

**Reviewing the EFT Code – ASIC consultation paper**  
**January 2007**

**Consumer Caseworker submission:  
‘Do the Complaint handling provisions of the EFT Code  
work in practice?’**



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## **Contributors to this submission (in alphabetical order):**

### **Australian Financial Counselling and Credit Reform Association:**

AFCCRA is the national peak body for financial counsellors.

### **Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT:**

Care Inc has been the main provider of financial counselling and related services in the ACT and region since 1983. It is host to the Consumer Law Centre of the ACT, an independent community legal centre providing advocacy and advice to low and moderate income earners in relation to credit, debt, telecommunications and fair trading matters.

### **Consumer Action Law Centre (Victoria):**

CALC is an independent, not-for-profit, campaign focused, casework and policy organisation. It was formed by the merger of the Consumer Law Centre of Victoria and the Consumer Credit Legal Service and builds on the significant strengths of these two centres.

### **Consumer Credit Legal Centre NSW Inc:**

CCLC is an independent legal centre providing legal advice, legal representation, and education to NSW consumers in relation to credit, debt and banking matters. CCLC also operates the Credit and Debt Hotline, a financial counselling information and referral service, which is the first port of call for many troubled debtors in NSW.

### **Consumer Credit Legal Service (WA):**

CCLS WA is an independent legal centre providing legal advice and representation to low income and disadvantaged consumers in Western Australia.

## **Coordination of the submission:**

The preparation of this submission has been coordinated by Jacqui Cavanagh, a Law Student at the Australian National University, as part of the Law Internship program. The contributors would like to acknowledge Jacqui's considerable effort and hard work in drawing together the submission and thank her for making a significant contribution to a discussion of considerable importance to low income and disadvantaged consumers.

The contributors to this submission have also been involved in the preparation of a more detailed submission coordinated by Galexia Pty Ltd. We support the comments and recommendations made by Galexia. In particular, the contributors strongly support Galexia's call to leave current liability standing arrangements unchanged.

## **Introduction:**

The current Electronic Funds Transfer Code ('the EFT Code') relates to all payments via electronic means, including internet banking, EFTPOS and telephone banking. Consumer take-up of electronic transaction options, especially internet banking, has increased dramatically in recent years. The EFT Code's requirements apply to institutions that adopt the code, however adoption is voluntary. Although the current list of EFT Code signatories includes all banks, credit unions, and building societies, as well as a number of other financial service providers, there are a variety of significant providers that stand outside the regime.

All of the contributors to this submission are directly concerned with issues confronting low income and disadvantaged consumers. With the exception of AFCCRA, all provide services directly to that client group. As the peak body for financial counsellors in Australia, AFCCRA's members are direct service providers.

From the perspective of the contributors, it is vital that the EFT Code delivers acceptable and accessible outcomes for ordinary consumers, especially those on low incomes. This submission draws on the experiences of working with low income consumers to access and enforce their rights. Through a series of recent case study examples we have considered a number of questions:

- Are the provisions of the EFT Code relevant to the problems consumers are experiencing in transacting electronically?
- Are consumers getting acceptable outcomes to problems they are reporting?
- Are the mechanisms in the EFT Code for resolving consumer complaints working?

Whereas the Galexia submission addresses all of the questions raised in the ASIC Consultation Paper, this submission is more focused on those questions relating to complaints, dispute resolution and related issues. It will specifically address questions 20, 22-27, 68, 69, and 73 as posed by the ASIC Consultation Paper.<sup>1</sup>

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<sup>1</sup> 'Reviewing the EFT Code', *ASIC Consultation Paper*, January 2007.

## **Consumer experiences of the complaint mechanisms under the EFT Code:**

The power imbalance that exists between individual consumers and large financial service providers is readily obvious. It is even more pronounced when the consumer has some vulnerability or disadvantage.

As noted in the ASIC Discussion Paper, recognition of the imbalance has underscored the development of industry regulation designed to protect and inform consumers.<sup>2</sup> The EFT Code has a significant role in that regulatory framework. The Galexia submission expands on why the current review of the EFT Code is so timely and important given advances in technology and increased consumer use of electronic means of transacting. A central question for casework agencies and groups working with vulnerable and disadvantaged consumers is how well the complaint and dispute resolution mechanisms in the current EFT Code have been working in practice.

A number of case studies follow, drawn from the casework of Consumer Action Law Centre Victoria, Consumer Law Centre of the ACT (co-located with Care Inc), Consumer Credit Legal Centre (NSW) and Consumer Credit Legal Service of Western Australia. All of the case studies involve fact scenarios that *could* invoke the EFT Code. Attention is drawn to how and why the EFT Code might have been or was recognised as being relevant. Similarly, reliance on or reference to the EFT Code in the resolution of the matters is also detailed.

The most relevant sections of the EFT Code dealing with complaint and dispute resolution procedures are contained in Appendix 1.

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<sup>2</sup> 'Reviewing the EFT Code', *ASIC Consultation Paper*, January 2007, p. 10.

## Case studies<sup>3</sup>:

### Case 1

#### *Facts:*

Samantha regularly checked her bank statement on the internet. Samantha's main income was parenting payment. She suffered from anxiety attacks and was responsible for her son's medical costs, which were significant. When Samantha discovered what she believed to be a fraudulent transaction on her credit card account she contacted the bank and cancelled the card. As it was the weekend she was initially told to contact the fraud department on Monday. Samantha expressed distress at the fact the funds, still charged to her account while the bank investigated the complaint, pushed her credit limit to its maximum level, leaving her with no available funds on which to draw. The bank then offered to replace the card and raise the limit to enable her to continue using the facility. At no stage was Samantha asked to apply for increased credit, nor did the bank appear to take into account her financial situation. The limit was later reduced without warning, and the bank began to pursue Samantha for the subsequent outstanding balance. The collection activity included calling Samantha at night and threatening her with a default notice, which caused her to have an anxiety attack.

