

It may be a breach of the duty if the broker suggested the consumer remain in their current home loan when they could refinance to a cheaper product as the broker did not want to incur the consequent liability to the [credit provider] when their commission payments were clawed back.

- RG 000.109 For consumers who may be considering refinancing, the costs associated with refinancing should be considered.

Example 7: Another assessment required

Scenario

Shiva is a first home buyer who contacts a broker to organise a home loan. The broker works with Shiva and ultimately recommends a particular home loan package. Shiva decides to take some time to think about whether she will accept the recommendation provided by the broker, or whether she will go direct to a credit provider.

Shiva meets with the same broker again five months later. Shiva says she has weighed up his options and wants to proceed with the broker's recommendation.

Commentary

The broker cannot rely on their initial inquiries for the previous recommendation and will need to reconsider what is in Shiva's best interests. This avoids any issues that may arise if a previous product recommended is no longer available, or if the consumer's circumstances have changed.

Separately, the broker (or the credit licensee that authorises them) would also need to comply with the responsible lending obligations before providing further credit assistance to Shiva.

Example 8: Home loan 'health check'

Scenario

Annie contacts the broker who assisted her in getting her home loan. She asks the broker if refinancing would be appropriate in light of her objective to repay her home loan quickly.

The broker discusses Annie's objectives and financial situation, surveys the market and concludes that Annie's objectives would be best met by her current loan. The broker determines that there is no benefit in terms of costs (or other features) in changing. The broker makes this recommendation and documents what they have done.

Commentary

The best interests duty applies in this scenario. Based on the credit assistance provided, the broker would need to be satisfied that suggesting that Annie remain in her current loan would be in her best interests, informed by her objectives and circumstances, and the potential for other products available in the market to be better suited to those objectives.

C Other obligations

Key points

This section sets out 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;
- the obligations for credit licensees to ensure that their representatives comply with the best interests obligations; and
- our approach to administering the anti-avoidance provision.

The conflict priority rule

RG 000.121 As a mortgage broker, you must prioritise the interests of the consumer if you know, or reasonably ought to know, when you provide the credit assistance, that there is a conflict between the interests of the consumer and the interests of:

- (a) the credit licensee;
- (b) the credit representative;
- (c) an associate of the licensee;
- (d) an associate of the credit representative;
- (e) another representative of the licensee; or
- (f) an associate of another representative of the licensee.

Note: The parties described in RG 000.121 are referred to as 'related parties' in this guide. We refer to the requirement in s158LB and 158LF as the 'conflict priority rule'.

RG 000.122 Paragraph 3.28 of the [Explanatory Memorandum](#) states:

In addition to the new best interests obligation, the new law also requires a mortgage broker to resolve conflicts of interests in the consumer's favour. ... This requirement is based on section 961J of the [*Corporations Act 2001*], which places an equivalent obligation on financial advisers.

RG 000.123 To comply with the conflict priority rule, you must first identify what interests you or your related parties have. You may then consider what a mortgage broker in your position but without a conflict of interest would do.

RG 000.124 The conflict priority rule means that you must not recommend a product or service of a related party that would create extra revenue for yourself, your credit licensee or another related party, unless doing so would also be in the consumer's best interests.

- RG 000.125 If you have a conflict of interest and are unable to prioritise the consumer's interests, you must not provide the credit assistance.
- RG 000.126 As for the best interests duty, the conflict priority rule applies each time you provide credit assistance to the consumer: see RG 000.105–RG 000.109.
- RG 000.127 The conflict priority rule applies in conjunction with the general obligation in s47(1)(b) imposed on all credit licensees to manage conflicts of interest.

Example 12: Aligned interests

Scenario

Linh and Zelda approach a mortgage broker for a home loan. Based on the information they provide, the broker concludes that the best product for them is a particular home loan and offset package with no annual fee. The second-best product is similar, but has an annual fee of \$149. The credit provider that offers the product the broker thinks is best for Linh and Zelda will also give the broker a higher commission for the same sized loan.

Commentary

In prioritising the consumer's interests, it is possible that the interests of the consumer and the broker will align. In this situation, the fact that there is a benefit for the broker does not indicate that the broker did not prioritise Linh and Zelda's interests.

If the situation was reversed, and the credit provider charging the annual fee also paid the broker a higher commission, recommending the higher fee product would be inconsistent with the conflict priority rule.

