**Consumer Action Law Centre and CHOICE submission to the Senate Economics Committee Inquiry into the Australian Securities and Investment Commission (Fair Bank & Credit Card Fees) Amendment Bill 2008**

## Key Points

CHOICE and Consumer Action identified bank penalty fees as a significant issue for consumers several years ago. Bank penalty fees are a problem because:

- some penalty fees are completely unfair to consumers;
- most penalty fees are out of all proportion to the costs incurred by banks
- the amount of penalty fees has risen at an alarming rate over the past 6-7 years;
- some consumers pay very large amounts of money in penalty fees and many of those consumers cannot afford to do so;
- market forces do not and cannot work to control the imposition or amount of penalty fees; and;
- bank penalty fees may themselves distort the market.

In addition, bank penalty fees may not be legally enforceable – but there is no efficient practical way for consumers or regulators to challenge those fees.

Bank penalty fees have become a significant problem in some other jurisdictions such that regulators have determined there is a need to respond (for example the UK). Regulators need to act in Australia, but have failed to do so.

CHOICE and Consumer Action support the proposed bill as it provides a practical response to a market problem without imposing costs on the financial sector. It is also capable of delivering to business the certainty they need to plan.

CHOICE and Consumer Action have campaigned on bank penalty fees since 2004. Further information about CHOICE, Consumer Action and the Fair Fees campaign can be found at the end of this submission.

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## Consumer experiences of penalty fees

Households and small business with limited finances are vulnerable to default fees. At an individual household and small business level, the burden of these fees can be overwhelming. In correspondence to the Fair Fees campaign, one consumer summed up the impact on her finances:

> *"I am a single mum of two school age children… struggling to make ends meet as it is without giving the banks $1000 or more for them honouring periodical payments sometimes for no more that $1.00 at a time and at times more than twice on one day."*

Working families across Australia have felt the impact of penalty fees. It is common practice for financial institutions to charge a fee to process a direct debit payment where there are insufficient funds in the customer's account. In the case told to us below, the family regularly was charged direct debit default fees as a result of erratic salary payments:

> *"I sent a letter to the N.A.B head office in complaint about excessive fees charged to our account over the last 7 years. We worked out the amount to be between $7,000 and $10,000. The fees were charged for direct debit defaults. We went through a period with one of my husbands employers not paying him on time, we set up direct debits to come out on a Friday when he would be paid, however sometimes the pay would not go in until Saturday or Monday, but automatically the bank would dishonour the payments despite the money being there the next day."*

In this instance, the bank has charged a default fee on average once a fortnight over a period of seven years. But the difficult situation of managing limited finances is not exclusively the domain of household customers. The business below contacted Fair Fees with their story:

> *"The total amount of the default fees charged to our Business Maximiser account between the 3rd of September 2007 and the 18th of December 2007 is $1,482.00 (39 lots of $38.00) and $90.00 between the 17th of September and the 18th of December for the Mastercard."*

That amounts to an average of three default fees a week over a period of 3½ months.

## What are penalty fees?

Any consumer contract may include a term that, if a party breaches the contract or defaults in some way, that party must pay the other "innocent" party a sum of money. The legal principles regarding such clauses or terms are relatively well-established.[1]

[1] See, for example, *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 368 per Gibbs CJ.

A fee for default is charged to a bank customer when the customer breaches a requirement of the terms and conditions of their bank account.

CHOICE and Consumer Action believe that most fees for default currently applied to credit card and transaction accounts are unfair – either in the way it is imposed or the amount charged. In addition we believe that many penalty fees are unlawful. The law provides that a fee is an unlawful penalty where it satisfies the following criteria:

- it is applied in respect of a breach of contract;
- it is out of all proportion to the cost to the "innocent" party accruing from the breach; and
- the relationship between the contracting parties and whether there was any opportunity to negotiate the term, is such that it would be unconscionable for the "innocent" party to enforce the term.

The legal argument is discussed further below.

