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Your ref

5 December 2016

Ms Natalie Morton  
Adjudication, Mergers and Authorisation Review Division  
Australian Competition and Consumer Commission  
Level 1, 23 Marcus Clarke Street  
Canberra ACT 2601

**BY EMAIL: adjudication @acc.gov.au**

Dear Ms Morton,

## **Finance Brokers Association of Australia (FBAA) – Authorisation Applications A91554 and A91555 (the Applications)**

We refer to your email to us of 30 November 2016.

We provide below, further submissions on behalf of the FBAA regarding the public benefit which will be derived from authorising the FBAA Code of Conduct (**Code**) and FBAA Disciplinary Rules (**Rules**), the subject of applications A91554 and A91555.

Throughout this submission, the term “Member” means a Finance Broker who is a member of the FBAA. Where a term is capitalised in this letter but not defined, it draws its meaning from the Code or the Rules.

### **Definition of Finance Broker**

The definition of a Finance Broker is relevant to the submissions made below and to demonstrating the public benefit that will be gained by authorising the Rules and the Code.

The constitution of the FBAA (**Constitution**) does not define a Finance Broker but instead refers to those Members of the FBAA who engage in the “Finance Broking” profession. Finance Broking is defined in section 2.1 of the Constitution as follows.

*“Finance Broking” includes negotiating or arranging the following types of loans or credit facilities:*

- (a) residential mortgages;
- (b) secured and unsecured consumer finance including credit cards;
- (c) **commercial mortgages;**
- (d) secured and unsecured **business finance;**

- (e) lease finance, **commercial hire purchase** and chattel mortgages;
- (f) mortgage origination and/or management on behalf of credit providers;
- (g) **debtor factoring** and cash flow finance;
- (h) debt reduction plans,<sup>1</sup>

*but does not include other services relating to the provision of contracts for insurance or advice relating thereto, or any financial or other advice or services relating to superannuation or other forms of investment or estate planning, remuneration or salary packaging, financial planning or taxation matters.”*

Therefore, the FBAA considers a Finance Broker to be a Member of the FBAA who undertakes the business of Finance Broking as defined above. Significantly, we draw the ACCC’s attention to the matters in bold and will provide submissions that the FBAA definition of Finance Broking and, by extension, the sectors of the credit industry the FBAA is seeking to deal with, is wider than the sectors of the credit industry currently regulated by the Australian Securities and Investments Commission (**ASIC**) under the *National Consumer Credit Protection Act 2009* (**NCCPA**) and *National Credit Code* (**NCC**).

#### **Code of Conduct – Additional to Legislation**

The submissions provided by ASIC suggested that there was a potential for the standard set in the Code to be lower than what is required by legislation. In relation to that submission, we highlight the following elements of the Code and Rules:

Firstly, section 1.4.3 of the Code states:

*“The Code is part of a voluntary self-regulatory scheme and acknowledges that various state or federal laws exist to regulate the conduct of Finance Brokers, in addition to the codes of other professional associations that Members may be bound by.”*

Secondly, section 1.6.1 of the Code states

*“The objectives of the Code will be achieved and the provisions of the Code will be applied having regard to:*

*The requirement of Finance Brokers to meet the standards established at common law and applicable Australian state, territory or federal statutory requirements.”*

Thirdly, section 3.1.7 of the Code states:

*“A Finance Broker, when acting on behalf of a Client in relation to a Finance Broking transaction will seek to:*

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<sup>1</sup> Items in **Bold** are considered and explained in Item 1 below.

Comply with the provisions of the Competition and Consumer Act 2010, Corporations Act 2001, Australian Securities and Investments Commission Act 2001, the National Consumer Credit Protection Act and any other Finance Broker specific legislation and any amendments thereto.

Finally, section 5.9.1 of the Code states:

*“Abide by the laws applicable to the conduct of a Finance Broker’s business which applies in the jurisdiction of the Finance Broker’s business address and Client’s residential or other applicable address.”*

Each of the above clauses demonstrates that compliance with all State and Federal laws is the base level of compliance and that the Code builds upon this base. As a result, where a Member has failed to comply with any law applicable to their business, this will demonstrate a breach of the Member’s responsibility to:

- Seek to comply with the provisions of legislation as required by section 3.1.7 of the Code; and
- Abide by all laws applicable to the conduct of the Member’s business as required by section 5.9.1 of the Code.

