

Association of Building Societies and Credit Unions



17 July 2008

Mr John Hawkins  
Committee Secretary  
Senate Economics Committee  
Department of the Senate  
[economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Hawkins,

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

*Abacus – Australian Mutuals* is the industry body for credit unions and mutual building societies.

Credit unions and mutual building societies are customer-owned Authorised Deposit-taking Institutions (ADIs), regulated under the *Banking Act 1959*, and Australian Financial Services Licensees, regulated under the *Corporations Act 2001*. Mutual ADIs are signatories to the Electronic Funds Transfer Code of Conduct and are currently in the process of adopting a new Mutual Code of Practice.

Abacus represents the largest and most diverse group of ADIs in the banking sector, with 130 credit union members and 9 mutual building society<sup>1</sup> members serving 4.6 million customers and managing \$65 billion in total assets.

Each mutual ADI is an independent entity with its own Board and its own business strategy on products, distribution and pricing.

The key distinguishing factor between mutual ADIs and their competitors in the retail banking market is that mutuals exist only to serve the needs of their customers and do not have to maximise profits to pay dividends or push up a share-price.

This explains why credit unions and building societies consistently and strongly outperform the major banks in customer satisfaction surveys. According to Roy Morgan Research's May 2008 *Customer Banking in Australia* survey, credit unions' customer satisfaction rating is 87.6 per cent and for building societies it is 85.6 per cent, compared to 70.2 per cent for the four major banks.

In debate about regulatory proposals, credit unions and mutual building societies urge a highly cautious approach to measures that would increase the regulatory compliance burden. Regulatory compliance is a fixed cost that weighs most heavily on smaller ADIs.

Our sector prefers action to empower consumers rather than further increasing the regulatory compliance burden for businesses.

---

<sup>1</sup> Two other building societies are listed (non-mutual) entities and are not members of Abacus.

Abacus is acutely aware of concerns by consumer groups and others, including MPs from all parties, about exception fees and, in particular, the impact of exception fees on vulnerable and disadvantaged consumers.

We have provided frequent updates to our members about the debate on exception fees and encouraged our members to review their fees. A number of Abacus members have adjusted exception fee settings and abolished some fees and there may be further adjustments if wholesale service providers to Abacus members adjust pricing for wholesale services that relate to exception fees.

We note that adjustments in exception fees and enhancements to exception fee disclosure have been occurring across the entire ADI sector. The success of consumer groups in putting the spotlight on exception fees has significantly raised the reputational risk associated with these fees for ADIs.

Competition and consumer advocacy are working.

This supports our view that market-based responses to concerns about exception fees are highly preferred to the alternative before the Committee: i.e. Government price setting and prohibitions on cost recovery.

Laws aimed at assisting a particular group of consumers, such as vulnerable and disadvantaged consumers, can have the unintended consequence of distorting pricing and reducing choice for all consumers.

### **Effect of proposed legislation**

Under the Bill:

- Financial services providers will have to devote time and resources to set up systems and processes to ensure that certain prices comply with a new legislated concept of being at or below a genuine pre-estimate of likely damage;
- ASIC will be empowered to set prices and demand disclosure of information and methodology about price setting and this information and methodology would be made public unless the provider can persuade ASIC not to make it public; and
- Providers are prohibited from direct cost recovery for inward cheque dishonours and for "multiple defaults".

### **Relevant developments since original Bill**

The Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008 is a revised version of the Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2007.

Relevant developments for exception fees and ADI transaction account pricing since 2007 include:

- Moves to facilitate account switching to improve competition;
- The Productivity Commission's report on consumer protection;
- Renewed attention on exception fees due to judgement in a United Kingdom test case; and
- The final draft of a new Mutual Code of Conduct for Abacus members.

### *Account switching*

The ADI sector, including all credit unions and mutual building societies, is currently implementing new pro-competitive account switching arrangements.

The Australian Payments Clearing Association (APCA) has developed a package with the following features:

- The old financial institute (FI) will provide a list of the customer's direct debit and credit arrangements over the past 13 months to the customer in order to facilitate the establishment of the arrangements for the new account;
- The new FI will provide the customer with information and support to help the customer make the switch. If requested by the customer, the new FI will assist in notifying the billing or crediting organisations of the new direct debit and direct credit arrangements.
- The service will be supported by obligations in industry codes of practice. This will include obligations in regards to timeliness and to provide information to customers on how to avoid exception fees, and to deal fairly with customers throughout the account switching process; and
- APCA will further seek to support the efforts of FIs by developing generic information and support material for customisation by FIs in supporting account switching.

Implementation of the package is due by November 2008.

Abacus backed the launch of this process in our October 2007 submission to APCA, arguing that customer mobility and account portability is fundamentally important to competition in consumer banking services.

"Effective competition means benefits for all consumers in choice, pricing, service standards and product innovation.

"Abacus supports measures to promote customer mobility and account portability, with an emphasis on a low-cost, practical and market-based approach.

"It is likely that consumer perceptions about the difficulty of switching accounts may be inflated. Simple measures to facilitate switching can go a long way towards overcoming this perception problem. In particular, the recent rapid proliferation of account switching advice and tools on ADI websites is a welcome development."

#### *PC report on consumer protection*

The Productivity Commission has recommended incorporation of "a carefully crafted unfair contracts provision in [a] new national generic consumer law."