Applying the above criteria, CHOICE and Consumer Action have included the following types of fees in our campaign to remove unfair bank penalty fees: over-limit, late payment and payment failure fees on credit card accounts, inward cheque dishonour fees, honour or dishonour fees and account overdrawn fees on transaction accounts.[2] References to penalty fees throughout this submission refer to these fees.

# Trends in penalty fees

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.[3] 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.[4] 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).[5]

Below is a list of penalty fees charged by major Australian banks on regular transaction and credit card accounts.

**Table 1: Penalty fees on regular transaction accounts and credit cards**

| Financial institution | Honour Fee (initiated by consumer) | Dishonour Fee (direct debit or cheque) | Cheque dishonour Fee (inward) | Credit card over the limit | Credit card late payment |
|---|---|---|---|---|---|
| Adelaide Bank[1] | $35 | $40 | $12 | $35 | $35 |

[2] Clearly the doctrine may have application in relation to other types of fees. The CHOICE and Consumer Action's campaign has focussed to date on bank penalty fees.
[3] RBA, *Banking fees in Australia, Reserve Bank Bulletin*, May 2007,
[4] Ibid.
[5] Ibid.

| Financial institution | Honour Fee (initiated by consumer) | Dishonour Fee (direct debit or cheque) | Cheque dishonour Fee (inward) | Credit card over the limit | Credit card late payment |
|---|---|---|---|---|---|
| ANZ | $35 | $35 | $0 | $35[2] | $35 |
| Bank of Queensland | $30 | $40 | $0 | $30 | $30 |
| BankSA | $38 | $45 | $0 | $30 | $35 |
| BankWest | $45[3] | $50 | $10 | $30 | $35 |
| Bendigo Bank | $25 | $40 | $0 | $28 | $25 |
| Citibank | $40 | $40 | $0 | $40 | $35 |
| Commonwealth | $30 | $35 | $0 | $25 | $25 |
| Credit Union Australia | $25 | $40 | $15 | $40 | $15 |
| HSBC | $20 | $40 | $5 | $30 | $30 |
| GE Money | N/A | N/A | $10 | $30 | $35 |
| NAB[4] | $30 | $30 | $0 | $25 | $30 |
| St. George | $38 | $45 | $0 | $30 | $35 |
| Suncorp | $40 | $40 | $0 | $40 | $30 |
| Westpac[5] | $40 | $50 | $0 | $35 | $35 |

[1] Adelaide Bank also charges a $5 fee for each letter sent in relation to a default charge.
[2] ANZ has instituted a policy whereby consumers can opt out of being able to exceed a credit card limit.
[3] Subject to a maximum $135 per day.
[4] NAB has a clear banking account which does not have any penalty fees.
[5] We note that Westpac is about to reduce its level of penalty fees.

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).[6]

The exception to the trend has been some downward movement on concession account penalty fees. In September 2006, National Australia Bank (**NAB**) cut penalty fees altogether for concession card holders. ANZ recently reduced fees from $35 to $10 for concession card holders. St George also charges dishonour and honour fees of $8 on concession accounts. These are moves that have been publicly welcomed by our organisations. The Australian Bankers Association (**ABA**) has summarised these movements in its Industry Fact Sheet.

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. Since 2005 Westpac's transaction account penalties have increased by 25-33% and its credit card penalties by 16-40%. During

[6] Ibid.

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.

## Cost to financial institutions of customer defaults

It is very difficult, if not impossible, for a consumer to determine whether these fees relate to cost. 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. The only cost figure which that report had to base this estimate on was from the Final Report of the Financial System Inquiry (the **Wallis Report**) from March 1997. It stated (presumably based on confidential information submitted to the Inquiry by financial institutions) that the cost of cheque processing was $1.50 to $3.00 per cheque.[7] The Rich Report stated that the cost of processing dishonours could involve additional costs, for example staffing and computer systems, and estimated that, being generous to Australian banks, the cost of processing a cheque dishonour is $3.00 to $6.00.

