



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 327

Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty

February 2020

About this paper

This consultation paper sets out ASIC's proposals for guidance on reforms relating to mortgage brokers, including a best interests duty and the conflict priority rule.

We are seeking the views of interested stakeholders, including industry and consumers, on our proposals.

Note: For the draft regulatory guide that sets out our proposed guidance, see the attachment to this consultation paper, which is available on our website at www.asic.gov.au/cp under Consultation Paper 327 *Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty* (CP 327).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 20 February 2020 and is based on:

- the National Credit Act as at that date; and
- the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Examples in this paper are purely for illustration and are confined to their particular facts.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on administering the best interests duty and the conflict priority rule. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by **20 March 2020** to:

MortgageBrokerBID@asic.gov.au

What will happen next?

| | | |
|----------------|------------------|--|
| Stage 1 | 20 February 2020 | ASIC consultation paper released |
| Stage 2 | 20 March 2020 | Comments due on the consultation paper |
| Stage 3 | May 2020 | Regulatory guide released |

A Background to the proposals

Key points

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) recommended the introduction of a best interests duty for mortgage brokers.

The Government has passed legislation which implements this recommendation.

This consultation paper sets out our proposals for guidance on the best interests obligations that will be inserted into Pt 3-5A of the *National Consumer Credit Protection Act 2009* (National Credit Act).

A draft regulatory guide setting out our proposed guidance is in the attachment to this paper: see draft Regulatory Guide 000 *Mortgage brokers: Best interests duty* (draft RG 000).

Note: See the 'Key terms' for a list of terms and definitions used in this paper. Draft RG 000 is available on our website at www.asic.gov.au/cp under CP 327.

What are the best interests obligations?

- 1 In its final report, the Royal Commission made recommendations relating to mortgage brokers, including Recommendation 1.2 (best interests duty) and Recommendation 1.3 (mortgage broker remuneration).

Note: See Royal Commission, [Final report](#), 4 February 2019.

- 2 In response, the Government has passed legislation to:
 - (a) create a duty for mortgage brokers to act in the best interests of their consumers (best interests duty); and
 - (b) require mortgage brokers to prioritise their consumers' interests when providing credit assistance (conflict priority rule).

Note: The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Mortgage Broker Reforms Act) will insert these obligations into the National Credit Act.

- 3 These obligations—collectively referred to in this guide as the 'best interests obligations'—give statutory recognition to consumers' expectations. The obligations are designed to achieve better consumer outcomes and align consumers' interests with the interests of mortgage brokers by ensuring that credit licensees and their representatives act in the best interests of their consumers in providing them with credit assistance.

Note: See the [Replacement Explanatory Memorandum](#) to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019 (Explanatory Memorandum) at paragraph 3.4.

- 4 The new obligations commence on 1 July 2020. Mortgage brokers, and other relevant credit licensees, would have to comply with these obligations from this date. A failure to comply with the obligations may result in a civil penalty.
- 5 The best interests obligations are principles-based standards of conduct, and do not contain prescriptive steps for mortgage brokers and others to follow to ensure they comply. These obligations operate alongside other obligations that affect how credit assistance is provided to consumers. The best interests obligations do not affect existing laws, including the responsible lending obligations.

Note: For a further discussion of the interaction between the best interests duty and responsible lending obligations, see paragraphs 49–52.

Why have these obligations been introduced?

- 6 In recent years, the conduct of mortgage brokers and issues relating to home lending have been examined by government bodies and inquiries in addition to the Royal Commission, resulting in recommendations to improve competition in the home loan industry and better align the interests of consumers and mortgage brokers.
- 7 These inquiries included:
- (a) a review of mortgage broker remuneration by ASIC (see [Report 516](#) *Review of mortgage broker remuneration* (REP 516));
 - (b) the Residential Mortgage Price Inquiry by the Australian Competition and Consumer Commission; and
 - (c) the Productivity Commission’s Inquiry into Competition in the Australian Financial System.
- 8 A recent consumer research project by ASIC highlighted the importance of these recommendations and confirmed that consumers expect mortgage brokers to act in their best interests: see [Report 628](#) *Looking for a mortgage: Consumer experiences and expectations in getting a home loan* (REP 628).
- 9 Our earlier research in [REP 516](#) also established that:
- for consumers with recent experience/future intention to use brokers, the majority (86%) considered that brokers would put consumers’ needs first, at least to some extent.

Note: See [REP 516](#) at paragraph 912 and [REP 628](#) at paragraph 48.

- 10 The best interests obligations are designed to achieve better consumer outcomes and align consumers' interests with the interests of mortgage brokers by:
- (a) requiring mortgage brokers to act in the best interests of their consumers when providing credit assistance (s158LA and 158LE of the National Credit Act);
 - (b) requiring mortgage brokers to prioritise the interests of the consumer in the event of a conflict of interests (s158LB and 158LF); and
 - (c) ensuring that remuneration structures do not incentivise conduct contrary to the best interests of consumers.
- 11 Paragraph 3.22 of the [Explanatory Memorandum](#) states:
- The obligations are intended to improve outcomes for consumers by legally requiring that mortgage brokers act in their consumer's best interests and place their consumer's best interests above their own.

The role of mortgage brokers

- 12 Mortgage brokers assist consumers to obtain home loans by approaching and negotiating with credit providers on the consumers' behalf. An important part of this process is brokers reviewing various credit contracts from their available panel of credit providers and making a recommendation to the consumer, based on information about the consumer and the nature of the product.
- 13 Mortgage brokers are regulated under the National Credit Act as either credit licensees or credit representatives of a licensee. The Mortgage Broker Reforms Act defines 'mortgage brokers' as persons who:
- (a) carry on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property;
 - (b) do not act as the credit provider in relation to most of those contracts; and
 - (c) provide credit assistance in relation to credit contracts offered by more than one credit provider.

