

# ALERT

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## Late payment fees unlawful – *Paciocco v ANZ* [2014] FCA 35

### Background

Earlier this month, Justice Gordon of the Federal Court of Australia released her judgment in the matter of *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35, finding that fees charged for late payment of credit card accounts were penalties and therefore unenforceable.

However, the decision was not the overwhelming consumer victory that it may seem to be, because Gordon J held that other fees imposed by ANZ, being honour fees, dishonour fees, non-payment fees and overlimit fees, were not penalties or otherwise unlawful.

### Reasoning

Central to the reasoning in this judgment was the recent High Court decision of *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30. In that case, the High Court reformulated the law on penalties, finding that a penalty is not confined to payments imposed solely on breach of contract. Instead, the pertinent question

is whether the fee is collateral to the performance of a primary obligation – or alternatively, if it is in fact a fee for further services.

- If the latter, it will not constitute a penalty because the fee will be deemed as the agreed consideration for those further services (even if the proportionality of the fee to the value of the services is substantially skewed).
- If the former, however, the fee will constitute a penalty unless it can be established that it is a genuine pre-estimate of the damage that will be suffered by the benefitting party as a result of the obligor party's non-performance.

In this case, Gordon J held that the late credit card payment fees were penalties because they did not represent fees charged for further services, but instead were collateral to the performance of a primary obligation; ie payment of the monthly minimum amount by the due date. Moreover, they were not a genuine pre-estimate of the damage that ANZ suffered as a result of the late payment (the



fees charged were \$35 or \$20, while the court held that the loss occasioned by ANZ was in the order of \$0.50 to \$3). Accordingly, they were held to be penalties.

In contrast, honour fees, dishonour fees, non-payment fees and overlimit fees were held not to be penalties because these were imposed for the provision of further services. Concluding that an attempt by a customer to overdraw an account should be considered as a request by the customer for further credit, which is then considered and either accepted or declined by the bank (even if this is done automatically through computerised processes), Gordon J found that these other fees were imposed as consideration for the further services of considering and granting (or not granting) the request for further credit, and were not collateral to the performance of any primary obligation. Therefore, they did not satisfy the test for being penalties.

An argument was also raised that these other fees were unconscionable, but this was rejected in the circumstances.

## Limitation of actions

Also – and worryingly for banks – in response to an argument by ANZ that the applicant was statute barred from suing for recovery of certain credit card late payment fees that were more than six years old (being the relevant statutory period), the court held that s 27 of the *Limitation of Actions Act 1958* (Vic) applied in the applicant's favour. Section 27 provides that, in circumstances where an action is brought for the purposes of rectifying a mistake, the time for bringing an action does not commence until that party discovers the mistake. Gordon J held that 'mistake' applies

to mistake of law as well as fact, and so the relevant time for bringing an action against ANZ only started running as of the first proceeding of the Andrews case in 2010.

## Conclusion

This was the first case brought against a financial institution challenging the lawfulness of the fees imposed in the course of providing financial services. Although the finding was not completely in the applicant's favour (with the enforceability of honour and dishonour fees being upheld), this decision certainly causes concern for companies that routinely impose break fees or late payment fees. Such companies should now reassess their standard agreements to ensure that any such fees are either imposed in the provision of further services or otherwise represent a genuine pre-estimate of loss.

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