

LIXI Regulatory Update – November 2021

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9 November 2021

Overview

Broker Best Interest Duty and Conflicted Remuneration

ACL Breach Reporting

Updates to Internal Dispute Resolution

Design and Distribution Obligations

Open Banking

Broker Best Interest Duty and Conflicted Remuneration

From 1 January 2021

What is the ‘best interests duty’?

- Applies to ‘*credit assistance provided ...in relation to a credit contract* [ie **any NCC-regulated credit contract**]’ by a **mortgage broker** – sections 158L and 158LD.
- The duty is to ‘*act in the best interests of the consumer in relation to the credit assistance*’ – sections 158LA and 158LE.
- Licensees ‘*must take reasonable steps to ensure that* (their) *credit representatives* comply – section 158LE.
- Once classified as a mortgage broker, the duty applies to **all** NCC-regulated credit arranged.

Changes proposed

- The BID provisions of the NCCP Act apply to mortgage brokers and also *‘in relation to credit assistance provided by a licensee to a consumer in relation to a credit contract if:*
 - a) the licensee carries on a business of providing credit assistance in relation to credit contracts; and*
 - b) the licensee does not perform the obligations, or exercise the rights, of a credit provider in relation to the majority of those credit contracts; and*
 - c) in carrying on the business, the licensee provides credit assistance in relation to credit contracts offered by more than one credit provider.’*
- Replicated for credit assistance with respect to consumer leases and also to credit representatives.
- Conflicted remuneration still applies only to mortgage brokers.

What is the conflict priority rule?

If the broker *'knows, or reasonably ought to know, that there is a conflict between the interests of the consumer and'* the broker, its licensees and associates. This is a very broad definition which includes lenders, other credit reps of the same licensee, the broker's aggregator and licensee, and any related corporations.

If the conflict rule is triggered, the broker *'must give priority to the consumer's interests when providing the credit assistance'* – sections 158LB and 158LF

Conflict

Ownership structures and commercial relationships of brokers, particularly with lenders, must be disclosed.

However, disclosure does not mean that the obligation is met if the potential conflict is not resolved in the customer's favour.

If a loan is available direct from the lender at a cheaper rate than through the broker channel, there will be a conflict if the broker does not suggest 'go direct'.

Practical application for brokers

- The law says (and only says) that mortgage brokers ‘must act in the best interests of the consumer in relation to the credit assistance’.
- There is no safe harbour – the guidance is nothing more than guidance. Whether what is done is compliant will depend on the facts of each case.
- ***Is cost paramount? Failure to investigate and consider the lowest cost options available to that consumer may suggest non-compliance (RG273.54).***
- Brokers are not necessarily required to recommend a specific product outside their panel (RG 273.114).

BID in practice

- Brokers should ensure that they have a panel and be accredited with a reasonably representative group of lenders.
- There are no set rules. However, if a broker does not have a suitable lender, they must decline the assistance or refer the customer to a broker or lender who can assist.
- The value of product features needs to be assessed.
- Brokers need to make it clear to customers that the broker is working within its panel and there may be cheaper loans out there which the broker cannot access.
- A broker cannot contract out of BID.
- Non-cost features of a loan (for example, service or approval times) can be taken into account, but the need for these features must be demonstrable and based on facts that can be backed up.
- Brokers need to exercise care if they favour a particular lender and make a large proportion of their introductions to that lender.
- Importantly, BID and responsible lending are separate obligations, and complying with one will not mean the other has automatically been complied with.

BID 11 months on...

- Often find general confusion about how it operates – we receive a lot of questions about cost and when commission can be prioritised.
- Lenders need to know which brokers are ‘mortgage brokers’ and which are not.
- White labelled products.
- Brokers who deal with different loan types (ie home loans, personal loans and asset finance) have to apply BID across the board.
- Conflict priority rule and dialling down interest rates.

Operational impact of BID extension

- Asset finance payments – how will brokers be remunerated fairly? How will brokers compete with POS referrers?
- Is choice and disclosure the answer?
- Lenders should look at changing remuneration structures now.
- Brokers should ensure that they have access to a wide enough panel.
- Pure asset finance brokers should start to have systems and processes in place.
- Recording recommendations is vital.
- Remember breach reporting!

