



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 220

# Early termination fees for residential loans: Unconscionable fees and unfair contract terms

August 2011

### About this guide

This is a guide for lenders who provide home loans or residential investment loans (residential loans) regulated by the *National Consumer Credit Protection Act 2009* (National Credit Act).

It gives general guidance on when an early termination fee for a residential loan may be unconscionable under Sch 1 of the National Credit Act (National Credit Code) or unfair under the *Australian Securities and Investments Commission Act 2001* (ASIC Act). It sets out the factors ASIC will consider in deciding whether to take action on potential breaches of these provisions.

From 1 July 2011, the National Consumer Credit Protection Regulations 2010 (National Credit Regulations) prohibit early termination fees for residential loans, subject to some limited exceptions. This guide is relevant to credit contracts for residential loans:

- with early termination fees that were entered into before 1 July 2011; or
- with early termination fees not prohibited by the regulations (e.g. break fees).

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This version was issued in August 2011 and is based on legislation and regulations as at the date of issue.

Previous version:

- Superseded Regulatory Guide 220, issued 10 November 2010

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the National Credit Act, ASIC Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

From 1 July 2010, ASIC or a consumer may take action against a lender if the lender charges an early termination fee that is unconscionable under the National Credit Code or unfair under the unfair contract terms provisions in the ASIC Act.

From 1 July 2011, the National Credit Regulations prohibit early termination fees for residential loans, subject to some limited exceptions. This guide is relevant to credit contracts for residential loans with early termination fees that were entered into before 1 July 2011 or those with early termination fees not prohibited by the regulations (e.g. break fees).

This guide contains general guidance on when an early termination fee for a residential loan may be unconscionable or unfair and the factors ASIC will consider in deciding whether to take action.

It also looks at other considerations relating to unfair contract terms, including that lenders should consider explaining early termination fees as transparently as possible so that consumers can better understand the fees they may have to pay if they terminate a loan early.

### What are early termination fees?

RG 220.1 Many home loans and loans for residential investment properties (collectively called 'residential loans' in this guide) have early termination fees, which are payable if a customer terminates a loan within a specified time (e.g. three to five years). Early termination fees can be a barrier to consumers switching loans by 'locking' them into loans with unfavourable interest rates if the early termination fee is also high.

RG 220.2 In this guide, the term 'early termination fee' refers to any fee payable because of the early repayment of a residential loan that is additional to standard discharge fees (which are paid regardless of whether a loan is terminated early). It may include the following fees:

- (a) *Deferred establishment fees*: This type of fee is said by lenders to reflect establishment costs not charged at the start of the loan. Typically, it is charged if the consumer repays the loan in the first three to five years (although, in some cases, it can be longer). A deferred establishment fee can be charged for both fixed rate and variable rate loans.
- (b) *Break fees (sometimes called 'break costs')*: This type of fee is said by lenders to be charged to recover the economic cost to the lender of a customer terminating a fixed rate loan before the end of the fixed rate term. It is not charged for variable rate loans.

Note: Break fees are usually calculated by reference to the difference between the fixed interest rate (which could be a retail or wholesale rate) and the prevailing interest rate (again, this could be a retail or wholesale rate) at the date of early termination over the remaining term for which the

interest rate is fixed. A consumer breaking a fixed rate loan that has a lower interest rate than the prevailing interest rate will pay a lower (or nil) break fee as compared to a consumer breaking a fixed rate loan that has a higher interest rate than the prevailing interest rate.

- RG 220.3 An early termination fee does not include any fee or charge that is payable regardless of whether the loan is repaid early or not (e.g. standard discharge fees and charges).

## What laws apply to early termination fees?

- RG 220.4 Two national laws administered by ASIC are relevant to early termination fees for residential loans:

- (a) the National Credit Code, which is part of the *National Consumer Credit Protection Act 2009* (National Credit Act); and

Note: The National Credit Code is in Sch 1 of the National Credit Act. For copies of our regulatory guides on how we regulate consumer credit generally, go to [www.asic.gov.au](http://www.asic.gov.au).

- (b) the *Australian Securities and Investments Commission Act 2001* (ASIC Act), particularly the unfair contract terms provisions in Subdiv BA of Div 2 of Pt 2.

The National Credit Code and unfair contract terms provisions both commenced on 1 July 2010.

- RG 220.5 Under the National Credit Code and the unfair contract terms provisions, borrowers can challenge the validity of early termination fees they think are unconscionable or unfair. They may also complain about these fees to ASIC. The borrower or ASIC can seek court review of these fees.

- RG 220.6 Consumers can also take their claim to an external dispute resolution (EDR) scheme as lenders must be a member of an EDR scheme. EDR schemes can consider complaints under both the National Credit Code and the ASIC Act.

## Regulations prohibiting early termination fees from 1 July 2011

- RG 220.7 From 1 July 2011, the National Consumer Credit Protection Regulations 2010 (National Credit Regulations) prohibit, subject to some exceptions, termination fees for residential loans, including early termination fees. The prohibition does not apply to a credit fee or charge that is:

- (a) a break fee;
- (b) a discharge fee; or
- (c) a credit fee or charge that is incurred before the termination of a credit contract that is terminated before any credit has been provided.

- RG 220.8 The prohibition can apply to fees commonly called ‘deferred establishment fees’ and ‘rebtable establishment fees’.

Note: See RG 220.25—RG 220.30 for more information.

## Scope of this guide

- RG 220.9 This regulatory guide sets out our guidance on how the unconscionable fees provisions in the National Credit Code and the unfair contract terms provisions in the ASIC Act apply to early termination fees for residential loans, and when we are likely to consider taking action if we think these provisions have been breached. This guide is designed to help lenders understand what costs and types of loss we think can be recovered through early termination fees.
- RG 220.10 Given the prohibition on termination fees in the National Credit Regulations, this guide is relevant to credit contracts for residential loans:
- (a) with early termination fees that were entered into before 1 July 2011; or
  - (b) with early termination fees not prohibited by the regulations (e.g. break fees).
- RG 220.11 Our guidance on the National Credit Code and unfair contract terms provisions as they relate to early termination fees is designed to apply flexibly and be high-level and principle-based. This is because of the diversity in the mortgage industry around pricing and structuring early termination fees. In administering the law we will take into account all the facts and circumstances of each case. Thus, whether a contractual term providing for an early termination fee is unconscionable or unfair is largely dependent on the individual circumstances.
- RG 220.12 In this guide, the term ‘lender’ refers to a ‘credit provider’ as defined in s5 of the National Credit Act. Lenders include authorised deposit-taking institutions (ADIs) and non-ADI lenders.

