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Senate Economics Committee Inquiry
Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011

Dear Dr Grant

ANZ is pleased to provide a submission on the Draft Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 (the Bill). In our submission, we have addressed the provisions in the Bill relating to the following:

- Financial hardship
- Remedies for unfair or dishonest credit service
- Direct debit default notices
- Reverse mortgages

Financial hardship

ANZ is committed to supporting customers facing financial difficulty. Our Customer Connect program was established to make it as easy as possible for customers to get the help they need. Through Customer Connect, we last year helped more than 10,000 customers.

The type of assistance we provide is flexible to a customer's individual circumstances. In most cases, we will:

- Make temporary arrangements quickly and efficiently over the phone so customers receive the assistance they need as soon as possible; and

- Suspend any debt collection activity while these arrangements are in place.

ANZ has taken a number of voluntary steps within the current legislative framework to improve customers' access to hardship relief when required. The Bill proposes to repeal and replace the current hardship provisions in s.72 of the National Credit Code (NCC). The stated purpose of the amendments is to make it easier for debtors to apply for

hardship assistance, by making the procedures more flexible. However, our view is that the current hardship processes and arrangements work effectively and that the proposed changes impose administrative burdens on lenders and potential delay to customer access to hardship assistance.

Under the current s. 72, a debtor can apply to a credit provider for a change in their credit contract on the grounds of illness, unemployment or other reasonable cause provided they reasonably expect to satisfy their contractual obligations if the contract terms are changed in the way requested. The credit provider is required to respond to the debtor's application within 21 days.

Under the new s.72, a debtor may give the credit provider an oral or written notice (hardship notice). Within 21 days of receiving the hardship notice, the credit provider must give the debtor either a notice (in a form to be prescribed in the regulations) that the credit provider agrees to negotiate a change or a written notice that the credit provider does not agree to negotiate a change; and

We support the Government's intent to make it as easy as possible for customers to apply for hardship assistance. However, there are a number of practical issues with this section:

1. The fact that a debtor is only required to give a hardship 'notice' rather than make an 'application' is too vague and uncertain and potentially triggers the need to issue formal correspondence in too many cases.

   In practice, this would make it difficult for credit providers to ascertain whether their obligations under s.72 have been triggered. For example, there may be instances where a debtor says that they 'notified' branch staff or a call centre operator of difficulty in making repayments, but this may have been expressed in such a way or interpreted as something other than notification, for example, a complaint.

2. The proposed amendments remove flexibility in the way ANZ can offer temporary repayment arrangements to assist customers deal with short term financial instability.

   ANZ will often offer very short term relief arrangements for customers who are experiencing a temporary difficulty in meeting repayments. This difficulty may be due to an unexpected expense incurred by the customer that, while causing some financial instability in the very short term (meaning the customer may miss one or two repayments to their loan), is not indicative of financial hardship.

   In these cases, once the cause of the short-term difficulty is explained by the customer and ANZ is comfortable the issue is temporary, ANZ will often be able to offer an arrangement over the telephone, with a minimum of 'red tape' for the consumer.

   However under the current proposed amendments, these scenarios will need to be treated in the same way as a financial hardship situation, requiring the issue of formal correspondence within 21 days, without any added perceived consumer benefit. We expect the added administrative burden in this area of our customer assistance team (mainly involving the preparation and dispatch of confirmation letters) will cause delays in responding to customers seeking short-term informal relief arrangements.

3. The amendment has removed any requirement for the debtor to consider whether they reasonably expect to discharge their obligations if their credit contract were changed or assistance given.

   On a practical level, this will mean that debtors can notify credit providers of their inability to pay without there being any likelihood that they can discharge their repayment obligations in the short to medium term. It is ANZ's view that this will also substantially increase customer correspondence without deriving consumer benefit.

4. There is no scope for a credit provider to decline to consider a hardship notification where the customers does not have a reasonable basis for their request, and/or the credit provider has recently declined to negotiate because the debtor has not demonstrated any capacity and/or willingness to meet an arrangement.

   In ANZ's view, this could lead to credit providers having to respond unnecessarily to multiple hardship notices from the same debtor in respect of the same debt. As such, we submit that s.72 should include a provision similar to that contained in the proposed s.89A (where the restriction on enforcement does not apply where customer has given the credit provider a notice or request on the same basis in the past 4 months). That is, s.72 should not require a credit provider to consider a hardship notice where the credit provider has assessed the customer for hardship within the past four months and the notice is provided on the same basis as the initial notice.

5. The 21 days in which a credit provider has to respond to a customer's hardship notice runs from the time the notice is received rather from when the credit provider has received enough information to make a decision.

   The trigger of the 21 day response time commencing immediately upon verbal notification from a customer, rather than once sufficient information has been provided to enable an assessment to be made, is of particular concern in the context of a joint mortgage and where there has been a breakdown in the relationship between the borrowers. In order to make an assessment of whether to negotiate, a credit provider will need information for all parties to the loan. In the case of a joint loan, the refusal of one party to provide information can impede our ability to assess both or one of the borrowers for hardship assistance. If a credit provider simply declined to negotiate a change on the basis of not having sufficient information, it is likely to result in increased complaints to external dispute resolution schemes.

