



**ASIC**

Australian Securities & Investments Commission

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**Productivity Commission  
Inquiry into competition in  
the Australian financial  
system: Draft report**

**Submission by the Australian  
Securities and Investments  
Commission**

March 2018

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## Overview

- 1 We welcome the Productivity Commission's [\*Competition in the Australian financial system: Draft report\*](#) (draft report) and the attention it has drawn to competition in Australia's financial system. It is important to recognise that failure of competition to work effectively often results in conduct issues and adverse outcomes for consumers.
- 2 Our view is that the fundamental purpose of competition in markets for financial products and services is to enhance the long-term interests of the end users of the financial system. Rather than competition occurring for its own sake, it should drive markets to meet consumer needs and preferences.
- 3 Persistent problems in a market—such as inefficient pricing and excess profits, poor service and deteriorating product quality, leading to poor consumer outcomes—can be a sign that competition is not working as effectively as it could be.
- 4 A number of factors may make it more difficult for competition to operate effectively in markets for financial services and products than in other markets, including:
  - (a) the 'credence' quality of some financial products and services, which means suitability and quality are hard to gauge before or even after purchase;
  - (b) asymmetric information and power between providers, intermediaries and consumers;
  - (c) the inherent risk and uncertainty, and complexity, of many financial products and services; and
  - (d) the fact that financial products are an infrequent purchase, and it may be more difficult to shop around and exert competitive pressure.
- 5 Additionally, even where industry recognises that particular practices are producing poor consumer outcomes, 'first mover' disadvantage and the difficulty of collective action means that regulatory intervention will be required to address the issue.

## Facilitating effective competition in the financial system

- 6 Competition laws are an essential foundation of effective competition. However, in our experience, the cause of consumer problems relating to financial products and services is generally not the kind of behaviour that would clearly breach competition laws (e.g. cartel conduct or misuse of market power). Rather, many current competition issues in markets for

financial products and services are derived from the nature of the markets themselves, and often require a tailored regulatory approach.

7 We appreciate that many of the Productivity Commission's recommendations similarly propose tailored responses to identified problems. Table 1 summarises our response to key issues raised by the Productivity Commission in its draft report.

**Table 1: ASIC's response to key issues raised in the Productivity Commission's draft report**

Issue	ASIC's response
<p><b>Mortgage broking</b></p>	<p>We are supportive of strengthening standards across the mortgage broking industry. While a best interests duty is an option to consider, there is scope to enhance the existing responsible lending obligations to promote good consumer outcomes and ensure the service provided by mortgage brokers is aligned with consumer expectations.</p> <p>We note that broker fees-for-service are under consideration by various current processes.</p> <p>Note: See Section A, paragraphs 13–29.</p>
<p><b>Financial advisers and credit advice</b></p>	<p>Financial advisers may already provide generic credit advice.</p> <p>A relatively low number of persons hold both an Australian financial services (AFS) licence and an Australian credit licence (credit licence). It is difficult to identify the precise reason for this. Table 4 analyses potential barriers, including regulatory, financial and industry-specific barriers.</p> <p>There may be an opportunity to consider some streamlining to allow financial advisers to provide more specific advice on credit products, beyond the generic credit advice they are currently able to provide without a credit licence. However, making this change is unlikely to overcome industry-driven, rather than regulatory, barriers.</p> <p>Note: See Section A, paragraphs 51–70.</p>
<p><b>Rethinking general and personal advice</b></p>	<p>Relabelling general advice may be a potentially useful step. Any final reform proposals should take into account:</p> <ul style="list-style-type: none"> <li>• the broad scope of the conduct that is currently regulated as general advice (and, for example, whether a single new name for general advice will assist in improving consumer understanding of all conduct currently regulated as general advice); and</li> <li>• pressures in the broader regulation of advice.</li> </ul> <p>Note: See Section A, paragraphs 35–50.</p>

Issue	ASIC's response
<b>Add-on insurance</b>	<p>We support the Productivity Commission's findings on add-on insurance, particularly the recognition of poor consumer outcomes across the sector.</p> <p>We welcome the Productivity Commission's support and recommendation for ASIC to proceed with our proposal to mandate a deferred sales model for add-on insurance through car dealerships, and for the Government to consider extending this to other types of add-on insurance products.</p> <p>We think it may be useful to extend the deferred sales model to all add-on products. The establishment of a Treasury-led working group to extend the deferred sales model to all add-on insurance products would be a matter for Government.</p> <p>Note: See Section A, paragraphs 30–34.</p>
<b>Data and transparency</b>	<p>Increasing consumers' access to data can help consumers better assess and manage risks, leading to better decision making and greater demand-side pressure.</p> <p>A particular area of opportunity is in improving consumers' access to performance-based data.</p> <p>Note: See Section B.</p>
<b>Regulating for competition</b>	<p>An explicit and broad competition mandate for ASIC will ensure we have a clear basis to consider and promote competition in the financial system.</p> <p>Note: See Section C.</p>

## ASIC's submission

- 8 This submission focuses on the Productivity Commission's draft recommendations that are specifically relevant for ASIC, including:
- (a) regulatory responses to facilitate positive consumer outcomes: see Section A;
  - (b) the need for accessible data to be provided to consumers: see Section B; and
  - (c) ASIC's role in relation to competition in the financial system: see Section C.
- 9 The Appendix contains our responses to each of the Productivity Commission's specific findings, recommendations and information requests of particular relevance to ASIC.

## A Consumer outcomes

### Key points

The Productivity Commission has made a number of recommendations aimed at improving consumer outcomes in various sectors of the financial system.

There may be scope to strengthen mortgage broker standards to improve outcomes for consumers obtaining home loans.

We support the Productivity Commission's findings on add-on insurance, particularly the recognition of poor consumer outcomes across the sector.

There may also be scope to improve the regulation of financial advice, including examining ways to ensure consumers understand the nature of advice provided to them and increasing the scope of credit advice that financial advisers can provide.

- 10 Where competition is not working effectively, this can be a key driver of poor consumer outcomes. The Productivity Commission's draft report examines various areas of the financial system where consumer outcomes could be improved, and proposes a number of reforms to address them.
- 11 This section sets out our views on the Productivity Commission's proposals in relation to:
- (a) mortgage broking: see paragraphs 13–29;
  - (b) add-on insurance: see paragraphs 30–34;
  - (c) advice (rethinking the regulation of general and personal advice): see paragraphs 35–50; and
  - (d) advice (financial advisers and credit advice): see paragraphs 51–70.
- 12 The Appendix also contains our responses to each of the Productivity Commission's specific findings, recommendations and information requests about consumer outcomes.

### Mortgage broking

#### Increasing mortgage broker standards

- 13 We are supportive of strengthening standards in the mortgage broking industry.
- 14 Mortgage brokers play a significant role in the home loan market, in acting as intermediaries between consumers and credit providers. Brokers can play an important role in promoting good consumer outcomes and strong competition in the home loan market. Our recent work examining mortgage

broker remuneration ([Report 516](#) *Review of mortgage broker remuneration* (REP 516)) did find some differences in the types of loans obtained through broker channels, in terms of size and type, although we noted that other ASIC work had resulted in improvements to industry standards that would not be reflected in these findings: see REP 516, paragraphs 51–56. Whether or not this resulted in a poor consumer outcome would also depend on whether the loan met the consumer’s requirements and objectives and did not result in the consumer experiencing financial hardship.

Note: REP 516 made a number of findings and proposals to improve consumer outcomes and competition in the home loan market. As noted in paragraph 27, the Government is considering its response to REP 516, as well as to an industry-led response to our review.

- 15 Since significant reforms in 2010 (the *National Consumer Credit Protection Act 2009* (National Credit Act)), consumer credit has been regulated at a national level, including a licensing and conduct framework and, in particular, responsible lending obligations.

Note: This historical background is discussed further in paragraph 52.

- 16 While this has greatly advanced consumer outcomes in this area, there may be potential to enhance the current regulatory requirements to recognise the specific role of mortgage brokers in influencing consumers’ decisions when choosing between lenders, particularly as the same responsible lending requirements currently apply to mortgage brokers and credit providers.

