



Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020

No. 2, 2020

An Act to amend the law relating to unfair contract terms and insurance contracts, funeral expenses facilities, funeral benefits, mortgage brokers and mortgage intermediaries, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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An Act to amend the law relating to unfair contract terms and insurance contracts, funeral expenses facilities, funeral benefits, mortgage brokers and mortgage intermediaries, and for related purposes

[Assented to 17 February 2020]

The Parliament of Australia enacts:

No. 2, 2020

*Financial Sector Reform (Hayne Royal Commission Response—
Protecting Consumers (2019 Measures)) Act 2020*

1

1 Short title

This Act is the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	17 February 2020
2. Schedule 1	5 April 2021.	5 April 2021
3. Schedules 2 and 3	The day after this Act receives the Royal Assent.	18 February 2020

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Unfair contract terms in insurance contracts

Australian Securities and Investments Commission Act 2001

1 Subsection 12BA(1)

Insert:

Insurance Contracts Act insurance contract means a contract of insurance to which the *Insurance Contracts Act 1984* applies.

2 At the end of section 12BF

Add:

Note: This section applies to Insurance Contracts Act insurance contracts in addition to the *Insurance Contracts Act 1984* (see paragraph 15(2)(d) of that Act).

3 At the end of subsection 12BI(1)

Add:

- ; or (d) if the contract is an Insurance Contracts Act insurance contract—is a transparent term that:
- (i) is disclosed at or before the time the contract is entered into; and
 - (ii) sets an amount of excess or deductible under the contract.

4 At the end of section 12BI

Add:

- (4) For the purposes of applying paragraph (1)(a) to an Insurance Contracts Act insurance contract, have regard to the main subject matter of the contract only to the extent that it describes what is being insured.

5 After subsection 12BL(1)

Insert:

(1A) This Subdivision does not apply to a contract of insurance:

- (a) under which a person provides medical indemnity cover (within the meaning of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*) for:
 - (i) a medical practitioner (within the meaning of that Act); or
 - (ii) a registered health professional (within the meaning of that Act) prescribed by regulations made under that Act for the purposes of a provision of Part 3 of that Act; and
- (b) to which that Act applies.

6 At the end of subsections 12GND(1) and (2)

Add:

- ; or (c) if the contract is an Insurance Contracts Act insurance contract—a person who is a third party beneficiary (within the meaning of the *Insurance Contracts Act 1984*) under the contract.

7 In the appropriate position

Insert:

**Part 29—Application provisions relating to the
Financial Sector Reform (Hayne Royal
Commission Response—Protecting
Consumers (2019 Measures)) Act 2020**

325 Application—unfair contract terms

- (1) The amendments of this Act made by Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* apply in relation to a contract entered into on or after the commencement of that Schedule.
- (2) The amendments do not apply to a contract entered into before the commencement of that Schedule. However:
 - (a) if the contract is renewed on or after that commencement—the amendments apply to the contract as renewed, on and

from the day (the *renewal day*) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; or

- (b) if a term of the contract is varied on or after that commencement and paragraph (a) has not already applied in relation to the contract—the amendments apply to the term as varied, on and from the day (the *variation day*) on which the variation takes effect, in relation to conduct that occurs on and after the variation day.
- (3) If paragraph (2)(b) of this section applies to a term of a contract, subsection 12BF(2) and section 12BK of this Act apply to the contract.
- (4) Despite paragraphs (2)(a) and (b) and subsection (3) of this section, the amendments do not apply to a contract, or a term of a contract, to the extent that the operation of the amendments would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

Insurance Contracts Act 1984

8 At the end of section 12

Add:

Note: This Part operates in addition to the unfair contract terms provisions of the *Australian Securities and Investments Commission Act 2001* (see paragraph 15(2)(d) of this Act).

9 Subsection 15(2)

Omit all the words after “but does not”, substitute:

include:

- (c) relief in the form of compensatory damages; or
- (d) relief relating to the effect of section 12BF (unfair contract terms) of the *Australian Securities and Investments Commission Act 2001*.

Note: See Subdivision G (enforcement and remedies) of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* for certain remedies relating to the effect of section 12BF of that Act.

10 Application of amendments of the *Insurance Contracts Act 1984*

The amendments of the *Insurance Contracts Act 1984* made by this Schedule apply in the same way as the amendments of the *Australian Securities and Investments Commission Act 2001* made by this Schedule.

Note: See Part 29 of the *Australian Securities and Investments Commission Act 2001*.

Schedule 2—Funeral expenses facilities

Australian Securities and Investments Commission Act 2001

1 At the end of section 12BAA

Add:

- (10) To avoid doubt, a *funeral expenses facility* is not a *funeral benefit* for the purposes of this Act.

