



Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 17 September 2020

David Hurley
Governor-General

By His Excellency's Command

Josh Frydenberg
Treasurer

Contents

1	Name.....	1
2	Commencement	1
3	Authority.....	1
4	Schedules.....	1
Schedule 1—Main amendments		2
	<i>National Consumer Credit Protection Regulations 2010</i>	2
Schedule 2—Consequential amendments		11
	<i>National Consumer Credit Protection Regulations 2010</i>	11

1 Name

This instrument is the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020*.

2 Commencement

- (1) Each provision of this instrument 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. The whole of this instrument	The day after this instrument is registered.	22 September 2020

Note: This table relates only to the provisions of this instrument as originally made.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

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

3 Authority

This instrument is made under the *National Consumer Credit Protection Act 2009*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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

National Consumer Credit Protection Regulations 2010

1 Subregulation 3(1) (definition of *associate*)

Repeal the definition.

2 Subregulation 3(1)

Insert:

campaign-based benefit: see regulation 28VF.

clawback requirements: see regulation 28VG.

drawdown cap: see subregulation 28VC(1) for the benefits to which the drawdown cap applies.

excluded amount: see subregulation 28VD(3).

home renovation or improvement facility: see subregulation 28VC(4).

line of credit facility: see subregulation 28VC(3).

maximum drawdown net of offset: see subregulations 28VD(1) and (2).

offset account, held by a consumer who is a debtor under a credit contract, has the meaning given by subregulation 28VD(4).

volume-based benefit: see regulation 28VE.

year to which the drawdown cap applies in relation to a credit contract: see subregulation 28VC(2).

3 Before subregulation 4(1)

Insert:

(1A) This regulation is made for the purposes of subsection 15A(2) of the Act.

4 In the appropriate position in Chapter 3

Insert:

Part 3.9—Mortgage brokers and mortgage intermediaries

Division 1—Interpretation

28V References to providing credit services to a consumer

To avoid doubt, a reference in this Part to a licensee, or a representative of a licensee, providing a credit service to a consumer includes both:

- (a) the licensee or representative providing credit assistance to the consumer;
- and

-
- (b) the licensee or representative acting as an intermediary between a credit provider and the consumer.

28VA Meaning of *amount of credit*

In this Part:

amount of credit has the same meaning as in the Code.

Division 2—What is conflicted remuneration?

28VB Monetary benefit given in certain circumstances not conflicted remuneration

- (1) This regulation is made for the purposes of paragraph 158NA(b) of the Act.

Benefit given by a consumer

- (2) A monetary benefit given to a licensee, or a representative of a licensee, is not conflicted remuneration if the benefit is given by a consumer in relation to a credit service provided to the consumer by the licensee or representative.

Other mortgage broker and mortgage intermediary remuneration

- (3) A monetary benefit given (whether directly or indirectly) to a licensee, or a representative of a licensee, is not conflicted remuneration if:
- (a) the benefit relates to a credit service provided by the licensee or representative to a consumer who is a debtor under a credit contract; and
 - (b) the benefit is not a volume-based benefit; and
 - (c) the benefit is not a campaign-based benefit; and
 - (d) for a benefit to which the drawdown cap applies under subregulation 28VC(1)—the benefit is one of the following:
 - (i) an amount given on the basis of the credit service provided to the consumer under the credit contract, without reference to a particular amount of credit that may be or has been provided to the consumer;
 - (ii) a benefit that is calculated as a percentage of an amount that is no more than the maximum drawdown net of offset for the credit contract for the year to which the drawdown cap applies in relation to the credit contract (see regulation 28VD);
 - (iii) a benefit that is a combination of either or both of subparagraphs (i) and (ii); and
 - (e) the clawback requirements are satisfied in relation to the benefit (if applicable).
- (4) A benefit is taken to be a benefit described in subparagraph (3)(d)(ii) if:
- (a) the benefit is a monetary benefit given (whether directly or indirectly) to a licensee, or a representative of a licensee; and
 - (b) the benefit relates to a credit service provided by the licensee or representative to a consumer who is a debtor under a credit contract; and
 - (c) the benefit is calculated as a percentage of an amount that is greater than the maximum drawdown net of offset for the credit contract for the year to which the drawdown cap applies in relation to the credit contract; and

