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Level 7, 120 Collins Street, Melbourne, 3000

25th March 2020
by email

Dear Ms Marshall

The FBAA welcomes the opportunity to make a submission in relation to Consultation Paper 327: Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty and the associated Draft Regulatory Guide: Mortgage brokers: Best interests duty.

Delay to commencement

The FBAA requested last year that the introduction of any best interests duty be carried out over a long timeframe to allow for fulsome consultation and to give industry time to prepare. We advocated for 2021 commencement. This was rejected on the basis that Government had an ambitious goal to accelerate acceptance and implementation of the Royal Commission recommendations.

The widespread concerns around the impact of COVID-19 have again brought the Government's timeframe into focus. We strongly recommend that Government defer the commencement of the BID obligations. This will provide more time to consult on the regulatory guidance to deliver more accurate and meaningful guidance while also giving industry more time to develop their systems and make any necessary changes to their practices. The disruption caused by the introduction of measures in response to the emerging COVID-19 threat will mean that many businesses may temporarily cease activities or scale down significantly and many will not have access to external services such as legal and regulatory compliance advice and IT. We support a 12-month extension to the commencement date with members being able to voluntarily adopt early compliance.

Comments on guidance

We hold concerns that the draft Regulatory Guide substantially increases the obligations on mortgage brokers well beyond the recommendation from the Royal Commission and the legislation and well beyond the obligations of other participants in the credit industry. This was not the recommendation nor intention of the Royal Commission. The original recommendation 1.2 from the Royal Commission Final report appears below:

1.2 "The law should be amended to provide that, when acting in connection with home lending, mortgage brokers must act in the best interests of the intending borrower. The obligation should be a civil penalty provision".

The FBAA maintains that the legislation and subsequent guidance extend considerably further than the recommendation of Commissioner Hayne.

It must be acknowledged that the consumer credit regime remains a ‘product suitability’ regime supported by a best interests duty. It is not a ‘best product’ regime. What constitutes a best outcome for a consumer is made up of many variables – too many to individually list (as the draft guidance acknowledges) and too many to expect a broker to record every single time they provide credit assistance.

We are concerned to ensure the best interests duty is not administered on the basis that it carries a reverse onus of proof. It is not incumbent on a broker to prove that a recommendation was not, not in a consumer’s best interests. The regime must be administered on this basis. A party must first have an evidential basis to assert that the BID may not have been complied with before a broker is required to mount a response or prove otherwise.

Putting this another way, a broker, doing their best, giving a credit assistance to a consumer which is not unsuitable, should be seen as meeting the BID unless ASIC (or some other party) has a basis to demonstrate otherwise and puts a case to the broker that is based on more than a mere assertion that the broker must demonstrate they have complied with the best interest obligations. We recognise the importance of good record keeping for brokers and will work with industry to communicate this message, but this is not the same as accepting that compliance with the best interests duty is measured predominantly by the quality of records maintained by a broker. We continue to challenge some of the most fundamental thinking around the additional regulation of mortgage brokers when compared to banks and other finance brokers.

It appears the legislation and administration of it is targeted to deliver on what Government and ASIC have decided is the ‘right outcome’.

It is a perpetual source of frustration for us and our industry that Australia appears to be legislating and regulating to give effect to consumer expectations where such expectations are not always balanced or well-informed.

Taken directly from paragraph 71 of REP628: “Consumers going through a mortgage broker were also more than twice as likely to believe that the broker got them the best interest rate available (42%) compared to consumers who took their loan out direct with a lender (17%)”. We grapple with the notion that we are only talking about making sure the 42% of consumers get what they think they should (whether this belief is correctly held) while we appear unconcerned that only 17% of consumers believe they’ll get the best rate when dealing direct with a lender. Thinking such as this underpins our concerns about the imbalance and should be challenged further.

We provide our responses to specific questions and the draft RG examples as follows.