#### *Was the EFT Code relevant?*

The relevant aspects of the EFT Code can be found in Part 5 and Part 10. Under the EFT Code, no liability is apportioned where it is clear the consumer did not contribute to the loss, cl 5.3. Further the bank did not communicate with the client the progress of the investigation, contravening clauses 10.5 and 10.9 of the Code.

#### *Outcome:*

Samantha was not advised of either the internal or external dispute resolution options by the bank when she first spoke to them. This information was provided to her later when she sought assistance from a consumer lawyer. The consumer lawyer also provided the bank with more detail about Samantha's financial and health situation. The matter was eventually settled; the bank acknowledged that the unauthorised payment was fraudulent and Samantha and the bank came to an agreement in relation to the remainder of the credit card debt, which was repaid with the help of a friend.

#### *Was the EFT Code Applied?*

No.

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<sup>3</sup> The case studies are drawn from actual consumer experience reported to the contributing agencies. The examples have been appropriately identified.

## Case 2

### *Facts:*

Eric had a serious mental illness that greatly impacted on his life, making it difficult to fully participate in or engage with his community. Eric had home internet access and through this device his details may have been stolen. Due to his illness, Eric failed to check his bank statements properly for a number of years. His details were repeatedly used without his permission on different transactions during this period. Eric subsequently paid for a number of transactions that were not his. Once Eric realised there was a problem with his statements he did attempt to raise his concerns with the bank directly by completing the required complaint forms. While the bank was initially responsive to Eric's complaint and reversed some more recent unauthorised activity, debate arose as to whether other earlier transactions could be reversed as they were considered 'outside the timeframe' to make a claim. The intervention of a consumer legal service was eventually required when Eric's efforts failed to resolve his complaint.

### *Was the EFT Code relevant?*

Clause 5.5(b) of the EFT Code is relevant, with this case showing the term 'unreasonable delay' is broad and open to interpretation. Additionally, 10.3, 10.5 and 10.6 are applicable.

### *Outcome:*

The EFT Code was not referred to in negotiations. With the help of the consumer legal service, the bank was made fully aware of Eric's mental illness and difficult financial situation. Eventually, Eric's account was refunded for all of the unauthorised transactions. As Eric had already paid the unauthorised transactions the bank did not however refund the amount until the dispute was resolved, four months after the complaint was made.

### *Was the EFT Code Applied?*

No.

### **Case 3**

*Facts:*

Justin accessed an ATM to withdraw \$300. His card took several minutes to come out of the machine and while the funds were debited from his account, no money was dispensed to him. The credit union denied any problem and stated, over the phone, that according to their records he had received the money. He approached a consumer legal service for assistance.

*Was the EFT Code relevant?*

The relevant clauses of the EFT Code are 10.4(c), 10.3 and Part 6.

*Outcome:*

The credit union did not agree to investigate, and at no point was Justin informed in writing about the dispute resolution procedures. The credit union did not investigate but settled the dispute on confidential terms.

*Was the EFT Code Applied?*

No.

### **Case 4**

*Facts:*

Derek used online banking to transfer funds from his bank to another person's account with another bank. He put in the wrong account number and another person entirely received the money. He notified the other bank who claimed they contacted the person who received the money but they refused to return it. The other bank did not identify the person who received the mistaken payment.

*Was the EFT Code Relevant?*

The EFT does not currently address mistaken payments.

*Outcome:*

The BFSO could not assist. Derek's choice is to go to Court to try and find out who received the mistaken payment. If Derek is able to ascertain who received the money he would then have to sue them at further cost.

*Was the EFT Code Applied?*

No.

## Case 5

### *Facts:*

Helena had a credit card. After using the card at a store and having the transaction declined, Helena decided to stop using it and put it in a drawer at her home. Later Helena was contacted by her bank regarding payment of the credit card debt and at that time was informed that the balance was much higher than she recalled having authorised. Helena contacted a consumer legal service for help.

### *Was the EFT Code relevant?*

If Helena had been found liable, she would have been entitled to view documents relevant to the transactions in line with cl 10.11.

### *Outcome:*

The consumer legal service asked the bank for further information about the transactions leading to the higher than expected balance. The bank could not say how the transactions occurred because they did not keep the relevant records. Liability was not ascertained and the matter was settled on the basis of a reduction of the debt. Helena negotiated a payment arrangement on the agreed debt.

### *Was the EFT Code Applied?*

It was never clear whether the EFT Code was applied.

## Case 6

### *Facts:*

Timothy had an account with O-Bank and withdrew money from an ATM belonging to L-Bank. There was a problem with the transaction. Timothy rang L-Bank who told him to contact O-Bank. He rang O-Bank who told him to ring L-Bank. He rang a consumer legal service for advice.

### *Was the EFT Code Relevant?*

The relevant aspects of the EFT Code are cl 10.4(c) and Part 6. Neither bank agreed to investigate, thereby denying Timothy the right to make a claim for the loss which arose as a result of a malfunction of the second bank's equipment.

### *Outcome:*

The matter is unresolved.

### *Was the EFT Code Applied?*

No – or rather not yet.