Considering the data from the above table, 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 Wallis Report estimated costs of processing direct entry payments, such as direct debits, to be 3.75% to 9% of the cost of processing a cheque. Taking the higher figures, a direct debit payment would cost $0.27 to process (9% of $3.00). Again, the Rich Report estimates that the cost of processing a direct debit dishonour would not be more than double the cost of processing a direct debit payment, and therefore estimated the cost of processing a direct debit dishonour may be $0.54.

If a direct debit dishonour costs $0.54, 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.

It must be emphasised that the above are estimates only, and we do not have clear figures about the costs to financial service providers of processing dishonours, allowing consumers to overdraw a transaction account or credit card limit, or paying a credit card late. Financial institutions have not released this information. We do suspect, however, that productivity and technological gains since the Wallis Report would suggest that the costs estimated may have significantly decreased. Further, we note that, in relation to defaults relating to credit card over the limit and late payments, financial service providers are already compensated through continuing to charge interest, and thus any estimate of cost should be discounted.

The analysis above draws on limited data available some time ago. Where individual customers have requested information about costs structure that underlies fees, financial institutions have refused to provide the information.

[7] Wallis *Committee, Final Report on the Financial System Inquiry*, March 1997, p 227.

*We do not accept your invitation to show you how we arrived at the amount charged for default fees and charges*[8]

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.

## Market failure in penalty fees

We noted above that the quantum of penalty fees charged has been increasing rapidly over the past 10 years – significantly above changes in the cost of living – and that new fees such as the credit card over the limit fee have been introduced in relatively recent times.

Our submission is that market mechanisms cannot contain the quantum of fees, essentially as the level of a penalty fee is not a relevant factor in most consumer decisions to choose or stay with a particular financial product. Consumers put little weight on penalty fees as they discount the possibility of the fee applying to them.

In response to our Fair Fees campaign, a number of banks have made changes to their penalty fees:

- St George dropped its $10.50 inward cheque dishonour fee on 12 June 2007;
- ANZ reduced the penalty fee from $35 to $10 on ANZ credit cards for low-income earners who hold an ANZ Basic Banking Account (effective from 1 December 2007);
- NAB reduced direct-debit dishonour fees from $50 to $30 earlier this year; and
- Westpac will reduce its dishonour fee from $50 to $35 commencing May 2008.

Of particular interest to the Committee will be the "Clear Banking" account introduced by the National Australia Bank (**NAB**). Late last year NAB became the only major bank to offer a standard transaction account with no penalty fees. Its Clear Banking account doesn't charge penalties if your account becomes overdrawn, or if the account has insufficient funds to pay a direct debit or periodical payment. Typically, other banks charge between $30 and $50 for these events. As well as providing a good alternative product offering for consumers, it suggests that much lower default fees are possible in other products. However, the NAB "Clear Banking" account continues to be the exception rather than the rule.

Just this week BankWest launched its newest "Zero" transaction account, which it claims is a new alternative to high-fee accounts.[9] The account has some important innovations which will be very attractive to consumers, including no foreign ATM fees and a $100 overdraft safety net (which will on occasion assist some customers to avoid dishonour fees). Unfortunately the account also includes some of the highest penalty fees in the market. The new account will charge a $50 dishonour fee and a $45 honour fee, which has attracted criticism from CHOICE.

[8] Correspondence from HSBC to customer, 30 November 2007

[9] http://www.bankwest.com.au/Personal/Transaction_Accounts/BankWest_Zero_Transaction_Account/index.aspx, accessed 17 April 2008

BankWest also proposed a $10 inward cheque dishonuor fee on its “Zero” transaction account. This goes against the trend from other financial intuitions to scrap this blatantly unfair fee altogether. It appears BankWest now proposes to abolish this fee, possibly in response to negative publicity.

There is little competitive pressure on financial institutions to keep fees in check. Consumers do not expect to pay penalty fees at the time they open an account or take out a loan or credit card and thus do not shop around for new a bank on the basis of the penalty fees they charge (or more importantly, don’t charge). Indeed, there is not enough competition even on core issues such as price and service among banking products generally, with consumers demonstrating significant inertia. Consumers often do not know these fees exist. They cannot find these fees easily when signing up for a product even if they were to look for them, which is unlikely.