The Rules also reference any breach of applicable legislation as giving rise to a Misconduct Complaint which can be made by a Member, Credit Provider or Client, and upon which the FBAA may act. This is exhibited by the following sections of the Rules.

Section 3.1.2(3) of the Rules allows a Member, Credit Provider or Client to make a Misconduct Complaint on the following grounds:

- (a) *That a Member has breached the Code of Conduct; or*
- (b) **That a Member has acted contrary to any piece of legislation that imposes obligations on Members for the benefit of Clients.**

Additionally, section 3.1.2(4) of the Rules allows the FBAA itself to make a Misconduct Complaint on the following grounds:

- (a) *That a Member has breached the Constitution;*
- (b) *That a Member has breached the Code of Conduct; or*
- (c) **That a Member has acted contrary to any piece of legislation that imposes obligations on Members for the benefit of Clients.**

It should be noted that a breach of the Code is only one of the grounds that allows clients, credit providers, other Members of the FBAA or the FBAA itself to make a Misconduct Complaint. Another, more obvious, ground is that the *“Member has acted contrary to any piece of legislation that imposes obligations on Members for the benefit of Clients”*.

The FBAA submits that for the reasons outlined above, it is impossible for a Member to breach a piece of legislation *“that imposes obligations on Members for the benefit of Clients”* without also breaching the Code.

Nevertheless, as there is a separate ground for making a Misconduct Complaint under the Rules, even if it were the case that a Member could breach a piece of legislation without necessarily breaching the Code (which for reason explained above cannot be the case anyway), a Misconduct Complaint could still be made.

### **Code of Conduct – Higher Standard**

CAFBA asserted that *“Also, many of the disciplinary matters [in relation to the Mortgage and Finance Association of Australia’s (MFAA) disciplinary regime] were triggered as a result of ASIC disciplinary action. So, at best, a duplication of what the regulatory environment already provides.”* and *“the potential consequences including...duplication of redress mechanisms with the potential for double jeopardy for a broker who is subject to more than one disciplinary process”*.

We reiterate our submissions on page 3 of our letter of 25 October 2016. Additionally, the FBAA submits that:

- ASIC did not provide any such submissions regarding people who have been prosecuted by ASIC and the MFAA, even though, if the CAFBA criticism were valid (which it is not), it could also be made of the MFAA scheme; and
- CAFBA’s conclusion requires an assumption that a decrease in suspensions and expulsions (according to the data CAFBA adduced from MFAA statistics) is due to a redundancy of the regulatory environment and not due to MFAA’s disciplinary regime providing any public benefit.

Notwithstanding the above arguments that CAFBA’s assertions are unsupported and without merit, we provide additional submissions below.

#### **1. Greater Scope than the *National Consumer Credit Protection Act 2009 (NCCPA)* and *National Credit Code (NCC)***

The FBAA regulates a greater scope of the credit industry compared to the scope regulated by the NCCPA and the NCC (Schedule 1 of the NCCPA).

A primary consideration of the NCCPA (and by extension the NCC) is to regulate “credit activity”. Credit activity is defined in section 6 of the NCCPA and refers to “credit contracts”, “credit service” and “credit assistance”. Regardless of the service being provided, a core component of credit activities is that they either are constituted by the entering into a credit contract, or lead to the entering into a credit contract (through “credit service” and/or “credit assistance”).

Section 5(1) of the NCCPA draws its definition of “credit contract” from section 4 of the NCC which defines a credit contract as *“For the purposes of this Code, a credit contract is a contract under which credit is or may be provided, being the **provision of credit to which this Code applies**”*. Pursuant to section 3 of the NCC, providing credit means either *“a payment of a debt owed by one person (the debtor) to another (the credit provider ) is deferred or where one person (the debtor ) incurs a deferred debt to another (the credit provider )”*.

Consequently, the NCC will only apply to contracts for credit if the provision of credit is one “to which the Code applies”. This is the central to understanding the scope of the NCC and the NCCPA. Pursuant to section 5(1), the NCC applies to provisions of credit if:

*“when the credit contract is entered into or (in the case of pre-contractual obligations) is proposed to be entered into:*

- (a) the debtor is a natural person or a strata corporation; and*
- (b) the credit is provided or intended to be **provided wholly or predominantly:***
  - (i) for **personal, domestic or household purposes**; or*
  - (ii) to **purchase, renovate or improve residential property** for investment purposes; or*
  - (iii) to **refinance credit** that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and*
- (c) a charge is or may be made for providing the credit; and*
- (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.”*

For simplicity we will refer to the provision of credit in the above circumstances as “**Consumer Credit**” as it is conceptually based on personal, household or domestic use or consumption.

