Contractual Penalties: Resurrecting the Equitable Jurisdiction

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Ignoring its own prior pronouncements, in Andrews v Australia and New Zealand Banking Group Ltd *the High Court of Australia held that the distinction between liquidated damages and penalties applies to promises to pay money whether or not associated with breach of contract. Disagreeing with the highly respected judgment of Mason and Wilson JJ in* AMEV-UDC Finance Ltd v Austin*, the court regarded the penalties doctrine to be a matter of equity jurisprudence, not contract. Notwithstanding that the issue before the court was one of great contemporary significance, the overriding concern was to give effect to its view of English law in 1873. The court therefore appears to have repositioned the whole law of penalties. This article questions the court's conclusion, its conception of penalty, its methodology and, from a broader perspective, the way the court has, in recent contract cases, discharged its role as an ultimate court of appeal.*

Introduction

> The statement that a precedent gains in authority with age must be read subject to an important qualification . . . A moderate lapse of time will give added vigour to a precedent, but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the ancient and perhaps partially forgotten principle with later decisions. Without having been expressly overruled or intentionally departed from, it may become in course of time no longer really consistent with the course of judicial decision . . . The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.[1]

Until recently, Australian contract lawyers would have regarded the modern law of penalties as being reasonably well settled. Its key features, mainly derived from the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,[2] can be expressed in four propositions. First, the law revolves around the distinction between a genuine pre-estimate of loss and a penalty. The distinction is relevant to any provision the effect of which is to liquidate damages for breach of contract.

Second, a genuine pre-estimate of loss is enforceable as an agreement for

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1 Sir John Salmond, 'The Theory of Judicial Precedents' (1900) 16 *LQR* 376 at 383, as cited in *PGA v R* (2012) 245 CLR 355 at 371; 287 ALR 599; [2012] HCA 21 at [24] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

2 [1915] AC 79 ('*Dunlop*').

liquidated damages. A penalty clause is void, or at least wholly unenforceable. Accordingly, the promisee is relegated to a claim for damages, assessed in accordance with general principles.

Third, whether a contract stipulates for a penalty is a question of construction. A court is not bound by the parties' expressed intention. In resolving the question of construction, the tests put forward by Lord Dunedin in *Dunlop* remain authoritative.

Fourth, an agreed damages provision is prima facie effective. Therefore, subject to Lord Dunedin's tests, the onus of proof is on the promisor to establish that the clause is a penalty.

Because these propositions are concerned with agreed liability for breach of contract,[3] the operation of the penalties doctrine can be described succinctly. For example, in *Ringrow Pty Ltd v BP Australia Pty Ltd*[4] the High Court of Australia said:

> The law of penalties, in its standard application, is attracted where a contract stipulates that on breach the contract-breaker will pay an agreed sum which exceeds what can be regarded as a genuine pre-estimate of the damage likely to be caused by the breach.

Since the concept relates to 'agreed sums' payable for breach of contract, the concept of penalty can alternatively be expressed by reference to the promisor's secondary obligation to compensate the promisee for breach of a primary obligation. Accordingly, in *Photo Production Ltd v Securicor Transport Ltd*[5] Lord Diplock said a penalty is a provision which imposes:

> upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation . . .

Of course, there are refinements. For example, the doctrine is not limited to specified money sums; it applies to clauses employing formulae, and may also apply to sums payable in consequence of discharge of a contract for breach. In addition, non-monetary benefits (or detriments) may be subjected to scrutiny. Thus, the statement in *Ringrow* contemplates 'non-standard' applications — in that case to an obligation to sell property.[6] But the scope of application of the doctrine to non-monetary benefits is narrow in practice. Not every benefit which is expressly stated as accruing to one party following breach of contract by the other is subject to the doctrine: for example, a right to terminate for breach. Again, while analogous principles may apply, because the penalties doctrine is concerned with executory promises, it does not apply to benefits which are liable to forfeiture on breach.

Modern authorities have based the invalidity of a penalty on a rule of public policy.[7] Since no rule of public policy is static, the scope of the penalties doctrine may vary over time. Unresolved issues may also remain. For

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3 For a recent evaluation of the role of breach in the penalty doctrine, see Sirko Harder, 'The Relevance of Breach to the Applicability of the Rule against Penalties' (2013) 30 *JCL* 52.

4 (2005) 224 CLR 656 at 662; 222 ALR 306; [2005] HCA 71 at [10] ('*Ringrow*').

5 [1980] AC 827 at 850.

6 See (2005) 224 CLR 656 at 665; 222 ALR 306; [2005] HCA 71 at [21].

7 See eg *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 622; *Robophone Facilities Ltd*

example, if it is agreed that a single sum is payable on the occurrence of various events, whether the doctrine can only ever be applied if the particular event which activates the payment obligation is associated with breach of contract has remained unresolved for some time.[8]

Any decision which broadens the reach of the penalty concept must be controversial. That can certainly be said of the decision reached by the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd*.[9] In a joint judgment of five members of the court,[10] it was held that a contractual stipulation may be a penalty whether or not it states an agreed liability for breach of contract. The significance of the decision beyond that point is a matter of debate. But if the analysis is taken at face value, the court has done considerably more.

In this article, we begin by explaining the context of the ruling in *Andrews*, which involved a preliminary point in an important test case on the validity of certain banking fees. The High Court concluded that the doctrine of penalties has survived in an equitable form long thought to be extinct. We set out the critical steps in the historical analysis that prompted this view, which we note is inconsistent with previous judgments of the court not cited in *Andrews*. We also highlight the court's failure to advance any policy justifications for what can only be regarded as a radical departure from the law as it had been commonly understood. From there we go on to explore various dimensions of the new, post-*Andrews* law of penalties, emphasising in particular the uncertainty it creates on key issues — not least, the range of common stipulations which may now be capable of challenge. Finally, and more generally, we suggest that the decision (as with other recent rulings by the High Court) fails to meet the standards that can reasonably be expected of an ultimate court of appeal — standards such as relevance, consistency and clarity.

The Decision in *Andrews*

Procedural Background

The procedural background to the decision in *Andrews* was unusual, and in one respect unique. Representative proceedings were brought by Andrews and others in the Federal Court of Australia against the Australia and New Zealand Banking Group Ltd ('ANZ'). The claims, set out in 'prolix pleading',[11] related to certain fees and payments ('exception fees') charged by ANZ to its customers. Typical examples are honour and dishonour fees exacted if there

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v Blank [1966] 1 WLR 1428 at 1446; *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292 at 320; [2008] NSWCA 310 at [99]. See also Contracts Restatement 2d (1979), §356 (including penal bonds).

8 See *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 368; 45 ALR 632. But cf *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 629.

9 (2012) 290 ALR 595; [2012] HCA 30 ('*Andrews*'). Recent English cases debating the scope of the doctrine include *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] 1 Lloyd's Rep 541; [2008] EWHC 344 (Comm) ('take or pay' clauses); *General Trading Company (Holdings) Ltd v Richmond Corp Ltd* [2008] 2 Lloyd's Rep 475; [2008] EWHC 1479 (Comm) (clause entitling party to withhold payment).

10 The court comprised French CJ, Gummow, Crennan, Kiefel and Bell JJ.

11 (2012) 290 ALR 595 at 597; [2012] HCA 30 at [4] per the court.

are insufficient funds to meet cheques drawn on a customer's account. Similar claims are on foot against the other major Australian banks. Given that the provisions under challenge are a routine feature of banking contracts, it is hard to think of another commercial case in recent years with more immediate ramifications for such a large proportion of the community.

Certain separate questions were answered by Gordon J.[12] Those questions — characterised[13] by the High Court as 'awkwardly expressed' — included whether exception fees were capable of being penalties under the law of contract even if they did not become payable on breach of contract by a customer. Gordon J held that she was bound by authority, including the decision of the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd*,[14] to hold the penalties doctrine inapplicable. Apparently on the basis that the Full Federal Court would be bound to apply *Interstar*,[15] when an application was made for leave to appeal, the High Court took the extraordinary step of removing the application to that court. Leave was granted.

The High Court's Decision

Since it took the view that the penalties doctrine is not limited to stipulations activated by breach of contract, the High Court allowed the appeal.

As explained below, the decision is based on an insight from a brief consideration of English legal history. No modern authority is cited to justify the court's decision. Nor is there discussion of expressions of the contrary view in the High Court. A prominent example is a statement by Walsh J in *IAC (Leasing) Ltd v Humphrey*.[16] Walsh J said that there was a 'preponderance of opinion' for the view that 'it is only when' an obligation is activated by the 'breach . . . of a term of the contract' that the question can arise whether an obligation is stated in a 'penal provision'. The other members of the court agreed. In *O'Dea v Allstates Leasing System (WA) Pty Ltd*,[17] Brennan J relied on Walsh J's statement to support his conclusion that the 'balance of opinion in this Court has favoured the view that no question of penalty arises unless the obligation to pay arises upon breach of contract'. Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin*[18] also agreed with Walsh J, citing as well a statement of the House of Lords in *Export Credits Guarantee Department v Universal Oil Products Co*[19] which, in accordance with *Dunlop*, restricts the penalties doctrine to cases of breach of contract. In the same case, Dawson J

12 (2011) 288 ALR 611; [2011] FCA 1376.
13 (2012) 290 ALR 595 at 600; [2012] HCA 30 at [20].
14 (2008) 257 ALR 292; [2008] NSWCA 310. See also *Fermiscan Pty Ltd v James* (2009) 261 ALR 408; [2009] NSWCA 355; *Ange v First East Auction Holdings Pty Ltd* (2011) 284 ALR 638; [2011] VSCA 335. Cf *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551 at 556–7.
15 See generally *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151–2; 236 ALR 209; [2007] HCA 22 at [135].
16 (1972) 126 CLR 131 at 143.
17 (1983) 152 CLR 359 at 390; 45 ALR 632.
18 (1986) 162 CLR 170 at 184; 68 ALR 185 ('*AMEV-UDC*').
19 [1983] 1 WLR 399 at 402–3 ('*Export Credits*').

said[20] that 'a provision calling for the payment of money by one party on the occurrence of a specified event, rather than upon breach by that party, cannot be a penalty'. He cited *Export Credits*.

These are all considered statements. Obviously, in *Andrews* the High Court disagreed with them. But why it chose simply to ignore the statements is not explained.

The High Court's Concept of Penalty

In *Andrews*, the High Court explained the concept of penalty as follows:[21]

> In general terms, a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation.

The court supported this complex and convoluted conception by citing the judgments in *Waterside Workers' Federation of Australia v Stewart*,[22] a case on a penal bond, and the judgment of Deane J in *Acron Pacific Ltd v Offshore Oil NL*,[23] with which no other member of the court expressed agreement. For the 'in terrorem' sense it referred to an 18th-century decision[24] and a part of Lord Dunedin's speech in *Dunlop*,[25] which is limited to payments activated by breach and does not refer to penalties as 'collateral or accessory' stipulations.

Four further relevant points were made in *Andrews*. First, it was said that the penalties doctrine is 'not engaged if the prejudice or damage to the interests of the second party by the failure of the primary stipulation is insusceptible of evaluation and assessment in money terms'.[26] Second, the 'primary stipulation may be the occurrence or non-occurrence of an event which need not be the payment of money'.[27] Third, the High Court said:[28]

> If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.

