

## **EXPOSURE DRAFT EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection Amendment (Mortgage Brokers) Regulations 2019*

Section 329 of the *National Consumer Credit Protection Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The exposure draft National Consumer Credit Protection Amendment (Mortgage Brokers) Bill 2019 (the Bill) has been released by the Government with these regulations. The Bill amends the Credit Act to require mortgage brokers to act in the best interests of consumers and enable restrictions to be made on conflicted remuneration relating mortgage broking.

The Bill allows regulations to be made that prescribe circumstances, in addition to those set out in the Bill, under which a benefit is and is not conflicted remuneration. The Bill also allows regulations to be made that prescribe circumstances in which conflicted remuneration must not be accepted and circumstances in which conflicted remuneration must not be given. Pursuant to these powers, the purpose of the *National Consumer Credit Protection Amendment (Mortgage Brokers) Regulations 2019* (the Regulations) is to make such regulations by amending the *National Consumer Credit Regulations 2010* (the Credit Regulations).

The Regulations amend the Credit Regulations to prescribe five kinds of benefit that are not conflicted remuneration:

- certain monetary and non-monetary benefits given by the consumer;
- monetary benefits that meet a number of specific requirements directed at ensuring the benefits are transparent and do not negatively impact consumers.
- infrequent, low-value non-monetary benefits;
- non-monetary benefits related to education and training; and
- non-monetary benefits related to IT support.

In relation to the second benefit, the requirements include that the benefits are not volume-based benefits or campaign-based benefits. Furthermore, in relation to certain residential property loans, the benefits must not be paid based on an amount that remains in the loan account or is in a redraw account or an offset account.

The Regulations also amend the Credit Regulations to prescribe circumstances in which conflicted remuneration must not be accepted and must not be given. In particular, the amendments enliven the primary obligations in the Bill not to accept and not to give conflicted remuneration.

The Regulations also make consequential amendments to the Credit Regulations that are necessary because of changes made by the Bill to support the effective and efficient operation of the reforms.

Details of the Regulations are set out in Attachment A.

These Regulations commence on the day after they are registered.

The Act does not specify any conditions that need to be met before the power to make regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

## ATTACHMENT A

### Details of the *National Consumer Credit Protection Amendment (Mortgage Brokers) Regulations 2019*

#### Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *National Consumer Credit Protection Amendment (Mortgage Brokers) Regulations 2019*.

#### Section 2 – Commencement

This section provides that the Regulations commence on the day after registration

#### Section 3 – Authority

This section provides that the Regulations are made under the *National Consumer Credit Protection Act 2009* (the Act).

#### Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

### **Schedule 1 – Main amendments**

#### **Items 1 and 3 – subregulation 3(1) (definition of *associate*) and before subregulation (4)(1)**

These items make consequential amendments to the definition of associate in the regulations to reflect the inclusion of a new definition of associate in the Bill.

#### **Item 2 – subregulation 3(1)**

This item inserts new definitions of ‘campaign-based benefit’, ‘clawback requirements’, ‘drawdown amount’ and ‘volume-based benefits’ into the Regulations.

#### **Item 4 – at the end of Chapter 3**

This item inserts a new part which applies in relation to mortgage brokers and mortgage intermediaries.

These regulations provide for when something is conflicted remuneration and when it is not for the purposes of proposed paragraph 158NA(b) of the Act.

#### *Division 1 - Interpretation*

The regulations apply in relation to the provision of a credit service. Credit service is defined in section 7 of the Act. A person provides a credit service if a person provides

credit assistance to a consumer (see section 8 of the Act), or if the person acts as an intermediary (see section 9).

To avoid doubt, the Regulations provide that a reference in the new Part to a licensee, or a representative of a licensee, providing a credit service to a consumer includes both the licensee or representative providing credit assistance to the consumer and the licensee or representative acting as an intermediary between a credit provider and the consumer (Schedule 1, item 4, regulation 28V).

