 2007 bill.[2] A list of submissions may be found at Appendix 1.

1.5 The committee conducted a public meeting on the reference in Sydney on 12 June 2008. Witnesses who gave evidence at the hearing are listed in Appendix 2.

Acknowledgements

1.6 The Committee thanks those who assisted with its inquiry.

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1 *Senate Bills List*, at: http://parlinfoweb.parl.net/parlinfo/view_document.aspx?id=1444&table=BILLSLST (accessed 18 June 2008).

2 *Journals of the Senate*, 20 March 2008, p.310.

Fees and charges

1.7 The bank fees and charges that are subject to this inquiry are described in the bill as *default charges*. A *default charge* is defined in the bill as follows:

> ***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.[3]

1.8 These fees and charges may also be described as *penalty fees* or (by the banks) as *exception fees*. In this inquiry witnesses used all these terms interchangeably, but wherever possible in this report the Committee has used 'default charges'. Default charges include account overdrawn or honour fees, credit card over limit fees and late payment fees, cheque inwards and outwards dishonour fees and direct debit dishonour fees.

Background

1.9 Bank customers who have defaulted on their contracts with the banks by, for example, exceeding limits on credit cards or not having sufficient funds in an account to cover a direct debit payment, have expressed concern for some time about the application and quantum of default charges levied by the banks.

1.10 CHOICE and the Consumer Action Law Centre in a joint submission to the inquiry informed the Committee that the organisations had identified default charges as a significant issue for consumers several years ago and that they had campaigned on this matter since 2004.[4]

1.11 Also in 2004 concerns relating to default charges were examined in detail in a report published by the Consumer Law Centre Victoria (the Rich report).[5] That report concluded that:

> Cheque and direct debit dishonour fees are penalties at law. If Australian banks continue to assert that dishonour fees are enforceable as liquidated damages, they should release the data that proves this to Australian consumers.
>
> Penalty charges are disproportionately borne by those who can least afford to pay them, namely, low-income consumers.
>
> It is difficult for low-income consumers to avoid penalty charges.
>
> Penalty charges contribute to preventing low-income consumers escaping their state of financial hardship.[6]

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3 ASIC (Fair Bank and Credit Card Fees) Amendment Bill 2008, Clause 12FAA Definitions.

4 CHOICE and Consumer Action Law Centre, *Submission 18*, p. 1.

5 Nicole Rich, *Unfair fees: A report into penalty fees charged by Australian Banks*, Consumer Law Centre Victoria, December 2004.

1.12 The Rich report observed that while the lack of transparency on the part of the banks made it difficult to assess whether penalty charges were in fact penalties at law the failure of the banks to demonstrate the genuine losses involved in defaults made it difficult for the banks to assert that the default charges they charged were not penalties at law.[7]

1.13 The evidence on costs submitted at the Committee's inquiry drew heavily on the work done by the Rich report and also on anecdotal evidence, because there is still no more recent information on the costs to financial institutions of customer defaults.

Quantum of default charges

1.14 Data for income earned from default charges by Australia's financial service providers are not available.

1.15 The Reserve Bank of Australia (RBA) routinely publishes aggregate figures on banking fees in Australia which show that in 2007, total income from fees grew by 8 per cent to $10.5 billion, with fee income from households growing faster than fee income from businesses.[8] In relation to fees earned from credit cards, for which more disaggregated data are published, the RBA reported that fee income had grown by 170 per cent over the past five years and that this mainly reflected strong growth in unit fees (particularly annual fees, over-limit and late payment fees and foreign currency conversion fees), but also a 30 per cent increase in the number of credit card accounts and a 20 per cent increase in the value of cash advances.[9]

1.16 Ms Elissa Freeman, Senior Policy Officer, CHOICE, informed the Committee that CHOICE had approached the RBA to request that additional information on categories of fees should be published. She stated that the RBA had indicated that this might possibly be done in the next annual survey, which will not be published till May 2009.[10]

1.17 Choice and the Consumer Action Law Centre, relying on the figures that are published by the RBA, submitted that:

> Penalty fees have been steadily increasing since 2002. In the case of credit card over-limit fees, the rate of growth has been exponential. These fees did not exist in 2000 and now average $30 each (and can be as high as $35.)[11]

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6 Nicole Rich, *Unfair fees: A report into penalty fees charged by Australian Banks*, Consumer Law Centre Victoria, December 2004, pp 21, 45.

7 Nicole Rich, *Unfair fees: A report into penalty fees charged by Australian Banks*, Consumer Law Centre Victoria, December 2004, p. 21.

8 Reserve Bank of Australia, *Banking Fees in Australia, Reserve Bank Bulletin*, May 2007, p. 79.

9 Reserve Bank of Australia, *Banking Fees in Australia, Reserve Bank Bulletin*, May 2007, p. 82.

10 Ms Elissa Freeman, Senior Policy Officer, CHOICE, *Committee Hansard* , 12 June 2008, p. 6.

11 CHOICE and consumer action law centre, *Submission 18*, p. 5.

1.18 Recently, default charges have trended downwards, and new products with low or no charges have been marketed. The great majority of these changes has occurred since a CHOICE campaign against unfair fees began in June 2007 and the 2007 version of the ASIC (Bank Fees and Charges) Bill was presented to the Senate.

1.19 The Australian Bankers' Association Inc. (ABA) submitted data that show a range of the lowest default charges, described as 'exception fees' by the banks, imposed on transaction accounts and credit cards. The data show that most banks no longer impose inward dishonour fees on regular transaction accounts. One product offered by a major bank does not impose any 'exception fees'. With that one exception, honour fees range from $20 to $45 and outward dishonour fees range from $35 to $45. There is a range of lower charges on transaction accounts offered for low-income earners and concession card holders. Banks charge late payment fees on credit card accounts and, with one exception for a concession account, also impose overlimit fees on those accounts. The quantum of default charges on credit card accounts is similar to those on transaction accounts.[12]

1.20 The ABA also submitted a copy of a 'Fact Sheet' published by the Association which includes information for potential bank customers about how to avoid or reduce default charges.[13]

Regulation of default charges

Australian Securities and Investments Commission

1.21 The Australian Securities and Investments Commission (ASIC) informed the Committee that the principal measure for regulating fees for financial services is the mandating of disclosure. The extent of disclosure depends on the product, with some products requiring Product Disclosure Statements (PDS). Basic deposit products and credit cards do not require a PDS, and ASIC's role is limited to ensuring that product providers do not engage in misleading, deceptive or unconscionable conduct. ASIC does not have the jurisdiction to prohibit or prevent the charging, or regulate the amount of, any properly disclosed default fees.[14]

1.22 ASIC also observed that:

> The common law doctrine of penalties, which renders come contractual provisions in relation to damages for breach of contracts 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 …[15]

12 Australian Bankers' Association Fact Sheet, 'Exception Fees November 2007', Submission *17*.

13 Australian Bankers' Association Fact Sheet, 'Exception Fees November 2007', Submission *17*.

14 Australian Securities and Investments Commission, *Submission 12*, pp 1-2.

15 Australian Securities and Investments Commission, *Submission 12*, p. 2.

Uniform Consumer Credit Code

1.23 Specific disclosure requirements for credit products exist at state level under the Uniform Consumer Credit Code (UCCC).[16] The UCCC imposes certain requirements for credit contracts for individuals, but there is little scope under the Code to challenge the quantum of fees and charges under those contracts. Under section 72 of the UCCC establishment fees and early termination fees may be challenged by a debtor or guarantor on the grounds that they are 'unconscionable', but there is no definition of 'unconscionable' in the Code. Government consumer agencies do not have standing to make applications relating to section 72, or more generally under the UCCC, and the cost and uncertainty of litigation in relation to the sums involved might militate against individual consumers taking action.[17]

