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Competition & Consumer Policy
Building, Resources and Markets
Ministry of Business Innovation & Employment
PO Box 1473, Wellington 6140
New Zealand

consumer@mbie.govt.nz

Submission on the discussion paper, review of consumer credit regulation

Thank you for the opportunity to provide feedback to the Ministry of Business, Innovation & Employment (**MBIE**) on the 'Review of consumer credit regulation' discussion paper.

ANZ does not propose to answer all the questions posed in the discussion document. Instead, we have provided comments on key issues in each of the areas covered by the discussion document.

However, we are happy to provide feedback on a specific question if that would be helpful.

We set out below the key messages to which we would like to draw to MBIE's attention, in order of priority. Further detail on these points is set out in our submission.

Key Messages

1. ANZ supports targeted amendments to the Credit Contracts and Consumer Finance Act 2003 which focus on preventing consumer harm.
2. ANZ supports in principle the concept of capping interest rates on high cost loans, but submits further consultation is required on the proposed options. We disagree that caps should be applied to fees.
3. All lenders should be required to report their debt arrangements through comprehensive credit reporting, or a similar mechanism.
4. We support the proposal to introduce a fit and proper person test in registration of creditors, however ANZ submits that banks should be deemed to meet any new requirements imposed, given they are already subject to fit and proper person requirements. If this proposal goes ahead we recommend that the fit and proper person requirements should mirror existing financial services legislative requirements.
5. ANZ submits that creditors should retain the flexibility to set their own fee structures, subject to the CCCFA's current requirement that the fees are not unreasonable.

Contact for submission

ANZ welcomes the opportunity to discuss our submission with MBIE officials. Please contact Cushla Scholfield, Senior Counsel,

Once again, we thank MBIE for the opportunity to comment on the discussion paper, 'Review of consumer credit regulation'.

Yours sincerely

Antonia Watson
Managing Director
Retail and Business Banking

David Bricklebank
General Counsel & Company Secretary

Introduction

ANZ is committed to complying with its obligations under the Credit Contracts and Consumer Finance Act 2003 (CCCFA). We support legislative changes which reduce harm to consumers, and note that the MBIE research has found that consumer harm occurs the most in the high-cost lending area.

While we generally support many of the suggestions in the discussion paper, we urge caution before increasing regulation. Regulation must be appropriately targeted and must not unduly deny consumers access to credit from responsible creditors.

Any changes must strike an appropriate balance between allowing consumers access to credit, where there is a genuine need, and protecting those who are vulnerable. To achieve balance, we consider education and support are particularly important, not simply increasing regulation.

Issue 1: Excessive cost of some consumer credit agreements

Addressing high interest and fees

ANZ supports, in principle, capping annual interest rates where high rates lead to consumer harm. We agree that charging excessive interest rates can cause small debts to spiral into unmanageable debt and can lead to financial hardship. However, we do not support caps on fees, as the existing regulation of fees under the CCCFA is adequate.

Definition of high-cost lending, and appropriate limits

In terms of Cap Options A and B, ANZ supports the intent of these options, but submits the detail must be developed further, with appropriate industry consultation, before proceeding to implement any regulatory changes.

The options also focus on high-cost lending, which we believe is appropriate, but the term itself is not defined in the discussion paper, and requires careful consideration.

We assume the intent is to use the 'high-cost credit agreement' definition from the Responsible Lending Code, being an agreement where the annual interest rate (expressed as a percentage) is 50% or greater.

However, we suggest it is important to consult further on any definition to ensure it captures the credit contracts that cause the greatest harm to consumers while remaining flexible if there are changes to market conditions. We note that any definition of high-cost lending should also build in anti-avoidance provisions, to prevent creditors from exploiting an overly narrow definition.

If high-cost lending is not appropriately defined, the proposed caps may capture scenarios beyond their intended reach. For example, in the context of long-term lending (e.g. a 20 year home loan), interest charged over the loan's term may often exceed the principal, even at lower interest rates. Similarly, undrawn revolving credit facilities will still incur regular account fees. An overly broad definition of high-cost lending could unintentionally capture these situations.

Further, it is difficult to predict if or when certain fees, including credit and default fees and interest will be incurred by a borrower and in the case of interest, for how long it will be charged. This will often depend on borrower behaviour. For example, a customer with a fixed-rate home loan could incur a full or part prepayment fee if they choose to repay the loan early during a fixed-rate period. The amount of the fee may depend on how much is being repaid and the difference between interest rates at the time of the prepayment. Such a fee could not reasonably be included when calculating the interest and fees over the life of a loan.