### **‘Best interests’ duty and other options**

- 17 The ‘best interests’ duty for financial advice and ‘responsible lending’ regime for credit services such as mortgage broking were developed by Government to respond to different regulatory issues in each industry.

- 18 The regulatory regime for consumer credit was introduced at a time when the ‘best interests’ duty for financial advice had not yet been proposed. The key regulatory concepts in the credit regime have a different and narrower focus to those in the financial services regime. Rather than regulating ‘advice’, the credit regime regulates the more specific services of providing ‘credit assistance’ or acting as an intermediary between a consumer and a lender.

Note: See ss7–9 of the National Credit Act and ASIC [Regulatory Guide 203](#) *Do I need a credit licence?* (RG 203) for more details.

- 19 A key element of the credit regime is responsible lending obligations (Ch 3 of the National Credit Act).
- (a) The obligations require credit licensees to make inquiries into a consumer’s objectives and financial situation and verify their financial situation, assess this information, and only provide or suggest credit to a

consumer if that credit will be ‘not unsuitable’ for that consumer: see paragraph 23.

- (b) They also contain a qualitative element, in that a credit contract will be presumed to be unsuitable in certain circumstances, with the onus on the person providing credit assistance to displace the presumption: s118(3) of the National Credit Act.

20 The ‘best interests’ duty for financial advisers was introduced through the 2013 Future of Financial Advice (FOFA) reforms, designed to improve confidence in the industry and make financial advice more accessible.

21 At this stage, we think that determining which legal model will best improve mortgage broker standards and outcomes for consumers obtaining home loans will require further analysis. This might depend on whether the mechanism of any new best interests duty involves:

- (a) changing the process for mortgage broking—for example, by mandating additional inquiries or steps that need to be taken before recommending or arranging a loan; or
- (b) setting standards for the quality of the outcome for consumers—for example, by specifying circumstances in which a mortgage broker recommends a loan from a related company will be acceptable or not be acceptable.

22 It may be preferable to enhance the existing responsible lending obligations for mortgage brokers by focussing on obtaining specific, positive outcomes for consumers.

23 Under the current responsible lending test, mortgage brokers and other persons providing ‘credit assistance’ (i.e. suggesting that the consumer apply for a particular credit contract with a particular credit provider, or assisting them to apply for that credit contract) are required to ensure that consumers are only entered into credit contracts that are ‘not unsuitable’ for them. A credit contract would be unsuitable for a consumer if:

- (a) the consumer would be unable to comply with their financial obligations under the contract, or could only comply while enduring substantial hardship; or
- (b) the credit contract would not meet their requirements and objectives.

24 The second criterion is relatively broad, and therefore may potentially only be considered in broad terms by the person conducting the responsible lending assessment for a consumer seeking a home loan (e.g. they might focus on the immediate need for a consumer to get a loan to purchase a home). There may be scope to be more explicit about what persons providing credit assistance, including mortgage brokers, should do in ascertaining and meeting the needs and objectives of the customer (including finding a competitive, well-priced loan). The fact that the current responsible

lending obligations contain both procedural and qualitative elements mean that they are suited to these kinds of enhancements. By comparison, similar enhancements were recently made to the underlying responsible lending regime for credit cards.<sup>1</sup>

- 25 An additional consideration is whether any reforms should apply in a competitively neutral way to all brokers, and not simply to lender-owned mortgage aggregators. While this will depend on the Productivity Commission's view as to the nature of the problem it is seeking to address, a broader scope may give consumers confidence that all mortgage brokers, regardless of their affiliations, will be acting under the same standards.

### **Broker fees-for-service**

- 26 The Productivity Commission has sought further information on whether consumers should pay brokers fees for service. This is intended to address the potential conflicts of interest arising from trail commissions.
- 27 We also made recommendations relating to the remuneration of mortgage brokers in REP 516, including that lenders change their standard commission arrangements so that brokers are not incentivised purely on the size of the loan. In August 2017, the Government welcomed the mortgage industry's creation of a forum to develop an industry-led response to our review and noted that it will take the mortgage industry forum's process into account when finalising its response to the review.<sup>2</sup>
- 28 We note that this issue is also under consideration by the current Royal Commission into misconduct in the banking, superannuation and financial services industry, which may make some recommendations in this area.
- 29 Reforms in this area should take into account how a shift to a fee-for-service model might affect:
- (a) the mortgage broker market—such as market consolidation;
  - (b) the broader mortgage loan industry—such as change in dynamics between smaller and larger lenders, market concentration, and contestability; and
  - (c) consumers—including consumer access, choice of products and services, and consumer decision making.

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<sup>1</sup> *Treasury Laws Amendment (Banking Measures No. 1) Act 2018*.

<sup>2</sup> The Hon Kelly O'Dwyer MP, [ASIC review of mortgage broker remuneration](#), media release, 29 August 2017.

## Add-on insurance

- 30 We support the Productivity Commission’s findings on add-on insurance, particularly the recognition of poor consumer outcomes across the sector.
- 31 We welcome the Productivity Commission’s support and recommendation for ASIC to proceed with our proposal to mandate a deferred sales model for add-on insurance through car dealerships, and for the Government to consider extending this to other types of add-on insurance products.

### Add-on car insurance

- 32 ASIC’s three reports in 2016 identified systemic problems with the sale of add-on insurance products in car dealerships, including that add-on insurance products sold through car dealerships:
- (a) can be extremely poor value for consumers (our data gathering has revealed claims ratios of between four and ten cents in the dollar);
  - (b) are sold in a high-pressure environment;
  - (c) are often designed in a way that offers little value to consumers, such as restrictions in cover or unnecessary or overlapping cover; and
  - (d) reflect reverse competition, where insurers compete for access to car dealer distribution networks by paying extremely high commissions (up to 80%), resulting in a first-mover problem for insurers who wish to improve consumer outcomes.
- 33 Car dealers earned four times more in commissions than consumers received in claims. For 2012–16, insurers earned \$1.6 billion on the sale of add-on insurance products through car dealerships, with \$602 million paid to car dealers as commissions, and only \$144 million paid out in claims to consumers.

#### ASIC’s actions on add-on car insurance

ASIC has prioritised the issue of add-on car insurance because of the potential harm to consumers. We are taking a range of actions to address this poor conduct.

To date, we have negotiated remediation programs with four of the main insurers in this market, refunding over \$120 million to over 210,000 consumers.

In 2017, we consulted on using ASIC’s statutory powers to introduce a deferred sales model for add-on products sold with cars that would:

- require a pause in the sales process for both add-on car insurance and warranties;

- introduce tools to improve consumer engagement and decision making;
- require enhanced supervision obligations for product issuers; and
- use technology to create opportunities to drive a better sales process.

See [Consultation Paper 294](#) *The sale of add-on insurance and warranties through caryard intermediaries* (CP 294).

Since the release of CP 294, we have been further considering this issue with a view to developing a preferred model. We have engaged in informal discussions with stakeholders to assess changes in the market following our previous work—for example, some insurers have made changes on a voluntary basis to their sales practices, and it is important that the design of a deferred-sales model takes this into account.

Our preliminary views are that:

- It is desirable to have a pause in the sales process, noting that there was broad support for this in submissions to CP 294. The combination of a pause in the sales process and enhanced and individual disclosure has the opportunity to improve consumer decision making.
- There are still challenges for providers of add-on products in monitoring what is said to the consumer at the point of sale, and ensuring they do not mislead the consumer. A pause in the sales process has the potential to mitigate, but not resolve, the effects of any misrepresentations made by the intermediary.
- There is a need to consider options for consumers making purchasing decisions when away from the premises of the car dealer, especially for consumers with identified vulnerabilities (for example, with poor financial literacy).

We are also collecting further data on the provision of products such as certain warranties, which are functionally similar to add-on insurance but are exempted from the regulatory regime for financial products in the *Corporations Act 2001* (Corporations Act) (although they are subject to some regulation under the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act)). The data collected will enable us to determine the extent to which these products are or are not providing value to consumers.

