

# COMPOUND INTEREST AS DAMAGES—THE APPROACH IN AUSTRALIA AND NEW ZEALAND\*

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## INTRODUCTION

An interesting article by Esther Martin-Pelegrin in a recent issue of ICLR<sup>1</sup> discussed the process by which, in England and Wales, the House of Lords has examined the recoverability of compound interest on unpaid sums of money. Readers might be interested in how the issue of awarding compound interest as damages has been dealt with in Australian and New Zealand jurisdictions. The article highlights some judicial developments in this area and provides an overview of the method of awarding statutory interest in these jurisdictions.

### Awards of interest in general

Interest can relate to an award of damages in different ways.<sup>2</sup> It can accrue as a result of a delay in receiving the quantum of damages in the period from when a wrong is committed to when a judgment is delivered, or it can accrue as a result of late payment of a judgment debt. These forms of interest are generally distinguished as pre-judgment and post-judgment interest. They are awarded as "interest upon damages" and are quantified by either statute, contract or arbitration agreement, depending on the origin of the right to interest.<sup>3</sup> There is no common law power to order payment of this form of interest, which compensates for the late payment of damages.<sup>4</sup> Such interest can only be awarded pursuant to statute, contract or arbitration agreement.

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<sup>1</sup> [1999] ICLR 453.

<sup>2</sup> Compensatory damages should not be confused with an award of restitution where a claim is based on the doctrine of unjust enrichment. Here, the court does not award damages—it awards restitution of the enrichment.

<sup>3</sup> The author acknowledges that there are particular circumstances in which the courts in their equitable jurisdiction, when making an order for money to be paid to the plaintiff, may require pre-judgment interest be added to that sum. In addition, the court also has a jurisdiction in equity to award compound interest. However, these topics are beyond the scope of this article and will not be discussed in detail. For more information on the equitable jurisdiction to award compound interest see *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] 2 All ER 961.

<sup>4</sup> The common law position as to the awarding of compound interest was stated by Lindley LJ in *London, Chatham and Dover Rly Co v. South Eastern Rly Co* [1892] 1 Ch 120 at p 140 (i.e. in the Court of Appeal): "at common law interest was not payable on ordinary debts, unless by agreement or by mercantile usage; nor could damages be given for non-payment of such debts".

Interest can also be awarded as a component of damages (as damages). Before considering in detail how interest as damages can be awarded it is necessary to refer, at least briefly, to the determinants of interest upon damages and the principles of compensation which are applied by the courts.

### **Interest upon damages**

In Australia, a court can award interest on pre-judgment damages and post-judgment damages by virtue of different legislation.<sup>5</sup> An example of this can be found in sections 94(1) and 95 of the Supreme Court Act 1970 (NSW). Section 94(1) states:

"(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods), the Court may order that there shall be included, in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when judgment takes effect."

Comparable legislation can be found in most jurisdictions.<sup>6</sup> The rationale behind such legislation is that, when payment is delayed, plaintiffs will not be fully compensated for their losses unless an additional allowance is made for the delay in payment that occurs before a judgment is given, or any delay in payment that might occur after judgment is given. A court's discretion to award interest can therefore be seen as an attempt to avoid any injustice a plaintiff might suffer if he or she were not allowed to recover the interest a wrongdoer has gained on money that rightfully belongs to the plaintiff.

A problem associated with both pre-judgment and post-judgment interest is that the prescribed rates rarely reflect prevailing interest rates. Since interest rates constantly fluctuate, any change in the statutory rate is usually conservative and far behind economic turns. This problem is then exacerbated by the fact that both legislative regimes in Australia and New Zealand prohibit the awarding of compound interest, notwithstanding compound interest being an integral part of business practice.<sup>7</sup> It follows that an award of simple interest under statute for delay in payment will not always have a realistic correlation to the true cost of the delay in payment.<sup>8</sup>

Even though Australian and New Zealand courts are not authorised to give "interest upon interest" (compound interest) this does not entirely exclude a claim to compound interest.<sup>9</sup> Both New Zealand and Australian legislative

<sup>5</sup> Similar legislation has been enacted in other Australian jurisdictions: Supreme Court Act 1986 (Vic) ss 58-60; Supreme Court Act 1935 (SA) s 30C; Supreme Court Act 1995 (WA) ss 31-32; and Federal Court of Australia 1976 (Cth) s 51A.