We encourage further engagement with the industry to develop a solution that is simple for consumers to understand, and for creditors to apply. In particular, it is important to reflect on the reasons why the concept of disclosing a finance rate was not included when the CCCFA was introduced (including the considerable consultation that occurred on that issue).

For these reasons, ANZ supports greater consultation on the proposed cap options.

Fee caps

We submit that introducing fee caps (whether in the regulated banking, wider finance or high-cost lending segments) would be counter-productive. ANZ considers that if caps are to be introduced, they should only apply to interest rates, and not to fees.

The CCCFA currently prohibits creditors from charging unreasonable fees. ANZ submits that the regulatory focus should be on enforcement where fees are unreasonable. We also note the CCCFA already prohibits lenders from making any profit on fees.

While we accept that introducing caps may make enforcement more straight-forward, creditors may lose the ability to charge fees which reflect actual costs. We believe this would go too far. The actual costs (and, by association, the fees charged for that lending) will also vary between different providers due in part to the scalability of operations, and fee caps are unlikely to respond flexibly to these differences.

Finally, capping fees may result in unintended consequences. For example, fees may rise up to the proposed cap, or creditors may pass on the cost of fee reductions to customers in other ways (such as by increasing interest rates), or higher fees charged for a better but more costly service might be removed, limiting the services to customers, which some customers would have been happy to pay for.

Equivalent interest rates

The caps proposed in Cap Options B and C require calculation of an equivalent interest rate. Generating and monitoring a combined fee and interest calculation per customer, per product type may be costly and difficult, especially in the debt collection context. Some fees will not be captured by the equivalent interest rate calculation, particularly fees charged in the high-cost segment of the market (for example, late payment fees). The exclusion of these fees could cause considerable social harm.

Additionally, bundling interest and fees may make it more difficult for customers to understand their fee breakdown and how much total interest will be charged. In our view, adopting an equivalent interest rate calculation goes against the regulatory trend of encouraging increased transparency.

On this point, in July 2017 the Financial Markets Authority amended its guidance on fee disclosure for Managed Funds (licensed under the Financial Markets Conduct Act). This guidance suggests operators should keep fees for management, administration, and underlying fund charges separate to performance fees. It also suggests that these fees should be clearly disclosed to investors. We submit that any amendments to the CCCFA should be in line with this trend of increased transparency for consumers – and this goal is best supported by keeping interest rates and fees for consumer credit contracts separate.

We also note that implementing equivalent interest rates would mark a return to the regulatory regime prior to the CCCFA. We submit that before doing so there should be careful consideration of the reasons that were given for moving away from that position in the first place. In particular, we refer MBIE to discussion documents released by the then Ministry of Consumer Affairs in 2000, which noted that there were a number of deficiencies with the use of an annual finance rate under the Credit Contracts Act. In particular, it was not suited to the majority of credit contracts and was extremely complex for creditors to calculate and consumers to understand.

Cooling off periods

The proposal to include 'cooling off' periods (in para 32) may have merit, but ANZ submits that if they are implemented, cooling off periods should apply across the high-cost industry as a whole. Without this requirement, there is a risk that customers would merely spread their loans across multiple creditors. Enforcing such an industry-wide prohibition could be assisted by requiring creditors to participate in an equivalent to the Comprehensive Credit Reporting regime (discussed further below).

Issue 2: Continued irresponsible lending and other non-compliance

ANZ submits that the current remedies in the CCCFA are more than sufficient to deal with statutory non-compliance.

We submit that an enforceable undertaking regime should be included in CCCFA, similar to the regime included in the Fair Trading Act. Under an enforceable undertaking regime, the regulator could require creditors to take specific actions to correct or avoid breaching the CCCFA.

An enforceable undertaking regime would allow greater flexibility for the regulator to take swift corrective action, without needing to meet the higher thresholds of evidence or harm required if proceedings were filed. It would also allow creditors to take remedial action without admitting guilt or liability for a breach, with certainty as to outcome.

Options for increasing lender registration requirements

ANZ submits that the current powers to deregister creditors and directors from future involvement in the credit industry are sufficient. As a result, ANZ does not support

Registration Option A. We submit that restricting who can be a lender will reduce the need to rely on and use of section 108.

We support the proposal to introduce a 'fit and proper person' test in the registration of creditors (Registration Option B). However, we consider that banks should be deemed to comply if new requirements are introduced, given banks are already subject to fit and proper person requirements. If this proposal goes ahead we recommend that the fit and proper person test should be consistent with other legislation which applies the same test.

