

1. Thank you for the opportunity to make a submission on the Options Paper (Parts 1 and 2) for the Review of the Financial Advisers Act 2008 (FAA) and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA).
2. The Commission is not directly responsible for enforcing the FAA and FSPA. However, our interest in the review lies in the question of how the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the Fair Trading Act 1986 (FTA) apply to the provision of financial advice and the interface between obligations contained in those Acts and the FAA and FSPA.
3. We submit that:
  - 3.1 Where possible, the review should ensure that the consumer protection aims and objectives of the FAA, FSPA and the CCCFA and FTA are generally consistent. We advocate for an “all- of- government” approach that promotes consistency and certainty across the spectrum of consumer protection laws that relate to the provision of financial services;
  - 3.2 Where proposed changes to the FAA and/or FSPA reflect different policy objectives and/or impose different obligations on financial service providers than they have under the FTA or CCCFA:
    - 3.2.1 The review gives appropriate consideration to whether a financial service provider can perform both sets of obligations at the same time in practical terms and/or whether there is any conflict between the obligations; and
    - 3.2.2 The review ensures that any differences or inconsistencies between the obligations are made clear for the benefit of consumers, financial service providers subject to the FAA, FSPA and the CCCFA and FTA, and the regulators of those Acts.

#### **Relationship between the FAA and the CCCFA**

4. The CCCFA does not expressly require lenders to provide financial advice. However, in our view, compliance with the Responsible Lending Principles contained in the CCCFA may nevertheless require them to do so in practical terms. This is because lenders are likely to make a recommendation or give an opinion to a potential borrower in the course of making reasonable inquiries under section 9C of the CCCFA about whether the credit or finance will meet the borrower’s requirements and objectives.
5. A lender discussing with a borrower the suitability and affordability of credit or finance could readily tip over into providing financial advice. They might naturally discuss other products that might be more suitable and/or affordable in the borrower’s particular circumstances.

6. For example, where a borrower is taking out a mortgage and is considering what rate and term is best in their individual circumstances, a responsible lender would be required to make the enquiries, and provide the assistance, necessary to advise the borrower about the suitability of the product. In some circumstances, the role of the lender under the CCCFA might be indistinguishable from that of a financial adviser under the FAA.
7. It is a matter of policy as to whether lenders advising on the suitability or otherwise of consumer credit contracts should be subject to additional obligations imposed under the FAA. However, we consider such an approach would be consistent with the objectives of the recent amendments to the CCCFA, one of which is that consumers are more informed and have a greater understanding of their credit arrangements. It would also be consistent with the achievement of the review's stated outcomes of providing access to the advice and assistance that consumers need and ultimately improving their financial outcomes. Given that the roles of lender under the CCCFA and financial adviser under the FAA can be as closely related as discussed above, we consider that consistency in the obligations owed to the consumer under each Act in relation to consumer credit contracts is desirable.
8. For example, in our view, it will be important for the review to consider how any changes to disclosure requirements, competency and ethical obligations or any distinction between "sales" and "advice" will interface with lenders' existing obligations. Particularly:
  - 8.1 Will a lender's obligations under the FAA be consistent with the overall objectives of the CCCFA and with the requirements of the Responsible Lending Principles?
  - 8.2 Will potential inconsistency between the requirements of each law result in the regulators in this area, the Financial Markets Authority (FMA) and the Commerce Commission (the Commission), having dual or divided enforcement responsibilities?
9. In our view, conflicting or overlapping obligations under the FAA and CCCFA could lead to uncertainty and difficulty with enforcement. Where the FMA and the Commission have jurisdiction over different aspects of the same conversation between lender and borrower, we submit that careful thought needs to be given to the extent of that overlap and how the regulators can best manage that. We think it important that both Acts align to ensure consistency in approach to lenders' obligations whenever financial advice is, in practice, provided to borrowers. Where policy dictates that the approach should differ, we submit that the differences should be clearly defined to provide regulatory certainty for lenders, borrowers, the FMA and the Commission.

#### **Consumer law considerations**

10. We provide some general observations below about enforcement issues arising mostly under the FTA that might be useful when MBIE considers the current consumer experience in the financial services sector.

11. The examples that we draw upon are largely anecdotal as they are drawn from our engagement with the community (for example, budget advisers) and from our complaints data. Not all matters complained of are matters suitable for further investigation by the Commission. However, they are examples of situations in which consumers report finding it difficult to access appropriate information and/or fail properly to understand the financial services they are acquiring and the contracts that they are entering into. By analogy, these examples appear to confirm the existence of some of the barriers to achieving some of the consumer outcomes identified in the Options Paper. We consider that they may be of assistance to MBIE when considering measures appropriate to achieve the review objectives of examining whether consumers access the advice and assistance they require and whether that advice improves their financial outcomes.
12. In the areas referred to below, our experience suggests that some individuals who provide financial advice may not be adequately trained or monitored, and this may result in the provision of misleading advice. Additionally, complaints suggest that commission-based selling (where an individual is incentivised to make sales by remuneration, such as commissions) may be a factor in some of the types of misrepresentations complained about. Our complaints indicate that the types of problems that consumers face that have been specifically addressed in the lending context by the Responsible Lending Principles, occur in the wider context of financial advice provided more generally.
13. The Commission receives a steady stream of complaints across a range of subject areas, including disclosure, up-selling of products (including extended warranties), and the sale of insurance products. A common thread throughout many of these complaints relates to conduct or representations made at point of sale, i.e. at the decision point in sales transactions. At that point, consumers take the information they are given at face value and rely on that information when making their purchasing decisions about goods and services.