<sup>6</sup> Examples of provisions in New Zealand are: s 87 of the Judicature Act 1908 and s 62B of the District Courts Act 1947.

<sup>7</sup> There is a possibility that s 65A of the District Courts Act 1947 (NZ) permits post-judgment interest to be compounded; however, in practice, New Zealand courts have awarded simple interest only.

<sup>8</sup> See for example s 94(2)(a) and (b) of the Supreme Court Act 1970 (NSW) and s 78(1)(a) of the Judicature Act 1908 (NZ).

<sup>9</sup> See for example s 94(2)(b) of the Supreme Court Act 1970 (NSW) and s 87(1)(b) of the Judicature Act 1908 (NZ).

regimes explicitly disallow the awarding of statutory interest where there is otherwise a right to claim interest, whether by virtue of an agreement or otherwise. This not only prevents a plaintiff from recovering interest twice but implies that any right to claim compound interest, that might exist at common law, is not excluded. Furthermore, it should be realised that the prohibition of awarding interest upon interest does not apply in circumstances where the plaintiff has paid interest to a third party, as a consequence of the defendant's breach. In this situation the payment of that interest is regarded as damages and the relevant statutes do not prohibit interest being awarded on that portion of the damages.

### Principles of compensation

At common law, when a claim to damages arises from a breach of contract, two questions assist the court in assessing the damages or compensation to be awarded. Firstly, what kind of damages should be compensated. This is commonly referred to as the remoteness question and is assessed according to the first and second limb of the rule in *Hadley v. Baxendale*<sup>10</sup>:

"The damages which the innocent party ought to receive for breach of contract should be such as may fairly and reasonably be considered either to have arisen naturally from the breach itself or to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach."<sup>11</sup>

The second question concerns the amount of compensation the innocent party should receive.<sup>12</sup> This is ordinarily assessed in accordance with the principle *restitutio in integrum*, which provides that the plaintiff is entitled to be placed in the same position that the party would have been in had the contract been performed.<sup>13</sup>

These principles of compensation govern common law damages and are the starting point for any assessment of common law damages. It is these principles which have facilitated the awarding of compound interest as damages in Australia and New Zealand.

### CLAIMING INTEREST AS DAMAGES

Historically, the court's ability to award compound interest as damages has been unduly constrained by the House of Lord's decision in *London, Chatham & Dover Railway Co v. South Eastern Railway Co*.<sup>14</sup> This held that there was no power at common law to award compound interest as compensation for the

<sup>10</sup> (1854) 9 Ex 341; 156 ER 145.

<sup>11</sup> *Ibid.*, at 345; at 150-151 per Alderson B.

<sup>12</sup> See Dorter and Sharkey, *Building and Construction Contracts in Australia*, 2nd ed (looseleaf) at 1.802 for a discussion on the principles relating to damages for breach of building contracts in Australia.

<sup>13</sup> *British Westinghouse Electric and Manufacturing Co v. Underground Electric Railways Co (London)* [1912] AC 673 at 689 per Lord Haldane.

<sup>14</sup> [1893] AC 429.

late payment of debt in the absence of any agreement or statutory provision to the contrary.<sup>15</sup> Common law development in the area of awarding compound interest as damages was fettered by this decision,<sup>16</sup> until England's Court of Appeal embraced a different form of reasoning in *Trans Trust v. Danubian Trading Co Limited*.<sup>17</sup> In this case an application of the common law principles of compensation led the court to a conclusion that loss due to the late payment of debt or damages might be recoverable under the second limb of *Hadley v. Baxendale*.

The Court of Appeal's reasoning was subsequently followed by it in *Wadsworth v. Lydall* with the result that the application of *London, Chatham & Dover Railway Co v. South Eastern Railway Co* was narrowed to the first limb of the *Hadley v. Baxendale* principle.<sup>18</sup> Since these developments in the law, courts have been able to award compound interest as special damages in limited circumstances where it was known or reasonably contemplated that a loss in terms of compound interest would be suffered.<sup>19</sup> In England, the common law has not developed from this point and it remains the position that, in the courts, compound interest as damages can only be recovered (if at all) as special damages under the second limb of *Hadley v. Baxendale*.