In support of these points, the High Court again relied on *Waterside*,[29] but also cited another 18th-century decision.[30]

Fourth, the court stated that 'the penalty imposed upon the first party upon

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20 (1986) 162 CLR 170 at 211; 68 ALR 185.
21 (2012) 290 ALR 595 at 597–8; [2012] HCA 30 at [10].
22 (1919) 27 CLR 119 at 128–9, 131 ('*Waterside*').
23 (1985) 157 CLR 514 at 520; 61 ALR 245. But cf his remarks in *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131 at 153; 84 ALR 99.
24 *Rolfe v Peterson* (1772) 2 Bro PC 436 at 442; 1 ER 1048 at 1052.
25 [1915] AC 79 at 86.
26 (2012) 290 ALR 595 at 598; [2012] HCA 30 at [11].
27 (2012) 290 ALR 595 at 598; [2012] HCA 30 at [12].
28 (2012) 290 ALR 595 at 598; [2012] HCA 30 at [10].
29 (1919) 27 CLR 119 at 131–2.
30 *Peachy v The Duke of Somerset* (1795) 1 Str 447; 93 ER 626.

failure of the primary stipulation need not be a requirement to pay to the second party a sum of money'.[31] For this point alone the High Court cited modern authority.[32]

The formulation and statements quoted above are not restricted to provisions activated by events other than breach of contract. They appear to be intended to express general features of the penalties doctrine, as understood by the High Court. This conception of penalty reflects the historical perspective which it has used to justify its decision, and to that we now turn.

The Historical Analysis

The decision in *Andrews* is based, largely, on a consideration of the evolution of English law prior to 1873. This is not the first occasion on which the High Court has delved into the history of penalties. As recently as 1986, in *AMEV-UDC*,[33] an account was given not only in the judgment of Mason and Wilson JJ, but also by Deane J.[34] The two judgments reached different conclusions. The fact that in *Andrews* the High Court does not adopt either seems reason enough to doubt the utility of the exercise.[35]

Steps in the analysis

There are three main steps in the historical analysis in *Andrews*. First, the 18th-century cases on penal bonds are used to expose the fact that equity granted relief in respect of payments (and other detriments) activated by various events; relief was not limited to stipulations activated by breach of duty. Of course, those cases involved actions brought in covenant or debt on deeds. The context was property, not contract. But the High Court treats the penal bond cases as shaping the modern law of contract.

The cases on penal bonds are also used to generate the distinction between 'promise' (and warranty) and 'condition'. The judgment explains that 'condition' in the context of bonds does not mean 'condition' as used in contradistinction to the word 'warranty'. That the High Court chose to devote space to the legal meanings of the word 'condition' — in preference to all that might have been discussed — is surprising.

At any event, the High Court did think it necessary to explain:[36]

> One meaning of 'condition' is an important, vital, or material promise, the breach of which will repudiate a contract; the term 'breach of contract' is used in contrast to 'breach of warranty'.

It is not easy to understand the statement that a 'breach . . . will repudiate a contract'. In the sale of goods legislation, the concept is that a breach of

31 (2012) 290 ALR 595 at 598; [2012] HCA 30 at [12].
32 *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507; *Jobson v Johnson* [1989] 1 WLR 1026.
33 (1986) 162 CLR 170; 68 ALR 185.
34 For attempts in the English cases to explain the history see eg *Wallis v Smith* (1882) 21 Ch D 243 per Jessel MR; *Law v Local Board of Redditch* [1891] 1 QB 127 at 133–5. Cf *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 630–1.
35 See further below, text at n 67.
36 (2012) 290 ALR 595 at 603; [2012] HCA 30 at [35].

condition entitles the promisee to 'treat the contract as repudiated'.[37] And the contrast drawn by the High Court between 'breach of contract' and 'breach of warranty' is an impossible one, unless the intention is to relate the statement to the time when a claim for breach of warranty was 'in the nature of an action for deceit'.[38]

If penal bonds were in common use today, it might be worth making the point that even under the modern law, in that context the penalties doctrine may have a distinct operation. That is the position taken in the United States under § 356 of the Second Restatement of Contracts. In practice, any local enactments[39] which still survive as relics of the English Administration of Justice Acts[40] must have the same effect.

The second step involves a consideration of the form of action in assumpsit. The High Court notes that the common law courts took to themselves a jurisdiction to relieve against penalties. Discussion of the form of action in debt is dealt with elsewhere in the judgment, but there is no discussion of the right of election which was apparently enjoyed by the promisee,[41] namely, to sue in debt for the penalty or to ignore the penalty and claim damages. Nor is there reference to yet another line of authority, under which the *promisor* was regarded as having the option to pay the penalty, and thereby avoid breaching the contract.[42]

Although indebitatus assumpsit is mentioned (though not by name), there is no discussion in *Andrews* of the use of special assumpsit to enforce liquidated damages clauses, or its procedural impact. But the point is nevertheless made that the jurisdiction of the common law courts was limited by their inferior procedures.[43] Indeed, the whole discussion is framed from the perspective of the inferiority of the common law.

The third step is to explain that the equitable jurisdiction remained in operation throughout the period prior to the Judicature reforms in England.[44] From that perspective, and without regard to well over 100 years of case law since those reforms, the High Court turned to the views expressed in *Interstar* and concluded[45] that 'the Court of Appeal thus had no basis for the proposition that the penalty doctrine is a rule of law not of equity'.

Fusion, *AMEV-UDC* and *Dunlop*

No instance is cited in *Andrews* of any decision following the fusion of the administration of law and equity in which a promise to pay money following

37 See eg Sale of Goods Act 1923 (NSW), s 16(2) and cf s 4(5).
38 See J W Carter, *Carter's Breach of Contract*, LexisNexis Butterworths, Sydney, 2011, §4-14.
39 See eg Instruments Act 1958 (Vic), s 30.
40 8 & 9 Will 3, c 11 and 4 & 5 Anne, c 16.
41 See eg *Lowe v Peers* (1768) 4 Burr 2225 at 2228; 98 ER 160 at 162; *Astley v Weldon* (1801) 2 B & P 346 at 353; 126 ER 1318 at 1322; *Beckham v Drake* (1849) 2 HLC 579 at 598, 618–19, 632; 9 ER 1213 at 1220, 1227, 1232. See notes to *Gainsford v Griffith* (1667) 1 Wms Saund 51 at 58; 85 ER 59 at 65.
42 See eg *Lowe v Peers* (1768) 4 Burr 2225 at 2229; 98 ER 160 at 162; *Hurst v Hurst* (1849) 4 Ex 571; 154 ER 1341; *Legh v Lillie* (1860) 6 H & N 170; 158 ER 69.
43 See (2012) 290 ALR 595 at 609; [2012] HCA 30 at [59] ('the common law courts were constrained by the limitations of their remedies and procedures').
44 See Supreme Court of Judicature Act 1873 (UK), as amended and extended by Supreme Court of Judicature Act 1875 (UK).
45 (2012) 290 ALR 595 at 610; [2012] HCA 30 at [63].

breach of contract has been held to be a penalty on the basis of the equitable doctrine as applied in the 18th century. Nor is any instance cited where an executory promise in a bilateral contract, activated by an event other than breach of contract, has been held to be a penalty. Indeed, unless it is the bond cases, it is unclear what decisions the High Court has in mind when it speaks of equity's intervention in ordinary contract actions, to grant relief against payments not payable on breach of contract.[46] However, a statement about the impact of fusion is why the historical analysis is followed by a brief discussion of *AMEV-UDC* and *Dunlop*.

The High Court begins the discussion by commenting: 'That counsel for the successful respondent [in *AMEV-UDC*] ... was well aware of the pre-Judicature developments in the common law courts is apparent' from his citation[47] of the judgment of Lord Eldon in *Astley v Weldon*.[48] The relevance of this comment is obscure. Counsel was R P Meagher QC, a leading equity scholar and (together with Gummow J, a member of the court that decided *Andrews*) a passionate and trenchant critic of so-called 'fusion fallacies'.[49] The court might also have noted that in *P C Developments Pty Ltd v Revell*,[50] Meagher JA (as he had then become) said that the modern law reflects the 'common law origins of the doctrine of penalties'.

In *AMEV-UDC*, the majority comprised Gibbs CJ and Mason and Wilson JJ. Earlier in its judgment in *Andrews*, the High Court referred to the acknowledgment by Gibbs CJ that the court was not required to consider the effect of the *Export Credits* case, saying[51] that Gibbs CJ had 'emphasised' the point. With respect, he merely said that the point was not in issue.[52] That was because it had been conceded that the clause in question stated a penalty. But, as noted above, three members of the court expressly agreed with *Export Credits*. Also, if in 2012 the law was as clear as the High Court makes out, it ought to have been as clear to Gibbs CJ in 1986[53] — he could simply have said that Australian law was different. Gibbs CJ did, however, say:[54]

> The appellant cannot successfully seek to rely on general equitable principles which relate to the relief against penalties when those principles have long since hardened into definite rules governing the position of parties to a contract which contains a clause imposing a penalty for breach.

That is inconsistent with the judgment in *Andrews*, where equitable principles are invoked to explain that penalty clauses are enforced to the extent of the promisee's loss.

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46 In many of the bond cases which the High Court cites, the basis is an inferred or implied agreement, that is, promise. These were said not to illustrate any general principle. See below, text at n 126.

47 See (1986) 162 CLR 170 at 172–3; 68 ALR 185.

48 (1801) 2 B & P 346; 126 ER 1318.

49 See eg R P Meagher, J D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Australia, 2002, Ch 2.

50 (1991) 22 NSWLR 615 at 651. See also R P Meagher, 'Penalties in Chattel Leases' in P D Finn, ed, *Essays in Equity*, Law Book Co Ltd, Sydney, 1985, pp 50–1.

51 (2012) 290 ALR 595 at 606; [2012] HCA 30 at [48].

52 See (1986) 162 CLR 170 at 174; 68 ALR 185 ('[w]e are not required to consider').

53 But see Gibbs CJ's analysis in *O'Dea* (1983) 152 CLR 359 at 367; 45 ALR 632.

54 (1986) 162 CLR 170 at 176; 68 ALR 185.

In *AMEV-UDC*, Mason and Wilson JJ concluded that:[55]

> the equitable jurisdiction to relieve against penalties withered on the vine for the simple reason that, except perhaps in very unusual circumstances, it offered no prospect of relief which was not ordinarily available in proceedings to recover a stipulated sum or, alternatively, damages . . .

No reference is made in *Andrews* to Gibbs CJ's statement; but the High Court's treatment of Mason and Wilson JJ's conclusion perhaps discloses the objective of its historical analysis. That objective was to hold that the fusion of law and equity achieved by the Judicature reforms was procedural, not substantive. It was this point which, in *Andrews*, the High Court said[56] Mason and Wilson JJ had 'overlooked'. It regarded the point as so obvious that no authority is cited to support it. No reference is made to contrary authorities.[57] The conclusion of Mason and Wilson JJ was in fact based on substantial reasons. They did not overlook fusion. In their view it did not matter whether the fusion of law and equity was procedural or substantive. That they took it into account is shown by their statement[58] that the 'Judicature system, with its emphasis on the disposition of all issues in one proceeding, hastened the demise of equity's separate jurisdiction'.

The decision in *Dunlop* was put forward[59] in *Andrews* as an illustration of the 'operation just mentioned of the Judicature system'. After recounting certain statements by Lord Atkinson in that case, the High Court concluded:[60]

> The litigation in *Dunlop*, where in the one court, and in the same proceeding, legal and equitable remedies were sought by the plaintiff and the defendant raised the penalty doctrine in its defence, illustrates the place of the penalty doctrine in a court where there is a unified administration of law and equity but equitable doctrines retain their identity.

That perspective on the litigation is perhaps a little self-serving. All the remedies were sought by the plaintiff: injunction to enforce a negative stipulation, and damages, as quantified by the agreement. The latter was a claim for liquidated damages. Neither the plaintiff nor the defendant raised the possibility of the clause being enforced to the extent of proved loss. In asserting that the clause was a penalty, the defendant did not ask for equitable relief or seek to restrain enforcement of a legal right by reference to a countervailing equity. Rather, the assertion was that the clause was invalid under the law of contract. The case did not involve an equitable doctrine of penalties.

