



JONES DAY  
**COMMENTARY**

## **BANK FEES CLASS ACTIONS IN AUSTRALIA: CUSTOMERS RECOVER CREDIT CARD LATE PAYMENT FEES THAT EXCEEDED BANK'S COSTS**

### **KEY POINTS**

- In the first of a series of large class actions by customers against retail banks operating in Australia, the Federal Court of Australia has ruled that credit card late payment fees charged by ANZ Bank to its customers were invalid because they were penalties at common law and in equity. Members of the 40,000-strong bank customer class who incurred this type of fee will be entitled to compensation for the difference between the fees paid to ANZ and the Bank's actual loss from their late payment.
- Other bank customer fees challenged in the class action—i.e., non-payment fees, overdraft honour/dishonour fees and overlimit fees—were held by the Federal Court to be valid as they were not penalties and did not otherwise contravene relevant statutory unconscionable conduct, unjust transaction or unfair contract term provisions.
- ANZ's limitations defence in relation to some of the late payment fees was unsuccessful.

- Parallel class actions against other banks raising similar claims are estimated to comprise a total pool of 140,000 class members. An announcement on whether ANZ will appeal the decision is expected shortly.

### **BACKGROUND**

*Paciocco v Australia and New Zealand Banking Group Limited* [2014] FCA 35 was a class action that proceeded on the basis that there would be a trial of all of the applicant's claims against ANZ.

The applicants, Mr Paciocco and one of his companies, Speedy Development Group Pty Ltd ("SDG"), held accounts with ANZ. Mr Paciocco held a consumer deposit account and two consumer credit card accounts. SDG held a business deposit account. The contractual terms for both the consumer deposit account and the business deposit account entitled ANZ to charge honour, dishonour and non-payment

fees. The contractual terms for the consumer credit card accounts entitled ANZ to charge late payment fees and overlimit fees. Mr Paciocco and SDG alleged that the contractual terms that entitled ANZ to charge these fees constituted penalties at common law and in equity. The applicants further contended that if a fee was not a penalty, then ANZ had contravened various statutory provisions dealing with unconscionable conduct, unjust transactions or unfair terms.

## DECISION

**Late Payment Fees.** Justice Gordon considered the law of penalties at common law and in equity separately; however, the application of the law largely hinged on a six-part test. The crux of the test was:

- Whether, on a proper construction, the purpose of the relevant stipulation is to secure performance of a primary obligation by the party subject to the fee or whether the fee is truly a fee for further services. If the latter, the fee cannot be characterized as a penalty.
- Further, whether the fee is “extravagant and unconscionable” in amount in comparison with the greatest loss that could conceivably be proved as a result of failure to pay on time.

Justice Gordon rejected ANZ’s submission that the late payment fees were a fee payable for a further period of credit being extended to a customer because of the absence of timely payment. Rather, the late payment fees were levied upon either breach of the obligation to pay a minimum amount by a certain time each month, or as a collateral fee to be regarded as security for performance of the primary obligation, i.e., payment by a particular date. Further, as the fee was payable to secure performance of the party subject to the fee, it could be enforceable only if it was a genuine pre-estimate of the damage suffered by reason of that party’s non-performance.

Justice Gordon estimated that the quantum of damage suffered by ANZ in respect of each fee charged, although difficult to determine, was significantly less (50 cents in some cases) than the fees of \$35 or \$20 charged. In addition, the same fee

was payable regardless of whether the amount was trifling or serious, demonstrating a necessary degree of disproportion.

Her Honour concluded that the charges were exorbitant and unenforceable, and Mr Paciocco was entitled to recover from ANZ the difference between the credit card late payment fees paid to ANZ and ANZ’s actual losses.

**Other Bank Fees.** Justice Gordon held that the non-payment fees, overdraw honour/dishonour fees and overlimit fees were not penalties but genuine fees for services. Considering the relationship between the bank and the customer, her Honour held that an attempt by a customer to overdraw an account or exceed his credit limit should properly be construed as a request by that customer for a service (for credit, or an extension of credit). The making of such a request was entirely within the customer’s control and required the consensual conduct of both the customer and bank.

The bank’s consideration and granting (or non-granting) of such a request was properly characterised as a further service, thereby justifying the fees levied. It was concluded that as the customer was getting an extra service for a greater fee, this was an alternative, not collateral, stipulation. Consequently, there was no need for Justice Gordon to assess whether the fees were extravagant or unconscionable.