Note: ‘Lender’ also includes a lender providing reverse mortgages.

## When an early termination fee may be unconscionable

- RG 220.13 Establishment fees and fees payable on early termination are subject to challenge by a debtor, guarantor or ASIC on the ground that the fee is unconscionable: s78–79 of the National Credit Code. Different tests apply to these fees.
- RG 220.14 A fee payable on early termination is unconscionable if it exceeds a reasonable estimate of the lender’s loss (including average reasonable administrative costs) arising from the early termination: s78(4).
- RG 220.15 Section B of this guide sets out our guidance on the factors we will consider in assessing whether an early termination fee may be unconscionable, including:
- (a) our view that a deferred establishment fee is generally a type of fee payable on early termination;

- (b) what we consider to be a reasonable estimate of the lender's loss arising from the early termination of a loan (including the types of loss we consider should not be recovered through fees payable on early termination); and
- (c) the need for lenders to keep records of how they calculate these fees.

## When an early termination fee may be unfair

- RG 220.16 The unfair contract terms provisions in the ASIC Act apply to standard form consumer contracts that are financial products or contracts for the supply, or possible supply, of financial services.
- RG 220.17 A term is unfair if:
- (a) it would cause a *significant imbalance* in the parties' rights and obligations arising under the contract;
  - (b) it is not reasonably necessary to protect the *legitimate interests* of the party who would be advantaged by the term; and
  - (c) it would cause *detriment* (whether financial or otherwise) to a party if it were to be applied or relied on: s12BG of the ASIC Act.
- RG 220.18 Section C of this guide sets out our guidance on these factors. Ultimately, we consider that determining whether a term is unfair will depend on the facts of each individual case. Our guidance is subject to this overriding consideration and is designed to illustrate when ASIC is more likely to take action, rather than set out a definitive view of the law. We will review our approach over time in light of any judicial decisions on the provisions.
- RG 220.19 The unfair contract terms provisions do not apply to terms that define the main subject matter of the contract or set the upfront price payable under a contract: s12BI(1). We will administer the law on the basis that terms imposing early termination fees, including deferred establishment fees, generally do not fit within either of these categories and are covered by the unfair contract terms provisions: see RG 220.62–RG 220.65.
- RG 220.20 The Australian Competition and Consumer Commission (ACCC), ASIC and the state and territory consumer protection agencies have published a general, non-industry specific guide on the unfair contract terms provisions in the ASIC Act and the *Competition and Consumer Act 2010*: see *A guide to the unfair contract terms law*.

Note: A copy of this guide is available at [www.accc.gov.au](http://www.accc.gov.au).

## Other considerations relating to unfair contract terms

RG 220.21 Section D of this guide looks at other considerations relating to unfair contract terms, including:

- (a) when a term in a loan agreement that permits the lender to vary an early termination fee is more likely to be unfair;
- (b) that lenders should consider being transparent in explaining early termination fees (especially break fees) so consumers understand what they will have to pay if they terminate a loan early; and
- (c) the interaction between disclosure requirements under the National Credit Code and the unfair contract terms provisions.

## B When an early termination fee may be unconscionable

### Key points

Under s78 of the National Credit Code, a court can annul or reduce a fee payable on early termination (including an early termination fee as described in RG 220.2), if it is unconscionable: see RG 220.22–RG 220.24.

We will administer the law on the basis that deferred establishment fees are generally a type of fee payable on early termination: see RG 220.36–RG 220.38.

A fee payable on early termination will not be unconscionable if it reflects a reasonable estimate of the lender's loss arising from the early termination of a loan. We consider that a loss arises from the early termination of a loan only if it is caused by the early termination: see RG 220.39–RG 220.46.

We expect lenders to keep records of how they calculate fees payable on early termination: see RG 220.47–RG 220.48.

## The National Credit Code

RG 220.22 The National Credit Code, which commenced on 1 July 2010, applies to credit that is provided to individual debtors or strata corporations wholly or predominantly:

- (a) for personal, domestic or household purposes; or
- (b) to purchase, renovate or improve residential property for investment purposes or to refinance such credit.

Note: See s5 of the National Credit Code.

RG 220.23 Home loan agreements entered into before 1 July 2010 are generally also regulated under the National Credit Code if they are wholly or predominantly for personal, domestic or household purposes. Loan agreements for credit to purchase, renovate or improve residential investment property, or to refinance such credit, are covered only if they were entered into on or after 1 July 2010.

RG 220.24 The National Credit Code allows court review of certain fees charged by lenders on the ground that these fees are unconscionable: see RG 220.31–RG 220.35. It also mandates the content of contractual and pre-contractual disclosure and provides relief mechanisms for consumers: see RG 220.49–RG 220.51.

## Prohibited termination fees

RG 220.25 The National Credit Code, when read in conjunction with the National Credit Regulations, prohibits (subject to some exceptions) termination fees for residential loans, including early termination fees. Specifically, a credit fee or charge is prohibited if:

- (a) it is provided for in a credit contract entered into on or after 1 July 2011;
- (b) it is to be paid on or in relation to the termination of the credit contract (whether the liability to make the payment is incurred at that time or at an earlier time); and
- (c) any of the amount of credit provided under the credit contract is secured over residential property: reg 79A.

RG 220.26 However, the prohibition does not apply to a credit fee or charge that is:

- (a) a break fee;
- (b) a discharge fee; or
- (c) a credit fee or charge that is incurred before the termination of a credit contract that is terminated before any credit has been provided under the credit contract.

Note: 'Break fee' and 'discharge fee' are defined in reg 79A(3).

RG 220.27 The prohibition can apply to fees commonly called 'deferred establishment fees' and 'rebtable establishment fees'.

RG 220.28 Any provision of a credit contract that seeks to impose a prohibited termination fee is void to the extent that it does so. If a consumer pays such a fee, they can recover the amount paid: s23 of the National Credit Code.

RG 220.29 The Explanatory Statement to the National Consumer Credit Protection Amendment Regulations 2011 (No. 2), which introduced the prohibition, states that:

The prohibition contained in regulation 79A assists consumers to switch home loan credit providers by banning certain termination fees. These fees include those fees commonly referred to as deferred establishment fees. It also includes other fees that do not reflect costs borne by a credit provider as a result of terminating a loan or that seek to penalise a debtor for terminating a loan early.