Corporations Act 2001

2 Section 761A (at the end of the definition of *funeral benefit*)

Note: A *funeral expenses facility* is not a *funeral benefit*: see section 765B.

3 Section 761A

Insert:

funeral expenses facility means a scheme or arrangement for the provision of benefits consisting of the payment of money, on the death of a person, for the purpose of meeting the whole or a part of the expenses of and incidental to the funeral, burial or cremation of the person.

4 At the end of Subdivision D of Division 3 of Part 7.1

Add:

765B Funeral expenses facilities are not funeral benefits

To avoid doubt, a *funeral expenses facility* is not a *funeral benefit* for the purposes of this Act.

Schedule 3—Mortgage brokers

Part 1—Main amendments

National Consumer Credit Protection Act 2009

1 Subsection 5(1)

Insert:

associate: see section 15A.

2 Subsection 5(1) (at the end of the definition of *commission*)

Add:

Note: Commissions may be conflicted remuneration: see Division 4 of Part 3-5A.

3 Subsection 5(1)

Insert:

conflicted remuneration: see sections 158N and 158NA.

mortgage broker: see section 15B.

mortgage intermediary: see section 15C.

4 After section 15

Insert:

15A Meaning of *associate*

- (1) If a person is associated with a credit provider for the purposes of the National Credit Code:
 - (a) the person is an *associate* of the credit provider; and
 - (b) the credit provider is an *associate* of the person.
- (2) In any other case, a person is an *associate* of another person in the circumstances prescribed by the regulations.

15B Meaning of *mortgage broker*

- (1) A licensee is a ***mortgage broker*** if:
 - (a) the licensee carries on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property; and
 - (b) the licensee does not perform the obligations, or exercise the rights, of a credit provider in relation to the majority of those credit contracts; and
 - (c) in carrying on the business, the licensee provides credit assistance in relation to credit contracts offered by more than one credit provider.

- (2) A credit representative of a licensee is a ***mortgage broker*** if:
 - (a) the credit representative carries on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property; and
 - (b) neither the credit representative nor the licensee performs the obligations, or exercises the rights, of a credit provider in relation to the majority of those credit contracts; and
 - (c) in carrying on the business, the credit representative provides credit assistance in relation to credit contracts offered by more than one credit provider.

15C Meaning of *mortgage intermediary*

- (1) A licensee is a ***mortgage intermediary*** if:
 - (a) the licensee carries on a business of acting as an intermediary in relation to credit contracts secured by mortgages over residential property; and
 - (b) the licensee does not perform the obligations, or exercise the rights, of a credit provider in relation to the majority of those credit contracts; and
 - (c) in carrying on the business, the licensee acts as an intermediary in relation to credit contracts offered by more than one credit provider.

 - (2) A credit representative of a licensee is a ***mortgage intermediary*** if:
-

- (a) the credit representative carries on a business of acting as an intermediary in relation to credit contracts secured by mortgages over residential property; and
- (b) neither the credit representative nor the licensee performs the obligations, or exercises the rights, of a credit provider in relation to the majority of those credit contracts; and
- (c) in carrying on the business, the credit representative acts as an intermediary in relation to credit contracts offered by more than one credit provider.

5 After Part 3-5

Insert:

Part 3-5A—Mortgage brokers and mortgage intermediaries

Division 1—Introduction

Subdivision A—Guide to this Part

158K Guide to this Part

This Part imposes obligations on mortgage brokers and mortgage intermediaries.

Mortgage brokers must act in the best interests of consumers when providing credit assistance in relation to credit contracts.

Where there is a conflict of interest, mortgage brokers must give priority to consumers in providing credit assistance in relation to credit contracts.

Mortgage brokers and mortgage intermediaries must not accept conflicted remuneration.

Employers, credit providers and mortgage intermediaries must not give conflicted remuneration to mortgage brokers or mortgage intermediaries.

The circumstances in which these bans on conflicted remuneration apply are to be set out in the regulations.

Subdivision B—Interpretation

158KA Doing acts

A reference in this Part to doing an act or thing includes a reference to causing or authorising the act or thing to be done.

158KB Circumstances in which a secondary representative is taken to be acting within actual or apparent authority

- (1) This section applies if a person (the *secondary representative*) is authorised as a credit representative of a licensee by a credit representative that is a body corporate (the *primary representative*).
- (2) For the purposes of this Part, the secondary representative is taken to be acting within the scope of the secondary representative's actual or apparent authority from the licensee if the secondary representative is acting within the actual or apparent scope of the authority given by the primary representative to engage in specified credit activities on behalf of the licensee.