Note: For guidance on the meaning of credit assistance, see [Regulatory Guide 203 Do I need a credit licence?](#) (RG 203).

- 14 Unlike financial advisers, who are regulated under the *Corporations Act 2001* (Corporations Act), mortgage brokers have not been subject to a statutory duty to act in their consumer's best interests. However, Commissioner Hayne recognised that mortgage brokers are well placed to ensure the consumer's best interests are met:

Not only do borrowers look to mortgage brokers for advice about mortgages, the brokers themselves ... publicly emphasise both the skills and help that brokers can offer to clients in securing the best outcome for the client.

Note: See Royal Commission, [Final report](#), p. 62.

- 15 Most consumers do not pay mortgage brokers for their services. Typically, credit providers pay brokers for their services with commissions. These commissions can create conflicts of interest where they may influence the broker's recommendations in favour of the credit provider.

Note: See [REP 516](#) at paragraphs 371–372.

Our approach to providing guidance

- 16 We have prepared draft guidance to help mortgage brokers to comply with the best interests obligations: see draft RG 000 in the attachment to this consultation paper.
- 17 The draft guidance is designed to give effect to the legislative purpose of the best interests obligations—that is, to align the interests of the mortgage broker with the interests and expectations of the consumer. It has been informed by discussions with stakeholders, including industry and consumer groups.
- 18 In developing the draft guidance, we have considered [Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure](#) (RG 175), which contains guidance on the best interests duty for financial advisers under the Corporations Act. Where relevant and appropriate, our proposals are consistent with RG 175. In some cases, differences in the obligations, or between the financial advice and mortgage broking markets, mean that our proposals differ from our guidance in RG 175.
- 19 The draft guidance explains:
- (a) our interpretation of the best interests obligations;
 - (b) our expectations for meeting these obligations; and
 - (c) our general approach to administering these obligations.
- 20 Consistent with the new obligations, the draft guidance is principles-based and does not contain a 'safe harbour' within which a broker is deemed to have complied with the obligations. This approach is supplemented by examples, intended to illustrate what the obligations may require in particular situations.
- 21 The Government's decision not to provide a 'safe harbour' is explained in the [Explanatory Memorandum](#) at paragraph 3.24:
- Consistent with the recommendation of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the duty does not prescribe conduct that will be taken to satisfy the duty in specific circumstances. It is the responsibility of mortgage brokers to ensure that their conduct meets the standard of 'acting in the best interests of the consumers' in the relevant circumstances.

- 22 While the draft guidance may help mortgage brokers to determine what they need to do to comply, they remain responsible for deciding how they will comply with the best interests duty and conflict priority rule when providing credit assistance.
- 23 Our guidance is intended to help industry make changes and improve practices before the new obligations commence. Over time, our approach to administering the best interests obligations may evolve and we will update the guidance as required.
- 24 We are seeking your feedback in this consultation paper on our general approach to administering the new obligations and a number of specific proposals, as well as the draft guidance. We are not seeking feedback on the Government's legislation or policy.
- 25 We intend to release final guidance, informed by the feedback we receive, before the new obligations commence on 1 July 2020.

B Proposed guidance on the best interests duty

Key points

We propose to provide guidance on how mortgage brokers may comply with the best interests duty: see draft RG 000 in the attachment to this consultation paper.

The draft guidance outlines our general expectations on processes mortgage brokers should have in place to meet their obligations and addresses specific issues, such as record keeping and the application of the obligations to packaged products.

Our general approach

Proposal

B1 We propose to provide high-level guidance on our expectations for what mortgage brokers may need to do to meet the best interests duty when:

- (a) gathering information about the consumer;
- (b) making an individual assessment of what is in the consumer's best interests; and
- (c) presenting information and recommendations.

Your feedback

B1Q1 Do you agree with our approach to structuring our guidance around the mortgage broking process?

B1Q2 Are there any steps or processes not covered in the draft guidance which are of particular relevance to the best interests duty?

B2 We also propose to address specific issues, including:

- (a) the interaction of the best interests duty and the responsible lending obligations;
- (b) the implications of the best interests duty for the range of credit providers and products mortgage brokers deal with;
- (c) when the best interests duty applies; and
- (d) other circumstances including packaged products or matters outside the mortgage broker's expertise.

Your feedback

B2Q1 What additional specific issues (if any) do you consider should be addressed in the draft guidance? Why is guidance on these issues needed?

Rationale

- 26 The draft guidance incorporates the following general principles:
- (a) the best interests obligations are intended to more closely align mortgage broker practices with consumers' expectations;
 - (b) the obligations should improve the support, guidance and communication provided to consumers throughout the credit assistance process;
 - (c) the obligations should lead to a higher quality of credit assistance being provided;
 - (d) any products recommended by a broker must be in the consumer's best interests, and the reasons for this conclusion should be explained to the consumer and recorded; and
 - (e) any benefit for the broker or a related third party must align with the consumer's best interests.
- 27 We have attempted to strike a balance between providing useful guidance and accurately reflecting the principles-based nature of the best interests duty. To that end, we have attempted to structure the draft guidance around key steps common to consumers' dealings with a mortgage broker. This includes the mortgage broker:
- (a) gathering information to determine what is in the consumer's best interests;
 - (b) considering the options available and assessing what is in the consumer's best interests; and
 - (c) presenting information and recommendations to the consumer.
- 28 In our view, the best interests duty is concerned with the processes, actions and recommendations of mortgage brokers. This is because the best interests obligations are point-in-time obligations which apply whenever credit assistance is provided.
- 29 The draft guidance also contains our views on specific issues, such as the effect of the duty on mortgage broker panels and when a packaged product may be in a consumer's best interests. These issues were raised by stakeholders during consultation on the Government's draft legislation.
- 30 We also propose to provide high-level guidance on the other obligations in the Mortgage Broker Reforms Act: see Section C.