1.24 ASIC informed the Committee that proposals for reform of the law include amendment of section 72 of the UCCC to make all fees reviewable, to replace 'unconscionable' with 'unreasonable' and to give government agencies standing to represent the public interest or individual debtors or groups of debtors.[18]

Other State laws

1.25 Victoria has enacted legislation in relation to unfair contract terms. Evidence submitted to the Committee indicated that the *Fair Trading Act 1999* [Vic.] may apply to financial services but that the Victorian authorities have not pursued the banks under the legislation.[19]

1.26 The Committee was informed that, in New South Wales, Section 10 of the *Contracts Review Act 1980* [NSW] provides for that State's Attorney-General to seek declarations that a particular term of a contract is unfair. This has not been done since the legislation was enacted.[20]

Proposed National Generic Consumer Law

1.27 A recent Productivity Commission report on a *Review of Australia's Consumer Policy Framework* recommended that there should be a new national generic consumer law and that unfair contract terms should be incorporated in that law.[21] ASIC submitted that as default charges are in all cases contingent charges they

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16 Australian Securities and Investments Commission, *Submission 12*, p. 2.

17 Australian Securities and Investments Commission, *Submission 12*, p. 4.

18 Australian Securities and Investments Commission, *Submission 12*, p. 7.

19 Mr Gerard Brody, Director, Policy and Campaigns, consumer Action Law Centre, *Committee Hansard*, 12 June 2008, p. 15.

20 Mr Ben Slade, Member, Consumer Law Committee, Law Council of Australia, *Committee Hansard*, 12 June 2008, p. 27.

21 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, p. 72.

would appear to fall within the scope of the Productivity Commission's recommendations.[22]

Council of Australian Governments

1.28 The Council of Australian Governments (COAG) has agreed in-principle that the Commonwealth should assume responsibility for regulating mortgage credit and advice, margin lending and lending by non-deposit taking institutions. COAG has also asked its Business Regulation and Competition Working Group to identify any other areas of financial services activities that best sit within the Commonwealth's regulatory responsibility.[23] More recently, the report of a COAG meeting held on 3 July 2008 indicates that the COAG has agreed that the Federal Government should take over all forms of consumer credit.[24]

1.29 The ABA claimed that the Ministerial Council on Consumer Affairs is:

> … pursuing fringe credit provider legislation that, despite its original objective of regulating fringe credit providers, is drafted to apply to all credit providers including banks and other mainstream providers and to capture all credit fees and charges.
>
> Like the Bill, the fringe credit provider draft bill proposed to limit default fees and charges to the reasonable estimate of the credit provider's loss arising from the default. However the draft MCCA bill is proposed to go further. With the price control genie out of the bottle, the notion is contagious so that there is the proposal to introduce a general test of 'unfairness' to limit the amounts of other credit fees and charges.[25]

Regulation in the United Kingdom

1.30 In the United Kingdom, the Office of Fair Trading (OFT) has a broad role in relation to conducting market studies and ensuring compliance with the Unfair Terms in Consumer Contracts Regulations. These regulations prohibit unfair contract terms generally, rather than specifically prohibiting penalty fees, but default fees are covered. In April 2006, the OFT announced that its enforcement policy would be to assume that any default fee on credit card accounts above 12 GBP ($A27) was likely to be unfair. The OFT has indicated that similar principles could apply in relation to default fees on other ADI accounts.[26]

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22 Australian Securities and Investments Commission, *Submission 12*, p. 7.

23 Australian Securities and Investments Commission, *Submission 12*, pp 7-8.

24 'A seamless national economy', Council of Australian Governments' Meeting, 3 July 2008, http://www.coag.gov.au/meetings/030708/index.htm#economy (accessed 9 July 2008).

25 Australian Bankers' Association, *Submission 17, p. 3.*

26 Australian Securities and Investments Commission, *Submission 12*, p. 8.

1.31 A recently-concluded test case in the UK High Court relating to the application of the Unfair Terms in Consumer Contracts Regulations in respect of unauthorised overdraft charges found that fees where no previous agreement had been made between customer and institution for an overdraft, yet an overdraft was provided to the customer, were fees for service. The common law of penalties therefore does not apply in those circumstances.[27]

1.32 The possible implications of this decision for default charges and for the bill are discussed in Chapter 2.

27 Mr Ben Slade, Member, Consumer Law Committee, Law Council of Australia, *Committee Hansard*, 12 June 2008, p. 23.

Chapter 2

Issues

2.1 In this Chapter the Committee considers several issues that were raised in the evidence.

Legal considerations

2.2 The legal status of default charges is among the most significant issues.

2.3 Until April 2008, when the UK High Court handed down the decision referred to in Chapter 1, the law in Australia seemed fairly certain. The Australian Consumer Law Committee of the Legal Practice Section of the Law Council of Australia (ACLC) informed the Committee that:

> The net effect of the common law of contract is that where a contract imposes an extravagant amount as a penalty, a person who pays the penalty can claim compensation for the difference between the extravagant amount and the reasonable sum for the loss arising from the breach of contract.[1]

2.4 Because financial service providers have not made available any information about the costs they incur when a customer defaults, it is not possible to determine whether default charges are necessarily extravagant. The information that is available is based on data from the Wallis Report that is a decade or more out of date.[2] Nevertheless, the evidence submitted to the inquiry suggests strongly that some default charges, especially direct debit dishonour fees and credit card over-limit fees, are almost certainly much greater that the costs incurred by the financial service providers and could be considered extravagant.

2.5 The ABA stated that critics of default charges have used the expression 'penalty fees' to describe these fees on the false premise that these fees are penalties at law. The ABA uses the expression 'exception fees' and asserted that 'exception fees' are not penalty fees.[3]

2.6 The Committee, however, was informed that Australian case law indicates that whether a contractual term is a penalty is a matter of substance not of form. In other words, describing a default charge as an 'exception fees' or a 'fee for service' may not hold up as an argument in Australian courts:

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1 Australian Consumer Law Committee of the Legal Practice Section of the Law Council of Australia, *Submission 21*, pp [3]-[4].

2 Financial System Inquiry (the 'Wallis Committee'), *Financial System Inquiry Final Report*, March 1997.

3 Mr David Bell, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 12 June 2008, pp 35-36.

> … the courts have indicated that whether someone has breached the terms and conditions of their account should not be looked at merely on what the particular terms say but on the actual substance of the matter. Was there an obligation on the consumer to maintain a certain amount of money in their account or not go over the limit?
>
> In this situation we would say, 'Yes, that obligation does exist in signing up to that account,' and if a consumer defaults then they have breached their account.[4]

2.7 There is no certainty, however, that an Australian court would not be guided by the UK High Court decision. Mr Ben Slade, a member of the ACLC, commented on the possible implications of the UK High Court decision as follows:

> … the High Court decision in the UK in the Office of Fair Trading v Abbey National PLC and 7 others, which was handed down on 24 April … found that, in relation to overdraft fees—fees where no previous agreement had been made between customer and institution for an overdraft, yet an overdraft was provided to the customer—those fees were fees for service. So it means that the common law of penalties does not in those circumstances apply.
>
> As a consequence of that, the evil that the bill before this committee is identified as addressing—that is, unfair and exorbitant default fees—would be relatively easily avoided by banking institutions in this country by defining all their fees as service fees …[5]

2.8 Mr Slade suggested that if Australian courts were to take the same view of the distinction between default charges and service fees the bill as currently drafted would not work.[6] He also suggested that it might be necessary to define the essence of the contract between customer and bank in the bill so as to avoid the interpretation that the UK court has found.[7]

2.9 Clause 12FAA of the bill which deals with definitions reads as follows:

> **12FAA Definitions**
>
> In this subdivision:
>
> ***consumer default*** means a breach by a consumer of a term of a contract between a financial service provider and the customer.