   Accordingly, we submit that s.72 should include:

   - An obligation on a debtor to provide sufficient information for a credit provider to consider the hardship notice; and

   - The 21 days for a credit provider to inform a debtor whether it agrees to negotiate should only commence once the debtor has provided sufficient information to the credit provider.

<u>Remedies for unfair or dishonest credit service</u>

The Bill proposes that a new s.180A be inserted into the *National Consumer Credit Protection Act 2009* (NCCP Act), to give consumers a remedy for conduct by a 'defendant' that is unfair or dishonest.

The Bill does not, however, define what is meant by 'unfair' and 'dishonest'. Section 180A(4) sets out the elements that a court must have regard to in determining whether conduct was unfair or dishonest, but does not limit the matters to which the court may have regard.

The guiding circumstances in s.180A(4) are heavily weighted towards the vulnerability of the consumer and the resulting credit contract. In ANZ's view, any finding of unfairness or dishonesty should be based on the nature of the actual conduct engaged in by the defendant, rather than on the consumer's particular circumstances.

Section 180A does not apply to the provision of credit assistance by a person who is or becomes a credit provider under the credit contract to which the assistance relates. ANZ submits that the credit provider carve out should apply not only to credit providers, but to representatives of credit providers under the NCCP Act, in respect of conduct they engage in on behalf of a credit provider. Conduct by representatives of credit providers would likely be covered by the other provisions available to consumers against credit providers, e.g. unconscionable conduct, as well as by consumer protection laws such as misleading and deceptive conduct. As such, our view is that there is no clear basis on which to include representatives of credit providers under s.180A.

Direct debit default notices

Section 87 of the NCC introduced a requirement for a credit provider to give the debtor (and any guarantor) a notice the first time a default occurs on a direct debit arrangement. The notice is required to be given within 10 business days of the default occurring unless the default is remedied during that time.

The Bill amends the requirement to issue a direct debit default notice within 10 business days, to a requirement to issue a notice 'complying with the section' within 14 days.

The Explanatory Memorandum does not clarify the reasons for this amendment and there is seemingly no policy reason for the change.

In order implement the change from 10 business days to 14 days, technology changes to systems as well as amendments to policies and processes are required. ANZ considers this an unreasonable impost on credit providers, especially in light of the following:

- Providers are already dealing with a significant volume of consumer credit related reform impacting systems;
- The direct debit default notice requirement was only implemented in July 2010; and
- There is no clear consumer benefit for the proposed change.

Definition of reverse mortgage

Schedule 2 of the Bill introduces new obligations in relation to reverse mortgages. Reverse mortgage is defined in s.13A as follows:

- An arrangement involving a credit contract, except a bridging contract, and a mortgage over a dwelling or land securing a debtor's obligations under a contract and either:
    - The conditions in subsections (2) and (3) are met; or
    - The arrangement is of a kind declared by ASIC under subsection (4).

The first condition is set out in subsection 2 and is that the debtor's total liability under the credit contract or mortgage may exceed the maximum amount of credit that may be provided under the credit contract without the debtor being obliged to reduce that liability to less than that maximum amount.

The second condition is contained in subsection (3) and requires that any prerequisites prescribed by regulation for the arrangement to be a reverse mortgage are met.

Under some standard mortgage arrangements, customers are required to at least make interest only payments, thereby keeping the loan balance to at least the original amount of credit provided. Interest only arrangements do not, however, require the customer to reduce liability to less than the credit limit.

In ANZ's view, the reference to 'reduce that liability to less than that maximum amount' should be changed to 'reduce that liability to less than or equal to that maximum amount' in order to properly distinguish reverse mortgages from standard mortgage arrangements.

It is also possible that the proposed definition of reverse mortgage could have the unintended consequence of capturing hardship assistance arrangements. Under current ANZ hardship arrangements, one of the options available is to capitalise a debtor's arrears into their loan if the debtor is likely to be able to meet their repayment obligations. Capitalising interest and arrears can take the loan over the original amount financed.

Treasury has previously communicated concerns regarding 'avoidance' by defining reverse mortgage to include a condition that a lender has a policy of only entering into contracts with consumers who are at least 55 years old.

In response to those concerns, Treasury proposed a definition of reverse mortgage that included age as a condition of the definition, without specifying a particular age. That is, age was expressed to be a 'directly relevant factor' to the credit provider in determining the credit limit under the credit contract.

This age 'linkage' does not appear in the Bill. If there no intention to clarify this by way of regulation, then ANZ's view is that the definition should be amended to include an age linkage, as this is an integral aspect of a reverse mortgage. It would also avoid capturing unintended situations, such as hardship arrangements, within the definition.

ANZ would be pleased to provide any further information on this submission.

Yours sincerely

Michael Johnston
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