Aussie

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20 March 2020

Ms Tara Marshall
Senior Lawyer - Credit, Retail Banking and Payments
Financial Services Group
Australian Securities and Investment Commission
Level 7, 120 Collins Street
Melbourne VIC 3000

**By email**: MortgageBrokerBID@asic.gov.au

Dear Ms Marshall,

**Mortgage brokers: Best interests duty – CP327 and draft Regulatory Guide**

AHL Investments Pty Ltd (**Aussie**), Australian Credit Licence 246786, welcomes the opportunity to provide comment in response to Consultation Paper 327 (Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty) and the draft Regulatory Guide 000.

Aussie supports regulations that will ensure consistently high standards across the mortgage broking industry and deliver good outcomes for consumers who engage the services of a mortgage broker.

Accordingly, we welcome the 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) and the draft Regulatory Guide (draft RG 000).

There are, however, certain aspects of the draft regulatory guide that we believe may benefit from additional clarity and some that may introduce broader risks than may be intended. Our specific areas of uncertainty or concern are detailed in the attached submission along with any suggestions about what could be amended to address these.

Should you require further information to supplement this submission, please do not hesitate to contact me on [redacted] or by email at [redacted].

Yours faithfully

**David Smith**

Chief Customer Officer

Aussie

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**Mortgage brokers: Best interests duty – CP327 and draft Regulatory Guide**

**Submission of AHL Investments Pty Ltd**

### 1. About Aussie

AHL Investments Pty Ltd (**Aussie**) was founded in 1992 as Australia's first non-bank home lender. Aussie has evolved since that time to become a branded mortgage broker.

Aussie is the holder of an Australian Credit Licensee and provides mortgage broking services to consumers through authorised credit representatives (**Aussie Brokers**) who operate exclusively under the Aussie brand and Australian Credit Licence.

Aussie's model gives every Aussie consumer the benefit of recourse to Aussie in the event of a poor consumer outcome. This requires Aussie to exercise the same level of care and responsibility for each Aussie Broker. This is different from the position with unbranded mortgage intermediaries/aggregators who may have brokers operating under the aggregator's Australian Credit Licence or under the broker's own licence.

### 2. Cost as a priority factor and the extent of comparison

While Aussie agrees with the principle that the cost of credit is a key consideration for both consumers and the satisfaction of a best interests duty,[1] we are concerned that the guidance and examples, when read in their totality, may create less clarity about where the reasonable starting point for such comparison is due to the focus on individual features within products and other factors.

Aussie believes that the most relevant starting point comes after understanding what products and options might be reasonably *available* to the consumer once the broker has gathered sufficient information about their personal circumstances and their requirements and objectives in regards to the loan.[2] This concept of availability recognises that "access to certain products may be limited based on consumer's specific circumstances, including their credit risk and desired loan amount"[3] and that the "credit policy, pricing practices and risk appetite of the credit provider may preclude some consumers from accessing the lowest cost products".[4]

[redacted]onsiderations [redacted]he context of the best interests duty obligation should begin after the broker has considered the consumer's likelihood, in their reasonable opinion, to be approved by a credit provider(s).[5] This would generally occur at a lender level and in relation to the products offered by that lender, and as such brokers should be expected to be able to outline the factors that *generally* limited the range of options or lenders that could be considered rather than requiring this *specifically* in relation to each loan product not considered which may, in some cases, be a considerable number.

This would also align with a consumer's expectation that their broker will present them with a curated selection of relevant loan options that meet their requirements and objectives, are in their best interests, and that they could expect to be approved for.

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[1] ASIC, Draft Regulatory Guide 000, Mortgage brokers: best interests duty, p.14 (RG 000.49)
[2] As above, p.13 (RG 000.43)
[3] As above, p.15 (RG 000.59)
[4] As above, p.15 (RG 000.60)
[5] As above, p.16 (RG 000.61(b))

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Aussie agrees that the features of a product, to the extent they influence the overall cost of the credit product recommended, are also important and that brokers should take reasonable steps to establish that the consumer receive the expected benefits of such features which may also involve comparison against more 'basic' options to establish value. However, we would argue that too much emphasis has been placed on assessing the individual components of such 'package' products in the guidance, particularly on credit cards.

Consumers look to 'package' products primarily as vehicles to assist them in saving interest via the use of offset accounts. Fees (and potentially higher interest rates) often apply to such products and they usually include other linked products such as internet banking and debit cards that enable consumers to derive maximum flexibility and utility from the offset feature (e.g. a consumer will direct their salary payments to their offset account to minimise interest and use a linked debit card and other banking functionality).

It may be difficult to ascribe a value to such features and it is recognised that many customers have such transactional banking products on a stand-alone basis. Accordingly, it is Aussie's view that it would not inappropriate for a comparison to be conducted for such features given their essential role in maximising the utility of the offset account.

Additionally, credit card products may be offered as part of a 'package' product and would not include an annual fee as this is incorporated into the overall cost of the 'package'. Generally these credit cards are optional but the cost of the 'package' is not reduced should the consumer elect not to apply for the card offered.