In terms of introducing a lender licensing regime (Registration Option C), ANZ submits that implementing a scheme which is sufficiently stringent would be expensive and time consuming, both for lending institutions and regulators. ANZ considers that the existing framework broadly provides sufficient regulation, and concerns with irresponsible lending could be better addressed by an increased focus on enforcement. If a licensing regime were to be implemented, ANZ submits that it should not apply to Qualifying Financial Entities (known as Financial Advice Providers under the Financial Services Providers Legislation Amendment Bill) and lending institutions that fall under licensing/supervisory regimes, such as Non-bank Deposit Takers. These entities are already subject to separate licensing requirements.

Increasing enforcement and penalties

ANZ supports an industry levy to fund advocacy, monitoring and enforcement under the CCCFA (Enforcement Option D). We note however that banks, as registered financial service providers, are already charged an industry levy. A new levy would raise the risk of duplication of industry costs for regulatory oversight and enforcement activities.

We do not support increasing fines or statutory damages. We note that the nature of the statutory damages regime in the CCCFA is unusual in New Zealand legislation, in that a creditor's liability for damages is triggered without a Court order and is, prima facie, quantified without any reference to the nature of the breach and the extent of any loss caused by the breach. The amounts were increased significantly in 2015, by doubling the starting point for statutory damages for some breaches of the Act from a maximum of $3,000 to $6,000 per loan. We consider this starting point is already excessive. The current provisions require a creditor to apply to Court to reduce the amount where appropriate given the nature of any breach or harm caused to consumers. An inadvertent immaterial issue across a large number of loans with a statutory damages starting point of $6,000 per loan, despite a lack of any harm to consumers could lead to materially disproportionate outcomes. ANZ submits that one amendment to this section should be to allow a materiality threshold to be applied.

More prescriptive affordability requirements

We submit that increasing transparency about the credit position of consumers between creditors would be the most effective way to ensure lending is affordable. In our view, all creditors should be required to report credit arrangements through Comprehensive Credit Reporting (**CCR**) or a similar mechanism.

We think that this would realise significant benefits to the consumers, the regulator and creditors.

A more complete register of the credit position of consumers (or debt register) will help consumers by allowing their overall credit score to be improved where they successfully meet their other debt obligations. Currently, repayment of other lending does not improve their credit score or assist them in obtaining future lending by first tier lenders as there is no record of this credit. This could mean that these consumers can become trapped by only having access to high cost lending.

A comprehensive debt register can also support the regulator in terms of monitoring and reviewing creditors against requirements and guidelines. There would be increased transparency with lending arrangements recorded by an independent third party which supports industry level supervision. Red flags could more efficiently highlight credit behaviour that needs regulatory exploration. Access to this data also reduces reliance on customer complaints to identify problem lenders, where we know vulnerable borrowers may not be willing to raise concerns.

Having a mechanism to show the aggregate financial commitments of a consumer helps creditors make better decisions regarding extending lending. Creditors will have a complete picture of a consumer's financial position and they can more accurately assess affordability and identify whether consumers may be in financial difficulty. There would also be a broader understanding of consumer behaviour in repaying debt which will lead to better credit decisions.

Although tightening affordability requirements for high-cost loans (as proposed in Responsibility Option A) may reduce harm, doing so could also increase the cost of credit or reduce the availability of credit for certain classes of customer, in particular the self-employed, seasonal workers and newly employed.

In terms of making changes to the section 9C(7) "reasonable grounds" requirement, ANZ submits that removing the "reasonable grounds" threshold could have a significant impact and greatly increase costs for creditors. Verifying customer income and expenses is challenging, for the following reasons:

- Consumers may have irregular sources of income.
- Relevant information about customers may not come from a single source – for example they may use multiple bank accounts, credit cards and other kinds of finance.
- Past costs may not accurately indicate future costs due to changing life circumstances (changes in employment, marital status, etc.)
- Irregular expenses are not easily verified (e.g. one off expenses, or expenses which are only incurred annually).
- Short term, high cost lending can be difficult to detect.
- Customers' disclosure of their own expenses is not always reliable.

For these reasons, banks are increasingly relying on benchmarking to help assess affordability. The Australian Royal Commission is currently considering these same complex issues around affordability, Uncommitted Monthly Income (**UMI**) and benchmarking. ANZ submits there is merit in awaiting the outcome of that review before making changes in this area.

A further area which merits consideration is whether financial institutions should be permitted to assist consumers to refinance where those customers have high-cost lending or are struggling to meet current debts, but are not yet in financial hardship. Under the current legislation, refinancing consumers in these types of situations may be prohibited because of affordability requirements.