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 	<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</p>

<p>the consumer’s best interests; and (c) presenting information and recommendations.</p>	<p>particular relevance to the best interests duty?</p>
<p>We agree these are the logical components of how a broker will assess a consumer’s needs and objectives before making a recommendation. We detail elsewhere in this submission that some of this is intuitive and/or steps a broker will take on behalf of their entire client base (for example, undertake product research) and we need to advise caution on the individual record keeping obligations for each transaction where some actions are taken ahead of providing credit assistance to more than one consumer. The guidance should make it clear that a broker does not need to create individual records each time they provide credit assistance to record the fact they have undertaken product research and know the range of products their customers may be eligible for.</p> <p>Additional guidance would be welcomed on what records a broker could create/ retain to demonstrate they have met their obligations to know the products they are advising on. Particular examples relating to records that could be maintained at a portfolio/practice level (i.e. not an individual customer level) would be very useful.</p>	
<p>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.</p>	<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>The duty is for a broker to know the suite of products they provide credit assistance in relation to and align the consumer’s requirements and objectives with the right product. A broker will rely on their product knowledge when taking instructions from a consumer and instinctively include or exclude certain products from the pool of eligible products based on the consumer’s eligibility criteria and their objectives.</p> <p>The record keeping requirements need to reflect this. What we do not want to see develop through the guidance is a position that suggests a broker must create a record that steps through every decision point for every instance of credit assistance solely to demonstrate to an external party that all options were methodically considered before a recommendation was made. The outcome of the credit assistance is the most important evidence of whether a recommendation was made in the consumer’s best interests or not.</p> <p>For example, consider a consumer who has been in a new job for 7 months or who has a 5% deposit saved. Their circumstances will exclude any lender that requires applicants to have minimum 12 months or more in their current job or a deposit larger than 5%. Brokers utilise product knowledge and technology to assist them to eliminate products where the consumer’s circumstances will take them outside of the eligibility criteria. The broker then focuses on making recommendations to the consumer regarding products they are eligible to apply for.</p>	

We are concerned to ensure the record keeping obligations focus on what a broker does recommend and not on creating records regarding the products they did not recommend. A broker should not be at risk of breaching the best interests duty for failing to create a record explaining why ineligible products were excluded. What would ASIC's approach be to undertaking a retrospective desk-based review of the broker's files. What records will ASIC want to see and why?

We support additional, accurate guidance on packaged products. It is important to recognise that credit assistance providers rarely have any control over bundled products and are unable to decouple certain bundled products. Where the primary product is the right one for the consumer, a broker is acting in the consumer's best interests by recommending that bundle.

The FBAA among other industry representatives worked closely with Treasury to ensure the legislation recognised product bundling and applied the best interests duty to the package and not the individual products within the package.

We note there is some inconsistency between the recent draft design and distribution obligations guidance and the best interests duty guidance. We hope to see more consistency on the recognition of product bundling between the best interests duty and the design and distribution obligations.

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.

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?

Question B3Q1 is quite specific to the practices of individual brokers. We cannot provide a detailed response to this question at a representative level.

There are many situations where a broker should and will make further inquiries of consumers. Most obviously, brokers will make further inquiries where:

- The information provided by the consumers is incomplete;
- Where there is conflicting information.

We caution against guidance suggesting the requirement to make further inquiries extends too far. If the information provided by a consumer appears on its face to be complete and there is nothing obvious to put the broker on notice that the information is not correct, a broker can, and should be able, to proceed with confidence. The duty to make inquiries must not suggest that brokers need to interrogate every piece of information to potentially uncover a mistruth. Naturally any information that is clearly inconsistent should be challenged.

The FBAA has made repeated calls for guidance to acknowledge that consumers also have obligations when providing information to brokers and credit providers. This is explicitly acknowledged in the legislation (s154 of the Code) however regulatory guidance in general, places emphasis only on the obligations of licensees and representatives.

We invite ASIC to include additional material in the regulatory guidance recognising that consumers must provide complete and truthful information and that credit assistance providers may have some protection from claims where the information provided by the consumer was misleading. Our view is that any dispute or investigation should explore, as a preliminary matter, whether all parties provided truthful information. We make this suggestion not to malign consumers but to encourage balance and fairness in the regulatory guidance. AFCA frequently references regulatory guidance and it is important that it be balanced and complete. It is also material when considering the outcomes of credit assistance provided by licensees and representatives.

