



ASIC

Australian Securities &
Investments Commission

REGULATORY GUIDE 273

Mortgage brokers: Best interests duty

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About this guide

This is a guide for mortgage brokers and other relevant Australian credit licensees.

It explains what ASIC looks for when we assess compliance with the best interests obligations in Pt 3-5A of the *National Consumer Credit Protection Act 2009* (National Credit Act). It also outlines steps you can take to minimise the risk of non-compliance with these provisions.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in June 2020 and is based on the legislation and regulations as at the date of issue.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

The *National Consumer Credit Protection Act 2009* (National Credit Act) requires mortgage brokers to act in the best interests of consumers when providing credit assistance. Where there is a conflict of interest, mortgage brokers must prioritise the interests of consumers.

This guide sets out ASIC's views on what these obligations require and steps you can take to minimise the risk of non-compliance.

This section of the guide gives an overview of our guidance. It also explains when the provisions apply and how we administer the provisions.

What are your obligations?

- RG 273.1 The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) considered mortgage broking in Australia and, in its final report, made recommendations relating to mortgage brokers, including Recommendation 1.2 (best interests duty) and Recommendation 1.3 (mortgage broker remuneration).

Note: See Royal Commission, [Final report](#), 4 February 2019.

- RG 273.2 In response to Recommendation 1.2, the Government passed legislation to:
- (a) create a duty for mortgage brokers to act in the best interests of their consumers (best interests duty); and
 - (b) require mortgage brokers to prioritise their consumers' interests when providing credit assistance (conflict priority rule).

Note: The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Mortgage Broker Reforms Act) inserted these obligations into the National Credit Act. The Mortgage Broker Reforms Act also inserted other reforms relating to mortgage broker remuneration.

- RG 273.3 These obligations—collectively referred to in this guide as the 'best interests obligations'—give statutory recognition to consumers' expectations. The Replacement Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures) Bill 2019 ([Replacement Explanatory Memorandum](#))) outlines the objective of the obligations at paragraph 3.11:

The objective of the new law is to improve consumer outcomes. Firstly, by requiring mortgage brokers to act in the best interests of their clients and secondly, by reducing the potential for conflicts of interests to impact the advice consumers receive from mortgage brokers.

RG 273.4 Mortgage brokers, and, where relevant, other credit licensees, must comply with these obligations from 1 January 2021.

Note: ASIC has provided a temporary exemption from the best interests obligations for six months from 1 July 2020 due to the effect of COVID-19: see [ASIC Credit \(Deferral of Mortgage Broker Obligations\) Instrument 2020/487](#) and [Media Release \(20-109MR\) ASIC defers commencement of mortgage broker reforms and design and distribution obligations](#) (8 May 2020).

RG 273.5 The best interests obligations apply only in relation to credit products that are regulated under the National Credit Act—that is, products provided to consumers for personal, domestic or household purposes or for the purchase or improvement of residential investment property.

Best interests duty

RG 273.6 If you are a mortgage broker, you are required to act in the best interests of the consumer when providing credit assistance: s158LA and 158LE of the National Credit Act.

Note: For guidance on the meaning of credit assistance, see [Regulatory Guide 203 Do I need a credit licence?](#) (RG 203).

RG 273.7 Mortgage brokers are defined as persons who:

- (a) carry on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property;
- (b) do not act as the credit provider in relation to most of those contracts; and
- (c) provide credit assistance in relation to credit contracts offered by more than one credit provider: s15B.

Note: For general guidance on the meaning of ‘carrying on a business’, see [RG 203](#) and Section C of [Regulatory Guide 121 Doing financial services business in Australia](#) (RG 121).

RG 273.8 This definition applies regardless of the title of the person providing credit assistance. For instance, a mortgage manager who meets these criteria will still satisfy this definition and be subject to the best interests duty.

Note: For information on the application of the best interests duty to mortgage managers, see RG 273.123–RG 273.128.

Conflict priority rule

RG 273.9 Sections 158LB and 158LF contain a conflict priority rule for mortgage brokers. If there is a conflict of interest when providing credit assistance, you are required to give priority to the consumer’s interests. You must not prioritise your own interests or the interests of credit providers or third parties.

Note: For our guidance on the conflict priority rule, see RG 273.144–RG 273.161.

Anti-avoidance provision

- RG 273.10 There is also a ban on entering into or carrying out a scheme that is designed to avoid the application of the best interests obligations, as well as the ban on conflicted remuneration. The purpose of the anti-avoidance provision is to ensure that the policy intent of the Mortgage Broker Reforms Act is not avoided through industry or transaction structuring.

Note: For our guidance on the anti-avoidance provision, see RG 273.180–RG 273.186.

Our approach to the best interests obligations

- RG 273.11 The best interests obligations are designed to more closely align the interests of mortgage brokers with the interests of their consumers: see [Replacement Explanatory Memorandum](#), paragraphs 3.4 and 3.22. This is the guiding principle in our approach to administering these obligations.
- RG 273.12 The obligations are high-level principles, and do not contain prescriptive steps for mortgage brokers and others to follow to ensure they comply. Paragraph 3.24 of the [Replacement Explanatory Memorandum](#) states:
- [W]hat conduct satisfies the duty will depend on the individual circumstances in which credit assistance is provided to a consumer in relation to a credit contract... the duty does not prescribe conduct that will be taken to satisfy the duty in specific circumstances. It is the responsibility of mortgage brokers to ensure that their conduct meets the standard of ‘acting in the best interests of consumers’ in the relevant circumstances.
- RG 273.13 This guidance sets out our views on the best interests obligations and our expectations of industry; nothing in this guidance is intended to provide a ‘safe harbour’.
- RG 273.14 The best interests obligations cannot be avoided by any notice or disclaimer provided to or signed by the consumer. A mortgage broker cannot comply with these obligations merely by getting the consumer to consent to certain credit assistance or a conflict of interest.

General principles

- RG 273.15 The following matters will guide our administration of these obligations:
- (a) The best interests obligations are intended to more closely align mortgage broker practices with consumers’ expectations.
 - (b) The obligations should improve the support, guidance and communication provided to consumers throughout the credit assistance process.
 - (c) The obligations should lead to a higher quality of credit assistance being provided.

- (d) Any products recommended by a broker must be in the consumer's best interests, and the reasons for this conclusion should be recorded and explained to the consumer.

Note: For our guidance on the things you may need to consider when determining what is in a consumer's best interests, see RG 273.44–RG 273.86.

- (e) To the extent that it is in the interests of the broker or a related third party to provide certain credit assistance, that credit assistance may only be provided if it is also in the consumer's best interests.
- (f) The best interests duty and the conflict priority rule are separate obligations that operate alongside each other and apply each time a mortgage broker provides credit assistance. This includes credit assistance about credit cards and personal loans that are packaged with a home loan, as well as standalone products on which mortgage brokers provide credit assistance.

What we expect of brokers

RG 273.16 Mortgage brokers must act in the best interests of each individual consumer to whom credit assistance is provided. We consider that the obligations require mortgage brokers to assess what product(s), and what credit assistance, would be in each consumer's best interests.

RG 273.17 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. The risk of non-compliance is substantially increased if a broker's processes typically lead to a 'one-size-fits-all' outcome for consumers.

Note: For a non-exhaustive list of factors which may need to be considered when making an assessment of the individual circumstances of a consumer, see RG 273.48.

RG 273.18 Brokers will need to exercise their judgment when determining what is in the consumer's best interests. In some situations, this will include challenging the consumer's perception of their best interests. Although it is the consumer's decision whether to accept or decline the recommendation and proceed with an application, it is the sole responsibility of the broker to ensure the recommendation is in the consumer's best interests.

RG 273.19 A variety of factors can be relevant in determining whether recommending a credit product is in the consumer's best interests. In our view, this determination involves considering the product holistically and weighing up the relevant factors based on the value and benefits they offer that consumer.

RG 273.20 In most instances, you should present consumers with more than one option. Where there are multiple options for a consumer to consider, these are to be presented in a manner consistent with the consumer's best interests: see RG 273.87–RG 273.104.

RG 273.21 We expect that evidence of compliance with the best interests obligations will come predominantly from the broker's records: see RG 273.162–RG 273.172. These records may help brokers demonstrate that they have met their obligations, and help credit licensees take reasonable steps to ensure that brokers who are their credit representatives comply with these obligations.

Note: For our guidance on obligations for credit licensees, see RG 273.173–RG 273.179.

Other obligations

RG 273.22 The best interests obligations operate alongside other laws that affect how credit assistance is provided to consumers. They do not alter existing laws, including the responsible lending obligations.

Note: [Regulatory Guide 209](#) *Credit licensing: Responsible lending conduct* (RG 209) provides information on the responsible lending obligations. We have also provided guidance on other obligations, including in [Regulatory Guide 205](#) *Credit licensing: General conduct obligations* (RG 205) and [Regulatory Guide 206](#) *Credit licensing: Competence and training* (RG 206).

RG 273.23 The best interests duty and the responsible lending obligations are distinct obligations that apply whenever credit assistance regulated under the National Credit Act is provided by a mortgage broker.

RG 273.24 The best interests duty introduces requirements and steps that are additional to the responsible lending obligations. The obligations are complementary and you will need to comply with both, even if some steps are not required by the responsible lending obligations: see [Replacement Explanatory Memorandum](#), paragraph 3.5.