#### Recovery of interest as damages under the second limb of *Hadley v. Baxendale*

The availability of compound interest as damages for late payment of debt only in relation to the second limb of *Hadley v. Baxendale* has been strongly criticised,<sup>20</sup> and it does not, of course, apply if the contract permits a party to recover compound interest or financing charges calculated by reference to losses incurred. It is not hard to conceive of situations where late payment of money would fall within the first limb of general damages. It seems logical that in a commercial environment late payment of money could result in various foreseeable losses to the plaintiff. For example, the plaintiff could suffer the loss of the use of the money, or a loss in the form of a borrowing cost which was necessitated because of a delay in payment. Yet in England, such losses have been excluded from the general damages category on the

<sup>15</sup> This meant interest became recoverable only if it had been stipulated, expressly or implicitly in the contract either as liquidated damages or as part of the debt, or where statutory provisions were applicable.

<sup>16</sup> With regard to Australia, see Latham CJ's dissenting judgment in *Marine Board of Launceston v. Minister of State for the Navy* (1945) 70 CLR 518 and the judgment of Gibbs CJ, Mason, Wilson and Dawson JJ in *Norwest Refrigeration Services Pty Ltd v. Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149 at p 162.

<sup>17</sup> [1952] 2 QB 297.

<sup>18</sup> The House of Lords accepted the distinctions made by Denning LJ in *Trans Trust SPRL v. Danubian Trading Co* [1952] 2 QB 297 and Brightman LJ in *Wadsworth v. Lydall* [1981] 1 WLR 598.

<sup>19</sup> See for example *Deeny v. Gooda Walker Ltd (in liq)* [1995] 1 WLR 1206; [1995] 4 All ER 289, *Burns v. MA N Automotive (Aust) Pty Ltd* (1986) 61 ALJR 81; (1996) 161 CLR 653, *Kollman v. Watts* [1963] VR 396, *Harris v. New Zealand Insurance Co Ltd* (1987) 4 ANZ Ins Cas 60-817, *Trimac Ltd v. C-I-L Inc* (1989) 69 Alta LR (2d) 113 (Alta QB), *Carlson v. Big Bud Tractor of Canada Ltd* [1981] 3 WWR 237 (Sask CA).

<sup>20</sup> See, for example, F A Mann, "On Interest, Compound Interest and Damages" (1985) 101 LQR 30.

basis that the defendant cannot be fixed with imputed knowledge of the plaintiff's financial situation.

Ultimately, limited access to compound interest as damages creates a discrepancy between the accrual of interest as practised in the business place and that of award and damages interest. The end result is a failure to compensate the plaintiff adequately and to restore it to the position in which it would have been if the breach or wrong had not been committed. New Zealand and Australian jurisdictions have attempted to overcome these problems by developing the law and situations in which compound interest as damages can be recovered.

#### Recovering compound interest as damages in New Zealand

In 1994, the New Zealand Law Commission published a report entitled "Aspects of Damages: The Award of Interest on Money Claims".<sup>21</sup> This report recommended that general legislation dealing with both pre-judgment and post-judgment interest be replaced by a more comprehensive statutory scheme which gave claimants virtually an automatic right to compound interest. At the time of writing this article none of the Commission's recommendations have been introduced. However, a lack of legislative action has not curbed the judiciary's approach to awarding compound interest as damages. In a 1998 New Zealand case concerning an award of compound interest, Thomas J stated<sup>22</sup>:

"The fact that the Law Commission has recommended that general legislation be passed dealing with both pre-judgment and post-judgment interest and that the rate of interest be compounded on a monthly basis, does not mean that compound interest cannot be awarded by the Courts in certain circumstances now. The Law Commission confirmed that there are a limited range of situations where the practice is to award compound interest."

It is evident from this passage that there is a judicial willingness to find a legal basis on which to found a claim for compound interest notwithstanding an absence of legislative guidance in the area.