Significantly, the definition of Finance Broking within the Constitution (outlined at the outset of these submission), refers to areas **not** covered by the definition of Consumer Credit (within the meaning of section 5(1) of the NCCPA), namely:

1. **Commercial mortgages:** These are not wholly or predominately for personal, domestic or household purposes and may not always constitute credit which is provided to purchase, renovate or improve residential property.
2. **Business finance:** This cannot be wholly or predominately for personal, domestic or household purposes and will not otherwise be captured by the NCCPA or the NCC unless the business is for the purchase, renovation or improvement of residential property.
3. **Commercial hire purchase:** This cannot be wholly or predominately for personal, domestic or household purposes.

4. **Debt factoring:** This cannot be wholly or predominately for personal, domestic or household purposes.

Therefore, the FBAA definition of Finance Broking is wider than the definition of Consumer Credit. Consequentially, the obligations under the Code and the Rules extend to activities which are not currently regulated by the NCCPA or the NCC. By applying obligations to areas of the credit industry not regulated by these pieces of legislation, the FBAA is creating a greater regulatory framework compared to that which currently exists.

The Code and the Rules extend the application of the current regulatory framework to sectors of the credit industry not currently covered by the national framework. By increasing the application of this framework, the FBAA increases the standard of the industry as a whole and thereby derives a public benefit.

## **2. More specific obligations compared to the NCCPA and the NCC**

Notwithstanding that the obligations under the Code and Rules extend to a greater cross-section of Finance Broking compared to the NCCPA and NCC, they also imposed obligations in excess of those prescribed in legislation.

For example, section 117 of the NCCPA states the matters a credit assistance provider (which the FBAA considers constitutes a majority of its Members) must consider before making a preliminary assessment. These matters are:

- (a) *make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and*
- (b) *make reasonable inquiries about the consumer's financial situation; and*
- (c) *take reasonable steps to verify the consumer's financial situation; and*
- (d) *make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and*
- (e) *take any steps prescribed by the regulations to verify any matter prescribed by the regulations.*

This section does not explain what is reasonable to inquire about regarding a consumer's financial situation. The Code explains this matter in section 3.2.3 which requires the Member to -

*"Make all reasonable enquiries of the Client as to their income, assets, actual and contingent liabilities, repayment history with other creditors or Credit Providers, details of any adverse credit or financial events and promptly convey such information, together with a fully completed credit application, to the Credit Provider in the form required".*

Therefore, by specifying the matters that a Member must investigate, the Code creates a more specific test which the Member must comply with, irrespective of whether the Member may

otherwise argue that he/she has already conducted sufficient inquiries to discharge the obligations under the NCCPA. Consequentially, this additional regulatory burden generates a public benefit.

Additionally, we submit that because Finance Broking as defined by the FBAA extends beyond the scope of the NCCPA and the NCC into commercial aspects of the credit industry yet maintains the same, or more prescriptive obligations, the FBAA has established standards for its Members in areas that are not regulated by the NCCPA and the NCC and thereby generates further public benefit.

### **3. Greater threshold required to discharge the Code compared to the NCCPA and the NCC**

The Code also requires that Members comply with existing regulatory requirements pursuant to the NCCPA and the NCC but to a greater standard. By raising the threshold of an existing legislative requirement, the Code generates a public benefit. For example, educational requirements are different between the NCCPA and the NCC and the Code.

Section 47(1)(f) of the NCCPA requires a licensee (such as a Member) to “*maintain the competence to engage in the credit activities authorised by the licence*”. Regulatory Guide 206 which is published by ASIC and outlines ASIC expectations in order to comply with the NCCPA and the NCC asserts, at section 206.13, that:

*“We expect your measures for complying with the organisational competence obligation will ensure that you:*

*(b) maintain and update the qualifications and experience of your responsible managers and ensure your responsible managers undertake at least 20 hours of continuing professional development (CPD) per year”*

The FBAA’s current continuing professional development policy requires all Members to perform at least 25 hours of continuing professional development per year. Therefore, this higher threshold requires that a Member cannot simply comply with the NCCPA in order to comply with the FBAA requirements.

