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19 March 2009

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Dear Sir/Madam

I refer to the *An Australian Consumer Law: Fair Markets—Confident Consumers Consultation Paper* February 2009 (Consultation Paper).

Given the subject of the Consultation Paper is broad ranging, and the timeframe for consultation is limited, this submission is brief and only addresses those broad themes in the paper in which ANZ has a particular interest.

### **National Harmonisation of Consumer Laws**

ANZ operates across all Australian jurisdictions and is required to comply with a range of State and Territory as well as Commonwealth regulation. This includes consumer protection laws under the Commonwealth *Trade Practices Act 1974* (TPA) and individual State and Territory Fair Trading Acts.

Despite the 1983 agreed intention for a uniform set of fair trading laws across the country, there have been legislative developments in various States and Territories in recent years that have created inconsistencies. It appears that State and Territory governments are increasingly using fair trading legislation as a means to drive consumer protection initiatives which do not necessarily have national support.

This has occurred in a range of areas including the introduction of new obligations for credit card limit increase offers in the Australian Capital Territory, and the proposed expansion of the Victorian Unfair Contract Terms regime to consumer credit (discussed in more detail below). Differences in regulation have also emerged over time between States' Fair Trading Acts, through for example, interest rate caps on credit.

For these reasons ANZ supports the move to harmonise this legislation between jurisdictions as this will reduce compliance costs and the complexities associated with complying with multiple legislative requirements while ensuring consumers are protected.

However, while ANZ supports the goal of the Commonwealth to harmonise consumer laws across all jurisdictions, we question the ability of the proposed 'application law model' to achieve this. The Uniform Consumer Credit Code (UCCC) in its current form operates under a similar 'template' model as that proposed for the Australian Consumer Law.

The UCCC has been widely criticised for its inability to adapt to changes in the market place in a timely manner, which has resulted in gaps in its coverage. Examples of this are responding to issues such as bills of exchange and the regulation of finance brokers.

A suitable alternative may be for States and Territories to refer their rights on fair trading law policy to the Commonwealth, but retain their enforcement role. This would eliminate the need for changes to the Australian Consumer Law to require the agreement of the Australian Government and four other jurisdictions – which has the potential to create significant delays to addressing future issues.

## **Unfair Contract Terms**

The unfair contract terms legislative model as put forward by the Consultation Paper adopts many of the features of that recommended by the Productivity Commission's *Review of Australia's Consumer Policy Framework—Inquiry Report* April 2008 but different to that that exists under Part 2B of the *Fair Trading Act 1999 (Vic)*. 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 put forward are significantly different from those recommended by the Productivity Commission (PC). One key example of this is that the PC recommended that the 'ex post' model should apply in any national regime, where 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 the '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 should occur after a review of the impact of the new law once it has been in operation for five years.

The Consultation Paper has, however, suggested a model which adopts the features of the 'ex ante' model, including that remedies should be available where the claimant shows actual detriment, or the substantial likelihood of detriment. Further, the Consultation Paper has flagged that there would be scope to 'ban' certain types of terms that would be, in all circumstances, considered to be unfair, indeed the Consultation Paper already puts forward for consideration some terms that could be banned in the legislation itself.

The PC's inquiry was thorough and detailed and the Consultation Paper does not adequately explain why the Government has deviated from the recommendations of its key economic research and advisory body. ANZ believes that there is no sound policy reason at this stage to deviate from the approach recommended by the PC and an 'ex post' model should be tested.

#### *National Uniformity of Unfair Contracts Legislation*

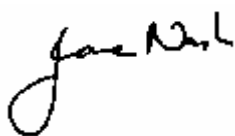
The proposed national unfair contract terms legislation is to be 'fast tracked' for introduction by 1 January 2010. However, at the same time the Victorian Government is progressing its *Fair Trading and Other Acts Amendment Bill 2008* in Parliament which will expand its existing unfair contracts regime to consumer credit.

As the Victorian unfair contracts legislation is different to that proposed by the Consultation Paper, and significantly different to that recommended by the PC, ANZ is concerned the Victorian amendment is being progressed. It would be a poor outcome if as a result companies such as ANZ were required to comply with the Victorian legislation for a period of approximately 6 months, before complying with the new Commonwealth regime.

The new Commonwealth regime will require ANZ to review a large number of contracts across many products and necessitate IT system changes. It would therefore be useful for there to be a minimum 12-18 month transition period and we would not expect changes to apply retrospectively to existing contracts.

ANZ would be pleased to provide any further information about the issues raised here and I can be contacted on 03 9273 6323 or via e-mail: [Jane.Nash@anz.com](mailto:Jane.Nash@anz.com).

Yours sincerely,



Jane Nash  
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