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Dear Madam

ASIC Consultation – Mortgage brokers and the best interests duty
Submission by Australian Finance Group Ltd ACN 066 385 822

Australian Finance Group Ltd (**AFG**) was founded in 1994, was listed on the Australian Securities Exchange in 2015, and has grown to become one of Australia's largest mortgage broking groups. Approximately 2,950 brokers (of which 1320 are credit representatives of AFG) arrange residential mortgages, commercial finance and other loan products through AFG.

AFG welcomes the opportunity to respond to the consultation paper *Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty* (the **Consultation Paper**), and the draft *Mortgage brokers: Best interests duty Regulatory Guide 000 (*the **Regulatory Guide**) accompanying the Consultation Paper, issued by the Australian Securities and Investment Commission (**ASIC**) on 20 February 2020. For the purposes of this submission, AFG's response is limited to providing some key observations below.

1. The mortgage broker best interests duty generally

AFG agrees in principle with the majority of the provisions set out in the Consultation Paper and concurs that requiring mortgage brokers to act in the best interests of consumers will strengthen existing protections for consumers who deal with mortgage brokers.

As an industry, we believe that operating in the best interests of customers is central to ensuring customer satisfaction. With referrals playing such as important role for mortgage brokers, the business model of all successful mortgage brokers is built on satisfied customers. The interests of mortgage brokers and ASIC are therefore aligned on the importance of making customer interests a priority.

2. The 'best interests' obligation

The recent changes to the *National Consumer Credit Protection Act* 2009 Cth (**NCCP**), implemented through the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act* 2020 (Cth), does not include a definition of the 'best interests' obligation. The Regulatory Guide states that that the best interest obligations "*are high-level principles"* and the Guide therefore does not *"contain prescriptive steps for mortgage brokers and others to follow to ensure they comply*".[1]

AFG agrees with the principles-based approach to define what conduct will constitute acting in the best interests of a consumer and appreciates that the Regulatory Guide has been drafted to provide further guidance on what matters brokers should consider when assessing what product(s) are in a consumer's best interest.

AFG was pleased to see that in addition to the cost of a credit product the Regulatory Guide recognises that a number of other non-cost considerations may affect what is in the consumer's best interests. However, AFG disagrees with the Regulatory Guide emphasising that brokers should prioritise the cost of a credit product[2] over other non-cost factors. In AFG's experience 'best' does not always mean 'lowest rate' for consumers.

AFG submits that a customer's stated needs and objectives should inform the priorities for a broker in discharging their duty rather than the first priority being the cost. In our experience, the services provided by a particular lender form an important part of why a mortgage broker recommends them (often, more than the cost of the product), based on the stated needs and objectives of the customer. These services include:

(a) **Approval time**. Many home sales are time sensitive to meet a contracted settlement deadline and a customer may have already paid a deposit to a seller. This deposit will be at risk of forfeit if the lender cannot meet the required settlement date;

(b) **Credit policy and risk appetite**. Particular customers, or the proposed property, may be outside a prime lenders' policy, so the available alternative products may not have the lowest rate i.e. the credit risk of the customer and the relevant loan will also have to pass the lenders' credit policies;

(c) **Customers do not always prioritise rate over the choice of lender**. Many customers want to use a non-Big Four bank, as evidenced in the shift to non-majors following the release of the Final Recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[3]. Other customers prefer services such as sophisticated mobile banking apps that larger lenders offer ahead of lower rates at non-ADIs.

We are therefore of the view that the Regulatory Guide should not encourage brokers to prioritise cost/interest rate every time.

[1] Paragraph 000.10, Regulatory Guide.
[2] Paragraph 000.49, Regulatory Guide.
[3] See AFG's Mortgage Index for Q42019 at https://www.afgonline.com.au/wp-content/uploads/2019/07/afg-index-q42019.pdf which shows non-major lender market share of lodgments increasing to 42.3% from 35.5% in Q42017 and 28.3% in Q42015.

AFG otherwise submits that some further worked examples of how a broker complies with the best interest duty in a situation where a consumer does not prioritise cost over other factors would be useful within the Regulatory Guide. This could include, for example, where there are two similar loan products and one lender's product has a slightly higher interest rate but a quicker loan application processing time; or an example where a consumer wants to use a specific type of lender due to its add-on services, rather than being focused on the interest rate of the product.

3. Packaged products

In line with the *Replacement Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures) Bill 2019*, the Regulatory Guide[4] clarifies that the best interests duty will not only capture credit assistance relating to residential mortgages but also ancillary credit such as credit cards and personal loans that are packaged with mortgages.

In the instances where an ancillary credit product is taken out with a mortgage, the Regulatory Guide states[5] that brokers should identify and consider, for each product within the package:

(a) how those products will meet the consumer's needs, objectives, priorities and preferences; and

(b) whether (and why) suggesting the consumer take out that product would be in the consumer's best interests.