## **Case 7**

### *Facts*

Ruth has very limited English skills. She applied for and received a credit card; however she never received her PIN. Ruth never used the card. After reviewing a statement Ruth discovered a number of unauthorised transactions had occurred, and assumed that the card had been lost or stolen. Ruth notified the financial service provider who is a signatory to the EFT Code. Ruth attempted to deal with the financial service provider herself but she had difficulty communicating.

### *Was the EFT Code relevant?*

The relevant clauses of the EFT Code are Part 10 regarding dispute resolution and Part 5 regarding liability.

### *Outcome:*

The financial service provider agreed to settle on the basis that Ruth was released from any allegation of liability.

### *Was the EFT Code Applied?*

The financial service provider requested some information in compliance with clause 10.4 of the EFT Code. A consumer legal service assisted Ruth to respond, and in return sought compliance from the financial service provider with a number of sections of the EFT Code:

1. To be provided with information regarding complaint and dispute handling procedures, cl 10.3;
2. To have the complaint dealt with in a timely manner, cl 10.4 and 10.5;
3. To have the reasons for the decisions given in writing to the client with reference to the relevant sections of the code, cl 10.9.

The financial service provider did not respond directly to the questions regarding the EFT Code. It appears therefore that the EFT Code was not relied upon to produce the outcome.

## Case 8

### *Spychalla v Australian National Credit Union Limited* [2003] VCAT 1296 (22 September 2003)

#### *Facts:*

In November 2001, Ms Spychalla gave her Visa card and the relevant PIN to Mr Shaer, who was her former de facto partner. Between 22 November and 18 December 2001 thirteen cheques totalling \$134,000.00 were drawn in the name of West Gippsland Horticultural and deposited by Mr Shaer into Ms Spychalla's credit union account. All cheques deposited into this account were dishonoured. Between 22 November 2001 and 10 December 2001 Mr Shaer withdrew \$30,800 from Ms Spychalla's account via an ATM using her Visa card and PIN. Additionally, a total of \$3,100.00 was transferred in three transactions from Ms Spychalla's account to another account. Mr Shaer made these transactions by guessing Ms Spychalla's password for internet banking, and made two further internet purchases totalling \$78.73.

#### *Was the EFT Code relevant?*

The relevant EFT Code provision is cl 5.6(a), which would result in Ms Spychalla being liable for EFT transactions facilitated by giving Mr Shaer her card and PIN. However, the EFT Code's Part 1 definition of 'funds transfer' does not include a bank cheque. In this case, the matters regarding the deposit of cheques were deemed to have been the responsibility of the credit union. In relation to the 'guessed' password for internet banking, Ms Spychalla may have been liable according to cl 5.6(d) if the password was for example her date of birth, where the credit union's terms and conditions warned her against using obvious passwords.

#### *Outcome:*

Ms Spychalla applied to the Victorian Civil and Administrative Tribunal (VCAT). The matter was decided in accordance with the Victorian [Fair Trading Act 1999](#) and [Wrongs Act 1958](#), holding the credit union and the consumer equally liable.

#### *Was the EFT Code Applied?*

It was not referred to by VCAT in relation to the final result, but was appeared to be the basis of the outcome reached when the matter was considered earlier by the relevant external dispute resolution process, the Credit Union Dispute Resolution Centre (CUDRC). CUDRC considered Ms Spycalla was entirely liable. Ms Spycalla exercised her option to press on with the complaint in the Tribunal after receiving the CUDRC decision.

## Case 9

### *Facts*

Thomas is an indigenous consumer who lives in Perth. He and his partner are reliant on Centrelink and have 6 children to support. Thomas has a debit card, which he uses to access his pension. The debit card is a 'co-badged' product between the bank where the account is held and a large supermarket chain.

Thomas presented to a financial counselling service seeking urgent assistance. He had attempted to withdraw the remaining \$200.00 in his account from an ATM to do the family's food shopping for the week. However, the machine malfunctioned and the \$200.00 cash failed to come out of the ATM, while reporting that withdrawal had been processed leaving account empty. Thomas was very upset because he had no other means of purchasing food for his family.

The client went straight to the supermarket that co-badged the card to report the malfunction. Staff at the supermarket advised him to call the service complaint line. Thomas contacted them immediately from the supermarket, explained what had happened. The complaint line operator told Thomas the problem would be investigated.

When Thomas went to the financial counselling service two weeks later, he was desperate for money to purchase food. He relayed the preceding events and the fact that he had followed up the complaint line. Thomas felt that he was not being taken seriously. The financial counsellor contacted the complaint line on Thomas's behalf, and was informed that the complaint had been received a week earlier and referred to the bank. The financial counsellor was further informed that the complaints process would take up to 28 days. The financial counsellor asked if the process could be expedited because the family needed the money to purchase food. The complaints officer informed her that this was not possible.

The financial counsellor contacted the bank directly to discuss the complaint but the bank had no record of receiving the complaint and no investigation had been commenced. Several further conversations with debit card complaint line and the bank resulted in the bank agreeing to deposit \$50.00 into Thomas's account as a 'bonus' payment to help the family purchase food while the matter was being investigated.

The financial counsellor lodged further complaints noting;

- The complaint had not been lodged until 1 week after Thomas first made contact;
- That it took a further week to refer the problem to the bank;
- Misrepresentation in relation to the logging of the complaint and its investigation;
- Thomas's problems had been dismissed;

Thomas contacted the financial counsellor several days later and instructed that he had still not heard from the bank. The financial counsellor contacted the bank and was informed it had not yet reached a decision on the dispute and would follow up on the matter the next day.