We have not examined the warranty market in detail. However, our initial inquiries show that consumers are being sold warranties with significantly higher prices than functionally-similar insurance products.

We will undertake a second round of consultation on proposed minimum standards of a deferred sales model and enhanced supervision obligations in the first half of 2018.

### **Deferred sales model for all add-on products**

34

It would be useful to extend the deferred sales model to all add-on products. We note that the establishment of a Treasury-led working group to extend

the deferred sales model to all add-on insurance products would be a matter for Government.

## **Advice—rethinking general and personal advice**

- 35 We agree with the Productivity Commission’s view that the provision of quality financial advice plays an important role in promoting effective competition by overcoming information asymmetries in the financial products and services market.
- 36 We welcome the Productivity Commission’s consideration of reform options that aim to:
- (a) improve consumers’ understanding of the advice and information they receive;
  - (b) reduce consumer misinterpretation; and
  - (c) reduce excessive reliance on certain types of information, such as promotional material.
- 37 The Productivity Commission has recommended in its draft report that general advice be renamed, noting that it supports consumer testing of alternative terminology to ensure that misinterpretation and excessive reliance on promotional information is minimised. The Productivity Commission also recommends that the term ‘advice’ only be used in association with ‘personal advice’ that takes into account personal circumstances.

### **Relabelling general advice**

- 38 We think that relabelling general advice conduct is potentially a useful step towards achieving the aims set out by the Productivity Commission (and noted above at paragraph 36).
- 39 Relevantly, in the 2017–18 financial year, we are conducting consumer research into Australian adults’ understanding of personal and general advice to gather a stronger evidence base on consumers’ needs in this area. In particular, this research will explore:
- (a) whether consumers understand the difference between general and personal advice;
  - (b) whether the current terms are enabling consumers to choose the right type of advice; and
  - (c) whether consumers who receive general advice are relying on it inappropriately (i.e. without adequate consideration of how it applies to their own personal circumstances).

- 40 This will provide a source of evidence about the extent to which Australian adults currently understand the existing terms.
- 41 We think gathering further evidence about consumers' experience of advice will help clarify the nature of the problem and the most effective regulatory response.
- 42 A very broad range of conduct is currently provided under the general advice definition. Consumers encounter general advice information, or information that is labelled general advice, in a variety of settings including:
- (a) aggregator and financial product comparison websites;
  - (b) investment research websites;
  - (c) digital advice provider websites;
  - (d) financial product issuer call centre inquiries and sales;
  - (e) financial product issuer websites;
  - (f) bank branch teller guidance;
  - (g) online broking platforms;
  - (h) during the course of receiving financial planning advice (for example, general advice given during prospective client interviews);
  - (i) stockbroker recommendations to clients;
  - (j) emails, newsletters and brochure mailouts to clients;
  - (k) investment research reports;
  - (l) investment seminars, videos or interviews;
  - (m) financial product advertisements;
  - (n) independent expert reports; and
  - (o) disclosure documents.
- 43 Within these settings, the potential scope of the advice that can be provided under the general advice definition is broad:
- (a) Sales and marketing material may fall within the definition of general advice to the extent that this material is presented in a way that is intended to (or could reasonably be regarded as an intention to) influence a client in relation to a decision about a financial product.
  - (b) Other forms of general advice may involve conduct that could be described as guidance, such as:
    - (i) a provider narrowing down financial products, based on features or price;
    - (ii) a provider explaining to a client the different options that are available to them and what is recommended to other clients in different circumstances, without considering whether it is appropriate for that client; and

- (iii) an insurer outlining that it is possible to reduce a premium by increasing the base excess payable, when a consumer asks how they can reduce their premium.
- (c) At its broadest, depending on the circumstances, general advice can involve an express recommendation intended to influence a person to make a decision about a particular financial product without considering their personal circumstances.

Note 1: ASIC [Regulatory Guide 244](#) *Giving information, general advice and scaled advice* (RG 244) provides guidance on the difference between providing general advice and personal advice.

Note 2: Some providers may use personal information about a consumer to provide more relevant general advice. In the example relating to insurance in paragraph 43(b)(iii), the insurer might not inform the consumer about the option to reduce the premium by restricting the age of the drivers for the vehicle, since the client has stated their adult children, who are under the age of 25 years of age, will be driving the vehicle.

- 44 The broad nature of conduct that falls under the general advice definition may mean that there may not be one term to replace the term ‘general advice’ that is reflective of all conduct.

### **Broader issues relating to financial advice**

- 45 While we consider that relabelling general advice is a useful step, this proposal, on its own, may not address broader issues relating to financial advice, including the need to raise the quality of advice, whether ‘general’ or ‘personal’, and to increase access to financial advice.
- 46 For example, we are concerned about products that are sold under a general advice (or sometimes, ‘no advice’ model), where that model may lead to consumer detriment—for example, where the complexity of the product means that personal advice might be more appropriate, or other factors in the sales process may negatively impact consumer decision making.

#### **General advice models for add-on insurance**

Our work on add-on insurance (see paragraph 33) has found that insurers have relied on a general advice model to achieve substantial sales of policies that were inappropriate for consumers, including:

- the sale of policies to consumers who were not eligible to claim under them;
- the sale of life insurance to young consumers with no dependants and no need for this cover; and
- the sale of ‘negative value’ policies, where the maximum amount that can be claimed is less than the premium charged by the insurer (or the total of the premium plus interest attributable to it under the related loan contract).

In these cases, the nature of the sales context may have facilitated the intermediary to sell these policies, and we consider that the use of the term 'general advice' did not have a significant impact on consumer's purchasing decisions. [Report 470](#) *Buying add-on insurance in caryards: Why it can be hard to say no* (REP 470) identified a range of behavioural biases that inhibited decision making by consumers.

Our view is therefore that changes to address information asymmetries may assist consumers, but cannot necessarily address other factors that distort or adversely impact the way in which consumers are sold financial products.

- 47 Additionally, some industry participants have expressed some concern that there is a mismatch between demand-side expectations to receive certain personalised information when purchasing a financial product, and their capacity to provide this information under the current regulatory framework. Regardless of whether these concerns are validly held, we expect this tension will increase as:
- (a) industry's capacity to provide useful and persuasive information increases with its capacity to collect and analyse individual consumer data and understand consumer behaviour; and
  - (b) based on their experience in other parts of the digital economy, consumers' expectation that they will have access to new forms of personalised guidance and assistance increases.
- 48 A risk in any expansion of general advice models is that there are fewer regulatory requirements associated with providing general advice. In particular, the record-keeping requirements that apply to personal advice do not apply when general advice is provided. This means that, if a consumer wishes to make a complaint about the quality of the 'general' advice received or the damage that it lead to, they will not have any records of the advice to rely on. This lack of records also hinders ASIC's ability to monitor this conduct.
- 49 Table 2 summarises the obligations applying to general and personal advice. Any person providing financial advice, whether general or personal, must hold an Australian financial services (AFS) licence, with an appropriate authorisation (unless operating under an exclusion, e.g. the exemption available for general advice provided in the media).

**Table 2: Obligations applying to general and personal advice**

Obligations	Information <sup>3</sup>	General advice	Personal Advice
AFS licence <sup>4</sup>	x	✓	✓
Education <sup>5</sup>	x	✓	✓
Disclosure: Financial services guide <sup>6</sup>	x	✓	✓
Disclosure: Statement of advice <sup>7</sup>	x	x	✓
Best interests and related obligations <sup>8</sup>	x	x	✓
General advice warning <sup>9</sup>	x	✓	x
Prohibition on conflicted and other banned remuneration <sup>10</sup>	x <sup>11</sup>	✓	✓

50 We also note that any reform in this space should also consider the introduction and role of the Government’s proposed design and distribution obligations<sup>12</sup>—effectively a ‘product governance’ framework to strengthen issuer and distributor accountability to ensure that products are designed with consumer needs in mind and are marketed at appropriate sections of the population. Ultimately, these reforms should complement the regulation of advice. In particular, these obligations should provide a foundational level of consumer protection, that will apply regardless of whether advice is provided.