#### *Division 2 – What is conflicted remuneration?*

##### *Benefits given by a consumer*

The regulations ensure that fees paid to a mortgage broker by a consumer are not captured within the definition of conflicted remuneration. They exclude from the definition of conflicted remuneration the giving of monetary benefits by consumers to a licensee or a representative of a licensee if it is given in relation to a credit service provided to the consumer by the licensee or representative. Non-monetary benefits given by a consumer are also excluded from the definition of conflicted remuneration. (Schedule 1, item 4, subregulations 28VA(2) and 28VF(7))

##### *Monetary benefits given to a licensee or a representative of a licensee*

A monetary benefit given (whether directly or indirectly) to a licensee, or a representative of a licensee is not conflicted remuneration if the benefit meets certain criteria. Those criteria are that:

- the benefit relates to a credit service provided by the licensee or representative to a consumer in relation to a credit contract (paragraph 28VA(3)(a));
- the benefit is not a volume-based benefit (paragraph 28VA(3)(b));
- the benefit is not a campaign-based benefit (paragraph 28VA(3)(c));
- for loans for purchasing residential property or refinancing a residential property loan, the benefit must reflect that part of the loan that is drawn down or must be unconnected to the size of the loan or amount of the loan drawn down (for example, a fixed fee) (paragraph 28VA(3)(d)); and
- the clawback requirements are satisfied in relation to the benefit (paragraph 28VA(3)(e)).

##### *Special rules for residential property loans*

For loans for purchasing residential property or refinancing a residential property loan, the commission must not reflect an amount that is not drawn down (i.e. commission must not be paid on an amount that remains in the loan account or is in the offset account).

Specifically, the benefit must be one of the following:

- a benefit that is calculated as a percentage of an amount that is no more than the drawn down amount for the credit contract (paragraph 28VA(4)(b)). The ‘drawdown amount’ is defined in regulation 28VB. The drawdown amount is

so much of the amount of credit as is used for the purpose of purchasing residential property or refinancing a residential property loan within 90 days after the day on which the credit contract is entered into by the consumer (regulation 28VB);

- a fixed amount given on the basis of the credit service provided to the consumer in relation to the credit contract, without reference to a particular amount of credit provided to, or drawn down by the consumer, under the credit contract (for example, a fixed or flat fee) (paragraph 28VA(4)(a)); or
- a combination of any of the above (paragraph 28VA(4)(d)).

#### *Volume-based benefits*

Under the regulations, volume-based benefits are banned. The exemption from the ban on conflicted remuneration in regulation 28VA explicitly excludes volume-based conflicted remuneration. (Schedule 1, item 4, paragraph 28VA(3)(b))

A ‘volume-based commission’ means a payment or non-monetary benefit that is dependent on the overall volume of sales of a particular class of credit contract. It includes commissions that are dependent on the number of contracts or credit contracts of a particular class entered into by consumers or a class of consumers. It also includes commissions that are dependent on the total amount of credit available or drawn down under credit contracts or credit contracts of a particular class. (Schedule 1, item 4, regulation 28VC)

#### *Campaign-based benefits*

Under the regulations, campaign-based benefits are banned. The exemption from the ban on conflicted remuneration in regulation 28VA explicitly excludes campaign-based benefits. (Schedule 1, item 4, paragraph 28VA(3)(c))

A campaign-based benefit is a benefit that is wholly or partly dependent on the credit service being provided or the consumer entering the credit contract during a particular limited period. Such a benefit is a campaign-based benefit if:

- the same benefit would not ordinarily be accessible in relation to the same provision of the credit service by the licensee or representative before or after the campaign period (Schedule 1, item 4, subparagraph 28VD(c)(i)); or
- the value of the benefit is more than the benefit that would ordinarily be given in relation to the same provision of the credit service by the licensee or representative before or after the campaign period (Schedule 1, item 4, paragraph 28VD(c)(ii)).

Campaign-based commissions provide higher rates of commissions offered on a time-limited basis. Lenders may use these offers to increase the flow of broker-originated loans on a targeted, short-term basis.

