# REGULATION OF LATE PAYMENT AND EARLY TERMINATION FEES

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## 1. OVERVIEW

This paper describes types of late payment fees and early termination charges found in Australian financial services contracts and the regulatory framework which applies to them. It then discusses various proposals and enquires that are likely to affect the settings of these charges in the future, both in Australia and overseas. This paper does not deal with establishment fees, although many of the issues are similar.

Late payment fees and early termination fees arise in a wide range of contracts, not confined to financial services contracts. For example, they are typical in telecommunications contracts for mobile phones. The principles set out in this paper may also be applicable to those contracts.

## 2. TYPES OF LATE PAYMENT FEES AND EARLY TERMINATION

### *(a) Late payment fees*

A "late payment fee" usually is taken to mean a charge for default including a failure to pay on the due date, exceeding a credit limit and failure to honour a payment made (OFT1). The fee could be levied for overdrawing, not meeting a direct debit, not paying a credit card minimum payment or for a cheque dishonour. If the fee is cast as a fee for service, such as a fee for going over the limit, rather than imposed on breach, the law relating to penalties described below may not apply.

According to Rich, there is insufficient public data to ascertain how banks and other providers set the amount of their late payment fees (Rich, 9-10) The Report of the Consumer Credit Review records late payment fees up to $50 for bank issued cards (Report, 107).

The growth of late payment fees in the last decade probably owes its origin to a change in the common law relating to damages. In *London, Chatham and Dover Railway v South Eastern Railway Co* [1893]AC 429 House of Lords held that there was no power to award damages for the late payment of a debt. This changed in Australia with *Hungerfords v Walker* (1989) 63 ALJR 210. In that case, the High Court held that although not formally disapproving *London, Chatham and Dover Ralway*, it is no longer good law in Australia. (Rossiter, 40)

> ' *it may follow that in a moneylending transaction where the defendant defaults in an obligation to pay a sum of money on a certain date, the plaintiff will be entitled to recover interest as general damages for incurred expense or opportunity cost. If so, then there is nothing in principle to prevent the parties settling in the contract an agreed sum representing such damages."*

The result is that a late payment fee can be levied as liquidated damages for default in payment of a sum of money, even where the underlying transaction is itself a loan and where interest is applicable to the amount owing.

### *(b) Early termination fees*

At common law. the customer or mortgagor has no right to make early repayment of a loan unless this is conferred by contract. Where there is no contractual right, the credit provider can insist on payment of the total amount that would have been payable if the contract ran its full course. Unearned interest need not be rebated or deducted. However, credit providers usually permit early completion without payment in full of unearned interest but the amount of rebate or deduction differs from case to case.

In cases where the contract does set out the right to early termination, the credit provider is able, apart from the Consumer Credit Code, to stipulate for the payment it requires. Apart from some dicta to the contrary (made in the hire purchase context: see eg *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 630 per Lord Denning and at 633 per Lord Devlin), the law of penalties would not apply to this stipulation which is not activated on breach (*The Protector Loan & Annuity Co v Grice* (1880) 5 QBD 592). Special rules apply to the redemption of mortgages (see Sykes and Walker).

It is otherwise where the contract stipulates for payment on termination for breach. In that case, the amount stipulated may be a stipulation for liquidated damages in the same way that late fees are. Accordingly, the law of penalties applies to set aside any amount which is not a genuine estimate of loss.

Early termination fees can be set in a variety of ways: as a lump sum dollar figure, by reference to a calculation based on the difference between contract rate and current market rate and actuarially on credit providers' wholesale cost of funds.

A deferred establishment fee is probably not an early termination fee, although it is the early repayment which triggers the deferred establishment fee. A deferred establishment fee typically is drafted as an amount which is payable if the credit contract is terminated within a specified period, but which is waived if the contract runs past that date. The deferred establishment fee is said to be aimed at recovering set up costs and discounted initial interest rates, not at recouping a loss as a result of early repayment (Submission to Credit Report by MIAA Appendix 1). This characterisation has not been judicially tested.