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4 Mr Gerard Brody, Director, Policy and Campaigns, Consumer Action Law Centre, *Committee Hansard*, 12 June 2008, p. 8.

5 Mr Ben Slade, Member, Consumer Law Committee, Law Council of Australia, *Committee Hansard*, 12 June 2008, p. 23.

6 Mr Ben Slade, Member, Consumer Law Committee, Law Council of Australia, *Committee Hansard*, 12 June 2008, p. 25.

7 Mr Ben Slade, Member, Consumer Law Committee, Law Council of Australia, *Committee Hansard*, 12 June 2008, p. 25.

> ***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 consumer default.

2.10 In answer to questions neither Mr Slade nor Ms Polczynski was able to suggest a ready solution as to how default charges might be redefined. Mr Slade suggested that the Office of Parliamentary Council might be consulted, while Ms Polczynski, speaking in her professional capacity rather than as a representative of the Law Council, suggested that it might be possible to identify the events that would trigger the fee and then to limit the fee that is trigged by those events.[8]

Price control

2.11 The ABA asserted that limiting default charges to a pre-estimate of the damage likely to be suffered by a financial institution as a result of customer default is a form of price control which has the potential for economic impact that could damage consumers.[9] Mr Gilbert quoted from the report of the Productivity Commission and from a Government Green Paper to illustrate that care needs to be exercised in intervening in a price control manner on fees and charges.[10]

2.12 Ms Polczynski informed the Committee that when the UCCC was being negotiated very substantial consideration was given to how fees should be regulated. It was decided at the time that flexibility in pricing should be allowed and that the initial consumer protection mechanism would be appropriate disclosures. This was expected to encourage flexibility in product design. Ms Polczynski stated that there was therefore a very deliberate move away from the prescriptive fees on cost recovery that then applied.[11] She suggested that an enormous amount of thought was given to the issue some 14 years ago and, while it might be time to think about it again, the same amount of thought should be given to it now.[12]

2.13 The bill could not be considered to impose a form of price control if it merely ensured that the law of contracts was applied to default charges. That would depend on whether the charge imposed was in fact for a breach of contract, ie a default charge, or was a fee for service.

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8 Mr Slade and Ms Polczynski, *Committee Hansard,* 12 June 2008, p. 25.

9 ABA, *Submission 17*, p. 2.

10 Mr Ian Gilbert, Director, Retail Policy, Australian Bankers' Association, *Committee Hansard,* 12 June 2008, pp 42-43, quoting from: Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, and Australian Government, The Treasury, *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation*, Green Paper, June 2008.

11 Ms Polczynski, *Committee Hansard*, 12 June 2008, p. 24.

12 Ms Polczynski, *Committee Hansard,* 12 June 2008, p. 25.

2.14 The ACLC suggested that a clause should be added to the bill to ensure that the legislation could not be circumvented by otherwise void 'default charges' being reformulated and imposed as 'service charges'. The proposed clause read as follows:

> A financial service provider must not include in any contract between the financial service provider and a consumer, a fee for service or any other charge relating to the account of that consumer, which is more than a genuine pre-estimate of the likely cost to the financial service provider of providing that service to the consumer.[13]

2.15 However, Mr Slade observed:

> … in spite of a suggestion made by the Consumer Law Committee… that service fees be constrained … The real concern is that defining service fees or all fees imposed by banks as fees that must be equivalent to the amount that it costs the bank to provide that service is akin to price control. … in which case more work needs to be done to identify those fees that are in effect default fees and those that are in reality service fees. There are quite clearly, according to the Consumer Law Committee at least, a number of fees that fall squarely into the service fee component, and price control is not something that we think should be exerted over those fees.[14]

A market for default charges?

2.16 CHOICE and the consumer action law centre submitted that market forces do not and cannot work to control the imposition or amount of penalty fees.[15]

2.17 That assertion is based partly on the proposition that customers, when opening a bank account or applying for a loan, do not consider the penalty charges that might apply. They do not think that they will default and are therefore concerned only about interest charges and up-front fees. The assertion is also based on the significant increase in the incidence and number of penalty charges imposed by financial institutions from 2000 to mid-2007.

2.18 The ABA submitted that the development of new products such as basic bank accounts shows that market-based solutions can work and deliver customers better outcomes.[16] Basic bank accounts have been introduced and extended during the past six years. The ABA stated that if a regulatory approach had been taken six years ago, then it is unlikely that consumers would have had the range of competitively priced options that are now available. The ABA argued that there are lessons from the experience of basic accounts that are relevant to 'exception fees'.[17]

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13 ACLC, *Submission 21*, p. [7].

14 Mr Slade, *Committee Hansard*, 12 June 2008, p. 24.

15 CHOICE and consumer action law centre, *Submission 18*, p. 1.

16 ABA, *Submission 17*, p. 4.

17 ABA, *Submission 17*, p. 5.

2.19 There is evidence that the incidence of default fees charges by the banks has declined recently. A few banks eliminated or reduced default charges for concession accounts in 2006 and in the past 12 months most banks have reduced the quantum of default fees.[18]

2.20 Mr Renouf stated that CHOICE is pleased that banks have offered reduced fees for pensioners but noted that there are still many low-income people who are not eligible for these accounts and pay the high fees still, and the fee reductions have not been made on credit card accounts, only on transaction accounts.[19]

2.21 A lower incidence of default charges coincides with a 'Fair Fees' campaign launched by CHOICE and Consumer Action in June 2007. The Fair Fees website contains information for consumers about how to seek refunds on default fees charged by financial institution and information about default charges on standard and concession accounts. Choice submitted that since launching the campaign more than 30,000 consumers have used material on the site to challenge unfair penalty fees.[20]

2.22 In answer to a question from the Committee that suggested that the market is not responding in the normal way, but is working because of community concern, Mr Bell responded:

> I think there are a number of catalysts which cause a market to work. No market is perfect. Clearly in this case there are a number of catalysts. One is that there is community sentiment out there, and we have acknowledged that quite openly for at least a year—well and truly before this particular process was even thought about—so we have been ahead of the game there. The other is the genuine view of our banks that this is an area they need to look at, and there have been discussions over the years about the need to do it.[21]

The case for regulation

2.23 One argument for government intervention in markets is market failure. As discussed earlier, the indications are that until a consumer campaign was launched to address the quantum and numbers of default charges, these charges were increasing rapidly. There is no evidence that there has been any competition in this area.

2.24 The consumer campaign apparently has had the effect of causing many of the financial institutions to reconsider these charges, and some institutions may now perceive that they may gain a market advantage by reducing default charges or by offering options for consumers to help them avoid those charges. However, the observed changes have only occurred in the past year and it is too early to say whether

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18 ABA, *Submission 17*, p. 5.