The next day, the financial counsellor again contacted the bank and was informed it had made a decision about the dispute, however it was unable to discuss the outcome without a written authority (despite having discussed the matter openly with the financial counsellor until that point).

Thomas contacted the bank directly a further day later and was informed that the money had been re-credited to the account. The bank did not apologise for any inconvenience.

*Was the EFT Code relevant?*

The relevant provisions of the code include Part 6, and Clauses 10.4 (c), 10.3 and 10.5.

*Outcome:*

The bank eventually resolved the dispute 30 days after Thomas made the first phone call about the failed withdrawal.

The bank took only limited notice of the extreme hardship that Thomas and his family were suffering (by depositing \$50.00 'bonus' into the account) and only after being told about repeated failures in its process.

Thomas was not notified in writing of the procedures for investigating and handling the complaint and there were no exceptional circumstances that would warrant extending the completion of an investigation to 45 days, as opposed to 21 days.

*Was the EFT Code Applied?*

Yes.

## Case 10

### *Facts:*

At approximately 11am on a Saturday, Glenda was doing her weekly shopping at the supermarket. While there she believes she was pickpocketed. She was unaware of this until approximately 12pm, when she arrived at the checkout and reached for her wallet. Glenda had only \$10.00 cash and her co-branded credit card was missing. She immediately notified a supermarket staff member the credit card had been stolen. In turn the staff member called security and the police.

Glenda did not immediately notify the credit provider of the stolen card. In fact she thought she had done that by informing the supermarket, as the co-badged company noted on the card, that had been stolen.

Two weeks after having the card stolen, Glenda received her credit card statement. She was surprised to find that the account balance was \$4,000.00 which was the maximum credit limit. She was certain that the balance should have been around \$500.00. Glenda called the enquiry number on the statement and spoke with a customer service representative. She was informed that at approximately 11.30am on 20 March 2006, \$1,000.00 had been withdrawn from an ATM close to where she was shopping and a further \$2,500.00 at approximately 12.30pm.

Glenda explained that the card had been stolen, that she had reported it and that the withdrawals were unauthorised. The customer service representative told her to make a complaint about the unauthorised transactions, which she did immediately.

The credit provider maintained that Glenda was liable for the unauthorised transactions on the following basis;

- She may have contributed to her loss by disclosing her PIN to a third party or otherwise had it written down – it was otherwise unclear how the thief came to know the PIN;
- She unreasonably delayed notification after becoming aware that the wallet was stolen.

Glenda responded on the following basis;

- She was unaware of her PIN code as she only used the credit card to pay for her shopping and did not use it to withdraw money at an ATM.
- She had not disclosed the PIN to a third party or kept it written down.
- She denied delaying notification as she immediately notified the supermarket as the co-badged company on the card and held a reasonable belief that this was sufficient notification.
- The credit provider should have known that the withdrawals were unauthorised given that she had never used an ATM to withdraw money at all, let alone for such large amounts.

*Was the EFT Code Relevant?*

The relevant provisions of the EFT Code are Parts 5 and 10.

*Outcome:*

Around three weeks after making the complaint to the credit provider and having chased up its progress, Glenda was informed that the credit provider had agreed to reverse the unauthorised transactions. However, the credit provider maintained its position that Glenda contributed to her loss and that she unreasonably delayed notification.

Glenda was initially unaware that the supermarket was not the primary lender. Once she discovered this, the credit provider's internal dispute resolution process was easy to access.

Glenda was generally satisfied at the outcome of the dispute; however initially felt that she was blamed for something that was out of her control. Her wallet had been in her handbag on her person and she believed had been taken by a very smart thief. She did not use or disclose her PIN and had notified what she believed to be the correct institution immediately. In her opinion, the credit provider's view that she must have intentionally or unintentionally disclosed her PIN and this resulted in the unauthorised transaction was unfair.

*Was the EFT Code Applied?*

Yes.

## Responses to specific questions in the ASIC Consultation Paper

### Q20

**Should the EFT Code include a definition of the term ‘complaint’ under cl 10? If so, should it adopt the definition in AS ISO 10002-2006? Does the standard sufficiently address uncertainty about what is a complaint for the purposes of the EFT Code? Are there any other steps that might be taken to assist stakeholders to understand what is meant by a complaint under the Code?**

The contributors to this submission support expanding the definition of the term ‘complaint’ to include an ‘expression of dissatisfaction made to an organisation, related to its products, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly excluded.’<sup>4</sup> Raising the standard in this manner would clearly put the onus on EFT Code signatories to identify a complaint, rather than relying on individuals, who may not be aware of their rights, to activate the complaints procedure. It may encourage signatories to take greater ownership of problems arising from ATM malfunctions, if their ‘product’ is able to be defined effectively. The change could additionally provide for situations where a consumer feels they have made a complaint, only to discover later it was made to an agent of the financial service provider or an associated entity that failed to relay the complaint to the relevant body. The problems that can follow inadequate links between the financial services provider and agents or related entities are clearly evidenced by case studies 9 and 10. The active encouragement of low income consumers toward certain types of co-badged products or services makes the need for action even more urgent.

### Q22

**Should account institutions be given a brief period within which to investigate a complaint before they must give the complainant written advice on how they investigate and handle complaints (as required under cl 10.3)? If so, what is an appropriate period?**

If the account institution is given a brief period within which to investigate a complaint before they must give the complainant written advice on the process for investigating and handling complaints it should be no more than one working day.<sup>5</sup> Ideally the time period would remain at ‘immediately.’ Consumers are entitled to be aware of dispute resolution procedures, and providing this advice should not prevent EFT Code signatories from continuing investigations if they require more time. The consumer must be fully informed of the progress of the investigations and should not have to actively seek out extra information.