Furthermore, section 5.2.1 of the Code requires Members to “*Provide suitable ongoing training for its employees and subcontractors having regard to the employees or subcontractor’s role and responsibilities*”. This broadens the educational requirements of organisations which are FBAA Members so that all employees, not just responsible manager receive ongoing training.

By creating a greater and broader educational requirement, the FBAA ensures that Members are better informed and that the currency of their knowledge is better maintained compared to a situation whereby the Member complies with the educational requirements under the NCCPA and NCC (and explained by ASIC) alone, thereby generating an increase public benefit.

Again, we submit that the FBAA has established higher standards for its Members and thereby generates further public benefit.

#### **4. Additional Duties required under the Code compared to the NCCPA and the NCC**

The majority of FBAA members would be regulated by the NCCPA and NCC as entities who provide “credit assistance”. “Credit Assistance” is defined in section 8 of the NCCPA as:

*“A person provides credit assistance to a consumer if, by dealing directly with the consumer or the consumer’s agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:*

- (a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or*
- (b) suggests that the consumer apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or*
- (c) suggests that the consumer remain in a particular credit contract with a particular credit provider; or*
- (d) assists the consumer to apply for a particular credit contract with a particular credit provider; or*
- (e) assists the consumer to apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or*
- (f) suggests that the consumer apply for a particular consumer lease with a particular lessor; or*
- (g) suggests that the consumer remain in a particular consumer lease with a particular lessor; or*
- (h) assists the consumer to apply for a particular consumer lease with a particular lessor.*

*It does not matter whether the person does so on the person’s own behalf or on behalf of another person.”*

Accordingly, the majority of obligations imposed on the FBAA members are imposed under Chapter 3, Part 3-1 of the NCCPA. Generally, these obligations require Members to inquire about the Consumers position (and the increased thoroughness required by Members in order to comply with the Code has been examined above) and provide an assessment as to whether the credit contract is suitable or not. The Code goes into much greater detail as to what a Member should provide to their Clients.

Set out below are sections from within the Code which the FBAA considers is in excess of the obligations contained within the NCCPA and the NCC.

Section of Code	Obligation under the Code.
3.1.15	Advise the Client of the need to provide the Credit Provider, their solicitor or valuer of any documentation or information that may be required to obtain approval of a Credit Facility, or to facilitate preparation of any loan documentation, including production of certificates of title or ownership, evidence of insurance in a form required by the Credit Provider and to do so in an expedient manner.
3.1.16	Advise the Client of the process of arranging any registered second mortgage or company charge and the need for the Client to first obtain the consent of the prior mortgagee or charge in a timely manner to avoid delays in settlement of any proposed transaction.
3.1.17	Advise the Client of the types of loan products that the Finance Broker can obtain for the Client, explain the differences between various types of loan products and inform the Client which Credit Providers the Finance Broker deals with.
3.1.18	Advise the Client on the process of arranging credit generally including the likely time-frames and problems that could be encountered throughout the process.
3.2.2	Maintain clearly written diary notes or provide written advice of reasons for any recommendations given to Clients and any variation subsequently sought by the Client or imposed by the Credit Provider. Any diary notes or written advice of reasons are to be kept by the Finance Broker in accordance with good business practice.
3.2.12	When requested by, or previously arranged with, the Client or Credit Provider, providing reasonable assistance with any post settlement liaison between the Client and Credit Provider including communicating any permissible variations in the credit contract, renewal of the term or discharge of security.
3.2.14	Assess the Client's ability to meet their obligations under a proposed Credit Facility in accordance with any Credit Facility affordability calculators supplied by a Credit Provider and advise the Credit Provider of any extenuating circumstances affecting the Client's ability to meet their proposed obligations to a Credit Provider.
3.2.15	Explain to Clients the possibility of notations being made on their credit record each time they apply for credit and take steps to avoid unnecessary notations on a Client's credit record.

By increasing the obligations of Members and the services they are expected to provide to their Clients, the Code is in effect ensuring that FBAA members provide a greater and more holistic level of service to their Clients which the FBAA submits constitutes a public benefit.

Again, we submit that because Finance Broking as defined by the FBAA extends beyond the ambit of the NCCPA and the NCC into commercial aspects of the credit industry yet maintains the same (or greater) obligations, the FBAA has established standards for its Members in areas that are not regulated by the NCCPA and the NCC and thereby generates further public benefit.