19 Mr Renouf, *Committee Hansard*, 12 June 2008, p. 3.

20 CHOICE and consumer action law centre, *Submission 18*, p. 15.

21 Mr Bell, *Committee Hansard*, 12 June 2008, p. 40.

the consumer campaign has provided the catalyst for long-term change. Not all witnesses were as optimistic as the ABA on this point. Ms Pidgeon, for example, stated that she thought that:

> … it is largely as a result of these campaigns that they are lowering fees. If these campaigns lost momentum, I do not think we would see the same response by the banks, and I think there is significant market failure that does need to be addressed.[22]

Effects on consumers

2.25 Several witnesses asserted that default charges not only greatly exceed the costs of the defaults to financial service providers but also that they are manifestly unfair.

2.26 As has been noted elsewhere in this report there is no recent information about the costs incurred by the financial institutions and so it is not possible to determine definitively whether the quantum of default charges really reflects the costs incurred. However, it would appear that, in some cases, the default charge is very much greater than the cost to the institution. This is the case particularly for default charges on direct debit accounts. The Committee asked the ABA whether it had information about costs, but it was informed that the banks would not provide this competitive information to the ABA.[23]

2.27 Witnesses' claims of unfairness related mainly to inward cheque dishonour fees, over-limit fees for credit card accounts and multiple default fees which are incurred when consumers are required to pay more than once for the same default. Witnesses submitted that it was also unfair to impose charges greatly in excess of the cost of the default.

2.28 Inward cheque dishonour fees may be incurred when a recipient of a cheque that is later dishonoured by a bank presents the cheque for payment. The Committee notes that most, but not all, financial institutions no longer impose this charge. An ABA Fact Sheet dated February 2008 shows that in November 2007 only the Adelaide Bank, BankWest and HSBC continued to impose inward cheque dishonour fees, although the application of the fee had previously been widespread.[24] The Committee is surprised that any financial institution would impose this fee, especially as those presenting such cheques can be people who can ill afford to bear the cost. As Mr Jonathan Campton, a Researcher with the St Vincent de Paul Society explained:

> The fees that are associated with these cheques bouncing are borne by, often, low-income earners, who may have to use cheques as a form of

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22 Ms Pidgeon, *Committee Hansard*, 12 June 2008, p. 50.

23 Mr David Bell, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 12 June 2008, p. 36.

24 Australian Bankers' Association Inc., Fact Sheet 'Exception Fees November 2007', Attachment to *Submission 17*.

> receiving income for casual or occasional work. They have no knowledge of it and, in some cases, have carried out work or services, only to find out that they have to bear the cost of trying to present a cheque to the bank.[25]

2.29 Over-limit credit card fees were also said to be blatantly unfair. Mr Renouf pointed out that most people believe that the limit on their accounts is the limit and that they should be stopped at the limit.[26] Mr Renouf also stated that over-limit fees were only invented in the early 2000s and increased rapidly to 2007.[27] The St Vincent de Paul Society asserted that default does not rest with the customer because credit card limits do not actually limit the use of the card, allowing people to exceed their 'limits'.[28]

2.30 The Committee also received evidence that financial institutions may charge multiple penalties for one case of default. This can occur when financial institutions impose more than one default charge under the same contract or when the imposition of a default charge leads to other charges, for example, when a late payment fee on a credit card account leads to an over-limit fee. Ms Wakeford provided an example of this practice:

> We had a client who received in a two-day period on the one account a late charge of $25 on her credit card and then an over-the-limit charge of $25. It makes it difficult for an individual to see their way out of financial difficulties if they just keep getting slogged.[29]

2.31 Ms Wakeford also gave an example in which the imposition of an account keeping fee caused a welfare recipient to incur a default charge. She stated that in one case a client checked the balance of her account to determine whether her Centrelink payment had been deposited and in so doing incurred a fee which caused her account to be overdrawn. She thereupon incurred a penalty of $40.[30]

2.32 An associated problem for low income groups is that, in the case of some defaults, both the merchant and the financial institution impose a fee. The Smith Family informed the Committee that:

> The experiences of participants in our financial literacy courses are consistent with research that indicates that they are unfairly penalised by financial fees and charges. In some cases these can constitute as much as 20% of their weekly income. The unfairness of bank fees and penalties is a key theme consistently expressed by participants in our financial literacy

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25 Mr Jonathon Campton, Researcher, St Vincent de Paul Society, *Committee Hansard*. 12 June 2008, pp 16-17.

26 Mr Renouf, *Committee Hansard*, 12 June 2008, p. 2.

27 Mr Renouf, *Committee Hansard*, 12 June 2008, p. 2.

28 St Vincent de Paul Society, *Submission 29*, p. [3].

29 Ms Michelle Wakeford, *Committee Hansard*, 12 June 2008, p. 30.

30 Ms Michelle Wakeford, *Committee Hansard*, 12 June 2008, p. 30.

> courses. The most common charges that are of concern are direct debit fees. Our families are particularly concerned about the double penalty of an overdrawn fee from the bank (typically $45-60) coupled with a dishonour fee from the merchant ($25- $60).[31]

2.33 Dr Falzon also commented on this issue, suggesting that this was not a fair impost, 'especially on a low economic resource household, which of course many of these products target'.[32]

2.34 The evidence indicated that in some cases the quantum of default fees caused great hardship. One client of the Brotherhood of St Laurence who incurred a charge as a result of a misunderstanding of the direct debit system was quoted as saying that:

> Fifty dollars is food for the whole week for my kids. That extra $50 that they charged has just shattered me.[33]

Are default fees avoidable?

2.35 Mr Bell stated that default charges are avoidable.[34]

2.36 Most customers most of the time no doubt can avoid paying penalty charges, but the statement does not appear to be universally true. In the preceding section the Committee has considered the difficulties that arise in relation to inward cheque dishonour fees and over-limit fees.

2.37 In relation to over-limit fees, Ms Wakeford informed the Committee that many banks provide an option for their customers to switch off the ability to overdraw their account or credit card. She stated that the Brotherhood of St Laurence considers that this should be the default option and that customers should be able to request the additional service of being able to overdraw their account and, with this, the acceptance of the fees that go with that service. Ms Wakeford also suggested that most people do not realise that there might be the option to switch off the ability to overdraw their account. [35]

2.38 In order to avoid penalty charges customers must know of their existence. As has been discussed elsewhere in this report, disclosure of these charges is mandatory. However, the information concerning default charges may not be easily found. Ms Pidgeon observed that:

> Disclosure is a huge problem. More often than not, bank customers are handed a standard form contract that they have no ability to negotiate and

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31 The Smith family, *Submission 10*, p. 2.

