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31 January 2019

Mr Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
GPO BOX 3131
CANBERRA ACT 2601

RE: Submissions of the FBAA to MFAA application for authorisation (AA1000432)

Dear Mr Jones,

We refer to your letter of 10 January 2019.

Thank you for the invitation to provide submissions on the application for authorisation of the Mortgage and Finance Brokers Association of Australia (**MFAA**).

The Finance Brokers Association of Australia (**FBAA**) takes this opportunity to provide the following submissions for the consideration of the Australian Competition and Consumer Commission (**ACCC**).

In these submissions, we make contentions as follows:

Part A addresses legal deficiencies of the MFAA's application.

Part B addresses market construction deficiencies.

Part C addresses the counter-factual analysis.

Part D addresses the effect on competition.

Part E provides some recommendations.

The FBAA is happy to make itself available to discuss these aspects should the ACCC require further explanation.

PART A – LEGAL DEFICIENCIES

The FBAA observes that the MFAA is not seeking authorisation of the "other parts of the governance regime".[1] The FBAA assumes this means that the MFAA is not seeking authorisation in respect of its Code of Practice or its Constitution. This is consistent with the position understood by the ACCC in Authorisation A91396,[2] Authorisation A91118[3] and Authorisation A90880.[4]

The FBAA submits that the MFAA application and authorisation is legally deficient because:

[1] Form FC App cat on, page 7 of 19 (**MFAA Application**).
[2] Determ nat on A91396 dated 21 May 2014, paragraph 4.
[3] Determ nat on A91118 dated 27 May 2009, paragraph 2.7
[4] Determ nat on A90880 dated 18 February 2004, paragraph 3.1

1. any authorisation granted should include the constitution of the MFAA as that document manifests the *"contract, arrangement or understanding"* to which the MFAA and its members are parties which includes provisions which may substantially lessen competition (which includes the imposition of the Disciplinary Rules).

2. a sole application authorising conduct which would otherwise contravene section 45 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is insufficient as such conduct may simultaneously breach section 45AJ and 45AK of the CCA, being provisions in respect of which the MFAA has not applied for authorisation.

Current Application

The current application is made pursuant to section 91C(1) of the CCA revoking a previous authorisation and substituting a new authorisation. The FBAA assumes that the current application is for an authorisation of the same conduct as initially authorised pursuant to section 88(1) of the CCA in 2004, being conduct which would otherwise contravene section 45 of the CCA.[5]

Section 88(1) of the CCA provides:

> *(1) Subject to this Part, the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.*

Section 45(1) of the CCA provides:

> (1) A *corporation* must not:
>
> (a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
>
> (b) give effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
>
> (c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

The FBAA assumes that the MFAA seeks an authorisation on the basis of authorising conduct which may other contravene section 45(1)(a) or (b) on the basis that section 45(1)(c) of the CCA was not law at the time of the previous authorisations.

A key component of a potential offence under section 45(1)(a) or (b) is the existence of a *"contract, arrangement or understanding"*.

[5] Cover etter of Sp er Consu t ng and accompany ng app cat on dated 18 August 2003.

The Disciplinary Rules of the MFAA does not of itself constitute a contract, arrangement or understanding. The Disciplinary Rules provide multiple conditions of membership which, without more, are not agreed to by any party including:

1. The Tribunal being empowered to make a determination of Misconduct and may censure the Member, suspend the Member, require the Member to take such steps as the Tribunal may determine to correct the effects of the Misconduct found, require the Member to pay a financial contribution, require the Member to undertake such education and compliance program as the Tribunal considers appropriate, expel the Member or cancel the Member's membership.[6]

2. All Members provide their express consent to the publication of material encompassed within this Rule and waive and release forever any rights they may otherwise hold to bring action with respect to such publication whether by suit in defamation or other cause of action.[7]

3. The Tribunal may enforce such tribunal orders by expulsion, suspension or cancellation of membership.[8]

4. All Members whose membership has been suspended or cancelled may not bring any legal action or proceeding against the Association, any member of the Tribunal or any employee or agent of the Association (including, without limitation members of the Board or an Investigation officer) with respect to the publication or provision of access to any person of material pursuant to Rule 3.8.1, Rule 3.8.2 or any other Rule in this document. This Rule may be pleaded as a complete bar to the commencement or continuation of any such proceedings in any jurisdiction.[9]

5. The Membership Secretary may cancel membership in particular circumstances.[10]

In the FBAA's view, there is no provision of the Disciplinary Rules of the MFAA in which the members of the MFAA agree to such impositions. Accordingly, the FBAA submits that the Disciplinary Rules is not a document which constitutes a contract, arrangement or understanding between the members of the MFAA.

