

Following the recent High Court decision penalty fees Paciocco v ANZ Bank - does the bank believe that late payment fees on credit cards could be set at level in which they are unlawful penalties?

In the Paciocco decision, the Court determined that in setting fees like late payment fees a bank may take into account its legitimate commercial interests, such as encouraging the customer to pay on time and the maximum conceivable costs it may incur as a result of the default.

Factors which may affect this cost include:

- the level of debt held by the customer;
- direct costs of additional processing, customer contact and staff handling;
- increased provisioning costs (banks must provide for expected losses in line with accounting practice and regulatory requirements); and
- increased capital costs (banks are expected to hold more capital to reflect the increased risk of lending where payments have not been met).

According to the Paciocco decision, to be a penalty the fee amount would have to be 'out of all proportion' to a bank's legitimate interests. The majority in Paciocco held that these interests could be of a business or financial nature, and were not limited to the reimbursement of the costs directly arising from the customer's breach in making a late payment.