Note: For guidance on the interaction of the best interests duty and the responsible lending obligations, see RG 273.105–RG 273.111.

RG 273.25 Information gathered for the purpose of complying with the responsible lending obligations may help brokers to comply with the best interests duty. The information gathered may also help brokers to comply with the design and distribution obligations from October 2021.

Note: For our draft guidance on the design and distribution obligations, see [Consultation Paper 325](#) *Product design and distribution obligations* (CP 325).

B Acting in the consumer's best interests

Key points

The best interests duty requires mortgage brokers to act in the best interests of their consumers.

What is required to act in a consumer's best interests will depend on the individual consumer's circumstances. Mortgage brokers are likely to need to:

- gather information about the consumer and their situation;
- use that information to assess what credit assistance would be in the consumer's best interests; and
- depending on that assessment, potentially suggest one or more options to the consumer, and provide information about why the recommended option(s) are in the consumer's best interests.

This section sets out what we consider mortgage brokers may need to do to comply with the best interests duty. Additional guidance on specific issues that are relevant to this obligation is set out in Section C.

What is the best interests duty?

- RG 273.26 Mortgage brokers assist consumers to obtain home loans by approaching and negotiating with credit providers on the consumer's behalf. An important part of this process is brokers reviewing various credit contracts from their available panel of credit providers and making a recommendation to the consumer, based on information about the consumer and the nature of the product.
- RG 273.27 The best interests duty extends this process by requiring that brokers determine and assess the best interests of the consumer and present recommendations in line with those interests.
- RG 273.28 The National Credit Act does not set out circumstances in which a mortgage broker is taken to have complied with these obligations. This means that there is no 'safe harbour'; mortgage brokers will need to take all steps necessary to ensure that they act in the best interests of the relevant consumer.
- RG 273.29 We consider that the processes and actions of the mortgage broker are a key consideration when determining whether the best interests duty has been complied with. Table 1 summarises our general approach to what we consider mortgage brokers may need to do to comply with the best interests duty.

Note: For our guidance on a range of specific issues relating to the best interests duty, see Section C.

Table 1: Complying with the best interests duty

Step	Process	Guidance
Gathering information about the consumer	This step may involve investigating the consumer's circumstances, objectives and financial situation by obtaining information about the consumer, what they are attempting to achieve and what features they value.	RG 273.30– RG 273.43
Making an individual assessment	This step may involve: <ul style="list-style-type: none"> considering a range of relevant products to identify options that are available to the consumer to meet their goals and objectives; and assessing what is in that particular consumer's best interests. 	RG 273.44– RG 273.86
Presenting information and recommendations	This step may involve: <ul style="list-style-type: none"> making recommendations that reflect the broker's consideration of the range of options that align with the consumer's circumstances; <p>Note: Making recommendations typically involves suggesting that a consumer apply for a particular credit contract, and therefore involves credit assistance.</p> presenting recommendations and information to the consumer in a manner that is consistent with acting in their best interests; educating and equipping the consumer to make informed decisions, including whether to apply the product(s) recommended with the broker's assistance; and following appropriate processes for engaging and communicating with the consumer, and assisting them to apply for the credit product they have selected. <p>Note: Assisting a consumer to apply for a particular credit contract is also credit assistance. This includes making recommendations or assisting a consumer to refinance an existing loan: see s8 of the National Credit Act and RG 203.</p> 	RG 273.87– RG 273.104

Gathering information about the consumer

RG 273.30 As a mortgage broker, to determine what is in the consumer's best interests, you will need to gather information about the consumer, including their reasons for approaching you and what they are seeking to achieve.

RG 273.31 Separately, you are required to obtain information about the consumer for the purposes of complying with the responsible lending obligations. Those obligations require brokers, or the credit licensees that authorise them, to make reasonable inquiries about the consumer's requirements and objectives, and make reasonable inquiries about the consumer's financial situation.

Note: See [RG 209](#) and s117, 130, 140 and 153 of the National Credit Act.

RG 273.32 Although the responsible lending obligations and the best interests duty are separate obligations, the information gathered for the purposes of responsible lending may help you to determine what is in the consumer's

best interests. If additional information is needed to make that assessment, you will need to obtain that information from the consumer.

Note: For a discussion of the interaction of the best interests duty and the responsible lending obligations, see RG 273.105–RG 273.111.

Receiving instructions and making inquiries

- RG 273.33 The best interests duty does not prescribe how you should gather information about the consumer or their circumstances. However, good communication and consultation—which ensures that your role and the broader application process are understood—are generally indicative of acting in the consumer’s best interests. This may in turn assist the consumer to understand, and choose from, any recommendation that you put forward in due course.
- RG 273.34 Consumers may communicate their instructions in different ways and with varying degrees of formality. For example, instructions may be provided through a face-to-face meeting, telephone or email, or by entering information on an online platform. Some consumers may have a specific request—such as whether you can help them obtain a better and/or cheaper loan than one that they currently have or have found themselves.
- RG 273.35 The information initially disclosed by consumers will often be insufficient for you to identify the consumer’s individual circumstances and do the analysis necessary to recommend products based on what would be in their best interests.
- RG 273.36 In many cases, consumers approach a mortgage broker because they do not know or fully understand what circumstances are relevant to a home loan application. Our findings in [Report 628](#) *Looking for a mortgage: Consumer experiences and expectations in getting a home loan* (REP 628) indicated that consumers who took out their loan through a broker tended to be more uncertain of the process and were less sure which loan would be right for them.
- RG 273.37 Consumers may also provide instructions that are unclear or make requests that seem inconsistent with their circumstances. In these situations, you should make further inquiries to identify the consumer’s circumstances to inform your product recommendation. This may also be important for you to determine the significance of various product features or options that may be relevant to the consumer.
- RG 273.38 There is no prescribed manner for making these inquiries. It may be an iterative process, as engaging with the consumer could lead you to identify other matters that are relevant to the credit assistance you intend to provide.
- RG 273.39 Further inquiries are particularly important and may be more detailed if the consumer has a low level of financial capability or the proposed transaction or structure of the home loan product sought is complex. For example, a first home buyer may require more detailed inquiries than an experienced borrower thinking about refinancing a loan on an owner-occupied property.

Incomplete or inaccurate information about a consumer's circumstances

- RG 273.40 If it is reasonably apparent that the information about a consumer's individual circumstances is incomplete or inaccurate, you should make further inquiries to obtain complete and accurate information.
- RG 273.41 If critical information is not obtained when inquiring about a consumer's circumstances, you should refrain from making a recommendation. Paragraph 3.25 of the [Replacement Explanatory Memorandum](#) states:
- [I]n cases where critical information is not obtained when inquiring about a consumer's circumstances, the broker could be expected to refrain from making a recommendation about a loan where there is a consequent risk that the loan will not be in the consumer's best interests.
- RG 273.42 A mortgage broker who provides incomplete or inaccurate information as part of a home loan application will not be acting in the consumer's best interests, even if the inaccurate information would increase the likelihood of approval or give the consumer access to better terms.
- Note: For our detailed guidance on incomplete and inaccurate information, see [RG 209](#).
- RG 273.43 It is possible that, in the course of providing credit assistance, the consumer may disclose additional information or a change in circumstances. If this occurs, you should clarify these circumstances with the consumer, and consider whether there is a need to change the content of the credit assistance you provide.

Making an individual assessment

- RG 273.44 As a mortgage broker, after going through a process of gathering information, you are likely to need to consider the available products and assess which of those (if any) are in the consumer's best interests: see [Replacement Explanatory Memorandum](#), paragraph 3.25.
- RG 273.45 What is needed to comply with the best interests duty varies depending on the individual circumstances of the consumer and their needs, goals and financial situation.
- RG 273.46 We consider that the judgment you exercise in considering the information provided by the consumer and making this assessment is an important part of acting in the best interests of the consumer.
- RG 273.47 There is no prescribed process or set of factors for mortgage brokers to consider when conducting this assessment. You should consider each consumer's individual circumstances, including any matters that may affect what is in that consumer's best interests.

- RG 273.48 Without limiting the assessment, some matters you are likely to need to consider are:
- (a) the consumer's priorities and preferences for different products or credit providers (including the price of the loan, product features such as bundled products or offset accounts, and the level of service of the credit provider);
 - (b) the consumer's needs and objectives (including the term of the loan, the amount to be borrowed and the outcome the consumer would like to achieve);
 - (c) the consumer's personal circumstances and financial situation, to the extent that they could affect the suitability of different products;
 - (d) reasonably foreseeable changes to the consumer's personal circumstances and financial situation;
 - (e) whether you have access to products that meet the consumer's needs, objectives, preferences and priorities; and
 - (f) whether you have the ability or expertise to make a recommendation that meets the consumer's needs, objectives, preferences and priorities.
- RG 273.49 The assessment of what product(s) would be in the consumer's best interests is a point-in-time assessment: see RG 273.116–RG 273.122.
- RG 273.50 If you cannot act in the consumer's best interests in providing them with credit assistance, you must not provide the assistance.

