



Australian Banking Association

16 April 2020

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

Dear Ms. Marshall

The Australian Banking Association (**ABA**) welcomes the opportunity to respond to the Australian Securities and Investments Commission (**ASIC**) consultation paper *CP327: Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty* and associated draft Regulatory Guidance.

As noted in our previous submission to Treasury, the ABA is supportive of the best interests duty (BID) and its important role in improving customer outcomes. As previously noted, our members have been focused on responsible lending requirements, but note the important role that the BID will play through loan distribution channels.

ABA member banks have noted a number of areas that they feel may require further detail to assist in the implementation of the BID.

Further detail is provided below, but the central issues are:

- Implementation schedule for the BID
- Broker consideration of individual circumstances
- The provision of services and service levels
- Cost as a priority factor
- Change of product after broker interaction
- Relative value of changes to loans and other factors/product features.
- Range of credit products and providers
- Application of the duty and conflicts priority rule
- Application to packaged products
- Other issues.

Our specific feedback is included in the Appendix below.

The ABA notes the considerable uncertainty due to restrictions in place in response to COVID-19 and is happy to assist ASIC and Treasury in the circumstance where they may need to reconsider the current implementation schedule.

Please contact me on [REDACTED] or at [REDACTED] if you require anything further.

Yours sincerely

Justin Mining
Policy Director



Appendix – ABA’s specific comments

1. Implementation schedule for the best interests duty

ABA members have raised concerns in light of the COVID-19 virus about the feasibility of implementation by 1 July 2020. These concerns are centered on:

banks having reduced numbers in workplaces and encouraging staff to work from home, as well as redirecting resources to work on critical functions within organisations and deal with customer concerns. This also extends to bans on face-to-face meetings and social distancing, which directly impacts on the ability to compile relevant information for responses to government

- the ban on mass gatherings, which has limited training and education for brokers, impacting on their understanding of their responsibilities under the BID, and ability to embed appropriate practices, and
- given the recent government announcements that restrictions have no clear end date, it is difficult to be able to determine when the required activity can recommence. Operationally, there will be some adjustment once restrictions are lifted while staff are shifted back to business as usual.

Noting the above, the ABA requests that Treasury and ASIC consider a 12-month relief period on commencement of the BID and conflicts priority rule until 1 July 2021.

2. Broker consideration of individual circumstances

ABA member banks note that considerations of what represents ‘individual circumstances’ are unclear and need to be further defined to ensure that there is not an unfair expectation on the broker to investigate every aspect of a customer’s circumstances which may be irrelevant to the credit assistance being provided.

The ABA suggests the regulatory guidance could be amended at 000.15 to reflect the following inclusions:

- factors that impact the customer’s financial situation, (including their financial (credit) experience, age in relation to the term of the loan, and the customer’s planned changes to their work or financial arrangements)
- factors that are specific to a particular customer (e.g., unique accessibility needs and/or vulnerabilities), and
- factors and product features which the borrower has expressed as being important to the borrower.

The broad nature of ‘individual circumstances’ means that it could potentially impact a lenders’ credit policy – for example, if the definition of individual circumstances extends to the consideration of a consumer’s health, their prospects for stable employment or the potential for their home to increase in value, this could create unintended biases against certain cohorts of the population, making it more difficult for them to secure a home loan.

In addition to the above, ASIC should consider modifying 000.15 as to articulate the intent of this section as follows:

The risk of non-compliance is substantially increased if a broker’s processes typically lead to a ‘one-size-fits-all’ outcome for consumers. The broker’s consideration of the individual circumstances of the consumer (and their needs, goals and financial situation) is particularly relevant to complying with the obligations.



Further to the above, it is unclear what a lender's obligation would be to raise concerns in the circumstances outlined in RG 000.69, example 2 and RG 000.136(c) where a broker has a high concentration of business with one lender. The ABA seeks further detail in relation to whether there is an obligation to act on this information, and who the lender would report the information to (i.e., whether this would fall under the breach reporting requirements).

3. The provision of services and service levels

RG000.46 of the guidance refers to 'level of service' of a credit provider, which we understand to include how quickly a loan will settle or how quickly the application will be assessed by a lender.

ABA member banks note that the 'level of service' is distinct from 'services provided', which captures a range of product and lender services on offer that may be of importance to the customer. These services could extend to customer support, access to other financial products or a branch network.

The ABA considers that these services should be included as a factor when brokers are assessing a loan. It is suggested that the regulatory guide refers to and clarifies the level of service and range of services available to the customer (and notes that these are distinct). Further, the 'level of service' should also include the quality of the service provided by the lender.