Basing itself on a comment by Lord Atkinson,[61] the High Court also said[62] that the clause in *Dunlop* was valid because the 'sum agreed was commensurate with the interest protected by the bargain'. But the orthodox

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55 (1986) 162 CLR 170 at 191; 68 ALR 185.
56 (2012) 290 ALR 595 at 611; [2012] HCA 30 at [68].
57 Such as Lord Diplock's speech in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, the decision in which the High Court appeared to approve in *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455; 49 ALR 135.
58 (1986) 162 CLR 170 at 191; 68 ALR 185.
59 (2012) 290 ALR 595 at 611; [2012] HCA 30 at [69].
60 (2012) 290 ALR 595 at 613; [2012] HCA 30 at [77].
61 See [1915] AC 79 at 92.
62 (2012) 290 ALR 595 at 613; [2012] HCA 30 at [75].

view is that in *Dunlop* the clause was valid because of the difficulty in assessing damages.[63] The modern law of penalties is not concerned with what interests the bargain protects: it is concerned with whether there is a genuine pre-estimate of loss in respect of provisions to which the clause applies. That point was made in *Ringrow*, when comparing the doctrine of restraint of trade. The court said[64] that the restraint of trade doctrine 'recognises certain interests which it is legitimate for a covenantee to seek to protect by a covenant in restraint of the covenantor's trade, so long as the covenant is not wider than is reasonably necessary to protect those interests'. That idea, it emphasised, is not 'part of the law relating to penalties'. The court cited *Dunlop* in support of that conclusion.

Relevance

In *Andrews* the High Court described the relevant claims in the Federal Court as being for 'money had and received'. The description does not identify the particular category of that form of action. That the High Court speaks in terms of forms of action rather than causes of action is itself a concern. But leaving that point to one side, what is the relevance of the history of penalties in equity to a claim for restitution? The jurisdiction which equity exercised, namely, to restrain enforcement subject to the payment of compensation for the promisee's actual loss, counts against any claim being made for restitution. The historical analysis by the High Court does not include a single example of a 'money had and received' claim.[65]

The obvious assumption underlying the claims made by the applicants in *Andrews* is that any exception fee payments held to be penalties were made under void provisions. Since the High Court set its face against treating penalties as void, the assumption must have been incorrect and there would thus be no obvious basis for restitution. The whole analysis adopted by the court — revolving around the idea of partial enforcement — seems quite irrelevant to a case where the payment has actually been made.[66]

Objections

The historical analysis, and the basis on which the High Court said the New South Wales Court of Appeal was wrong in *Interstar*, would seem inevitably to stamp the whole of the Australian doctrine of penalties as being 'equitable'. Therefore, the decision in *Andrews* gives every appearance of adopting a single doctrine based on equitable principles, rather than a general doctrine applicable to provisions activated by breach of contract and an analogous concept derived from equity dealing with other contexts. Therein lies a major problem. Did the High Court intend to reformulate the whole doctrine?

A bit of history is good for anyone. However, it is not an end in itself. Of the many objections to the High Court's analysis, three may be mentioned. First, the fundamental objection is that it is contemporary contract law which

63 Indeed the analysis (see below, text at n 137) in *Andrews* of *Waterside* would suggest that the penalties doctrine was not even 'engaged' in *Dunlop*.

64 (2005) 224 CLR 656 at 667; 222 ALR 306; [2005] HCA 71 at [27].

65 Cf *Brett v Barr Smith* (1919) 26 CLR 87.

66 Cf *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 260; 244 ALR 1 at 19; [2008] HCA 10 at [60].

matters. No thought appears to have been given by the High Court to the elementary proposition that, today, the penalties doctrine is simply an ingredient of the law of contract. The historical analysis is not tested against the law. If doctrine is all that is relevant (which is what the High Court's analysis suggests) modern doctrine ought to have been considered. Decisions reached under the forms of action — before the existence of the law of contract as we know it today — cannot provide a reliable basis on which to determine the current scope of any area of contract law. That great legal historian, Windeyer J, when commenting on whether the consideration rule neglected many cases that allowed third party beneficiaries to recover and did not bring about a desired result, said:[67]

> [I]t seems to me another thing to hope that the desired result can now be brought about by looking back to the sixteenth and seventeenth centuries. I do not, I hope, undervalue the history of a legal doctrine as an aid to an understanding of it. But I am unable to think that looking at the common law 'in its original setting' necessarily determines what it is in the setting of today. The history of much of our law is a story of development over centuries. The process still goes gradually on. The law of today is a living law. I would not suggest we should arrest its growth. But is a rule, which for a century or more has been said to be a fundamental principle of the common law and which has been asserted as such upon the highest authority, to be now condemned as a mistaken aberration because at some earlier stage in the history of our law a different rule prevailed? I think not. The common law develops, but not by looking back to an assumed golden age. I have said elsewhere that
>
> ' . . . the only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of to-day by seeing how it took shape': *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 595.
>
> . . . Statements made by courts hundreds of years ago about the doctrine of consideration ought not I think to be taken as pronouncements of the law today, ignoring all that has been said in the meantime, ignoring all changes in social conditions and men's ways.

Second, the task which the court set itself, namely, to provide a meaningful historical account of the evolution of the penalties doctrine over several hundred years within the space of a few pages seems an impossible and futile exercise. The point has regularly been made that extracting a coherent rationale for the variety of situations in which hundreds of years ago equity intervened on the basis of 'penalty' is either impossible or unprofitable.[68] It is difficult to dissociate the old penalty cases from equity's wanton disregard of contractual intention during what Lord Dunedin described[69] in *Dunlop* as the period 'when equity reformed unconscionable bargains merely because they were unconscionable'. There is also the problem that the old cases did not draw the distinction between relief against contractual penalties and relief

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67 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 496.

68 See eg *Wallis v Smith* (1882) 21 Ch D 243 at 274 per Lindley LJ ('antiquarian research'); *Widnes Foundry (1925) Ltd v Cellulose Acetate Silk Co Ltd* [1931] 2 KB 393 at 405 per Scrutton LJ ('good deal of disagreement'), 412 per Greer LJ ('somewhat doubtful origin'), 414 per Slesser LJ ('differences of opinion in the past' as to origin) (affirmed *sub nom Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20); *AMEV-UDC* (1986) 162 CLR 170 at 183; 68 ALR 185. And see Law Commission, *Penalty Clauses and Forfeiture of Money Paid*, Working Paper No 61, HMSO, London, 1975, para 15.

69 [1915] AC 79 at 87.

against forfeiture in the way that it is drawn today.[70]

Third, Lord Dunedin's speech in *Dunlop* was clearly intended to be a synthesis of common law and equity. It was a statement of substantive principles of contract law which was intended to end historical debate.[71] There is no reference to any separate equitable jurisdiction,[72] or the idea put forward in *Andrews* that penalties are enforced to the extent of the promisee's loss. Lord Dunedin's synthesis was not — and was not intended to be — an exhaustive statement of the law. But, in his view, the several recent cases in which the House of Lords and Privy Council had considered the doctrine made it unnecessary to go back to the old cases. Moreover, in *Ringrow*, just seven years prior to *Andrews*, the High Court described[73] the *Dunlop* principles — not the equitable principles of a bygone era — as 'governing the identification, proof and consequences of penalties in contractual stipulations'. Lord Dunedin's conception of penalty, as the High Court acknowledged in *Ringrow*,[74] relates to provisions activated by breach of contract. Why the English courts do not regard the decisions on which the High Court relies in *Andrews* as having any general contemporary relevance is not explained. Thus, the court simply expresses its disagreement with the statement in *Export Credits*, with which three members of the court agreed in *AMEV-UDC*. Nor did the court refer to other English cases or leading Australian or English texts to the same effect.[75]

Reforming the Law

In *Dunlop* the House of Lords plainly limited the penalties doctrine to provisions activated by breach of contract. The synthesis produced in that case was not made 'subject to equity'. In *Ringrow*, as noted above, the High Court described[76] the principles stated by Lord Dunedin as 'governing . . . identification, proof and consequences'. After noting that neither side had contested their applicability, the High Court said:[77]

> In these circumstances, the present appeal afforded no occasion for a general reconsideration of Lord Dunedin's tests to determine whether any particular feature of Australian conditions, any change in the nature of penalties or any element in the contemporary market-place suggest the need for a new formulation.

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70 See eg *Peachy v The Duke of Somerset* (1795) 1 Str 447 at 453; 93 ER 626 at 630. Cf *Thompson v Hudson* (1869) LR 4 HL 1 at 15; *Legione v Hateley* (1983) 152 CLR 406 at 425; 46 ALR 1.

71 See also *Widnes Foundry (1925) Ltd v Cellulose Acetate Silk Co Ltd* [1931] 2 KB 393 at 405, 413 (affirmed *sub nom Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20).

72 The only reference (see [1915] AC 79 at 87) to 'equity' is a comment dismissive ('more interesting than material') of Jessel MR's judgment in *Wallis v Smith* (1882) 21 Ch D 243.

73 (2005) 224 CLR 656 at 663; 222 ALR 306; [2005] HCA 71 at [12].

74 See below, text at n 4.

75 See eg *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 at 767, where Viscount Simonds noted that no case had been cited to the House of Lords in which the equitable doctrine had been invoked in the absence of breach of contract. See also Law Commission, *Penalty Clauses and Forfeiture of Money Paid*, Working Paper No 61, HMSO, London, 1975, para 17. In H McGregor, *McGregor on Damages*, 18th ed, Sweet & Maxwell, London, 2009, §13-009, the point is described as 'self-evident'.

76 (2005) 224 CLR 656 at 663; 222 ALR 306; [2005] HCA 71 at [12].

77 (2005) 224 CLR 656 at 663; 222 ALR 306; [2005] HCA 71 at [12] (footnotes omitted).

By departing in *Andrews* from the established rule that the penalties doctrine is limited to payments in the nature of agreed damages for breach, the High Court has now adopted a different view about *Dunlop*. Whether that is the full extent of the 'reform' in *Andrews* is unclear. But at no stage does *Andrews* undertake the analysis contemplated in *Ringrow*. Clearly, whatever the change to the law wrought by the decision, it is not based on a consideration of the 'contemporary market-place' or 'any particular feature of Australian conditions'.

Freedom of contract

In *Andrews*, some of the claims against the ANZ were for statutory relief based on contravention of statutory prohibitions on unconscionable conduct, and the operation of unfair contract terms legislation. None of these claims was before the High Court. Nevertheless, it concluded that:[78]

> [T]his pattern of remedial legislation suggests the need for caution in dealing with the unwritten law as if laissez faire notions of an untrammelled 'freedom of contract' provide a universal legal value.

The suggestion is diametrically opposed to the sentiment in *Ringrow*,[79] where the court made[80] the point that the 'law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships'.

In *Ringrow*,[81] the High Court endorsed an invitation made by Mason and Wilson JJ in *AMEV-UDC*. Commenting on the fact that the decisions since *Dunlop* exhibited a greater emphasis on a need for accuracy in the pre-estimate,[82] they invited Australian courts to return to the *Dunlop* concept, 'thereby allowing parties to a contract greater latitude in determining what their rights and liabilities will be'.[83] In other words, Mason and Wilson JJ advocated freedom of contract. On that basis, as approved in *Ringrow*, in most cases an agreed sum is only 'characterized as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach'.[84]

Mason and Wilson JJ's invitation in *AMEV-UDC*, for 'greater latitude' to be allowed, was a response to the argument of the appellant that the penalty which it had exacted should be enforced to the extent of its loss. It was expressly put forward[85] by Mason and Wilson JJ in preference to 'developing a new law of compensation for plaintiffs who seek to enforce a penalty clause'. It therefore seems impossible to separate the adoption in *Ringrow* of this aspect of Mason and Wilson JJ's judgment from their conclusion on the role of equity, the view that the doctrine is limited to sums payable in connection with breach and their rejection of the idea of partial enforcement.

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78 (2012) 290 ALR 595 at 597; [2012] HCA 30 at [5].