32 Dr Falzon, *Committee Hansard*, 12 June 2008, p. 19.

33 Ms Wakeford, *Committee Hansard*, 12 June 2008, p. 30.

34 Mr Bell, *Committee Hansard*, 12 June 2008, p. 39.

35 Ms Wakeford, *Committee Hansard*, 12 June 2008, p. 31.

> the fees are in the middle of that standard form contract in very small print, which most customers do not generally read. The disclosure could certainly be improved.[36]

2.39 The Committee is aware that the ABA has attempted to address concerns in this area by publishing a Fact Sheet that aims to inform customers about penalty charges and how they may be avoided.[37] It is not known whether this publication has been effective, but it would probably not be as effective as would a direct communication from a financial institution to a customer which warned about a potential default. This is apparently done by some institutions and was a course recommended by Mr Renouf.[38]

2.40 Few people can avoid having at least one bank account, even if that account is used only for depositing and withdrawing money received from Centrelink. People in that unfortunate situation need to manage accounts that in many cases will have little money in them and, in so doing, hopefully not become overdrawn and incur default charges. This will be difficult and that difficulty is likely to be exacerbated when people managing their money cannot use the internet and therefore do not know what their account balances are at any given time. As Ms Wakeford observed:

> However, many low-income people do not have access to secure computers and they rely on statements produced—and often the default is quarterly or half-yearly—so they are not getting up-to-date tools to help them to manage their accounts. This obviously makes it difficult to keep track of balances, and even more difficult to avoid fees.[39]

Dispute resolution

2.41 Individuals who incur default fees in effect do not have ready access to an external agency for the resolution of disputes. The Banking and Financial Services Ombudsman considers that it does not have jurisdiction in these matters. This contrasts with the view taken by the Credit Ombudsman who is reported to have indicated its willingness to investigate complaints about penalty fees.[40]

2.42 The ABA in evidence referred to the current revision of the Banking Code of Practice. The Code may address the issue of default charges, but it is not known whether that will give any comfort to those adversely affected by the charges. It is of interest that the draft Code of Practice for Credit Unions and Mutual Building Societies includes the following:

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36 Ms Pidgeon, *Committee Hansard*, 12 June 2008, p. 52.

37 Mr Bell, *Committee Hansard*, 12 June 2008, p. 37.

38 Mr Renouf, *Committee Hansard*, 12 June 2008. p. 14.

39 S Wakeford, *Committee Hansard*, 12 June 2008, p. 30.

40 CHOIC and consumer action law centre, *Submission 18*, p. 11.

> **(4.5)** We will make sure any exception fees we charge (including credit card late payment fees, account overdrawn or dishonour fees, direct debit dishonour fees, cheque dishonour fees, and ATM failed transaction fees) are:
>
> - Reasonable, having regard to our costs
> - Clearly disclosed, and
> - Fairly applied.[41]

2.43 While it theoretically possible to take action in the courts, high legal fees and the possible legal costs are so disproportionate to the amount of any default charges that this has not been done. Also, as discussed earlier, the uncertainty of the law following the UK High Court case might dissuade anyone from taking such action, especially because if a case is lost costs might be awarded against the plaintiff.

2.44 It is of interest, however, that some matters have been taken to the Victorian Civil and Administrative Tribunal under that State's Fair Trading Act. The Committee was informed that these cases were settled subject to confidentiality provisions, which suggests that the Tribunal found in favour of the plaintiffs. When asked about these cases, and the assumption that the findings implied that the fees were not legal or sustainable, Mr Gilbert stated:

> That was my assumption also: that for a tribunal or whatever to entertain a claim, you would have to start with the basis that the fee is not valid at law, and that is an issue that will arise if this bill is passed into law as well. There will be litigious disputes about what is costs … what is a default, and whatever else may arise under the bill's provisions. For example, what if an organisation disagrees with ASIC's analysis of the situation, based on the evidence and the information that the bank has provided to ASIC? Is the bank going to take ASIC to court under judicial review legislation?[42]

41 ASIC, *Submission 12*, p. 5.

42 Mr Gilbert, *Committee Hansard*, 12 June 2008, p. 46.

Chapter 3

Conclusions

3.1 The Committee is not able to support the passage of the ASIC (Fair Bank Fees and Charges) Bill 2008. In reaching this conclusion the Committee took into account the following issues raised by its inquiry into the bill.

Drafting and legal considerations

3.2 The bill raises difficult legal questions that could not be resolved by the Committee's inquiry.

3.3 The Committee's principal concern is that the bill as drafted might be ineffective if the financial institutions chose to describe the charges that are the subject of the bill as fees for service. By so doing the institutions might be able to avoid the intent of the bill. The definitions contained in Clause FAA are therefore of concern. Possible solutions to this problem are also problematic, for example, if the definitions were broadened genuine service fees might come within the scope of the bill and this would amount to price control, which the Committee cannot support. In any event, evidence from the ABA confirmed that the passage of the bill could be expected to lead to expensive and protracted litigation.

Regulation of consumer credit

3.4 The bill if passed would introduce an element of regulation in a relatively small segment of the consumer credit market. Default charges are not unique to the financial institutions. Many industries, including telecoms and utilities, impose charges for customer default. It would be better public policy if default charges were dealt with in total rather than industry by industry.

3.5 While it might be argued that this would effectively leave problems unaddressed, this is unlikely. Regulation of consumer credit is both topical and is a dynamic area. The Government now has before it a major report of the Productivity Commission, which recommended that there should be a new national generic consumer law that, among other things, addresses unfair contract terms. Firstly, the Commission has listed several features that should be taken into consideration in defining and applying unfair contracts.

3.6 Secondly, the Government has produced a policy Green Paper on financial services and credit reform and COAG has very recently agreed that the federal government should take over the regulation of consumer credit. If the bill were passed it could be inconsistent with the wider legislative framework being developed by the Government.

Market for Default charges

3.7 From 2000 or earlier till mid-2007, the incidence and quantum of the charges covered by the bill increased significantly. This, together with consumers' initial assumptions that they would not default on their contracts with the financial institutions and their associated ignorance of the default charges they would incur as a result of any default, suggests that there was not a competitive market in relation to default charges.

3.8 In the time since mid-2007, which was when CHOICE and the Consumer Action Law Centre launched a 'Fair Fees' consumer campaign, there has been some movement toward fewer and lower default charges. Some new products have been developed; most institutions have ceased to impose one of the most egregious default charges (the inwards cheque dishonour fee); and charges overall have been reduced.

3.9 The above changes suggest that at least some financial institutions may consider that they will be able to achieve a competitive advantage by reducing default charges or by introducing products that enable customers to avoid or minimise the charges.

3.10 Despite the record of Australia's financial institutions for most of this decade, but in the light of more recent developments, it could be argued that for the parliament to move now to regulate default charges would be premature. A competitive market may be developing but existing and future products need to be better marketed and promoted to their target demographic.

3.11 The Committee and other interested parties would be in a better position to make a judgement that the market is operating efficiently if more data were available. In particular, the Reserve Bank of Australia could collect and publish detailed information on the charges that are covered by the bill and the Committee will so recommend.

Recommendation

3.12 The Reserve Bank of Australia should collect and publish annually in its monthly bulletin detailed data on the incidence and quantum of default charges.

Social considerations

3.13 Although it is unable to support the bill, the Committee is concerned about the social effects of default fees on consumers, particularly on those on low incomes and on welfare recipients. There was strong anecdotal evidence that in some cases at least the impost of high default fees is marginalising people who are already struggling to feel they belong in Australian society. The Committee would be most concerned if the apparent past indifference of institutions which themselves benefit from a strong regulatory environment were to continue.

Senator Annette Hurley

Chair

Family First

Dissenting Report

Inquiry into the Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008

Families have nowhere to turn when they are slugged by outrageous bank penalty fees, which is why Family First wants to ensure penalty fees are for cost recovery rather than a blatant profit grab. The Rudd Government has done nothing to help families struggling to pay bank penalty fees of up to $50 a pop.