## 5. Supplementing ASIC

Public money is not endless. Accordingly, there may be situations where ASIC may wish to prosecute a Finance Broker who has contravened the NCCPA or the NCC but is unable to due to monetary restriction or prioritisation of its activities.

The FBAA has envisaged that there will be circumstances where it would be more appropriate for ASIC to prosecute a Finance Broker. Accordingly, the Board is specifically empowered pursuant to sections 3.2.2(b)(iii) and 3.2.5 of the Rules to refer a Misconduct Complaint to a government agency (such as ASIC) if it is more appropriate.

However, the FBAA also envisages that ASIC may not prosecute every matter the FBAA refers to it because either:

- The Misconduct Complaint is a minor breach which may not warrant significant expenditure from ASIC; or
- ASIC is unable to commit to prosecute the Misconduct Complaint for some reason (and we do not profess to understand the decision making process within ASIC).

In light of this, it is important that the FBAA is still able to act in circumstances where ASIC may not. The objective of the FBAA in these circumstances is to supplement ASIC's activities and ensure that all Finance Broking activity is regulated, not just the most repugnant of behaviours.

However, a risk is that there may be an instance where ASIC becomes involved after the Misconduct Complaint has progressed through the disciplinary process under the Rules. A further protection mechanism is in place to ensure that a Finance Broker is not penalised by the FBAA and ASIC. This mechanism is implemented pursuant to section 4.4.5(1)(a)(vi) of the Rules, which states:

(1) *In making a decision regarding a Misconduct Complaint, the Tribunal may have regard to whether:*

(a) *the conduct that is the subject of the Misconduct Complaint:*

(vi) *Has be addressed by a Government Agency;*

Where the matter later comes to the attention of a government agency which then takes action, the Tribunal may (in applying the principles of natural justice which are paramount to the decisions of the Tribunal pursuant to section 4.4.1(1) of the Rules) take this into account when making a determination.

Therefore, the Code and Rules balance the importance of ensuring as much credit activity is regulated by supplementing ASIC's functions and regulating matters which ASIC for whatever reason is unable to regulate while also ensuring that Members are not unfairly penalised by the potential overlap.

## Conclusion

To summarise the above, the FBAA submissions are that:

1. The Code and the Rules are additional to the regulatory framework under the NCCPA and the NCC as shown by a number of provisions within the Code.
2. As there are specific obligations within the Code to comply with legislation *"that imposes obligations on Members for the benefit of Clients"* it is impossible for a Member to comply with the Code while also breaching legislation such as the NCCPA and the NCC.
3. Even if it were the case that a Member could breach a piece of legislation without necessarily breaching the Code, there is a specific ground for making a Misconduct Complaint where *"a Member has acted contrary to any piece of legislation that imposes obligations on Members for the benefit of Clients"*. Therefore, a Misconduct Complaint can still be made.

Additionally, the FBAA submits that the Code and the Rules provide a public benefit by:

4. Specifying the matters that a Member must investigate which is more prescriptive than that required by the NCCPA. Accordingly, the Code creates a more specific, greater regulatory burden which the Member must comply with, irrespective of whether the Member has already conducted sufficient inquiries to discharge the obligations under the NCCPA.
5. The FBAA has a greater and broader education requirement which ensures that Members are better informed compared to a situation where the Member complies with the NCCPA and NCC.
6. There are a number of obligations under the Code which are additional to those imposed by the NCCPA and the NCC. Therefore, the Code is in effectively ensuring that Members provide a greater level of and more holistic service to their Clients.
7. The Code and the Rules strike a balance between ensuring the FBAA supplements ASIC's functions by regulating matters which ASIC for whatever reason is unable to regulate.

Most significantly, the greatest and most obvious public benefit is drawn from the sectors of the credit industry that the FBAA may regulate according the Code (which has a greater burden than the NCCPA and the NCC as outlined above) compared to the areas that ASIC may regulate under

the NCCPA and the NCC. Members of the FBAA engage in Finance Broking which encompasses both consumer and commercial broking practices.

If the ACCC has any further queries regarding the possible public benefit to be realised by authorising the FBAA's Code and Rules, please do not hesitate to contact our office.

Finally, we confirm that we authorise the ACCC to publish this letter publicly so that the industry can understand the public benefits which the FBAA is driving.

Yours faithfully  
**RBG Lawyers**



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