Role conflicts

- RG 000.128 We recognise that brokers and their related entities may have multiple roles on the same or related transactions. This can cause a conflict based on the earning of two or more income streams, dependent on the transaction.
- RG 000.129 Examples of additional roles which may give rise to such a conflict include acting as a:
- (a) lawyer/conveyancer;
 - (b) accountant;
 - (c) financial planner;
 - (d) real estate developer/vendor; or
 - (e) real estate agent.
- RG 000.130 In situations where you may earn multiple income streams, you will still need to ensure that where your interests and those of the consumer conflict, you give priority to the consumer's interests when providing credit assistance.

Related party or credit provider conflicts

- RG 000.131 The conflict priority rule means that you must not act to further your interests or those of one of your related parties over the consumer's interests when providing credit assistance.
- RG 000.132 This will require you to consider what conflicts may exist. Paragraph 3.29 of the [Explanatory Memorandum](#) states that:
- The obligation to give priority to the consumer's interests is not limited to conflicts of interest that mortgage brokers currently know about. Mortgage brokers are expected to take active steps to identify all conflicts of interest covered by section 158LB to minimise the risk of a contravention, including obligations that can arise because of their commercial relationships with third parties.
- RG 000.133 Considering what benefits (if any) a credit licensee, credit representative or their related parties will receive if the consumer acts on your credit assistance may help you to determine whether a conflict exists.
- RG 000.134 The systems you use will be an important part of complying with the conflict priority rule. We consider that systems should be structured without bias or conflicts. That is, product recommendation or aggregator software should not have in-built credit provider or product bias.
- RG 000.135 You should inform the consumer where ownership structures or other commercial ties have the potential to affect the credit assistance provided. However, you cannot comply with the conflict priority rule merely by disclosing a conflict of interest or having the consumer consent to a conflict.
- Note: A condition of a contract (or other arrangement) is void if it seeks to waive any of the obligations in s158LB or 158LF: s334.
- RG 000.136 There is potential for commissions given by credit providers to cause conflicts of interest. Examples of scenarios which would not satisfy the conflict priority rule include recommending, based on commission:
- (a) a loan with a higher interest rate than comparable alternatives;
 - (b) a loan without features the consumer considers important or that would otherwise be in the consumer's best interests; or
 - (c) loans by a particular credit provider to a substantial proportion of consumers, irrespective of the consumers' particular needs.
- RG 000.137 The conflict priority rule will not always prohibit you from recommending a credit product provided by a related party. However, if there is a conflict, you should keep records of your reasoning behind any recommendation you make that the consumer acquire a certain product or increase their credit limit, where this would benefit the related party.
- RG 000.138 You should ensure that all your recommendations are made with the consumer's interests as the primary consideration. If you prioritise maximising or receiving non-consumer sources of remuneration over the interests of the consumer, you will be in breach of the conflict priority rule.

Example 13: Product of a related party*Scenario*

William and Megan are thinking about refinancing their principal-and-interest loan. The broker makes an assessment and recommends a product provided by a related party of the broker.

William and Megan benefit from the refinance with a lower interest rate. However, the broker did not explain that the product was from a related party.

Commentary

Whether the broker has complied with the conflict priority rule will depend on whether it was in William and Megan's interests to recommend the related party product. In this scenario, the broker must be able to articulate how the consumer's interests are placed ahead of the interests of the broker to comply with the conflict priority rule.

Although disclosure is not sufficient to satisfy the conflict priority rule, the broker should have nonetheless explained to William and Megan the relationship between the broker and the related party, what benefit the broker may receive, why that product was recommended and how their interests were placed ahead of the broker's.

Record keeping

- RG 000.139 As a mortgage broker, we expect you to keep records of how you have acted when providing credit assistance. This includes records of inquiries you make into the consumer's circumstances, and the consideration, investigation and assessment of the products you recommend.
- RG 000.140 Generally, we expect you to keep records that include:
- (a) a copy of the responsible lending assessment which may be provided to the consumer, or the documents and information that would be used to prepare the assessment if it is requested;

Note: For our guidance on this assessment, see Section D of [RG 209](#).
 - (b) a copy of the credit guide which was provided to the consumer;
 - (c) information provided to the credit provider as part of the application process;
 - (d) outcomes of credit applications;
 - (e) relevant conversations with the consumer;
 - (f) information showing that you acted in the best interests of the consumer (including records of efforts made to educate the consumer);

- (g) the options and ultimate recommendation you gave and the reasons why (including a detailed description of your decision-making process); and
- (h) any potential conflict of interest which you have identified, and the actions you have taken to prioritise the interests of the consumer over your own or those of a related party.