<sup>3</sup> ASIC [Regulatory Guide 36](#) *Licensing: Financial product advice and dealing* (RG 36) sets out that factual information is objectively ascertainable information, the truth or accuracy of which cannot reasonably be questioned: see at RG 36.21.

<sup>4</sup> Section 911A of the Corporations Act.

<sup>5</sup> [Regulatory Guide 146](#) *Licensing: Training of financial product advisers* sets out the minimum training standards that apply to advisers and how advisers can meet these standards. As set out in RG 146, these standards vary depending on whether the adviser gives general or personal advice; and what products the adviser gives advice on. From 1 January 2019 reforms under the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* will take effect. These reforms introduce the term of ‘relevant provider’ to refer to individuals employed or authorised by an AFS licensee to provide personal advice to retail clients in relation to ‘relevant financial products’. The new requirements to be registered as a ‘relevant provider’ will include completing a bachelor degree or higher; passing an exam approved by a ‘Standards Body’; and completing at least one year of work and training specified by the ‘Standards Body’.

<sup>6</sup> Part 7.7, Div 2, Subdiv A of the Corporations Act.

<sup>7</sup> Part 7.7, Div 2, Subdiv C of the Corporations Act.

<sup>8</sup> These are the obligations to: (a) act in the client’s best interests: s961B of the Corporations Act; (b) provide appropriate advice: s961G of the Corporations Act; (c) warn if advice incomplete or inaccurate: s961H of the Corporations Act; and (d) prioritise client’s interests: s961J of the Corporations Act.

<sup>9</sup> Section 949A(2) of the Corporations Act.

<sup>10</sup> Part 7.7A, Divs 4 and 5 of the Corporations Act.

<sup>11</sup> The *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017* which commenced on 1 January 2018, among other things, extended the ban on conflicted remuneration so that it applies where information is given on, or dealing occurs in, a life insurance product, even in the absence of advice.

<sup>12</sup> Treasury, [Treasury Laws Amendment \(Design and Distribution Obligations and Product Intervention Powers\) Bill 2017](#), exposure draft legislation, released for consultation on 21 December 2017.

## Advice—financial advisers and credit advice

- 51 In Australia, advice and other services related to credit products are regulated separately from those related to financial products with similar but distinct licensing, conduct and disclosure regimes. ASIC is the regulator with responsibility for both regimes.
- 52 The reasons for having separate regulatory regimes include:
- (a) *historical reasons*—while other financial products have been regulated at a national level for some time, before 1 July 2010 consumer credit was regulated by the states and territories under the Uniform Consumer Credit Code (UCCC). ASIC took over the regulation of consumer credit on 1 July 2010 under the National Credit Act through a separate referral of power from the states and territories; and
  - (b) *functional reasons*—at the time of developing the current regulatory regime for consumer credit, the Government made a conscious decision not to adopt an advice-based regime.<sup>13</sup> It decided not to incorporate consumer credit into the financial services regulatory regime under the Corporations Act due to its different nature, as explained in the Explanatory Memorandum:
 

It was decided to provide a stand-alone national licensing scheme that is to be distinguished from the regulation of financial services under the [Corporations Act]. This is because credit involves consumers receiving money that they must repay, rather than the purchase of, or investment in, a financial product that generally includes the expectation of a benefit or return from the payment. From the outset the [National Credit Act] is tailored to meet the issues arising in the credit context, thereby avoiding the need to extensively modify or vary elements of the Corporations Act.<sup>14</sup>
- 53 As outlined in paragraphs 60–62, financial advisers (i.e. AFS licensees or their representatives authorised to provide advice relating to financial products) are already permitted to provide generic credit advice, and ASIC encourages them to do so.
- 54 Nevertheless, there may be an opportunity for the Government to consider further streamlining the two regimes to allow financial advisers to provide more specific credit advice, while meeting certain standards, in the interests of promoting consumer access to advice. However, making this change would not necessarily overcome industry-driven, rather than regulatory, barriers.

<sup>13</sup> [Explanatory Memorandum](#) to the National Consumer Credit Protection Bill 2009, paragraph 9.138.

<sup>14</sup> *Ibid*, paragraph 2.15.

## Key regulatory requirements for financial and credit advice

### Financial services regime

55 Generally, a person providing financial advice must hold an AFS licence, with an appropriate authorisation, or be authorised as the representative of an AFS licensee. They must meet general conduct obligations applying to all AFS licensees (under s912A(1) of the Corporations Act), and provide various disclosure documents in different situations (e.g. a Financial Services Guide outlining the types of services the licensee can provide).

Note: See ASIC [Regulatory Guide 104](#) *Licensing: Meeting the general obligations* (RG 104) for more details.

56 As a result of the 2013 FOFA reforms:

- (a) all advisers are required to avoid ‘conflicted remuneration’—essentially, a benefit given to an advice provider that could reasonably be expected to influence advice; and
- (b) additional specific obligations, collectively referred to as the best interests duty and related obligations, require advisers providing personal advice:
  - (i) to act in the ‘best interests’ of the client when providing them with personal advice (s961B of the Corporations Act);
  - (ii) to provide the client with appropriate advice (s961G);
  - (iii) to warn the client if the advice is based on incomplete or inaccurate information (s961H); and
  - (iv) to prioritise the interests of the client (s961J).

57 See Table 4 for more details on regulatory requirements for financial advisers.

### Credit regime

58 As noted in paragraphs 18–19, the key regulatory concepts in the credit regime have a different and narrower focus to those in the financial services regime, and a significant element of the credit regime is responsible lending obligations (Ch 3 of the National Credit Act).

59 See Table 4 for more details on regulatory requirements for consumer credit.

### Financial advisers—current ability to provide credit advice

60 If a financial adviser is giving generic advice relating to credit (i.e. advice relating to classes of credit products, or concepts like debt management), no credit licence is required. Generic advice is not regulated in the credit regime in the same way as it is regulated under the financial services regime.

- 61 However, if the financial adviser suggests or assists a consumer in relation to a specific contract from a specific credit provider (including suggesting that the customer remain in a particular contract), then a credit licence is required.
- 62 ASIC encourages financial advisers to give some generic credit advice:
- (a) In [Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure](#) (RG 175) we say that, in some cases, complying with the best interests duty will require an adviser to give the client advice that is not product specific.
  - (b) For example, we would expect advisers to be giving advice on reducing debt where that would meet the client’s relevant circumstances and is consistent with the subject matter of the advice sought by the client.

### Numbers of licensees and representatives

- 63 At present, only a small proportion of AFS licensees also hold a credit licence (around 4%). A slightly bigger population are representatives of both an AFS and credit licensee (10%): see Table 3.

**Table 3: AFS and credit licensee data**

Number of AFS licensees	6,180
Number of credit licensees	5,547
<b>Number of dual licensees</b>	<b>430</b>
Number of authorised representatives of AFS licensees	65,982
Number of credit representatives	40,209
<b>Number of dual representatives</b>	<b>10,406</b>

Source: ASIC professional register data, as at 31 January 2018.

### Additional category—referrers

- 64 The National Credit Act also allows persons to act as ‘referrers’ without needing to hold a credit licence. To comply with this exemption, the referrer must disclose any benefits, such as commissions, they may receive for giving the referral. Some financial advisers act as referrers.

Note: Mortgage referrers are individuals or businesses that provide a referral service to lenders or brokers. Some of the most common referrers are real estate agents, financial planners, accountants and lawyers. However, referrers may also include other types of individuals and organisations, including property developers and non-profit organisations: see REP 516, paragraphs 99–103.

- 65 The ‘referrer’ segment of the market is growing in size. REP 516 found that the total number of home loans sold after a referral increased from 8,124 in 2012 to 26,106 in 2015, representing an increase in value from \$3.3 billion

to \$14.6 billion. It also found that referral by professional services made up the bulk of the referrals (i.e. lawyers, accounts, financial advisers and similar professionals). It is difficult for ASIC to monitor whether some referrers are going beyond the limitations of the exemption, given their dispersed population and the fact that they are not regulated under the broader credit regime.