#### *Clawback requirements*

Commissions are not permissible if the commission includes a clawback period that is greater than two years after the day on which the credit contract is entered into by the consumer. (Schedule 1, item 4, regulation 28VE)

Currently, many credit providers have clawback arrangements with aggregators, which in turn have arrangements with brokers. Such arrangements allow a credit provider to recover some or all of the commission paid by the lender to the aggregator if the loan does not continue beyond a minimum 'clawback period'. The aggregator will then in turn claw back the commission from the broker, who may claw it back from the consumer.

Clawbacks may therefore discourage mortgage brokers and consumers from exploring new and better loans because they add to the cost of switching products.

#### *Non-monetary benefits – 28VF*

The regulations provide that certain non-monetary benefits are permissible conflicted remuneration. (Schedule 1, item 4, regulation 28VF)

#### Infrequent benefit valued less than \$300

The regulations permit a non-monetary benefit where the value of the benefit is less than \$300 for each licensee or each representative who is a financial services licensee and identical or similar benefits are not given on a frequent or regular basis. (Schedule 1, item 4, subregulation 28VF(2))

#### Education or training

The regulations permit certain education or training benefits given to a licensee, or representative of a licensee who provides a credit service to consumers.

The benefit must have a genuine education or training purpose, and must be relevant to the carrying on of a business of providing a credit service to customers. (Schedule 1, item 4, paragraph 28VF(3)(a) and (b))

If the benefit is the provision of an education or training course (including a conference or seminar), the education or training activities for the professional development of the participants in the course must take up at least 75 per cent of the time spent on the course or 6 hours a day, whichever is the lesser. The participant or the participant's employer or licensee, must pay for the costs of the participant's travel and accommodation relating to the course and the participant attending events and functions held in conjunction with the course (for example, the cost of day trips or dinners). (Schedule 1, item 4, subregulations 28VF(4) and (5))

If the benefit is not the provision of an education or training course, the dominant purpose of the benefit must be education and training. (Schedule 1, item 4, paragraph 28VF(3)(d))

#### IT support

The regulations permit the provision of IT software or support that is related to the provision of credit services to consumers in relation to credit contracts with the benefit provider. (Schedule 1, item 4, subregulation 28VF(6))

### Non-monetary benefits given by consumer

The regulations permit the giving of non-monetary benefits given by consumers to a licensee or a representative of a licensee if it is given in relation to a credit service provided to the consumer by the licensee or representative. (Schedule 1, item 4, subregulation 28VF(7))

### *Division 3 – Circumstances in which conflicted remuneration must not be accepted*

Division 3 of new part 3.8 of the Regulations prescribes circumstances in which a licensee must not accept conflicted remuneration.

Proposed section 158NB of the Act provides that a licensee must not accept conflicted remuneration in circumstances prescribed by the regulations if the licensee is a mortgage broker or the licensee is a mortgage intermediary.

Regulation 28VG provides that a licensee must not accept conflicted remuneration if the conflicted remuneration relates to credit assistance provided by the licensee to a consumer in relation to a credit contract. It also provides that the licensee must not accept conflicted remuneration if the conflicted remuneration relates to whether or how the licensee acts as an intermediary between a credit provider and consumer in relation to a credit contract.

However, subregulation 28VG(2) does not apply in relation to a credit service provided to a consumer in relation to a credit contract by a credit representative acting within the scope of the credit representative's actual or apparent authority from the licensee. Credit representatives are dealt with in regulation 28VG.

Proposed subsection 158NC(1) of the Act provides that a credit representative must not accept conflicted remuneration in circumstances prescribed by the regulations if the licensee is a mortgage broker or the licensee is a mortgage intermediary.

Regulation 28VH provides that a credit representative of a licensee must not accept conflicted remuneration if the conflicted remuneration relates to credit assistance provided by the licensee to a consumer in relation to a credit contract by the credit representative acting within the scope of the credit representative's actual or apparent authority from the licensee. It also provides that the credit representative must not accept conflicted remuneration if the conflicted remuneration relates to whether or how the licensee acts as an intermediary between a credit provider and consumer in relation to a credit contract while acting within the scope of the credit representative's actual or apparent authority from the licensee.