### Q23

**Should any changes be made to the timeframe for resolving complaints under cl 10 of the EFT Code?**

The ASIC Consultation Paper refers to Option 6.52, which would require ‘subscribers to respond as far as possible within a specific time to requests for information made

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<sup>4</sup> Australian Standards – Customer Satisfaction – Guidelines for complaints handling organizations (ISO 1000:2006, MOD); ‘Reviewing the EFT Code’, *ASIC Consultation Paper*, January 2007, p.54.

<sup>5</sup> cl 10.3, EFT Code.

by a complainant's authorising institution.<sup>6</sup> This suggestion should assist subscribers to resolve disputes quickly. It will, however, need to be framed carefully so as not to encourage further time-consuming debates between subscribers.

Regardless of the exact timeframe, the contributors would like to see the introduction of provisions that take account of financial hardship that might be caused or exacerbated by delay in investigating or resolving complaints. Such a circumstance is outlined in case study 9, where a family reliant on Centrelink benefits was forced to wait thirty days for the funds to be recredited. The delay was in no way contributed to by the acts of the consumer and the bank was fully aware of his financial position. In this situation the timeframe provisions of the EFT Code created an excuse for inaction on the part of the bank, which greatly increased the financial difficulties experienced by the consumer and his family.

At a general level, when a complaint is made and an investigation is to commence, arrangements in relation to the disputed funds during this period should be clearly articulated. If financial hardship is likely to be caused or exacerbated while the investigation is undertaken and a response provided, the interim arrangements in relation to the disputed amount should have regard to that hardship and efforts made to limit its impact. Once resolution has occurred, if the consumer is found liable or the no-fault liability amount is applied, the EFT Code signatory should be required to consider the consumer's ability to repay any outstanding balance, and give consideration to a repayment plan. For bank signatories, inserting obligations of this type would not be entirely new, bearing some similarity to Clause 25.2 of the current Code of Banking Practice. The contributors urge the Working Group to give further consideration to these issues.

We note also that the US 'provisional recredit' system allows consumers the continued use of the funds in dispute whilst the investigation continues.<sup>7</sup> A similar approach in Australia might prevent consumers being offered increased credit limits in response to unauthorised transactions, as described in case study number 1. For those on limited incomes, this could be a very welcome addition to the code.

## **Q24**

### **Do you have information or views about the level of compliance with cl 10?**

Irrespective of the care and precision taken in drafting, the effectiveness of the EFT Code ultimately lies in the approach signatories adopt in relation to compliance. Disputes such as those detailed in the case studies may have been resolved in favour of the consumer, yet little information is received as to whether the EFT Code was applied or even considered in reaching a decision. The contributors hope this is because EFT Code signatories incorporate the Code fully into their internal dispute resolution processes and therefore do not need to refer to it separately or specifically. Some of the case studies however suggest this is not the case.

The level to which the code is being complied with is difficult to ascertain with any precision. Signatories are required to report to ASIC. That self-reporting method does

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<sup>6</sup> 'Reviewing the EFT Code', *ASIC Consultation Paper*, January 2007, p.57.

<sup>7</sup> s169f(e), *Truth in Lending Act* 12 U.S.C. 1601 et seq. (2004).

not however appear to produce useful and reliable information. The most recent ASIC report into compliance focused on the ability of the industry to provide electronic financial services, product information and generally in collating data regarding the development of electronic commerce.<sup>8</sup> It appears this system of self-reporting was not developed to provide information specifically on the application of the EFT Code. While general data is being collected by consultants and researchers, ASIC holds a unique position enabling it to demand more detailed and sensitive information from subscribers. Thus it would be of greater benefit to consumers and consumer legal organisations for investigation to be conducted into genuine problems with the code. Alternatively or in addition, independent monitoring such as that adopted in the Code of Banking Practice could usefully be explored.

Insofar as can be determined from the case studies, consumers do not appear to be well informed of the progress of the investigation. Rather than satisfying cl 10.7(c)(ii) and suspending the account holder's obligation to pay, members have offered other solutions, for example increasing a consumer's credit limit as occurred in case study 1. Especially when the correct procedures have not been followed, disputes regarding credit can be prolonged for months. Additionally advising a consumer of their right to go to an external dispute resolution scheme has often fallen to a community legal organisation.

Further, it is the understanding of the contributors that Visa is planning to introduce compulsory PIN based transactions for all credit card payments. If this is correct such a move will greatly expand the number of transactions covered by the EFT Code. Overt evidence of compliance with the current EFT does not instill confidence that this will be a positive step for consumers.

#### **Q25**

**Has the procedure in cl 10.12 been an effective incentive to compliance? Are further incentives required, and if so what form should they take?**

No cases have arisen under the current EFT Code of which we are aware where this clause has been considered and determined through external dispute resolution.