79 See also, in other contexts, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; 201 ALR 359; [2003] HCA 57; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; 244 ALR 1; [2008] HCA 10.

80 (2005) 224 CLR 656 at 669; 222 ALR 306; [2005] HCA 71 at [31].

81 (2005) 224 CLR 656 at 667; 222 ALR 306; [2005] HCA 71 at [27].

82 Cf G D Muir, 'Stipulations for the Payment of Agreed Sums' (1985) 10 *Syd LR* 503 at 519.

83 (1986) 162 CLR 170 at 190; 68 ALR 185.

84 (1986) 162 CLR 170 at 190; 68 ALR 185.

85 (1986) 162 CLR 170 at 193; 68 ALR 185.

However, each was spurned in *Andrews*.

Since the rationale for the High Court's decision in *Andrews* is historical, and based on cases decided at a time when it was generally considered that freedom of contract counted for more than it does today, there seems a major and unexplained paradox. But perhaps the explanation is that it exposes the equitable doctrine as itself inimical to freedom of contract. That seems to have been Lord Dunedin's perspective on the equitable jurisdiction in *Dunlop*.[86]

Contemporary market-place

It is common knowledge that the limitation of the penalty doctrine to provisions activated by breach of contract has exerted a powerful influence on how contracts are drafted and structured. A quite striking feature of *Andrews* is therefore that there is no consideration of the implications of the decision for current drafting practices, or the ways in which transactions are typically structured. Moreover, by providing criteria for establishing a prima facie case for a penalty with no statement of principles for what might push it across the line or rebut that prima facie position, no lawyer or court in the country could feel comfortable in making a judgment as to the efficacy of any provision that might fall within the reach of the initial criteria. Arguably, as noted below,[87] when read in context the 'prima facie' reference does not appear to carry much weight, so that all the High Court did was in fact state what in its view was in substance a penalty.

Even if it is assumed that the statements of principle in *Andrews* are relevant only to provisions which are not activated by breach, the implications may be far-reaching. Examples of payments (in addition to 'exception fees') which have either become entirely problematic, or which may need to be brought within a new set of principles, include:

- 'take or pay' clauses;
- 'break fees', for example, payments made to lenders in order to obtain the premature discharge of a debt;
- additional establishment fees, not activated by breach, payable in connection with loan facilities;
- 'termination for convenience' payments;
- provisions for the loss of incentive payments, for example, if a building contract is not completed 'early';
- agreed fee rebates, for example, where a contractor does not achieve certain pre-determined performance levels; and
- compulsory transfer obligations, for example, where a party to a joint venture becomes insolvent or suffers a change of control.

For an ultimate court of appeal to ignore the potential implications of its decision on a controversial issue is unusual. All around the country, lawyers are currently reviewing — and no doubt amending — standard form contracts and precedent documents in light of *Andrews*, but without being clear in what they need to do. Equally, there must also be lawyers who are advising clients

86 In *Astley v Weldon* (1801) 2 B & P 346 at 351; 126 ER 1318 at 1321, Lord Eldon lamented the interference with freedom of contract. See also *Wallis v Smith* (1882) 21 Ch D 243 at 259; *Bridge* [1962] AC 600 at 626.

87 See below text at n 119.

who have in the past six years made payments on the basis of the law as understood in *Interstar* whether to bring restitutionary claims. Lawyers will do very well out of *Andrews*.

Australian conditions

As mentioned above, although the 'remedial legislation' to which it referred was not before the court in *Andrews*, it nevertheless saw it as significant for the scope of freedom of contract under Australian law. This is despite the fact that the legislation in question affects freedom of contract in a way that is far from uniform. Generalised suggestions about the impact of legislation are simply unhelpful. No 'pattern' is identified by the High Court. Nevertheless, it is worth focusing on the scope of the unfair contract terms legislation, which was directly relevant to the issue of principle before the High Court.[88]

The introduction of the unfair contract terms regime in the Australian Consumer Law[89] can be seen as entirely consistent with the promotion of 'laissez faire notions' in the commercial context. That regime supersedes the unfair contract terms provisions of the Fair Trading Act 1999 (Vic)[90] invoked in *Andrews*. But it is based on that Act.[91] Section 25(1)(c) of the Australian Consumer Law states, as an example of a term which may be unfair, one which 'penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract'.

Provisions which state the 'upfront price' are exempted from review under the regime. The scope of the concept is important. Section 26(2) states:

> The *upfront price* payable under a consumer contract is the consideration that:
>
> (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
>
> (b) is disclosed at or before the time the contract is entered into;
>
> but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

Therefore, if it falls within the concept of 'any other consideration', the impact is that a term requiring the payment of a money sum (or other 'consideration') on the occurrence of a contingency can be reviewed for fairness.

The Australian Consumer Law is a somewhat strange animal. Like the legislation which it replaces, it is not limited to 'consumers'; and has varying

88 The High Court has in the past usually regarded it as important to delineate the scope of legislation before drawing conclusions as to its effect. For example, in *Webb Distributors (Aust) Pty Ltd v State of Victoria* (1993) 179 CLR 15 at 37; 117 ALR 321 it was held that the commencement of the winding up of a company was a restriction on the court's statutory jurisdiction to declare a contract void on the basis that it was induced by conduct in contravention of a statutory prohibition on misleading or deceptive conduct. The legislation made no reference to any such restriction. The court approved *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144 at 160–1, 168; 14 ALR 623 at 638–9, 645–6, where Brennan and Deane JJ said the statutory jurisdiction was not to be regarded as conferring a power to declare void a contract valid at its inception, other than through the operation of the legislation or a change in circumstances.

89 Competition and Consumer Act 2010 (Cth), Sch 2.

90 See now Australian Consumer Law and Fair Trading Act 2012 (Vic).

91 So also are corresponding provisions in the Australian Securities and Investments Commission Act 2001 (Cth).

degrees of application to commercial parties.[92] For example, the remedies for unconscionable conduct in Pt 2-2 are available to commercial parties. The only relevant limitation is that the benefit of the prohibition in s 21 does not extend to a public listed company. But the position in relation to the unfair terms regime in Pt 2-3 is different. That is applicable only to 'consumer contracts', a concept which is limited to standard form contracts entered into by individuals to acquire goods, services or land for personal, domestic or household use or consumption.[93] Given the broader scope of other provisions, it is a statement of the obvious to say that every Australian Parliament refrained from enacting legislation which would have cut across the general law of penalties.[94] Only the parties to consumer contracts are given the right to challenge as unfair terms stipulations for contingency payments not activated by breach. In short, the Australian Consumer Law leaves in place for commercial parties the freedom of contract inherent in the penalties doctrine as understood prior to *Andrews*.

Since it chose to say that legislation 'suggests the need for caution', it would have been useful for the High Court in *Andrews* to explain what it meant, and how its decision achieved a satisfactory interaction with the legislation. It is quite possible now that a term may be invalid under the penalties doctrine resurrected by the High Court but not under statute.

The New Law of Penalties after *Andrews*

The reasoning and decision in *Andrews* would seem to imply three things. First, the reason why the law refuses to enforce a penalty in accordance with its terms is that it is an 'additional detriment' (to the promisee's benefit) imposed by a 'collateral or accessory stipulation . . . in the nature of a security for and in terrorem of the satisfaction of [a] primary stipulation'. Second, if a collateral stipulation for an additional detriment is found, the stipulation is prima facie a penalty. Third, a penalty is not void, or even wholly unenforceable, as had previously been assumed. Therefore, the promisee is entitled to have the penalty enforced to the extent necessary to obtain 'compensation' for loss actually sustained.

There is no evidence of any intention to restrict the statements in *Andrews* from which these three points are derived to stipulations which are not activated by breach of contract. Since each point reflects the position said to have been taken in equity prior to 1873, it is — as we have already pointed out — exceedingly difficult to determine the impact of *Andrews* on modern contract doctrine as previously understood. Nevertheless, in what follows we endeavour to tease out some of the implications of the decision.

Partial Enforcement

AMEV-UDC and rejection of the conventional view

The conventional view, that a penalty is void or wholly unenforceable, was rejected in *Andrews*. Under that decision, the promisee is apparently entitled

92 See J W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *JCL* 221.

93 See the definition in s 23.

94 Cf also J Paterson, *Unfair Contract Terms in Australia*, Lawbook Co, Sydney, 2012, §5.150.

to enforce the penalty to the extent of its loss. Although stated as a general rule, there are no modern cases to support it in the context of promises to pay money. Partial enforcement is in fact contrary to the decision in *AMEV-UDC*, where only Deane J (in his dissenting judgment) ventured the view[95] that a penal clause is neither void nor 'completely unenforceable'.

It was part of the ratio of *AMEV-UDC* that penalties are not enforced to the extent of the loss proved by the promisee.[96] As mentioned earlier, Gibbs CJ said there were no equitable principles that the appellant could invoke to enforce the penalty. Mason and Wilson JJ said: 'At least since the advent of the Judicature system a penalty provision has been regarded as unenforceable or, perhaps void, ab initio'.[97] Although Mason and Wilson JJ also recognised that the choice between 'unenforceable' and 'void' has been a matter of debate, all the modern cases support the view that it is one or the other.[98]

The principles in *Andrews* can be reconciled with the decision in *AMEV-UDC* by treating the former as limited to situations in which there is no breach of contract. However, there is no express statement to that effect. The most that can be said is that in *Andrews* the court agreed with Mason and Wilson JJ that 'compensation' is determined by reference to general principles of contract damages. But why should a court redress loss under damages principles if there is no breach of duty? In order to carry that over to the occurrence of a non-promissory event, it would have to be assumed that the primary stipulation is promissory in substance. However, the latter limitation on the penalties doctrine was rejected in *Andrews*.[99] And its acceptance would have made the inconsistency with *AMEV-UDC* even more apparent.

Doctrinal purity

The reasoning in *Andrews* places much stress on doctrinal purity. But that purity is based on the untested view that what was once the law has remained the law. From the perspective of current doctrine, the conclusion in favour of partial enforcement is largely incoherent. 'Partial enforcement' is simply another name for rewriting the contract. First, the modern law has hitherto refused to enforce a penalty clause, relegating the promisee to a *different* right, namely, damages for breach of the 'primary stipulation'. As was held in *AMEV-UDC*, the promisee thus obtains no benefit from the penalty. But under the conception in *Andrews* the promisee is entitled to enforce the same promise, namely, the 'collateral stipulation' which serves as surrogate for a claim based on the primary stipulation. In situations where failure of the

95 (1986) 162 CLR 170 at 203; 68 ALR 185. See also R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Sydney, 2002, §18-090 ('Deane J's reasoning has much to commend it').

96 The issue in *AMEV-UDC* was actually narrower, namely, whether the penalty was evidence of what loss was in the contemplation of the parties when they contracted. That too was rejected.

97 (1986) 162 CLR 170 at 192; 68 ALR 185.

98 See *IAC (Leasing) Ltd v Humphrey* (1972) 126 CLR 131 at 142; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 698; *Pigram v Attorney-General (NSW)* (1975) 132 CLR 216 at 221; 6 ALR 15; *O'Dea* (1983) 152 CLR 359 at 372; 45 ALR 632; *Ringrow* (2005) 224 CLR 656 at 663; 222 ALR 306; [2005] HCA 71 at [14].

99 (2012) 290 ALR 595 at 604–6; [2012] HCA 30 at [39], [42], [45].

primary stipulation is not a breach of contract, the promisee is benefited by the penalty because, but for the penalty, the promisee would have no 'compensation' right.

Second, partial enforcement may be seen as a form of severance. However, questions of severance have never entered into the analysis of the modern penalty cases. That is not surprising. For example, many of the cases in which clauses were held to be void as penalties in the second half of the 20th century involved hire-purchase contracts employing formulae. How can such clauses be partially enforced? It would be fictional to say that in awarding damages a penalty is being partially enforced when in *AMEV-UDC* it was decided that effect is simply given to the obligation — implied by law — to pay compensation for breach of contract. But it must be something worse than fiction to say that a clause is being partially enforced when a court is actually ordering payment of a sum which the parties never agreed would be paid on the basis that, had a breach occurred, the same sum would have been awarded as damages.

