

Ms S Black  
Director  
Mergers and Adjudication Division  
ACCC

12<sup>th</sup> April 2019

Ms Tanya Hobbs  
Adjudication Division  
ACCC

**BY EMAIL ONLY:** adjudication@accc.gov.au.

Dear Ms Black and Ms Hobbs,

**Mortgage and Finance Association of Australia application for revocation of authorisation A91396 and substitution of AA1000432 (Authorisation Application).**

We refer to the following:

1. Your letter of 10 January 2019 in respect of the Authorisation Application (**Consultation Request**).
2. Our letter of 31 January 2019 (**Consultation Response**).
3. The Applicant's letter of 31 March 2019 (**Amendment Request**).
4. The interim authorisation dated 11 April 2019 (**Interim Authorisation**).

We are writing this letter to you as we are concerned with the carriage of this matter particularly in light of the matters raised in our Consultation Response.

In our view, the Australia Competition and Consumer Commission (**ACCC**) should revoke the interim authorisation pursuant to section 91(2AB) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). This letter sets out the reasons for this view.

Firstly, as far as we are aware, the Applicant has not identified with any precision the anticipated changes or whether any changes will be made. Instead the Applicant considers that it requires 3 to 6 months to make "any initial changes". Without specificity, the Applicant is effectively seeking an interim authorisation without displaying any basis for doing so.

Section 92(2) of the *Competition and Consumer Act 2010* (Cth) empowers the ACCC to grant an interim authorisation in a number of circumstances. While we are aware of the ACCC's reasoning (and note it is not required to provide reasoning), in our view, the only ground which could apply for the ACCC to allow the Interim Authorisation is "for any reason".

While this is a matter for the ACCC to consider, in our view, the pending election is not a viable reason considering that elections and their associated uncertainty are always to be expected. Additionally, the Royal Commission final report had been released for six weeks before the Applicant sought interim authorisation and the Royal Commission report was always expected to be delivered by its due date. In the circumstances, we consider that “surprise” and “uncertainty” allegedly caused by clearly predictable events should not be a reason to provide the Interim Authorisation.

Secondly, in our view the Interim Authorisation has been granted without any consideration to the matters raised in our Consultation Response. In Part A of our Consultation Response we identified that the current application may in fact be defective in authorising the conduct requested by the Applicant. Accordingly, we can only view the Interim Authorisation as granting immunity in circumstances where the legal deficiencies of the underlying application have not been addressed.

Relatedly, the Interim Authorisation observes that it maintains the status quo of the rules currently authorised by authorisation A91396. For the reason above, we invite the ACCC to consider how the Interim Authorisation maintains a status quo when, as far as we are aware, it does not consider the legal deficiencies of the current application nor does it consider the effectiveness of the previous authorisation in authorising the Applicant’s conduct.

Thirdly, the ACCC identifies, in paragraph 18 of the Interim Authorisation, that no public consultation occurred. Considering the above issues, we would go further and note that not only did the ACCC not conduct separate public consultation, it did not consider the issues raised in the Consultation Response.

The decision to grant the Interim Authorisation appears to have been made arbitrarily because as far as we are aware:

1. The Applicant did not provide any information regarding the anticipated changes;
2. The Applicant did not provide any guarantee it would in fact be making changes as it is only “considering” adopting any recommendations;
3. We raised significant concerns about the current authorisation in the Consultation Response; and
4. No public consultation occurred.

Even if the ACCC does not revoke its Interim Authorisation, we observe the current timeframes infringe section 90(10) of the CCA. This section requires a decision within 6 months of the application (being 20 December 2018). This may be extended pursuant to section 90(10A) of the CCA for a period of not more than six months where the ACCC prepares a draft determination, identifies that a period of not more than 6 months is required and the Applicant agrees.

No draft determination has been provided. Accordingly, extensions are currently outside of section 90(10A) of the CCA. Further, even had the draft determination been made and the process identified in section 90(10A) of the CCA had been followed, this would only extend the authorisation to December 2019. The Interim Authorisation seeks to extend this application to April or May 2020, being a period outside of authority provided by section 90 of the CCA.

In the circumstances, the Interim Authorisation in fact will amount to a deemed authorisation on and from June or December 2019 pursuant to section 90(10) of the CCA. This is clearly inappropriate.

We look forward to your response.

Yours faithfully,

Peter J White  
Managing Director