In relation to the section commencing at RG000.39 titled **“Incomplete or inaccurate information about a consumer’s circumstances”** we recommend ASIC reconsider the use of the word “incomplete”.

It is more correct for the guidance to focus on inaccurate information or information which misleads by omission (in this sense it is *incomplete* but deliberately incomplete in order to influence the outcome of the application).

Accuracy of information is paramount. What constitutes “complete” information may be dictated by the lender’s application form. A broker frequently obtains more information from a consumer than is communicated to the lender through the application. Each lender asks for different information depending on what is relevant to its lending decision. A broker cannot breach the BID by not providing information to a lender where such information is not sought. Care must be taken not to assess a broker’s compliance with the BID against records obtained from other sources – such as from the licensee. Aspects of REP 516 were informed by records obtained from indirect sources and this was one of the criticisms advanced by the FBAA in response to REP516. ASIC should reflect on this to avoid building on the mistakes in the methodology of REP516.

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.

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

It is not clear what ASIC intends where it references an ‘holistic’ approach. Consumers use the services of mortgage brokers to help them narrow down the hundreds of mortgage products from dozens of providers in the marketplace and to help them manage the application process. Mortgage brokers do not have, and it is not realistic to suggest they should have, knowledge of every product in the marketplace. It is not incumbent on a broker to adjust what would otherwise be a suitable recommendation to ‘something else’ merely to anticipate how a consumer might use the product in ways other than as it is intended.

Another challenge with the notion of holistic assessment is the difficulty of weighting financial factors with non-financial. It is relatively easy to compare the interest rates on two loans, but far more difficult to weight the benefit of an offset against a lower rate product where there is potential for the consumer to use it. The “value” may lie in how efficiently the consumer utilises the

opportunity. ASIC needs to provide further guidance and examples on what it considers to be a holistic approach.

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 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.

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?

The factors and product features most relevant to a consumer vary widely. Cost is most definitely a primary consideration. We believe everyone recognises that it is not acceptable to promote a high cost product over a low cost product where the benefits of the higher cost product are not material or are disproportionate to the additional cost. Guidance reinforcing this concept is supported.

As ASIC has recognised, consumers often do not understand how to rank priorities in order of importance, or alternately, consumers place excessive bias on some aspects over others to the potential detriment of being able to identify the right product for their circumstances. It is not reasonable to suggest that a broker should override a consumer’s objectives on the basis that their best interests can be met by strategies or priorities the consumer has no regard for. We will accept that the guidance may indicate that a broker may choose to point this out without being obligated to action it.

Where REP628 observes that 58% of consumers surveyed reported receiving 2 or less options, the report does not explore whether those consumers wanted more options than this. The observation in isolation to the follow up question is largely meaningless, however it carries an inference of inadequacy because the authors of REP628 believe multiple options should be provided. Consumers interviewed/pollled for REP 628 demonstrated some difficulty with being able to reduce the options to a single decision point. How many options would a credit provider give that same consumer?

Consumers seeking out the services of other professionals do not ask for options. They ask for solutions. We reiterate previously ventilated concerns that the role of a broker is being miscast. While many brokers already provide consumers with multiple options, the business case for consumers needing multiple options has not been made out by ASIC. What consumers want is guidance and advice. They are better placed to receive this from brokers than they are from credit providers.

The best interests duty obligations do not override a consumer’s requirements to the extent that a broker must only offer to provide assistance for a product they deem to be in the consumer’s best interests even where the consumer does not want it.

We recommend an addition to RG000.46. RG000.46(c) talks about taking into consideration a consumer's personal circumstances and financial situation to determine the extent to which this affects suitability. We recommend either including the words "and product eligibility" or to insert a new paragraph (d) stating the broker should consider the consumer's personal circumstances and financial situation to determine product eligibility against the criteria set by lenders.