Considering cost

- RG 273.51 The cost of a credit product can significantly affect the outcome the consumer achieves, as well as their other objectives that are unrelated to the credit product. For that reason, we generally expect the cost of a credit product—such as interest rate, fees and charges and the size of repayments—to be a factor that mortgage brokers should prioritise.
- RG 273.52 We believe that this is consistent with consumers' expectations of brokers. In our research for [REP 628](#), we found that the key focus for consumers is finding the 'best loan', usually in reference to a low or competitive interest rate. The cost of the home loan was generally considered the most important feature, with flexibility also being important for some consumers.
- RG 273.53 Further, in [Report 516](#) *Review of mortgage broker remuneration* (REP 516), we found that consumers who use a mortgage broker also tend to have a higher loan-to-income ratio and greater leverage. This suggests that lower costs and affordable repayments may be a priority and are likely to be consistent with those consumers' best interests.

- RG 273.54 A failure to consider cost and investigate the lowest cost options available to the consumer may suggest non-compliance with the best interests duty. Any situation where a higher cost loan is recommended will need to be supported by evidence demonstrating why that recommendation is in the consumer's best interests.
- RG 273.55 Additionally, suggesting that the consumer apply for a loan—when there is another, cheaper loan you could recommend that would meet their non-cost needs and objectives—is unlikely to be in the consumer's best interests.
- RG 273.56 However, the product with the lowest interest rate is not necessarily the lowest cost option for all consumers. For example, a product with access to an offset account or redraw facility may offer certain consumers greater flexibility and save them a considerable amount in interest. Additionally, annual or establishment fees associated with some loans or packages may mean the loan will be more expensive for the consumer despite a lower interest rate.
- RG 273.57 Cost is not the only matter relevant to whether recommending a product is in the consumer's best interests. Some consumers' circumstances will mean that the benefits provided by particular features might outweigh the importance of cost: see RG 273.71–RG 273.79.
- RG 273.58 For consumers who are thinking about refinancing an existing loan, the expenses incurred when refinancing may exceed the cost savings of a new loan. In this situation, recommending a new loan may not be in the consumer's best interests. The consumer may benefit from being made aware of any potentially minor cost savings associated with refinancing, with an explanation of when the cost savings would exceed the refinancing expenses.

Consumers with limited access to certain products

- RG 273.59 We understand that access to certain products may be limited based on consumers' specific circumstances, including their credit risk and desired loan amount.
- RG 273.60 The credit policy, pricing practices and risk appetite of the credit provider may preclude some consumers from accessing the lowest cost products. Different policies and approaches by credit providers to matters such as lenders' mortgage insurance, the need to see repeated savings history, and acceptance of a guarantee might influence whether or not certain products may be available to the consumer.
- RG 273.61 In these situations, you should:
- (a) explain why the products are not available and the limitations involved with the available option(s); and
 - (b) still consider the cost of the available options (i.e. if you think the application is reasonably likely to be approved by the credit provider).

Example 1: Considering cost and comparing products*Scenario*

Ben receives an inheritance of \$200,000. He approaches a mortgage broker for help buying an apartment with his inheritance. Ben would like to use \$50,000 for the deposit and keep the remaining \$150,000 liquid.

Aware of Ben's financial situation, the broker presents him with several options but recommends only the lowest cost, 'no frills' option. Although this product offers the lowest interest rate on the market, it does not allow for features such as an offset account or redraw facility. Ben applies for the recommended loan and buys an apartment.

Several months later, Ben discovers that, with an offset account holding the \$150,000 he has kept liquid, he would have paid less interest and would owe less money. Ben finds that an offset balance as low as \$10,000 would have reduced the amount of interest charged on the home loan.

Commentary

Offset accounts may not benefit all consumers because higher fees may be charged for having the offset facility included in the home loan package. However, Ben's inheritance and other circumstances created a situation where an offset account feature may have been in his best interests and outweighed the benefit of having the lowest interest rate.

In this situation, we would expect the broker to have presented an option with an offset account and explained to Ben that he could have a net benefit if he keeps a sufficient level of savings in the offset account.

This option may not be in the best interests of other consumers, such as those who do not have or are unlikely to build substantial savings.

Promotional offers

- RG 273.62 Some credit providers make promotional offers to entice consumers to take out their credit products. These can include, for example:
- (a) cashback or reward points offers;
 - (b) waived or reduced fees; or
 - (c) a discounted interest rate.
- RG 273.63 We expect that any promotional offer that is quantifiable will be considered as part of the cost of the credit product. For example, a cashback offer, waived fees and a reduced interest rate are all quantifiable. When considering these offers, it is important to be aware of eligibility criteria, exclusions and time limitations.
- RG 273.64 The value of some promotional offers is not easily quantified. For example, offers which include the provision of rewards points may be more valuable to certain consumers.
- RG 273.65 You should also consider whether a lower interest rate, or other features such as an offset account, would provide more benefit to the consumer than the short-term benefit offered by the promotion. For example, where a consumer has short-term expenses or debts, a cashback offer may provide them greater value than comparatively marginal cost savings over the life of the loan.

Government schemes

RG 273.66 When considering a consumer's individual circumstances, it may become apparent that they could be eligible for a Government grant or scheme. These schemes are typically available to first home buyers, pensioners and social housing tenants.

Note: ASIC research suggests that first home buyers and consumers with lower incomes are both more likely to take out a loan through a broker, rather than directly from a credit provider: see [REP 628](#) at paragraphs 27 and 28.

RG 273.67 In this situation, we generally expect you to educate consumers about the availability and eligibility requirements of these schemes. You may also help consumers to assess their eligibility and the potential benefits of the schemes.

RG 273.68 We understand that obtaining a scheme's full benefit may require steps to be taken before the broker starts providing credit assistance. For example, taking advantage of the [First Home Super Saver Scheme](#) (FHSSS) would generally involve the consumer making voluntary superannuation contributions in advance of seeking credit assistance from a broker.

Example 2: Considering Government schemes—First home buyer

Scenario

Isabella approaches a mortgage broker for help buying her first home. She has contributed \$15,000 to her superannuation under the Government's FHSSS to help save for a deposit.

Isabella mentions this contribution to the broker because she is unsure about how to release her contributions. She also asks the broker whether she can access the First Home Loan Deposit Scheme (FHLDS) to buy a more expensive home.

Commentary

We would expect the mortgage broker to take into account Isabella's FHSSS contributions as part of her individual circumstances when providing credit assistance. The broker should also consider the restrictions of the scheme, such as the lead times between requesting a release and receiving the FHSSS funds.

It would be appropriate for the broker to educate Isabella about these restrictions and the process for requesting a release.

As Isabella may also be eligible for the FHLDS, we would expect the broker to give her information about the scheme including its eligibility requirements and potential benefits. This information should be given regardless of whether Isabella asked about the FHLDS, because it is apparent from her circumstances that she could be eligible.

We note that the FHLDS can only be accessed through certain credit providers. If the broker does not have these providers on their panel, they should inform the consumer. It would also be useful for the mortgage broker to inform Isabella of the availability of first home owner grants.

RG 273.69 Other schemes can be alternatives to the credit products available to mortgage brokers and specialist reverse mortgage brokers. For example, the [Pension Loans Scheme](#) and shared equity loan schemes provide alternative finance from the Government at a concessional rate to eligible consumers.

RG 273.70 If such a scheme meets an eligible consumer's requirements, accessing it may provide a concession that is of such benefit that it would not be in the best interests of the consumer to recommend any other credit product.

Weighing up other factors and product features

RG 273.71 Although cost is a key consideration, some consumers may also derive value from other loan features, depending on their individual circumstances. These features can include:

- (a) substantive features, such as access to an offset account, redraw facility or a package which includes other credit product(s); and
- (b) matters that are more difficult to quantify, such as the service levels and policies of the credit provider.

RG 273.72 You should exercise judgment in considering the relevance of these factors with reference to the consumer's individual circumstances.

RG 273.73 Generally, some examples of factors that you could take into account in assessing whether a credit product will be in a consumer's best interests are:

- (a) the features that meet the consumer's needs and objectives, and any features that are inconsistent with those needs and objectives;
- (b) if the consumer has more than one need or objective—
 - (i) the relative importance of each to the consumer; and
 - (ii) the way in which any inconsistencies between competing needs or objectives are resolved;
- (c) the term and structure of the credit product relative to the consumer's objectives;
- (d) the credit policy and risk appetite of the credit provider;
- (e) the interest rate, fees and charges applicable to the credit product;
- (f) the consumer's understanding of the credit product; and
- (g) in relation to switching—the extent to which switching to the new credit contract will be in the consumer's best interests.

Note: This is not intended to be an exhaustive list of potentially relevant factors.

RG 273.74 Some consumers' circumstances will mean they may derive greater benefit from particular features than they might from a lower cost product. We do not expect you to comprehensively assess the separate value of each feature.

RG 273.75 However, if a product is recommended based on one of these features, you should be able to make an overall assessment that the non-cost consideration

has a realistic possibility of offering that individual consumer greater value. Paragraph 3.25 of the [Replacement Explanatory Memorandum](#) states:

[A] broker should not recommend a loan by prioritising factors that cannot be substantiated as delivering benefits to that particular consumer (such as the broker's relationship with the [credit provider]), over factors and features which affect the cost of the product or are more relevant to the consumer.