Even if consumers were to focus on penalty fees in making their choices, they do not generally have the market power to negotiate the terms and conditions of clauses in contracts. We believe these market problems create an inbuilt temptation to add in unjustifiable margins when setting penalty fees. Household consumers are ‘price takers’ in the market for bank fees and charges. They are unable to negotiate terms and conditions that suit their preferences. One bank told its customer

> *Whilst I appreciate you were unable to negotiate the terms of your contract, you agreed to the terms and conditions of the contract when you elected to sign them.*[10]

In the context of penalty fees, this means that consumers are taken to have accepted the application of default fees to their account upon opening the account and must accept any change that is unilaterally applied to the level and application of penalties.

The Fair Fees campaign has produced some good outcomes for consumers. Lower fees apply to pensioners and there is now better information about default fees. However, as the new BankWest account demonstrates, the banking industry continues to deliver hefty default fees. The market alone will not and can not ensure that fees for default are fair.

# Limitations of disclosure

> *We’re legally required to disclose our fees and charges to all our customers, which is why you would have received a Product Disclosure Statement from us when you opened your account. We also update you whenever there is a change to this information.*[11]

> *Your request to have $280.00 refunded to your account (representing exception fees charged between February 2005 and February 2006), is*

[10] Correspondence from Westpac to customer, 16 January 2008

[11] Correspondence from Westpac to customer, 3 July 2007

> *declined on the basis that the fees charged were disclosed to you prior to your obtaining the product, and are reasonable.*[12]
>
> *While we appreciate that you are dissatisfied with these fees, the information that is given to you clearly outlines our fee structure and we will continue to charge fees in line with our Product Disclosure Statement.* [13]

We do not dispute that financial institutions have obligations to disclose fees and charges upfront. These obligations are written into industry codes as well as the Uniform Consumer Credit Code. While better disclosure of fees is welcome, focusing on it as a solution to the penalty fee problem misses the point. Disclosure, alone, does not mean that a fee is fair or legal.

Many financial institutions have responded to the Fair Fees campaign by providing more information to consumers about the level and application of fees to customer accounts and many more have provided tips on how to avoid default fees altogether. The Australian Bankers' Association has published two fact sheets on the issue. All of these steps have been welcomed by us and the community more broadly.

> *Our fees are fully compliant with legal and regulatory requirements. We recognize the need for customer to have easy access to information on all fees. We currently advise our customers about fees in a number of ways including the provision of A Guide to Fees and Charges when they open an account. We also provide a guide on how to avoid fees and charges and an explanation of exception fees on our website.*[14]

However, the provision of information is cold comfort to consumers who have been charged fees under dubious or unfair circumstances. The reality is that banks happily allow customers' credit cards to go over its limit or their account to be overdrawn, pocketing up to $50 each time that happens. Often it's the bank's own fees that trigger the penalties. One consumer told us how a 2 cent bank charge resulted in a failed transaction, $70 in fees and a bill remaining to be paid. Other consumers are shocked to find an annual account keeping fee on a credit card accompanied by over-limit fees up to $35.

Contrary to popular belief, many banks do not stop ATM transactions that push an account into the red. When customers have requested that their account not be allowed to overdraw, the bank often can't honour that request because of system limitations.

Better information will always be welcome. But if financial institutions were really serious about helping customers to avoid fees, they would implement changes to their operating systems and procedures to limit the number of fees they issue.

There are a range of steps institutions could take, a few of which are set out below. Some have adopted some of these ideas.