#### **Q26**

**Should the EFT Code be amended to cover situations when the subscribing institution is unable to, or fails to, give the dispute resolution body a copy of the record within a certain time? If yes, should the Code specify that a dispute resolution body is entitled to resolve a factual issue to which a record relates on the basis of the evidence available to it?**

Yes. Case studies have revealed that crucial documents have been misplaced by the signatory and cannot be produced in responding to a dispute. If an external dispute resolution body is unable to resolve the issue due a lack of evidence then the complaint is effectively at a stalemate. This could encourage signatories to prolong the process, possibly in the hope that the consumer will find it too difficult to

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<sup>8</sup> 'The Compliance with the EFT Code of Conduct for the Period April 2003-March 2004', ASIC Report, December 2005.

challenge. Timely consideration of disputes can be linked to their just resolution. Perhaps this would be achieved by the clear adoption of the best evidence rule. Financial institutions adopting the code should be encouraged to retain the relevant documentation. If they do not, then presumptions should be drawn against them in resolving disputes.

#### **Q27**

**Should there be a time after which EFT Code Subscribers are no longer required to resolve complaints about EFT transaction on the basis set out in Part A of the Code?**

From a consumer perspective, any move which allows signatories to rely exclusively on their terms and conditions to resolve or rather dismiss disputes, would be opposed.

In general, the common limitation period of six years may be an appropriate period. The codes states in cl 5.5(b) that a consumer becomes liable for unreasonable delay in informing the bank, ‘after becoming aware of the misuse, loss or theft of a device forming part of the access method, or that the security of all the codes forming part of the access method has been breached.’ However, there is evidence, for example in scenarios like that described in case study 2, that signatories are unwilling to acknowledge this clause in their terms and conditions. If any type of limitation period is introduced, a very strong onus must lie with the members to clearly advise consumers on the presence of the EFT Code, various dispute resolution methods and options for obtaining assistance to deal with such issues.

#### **Q 41**

**To what extent, and how, should the Code address the issue of mistaken payments? Discuss the usefulness, practicality and cost of implementing some or all of the measures outlined, as well as other measures you consider appropriate.**

Mistaken payments are most likely to occur due to current inadequacies in the internet banking interface. The means for providing a safe interface system entirely lies with code signatories, and by not having best practice methods in place consumers are exposed to the risk of transferring funds incorrectly. Currently, unless the institution makes the mistake themselves or volunteers for a resolution, the consumer will not be reimbursed without assistance from the Banking and Financial Services Ombudsman. Clearly a more effective system is to expose any potential problems with a transfer at the payer bank’s level, before the transfer takes place. A third party bank often refuses to provide details of the recipient of a mistaken payment, invoking privacy law as the basis for this. Any chance of recovering the payment falls to the honesty of the person who receives the payment. That is clearly an unintended outcome of privacy legislation – potentially even a perversion of its purpose. Perhaps a scheme similar to chargeback could be investigated as a way to move forward. If such a system were adopted, where consumers who receive mistaken payments access some or all of those funds in good faith, appropriate repayment arrangements should be reached, especially with those experiencing financial hardship.

**Q68**

**In your view, why has membership of the EFT Code remained limited generally to providers of generic banking services?**

A failure of the EFT Code to attract wider subscription may stem from the impotence of a voluntary code where there is no consequence for not signing. ‘Consequence’ does not in this context have to mean removing the voluntary nature of Code adoption however that may be one of the possible courses the working group could usefully consider. At present there is insufficient encouragement for non-mature market segments to become compliant.

**Q69**

**What steps could/should be taken to broaden EFT Code membership?**

It is clearly desirable that the *EFT Code* applies to all entities engaged in the relevant activities. Therefore, the inclusion of organisations such as BPay and PayPal would enhance the credibility of the Code. Without the protection of the Code the consumer is forced to rely upon the terms and conditions of their agreement with the service provider. PayPal, for example, sets time limits on liability, and does not offer an external dispute resolution body to turn to if the consumer is unsatisfied with the outcome.<sup>9</sup> A mandatory code would overcome this difficulty. Alternatively whilst the Code in its entirety might not need to be proscribed, key minimum conditions based on those delivered in the Code should be included in licensing requirements, especially in relation to internal dispute resolution and external dispute resolution.

**Q73**

**Are there other issues that are not included in this consultation paper that the review should address?**

Members appear to need to be pushed to consider the financial challenges consumers might be confronting, for example through health problems, loss of employment and so on. Consumer advocates working in direct service agencies would like to see a mirroring of the s 25(2) of the Code of Banking Practice which requires signatories to make allowances for financial difficulty. Such provisions need to be introduced in the EFT Code, as it covers a much greater member base than just banks.

Whether direct debit should also be covered, may be a useful issue for the working group’s consideration. The contributors’ experience suggests current direct debit rules are difficult to access and understand.

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<sup>9</sup> *Electronic Transfer Funds Rights and Error Resolution*, Pay Pal, [https://www.paypal.com/au/cgi-bin/webscr?cmd=p/gen/ua/policy\\_efunds-outside](https://www.paypal.com/au/cgi-bin/webscr?cmd=p/gen/ua/policy_efunds-outside) at 23 April 2007.

## **Appendix 1:**

### **Electronic Transfer Code of Conduct – Relevant Provisions**

#### **6. Liability in cases of system or equipment malfunction**

- 6.1 Account institutions will be responsible to their users for loss caused by the failure of an institution system or institution equipment to complete a transaction accepted by an institution system or institution equipment in accordance with the user's instructions.
- 6.2 The account institution is not to deny, implicitly or explicitly, a right to the user to make claims for consequential damage which may arise as a result of a malfunction of an institution system or institution equipment however caused, except, where the user should have been aware that the system or equipment was unavailable for use or malfunctioning, the account institution's responsibilities may be limited to the correction of any errors in the account, and the refund of any charges or fees imposed on the account holder as a result.