- (d) the use of that greater amount is a result of a mistaken but reasonable estimation of what the maximum drawdown net of offset for the credit contract would be for the year to which the drawdown cap applies in relation to the credit contract; and
- (e) the difference between the following amounts is refunded by the licensee or representative to the person who paid the benefit within 3 months after the end of the year to which the drawdown cap applies in relation to the credit contract:
 - (i) the benefit paid to the licensee or representative;
 - (ii) the benefit that would have been paid to the licensee or representative if the correct maximum drawdown net of offset for the credit contract for the year to which the drawdown cap applies in relation to the credit contract had been used.

28VC Benefits to which the drawdown cap applies

- (1) The ***drawdown cap*** applies to a monetary benefit given (whether directly or indirectly) to a licensee, or a representative of a licensee, if:
 - (a) the benefit relates to a credit contract secured by a mortgage over residential property; and
 - (b) the benefit does not relate to a reverse mortgage; and
 - (c) the benefit does not relate to a line of credit facility; and
 - (d) the benefit does not relate to:
 - (i) the provision of credit under a home renovation or improvement facility; or
 - (ii) the provision of credit wholly or partly to refinance credit, where the original or additional credit is provided under a home renovation or improvement facility; and
 - (e) the benefit is given within 1 year beginning on:
 - (i) for the provision of credit that is not wholly or partly to refinance credit—the first day on which an amount of credit is provided to the consumer under the credit contract; or
 - (ii) for the provision of credit that is wholly or partly to refinance credit—the first day on which an amount of credit is provided to the consumer under the credit contract after the refinanced credit is made available.
- (2) The ***year to which the drawdown cap applies*** in relation to a credit contract is the period worked out under paragraph (1)(e).
- (3) A ***line of credit facility*** means a facility made available under a continuing credit contract under which the debtor is not obliged to repay any amounts of credit provided under the facility, or otherwise reduce the debtor's liability under the facility, until:
 - (a) the debtor's total liability under the facility (including the amounts of credit provided under the facility, interest charges in relation to the facility and fees and charges payable in relation to the facility) reaches or exceeds the limit specified in the credit contract for the facility; or
 - (b) if credit is available to the debtor under the facility only for a specified period—the period has ended.
- (4) A ***home renovation or improvement facility*** is a facility:

-
- (a) made available under a credit contract; and
 - (b) the whole or predominant purpose of which is to provide credit to renovate or improve residential property.

28VD Working out the maximum drawdown net of offset for a credit contract

- (1) To work out the *maximum drawdown net of offset* for a credit contract under which a consumer is a debtor, for the year to which the drawdown cap applies in relation to the credit contract, first work out, for each day during the year, the difference between:
 - (a) the amount of debt actually deferred under the credit contract, as the amount stands on that day, excluding any excluded amounts but including any interest, fees and charges that do not relate to excluded amounts; and
 - (b) the total of all amounts standing to the credit of the consumer in all offset accounts held by the consumer on that day in relation to the credit contract.
- (2) The *maximum drawdown net of offset* for the credit contract, for the year to which the drawdown cap applies in relation to the credit contract, is the greatest amount worked out under subregulation (1) for any day during the year.
- (3) An *excluded amount* is an amount of credit that:
 - (a) is provided to a consumer under a credit contract; and
 - (b) relates to a reverse mortgage, a line of credit facility or a home renovation or improvement facility.
- (4) An *offset account*, held by a consumer who is a debtor under a credit contract, means a facility held by the consumer in relation to which either of the following applies:
 - (a) the amount standing to the credit of the facility at a particular time is notionally offset against the amount of credit provided to the consumer under the credit contract that has not been repaid at that time, and interest is calculated by reference to the resulting notionally reduced amount of credit;
 - (b) the interest payable under the credit contract is periodically reduced by an amount that would otherwise accrue as interest or other earnings on the amount standing to the credit of the facility from time to time.