RG 000.141 We expect that the types of record you keep will vary depending on the recommendations and assistance you provided to the consumer, including their scope.

RG 000.142 Records may take various forms, and do not have to be paper based. For example, they may include:

- (a) documents used to make product recommendations;
- (b) file notes, including records of conversations;
- (c) correspondence;
- (d) working papers;
- (e) outputs of product and feature comparison tools, including graphical presentations and calculators;
- (f) fact-finding documents used when making inquiries into the consumer's circumstances;
- (g) audio recordings; and
- (h) evidence of the compliance systems you used (including any compliance systems put in place by the credit licensee), such as:
 - (i) training materials;
 - (ii) records of who is attending the training; and
 - (iii) call scripts; and
- (i) evidence of how you have complied with these systems.

Note: This list is not intended to be exhaustive.

RG 000.143 Our expectation of how long these records should be kept may vary depending on factors such as the loan term, interest-only period and whether the consumer refinances. You should use your judgement to consider the nature of the credit product and determine whether documents should be kept for a longer period.

RG 000.144 It is necessary for you to keep records that clearly show that you have complied with the best interests obligations. Good records will help you to demonstrate that you have complied with these obligations.

Obligations for credit licensees

- RG 000.145 Credit licensees must take reasonable steps to ensure that their credit representatives who are mortgage brokers comply with the best interests duty and the conflict priority rule: s158LE(2) and 158LF(2). We consider that this includes the processes a licensee develops to help their mortgage brokers to comply with the best interests obligations.
- RG 000.146 What constitutes reasonable steps may vary depending on the nature and scale of the mortgage broker's operations and their relationship with the licensee.
- RG 000.147 In determining whether the steps taken are reasonable, licensees should consider the likelihood of the mortgage broker not complying and the harm that would result from that non-compliance.
- RG 000.148 These obligations require licensees to take reasonable steps to prevent contraventions, rather than simply respond to contraventions after they have happened: see [Explanatory Memorandum](#), paragraph 3.31. A mortgage broker does not need to have breached their best interests obligations for the licensee to have breached the requirement to take reasonable steps.
- RG 000.149 To comply with this obligation, we generally expect credit licensees to:
- ensure that their mortgage brokers are adequately trained and competent (noting the existing general requirements for licensees in relation to the training and competence of their credit representatives—see [RG 206](#));
 - provide systems, guidelines and other materials to ensure that brokers understand and comply with their best interests obligations;
 - monitor compliance (noting that method and frequency may vary based on these factors and other information available to the licensee); and
 - ensure that appropriate records are kept, which demonstrate the mortgage broker's compliance with the best interests obligations and the reasonable steps the licensee has taken.

Note: For more information on the general conduct obligation requirements, see Section E of [RG 205](#).

Example 14: Licensee approach to reviewing broker compliance

Scenario

ZYX Pty Ltd is a credit licensee that authorises approximately 200 credit representatives who are mortgage brokers.

One aspect of ZYX's approach to ensuring that its broker representatives comply with the best interests obligations is to conduct reviews of broker files and transactions.

Brokers are selected for review based on a range of factors including:

- the volume of business they conduct;
- the variety of credit providers and products they recommend or arrange;
- the number of consumer complaints associated with them; and
- the subsequent performance of the loans they arrange.

ZYX's software allows mortgage brokers to attach file notes, correspondence and other outputs to each consumer's file. ZYX can access these records as part of their reviews.

Commentary

This type of review may form part of a licensee's approach to taking reasonable steps to ensure that its mortgage broker representatives comply with the best interests obligations. ZYX may also need to consider whether anything identified during the reviews requires further action.

Example 15: Licensee systems

Scenario

XYZ Corp is a credit licensee that provides aggregation services to mortgage brokers who are its credit representatives.

XYZ Corp's corporate group includes an entity, XYZ Loans, which is a credit provider offering home loan products.

XYZ Corp updates its aggregator platform software to change how home loan products are presented to mortgage brokers. The new algorithm prioritises loans offered by XYZ Loans when brokers sort available products.

