

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

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

National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2021

Section 6 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) 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 purpose of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2021* (the Regulations) is to implement in full the Government's response to recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission). The Regulations apply the ban on conflicted remuneration for mortgage brokers and mortgage intermediaries to benefits given under arrangements made prior to 1 July 2020, regardless of when the arrangement under which the benefits are given was entered into.

The Final Report of the Financial Services Royal Commission considered mortgage broking in Australia and made a recommendation in relation to mortgage broker remuneration. On 4 February 2019, the Government announced the reforms in response to the Final report of the Financial Services Royal Commission. In the response, the Government committed to addressing conflicted remuneration for mortgage brokers. In February 2020, to give effect to the Government's response, Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* introduced a ban on conflicted remuneration by inserting Division 4 of Part 3-5A into the *National Consumer Credit Protection Act 2009* and Schedule 10 into the Act.

The Regulations build on the amendments made by the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*. Those amendments established a prohibition on giving or receiving conflicted remuneration for certain persons including mortgage brokers, mortgage intermediaries and credit representatives (who are mortgage brokers or mortgage intermediaries). Additionally, that Act provides that the ban on conflicted remuneration applies to benefits given under arrangements entered into on or after 1 July 2020.

The Regulations prescribe circumstances in which the ban on conflicted remuneration applies. In particular, the Regulations prescribe that the ban applies to any benefit given or received after the Regulations commence, even if the benefits are given under an arrangement made prior to 1 July 2020.

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

No public consultation was undertaken on the Regulations as they ensure the ban on conflicted remuneration provisions operate to provide the intended outcome as announced by the Government.

The Legislative and Governance Forum for Corporations has been notified of the Regulations.

Details of the Regulations are set out in Attachment A.

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

The Regulations commence on the day after registration.

The Regulations have no impact on compliance costs.

A statement of Compatibility with Human Rights is at Attachment B.

Details of the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2021

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2021*.

Section 2 – Commencement

Schedule 1 to the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (the Act).

Sections 4 and 5– Definitions

These sections provide definitions for terms used within the Regulations.

Section 6 - Application of ban on conflicted remuneration

This section prescribes circumstances in which the ban on conflicted remuneration in Division 4 of Part 3-5A of the *National Consumer Credit Protection Act 2009* applies.

Subsection (2) sets out that the ban on conflicted remuneration applies to benefits given at or after commencement of the Part (that is the day after the Regulations are registered), regardless of when the arrangement under which the benefits are given was entered into.

Subsection (3) of this section states that subsection (2) does not apply to benefits in respect of which persons are provided relief from complying with the ban on conflicted remuneration by the *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487*.

Due to the COVID-19 pandemic, the Australian Securities and Investment Commission created a relief instrument (*ASIC Credit (Deferral of Mortgage Brokers Obligations) Instrument 2020/487*). This instrument relieved certain persons from complying with the ban on conflicted remuneration provisions in relation to credit services provided before 1 January 2021.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2021

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Regulations ensure the Government's response to recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is implemented in full.

The Regulations prescribe circumstances in which the ban on conflicted remuneration applies. The Regulations prescribe that the conflicted remuneration provisions apply to any benefit given or received after the Regulations commence, even if the benefits are given under arrangements made prior to 1 July 2020.

Human rights implications

The Regulations engage the following human rights:

- the right to freely choose and accept work, under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to enjoyment of just and favourable conditions of work under Article 7 of the ICESCR.

Right to work

The Regulations may, or may not, engage the right to work, set out in Articles 6 and 7 of the ICESCR.

The right to work assures individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. It also recognises the right of just and favourable conditions of work, ensuring the right to remuneration for all workers.

The Regulations restrict the circumstances in which individuals working as mortgage brokers or intermediaries can receive remuneration by providing that the existing ban on conflicted remuneration applies to benefits regardless of when the arrangement under which the benefit is given was entered into. This may engage the right to work as it prohibits mortgage brokers from obtaining certain financial advantages from their advice to clients.

Article 4 of the ICESCR notes that rights under the ICESCR may be limited only so far as it may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society.

Therefore, to the extent the Regulations limit the right to work, this limitation is necessary and proportionate to achieve the legitimate objective of strengthening the existing protections for consumers who deal with mortgage brokers. The Regulations promote the nature of these rights by ensuring that the law aligns with the expectations of consumers – that any advice provided by a mortgage broker serves the consumer’s interests first and foremost. This is consistent with the findings of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

In addition to this, while the Regulations may impact arrangements already in place, no retrospective criminal offences are created.

Conclusion

This Regulation is compatible with human rights as the application of the ban on conflicted remuneration strengthens protections for consumers.