### *Division 4 – Circumstances in which conflicted remuneration must not be given*

Division 4 of new part 3.8 of the Regulations prescribes circumstances in which conflicted remuneration must not be given.

Proposed subsections 158ND(1) and (2) of the Act provide that an employer of a licensee or representative of a licensee must not give the licensee or representative conflicted remuneration in circumstances prescribed by the regulations, if the licensee or the representative is a mortgage broker or mortgage intermediary.

Subregulation 28VI(2) provides that an employer of a licensee must not give conflicted remuneration to the licensee or a representative of the licensee (other than a credit representative), if it would be a contravention of section 158NB of the Act for the licensee or representative to accept the conflicted remuneration.

Subregulation 28VI(3) provides that an employer of a licensee must not give conflicted remuneration to a credit representative, if it would be a contravention of section 158NC(1) of the Act for the credit representative to accept the conflicted remuneration.

Proposed subsections 158NE(1) and (2) of the Act provide that a credit provider must not give a representative of a licensee conflicted remuneration in circumstances prescribed by the regulations, if the licensee or the representative is a mortgage broker or a mortgage intermediary.

Subregulation 28VJ(2) provides that credit provider must not give conflicted remuneration to the licensee or a representative of the licensee (other than a credit representative), if it would be a contravention of subsection 158NB(1) of the Act for the licensee or representative to accept the conflicted remuneration.

Subregulation 28VJ(3) provides that an employer of a licensee must not give conflicted remuneration to a credit representative, if it would be a contravention of subsection 158NC(1) of the Act for the credit representative to accept the conflicted remuneration.

Proposed subsections 158NF(1) and (2) of the Act provide that a mortgage intermediary must not give the licensee or representative conflicted remuneration in circumstances prescribed by the regulations, if the licensee or the representative is a mortgage broker or mortgage intermediary.

Subregulation 28VK(2) provides that a mortgage intermediary must not give conflicted remuneration to the licensee or a representative of the licensee (other than a credit representative), if it would be a contravention of section 158NB of the Act for the licensee or representative to accept the conflicted remuneration.

Subregulation 28VK(3) provides that mortgage intermediary must not give conflicted remuneration to a credit representative, if it would be a contravention of section 158NC(1) of the Act for the credit representative to accept the conflicted remuneration.



## Schedule 2 – Consequential amendments

### Items 1-43

Schedule 2 to the Regulations makes a number of consequential amendments that ensure that all provisions of the Credit Regulations that currently apply in relation to ‘commissions’ also apply in relation to ‘conflicted remuneration’. The affected provisions generally relate to information that must be disclosed to consumers in particular circumstances. (Schedule 2, items 1-43, paragraphs 9AB(6)(b), 20(5)(b), (c) and (d), 20(12)(c), subparagraphs 25(2)(b)(i) and (ii), 25(2A)(b)(i) and (ii), 25(4)(d)(i) and (ii), 25(5)(e)(i) and (ii), paragraph 25H(1)(e), regulation 26 (paragraph (b) of the definition of *product designer*), regulation 26 (definitions of *trail commission* and *volume bonus arrangement*), subregulation 26A(2), paragraphs 26A(2)(a) and (b), 26A(3)(b), (c) and (d), regulation 27 (heading), subparagraph 27(2)(a)(ii), subregulation 27(3), subregulation 27A(2) (heading), subregulation 27A(2), paragraphs 27A(2)(a) and (b) and (4)(b), (c) and (d), regulation 27B (heading), subparagraph 27B(2)(a)(ii), regulation 28G (heading), subregulation 28G(2), paragraph 28G(2)(a), (2)(b), (c) and (d), subregulation 28G(2) (note), subregulations 28G(5) and (6), paragraphs 28G(6)(a), (b) and (c), subregulation 28G(6), paragraphs 28G(7)(a) and (b), subregulation 28G(8), regulation 28H (heading), subregulations 28H(2), (3) and (4), paragraph 28R(3)(a),(b) and (c), subregulation 28R(4)).