In practice, New Zealand Courts have readily accepted the approach adopted in *Wadsworth v. Lydall* and broadly interpreted the category of special damages under the second limb of *Hadley v. Baxendale*.<sup>23</sup> For example, in *Cruickshank v. Westpac Banking Corp*<sup>24</sup> the plaintiff was able to recover compound interest as damages despite a lack of evidence of the defendant's knowledge of any special circumstances affecting the plaintiff. The basis for allowing compound interest to be recovered, according to Sinclair J, was because the bank's liability on the letter of credit had "arisen in a commercial atmosphere", which meant that "one ought to approach the question of

<sup>21</sup> *New Zealand Law Commission Report No 28*, May 1994, Wellington, New Zealand.

<sup>22</sup> *State Insurance Ltd v. Cedenco Foods Ltd*, 11 June 1998, (CA).

<sup>23</sup> See for example: *Edlin Holdings Ltd v. Carlisle* [1986] 1 NZLR 198; *Roberts' Family Investments Ltd v. Total Fitness Centre (Wellington) Ltd* [1989] 1 NZLR 530; *Krehic v. Clark* [1991] NZLR 703.

<sup>24</sup> [1989] 1 NZLR 114.

compensation bearing in mind the considerations which commercially minded men would apply in a similar situation".<sup>25</sup>

By broadly interpreting the category of special damages, New Zealand courts have expanded situations where compound interest can be recovered as damages, and to some extent, ameliorated the oppressive effect of *London, Chatham and Dover*. Still it cannot be said that the decision of *London, Chatham and Dover* no longer poses an obstacle to the development of the law. The *Wadsworth v. Lydall* approach requires a court to examine the facts in each individual case to ascertain whether a claim for compound interest falls within the second limb of *Hadley v. Baxendale*. It is suggested that the time and cost required to make such an assessment might at times outweigh the value of any interest awarded. There also exists an inherent risk that compound interest will not be awarded because the right combination of facts has not arisen to warrant an interpretation which falls within the second limb of *Hadley v. Baxendale*. It is desirable that the decision of *London, Chatham and Dover* be completely overthrown *via* specific legislation or otherwise, to enable the courts to award appropriate compensation in all situations and not just those that happen to have the correct forensic make-up to warrant special damages.

### Recovering compound interest as damages in Australia

The principle espoused in *London, Chatham and Dover* has a very limited application in Australia, if any at all. In the 1989 case of *Hungerfordsv. Walker*,<sup>26</sup> the High Court of Australia took the view that the distinction between the availability of compound interest as an element of special damages but not general damages was illogical and a subversion of the second limb in *Hadley v. Baxendale*. In the leading judgment of Mason CJ and Wilson J (with whom Brennan and Deane JJ agreed), it was stated that:

"If a justification exists for the difference in treatment, it must have its genesis in a policy that encourages recovery of expense actually incurred and discourages or denies recovery of opportunity cost. Yet . . . opportunity cost . . . is a plainly foreseeable loss because, according to common understanding, it represents the market price of obtaining money."<sup>27</sup>

### *Hungerfords'* case—the facts

*Hungerfords'* case concerned the negligence of accountants in preparing tax returns. The negligence caused the client to overpay tax and provisional tax for a period of seven years. The difficulty was that the client could recoup only part of this tax because its right to recover some of the tax had been statute-barred. Consequently, the client brought a claim to recover the

<sup>25</sup> *Ibid.*, at 127.

<sup>26</sup> (1989) 171 CLR 125.

<sup>27</sup> *Ibid.*, at p 143.

amount of overpaid income tax, which it could not recover, as well as compound interest upon that amount at the market rate being paid by the client on moneys borrowed to finance its business at the time. As an alternative to the claim for interest, the respondents claimed damages at the trial for loss of use of the money that they had overpaid.

The accountants responded with the argument that, where a purely financial loss is inflicted, damages caused by the consequential unavailability of money should not be allowed. In any event, where a court awards interest as damages it can only do so at the rate prescribed under the Supreme Court Act 1970—that is, simple interest at 10% per annum.