We recognise that cost is a fundamentally important factor in a recommendation for a mortgage. The draft RG goes too far in the expectations placed on brokers with respect to considerations relating to cost. Importantly, lenders change their rates and other costs regularly. No single lender is consistently the cheapest. We recommend replacing references to "the lowest cost options" to something more forgiving such as considering products from a group of low-rate products.

Focussing too heavily on the rate offered by the credit provider presents a distorted picture of what true "value" is. The absolute lowest rate products offer little flexibility while many consumer's lives and incomes are dynamic. We argue there is as much risk in placing the wrong consumer into an inflexible, low-rate product as there is placing the wrong consumer into a higher rate product with some flexibility. The risks are different depending on how each product is used (not which is ostensibly the best for the consumer). How each can be measured and monetised is where the difficulty of side by side comparison comes in.

It is easy to reach a conclusion about which product is better for a particular consumer when there is large interest rate differential between a low-rate fixed repayment product and a much higher-rate product with a rewards program and other features the consumer neither wants nor needs. It becomes much more difficult where the interest rate differential is much lower between the products and parties need to place a value on less tangible features such as the possibility of making additional payments or the likelihood of success of the application based on lender criteria (the applicant's credit history/credit score, class of occupation, nature and duration of employment (i.e. self employed, part-time etc) are all hugely material. This is further compounded when coupled with an understanding that the rates of each lender could change at any time in the future such that the apparent margin between the products may increase or reduce. All of these considerations are live for a broker each time they see a new client. It can be the case that what consumer wants is not achievable because of their circumstances. The broker's role is to focus on what a consumer can achieve.

The guidance should acknowledge that individual lenders change the "cost" of their products independently of other lenders and that a broker will not breach their BID by failing to chase today's best rate, nor will they breach their BID by failing to recommend the cheapest loan where they know there are better products available for the consumer.

Again we have to stress this is not a cheapest product nor best product (as defined by being the cheapest) obligation and credit providers have absolutely no restrictions on them requiring that they consider the cost of the products they assist consumers to apply for. The only difference between the obligations is the channel through which the consumer chooses to access the product while the difference to the outcome can be enormous.

We support the recognition at RG000.75 that a mortgage broker may assist a consumer to apply for a particular product even where the broker may believe there are better products. Record-keeping will clearly be important.

In practice, consumers want the product that will meet their future needs and objectives while a broker must use information about the consumer’s immediate history and current circumstances when preparing a loan application. Thus a consumer with a poor history of saving may not appear to be a good candidate for a redraw or offset loan, however the consumer may understand the benefit of making additional payments towards their loan and believe they will change their spending habits once they take out on the loan. Justice Perram in the recent ASIC v Westpac case recognised that it is reasonable to expect that consumers will “trim the sails” after taking on a new credit commitment. Consumer behaviour is critical. We do not believe this is adequately addressed in the draft guidance.

Any assessment of the credit assistance provided by the broker must be based on the information available at the time of the application and not on performance subsequent to the loan being entered into since the latter tests the consumer’s conduct rather than the broker’s recommendation.

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.

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?

Many brokers already provide a consumer with more than one option. The challenge is always to manage the amount of information and to not overload the consumer with information. Many seek the assistance of a broker to help make a decision and do not want to be presented with options. ASIC’s REP 628 appears to suggest that even where brokers provided multiple options, they either didn’t explain which one to take or influenced the consumer’s decision (see REP628 paras 154-157). From this observation it is not clear what ASIC wants. Does ASIC want brokers to present multiple options and to then ensure the consumer selects the one that is in their own best interests without being too heavy handed to suggest which one the consumer should take? The objective of ASIC’s guidance in this draft RG is not clear.

The guidance must reflect situations where a broker may only be able to recommend one product from their panel of lenders depending on the consumer’s eligibility criteria. Sharia lending is one example. It is acceptable for a broker to recommend only one product in these circumstances and no adverse inference should be drawn from it.

We are further concerned there is an expectation being set by ASIC through the guidance around RG000.80 that brokers prepare something akin to a statement of advice that is used in financial planning. The NCCP commenced with virtually no record keeping obligations on credit assistance providers beyond providing the statutory documents of a credit guide, quote and credit proposal disclosure document and creating an assessment of unsuitability (which more recent guidance has had to clarify should be a written assessment of unsuitability in all cases as many licensees were not making contemporaneous written assessments).