Gathering information about the consumer

Proposal

- B3** We propose to provide guidance that mortgage brokers should gather relevant information to ensure they can provide recommendations that will be in the consumer's best interests. The draft guidance indicates that this may involve an iterative process of receiving instructions and making inquiries.

See draft RG 000.29–RG 000.42.

Your feedback

- B3Q1** If you are a mortgage broker, what information do you typically gather from a consumer before considering products? What steps do you take to verify this information?
- B3Q2** When should mortgage brokers make further inquiries into a consumer's circumstances to act in their best interests?

Rationale

- 31 The draft guidance aims to foster clear communication between brokers and consumers, which may ultimately help the consumer to understand, and choose from, the options the broker puts forward.
- 32 The best interests duty does not prescribe how mortgage brokers should engage with consumers or gather information. However, the information gathered through the consumer's instructions and the broker's inquiries is essential in allowing the broker to understand the consumer's circumstances and assess what is in their best interests.
- 33 In our view, the type and amount of information that a mortgage broker should gather to identify the consumer's needs and objectives, and determine whether a credit contract will be in their best interests, varies depending on the consumer's individual circumstances.
- 34 We consider that this case-by-case approach reflects that the best interests duty is owed separately to each consumer. We also note the Royal Commission's concerns about information gathering and verification in other contexts, specifically that:
- ... in many cases brokers assembling information about a loan applicant's financial situation either did not make sufficient inquiries, or did not seek sufficient verification of what they were told, about these matters.
- Note: See Royal Commission, [Final report](#), p. 65.
- 35 Gathering information is also part of the responsible lending obligations. These existing obligations apply separately from the best interests duty. The draft guidance specifies that information gathered for the purpose of complying with the responsible lending obligations may also be used to demonstrate compliance with the best interests duty. However, in some cases, that information alone may not be sufficient to allow a broker to determine what credit assistance would be in the consumer's best interests.

Assessing what is in the consumer's best interests

Proposal

- B4** We propose that mortgage brokers should consider products holistically to assess whether they are in the consumer's best interests. The draft guidance describes factors which may be relevant to this assessment, although the factors and their relative importance will depend on the consumer's circumstances.

Your feedback

- B4Q1** Do you agree that mortgage brokers should consider products holistically in assessing whether they are in the consumer's best interests?

- B5** We propose to provide guidance that:
- (a) the cost of a product—such as interest rate, fees and charges and repayment size—is a factor that should generally be prioritised during this assessment; and
 - (b) where other non-cost considerations affect what is in the consumer's best interests, brokers should assess whether those considerations or loan features have a realistic possibility of offering the consumer good value or a net benefit relative to other options.

See draft RG 000.43–RG 000.76.

Your feedback

- B5Q1** What factors and product features do you consider are most relevant to assessing whether home loan products are in an individual consumer's best interests?
- B5Q2** Do you agree with our expectations about how cost and non-cost factors should be considered by brokers when making a product assessment?
- B5Q3** Are there any other factors or circumstances relevant to determining whether a product is in the consumer's best interests that our guidance should discuss? If so, what are they and why is guidance needed?

Rationale

- 36 The draft guidance encourages mortgage brokers to use their judgment to weigh up factors according to the consumer's individual circumstances, which in turn should help with ensuring the best interests duty is complied with.
- 37 In [REP 516](#), we acknowledged that consumer outcomes are multifaceted and comprise a series of factors, such as price, product accessibility, product features and loan performance. These factors vary in importance from consumer to consumer and the weight that should be attributed to such

factors will also vary. Paragraph 3.25 of the [Explanatory Memorandum](#) provides that:

[A] broker should not recommend a loan by prioritising factors that cannot be substantiated as delivering benefits to that particular consumer (such as the broker's relationship with the [credit provider]), over factors and features which affect the cost of the product or are more relevant to the consumer.

- 38 The ultimate cost of the credit contract materially affects whether recommending that contract (as opposed to others) is in the consumer's best interests. This is because the cost of the credit contract will affect the amount the consumer can borrow, as well as their ability to use funds for unrelated purposes or repay debts quicker.
- 39 Accordingly, we consider that cost is generally a factor brokers should prioritise. A failure to consider cost and investigate the lowest cost options available to the consumer may be indicative of non-compliance. However, the draft guidance emphasises that cost is not the only consideration and there is an increased risk that the best interests duty is not being complied with if a broker's processes typically lead to a 'one-size-fits-all' outcome for consumers, even if that outcome is low cost.
- 40 Non-cost considerations may be relevant and beneficial for some consumers. For example, some consumers may have time-sensitive transactions and benefit from prompt decisions by credit providers. Other consumers may have financial circumstances that indicate that they could derive material benefit from features such as offset accounts.
- 41 The draft guidance states that non-cost considerations should present a realistic possibility of offering the consumer good value or a net benefit relative to other options. This is intended to make clear that presenting consumers with products on the basis of non-cost considerations which are irrelevant or detrimental to them (based on their particular circumstances and objectives) is likely to be inconsistent with acting in their best interests.
- 42 The draft guidance states that if a mortgage broker cannot act in the consumer's best interests in providing them with credit assistance, the broker must not provide the assistance. This is consistent with our expectations of financial advisers subject to a best interests duty under the Corporations Act: see [RG 175](#) at RG 175.257.