That's why Family First proposed new laws that would:

- Restrict penalty fees to cost recovery, to stop banks charging penalty fees which are up to 92 times the cost of processing the customer's mistake;
- Give the Australian Securities and Investments Commission (ASIC) the power to ensure penalty fees reflect costs and investigate customer complaints and issues referred by the Treasurer;
- Outlaw inward cheque dishonour fees;
- Stop penalty fees being charged because another bank charge has pushed the customer over or under the necessary bank balance;
- Prevent penalty fees for customers exceeding their credit card limit, where the bank does not give customers the option of a solid maximum credit limit; and,
- Ban charging multiple fees for the same mistake.

Bank penalty fees can cost families as much as $50 for each dishonoured transaction, with some paying multiple fees for the one mistake.

The inquiry heard evidence these fees are still rising. There is not effective competition between banks to protect families from this fee gouging.

Low income families are particularly and disproportionately hit hard by penalty fees that may be as much as 20% of their weekly income.

Family First has an action plan that the Rudd Government should take up, with amendment if necessary, to protect families from outrageous bank penalty fees.

Bank penalty fees

Bank penalty fees range up to $50 a hit[1] and charge customers for a number of mistakes, such as not having enough funds to cover a cheque or a direct debit and going over a credit card limit. Some customers pay multiple fees for the same mistake.

Choice and the Consumer Action Law Centre pointed out that:

> In its 2007 Bulletin on banking fees, the Reserve Bank of Australia (RBA) showed that total fee income earned from household deposit and credit card accounts was over $4 billion in 2006. That represented a ten per cent increase on 2005 fee income. Between 2002 and 2006 fee income increased by 45% on deposit accounts and a massive 140% on credit card accounts. The RBA, however, does not collect data on income derived specifically from penalty fees. The RBA did observe the steady growth in some category of fees. In the case of credit card over limit fees, these fees did not exist in 2000 and now average $30 each (and can be as high as $35).[2]

Further, the Consumer Action Law Centre and Choice said that the cost to families of each penalty fee has increased rapidly in recent years:

> Since 2005 Westpac's transaction account penalties have increased by 25-33% and its credit card penalties by 16-40%. During this time St George credit card penalty fees increased by 40-50%. ANZ recently reduced its dishonour fee from $45 to $35 but increased its overdrawn account fee from $29.50 to $35.[3]

Rates have increased faster than inflation or other measures that might have explained a change in costs to banks:

> … rates just keep going up. They bear no relation to costs. They go up way faster than the CPI; they go up way faster than the change in the volume of banking business; they go up way faster than changes in wages. When fees are going up 15 to 40 per cent over a two-year period, when new fees are invented and rise from nothing to $50 over four or five years, competition works to this effect: each bank jumps on board and says, 'We can charge that kind of fee as well,' but it does not work to the benefit of the consumers. [4]

Bank penalty fees are clearly a significant cost to families and those costs have skyrocketed in recent years.

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1 Australian Bankers Association, *Fact Sheet: Exception Fees September 2008*, 11 September 2008. Page 4.

2 Consumer Action Law Centre and Choice, submission 18, page 4

3 Consumer Action Law Centre and Choice, submission 18, page 5-6

4 Mr Renouf, Choice, Committee Hansard, 12 June 2008, page 8.

Direct debit dishonour fees

There is a range of types of bank penalty fees, from cheque dishonour fees to credit card over the limit fees, but the Committee heard that direct debit dishonour fees, which cost up to $50,[5] may be the most outrageous:

> That is an automatic, electronic hit that happens. There is no person taking any step in that process. Some banks choose to send a letter to the customer to tell the customer that they have denied that transaction, but in those circumstances it hardly costs the bank anything at all. In circumstances where the person who gets hit with the fee has no money in their account, they are substantially worse off. Fairly regularly we find circumstances where they get hit with multiple fees.[6]

Direct debit dishonour fees are becoming more difficult to avoid, with increasing numbers of businesses asking for this sort of payment, which requires families to closely monitor their balance against automatic deductions:

> More and more businesses—not banks but other businesses—are requiring consumers to have relationships with them which depend on direct credit and direct debit payments. Instead of having maybe one or two direct payments coming out of your account a month and one, your salary, going in, you now have a myriad of payments going out of your account on a fortnightly basis, a four-weekly basis, a monthly basis, a three-monthly basis—we charge our customers three-monthly; so do a lot of businesses—or an annual basis. Once you start getting a dozen or 20 regular payments coming out, it is much harder for consumers to keep track. If you are on a tight budget, which perhaps 50 per cent of Australian families are, it is very easy to make a mistake and not have enough money in, particularly when it is one of those monthly payments that are out of cycle with your wages.[7]

The Combined Pensioners and Superannuants Association argued that the increased use of direct debits shifts increasing levels of risk from businesses and financial institutions to customers:

> … customers are penalised for hiccups in the electronic payment system, with penalties set at seemingly arbitrary levels without a thought for whether the cause of such hiccups, mostly defaults, could have been avoided by customers. [8]

There is a much higher level of risk from direct debit penalty fees for low income families:

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5 Australian Bankers Association, *Fact Sheet: Exception Fees September 2008*, 11 September 2008. Page 4.

6 Mr Slade, Law Council of Australia, Committee Hansard, 12 June 2008, page 33.

7 Mr Renouf, Choice, Committee Hansard, 12 June 2008, page 11.

8 Combined Pensioners and Superannuants Association of NSW Inc, submission 16, page 1.

> It is a lot more difficult for disadvantaged, low-income consumers to access internet banking and things like that. The main problem that we see is the requirement to pay by direct debit. It is not illegal for the bank to require payment by certain methods. The theory is that, if you do not like the payment options, you talk with your feet. The reality is quite often different.[9]

The Brotherhood of St Laurence said that many low income people, who may not have access to Internet banking, have to consider other costly ways to try to keep track of their account:

> We have many clients who do not want to check their balance at ATMs because, depending on the account, the cost can be $2 for checking. This means that they tend to play Russian roulette and just pray that their withdrawal of funds will not overdraw their account.[10]

The Smith Family commented "the most common charges that are of concern are direct debit fees."[11]

Direct debit dishonour fees are clearly a problem for people across the board, but have a particularly big impact on lower income families.

Multiple fees

Choice and the Consumer Action Law Centre pointed out the significant problem with "multiple fees charged on successive days for the same breach, multiple dishonour fees charged on the same day and fees charged because another bank charge has pushed the consumer's balance over or under the relevant limit."[12]

The St Vincent de Paul Society highlighted the difficulty its clients face with multiple fees:

> Exceeding a credit limit on a small credit card will attract one fee while, at the same time, failing to make the monthly payment will attract another fee. By not addressing a credit card debt for a number of months, they can be consecutively hit with multiple fees that far exceed both the interest to the bank, which is already high on the credit card, and any costs in trying to deal with the small credit card debt. This pushes people further to the edges and marginalises many Australians financially.[13]

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9 Ms Pidgeon, Consumer Credit Legal Service of WA, Committee Hansard, 12 June 2008, page 71-72.

10 Ms Wakeford, Brotherhood of St Laurence, Committee Hansard, 12 June 2008, page 43.

11 The Smith Family, submission 10, page 2

12 Choice and the Consumer Action Law Centre, submission 10 to the Inquiry into the Australian Securities and Investment Commission (Fair bank and Credit Card Fees) Amendment Bill 2007.

