



**Submission in response to:**

**Banking Amendment (Delivering Essential Financial Services for the Community) Bill 2010**

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## **About Care Inc. and the Consumer Law Centre**

Care Inc. Financial Counselling Service (Care) has been the main provider of financial counselling and related services to low income and vulnerable consumers in the ACT since 1983. Care's core services include the provision of information, counselling and advocacy to residents in the ACT and the surrounding Queanbeyan region in the NSW experiencing problems with credit and debt. Care also runs a Community Development, Education and Research program and the ACT's only No Interest Loans Scheme.

The Consumer Law Centre of the ACT (CLC) is a project of Care offering legal assistance and advice to consumers on low to moderate incomes, mainly in the areas of consumer credit, telecommunications and utilities, general fair trading law and consumer protection.

Care responds to over 2000 new requests for assistance every year across its programs. In addition to casework, Care and the CLC work hard to advocate on behalf of the ACT's consumers, providing policy comments on issues of significance to its client group and striving to improve legal protection and awareness of consumers' rights in the ACT.

Care receives funding from a variety of contributors, and specifically acknowledges the funding that it receives from: ACT Government, the Department of Disability, Housing and Community Services and the Department of Justice and Community Safety; the NSW Financial Counselling Trust Fund administered by the Office of Fair Trading; and the Commonwealth Financial Counselling Program administered by the Department of Family and Community Services.

## **Comments**

Thank you for the opportunity to provide input into the Banking Amendment (Delivering Essential Financial Services for the Community) Bill 2010. Care is supportive of strategies that will deliver essential financial services at a reasonable cost, fair mortgages for families and increased competition for the community.

Care will focus our brief comments in this submission on Part 1 of the Amendment of the Banking Act 1959 that deals with 'Conditions on bank's authorities'. We will not at this time, be making any detailed comments on Part 2 (Fixed interest gap mortgages) and Part 3 (Exit fees on mortgages) of the proposed amendments of the Banking Act 1959 for the following reasons:

- On 17 March 2010 a single national consumer law was passed by parliament to create the new Australian Consumer Law (ACL). *The Trade Practices Amendment Act 2010* introduced provisions which void unfair contract terms in standard form consumer contracts. These laws commenced on 1 July 2010. It is very likely that issues such as penalty fees on transaction accounts and excessive early exit fees on mortgage contracts will be impacted by the new unfair contract provisions. The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission

(ASIC) have recently released A Guide to the Unfair Contract Terms Law. The guide provides examples of the types of terms in a standard form consumer contract that may be unfair. One such example is:

*“A term that penalizes, or has the effect of penalizing, one party (but not another party for a breach or termination of the contract”<sup>1</sup>*

The guide goes on to explain that a penalty imposed by a contract should bear a reasonable relationship to the loss likely to be suffered by the business in relation to the breach or early termination. Under the Australian Consumer law, an unfair contract term that includes payment of early exit fees can be declared void.

- The new National Consumer Protection Act also came into effect on July 1 2010. Under this new Act the regulation of credit has been transferred from the States and Territories to the Commonwealth. Under the National Credit code, early exit fees which are unconscionable can be annulled or reduced by a court.

In his media release, the Hon Chris Bowen MP indicated that these recent reforms would increase the capacity of ASIC as the regulator to pursue banks over unfair mortgage exit fees. ASIC will similarly be able to take action against banks who charge high upfront fees as an alternative to mortgage exit fees, where these fees are seen to be unconscionable. Care welcomes the strengthening of regulation and enforcement powers in relation to mortgage exit fees. Financial institutions have in the past used excessive fees to discourage and indeed prevent consumers from switching mortgages to a provider with a more competitive rate. As interest rates continue their upward trend and the financial pressure on many households increases, it is essential that consumers have the capacity to shop around for loans that best suit their needs and are not penalised from doing so by excessive break fees on their existing contract.

Care agrees that all ADI's offering mortgage products should outline the reasonable costs associated with early termination of a mortgage and include these charges clearly in the contract. This should minimize the likelihood of financial institutions charging excessive fees and at the same time make it easier to identify unfair early exit fees that may be unconscionable or unfair.

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<sup>1</sup> A guide to unfair contracts law ACCC 2010 p16

- ASIC has recently released Consultation paper 135 *Mortgage early exit fees: Unconscionable fees and unfair contract terms*. This paper contains proposals in relation to ASIC's expectations for compliance with the provisions in the National Code and ASIC Act that apply to setting the price of and explaining mortgage early exit fees. Given the significance of the new national legislation and the potential impact on clients of Care and the CLC, our focus over coming weeks will be on reading and responding to this Consultation Paper. Our submission will focus on transparency and legitimacy of costs as well as on contractual and pre-contractual disclosure. We will therefore be covering in some detail a number of the issues raised in Part 3 of the Amendment of the Banking Act (exit fees on mortgages).
- Consultations on Phase 2 of the new National Consumer Credit Protection Act are currently under way. On July 7 the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen announced the release of the Consumer Credit Reform Green Paper *National Credit Reform – Enhancing confidence and fairness in Australia's credit law*. Phase 2 of the act will cover amongst other things enhancements to regulation for reverse mortgages, regulation of various aspects of credit card lending, state based interest rate caps, and reform of mandatory comparison rates. Care and the CLC intend to prepare a submission addressing the issues in the Green Paper. Available time and resource will be directed toward this very important consultation.