## 3. REGULATORY FRAMEWORK

### *(a) Law of penalties*

To be enforceable as liquidated damages, the agreed amount payable as a late fee or as an early termination charge must be a genuine pre-estimate of the loss (*Commissioner of Public Works v Hills* [1906] AC 368 at 375). A penalty, which consists of "the imposition of an additional or different liability upon breach of a contractual stipulation" than would be payable at law by way of damages will be unenforceable (*Legione v Hateley* (1983) 152 CLR 406 at 445 per Mason and Deane JJ). In classifying the clause, the court will have regard to the circumstances prevailing at the time the contract was entered into, not at the time of the breach. Although whether a clause is penal is said to be a matter of construction (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-87 per Lord Dunedin, this will be determined as a matter of substance and not of form and on the operation of the clause and not how the parties describe it (*O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 368 per Gibbs CJ).

Several Australian cases in the last 30 years have dealt with the doctrine of penalties, particularly in the context of consumer leases. The trend has been to favour the discretionary formulation articulated by Mason and Wilson JJ (*AMEV-UDC Finance Ltd v Austin* (1986)162 CLR 170 at 193-4) rather than a purely mechanical test of whether the loss or damage exceeds the loss or damage that could be awarded by the court in its assessment of damages. The discretionary approach is as follows: the court will relieve against provisions

*which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing the distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term.*

The following principles emerge from the cases:

- A clause will be a penalty if it provides for the acceleration of future instalments without allowing a discount for premature payment.
- The credit provider must mitigate its loss and bring to account other receipts so there is no double counting.
- In most cases it will not be sufficient to nominate a fixed dollar account since breach may occur at any time during the life of the contract.
- A single formula may be used irrespective of whether the events which trigger it are serious or trivial.

The High Court upheld a provision reflecting these principles in *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131. The case concerned a hire purchase contract, however, not a loan contract with a break cost provision. Applying the principles to loans, loss would extend to the gains the credit provider would have made if the loan had run its course, but the amount may need to be reduced in several ways. The amount must be rebated to present value. Also the credit provider may be reasonably able to reinvest the money (normally at the then current market rate). At common law, expenditure reasonably incurred in preparation for or in the course of the performance of the contract which is wasted as a result of the breach may be recovered by way of damages but not in addition to loss of expectation damages (since if the contract had run its course the profit would recoup that expenditure). Loss of damages will ordinarily be the most appropriate measure. However, the plaintiff can measure its loss by reference to expenses where it is not possible to demonstrate to what extent performance would have resulted in a profit, or the size of that profit (*The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64)

## (b) Consumer Credit Code

### *(i) Treatment of default charges*

The Code does not prescribe types of fees and charges permitted to be charged. While the method for charging interest is regulated (see Part 2, Division 3 of the Code), there is no equivalent mechanism for calculating or rebating credit fees and charges. Provided the relevant fees are disclosed as required by the Code, there is no limit on the amount which can be charged. The position is different if the fees are in the nature of enforcement expenses, which must be reasonable costs reasonably incurred (section 99). Enforcement expenses are those incurred in recovering the debt or enforcing the security (see Duggan and Lanyon, para 10.4.42)

## *(ii) Treatment of early termination fees in credit contracts*

Under the Consumer Credit Code, the debtor or the guarantor has an unfettered right to pay out the consumer credit contract at any time. The payout figure may include an early termination charge if this is provided for in the contract. It follows from the operation of other sections of the Code that if none is provided, the debtor cannot be required to pay a termination charge.

The Consumer Credit Code does not define "early termination fees", although it does expressly refer to them. An early termination fee is a credit fee or charge (Code, schedule 10). Code requirements as to disclosure of credit fees and charges in the pre contractual statement apply (the financial table must include a statement that an early termination charge is payable, other details can appear in the table or elsewhere: section 14, reg s13). The contract must state that a termination charge is payable and the amount of the charge if ascertainable or if not ascertainable , then the method of calculation, if ascertainable) (s15(G). Section 64 provides that the contract cannot be varied to increase the amount or change the method of calculation.