- RG 273.76 The circumstances may also demonstrate that a feature is irrelevant or detrimental to a particular consumer. For example:
- (a) a fixed rate loan with a substantial break fee could be detrimental to a consumer who wants flexibility to refinance; or
 - (b) an offset account may not be relevant to a consumer whose plans do not include repaying additional amounts (and may be detrimental if there is an additional cost for the feature).
- RG 273.77 In some situations, features which do not relate to the cost of the product will be highly relevant. For example, some consumers will prioritise approval time and compromise on cost because of a time-sensitive transaction, such as an impending settlement date. However, we expect that any claims of this nature you make will be evidence-based and able to be substantiated.
- RG 273.78 In our view, there is an increased risk that you are not complying with the best interests duty if your processes typically lead to a 'one-size-fits-all' outcome for consumers.

Example 3: Considering other factors—Application processing times

Scenario

Tim, a mortgage broker, regularly recommends home loan products from one particular credit provider to consumers who contact him for a home loan. Tim tells consumers that he has a strong relationship with the business development manager at this credit provider and can get loan applications processed 'much faster'.

Tim thinks that consumers are happy to make concessions on cost in order to be pre-approved by a credit provider at short notice.

Commentary

We expect that Tim would:

- consider the individual circumstances of each consumer to determine whether timely processing is relevant and valuable for that consumer;
- only weigh timeliness above other factors (including cost) if the individual consumer's information and circumstances indicate that this is of significant importance and could offer them good value; and
- be able to substantiate his claims about processing times.

Tim should be able to demonstrate that he has considered and presented a range of options, but ultimately recommended this option because it is in the consumers' best interests.

Tim should also keep a record of this process.

RG 273.79 We do not expect you to give advice on matters that are outside your competence (e.g. detailed tax or investment advice). However, we do expect you to be able to give guidance on the suitability and benefits of product features for each consumer.

Note: See RG 273.141–RG 273.143 for further guidance on matters outside the mortgage broker’s expertise.

Requests made by consumers

RG 273.80 When providing credit assistance, you may discover that a type of product other than the one initially sought by the consumer could be more appropriate to the consumer’s circumstances. In this situation, you should discuss this with the consumer and recommend alternative options. Based on this discussion, the consumer may decide to change their mind.

RG 273.81 In our view, if you consider that a different product or feature to the one initially sought by the consumer may be more appropriate, and fail to advise the consumer of this, you are unlikely to have acted in their best interests.

RG 273.82 Exercising judgment is particularly important if the consumer has strong preferences or self-selects a specific credit provider or product type. For example, consumers may have strongly held beliefs or preferences about certain credit providers and will not consider those providers, regardless of the competitiveness of their product offering.

RG 273.83 In these situations, you may still reasonably consider and recommend products from these credit providers, rather than exclude them from the outset. Similarly, where the consumer prefers a specific credit provider, you should investigate a broader range of products than just those offered by the preferred credit provider in order to act in the consumer’s best interests.

RG 273.84 Consumers may also have a strong preference for a loan feature that may not be in their best interests. For example, consumers may insist on an interest-only loan or offset account when it is not, in your view, in their best interests.

RG 273.85 In these situations, you should make reasonable efforts to explain to the consumer why these features may not be appropriate or may not offer good value to them: see [Replacement Explanatory Memorandum](#), paragraph 3.27. This will help the consumer make an informed decision. If the consumer decides to still proceed with an application for that product, you may assist the consumer with that application.

RG 273.86 Your recommendations may deviate from the consumer’s request and present an alternative if an alternative without that feature is in the consumer’s best interests. Providing the consumer with a cost–benefit analysis may be helpful in explaining why the alternative has been presented.

Example 4: Responding to specific consumer requests*Scenario*

Jordan approaches a mortgage broker to assist with financing the purchase of a property. Jordan indicates to the broker that frequent flyer points are important, and that she would like a home loan and credit card package that would allow her to earn points in her preferred scheme.

When considering Jordan's circumstances, the broker can see that she has not typically paid off her credit card balance in full, incurring interest charges.

Additionally, there are some products available without a frequent flyer credit card which would appear to better suit Jordan's financial situation (as under that credit provider's policy she would not need to buy lenders' mortgage insurance).

The broker doesn't explain the cost-related benefits of what Jordan requested and the other product, and eventually recommends a home loan and credit card package.

Commentary

Jordan's individual circumstances mean that the package the broker recommends may not be in her best interests. We would expect the broker to explain why what Jordan has requested may not be appropriate for her circumstances.

If Jordan insists on a home loan package, we consider that the broker can help her to obtain this, but should still recommend a superior alternative option if one exists, and make reasonable efforts to ensure that Jordan makes an informed decision.

Presenting information and recommendations

- RG 273.87 As a mortgage broker, when you have assessed which options are consistent with the consumer's best interests, you will need to explain these options to the consumer.
- RG 273.88 We consider that presenting information about options, including one or more recommendations, forms part of the credit assistance you provide. As a result, you must act in the consumer's best interests when presenting information.
- RG 273.89 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 appropriate for them.
- RG 273.90 When you recommend a product, we consider that you should present the information to the consumer in a way that clearly articulates how taking the recommended action would achieve their objectives and be in their best interests (relative to the other options available).

- RG 273.91 You must base *all* recommendations you make on the consumer's individual circumstances. This includes the judgements you make about:
- (a) the extent of the inquiries you make into the consumer's relevant circumstances;
 - (b) the strategies, types of credit product, specific credit products and credit providers you investigate; and
 - (c) the strategies, types of credit product, specific credit products and credit providers you make recommendations about.
- RG 273.92 It would generally be helpful to present the consumer with a shortlist of options with one option being the recommended option. For example, the recommended option may be a suggestion that the consumer take out a particular product.
- RG 273.93 We consider that it is important that consumers are presented with options and understand why:
- (a) the options presented to them have been selected;
 - (b) other options have not been presented to them (e.g. why they have received relatively few or many options); and
 - (c) a particular option has been recommended to them.
- RG 273.94 The size of the shortlist may vary according to the consumer's circumstances. Additionally, in some specific cases, it may be necessary for you to make more than one recommendation to the consumer. This could occur if you determine that two products are largely similar and would equally meet the consumer's best interests, and you decide that it is in the consumer's best interests to, after providing the shortlist of other options to the consumer, recommend both of those products.
- RG 273.95 If all the options presented to a consumer are for products from the same credit provider, you should explain this and provide reasons for this to the consumer.
- RG 273.96 In some situations, the consumer may not understand the implications of the options available to them. You should help the consumer understand why a particular loan may or may not be in their best interests. Paragraph 3.27 of the [Replacement Explanatory Memorandum](#) states:
- In some situations the consumer will not properly understand the implications of different choices and so the broker may have to assist them to understand why a particular loan is or is not in their best interests.
- RG 273.97 You may find that some matters need to be explained frequently, to multiple consumers. If this is the case, there is scope for you to consider the best way to provide this explanation in a consistent manner. However, any information or description provided should be fit for purpose for the individual consumer it is being presented to.

RG 273.98 For example, you may choose to provide consumers with a standardised factsheet explaining offset accounts. In this situation, you should consider whether this information is sufficient and provide further explanation where appropriate, based on the products recommended and the circumstances of each individual consumer.

Note: Records of the information provided to the consumer should be kept including any offset calculations used. For our guidance on record keeping, see RG 273.162–RG 273.172.

RG 273.99 You should ensure that any recommendations presented to the consumer are based on benefits to that consumer, rather than benefits that may be realised by you. You should not present recommendations by prioritising factors that cannot be substantiated as delivering benefits to that consumer.

Example 5: Presenting recommendations when options are limited

Scenario

Looking to buy his first home, Edwin approaches a mortgage broker after having experienced difficulty approaching credit providers directly for a home loan. Edwin has saved a 5% deposit, but recently started working casually in a temporary position.

The mortgage broker presents one home loan option. The option has a much higher interest rate than expected and lacks many of the features Edwin sought.

The broker tells Edwin that this is the only credit provider that is willing to offer a home loan, given his employment situation and the size of his deposit. The broker explains that Edwin's credit risk means that the lower cost options that Edwin has seen advertised are not available to him.

The broker also explains what Edwin could do to become eligible for the lower cost options. Based on Edwin's circumstances, this would mean a longer history in his current job and continued saving for a larger deposit to reduce the loan-to-value ratio.

Commentary

We generally expect mortgage brokers to present a range of options and provide a recommendation.

In some circumstances, limited options are available to a consumer for reasons outside the broker's control.

Consistent with our expectations, the mortgage broker explains to Edwin the reason for presenting only one product and why lower cost options are not available.

If the broker determines that applying for this product will not be in Edwin's best interests, the broker should help Edwin understand the reasons why.

After the recommendation has been made

- RG 273.100 Consumers may have questions about the recommendation(s), options and information that brokers provide. This may lead to further information being presented.
- RG 273.101 In some instances, providing a recommendation may prompt the consumer to reflect on the importance of certain product features. As a result, there may be further engagement, or you may need to consider additional options.
- RG 273.102 At some point, the consumer may indicate to you that they would like to proceed with one of the options you have put forward. At that stage, you might proceed to assist the consumer to apply for a particular credit contract.
- RG 273.103 There may be situations where you have acted in the consumer's best interests but the consumer decides not to follow your recommendation and chooses a product which, in your view, is not in their best interests.
- RG 273.104 You should ensure that:
- (a) consistent with our guidance in RG 273.80–RG 273.86, these consumers are informed and understand the nature of the products you recommended or those self-selected by the consumer, including their structure and features; and
 - (b) you 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.