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[12] Correspondence from ANZ to customer, 5 July 2007

[13] Correspondence from Westpac to customer, 3 July 2007

[14] Correspondence from NAB to customer, 7 December 2007

- 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]

## The legal argument

Whether a contractual term for the payment of money is an unlawful penalty or simply a reasonable pre-estimate of loss (liquidated damages) is a question of degree which turns on all the circumstances of the case. In particular, a term is likely to be an unlawful penalty if:

1. The sum to be paid under the term by the party in breach is out of all proportion or extravagant, exorbitant or unconscionable in comparison with the loss suffered by the "innocent" party; and/or
2. The relationship between the contracting parties and whether there was any opportunity to negotiate the term, is such that it would be unconscionable for the "innocent" party to enforce the term.[15]

In addition, it is important to remember that the question is one 'not of words or of forms of speech, but of substance and of things'.[16] In other words, although banks describe various payments as "fees", for example cheque or direct debit dishonour fees or late payment fees, this does not demonstrate that they are not, in fact, penalties.

As demonstrated further below in our discussion on the level of default fees, it is our view that many default fees charged by Australian financial institutions are in fact penalties and are thus unenforceable by the banks against their customers. Further, as demonstrated below, consumers cannot effectively use dispute resolution systems (including the legal system) to challenge the level of penalty fees.

[15] For a detailed analysis of the law of penalties and how it applies to bank default fees, see Nicole Rich, *Unfair fees: A report into penalty fees charged by Australian banks*, December 2004, available at: http://www.consumeraction.org.au/downloads/DL56.pdf.

[16] *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 15 per Lord Davey.

## Practical limitations to challenging penalty fees

> *The Credit Union Dispute Resolution Centre (**CUDRC**) operates a free and independent dispute resolution service… However, CUDRC is unable to deal with dispute that fall outside its terms of reference and we consider that your complaint, which we consider to be about the fairness and amount of our fees, falls outside its terms of reference. Therefore, while we feel it is appropriate to inform you of CUDRC's services, we may object to CUDRC dealing with the matter should you choose to attempt to refer the matter to it.*[17]

All financial services providers in Australia (as well as a range of other persons who issue certain financial products) are required to be members of an approved external dispute resolution scheme.[18] There are a range of approved schemes.[19] The Banking and Financial Services Ombudsman (**BFSO**) is the scheme which covers Australian banks together with some additional financial services providers. The Credit Ombudsman Scheme Limited (**COSL**), the Credit Union Dispute Resolution Centre and the Financial Co-operatives Disputes Resolution Centre (**FCDRS**) also have relevant jurisdiction.

The BFSO has stated publicly that it does not consider it has jurisdiction to investigate complaints relating to penalty fees. It appears this view is formed on the basis that the BFSO's terms of reference exclude complaints arising from a policy or practice of a bank, unless that policy or practice is in breach of a specific obligation or duty to the customer.[20]

It is our view that whether or not a fee charged is an unlawful penalty involves questions of legal obligations or duties, as opposed to merely raising issues of banks' fee setting policy, and therefore the BFSO could and should accept complaints about penalty fees. We have made such representations to the BFSO.

The Credit Ombudsman, however, has indicated its willingness to investigate complaints about penalty fees.[21] The Financial Co-operatives Dispute Resolution Centre has foreshadowed that it is reviewing its position relating to complaints about the level of penalty fees.[22] However, only consumers who have accounts with members of those schemes can make a complaint, and whilst the positions taken by COSL and FCDRS are significant and important, in reality they provide coverage for a relatively small proportion of relevant consumers.

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[17] Correspondence from Police Credit Union to customer, 4 July 2007

[18] See ASIC Pro Forma 209 Australian Financial Services Provider conditions, clause 39 and section 1017G, *Corporations Act 2001* (Cth).

[19] These include the Banking and Financial Services Ombudsman, Credit Union Dispute Resolution Service, Credit Ombudsman Service Limited, Financial Industry Complaints Service Limited and Financial Co-operatives Dispute Resolution Centre.

[20] See http://www.bfso.org.au/ABIOWeb/abiowebsite.nsf.

[21] See http://www.afccra.org/Documents_2007%20conference/COSL%20Presentation.pdf, p 31-2.

[22] See http://www.fcdrs.org.au/.

