

11 October 2019

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

By email to: ProductRegulation@treasury.gov.au

Submission on draft Corporations Amendment (Design and Distribution Obligations) Regulations 2019

The Mortgage & Finance Association of Australia (MFAA) is pleased to have the opportunity to comment on the Exposure Draft Corporations Amendment (Design and Distribution Obligations) Regulations 2019.

1. About the MFAA

With more than 13,500 members, the MFAA is Australia's leading professional association for the mortgage broking industry with membership covering mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. The stated purpose of the MFAA is to advance the interests of our members through leadership in advocacy, education and promotion. To achieve this aim, the MFAA promotes and advances the broker proposition to a range of external stakeholders including governments, regulators and consumers, and continues to demonstrate the commitment of MFAA professionals to the maintenance of the highest standards of education and development.

2. Overview

- 2.1. There is potential for finance brokers and aggregators to be required to issue target market determinations (**TMDs**) because of the wide definition of 'issuer' in the *Corporations Act*. In our view, finance brokers and aggregators that are not the credit provider should be exempted from the obligation to produce TMDs.
- 2.2. The proposed requirement for lenders to monitor the distribution activities of finance brokers is likely to create significant difficulties for the industry and may be wholly impractical. Given that finance brokers will owe a best interests duty and must conduct responsible lending assessments, further monitoring is not necessary or appropriate. Similarly, it should be made clear that 'referrers' need not be monitored by credit providers. Our preferred approach is for 'generic' credit products to be removed altogether from the regime for the reasons given in paragraph 4 below.

2.3 As outlined in section 6 below, additional clarification would be useful to assist the industry to determine the meaning of 'business purpose'.

3. Finance brokers should not be required to prepare TMDs

Section 994B(1) of the *Corporations Act* provides that a TMD must be made by each of:

- (a) a person who issues a credit product to a retail client ('issue' is defined in section 9 of the *Corporations Act* to mean '*circulate, distribute, and disseminate*'); or
- (b) the person [who] sells the product under a regulated sale prescribed by regulation; or
- (c) the regulations require a person to make a TMD.

Finance brokers and aggregators are likely to fall within (a) above because they '*circulate, distribute, and disseminate*' credit products.

We note that section 761E(4) of that Act states that an 'issuer' in relation to a financial product is the person responsible for the obligations owed, under the terms of the facility that is the product, to the client. This section may operate to exclude finance brokers and aggregators because even though they arguably '*circulate, distribute, and disseminate*' the credit facility, they do not owe any obligations to borrowers under the credit facility. However, this section relates solely to financial products and so may arguably not extend to credit.

The Draft Regulations do not prescribe finance brokers or aggregators for the purpose of (b) or (c) above, but we note that they also do not exempt them.

Lenders will be required to make TMDs in respect of credit products. It is not practical to require finance brokers and aggregators to also prepare TMDs for those same products. This could result in thousands of TMDs being produced for a single product. This also raises the question of whether finance brokers and aggregators should follow their own TMD, or the lender's TMD, if they were to differ (section 994E implies they would have to follow their own). Further, requiring finance brokers and aggregators to prepare TMDs is unnecessary to achieve the regulatory purposes of ensuring products are marketed to an appropriate target market. In the case of finance brokers, this is impractical for the small businesses that form the vast majority of mortgage and finance broking enterprises.

Accordingly, finance brokers and aggregators that are not the credit provider should be exempted in the same way that financial planners are exempted by section 761E(4).

Finance brokers often offer incidental financial products such as home insurance, credit cards, and deposit accounts distributed with mortgage loans. The exemption of finance brokers from the requirement to prepare TMDs should extend to the distribution of these incidental products.

It appears that specific advice given by financial advisers is exempt from the TMD requirement. Arguably, finance brokers' and aggregators' best interests duty is analogous to specific advice and so finance brokers should likewise be exempt.

4. Lenders monitoring distribution

Section 994E(1) of the *Corporations Act* requires lenders to take reasonable steps to ensure that product distribution is consistent with the TMD.

A requirement for lenders to monitor thousands of finance brokers is simply not practical. Although issuers need only take reasonable steps, under the current proposal it is unlikely that taking no steps will be sufficient. Either the monitoring requirement should be removed for distribution through finance brokers or a practical and not too onerous safe harbour needs to be prescribed to ensure that significant inefficiencies and cost are not imposed on lenders and finance brokers. If there is no workable solution, there is likely to be a significant reduction in competition, finance brokers would be obliged to have very limited panels, and lenders limited finance broker accreditations.

If the requirement to monitor distribution by finance brokers is retained, it is likely that lenders would largely outsource this to aggregators and other large broking groups. That is not a solution, because those entities would then be required to undertake the monitoring which as we note above is highly impractical and may adversely affect competition.

We submit that monitoring aggregators and finance brokers at all is unnecessary and imposes another level of regulation and needless cost on industry. In our view, consumers are already protected by the requirements of the National Consumer Credit Protection Act and, in the case of mortgage brokers, soon by the best interests duty, both of which ensure that customers are only presented with appropriate products.

While recognising the potential benefit of TMDs as an early intervention tool in relation to 'specialist' credit products, we believe that the exclusion of generic products such as home loans, credit cards, and personal loans altogether would be optimal. The requirement to create, maintain, and monitor TMDs for these generic products will create significant cost without any corresponding benefit.

We urge government to reconsider this possibly unintended consequence.

5. Referrers

It is important that lenders do not have to monitor the conduct of persons and businesses who act as referrers. These include licensed intermediaries and unlicensed referrers such as real estate agents, lawyers, and accountants (operating under an exemption from the NCCP Act). Referrers do not fall within the definition of an issuer because they do not 'circulate, distribute, and disseminate' (see para 3 above) and so under the current proposals will not need to prepare TMDs and lenders will not need to monitor their conduct – but an express statement to this effect would be very useful to the industry in order to avoid doubt.

6. Retail clients v Credit Code regulated credit

Section 994AA of the Act extends the requirement for TMDs for credit to 'retail clients'. The credit industry is comfortable with the current distinction between credit regulated by the Credit Code and unregulated credit. It is unfortunate if it becomes necessary to apply another test. We understand that it is unlikely that the law will be amended to be restricted to Credit Code regulated loans because regulators are keen for the scheme to apply to unregulated credit provided for personal use such as Buy Now Pay Later arrangements.

However, the Draft Regulations do exempt 'credit' applied wholly or predominantly for business purposes (Schedule 1, item 1, item 8 in the table in regulation 7.8A.04). 'Business purposes' is not defined in the Act or the Draft Regulations, and so it would be useful to clarify whether a person conducting investment activities (such as investing in real estate or shares) is considered to be conducting a business.

7. Conclusion

The MFAA appreciates the opportunity to provide a response to The Treasury's consultation paper on the Exposure Draft Corporations Amendment (Design and Distribution Obligations) Regulations 2019.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Felton', with a large, stylized initial 'M'.

Mike Felton
Chief Executive Officer
Mortgage & Finance Association of Australia