28VE Volume-based benefits

- (1) A benefit is a *volume-based benefit* if:
 - (a) access to the benefit, or the value of the benefit, is wholly or partly dependent on the total amount of credit available or provided under credit contracts, or credit contracts of a particular class:
 - (i) that have been entered into by consumers, or a class of consumers; and
 - (ii) in relation to which the consumers, or the class of consumers, were provided credit services by a licensee, or a representative of a licensee; or
 - (b) access to the benefit, or the value of the benefit, is wholly or partly dependent on the number of credit contracts, or the number of credit contracts of a particular class:

- (i) that have been entered into by consumers, or a class of consumers; and
 - (ii) in relation to which the consumers, or the class of consumers, were provided credit services by a licensee, or a representative of a licensee.
- (2) If all or part of the monetary benefit given (whether directly or indirectly) to a licensee, or a representative of a licensee, by another person (the **benefit giver**) is of a kind specified in one of the following paragraphs, then, to the extent that the benefit is of that kind, it is not a **volume-based benefit**:
 - (a) a discount on an amount payable to the benefit giver by the licensee or representative that can reasonably be attributed to economies of scale that are gained, or could reasonably be expected to be gained, because of the number or value of credit contracts, or credit contracts of a particular class, in relation to which the licensee or representative provides credit services to consumers;
 - (b) a rebate of an amount paid to the benefit giver by the licensee or representative that can reasonably be attributed to economies of scale that are gained, or could reasonably be expected to be gained, because of the number or value of credit contracts, or credit contracts of a particular class, in relation to which the licensee or representative provides credit services to consumers.

28VF Campaign-based benefits

A benefit is a **campaign-based benefit** if:

- (a) the benefit is given to a licensee, or a representative of a licensee, in relation to a credit service provided to a consumer in relation to a credit contract; and
- (b) access to the benefit, or the value of the benefit, is wholly or partly dependent on the credit service being provided, or the consumer entering the credit contract, during a particular limited period (the **campaign period**); and
- (c) either or both of the following apply:
 - (i) 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;
 - (ii) 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.

28VG Clawback requirements

- (1) This regulation applies if:
 - (a) a monetary benefit is, or will be, given to a licensee or a representative of a licensee; and
 - (b) the benefit is in relation to a credit service provided by the licensee or representative to a consumer in relation to a credit contract; and
 - (c) the arrangement under which the benefit is payable includes an obligation (the **repayment obligation**) to repay all or part of the benefit if the

consumer is in default under the credit contract or wholly or partly discharges the credit contract.

- (2) The ***clawback requirements*** in relation to the benefit are:
- (a) the repayment obligation must not apply for more than 2 years after:
 - (i) for a credit contract under which credit is provided that is not wholly or partly to refinance credit—the first day on which an amount of credit is provided to the consumer under the credit contract; or
 - (ii) for a credit contract under which credit is provided that is wholly or partly to refinance credit—the first day on which an amount of credit is provided to the consumer under the credit contract after the refinanced credit is made available; and
 - (b) the repayment obligation must not require repayment of an amount greater than the benefit given to the licensee or representative; and
 - (c) the consumer must not be subject to an obligation to pay an amount as a result of an amount being required to be repaid under the repayment obligation.

28VH Non-monetary benefit given in certain circumstances not conflicted remuneration

- (1) This regulation is made for the purposes of paragraph 158NA(b) of the Act.

Infrequent benefit valued less than \$300

- (2) A non-monetary benefit given to a licensee, or representative of a licensee, who provides credit services to consumers is not conflicted remuneration if:
- (a) the value of the benefit is less than \$300 for each licensee, or each representative of a licensee, who is the final recipient of the benefit; and
 - (b) identical or similar benefits are not given on a frequent or regular basis.