RG 220.30 Given the prohibition in reg 79A, this guide is relevant to credit contracts for residential loans with early termination fees that were entered into before 1 July 2011 or those with early termination fees not prohibited by the National Credit Regulations (e.g. break fees).

## Unconscionable fees provisions

RG 220.31 If we believe it is in the public interest, ASIC may bring an action to court for a review of an:

- (a) unjust transaction; or
- (b) unconscionable:
  - (i) establishment fee or charge;
  - (ii) fee or charge payable on early termination; or
  - (iii) fee or charge payable for prepayment of an amount under a loan: s79 of the National Credit Code (see also s76 and 78).

Note: A court cannot review a fee under both the unjust transaction provision in s76 and the unconscionable fee provision in s78: s76(6).

RG 220.32 Individual borrowers or guarantors may be able to rely on a finding resulting from our action to seek relief, or may bring an action independently of us.

RG 220.33 A fee or charge payable on early termination, or for pre-payment of an amount under a loan, is unconscionable if a court determines the fee or charge exceeds a reasonable estimate of the lender's loss arising from the early termination or pre-payment (including their average reasonable administrative costs for such a termination or pre-payment): s78(4).

RG 220.34 The test to determine whether an establishment fee or charge is unconscionable is different. In this case, the court must have regard to whether the amount of the fee or charge equals:

- (a) the lender's reasonable costs of determining an application for credit, and the initial administrative costs of setting up the loan; or
- (b) the lender's average reasonable costs for those things for that class of contract: s78(3).

RG 220.35 If a court finds an early termination fee unconscionable under s78 of the National Credit Code, it may annul or reduce the fee or charge and may make ancillary or consequential orders: s78(1).

## Deferred establishment fees

RG 220.36 Some lenders do not charge the full amount of their establishment costs at the start of the loan. These unrecovered costs are often recovered through interest and other charges paid if the loan continues for a certain period of time (e.g. more than three or five years).

RG 220.37 If a customer terminates a loan early (e.g. in the first three to five years of the loan), some lenders charge a 'deferred establishment fee' when the loan is terminated. This fee is said to recoup the establishment costs which were

not charged at the start of the loan and which, due to early termination, have not been recovered through repayments.

RG 220.38 We will administer the law on the basis that generally a deferred establishment fee is a ‘fee payable on early termination’, to which the test in s78(4) applies.

## Reasonable estimate of the lender’s loss

RG 220.39 We consider that, for the purposes of the test in s78(4), a loss arises from the early termination of a loan only if it is *caused by* the early termination. Such types of loss can include:

- (a) break fees when a fixed rate loan is terminated;
- (b) administrative costs for calculating the payout figure and the amount of the fees payable on early termination;
- (c) administrative costs for processing the early termination;
- (d) third party costs that arise because of the early termination (e.g. if a function associated with processing an early termination is outsourced);
- (e) costs that have not been recovered because a loan with a honeymoon or introductory interest rate is terminated early. Loans with a honeymoon or introductory interest rate are those which offer a discounted interest rate at the start of a loan, typically for the first one to two years; and
- (f) unrecovered establishment costs arising from a lender’s inability to recover establishment costs during the shortened period the loan was on foot (see RG 220.42).

Note 1: The above list is not exhaustive. There may be other types of loss caused by early termination.

Note 2: Break fees are discussed in more detail at RG 220.80(b) and RG 220.122–RG 220.131.

RG 220.40 An administrative charge, whether it is for calculating the payout figure and the amount of the fees payable on early termination or for processing the early termination, will not be unconscionable if it does not exceed an average of the lender’s administrative costs for loans with similar underlying costs.

RG 220.41 Loss, as described at RG 220.39, is not suffered if an amount reflecting that loss has already been recovered through payments made by intermediaries or other parties (e.g. mortgage brokers or managers) or by the customer (e.g. through fees and loan repayments, including the interest component of a loan repayment). Similarly, a loss is reduced to the extent it has been partially recovered.

RG 220.42 Types of unrecovered establishment costs that, if not recovered from other parties or the customer, could be a loss caused by the early termination of a loan include:

- (a) evaluating and processing the loan application;
- (b) preparing the loan agreement and other documentation;
- (c) lender's mortgage insurance;
- (d) disbursements (e.g. valuation, settlement, legal and land registry costs—although, in practice, these are typically charged separately and at the start of the loan);
- (e) cost of obtaining funding;
- (f) commissions paid to loan originators (e.g. brokers, mortgage managers and aggregators); and
- (g) a component for overheads for evaluating and processing the loan application and establishing the loan (e.g. equipment, telephone, utilities, lease of premises and staff costs).

Note: The above list is not exhaustive. There may be other types of unrecovered establishment costs.

RG 220.43 Some of these may be third party costs if the relevant function is outsourced.

RG 220.44 Standard discharge fees and charges may also apply when a customer terminates a loan early. For example, these can include legal fees and land registry costs. These are not unique to the early termination of a loan and are therefore not considered in this guide.

### **Types of loss which should not be recovered through fees payable on early termination**

RG 220.45 We are more likely to take action if a fee payable on early termination includes a component covering the following types of loss:

- (a) loss of profits that would have been received if the loan proceeded to the expected term or if the loan had lasted beyond the time at which the customer terminated the loan;
- (b) marketing costs and other costs associated with obtaining new customers; and
- (c) costs associated with developing new products and product features.

Note: The above list is not exhaustive. Depending on the circumstances of a particular case, there may be other factors we take into account in deciding whether to take action.

RG 220.46 We think the above matters are less likely to be losses arising from the early termination of a loan.

## Keeping records

RG 220.47 We expect lenders to keep records of how they calculate fees payable on early termination, including break fees and deferred establishment fees. For deferred establishment fees, we expect that these records will be created at the time the loan is established. This is because lenders should know what their establishment costs are at the start of a loan.

RG 220.48 We may use our powers under s49 of the National Credit Act to direct a licensee to provide us with information showing how a fee payable on early termination reflects a reasonable estimate of the lender's loss arising from early termination.

Note: Under s49, ASIC may provide a licensee with a written notice directing the licensee to lodge a statement with ASIC containing the information specified in the notice about the credit activities that the licensee or its representatives are engaged in.

## Other relevant provisions

### Disclosing early termination fees

RG 220.49 The National Credit Code mandates the content of contractual and pre-contractual disclosure. Under the Code, a credit contract and pre-contractual statement must state:

- (a) the amount of any credit fees and charges payable under the contract and when the fee or charge is payable, if that is ascertainable (if the amount of the fee is not ascertainable, the method of calculation must be set out, if that is ascertainable); and
- (b) if applicable, any fees that may be changed and how the debtor will be told about such changes: s16 and 17.

