

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates, 16 & 17 February 2005

Question: Add 11

Topic: Consumer Financial Penalties

Hansard Page: E91

Senator Lundy asked:

Does ASIC believe the principle that financial penalties applied to consumers should be relative to their costs or comparable to their costs to the institution – as a principle?

Answer:

There is a general law prohibition on penalties, i.e. contractually based charges for breaches of contract terms, which are disproportionate to the loss suffered by the innocent party.

Such pre-agreed charges for a breach of a contract term should be based on a genuine pre estimate of the damage that would be caused by the type of breach in question.

There is no such prohibition in the ASIC Act or the Corporations Act. However, if a financial services provider knowingly sets a predetermined fee for a consumer that breaches of one of the contract terms and is out of proportion to the general cost to the provider of such a breach (i.e. a penalty at common law), those Acts may be relevant in at least two ways.

1. It may constitute unconscionable conduct under the ASIC Act .
2. Where the service provided is a Corporations Act financial service, it may breach the s912A obligation to do all things necessary to ensure the financial services are provided fairly honestly and efficiently.