Note: For our guidance on record keeping, see RG 273.162–RG 273.172.

C Guidance on specific issues and the best interests duty

Key points

This section provides guidance on a range of specific issues relating to the best interests duty, including:

- the interaction of the best interests duty and the responsible lending obligations (see RG 273.105–RG 273.111);
- implications of the best interests duty for the range of credit providers and products you deal with (see RG 273.112–RG 273.115);
- when the best interests duty applies (see RG 273.116–RG 273.122);
- when mortgage managers may be subject to the best interests duty (see RG 273.123–RG 273.128);
- the interaction of risk-based pricing of credit products other than home loans and the best interests duty (see RG 273.129–RG 273.132); and
- how the best interests duty applies in other circumstances, including to packaged products or matters outside your expertise (see RG 273.133–RG 273.143).

Interaction with the responsible lending obligations

- RG 273.105 The best interests obligations apply in addition to other laws—such as the responsible lending obligations—which affect the credit assistance that may be provided to consumers.
- RG 273.106 Mortgage brokers who are credit licensees will need to comply with both responsible lending and the best interests obligations. Mortgage brokers who are credit representatives will need to comply with the best interests obligations, and may need to help their authorising licensee to comply with the responsible lending obligations.
- RG 273.107 In both situations, the obligations are separate, and compliance with one of these obligations does not necessarily mean the other has been satisfied.
- RG 273.108 There may be some overlap in the process of making inquiries for each of these obligations. Information gathered for the purpose of complying with the responsible lending obligations may assist you in complying with the best interests obligations. However, if additional information is needed to comply with the best interests obligations, you will need to seek this information.
- RG 273.109 The responsible lending obligations involve an assessment, which is ultimately the credit licensee’s responsibility, of whether a credit product is ‘not unsuitable’ for a consumer. The best interests obligations apply more broadly to the credit assistance you provide, which extends to your conduct and processes as well as the appropriateness of the credit product.

RG 273.110 There are situations where you might satisfy the responsible lending obligations but fall short of complying with the best interests duty. Where a credit product is deemed ‘not unsuitable’ for the consumer, it is possible that suggesting that the consumer take out that product may not be in the consumer’s best interests.

Note: For a comparison of the responsible lending obligations and the best interests duty and the interaction between these obligations, see Table 2 in the appendix to this guide.

RG 273.111 Paragraph 3.5 of the [Replacement Explanatory Memorandum](#) states:

There are circumstances where the mortgage broker may not have acted in a consumer’s best interests even if the responsible lending obligations were complied with. For example, even if a home loan product is ‘not unsuitable’, recommending it to the consumer might not be in the consumer’s best interests.

Range of credit providers and products

RG 273.112 As a mortgage broker, you must be satisfied that the credit products you can access and recommend are sufficient to allow you to act in your consumers’ best interests. Having an awareness of the products and features that are available in the market, and periodically comparing them to those you can access and recommend, may help you to determine whether your panel and accreditations are sufficient for you to act in your consumers’ best interests.

RG 273.113 You should be accredited with a reasonably representative panel of credit providers. The number of credit providers on your panel may vary, including based on the market you operate in. For example, if you operate in a market with fewer credit providers and products, your panel may be smaller. We expect that you will use your judgement to determine whether the composition of your panel is sufficient to meet your consumers’ best interests.

RG 273.114 You are not necessarily required to recommend a specific product outside your panel. If a consumer is interested in a product from a credit provider that is on your aggregator’s marketing material, but you do not have access to that provider, you should tell the consumer this.

RG 273.115 If you are not satisfied that the products and credit providers you can access and recommend will allow you to act in a consumer’s best interests, you must not provide credit assistance to that consumer. In declining to provide credit assistance, it may be helpful to refer the consumer to another mortgage broker who would be better placed to assist them.

Example 6: Maintaining general awareness

Scenario

Phillip is a mortgage broker who has a number of credit providers and products on his panel. Phillip is confident that his current panel has enough variety to enable him to act in the best interests of most consumers.

Francesca contacts Phillip and indicates she is looking for a home loan from a credit provider whose ethical values align with her own. Francesca has signed a conditional contract, so gaining approval for a home loan is time sensitive.

Phillip is familiar with the credit providers currently on his panel and is generally aware that there are lenders outside his panel that operate based on ethical concerns such as not investing in environmentally harmful industries, which aligns with the ethics Francesca has indicated are important to her.

Phillip tells Francesca this and says he can still provide her with options and a recommendation that would be likely to meet the timeframe for settlement. Francesca reiterates that she wants to deal only with credit providers that reflect her ethics and asks Phillip if he can help her do that.

Phillip is aware that gaining accreditation might not be possible within the timeframe required. He tells Francesca this and suggests that it might be in her best interests to seek the assistance of a mortgage broker already accredited with credit providers that align with Francesca's ethical values.

Commentary

In this situation, Phillip acted in Francesca's best interests by:

- maintaining a general awareness of the products and credit providers available on the market;
- offering to assist Francesca after having informed her of potential limitations relating to his panel's composition; and
- given the limited timeframe—suggesting that it might be in Francesca's best interests to seek the assistance of a mortgage broker already accredited with the type of credit provider she is seeking.

Phillip may maintain a panel with sufficient variety to enable him to act in the best interests of *most* consumers.

Example 7: Narrow panels of credit providers

Scenario

Ali is a new mortgage broker and has received accreditation from only a limited number of credit providers. Two consumers approach Ali for help:

- Pip, who is seeking a loan with low or no ongoing fees; and
- Wei, who is seeking to purchase a small studio apartment.

Ali proceeds to conduct inquiries into Pip and Wei's circumstances, and assesses a variety of products available for each.

For Pip, Ali concludes that there are several products for which he has an accreditation that could be appropriate. From this group, Ali recommends that Pip take out the loan with the lowest (variable) interest rate, which he concludes is in her best interests, but also explains her other options.

In Wei's case, given that not all credit providers may be willing to finance a small apartment, Ali also conducts some broader research on the options that may be available.

He concludes that the product which is likely to be the most appropriate for Wei is offered by a credit provider that is on his aggregator's panel, but for which he does not have accreditation. Ali decides to seek the accreditation. Once he obtains it, he recommends the product to Wei.

Commentary

Ali acted in Pip's best interests by making relevant inquiries into her personal circumstances, considering the options available, providing a recommendation based on Pip's best interests and explaining the options.

Ali also acted in Wei's best interests. The circumstances indicate that Ali may not have been able to satisfy himself that recommending one of the existing suite of products would have been consistent with acting in Wei's best interests.

If Wei's application was time sensitive, such that there was not time for Ali to seek the accreditation, he could have chosen to refer Wei to another broker.

When the duty applies

- RG 273.116 The best interests duty applies any time you provide credit assistance to the consumer, based on the information available at the time. This information includes reasonably foreseeable changes to the consumer's personal circumstances and financial situation.
- RG 273.117 It does not matter whether you have provided credit assistance to the consumer before. For example, if you provide credit assistance suggesting that a consumer remain in a home loan you previously helped them obtain, you will need to act in the consumer's best interests when making that suggestion.

Note: The conflict priority rule also applies in these situations: see Section D.

Example 8: Point-in-time assessment

Scenario

Basil meets with a mortgage broker to obtain a home loan. Basil is a low-income earner who is worried he will not be able to afford his loan repayments if interest rates increase.

The mortgage broker assesses Basil's current situation and recommends a fixed rate loan at a similar rate to the lowest cost variable rate loans available to Basil. Basil selects the fixed rate option recommended by the broker.

Interest rates fall. If Basil had taken out a variable rate loan, he would have saved a significant amount in interest.

Commentary

At the time credit assistance was provided, the fixed rate loan was the best option available to Basil because it allowed him to take out a loan, and to do so with certainty about his future repayments and at a low cost, relative to other options.

The broker therefore complied with the best interests duty.

Generally, changes that occur after the recommendation is made are not relevant to whether the best interests duty has been complied with.

The broker's assessment of what would be in the consumer's best interests is a point-in-time assessment. However, we also expect brokers to consider reasonably foreseeable changes to the consumer's personal circumstances and financial situation.

- RG 273.118 The best interests duty does not require you to conduct a ‘periodic review’, or to provide credit assistance to the consumer in the future. However, it is good practice to review the consumer’s circumstances from time to time. If you choose to review the consumer’s circumstances, or you are contacted by a consumer you previously assisted, then the best interests duty will apply to any credit assistance you provide at that time.
- RG 273.119 You must not suggest that a consumer remain in a credit contract without considering whether this would be in the consumer’s best interests. Paragraph 3.25 of the [Replacement Explanatory Memorandum](#) states:
- [I]t may be a breach of the duty if the broker suggested the consumer remain in their current home loan when they could refinance to a cheaper product as the broker did not want to incur the consequent liability to the [credit provider] when their commission payments were clawed back.
- RG 273.120 For consumers who may be thinking about refinancing, you should consider the costs associated with refinancing.
- RG 273.121 When the credit assistance process is subject to delay, you should consider whether you need to start a new assessment or make further inquiries into the consumer’s circumstances before making a recommendation or assisting the consumer to take out a product.
- RG 273.122 In deciding whether to take these steps you should consider:
- (a) the length of the delay;
 - (b) whether the information considered is reasonably current and likely to still reflect the consumer’s circumstances; and
 - (c) your responsible lending obligations.