For example, ANZ has customers who manage their accounts responsibly on the whole, but do not regularly make credit card repayments. In one example, ANZ considered agreeing to consolidate a customer's credit card debt into their personal loan, with the goal of removing the credit card facility. However, in addition to lending with ANZ the customer had recently taken out two high cost loans with third tier creditors which significantly increased the customer's overall expenses. The best thing for the customer would have been for ANZ to restructure all of the customer's borrowing in a way that would reduce the customer's interest costs. Unfortunately, due to affordability concerns under the lender responsibility principles in the CCCFA, this was not possible.

We suggest these types of situations warrant further discussion. We consider it may be appropriate to make regulatory changes (or even a separate regulatory regime) to allow creditors to assist vulnerable customers to refinance high-cost debts where this is in the best interests of the consumer, including where the overall lending position is currently unaffordable. Such a proposal would need careful rules around how and when unaffordable lending could be restructured to protect consumers and there may need to be exemptions from the current capital requirements imposed on banks.

Introduce more prescriptive requirements for advertising

ANZ supports the recommendation to make the current Responsible Lending Code guidance for advertising mandatory (Responsibility Option B).

In principle, ANZ supports implementing more prescriptive advertising requirements for high-cost lending (assuming the current definition in the Code is used), given the increased risk of social harm associated with that market segment. However, any proposal to extend the advertising requirements beyond the current terms of the Responsible Lending Code would need to be considered in greater detail.

ANZ does not support the proposal to require disclosure to be in the same language as advertising (Responsibility Option C). Clause 7.15 of the Responsible Lending Code already provides guidance on this and states:

> Where a lender advertises its credit product(s) in a language other than English and a borrower who speaks that language but who the lender reasonably suspects does not have a good understanding of the English language applies for credit from that lender, the lender should communicate the information about key features referred to in 7.2 in that language or refer the borrower to an interpreter who can translate English into that language, at the lender's cost.

It is difficult and extremely costly to translate documents into other languages in a way that ensures that all disclosure documentation has the same meaning.

Issue 3: Mobile Traders

ANZ considers lending from mobile traders can be particularly harmful to borrowers, and supports measures to increase enforcement against this market segment.

ANZ supports widening the scope of the CCCFA to include credit contracts with default fees, and in particular, credit-based payment options such as AfterPay and LayBuy. While these payment options may not charge explicit interest or credit fees, they may charge significant default or late-payment fees. These can be equally harmful to consumers as traditional high-cost lending. We note that these arrangements may have been inadvertently removed from the CCCFA's scope when the Act was amended in 2015.

With respect to goods purchased on credit e.g. the iPhone example at para 94, ANZ suggests creditors should be required to display the difference between the recommended retail price and the credit price of the goods. This will make it clearer to borrowers how much credit costs in real terms. In addition, it is recommended that the proposed change also requires creditors to display the total cost over the life of the lending, as without this information it becomes less evident to the consumer how much it will actually cost them.

Issue 4: Unreasonable Fees

Options for addressing unreasonable fees

Substantiating reasonableness of fees

ANZ supports the intent behind the proposal to require creditors to substantiate the reasonableness of their fees. However, ANZ believes the existing provisions of the CCCFA already allow for this, including the right for the Commerce Commission to use information-gathering powers to obtain these records. Due to the commercially sensitive nature of how fees are set, we caution changes to CCCFA that might require disclosure of the breakdown of fee costs with borrowers. We note that the law currently requires creditors to only charge reasonable fees, which represent the actual costs the lender incurs. This prevents harm to consumers through excessive fees which are not linked to actual costs.

Although ANZ supports measures which encourage creditors to comply with their current obligations, we submit caution is required before imposing new substantiation requirements. Depending on how frequently creditors would be required to substantiate their fees, and what evidence would be required to substantiate them, the cost on creditors to comply with new substantiation requirements may be significant. A substantiation requirement may also unnecessarily complicate the existing legal framework. We submit there should be further consultation on this issue.

Fee caps

For the reasons discussed above (under the heading *Addressing high interest rates and fees*) ANZ does not support imposing caps on fees (i.e. Fees Option B).

Notwithstanding our comments above, if caps were introduced, in relation to Debt Collection Agency (**DCA**) fees we suggest fees should be capped at a percentage of the debt outstanding, up to a maximum dollar level. If caps are implemented on an individual account basis (for example, if there was a capped fee for every call or text made by a DCA) the difficulty in complying with the regulations may make the cost involved in debt collection prohibitive.