Commentary

XYZ Corp has an obligation to take reasonable steps to ensure that its broker representatives comply with the best interests duty.

Providing platform software that prioritises XYZ Loans' products may be inconsistent with the obligation to take reasonable steps to ensure XYZ Corp's mortgage broker representatives comply with the conflict priority rule.

Whether or not a conflict exists, or whether an XYZ Loans product is in the consumer's best interests, will depend upon the consumer's circumstances.

Software platforms have the potential to help mortgage brokers to comply with their obligations, and enable licensees to take reasonable steps to ensure this. Software that sorts products by relevance (based on the consumer's individual circumstances) or by price or in a credit provider neutral manner, would appear to be more consistent with the obligations.

The anti-avoidance provision

What is anti-avoidance?

- RG 000.150 The effect of the anti-avoidance provision is that a person must not, either alone or with other people, enter into or begin to carry out a scheme if:
- (a) it would be concluded that they did so for the sole or non-incidental purpose of avoiding the application of any provision of Pt 3-5A; and
 - (b) the scheme or part of the scheme has achieved or would achieve that purpose.
- RG 000.151 A person may be liable for a civil penalty if they are found to have breached s158T.
- RG 000.152 The anti-avoidance provision is designed to ensure that the policy intent of the reforms is not avoided through industry or transaction structuring.
- RG 000.153 Section 158T could potentially apply to a broad range of schemes (e.g. any contract, agreement, plan, proposal, course of action or course of conduct).

Our approach to administering the provision

- RG 000.154 In administering the anti-avoidance provision, we are more likely to scrutinise schemes that appear to have no commercial purpose other than to avoid the application of the best interests duty, conflict priority rule and conflicted remuneration provisions.

Note: The discussion in this section on arrangements to which the anti-avoidance provision applies is not intended to be exhaustive.

- RG 000.155 We are unlikely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business.
- RG 000.156 We are also unlikely to take action on arrangements that have been genuinely entered into to comply with the ban on conflicted remuneration.

Appendix: Comparison of the responsible lending obligations and the best interests duty

Table 2: Interaction of the responsible lending obligations and best interests duty

| Area | Responsible lending obligations | Best interests duty |
|---|---|---|
| The purpose of the inquiry and verification obligations | <p>The purpose is to obtain reliable information to:</p> <ul style="list-style-type: none"> • assess whether a credit product or increased credit limit is unsuitable for that consumer; and • not engage in the regulated conduct if the credit product or increased credit limit is unsuitable. <p>As a mortgage broker, the information you gather is also likely to be relevant to the credit provider's responsible lending obligations when entering into a credit product with the consumer you have assisted.</p> | <p>The purpose is to obtain reliable information to:</p> <ul style="list-style-type: none"> • determine what the individual consumer's best interests are; • determine that there are certain credit products which are in the consumer's best interests, and others which are not; • determine that there are no conflicts of interest (and if there are, prioritise the consumer's interests); • weigh up features according to their benefit to the consumer; and • provide recommendations to the consumer. |
| Making reasonable inquiries about the consumer | <p>For all consumers, you must make reasonable inquiries about:</p> <ul style="list-style-type: none"> • the consumer's financial situation, requirements and objectives; and • the maximum credit limit that a consumer requires. <p>Note: Additional requirements apply to some products, such as reverse mortgages.</p> | <p>You should consider each consumer's individual circumstances, which will likely require information about:</p> <ul style="list-style-type: none"> • the consumer's priorities and preferences over different products; • the consumer's needs and objectives; and • the consumer's personal circumstances and financial situation. <p>You should use your judgment to determine whether you should make additional inquiries, beyond the reasonable inquiries undertaken to comply with the responsible lending obligations. This could require you to obtain information that is not needed to comply those obligations.</p> |
| Switching and refinancing | <p>Additional matters to be considered include whether the new product would result in:</p> <ul style="list-style-type: none"> • overall cost savings to the consumer; or • minimal cost savings, but better meet the consumer's requirements and objectives. | <p>Additional matters to be considered include whether the new product would result in:</p> <ul style="list-style-type: none"> • overall cost savings to the consumer; or • minimal cost savings, but better meet the consumer's requirements and objectives. |