Note: Your responsible lending obligations require you to undertake inquiries within 90 days of credit assistance being provided. See [RG 209](#) for more information on this requirement.

Example 9: Another assessment required

Scenario

Shiva is a first home buyer who contacts a broker to organise a home loan. The broker works with Shiva and ultimately recommends a particular home loan package.

Shiva decides to take some time to think about whether she will accept the recommendation provided by the broker, or whether she will go direct to a credit provider.

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

Commentary

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

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

Example 10: Home loan 'health check'*Scenario*

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

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

Commentary

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

Example 11: Home loan 'health check'—No credit assistance*Scenario*

Esther contacts the broker who assisted her to get her home loan, as she has noticed that her credit provider has since started offering larger discounts to new consumers.

Esther asks the broker whether they can contact the credit provider and offer her a more competitive interest rate. The broker contacts the credit provider and arranges a discount for Esther.

The broker then advises Esther that the credit provider has agreed to change her interest rate, without making any other representations or suggestions.

Commentary

In this scenario, the broker has not suggested that Esther remain in her current credit contract, and has not assisted her to increase the limit on her loan. On that basis no credit assistance has been provided, and the best interests duty does not apply.

The broker would need to comply with the best interests duty in relation to any suggestion that a consumer remain in a home loan, enter a new credit contract, or an increase in the limit of the current loan.

Mortgage managers

- RG 273.123 Mortgage managers are intermediaries that help consumers to obtain credit, sometimes from a range of credit providers. Some mortgage managers also have arrangements with a particular credit provider where they help that provider with the day-to-day management of their loans.
- RG 273.124 However, mortgage managers operate under different models, and whether they are mortgage brokers for the purposes of the best interests duty depends upon their individual circumstances and business structure.
- RG 273.125 While managing credit contracts and the day-to-day relationship with the consumer, mortgage managers may exercise the rights or perform the obligations of a credit provider. For example, mortgage managers typically help consumers complete loan applications and, after approval of the loan, administer the loan on behalf of the credit provider by accepting payments, issuing statements, monitoring defaults and responding to consumer inquiries.
- RG 273.126 For the purposes of the best interests duty, a person is not a mortgage broker if they perform the obligations, or exercise the rights, of a credit provider in relation to the majority of credit contracts on which they provide credit assistance.
- RG 273.127 We consider that exercising *some* of the rights or performing *some* of the obligations of credit providers is sufficient for a person, including a mortgage manager, to not be considered a mortgage broker.
- RG 273.128 For example, a mortgage manager that does not securitise the loan or exercise the right to collect repayments may not be considered a mortgage broker if they exercise some other rights or perform some other obligations of a credit provider in relation to the majority of credit contracts on which they provide credit assistance.

Example 12: Misleading or deceptive conduct

Scenario

Ron is a mortgage manager who exercises the right to repayment, on behalf of the credit provider, in the majority of contracts that he provides credit assistance on. For this reason, Ron knows that he will not be a 'mortgage broker' for the purposes of the best interests duty. Because of this, Ron is not required to comply with the best interests duty.

In the course of providing credit assistance, Ron suggests to consumers that he has a duty to act in their best interests.

Commentary

Any intermediaries—including mortgage managers—must not imply that the best interests duty applies when that is not the case. This applies both when the person providing the credit assistance is not a mortgage broker and when no credit assistance is being provided (e.g. when an insurance product is being offered).

While Ron may, in fact, act in the best interests of his clients while providing credit assistance, there is no legal obligation for him to do so.

By stating that the best interests duty will apply to him, Ron is likely to have engaged in misleading or deceptive conduct, which is prohibited by the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the National Credit Act.

Risk-based pricing

- RG 273.129 There are some credit products where the applicable interest rate is determined during the application process. An example is a personal loan product where only an interest rate band is publicly available, with the specific interest rate being determined by the credit risk presented by the consumer.
- RG 273.130 When discussing these products, you should explain to the consumer how risk-based pricing works and give a general description of how the consumer's circumstances may affect the credit provider's decision. You may need to discuss matters which credit providers typically take into account, including:
- (a) the consumer's past use of credit;
 - (b) the consumer's employment status and income; and
 - (c) whether the loan would be secured and what the security is.
- RG 273.131 When considering whether a product with risk-based pricing is in the consumer's best interests, you should be informed by public material on the range of interest rates offered by particular credit providers, as well as your previous experience. This should allow you to provide the consumer with an estimated range for the interest rate they might expect to receive from a credit provider.
- RG 273.132 We consider that applying for loans to determine loan price offerings may not be in the consumer's best interests. For example, multiple applications may affect the consumer's credit history and reduce the availability, or increase the cost, of future credit products.

Other circumstances where the duty applies

- RG 273.133 As a mortgage broker, the best interests duty applies to any credit assistance you provide. This includes credit assistance on products that are packaged with a mortgage, as well as any standalone credit products on which you provide credit assistance.
- RG 273.134 The duty does not apply in relation to non-credit products, such as insurance products. If you offer these products or other services to a consumer, you must not imply that the best interests duty applies in this situation. Doing so may be misleading or deceptive conduct.

Note: See s12DA(1) of the ASIC Act.

Packaged products

- RG 273.135 Credit cards, personal loans and other credit products that are packaged or bundled with the mortgage are subject to the best interests duty.
- RG 273.136 A consumer's financial situation and personal circumstances may affect the suitability of different products within packages.
- RG 273.137 Recommendations to consumers 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, as part of a package, would be in the consumer's best interests.
- RG 273.138 Forming a view on these matters will require you to compare the package to other packages available to the consumer, and to standalone home loans without other packaged credit products. In some instances, it may be helpful for you to base your recommendations on an assessment of the package as a whole.
- RG 273.139 Paragraph 3.26 of the [Replacement Explanatory Memorandum](#) states:
- 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.
- RG 273.140 You should not recommend a package to a consumer on the basis that it is merely satisfactory. There must be reasons why selecting that package would be in that consumer's best interests and preferable to both the other packages that are available and non-packaged products.

Example 13: Recommending home loan packages—Existing credit card

Scenario

Sofia approaches a mortgage broker seeking a home loan. The broker determines that Sofia may be eligible for a range of products, including some home loan packages with a credit card. Sofia currently has a standalone credit card.

The broker concludes that the product that is most appropriate for Sofia given her circumstances and objectives is a packaged product.

The broker recommends that Sofia take out a package which includes a credit card and close her existing credit card to simplify her arrangements. Sofia is presented with credit card options that can be packaged with the home loan—including one option that is recommended because of its lower interest rate—as well as some other, standalone home loan products.

The broker explains to Sofia why the packaged product is recommended.

Commentary

In this scenario, the broker is likely to have complied with the best interests duty. The broker has considered which home loan products address Sofia's objectives for a property purchase, including in some instances products that are part of a package.

Because the best interests duty applies to all aspects of the credit assistance provided, the broker would need to be satisfied that recommending Sofia take out the new credit card with the package is in her best interests.

Because Sofia already has a credit card, at a minimum this may involve:

- a comparison with her existing credit card; and
- a holistic assessment of the outcomes that may be achieved if Sofia takes out the home loan packaged with a credit card (i.e. relative to the standalone home loan products that are available).

Example 14: Recommending home loan packages—No existing credit card*Scenario*

Grant approaches a mortgage broker, seeking a home loan. The broker determines that Grant may be eligible for a range of products due to his strong financial position. The range of potential products that would meet Grant's needs includes loans that are packaged with credit cards.

The broker learns that Grant does not currently have a credit card and has no history of credit card debt. Further inquiries reveal that, although Grant does not think that taking out a credit card is essential, he is open to considering such a product if a home loan–credit card package increases the overall benefit of his mortgage. The broker concludes that the most appropriate recommendation for Grant, given his circumstances and objectives, is a packaged product.

The broker is generally aware that some standalone credit cards may offer better value, but cannot be packaged. Also, the home loan the broker considers most appropriate offers better value than other standalone or packaged loans.

Looking at Grant's circumstances, the broker concludes that the risk of harm (e.g. from non-repayment of the credit card) is minimal and is outweighed by the benefits Grant would receive from the packaged product.

Commentary

The broker is likely to have complied with the best interests duty in this scenario. The broker's research into Grant's past experience with credit cards, including past credit card debt, is consistent with complying with the duty. Previous experience with credit cards and the risk of non-repayment are factors that should be assessed.

As stated in the [Replacement Explanatory Memorandum](#), what Grant is seeking to achieve, and the relative importance of the different components of the package (including to Grant) are both relevant to the broker's assessment of what is in Grant's best interests. This may inform the amount of research into standalone credit cards the broker needs to undertake.

The credit assistance for each component product is subject to the best interests duty. This means the broker would need to be able to outline why the suggestions that Grant take out the particular home loan and the particular credit card are in his best interests.

However, the recommendation that Grant enter into the credit card contract is made in the context of Grant seeking to take out a home loan. Thus, the home loan (and the benefits provided by the products when packaged, including the lower overall cost) is likely to be relevant to the broker's assessment.

