

22 May 2018

**By email: FlexCommissions@asic.gov.au**

Christian Mikula  
ACT Regional Commissioner  
Australian Securities & Investments Commission

Dear Christian

### **Consultation Paper: Implementation of prohibition on flex-commissions**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the implementation of the prohibition on flex-commissions Consultation Paper (**the Consultation Paper**).

We generally support the prohibition on flex-commissions in the ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 (**the Instrument**) and proposed amendments. However, we consider that the Instrument could be strengthened in several areas. In particular, we recommend that the 200-basis point 'reverse flex' arrangement under section 5(b) of the Instrument be removed.

Our comments are detailed more fully below.

### **About Consumer Action**

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

### **200 basis point 'reverse-flex' arrangement**

As set out in our previous submissions,<sup>1</sup> flex-commissions effectively reward car dealers for acting against the interests of their customers, and to do so without their customers' knowledge. While the Instrument

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<sup>1</sup> Consumer Action Law Centre, *Comment on ASIC CP 279: Flex commission arrangements in the car finance industry*, 28 March 2017, available at: [https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/03/170328\\_CALCSUB\\_ASICFlexCommnsBan.pdf](https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/03/170328_CALCSUB_ASICFlexCommnsBan.pdf); Consumer Action Law Centre, *Comment on ASIC proposed ban on flex-commissions*, 8 August 2017, available at: [https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/08/170808\\_CALCSUB\\_ASICFlexCommnsBan2\\_Final\\_ForWeb.pdf](https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/08/170808_CALCSUB_ASICFlexCommnsBan2_Final_ForWeb.pdf).

purports to prohibit flex commissions, the 200 basis point 'reverse-flex' arrangement permitted under section 5(b) is problematic. This arrangement most likely means that vulnerable people who lack the knowledge or ability to negotiate interest rates will still continue to pay more.

Flex-commission arrangements mean that loan interest rates may be based purely on what the customer can bear, and it is generally vulnerable and disadvantaged customers who are charged the most. This observation was supported by evidence given by ANZ during the Royal Commission into Misconduct in the Banking, Insurance and Financial Services Industry (**the Royal Commission**) hearings. ANZ said that its flex-commission arrangements gave an incentive to car dealers to increase the price of credit in a way that did not relate to credit risk, but instead demined by a consumer's financial sophistication and capacity to negotiate.<sup>2</sup>

The Royal Commission also heard evidence of a clear 'first mover' problem in the industry, showing that industry players are unlikely to stop harmful flex commission practices unless regulation forces them to do so. For example, Westpac said it continues to pay hidden flex-commissions to car dealers despite flex-commissions creating a conflict of interest between the car dealer and the customer. Westpac gave evidence that it would continue to use the flex commission model until the prohibition comes into effect in November 2018. In our view, this evidence suggests a reluctance to improve practices where to do so would affect profitability, without regulator or government intervention.

In our view, it would be more effective to ban flex commissions entirely, so that interest rates were set by lenders rather than car dealers. This would mean that customers would not unknowingly be paying up to 200 basis points more for their loan due to their inability to negotiate or lack of financial sophistication.

### **Exemption for home loans**

We do not oppose the exemption for home loans in the Instrument, as we are not aware of flex commissions in the home lending market. However, we note that this exemption should be revisited if the flex commission model appears in the home lending market in future. Our casework and the Royal Commission has uncovered significant problems with lenders failing to properly monitor brokers and introducers, meaning that any introduction of flex commission in this market would carry a significant risk of poor consumer outcomes.

### **Criminal penalties**

We support the imposition of criminal liability for contraventions of the Instrument. The risk of consumer harm from a lack of meaningful consequences for misconduct and inadequate supervision of intermediaries is significant. The penalties available to the regulator when financial services entities break the law must incentivise compliance and deter misconduct.

However, it is unclear why civil penalties under the Instrument are 2,000 penalty units while criminal contraventions attract only 100 penalty units. In our view, the penalty units should be more consistent. There is a higher burden of proof for criminal offences, and it would seem unlikely that the regulator will prefer criminal action over civil action even if the conduct is criminal in nature if the penalty is somewhat weaker. We consider that criminal penalty units should equal (or exceed) civil penalty units, particularly for corporations where criminal penalties cannot be converted into imprisonment.

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<sup>2</sup> Transcript of Proceedings (Day 9, 22 March 2018), 818–9.

## Data collection

We support data collection relating to interest rates and origination fees in order for ASIC to track changes in the market and determine the impact of the prohibition. We suggest that promotional interest rate data also be collected, so that ASIC can monitor the difference between interest rates set by lenders and those being advertised to the public. We also recommend that the data collected by ASIC be made publicly available.

Please contact Katherine Temple on 03 9670 5088 or at [katherine@consumeraction.org.au](mailto:katherine@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely,

**CONSUMER ACTION LAW CENTRE**



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