Presenting information and recommendations

Proposal

B6 We propose to provide guidance to encourage mortgage brokers to, where necessary, tailor how they present product options and recommendations to account for the consumer's expectations and circumstances. We also propose to emphasise the educative role of mortgage brokers and the importance of presenting a range of options.

See draft RG 000.77–RG 000.92.

Your feedback

- B6Q1 Are there any other factors relevant to the presentation of information that we should consider including in our guidance?
- B6Q2 If you are a mortgage broker, how do you typically present information to consumers? Does this information take a particular form?
- B6Q3 Do you agree that mortgage brokers should educate consumers and help them to understand potential implications of different choices (e.g. the nature of credit products and their features)?
- B6Q4 If you are a mortgage broker, in what circumstances would you only provide one product option/recommendation? Do you agree with our view that consumers should generally be presented with more than one option?
- B6Q5 How can a mortgage broker act in a consumer's best interests when assisting them to apply for one credit product when the broker recommended another?

Rationale

- 43 In our view, mortgage brokers should ensure the consumer is adequately informed about their options, as this will promote informed decision making. In many cases, this will involve presenting a range of relevant options, and making a recommendation. The options presented and recommendation made should be the outcome of the work the broker has undertaken to make inquiries, investigate products and determine what would be in the consumer's best interests.
- 44 The legislation does not prescribe how many options should be presented to consumers, or how this should occur. However, in our view, some practices are not consistent with acting in the consumer's best interests.
- 45 Consumer research in [REP 628](#) found that consumers are often not presented with a range of options, with 58% of consumers surveyed receiving two or fewer loan options. We recognise that some consumers prefer fewer options and others prefer a wider choice.

Note: See [REP 628](#) at paragraphs 30 and 100.

46 Paragraph 3.27 of the [Explanatory Memorandum](#) states that:

In some situations the consumer will not properly understand the implications of different choices and so the broker may have to assist them to understand why a particular loan is or is not in their best interests. In some cases this assistance may inform any recommendations provided by the broker.

47 Our research in [REP 628](#) also found that it is important that consumers are helped to understand the options presented, so they can meaningfully compare options. Presenting a recommendation in a way that allows consumers to understand the reasons that specific product has been recommended will help them in making informed decisions.

48 The draft guidance also refers to issues that may arise after a recommendation has been made. This guidance reflects the fact that a mortgage broker's role and legal obligations do not necessarily end once a recommendation is provided. In particular, the best interests duty extends to assisting the consumer to apply for a credit contract.

Note: The best interests duty in the Corporations Act does not apply to the equivalent concept under that Act of arranging for someone to apply for a financial product.

Guidance on specific issues relating to the best interests duty

Interaction with other obligations

49 The best interests obligations operate alongside other laws that affect how credit assistance is provided to consumers, including the responsible lending obligations.

Note: For further guidance on the responsible lending obligations, see [Regulatory Guide 209](#) *Credit licensing: Responsible lending conduct* (RG 209). For guidance on the general conduct obligations, see [Regulatory Guide 205](#) *Credit licensing: General conduct obligations* (RG 205).

Proposal

B7 We propose to avoid duplicating the content of other regulatory guides in our guidance on the best interests obligations. We propose to distinguish the requirements of the best interests duty and responsible lending obligations.

See draft RG 000.93–RG 000.99.

Your feedback

B7Q1 Do you require further guidance on the distinction between your obligations under the new best interests duty and the existing responsible lending obligations?

B7Q2 Are there any other requirements of the National Credit Act that interact with the new obligations and require further guidance?

Rationale

- 50 The best interests duty introduces requirements and steps that are additional to the responsible lending obligations. The obligations are complementary and mortgage brokers will need to comply with both, even if some steps are not required by the responsible lending obligations.
- 51 Although complying with the responsible lending obligations would be consistent with acting in a consumer's best interests, meeting these obligations is not necessarily sufficient to discharge a duty to act in someone's best interests. Paragraph 3.5 of the [Explanatory Memorandum](#) states:
- There are circumstances where the mortgage broker may not have acted in a consumer's best interests even if the responsible lending obligations were complied with. For example, even if a home loan product is 'not unsuitable', recommending it to the consumer might not be in the consumer's best interests.
- 52 The appendix to draft RG 000 shows the interaction between the requirements of the best interests duty and the responsible lending obligations.

Range of credit products and providers

Proposal

- B8** We propose to provide guidance that mortgage brokers must be satisfied that the range of products they can access and recommend is sufficient to allow them to act in consumers' best interests. Additionally, we would generally expect brokers to maintain an awareness of products and features that may be available on the market.

See draft RG 000.100–RG 000.104.

Your feedback

- B8Q1 Should mortgage brokers be required to consider products provided by parties outside their panel of credit providers?
- B8Q2 If you are a mortgage broker, does the software you currently use present you with options that you are not accredited to recommend?

Rationale

- 53 The draft guidance is designed to facilitate brokers conducting case-by-case assessments that consider a range of credit providers and products. However, we acknowledge that credit providers' credit policies, pricing practices and risk appetite might limit the availability of certain products.
- 54 In our view, consumers should be informed about which credit providers the broker has access to and which they do not. Consumers may be unaware that

their broker can only offer the products on the aggregator's panel, or that the broker may not have access to all the brands listed on their aggregator's promotional material. This is supported by the Productivity Commission's finding that approximately 20% of aggregators required their brokers to be accredited by all credit providers on their panel.