Instead, the required contract, arrangement or understanding is contained solely within the Constitution of the MFAA, with such a contract drawing the conditions of membership from the Code of Practice which is enforceable through the Disciplinary Rules, these conditions being the terms which may be considered to substantially lessen competition.

Section 140(1) of the *Corporations Act 2001* (Cth) states:

> *(1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:*

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[6] MFAA App cat on, Attachment A: Mortgage & F nance Assoc at on of Austra a, D sc p nary Ru es (**Disciplinary Rules**), sect on 3.5.2.
[7] D sc p nary Ru es, sect on 3.8.2.
[8] D sc p nary Ru es, sect on 3.9.2.
[9] D sc p nary Ru es, sect on 3.11.1.
[10] D sc p nary Ru es, sect on 4.1.1.

(a) between the company and each member; and
(b) between the company and each director and company secretary; and
(c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

Pursuant to section 140(1) of the *Corporations Act 2001* (Cth), the MFAA constitution manifests an agreement between MFAA and each of its members, the MFAA and each director and secretary and between each member of the MFAA. That contract contains the following provisions which raise the Disciplinary Rules.

Subject to clause 7.1, an application form to be completed by a person making an application to become a Member or to renew their Membership, must:[11]

(b) state that the applicant agrees to be bound by this Constitution, the Disciplinary Rules, the MFAA Code of Practice, and, if the applicant is conducting any credit activities as defined in the National Consumer Credit Protection Act 2009 (Cth), is or will be a member of, or be covered by a membership of, a Qualifying EDR Scheme.[12]

Each Member must not engage in Misconduct as defined in the MFAA Code of Practice or in breach of the Disciplinary Rules or any Qualifying EDR Scheme Rules.[13]

A person is no longer eligible to be a Member and the Association may cancel that person's Membership if the person:[14]

(v) is expelled from the Association under this Constitution or under the Disciplinary Rules.[15]

The Disciplinary Rules may specify other circumstances in which a person is no longer eligible to be a Member. This clause operates independently of any provision of the Disciplinary Rules.[16]

To avoid doubt, nothing in this clause prevents the Association or the Tribunal from expelling a person from the Association without first cancelling the person's Membership.[17]

While a Member is under investigation by the Association under the Disciplinary Rules, the Member's Membership is deemed to continue until the matter is finalised and all outstanding debts, fees, subscriptions, levies and monetary penalties which were due from the Member to the Association will remain a contractual obligation of the Member under settled to the satisfaction of the Board. The Association may enter into an arrangement with a third party to collect any debts, fees, subscriptions, levies and monetary penalties. Despite this clause, the Board, Tribunal or

[11] MFAA App cat on, Attachment D: Const tut on (**Constitution**), c ause 7.2.
[12] Const tut on, c ause 7.2(b).
[13] Const tut on, c ause 9.1.
[14] Const tut on, c auses 12.1(a).
[15] Const tut on, c auses 12.1(a)(v).
[16] Const tut on, c ause 12.1(b).
[17] Const tut on, c ause 12.1(d).

Membership Secretary may in its absolute discretion determine that a Membership has terminated.[18]

The Board may from time to time promulgate rules to establish a procedure and a Tribunal to deal with matters referred to the Tribunal in accordance with the rules or this Constitution, including complaints made to the Association by any person, including any Member, in relation to the conduct of any Member, the refusal to grant or renew Membership, and concerns about the conduct of a Member.[19]

Changes to the Disciplinary Rules will come into effect one month after publication of the revised Disciplinary Rules on the MFAA website and by publication elsewhere if the Board sees fit.[20]

Each Member is bound by the Disciplinary Rules.[21]

The Board may, from time to time, promulgate a code of practice in relation to the conduct of participants in the mortgage and finance industry and mortgage market towards other participants in the industry or towards consumers in the industry.[22]

Each Member is bound by the MFAA Code of Practice.[23]

Accordingly, the FBAA submits that as it is the MFAA Constitution that provides the contractual force under which the MFAA may act in accordance with the Disciplinary Rules, the constitution must also be authorised by the ACCC.