Education or training

- (3) A non-monetary benefit given to a licensee, or representative of a licensee, who provides credit services to consumers is not conflicted remuneration if:
- (a) the benefit has a genuine education or training purpose; and
 - (b) the benefit is relevant to the carrying on of a business of providing credit services to consumers; and
 - (c) for a benefit that is the provision of an education or training course—the requirements in subregulation (4) are satisfied in relation to the course; and
 - (d) for a benefit that is not the provision of an education or training course—the dominant purpose of the benefit is education and training.
- (4) For the purposes of paragraph (3)(c), the requirements are:
- (a) education or training activities for the professional development of the participants in the course must take up at least:
 - (i) 75% of the time spent on the course; or
 - (ii) 6 hours a day;
 whichever is the lesser; and
 - (b) the costs of:
 - (i) the participant's travel and accommodation relating to the course; and

(ii) the participant attending events and functions held in conjunction with the course;

must be paid for by one or more of the following:

(iii) the participant;

(iv) the participant's employer or licensee;

(v) if a mortgage intermediary provides services to the participant, or the participant's employer or licensee, to assist in carrying on a business of providing credit assistance to consumers—the mortgage intermediary.

Note: An example for subparagraph (b)(ii) is the cost of day trips or dinners.

(5) In this regulation:

education or training course includes a conference or seminar.

IT support

(6) A non-monetary benefit given to a licensee, or representative of a licensee, who provides credit services to consumers is not conflicted remuneration if:

(a) the benefit is the provision of information technology software or support; and

(b) the benefit is related to the provision of credit services to consumers in relation to credit contracts with the benefit provider.

Benefit given by a consumer

(7) A non-monetary benefit given to a licensee, or representative of a licensee, is not conflicted remuneration if the benefit is given:

(a) by a consumer to the licensee or representative; and

(b) in relation to a credit service provided by the licensee or representative to the consumer in relation to a credit contract.

Division 3—Circumstances in which conflicted remuneration must not be accepted

28VI Circumstances in which a licensee must not accept conflicted remuneration

(1) This regulation is made for the purposes of section 158NB of the Act.

(2) A licensee must not accept conflicted remuneration if the conflicted remuneration relates to:

(a) credit assistance provided by the licensee to a consumer in relation to a credit contract; or

(b) whether or how the licensee acts as an intermediary between a credit provider and consumer in relation to a credit contract.

(3) However, subregulation (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.

28VJ Circumstances in which a credit representative must not accept conflicted remuneration

- (1) This regulation is made for the purposes of subsection 158NC(1) of the Act.
- (2) A credit representative of a licensee must not accept conflicted remuneration if the conflicted remuneration relates to:
 - (a) credit assistance provided 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; or
 - (b) whether or how the credit representative 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**28VK Circumstances in which an employer must not give conflicted remuneration**

- (1) This regulation is made for the purposes of subsections 158ND(1) and (2) of the Act.
- (2) 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.
- (3) An employer of a credit representative of a licensee must not give conflicted remuneration to the credit representative if it would be a contravention of subsection 158NC(1) of the Act for the credit representative to accept the conflicted remuneration.

28VL Circumstances in which a credit provider must not give conflicted remuneration

- (1) This regulation is made for the purposes of subsections 158NE(1) and (2) of the Act.
- (2) A credit provider must not give conflicted remuneration to a 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.
- (3) A credit provider must not give conflicted remuneration to a credit representative of a licensee if it would be a contravention of subsection 158NC(1) of the Act for the credit representative to accept the conflicted remuneration.

28VM Circumstances in which a mortgage intermediary must not give conflicted remuneration

- (1) This regulation is made for the purposes of subsections 158NF(1) and (2) of the Act.
- (2) A mortgage intermediary must not give conflicted remuneration to a 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.
- (3) A mortgage intermediary must not give conflicted remuneration to a credit representative of a licensee if it would be a contravention of subsection 158NC(1) of the Act for the credit representative to accept the conflicted remuneration.

Schedule 2—Consequential amendments

National Consumer Credit Protection Regulations 2010

1 Paragraph 9AB(6)(b)

Omit “commission”, substitute “indirect remuneration”.

2 Paragraphs 20(5)(b), (c) and (d)

Omit “(whether by way of commission or otherwise)”, substitute “(including as indirection remuneration)”.

3 Paragraph 20(12)(c)

Omit “(whether by way of commission or otherwise)”, substitute “(including as indirection remuneration)”.

4 Subparagraphs 25(2)(b)(i) and (ii)

Omit “commission”, substitute “indirect remuneration”.