Note: For a definition of what is 'ascertainable', see s180.

RG 220.50 The unfair contract terms provisions are also relevant to how early termination fees are disclosed. Under these provisions, a court must consider the extent to which the term is transparent: see s12BG(2) of the ASIC Act and Section C.

RG 220.51 We believe that lenders should disclose early termination fees in a way that satisfies both the requirements of the National Credit Code and the transparency consideration in the unfair contract terms provisions: see Section D.

### **Increasing or varying fees for fixed rate loans**

- RG 220.52 If the interest rate on a loan is fixed for part or all of the term, a lender is prohibited from:
- (a) unilaterally increasing an early termination fee (including a break fee) or a fee payable for pre-payment of part of the loan or the entire loan; or
  - (b) changing the method used to calculate these fees, if that change has the effect of increasing the relevant fee: s70 of the National Credit Code.
- RG 220.53 Section 70 limits a lender's right to vary break fees. In addition, a contractual term providing the lender with a right to vary an early termination fee (including a break fee) may be unfair under the ASIC Act in some situations: see Section D.

## C When an early termination fee may be unfair

### Key points

We will administer the law on the basis that terms imposing early termination fees, including deferred establishment fees and break fees, are reviewable under the unfair contract terms provisions: see RG 220.62–RG 220.65.

A term is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract (see RG 220.70–RG 220.74);
- it is not reasonably necessary to protect the lender's legitimate interests (see RG 220.75–RG 220.81); and
- it would cause detriment (whether financial or otherwise) to a party if it were applied or relied on (see RG 220.82–RG 220.87).

If a term providing for an early termination fee reflects a lender's reasonable costs directly arising from the early termination (including unrecovered establishment costs), it is likely to be reasonably necessary to protect the lender's legitimate interests and is unlikely to be unfair: see RG 220.80.

If a court finds that a term is unfair, it can declare that term void. It can also direct a lender to refund money to a consumer or vary the loan agreement: see RG 220.88–RG 220.92.

### The unfair contract terms provisions

- RG 220.54 Under the ASIC Act, the unfair contract terms provisions apply to standard form consumer contracts that are financial products or contracts for the supply, or possible supply, of financial services.
- RG 220.55 These provisions commenced on 1 July 2010 and apply to:
- (a) new contracts entered into on or after 1 July 2010;
  - (b) contracts renewed on or after 1 July 2010; and
  - (c) terms in a consumer contract that are varied on or after 1 July 2010.
- RG 220.56 At least one of the parties to the contract must be an individual and the financial product or service must be acquired wholly or predominantly for personal, domestic or household use or consumption: s12BF of the ASIC Act.
- RG 220.57 A contract that involves genuine negotiation is less likely to be a standard form contract, but the inclusion of trivial or token negotiated terms will be insufficient to demonstrate that it is not a standard form contract. If a party to a proceeding alleges that the contract is in a standard form, it is presumed to be a standard form contract unless another party to the contract proves otherwise: s12BK. Loan agreements for residential loans will generally be standard form contracts.

## Our approach to unfair contract terms

- RG 220.58 A term in a consumer contract is unfair if:
- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
  - (b) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
  - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on: s12BG(1) of the ASIC Act.
- RG 220.59 Each of these elements must be satisfied if a court is to find a term providing for an early termination fee unfair. Ultimately, we consider that determining whether a term is unfair will depend on the facts of each individual case. Our guidance is subject to this overriding consideration and is designed to illustrate when we are more likely to take action, rather than set out a definitive view of the law. We will review our approach over time in light of any judicial decisions on the provisions.
- RG 220.60 Section 12BH of the ASIC Act lists as examples of terms that may be unfair:
- (a) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract (s12BH(1)(c)); and
  - (b) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract (s12BH(1)(d)).
- RG 220.61 A term cannot be declared unfair to the extent that it:
- (a) defines the main subject matter of the contract;
  - (b) sets the upfront price payable under the contract; or
  - (c) is a term required, or expressly permitted, by a law of the Commonwealth or a state or territory: s12BI(1).
- RG 220.62 We will administer the law on the basis that terms imposing early termination fees for a residential loan are covered by the unfair contract terms provisions (i.e. they are not within the categories described in RG 220.61). These terms do not describe or give effect to the subject matter of the contract as residential loans primarily relate to lending money and repaying the money lent.
- RG 220.63 We also consider terms imposing early termination fees for a residential loan are not part of the upfront price of a loan. The upfront price payable under a loan is defined as the consideration that:
- (a) is provided, or is to be provided, for the supply under the loan; and
  - (b) is disclosed at or before the time the contract is entered into,
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event: s12BI(2).

RG 220.64 Early termination fees, including deferred establishment fees, are payable only if the loan is terminated within a particular time specified by the lender (typically within three to five years of when the loan was taken out). Accordingly, we consider it is not consideration that *'is provided, or is to be provided'* for the loan: s12BI(2)(a) (emphasis added). It is consideration that *may be provided*.

RG 220.65 We consider that a contractual term providing for an early termination fee that is unconscionable under the National Credit Code is also likely to be unfair under the unfair contract terms provisions.

Note: Given the prohibition in reg 79A of the National Credit Regulations, this guide is relevant to credit contracts for residential loans with early termination fees that were entered into before 1 July 2011 or those with early termination fees not prohibited by the regulations (e.g. break fees).

## What a court will consider in determining whether a term is unfair

RG 220.66 In determining whether a term is unfair, a court must take into account:

- (a) the extent to which the term is transparent; and
- (b) the contract as a whole: s12BG(2) of the ASIC Act.

RG 220.67 A term is transparent if it is:

- (a) expressed in reasonably plain language;
- (b) legible;
- (c) presented clearly; and
- (d) readily available to any party affected by the term: s12BG(3).

RG 220.68 Failure to meet the requirement for transparency will not automatically mean that the term is unfair. Nor will transparency, on its own account, mean that a term is necessarily fair.

RG 220.69 The requirement for a court to consider the transparency of a term and the contract as a whole is discussed in more detail in Section C.

## Significant imbalance

RG 220.70 The first element of the test of unfairness is whether the term would cause a significant imbalance in the parties' rights and obligations under the loan agreement: s12BG(1)(a) of the ASIC Act.