The Code does not say how the early termination fee is to be calculated: this is left up to the credit provider. However, section 72 (1)(c) gives the debtor or a guarantor a right to apply to the court to review an early termination charge on the ground that it is unconscionable. The court may annul or reduce an unconscionable charge.

Section 72(4) of the Code provides as follows:

> *For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the Court that it exceeds a reasonable estimate if the credit provider's loss arising from the early termination or prepayment including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.*

Section 72(4) means that an early termination charge will be set side or reduced if it exceeds a reasonable estimate. The charge need not *be* a reasonable estimate. The reference to an estimate makes it clear the court is to judge the amount in the light of the circumstances when the contract was entered into not with the benefit of hindsight.

The Code does not define the "credit provider's loss" so the relevant principles will probably be drawn from the common law on penalties and damages referred to above. (For a full discussion see Duggan and Lanyon para 10.2.12 to 10.2.16). Loss also includes the credit provider's average reasonable administrative costs in respect of the termination. This would include costs relating to the termination such as calculating payout figures and attending settlement and also probably includes set up costs but not if the credit provider charges a separate establishment fee to cover these. There is no authority which establishes if the amount can or cannot include expenses for general overheads such as rent, salaries and advertising.

The Code's treatment of early termination charges should be contrasted with that relating to establishment fees. Under 72(4) an early termination fee is unconscionable on the basis of a quantitative test, not on factors relating to the conduct of the credit provider. The position is different in relation to establishment fees under section 72(3), in which the court is directed to "have regard to" costs rather than the fees being "unconscionable if and only if" the cots exceed the formulation.

In *Director of Consumer affairs v JLL trading as City Finance Loans and Cash Solutions (Moreland) and others* [2005] VCAT 1989 ("City Finance"),) Morris J (at para 31) notes that in determining whether an establishment fee is unconscionable, the court will not only have regard to the credit provider's costs but also other factors which might apply, citing *Commonwealth v Verwayen* (1990) 170 CLR 394 at 441 per Deane J and *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 per Mason J. It is to be noted that Morris J is not restricting the meaning of unconscionability to the narrow action in unconscientious dealing as elaborated in *Amadio*; he is making a general point about the procedural factors which can be taken into account by the court in dealing with unconscionability.

***(iii) Treatment of early termination fees in consumer leases***

Part 10 of the Code applies to consumer leases. Section 152 provides that the lease must include a statement of the liabilities of the lessee on termination of the lease. The lease may be terminated at any time (section 157). The amount payable to the lessee is the amount payable under the lease or the amount prescribed by regulation whichever is the lesser. No regulations have been made. Section 72 (relating to unconscionable fees and charges) does not apply to consumer leases.

### (c) Unfair terms in consumer contracts: Part 2B *Fair Trading Act* 1999 (Vic)

Unfair terms in consumer contract provisions are located in Part 2B of the *Fair Trading Act* 1999 (Vic), which commenced in October 2003. There is no equivalent in any other Australian legislation. An unfair contract term in a consumer contract is void. Part 2B does not currently apply to contracts regulated by the Code. It would apply to other banking and financial services products provided the general criteria referred to below are met.

In determining whether Part 2B applies to a contract, some link with Victoria must be found. Consumer Affairs Victoria considers that jurisdiction is made out if the consumer is resident in Victoria or if the goods or if the goods or services under the contract were supplied in Victoria.

Part 2B applies only to consumer contracts: contracts for the supply of goods or services of a kind ordinarily acquired for personal, household and domestic use, but acquired for that use by the person. A term which is expressly permitted or required by law is not an unfair contract term, but only to the extent expressly permitted or required.

