



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

The Finance Brokers Association of
Australia

in respect of

a disciplinary scheme
to enforce the FBAA Code of Conduct

Date: 21 February 2017

Authorisation numbers: A91554,
A91555

Commissioners: Sims
Schaper
Rickard
Court
Featherston

Summary

The ACCC grants authorisation to the Finance Brokers Association of Australia in respect of a disciplinary scheme to enforce the FBAA Code of Conduct.

The ACCC grants authorisation until 15 March 2022.

The applications for authorisation

1. On 31 August 2016 the Finance Brokers Association of Australia (**FBAA**) lodged applications A91554 and A91555 with the ACCC seeking authorisation for the conduct described below.
2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.¹
3. On 16 December 2016, the ACCC issued a draft determination² proposing to grant authorisation to the Finance Brokers Association of Australia in respect of a disciplinary scheme to enforce the FBAA Code of Conduct for five years. A conference was not requested in relation to the draft determination.

The conduct

4. The Finance Brokers Association of Australia seeks authorisation to implement a disciplinary scheme to enforce its Code of Conduct (the **Conduct**).
5. The disciplinary scheme includes the Disciplinary Rules (Annexure 1) and changes to the FBAA Constitution (Annexure 2), and is intended to be part of the regulatory framework for dealing with disciplinary disputes involving members of the FBAA.
6. The FBAA seeks authorisation for the Conduct for a period of five years.

The FBAA

7. The FBAA is an association of finance and mortgage brokers who offer domestic finance, commercial finance, lease and motor vehicle finance, and business and debtor finance. The FBAA provides services to, and advocates on behalf of, finance brokers and credit providers (such as banks) for the purpose of cultivating and facilitating relationships between credit providers and consumers.
8. The FBAA currently has approximately 6,000 members across Australia.

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

² Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

9. Membership of FBAA is voluntary and non-exclusive but members must comply with the FBAA Code of Conduct.

FBAA Code of Conduct

10. The disciplinary scheme, for which authorisation is sought, enforces the FBAA Code of Conduct. The FBAA does not seek authorisation for the Code of Conduct but it is the benchmark against which an FBAA member's conduct is to be judged. Among other things, the Code of Conduct requires that finance brokers:
- comply with the provisions of the *Competition and Consumer Act 2010* (Cth), the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and all state and territory Fair Trading Acts or finance broker specific legislation
 - discharge their responsibilities and duties competently and with integrity and honesty
 - act in the best interest of the client by exercising reasonable care and skill and avoiding conflicts of interest
 - maintain professional indemnity insurance.
11. The FBAA provided a copy of the Code of Conduct with its application for authorisation on 31 August 2016 which is available on the ACCC's website www.accc.gov.au/authorisationsregister. Amended versions of the Code were provided on 25 October 2016 and 3 February 2017 including changes in response to issues raised by ASIC and the ACCC. These are also available on the ACCC's website. The Code is discussed in more detail below.

FBAA disciplinary scheme

12. The scheme involves a complaint lodgement and resolution regime to facilitate the resolution of the following types of complaints:
- **Misconduct complaints.** Complaints by a client, a current FBAA member, a credit provider (such as a bank) or the FBAA Board that a current member of the FBAA has breached the FBAA Code of Conduct or has acted contrary to any piece of legislation that imposes obligations on current members for the benefits of clients. Additionally the FBAA Board may bring a complaint against a current member of the FBAA where they have breached the FBAA Constitution.
 - **Membership complaints.** Complaints by prospective or former members of the FBAA regarding the outcome of either their application for membership or renewal of membership with the FBAA.

13. The disciplinary scheme comprises the Disciplinary Rules and the FBAA Constitution.

The Disciplinary Rules

14. Currently, the FBAA's only option to discipline members for misconduct is to issue a Show Cause Notice under the FBAA Constitution which could result in expulsion or suspension or a decision to ignore the conduct.

15. The Disciplinary Rules implement a process for the making of complaints and how these complaints are investigated, resolved or determined and the publication of determinations where appropriate to safeguard consumers. The key elements of the process are outlined below.

Making a complaint

16. Complaints are made in writing to the FBAA Board.
17. Following receipt, the Board must make a decision whether to investigate, reject or directly refer the complaint to the FBAA Tribunal established under the Disciplinary Rules. Additionally, where the complaint is a misconduct complaint, the Board may issue a Show Cause Notice pursuant to the FBAA Constitution or refer the complaint to a dispute resolution scheme or a regulator (such as ASIC) where this is more appropriate.

Investigations

18. The FBAA Board may conduct an investigation into the complaint. The Board may delegate the responsibility of the investigation to a committee of the Board; an individual Board member; another FBAA member (having not less than ten years' experience as a finance broker and five continuous years membership of the FBAA); or an external legal advisor.
19. Following an investigation, a report is provided to the Board who then decides the appropriate action.

The FBAA Tribunal

20. Complaints may be referred to the FBAA Tribunal which is empowered to determine the complaint but not any legal dispute arising by contract or any area of law.
21. The Tribunal will consist of a Chairperson who must be an appropriately qualified current or retired Australian legal practitioner. The Chairperson is the sole adjudicator of the complaint but is assisted by two Tribunal members. The purpose of the Tribunal members is to assist the Chairperson by providing context to the complaint based on their experiences. Accordingly, Tribunal members may only be appointed if they have at least 10 years continuous experience as a finance broker and at least five years continuous membership of the FBAA immediately prior to being appointed.
22. The Tribunal has discretion on how to conduct the determination but must do so in as expeditious manner as possible in the circumstances. The paramount consideration of the Tribunal is adherence to the principles of natural justice and procedural fairness.
23. Any decision may only be made where the Tribunal is satisfied that there are reasonable grounds for the decision which are based upon relevant, credible and logically consistent facts. The Tribunal must provide the reasons for any decision made.
24. Decisions made by the Tribunal will be published by the FBAA on a register available to the public so consumers can determine whether the member they are dealing with has had a history of misconduct.
25. The Tribunal does not have to have regard to the rules of evidence, nor is there a burden of proof requirement.