In *AMEV-UDC*, Mason and Wilson JJ said[100] that 'the court, if it were to enforce the clause, would be performing a function very different from that which it undertakes when it severs or reads down an unenforceable covenant, such as a covenant in restraint of trade'. The 'out of all proportion' basis for the conclusion that a term is a penalty itself suggests that partial enforcement is inappropriate.[101] There is an analogy with the Restraints of Trade Act 1976 (NSW). Departing from common law principles in that context, the Act employs a partial enforcement process, under which a 'restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not'.[102] But the process is denied to the promisee if there is a 'manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint'.[103] If we must have penalties where there is no breach, surely that is the correct approach — the promisee gets nothing.

Third, the balance of authority[104] favours the view that the amount stipulated in a penalty is not a cap on the promisee's damages entitlement. Given the greater latitude allowed under *Dunlop*, it is rare for any claim in damages to exceed the sum provided for in any clause found to be a penalty. But under *Andrews*, the law must be different. That is, again, the influence of ancient cases and procedures. Historically, the partial enforcement idea was associated with a right of election.[105] In relation to a money sum payable on breach, the promisee could choose to sue on the penalty or for damages. In a

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100 (1986) 162 CLR 170 at 193; 68 ALR 185.

101 Cf *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 703 per Lord Morris ('ought not to be accorded any validity').

102 See s 4(1).

103 See s 4(3). The process is also denied if there is no legitimate interest to support the restraint in the first place: see eg *A Buckle & Son Pty Ltd v McAllister* (1986) 4 NSWLR 426.

104 See *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66; *W & J Investments Ltd v Bunting* [1984] 1 NSWLR 331 at 335–6 (see A H Hudson (1985) 101 *LQR* 480). Cf *AMEV-UDC* (1986) 162 CLR 170 at 212; 68 ALR 185. But cf *Commissioner of Public Works v Hills* [1906] AC 368 at 376; *Pearl Assurance Co Ltd v Government of the Union of South Africa* [1934] 1 AC 570 at 584.

105 See above, text at n 41.

claim to enforce the penalty, the amount was necessarily a cap.[106] But if the promisee elected to ignore the penalty, there was no limit.[107]

It is, of course, a long time since courts spoke in terms of enforcing penalty clauses.[108] Modern decisions, in which provisions fixing an amount substantially less than the promisee's actual loss have been enforced as liquidated damages,[109] proceed either on the basis that the right of election has disappeared from the law or that no such right exists unless the clause is a penalty. To modern contract lawyers it must seem rather peculiar that a plaintiff should have a choice of remedies where a provision is a penalty, but only one remedy where the clause is liquidated damages. Even stranger is that the law should conceive that an action on a penalty is an action in debt,[110] when the modern law establishes that an action for liquidated damages is an action for damages.[111] But most strange of all is the idea, adopted in *Andrews*, that by reason of having obtained agreement to a penalty, a promisee should become entitled to receive compensation for which it never bargained.

These issues are not acknowledged in *Andrews*, let alone discussed.

Finally, *Andrews* may have implications for other contractual arrangements that refer to, or depend upon, agreed damages clauses in a principal contract. Actions against guarantors have always been denied where the principal debtor has agreed to pay a penalty. The rationale is that a clause which is a penalty does not give rise to any obligation.[112] Yet if the penalty clause is enforceable pro tanto, it may be that the guarantor's liability is affected in a corresponding manner.

Payments 'in Terrorem' and Collateral Stipulations

The concept of penalty adopted by the High Court in *Andrews* posits that the provision is 'as a matter of substance' a 'collateral or accessory stipulation' which imposes an 'additional detriment' on the 'failure of the primary stipulation'. In its view, such a collateral stipulation is 'in the nature of a security for and in terrorem of the satisfaction of the primary stipulation'. The High Court expressed itself as a matter of principle. That key statement appears to be directed not only to the question of the scope of the penalty rules, but also to the substance of what constitutes a penalty, albeit dressed up in a prima facie case. Applied to cases of breach it makes every agreed damages clause which provides for more than common law damages prima facie a penalty. As applied to events which are not a breach it is inconsistent with the acceptance in prior cases of the view that a 'penalty is a

106 *Wilbeam v Ashton* (1807) 1 Camp 78; 170 ER 883.
107 Cf *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332 at 346.
108 There is a peculiar line of charterparty cases. See *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 at 72–3; *Watts Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227.
109 See eg *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20.
110 See *Jobson v Johnson* [1989] 1 WLR 1026 at 1040–1.
111 See *Hungerfords v Walker* (1989) 171 CLR 125 at 139, 162; 84 ALR 119; *Mantoufeh v Enterprise Finance Solutions Pty Ltd* [2009] NSWSC 1144.
112 For a recent statement, see *Azimut-Benetti SpA v Healey* [2011] 1 Lloyd's Rep 473 at 479; [2010] EWHC 2234 at [24]. See also *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1.

punishment . . . for not doing, or for doing something',[113] and that the in terrorem rationale can only be applicable where the relevant event is breach.[114]

The High Court in *Andrews* does not explain the failure of the modern cases to speak in terms of 'collateral' stipulations.[115] There is no mention of it in *Ringrow*. That is probably because it has generally been regarded as otiose. Every agreed damages provision is by definition 'accessory' in character — whether or not it is a penalty.[116] As a tool used in ancient times, it was given prominence in *Andrews* to justify application of the penalties doctrine to payments not activated by breach of contract. The court gave no examples to show how the line is drawn between a provision which is, and one which is not, 'in substance' a 'collateral or accessory' stipulation.

Impact of the prima facie rule

Underpinning the modern law (as conventionally understood) is the idea that a genuine pre-estimate should be enforced because, as a liquidated damages clause, it benefits both parties. That is true whether or not the amount stipulated exceeds what would otherwise be recoverable as damages. But the conception of penalty in *Andrews* seems different. Additional detriment is said to activate a prima facie rule. That reflects the ancient proposition that if A is obliged to pay a definite sum to B, a promise to pay a greater sum to B if the money is not paid on time is prima facie a penalty. Although stated in Lord Dunedin's second test, the rule is not much of a guide to the modern law.

Under the approach explained in *AMEV-UDC*, even a substantial 'additional detriment' does not create a prima facie position. For example, the decision paved the way for the conclusion in *Esanda Finance Corp Ltd v Plessnig*,[117] that a sum stipulated to become payable following termination for breach is a genuine pre-estimate if it liquidates loss of bargain damages, even though the clause may apply to situations in which the breach which activates the termination right is a failure to pay money, and notwithstanding that the damages rules would limit the promisee to a purely nominal sum.[118] The decision exemplifies a concern to promote freedom of contract. It is based on the view that an agreed damages provision is prima facie effective.

Inherent in the modern law — including the 'out of all proportion' criterion approved in *Ringrow* — is that the onus of proof is on the promisor.[119] That is how the tests stated in *Dunlop* have been applied. Except to the extent that those tests rely on contrary presumptions, the prima facie position is that a clause provides for liquidated damages. The purpose of construction of the contract is to establish whether the term provides for a penalty. It is not to establish a prima facie position. But, under *Andrews*, unless the court

113 *Thompson v Hudson* (1869) LR 4 HL 1 at 28 per Lord Westbury.
114 See eg *Bridge* [1962] AC 600 at 624.
115 Cf *Moss' Empires Ltd v Olympia (Liverpool) Ltd* [1939] AC 544 at 551; *O'Dea* (1983) 152 CLR 359 at 383; 45 ALR 632.
116 Cf *Acron* (1985) 157 CLR 514 at 518; 61 ALR 245.
117 (1989) 166 CLR 131; 84 ALR 99.
118 Under *Shevill v Builders Licensing Board* (1982) 149 CLR 620; 42 ALR 305.
119 See *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447; *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 at 527. But cf *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578.

considered that *any* additional detriment is sufficient to create a presumption in favour of penalty, its concept seems bedevilled by circularity: a collateral stipulation is a penalty if it imposes on the promisor an obligation to pay a penal sum.

Collateral benefits

Because of the close association under equitable principles between penalty and forfeiture, it may well be correct to say — as a matter of original theory — that the rationale for refusal to enforce a penalty was the conception of a penalty as a 'collateral or accessory stipulation . . . in the nature of a security for and in terrorem of the satisfaction of the primary stipulation'.

To the modern eye, however, the High Court's concept (in *Andrews*) must appear convoluted in its formulation and in its application unduly complex. The modern law of contract has opted for a simpler and more practical approach. There are three points. First, whatever may have been the position before the Judicature reforms, the in terrorem nature of a provision is determined indirectly as a matter of law. Unless the penal nature of the clause is manifest, the intention for the clause to be a penalty is not a direct inference based on the collateral nature of the stipulation, and the fact that it provides for an additional detriment.[120] Whether a payment is in terrorem is determined by the application of rules. Those rules provide bases for inferring the intention of the parties. Intention is determined as a matter of law, not fact.[121]

Second, under the modern law, application of the penalties doctrine gives effect to a rule of public policy, not a rule of equity. Because the concern is to police the compensation principle of contract damages, if a clause provides for payment of a sum which exceeds a genuine pre-estimate it is a penalty. The emphasis is on genuineness and, except where the specific tests provide otherwise, the modern law does not insist on accuracy.[122] Because legal criteria and tests are used, the in terrorem description is a statement of the effect of the clause as a matter of law. Therefore, as Lord Radcliffe said in *Bridge*,[123] the in terrorem description adds 'nothing of substance to the idea conveyed by the word "penalty" itself, and it obscures the fact that penalties may quite readily be undertaken by parties who are not in the least terrorised by the prospect of having to pay them'. As he went on to explain, the basis for the law is public policy, not the prevention of unconscionable conduct or other conduct with which equity has concerned itself. Relief is not discretionary and the promisor is not required to suffer judgment on the penalty as a condition of relief.

Third, modern contracts bear no resemblance to the 18th-century 'model' that influenced the High Court in *Andrews*. Stipulations which provide for additional benefits and detriments on the occurrence of contingencies are

120 See also A L Corbin, *Corbin on Contracts*, West Publishing Co, St Paul, Vol 6, 1964, §1058 (liquidated damages also 'in large measure' in terrorem).

121 Application of the rules may lead to a provision being regarded as penal on a basis which is largely technical. Cf G H Treitel, *Remedies for Breach of Contract*, Clarendon Press, Oxford, 1988, p 229. In *Andrews*, no attempt is made to distinguish between such cases and true 'in terrorem' cases. See eg (2012) 290 ALR 595 at 609; [2012] HCA 30 at [57].

122 Cf J W Carter and Elisabeth Peden, 'A Good Faith Perspective on Liquidated Damages', in C E F Rickett, ed, *Justifying Private Law Remedies*, Hart Publishing, Oxford, 2008, p 149.

123 [1962] AC 600 at 622. See also *O'Dea* (1983) 152 CLR 359 at 399; 45 ALR 632.

common. Unless in substance activated by breach, they are no concern of the law of penalties. And there is no requirement that the clause secure performance of a primary obligation. An obligation to pay money following termination for breach is subject to the penalty rules; but given that the contract has been discharged, it is not easy to identify the primary obligation the performance of which is secured by the clause.