The High Court rejected both arguments, deciding that in appropriate circumstances an award of damages at common law can include an award of damages for the loss of the use of the money which the innocent party paid, or lost the use of, as a direct result of the other's breach of contract or negligence. Brennan and Deane JJ stated that:

“to the extent that the reported cases support the proposition that damages cannot be awarded as compensation for the loss of the use of a specific sum of money, which the wrongful act of the defendant has caused to be paid away or withheld, they are contrary to principle and commercial reality.”<sup>28</sup>

Furthermore, if the loss suffered could only be accurately estimated by reference to compound interest rates, then that person was entitled to compound interest. In this case, the quantum of damages which represented proper compensation was assessed by reference to the rate of interest paid by the innocent party upon borrowings which probably would have been avoided, but for the negligence of the accounts or the breach of contract.

#### **Interest as damages for the loss of use of the money distinguished from an award of interest for late payment**

The claim in *Hungerfords* was framed as compensation for the loss of use of the money which an innocent party paid, or lost the use of, as a direct result of another's breach of contract or negligence. Mason CJ and Wilson J preferred this formulation to that of a claim for an award of interest for the late payment of damages. Their Honours stated:

“The recovery of compensation for the loss may be ascribed to the operation of the second limb in *Hadley v. Baxendale* ... we would prefer to put it on the footing that it is a foreseeable loss necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort.”<sup>29</sup>

Brennan and Deane JJ considered critical the distinction between an order that interest be awarded on damages for late payment and an award of damages to compensate a plaintiff for the loss of the use of the money caused by the defendant's wrongful act, that is, “a loss assessed by reference to the

<sup>28</sup> *Supra*, note 26 at p 152.

<sup>29</sup> *Hungerfords v. Walker* (1989) 63 ALJR 210 at p 218.

interest which would have been earned by safe investment of the money or which was in fact paid upon borrowing money".<sup>30</sup> Their Honours recognised that there was no common law power to order payment of interest to compensate for the delay in obtaining payment of damages and that such interest must be awarded pursuant to statutes. However, they could see no acceptable reason why the ordinary principles governing the recovery of common law damages should not, in an appropriate case, apply to entitle a plaintiff to an award of damages as compensation for loss of the use of the money, provided that the general principles of compensation were sufficed, that the loss was caused by wrongful actions of the defendant, and that the loss was foreseeable.

With regard to foreseeability, Mason CJ and Wilson J stated:

"The requirement of foreseeability is no obstacle to the award of damages, calculated by reference to the appropriate interest rates, for loss of the use of money. Opportunity cost, more so than incurred expense, is plainly foreseeable loss because, according to common understanding, it represents the market price of obtaining money. But, even in the case of incurred expense, it is not too remote on the score of foreseeability. In truth, it is an expense which represents loss or damage flowing naturally and directly from the defendant's wrongful act or omission, particularly when that act or omission results in the withholding of money from a plaintiff or causes the plaintiff to pay away money."<sup>31</sup>

It is apparent from this excerpt that the court considered the requirement of foreseeability under the first limb of *Hadley v. Baxendale* to be fulfilled. This is a considerable advancement in the law of common law damages as it acknowledges the commercial realities of business transactions. It enables courts to award compound interest as damages in accordance with the actual commercial loss incurred, including those losses that may arise in the form of investment costs or borrowing costs. The underlying assumption of awarding interest as damages for the loss of use of the money is that, had the money been paid to the plaintiff at the time that it was due, or when the wrong was committed, either the plaintiff would have invested the money, and received compound interest thereon, or he or she would have been relieved of the need to borrow a similar amount, on which compound interest would have been charged.

#### The effect of *Hungerfords*

The significance of *Hungerfords* is that it held that Australian statutes did not impose a ceiling on interest recoverable as damages. Accordingly, a plaintiff can receive a much greater return under the *Hungerfords* measure of loss than that provided for by statute. For example, if a late progress payment forces a contractor to borrow money to finance its work, the contractor is entitled to recover interest at the overdraft rate (which could be compounded) and not the statutory rate of simple interest. A court would include the overdraft rate

<sup>30</sup> *Ibid.*, at p 152.