158KC Obligations under this Part in addition to other obligations

The obligations imposed on a person under this Part are in addition to any other obligations to which the person is subject under this Act or any other law.

Division 2—Best interests obligations

Subdivision A—Licensees that provide credit assistance in relation to credit contracts

158L Application of this Subdivision

- (1) This Subdivision applies in relation to credit assistance provided by a licensee to a consumer in relation to a credit contract if the licensee is a mortgage broker.
- (2) However, this Subdivision does not apply in relation to credit assistance 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.

Note 1: A credit representative in these circumstances is covered by Subdivision B of this Division.

Note 2: The conduct of any other representative, acting within the scope of actual or apparent authority from the licensee, is taken to have been engaged in also by the licensee: see sections 324 and 325.

158LA Licensee must act in the best interests of the consumer

The licensee must act in the best interests of the consumer in relation to the credit assistance.

Civil penalty: 5,000 penalty units.

158LB Conflict between consumer's interests and those of the licensee etc.

If the licensee knows, or reasonably ought to know, that there is a conflict between the interests of the consumer and the interests of:

- (a) the licensee; or
- (b) an associate of the licensee; or
- (c) a representative of the licensee; or
- (d) an associate of a representative of the licensee;

the licensee must give priority to the consumer's interests when providing the credit assistance.

Civil penalty: 5,000 penalty units.

Subdivision B—Credit representatives that provide credit assistance in relation to credit contracts

158LD Application of this Subdivision

This Subdivision applies in relation to credit assistance 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 a licensee, if either the credit representative or the licensee is a mortgage broker.

158LE Credit representative must act in the best interests of the consumer

- (1) The credit representative must act in the best interests of the consumer in relation to the credit assistance.

Civil penalty: 5,000 penalty units.

- (2) The licensee must take reasonable steps to ensure that the credit representative complies with subsection (1).

Civil penalty: 5,000 penalty units.

158LF Conflict between consumer's interests and those of the credit representative etc.

- (1) If the credit representative knows, or reasonably ought to know, that there is a conflict between the interests of the consumer and the interests of:

- (a) the licensee; or
- (b) an associate of the licensee; or
- (c) the credit representative; or
- (d) an associate of the credit representative; or
- (e) another representative of the licensee; or
- (f) an associate of another representative of the licensee;

the credit representative must give priority to the consumer's interests when providing the credit assistance.

Civil penalty: 5,000 penalty units.

- (2) The licensee must take reasonable steps to ensure that the credit representative complies with subsection (1).

Civil penalty: 5,000 penalty units.

Division 4—Conflicted remuneration

Subdivision A—What is conflicted remuneration?

158N *Conflicted remuneration*

Conflicted remuneration means:

- (a) any benefit, whether monetary or non-monetary, that:
 - (i) is given to a licensee, or a representative of a licensee, who provides credit assistance to consumers; and
 - (ii) because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided to consumers; or
- (b) any benefit, whether monetary or non-monetary, that:
 - (i) is given to a licensee, or a representative of a licensee, who acts as an intermediary; and
 - (ii) because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence whether the licensee or representative acts as an intermediary, or how the licensee or representative acts as an intermediary.

158NA Regulations may further define *conflicted remuneration*

The regulations may prescribe:

- (a) circumstances, in addition to those set out in section 158N, in which a benefit given to a licensee or a representative of a licensee is **conflicted remuneration**; and
- (b) circumstances in which a benefit given to a licensee or a representative of a licensee is not **conflicted remuneration**.

Subdivision B—Ban on accepting conflicted remuneration

158NB Licensee must not accept conflicted remuneration

A licensee must not accept conflicted remuneration in circumstances prescribed by the regulations if:

- (a) the licensee is a mortgage broker; or
- (b) the licensee is a mortgage intermediary.

Civil penalty: 5,000 penalty units.

158NC Credit representative must not accept conflicted remuneration

- (1) A credit representative of a licensee must not accept conflicted remuneration in circumstances prescribed by the regulations if the credit representative or the licensee is:

- (a) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

- (2) The licensee must take reasonable steps to ensure that the credit representative complies with subsection (1).

Civil penalty: 5,000 penalty units.