In its 8 May 2008 *Review of Australia's Consumer Policy Framework*, the Commission says its preferred approach to this unfair contracts provision would have the following features:

- a term is established as 'unfair' when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- there would need to be material detriment to consumers (individually or as a class);
- it would relate only to standard form, non-negotiated contracts;
- it would exclude the upfront price of the good or service; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

The Commission also recommends that Australian Governments should provide enhanced support for individual consumer advocacy through increased resourcing of legal aid and financial counselling services, especially for vulnerable and disadvantaged consumers.

“As well as facilitating more effective third-party representation for disadvantaged consumers, extra funding could strengthen the incentives for suppliers to better meet the needs of all consumers, and thereby lead to more competitive and better functioning markets overall.”

The Commission warns that:

“consumer policies that impose significant compliance burdens on businesses, or dull competitive market incentives for them to improve productivity, can lead to higher prices, as well as to lower incomes and therefore reduced household spending power.”

These recommendations are under consideration by the Federal and State Governments and will more appropriately and effectively address issues arising from exception fees than the Bill current before the Committee.

#### *UK test case*

The UK High Court handed down a decision on 24 April 2008 in a test case on the application of unfair contract terms regulation and the enforceability of certain exception fees under common law. The case was brought by the UK Office of Fair Trading and defended by the largest 8 issuers of personal current accounts in the UK.

The most critical part of the case centred around whether exception fees could be considered as penalty fees under common law and therefore be unenforceable. The UK High Court decided that, based on the terms and conditions used by the financial institutions in question, the fees charged by those institutions for “unauthorised overdrafts” were not penalty fees under common law because there was no breach of contract that gave rise to the fee being charged.

The High Court did however decide that the fees in question could be assessed for unfairness (and potentially disallowed or reduced) under the UK’s specific unfair contracts terms legislation.

#### *Mutual Code of Practice*

Abacus recently circulated to credit unions and mutual building societies the final draft of a new Mutual Code of Practice to replace the Credit Union Code of Practice in 2009.

Section 5 of the new Code, *Fees and Charges*, says:

(5.1) We will regularly review any fees and charges on our products and services, including their level, and the effectiveness of our disclosure to members.

(5.2) 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. Our costs include charges imposed by our service providers, where applicable.

Section 24 of the new Code, *If you are in financial difficulties*, says:

(24.1) We will work with you in a constructive way if you experience genuine difficulties meeting your financial commitments. With your agreement and commitment, we will try to assist you to overcome those difficulties. We will do this whether or not you have a right to seek a hardship variation or change under the consumer credit laws.

(24.2) Without limiting (24.1), we will have procedures in place to ensure we:

- Adhere to hardship variation or change provisions of the consumer credit laws.
- Respond promptly to any request or application made to us. (We may also initiate contact to discuss your financial situation).
- Genuinely consider your application or request, taking account of your situation. However, we will only be able to do this if you provide us with the financial information and documents we may reasonably need to assess your situation for ourselves.
- Encourage you to keep making whatever payments you can while we are considering your request.
- Consider longer term as well as short-term financial issues when they are relevant. If you are experiencing longer term difficulties, we will try to develop an appropriate solution with you to allow you to meet your obligations.
- Not list your default on your credit reference file while we are considering your application or request.
- Where you have made an application or request in respect of a debt, not sell that debt to a debt buy-out business while we are still considering the application or request.
- Suggest other options or avenues that may be available to you, if we are unable to agree to your application or request.
- If we agree on a plan to assist you, summarise this in a letter to you.
- If we are unable to assist you, advise you promptly in writing, and
- Refer you to a Financial Counselling or similar service in appropriate cases (subject to availability).

### **Legislative intervention unwarranted**

Abacus understands why consumer groups and charities and others who speak for vulnerable and disadvantaged people want to stop these consumers being hit with fees of \$40 or \$50.

However, we oppose the introduction of new laws to attain this objective. The market is delivering accounts that do not impose such fees or impose much lower fees. All interested parties, including providers and consumer advocates, should be directing disadvantaged consumers to accounts that suit them best.

Providers of accounts that have zero or very low exception fees are entitled to reap the reputational benefits and should be recognised by other stakeholders.

Exception fees by their nature are avoidable and credit unions and mutual building societies are proactive in advising members how to avoid them. Many consumers dislike account keeping fees because account keeping fees are unavoidable and have no connection with

transaction activity. The market recognises these consumer preferences by providing accounts that do not have account keeping fees.

Credit unions and mutual building societies do not always automatically charge their listed exception fees but may instead provide grace periods, contact the customer, or allow the transaction to be processed in certain circumstances even when there are insufficient funds.


Many exception fees charged by mutual ADIs reflect the fees those mutual ADIs pay to services providers.

Legislating to prohibit certain fees and to make ASIC a price-setter could reduce choice in a market which currently provides a wide and growing range of exception fee regimes and related services, such as accounts than can be overdrawn.

Legislated intervention is imprudent and unnecessary, particularly given the prospect of increased competition in retail banking flowing from improved account switching processes.

Please contact me on 02 6232 6666 to discuss any aspect of this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'L. Lawler', written in a cursive style.

**LUKE LAWLER**  
**Senior Adviser – Policy & Public Affairs**