<sup>31</sup> *Ibid.*, at p 215.



as a component of the damages to be awarded to the contractor. It should be remembered, however, that the contractor cannot recover both *Hungerfords* and statutory interest.<sup>32</sup>

In order to obtain compound interest as damages for the loss of the use of the money, there are three important points that should be remembered. First, for the *Hungerfords* principle to apply, there must be an amount due at a certain date which is not paid, or there must be an expenditure incurred at a certain date which is not reimbursed. Secondly, the onus is on the plaintiff claiming compound interest to convince the court that it should award interest at the compound market rate. The plaintiff must expend or borrow money as a direct result of the late payment of money. Where there is no subsequent expenditure or borrowing of money, the plaintiff has not been wrongfully deprived of the use of the amount of money and will not be entitled to interest as damages. The plaintiff may, however, be entitled to simple interest under the Supreme Court Act for delay in payment.<sup>33</sup>

Thirdly, should the court make an order for compound interest to be paid, it will be calculated on the basis that interest will accrue from the time the cause of action arose until the date when judgment takes effect. This complies with the recognised common law rule that there is no common law power to make an order for the payment of interest to compensate for the delay in obtaining payment of what the court assesses to be the appropriate measure of damages for late payment, except under statute. It follows that a plaintiff may recover interest at common law if he or she seeks the repayment of a debt, or sues for a liquidated sum, but not if the action is for damages in an unliquidated amount.

#### ***Hungerfords* and the arbitrator's power to award compound interest**

The question of whether arbitrators have the power to award compound interest as damages in Australia is not a straightforward one. In England, Wales and Northern Ireland an arbitrator can award compound interest upon damages by virtue of section 49 of the Arbitration Act 1996. This section provides that (unless the parties agree otherwise) an arbitral tribunal may award simple or compound interest from such date at such rates and with such rests as it considers meet the justice of the case. Interest can be awarded: (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award; and (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

<sup>32</sup> See, for example, s 94(1)(b), Supreme Court Act 1970 which disallows the giving of interest where interest is payable as of right, whether by virtue of an agreement or otherwise.

<sup>33</sup> See Uniform Commercial Arbitration Act 1984, s 31, which enables an arbitrator to award interest in accordance with the guidelines under the Supreme Court Act 1970.

The New Zealand Arbitration Act 1996 also confers broad powers on arbitrators. Section 12(1) of this Act provides:

"An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal:

- (1) May award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court;
- (2) May award interest on the whole or any part of any sum which—(i) Is awarded to any party, for the whole or any part of the period up to the date of the award; or (ii) Is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment."

While this provision does not expressly refer to an award of compound interest, it is implicit that an arbitrator can utilise the High Court of New Zealand's approach of awarding compound interest as special damages.<sup>34</sup> No doubt the arbitral tribunal would encounter the same difficulties faced by the courts with respect to not being able to award compound interest upon damages or compound interest as general damages.

There is no comparable legislation in Australia which confers on arbitrators a power to award compound interest. Indeed it has been confirmed by the High Court of Australia<sup>35</sup> and is clearly set out in the different commercial arbitration acts that arbitrators cannot award interest upon interest.<sup>36</sup> Nevertheless, the approach in at least one Australian state has been to interpret existing provisions concerning the power of an arbitrator to award statutory interest as not excluding the common law power to award compound interest as damages. For example, in *Leighton Contractors Pty Ltd v. Kilpatrick Green Pty Ltd*,<sup>37</sup> the Full Court of the Supreme Court of Victoria discussed the issue of whether an arbitrator had jurisdiction to award *Hungerfords* interest under the Commercial Arbitration Act (Vic) 1984. This Act can be conveniently referred to as the "Uniform Act" as it has been enacted in substantially the same terms in each Australian state and territory. Section 31 states:

"(1) Unless a contrary intention is expressed in the arbitration Agreement, but subject to sub-section (2), where the arbitrator or umpire determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the arbitrator or umpire shall, have power to include in the sum for which the award is made interest at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is payable on a judgment debt of the Supreme Court) on the whole or any part of the money for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(2) Subsection (1) does not—

- (a) authorise the awarding of interest upon interest;

<sup>34</sup> See, e.g., *Dods v. Coopers Creek Vineyards Ltd & Co* [1987] 1 NZLR 530.

