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Practice Groups:

Commercial Disputes

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ANZ Wins Appeal – Late Payment Fees Held to be Enforceable

Australia Commercial Disputes and Consumer Financial Services Alert

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Paciocco v ANZ [2015] FCAFC 50

In a significant decision in *Paciocco v ANZ [2015] FCAFC 50 (Paciocco)*, the Full Court of the Federal Court of Australia (Full Court) has upheld an appeal by ANZ Bank (ANZ) and overturned a 2014 Federal Court of Australia (Federal Court) decision which held that credit card late payment fees in banking contracts were unlawful penalties (see our [Legal Insight](#) from 10 March 2014).

The Full Court upheld other aspects of the trial Judge's decision that honour fees, dishonour fees, overlimit fees and non-payment fees charged by ANZ were not penalties, nor were they unconscionable, unjust or unfair.

The latest decision supports the enforceability of contractual provisions entitling banks and other companies to charge these fees.

The decision is of significance, not only to banks and financial services providers, but also to companies in the telecommunications, internet and utilities industries, and similar providers of consumer services.

The decision will make it more difficult for consumers to establish that late payment and similar fees are penalties which may discourage class action litigation by consumers.

Given the nature and potential impact of this decision, an application for special leave to appeal to the High Court of Australia (High Court) is expected. In an interesting development, the first instance judge (Justice Michelle Gordon) was yesterday appointed to the High Court, although would not hear any special leave application in this matter.

Background

In 2012, in *Andrews v ANZ*, the High Court overturned existing case law which said that a fee could only be a penalty if it was levied in respect of a breach of contract. The High Court held that a secondary obligation, imposed in order to secure performance of a primary obligation, could be a penalty even if there has been no breach of contract.

The first instance decision in *Paciocco* was the first case to be decided after *Andrews v ANZ*. In summary, the Federal Court held that the late payment fees charged by the ANZ Bank to its customers, for failure to pay credit card bills on time, were unenforceable penalties.

The Decision – Assessment of Extravagant and Unconscionable

In the *Paciocco* Appeal, the Full Court held that, in order for the late fees to be a penalty, it was necessary to prove that the secondary obligation (payment of the late fee) was

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imposed to secure performance of a primary obligation (timely payment of an account) and the obligation (the fee) was extravagant and unconscionable.

The Full Court held that, in determining if the fee is "extravagant or unconscionable":

- the Court should assess the fee against the greatest conceivable loss that could have resulted from the customer's non-payment, assessed at the time of entry into the contract (i.e. looking forward not knowing the actual loss)
- the trial Judge had incorrectly assessed the fee against the actual damage resulting from the breach (not known when the parties entered into the contract).

The Full Court stressed that the loss actually suffered because of non-compliance is irrelevant to assessing whether a fee is an unlawful penalty. The enquiry as to actual loss suffered is only required when a fee is found to be a penalty in order to calculate the damages to which the customer would be entitled.

What Potential Losses Can be Taken Into Account?

In calculating ANZ's greatest conceivable loss, the Full Court accepted evidence of indirect losses stemming from provisioning costs, regulatory capital costs and operational collection costs (including an element for infrastructure).

It was held that these costs could be validly included in the calculation of conceivable loss and would likely increase ANZ's conceivable loss to a level at, or exceeding, the amount of the late payment fee that it charged (which was not then extravagant or unconscionable).

This may broaden the approach of courts when determining the types of losses that can be taken into account to decide whether a fee is extravagant or unconscionable.

Who Bears the Onus?

The Full Court confirmed that the onus was not on ANZ to disprove the extravagance and unconscionability of the fees. Instead, it was a matter for the customer to prove the fees were extravagant and unconscionable at the time of entering into the contract.

Other ANZ Fees

The Full Court upheld the findings of the primary judge that:

- other fees such as honour fees, dishonour fees, overlimit fees and non-payment fees, were fees for additional services or accommodation by ANZ and not penalties
- the conduct of ANZ in imposing such fees, including late payment fees, was not unconscionable, unjust or unfair, under the National Credit Code, *Fair Trading Act* (Vic) and the *Australian Securities Investment Commission Act 2001* (Cth).

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Implications – What Does This Mean for Your Business?

While the enforceability, or otherwise, of a late payment fee will depend upon the specific fee imposed, this decision will make it more difficult for a customer to prove that a fee imposed by a business is a penalty.

This decision is a setback for the proponents of class-action litigation in relation to late payment fees which had been an area of significant corporate risk since the High Court decision in *Andrews v ANZ*.

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