The Director of Consumer Affairs Victoria can apply to the court for a declaration that a term is unfair or seek an injunction. The Governor-in-Council can prescribe a standard term as unfair.

Section 32W provides that an "unfair contract term" is a term which, *"contrary to the requirements of good faith and in all the circumstances, causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer."*

The standard set out in section 32W is accompanied by a list of factors in section 32X which gives the Court a guide in assessing whether a contract term is unfair. Section 32X(c) refers to a term which penalizes the consumer but not the supplier on breach or termination. Consumer Affairs Victoria considers that section 32X extends to any early termination charge, operative on breach or on consensual termination and allows the court to weigh if the amount stipulated overcompensates the supplier.

### (d) Other legislation

Other State and territory legislation deals with unconscionable conduct or allows re opening of unfair contracts (*Australian Securities and Investments Commission Act* 2001 (C'th) and the *Contracts Review Act* 1980 (NSW). Strictly, in each case the provisions could be used to allow courts to intervene on the basis of substantive unfairness, rather than procedural unfairness or a combination of both. In *West v AGC* (1986) 5 NSWLR 610 at 620-1, McHugh JA spoke about an "unreasonable burden on the claimant when it was not reasonably necessary for the protection of the legitimate interests of the party seeking to enforce the provision.". Nevertheless, those provisions have rarely if ever been used in cases relating to substantive unfairness alone. Further, these provisions do not provide a mechanism to address unfair fees and charges across a class of contracts, nor do they confer right of action on regulatory agencies to permit a proactive and systemic approach.

## 4. REFORM PROPOSALS

### (a) Apply unfair contract terms legislation to consumer credit contracts

#### *(i) National process*

In 2002, the Ministerial Council on Consumer Affairs ("MCCA") directed the Standing Committee of Officials on Consumer Affairs ("SCOCA") to investigate policy options to address unfair terms in consumer contracts and the means to progress nationally consistent unfair contract terms legislation. SCOCA set up a national working party. The Working Party released a discussion paper in 2004 and sought submissions. It concluded that adoption of a model based principally on the Victorian legislation was its preferred option for a national response. Following this, at its May 2005 meeting, MCCA asked for a Regulatory Impact Statement “”RIS”) to be prepared. In line with the Commonwealth States agreement, this RIS requires the approval of the Commonwealth Office of Regulatory Review. MCCA meets in August 2006, but it is understood the RIS is still being worked on and is not ready for adoption and publication.

### *(ii) Extend Part 2B Fair Trading Act 1999 to consumer credit contracts*

Victoria has recently conducted an extensive Consumer Credit Review (Merlino, 2006). The Report sets out the option of extending the unfair contract terms provisions in Part 2B to vendor finance (Option 7.2). It also suggests that Victoria could work through MCCA to achieve unfair contract terms legislation extending to consumer credit contracts, a position the national working party also favored. In the event of undue delay, the Report says that Victoria should proceed to apply Part 2B of the Fair trading Act to consumer credit contracts (Option 9.1). A government response to the Review is expected shortly.

### *(iii) United Kingdom unfair contract terms approach*

The Unfair Terms in Consumer Contracts Regulations 1999 implement the Council Directive 93/13/EEC on unfair terms in consumer contracts. The UTCCs came into force in 1995 and were re-issued in 1999. They apply to consumer credit contracts. Under the Regulations, only a court can determine if a term is unfair but the Office of Fair Trading has injunction powers and also shares enforcement powers with local Trading Standards Services, national regulatory bodies and Which?. From time to time, the Office of Fair Trading publishes guidance on its enforcement activity.