55 We do not propose that mortgage brokers be required to recommend a specific product outside their panel. We note that some credit providers may choose not to deal with certain brokers.

56 However, the draft guidance does set out our expectation that mortgage brokers be able to satisfy themselves that recommending from within their panel is in the consumer's best interests. Brokers may look beyond their panel when considering whether other products exist that better suit the consumer's needs.

Note: See Australian Government Productivity Commission, [Productivity Commission Inquiry Report](#) (No. 89), 29 June 2018, pp. 305–306 and 338.

When the duty applies

Proposal

B9 We propose to provide guidance to clarify that the best interests duty generally applies at the time of the assessment and whenever a mortgage broker provides credit assistance.

See draft RG 000.105–RG 000.109.

Your feedback

B9Q1 Do you agree that the best interests duty should apply at the time of the assessment?

B9Q2 Do you agree that when making subsequent assessments brokers cannot necessarily rely on the initial assessment?

B9Q3 Do you agree that changes which occurred after the recommendation, which were reasonably foreseeable when the recommendation was made, should be relevant in considering whether the best interests duty has been complied with?

Rationale

57 The National Credit Act will require mortgage brokers to act in the best interests of their consumers when providing credit assistance. Based on discussions with stakeholders, the draft guidance attempts to make clear the effect of this legal distinction, including:

- (a) the application of the duty to consumers who the broker has previously assisted; and
- (b) what the duty requires if the consumer's circumstances change.

- 58 The draft guidance specifies that any credit assistance provided—such as the recommendations or suggestions made by the broker—must be in the consumer’s best interests at the time of assessment.
- 59 The consumer’s individual circumstances, and the price or availability of credit products, may change between the time the consumer first contacts the broker and when the broker provides credit assistance. Where there has been a change, brokers may need to reassess what is in the consumer’s best interests before providing credit assistance.

Other circumstances where the duty applies

- 60 There have been questions about what the best interests duty requires of mortgage brokers where:
- (a) there is a package of products (given that the duty applies in relation to any credit assistance provided by mortgage brokers, including for credit products that are packaged with a home loan); or
 - (b) there are matters outside their expertise.

Proposal

B10 We propose to provide guidance that recommendations by mortgage brokers on packages are to be based on a holistic assessment of the package and involve a process of comparison with other available products, such as other packages or standalone home loan products.

See draft RG 000.110–RG 000.117.

Your feedback

B10Q1 If you are a mortgage broker, on what basis do you typically recommend a package to a consumer?

B10Q2 If you are a mortgage broker, do you typically compare a range of packages that are available to you? Do you currently compare packages available to standalone home loan products? If so, how?

B11 We propose that mortgage brokers should be able to give guidance about the suitability and value of product features for each consumer, including a basic understanding of tax implications. However, we do not expect mortgage brokers to advise on matters outside their expertise.

See draft RG 000.118–RG 000.120.

Your feedback

B11Q1 If you are a mortgage broker, what do you generally do if a consumer seeks tax advice from you? What other matters outside your expertise do consumers seek guidance on?

Rationale

Packaged products

- 61 Packaging or bundling products into a home loan package can be efficient and provide consumers with easy access to a number of products simultaneously at lower cost. However, packages can lock consumers into ongoing use of products that are not wanted or needed by that consumer (and in those circumstances may impose additional costs).
- 62 The draft guidance explains our interpretation of the obligations placed on mortgage brokers in relation to packaged products. In our view, there are certain situations where it may be helpful to compare packages to other packages and standalone products.
- 63 We consider that the process of comparing these products may differ on a case-by-case basis, particularly because some products within packages will require greater analysis to determine whether they will meet the consumer's best interests. To support this approach, the draft guidance includes examples of situations where greater analysis may be required.

Matters outside the broker's expertise

- 64 Taking out a home loan will typically involve tax implications for the consumer, particularly if they are an investor. Advising on these implications may be outside mortgage brokers' expertise.
- 65 These implications and the consumer's tax position may be relevant to the assessment of the consumer's individual circumstances. However, where material tax implications go beyond a broker's expertise and competence, the application of the best interests duty means it would be more appropriate to refer consumers to a registered tax agent.
- 66 The draft guidance on the appropriate steps to take in relation to matters outside mortgage brokers' expertise is generally consistent with our guidance for financial advisers.

Note: See [RG 175](#) at RG 175.380.

C Proposed guidance on other obligations

Key points

We propose to provide guidance on:

- the conflict priority rule, which requires mortgage brokers to prioritise the consumer's interests in the event of a conflict of interest;
- the types of records that mortgage brokers may need to keep to demonstrate their compliance with the best interests obligations; and
- the obligations for credit licensees to ensure that their representatives who are mortgage brokers comply with the best interests obligations.

The conflict priority rule

- 67 The conflict priority rule requires mortgage brokers to resolve conflicts of interests in the consumer's favour.

Proposal

- c1 We propose to provide guidance that complying with the conflict priority rule requires mortgage brokers to:
- (a) identify what interests they or their related parties have, and prioritise the consumer's interests; and
 - (b) not provide credit assistance where it would not be possible to prioritise the consumer's interests.

See draft RG 000.121–RG 000.138.

Your feedback

- C1Q1 Do you agree with our general approach to administering the conflict priority rule?
- C1Q2 Are there any other factors relevant to the prioritisation of consumers' interests that we should consider including in our guidance?
- C1Q3 Are there other types of activities or conduct that would contravene the conflict priority rule where ASIC should provide guidance?

