

## Early termination charges – major developments (and for the penalties regime)

*Last month we reported on new developments on ETCs. Additionally, an Australian case makes it more likely in Commonwealth countries that ETCs are unenforceable and the penalty regimes applies more widely.*

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Last month's articles comprehensively reviewing ETCs are *Early Termination Charges – Enforceable?*<sup>1</sup> and *Minimise early termination charges on switching ICT suppliers: a case study.*<sup>2</sup>

The UK case we reviewed didn't refer to a High Court of Australia decision markedly widening the penalty regime to extend it beyond situations where there is a breach of contract. The case is *Andrews v ANZ Banking* [2012] HCA 30.

*Andrews* also appears to open up potential litigation against banks in many countries.

Until this decision, the widespread view in the courts, including the case we reported on last month, was that the penalty regime only applied to payments due on breach of contract, such as liquidated damages. Payments made as anticipated by the contract – other than for breach – include ETCs; that is, so long as the ETC regime is well drafted, something that often does not happen as we noted in our articles last month.

*Andrews* involves a class action against the ANZ Bank as to fees for honour, dishonour and non-payment. Among other things, it is claimed that those fees are subject to the penalty legal regime, even though the payments are not due because of breach of contract. They are a primary obligation just like well-drafted ETCs and not a payment due on breach.

Australia's final appeal court held that, contrary to the long standing position of the courts, the fees could be subject to the penalty regime. Whether or not the fees are in fact too high – so they are penalties – is to be decided by the trial court.

The Court got to this outcome by an extensive review of the evolution of the penalty regime over the centuries.

This leads to a head-on collision with the deeply entrenched rule that the courts will not enquire into amount of consideration in a contract. If A agrees to pay to B \$400K for a house worth only \$200K, B can insist on the \$400K and the court will not question the lesser value.

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Therefore, despite the new decision, and to ensure that this rule is not eroded, the extension of the penalty regime won't apply to such payments for goods and services.

Where does the ETC fit? It's more likely, where the *Andrews* case is applied, that it will not be treated as a payment for goods and services. But that won't be clear until more cases make the position clearer. The ETC allows the customer to end the agreement earlier, rather than being a payment to receive further goods and/or services.

But there will be many payments potentially due under agreements where it will not be clear whether they are in or out of the penalty regime until more law develops. For example, the Australian case referred to an earlier Australian decision<sup>3</sup> where Metro-Goldwyn-Mayer hired films to exhibitors for one screening only. If the exhibitor screened more than once, it paid 400% of the single screening fee. The NSW Court of Appeal held that the penalty regime did not apply.

It's not clear how that case would be decided today.<sup>4</sup>

Suppliers relying on ETCs and other clauses potentially falling within the scope of *Andrews* should get them checked out.

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1. <http://www.wigleylaw.com/assets/Uploads/Early-Termination-Charges-Enforceable.pdf>
  2. <http://www.wigleylaw.com/assets/Uploads/Minimise-Early-Termination-Charges-Case-Study.pdf>
  3. *Metro-Goldwyn-Mayer* [1966] 2 NWSR 717 (NSW Court of Appeal).
  4. The High Court appears to have left this open (see Para 83 of the judgment).

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