Another option for consumers is to approach a court or tribunal with relevant jurisdiction. In many jurisdictions small claims or consumer tribunals would be the appropriate forum, as these have quicker processes and are considerably less expensive than courts. In Victoria, for example, the relevant tribunal is the Victorian Civil & Administrative Tribunal (**VCAT**). It should be noted that not all jurisdictions give consumers access to such tribunals. In these cases consumers must seek redress in the Local Court or Magistrates' Court – a significantly more costly and time consuming exercise, with the additional risk of liability for the costs of the other party if an action is unsuccessful.

Further, approaching either a court or tribunal carries appeal risk – if the consumer's case succeeds, the financial institution may appeal the decision to a higher court, which is likely to increase the consumer's costs risks significantly. These risks are a significant disincentive to consumers seeking redress from a court or tribunal about the imposition of a penalty fee. Without substantial support to ameliorate this risk consumers will be unwilling to pursue the matter.

To date we are aware of a small number of consumers who have pursued legal action through small claims tribunals. Generally these have settled with confidentiality clauses placed as part of the settlement. We assume that the settlements have generally been to the consumer's satisfaction and that the financial institution was willing to settle the matter to avoid the issue being litigated.

# Options for regulatory reform

CHOICE and Consumer Action support the Bill and believe it is a significant improvement on the Bill previously referred to the Senate Economics Committee in 2007. This bill provides for ASIC to regulate the level of bank penalty fees.

We offer the following commentary on the precise details of the Bill:

**Section 12FAA** definition of 'consumer default' and 'default charge':

Like the common law, section 12FAA limits its consideration of 'penalty fees' to those arising only in breach of a contractual term. While the common law is clear that the construction of such a term is a matter of substance not form, we have historically had difficulties with financial service providers disguising liquidated damages clauses as clauses that merely impose a fee for a service. To be effective, the Bill ought to go beyond the standpoint of the common law by redefining 'consumer default' and 'default charge' in section 12FAA more broadly to ensure that they cannot avoid its operation by rewording damages clauses in the manner set out above. While recent case law confirms that whether a contractual term is a penalty is a matter of substance and not of form,[23] we believe that the Bill should address the likelihood that financial institutions will continue to draft contractual terms that impose default charges as fees for service. One way of overcoming this might be to insert a clause that provides that, for the purpose of determining whether a fee is a 'default charge', one should have regard to substance of the matter not the form of the clause. Additionally, the

[23] *Integral Home Loans Pty Ltd & Anor v Interstar Wholesale Finance Pty Ltd & Anor* [2007] NSWSC 406

onus should be on the financial service provider that imposes the fee to set out the basis of the fee.

**Section 12FA(3)** requires financial service providers to set up a process for which consumers can claim a refund of the difference between a default charge and the amount equal to a genuine estimate of the damage that was in fact suffered by the financial service provider.

The common law clearly states that, in the event a liquidated damages clause is deemed void as a penalty clause, the innocent party to the contract may nevertheless recover damages for the breach. Accordingly, section 12FA(3) does not modify the common law position. However, in our submission there are compelling public policy considerations in favour of a bolder stance on this point. Namely, the Bill should make it clear that, in an event a penalty clause is deemed void, no monies ought to be recoverable in respect of the breach in question, and any monies paid under such a clause ought to be refunded in full. If it was deemed necessary to limit such an approach, it could be limited to penalty clauses in standard form contracts.

The rationale for this is twofold. Firstly, it acts as a valuable incentive to financial service providers ensuring they are in compliance with the intent of the Bill, which will lead to greater self-regulation in the industry regarding lowering fees to an acceptable level. Secondly, with reference to section 12FA(3), a consumer will have no practical means of assessing whether the estimate of damage put forward by the financial service provider is in fact genuine. That assessment is a formidable accounting exercise requiring a major commitment of expertise and resources. Therefore, we do not believe that section 12FA(3) as currently drafted will ensure that fair and reasonable refunds are extended to affected consumers. Alternatively, if section 12FA(3) is ultimately allowed to stand, we propose that a financial service provider be required to bear the onus of presenting clear and comprehensive evidence to a consumer upon which its genuine estimate of damage relies.