The bond cases

In *Andrews* the argument of ANZ was that, taking a modern perspective, the bond cases should be seen as illustrating payments activated by events which — as a matter of substance — involve breaches of duty. The High Court rejected that argument. In so doing it again disagreed with Mason and Wilson JJ in *AMEV-UDC*.[124] Although in *Andrews* the court referred to several cases[125] in which a promise has been implied or inferred from the fact that the condition of the bond was within the control of the obligor, these cases were cast aside as not illustrating a general principle.[126]

It is of course a major oversimplification to speak of the 'bond cases'. Bonds were used in a variety of situations, to serve a variety of purposes. Much of the explanation in *Andrews* relates to types of bond which have not been in use for a very long time.[127] Since it has been well understood for the best part of 300 years that penal bonds are not enforced in accordance with their terms, they necessarily became stylised instruments, enforced in a distinctive way.[128] The bond cases cannot provide a reliable guide to bilateral executory contracts. But if there is an analogy, it must be coherent. Whatever jurisdiction equity formerly exercised, under the modern law of contract a court has no general power to rewrite an instrument.[129] For a court to order the payment of compensation for a loss incurred, it must either be acting pursuant to statute or on the basis of breach of duty. In relation to the latter — which is all that is relevant if the bond cases are a guide to bilateral contracts — the court must be acting pursuant to the instrument. Therefore, assume that a contract states a penalty even though the contingency on which the sum is expressly made payable is not a breach of contract. If the court enforces the penalty to the extent of the beneficiary's loss it must be giving effect to an intention to allocate responsibility for that loss to the promisor. Assessment by reference to loss caused by the failure of a contingency can only be on the basis that the contingency was the subject of some sort of promise. The fact that one meaning of condition is 'contingency' does not prevent the inference of a promise in relation to its occurrence or non-occurrence. If that inference

124 But cf (2012) 290 ALR 595 at 611; [2012] HCA 30 at [67].

125 See eg *Parks v Wilson* (1795) 10 Mod 515 at 518; 88 ER 832 at 833; *Prebble v Boghurst* (1818) 1 Swans 309 at 318; 36 ER 402 at 406; *National Provincial Bank of England v Marshall* (1888) 40 Ch D 112 at 114, 116, 117.

126 See (2012) 290 ALR 595 at 605; [2012] HCA 30 at [42] (rejection of 'general proposition as to the contractual character of the condition in a bond').

127 Cf H McGregor, *McGregor on Damages*, 18th ed, Sweet & Maxwell, London, 2009, §13-004 ('only an historical interest').

128 Including under the Administration of Justice Acts. However, the Acts were not limited in their application to bonds.

129 But cf *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; 130 ALR 570.

cannot be made, a court which orders payment of 'compensation' is not enforcing the agreed bargain.

The High Court treats *Waterside* as illustrating that a payment obligation activated by a non-promissory contingency is subject to the penalty rules. We do not understand the analysis. The case seems quite consistent with the idea that, where the event referred to in the condition is within the control of the obligor, a promise should be inferred from agreement to the condition.[130] In *Waterside*, the action was to recover the sum of £500 payable under a bond given to the Industrial Registrar. The condition of the bond was payment of £50 on the occurrence of certain specified events, such as a strike by two or more members of the Federation. Since the condition was not fulfilled, the £500 fell due. In both judgments, the issue was said[131] to be whether the £50 payment was a penalty for breach of the condition, or liquidated damages. It would be absurd to inquire whether a sum is 'liquidated damages', and at the same time to deny that the clause quantifies liability for breach of duty. Nor did the High Court accept such an absurdity in *Waterside*. Instead, it cut through the form of the bond and went to its substantive effect. The real question was not the relation between the condition and the headline penal sum, but the relation between the two components of the condition. Hence, the High Court's remarks about the difficulty of assessing loss for 'breach' of the condition. If the condition were, in substance, one to pay £50 in a certain event, then, that event having occurred, the condition would be breached by non-payment of £50; the measure of damage would be readily calculable as £50. That was not how the case was approached.[132] The promise to pay £500 was a penalty, but each £50 payment was, as a matter of substance, in the nature of agreed damages in respect of the other component of the condition. The promise to pay that amount was enforceable as a promise to pay liquidated damages.

Dealing with the Qualifications

Expressly or impliedly, in *Andrews* the High Court identifies three qualifications to its analysis. First, the penalties doctrine is 'not engaged if the prejudice or damage to the interests of the second party by the failure of the primary stipulation is insusceptible of evaluation and assessment in money terms'.[133] Second, a provision will not be a penalty if there is an identifiable reciprocal benefit. Third, there is no scope to consider the penalties doctrine if a money sum becomes payable because the promisor has exercised an option in performance.

Assessment in money terms

The first qualification operates if 'compensation' cannot be assessed. Even if the stipulation is 'collateral', *Andrews* says the penalty rules are not

130 See also A L Corbin, *Corbin on Contracts*, West Publishing Co, St Paul, Vol 6, 1964, §1056 ('penal bond . . . has come to be regarded as a promise that the condition will be performed; and the remedy, instead of debt on obligation to recover the prescribed penalty, has become assumpsit for damages as compensation for the nonperformance of the condition').

131 See (1919) 27 CLR 119 at 128, 132.

132 Cf (1919) 27 CLR 119 at 132 per Isaacs and Rich JJ.

133 (2012) 290 ALR 595 at 598; [2012] HCA 30 at [11].

'engaged'. We understand that to mean that the rules do not apply. Like the idea that under the modern law of contract a court has jurisdiction to award 'compensation' for loss when there is no breach of duty, that seems wrong as a matter of principle.

It would scarcely be credible to suggest that if damages are impossible to assess the promisee can enforce an obligation to pay a wholly arbitrary sum on the basis that the penalties doctrine is irrelevant. Nor is that the law. Whatever the position may have been in the 19th century,[134] difficulty in assessing damages is simply a material factor when deciding whether an agreed damages provision operates as a penalty. It is therefore part of the penalties rules themselves, not a basis for saying that the rules are displaced. Indeed, the fact that damages are difficult to assess seems the very reason for applying the distinction, not the basis for saying that the distinction does not apply.[135] Thus, in *Dunlop*, Lord Dunedin said[136] it is 'no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility'.

Of course, it may be that the High Court intended to restrict its approach to cases where the alleged penalty is not activated by breach. However, it did not say so. And the best reason for saying the analysis is different is the simple one — that the penalties doctrine does not apply.

Even if the High Court in *Andrews* meant to say that the penalty rules are not 'engaged' where a stipulation is within the ambit of the rules but does not contravene them, since it uses[137] the decision in *Waterside* to illustrate its point, we do not understand the analysis. Albeit in the context of a penal bond, the case seems an orthodox application of *Dunlop*.[138] Nobody doubted that in providing for the payment of £500 if the Federation failed to pay £50, the bond stated a penalty. Accordingly, when the trial judge (Hodges J) gave judgment for the penalty,[139] leave to levy execution was limited to £50. That sum was described as 'damages sustained by reason of breach of the condition of the bond'.[140] In other words, in accordance with ancient practice,[141] the court relieved against the penalty. The question for the High Court was whether the promise to pay £50 was liquidated damages. On any view, the penalty rules were 'engaged' in the case.

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134 See *Galsworthy v Strutt* (1848) 1 Ex 659 at 666; 154 ER 280 at 283 per Alderson B (since damages were uncertain, and the parties referred to 'liquidated damages', the court could give 'the words their plain and ordinary meaning'). The position was the same if there were several stipulations, each of uncertain value; see eg *Atkyns v Kinnier* (1850) 4 Ex 776 at 783–4; 154 ER 1429 at 1432–3; *Reynolds v Bridge* (1856) 6 E & B 528; 119 ER 961.

135 See C J Goetz and R E Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach' (1977) 77 *Columbia Law Review* 554 at 559–60 (liquidated damages agreements are enforceable only if the damages are uncertain and difficult to estimate; the greater the uncertainty the greater the latitude).

136 [1915] AC 79 at 87–8.

137 (2012) 290 ALR 595 at 598; [2012] HCA 30 at [11].

138 Counsel for the successful respondent (Starke) was well aware of recent developments in the law of contract when he said the case was within *Dunlop*. See (1919) 27 CLR 119 at 123.

139 Cf *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 at 73.

140 See (1919) 27 CLR 119 at 125.

141 As expressed in the predecessor to the Instruments Act 1958 (Vic), s 30, and derived from the Administration of Justice Acts.

Accordingly, both judgments delivered in the High Court proceed on the basis that the question was whether £50 was liquidated damages. Knox CJ, Barton and Gavan Duffy JJ referred[142] to the fact that the actual loss would be 'practically impossible to calculate' as one of five factors which they took into account in reaching the conclusion that the sum agreed was liquidated damages.

Dependent rights and obligations

Under the law as it was understood before *Andrews*, it was tautological to say that a penalty was a collateral or accessory stipulation: by definition, it was engaged upon the failure to perform a primary contractual obligation. The abandonment of breach as a reference point gives rise to an important doctrinal concern, which might be described as 'architectural' in nature.

Dependent obligations of an almost infinite variety exist in contracts. Furthermore, the contingency upon which one party's obligation to perform depends may or may not be the subject of another promise by that party. It would be extraordinary and contra-historical for all such arrangements to become the subject of review under a law of penalties. It suffices to give two well-known examples. An insurer's promise to indemnify against a loss upon an event is contingent in nature. An agreement as to the value of the insured subject-matter, even if plainly excessive, has never been regarded as within the rules on penalties; the pre-estimate is generally binding in the absence of fraud.[143] Likewise, gaming and wagering contracts have always been treated on a very different basis from penalty clauses.

It therefore becomes necessary to distinguish those dependent obligations which are subject to the rules on penalties from those that are not.[144] In *AMEV-UDC*, Deane J referred to an expanded penalty doctrine that applied to:[145]

> a contractual liability . . . to pay or forfeit an amount . . . on or in default of the occurrence of an event which can be seen, as a matter of substance, to have been treated by the parties as lying within the area of obligation of the party liable to make the payment in the sense that it is his or her responsibility to ensure that the specified event does or does not occur.

The High Court's definition in *Andrews* is broader in its reference to the imposition of an additional 'detriment' upon one party to the 'benefit' of the other. The purposive element of the definition — that the stipulation operates as 'a security for and in terrorem of the satisfaction of' a primary stipulation — also appears to be wider, as it is not limited to the class of events described by Deane J in *AMEV-UDC*.

The definition calls for a degree of characterisation that was not necessary under the old penalty rules.[146] Taken at face value, the definition seems over-inclusive: it is too easily satisfied. If the prima facie rule applies whenever there is an additional benefit, the conception makes no allowance

142 (1919) 27 CLR 119 at 128.
143 See eg *Elcock v Thomson* [1949] 2 KB 755 at 760.
144 See also Harder, above, n 3 at 58–60.
145 (1986) 162 CLR 170 at 199; 68 ALR 185.
146 See text at above, n 120 and below, n 151.

for the various bases on which a detriment may be 'additional', or the fact that the law permits certain additional detriments. For example, since in *Andrews* the court was at pains to explain that the detriment need not be an executory promise to pay money, any additional right which the promisee would not otherwise enjoy is capable of activating the prima facie rule. That not only includes all rights of forfeiture,[147] it also includes many rights of termination unless the view is taken that these would not be 'in substance' collateral stipulations!

There seems no better way to secure timely performance than to obtain a right to terminate the contract if there is any delay in performance. Particularly where the breach relates to the payment of money, in most cases there would be no common law right of termination. Therefore, failure to perform on time exposes the promisor to an additional detriment. But nobody suggests that a right of termination is subject to the penalty rules just because it is drafted in favour of only one party.[148] An indemnity is another example. If a contract between A and B provides that A must indemnify B if a certain event occurs, the indemnity may well be designed to secure satisfaction of another term of the contract. Given that indemnities often impose an 'additional detriment' on the promisor, they potentially fall within the High Court's conception of penalty. If the relevant event is breach of contract, there may be an argument that the penalty rules apply.[149] Following *Andrews*, therefore, contractual indemnities in general are open to classification as penalties.