The Office of Fair Trading is currently considering enforcement action in relation to late payment fees in credit card contracts, although it notes the principles have wider implications for mortgages, current bank accounts and storecards (1). A term is unfair if "…contrary to the requirements of good faith, it causes an imbalance in the rights and obligations arising under the contract, to the detriment of the consumer." (Reg 8(1)) One factor indicating if a term is unfair is if it requires a customer who fails to fulfil his obligation to pay a disproportionately high sum in compensation (para.1(e) of Schedule 2). The Office of Fair Trading explains (Statement, para 3.2)

*"The requirement of 'good faith' reflects the principle of fair and open dealing with consumers. It does not simply mean that terms must not be used deceitfully; it means that terms should be drafted in a way that respects consumers' legitimate interests. In assessing fairness we take note of not only how a term is used, but how it could be used. The test of fairness also takes account of the circumstances surrounding the conclusion of the contract and the effect of the other terms in the contract."*

The Office has issued a position description issued in April 2005 which "sets out [its] view of the law, which is in essence that default charge provisions are open to challenge on grounds of unfairness if they have the object of raising more in revenue than is reasonably expected to be necessary to recover certain limited administrative costs incurred by the credit card issuer."

The paper outlines the two steps which the OFT has taken: the provision of guidance and setting the monetary threshold above which the OFT is likely to challenge the fee (Statement, 3 ) The monetary threshold is 12 pounds. (a charge under 12 pounds is not necessarily fair). The Office explains that "[t]he setting of the threshold is a provisional practical measure to move the whole market towards compliance " The Office gave credit providers until 1 June 2006 to change their fees or make out a special case. It is currently considering the submissions made to it.

The Office (Statement, 2) says that its position takes into account "all the circumstances" relating to the setting of the charge such as credit providers' differing financial and administrative systems, different customer profiles and is designed to create incentives for efficiency and competition and leave room for competitive differences. The Office says that a higher fee may be appropriate if the issuer requires direct debit payments and thus usually expects lower defaults (so that business costs are being recovered from a proportionately smaller number of defaults).

The key principles according to the Office are (Statement,5)

- That the charge reflect a reasonable pre-estimate of the net limited additional administrative costs which occur as a result of specific breaches and which can be identified with reasonable precision.
- Reflect a fair attribution of those costs between defaulting consumers
- Be based on a genuine estimate of the total numbers of expected instances of default in the relevant period and
- Treat costs other than those net limited additional administrative costs as a general overhead of the credit card business and disregard them for the purpose of calculating a default fee.

*"certain predictable administrative costs...might potentially be recovered in a default charge without being inconsistent with the UTCCRs . We consider that it would only be legitimate for a default charge to take account of kinds of administrative cost that could be objectively and consistently identified so that a consumer could have been aware that a cost of that sort would arise from his default. The example of such a cost we have in mind is the cost of informing the consumer of his breach and advising him on what to do about it." (para 3.26)*

The Office contemplates a default letter would fall within this rubric, and also other overheads such as staff costs, premises telephone, letters and postage, IT systems depreciation of assets related to collection systems, IT support and HR. However, they must "be calculated on objectively justifiable principles, have a substantial causal connection with the administration of defaults and satisfy the test of remoteness.. A starting point of allocation might be the ratio of full time equivalent staff engaged in administration of defaults to the total of staff with whom those overheads were associated" (Statement para 4.3). It would not allow inclusion of raising of provisions Statement, para 4.5), capital costs (Statement para 4.20) or charge off of bad debts (Statement para 4.11). Nor will it count debt collection agency costs or fraud costs in administrative costs to be borne by defaulters generally.

The credit provider is also expected to make allowances for benefits derived such as that part of the multi lateral interchange fee assigned to default and any benefits accruing from a risk based pricing policy such as application of a higher interest rate.

The Office does not insist on charges that discriminate between types of default nor does it object to a reasonable degree of rounding. It says it can accept within reason graduated charges such as a lower charge for the first default, rising for the second and subsequent defaults. It makes it clear however that it will not tolerate strategies such as changing nomenclature or recharacterising the charges. One example it gives is a charge for agreeing to or allowing a customer to exceed the credit limit (Statement, para 4.21).