We recognise that record keeping obligations are increasing but want to ensure prescriptive record creation requirements are not introduced by stealth or that the objective for the creation of these records is adequately enunciated. The effect of the current draft guidance would be that compliance with BID will be assessed upon an expectation to see an extensive written proposal of multiple options presented to a consumer.

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.

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?

RG000.93-RG000.99 is clear enough and needs no further elaboration.

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.

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?

We have strong objections to the structure and content of the guidance around the range of credit products and providers.

Again we ask all parties to bear in mind the enormous gap between the obligations on credit providers to conduct an assessment of unsuitability and with no requirement to consider the consumer’s existing product or the broader marketplace, and the expectations in the draft regulatory guidance as they apply to mortgage brokers.

FBAA members are required to undertake a minimum of 25 hours CPD each year to maintain their product knowledge. This is to ensure they know the products on which they provide credit assistance. Owing to the enormous number of products and credit providers in the marketplace it is not feasible to suggest that brokers should be aware of the products they do not provide credit assistance in relation to.

It is not clear what potential harm ASIC is attempting to address through this draft guidance. A broker with even a small panel of lenders will offer more product range than a credit provider promoting their own products. A consumer approaching a credit provider will be offered no choice.

We recommend removing any reference in the guidance to an expectation that brokers should maintain an awareness of products and features that may be available in the broader market. Alternately this must be much better explained – including the basis of why ASIC has this expectation, how it is appropriate that it should apply to brokers and not lenders, and how it will be measured.

Brokers intentionally work from a panel of lenders for which they are accredited. Obtaining and maintaining accreditation requires brokers to regularly review the features of their products and requirements of their lenders. It is not possible to know the entire market. Credit providers providing credit assistance in relation to their own products are entitled to remain ignorant of competitor products.

If ASIC is concerned there are brokers operating in the Australian market that intentionally have a very limited panel of poor products such that they can only recommend products that are not in the consumers’ best interests they should more directly address this in the guidance by specifically warning licensees not to do it.

We are unable to comment in response to B8Q2.

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.

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?

Yes we agree with the guidance as it is presented in paragraphs RG000.105-000.109.

It is worth noting that under the new laws, almost all contact from a consumer will trigger a positive obligation on a mortgage broker to provide credit assistance unless they refuse to deal with the consumer at the outset. Once a consumer asks a broker if their current product is the “right one” or if there are “better products in the market” (both questions are frequently asked of brokers), the

broker’s response will either constitute a “remain in the current product” recommendation or a new product recommendation; both of which constitute credit assistance. This is reflected in RG000.107

When coupled with the conflicted remuneration provisions permitting clawbacks for up to 2 years, this creates a situation where mortgage brokers may be under a best interests duty obligation to recommend that a consumer switch from their current product, triggering a clawback against their previous credit assistance if it was provided less than two years earlier. Again we note that credit providers could advise the consumer to stay where they are without any similar risk.

In the above situation, the only person adversely impacted is the broker, however they are the only party that has no control or influence over the factual situation that drives the outcome. A lender may have altered their rates and/or the consumer’s circumstances or needs and objectives may have changed, where the broker has done nothing but provide a quality service.

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.

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?

We disagree with the guidance around bundling. The FBAA and other parties consulted with ASIC and Treasury in February 2020 over the proposed regulatory guidance. The language used in the meeting was for the best interests duty to apply to the predominant debt in the bundle and the parties agreed with this approach. As a result of separate, earlier consultation, Treasury issued a revised explanatory memorandum which clarified that the duty applied to the package as opposed to each product within a bundled product. We refer ASIC to paragraph 3.26 of the Revised Explanatory Memorandum. The current drafting does not reflect the position agreed in the February meeting or the revised EM from Treasury.

The BID cannot be applied to each product within a bundle where the consumer’s overall position is improved. Product bundles are developed by product issuers and not brokers. Brokers have little to no ability to unbundle products.