<sup>35</sup> See *Codelfa Construction Pty Ltd v. State Rail Authority of NSW* (1982) 149 CLR 337 at 371.

<sup>36</sup> See s 31(2)(a), Commercial Arbitration Act 1984 (NSW); s 31(4)(a), Commercial Arbitration Act 1990 (Qld); s 31(2)(a), Commercial Arbitration Ordinance 1986 (ACT); s 31(2)(a), Commercial Arbitration Act 1984 (Vic); and s 31(4)(a), Commercial Arbitration Act 1986 (SA).

<sup>37</sup> [1992] 2 VR 505 (FC).

- (b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an Agreement or otherwise; or
- (c) affect the damages recoverable for the dishonour of a bill of exchange."

Fullagar J (with whom Ashley and McGarvie JJ agreed) accepted that the legislation was not code and it could not be inferred that the legislature intended to exclude the operation of the common law as to damages. It is worth noting that section 31(4)(b) of the Uniform Act states that section 31(1) does not apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise, as this would seem to support the conclusion that the common law is not excluded by the Act. Justice Fullagar stated that the purpose of section 31 is "to fill a gap in the common law and therefore must not be used for the purpose of rewarding a litigant who has not suffered from the existence of any gap".<sup>38</sup> His Honour believed that excluding the common law award of interest as damages would result in a failure to give effect to the logical development of common law principle<sup>39</sup> and concluded that an arbitrator does have power at common law to award compound interest in accordance with the *Hungerfords* principle.

Apart from Victoria, the other Australian jurisdictions have not discussed the issue of whether an arbitrator has power to award compound interest as damages. In *State of New South Wales v. Coya (Constructions) Pty Ltd*,<sup>40</sup> the arbitrator made an award for both "interest as damages" and "damages" for breach of contract. The Supreme Court of New South Wales remitted the matter to the arbitrator on the basis that there were insufficient reasons to support the arbitrator's decision but failed to consider whether an arbitrator has power to award compound interest as damages. In a more recent decision of the Supreme Court of South Australia it was held that there was no statutory or common law authority which enabled the arbitrator to award compound interest.<sup>41</sup> However, this case concerned the question of whether the arbitrator has jurisdiction to award compound interest on costs and can therefore be distinguished from the present discussion of compound interest as damages.

Despite a lack of authority on the issue, and for the sake of uniformity, it would seem that the logical conclusion to be drawn is that the *Hungerfords* principle can be applied by arbitrators throughout Australia. This conclusion is supported by the fact that the relevant interest sections of the various state commercial arbitration Acts do not differ considerably from section 31 of the Uniform Act considered in *Leighton Contractors Pty Ltd v. Kilpatrick Green Pty Ltd*.<sup>42</sup> While it remains unconfirmed by the High Court, it would be safe to presume for the moment that the *Hungerfords* principle does apply to arbitration in Australia.

<sup>38</sup> *Ibid.*, at p 520.

<sup>39</sup> *Ibid.*, at p 520 quoting Mason CJ and Wilson J in *Hungerfords v. Walker*.

<sup>40</sup> Unreported, NSW Sup Ct, 4 July 1994.

<sup>41</sup> *South Australian Superannuation Fund Investment Trust v. Leighton Contractors Pty Ltd* (1996) 66 SASR 509 at p 513.

<sup>42</sup> [1992] 2 VR 505 (FC).

## CONCLUSION

In light of the High Court of Australia's decision in *Hungerfords*, and New Zealand's growing dissatisfaction with the decision in *London, Chatham and Dover*, it is evident that the claim of compound interest as damages is here to stay. The courts are taking a different attitude towards the awarding of compound interest as damages and are attempting to free the law from the fetters of a rule which owes its origins to the commercial thinking of the eighteenth century. Whether the common law is flexible enough to ensure adequate compensation is received in all cases remains to be seen, but the courts in Australia and New Zealand have gone some way to securing the demise of an outmoded precedent and reinstating awards of compound interest as damages.