Subdivision C—Ban on giving conflicted remuneration

158ND Employer must not give employees conflicted remuneration

- (1) An employer of a licensee must not give the licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee is:

- (a) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

- (2) An employer of a representative of a licensee must not give the representative conflicted remuneration in circumstances prescribed by the regulations if the licensee or the representative is:

- (a) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

158NE Credit provider must not give conflicted remuneration

- (1) A credit provider must not give a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee is:

- (a) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

- (2) 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) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

158NF Mortgage intermediary must not give conflicted remuneration

- (1) A mortgage intermediary must not give a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee is:

- (a) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

- (2) A mortgage intermediary must not give a representative of a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee or the representative is:

- (a) a mortgage broker; or
- (b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

Division 6—Miscellaneous

158T Anti-avoidance

A person must not, either alone or together with one or more other persons, enter into, begin to carry out or carry out a scheme if:

- (a) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole purpose or for a purpose (that is not incidental) of avoiding the application of any provision of this Part in relation to any person or persons (whether or not a person or persons who entered into, began to carry out or carried out the scheme or any part of the scheme); and
- (b) the scheme or the part of the scheme has achieved, or apart from this section, would achieve, that purpose.

Civil penalty: 5,000 penalty units.

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

6 In the appropriate position

Insert:

Schedule 10—Application provisions for Schedule 3 to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020

1 Definitions

In this Schedule:

amending Act means the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*.

2 Application of best interests obligations

Division 2 of Part 3-5A of the National Credit Act, as inserted by item 5 of Schedule 3 to the amending Act, applies in relation to the provision of credit assistance to a consumer on or after 1 July 2020 (whether or not the assistance was sought, or commenced being provided, before that day).

3 Application of ban on conflicted remuneration

- (1) Subject to subitem (2), Division 4 of Part 3-5A of the National Credit Act, as inserted by item 5 of Schedule 3 to the amending Act, applies to a benefit given on or after 1 July 2020 to a licensee, or a representative of a licensee, if the benefit is given under an arrangement entered into on or after 1 July 2020.
- (2) The regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a licensee or a representative of a licensee.

Part 2—Consequential amendments

National Consumer Credit Protection Act 2009

7 Subsection 5(1)

Insert:

indirect remuneration means a commission or conflicted remuneration.

8 Paragraph 92(e)

Omit “commissions” (wherever occurring), substitute “indirect remuneration”.

9 Section 111 (paragraph beginning “Division 5”)

Omit “commission”, substitute “indirect remuneration”.

10 Subparagraph 113(2)(g)(i)

Omit “commissions”, substitute “indirect remuneration”.

11 Subparagraph 113(2)(g)(ii)

Omit “those commissions”, substitute “that indirect remuneration”.

12 Subparagraphs 113(3)(b)(i) and (ii)

Omit “commissions” (wherever occurring), substitute “indirect remuneration”.

13 Division 5 of Part 3-1 of Chapter 3 (heading)

Omit “commissions”, substitute “indirect remuneration”.

14 Section 121 (heading)

Omit “commissions”, substitute “indirect remuneration”.

15 Paragraph 121(2)(b)

Omit “commissions”, substitute “indirect remuneration”.

16 Paragraphs 121(3)(a) and (b)

Omit “commissions”, substitute “indirect remuneration”.

17 Section 134 (paragraph beginning “Division 5”)

Omit “commission”, substitute “indirect remuneration”.

18 Subparagraph 136(2)(g)(i)

Omit “commissions”, substitute “indirect remuneration”.

19 Subparagraph 136(2)(g)(ii)

Omit “those commissions”, substitute “that indirect remuneration”.

20 Subparagraphs 136(3)(b)(i) and (ii)

Omit “commissions” (wherever occurring), substitute “indirect remuneration”.

21 Division 5 of Part 3-3 of Chapter 3 (heading)

Omit “commissions”, substitute “indirect remuneration”.

22 Section 144 (heading)

Omit “commissions”, substitute “indirect remuneration”.

23 Paragraph 144(2)(b)

Omit “commissions”, substitute “indirect remuneration”.

24 Paragraphs 144(3)(a) and (b)

Omit “commissions”, substitute “indirect remuneration”.

25 Subparagraph 158(2)(g)(i)

Omit “commissions”, substitute “indirect remuneration”.

26 Subparagraph 158(2)(g)(ii)

Omit “those commissions”, substitute “that indirect remuneration”.

27 Subparagraphs 158(3)(b)(i) and (ii)

Omit “commissions” (wherever occurring), substitute “indirect remuneration”.

28 Subparagraph 160B(2)(a)(i)

Omit “commissions (apart from commissions that are”, substitute
“indirect remuneration (apart from indirect remuneration that is”.

29 Paragraph 160B(2)(d)

Omit “commission”, substitute “indirect remuneration”.

*[Minister’s second reading speech made in—
House of Representatives on 28 November 2019
Senate on 5 February 2020]*

(226/19)
