

ENHANCEMENTS TO UNFAIR CONTRACT TERM PROTECTIONS

SUBMISSION TO THE TREASURY

May 2020

COMPLIANCE WITH EXISTING UCT REQUIREMENTS FOR SMALL BUSINESS CONTRACTS

1. ANZ thanks the Treasury for the opportunity to contribute to the consultation regulation impact statement (**RIS**) on enhancing the unfair contract term (**UCT**) protections. The UCT protections provide important safeguards against consumers and small businesses being subject to inappropriate contractual provisions. This submission relates to small business contracts.
2. ANZ has taken significant steps to review and amend its small business lending contracts in compliance with these protections. These steps include responding to recommendations and requests from the Australian Securities and Investments Commission (**ASIC**) and the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) on these contracts.
3. For example, for small business lending contracts, ANZ has:
 - Adjusted its unilateral variation clauses;
 - Changed its indemnification clauses to exclude liability to the extent arising from ANZ's or its agents' negligence, fraud or wilful default;
 - Removed any "entire agreement" clauses;
 - Removed material adverse change as a default event;
 - Limited non-monetary default events to a reduced number of specific events (unlawful conduct, insolvency, change of control without consent, loss of business licence/permit, failure to provide financial information or maintain insurance, material misrepresentation, use of loan for non-approved purpose, unauthorised dealing with assets/assets seized, change in legal status); and
 - Removed financial indicator covenants as an event of default for more than 95% of ANZ small business customers.

4. These changes overlap with several of the ASBFEO recommendations for small business lending contracts and complement other changes to ANZ's main small business lending contract made in response to the ASBFEO report.¹ These additional changes include:
- Simplification of ANZ's main small business lending contract to make it easier for customers to understand;
 - Providing a summary of key terms at the front of the contract (now also reflected in the Banking Code of Practice (**BCOP**));
 - Providing at least 30 calendar days' notice where the bank exercises the power to unilaterally vary a particular small business's credit contract in a way that is materially adverse (reflected in the BCOP); and
 - Providing a minimum of 3 months' notice before requiring a customer to repay or refinance a loan (reflected in the BCOP).
5. We consider these changes to have led to fairer contract terms for our small business customers. We note that this dynamic of engagement with oversight authorities to implement changes to the benefit of customers appears to align with Option 2 in section 4.4 of the Consultation RIS ('strengthened compliance and enforcement activities').

ADDITIONAL POINTS

6. We note that the Australian Banking Association (**ABA**) will be making a submission to Treasury on the Consultation RIS. In support of that submission, we would note the following points.
- Simple tests for determining whether contracts are subject to the UCT requirements are useful and, to this end, ANZ supports:
 - An upfront price limb to the small business test;
 - Replacing the employee limb of the small business test with an annual turnover limb; and
 - Consideration of related bodies corporate for the purposes of the small business test.

¹ ANZ Media Release, *ANZ reinforces commitment to small business, simplifies loans up to \$3 million*, 28 April 2017, available at: <<https://media.anz.com/posts/2017/04/anz-reinforces-commitment-to-small-business--simplifies-loans-up>>.

- The threshold for what lending falls under the BCOP was the subject of considerable discussion with ASIC and other regulators and will be reviewed independently to see whether it should be increased from \$3 million to \$5 million total credit exposure.
 - It would be appropriate to consider the UCT provisions applicable to the financial sector in light of the outcome of this review and with a 'consistency of regimes' lens.
- While ANZ has already amended its contracts as described above, if UCTs were to become "illegal" and subject to a penalty (Option 3, section 4.5 in the Consultation RIS), this may trigger further legal review of ANZ contracts. We would suggest that those businesses in compliance with the current regime would likely undertake further reviews of their contracts if a change were made as proposed in Option 3.
 - Given the amount of work involved in responding to COVID-19, we would ask that Treasury allow adequate time for the implementation of any changes if it is minded to recommend these.
- If UCTs become subject to a penalty, it will be critical that there is clarity on when a term is unfair under the regime.
 - It may be difficult, for example, to understand how a judicial decision that one term is unfair applies to similar terms that are used in different contexts.
 - We would ask Treasury to strongly consider Option 4b (section 4.6) in the Consultation RIS on the ability of regulators to provide 'determinations' (or 'rulings').
 - While these mechanisms could introduce additional costs into regulators' budgets, these costs could be recouped from industry and reduce enforcement, compliance and court costs in the long run
 - Clarity of obligations is critical in designing compliance systems and regulator determinations may be a good option in achieving this, particularly in comparison to court decisions.

7. We thank Treasury for the opportunity to comment on this Consultation RIS and would welcome any questions from Treasury on the points made in this submission.

ENDS