ANZ does not support the adoption of an 'equivalent interest rate' for disclosure and advertising purposes (i.e. Fees Option C). As discussed above in the context of Cap Option B, we submit there should be good reasons for returning to this pre-CCCFA requirement.

Issue 5: Irresponsible debt collection practices

ANZ has limited insight into the problems identified in this discussion paper suffered by customers experiencing debt collection. It would be beneficial if more context was provided in regards to the problems that have been identified.

Debt Collection Option A: providing key loan information at commencement of debt collection

In terms of the disclosure obligations on DCAs, ANZ is generally supportive of Debt Collection Option A. However, ANZ considers the implementation costs of this option would be significant and suggests a limited disclosure obligation on debt collectors may be appropriate (for example, an obligation to disclose the balance outstanding and fees charged).

On this point, ANZ would appreciate further clarification in this area regarding whether continuing disclosure is required once debts cease to accrue interest or fees. At present the Act appears to require disclosure if interest/fees have been charged at any time under the credit contract. We recommend that where lending has been passed to a DCA (regardless of whether the debt collectors have been assigned rights to the debts or are acting as agents on behalf of a creditor) that the requirement for creditors to provide continuous disclosure should cease where interest and fees are not being charged. We note that if both banks and DCAs are to be required to make disclosure with respect to the same debt, this may be confusing to customers.

Debt Collection Option B: require debt collectors to offer an affordable repayment plan

ANZ broadly supports Debt Collection Option B, which would require debt collectors to offer affordable payment plans. However, the scope of the regulations would have to be appropriate, both in terms of how affordability is to be determined, and how it is to be substantiated. If the requirements in this area are too prescriptive, the cost of debt collection may become prohibitive.

Debt Collection Option C: specify appropriate contact limits

ANZ would generally support implementing Debt Collection Option C if it would address issues arising in the industry at large, although we note there is already guidance in the Responsible Lending Code in relation to contact with borrowers. If New Zealand were to implement guidelines setting out appropriate contact with debtors we suggest that these should also be developed consistently with the Australian Securities and Investments Commission (ASIC) Guidelines.

Debt Collection Option D: make debt collectors subject to CCCFA

ANZ supports making third party DCAs directly subject to the CCCFA (Debt Collection Option D), with appropriate limits. We suggest any obligations on DCAs under the CCCFA should be limited to ensure that the cost to collect does not become prohibitive. We note that the proposed measures such as limiting contact attempts, requiring reasonable repayment plans and more clearly defining creditors' disclosure requirements should assist in improving the practices that have been identified as problems. We submit that there should be further consultation on which additional obligations under the CCCFA should be extended to DCAs and which should be excluded.

Debt Collection Option E: make external debt collection fees cost-based

ANZ supports fees being capped as a percentage of the debt outstanding to a maximum dollar level, rather than the proposal to require external debt collection fees to be cost-based (Debt Collection Option E). A cost-based fee could be difficult to administer, and ANZ disagrees that borrowers will be charged excessive fees if this option is not adopted. In contrast, if fees are required to be cost-based (for example, a set fee for each contact attempt), this could result in Debt Collectors taking more action.

We also note that the cost of debt collection is not possible to disclose initially (especially if fees are to be cost-based) because a DCA is unable to predict how much cost it will incur with respect to a particular customer (for example, how many contact attempts will be required).

Other Issues

Non-consumer lending is very different to the kinds of lending currently governed by the CCCFA. Small businesses and investors operate for commercial purposes (for profit), and frequently have professional advisors and professional trustees. Extending CCCFA protection to these entities would increase costs and may reduce the availability of credit, making it harder for people to start and operate businesses. In particular it would make smaller credit facilities more expensive.

We note that most consumer protection legislation distinguishes between consumers and business customers because of these factors. For example, parties can contract out the Consumer Guarantees Act and certain sections of the Fair Trading Act where the supply of goods or services is for business purposes. The Credit (Repossessions) Act was amended to limit the scope of the Act to consumers only.

The increased administrative burden on lending institutions would serve to discourage them from supporting new business start-ups, or from continuing to support some low value segments of the market. We note that there was considerable consultation on this point prior to the CCCFA's introduction that may be useful to consider.

The Australian Royal Commission has considered this issue in detail - it is complex and nuanced. ANZ submits New Zealand should wait and see what recommendations are made by the Australian Royal Commission before taking action here.

Finally, we would like to note that the June 2018 Cabinet paper recommends a prospective amendment to s 99(1A) of the CCCFA. While ANZ strongly supports changes to this section, the proposed changes do not entirely address our concerns, as the amendment would not apply retrospectively. We will contact officials to discuss our concerns further soon.