

## Clausen, Timothy

**From:** Loan, Nick  
**Sent:** Wednesday, 6 October 2010 10:01 AM  
**To:** Lonsdale, John  
**Cc:** MG FSD Bank Competition Unit; Writer, Simon; Khalu, Ruth  
**Subject:** Mortgage exit fees - contact with [§ 45] [SEC=IN-CONFIDENCE]  
**Attachments:** FW: Release by The Hon Wayne Swan MP, Treasurer - Transcript  
[SEC=UNCLASSIFIED]; RE: Materials for announcement with Treasurer [SEC=IN-CONFIDENCE]

**Security Classification:** IN-CONFIDENCE

Hi John,

### Section 45

#### Breach of

As discussed last night, [confidence] has suggested to the Tsr that exit fees on variable mortgages should be banned after 12 months, to facilitate switching & promote competition. (Jim has been in touch with [§ 45] to discuss; see below e-mail to Ollie)

Simon Writer (Manager, Consumer Policy), Ruth Khalu (Consumer Credit) and myself met with Jim to discuss whether the current provisions in the Australian Consumer Law - Unfair Contract Terms provisions- and/or the Consumer Credit Act - Unconscionable fee provisions - allow such exit fees to be banned entirely, or banned after 12 months at [§ 45] suggested.

The short answer is no, and to give effect to [§ 45] suggestion, legislation wld be necessary (The unfair / unconscionable fee provisions allow fees to be challenged, with a court to decide on whether those fees are unfair / unconscionable).

There are a range of pros and cons for [§ 45] proposal, eg

#### Pro

- would make it easier for consumers to switch
- would make it simpler for consumers to compare products when they are entering their mortgage
- would provide a common market benchmark for all providers (lenders currently offer a range of timeframes during which mortgage exit fees apply)

#### Con

- Banks are likely to move to recover the legitimate costs associated with establishing a mortgage through other means (eg higher interest rate, higher other fees – eg establishment fees etc).
- Penalises consumers who don't want to, and never would switch, as they are likely to end up paying a higher prices (and cross subsidising the switchers)

[§ 45] is sending through its submission to ASIC's consultation paper on mortgage exit fees (the consultation paper is [here](#)), which Consumer Policy, Consumer Credit and ourselves will review and collectively provide comments back to the Tsr's office.

Jim also asked for comments on the Treasurer's recent observations about the Government 'banning' unfair mortgage exit fees. (see attached e-mail from Jim).

Simon Writer has spoken to Jim about the Tsr's statements and basically as long as the Tsr uses qualifiers about what the law does (eg "it can ban fees..." etc), this is ok, however, the Tsr should not be categorical about the law banning specific things. (see attached e-mail).

We will keep you informed of progress with [§ 45] proposal.

for info

cheers  
nick

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**From:** Murphy, Jim  
**Sent:** Tuesday, 5 October 2010 6:23 PM  
**To:** Loan, Nick; Writer, Simon; Khalu, Ruth  
**Subject:** FW: Mge exit fees - contact with [ S 45 ]

[SEC=UNCLASSIFIED]

For info

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Executive Director

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**From:** Murphy, Jim  
**Sent:** Tuesday, 5 October 2010 6:13 PM  
**To:** Browne, Oliver  
**Cc:** Henry, Ken  
**Subject:** Mge exit fees - contact with [ S 45 ]

[SEC=UNCLASSIFIED]

Ollie

[ S 45 ] suggestion is to ban exit fees from variable mortgages if the mortgage has been held for 12 months. [He sees these fees as a major impediment to competition especially when the major banks respond to interest rate movements. In effect this additional cost prevents consumer from switching mortgage provider to obtain lower fees. X ]

Under the consumer law and the credit law ASIC is empowered to take action where an exit fee is unconscionable- this is a matter of interpretation which would in the final instance be adjudicated on by a court.

ASIC does not have the power to ban exit fees after 12 months. Such a power was included in the consumer bill when it was presented to parliament but was objected to by the opposition and the provision were excluded from the bill.

[ S 45 ] will send through further information re the ASIC consultation paper on mortgage which we will examine to see whether we think there are matters that ASIC should take account in its administration.

We will provide a detailed note on these issues in the next day or so

Jim

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