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.

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?

The question is directed at brokers and we will defer to other submissions for content on this question. We do wish to point out that brokers regularly refer consumers to accountants for tax advice.

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.

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?

The focus of the conflict priority rule is to ensure a broker’s recommendations are not influenced by a known conflict to the detriment of the consumer. The test as it is expressed in RG000.123 appears reasonable.

We support an approach that recognises that only material conflicts need to be dealt with in this way. There is a risk that the ‘related parties’ test is too broad where there are structural relationships a broker is unaware of or that cannot directly influence the credit assistance provided by the broker to the consumer. It would not be a logical outcome of this requirement to have to address unknown or immaterial conflicts.

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.

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?

As raised earlier in the submission, we have some concern that significant new record-keeping obligations that are not statutory obligations are being introduced through this draft guidance. We are also concerned that compliance with the BID will be measured against the record keeping obligations rather than an assessment of the credit assistance provided to the consumer. Guidance is not law, however if ASIC administers the regime against the standard set in its guidance, then the guidance will become defacto law. Also raised previously, AFCA regularly refers to ASIC regulatory guidance and is likely to adopt it as the measure by which they determine their matters.

We strongly oppose any suggestion that brokers must retain records of “efforts made to educate the consumer” currently contained in RG000.140(f). It is not practically workable to require brokers to keep notes of their “efforts to educate their customers” nor is there a requirement they do this. It is not possible to define how far must a broker go to “educate the consumer”.

The form that these documents are maintained in is also relevant. Many brokers record file notes of their conversations and instructions from their clients, however the records created to satisfy the

NCCP obligations do not always reflect the full extent of conversations had. Frequently, very little of the information collected by a broker makes it through to a lender application unless it is explicitly requested. This was one of the criticisms the FBAA had of ASIC’s work under REP 516 where it reached a number of conclusions about the conduct of brokers based on information obtained only from the lender.

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.

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?

We support the guidance in these sections.

FBAA Comments against the examples in the draft RG

Quite a number of the examples in the draft RG are either *artificially simple* or are not representative of true situations that arise in the course of providing credit assistance to consumers. Simple examples can be useful for clearly demonstrating a particular concept, however we believe the simple concepts are already well understood by industry and what causes the most concern is dealing with issues that are more complex or that deal with comingled issues. Better examples will increase the utility of this guidance. We encourage ASIC to revisit their examples and to consider providing more realistic examples that will provide clearer guidance to industry.

We provide comments against specific examples in the draft RG.

Example 1 (p16)

This example appears to directly contradict the criticism levelled at brokers in REP516. The example suggests a consumer with an inheritance take out a large loan and use the inheritance to offset a portion of the loan. The example suggests that putting the consumer into a low interest rate loan that does not allow offset may breach BID. In REP516, ASIC criticised brokers for recommending larger loans with offset, saying they only did it to earn commission on larger loan sizes. The FBAA in its submission in response to REP516 pointed out there are multiple reasons why a broker might recommend that a consumer apply for a loan larger than their immediate needs dictate. Maintaining headroom in a loan and not maxing out the facility in order to provide a buffer for unforeseen issues and placing funds into offset to allow for future flexibility were both acknowledged. This submission was never acknowledged, yet it now appears to be asserted as “good practice”.

Additionally, if the consumer had a history of poor financial management, would the broker be expected to identify this and recommend the consumer apply for a product that discourages them from reckless spending? If the broker recommended the offset product and the consumer wasted the available money, how would the broker's recommendation be viewed at a later point in time?

This question highlights tension between a broker making a "not unsuitable" recommendation or one the broker believes is in the consumer's best interests and the retrospective test for compliance with the BID applied at a later date when the consumer's behavior will be also taken into account. Whether the broker complied with their BID in this example may currently depend on how the consumer behaves. Such an approach creates enormous hesitancy and uncertainty.