#### **10. Complaint investigation and resolution procedures**

- 10.1 Account institutions will establish internal complaint handling procedures which comply with Australian Standard AS4269-1995 or any other industry dispute resolution standard or guideline which ASIC declares to apply to this clause.
- 10.2 The account institution shall advise users in their Terms and Conditions, upon request and in their general documentation of the procedures for lodging a complaint.
- 10.3 When a complaint is lodged and is not immediately settled to the satisfaction of both user and account institution the account institution will advise the user, in writing, of the procedures for investigating and handling the complaint.
- 10.4 (a) The account institution's decision in relation to a complaint is to be made on the basis of all relevant established facts and not on the basis of inferences unsupported by evidence.
- (b) Where a user raises a complaint concerning the authorisation of a transaction, the account institution will make reasonable efforts to obtain from the user at least the information outlined in the attached schedule where such information is relevant and available.

- (c) Where a user raises a complaint concerning the authorisation of a transaction or a system or equipment malfunction, the institution must investigate whether there was any system or equipment malfunction at the time of the transaction.

10.5 Within 21 days of receipt of a complaint, the account institution will:

- (a) complete the investigation and advise the user, in writing, of the outcome of the investigation; or
- (b) advise the user, in writing, of the need for more time to complete its investigation.

Unless there are exceptional circumstances, the account institution should complete its investigation within 45 days of receipt of the complaint.

10.6 If an account institution is unable to resolve a complaint within 45 days, it must:

- (a) inform the user of the reasons for the delay;
- (b) provide the user with monthly updates on progress with the complaint; and
- (c) specify a date when a decision can be reasonably expected;

unless the account institution is waiting for a response from the user and the user has been advised that the account institution requires such a response.

10.7 If an account institution decides to resolve a complaint concerning a credit card account or a charge card account by exercising its rights under the rules of the credit card or charge card scheme:

- (a) the time limits under the rules of the scheme apply in lieu of the time limits in sub-clause 10.5;
- (b) sub-clause 10.6 applies to the complaint with the following modifications:

- (i) "60 days" replaces "45 days"; and
- (ii) "updates once every two months" replaces "monthly updates";

and

- (c) the account institution shall:
  - (i) inform the user, in writing, of those time limits and when a decision can be reasonably expected; and
  - (ii) shall suspend the account holder's obligation to pay any amount which is the subject of the complaint and any credit and other charges related to that amount until the complaint is resolved and inform the account holder of that suspension.

10.8 When an account institution is a member of an external dispute resolution scheme, and the scheme's rules provide that a matter may be referred to it if a decision is not made within a specified time period, then the account institution must inform the user that a complaint may be lodged with the

scheme no more than 5 business days after the expiry of the relevant time period.

- 10.9 On completing its investigation of a complaint, the account institution will promptly inform the user of:
- (a) the outcome of the investigation;
  - (b) the reasons for the outcome including references to relevant clauses of the Code;
  - (c) except where the complaint has been resolved completely in favour of the user, the further action the user can take in respect of the Code, including the contact details of any external dispute resolution body which the institution belongs to or, if it does not belong to such a body, the contact details for the Consumer Affairs Agency and Small Claims Courts/Tribunals in the consumer's jurisdiction. Such advice is to be in writing except where the complaint is settled immediately the account institution receives the complaint to the satisfaction of both the user and account institution.
- 10.10 Where as a result of the investigation of a complaint, an account institution decides that the account holder's account has been incorrectly credited or debited, having regard to the provisions of this Code, the account institution will, where appropriate, forthwith adjust the account holder's account (including appropriate adjustments for interest and/or charges) and notify the account holder in writing of the amount with which their account has been debited or credited as a result.
- 10.11 Where on completion of an investigation the account institution decides that the account holder is liable under clauses 5 or 6 of this Code for at least part of the amount of the transaction subject to complaint:
- (a) the account institution is to make available to the account holder copies of any documents or other evidence relevant to the outcome of its investigation including information from any logs or audit trails relating to the transaction; and
  - (b) the account institution must advise the account holder in writing whether there was any system or equipment malfunction at the time of the transaction.
- 10.12 Where:
- (a) the account institution, its employees or its agents fail to observe the applicable complaint investigation and resolution procedures set out in this clause, or fail to determine the allocation of liability in accordance with clauses 5 and 6, or fail to communicate the reasons for that determination by reference to relevant aspects of clauses 5 and 6; and
  - (b) the failure contributed to an institution decision on the complaint (including an initial decision) against the account holder, or the failure delayed the resolution of the complaint (including by contributing to the account holder referring the complaint to external dispute resolution);

the account institution or an external dispute resolution body may determine that the account institution is liable for part or all of the amount of the transaction in dispute as compensation for the effects of that decision or delay on the account holder or the user, even if the account institution or external dispute resolution body ultimately determine that the institution was not liable under clauses 5 and 6.

- 10.13 Where the account institution:
- (a) decides to resolve a complaint concerning an unauthorised transaction under sub-clause 5.2, 5.3, 5.4 or paragraph 5.5(c); and
  - (b) within 7 business days of receipt of the complaint, adjusts the account holder's accounts pursuant to sub-clause 10.10 to give effect to that decision and provides the user and account holder with the information required by subclauses 10.9 and 10.10;

the account institution is not required to comply with sub-clauses 10.3, 10.5, or 10.11 in respect of the complaint concerning the unauthorised transaction.

- 10.14 The account institution is to provide for the recording of complaints and their resolution so that aggregate data on the type, frequency and resolution of such complaints can be made available as required in Part C of this Code and so that account institutions can identify and address systematic problems.

