

---

## Recovering costs for debt collection services

Date : August 20, 2020

### Recovering costs for debt collection services

Fees and costs, including legal costs and costs for third party debt collection services can only be collected from a debtor if there is an agreement between the creditor and debtor providing for those costs to be payable to the creditor. Attempting to recover costs in the absence of a clause in the relevant agreement can be misleading deceptive and conduct in contravention of section 18 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)), section 154 of the *National Credit Code* (Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth)) as well as Section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (“**the ASIC Act**”).

This issue was raised in *Australian Competition and Consumer Commission v Sampson* [2011] FCA 1165 in which a solicitor was found liable for, amongst other things, asserting that debtors were liable for legal costs of \$30 on top of the debt for unpaid video rental fees, when sending letters of demand and notices to customers of a video rental company. There was no entitlement for the video rental company to recover pre-litigation legal costs and so the Court found the statements made by the solicitor were misleading and deceptive.

Where a creditor has instructed legal practitioners to commence proceedings, legal costs can then be claimed from debtors – although certain rules apply and it is generally subject to the court’s supervision and discretion.

### Excessive expenses

Notwithstanding that an agreement may provide an entitlement to recover costs of debt collection services, creditors should still be mindful that the costs being sought are not excessive. For example, section 107 of the *National Credit Code* prohibits credit providers from recovering enforcement expenses “in excess of those reasonably incurred by the credit provider”. Terms in contracts that seek excessive amounts for the recovery of debt collection services may also be considered unfair terms, whereby the creditor may fall foul of section 12BF of the ASIC Act.

### Recovering internal debt recovery cost

Creditors are able to recover their internal debt collection costs. A very useful manner of achieving this (as well as for recovering costs associated with the use of external debt collection services) is through the use of late payment fees. Late payment fees are ‘liquidated damages clauses’ – which are subject to certain principles of law. In addition to regulations under the *Australian Consumer Law*, the *National Credit Code* and the ASIC Act, creditors need to be mindful that fees and charges sought are a “genuine pre-estimate of the loss” caused to the credit provider and not “out of all proportion” to the expected loss occasioned by the debtor’s



default. Such clauses are void as ‘penalties’. Serving as a guide to credit providers, in *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 the High Court considered whether ANZ’s late payment fees of \$35 per month on overdue credit card accounts were penalties. In that case, the High Court found that the fees were not “extravagant” or “exorbitant” despite ANZ’s collection costs could be estimated as perhaps approximately \$5.

## **Conclusion**

Creditors should be mindful of the terms of their contracts with debtors when pursuing legal costs and expenses for debt collection services. Where appropriate, they should update their agreements to include an entitlement to recover these costs as well as consider their use of late payment fees and other liquidated damages clauses.

If you would like more information or advice in relation to debt recovery or debt collection services, contact Andrew Hack at [andrewh@matthewsfolbigg.com.au](mailto:andrewh@matthewsfolbigg.com.au) or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

Jeffrey Brown on (02) 9806 7446 or [jeffreyb@matthewsfolbigg.com.au](mailto:jeffreyb@matthewsfolbigg.com.au)

Stephen Mullette on (02) 9806 7459 or [stephenm@matthewsfolbigg.com.au](mailto:stephenm@matthewsfolbigg.com.au).