#### **Additional category—point of sale exemption**

- 66 Persons who assist consumers to apply for credit for the purchase of goods or services at the point of sale (i.e. vendor introducers, such as retailers of white goods) are also exempted from the National Credit Act, including responsible lending obligations. Financial advisers may also be relying on this exemption (including as vendor introducers for credit within the same institution).

#### **Current barriers to dual licensing**

- 67 It is difficult to identify the precise reason for the relatively low number of dual AFS and credit licensees. Table 4 analyses potential barriers, including regulatory, financial and industry-specific.

**Table 4: Potential barriers to dual AFS and credit licensees**

Area	Potential barriers
<b>Regulatory considerations</b>	
<b>Licensing assessment</b>	<p>We have set out guidance on how we will assess an application for an AFS or credit licence in Regulatory Guides 1–3 <a href="#">AFS licensing kit</a> and <a href="#">Regulatory Guide 204 Applying for and varying a credit licence</a> (RG 204), respectively. While not identical, the two licensing regimes are very similar, and require compliance with similar general obligations. Therefore, if a licensee has a problem-free history of compliance with one regime, this would support an assessment of their application for the other type of licence.</p> <p>There are some elements specific to each regime that the licensee would need to demonstrate (e.g. ability to comply with responsible lending and hardship regimes in an application for a credit licence).</p>
<b>Providing ‘advice’</b>	<p>While the two regimes have quite different regulatory concepts, as noted in paragraphs 55–58, both specify factors to be considered when developing recommendations (i.e. personal advice or suggesting a particular credit contract). Under both regimes, licensees must make ‘reasonable inquiries’ into a client’s relevant personal circumstances, requirements and objectives before providing advice or a suggestion.</p> <p>A dual licensee or representative could undertake inquiries for both financial advice and credit assistance in a single fact-finding process. However, as noted in paragraphs 55–59, a financial adviser providing personal advice must meet a best interests duty, and a credit intermediary must consider an explicit set of criteria as part of responsible lending requirements.</p>
<b>Disclosure</b>	<p>Both the financial services and credit regimes mandate the provision of a variety of different pre- and post-contractual disclosure documents.</p> <p>We have provided guidance on some efficiencies that can be gained in merging the two disclosure regimes—see <a href="#">Information Sheet 134 Complying with your obligations if both credit licensee and AFS licensee</a> (INFO 134). For example, dual licensees could provide a single document including the information required in a Financial Services Guide and Credit Guide, about their business and the services they can provide. However, these opportunities for efficiencies are relatively limited.</p>

Area	Potential barriers
<b>Competency and training</b>	<p>Generally, the training requirements for the two regimes are relatively similar. They both require upfront and ongoing training, scaled according to the complexity of the activities engaged in. In circumstances where a financial adviser also provided credit advice, some training content might be relevant to both regimes, and would not need to be undertaken separately. However, overall, dual licensees and their representatives would likely need to spend more time and other resources on obtaining and maintaining proficiency in two areas.</p> <p>Note: Under the <i>Corporations Amendment (Professional Standards of Financial Advisers) Act 2017</i>, from 1 January 2019, advisers giving personal advice on more complex products will be required to comply with higher education and training requirements (phased in for existing advisers). This includes holding a degree qualification, passing a national exam, engaging in CPD training and a professional year.</p>
<b>Financial considerations</b>	
<b>Applying for and maintaining two licences</b>	<p>There are upfront and ongoing costs associated with obtaining both an AFS licence and a credit licence, and these would be cumulative for a dual licensee, including:</p> <ul style="list-style-type: none"> <li>• fees for lodging an application for a licence (\$1,643 for a body corporate seeking an AFS licence; \$1,160 for a body corporate seeking to engage in credit activities worth less than \$200 million);</li> <li>• annual financial statement and auditor's report lodgement fee for AFS licensees (\$608); and</li> <li>• annual compliance certificate lodgement fee for credit licensees (between \$1,160 to \$24,384 depending on the scale of the business).</li> </ul> <p>These fees are set by legislation and are not within ASIC's control.</p>

Area	Potential barriers
<b>Industry funding</b>	<p>Industry funding for ASIC will impose ongoing costs associated with maintaining an AFS and/or credit licence. Dual licensees will pay two levies associated with each industry sector. According to ASIC's <a href="#">Cost Recovery Implementation Statement: Levies for ASIC industry funding (2017–18)</a>:</p> <ul style="list-style-type: none"> <li>• AFS licensees that provide personal advice to retail clients on more complex products will pay a minimum levy of \$1,500, and an additional graduated component based on each licensee's share of the total number of advisers registered on the financial advisers register.</li> <li>• Each credit intermediary will pay a minimum levy of \$1,000 and a graduated levy based on the number of credit representatives the entity has as a proportion of the total number of credit representatives in the subsector.</li> </ul> <p>This is because the greater the number of advisers/representatives, the larger the number of clients able to be serviced and the higher the level of regulatory oversight required. However, given costs will increase with representatives, there may be some disincentive to employ representatives who only do occasional or sporadic work of a particular type, and greater incentive to specialise. A person could avoid some or all of these costs by acting as a representative of another licensee.</p>
<b>External dispute resolution (EDR)</b>	<p>Both AFS and credit licensees must be a member of an ASIC-approved EDR scheme. Under the National Credit Act, credit representatives must also belong to an EDR scheme in their own right; however, a similar obligation does not exist for authorised representatives of AFS licensees.</p> <p>EDR costs for a dual licensee would typically not be significantly greater than for a single licensee—for example, both the Financial Ombudsman Service and the Credit Industry Ombudsman accept both types of licensee and charge fees based on factors such as the size of the business, rather than on the basis of the type of licence held.</p> <p><i>Note: The recent <a href="#">Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018</a> creates a new, single EDR scheme for all financial services, credit and superannuation complaints, the Australian Financial Complaints Authority (AFCA). The Minister for Revenue and Financial Services, the Hon. Kelly O'Dwyer MP has announced that AFCA will commence operations no later than 1 November 2018. At this stage, no information is available on AFCA's fees.</i></p>
<b>Remuneration</b>	<p>All financial advisers are required to avoid 'conflicted remuneration', that is, a benefit given to an advice provider that could reasonably be expected to influence advice. Financial advisers are remunerated by a fee-for-service model where the upfront cost of can range between \$200 and \$700 for simple advice and between \$2,000 and \$4,000 for comprehensive advice (see the <a href="#">ASIC MoneySmart website—financial advice costs</a>).</p> <p>Remuneration in the credit industry varies. In relation to home loans, generally mortgage brokers do not charge fees directly to consumers. Most brokers' entire income is derived from commissions (upfront and trail commissions) from the provider of the loan. In REP 516, we found (based on data we received from aggregators) that the average rate of upfront commission and annual rate of trail commission paid by lenders to aggregators was 0.62% and 0.18%, respectively. On a \$500,000 home loan, this equates to an upfront payment of \$3,100 and a trail payment of \$75 per month (or \$900 in the first year of the home loan).</p>

Area	Potential barriers
<b>Professional indemnity (PI) insurance</b>	<p>Both AFS and credit licensees are required to hold PI insurance under the general licensing obligations applying in each regime. Obtaining additional cover in relation to additional types of services may result in additional expenditure.</p> <p>Note: See <a href="#">Regulatory Guide 126 Compensation and insurance arrangements for AFS licensees</a> (RG 126) and <a href="#">Regulatory Guide 210 Compensation and insurance arrangements for credit licensees</a> (RG 210) for more details.</p>
<b>Cultural and structural considerations</b>	
<b>Industry accreditation requirements</b>	<p>Mortgage brokers are subject to a number of industry-driven accreditation requirements, including:</p> <ul style="list-style-type: none"> <li>• lender accreditation;</li> <li>• aggregator accreditation; and/or</li> <li>• industry association membership (a requirement for both of the above).</li> </ul> <p>A financial adviser who wishes to provide credit advice might need to meet these standards to operate in the industry.</p>
<b>Historical and current industry practices</b>	<p>Credit and financial services may be viewed as distinct offerings by industry. For example, large banks that are dual licensees may have a separate 'wealth advisory' division, in which qualified financial advisers refer clients to a more general banking area if they are seeking advice in relation to credit (and vice versa). This distinction could result from historical practice, the different skills required, regulatory requirements and systems used for different advisory services. Credit may have prudential considerations and requirements that must be taken into account by industry that may contribute to it being seen as a separate product offering or service.</p>

## Options for change

- 68        There may be an opportunity to consider some streamlining to allow financial advisers to go beyond the generic credit advice they are currently permitted to provide without a credit licence, and provide more specific advice on credit products. For example, financial advisers could be authorised to do so under their existing AFS licence as long as:
- (a)    they complete a responsible lending assessment as a component of their advice process; and
  - (b)    they ensure that they meet specific training obligations in relation to the credit products in question.
- 69        This would be a substantial change, and ultimately one for Government to make through legislation.
- 70        However, making this change would not necessarily overcome industry-driven, rather than regulatory, barriers (e.g. as noted in Table 4 above, resulting from historical, cultural or structural considerations).

