

4 October 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Cres
PARKES ACT 2600

Online: ConsumerCredit@treasury.gov.au

Dear Sir/Madam,

Mortgage broker best interests duty and remuneration reforms

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

CPA Australia supports the proposed reforms, which would see a duty extended to mortgage brokers to act in the best interests of their customers when providing credit assistance. We note the Government's decision to support all 76 recommendations from the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services. The issues arising from the case studies explored as part of the Royal Commission highlighted differences which exist simply due to a historically anomalous division that has been drawn between products provided through the financial sector, where credit is treated differently to other financial products which are subject to uniform consumer protections in relation to advice.

Our submission is intended to be brief and to provide insight into a number of areas which we believe require additional attention. These are provided in the attachment to this submission.

If you have any queries do not hesitate to contact Richard Webb, Policy Advisor Financial Planning & Superannuation at CPA Australia on richard.webb@cpaaustralia.com.au or 03 9606 9607.

Yours sincerely



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CPA Australia**

1. The definition of credit assistance

The exposure draft legislation outlines the obligations imposed on mortgage brokers and mortgage intermediaries in the provision of credit assistance. 'Credit assistance' is a term which is already defined at section 8 of the *National Consumer Credit Protection Act 2009* (the "Credit Act") as covering recommendations to apply for new or increased credit with particular credit providers, to remain with those credit providers, or to assist with applications for new or increased credit from those credit providers.

A parallel should be drawn with the definition of financial product advice which is contained at section 766B of the *Corporations Act 2001* (the "Corporations Act"), which "is a recommendation or statement of opinion, or a report of either those things, that is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product, or could reasonably be regarded as being intended to have such an influence. Information is not advice." (Hanrahan 2018:20)

ASIC clarifies in *Regulatory Guide 36: Licensing: Financial Product Advice and Dealing* (RG 36) that the decisions made by persons influenced by financial product advice includes any decision to buy, sell or hold a particular financial product or class of financial product (RG 36.27).

This definition highlights that consumers consulting a mortgage broker in respect of their lending needs can only be partly covered by the best interests duty, since the definition of 'credit assistance' in the Credit Act does not include an equivalent for the decision to "sell", that is, exit, a credit contract.

This means that consumers consulting a mortgage intermediary for advice related to the decision to refinance a credit contract will not be able to rely on mortgage brokers acting in their best interests in relation to the decision to exit one credit contract, but are able to rely on mortgage brokers acting in their best interests in relation only to advice in entering a new contract.

Whilst the definition of 'credit assistance' is outside the scope of the exposure drafts, CPA Australia points out that inappropriate 'churning' of consumers between credit contracts may continue to be justified until this definition is rectified.

2. The lack of a safe harbour

The measure contains no safe harbour provisions, only a principles-based requirement to act in the best interests of their clients, and to prioritise their clients' interests when providing credit assistance. Although the safe harbour provision available to financial product advisers also contains a catch-all provision, the remaining requirements provides financial advisers with a guide which can assist them in their roles.

CPA Australia supports the need for a best interests duty which is principles-based, however in the absence of a safe harbour, we raise the need for guidance to ensure that mortgage brokers are in no doubt that the advice which they provide to clients is in their best interests.

3. Clawback restrictions

We note the draft regulations propose a restriction which would see commission arrangements between lenders and aggregators restricted to a two year period, as well as an outright ban (as proposed at 28VE(2)(c)) on recovery from consumers.

We welcome the aims of this to ensure that consumers are better able to shop around in relation to credit.

We are however concerned that this may affect consumers in certain situations, such as those which apply where part or all of commissions are passed on to borrowers as rebates. The ban on clawbacks from consumers means that such arrangements will become an unintended casualty of this measure.

We note that no alternative arrangement has been proposed in relation to this, and are concerned that unintended outcomes may see brokers charging additional amounts in the hope of refunding to borrowers at a future date two

years into the future. We note that such arrangements add complexity to borrowing arrangements and would recommend that this be rectified by an allowance for rebated commissions.

4. Conflicted remuneration to be defined in the regulations

CPA Australia supports the ability for the regulations to prescribe the circumstances in which a payment is defined as conflicted remuneration. We note in passing that, as with the prohibitions on conflicted remuneration in the Corporations Act, this may create differences in what is conflicted remuneration in law, as opposed to conflicted remuneration in fact, for example where commissions are banned for investment products, but not risk insurance products. Such differences may potentially create misunderstandings for consumers.

References

Hanrahan, P. (2019). *Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households*. Background Paper 7. [online] Melbourne: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services. Available at: <http://t.ly/wKV0e> [Accessed 26 Sep. 2019].

Regulatory Guide 36: Licensing: Financial Product Advice and Dealing. (RG 36)