Example 15: Recommending a packaged credit card

Scenario

A mortgage broker tells Pablo about potential savings he can make if he takes out a loan packaged with an offset account and a credit card. The broker says Pablo can meet his living expenses with the credit card, and his salary will be offset against the home loan balance during the interest-free period on the card.

The broker says this package could help Pablo 'save years' on his home loan.

However, the broker does not mention that if Pablo fails to repay the amount outstanding on the credit card in full each month (e.g. because he cannot afford the repayments), he will be liable for interest on that amount at a high interest rate (i.e. higher than the interest rate on his home loan).

Pablo is not aware of this and does not pay the amount outstanding on the credit card in full each month. As a result, Pablo does not receive the benefits the broker told him he would receive.

Commentary

The appropriateness of a mortgage broker's recommendation in part depends on the consumer's understanding of the recommended products, including a packaged credit card. Whether or not the credit assistance is in the consumer's best interests may be informed by:

- information about the consumer's past use of similar products; and
- the consumer's financial situation (including investigating consumer spending habits, cash flow and capacity to meet repayments).

Brokers should research the consumer's circumstances and the products available. This information will affect the extent to which a package may or may not be in the consumer's best interests, and may help the broker educate the consumer about what is involved for each product in a package.

Matters outside your expertise

RG 273.141 As a mortgage broker, we do not expect you to give detailed advice on tax or other matters outside your expertise as part of the best interests duty. However, we do expect you to be able to give guidance about the suitability and value of product features for each of your consumers.

RG 273.142 Matters like a consumer's tax position or investment objectives may be relevant to the assessment of the consumer's individual circumstances.

- RG 273.143 If there are material implications the consumer should consider that go beyond your competence, you can act in the consumer's best interests by ensuring that the credit assistance is:
- (a) based on advice given to the consumer by someone with appropriate expertise and competence, such as a registered tax agent or a financial adviser—in this situation, you must make it clear to the consumer that you are assuming that the advice given is appropriate, rather than endorsing it; or
 - (b) limited to matters on which you are competent to advise—in this situation, you must take steps so that the consumer understands that they should seek advice from someone with appropriate expertise and competence before following your recommendation.

D Related obligations

Key points

This section sets out guidance on:

- the conflict priority rule, which requires mortgage brokers to prioritise the consumer's interests in the event of a conflict of interest;
- the types of records that mortgage brokers may need to keep to demonstrate their compliance with the best interests obligations;
- the obligations for credit licensees to ensure that their representatives comply with the best interests obligations; and
- our approach to administering the anti-avoidance provision.

The conflict priority rule

RG 273.144 As a mortgage broker, you must prioritise the interests of the consumer if you know, or reasonably ought to know, when you provide the credit assistance, that there is a conflict between the interests of the consumer and the interests of:

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

Note: The parties described in RG 273.144 are referred to as 'related parties' in this guide. We refer to the requirement in s158LB and 158LF as the 'conflict priority rule'.

RG 273.145 Paragraph 3.28 of the [Replacement Explanatory Memorandum](#) states:

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

RG 273.146 To comply with the conflict priority rule, you must first identify what interests you or your related parties have. You may then consider what a mortgage broker in your position but without a conflict of interest would do.

RG 273.147 The conflict priority rule means that you must not recommend a product or service of a related party that would create extra revenue for yourself, your credit licensee or another related party, unless doing so would also be in the consumer's best interests.

- RG 273.148 If you have a conflict of interest and are unable to prioritise the consumer's interests, you must not provide the credit assistance.
- RG 273.149 As with the best interests duty, the conflict priority rule applies each time you provide credit assistance to the consumer: see RG 273.116–RG 273.122.
- RG 273.150 The conflict priority rule applies in conjunction with the general obligation in s47(1)(b) imposed on all credit licensees to manage conflicts of interest.

Example 16: Aligned interests

Scenario

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

Commentary

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

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

Role conflicts

- RG 273.151 We recognise that brokers and their related entities may have multiple roles on the same or related transactions. This can cause a conflict based on the earning of two or more income streams, dependent on the transaction.
- RG 273.152 Examples of additional roles which may give rise to such a conflict include acting as a:
- (a) lawyer/conveyancer;
 - (b) accountant;
 - (c) financial planner;
 - (d) real estate developer/vendor; or
 - (e) real estate agent.
- RG 273.153 In situations where you may earn multiple income streams, you will still need to ensure that where your interests and those of the consumer conflict, you give priority to the consumer's interests when providing credit assistance.

Related party or credit provider conflicts

- RG 273.154 The conflict priority rule means that you must not act to further your interests or those of one of your related parties over the consumer's interests when providing credit assistance.
- RG 273.155 This will require you to consider what conflicts may exist. Paragraph 3.29 of the [Replacement Explanatory Memorandum](#) states:
- The obligation to give priority to the consumer's interests is not limited to conflicts of interest that mortgage brokers currently know about. Mortgage brokers are expected to take active steps to identify all conflicts of interest covered by section 158LB to minimise the risk of a contravention, including obligations that can arise because of their commercial relationships with third parties.
- RG 273.156 Considering what benefits (if any) a credit licensee, credit representative or their related parties will receive if the consumer acts on your credit assistance may help you to determine whether a conflict exists.
- RG 273.157 The systems you use will be an important part of complying with the conflict priority rule. We consider that systems should be structured without bias or conflicts. That is, product recommendation or aggregator software should not have in-built credit provider or product bias.
- RG 273.158 You should inform the consumer where ownership structures or other commercial ties have the potential to affect the credit assistance provided. However, you cannot comply with the conflict priority rule merely by disclosing a conflict of interest or having the consumer consent to a conflict.
- Note: A condition of a contract (or other arrangement) is void if it seeks to waive any of the obligations in s158LB or 158LF: s334.
- RG 273.159 There is potential for commissions given by credit providers to cause conflicts of interest. Examples of scenarios which would not satisfy the conflict priority rule include recommending, based on commission:
- (a) a loan with a higher interest rate than comparable alternatives;
 - (b) a loan without features the consumer considers important or that would otherwise be in the consumer's best interests; or
 - (c) loans by a particular credit provider to a substantial proportion of consumers, irrespective of the consumers' particular needs.
- RG 273.160 The conflict priority rule will not always prohibit you from recommending a credit product provided by a related party. However, if there is a conflict, you should keep records of your reasoning behind any recommendation you make that the consumer acquire a certain product or increase their credit limit, where this would benefit the related party.
- RG 273.161 You should ensure that all your recommendations are made with the consumer's interests as the primary consideration. If you prioritise maximising or receiving non-consumer sources of remuneration over the interests of the consumer, you will be in breach of the conflict priority rule.

Example 17: Product of a related party*Scenario*

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

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

Commentary

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

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

Record keeping

- RG 273.162 As a mortgage broker, we expect you to keep records of how you have acted when providing credit assistance. This includes records of inquiries you make into the consumer's circumstances, and the consideration, investigation and assessment of the products you recommend.
- RG 273.163 We expect that these records will clearly show how you have complied with the best interests obligations. Good records will help you to demonstrate that you have complied with these obligations.
- RG 273.164 You may also be subject to legal requirements to keep information relating to other obligations. Keeping good records may help you to demonstrate that you have met more than one set of obligations.

Note: For information on record-keeping requirements relating to the responsible lending obligations, see Section D of [RG 209](#). There are also record-keeping requirements associated with the product design and distribution obligations.

- RG 273.165 Generally, we expect you to keep records that include:
- (a) a copy of the responsible lending assessment which may be provided to the consumer, or the documents and information that would be used to prepare the assessment if it is requested;

Note: For our guidance on this assessment, see Section D of [RG 209](#).

- (b) a copy of the credit guide which was provided to the consumer;

- (c) information provided to the credit provider as part of the application process;
- (d) outcomes of credit applications;
- (e) relevant conversations with the consumer;
- (f) information showing that you acted in the best interests of the consumer (including records of efforts made to educate the consumer);
- (g) the options and ultimate recommendation you gave and the reasons why (including a detailed description of your decision-making process); and
- (h) any potential conflict of interest which you have identified, and the actions you have taken to prioritise the interests of the consumer over your own or those of a related party.

RG 273.166 We expect that the types of record you keep will vary depending on the recommendations and assistance you provided to the consumer, including their scope.

RG 273.167 Records may take various forms, and do not have to be paper based. For example, they may include:

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

Note: This list is not intended to be exhaustive.

RG 273.168 How long these records should be kept may vary depending on factors such as the loan term, the interest-only period and whether the consumer refinances. You should use your judgement to consider the nature of the credit product and determine whether documents should be kept for a longer period. Keeping records for a short period of time will place you at risk of being unable to demonstrate how you have complied with your obligations.

- RG 273.169 Taking notes and keeping records throughout the process (contemporaneously) may help you to accurately capture your thinking and reasoning at each relevant point in time. Just drafting notes and creating records at the end of the process may not be as effective as taking a contemporaneous approach.
- RG 273.170 As providing credit assistance is often not a linear process, it may be helpful to also prepare a concise narrative summary which connects the various records you have kept. A narrative summary can be an effective way of outlining why particular products were recommended, the decisions made by the consumer, and the steps you took throughout the process to act in the consumer's best interests. It should be evidence based and supported by contemporaneous records.
- RG 273.171 It is unlikely that you will need to provide reasons why you did not consider or recommend every alternative product on the market. Distinguishing the type of product or feature, as opposed to exhaustively excluding individual products, is likely to be sufficient.
- RG 273.172 There may be situations where recording the reasons why you did not recommend a certain product or type of product will help you to demonstrate your compliance with the best interests duty. For example, if a product or type of product has the potential to be in the best interests of the consumer, you could document your reasons for why it is not.