While members noted that developing and utilising industry wide measures will assist in providing consistency, it will potentially result in higher costs to implement and maintain. Any metrics developed by ASIC should inform government and industry of the consequences of inclusion/exclusion of particular services and whether they continue to offer value to customers.

4. Cost as a priority factor

ABA member banks note their concern that cost as a priority could lead brokers placing too much emphasis on the cost factor to the exclusion of other factors, which could result in outcomes which are not consistent with the best interests for a particular consumer. There is also a risk that an over-emphasis on cost may lead to product features becoming unavailable to customers (that they may wish to access) as product manufacturing responds to a 'cost as a priority' regulatory requirement. To reduce this risk, the ABA suggests that the language in the guidance could be adjusted to emphasise that cost is 'important', rather than it being a 'priority'.

Further, we note that there are a number of other services that are of interest to the customer and that a measure of value to the customer in line with their circumstances may be more appropriate. This can cover a number of different areas such as:

- identification of specific lender policies that are most beneficial in a customer's specific circumstances. Some lenders may target a subset of the credit market/have differing credit risk appetites which would influence the calculation of serviceability and resulting limit offered. As an example, a lender targeting the investor market would have policies that are more attractive to an investor
- compatibility to the customer's lifestyle and needs, including range of services, accessibility to other products, internet banking, availability of branch networks
- transaction based costs (e.g. costs to vary the loan/costs due to a customer-initiated event) should be excluded from the assessment - other than those indicated in a comparison rate, and
- promotional, one-time offers and incentives offered by lenders, such as cashback and loyalty points offers which may be attractive to eligible borrowers and influence their preference to choose a particular lender.

The ABA also notes the potential benefits of further clarity in respect to a consistent set of factors that brokers should assess when aligning loan products to the customer's best interests.



5. Change of product after broker interaction

There can be circumstances where a broker recommends a loan to a customer (e.g., basic, non-packaged loan) but the lender in onboarding a customer recommends a change in product (e.g., standalone card or offset account). This can reflect that the broker may not have access to detailed information about the range of products that the lender offers. The ABA suggests that should a lender change products after they have received their initial credit assistance, the responsible lending requirements should apply. This approach also notes the possible hawking restrictions that may apply in such circumstances.

The structure of paragraph 48 of CP327 is ambiguous, and does not give a firm understanding of when the broker's obligations to the best interests of the customer are finalised. It appears the intention is to note that while the credit assistance may take place at a point in time, the broker has obligations to assist the customer in the transactional phase through to settlement. This may include sourcing further documents or explaining aspects of the loan contract to the customer.

Noting the model usually involves the broker presenting the customer with options and suggesting the one that is best aligned to their needs, objectives and circumstances, the customer selecting an option and then the broker assisting the customer to apply for the loan with that lender, the ABA suggests that the language in the guidance be reviewed to ensure that it is consistent with this understanding. Any cross over of responsibilities between lender and broker will be confusing as when the BID applies and ceases.

A suggestion could be that the heading of '*After the recommendation is made*' is changed to language such as 'after the broker provides their suggestions to the customer, and provide further necessary assistance through to the settlement of the loan with the lender'.

The ABA notes that Aggregators and ACL holders will be responsible for ensuring that the broker has met the requirements of the BID. Lenders have noted that they do not have sufficient visibility of the broker's day to day activity to monitor their BID compliance.

6. Relative value of changes to loans and other factors/product features

RG 000.64 includes a reference to "*the term and structure of the credit product*" as an example of the factors a broker could consider in assessing whether a credit product will be in a consumer's best interests.

Noting the importance that the guidance has placed on cost factors, the ABA suggests a detailed example should be included that clarifies how a refinance can/should be assessed by the broker. For example, changing a loan with 18 years remaining, to a new loan term of 30 years may not be in the best interests of the customer. In the long run, the customer may pay more interest, even if their new repayments were less than those for their current loan. Ideally the example should also reflect an approach that considers costs calculable over the life of the loan.

Further, the ABA suggests that ASIC consider providing more detail on the broader range of factors that relate to the true cost of a product to a consumer (beyond interest rates, fees and charges), which ought to be considered by a broker (e.g., the length of the loan term - particularly in the context of a refinance, and any lenders' mortgage insurance which may apply). An example that notes that costs savings may not outweigh expenses in the first year or two following a refinance, but they might do after that period may assist in refining 000.54, specifically in regard to expenses incurred against the potential short and long term savings.

The ABA is also concerned by the use of the term 'net benefit' in 000.65. Net benefit suggests a comparison of all factors including both cost and non-cost based. Non-cost benefits are difficult to quantify (e.g. the potential value of a rewards scheme). The ABA suggests the individual consumer good value in 000.65 is sufficient and that the term 'net benefit' should be removed.



