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22 May 2009

Mr James Chisholm
Competition and Consumer Policy Division
Treasury
Langton Crescent
Parkes ACT 2600

Dear Mr Chisholm,

Re: The Australian Consumer Law - Consultation on Draft Unfair Contract Terms Provisions

I refer to the *Consultation paper on draft unfair contract provisions* released for comment on 11 May 2009. ANZ offers the following comments in relation to the draft legislation and explanatory material.

1. VARIATIONS FROM THE PRODUCTIVITY COMMISSION MODEL

The unfair contract provisions contained in the Exposure Draft of the Bill adopt many of the features recommended in the Productivity Commission's *Review of Australia's Consumer Policy Framework*. These features include:

- the exclusion of upfront price terms;
- the application of the law only to standard-form, non-negotiated contracts; and
- consideration of the broader interests of consumers, as well as the particular consumers affected.

However, other features are significantly different from those recommended by the Productivity Commission (PC). One key example of this is that the PC recommended that the national regime should be an 'ex post' model. In an 'ex post' model, regulators would only initiate action when a consumer had already suffered actual detriment from an unfair term. This feature was recommended as the preferable approach because it would be:

- a better targeted measure than an 'ex-ante' approach;
- a prudent approach given the uncertainty about the severity of the problem; and
- less prone to regulatory error, as some evidence of actual detriment would be required.

Further, the PC recommended consideration of the 'ex ante' model only after substantive evidence of market failure became available. It was suggested

that this be considered after a review of the impact of the new law once it had been in operation for five years.

The proposed Bill adopts the features of the 'ex ante' model, including that remedies should be available where the claimant shows a substantial likelihood of detriment.

The PC's inquiry was thorough and detailed. No adequate explanation has been given for why the Government has deviated from its recommendations. ANZ believes that there is no sound policy reason at this stage to deviate from the approach recommended by the PC. We are disappointed the Government has done so and that an 'ex post' model will not be tested.

2. DEFINITION OF STANDARD-FORM CONTRACT

The Bill does not include a definition of a standard-form contract. As a result, it is unclear whether some contracts will be considered negotiated or standard-form. For example, where some of the terms of a contract have been negotiated, is it intended that this contract would not be a standard form contract? Given the onus of having to rebut the presumption that a contract is in standard form, a clear definition or clearer guidance would greatly assist with the implementation of these requirements. We consider that a standard-form contract should be defined as a contract offered on a 'take it or leave it' basis (except in relation to upfront price).

3. TIMING

The new Commonwealth regime will require ANZ to review a large number of contracts across many products and all of our business given the proposed regime will apply to consumer contracts as well as contracts with business of all sizes. This would extend to contracts we have with suppliers as well as customers.

Reviewing all standard form business and consumer contracts currently provided by ANZ is a significant task. For example, for deposit products, which are the products with the most straightforward contracts, ANZ has different terms and conditions for each of retail deposit accounts, business deposit accounts and regional and rural deposit accounts and 28 different Terms and Conditions and Fees and Charges booklets for deposit products. In the case of credit products, in addition to Terms and Conditions and Fees and Charges booklets, there are system generated letters of offer that together with the other documents, make up the contract with the customer that will need to be reviewed. This is one segment of our business; the task is obviously much larger as the regime will affect all businesses across ANZ.

Furthermore, many standard form contracts are automatically generated from our IT systems. Changes to those systems would be required to accommodate changes to the contracts. In practical terms, ANZ would need to have reviewed all contracts and made the necessary system changes by November 2009 as a 'freeze' is applied to making changes to the Bank's systems in December each year until mid-January to help ensure those systems function smoothly through the Christmas/New Year period.

It is unlikely that ANZ could make all the changes necessary before 1 January 2010, when the legislation will come into force. In addition, before the end of 2009, ANZ will also be required to make changes to comply with national credit regulations and the new margin lending regulations. It would be useful for there to be an 18-24 month transition period.

4. APPLICATION TO LARGE BUSINESSES

The extension of this legislation to large businesses was not recommended by the Productivity Commission. Large businesses are sophisticated and able to access resources (either internally or externally) to understand the terms and conditions of the product and the risks they assume under the terms of standard-form contracts.

Furthermore, there may be a number of unexpected consequences for business transactions from this legislation. For example, the use of standard-form contracts is widespread in wholesale financial markets. This includes critical market infrastructure documentation governing derivative market transactions produced by the International Swap Dealers Association and widely used 'boiler-plate' contracts that allow efficient drafting without negotiation on terms and conditions for standardised transactions.

The opportunity to negotiate the terms and conditions of an instrument may exist, but does not often occur. The use of these standard-form contracts reduces costs and provides certainty about the rights and obligations assumed under the contract. Parties must be certain that the contracts into which they enter are permissible in the governing jurisdiction, that their counterparties have the legal capacity to enter into the contracts, and that the provisions of the contracts are enforceable. This legislation will introduce uncertainty about the enforceability of the contract in Australia. We are concerned it may undermine the use of standard agreements and the certainty they provide in the context of international trade.

There are a number of risks in extending the coverage of the unfair contract terms provisions to large businesses. The legislation should be limited to contracts with consumers and small business (defined in terms of size of business rather than transaction).

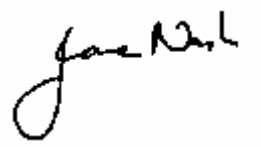
5. TRANSITIONAL ARRANGEMENTS

The commentary states that contracts negotiated before 1 January 2010 will come under the legislation if they are renewed or varied but only to the extent they are renewed or varied. The Bill provides that it 'will apply to the contract as varied…, in respect of conduct that occurs on or after the variation day'.

It is unclear from this drafting whether the legislation will apply to the entire contract or only the varied clause (as contemplated by the commentary). We believe the approach should be the same as that adopted in the Victorian unfair contracts legislation. That legislation will apply to pre-existing contracts only when they were varied and only in respect to the varied term. This should be clarified in the final legislation.

ANZ would be pleased to provide further information about this submission as required and I can be contacted on 03 9273 6323 or jane.nash@anz.com.

Yours sincerely,



Jane Nash
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