| Area | Responsible lending obligations | Best interests duty |
|--|---|--|
| <p>Assessing whether a credit product is 'not unsuitable' or in the best interests of the consumer</p> | <p>The credit product or credit limit increase will be unsuitable if (at the time of the assessment) it is likely that:</p> <ul style="list-style-type: none"> • the consumer will be unable to comply with their financial obligations, or compliance will result in substantial hardship; • the contract will not meet the consumer's requirements or objectives; or • circumstances prescribed in the National Credit Regulations apply. <p>Note: There are additional matters that affect this assessment for some products, such as credit cards and reverse mortgages.</p> | <p>This assessment is relevant to acting in the consumer's best interests.</p> <p>However, you should take into account additional considerations when providing credit assistance in relation to products which are assessed as 'not unsuitable' for the purposes of the responsible lending obligations before determining that they are in the consumer's best interests.</p> <p>For example, providing credit product assistance in relation to such a product may not be in the consumer's best interests if:</p> <ul style="list-style-type: none"> • the consumer's interests would be better served by you suggesting an alternative course of action (i.e. entering into a different credit product); • the recommendation is based on your own interests, rather than the interests of the consumer; • you prioritise conflicting interests of others over the consumer's interests; • you have not considered the consumer's circumstances and financial situation in sufficient detail to determine what is in the consumer's best interests; • you have not considered a sufficiently broad range of relevant product options; or • you have not equipped and educated the consumer to make informed decisions. |
| <p>Reviewing the outcome of the assessments</p> | <p>Credit licensees should periodically review their portfolio to consider whether the assessments are effectively identifying individual circumstances in which credit product are unsuitable or 'not unsuitable'.</p> | <p>The best interests obligations apply whenever credit assistance is provided. What is in the best interests of the consumer must be assessed at that time.</p> <p>Mortgage brokers should nonetheless periodically review their portfolio to consider whether, with the benefit of hindsight, their processes have enabled them to act in the consumers' best interests.</p> |

| Area | Responsible lending obligations | Best interests duty |
|----------------------------|--|---|
| Record-keeping obligations | <p>We expect you to keep a record of inquiries made, verification steps taken, and information relied on in the assessment.</p> <p>If requested by the consumer, you must provide a written copy of the assessment.</p> <p>A written assessment should include:</p> <ul style="list-style-type: none"> • a statement of your understanding of the consumer's requirements and objectives; • a description of the consumer's financial position; and • if the consumer's capacity to make repayments depends on them taking particular actions—a clear statement of what those actions are. <p>ASIC may also ask for a copy of the written assessment.</p> | <p>We expect you to keep records of:</p> <ul style="list-style-type: none"> • information provided to the credit provider; • outcomes of credit applications; • relevant conversations with the consumer; • information showing that you acted in the consumer's best interests; • the options and recommendation you gave; • information explaining your reasons for the recommendation (e.g. why that product was in the consumer's best interests); and • any potential conflicts identified, and any steps taken to prioritise the consumers' interests. |

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. |
| CP 325 (for example) | An ASIC consultation paper (in this example numbered 325) |
| 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 |
| 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 |

| Term | Meaning in this document |
|------------------------------|---|
| 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 | A person who: <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 |
| REP 516 (for example) | An ASIC report (in this example numbered 516) |
| RG 203 (for example) | An ASIC regulatory guide (in this example numbered 203) |
| Royal Commission | Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry |
| s15B (for example) | A section of the National Credit Act (in this example numbered 15B), unless otherwise specified |

Related information

Headnotes

Best interests duty, conflict priority rule, conflicted remuneration, credit licensees, mortgage brokers, responsible lending

Consultation papers

[CP 325](#) *Product design and distribution obligations*

Reports

[REP 516](#) *Review of mortgage broker remuneration*

[REP 628](#) *Looking for a mortgage: Consumer experiences and expectations in getting a home loan*

Regulatory guides

[RG 121](#) *Doing financial services business in Australia*

[RG 203](#) *Do I need a credit licence?*

[RG 205](#) *Credit licensing: General conduct obligations*

[RG 206](#) *Credit licensing: Competence and training*

[RG 209](#) *Credit licensing: Responsible lending conduct*

Legislation

Mortgage Broker Reforms Act

Mortgage Broker Reforms Bill

National Credit Act, Pt 3-5A, s15B, 47(1)(b), 117, 130, 140, 153, 158LA, 158LB, 158LE, 158LE(2), 158LF, 158LF(2), 158T, 334

Other references

Royal Commission, [Final report](#), 4 February 2019