Example 18: Documenting types of products not recommended to the consumer

Scenario

Malia approaches a broker, Radha, for a home loan. Malia has \$10,000 she would like to put into an offset account. However, she says she might like to go on a holiday in the coming months. Malia indicates that if Radha does so, she will need to use a large part of the money that will otherwise be used to offset her loan.

Radha explains to Malia that a loan with an offset account would not be in her best interests as this type of loan is generally more expensive. Radha also informs Malia that \$10,000 in an offset account might not be sufficient to negate the higher account fees, especially if Malia withdraws most of the \$10,000 and does not look to increase her savings over time.

Malia agrees and Radha presents her with options and a recommendation which do not include offset accounts.

Rather than waiting until the end of the process to record the details of the credit assistance, Radha decides to take thorough, contemporaneous notes throughout the process, including about her conversations with Malia and the reasons for not considering products with offset accounts.

Commentary

The mortgage broker in this scenario is likely to have acted in the best interests of the consumer by deciding not to closely consider products with a certain type of product feature. By keeping thorough notes and records throughout the process, mortgage brokers can accurately capture their reasoning, including why they might not closely consider certain types of products.

Obligations for credit licensees

- RG 273.173 Credit licensees must take reasonable steps to ensure that their credit representatives who are mortgage brokers comply with the best interests duty and the conflict priority rule: s158LE(2) and 158LF(2). We consider that this includes the processes a licensee develops to help their mortgage brokers to comply with the best interests obligations.
- RG 273.174 What constitutes reasonable steps may vary depending on the nature and scale of the broker's operations and their relationship with the licensee.
- RG 273.175 In determining whether the steps taken are reasonable, licensees should consider the likelihood of the mortgage broker not complying and the harm that would result from that non-compliance.
- RG 273.176 The use of technology may be helpful in demonstrating that a licensee has taken reasonable steps to ensure compliance by their representatives. Helpful technology may include real time monitoring and automated analysis of trends in a representative's credit assistance.
- RG 273.177 These obligations require licensees to take reasonable steps to prevent contraventions, rather than simply respond to contraventions after they have happened: see [Replacement Explanatory Memorandum](#), paragraph 3.31.
- Note: Courts have also interpreted in this way the very similar obligations on financial services licensees to take reasonable steps under s961L of the *Corporations Act 2001* (Corporations Act): see *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd* [2018] FCA 1708 at [105].
- RG 273.178 As a result, a mortgage broker does not need to breach their best interests obligations for the licensee to have failed to take reasonable steps.

Example 19: Taking reasonable steps

Scenario

Barra Brokers Pty Ltd (Barra), a credit licensee, learns that Hayao, one of its brokers, has breached the best interests duty. This breach has occurred despite Barra's monitoring and training of its representatives, and has caused harm to Hayao's clients.

Although the breach is one that other brokers could commit in other situations, Barra does not make any attempt to educate its other brokers that this behaviour does not meet the best interests duty, or make any inquiries into how prevalent the behaviour is.

Commentary

Initially, Barra may have taken reasonable steps to ensure Hayao complied with the best interests duty.

Once Hayao's breach occurs, however, it is likely that Barra has breached its obligation to take reasonable steps, by failing to further educate its brokers or investigate the prevalence of similar breaches.

In these circumstances, it is reasonable to assume that, if preventative action is not taken, other brokers may engage in similar conduct, resulting in further breaches. As such, it may be reasonable for Barra to attempt to prevent such breaches in the future.

Reasonable preventative steps could include providing additional training or an updated code of practice focusing on avoiding similar future breaches.

- RG 273.179 To comply with this obligation, we generally expect credit licensees to:
- (a) ensure that their mortgage brokers are adequately trained and competent (noting the existing general requirements for licensees in relation to the training and competence of their credit representatives—see [RG 206](#));
 - (b) provide systems, guidelines and other materials to ensure that brokers understand and comply with their best interests obligations;
 - (c) monitor compliance (noting that method and frequency may vary based on these factors and other information available to the licensee); and
 - (d) ensure that appropriate records are kept, which demonstrate the mortgage broker’s compliance with the best interests obligations and the reasonable steps the licensee has taken.

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

Example 20: Licensee approach to reviewing broker compliance

Scenario

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

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

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

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

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

Commentary

This type of review may form part of a licensee’s approach to taking reasonable steps to ensure that its mortgage broker representatives comply with the best interests obligations.

Loanbridge may also need to consider whether anything identified during the reviews requires further action.

Example 21: Licensee systems*Scenario*

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

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

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

Commentary

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

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

Software platforms have the potential to help mortgage brokers to comply with their obligations, and enable licensees to take reasonable steps to ensure this.

Using software that sorts products by relevance (based on the consumer's individual circumstances) or by price or in manner that is credit provider neutral, would appear to be more consistent with the obligations.

The anti-avoidance provision**What is anti-avoidance?**

- RG 273.180 The effect of the anti-avoidance provision is that a person must not, either alone or with other people, enter into or begin to carry out a scheme if:
- (a) it would be concluded that they did so for the sole or non-incidental purpose of avoiding the application of any provision of Pt 3-5A; and
 - (b) the scheme or part of the scheme has achieved or would achieve that purpose.
- RG 273.181 A person may be liable for a civil penalty if they are found to have breached s158T.
- RG 273.182 The anti-avoidance provision is designed to ensure that the policy intent of the reforms is not avoided through industry or transaction structuring.
- RG 273.183 Section 158T could potentially apply to a broad range of schemes (e.g. any contract, agreement, plan, proposal, course of action or course of conduct).

Our approach to administering the provision

RG 273.184 In administering the anti-avoidance provision, we are more likely to scrutinise schemes that appear to have no commercial purpose other than to avoid the application of the best interests duty, conflict priority rule and conflicted remuneration provisions.

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

RG 273.185 We are unlikely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business.

RG 273.186 We are also unlikely to take action on arrangements that have been genuinely entered into to comply with the ban on conflicted remuneration.

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

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

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

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

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

Key terms

Term	Meaning in this document
aggregator	A business which provides aggregation services to a broker business or broker and with which a credit provider has a direct contractual relationship.
ASIC	Australian Securities and Investments Commission
best interests duty	The duty for mortgage brokers to act in the best interests of their consumer when providing credit assistance in relation to credit contracts as set out in s158LA of the National Credit Act
best interests obligations	The obligations in Div 2 of Pt 3-5A of the National Credit Act
conflict priority rule	The requirement for mortgage brokers to prioritise their consumers' interests when providing credit assistance as set out in s158LB and 158LF of the National Credit Act
consumer	A natural person or strata corporation Note: See s5 of the National Credit Act.
consumer lease	A consumer lease to which the National Credit Code applies Note: See s169–171 of the National Credit Code.
CP 325 (for example)	An ASIC consultation paper (in this example numbered 325)
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit assistance	Has the meaning given in s8 of the National Credit Act
credit assistance provider	A person who provides credit assistance to a consumer in relation to a credit contract or a consumer lease and who is not the credit provider (for a credit contract) or the lessor (for a consumer lease)
credit contract	Has the meaning given in s4 of the National Credit Code
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit provider	Has the meaning given in s5 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee under s64(2) or 65(2) of the National Credit Act

Term	Meaning in this document
final report	The final report of the Royal Commission released in February 2019
FHLDS	First Home Loan Deposit Scheme
FHSSS	First Home Super Saver Scheme
mortgage broker	A person who: <ul style="list-style-type: none"> • carries on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property; • does not act as the credit provider in relation to most of those contracts; and • provides credit assistance in relation to credit contracts offered by more than one credit provider. <p>Note: See s15B of the National Credit Act.</p>
Mortgage Broker Reforms Act	<i>Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020</i>
Mortgage Broker Reforms Bill	Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures) Bill 2019
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
REP 516 (for example)	An ASIC report (in this example numbered 516)
Replacement Explanatory Memorandum	Replacement Explanatory Memorandum to the Mortgage Broker Reforms Bill
RG 203 (for example)	An ASIC regulatory guide (in this example numbered 203)
Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
s15B (for example)	A section of the National Credit Act (in this example numbered 15B), unless otherwise specified

Related information

Headnotes

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

Legislative instrument

[ASIC Credit \(Deferral of Mortgage Broker Obligations\) Instrument 2020/487](#)

Regulatory guides

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

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

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

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

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

Legislation

ASIC Act, s12DA(1)

Corporations Act, s961L

Mortgage Broker Reforms Act

Mortgage Broker Reforms Bill

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

Cases

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd [2018] FCA 1708

Consultation papers

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

[CP 327](#) *Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty*

Reports

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

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

[REP 662](#) *Response to submissions on CP 327 on mortgage brokers and the best interests duty*

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[20-109MR](#) *ASIC defers commencement of mortgage broker reforms and design and distribution obligations* (8 May 2020)

Other references

[Replacement Explanatory Memorandum](#) to the Mortgage Broker Reforms Bill

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