The FBAA also queries whether because of the above, the MFAA's actions in expelling members on the basis of the Disciplinary Rules since 2004 may have contravened the CCA notwithstanding an authorisation existing since it appears to have been limited to the Disciplinary Rules.

Further Authorisation required

While it is entirely a matter for the MFAA to determine, the FBAA considers that the MFAA should seek a new authorisation for potential offences under sections 45AJ and 45AK of the CCA. As previously stated, the constitution of the MFAA is a contract, arrangement or understanding between the members of the MFAA and the MFAA by virtue of section 140(1) of the *Corporations Act 2001* (Cth).

By implementing the Constitution and the Disciplinary Rules, any provision which forcibly excludes members from the MFAA may constitute a direct or indirect prevention, restriction or limitation upon the supply or likely supply of services (being the MFAA's services) to classes of persons by the parties to the contract arrangement or understanding (the MFAA and its members). In the FBAA's view, this constitutes a cartel provision as defined in section 45AD(3)(iii) of the CCA.

As the MFAA submits, "its membership consists of about 94 per cent of mortgage brokers, lenders and managers".[24] Accordingly, in the FBAA's view, as the MFAA professes to cover

[18] Const tut on, c ause 12.4.
[19] Const tut on, c ause 13.1(a).
[20] Const tut on, c ause 13.1(d).
[21] Const tut on, c ause 13.1(e).
[22] Const tut on, c ause 13.2(a).
[23] Const tut on, c ause 13.2(d).

such a high number of such individuals, it is likely that members of the MFAA would be competitors with one another in satisfaction of the competition condition required by section 45AD(4) of the CCA.

The FBAA submits that the MFAA should submit a new application for authorisation in respect of conduct which may breach section 45 of the CCA (to cover both the Disciplinary Rules and the Constitution) and a new application for authorisation in respect of conduct which may breach 45AJ and 45AK of the CCA.

The FBAA does not make any submission regarding whether the MFAA by not obtaining an authorisation of its conduct in respect of offences under sections 45AJ and 45AK (previously, sections 44ZZRJ and 44ZZRK) of the CCA has contravened these sections.

PART B – MARKET CONSTRUCTION

The MFAA makes a number of submissions which, in the FBAA's opinion, are not accurate or are no longer accurate since the last application for authorisation by the MFAA.

1. Market Definition – Temporal Submission

The MFAA submits that *"In its 2004 consideration of the MFAA Rules' authorisation, the Commission considered that it was not necessary to fully define the scope of the relevant markets"*.[25]

The FBAA considers that an approach to market definition from approximately fifteen years ago is not appropriate. The process of identifying the relevant market and authorising activities considers the temporal nature of the market separately.[26] This is because markets are dynamic and will evolve over time.[27] As such, the ACCC's conclusion in 2004 may need to be reconsidered in light of practical and legislative changes in today's market. For example, in 2004, the CCA was not yet law.

2. Market Definition – Product Dimension

The FBAA considers that in the MFAA's case, the relevant product market should be the broader market for mortgage retail services which includes mortgage retailing by banks, building societies and credit unions directly to consumers, as well as through mortgage brokers.[28] The MFAA professes to have a broad variety of members including individual finance brokers, finance broking businesses as well as lenders, aggregators and franchise groups, insurers and other industry support service providers, non-loan writing individuals and students.[29]

The FBAA considers that it is necessary, based upon the MFAA's professed broad membership, to define the product dimension as being for mortgage retailing services (including mortgage broking) provided by individuals not just as individual brokers but also as individuals engaged by all the companies and businesses which the MFAA purports to represent.

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[24] MFAA App cat on, page 16 of 19.
[25] MFAA App cat on, page 14 of 19.
[26] See for examp e, *Re AGL Cooper Basin natural Gas Supply Arrangements* (1997) ATPR 41 593.
[27] R V M er, *Australian Competition and Consumer Law Annotated* (36th ed, Lawbook Co, Sydney, 2014) at [1.4E.45].
[28] MFAA App cat on, page 14 of 19.
[29] Mortgage and F nance Assoc at on of Austra a, *Members* (Webpage) <https://www.mfaa.com.au/about us/members>

This contention is supported in the FBAA's submission on the relevant functional dimension (discussed below) and by the fact that the Disciplinary Rules (as contractually enforceable through the MFAA's Constitution), applies to all of its members and not just to the minor subset where mortgages are arranged by brokers.