Reciprocal benefit

Fees for services and other examples of reciprocal benefit are exempted from the analysis in *Andrews*. Thus, the High Court intimated that the questions to be considered in the trial of the case might include:[150]

> whether the fees were charged by the ANZ, as specified in pre-existing arrangements with the customer, and ANZ, respectively, for the further accommodation provided to the customer by its authorising payments upon instructions by the customer upon which the ANZ otherwise was not obliged to act, or upon refusal of that accommodation.

Under the conventional approach to penalties, unenforceability is based on a rule of public policy. The decision whether a clause states a penalty does not involve a balancing of the various contractual provisions. No inquiry can be made as to whether, elsewhere in the contract, there is some benefit which can be seen to counterbalance agreement to the penalty.[151] A promise to pay a penalty is therefore unenforceable even if expressly given in exchange for an additional benefit which the promisee would not otherwise have provided.

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147 That seems to confirm that the equitable approach to penalties is inseparable from its approach to forfeiture. Cf R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Sydney, 2002, §18-150.

148 Cf *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694 at 702.

149 See J W Carter and Wayne Courtney, 'Indemnities against Breach of Contract as Agreed Damages Clauses' [2012] *JBL* 555.

150 (2012) 290 ALR 595 at 613; [2012] HCA 30 at [79].

151 See *Ringrow* (2005) 224 CLR 656 at 670–1; 222 ALR 306; [2005] HCA 71 at [38].

However, in the quotation above, the High Court requires a different rule to be applied. It conceives of a sum which would otherwise be a penalty not being a penalty because the promise has a designated agreed return. But it is a selective approach. For example, if the promise to pay a dishonour fee is a 'collateral stipulation', it will be construed as a penalty if no particular benefit has been allocated to the fee, or, presumably, the benefit is colourable. It will not be relevant to consider the 'total package', including matters such as whether, or at what rate, interest is paid on sums held in current account.

The search for reciprocal benefit which *Andrews* postulates must be based on the view that the 'additional detriment' is unobjectionable if it has been provided as the whole or part of a discrete 'price' for the benefit. That reflects the finding of the root of the law in the obsolete cases on penal bonds, that is, unilateral obligations not supported by a reciprocal consideration. Even in the context of bilateral contracts, in primitive times lining up promises like bonded pairs may well have been important. Indeed, the early cases in assumpsit may well have suggested a conception of bilateral contracts as two unilateral promises binding by reason of their exchange at more or less the same time. But the modern conception of contract is that all the promises made by one party are given in exchange for ('in consideration of') all the promises provided by the other.

Andrews highlights how undesirable it is for the law of penalties to target provisions which are not activated by breach. Although the essence of any contract may be a promise to pay in return for a promise to supply, it is elementary that there will often be a great many other promises which do not have particular — designated — agreed returns for their performance. The mere fact that it is impossible to identify a distinct agreed return for a payment of money does not signify that the promise to make the payment is subject to the penalty rules, even though performance will often be linked to another promise.[152] Unless, as a matter of substance, occurrence of the relevant contingency is a breach of contract, the penalties doctrine has no role. Equally, if the doctrine is applicable it should make no difference that the promisee can point to a reciprocal benefit. That *Andrews* is rationalised by reference to decisions reached at a time when equity was inclined to grant relief simply on the basis of the inadequacy of consideration[153] is no surprise. However, it is a rationalisation which ignores the modern conception of contract.

Furthermore, this analysis suggests that contract drafters, in seeking to evade the application of the new penalties doctrine, will simply exchange one set of drafting techniques for another. The old rules encouraged structures providing for payments or rebates upon contingencies that were not otherwise the subject of a contractual promise. The new rules, which extend to non-promissory contingencies, encourage restructuring in the form of contractual options, exercisable upon a certain event, for a contrived or nominal consideration.

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152 See above, text at n 149.

153 See R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, Butterworths, Sydney, 2002, §16-40.

Performance options

If a contract states two primary obligations, either of which can be performed without breaching the other, and the promisor is not obligated to perform both, the penalties doctrine has no application. That is explicable on the basis that there is no breach of contract.[154] However, in *Andrews* the relevance of the concept is based on the view that neither promise is collateral to the other. Unfortunately, the decision which the High Court treats as illustrating the qualification — *Metro-Goldwyn-Mayer Pty Ltd v Greenham*[155] — is far from convincing. Moreover, it serves merely to reinforce the view that the penalties doctrine is restricted to benefits to be conferred following breach of contract.

The court explained the decision as follows:[156]

> In *Metro-Goldwyn-Mayer*, the contract for the hiring of films to exhibitors for public showing conferred the right to one screening only. The exhibitor was obliged to pay for each additional screening a sum equivalent to four times the original fee. The questions of construction of the contract were resolved by Jacobs and Holmes JJA in such a fashion that the penalty doctrine had no application. Jacobs JA concluded [1966] 2 NSWR 717 at 723:
>
> > There is no right in the exhibitor to use the film otherwise than on an authorized occasion. If he does so then he must be taken to have exercised an option so to do under the agreement, if the agreement so provides. The agreement provides that he may exercise such an option in one event only, namely, that he pay a hiring fee of four times the usual hiring fee.

Metro-Goldwyn-Mayer has not previously been regarded as an important authority. The choice of this decision as one of a very small number of 20th-century authorities discussed in the text of the judgment in *Andrews* is not easy to explain. Nor does reliance on the decision engender confidence in the new law of penalties.

Relevantly, the contract in *Metro-Goldwyn-Mayer* licensed the exhibitor to show a film once, or more than once with the consent of the distributor. Clause 54 provided that the exhibitor was liable to pay the usual hiring fee whether or not it showed any film which it was expressly licensed to show. But since there was an express prohibition,[157] any unlicensed showing was a

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154 Cf A L Corbin, *Corbin on Contracts*, West Publishing Co, St Paul, Vol 6, 1964, §1058 ('the promisee clearly expresses his assent to receive either one of them as the agreed exchange for his own performance').

155 [1966] 2 NSWR 717.

156 (2012) 290 ALR 595 at 614; [2012] HCA 30 at [82].

157 See cl 9 ('shall not exhibit'). The High Court's interpretation of this case will no doubt have implications for other types of prohibitions, such as prohibitions on assignment. If a prohibition on assignment in the form of the promisee 'shall not' assign its rights under the contract is not construed as a mere promise not to assign — with the natural result that an attempted assignment merely gives rise to a right to damages — then it would appear that there exists only one category of prohibition. That is, a prohibition that negates the power to carry out some act rather than merely undertaking not to do it: see Greg Tolhurst, *The Assignment of Contractual Rights*, Hart Publishing, Oxford, 2006, §6.87, p 259. Of course, even with two categories a court may take the view that it will not recognise an assignment in the face of a mere promise not to assign. Similarly a court will not recognise a revocation of an option even when drafted in the form of an irrevocable offer. To do so would defeat the intention of the parties. The alternative view is that such prohibitions do not inhibit assignment but ensure the obligor need only account to the assignor.

breach of contract.[158] If the consent of the distributor was sought and obtained, there was no breach of contract.[159] But if consent to a second showing was not sought the exhibitor was required to pay the larger sum.

The contract did not confer an option on the exhibitor to make an extra showing without seeking consent. Therefore, the exhibitor did not enjoy a true option in performance. Moreover, if there was an unauthorised showing, cl 56(a) became applicable. It provided for payment of the increased amount, on the basis that ('as if') the exhibitor had 'without excuse failed to exhibit' the film on an 'authorised exhibition date'. Given the express prohibition, and the fact that the normal fee was payable if the exhibitor failed to exhibit when authorised to do so, the larger sum was in the nature of agreed damages for breach of the agreement. Whether the actual breach was the second showing, or the failure to obtain consent, hardly matters because the contract made the increased amount payable on the basis of a deemed breach.

Jacobs JA saw the matter differently. He was concerned to establish that even if consent was not sought, both possession and exhibition would nevertheless be authorised. Therefore, although it did not seek consent, in Jacobs JA's view the exhibitor 'must be taken to have exercised an option'. This is based on the view that otherwise the exhibitor would have been liable in conversion for showing the film. This analysis seems somewhat idiosyncratic. It ignores the statement in cl 56(a), which deemed the exhibitor *not to have shown* the film. Therefore, even if it is assumed that the penalties doctrine would not have applied if the contract had deemed consent to have been given, that was not the contract.

More generally, it is not easy to reconcile Jacobs JA's approach with *Bridge*. In that case the contract expressly conferred an option on the hirer to return the goods and pay the agreed fee for early termination. But the majority took the view that it would have been fictional to deem the hirer to have exercised an option where there was no expression of any intention to do so. Because the option was express, it was a stronger case than *Metro-Goldwyn-Mayer*. In *Andrews*, the court chose not to discuss *Bridge*.

All options state conditional performance obligations. Even accepting Jacobs JA's approach in *Metro-Goldwyn-Mayer*, what is the difference between an option which a promisor is *deemed* to have exercised and the discharge of a conditional performance obligation following the occurrence of the relevant contingency? Given the decision in *Andrews* that sums which are not payable on breach of contract may nevertheless be subject to the penalties doctrine, why should the case be supported on the basis that Jacobs JA's construction of the contract showed that there was no breach by the exhibitor?[160] It might as well be said that the principal consents to delay in completion by a builder, if only the builder will pay agreed damages. The

158 Jacobs JA records ([1966] 2 NSWR 717 at 722) that the parties agreed that unauthorised exhibition was a breach of contract.

159 In that respect, the contract stated expressly what is inherent in every contract, namely, an 'option' to obtain consent for an act which would otherwise be a breach; or to do the act and breach the contract.

160 See Contracts Restatement 2d (1979), §356, com c ('disguised penalty'). See also Law Commission, *Penalty Clauses and Forfeiture of Money Paid*, Working Paper No 61, HMSO, London, 1975, para 18.

analysis also seems to contradict the concern to arrive at a modern doctrine of penalties which is faithful to the history of the subject.

The Role of the High Court

Any decision by an ultimate court of appeal ought to be relevant, sympathetic to generally held views, positive in its contribution and expressed in reasoning which is readily understood. The Australian profession looks to the High Court to keep watch over developments in the law, to draw the strings together and develop helpful principles, rather than knock down bridges without rebuilding. If it grants leave to hear a matter that raises the complete reform of an area of law, then the court must be prepared to address properly the arguments for and against such a move. Often the complexity of such changes means that the court is not the proper place to consider such issues and they are best left to the legislature properly informed by a law reform body. Hence in the past the court has been careful in considering such questions.[161]

The decision in *Andrews* does not meet any of those criteria. In any controversial decision in contract, it would seem reasonable to expect the decision to have a distinct policy rationale. It might be expected that the court would take into account matters such as:

- the impact of the decision for the local community;
- contemporary authority in other common law jurisdictions;
- contemporary debate on the subject in journals and texts; and
- the modern conception of a penalty and its institutional backing.

None of these is considered in *Andrews*. Indeed there is no statement of any policy rationale in *Andrews*; the decision is entirely doctrinal.[162]

That the High Court should have chosen to resolve an issue which was not previously regarded as controversial without full explanation of the relationship with its own prior decisions, and what goals Australian contract law seeks to achieve, undermines the judgment. So also does the failure to address the question of why the penalties doctrine should be extended beyond breach. The only rationale is that it was once the law in England. But the case also illustrates the somewhat unpredictable approach that has characterised the High Court's treatment of important issues in contract law in recent years.

Due regard for equity and history has often characterised important contract decisions by the High Court.[163] In the 1980s, the court made positive contributions in areas such as promissory estoppel,[164] relief against forfeiture[165] and unconscionable conduct[166] by doctrinal analysis justified principally by reference to equity jurisprudence. By contrast, *Andrews* is very

161 As for example with the changes to the law on privity of contract contemplated in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; 80 ALR 574.