#### *Disclosure*

14. A consistent theme emerges from our complaints data (both under the FTA and CCCFA) to the effect that a lack of information (or a lack of transparent or meaningful information) causes difficulty for consumers, as does the provision of misleading information. For example, consumers report not understanding important terms and conditions of their contracts such as cancellation rights, fees, exclusions, outstanding balances of debt or how interest rates are charged. We consider meaningful disclosure to be an important factor in informed decision-making by consumers and this has been recognised in the CCCFA. Our experience tends to confirm the position of the Options Paper that the provision of clear, concise and meaningful disclosure should be an area of focus for the review.

#### *Conflicts of interest*

15. We consider it relevant to the consideration of ethics and client care in the review that the Commission receives complaints relating to the sale of extended warranties that we consider may be connected to sales incentives - the up-selling of add-ons as a means of extra remuneration for sales people. For example, we receive complaints alleging misrepresentations about:

- 15.1 the need for an extended warranty;
  - 15.2 consumers' rights under the Consumer Guarantees Act 1993 (even when consumers try to exercise those rights);
  - 15.3 the nature or extent of the warranty, or its commencement date; and
  - 15.4 the relationship of the extended warranty to the manufacturer's warranty.
16. Complaints also relate to the targeting of vulnerable consumers, such as the elderly, being sold warranties they neither understand nor need.
17. We consider it is unlikely that many consumers understand the potential conflict of interest that may be influencing the advice provided in these contexts. This type of complaints data may be relevant to consideration in the review of regulated requirements for commission based sales of financial products and services.

#### *Insurance contracts*

18. Complaints are made that relate to a lack of disclosure and inadequate or misleading information provided about insurance contracts. This includes misrepresentations made about the existence of exclusions and conditions, hidden or additional fees and ambiguity around terms and conditions and how they may affect a policy. Examples include, income protection insurance being sold to beneficiaries or retirees. Insurance contracts/policies may be quite complex and misrepresentation about or unethical selling of these products can cause significant harm to consumers. This was recognised by imposing responsibilities on lenders (Responsible Lending Principles 9C(5) and 9B(1)) in relation to the sale of related insurance products, i.e. to make the enquiries and provide the assistance necessary to advise the borrower about the suitability of the product.

#### **Other matters**

19. We wish to draw to your attention three other matters relevant to issues referred to in the Options Paper:

#### *Disputes Resolution schemes*

20. The Options Paper notes that there is a lack of evidence of negative impacts on competition in the current multiple schemes model (including "scheme hopping" by members to the detriment of the consumer). However, stakeholder information indicates that some parties may deliberately select a dispute resolution scheme that is most favourable to that party. This is made possible because the current schemes are independent and industry-based (and funded) and they offer different processes and criteria (and potentially different outcomes) for members. We understand that this may lend itself to forum shopping by members, which may be in the members' interests but may not be in consumers' best interests. This may be relevant to the outcome of consumers having access to effective redress that the review is seeking to achieve.

#### *Robo –advice*

21. The issue of whether it is appropriate to provide financial advice solely through technological channels (such as robo-advice) has been raised as a concern in the context of responsible lending under the CCCFA. Both industry and consumer groups have voiced concerns (which we share) that a lender cannot adequately test a borrower's understanding of the

information provided without discussing their needs with a natural person. We consider it unlikely that consumers can access the advice and assistance they need without access to discussion with a natural person. We submit that the review's consideration of the provision of robo-advice should take into account these stakeholder views and consistency with CCCFA requirements.

*Product categories*

22. Currently, consumer credit products, many savings products and most insurance products are classified as Category 2 products for the purposes of the FAA. This means they are considered to be less complex and less risky than category 1 products. This distinction does not recognise the diversity that exists within the broad class of consumer credit contracts. A consumer credit contract (for example, a mortgage), can be the most significant financial arrangement a consumer may have, and in fact some mortgages and loans impose extremely large commitments on borrowers.
- 22.1 Since 2006, we have received complaints about reverse equity mortgages. These products cannot generally be described as lower risk or less complex and we have seen significant consumer detriment associated with these products.
- 22.2 High risk products, such as some high cost credit agreements and payday loans also exist within the class of "consumer credit contracts". The need for greater due diligence in relation to high risk, complex or uncommon consumer credit contracts or where the borrower is a vulnerable borrower, was recognised in guidance in the Responsible Lending Code (see guidance at 4.6,4.8,4.9,7.2 and 7.11).
- 22.3 We raise these issues for consideration in terms of a potential inconsistency or gap between the FAA and the CCCA as to the requirements for advice provided in respect of products of higher complexity and risk under each of the laws.
23. We trust that the issues raised in this submission are useful to MBIE as it progresses consideration of the matters raised in the Options Paper. We are of course happy to discuss any aspect further if that would be helpful.