The Office expects the charge to be ascertained by dividing a pre-estimate of numbers of chargeable defaults into a pre-estimate of the amount of limited additional administrative costs. The number of chargeable defaults should not be reduced by those falling into grace periods or where the default is waived.

The Office does not give weight to an argument that its approach will make interest rates go up (Statement, para 4.24) and if it does so, that is acceptable on the basis that that would enhance the ability of consumers to compare prices. It notes that there is competitive downward pressure on rates and hence on costs.

**(b) Amend Consumer Credit Code to regulate fees and charges generally.**

The Merlino Report notes as an Option that all fees and charges should be reviewable on the ground of unreasonableness, which would include reference to the underlying costs of service provision as the principal criterion for assessment and for default fees, cost recovery. The Report says that this proposal has the advantage of avoiding uncertainty about application of section 72 to deferred establishment fees or rollover fees (Report, 117).

The Report also asks whether Government Consumer Agencies should be able to bring proceedings to challenge unjust transactions, interest and unreasonable fees (Option 5.3, Option 14.3). Group proceedings are also contemplated (Option 14.2)

## (c) International developments

### *(i) New Zealand*

New Zealand has adopted a broad ranging approach to control of default fees. Section 41 of the *Credit Contracts and Consumer Finance Act* 2003 provides as follows:

(1) *A consumer credit contract must not provide for a credit fee or a default fee that is unreasonable.*

(2) *If the Court is satisfied, on the application of the Commission, a debtor, or a guarantor, that a credit fee or default fee is unreasonable, it may order that the fee be annulled or reduced*

(3) *The Court may make any other order it thinks fit for the purpose of giving effect to an order under subsection*

(4) *An application for an order may be made within 1 year of the day that the fee is imposed or debited under the consumer credit contract*

Section 44 provides

(1) *In determining whether a credit fee or a default fee is unreasonable, the Court must have regard to,—*

(a) *in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for the following:*

  (i) *any cost incurred by the creditor (including the cost of providing a service to the debtor if the fee relates to the provision of a service):*

  (ii) *a reasonable estimate of any loss incurred by the creditor as a result of the debtor's acts or omissions; and*

(b) *reasonable standards of commercial practice*

(2) *This section does not apply to*

(a) *establishment fees; or*

(b) *a fee or charge payable on a part prepayment under a consumer credit contract; or*

(c) *a fee or charge payable on a full prepayment of a consumer credit contract (unless the fee relates to administrative costs*

*[``**default fees**" means fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor; but does not include default interest charges]*

### *(ii) United Kingdom*

The *Consumer Credit Act* 2006 (United Kingdom) amends the *Consumer Credit Act* 1974 to remove the provisions relating to extortionate credit bargains (ss137 -140) and includes a new concept of unfair relationships. Section 140A provides that the court may determine that the relationship between a borrower and a lender is unfair on a number of grounds, including because of the terms of the credit agreement or a related agreement.

The Office of Fair Trading has issued draft guidance. It notes (Draft guidance para 4.15) that a court could decide there is an unfair relationship by virtue of the amount of fees and charges where they are so much higher than the rates applicable generally in the market sector or by other borrowers in a similar situation as to make the relationship as a whole unfair. The Office says that in practice a court may be unlikely to find unfair relationship solely on the basis of high charges, but that in many cases excessive prices will be accompanied by other unfair terms or practices, such as lack of transparency. (Draft guidance 24). The Office will not however rule out the possibility that charges may be so high in a particular case as to make the relationship unfair.

## (d) Self regulatory approach

On 7 July 2006, the ANZ Bank announced it was simplifying all personal transaction and credit card exception fees to a single rate of $35, effective 7 August 2006. Prior to that, its charges ranged from $29.50 to $45. It has lowered these fees on ANZ Access Basic Accounts to $10. This represents an interesting self regulatory approach to the issue of late fees.

The Code of Banking Practice does not currently deal with the level of fees and charges and early termination fees otherwise than by requiring disclosure.

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