RG 220.71 Generally, contracts include rights and obligations for both parties. This element of the test of unfairness would involve a factual assessment of the available evidence to determine whether a term creates a significant

imbalance in those rights and obligations. This may vary depending on the context. For example, a term placing an unusually onerous obligation on a borrower may be balanced by another term which accords the borrower a countervailing increase in rights under the contract.

RG 220.72 In the Australian market, most residential loan agreements give lenders an unfettered right, or a right subject to few restrictions, to vary the interest rate of the loan. This could be something that a court considers in the context of a loan agreement in deciding if there is a significant imbalance in the rights and obligations of the parties.

RG 220.73 An example of where balance is not maintained is where the loan agreement gives the lender an unlimited unilateral right to vary an early termination fee or the circumstances in which the fee applies. Such a contractual right does not place a limit on the amount of the fee that can be charged and does not really give the consumer the ability to negotiate the fee under the contract. Such a term greatly increases the rights of the lender (i.e. a complete discretion to increase the fee), while placing a significant responsibility on the borrower (i.e. to pay whatever amount the fee is increased to).

Note 1: The right to vary early termination fees is discussed in greater detail in Section D.

Note 2: In the above example, a consumer may not be able to negotiate a fee under the contract. However, there are other grounds on which the fee may be challenged (e.g. the unjust transaction and unconscionable fee provisions in s76 and 78 of the National Credit Code and the consumer protection provisions in Subdiv C and D of Div 2 of Pt 2 of the ASIC Act).

RG 220.74 We also think that a significant imbalance is likely to exist if the early termination fee is unconscionable for the purposes of the National Credit Code: see Section B.

## Legitimate interests

RG 220.75 The second element of the test of unfairness requires that the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term: s12BG(4) of the ASIC Act. The law presumes that a term of a consumer contract providing for an early termination fee to be paid is not reasonably necessary to protect the lender's legitimate interests. This means that the lender must establish that the term is reasonably necessary to protect their legitimate interests on the balance of probabilities.

RG 220.76 A lender might seek to protect or advance a number of interests in determining the amount of an early termination fee. These can range from recovering costs incurred as a direct result of the early termination to a lender's interest in running a profitable business.

### What is not a 'legitimate interest'?

- RG 220.77 We consider that for early termination fees the following are less likely to represent legitimate interests:
- (a) marketing;
  - (b) obtaining new customers;
  - (c) retaining existing customers;
  - (d) developing new products;
  - (e) ongoing loan administration;
  - (f) seeking to recoup establishment costs that have already been recouped (whether it is from the customer or through other means);
  - (g) making a profit by imposing the fee; and
  - (h) penalising a consumer for terminating the loan.
- RG 220.78 Depending on the circumstances of a particular case, there may be other matters which do not represent the legitimate interests of a lender.

### What is a 'legitimate interest'?

- RG 220.79 We consider interests which are likely to be legitimate include:
- (a) recouping:
    - (i) the cost of processing the early termination (excluding standard discharge costs, which are not considered in this guide);
    - (ii) any unrecovered establishment costs;
    - (iii) break fees for fixed rate loans, provided the break fee reflects the cost incurred by the lender because the loan was terminated early; and
    - (iv) costs that have not been recovered because a loan with a honeymoon or introductory interest rate is terminated early; and
  - (b) for existing products, being flexible with product design and charging to the extent it does not involve any of the interests listed at RG 220.77.

Note 1: The above list is not exhaustive. A lender may have other legitimate interests.

Note 2: Types of unrecovered establishment costs are listed at RG 220.42. Among other things, they include lender's mortgage insurance, the cost of obtaining funding and commissions paid to loan originators (e.g. brokers, mortgage managers and aggregators).

### What fees are reasonably necessary to protect a lender's legitimate interest?

- RG 220.80 We think that the following are examples of early termination fees that are more likely to be reasonably necessary to protect the lender's legitimate interests:
- (a) a fee that is related to a lender's reasonable costs directly arising from the early termination (including any unrecovered establishment costs:

see RG 220.42–RG 220.43). This may be determined based on an estimate of the lender’s average cost for similar loans with similar underlying costs (i.e. the early termination fee does not need to be individualised for each loan); and

- (b) for break fees, a break fee that reflects the amount needed to recover the lender’s loss from a fixed rate loan being terminated early.

Note 1: The above list is not exhaustive. There may be other types of early termination fees that are reasonably necessary to protect a lender’s legitimate interests.

Note 2: Break fees and other early termination fees should be explained in a transparent way: see RG 220.109–RG 220.131.

### **An early termination fee that penalises the consumer**

- RG 220.81 An early termination fee that has the effect of penalising the consumer for terminating the loan is not likely to be reasonably necessary to protect the lender’s legitimate interests. We consider that it also likely to be unfair as the other elements of the test of unfairness are also likely to be satisfied, namely that the term creates a significant imbalance in the parties’ rights and obligations and causes detriment.

## **Detriment**

- RG 220.82 The third element that needs to be satisfied for a term to be considered unfair is that the term must be one that would cause detriment if it were applied or relied on. It is unnecessary to prove actual detriment has been caused.

- RG 220.83 The detriment can be financial detriment or some other type of detriment. A guide developed jointly by the ACCC, ASIC and the state and territory consumer protection agencies lists delay and distress suffered as a result of the unfair term as examples of non-financial detriment that may be suffered: see *A guide to the unfair contract terms law*.

Note: A copy of this guide is available at [www.accc.gov.au](http://www.accc.gov.au).

- RG 220.84 We do not think that *how much* detriment would be suffered is relevant.
- RG 220.85 We expect that in most cases where a contractual term providing for an early termination fee is otherwise unfair because of the amount of the fee, financial detriment will be or is likely to be suffered.
- RG 220.86 The detriment a consumer may suffer can take a number of forms. For example:
- (a) if a consumer refinances, it will take longer for them to ‘break even’ on switching loans;
  - (b) the consumer may need to enter into further debt to pay the early termination fee and exit the loan;

- (c) the consumer might be prevented from switching to a loan that is more suitable for them (this loss of opportunity could be considered a type of detriment); or
- (d) if a lender changes the terms governing when the early termination fee is charged, it may be unfavourable to the consumer (e.g. if the length of time in which an early termination fee can be charged is increased).

Note: The above list is not exhaustive. There may be other types of detriment that can be suffered.

RG 220.87 A unilateral right to vary early termination fees by the lender may also cause detriment: see Section D.