5 Subparagraphs 25(2A)(b)(i) and (ii)

Omit “commission”, substitute “indirect remuneration”.

6 Subparagraphs 25(4)(d)(i) and (ii)

Omit “commission”, substitute “indirect remuneration”.

7 Subparagraphs 25(5)(e)(i) and (ii)

Omit “commission”, substitute “indirect remuneration”.

8 Paragraph 25H(1)(e)

Omit “commission”, substitute “indirect remuneration”.

9 Regulation 26 (paragraph (b) of the definition of *product designer*)

Omit “commission”, substitute “indirect remuneration”.

10 Regulation 26 (definition of *trail commission*)

Omit “a commission”, substitute “indirect remuneration”.

11 Regulation 26 (definition of *trail commission*)

Omit “includes commission”, substitute “includes indirect remuneration”.

12 Regulation 26 (definition of *volume bonus arrangement*)

Omit “commission”, substitute “indirect remuneration”.

13 Subregulation 26A(2)

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

14 Paragraphs 26A(2)(a) and (b)

Omit “commission”, substitute “indirect remuneration”.

15 Paragraphs 26A(3)(b), (c) and (d)

Omit “commission”, substitute “indirect remuneration”.

16 Regulation 27 (heading)

Omit “**commission**”, substitute “**indirect remuneration**”.

17 Subparagraph 27(2)(a)(ii)

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

18 Subregulation 27(3)

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

19 Subregulation 27A(2) (heading)

Omit “*Commissions*”, substitute “*Indirect remuneration*”.

20 Subregulation 27A(2)

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

21 Paragraphs 27A(2)(a) and (b)

Omit “commission”, substitute “indirect remuneration”.

22 Paragraphs 27A(4)(b), (c) and (d)

Omit “commission”, substitute “indirect remuneration”.

23 Regulation 27B (heading)

Omit “**commission**”, substitute “**indirect remuneration**”.

24 Subparagraph 27B(2)(a)(ii)

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

25 Regulation 28G (heading)

Omit “**commissions**”, substitute “**indirect remuneration**”.

26 Subregulation 28G(2)

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

27 Paragraph 28G(2)(a) (not including the example)

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

28 Paragraph 28G(2)(a) (example)

Omit “A commission”, substitute “Indirect remuneration”.

29 Paragraphs 28G(2)(b), (c) and (d)

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

30 Paragraph 28G(2)(d)

Omit “commissions”, substitute “indirect remuneration”.

31 Subregulation 28G(2) (note)

Repeal the note.

32 Subregulation 28G(5)

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

33 Subregulation 28G(6)

Omit “a commission”, substitute “indirect remuneration”.

34 Paragraphs 28G(6)(a) and (b)

Omit “commission”, substitute “amount of indirect remuneration”.

35 Paragraph 28G(6)(c)

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

36 Subregulation 28G(6) (example)

Omit “A commission”, substitute “Indirect remuneration”.

37 Paragraphs 28G(7)(a) and (b)

Omit “commission”, substitute “indirect remuneration”.

38 Subregulation 28G(8)

Omit “commission”, substitute “indirect remuneration”.

39 Regulation 28H (heading)

Omit “commissions”, substitute “indirect remuneration”.

40 Subregulations 28H(2), (3) and (4)

Omit “commission”, substitute “indirect remuneration”.

41 Paragraph 28R(3)(a)

Omit “commissions”, substitute “indirect remuneration”.

42 Paragraphs 28R(3)(b) and (c)

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

43 Subregulation 28R(4)

Omit “commissions”, substitute “indirect remuneration”.

44 Regulation 109 (heading)

Omit “loan account offset arrangements”, substitute “offset accounts”.

45 Subregulation 109(1)

Omit “a loan account offset arrangement may be made on the assumption that the contract is not linked to the arrangement”, substitute “an offset account may be made on the assumption that the contract is not linked to the offset account”.

46 Subregulation 109(2)

Omit “a loan account offset arrangement”, substitute “an offset account”.

47 Paragraph 109(2)(b)

Omit “the loan account offset arrangement”, substitute “the offset account”.