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ANZ - Bank fees class actions

ANZ, CBA, NAB, WBC now face claims in NZ

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Summary

- ANZ has been sued in NZ - it is the first bank to be sued, with other cases expected in NZ.
- The class action against ANZ in Australia is awaiting judgment and is a test case.
- At stake for the banks: all exception fees collected from claimants since about 2004 (fees would be reimbursed) and the size of exception fees that can be charged in future.
- The High Court of Australia has ruled that exception fees are capable of being penalties, which are legally unenforceable.

About 185,000 Australians have joined 8 class actions against the banks in Australia and in New Zealand, the first two class actions have been filed. ANZ is the test case in Australia and New Zealand, so the class actions against the other banks are on hold or will not be commenced until the ANZ cases in both countries are complete.

Class actions commenced to date in AUS: ANZ, CBA, NAB, WBC, Citigroup.²

¹ The total claims will not be known until later in the proceedings, possibly until settlement or judgment. Estimates provided by class action law firm Maurice Blackburn on 2 December 2013.

² Some banks face multiple claims because brands have been sued e.g. WBC faces claims against Westpac, Bank of SA and St George.

Est. size of claims in AUS ¹	
ANZ	\$57m
CBA	\$71m
NAB	\$39m
WBC	\$57m
TOTAL	\$224m

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Class actions pending in AUS: BOQ, BEN, SUN, HSBC.

Fees being challenged: late payment fees, over limit fees, honour and dishonour fees (\$20 - \$60 per transaction, referred to as exception fees).

Brief overview of the class actions

- **The claim:** that the fees should be struck down as penalties because of their size. When compared with the relevant service provided by the bank (e.g. the cost of dealing with a late credit card payment), the fee is out of all proportion to that service so is a penalty.
- Fees that are held to be penalties are not legally enforceable.
- **The principle:** fees should reflect the cost of providing a service.
- **Impact on the banks:** If the banks lose, there will be two impacts:
 1. They will need to repay all fees that were found to be penalties to all members of the class actions *less* the cost of providing the services; and
 2. They may need to reduce the size of fees collected from customers. Fees charged need to reflect the cost of providing the particular service.

Next steps in the proceedings

- **AUS:** The High Court of Australia has clarified the law on penalties³ and ruled that all fees in the class action are capable of being categorised as penalties. It is now up to the Federal Court to decide whether the fees were in fact penalties, which would be unenforceable.
 - *ANZ - heard in December 2013:* The Federal Court in Melbourne examined the size of the fees charged and will be comparing those fees with the services ANZ provided.

³ This was an intermediate step in the ANZ case. HCA judgment: <http://www.austlii.edu.au/au/cases/cth/HCA/2012/30.html>
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Judgment is expected in the next three or so months.

- *Other bank class actions will follow once ANZ has settled or there is final judgment.*
- **NZ:** The ANZ claim is also the test claim in NZ.⁴ It is likely that the plaintiff law firms will continue their media campaign to grow the class actions before commencing against the other banks. In NZ, all class action members need to be signed up before cases are commenced. Legal arguments in NZ are likely to be very similar to those made in Australia.

Banks appear to have anticipated the impact

- **Exception fees have fallen since 2009** when litigation funder IMF announced its intention to fund a series of class actions challenging the fees.⁵
- In 2009, Australian banks collected \$1.5 billion in exception fees from consumers and businesses. In 2012, that amount had more than halved to \$653 million.

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⁴ Australian class action law firm Slater & Gordon is running the NZ claim against ANZ with local law firm Andrew Hooker. Website 'Fair Play on Fees' is seeking registrations of interest against each of the banks owned by ANZ, WBC, CBA, NAB.

⁵ Reserve Bank of Australia, 'Banking fees in Australia' June 2013:
<http://www.rba.gov.au/publications/bulletin/2013/jun/pdf/bu-0613-5.pdf>
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