13 Mr Campton, St Vincent de Paul Society, Committee Hansard, 12 June 2008, page 23-24.

When asked about customers hit by multiple bank penalty fees for the one mistake, the Australian Bankers Association displayed an amazing lack of awareness of the reality of penalty fees, saying "I am struggling to think of an example where that might occur … banks would not want that situation to occur."[14]

But these situations do occur and are among the reasons for Family First's bill.

Cost of failed transactions to banks

It is difficult to determine the exact cost of failed transactions to banks, but the evidence is that banks may be charging penalty fees which are up to 92 times the value of what it costs them:

> The report, Unfair fees: a report into penalty fees charged by Australian banks (the Rich Report), estimated the extent to which penalty fees relate to cost … Considering the data … [in the submission] … , the institutions with the lowest dishonour fees (CBA, Westpac and ANZ), could be charging nearly six times the cost to process. BankWest (with the highest dishonour fee) could be charging over eight times what it costs to process a dishonoured cheque … the CBA, Westpac and ANZ (with the lowest direct debit dishonour fee) could be charging over 64 times cost, and BankWest (with the highest direct dishonour fee) over 92 times of what it costs them to process a direct debit dishonour..[15]

In the Committee hearing the Australian Bankers Association indicated that bank penalty fees do not just cover costs and that there is a profit margin in penalty fees.[16]

Family First's legislation would require banks to give details of the cost of transactions that trigger a penalty fee to the Australian Securities and Investments Commission, which the Australian Bankers Association claimed it would be "… an enormous exercise which, of itself, would be very costly … the issue is allocating those costs to particular services and products. There may not necessarily be a science behind it".[17] This admission shows bank penalty fees bear no relation to the cost of a transaction to banks.

The banks also admitted they had not done any analysis of what a fair level of fee would be:

> No, we have not [done any independent analysis on a fair level of bank penalty fees]. In fact, there is no collection of any information in relation to exception fees and there has been no analysis done.[18]

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14 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 64.

15 Consumer Action Law Centre and Choice, submission 18, page 6

16 Committee Hansard, 12 June 2008, pages 51-52.

17 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 63.

18 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 66.

Choice and the Consumer Action Law Centre stated:

> We have come to the conclusion that the fees are excessive and out of all proportion to the loss incurred by the financial institution. We submit that given the sensitive nature of information about costs, that only an independent regulator will be in a position to obtain and review this information.[19]

Family First's plan would establish ASIC as the independent regulator to determine bank costs and a fair level of bank penalty fees for cost recovery.

Low income families

Low income families are particularly and disproportionately hit by bank penalty fees[20] and a number of welfare groups made submissions to the inquiry to point this out.

Dr Falzon from the St Vincent de Paul Society explained why his organisation had made a submission to the inquiry:

> There was a very strong, in fact unanimous, indication from all of those who were involved in financial or budget counselling that the people that they were assisting were disproportionately impacted upon by the prevalence of bank penalty fees.[21]

The Brotherhood of St Laurence explained the practical effect of bank penalty fees on low income households:

> Being on a tight budget means that low-income people have very limited discretionary expenditure. The standard penalty fee for dishonoured direct debits ranges from $35 to $50 and when low-income people are charged these fees, they struggle with other important spending needs such as food, rent and bills. For instance, a Brotherhood customer was recently charged several penalty fees because of a misunderstanding of the direct debit system. He said '$50 is food for a whole week for my kids. That little extra $50 that they have charged, it's just shattered me. To someone on a disability pension, $50 is a fortune.'[22]

The Smith Family described the impact on its clients:

> The experiences of participants in our financial literacy courses are consistent with research that indicates they are unfairly penalised by financial fees and charges. In some cases these can constitute as much as 20% of their weekly income. The unfairness of bank fees and penalties is a key theme consistently expressed by participants in our financial literacy courses. The most common charges that are of concern are direct debit fees.

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19 Consumer Action Law Centre and Choice, submission 18, page 7

20 Dr Falzon, St Vincent de Paul Society, Committee Hansard, 12 June 2008, page 22.

21 Dr Falzon, St Vincent de Paul Society, Committee Hansard, 12 June 2008, page 26.

22 Brotherhood of St Laurence, submission 13, page 1

> Our families are particularly concerned about the double penalty of an overdrawn fee from the bank (typically $45-60) coupled with a dishonour fee from the merchant ($25-$60).[23]

Families can find it hard to pull themselves out of debt when they are slugged with a penalty fee:

> We also regularly see many genuine people struggling to repay debts to financial institutions only to be hit with additional fees eg credit card over the limit or late fees. These fees can cause additional stress and anxiety for people who are earnestly trying to repay their debts.[24]

It does not make much sense to continue to hit families in financial difficulties with exorbitant penalty fees:

> … during our 25 years of financial counselling, we can say that it is primarily financial difficulties that cause people to go over their credit limit or make a late payment on their credit cards. These fees penalise those who can least afford them.[25]

The banks claimed that fees are falling and there are more products available that are low fee products.[26]

But the effect of any of these changes do not appear to have been felt on the ground:

> We see over 1,000 people a year. We run an advice line which is free to all Western Australian consumers and they can just ring in and get advice. People calling about bank fees is a significant pressure on our service. I do not think that has significantly changed in the last year.[27]

Choice and the Consumer Action Law Centre put the case that:

> Reduced rates for the most disadvantaged members of our community are a very welcome initiative. However, not all institutions have taken this step, and the fact remains that penalty fees for the majority of consumers have increased.[28]

Banks should make particular efforts to help lower income families to avoid penalty fees, but they also have an obligation to the rest of the community to not charge exorbitant fees.

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23 The Smith Family, submission 10, page 2

24 The Salvation Army, submission 28

25 Port Phillip Community Centre, submission 34.

26 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 49.

27 Ms Pidgeon, Consumer Credit Legal Service of WA, Committee Hansard, 12 June 2008, page 70.

28 Consumer Action Law Centre and Choice, submission 18, page 5

Helping families avoid penalty fees

Banks that are serious about helping families avoid penalty fees can do a lot to help fix the problem:

> There are a range of steps institutions could take, a few of which are set out below. Some have adopted some of these ideas.
>
> - offer customers the choice whether or not their credit cards will have a hard limit (to avoid fees) or a soft limit (fees will be charged) [now offered on some ANZ products]
>
> - provide a free 'safety net' on transaction accounts [offered by BankWest]
>
> - provide real time notification to customers of the danger of missing a payment. For example an email or SMS advising a payment is due tomorrow but there are currently not enough funds available. The low costs of such a service could be passed on to consumers who elect to take it up. [St George offers an SMS notification service][29]

The St Vincent de Paul Society also stated that banks could do more:

> While there is a place for greater financial education, even a highly educated money manager can fall prey to existing traps in the banking industry. Banks must be encouraged to increase Australia's status as a smart country by finding technological solutions to prevent such events as ATM's authorising withdrawals beyond known bank balances, bank balances showing uncleared funds or credit card "limits" being exceeded. Advances in such areas will be slowed until banks are prohibited from obtaining penalty fees from events where customers cannot control liability.[30]

Some banks have argued that people appreciate being able to overdraw their credit card so they are not embarrassed when trying to purchase something, but one welfare group says many people would appreciate the assurance they cannot overdraw:

> … we would say that a lot of the people we are dealing with do not eat in restaurants and they are not going to get embarrassed; they would prefer not to have that facility where they have the capacity to overdraw their accounts.[31]

There is plenty of scope for banks to do more to assist families to avoid bank penalty fees, rather than just blame their customers.