3. Market Definition – Geographic Dimension

The FBAA agrees MFAA's construction of the geographic dimension being Australia-wide,[30] and in particular agrees with the MFAA's representation of the ACCC's previous observation that consumers are likely to prefer using a locally based broker rather than one located some distance away.[31]

4. Market Definition – Functional Dimension

The FBAA considers that specific attention should be given to the functional dimension of the market for mortgage related services. It is incorrect and short-sighted to consider a broker's ability to compete exists solely at the lowest functional level, being between brokers and end-consumers (borrowers). In reality, their ability to compete at the lowest functional level is determined by their access to higher functional levels.

A broker's ability to compete at the lowest functional level is determined by their access to a varied portfolio of lenders, loan terms and financial products. A predominant way in which this product offering can be improved is by negotiating with the product offerors (being lenders). However, no individual broker can generate enough business to convince lenders to offer them better or unique products which they can then provide to end-consumers.

In order to address this issue, brokers engage with other entities that utilise the volume of brokers (and by extension, the volume of potential loans) to reach a sufficient economy of scale to meaningfully negotiate with lenders and provide better product offerings to their brokers. These entities are known as aggregators. The market is developing a further layer between brokers and aggregators known as sub-aggregators.

The size of the aggregator or sub-aggregator is significant because, as identified above, aggregators and sub-aggregators are able to use the volume of brokers to leverage better financial products from lenders to provide to their brokers who provide these to end-consumers. Consequentially, the bigger an aggregator, the better a broker's ability to compete.

In essence, ensuring brokers have access to aggregators and sub-aggregators is critical to a broker's ability to compete. Without aggregators, a broker may not be able to retain access to better product offerings to provide to end-consumers.

Therefore, the FBAA submits that in considering the relevant market, the ACCC should also consider additional functional levels, such as the access to aggregators and sub-aggregators.

PART C – Counter-factual analysis

The MFAA submits that a likely counter-factual should the MFAA's application be refused is that the MFAA will not sanction or expel members who are found to have engaged in

[30] MFAA App cat on, page 14 of 19.
[31] MFAA App cat on, pages 14 and 15 of 19.

misconduct as defined in the MFAA's Constitution.[32] Further, the MFAA submits that it cannot legally enforce its governance regime unless the application is granted.[33]

The FBAA agrees that the MFAA cannot legally enforce, and should indeed refrain from enforcing its disciplinary rules by expelling or sanctioning members unless the application is granted. However, the FBAA considers that the application, in its current form, would not allow the MFAA to expel or sanction members because the MFAA is not attempting to authorise the contractual force empowering the MFAA to do so for the reasons set out in Part A (i.e. the constitution must also be authorised).

The FBAA observes that the MFAA is able to set out criteria by which it may cancel membership and that these criteria may change (irrespective of whether this application is granted).[34]

PART D – EFFECT ON COMPETITION

The MFAA makes the following submissions:

> *"MFAA membership is not mandatory for mortgage brokers"*[35]
>
> *"The MFAA considers it unlikely a loss of MFAA membership would significantly impede mortgage brokers' ability to compete"*.[36]

The FBAA disagrees with these statements because of developments within functional levels of the market which the MFAA's Disciplinary Rules may exacerbate.

1. Aggregator Third-line forcing involving brokers

The FBAA is aware of practices within the industry whereby aggregators or sub-aggregators require that brokers must as a condition of such engagement with the aggregator or sub-aggregator and for the provision of such services by the aggregator or sub-aggregator, obtain membership with the MFAA. The importance of aggregators and sub-aggregators to a broker's ability to compete in the market was examined above.[37]

In the FBAA's view, this conduct was prohibited *per se* under section 47 of the CCA as constituting third-line forcing. Further, it appears that the view that this behaviour was prohibited by the CCA was consistently held by participants in the market as the ACCC had received multiple notifications in the past from various aggregators including:

- AHL Investments Pty Ltd (known as Aussie Home Loans) in 2007;[38]
- Virgin Money (Australia) Pty Ltd in 2007;[39]
- Virgin Money Financial Services Pty Limited in 2007;[40]

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[32] MFAA App cat on, page 15 of 19.
[33] MFAA App cat on, page 15 of 19.
[34] Const tut on, c ause 6.3.2.
[35] MFAA App cat on, page 16 of 19.
[36] MFAA App cat on, page 16 of 19.
[37] See Part B, sect on 4 Market Def n t on Funct ona D mens on
[38] Not f cat on N92787.
[39] Not f cat on N93141.
[40] Not f cat on N93142.