ACL Breach Reporting

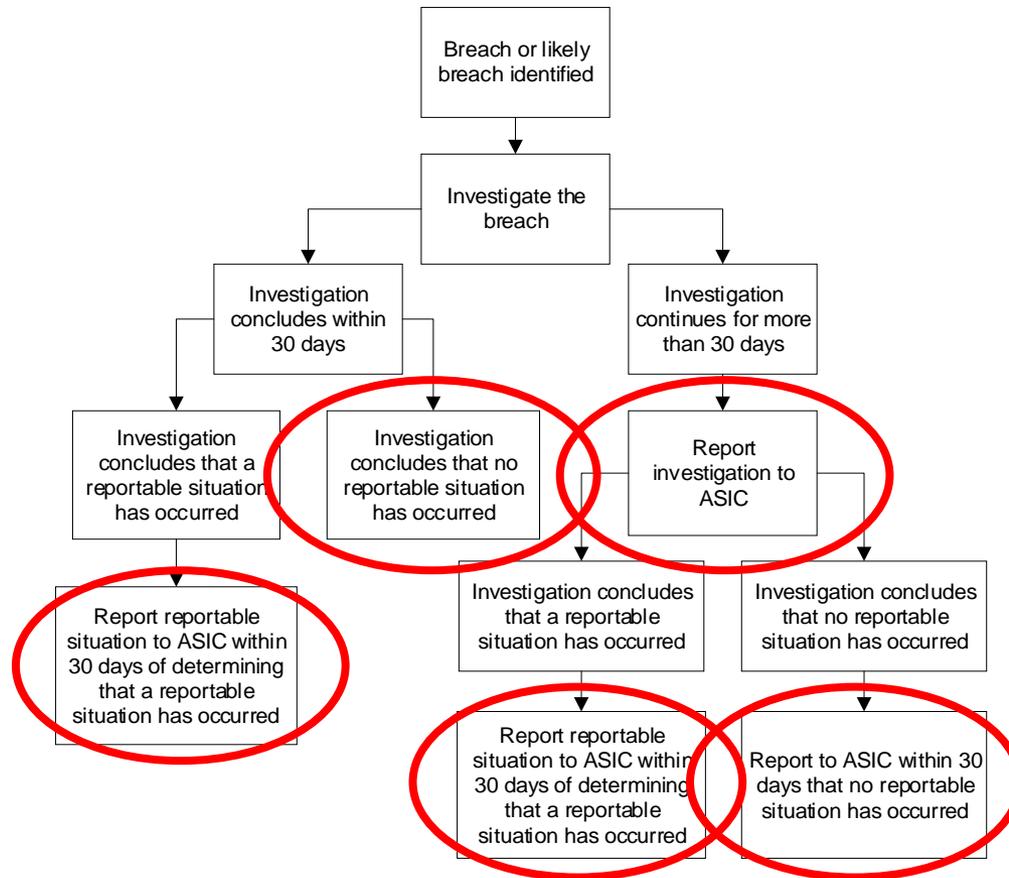
From 1 October 2021

Overview of new regime

Under the new breach reporting regime in the NCCP Act and Corporations Act, ACL holders and AFSL holders must report all 'reportable situations' to ASIC.



Potential outcomes from a breach



Devil in the detail

Deemed significant breaches

Breaches which are determined to be significant

The 'significance factors'

Noticing trends

Updates to Internal Dispute Resolution

From 5 October 2021

Updates to Internal Dispute Resolution

New RG 271

ASIC's new RG 271 came into effect on 5 October 2021.

New RG 271

Applies to a range of entities, including credit licensees

Has some enforceable standards and requirements

Explains what you must do to have an IDR system in place that meets ASIC's standards and requirements

Updates to Internal Dispute Resolution

What are the changes?

RG 271

A wider definition of 'complaint' that includes complaints made 'about' an organisation and social media complaints

A requirement for all complaints to be acknowledged

Reduced time frames for responding to 'standard' complaints (30 days instead of 45)

Prescribed contents for complaint responses

Provides that delayed responses should only occur in exceptional circumstances

Guidance for identification and management of systemic issues including outlining what is expected of boards in this respect.

Design and Distribution Obligations

From 5 October 2021

Design and Distribution Obligations

What are they intended to achieve?

Why was it introduced?

- Existing framework for consumer protection relies heavily on disclosure.
- Disclosure documents are lengthy technical and hard for consumers to read and understand.
- Poor design and distribution practices played a significant role in contributing to consumer detriment.

The Desired Outcome

- DDO is intended to help consumers obtain appropriate financial products by requiring issuers and distributors of financial products to have a consumer-centric approach to the design and distribution of those products

Commencement

- Commences on 5 October 2021.
- RG271 sets out ASIC's expectations.

Design and Distribution Obligations

Target Market Determinations

What is a TMD?