## What happens if a term is found to be unfair?

RG 220.88 If the court finds that a contractual term is unfair under the ASIC Act, then that term is void. However, the contract continues to bind the parties if it is capable of operating without the unfair term: s12BF of the ASIC Act.

RG 220.89 In addition, if the court finds a term to be unfair, a variety of remedies may be sought. For example, ASIC may apply to the court to seek certain orders for the benefit of people that are not parties to proceedings (non-party consumers) where a term has been declared unfair.

RG 220.90 Some orders that the court may be able to make include any or all of the following:

- (a) an order declaring all or part of a contract to be void;
- (b) an order varying a contract or arrangement as the court sees fit;
- (c) an order refusing to enforce any or all of the terms of a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to a non-party consumer; and
- (e) an order directing the respondent to provide services to the non-party consumer at their expense: see s12GNB–GND of the ASIC Act.

RG 220.91 The order will be made against the party to a consumer contract who is advantaged by a term. In the context of early termination fees for residential loans, this will typically be the lender. Such orders can only be made if the court considers that the orders will:

- (a) redress, in whole or in part, the loss or damage suffered by the non-party consumers; or
- (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers: s12GNB(3).

RG 220.92 If a court makes a declaration that a term is unfair and a party subsequently seeks to apply or rely upon the unfair term, the court may, among other things, grant:

- (a) an injunction (s12GD); or
- (b) any other orders the court thinks appropriate (s12GM).

## Other consumer protection provisions

RG 220.93 The consumer protection provisions of the ASIC Act prohibit unconscionable conduct: see Subdiv C of Div 2 of Pt 2 of the ASIC Act. These provisions operate concurrently with the unfair contract terms provisions and unconscionable fees provisions of the National Credit Code.

RG 220.94 In addition, the ASIC Act contains prohibitions on false or misleading representations and on misleading or deceptive conduct, which could be applied in appropriate circumstances to early termination fees for residential loans: see Subdiv D of Div 2 of Pt 2 of the ASIC Act.

RG 220.95 In deciding whether a supplier has engaged in unconscionable conduct under the ASIC Act, a court can have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the consumer;
- (b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the supplier's legitimate interests;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer by the supplier in relation to the supply or possible supply of the loan; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent services from a person other than the supplier: s12CB(2).

RG 220.96 If a lender has imposed or required a consumer to comply with a term that has been found by a court to be unfair, they may also have engaged in unconscionable conduct.

## D Other considerations relating to unfair contract terms

### Key points

A term that gives the lender an unlimited unilateral right to vary an early termination fee or permits a lender to increase an early termination fee in a way that is not proportional to an increase in their costs may be unfair: see RG 220.97–RG 220.108.

Lenders should explain early termination fees as transparently as possible: see RG 220.109–RG 220.131. Ways to achieve this include:

- explaining in a meaningful and clear way when the fee will be charged;
- clearly stating the fee amount in dollars or, if that is not possible, the method of calculation;
- using prominent warnings to explain risks associated with early termination fees, particularly break fees; and
- using meaningful worked examples of break fees, as long as the example can be provided in a way that is not misleading (see RG 220.125–RG 220.131).

Lenders need to consider the requirements of both the National Credit Code and the ASIC Act as they apply to early termination fees. Adequate disclosure under the National Credit Code is not the same as transparency or fairness of a contractual term under unfair contract terms provisions: see RG 220.132–RG 220.133.

## The right to vary early termination fees

### Unfair contract terms provisions

RG 220.97 The unfair contract terms provisions include a non-exhaustive list of examples of the types of terms in a consumer contract that a court may regard as unfair. An example that is relevant to early termination fees is ‘a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract’: see s12BH(1)(d) of the ASIC Act.

RG 220.98 We think that a term in a loan agreement that permits the lender to vary an early termination fee is more likely to be unfair if:

- (a) it is an unlimited unilateral right to vary an early termination fee;
- (b) the fee is a deferred establishment fee or includes a component which is a deferred establishment fee, and there is an increase to this fee or the component dealing with unrecovered establishment costs. This is because a lender should know what the costs of establishment are at the start of the loan; or

- (c) the fee is increased and this increase is not proportional to the lender's increase in costs related to the early termination.

Note: The above list is not exhaustive. There may be other rights to vary an early termination fee that could be unfair.

- RG 220.99 If an early termination fee, excluding a deferred establishment fee, is increased and this increase is proportional to an increase in the lender's costs related to the early termination (e.g. an administrative cost for processing the early termination), then such an increase is likely to be reasonably necessary to protect the lender's legitimate interests and unlikely to be unfair.
- RG 220.100 If there is a term providing for an early termination fee which gives the lender discretion over a matter, the fairness of this term can be improved by not making the discretion absolute and clearly specifying when the discretion may be exercised.
- RG 220.101 A term providing for a unilateral right to vary an early termination fee is more likely to be fair if the contract transparently explains the right and specifies the circumstances when a lender may increase fees, including the way the increase will be calculated, if relevant. These circumstances should be reasonably necessary for the lender to protect their legitimate interests.
- RG 220.102 The transparency of a term relating to changes to early termination fees must also be considered by a court in deciding whether the term is unfair: see RG 220.109–RG 220.131.

### **National Credit Code**

- RG 220.103 Under the National Credit Code, a lender may unilaterally change the amount of a fee or the frequency or time for payment. However, this does not apply to fees for fixed rate loans if the change has the effect of increasing the fee: s70.
- RG 220.104 Changes can only be made by giving the consumer at least 20 days notice before the change takes effect. The notice must set out particulars of the change. The notice can be given by publishing it in a newspaper circulating throughout each state and territory. If this is done, the lender must also give information about the change to the consumer before or in their next account statement.
- Note: The National Credit Code also requires the notice to set out any information required by the National Credit Regulations: s66(1). Currently, there is no information prescribed in these regulations.
- RG 220.105 These notice requirements do not apply to a change that reduces the obligations of the debtor or extends the time for payment. If such a change is made, the debtor must be informed of it before or in their next account statement: s66(3) of the National Credit Code.

- RG 220.106 We consider that complying with s66 of the National Credit Code on changes to credit fees and charges does not necessarily mean a term providing for an early termination fee to be varied is 'fair' for the purposes of s12BG of the ASIC Act. For example, s66 does not prohibit a lender from having an unlimited unilateral right to vary an early termination fee. We consider that a term providing for such a right is likely to be unfair under the unfair contract terms provisions: see RG 220.98(a).
- RG 220.107 Section 66 of the National Credit Code deals only with providing notice about a change in fees and does not contain any restrictions on how the fee may be increased. The increased fee should not exceed a reasonable estimate of the lender's loss arising from the early termination. If it does, a court is likely to find that the fee is unconscionable under s78 of the National Credit Code and order that it be annulled or reduced: see Section B. Section 70 of the National Credit Code also contains a restriction on increasing fees for fixed rate loans: see RG 220.103.
- RG 220.108 The transparency of a term relating to changes to early termination fees must be considered by a court in deciding whether the term is unfair: see RG 220.109–RG 220.131.