- Mortgage Choice Limited in 2008;[41]
- AMP Financial Planning Pty Limited in 2010;[42] and
- Hillross Financial Services Limited in 2010.[43]

The MFAA did elude to this behaviour in its submissions.[44]

2. Legislative amendments lessening ACCC visibility

The FBAA observes that this conduct is no longer prohibited *per se* as a result of amendments to the CCA recommended by the Harper Review[45] and subsequently implemented.[46] Instead such conduct must now satisfy section 47(10) of the CCA in order to contravene section 47(1). This requires such conduct to have the purpose, effect or likely effect of substantially lessening competition.

As a consequence of this change of law, market participants may now make an assessment of whether their conduct substantially lessens competition before considering whether a notification is required. It is anticipated that no single aggregator will admit to engaging on its own, enough brokers to constitute a "significant" section of the market. Hence, each will no doubt consider that it is unlikely that the imposition of such a condition requiring MFAA membership would satisfy the test imposed by section 47(10), and consequentially breach section 47(1) of the CCA.

Accordingly, in the FBAA's view, the ACCC will no longer be provided with visibility of these practices as it will no longer receive notifications of this conduct. Hence, the ACCC would need to increase its market investigations to identify any such conduct that may be considered to be substantially lessening competition.

In November 2018, the FBAA became aware of a sub-aggregator, [redacted], which mandated that brokers must obtain MFAA membership. The FBAA understands that [redacted] acts as a "sub-aggregator" under [redacted]. The FBAA wrote to the MFAA in December 2018 advising of this conduct to which the MFAA advised that it will not intervene because it is a private matter between entities. This correspondence is **annexed** hereto as **Attachment A**. The FBAA is not in a position to investigate or conclude on the MFAA's position nor how widespread the practice is within the industry, although it anticipates that this conduct will become less visible to regulators and will therefore require greater self-regulation.

3. Impact of Third-line forcing

As more aggregators and sub-aggregators engage in or may begin to engage in third-line forcing (such as the instances identified above), it is crucial to appreciate the impact that the MFAA's Disciplinary Rules will have.

As identified above, the size of an aggregator impacts upon a broker's ability to compete by influencing the portfolio of products which are available to that broker. Consequentially, the bigger an aggregator, the better a broker's ability to compete.

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[41] Not f cat on N93329.
[42] Not f cat on N95111.
[43] Not f cat on N95109.
[44] MFAA App cat on, page 9 of 19.
[45] *Competition Policy* Rev ew, *Final* Report, March 2015: Recommendat on 32, page 63.
[46] *Competition and Consumer Amendment (Competition Policy Review) Act 2017*, Schedu e 7.

The size of some of these aggregators (and indeed the size of some of the aggregators which have engaged in notified third-line forcing involving MFAA membership in the past) was identified during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. For example, during the examination of Mr Matt Comyn on 19 November 2018, the following admissions were elicited:

> *"Now, mortgage brokers typically interact with CBA through aggregators, don't they? ---Yes."*
>
> *"And CBA has an ownership stake in a number of mortgage aggregators? --- Yes."*
>
> *"It part-owns Mortgage Choice, one of the largest aggregators? --- Yes."*
>
> *"And it's the parent company of online aggregator, eChoice Home Loans? --- Yes."*
>
> *"And it presently wholly owns Aussie Home Loans, the largest aggregator by market share? --- Yes."*
>
> *"Now what's CBA's current market share of the broker channel? --- In terms of – so what proportion of the entire broker market would be - - -"*
>
> *"Yes? ---I don't – I think it would be in the order of – I don't know in aggregate. I would be more familiar with some of the individual aggregator groups, I think one of the larger ones like AFG, maybe 15 percent or something of their flows…"*[47]

Therefore, where a broker is expelled from the MFAA, that broker will be prohibited from engaging with particular aggregators that require MFAA membership. This will impact a broker's ability to compete. As a result, the submissions that *"MFAA membership is not mandatory for mortgage brokers"*[48] and that *"The MFAA considers it unlikely a loss of MFAA membership would significantly impede mortgage brokers' ability to compete"*[49], in this context, should not be accepted.