A broker has only a limited ability to compare such credit cards within 'package' products as detailed information is not provided to aggregators by lenders for inclusion in software comparison tools and thus cannot be used as a criteria in the selection of the 'package' product itself. The broker's ability to compare is essentially limited to a comparison of the consumer's current credit card to the credit card offered as part of the recommended 'package' product for the home loan being applied for as sufficient information is usually provided as part of the loan documents or application forms of the lender.

Aussie, would recommend that the guidance be clarified and amended to focus on this more limited comparison as a matter of practicality.

[redacted] [redacted]

## 3. Requests made by consumers inconsistent with broker recommendations

Aussie notes that there are situations where a consumer may elect to proceed with a product or lender that a mortgage broker recommends to be in that consumer's best interests.

This may include, but not be limited to, consideration of a consumer's specific lender preference influenced by a current or prior relationship between the consumer and a lender (or other specific, consumer-driven preferences regarding products or features).

The draft regulatory guide states that "exercising judgment is particularly important if the consumer has strong preferences or self-selects a specific credit provider or credit type"[6], and that, in such scenarios, brokers should "clearly record the recommendations you presented, including any alternatives that are not selected by the consumer – this should include the steps you took to educate the consumer about the options."[7]

[6] ASIC, Draft Regulatory Guide 000, Mortgage brokers: best interests duty, p.18 (RG 000.72)
[7] As above, p. 22 (RG 000.92)

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While Aussie is supportive of the broad intent of this guidance, we believe that further clarity and guidance is required in the following areas:

- a more explicit acknowledgement that the broker is proceeding on an execution only basis to align with current practices in financial planning including additional guidance around how brokers and licensees should record such an election from the consumer,
- whether an earlier preliminary assessment or Needs Analysis that records the recommendation of the broker that the consumer elected to not proceed with would adequately satisfy the requirements outlined in RG 000.092, noting that different documentation may be produced to facilitate the consumer's preference, and
- ensuring that it is clear, in cases where the broker assists the consumer at the consumer's specific direction, to apply for a product that was not recommended by the broker, that the broker is still obliged to comply with responsible lending practices under RG 209 in respect of the final product the consumer decides to apply for.

## 4. Outside panel recommendations

The draft guidelines set out that ASIC's expectation that mortgage brokers "should have an awareness of the most price competitive products on the market" and "be able to engage in informal benchmarking with the options available on your panel of credit providers" in order to satisfy themselves that their "panel and/or accreditations are sufficient" to allow them to act in the consumer's best interests[8].

The vast majority of brokers in the market operate under aggregators who provide access to a software platform and a panel of approved lenders for whom they have a contractual distribution agreement. This structure is common to both those who operate as independent credit licensees and to those who operate as credit representatives under an aggregator's credit licence.

This allows brokers to access training and application support from these lenders in relation to their products which is crucial in being able to meet the needs of consumers and in ensuring that any recommendations made are well informed and in their best interests. Aggregators enter into such agreements with lenders for a range of reasons including the suitability of contractual terms, the competitiveness of the lender's product, feedback [redacted]kers, and the le[redacted]opriate service levels at scale for both brokers and consumers. Not all lenders in the market will choose to make their products available for brokers to distribute and typically brokers cannot directly contract with a lender outside of their aggregation arrangement.

Generally, an aggregator's panel provides brokers access to a large range of lenders and products. In some models brokers may elect not to obtain accreditations with some lenders on that panel, while for branded broking groups such as Aussie, where all brokers are credit representatives under its credit licence, brokers will be required to obtain accreditations with all available lenders represented on its lender panel. In any event, Aussie believes that a broker's individual accreditations should represent a broad enough range of lenders and products to allow them to meet the bests interests duty, in the majority of circumstances, although it is worth noting that the advertising materials and collateral (outside of their Credit Guide) of many brokers may promote the broad range of lenders available to them via their aggregator panel.

Importantly, Aussie requires its brokers to retain accreditation and knowledge of the products made available by lenders represented on our panel supported by comparison tools supplied by Aussie. Currently there are 24

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[8] As above, p.24 (RG 000.101)

available lenders that provide approximately 4,000 products (note – not all lenders are available in all states). To expect a broker to have, at all times, an up-to-date awareness of the vast number of additional products available in the market would likely place a significant onus on brokers and licensees, especially as these would generally represent a small percentage of overall loans settled in Australia. Aussie would also note that this potentially imposes a competitive disadvantage on brokers in that a lender, through its own internal sales channels, is not required to consider products available through other lenders when considering if one of their products meets a consumer's needs.

Accordingly, Aussie would argue that RG 000.101 would benefit from a small clarification to place the emphasis upon the broker considering the range of accreditations that they hold with lenders available to them through their aggregator's panel rather than a consideration of whole market. This intent appears to be captured in the scenario outlined in Example 5[9] and would be more appropriate when considering marketing material commonly used that would highlight the range of lenders available on the aggregator panel of the broker.