## B Data and transparency

### Key points

Increasing consumers' access to data can help consumers better assess and manage risks, leading to better decision making and greater demand-side pressure.

A particular area of opportunity is in improving consumers' access to performance-based data.

Consumer testing should be undertaken before mandating specific mechanisms for data collection.

- 71 We welcome the Productivity Commission's strong focus on data and harnessing new technologies to facilitate consumers' understanding, choices and greater exertion of demand-side pressure.
- 72 We agree with the Productivity Commission's conclusion that a significant component of increasing consumer choice is providing consumers with the right sort of information (i.e. readily digestible data that is useful, accurate, and relevant), at the right time. This section sets out our views on the Productivity Commission's recommendations in relation to data, and discusses our current work on making greater use of recurrent datasets, and developing new consumer tools.
- 73 The Appendix also contains our responses to each of the Productivity Commission's specific findings, recommendations and information requests related to data.

### Performance and other comparative data

- 74 We consider that there is particular potential to improve consumer outcomes by improving their access to performance data, as there is relatively little information currently available to consumers on how financial products, and the entities providing them, perform in practice. We note that the Productivity Commission has also advocated for this kind of approach in some of its recommendations in this area. In appropriate cases, ASIC is working to make 'performance' type information available: see the examples under paragraph 77.
- 75 In addition to recommending specific new measures relating to data, we would support the Productivity Commission's final report highlighting the importance of improving access to performance data as a general principle to improve consumer outcomes.

## ASIC's data work

- 76 We have conducted, and are currently conducting, a range of projects on the collection of recurrent financial services data. In some cases, these projects are responses to law reform, such as the collection of dispute resolution data (as discussed below). In other cases, the data collection is an ASIC initiative.
- 77 Together, these projects cover a range of subjects, including performance-based data. Where possible, we are seeking to facilitate greater collection and use of recurrent data sets that provide insight into the financial sector, and legal compliance and consumer outcomes.

### Competition related data projects

#### Financial Advisers' Register

Launched in March 2015, the new financial advisers register helps people find out where a financial adviser has worked, their qualifications, disciplinary actions, training, membership of professional bodies and on what products they can advise.

Within the first three months, there had been almost 124,000 visits to the register and it continues to be among the most popular content on ASIC's MoneySmart website.

#### Life insurance and add-on insurance

The collection and analysis of data related to life insurance claims and add-on insurance is intended to have a direct and positive impact on competition.

ASIC and APRA are working together to collect data on life insurance claims outcomes, including claims handling timeframes and dispute levels across policy types. We aim to publish this credible, reliable and comparable data, to improve the accountability and performance of life insurers and to facilitate public discussion about the industry.

We also intend to collect individual policy and claim-level data on add-on insurance distributed through car dealerships. One of the purposes of this data collection will be to improve competition through price transparency.

#### Internal dispute resolution reporting

The *Review of the financial system external dispute resolution framework*, conducted by an independent panel led by Professor Ian Ramsay, recommended that financial services and credit providers that deal with retail clients be required to report standardised information about their internal dispute resolution (IDR) performance on a recurring basis to ASIC, and that to improve transparency ASIC should have power to publish that information.

We have advocated for such a power, including to be able to report complaints about individual firms, given the great majority of consumer complaints are dealt with through firms' IDR processes, and greater transparency may aid consumer decision making about where they access financial products and services.

Legislation has recently passed that establishes a new, single EDR scheme, the Australian Financial Complaints Authority (AFCA) and creates a new IDR reporting framework, which gives ASIC specific powers to collect, report and publish IDR data, including provider-specific data.<sup>15</sup>

AFCA will start accepting complaints no later than 1 November 2018. ASIC will publicly consult on new IDR standards and the mandatory IDR reporting requirements in the AFCA legislation; however, this consultation will not take place until after AFCA commencement.

#### **Pilot project on recurrent data**

We intend to begin a pilot process on the receipt of recurrent data relating to mortgages later this year. To reduce regulatory burden, we intend to work closely with other agencies and industry to maximise reliance on existing reporting of datasets (and taxonomies), including through the sharing of data between regulators. For example, both APRA and RBA already receive data on mortgages. The intended outcome on the receipt of data recommended by the Productivity Commission could therefore be achieved in a number of different ways, including variations on which body should receive any new data.

#### **Approved product lists**

In [Report 562](#) *Financial advice: Vertically integrated institutions and conflicts of interest* (REP 562), we noted that we would be consulting with the financial advice industry and other relevant groups on introducing public reporting on approved product lists and where client funds are invested for advice licensees that are part of a vertically integrated institution. This would provide some transparency around management of the conflicts of interest that are inherent in vertically integrated business models.

### **Comparison tools for home loan rates**

- 78 We support the Productivity Commission's finding that offering consumers a more realistic, and therefore more useful, tool to compare home loan rates will encourage people to exert more demand-side pressure on banks, resulting in improved consumer outcomes (Draft Recommendations 8.3 and 8.4).
- 79 We agree, in principle, with the draft report's recommendations on the collection and dissemination of home loan interest rate data being a useful

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<sup>15</sup> *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018.*

way to provide consumers with the information they need to negotiate better home loans.

- 80 Consumer testing may assist in refining the approach, and provide insights into areas such as:
- (a) whether publishing a historical monthly median based on comparable loans and comparable risks is likely to create more demand-side pressure in the home loan market (Draft Recommendations 8.3 and 8.4)—we recognise that publishing a median rather than a mean may make the data less susceptible to incorrect interpretation, however we are not sure that the median alone should be the anchor;
  - (b) whether consumers would take the opportunity to go to an alternative (Government) website that was far removed from point of sale and other product information in order to make more informed choices (Draft Recommendations 7.2, 8.2 and 11.2), or whether the information would be conveyed most effectively by vendors at the point of sale; and
  - (c) whether any such data publication should be based on real-time data and published retrospectively.

## Disclosure of ownership structures

- 81 In principle, we agree that information about ownership structures should be transparent and readily available for consumers (Draft Recommendations 7.2 on integration, 8.2 on mortgage broking and 11.2 on insurance).
- 82 In deciding the best way to implement any new measures in this area, it would be useful to consider where this data should be made available—for example, through the entity’s website, or within mandated disclosure documents. A challenge with the latter approach is that it may be difficult for consumers to assess how to act on this information—for example, whether they should discontinue the transaction and keep shopping around.

## Mechanisms for data collection and dissemination

- 83 In determining the best way to implement any new recommendations in relation to data, it may be useful to consider:
- (a) user testing on what would be the most useful framework and mechanism to ensure positive consumer outcomes; and
  - (b) allowing some flexibility to allow the responsible regulator(s) to determine the most efficient and effective mechanism to collect and disseminate the data, and take into account experience from previous data projects.

## C Regulating for competition

### Key points

We support the Productivity Commission's recognition of the importance of ASIC having a broad, proactive competition mandate to undertake our role effectively.