### **Part 1 – Conditions on banks' authorities**

Provision of suitable basic bank accounts that do not attract fees is essential particularly for consumers who are on low incomes and negatively impacted by transaction and penalty fees. Australian households pay an enormous amount on transaction accounts. According to Choice<sup>2</sup> in 2008 the figure was \$1.9 billion. For those on low incomes their capacity to absorb the cost of transaction fees is limited and places an unnecessary financial strain on already stretched resources.

Over the past few years there have been a number of developments and improvements in banking products. Consumers are now able to choose an account with no monthly fees and no fees for certain everyday transactions. Despite these improvements there remain some issues of concern that need to be addressed:

- Many of the accounts that do not charge monthly service fees also do not attract any interest. Such accounts provide little incentive for consumers

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<sup>2</sup> [www.choice.com.au](http://www.choice.com.au) Reviews and Tests 'Low-fee transaction accounts review and compare'

with the capacity to save even small regular amounts. For some consumers the disadvantage outweighs the benefit of a fee free account. For example the fee may be less than the interest that could accrue on an interest bearing account. Basic bank accounts should not only avoid transaction fees, they should also attract interest and therefore provide a financial benefit for consumers who are able to make regular savings

- There are often conditions on fee free accounts that render them unattractive or unsuitable. These might include the requirement for a minimum monthly deposit, a minimum balance to be maintained in the account or impose a limit on the number of monthly withdrawals. Such conditions unfairly disadvantage consumers who have neither the income to meet the minimum requirement nor the capacity to limit transactions. Many low income consumers withdraw small amounts of money at a time in order to control spending and are therefore penalized for making too many withdrawals. Maintaining a particular balance in an account can also be very difficult for consumers who have limited incomes, including those on Centrelink incomes, and high ongoing living expenses such as the need for substantial outlays on medical expenses
- Customers are not automatically made aware of the existence of basic bank accounts that do not attract fees. This lack of transparency results in many consumers not having accounts that best reflect their banking needs
- Many basic bank accounts provide some benefits to customers who use internet/phone banking and make limited ATM transactions. However, customers who do not have access to these means and who rely on over the counter transactions are often unfairly discriminated against as they must make withdrawals in a branch. This can particularly affect elderly or other vulnerable consumers who may require counter assistance to process a transaction and therefore are charged a fee, that would otherwise not be charged.

Basic bank accounts need to be not only fee free but also flexible and adequate enough to meet the banking needs of the particular customer.

A large portion of bank fees paid by consumers come from penalty fees. Such fees have been an enormous concern for consumer advocates over many years. Penalty fees include dishonour, default and overdrawn transaction fees. In the past, financial institutions have charged up to \$50 for dishonor fees and up to \$90 on over limit penalties.

Care acknowledges the recent campaign on 'Fair Fees' run by Choice and Consumer Action Law Centre. This campaign drew attention to the potentially unlawful nature of penalty fees. As a result of the campaign many financial institutions considerably reduced the fees they charge. In fact in 2009 NAB stopped all penalty fees on transaction accounts. It is pleasing that there have already been improvements in this area though there is still some way to go.

Another fee of concern is that imposed on customers for use of a foreign ATM. According to Choice data<sup>3</sup>, almost half of all ATM cash withdrawals are made outside of a bank or credit union's own ATM network. Whilst the simplest way to avoid these fees is for consumers to only use their own bank's machines, this is not always practical, particularly when there is not an ATM in the area a consumer regularly shops. The cost of using a foreign ATM is generally \$2.00. This might appear to not be a large amount however it can rapidly deplete a low income consumer's bank balance and impose a substantial burden over a period of time. Financial institutions should abolish fees for using a foreign ATM.

Care is strongly of the view that financial institutions should not stand to gain financially at the expense of consumers, particularly low income and disadvantaged consumers with these types of fees and charges. If banks do impose fees to meet their reasonable costs, these fees should be transparent and clear to the consumer. Banks should also have the capacity to waive any such fee in situations where charging it would cause financial hardship for the consumer.

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<sup>3</sup> [www.choice.com.au/media](http://www.choice.com.au/media) and news - Banks \$200m ATM grab sabotages RBA plan