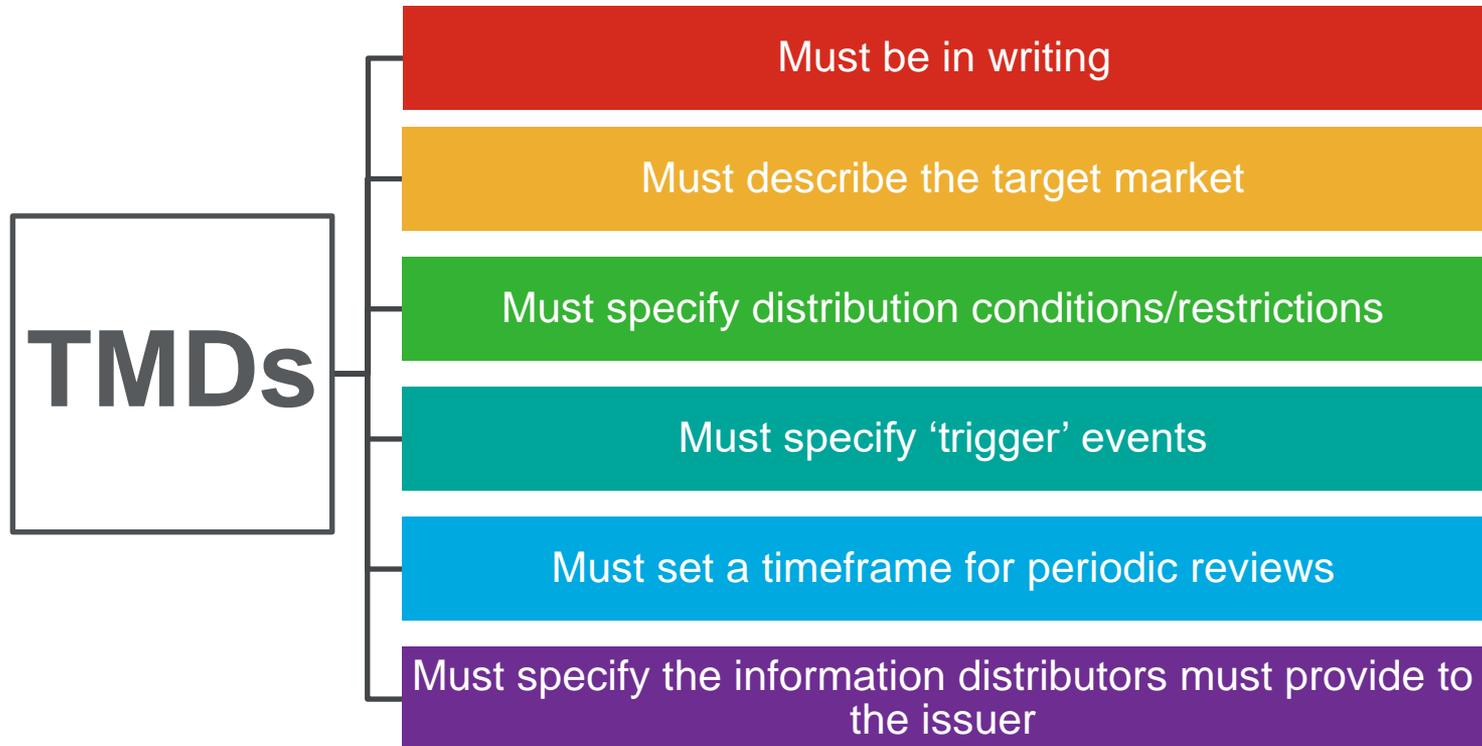
- The target market, distribution conditions, and information related to review and monitoring must be set out in a document called a 'target market determination' or a TMD.

When are they required?

- An issuer must make a target market determination for each of its financial products before the product is distributed.
- A distributor must ensure there is a target market determination in place and that any distribution of the product is consistent with it.

Design and Distribution Obligations

Content of TMDs



Design and Distribution Obligations

Distributing

Distributors must:

- Implement a governance framework
- ensure that a TMD has made before a product is distributed;
- take reasonable steps that will, or are reasonably likely to, result in distribution being consistent with the most recent TMD including distribution conditions and restrictions;
- notify issuers when a significant dealing that is not consistent with the TMD is identified;
- provide issuers with information about complaints and distribution; and
- keep records of distribution information in relation to products that are currently being issued for up to seven years.

Open Banking

What is Open Banking (AKA the ‘Consumer Data Right’)?

- The Consumer Data Right (or Open Banking) gives consumers the right to share their data between service providers.
- Intention is the increase competition and make switching service providers easier.
- Provides for a safe and secure data sharing environment.
- Brokers have just been added to the list of ‘trusted advisors’ who can receive consumer data.
- BUT, consideration has to be given to how brokers participate.

Thank you

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