We also support regulators working together to consider competition issues in the financial system, and to learn from each other's expertise and perspectives.

- 84 Competition in financial markets is dynamic and evolving. Ensuring effective competition in the Australian financial system is an ongoing process. As a starting point, each regulator needs the right mandate and regulatory toolkit to promote effective competition.
- 85 In particular, we support the Productivity Commission's recognition of the importance of ASIC having a broad, proactive competition mandate to undertake our role effectively. An explicit and broad competition mandate for ASIC would ensure we have a clear basis to consider and promote competition in the financial system.
- 86 A broad mandate would allow us to:
- (a) factor and appropriately balance competition into our regulatory decision making; and
  - (b) address market failure as a driver of misconduct or poor consumer outcomes.
- 87 Historically, there has been uncertainty about if and how ASIC could consider competition factors. For example, in one case the Administrative Appeals Tribunal rejected ASIC's approach to taking competition factors (competitive neutrality) into account in the decision involved, as ASIC was not a 'competition regulator'.<sup>16</sup>
- 88 Having a broad competition mandate—to ensure we can appropriately incorporate competition considerations into our existing role as a market conduct regulator—would not make ASIC a competition regulator. We would not have a role in enforcing competition laws—for example, regulating corporate transactions from a competition perspective or monopolies, bringing abuse of market power cases, or regulating pricing and access regimes.

<sup>16</sup> *Queensland Power Trading Corporation t/a Enertrade v Australian Securities and Investments Commission* [2005] AATA 945.

- 89 As noted in the Productivity Commission’s draft report at pp. 471 and 473, in addition to agreeing to include competition within ASIC’s existing mandate, the Government has also committed to expanding ASIC’s regulatory toolkit through new product design and distribution obligations, and a product intervention power for ASIC. These new powers will help us to address some of the competition-related market failures that lead to poor consumer outcomes.
- 90 We note the Productivity Commission’s suggestion in the draft report that the regulators’ Statements of Expectations be amended to include requirements to ‘consider amending policies to alleviate adverse impacts on competition’. We anticipate that any such amendments would outline the Government’s expectations in relation to competition, appropriately balanced with our other objectives.
- 91 Together, a broad competition mandate, an enhanced regulatory toolkit and an adjusted Statement of Expectations would enable us to:
- (a) evaluate and take into account a range of competition factors that result in market problems, including demand-side factors;
  - (b) effect targeted and evidence-based change to address market failures and market-wide problems more quickly than through legislation;
  - (c) deal with ‘first-mover’ problems that may inhibit industry-led responses to market failures; and
  - (d) help promote competition in the long-term interests of the end users of the financial system.
- 92 Similarly to the Productivity Commission, we also support regulators working closely together to consider competition issues in the financial system, and to learn from each other’s expertise and perspectives. However, each financial regulator has the relevant expertise in relation to its own role and, assuming it has an appropriate mandate, is therefore best placed to assess how competition should be weighed and balanced within its area.
- 93 While we appreciate the Productivity Commission’s concern to ensure that all regulators give appropriate consideration to the competition impacts of their decisions, we are not sure that the role of the competition champion, as envisioned in the draft report, is necessarily the best option to achieve that goal.
- 94 The ACCC does have a significant role to play as competition regulator for the entire economy and as a competition advocate. We acknowledge and support the ACCC’s establishment of its Financial Services Unit, and the role it plays in the financial sector. ASIC maintains a strong working relationship with the ACCC, and welcomes the ACCC’s views and input, including in our work to encourage positive consumer outcomes through effective competition.

## Appendix: Responses to specific recommendations

95 Table 5 sets out ASIC’s responses to the various findings, recommendations and information requests by the Productivity Commission that are of specific relevance to ASIC.

**Table 5: Productivity Commission’s findings, recommendations and information requests—ASIC’s response**

Reference/s	Issue/s	ASIC’s response
Information Request 4.1	ASIC’s regulatory sandbox	<p>In <a href="#">Consultation Paper 297</a> <i>Retaining ASIC’s fintech licensing exemption</i> (CP 297), we proposed to retain (and not extend) our current licensing exemption, as we consider that we have gone as far as we can in balancing facilitation and consumer protection within our regulatory remit.</p> <p>We note the Government concluded a consultation on exposure draft legislation and regulations for an enhanced regulatory sandbox exemption in December 2017, and is currently considering the feedback received.</p>
Draft Finding 8.1 Draft Finding 8.2	<p>Interest rates from brokers versus other channels</p> <p>Cost of home loans through brokers vs branches</p>	<p>As part of our mortgage broker remuneration review (REP 516):</p> <ul style="list-style-type: none"> <li>• we tested the interest rate that applied when loans were sold to see if brokers were obtaining better-priced loans;</li> <li>• the data we obtained did not show a consistent trend that brokers obtained either cheaper loans or more expensive loans than those obtained directly through bank branches;</li> <li>• we found consumers who use brokers are different to consumers who go directly to lenders (e.g. younger and with lower incomes); and</li> <li>• we noted that brokers can play a very important role in driving competition and consumer choice.</li> </ul> <p>However, competition in the home loan market is also affected by ownership relationships between lenders and aggregators and the inability of smaller lenders to access or remunerate brokers in the same way as larger lenders.</p>

Reference/s	Issue/s	ASIC's response
Draft Recommendation 8.1 Information Request 8.1	Duty of care obligations for lender-owned aggregators  How should new duty of care obligations for lender-owned aggregators be implemented	We are supportive of strengthening standards across the mortgage broking industry. While introducing a 'best interests' duty is one option to consider, there is scope to enhance the existing responsible lending obligations to promote good consumer outcomes and ensure the service provided by mortgage brokers is aligned with consumer expectations.  Consideration would need to be given to whether any reforms need to apply more broadly than lender-owned mortgage aggregators.
Information Request 8.2	Should consumers pay broker fees for service	This issue is under consideration by various current processes, including the current Royal Commission into misconduct in the banking, superannuation and financial services industry. Reforms in this area should take into account how a shift to a fee-for-service model might affect the market and consumers.
Draft Recommendation 8.2	Mortgage broker disclosure requirements	We agree with this recommendation in principle. We note the Combined Industry Forum's implementation of its public reporting framework and its work, in cooperation with ASIC, to create standard models to represent pricing and remuneration information.  Note: The Combined Industry Forum consists of representatives from bank and non-bank lenders, aggregators and brokers, and relevant industry bodies.  We note REP 516 also proposed a new public reporting regime with the aim of improving transparency in the market (Proposal 5) and clearer disclosure of ownership structures (Proposal 4).
Draft Recommendation 8.3	Collection of home loan interest rate data	We agree, in principle, with the draft report's recommendations on the collection and dissemination of home loan interest rate data being a useful way to provide consumers with the information they need to negotiate better home loans.  We are currently in the process of developing an approach for recurrent data collection relating to mortgages, and have begun industry consultation on this subject. We intend to begin a pilot process shortly. To reduce regulatory burden, part of this pilot includes working with other agencies, including APRA, to ensure that there is minimal overlap of information gathering.  The Combined Industry Forum has also proposed to provide to ASIC the weighted average pricing of home loans across different distribution channels using various standard scenarios (to be defined).