162 This has been the hallmark of the court in recent years: see Paul Finn, 'Internationalisation or Isolation: The Australian *cul de sac*? The Case of Contract Law' in E Bant and M Harding, eds, *Exploring Private Law*, Cambridge University Press, Cambridge, 2010, p 41 at pp 46–7.

163 See J W Carter and Andrew Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *UWALR* 49.

164 See *Legione v Hateley* (1983) 152 CLR 406; 46 ALR 1; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 76 ALR 513.

165 See *Legione v Hateley* (1983) 152 CLR 406; 46 ALR 1.

much a 'backward-looking' case. It resembles *Tanwar Enterprises Pty Ltd v Cauchi*,[167] where the traditional heads of 'fraud, accident, surprise and mistake' were resurrected as part of the decision to discredit the approach taken by Mason and Deane JJ to relief against forfeiture in *Legione v Hateley*.[168]

Again, in relation to important aspects of contract construction, such as the construction of exclusion clauses[169] and the application of 'subject to' clauses,[170] there was a time when the High Court seemed willing — even without the aid of 'equity' — to address a concern for 'correct' doctrine while at the same time promoting 'laissez faire notions', common sense and good faith in construction. The ideas of equity and construction came together in *Louinder v Leis*,[171] where the High Court rewrote the law on notices to complete in a clear and coherent manner. The decision in *AMEV-UDC* was consistent with this approach, including the majority's rejection of the idea that the solutions to penalty issues in modern commercial contracts were to be found in pre-Judicature decisions.[172] As we have explained, following *Andrews*, the status of *AMEV-UDC* is now unclear.

Andrews joins other recent contract decisions of the High Court, the methodology of which is a source of concern.[173] For example, in *Agricultural and Rural Finance Pty Ltd v Gardiner*[174] the controversial rule that subsequent conduct is not admissible in aid of construction was confirmed in a single paragraph, without analysis, and without discussion of conflicting Australian authorities, the position in other jurisdictions or academic discussions of the issue. Similarly, in *Andar Transport Pty Ltd v Brambles Ltd*,[175] a rule of construction was adopted for contractual indemnities in a manner which left unresolved the conflicting views expressed in lower courts on the status of the *Canada SS* rules following *Darlington Futures Ltd v Delco Australia Pty Ltd*.[176] The decision in *Andar* is also significant for including an unhelpful excursus into the concept of 'compensated sureties', not to mention the apparent inconsistency[177] between the approach adopted for contractual indemnities and the approach applied in the construction of indemnity

166 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; 46 ALR 402. See also *Taylor v Johnson* (1983) 151 CLR 422; 45 ALR 265 (unilateral mistake).
167 (2003) 217 CLR 315; 201 ALR 359; [2003] HCA 57.
168 (1983) 152 CLR 406 at 425; 46 ALR 1.
169 See *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500; 68 ALR 385.
170 See *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537; 41 ALR 441; *Meehan v Jones* (1982) 149 CLR 571; 42 ALR 463.
171 (1982) 149 CLR 509 at 534; 41 ALR 187.
172 See also *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; 57 ALR 609 (application of doctrine of repudiation to leases).
173 See Andrew Stewart and J W Carter, 'The High Court and Contract Law in the New Millennium' (2003) 6 *Flinders Journal of Law Reform* 185; Andrew Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *JCL* 74.
174 (2008) 238 CLR 570 at 582; 251 ALR 322 at 330; [2008] HCA 57 at [35].
175 (2004) 217 CLR 424; 206 ALR 387; [2004] HCA 28.
176 (1986) 161 CLR 500; 68 ALR 385.
177 See J W Carter and David Yates, 'Perspectives on Commercial Construction and the *Canada SS* Case' (2004) 20 *JCL* 233.

insurance,[178] that is, promises by 'compensated indemnifiers'. Equally, opportunities to say useful things about important issues, such as the role of good faith in contract law,[179] have not been taken.

Andrews also illustrates the difficulties which intermediate appellate courts face. Prior to *Andrews*, the High Court had usually stood jealous guard over its own decisions, severely criticising lower courts, particularly the New South Wales Court of Appeal, who sought to detect evolution in the law of contract.[180] For example, in *Garcia v National Australia Bank Ltd*[181] the High Court rejected suggestions that the *Yerkey* principle had been overtaken by developments in respect of unconscionable conduct. More recently, three members of the High Court chose the special leave application in *Western Export Services Inc v Jireh International Pty Ltd*[182] as the vehicle to voice an opinion that the New South Wales Court of Appeal has wrongly treated the High Court's position in relation to the use of context in construction as having moved on since *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.[183] They did not say why the Court of Appeal was wrong, let alone explain the passages in its own judgments from which commentators have drawn the same conclusions as the Court of Appeal.[184] Although in several cases the New South Wales, Victorian and Western Australian Courts of Appeal seem to have treated the judgment in the special leave application as if it were a judgment of the High Court,[185] so far it seems to have been ignored by the High Court itself![186]

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178 See eg *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589; 176 ALR 711; [2000] HCA 65 at [22].

179 See *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45; 186 ALR 289; [2002] HCA 5. See also *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; [2000] HCA 64 (whether employees required to disclose past misconduct to their employers).

180 Cf *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22.

181 (1998) 194 CLR 395; 155 ALR 614.

182 (2011) 282 ALR 604; [2011] HCA 45.

183 (1982) 149 CLR 337; 41 ALR 367.

184 See David McLauchlan and Matthew Lees, 'More Construction Controversy' (2012) 29 *JCL* 97.

185 See *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 at [174]; *Malago Pty Ltd v A W Ellis Engineering Pty Ltd* [2012] NSWCA 227 at [23]; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 at [52]; *Rinehart v Welker* [2012] NSWCA 95 at [116]; *Schwartz v Hadid* [2013] NSWCA 89 at [37], [85]; *Pepe v Platypus Asset Management Pty Ltd* [2013] VSCA 38 at [25]; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216 at [9]; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66 at [81], [107]. Cf *McCourt v Cranston* [2012] WASCA 60, where the Western Australian Court of Appeal took a more cautious approach. Besides neatly highlighting the High Court's inconsistent observations on the issue of surrounding circumstances evidence, it noted (at [22]) that in an appropriate case a court may need to consider 'whether a set of reasons of the High Court dismissing an application for special leave have anything more than persuasive value'; and see also *Fuji Xerox Finance Ltd v CSG Ltd* [2012] NSWSC 890 at [55]–[58]; *Sharp v Maritime Super Pty Ltd* [2012] NSWSC 1350 at [130]. There are more than 100 first instance decisions citing *Jireh*.

186 See *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 293 ALR 241 at 250; [2012] HCA 54 at [36], where French CJ, Crennan, Kiefel and Bell JJ cite *Maggbury*

Conclusions

The quotation from the work of Sir John Salmond that appears at the start of this article is taken from the majority judgment in *PGA v R*,[187] a decision handed down by the High Court some three months before its ruling in *Andrews*. In holding that the common law no longer (if it ever had) recognised a marital exemption to the crime of rape, French CJ, Gummow, Hayne, Crennan and Kiefel JJ reaffirmed the capacity of the common law to evolve with the times. They endorsed the view that the common law should be 'understood not only as a body of law created and defined by the courts in the past, but also as a body of law the content of which, having been declared by the courts at a particular time, might be developed thereafter and be declared to be different'.[188]

In our view, the quotation from Salmond substantially sums up the situation which the High Court of Australia confronted in *Andrews*. In relation to contingent payments not activated by any breach of duty, what was (on one view) previously the law had ceased to be so long before the High Court seized the issue in *Andrews*. The decisions in which equity may previously have intervened on the basis of 'penalty' in that context have never formally been departed from. But that does not alter the fact that, at least by the time of *Dunlop*, they had ceased to be viable precedents. Like most decisions reached in the 17th and 18th centuries, their relevance is purely historical. That had also been established by decisions of the High Court prior to *Andrews*.[189]

Accordingly, what the High Court sought to do in *Andrews* was to turn back time by resurrecting precedents which have long since ceased to be reliable guides to the scope of the penalties doctrine. The fact that there may have been some 'golden age of equity', in which freedom of contract was curtailed even in relation to payments not activated by breach, has no contemporary relevance. And for the High Court to seek to reinstate that golden age, merely because in its view it formerly represented the law in some courts is, as Windeyer J emphasised in the passage quoted earlier,[190] an inappropriate use of legal history. In fact, the High Court itself accurately expressed the position by agreeing that *Dunlop* was the 'product of centuries of equity jurisprudence'.[191] As a matter of contract doctrine, the principles there stated superseded that jurisprudence.

Moreover, as we have explained, unless it is in the bond cases, the High Court does not discuss any case which clearly supports its perspective on the history of the subject. Imperfectly reported cases, decided in contexts vastly different from those which arise under the modern law, to say nothing of

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Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181 at 188; 185 ALR 152; [2001] HCA 70 at [11], one of the principal cases relied on by those who say that the High Court has moved on since *Codelfa*.

187 (2012) 245 CLR 355; 287 ALR 599; [2012] HCA 21.

188 (2012) 245 CLR 355 at 371; 287 ALR 599; [2012] HCA 21 at [23], citing *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 484–6; 128 ALR 1.

189 See above, text at n 54.

190 Text at n 67.

191 (2012) 290 ALR 595 at 599; [2012] HCA 30 at [15] per the court.

fragments from a handbook of equity written in the 17th century,[192] have no bearing on the law of today. It is simply impossible to point to any case in which it was held that a contingent payment in an ordinary commercial contract should be castigated as a penalty even though not associated with breach of contract. Much could be made here of Corbin's observation about 'law and equity':[193]

> Since the two systems varied in important respects, the learned jurists who knew most about them and realized the importance of these differences came to believe that law and equity are different 'in the nature of things' and that a dual system of doctrines and jural relations is inevitable and eternal.

In our view, the distinction between law and equity is not eternal. In the context of penalties in contracts, the modern legal label is 'contract', not 'equity'.

There are major problems in seeking to find a coherent approach to contract in the 18th and early 19th centuries. It is not simply that the forms of action ruled, or that at common law and in equity the law was administered under different procedures in vastly different contexts and social conditions. It is also that the cases were decided without the benefit of the discipline which the (later) conception of a law of contract brought to the law. Every major principle of the modern law of contract must have a basis in policy and doctrine. It is the policy and doctrine of the 21st century against which the High Court, as the guardian of the common law of Australia, should be testing the principles of contract law. When major principles are reconsidered, and a fortiori when the law is changed, the decision must be a response to current conditions. What matters is the coherent application of contract doctrine to give effect to public policy concerns of Australia today. That includes respect for — though not uncritical deference to — the objectives of those who enter into commercial contracts.[194]

If the law of penalties is to be applied to contingent payments not activated by breach, so be it. But the basis should lie in policy, not ancient doctrine. And the policy must be current policy, not policy which, even in England, has long ceased to be a controlling factor. The only concern should be the law of contract as administered in Australia today, not 'equity' as administered (in England) prior to the fusion of law and equity. As we have noted, the policy which underlies the decision in *Andrews* was not in fact articulated. And the concept of 'penalty' adopted by the High Court is not only convoluted, it lacks contemporary support in the law. Since its scope is unclear and its application uncertain,[195] so also is the decision in *Andrews*. That seems to us unacceptable.

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192 (2012) 290 ALR 595 at 607–8; [2012] HCA 30 at [53].

193 A L Corbin, *Corbin on Contracts*, West Publishing Co, St Paul, Vol 3, 1960, §613.

194 Cf John Gava, 'Can Contract Law be Justified on Economic Grounds?' (2006) 25 *University of Queensland Law Journal* 253.

195 We say this notwithstanding that in decisions since *Andrews*, lower courts do not (as yet) appear to have explored its full implications: see eg *Love v O'Brien* [2012] WASC 457; *Sun North Investments Pty Ltd v Dale* [2013] QSC 44; *Cedar Meats Pty Ltd v Five Star Lamb Pty Ltd* [2013] VSC 164.