Rationale

- 68 Mortgage broking involves complex commercial relationships with a range of stakeholders, such as credit providers, aggregators, other brokers and credit licensees and software providers. Our guidance will clarify how brokers may prioritise a consumer's interests when faced with potential conflicts of interest, including in relation to third parties.

- 69 The draft guidance for mortgage brokers is consistent with our guidance on prioritising interests for financial advisers. This approach reflects the legislation, which is based on an equivalent obligation on financial advisers in s961J of the Corporations Act: see [Explanatory Memorandum](#) at paragraph 3.28.

Note: See also [RG 175](#) at RG 175.390–RG 175.404.

- 70 The requirement for mortgage brokers to identify what interests they or their related parties have and prioritise the consumer's interests is supported by our findings in paragraph 135 of [REP 628](#):

We found that consumer understanding and perception of commissions varied considerably. Even where consumers were aware that a broker received a commission payment, it was not always clear that they understood that a broker is likely to receive different commission payments based on the lender selected, and that this presented a conflict of interest.

- 71 Paragraph 133 of [REP 628](#) identified two primary ways in which conflicts of interests may manifest:
- (a) a broker could recommend a loan that is larger than the consumer needs or can afford, to maximise their commission payment; and
 - (b) a broker could have an incentive to recommend a loan from a particular ...[credit provider] because they will receive a higher commission, even though that loan may not be the best loan for the consumer.

- 72 Our approach to the conflict priority rule reflects the objective of the new law outlined in paragraph 3.18 of the [Explanatory Memorandum](#) to improve consumer outcomes by reducing the potential for conflicts of interests to impact the advice consumers receive from mortgage brokers.

Record keeping

Proposal

- c2 We propose to provide guidance on the types of records mortgage brokers may keep to help them demonstrate that they have acted in the consumer's best interests.

See draft RG 000.139–RG 000.144.

Your feedback

- C2Q1 Do you agree with our expectations about record keeping?
- C2Q2 Are there any other examples of types of records that could be referred to in our guidance?
- C2Q3 How long should records be kept for?
- C2Q4 If you are a credit licensee, do you already require the mortgage brokers you authorise to keep standardised records? If you do, what form does this take?

Rationale

- 73 Evidence of compliance with the best interests duty and the conflict priority rule is likely to come predominantly from a mortgage broker's records. These records may help brokers demonstrate that they have met their obligations, and may also help authorising licensees comply with their obligation to take steps to ensure that credit representatives who are mortgage brokers comply with the new obligations.
- 74 Mortgage brokers typically keep records, including correspondence, file notes and interview guides. The purpose of our guidance is to clarify how brokers may need to enhance their existing record-keeping processes to ensure they can demonstrate they have complied with the law. The draft guidance specifically outlines the type and nature of documents that might be kept, including documents that make clear how the credit assistance provided was in the consumer's best interests.
- 75 We expect that the types of records kept will vary depending on the scope of the recommendations and assistance provided to the consumer. The draft guidance suggests that the period of time documents should be kept may vary and that brokers should use their judgment.
- 76 The draft guidance is generally consistent with our guidance on record keeping under the best interests duty for financial advisers.

Note: See [RG 175](#) at RG 175.417–RG 175.432.

Obligations for credit licensees

- 77 Credit licensees must take reasonable steps to ensure that their credit representatives who are mortgage brokers comply with the best interests duty. This obligation is extended to any process developed by a licensee to assist compliance with the best interests duty: see s158LE(2).

Proposal

c3 We propose to provide guidance that:

- (a) what constitutes reasonable steps may vary depending on the nature and scale of the mortgage broker's operations and their relationship with the credit licensee; and
- (b) in determining whether steps taken are reasonable, we would consider factors such as the likelihood of the mortgage broker not complying and the harm that would result from that non-compliance.

See draft RG 000.145–RG 000.149.

Your feedback

- C3Q1 Do you agree with our general expectations about the practical steps credit licensees should take to comply with this obligation? Are there any other relevant factors?
- C3Q2 If you are a credit licensee, how do you currently monitor your authorised mortgage brokers? How do you intend to monitor compliance with the best interests obligations?

Rationale

- 78 Credit licensees play an important role in ensuring their authorised mortgage brokers comply with the best interests duty. Licensees should already have compliance, monitoring and training processes in place with their authorised brokers.
- 79 The draft guidance includes our general expectations about steps that licensees should take in relation to training and competence, systems, compliance monitoring and record keeping.
- 80 The draft guidance does not duplicate existing guidance on other general requirements for licensees. Guidance relating to training and compliance, for example, is covered in [RG 205](#).
- 81 Licensees should be proactive and take reasonable steps to prevent contraventions: see [Explanatory Memorandum](#), paragraph 3.31. These proactive steps may include the provision of systems by the licensee (including when the licensee is an aggregator) and consistent monitoring so that any potential breaches can be identified before they become detrimental to the consumer.
- 82 Keeping adequate records should help licensees to demonstrate the mortgage broker's compliance and the reasonable steps taken.

D Regulatory and financial impact

83 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. Based on the information currently available to us, we think the proposals will strike an appropriate balance between:

- (a) ensuring that the interests of mortgage brokers are more closely aligned with the interests of consumers;
- (b) ensuring that credit licensees and mortgage brokers comply with the best interests obligations; and
- (c) ensuring credit licensees and mortgage brokers do not incur unreasonable costs in complying with the best interests obligations.

84 The Government has confirmed that a process equivalent to a Regulation Impact Statement has been undertaken through the Royal Commission.

Note: See Royal Commission, [Final report](#), 4 February 2019.