Related to this last point, the section could be improved by authorising ASIC to prescribe a process by which a consumer can follow to claim this refund. We believe it must be clear that a consumer has rights to internal dispute resolution processes and external dispute resolution processes should their claim for a refund be rejected. They should also ultimately have a right to go to a small claims tribunal or court to enforce their rights.

**Section 12FB** allows ASIC to require a financial service provider to provide the information and methodology relied upon to calculate any default charges.

We are concerned about whether ASIC will actually require this information to be provided. We believe Government should provide direction to ASIC, for example in the second reading speech, to use this power to obtain information from financial service providers where there is demonstrable consumer detriment.

We assume that ‘financial provider’ should be ‘financial service provider’ in line 3.

**Section 12FD** provides that ASIC may accept a written undertaking given by a financial service provider in connection with default charges.

So as to encourage maximum industry use of this section, perhaps an approach would be to make it clear that should a financial service provider provide an enforceable undertaking, then that is secure regulatory approval or a 'safe harbour' default charge and it would be immune from any further action by ASIC. We recognise that costs can change over time and this may impact on the safe harbour default charge proposed by a financial service provider. In recognition of this, the immunity might operate for a defined period of time, similar to the immunity provided by notifying anti-competitive conduct under Part VII of the *Trade Practices Act 1974* (Cth).

**Section 12FE(1)(d)**

It is our understanding that this section provides that a financial service provider cannot impose a default charge unless the consumer has actively opted in to have the ability to overdraw their non-credit account or to obtain credit over a credit limit. If this is the section's intention, then we strongly support it. We agree that the default position on transaction accounts and credit cards is for the accounts to have 'hard limits', so a consumer initiating a transaction cannot be allowed to go overdraw or obtain credit over his/her limit.

However, we recognise that default fees are charged even where there are hard limits in place (sometimes called dishonour fees). We believe there should be a provision that requires a financial service provider to alert a consumer if a charge is to be applied and allow them to rectify the matter within a period of time before the fee is charged.

**Section 12FF(1)(a)** regarding ASIC producing copies of information.

We are not sure of the rational behind the inclusion of this paragraph, but given the likelihood of financial service providers asking ASIC not to release any information provided to it under sections 12FB or 12FD, this provision seems to render toothless the entirety of section 12FF. This section should be removed.

# Conclusion

We urge the Senate Economics Committee to recommend the adoption of the Bill subject to the minor amendments outlined above. Australian consumers will benefit from the transparency and fairness it will bring to the banking industry.

## About us

**CHOICE** is a not-for-profit, non-government, non-party-political organisation established in 1959. CHOICE works to improve the lives of consumers by taking on the issues that matter to them. We arm consumers with the information to make confident choices and campaign for change when markets or regulation fails consumers.

CHOICE does not receive ongoing funding or advertising revenue from any commercial, government or other organisation. With over 200,000 subscribers to our information products, we are the largest consumer organisation in Australia. We campaign without fear or favour on key consumer issues based on research into consumers' experiences and opinions and the benefit or detriment they face.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and subscribe to CHOICE Campaigns Update at www.choice.com.au/ccu.

Consumer Action Law Centre (**Consumer Action**) is an independent campaign-focused consumer casework and policy organisation, dedicated to advancing the interests of low-income and vulnerable consumers, and of consumers in general. Based in Melbourne, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

To find out more about Consumer Action, visit www.consumeraction.org.au

The **Fair Fees** campaign is a joint campaign of CHOICE and Consumer Action and was launched in June 2007. The Fair Fees campaign is designed to empower consumers to fight bank against unfair and potentially illegal bank penalty fees. The Fair Fees website (www.fairfees.com.au) contains information for consumers about how to seek refunds on penalty fees charged by financial institutions. The site also provides information about penalty fees on standard and concession accounts. Since launching the campaign more than 30,000 consumers have used material on the site to challenge unfair penalty fees.