The Regulatory Guide suggests that as part of this process brokers should consider the relevant terms and conditions of the ancillary credit product, as well as other features such as the credit card's frequent flyer program. However, AFG submits that:

(a) advising consumers on credit cards is not part of the general services provided by brokers; and

(b) brokers are not accredited by lenders or credit card providers to provide such advice in relation to these credit products. Brokers will instead notify the lender if the consumer would like to take out a credit card as part of their home loan application. This application will then be reviewed and assessed by the lender or credit card provider themselves rather than the broker.

The features and conditions of credit card products should therefore not be a relevant consideration for a broker in discharging their best interest duty when providing credit assistance for a residential home loan unless the broker has been specifically accredited by a lender to provide such services. To require brokers to advise on these matters is, in our view, unreasonable and outside of their authority. AFG submits that brokers should instead only be required to consider whether a credit card product will influence a consumer's ability to service their mortgage in accordance with their responsible lending obligations under the NCCP. AFG submits that this should be clearly articulated in the Regulatory Guide.

[4] Paragraph 000.112, Regulatory Guide.
[5] Paragraph 000.114, Regulatory Guide.

Contrary to AFG's submission above, if ASIC does retain the guidance that brokers should consider the relevant terms and conditions of a credit card product, it would be useful if ASIC could `provide some

further examples of how it expects a broker to discharge their best interests obligations when dealing with packaged credit card products. Such guidance could also include a detailed list of the features that ASIC expects brokers to review for credit card products.

4. Commercial v retail brokers

The NCCP states that the best interests duty will apply to mortgage brokers who provide credit assistance in relation to credit contracts secured by mortgages over residential property.[6] However the Regulatory Guide does not contain any further commentary for brokers on determining whether they will be subject to this duty.

AFG submits that it would be helpful to the industry if ASIC added a section to the Regulatory Guide that deals with the applicability of the best interests obligation particularly to commercial loans. For example, ASIC should emphasise that a broker whose primary business is to arrange commercial finance will need to comply with the best interests obligation if they decide to assist a customer with a residential loan. Conversely, a mortgage broker who assists a customer with a commercial loan (which is not subject to the NCCP), would not be required to comply with the best interest obligations in relation to that loan.

More generally, AFG submits that the Regulatory Guide should include a statement reminding brokers that they will need to consider the purpose of the loan rather than the primary focus of their broking business when determining whether they must comply with the best interests obligations.

5. Presenting options to consumers

AFG agrees with ASIC's view that in most instances, brokers should present consumers with more than one credit option.[7] However, the NCCP does not prescribe how many home loan options should be presented to consumers when acting in a consumer's best interest. The Regulatory Guide states that:

> "*You should assess the needs of each consumer on a case-by-case basis, and then determine the number of options you should provide to that specific consumer. As a matter of good practice, you should present a consumer with more than one option, unless there is a good reason not to. For example, a consumer's financial situation may mean that very few credit products are available or suitable for them*."[8]

AFG agrees with ASIC's view that the number of products presented to a consumer should be determined on a case by case basis. However, AFG submits that it would be useful for the Regulatory Guide to provide more practical examples of how a broker discharges the best interests duty when, for example, there is:

(a) only one product in the market potentially available to a consumer; or

[6] Section 15B and 158LA of the NCCP.
[7] Paragraph 000.18, Regulatory Guide.
[8] Paragraph 000.79, Regulatory Guide.

(b) only two products in the market potentially available to a consumer; or
(c) a large number of products that are available to a consumer.

6. Looking 'off panel'

We note ASIC has sought "*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*."[9] In doing so, the Regulatory Guide states that brokers are not necessarily required to recommend a specific product outside of their panel but may need to look beyond their panel when considering whether other products exist that better suit a consumers' needs.[10]

In AFG's view the potentially inconsistent statement may lead to confusion for brokers as to when they should be looking at products 'off panel'. AFG submits that ASIC should make a clear statement in the Regulatory Guide that brokers are not under any obligation to look off their panel of lenders when determining whether a product is in a consumer's best interests unless they have been made specifically aware of a product by a consumer or another source i.e. a broker cannot be wilfully blind to a product 'off panel' but must not otherwise actively look 'off panel'.

AFG submits that ASIC should therefore provide further guidance which clarifies that:

(a) brokers do not have a positive obligation to look 'off panel' for products, rather brokers should decline to broker a mortgage for a customer if they do not have a product for them on their panel which is in the consumer's best interests; and
(b) it is for aggregators, credit licensees and brokers themselves to generally ensure that their available panel of lenders is well rounded and has a range of products suitable to consumers.

If ASIC disagrees with our view, AFG submits that more detailed guidance and practical examples should be included within the Regulatory Guide that set out ASIC's expectations for when brokers should be looking 'off panel'.

Please do not hesitate to contact AFG if you require any further detail about the matters raised in this submission or if AFG can provide any further assistance in the development of alternative proposals.

Yours sincerely

Mark Hewitt
General Manager Industry & Partnership Development

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[9] Paragraph B8, Consultation Paper.
[10] Paragraph 000.102-103, Regulatory Guide.