4. Competition provided by the FBAA

The MFAA submits that *"There is a competition profession association, the Finance Brokers' Association of Australia (FBAA), which includes mortgage brokers among its membership. It seems likely that the FBAA would offer similar benefits to its members to those offered by the MFAA"*.[50]

The FBAA submits that in the circumstances identified above, being that some aggregators and sub-aggregators third-line forcing requiring MFAA membership and the consequent impact on brokers' ability to compete, this submission is misconceived.

Where the MFAA expels a member, that member would not be able to re-engage with certain aggregators and sub-aggregators by obtaining FBAA membership because those aggregators and sub-aggregators require MFAA membership.

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[47] *In the matter of a Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry*, Transcr pt 19 November 2018, P 6559, L nes 28 41.
[48] MFAA App cat on, page 16 of 19.
[49] MFAA App cat on, page 16 of 19.
[50] MFAA App cat on, page 16 of 19.

5. Change of public benefit

The MFAA submits that *"It is the clear view of the Applicant that the public benefit balance will not change in the foreseeable future"*.[51] Given the issues identified above and the recent further conduct engaged in by aggregators and sub-aggregators, the FBAA considers that this statement is without sufficient foundation.

The FBAA does observe the undertaking offered by the MFAA that the applicant will file a new application or variation should the public benefit balance change.

PART E – RECOMMENDATIONS

While the ACCC's request does not specifically call for recommendations, the FBAA considers that the MFAA application and the state of competition would benefit from the following:

1. The MFAA should re-apply, or vary its current application on the basis that the MFAA seeks authorisation of the contract underpinning the disciplinary rules, its constitution (or at least the constitution insofar as it relates to the disciplinary rules and code of practice).

2. The MFAA should apply for authorisation in respect of potential contraventions of 45AJ and 45AK of the CCA in respect of the Disciplinary Rules and the constitution (or at least the constitution insofar as it relates to the disciplinary rules and code of practice).

3. Any authorisation granted by the ACCC should prescribe a condition requiring that the MFAA must impose a condition within its Disciplinary Rules or Code of Practice prohibiting conditions that require a broker to obtain membership with only the MFAA.

4. It is inappropriate for the MFAA to seek an authorisation for a period of ten years[52] as the market is now in such a state of transition that the ACCC may not be able to make a conclusion on the anti-competitive effects over such a long period of time. A term of five (5) years, as the ACCC has previously done, may be more appropriate.

Yours Faithfully,

Peter J White MAICD
Manag ng D rector

pwh te@fbaa.com.au

[51] MFAA App cat on, page 18 of 19.
[52] MFAA App cat on, page 2 of 19, sect on 3(c).

"Attachment A"

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The Directors
Mortgage and Finance Association of Australia
c/ Mr M Felton
Chief Executive Officer
GPO Box 144
Sydney NSW 2001

Suite 2, Level 9
130 Pitt Street
Sydney NSW 2000

Dear Mike,

[redacted] **(the Company)**

We write this letter following a sequence of events involving the Company which we are concerned may be contrary to law. We understand that Company is a member of the Mortgage and Finance Association of Australia (**MFAA**). Ensuring all brokers, aggregators and sub-aggregators, regardless of membership act according to law is of paramount concern to our industry and transcends our status as competitors.

Background
The Company carries on the business known as [redacted] under the ABN [redacted] and possesses Australian Credit Licence number [redacted] under this ABN. We understand that the Company is a "Sub-aggregator" under [redacted] and provides services to brokers. These services include access to various lenders (either itself or through its aggregator), software services (such as loan comparisons, loan lodgement or customer-relationship management platforms), training (in relation to lending, sales and compliance), lead generation, branding and back-office support (**Aggregation Services**).

For context, our respective organisations both provide services to brokers such as dispute resolution services, advocacy and continuing professional development (**Association Services**).

It has come to the FBAA's attention that in order for a broker to contract with the Company and be provided with Aggregation Services, that broker must as a condition of being provided with such Aggregation Services, become a member of the MFAA (**the Conduct**). The Conduct was verified by Peter White, managing Director of the FBAA in a telephone call to [redacted] of the Company.

Concerns

our view, we are concerned that the Conduct may constitute exclusive dealing as defined and prohibited by sections 47(1), (6) and (10) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). Any parties knowingly concerned in the Conduct may also be at risk of breaching the CCA. We formed our view based on the following analysis of the Conduct in relation to what constitutes exclusive dealing under the CCA.