## Appendix 2:

### Dispute Resolution Models

#### New Zealand

The relevant code is the *New Zealand Code of Banking Practice* which is observed by members of the New Zealand Banking Association. In New Zealand, the language available regarding dispute resolution in line with the *NZ Code* is rather broad. It requires that internal dispute resolution must be documented, accessible and provide for a resolution of the dispute in a timely and effective manner.<sup>10</sup> It appears to have a restriction on the time in which a consumer can approach the external dispute resolution body, The Office of the Banking Ombudsman of New Zealand, to two months after receiving a deadlock notice from the bank.

#### Canada

##### *Canadian Code of Practice for Consumer Debit Card Services*

Canadian rules state that a bank must provide details of internal dispute resolution in writing, and if the matter cannot be resolved it will then be referred to an external dispute body. Such circumstances include not being dealt with satisfactorily at first instance or if a consumer contacts the bank to claim they have not yet responded to a dispute.<sup>11</sup> At this point the bank must explain to the cardholder why the matter has not been responded to, and advise them of the external dispute resolution scheme. During a dispute, the card holder will not be unreasonably restricted from the use of funds that are subject to the dispute.<sup>12</sup>

#### United States

##### *Truth in Lending Act and Regulation Z*

*Regulation Z*<sup>13</sup>, implementing the *Truth in Lending Act*<sup>14</sup>, includes unauthorised or incorrect electronic transfers, omissions from period statements or requests for further information.<sup>15</sup> The financial institution must respond to a consumer complaint; it has ten business days to investigate, determine and respond to the matter.<sup>16</sup> If it determines that an error has occurred it has not more than one business day to return the funds with interest where appropriate.<sup>17</sup> While the matter is being determined, the funds may be provisionally recredited to the consumer, who may have full use of them during this period. The consumer should be made aware there is an investigation regarding such funds and it shall be resolved within forty-five days of

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<sup>10</sup> Cl. 1.3.4. *New Zealand Code of Banking Practice*.

<sup>11</sup> Cl. 7.2, *Canadian Code of Practice for Consumer Debit Card Services*.

<sup>12</sup> Cl. 7.3, *Canadian Code of Practice for Consumer Debit Card Services*.

<sup>13</sup> 12 C.F.R. 225 at pt.226.12.

<sup>14</sup> 12 U.S.C. 1601 et seq. (2004).

<sup>15</sup> s 169f(f), 12 U.S.C. 1601 et seq. (2004).

<sup>16</sup> s 169(a), 12 U.S.C. 1601 et seq. (2004).

<sup>17</sup> s 169f(b), 12 U.S.C. 1601 et seq. (2004).

the bank being notified of the error.<sup>18</sup> The consumer receives news from his/her bank that no error has occurred, the bank must notify the consumer within three days of their decision, and the consumer may request a copy of any documents the bank relied upon when making its decision.<sup>19</sup> Additionally, if the bank did not provisionally recredit the account, acted outside good faith, unreasonably reached its decision or knowing and wilfully made an unreasonable decision, then the consumer may be awarded treble damages.<sup>20</sup> The United States regulations appear to refer its disputes to the court as opposed to an ombudsman.

## United Kingdom

### *UK Banking Code*

“The role of the BCSB is to monitor compliance with and enforce the Banking Codes and to ensure subscribers provide a fair deal to their personal and small business customers.”<sup>21</sup> The United Kingdom Banking Standards Board has a hands-on role to inquire into bank’s compliance with the *UK Banking Code* through investigations and spot checks. United Kingdom requirements state that the bank must send a written acknowledgement of the complaint within five working days of receiving it. Further, within four weeks the bank must provide a response to the complaint or explain why they need more time to do so. The bank has eight weeks in which they must send a final outcome of their investigation. If the matter is still not resolved the bank must provide details of external dispute resolution.

Alternatively the Financial Ombudsman is established by Parliament to resolve disputes between financial service providers and their consumers.<sup>22</sup> However this ombudsman also has a pro-active role. The financial ombudsman is a new merger of various other ombudsmen; it has recently added consumer credit to its portfolio. While the BSFO is likely to be the ombudsman dealing with the majority of EFT Code matters, as the Code is expanded to include newer entities such as BPay it should be debated as to whether the jurisdiction of existing ombudsmen should be expanded. The Financial Ombudsman has proposed a series of rules for the new consumer credit jurisdiction, which set out clear time frames as creating opportunities for disputes between service providers.<sup>23</sup> Additionally it regulates how the financial service provider must inform the consumer of its internal and external dispute resolution schemes; this includes supplying written information *automatically* when it receives a complaint.

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<sup>18</sup> s169f(c), 12 U.S.C. 1601 et seq. (2004).

<sup>19</sup> s169f(d), 12 U.S.C. 1601 et seq. (2004).

<sup>20</sup> s169f(e), 12 U.S.C. 1601 et seq. (2004).

<sup>21</sup> *Mission Statement*, Banking Code Standards Board, <http://www.bankingcode.org.uk/> at 23 April 2007.

<sup>22</sup> *About Us*, Financial Ombudsman, <http://www.financial-ombudsman.org.uk/about/index.html> at 23 April 2007.

<sup>23</sup> Financial Ombudsman, [http://www.financial-ombudsman.org.uk/publications/technical\\_notes/consumer-credit/CCJ-feedback-rules-Dec06.pdf](http://www.financial-ombudsman.org.uk/publications/technical_notes/consumer-credit/CCJ-feedback-rules-Dec06.pdf) DISPL4.14 at 23 April 2007.