Reference/s	Issue/s	ASIC's response
Draft Recommendation 8.4	Interest rate transparency for home loans	<p>It would be good for consumers to have a realistic idea of how the loan they have been offered compares to loans offered to other people in similar circumstances. At present, the comparison rate is built on size of loans and term of the loan. The comparison rate is based on advertised rate, not the rate people are actually being offered, and does not include contingency expenses such as lenders' mortgage insurance (LMI).</p> <p>Consumer testing might assist in identifying the best way to achieve this recommendation.</p>
Draft Recommendation 8.5	LMI refund	<p>It may be appropriate for borrowers to be provided LMI premium refunds, or equivalent, if the loan is terminated (either due to re-financing or paying out the loan).</p> <p>Under the National Credit Code, when a consumer credit contract is terminated, any consumer credit insurance financed under the contract is also terminated and the lender is required to pay or credit the borrower with a proportionate rebate (s148). The lender is then entitled to recover the rebate amount from the insurer. Although not entirely analogous, this provides an example mechanism for the payment of an insurance rebate to a borrower.</p>
Draft Recommendation 7.2	Building an evidence base on integration	<p>In principle, we agree that information about ownership structures should be transparent and readily available for consumers.</p> <p>In REP 562 we noted that we would be consulting with the financial advice industry and other relevant groups on introducing public reporting on approved product lists and where client funds are invested for advice licensees that are part of a vertically integrated institution. This would provide some transparency around management of the conflicts of interest that are inherent in vertically integrated business models.</p>
Draft Recommendation 10.2	Making the ePayments Code mandatory	<p>We support this draft recommendation in principle. We note that ASIC does not currently have the power to mandate the ePayments Code and that consideration of whether we should have such power is a matter for Government.</p>
Information Request 10.1	How should liability for unauthorised transactions be shared?	<p>Currently, the person providing the payment is generally liable for unauthorised transactions (unless the customer is clearly at fault). This means that those with the means to bear liability are generally required to do so. If this arrangement is altered, careful consideration would need to be given to any potential impacts for customers.</p>

Reference/s	Issue/s	ASIC's response
Draft Recommendation 11.1	Comparative pricing information on insurance renewal notices	We support this recommendation. If this recommendation is implemented, it would be important to ensure comparability (e.g. ensuring the application of any discounts or price reductions to both the current and previous year's premiums on a comparable basis, to ensure they are not misleading).
Draft Recommendation 11.2	Transparency on insurance underwriting	In principle, we agree that information about ownership structures should be transparent and readily available for consumers. Consumer testing might indicate whether the information would be conveyed most effectively by insurers at the point of sale (e.g. on a website or via a recorded message), or on ASIC's website.
Draft Recommendation 11.3	Phase out distortionary insurance taxes	This recommendation is generally a matter for state and territory governments. However, while precise information on the degree of underinsurance is not readily available, we are concerned that it remains a significant issue. The 2014 Financial System Inquiry (Murray Inquiry) indicated that insurance taxes mean consumers must pay more to achieve the same risk reduction and found that reducing duties on insurance would assist in dealing with underinsurance.
Information Request 12.1	Potential to increase the scope of financial advice to include some credit products	<p>Financial advisers may already provide generic credit advice without a credit licence because, in general, a credit licence is only required if a person suggests or assists a consumer in relation to a particular credit contract with a particular credit provider.</p> <p>A relatively low number of persons hold both an AFS licence and a credit licence. It is difficult to identify the precise reason for this.</p> <p>There may be an opportunity to consider some streamlining to allow financial advisers to provide more specific advice on credit products, beyond the generic credit advice they are currently able to provide without a credit licence. However, making this change is unlikely to overcome industry-driven, rather than regulatory, barriers.</p>
Draft Recommendation 12.1 Information Request 12.2	Rename general advice Renaming general advice and merits of further changes	<p>We think that relabelling general advice conduct is potentially a useful step. Any final reform proposals should also take into account:</p> <ul style="list-style-type: none"> <li>• the broad scope of the conduct that is currently regulated as general advice (and, for example, whether a single new name for general advice will assist in improving consumer understanding of all conduct currently regulated as general advice); and</li> <li>• pressures in the broader regulation of advice.</li> </ul>

Reference/s	Issue/s	ASIC's response
Draft Finding 13.1 Information Request 13.2	Mortgage broker commission structures weaken consumer switching  Is there a rationale for the structure of mortgage broker commissions?	Trail commissions with the inclusion of claw back may act as an incentive to reduce 'churn' (where the mortgage broker switches their client from one lender to another). As identified in REP 516, ASIC did not find that trail commissions directly result in poor outcomes for consumers based on the data we reviewed.  However, we also note in REP 516 that lenders have been offering new borrowers better discounts than existing borrowers (who may not be aware that they will benefit from refinancing their loan).  See Information Request 8.1 and 8.2.
Draft Recommendation 13.1	Data access to enable switching	We strongly support the Government's Review into Open Banking in Australia.  Open banking has the potential to help empower consumers in their decision making, stimulate competition and innovation within the financial services sector, and support better decision making and risk management by financial institutions.  To the extent that open banking involves financial institutions granting third party access to data on their products and services, it also has the potential to act as a catalyst for more competition and innovation in the Australian financial services industry.
Draft Recommendation 14.1	Deferred sales model for add-on insurance	We support this recommendation, and note that it may be useful to extend the deferred sales model to all add-on products. We note that the establishment of a Treasury-led working group to extend the deferred sales model to all add-on insurance products would be a matter for Government.
Draft Recommendation 15.1	Statements of Expectations for regulators	We would expect that Statements of Expectations would outline the Government's expectations in relation to competition, appropriately balanced with our other objectives.
Draft Recommendation 17.1	New competition functions for a regulator	We strongly support recommendations to expand ASIC's regulatory mandate and toolkit, to provide us with a means to better analyse and respond to competition issues. An explicit and broad competition mandate for ASIC would ensure we have a clear basis to consider and promote competition in the financial system.  The Government has committed to implementing new product design and distribution obligations, and an ASIC product intervention power. These new powers will help us to address some of the competition-related market failures that lead to poor consumer outcomes.

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Reference/s	Issue/s	ASIC's response
Draft Recommendation 17.2 Information Request 17.1	Transparency of regulatory decision making  Which regulator should advance competition	We support regulators working together to consider competition issues in the financial system, and to learn from each other's expertise and perspectives, through whatever mechanism is ultimately chosen to achieve this.

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## Key terms

Term	Meaning in this document
ACCC	Australian Competition and Consumer Commission
ADI	Authorised deposit-taking institution—has the meaning given in s5 of the <i>Banking Act 1959</i>
AFCA	Australian Financial Complaints Authority
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A.
best interests duty	The duty to act in the best interests of the client when giving personal advice to a client as set out in s961B(1) of the Corporations Act
CFR	Council of Financial Regulators
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CP 294 (for example)	An ASIC consultation paper (in this example numbered 294)
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds a credit licence under s35 of the National Credit Act

Term	Meaning in this document
draft report	Productivity Commission, <a href="#">Competition in the Australian financial system: Draft report</a> , February 2018
EDR	External dispute resolution
fintech	Financial technology
fintech licensing exemption	A conditional licensing exemption provided by ASIC under <a href="#">ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175</a> and <a href="#">ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176</a> to allow eligible businesses to test certain specified products and services for up to 12 months without holding an AFS licence or credit licence
FOFA	Future of Financial Advice
IDR	Internal dispute resolution
INFO 153 (for example)	An ASIC information sheet (in this example numbered 153)
LMI	Lenders mortgage insurance
MoneySmart	ASIC's website for consumers and investors ( <a href="http://www.moneysmart.gov.au">www.moneysmart.gov.au</a> )
Murray Inquiry	<a href="#">Financial System Inquiry</a> (2014)
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
OAIC	Office of the Australian Information Commissioner
PI insurance	Professional indemnity insurance
Pt 9.4 (for example)	A part of the Corporations Act (in this example numbered 9.4), unless otherwise specified
RBA	Reserve Bank of Australia

Term	Meaning in this document
regulatory sandbox	<p>ASIC's regulatory sandbox framework, comprised of three broad options for testing a new product or service without a licence. Those options are:</p> <ul style="list-style-type: none"> <li>• relying on existing statutory exemptions or flexibility in the law—such as by acting on behalf of an existing licensee;</li> <li>• relying on ASIC's 'fintech licensing exemption' for the testing of certain specified products and services; and</li> <li>• for other services, relying on individual relief from ASIC.</li> </ul> <p>More information about each of these options is available in Regulatory Guide 257 <a href="#">Testing fintech products and services without holding an AFS or credit licence</a> (RG 257)</p>
REP 240 (for example)	An ASIC report (in this example numbered 240)
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s961B (for example)	A section of the Corporations Act (in this example numbered 961B), unless otherwise specified