

CORPORATIONS AMENDMENT (DESIGN AND
DISTRIBUTION OBLIGATIONS AND PRODUCT
INTERVENTION POWERS) REGULATIONS 2018

SUBMISSION TO THE TREASURY

13 November 2018

1. ANZ thanks the Treasury for the opportunity to comment on the draft Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018 (**Regulations**). As noted in our submission on the draft Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (**Bill**), ANZ supports the introduction of the design and distribution obligations.
2. We offer two comments on the Regulations for the Treasury's consideration.

WHOLESALE DEBENTURES

3. First, clause 7.8A.02 of the Regulations will make 'a debenture of a body that is an ADI' subject to proposed section 994B of the Corporations Act 2001 (Cth) (**Corporations Act**). This means that an issuer must make a target market determination for the debenture before any 'retail distribution conduct' occurs in relation to the debenture. Retail distribution conduct includes providing financial product advice in relation to the product to a retail client.
4. As proposed, clause 7.8A.02 will capture the wholesale debt programs of banks: the Regulation does not distinguish between debentures issued to retail clients and those issued to wholesale clients.
5. While none of the other substantive obligations of the proposed Part 7.8A of the Corporations Act would operate with respect to ADI debentures offered to wholesale clients, we note that proposed section 994B would require ADIs to assess whether any person provides financial product advice to a retail client in relation to the wholesale debentures. This is because, if such advice were somehow provided, the issuer would come under an obligation to make a target market determination. Failure to comply with this obligation would be a criminal offence.
6. In practice, this may mean that ADIs will develop target market determinations for wholesale debentures to ensure that if, despite their wholesale nature, financial product advice is provided to a retail client in respect of the debentures, the ADI will not breach proposed section 994B. We would suggest that this is an odd result given the intent of the design and distribution obligation is to regulate issuances of retail products.
7. This outcome could be avoided while retaining the policy intent of capturing retail ADI debentures by stating in the Regulation that the debentures which are caught are those which, save only for section 708(19) of the Corporations Act, a person would be required under Part 6D.2 to prepare a disclosure document.
8. We note that this amendment would then align the treatment of wholesale ADI debentures with the treatment of wholesale corporate debentures (as the latter would never be subject to proposed section 994B due to section 994B(1)(a)).

BASIC DEPOSIT/BANKING PRODUCTS

9. Second, clause 7.8A.02 of the Regulations will also make 'basic banking products' (as defined by section 961F of the Corporations Act) subject to proposed section 994B.
10. We note that this is different from the Government's stated intention in the Explanatory Memorandum that accompanied the introduction of the Bill into Parliament. At paragraph 1.34, the Explanatory Memorandum stated that the Government proposes to make regulations that would apply the regime to, among other products, 'basic deposit products' (which are defined by section 761A of the Corporations Act).
11. The concept of a basic banking product is broader than a basic deposit product in that it includes a facility for making non-cash payments and travellers cheques. We would ask Treasury to consider what benefit making non-cash payment facilities to subject to the design and distribution obligation will bring. For example, the Regulation could require the preparation of target market determinations for certain facilities for the transfer of funds through digital platforms.
12. We also note that the financial products excluded from the disclosure obligations under Part 7.9 by regulation 7.9.07FA are not the same as those caught by the definition of 'basic banking product' in section 961F. Specifically, regulation 7.7A.07 provides that a facility for making non-cash payments that is not related to a basic deposit product is a basic banking product. Such facilities are not covered by the exclusion provided by regulation 7.9.07FA. This suggests that the statement at page 6 of the draft explanatory statement for the Regulation that '[u]nder regulation 7.9.07FA of the Corporations Regulations, such disclosure is not required for basic banking products when specified conditions are met' may benefit from reconsideration.

ENDS