Key terms

| Term | Meaning in this document |
|----------------------------|--|
| aggregator | A business which provides aggregation services to a broker business or broker and with which a credit provider has a direct contractual relationship. |
| ASIC | Australian Securities and Investments Commission |
| best interests duty | The duty for mortgage brokers to act in the best interests of their consumer when providing credit assistance in relation to credit contracts as set out in s158LA of the National Credit Act |
| best interests obligations | The obligations in Div 2 of Pt 3-5A of the National Credit Act |
| conflict priority rule | The requirement for mortgage brokers to prioritise their consumers' interests when providing credit assistance as set out in s158LB and 158LF of the National Credit Act |
| consumer | A natural person or strata corporation Note: See s5 of the National Credit Act. |
| consumer lease | A consumer lease to which the National Credit Code applies Note: See s169–171 of the National Credit Code. |
| Corporations Act | <i>Corporations Act 2001</i> , including regulations made for the purposes of that Act |
| CP 327 (for example) | An ASIC consultation paper (in this example numbered 327) |
| credit | Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code. |
| credit assistance | Has the meaning given in s8 of the National Credit Act |
| credit assistance provider | A person who provides credit assistance to a consumer in relation to a credit contract or a consumer lease and who is not the credit provider (for a credit contract) or the lessor (for a consumer lease) |
| credit contract | Has the meaning given in s4 of the National Credit Code |
| 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 an Australian credit licence under s35 of the National Credit Act |
| credit provider | Has the meaning given in s5 of the National Credit Act |

| Term | Meaning in this document |
|------------------------------|--|
| credit representative | A person authorised to engage in specified credit activities on behalf of a credit licensee under s64(2) or 65(2) of the National Credit Act |
| Explanatory Memorandum | Replacement Explanatory Memorandum to the Mortgage Broker Reforms Bill |
| final report | The final report of the Royal Commission released in February 2019 |
| mortgage broker | <p>A person who:</p> <ul style="list-style-type: none"> • carries on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property; • does not act as the credit provider in relation to most of those contracts; and • provides credit assistance in relation to credit contracts offered by more than one credit provider. <p>Note: See s15B of the National Credit Act.</p> |
| Mortgage Broker Reforms Act | <i>Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020</i> |
| Mortgage Broker Reforms Bill | Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019 |
| 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 |
| National Credit Regulations | National Consumer Credit Protection Regulations 2010 |
| OBPR | Office of Best Practice Regulation |
| related party | Has the meaning given in s5 of the National Credit Act |
| REP 516 (for example) | An ASIC report (in this example numbered 516) |
| RG 246 (for example) | An ASIC regulatory guide (in this example numbered 246) |
| Royal Commission | Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry |
| s158LB (for example) | A section of the National Credit Act (in this example numbered 158LB), unless otherwise specified |

List of proposals and questions

| Proposal | Your feedback |
|--|--|
| <p>B1 We propose to provide high-level guidance on our expectations for what mortgage brokers may need to do to meet the best interests duty when:</p> <ul style="list-style-type: none"> (a) gathering information about the consumer; (b) making an individual assessment of what is in the consumer's best interests; and (c) presenting information and recommendations. | <p>B1Q1 Do you agree with our approach to structuring our guidance around the mortgage broking process?</p> <p>B1Q2 Are there any steps or processes not covered in the draft guidance which are of particular relevance to the best interests duty?</p> |
| <p>B2 We also propose to address specific issues, including:</p> <ul style="list-style-type: none"> (a) the interaction of the best interests duty and the responsible lending obligations; (b) the implications of the best interests duty for the range of credit providers and products mortgage brokers deal with; (c) when the best interests duty applies; and (d) other circumstances including packaged products or matters outside the mortgage broker's expertise. | <p>B2Q1 What additional specific issues (if any) do you consider should be addressed in the draft guidance? Why is guidance on these issues needed?</p> |
| <p>B3 We propose to provide guidance that mortgage brokers should gather relevant information to ensure they can provide recommendations that will be in the consumer's best interests. The draft guidance indicates that this may involve an iterative process of receiving instructions and making inquiries.</p> <p>See draft RG 000.29–RG 000.42.</p> | <p>B3Q1 If you are a mortgage broker, what information do you typically gather from a consumer before considering products? What steps do you take to verify this information?</p> <p>B3Q2 When should mortgage brokers make further inquiries into a consumer's circumstances to act in their best interests?</p> |
| <p>B4 We propose that mortgage brokers should consider products holistically to assess whether they are in the consumer's best interests. The draft guidance describes factors which may be relevant to this assessment, although the factors and their relative importance will depend on the consumer's circumstances.</p> | <p>B4Q1 Do you agree that mortgage brokers should consider products holistically in assessing whether they are in the consumer's best interests?</p> |