## Explaining early termination fees

- RG 220.109 Under the unfair contract terms provisions, in determining whether a term of a consumer contract is unfair, a court must take into account the extent to which a term is transparent and the contract as a whole: s12BG(2) of the ASIC Act.
- RG 220.110 A term is transparent if it is:
- (a) expressed in reasonably plain language;
  - (b) legible;
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term: s12BG(3).
- RG 220.111 In considering the contract as a whole, it is possible that there are terms in the contract which could counterbalance any potential unfairness in an early termination fee. For example, while a contract may provide that any term may be unilaterally varied by the lender, there may be an overriding term which provides that the price of the early termination fee will not be changed. A court might take such a term into account in deciding that a general term allowing fees to be varied is not unfair.
- RG 220.112 While the unfair contract terms provisions apply to consumer contracts, we consider that the requirement for transparency is relevant to information given to a consumer *before* the contract is entered into (e.g. disclosures about early termination fees in the pre-contractual statement required under

s16 of the National Credit Code and in brochures and pamphlets). A court can take into account any matter it thinks is relevant in deciding whether a term is unfair. We consider that explanations of early termination fees and the transparency of such explanations in pre-contractual documents are likely to be a relevant consideration for a court in deciding if a term is unfair.

- RG 220.113 As with unfairness of a contractual term, it is for a court to determine whether a term is transparent. Transparency, on its own account, will not necessarily overcome underlying unfairness in a contract term. In addition, while the transparency of a term must be considered when deciding if a term is unfair, a court may find that a term is 'fair' even if it is not transparent. For example, the term may still be reasonably necessary to protect the lender's legitimate interests. However, we believe early termination fees should be explained as transparently as possible.
- RG 220.114 Under the National Credit Code, a loan agreement and a pre-contractual statement must contain information about the fees and charges that are, or may become, payable under the loan: s16 and 17. This includes setting out when the fee is payable and the amount of the fee or, if that is not ascertainable, the method of calculation. Explaining this information transparently is likely to improve the fairness of the fee. However, as mentioned above, transparent explanations will not overcome unfairness.

### **Factors to consider when explaining early termination fees**

- RG 220.115 In explaining early termination fees, lenders should consider:
- (a) explaining in a meaningful and clear way when the fee will be charged. A clear explanation is one that is in plain English with no industry or legal jargon;
  - (b) clearly stating the fee amount in dollars or, if that is not possible, the method of calculation. If all the variables that determine how a fee is calculated are known at the time the fee disclosure is made, then the fee should be stated as an amount. If this is not possible, the method of calculation should be disclosed. Meaningful worked examples that give an idea of the range of fees that could be payable should generally be included in the document, as long as the example can be provided in a way that is not misleading; and
  - (c) clearly disclosing the circumstances when a fee may be changed.
- RG 220.116 The above considerations may also be relevant when disclosing other contingent fees and charges (e.g. those payable when a loan is terminated because a customer is in default).
- RG 220.117 Lenders and mortgage intermediaries (e.g. brokers) should also consider ensuring that any staff who answer queries from customers about how early termination fees (including break fees) are charged and calculated are able to

accurately respond to these queries. If an accurate explanation is not provided, there is a risk that misleading conduct has been engaged in.

- RG 220.118 In general, the National Credit Regulations require early termination fees to be prominently explained in the context of the requirements of these regulations. For a pre-contractual statement, credit fees and charges must be set out at the beginning of the pre-contractual statement: see reg 72.
- RG 220.119 Lenders may also consider using other textual features to explain early termination fees. This can include, but is not limited to:
- (a) a prominent warning that the loan may not be suitable for the consumer if they plan on terminating the loan within the time that the early termination fee would be payable; and
  - (b) if an early termination fee is payable, the amount of the early termination fee as at the date of the statement could be mentioned in account statements at least annually, provided that stating the amount of the fee is not misleading. If the fee cannot be stated as an amount, then general information about how the amount of the fee can be ascertained should be set out. For example, this information could include the method of calculation or for fees with complex calculations, such as break fees, who the customer can contact for further information about how the fee is calculated. This will help keep consumers aware of the fact that an early termination fee is payable.
- RG 220.120 Lenders should decide whether such features are an appropriate way of explaining early termination fees for their particular loan products. In all cases, a lender should not provide a consumer with an explanation of an early termination fee that is misleading.
- RG 220.121 While it is not required by the National Credit Act or ASIC Act, lenders should consider explaining the early termination fee of a loan to a consumer when they are considering whether they should acquire the loan. This could involve mortgage intermediaries (e.g. brokers) and lenders drawing to a consumer's attention when they are discussing a loan with them the fact that an early termination fee is payable, when it is payable and the possible amount or range of the fee (provided they can do it in a way that is not misleading). Lenders should consider adopting measures to ensure that disclosure is not just made in the loan agreement or pre-contractual statement.

### **Factors to consider when explaining break fees**

- RG 220.122 We consider that transparency is particularly important when a contractual term imposes a liability on a consumer that is substantial and will be an important part of the consumer's decision-making process when entering into the contract. Break fees for fixed rate loans and reverse mortgages can be substantial. For example, in some circumstances, these fees can be tens of thousands of dollars.

- RG 220.123 As mentioned at paragraph RG 220.113, we believe that early termination fees, including break fees, should be explained as transparently as possible. For break fees for fixed rate loans and reverse mortgages, we think that, to be transparent, an explanation should clearly describe in plain English the amount of the fee, or if that is not ascertainable, the method of calculation. This information should be given appropriate prominence so that consumers are alerted to the consequences of terminating a fixed rate loan or reverse mortgage early. Any schedule of fees in the loan agreement should also be clear about when the fee is payable.
- RG 220.124 Lenders may also wish to consider using a prominent warning in their documentation for fixed rate loans and reverse mortgages including:
- (a) a statement that if a consumer seeks to terminate the contract early they could have to pay break fees, which can be substantial (in some circumstances, tens of thousands of dollars);
  - (b) a reference to where or how a consumer can find more information about how break fees are calculated; and
  - (c) a description of the uncertainty and risks associated with break fees. For example:
    - (i) if wholesale interest rates drop substantially from the time that a consumer takes out a fixed rate loan, the consumer could have to pay a very high break fee to terminate the loan early;
    - (ii) it is hard for anyone to accurately predict whether interest rates will go up or down, by how much and when; and
    - (iii) the loan may not be suitable for the consumer if they plan on terminating the loan within the fixed rate period, or if they would want to terminate the loan within the fixed rate period if interest rates dropped after they took out the loan.