Example 3 (p19)

This example provides an example of where a consumer has ill-defined objectives. The example says that for a broker to meet their BID obligations, the broker must explain to the consumer why their objectives are not in their own best interests. The example escalates the existing NCCP obligation of providing assistance to find the consumer a "not unsuitable" loan to a positive obligation to identify what is in the consumer's best interests, educate the consumer where they don't know themselves and override their instructions where the broker believes there is a better outcome than what the consumer is seeking. **This is a fundamental reinvention of the role of a broker.** The example is aspirational rather than representative of how the obligations should work. We recommend ASIC redraft this example to reflect correctly how the obligations operate. As with multiple other examples provided previously, a credit provider in the same situation where a consumer walks in and asks for the worst, least suitable, most expensive product from the suite of products on offer, can put the consumer into that loan provided there is some semblance of suitability (thus making it not entirely unsuitable). Credit providers are not required to challenge a consumer's instructions or consider their current product before switching them.

Example 4 (p21)

This example deals with a scenario of where a consumer has limited options because their circumstances exclude them from the criteria of many lenders. The example suggests a broker should educate the consumer as to why they may not be eligible with certain lenders. We do not support this example.

At the outset we stress that the consumer in this example could apply directly with 5 different credit providers and be declined without any explanation provided. Lenders often do not share their lending criteria with customers because it otherwise educates the customer on how to circumvent them.

The example suggests the broker should tell the consumer what they can do to improve their creditworthiness. Even where many brokers may do this, the inclusion of it in regulatory guidance miscasts the role of brokers. Such advice strays into behavioral advice and budgeting advice. It also raises concerns that it could assist consumers to manipulate the information they provide in future applications to the detriment of credit providers. The principles elicited in this example are not legal obligations and are entirely aspirational.

ASIC has a role to educate consumers about appropriate behavior yet it must be aware that consumers frequently do not make good choices even when told they should. It is manifestly inappropriate to suggest a broker must educate or counsel a consumer and it is equally inappropriate to measure compliance with explicit legal obligations against such a framework.

If the broker decides the consumer should not apply for credit, the draft RG says they should explain to the consumer why. Against the legal framework of the NCCP, this would not be required (not assisting a consumer to apply for credit is not providing credit assistance and is therefore unregulated). ASIC must align its expectations against existing obligations/ standards. It is not adequate to assert “best industry practice” as the basis of new obligations developed through regulatory guidance.

Many of the suggested steps in Example 4 do not fall within the definition of credit assistance and the basis on which ASIC suggests these obligations arise is unclear.

Example 5 (p24)

We recommend removing this example as the framing of the scenario is quite artificial and would rarely occur in practice. It also appears designed around the following incorrect assumptions:

- a) the broker must help the consumer find the “best” product in the marketplace;
- b) the broker must have a wide panel of credit providers (no such obligation exists); and
- c) a broker has a positive obligation to assist consumers where they cannot provide a recommendation.

If a broker cannot recommend a product that is not unsuitable having regard to the requirements and objectives of the consumer they will decline to provide credit assistance. As with any other industry, there may be other products in the market that could be better or cheaper, however it is incumbent on the consumer to search these out. In no other industry is there a suggestion that a service provider who can provide a suitable product or service must tell a potential client to go elsewhere because they may get a better deal.

Example 5 deals with a broker recommending a narrow range of products. The example says the broker must refer the consumer to another broker or lender if they know there is a better product out there but they cannot advise on it.

A broker is under no obligation to assist a consumer to find another broker, nor are they under any obligation to identify products outside their panel. A broker should recommend a product that meets the needs and objectives of the consumer or should decline to provide assistance.

We recommend ASIC remove this example.

Example 9 (p27)

In Example 9, a broker assists a client to secure a lower rate on their current product with their bank. ASIC says, and we agree, that this is not credit assistance and the BID does not apply because the broker made no other recommendations or suggestions (assisting someone to remain in their current loan does not come under the definition of *credit assistance* in the NCCP Act).

The example is very narrowly constructed because it requires the consumer to frame their request in a very specific way to avoid triggering the credit assistance requirements and the broker to answer in a very specific way (note the example says the broker makes no other representations or suggestions). This does not happen in practice. The example would be more useful if it dealt with the two more likely situations which are:

- a) The consumer asks the broker if they can I get a better rate on their mortgage without specifying the current bank; and

- b) The bank does not offer to reduce the current rate which would lead to the consumer asking the broker a follow up question which would be if they should switch to another product.