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29 Consumer Action Law Centre and Choice, submission 18, page 9-10

30 St Vincent de Paul Society, submission 32, page 3

31 Ms Wakeford, Brotherhood of St Laurence, Committee Hansard, 12 June 2008, page 46.

Current regulation

Regulation of financial services in Australia is focused on disclosing fees, but according to the Australian Securities and Investments Commission (ASIC), bank penalty fees are not among those things banks must disclose:

> The principal regulatory measure in relation to fees for financial services, both at state and federal level, is the mandating of disclosure. … Many financial products (for example, insurance and superannuation) are regulated by the Corporations Act and require a product disclosure statement (PDS) … [but] … the financial products and services the subject of the current public debate on default fees (that is, basic deposit products and credit cards) do not require a PDS. For such products, ASIC's jurisdiction is limited to its ASIC Act role of ensuring that product providers do not engage in misleading, deceptive or unconscionable conduct, either by act or omission.[32]

Banks generally detail their fees, including bank penalty fees, in booklets they produce on fees and charges. The Consumer Action Law Centre and Choice argue that even if penalty fees are detailed in bank publications, "disclosure, alone, does not mean that a fee is fair or legal."[33]

But if families have a dispute with a bank over penalty fees, there is no easy option for them to pursue that dispute. Customers with deep pockets can take banks to court, but there is no dispute resolution in place, with ASIC favouring light touch regulation and the Banking and Financial Services Ombudsman not responsible:

> The Banking and Financial Services Ombudsman has declared that it is not able to take on such disputes. It has decided that its terms of reference do not allow it to look at the specific issue of the level of the penalty fee. Taking out the option of going to an external dispute resolution scheme means that consumers are left to go to the courts if they want to pursue action on the level of the fees that they have been charged. This is quite a costly and high-risk exercise for consumers.[34]

Family First's plan for regulation of bank penalty fees is to give ASIC the power to take an active role in ensuring bank penalty fees are for cost recovery only. Family First's bill covers banks, building societies, credit unions and other institutions that offer credit cards.

Competition

The improved regulation detailed in Family First's plan is important because there is not effective competition in the bank penalty fee market:

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32 Australian Securities and Investments Commission, submission 12, page 1-2.

33 Consumer Action Law Centre and Choice, submission 18, page 9

34 Miss Freeman, Choice, Committee Hansard, 12 June 2008, page 6.

> … the crux of the problem is that market forces do not and cannot work to solve this problem. Where features of a product do not appear to be relevant to a consumer at the time they are making a decision on whether or not to choose that product, then the market is not going to work to control the prices. For the most part, when a consumer chooses a banking product they do not intend to incur a default fee. They do not intend not to have funds in their account when a payment is due. They do not intend to spend more on their credit card than their limit. They do not intend to make their payments late. So, as a consequence, a bank cannot gain a market advantage by offering a product which has lower fees than its rivals. If it is going to reduce its costs or its revenue, it is much better off doing that on its interest rate or its up-front fees where there is more competition. So this is not a market failure which is an information problem; it is not that consumers lack the information about the products they are choosing. The issue is that the amount of a penalty fee is not a relevant consideration for most consumers when choosing the product.[35]

There is also little scope for customers to negotiate with a bank on penalty fees charged before they sign up for an account – it is take it or leave it:

> … small consumers take contracts as they are given to them. They do not have the opportunity to make adjustments. The proposition that a bank enters into negotiations with a small retail customer, a household customer, about the nature of their banking arrangements is not based in reality.[36]

An indication of the lack of competition in bank penalty fees was the banks were able to quote their interest margins falling from "… roughly four per cent to less than two per cent over the last decade", but they were not able to quote their margins on bank penalty fees. [37]

The Australian Bankers Association claimed market forces are reducing penalty fees[38], but seemed to be confusing market forces with political pressure and public outrage. In this the banks want to have it their own way, with a high degree of regulation protecting their place in the market, but with less regulation protecting the interests of families against exorbitant bank penalty fees.[39]

But despite the banks' claims of lower penalty fees, it was pointed out to the Committee that only some fees are lower, while "… penalty fees for the majority of customers have increased."[40]

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35 Mr Renouf, Choice, Committee Hansard, 12 June 2008, page 2.

36 Miss Freeman, Choice, Committee Hansard, 12 June 2008, page 14.

37 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 50, 53.

38 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 53.

39 Mr Bell, Australian Bankers Association, Committee Hansard, 12 June 2008, page 54-58.

40 Consumer Action Law Centre and Choice, submission 18, page 5

Conclusion

Families have nowhere to turn when they are slugged by outrageous bank penalty fees, which is why Family First wants to ensure bank fees are for cost recovery rather than a blatant profit grab. The Rudd Government has done nothing to help families struggling to pay bank penalty fees of up to $50 a pop.

That's why Family First proposed new laws that would make the Australian Securities and Investments Commission (ASIC) responsible for monitoring fees and ensuring they are for cost recovery only.

Family First has a plan that the Rudd Government should take up, with amendment if necessary, to protect families from outrageous bank penalty fees.

Senator Steve Fielding
Leader of Family First

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	CONFIDENTIAL
2	Form Letters
3	Mr W J Orme
4	Ms Vera Martin
5	Mr John Curtis
6	Ray & ALex Thomas
7 & 7a	Mr Paul Myers
8	CONFIDENTIAL
9	Mr Peter Golding
10	The Smith Family
11	Financial Counsellors Association of QLD
12	Australian Securities & Investments Commission (ASIC)
13	The Brotherhood of St Laurence
14	National Association of Community Legal Centres (NACLC)
15	Mr Kevin Cox
16	Combined Pensioners & Superannuants Association (CPSA)
17	Australian Banker's Association (ABA)
18 & 18a	CHOICE & Consumer Action Law Centre
19	CONFIDENTIAL
20	The Salvation Army
21	Law Council of Australia
22	Mr John Christiansen
23	Mr Ian Bailey
24	Veda Advantage
25	Mr I Emmanuel
26	Carers Australia
27	National Association of Community Legal Centres (NACLC)
28	The Salvation Army (Australian Eastern Territory)
29	CONFIDENTIAL
30	Mr James Rowley
31	Mr Barry Redshaw
32	St Vincent de Paul Society National Council
33	ABACUS
34	Port Phillip Community Centre

APPENDIX 2

Public Hearing and Witnesses

SYDNEY, 12 JUNE 2008

BELL, Mr David Peter,
Chief Executive Officer, Australian Bankers Association

BRODY, Mr Gerard Gavan,
Director, Policy and Campaigns, Consumer Action Law Centre

CAMPTON, Mr Jonathan,
Researcher, St Vincent de Paul Society

FALZON, Dr John,
National Chief Executive Officer, St Vincent de Paul Society

FREEMAN, Miss Elissa,
Senior Policy Officer, CHOICE

GILBERT, Mr Ian Bruce,
Director, Retail Policy, Australian Bankers Association

PIDGEON, Ms Alison Louise,
Solicitor, Consumer Credit Legal Service of Western Australia

POLCZYNSKI, Ms Maria,
Member and Former Chair, Financial Services Committee, Law Council of Australia

RENOUF, Mr Gordon,
Director, Policy and Campaigns, CHOICE

SLADE, Mr Ben,
Member, Consumer Law Committee, Law Council of Australia

WAKEFORD, Ms Michelle,
Manager, Program Development, Brotherhood of St Laurence