The guidelines also state that brokers "may look beyond your panel when considering whether other products exist that better suit the consumer's needs."[10] For the reasons outlined above, Aussie believes that this would be impractical given that the broker would have no ability to assist a consumer with an application for a lender not on their panel and may also expose the consumer to a risk of incorrect product recommendations given that the broker would not have the proper degree of expertise in the product features and credit policy of a lender with which they are not accredited.

However, it is important to note that there are circumstances where the complete absence of a required product could, in our view, be relevant to satisfying the broker's best interests duty – for example, where the broker is not accredited with any lender for a reverse mortgage or is not accredited with any lender participating in the federal government's First Home Loan Deposit Scheme. In such cases we believe that the guidance would be better expressed as a requirement for the broker to consider whether they could adequately satisfy their best interests duty or whether the consumer might be referred to another broker accredited for such product ranges, or suggest that they enquire directly with a credit provider that offers such products.

## [redacted] of discharge [redacted]ligation is not always clear

The draft regulatory guide reinforces that a best interests duty applies any time that credit assistance is provided.[11] The commentary provided within the supporting example also attempts to make it clear that the best interests duty is designed to operate as a point in time measure and not an ongoing one by stating that "generally, changes that occur after the recommendation is made are not relevant to whether the best interests duty has been complied with".[12]

As such, RG 000.105 and the supporting example focus on just one aspect of credit assistance, namely the act of *suggesting* that a consumer apply for a particular credit product. In the context of this example, there is no reference as to what might be required to satisfy other points at which credit assistance may be required, in

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[9] ASIC, Draft Regulatory Guide 000, Mortgage brokers: best interests duty, p. 24 (Example 5: Narrow panels of credit providers)
[10] As above, p.24 (RG 000.102)
[11] As above, p.25 (RG 000.105)
[12] As above, p.25 (Example 6: Point-in-time assessment)

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particular the act of assisting a consumer to ***apply*** for a particular credit product.

The further example provided in the draft regulatory guide would appear to provide clarification that the passing of time is a relevant factor to consider when moving from the act of ***suggesting*** customer apply to ***assisting*** them to apply for a particular loan product. However, Aussie is concerned that the example provided does not provide sufficient clarity to credit representatives and licensees as to what steps they should take to satisfy their best interests duty to the consumer.

Practically the product recommendation and application for credit are separate acts and are separated in time to a varying degree. Aussie believes more prescriptive or definitive guidance is required around what, if any, additional steps a broker should undertake between these two events and to the extent practical, what length of time might expire before this requirement would be triggered.

Potentially a simpler way to assess the best interests duty would be for a best interest duty assessment to apply for a set period of time from the date on which the initial credit assistance was provided and then cover related additional credit assistance provided by the broker. This would allow for better alignment with RG 209 which outlines a 90 day validity for an assessment that a credit product was not unsuitable.

## 6. Obligations for credit licensees – preventative monitoring

Aussie supports the obligation set out in the regulatory guide that credit licensees must take reasonable steps to ensure that their credit representatives who are mortgage brokers comply with the best interests duty. This includes "obligations [to] require licensees to take reasonable steps to prevent contraventions, rather than simply respond to contraventions after they have happened."[13]

The preventative measures licensees are able to take will evolve and become more robust as regulatory technology evolves and can increasingly enable real time review of files and applications. Currently technology that enables real time reviews, as opposed to flagging issues that may be suggestive of non-compliance, is not readily available. This means that until the market and accessibility of this technology improves such preventative reviews will need to occur manually.

[redacted]reviews are lik[redacted]nsumer due to the fact that the only point in time that a review can occur to prevent a breach of best interests duty would be prior to the application being submitted to a lender. This is because once the application has been submitted there is the potential for the consumer to suffer harm either through enquiries on their credit file or at settlement because of the recommended product itself. It is also the case however, that such pre-lodgement reviews then will delay the submission of applications which in some cases may be to the detriment of the customer.

Aussie believes that some additional clarity would be beneficial to licensees acknowledging that the technology is not yet available to enable automated reviews in real time and at scale, and that the extent and robustness of contemporaneous monitoring will evolve and improve over time as technology is built and created to support this legal requirement. In light of the potential detriment to consumers until technology adequately caters for this, we would also suggest that the obligation to mitigate rather than prevent is a more practical approach at this point in time.

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[13] As above, p. 35, (RG 000.148)

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## 7. Record keeping obligations of licensees

Aussie would note that the guidance at RG 000.143 regarding record keeping is rather confusing and conflicts with general practices required under the NCCP Act and RG 209 which outline that records be retained for seven years after the date credit assistance was provided.

The guidance provided appears to indicate that a broker or licensee would potentially be required to keep records for as long as the loan term which is both impractical and inconsistent with the principle that the "best interests duty applies any time you provide credit assistance to the consumer, based on the information available at the time"[14].

Aussie believes that additional clarity would be beneficial to brokers and licensees but would recommend that, for the reasons outlined above, that these remain consistent with the obligations under RG 209 and the NCCP Act.

[redacted] [redacted]

[14] ASIC, Draft Regulatory Guide 000, Mortgage brokers: best interests duty, p. 25 (RG 000.105)

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