7. Range of credit products and providers

The guidance suggests that even though brokers must be satisfied that the credit products they can access are sufficient to allow them to act in their consumer's best interests (RG 000.100), brokers are to have regard to products that they do not have access to through their panel of lenders (RG 000.101).

In practical terms this may be difficult for a broker to do and could be an onerous process given the scale of some broker panels (a broker panel may capture a large percentage of available loan products, which is estimated to be over 2100).

The ABA suggests greater clarity is required on how a broker would be expected to have awareness of the products on the broker's panel of lenders outside those they are currently accredited with, or lenders not on the panel that a broker has (where a broker may not be able to access accreditation).

8. Application of the duty and conflicts priority rule

The guidance for the BID suggests that it applies any time a broker provides credit assistance to the customer (e.g., if a broker provides credit assistance suggesting a customer remain in a home loan that they previously helped them obtain, the broker needs to act in the customer's best interests when doing so). On this basis, the duty would apply if the broker assisted the customer to access the loan.

This reflects the requirements outlined in the NCCP Act (Div 3, Section 8), which notes that to be considered credit assistance, the customer should (on the basis of the suggestions made) acquire a new credit contract, increase an existing limit or be advised to retain their current contract. On this basis, the BID should apply for any credit assistance consistent with these factors.

The ABA wishes to note that it is common for aggregators to have both credit representatives under its own licence, and also credit licensees that 'aggregate' through the Aggregator to access that Aggregator's panel of lenders. It is suggested that further clarity be added that determines whether the Aggregator is responsible for the actions of an ACL holder accessing their aggregation services.

In regard to the conflicts priority rule, the ABA suggests that ASIC provide greater clarity about its interaction with the BID. RG000.126 states that the *'the conflict priority rule applies each time you provide credit assistance to the consumer'*. One means of providing further detail could be to include threshold parameters in line with the new legislation to define which credit assistance and credit product/s this applies to. This will assist industry in updating their systems for implementation of the new regulations.

9. Application to packaged products

Brokers do not have access to detailed information regarding credit cards and other products that may be part of a packaged loan. In many cases, the products offered with a package are structured in such a way that they operate directly with the particular loan product suggested by the broker.

The ABA suggests 000.112-118 be amended to reflect that the broker should consider whether the package as a whole is best for the customer, rather than on an individual feature/product level.

Further, the ABA recommends that ASIC clarify whether non-home loan products such as credit cards, car loans or personal loans are captured by the BID depending on how they are submitted. For example, it is understood that products bundled/packaged with a home loan will be subject to the duty, however it is unclear if it applies when a mortgage broker provides credit assistance with a car loan. We suggest amending RG 000.110 to cover this distinction and also insert examples which covers a scenario where a mortgage brokers provides credit assistance to a client for a home loan and a credit card (a more common form of a bundle) and where a mortgage broker provides credit assistance for a car loan only.



10. Other Issues

The ABA also wishes to note the following in regard the questions posed in CP327 and the draft regulatory guidance:

- Liability – in circumstances where a dispute has been raised in relation to whether the BID has been satisfied, ASIC should be clear that the lender only has responsibility to meet the responsible lending obligations, and the broker is required to meet the BID. Further, there should be a presumption that the broker has satisfied the BID when a credit application is submitted.
- Record keeping - noting the requirements outlined in S 95 of the NCCP Act, records should be kept for 7 years after the closure of the loan.
- Personal advice – noting that personal advice is not necessarily required to meet the BID, it is suggested that Example 1 be clarified to note that the broker should focus on understanding the purpose the customer wants to fulfil and why an offset account included with a home loan product is appropriate. Finally, there should be no expectation on the broker to provide personal advice unless they are qualified to do so, and the customer wants to avail themselves of these services.
- Other examples – There is scope for ASIC to include a number of other examples relating to conflicted remuneration which would assist in designing compliance systems. Specific examples may be:
 - Drawdown net of offset and when the drawdown cap does/doesn't apply
 - Drawdown Cap, and the interaction with principal increases within the first 12 months of drawdown
 - Lender monetary contribution to education and training.
- Hawking - The ABA notes that presenting loan customers with product options outside the suggested packaged product is inconsistent with the proposed hawking requirements currently being considered. The Regulatory Guidance should reflect the restrictions placed on offering products to customers, particularly in respect to those that the broker may not be in a position to consider in detail.
- Lender tools - Banks can and should only be liable for the accuracy and validity of the information in relation to their own lending products and services.