| Proposal | Your feedback |
|---|---|
| <p>B5 We propose to provide guidance that:</p> <ul style="list-style-type: none"> (a) the cost of a product—such as interest rate, fees and charges and repayment size—is a factor that should be prioritised during this assessment; and (b) where other non-cost considerations affect what is in the consumer's best interests, brokers should assess whether those considerations or loan features have a realistic possibility of offering the consumer good value or a net benefit relative to other options. <p>See draft RG 000.43–RG 000.76.</p> | <p>B5Q1 What factors and product features do you consider are most relevant to assessing whether home loan products are in an individual consumer's best interests?</p> <p>B5Q2 Do you agree with our expectations about how cost and non-cost factors should be considered by brokers when making a product assessment?</p> <p>B5Q3 Are there any other factors or circumstances relevant to determining whether a product is in the consumer's best interests that our guidance should discuss? If so, what are they and why is guidance needed?</p> |
| <p>B6 We propose to provide guidance to encourage mortgage brokers to, where necessary, tailor how they present product options and recommendations to account for the consumer's expectations and circumstances. We also propose to emphasise the educative role of mortgage brokers and the importance of presenting a range of options.</p> <p>See draft RG 000.77–RG 000.92.</p> | <p>B6Q1 Are there any other factors relevant to the presentation of information that we should consider including in our guidance?</p> <p>B6Q2 If you are a mortgage broker, how do you typically present information to consumers? Does this information take a particular form?</p> <p>B6Q3 Do you agree that mortgage brokers should educate consumers and help them to understand potential implications of different choices (e.g. the nature of credit products and their features)?</p> <p>B6Q4 If you are a mortgage broker, in what circumstances would you only provide one product option/recommendation? Do you agree with our view that consumers should generally be presented with more than one option?</p> <p>B6Q5 How can a mortgage broker act in a consumer's best interests when assisting them to apply for one credit product when the broker recommended another?</p> |
| <p>B7 We propose to avoid duplicating the content of other regulatory guides in our guidance on the best interests obligations. We propose to distinguish the requirements of the best interests duty and responsible lending obligations.</p> <p>See draft RG 000.93–RG 000.99.</p> | <p>B7Q1 Do you require further guidance on the distinction between your obligations under the new best interests duty and the existing responsible lending obligations?</p> <p>B7Q2 Are there any other requirements of the National Credit Act that interact with the new obligations and require further guidance?</p> |

| Proposal | Your feedback |
|--|--|
| <p>B8 We propose to provide guidance that mortgage brokers must be satisfied that the range of products they can access and recommend is sufficient to allow them to act in consumers' best interests. Additionally, we would generally expect brokers to maintain an awareness of products and features that may be available on the market.</p> <p>See draft RG 000.100–RG 000.104.</p> | <p>B8Q1 Should mortgage brokers be required to consider products provided by parties outside their panel of credit providers?</p> <p>B8Q2 If you are a mortgage broker, does the software you currently use present you with options that you are not accredited to recommend?</p> |
| <p>B9 We propose to provide guidance to clarify that the best interests duty generally applies at the time of the assessment and whenever a mortgage broker provides credit assistance.</p> <p>See draft RG 000.105–RG 000.109.</p> | <p>B9Q1 Do you agree that the best interests duty should apply at the time of the assessment?</p> <p>B9Q2 Do you agree that when making subsequent assessments brokers cannot necessarily rely on the initial assessment?</p> <p>B9Q3 Do you agree that changes which occurred after the recommendation, which were reasonably foreseeable when the recommendation was made, should be relevant in considering whether the best interests duty has been complied with?</p> |
| <p>B10 We propose to provide guidance that recommendations by mortgage brokers on packages are to be based on a holistic assessment of the package and involve a process of comparison with other available products, such as other packages or standalone home loan products.</p> <p>See draft RG 000.110–RG 000.117.</p> | <p>B10Q1 If you are a mortgage broker, on what basis do you typically recommend a package to a consumer?</p> <p>B10Q2 If you are a mortgage broker, do you typically compare a range of packages that are available to you? Do you currently compare packages available to standalone home loan products? If so, how?</p> |
| <p>B11 We propose that mortgage brokers should be able to give guidance about the suitability and value of product features for each consumer, including a basic understanding of tax implications. However, we do not expect mortgage brokers to advise on matters outside their expertise.</p> <p>See draft RG 000.118–RG 000.120.</p> | <p>B11Q1 If you are a mortgage broker, what do you generally do if a consumer seeks tax advice from you? What other matters outside your expertise do consumers seek guidance on?</p> |
| <p>C1 We propose to provide guidance that complying with the conflict priority rule requires mortgage brokers to:</p> <ul style="list-style-type: none"> (a) identify what interests they or their related parties have, and prioritise the consumer's interests; and (b) not provide credit assistance where it would not be possible to prioritise the consumer's interests. <p>See draft RG 000.121–RG 000.138.</p> | <p>C1Q1 Do you agree with our general approach to administering the conflict priority rule?</p> <p>C1Q2 Are there any other factors relevant to the prioritisation of consumers' interests that we should consider including in our guidance?</p> <p>C1Q3 Are there other types of activities or conduct that would contravene the conflict priority rule where ASIC should provide guidance?</p> |

| Proposal | Your feedback |
|---|--|
| <p>C2 We propose to provide guidance on the types of records mortgage brokers may keep to help them demonstrate that they have acted in the consumer's best interests.</p> <p>See draft RG 000.139–RG 000.144.</p> | <p>C2Q1 Do you agree with our expectations about record keeping?</p> <p>C2Q2 Are there any other examples of types of records that could be referred to in our guidance?</p> <p>C2Q3 How long should records be kept for?</p> <p>C2Q4 If you are a credit licensee, do you already require the mortgage brokers you authorise to keep standardised records? If you do, what form does this take?</p> |
| <p>C3 We propose to provide guidance that:</p> <ul style="list-style-type: none"> (a) what constitutes reasonable steps may vary depending on the nature and scale of the mortgage broker's operations and their relationship with the credit licensee; and (b) in determining whether steps taken are reasonable, we would consider factors such as the likelihood of the mortgage broker not complying and the harm that would result from that non-compliance. <p>See draft RG 000.145–RG 000.149.</p> | <p>C3Q1 Do you agree with our general expectations about the practical steps credit licensees should take to comply with this obligation? Are there any other relevant factors?</p> <p>C3Q2 If you are a credit licensee, how do you currently monitor your authorised mortgage brokers? How do you intend to monitor compliance with the best interests obligations?</p> |