Requirement	Why we think it is satisfied
The Company is a corporation	The Company is a limited liability company.
The Company engages in trade or commerce	The Company engages in trade or commerce by providing Aggregation Services for a fee.
The Company supplies or offers to supply goods or services to a person	The Company offers to supply Aggregation Services to finance brokers.
Goods or services are offered on a condition	By virtue of the Conduct, the Company offers to provide Aggregation Services to a broker on the condition that the broker obtains Association Services from the MFAA.
Condition requires the person to obtain particular kinds of services	The condition identified above requires a broker to obtain Association Services.
The particular goods or services will be acquire directly or indirectly	The Conduct does not merely persuade brokers to obtain Association Services from the MFAA, rather it compels the acquisition of Association Services from the MFAA as a pre-requisite of obtaining Aggregation Services from the MFAA.
The particular services are to be provided by another person not being related to the Company	The Association Services are to be provided by the MFAA. We understand that there is no connection between the Company and the MFAA (except perhaps membership).

Further, there is a very real risk that the very purpose of the Conduct, or at least its effect or likely effect would be to substantially lessen competition, which is obviously a matter at the very heart of the competition legislation.

Accessorial Liability

Liability for a contravention of section 47 of the CCA does not rest solely on the Company and may, by virtue of sections 75B and 76 of the CCA, extend to those who are involved, by attempting, aiding, abetting, counselling, procuring, inducing being knowing concerned in or conspiring with others to contravene section 47.

Resolution

We assume that the MFAA was previously unaware of the Conduct. Accordingly, we trust the MFAA will take such steps as necessary to address these matters.

ABN: 22 094 784 040

We would appreciate that the MFAA advise us of whether it has taken action because in our view, it would be unfair to the MFAA's member for us to take any action in circumstances where the MFAA has already acted.

We would appreciate such advice from the MFAA within 21 days. Should we not receive any correspondence from you, then we will consider that the MFAA has considered the above matters and decided not to take any action.

We look forward to your advice in due course.

Yours faithfully,

Peter J White MAICD
Managing Director

MFAA
MORTGAGE & FINANCE ASSOCIATION OF AUSTRALIA
GPO Box 144
Sydney NSW 2001
1300 554 817
enquiries@mfaa.com.au

7 December 2018

The Directors
Finance Brokers Association of Australia
c/- Mr Peter White
PO Box 234
Stones Corner QLD 4120

By email to: pwhite@fbaa.com.au

Dear Peter,

Re: [redacted] (the Company)

We refer to your letter sent by email dated 30 November 2018 and we thank you for bringing this matter to our attention.

We share your concern that all brokers, aggregators and sub-aggregators must act in compliance with the law, and we are committed to ensuring that all participants in our industry, in particular our members, do not engage in conduct which contravenes relevant legislative provisions.

The MFAA does not suggest or recommend that any organisation requires all its associates to join a single industry organisation (either the FBAA or the MFAA). We presume that the FBAA does the same.

However, the MFAA does encourage industry participants to join the MFAA, in the same way that the FBAA promotes itself and both associations will no doubt continue to provide healthy competition for members into the future.

Until we received your letter, we were not aware of the MFAA membership requirement imposed by [redacted]. However, as discussed further below, that requirement is a commercial decision by [redacted] and not something in which the MFAA can interfere.

We agree that the conduct of the Company is capable of constituting 'exclusive dealing' as defined by subsection 47(4) of the *Competition and Consumer Act 2010* (Cth) CCA.

However, the advice we have received is that the prohibition against exclusive dealing under subsection 47(1) of the CCA is qualified by subsection 47(10), which states that the practice of exclusive dealing is only prohibited if the relevant conduct has the purpose, or is likely to

have the effect, of substantially lessening competition. As both the MFAA and our legal advisers are comfortable that a lessening of competition has not occurred in this case it is not our intent to interfere with a commercial decision taken by [redacted]. We also note that the small number of brokers engaged by the Company represents a very small portion of the industry.

The MFAA has neither encouraged nor recommended that aggregators engage in such practices. In our view, brokers are not disadvantaged by the requirement, and are free to join other aggregators if they do not wish to join the MFAA.

Thanks again for bringing this matter to our attention however for the reasons stated above, we consider this matter as closed.

Yours sincerely

Mike Felton
CEO
Mortgage & Finance Association of Australia