In both of the above situations, we understand the broker is obligated to provide credit assistance or refuse to deal with the consumer. Note also in consultation on the revision of RG165, ASIC said it believes a refusal to offer credit assistance is a matter which a consumer can complain to AFCA about. The FBAA does not agree with this position.

ASIC may consider providing a second example here addressing the implications of a more broadly asked question (e.g. can I get a better rate on my mortgage).

Example 10

This should be re-written or removed because it does not reflect the legislative intention of the BID which is that it applies to the package and not to individual products within the package in isolation.

The Revised Explanatory Memorandum to the legislation at 3.26 says the following:

3.26 Often a mortgage is packaged with one or more other credit contracts as a single product offering. In recommending a package the broker would be expected to ensure that it, rather than the standalone mortgage (if available) or an alternative standalone mortgage or packaged product in the range of options considered by the broker, is in the consumer's best interests. In making this assessment, the broker would be expected to weigh up the relative benefits and risks for the consumer, which may depend on a range of factors including what the consumer is attempting to achieve and the relative value and importance of the different components of the package. In a package consisting of a home loan and a credit card, for example, the home loan will often be the primary credit contract relevant for determining whether the package is in the consumer's best interests. A broker should be able to articulate why the particular loan or package they recommend is in the consumer's best interests – including to the consumer.

The BID does not impose an obligation on a broker to compare a consumer's current credit card with a card offered under a bundled product for many reasons including:

- a) The BID applies to the package. A credit card will never be the predominant product where a mortgage is involved;
- b) The consumer has full discretion to not use the bundled card should they so decide (the consumer also has the right to cancel their existing card);
- c) The recommendation from the broker is to apply for the primary product and it is a product design consequence that other products may be attached;
- d) A credit assistance provider's obligations under the NCCP, including the BID obligations, do not require a broker to optimize a consumer's financial position or provide any form of budgeting advice (whether brokers typically do this or not is a standalone issue and is not tied to a legislative obligation for which there is a potential penalty of more than \$1m for non-compliance).

We note that many brokers would advise the consumer to cancel one card or the other, however the inclusion of this in the regulatory guide as an explicit expectation by ASIC effectively transforms this from good practice to a legal obligation. There is no basis for this.

Example 11 (p29)

Example 11 deals with a situation where a broker recommends a mortgage packaged with offset and credit card but the consumer does not use their products correctly and incurs costs. The outcome of the consumer's conduct is attributed to the broker breaching their BID by failing to ensure the consumer understood how to use it (RG000.117). This is incorrect because it attributes the consumer's conduct to a breach of BID by the broker.

The recommendation by the broker is the best recommendation. The fact that the consumer does not do what they are told is not a breach of BID by the broker. If it were, the same could be said of a consumer who takes out a mortgage with offset but spends recklessly and either does not pay down the loan any more quickly than they would under a fixed P&I loan or ends up in a worse position because of impulsive spending.

This example should be removed as it reflects a poor understanding of the balance between the BID obligations on a broker and the consequences of consumer behavior. If anything, the example should be modified to say the broker is not liable for a breach of BID because they made a recommendation that was in the consumer's best interests but the consumer failed to follow it.

We do not believe that because the example specifies there is evidence of the consumer not paying off the balance of their existing credit card (which they could retain even if acting on the credit assistance provided by the broker) that this changes the correct assessment of that situation as to whether the broker complied with their BID. The behavior attributed to the consumer is too heavily nuanced and it is not reasonable to expect a broker to identify that a consumer is unlikely to act in their own best interests and adjust the product recommendation to change the consumer's behavior. To assert the BID imposes a positive obligation on a broker to provide budgeting advice and to critique every consumer's spending behavior overstates the obligation by a significant margin.

The example also focuses on the secondary product where the correct test of compliance with the BID is to look at the overall position the consumer is placed into.

End.

Yours faithfully



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