**Alternative Statutory Causes of Action.** The applicants contended that the fees were not penalties. Nonetheless:

- ANZ had engaged in unconscionable conduct in respect of its accounts under the *Australian Securities and Investments Commission Act 2001 (Cth)* (“ASIC Act”) and/or the *Fair Trading Act 1999 (Vic)* (FTA); and/or
- the transactions were unjust transactions under the applicable *Consumer Credit Codes*; and/or
- the contract terms were unfair terms under the FTA or the ASIC Act.

Justice Gordon concluded that there was no dishonesty, oppression or abuse on the part of the bank to elevate the conduct to the requisite level of “moral obloquy” required for contravention of these provisions. There was no allegation that the applicants misunderstood what they were agreeing

to, or were compelled to request the further services. Circumstances indicative of unconscionability, unjustness or unfairness had not been made out, and each argument was rejected in turn.

## SUMMARY OF CLAIMS

<b>Consumer Credit Card Account</b>					
<b>Fee / Claim</b>	<b>Penalty at common law</b>	<b>Penalty in equity</b>	<b>Unconscionable Conduct</b>	<b>Unjust Transaction</b>	<b>Unfair Contract Terms</b>
Late Payment Fee	Succeeded	Succeeded	Not considered	Not considered	Not considered
Overlimit Fee	Unsuccessful	Unsuccessful	Unsuccessful	Unsuccessful	Unsuccessful
<b>Consumer Deposit Account</b>					
<b>Fee / Claim</b>	<b>Penalty at common law</b>	<b>Penalty in equity</b>	<b>Unconscionable Conduct</b>	<b>Unjust Transaction</b>	<b>Unfair Contract Terms</b>
Honour Fee	Unsuccessful	Unsuccessful	Unsuccessful	N/A	Unsuccessful
Dishonour Fee	Unsuccessful	Unsuccessful	Unsuccessful	N/A	Unsuccessful
Non-Payment Fee	Unsuccessful	Unsuccessful	Unsuccessful	N/A	Unsuccessful
<b>Business Deposit Account</b>					
<b>Fee / Claim</b>	<b>Penalty at common law</b>	<b>Penalty in equity</b>	<b>Unconscionable Conduct</b>	<b>Unjust Transaction</b>	<b>Unfair Contract Terms</b>
Honour Fee	Unsuccessful	Unsuccessful	Unsuccessful	N/A	N/A
Dishonour Fee	Unsuccessful	Unsuccessful	Unsuccessful	N/A	N/A
Non-Payment Fee	Unsuccessful	Unsuccessful	Unsuccessful	N/A	N/A

**Statute of Limitations Defence.** Two late payment fees were incurred more than six years prior to the commencement of proceedings. ANZ’s attempt to rely on the statute of limitations that imposed a six-year limitation period was unsuccessful. Mr Paciocco relied on the principles that extend limitation periods in cases of mistake. The late payment fees were held to be made pursuant to a mistake at law, and Mr Paciocco was entitled to rely on s 27 of the *Limitation of Actions Act 1958 (Vic)*, which extends limitations in the case of mistake to when the mistake is discovered or could with reasonable diligence be discovered. Mr Paciocco became

aware that ANZ may not have been able to charge the late payment fees only when proceedings were originally commenced against ANZ on 22 September 2010. The limitation period ran from that date.

## RAMIFICATIONS

Since the commencement of proceeding against ANZ, a number of other class actions have been filed against other banks operating in Australia. The outcome in the class action against ANZ was therefore not just of relevance to

the 40,000 group members in that class action but a guide for claims of another estimated 140,000 customers claiming against other banks. However, it must be remembered that the ANZ case was decided based on the terms of the accounts provided to Mr Paciocco and SDG. Accounts and banks with different terms may result in different outcomes.

Justice Gordon's estimate of the quantum of damage suffered by ANZ in respect of each fee charged and the quantum of that fee, although small, when multiplied by the number of times a fee was charged and the number of claimants, gives rise to a substantial liability for the banks.

The use of the penalty doctrine in relation to bank fees may also be transferred to other industries that charge consumers standard fees where that fee is not a genuine pre-estimate of the losses incurred by the company providing the service or product.

The finding on the statute of limitations defence further increases the exposure of the banks. It may also mean that fees charged by companies in other industries could have been levied more than six years ago but can still be the subject of litigation.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

### **John Emmerig**

Sydney

+61.2.8272.0506

[jemmerig@jonesday.com](mailto:jemmerig@jonesday.com)

### **Michael Legg**

Sydney

+61.2.8272.0720

[mlegg@jonesday.com](mailto:mlegg@jonesday.com)