### Worked examples of break fees

- RG 220.125 Meaningful worked examples that give consumers an idea of the range of fees they may be liable for can be a useful tool in explaining break fees. Worked examples should only be used if they can be provided in a way that is not misleading.

#### Fixed rate loans

- RG 220.126 The Financial Ombudsman Service (FOS) in *Banking and Finance: Bulletin 60* has published information about how it considers complaints about unconscionable break fees under the former Uniform Consumer Credit Code (UCCC). It is available from [www.fos.org.au](http://www.fos.org.au).
- RG 220.127 While the purpose of *Bulletin 60* is to set out FOS's approach to complaints about break fees, it does provide one example of how a break fee may be able to be explained. A lender may find that other examples and explanations provide a more meaningful illustration of the break fees applying to their fixed rate loans.

RG 220.128 In addition to including worked examples, the variables that affect how break fees are calculated could also be explained. In all cases, the amount of the break fee will need to comply with the requirements of the National Credit Code and unfair contract terms provisions.

Note 1: Our guidance on how these provisions apply to setting the amount of an early termination fee is set out in Sections B and C.

Note 2: FOS's statements in *Bulletin 60* related to whether the break fee was unconscionable under s72 of the UCCC. Section 72 of the UCCC was drafted on the same terms as s78 of the National Credit Code: see Section B.

### Fixed rate reverse mortgages

RG 220.129 Similar to break fees for fixed rate loans, we understand that break fees for fixed rate reverse mortgages are based on the cost to the lender for 'breaking' the arrangements it has entered into on the wholesale market to fund the fixed rate loan.

RG 220.130 Calculating the break fee for a fixed rate reverse mortgage can be more complex than that for a typical fixed rate loan. However, we consider that worked examples can still be used to illustrate the break fees that may be payable, provided it would not be misleading for the lender to provide a consumer with the worked examples. Transparent explanations and meaningful illustrations are useful tools to help consumers understand break fees.

RG 220.131 Worked examples of the break fees that would be payable for a typical fixed rate reverse mortgage with an expected term of 20 years if it were terminated two and ten years into the reverse mortgage could provide a meaningful illustration of the break fees that could potentially be payable.

## Interaction between disclosure requirements

RG 220.132 The differences in the relevant tests under the National Credit Code and unfair contract terms provisions could mean that adequate disclosure under the National Credit Code is not the same as transparency or fairness of a contractual term under the unfair contract provisions.

RG 220.133 For example:

- (a) a term may disclose the information required by the National Credit Code, but still not be transparent under the unfair contract terms provisions (a court must take lack of transparency into account in determining whether a term is unfair); and
- (b) even though a lender complies with the requirements of the National Credit Code to tell borrowers about changes to the amount or frequency of payment of a fee or charge, or the imposition of new fees or charges, these variations or impositions may not necessarily be fair under the ASIC Act (we consider that, in some circumstances, a contractual right to vary a fee may be an unfair term: see RG 220.97–RG 220.108).

## Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
break fee	A type of fee charged for early termination of a fixed rate loan (sometimes called 'break costs')
Corporations Act	<i>Corporations Act 2001</i>
deferred establishment fee	A type of early termination fee which is said to recover establishment costs not charged at the start of the loan. Typically, it is charged if the consumer repays the loan in the first three to five years (although, in some cases it can be longer)
early termination fee	A fee which is payable because of the early repayment of a residential loan that is additional to standard discharge fees (which are paid regardless of whether a loan is terminated early)
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in Regulatory Guide 139 <i>Approval of external complaints resolution schemes</i> (RG 139)
FOS	Financial Ombudsman Service—an ASIC-approved EDR scheme
lender	A 'credit provider' as defined in s5 of the National Credit Act. In relation to the unfair contract terms provisions, it is the lender under the loan agreement. In both cases, it includes ADI and non-ADI lenders
loan or residential loan	A home loan and/or a residential investment loan
loans with a honeymoon or introductory interest rate	Loans which offer a discounted interest rate at the start of a loan, typically for the first one to two years
standard discharge fee	A type of fee payable on termination of a loan, whether the termination is early or not
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>

<b>Term</b>	<b>Meaning in this document</b>
National Credit Code (or Code)	National Credit Code at Sch 1 of the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
RG 139 (for example)	An ASIC regulatory guide (in this example numbered 139)
s78 (for example)	A section of an act or code as specified (in this example numbered 78)
UCCC	Uniform Consumer Credit Code, which applied prior to the National Credit Code
unconscionable fees provisions	Section 78–79 of the National Credit Code
unfair contract terms provisions	The unfair contract terms provisions in Subdiv BA of Div 2 of Pt 2 of the ASIC Act

## Related information

### Headnotes

break fee, credit contract, credit provider, deferred establishment fee, early termination fee, home loan, lender, loan agreement, mortgage, residential investment property loan, residential loan, reverse mortgage, unconscionable conduct, unconscionable fee, unfair contract terms

### Regulatory guides

RG 139 *Approval of external complaints resolution schemes*

### Legislation

ASIC Act, Pt 2, Div 2, s12BF, 12BG, 12BG(1), s12BG(1)(a), 12BG(2), 12BG(3), 12BG(4), 12BH(1)(d), 12BI(1), 12BI(2), 12BI(2)(a), 12BK, 12CB(2), 12GD, 12GN, 12GNB–GND, 12GNB(3)

Corporations Act, s912A(2)(b), 1017G(2)(b)

National Credit Act, s5, 11(1)(a), 49

National Credit Code, s5, 16, 17, 66, 66(1), 66(3), 70, 76, 76(6), 78(1), 78(3), 78 (4), 79, 180

National Credit Regulations, regs 72, 79A

UCCC, s72

### Consultation papers and reports

CP 135 *Mortgage exit fees: Unconscionable fees and unfair contract terms*

REP 216 *Response to submissions on CP 135 Mortgage exit fees: Unconscionable fees and unfair contract terms*