Orders by the FBAA Tribunal

26. Where the Tribunal upholds a misconduct complaint, it may make various orders including:

- cancelling or suspending membership for a period of time
- making membership subject to conditions for a period of time
- officially warning or reprimanding a member
- requiring a member to take steps to remedy misconduct
- requiring a member to undertake supervised practice for a period of time
- requiring a member to attend an education or compliance program.

27. Where the Tribunal upholds a membership complaint, it may make orders including that the complainant be admitted as a member absolutely or subject to conditions.

The FBAA Constitution

28. The FBAA Constitution is a key governance document, the amendment of which is the subject of this application for authorisation.³

29. Amendments will be made to alter the FBAA disciplinary process to include the Disciplinary Rules, as well as the former process of Show Cause Notices.

Industry background

30. The *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) imposes general conduct obligations and responsible lending obligations on credit providers, including mortgage brokers and credit assistance providers in respect to consumer credit.

31. The Australian Securities and Investments Commission (ASIC) is responsible for regulating consumer credit under the NCCPA.

32. Membership of a professional association is not a requirement of the NCCPA, although the ACCC understands that the majority of brokers are members of an industry association.

Other relevant matters

33. The ACCC has previously authorised the disciplinary rules of another industry association, the Mortgage Finance Association of Australia (MFAA), most recently in 2014.⁴

34. The ACCC has received several third line forcing notification from banks which require that brokers of various lending institutions be members of the MFAA or the FBAA. These notifications have been allowed to stand following the ACCC's assessment that the public benefit from the notified conduct outweighed the public detriment.

Submissions received by the ACCC

35. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.

³ The relevant sections of the Constitution which are proposed to be amended are clauses 2.1, 9.1, 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 61.1 and 62.2.

⁴ A91390, 21 May 2014.

36. The ACCC sought submissions from 56 interested parties potentially affected by these applications, including banks, consumer welfare groups, regulators and other financial broker organisations.

Prior to the draft determination

37. The ACCC received submissions from three interested parties:

- **ASIC** submits that industry organisations can play an important role in raising industry standards, and in investigating and appropriately responding to instances of member misconduct. ASIC initially raised concerns that the FBAA Code of Conduct set a lower level of compliance than the NCCPA and contained obligations that were inconsistent with that law. The FBAA subsequently amended its Code of Conduct and ASIC states that the updated version addresses its concerns. ASIC does not oppose the FBAA's application for authorisation.
- The **MFAA** does not oppose the FBAA's application for authorisation. However, it does have concerns with the mechanism by which the FBAA will enforce its Code of Conduct and Constitution. In particular the MFAA has concerns that there is no requirement for procedural fairness in investigations by the FBAA Board. Further, in respect of the FBAA Tribunal, there is no requirement that the Chairperson be a third party, it can be a member, albeit the member has to be a current or former lawyer.
- The Commercial Asset Finance Brokers Association of Australia (**CAFBA**) opposes the FBAA's application for authorisation. It submits that the FBAA Disciplinary Rules duplicate existing legislation and are therefore unnecessary.

Following the draft determination

38. The FBAA provided a further public submission addressing concerns raised by the ACCC in the draft determination.

39. The views of the FBAA and interested parties are outlined in the ACCC's evaluation chapter of this determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

40. The ACCC's evaluation of the Conduct is in accordance with the relevant net public benefit tests⁵ contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.

41. In order to assess the effect of the Conduct and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future with and without the Conduct.

⁵ Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8) The relevant tests are set out in Attachment A.

The relevant area of competition

42. The FBAA submits that the relevant area of competition is the supply of finance and mortgage related services provided by finance brokers for consumers at an intermediary functional level independent of credit providers, in Australia. That is, the FBAA considers that finance and mortgage services provided by credit providers are in a different market to finance and mortgage services provided by brokers independently of credit providers.

43. The FBAA further submits that:

- barriers to entry are low, because participation is only predicated on obtaining an Australian Credit Licence or to be authorised under another person's Australian Credit Licence
- while membership of an industry association such as the FBAA is not a requirement necessary to compete, there are other organisations that a broker could join such as the MFAA.

44. Interested parties did not comment on the FBAA's categorisation of the relevant area of competition, however ASIC confirmed that there is no requirement under the NCCPA for licensees to be members of the FBAA or any other peak industry body.⁶

45. The FBAA represents both finance and mortgage brokers and therefore, membership encompasses a broad range of services. The FBAA submits that 'the FBAA provides services to and advocates on behalf of finance brokers, credit providers (such as banks) for the purpose of cultivating and facilitating relationships between credit providers and consumers.'⁷

46. Accordingly, the ACCC considers that the relevant area of competition is the supply of mortgage and finance related services (whether provided by banks, building societies and credit unions directly, or being provided by finance brokers) in Australia.

47. In addition, the ACCC considers that the supply of professional membership services to mortgage and finance brokers and credit advisors across Australia is also likely to be affected.

The future with and without

48. To assist in its assessment of the Conduct against the authorisation tests the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future without the Conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the Conduct occurs against the future in which the Conduct does not occur.

49. The FBAA submits that in the likely future without the Conduct prospective members may be less inclined to join the FBAA or may be dissuaded from continuing membership of the FBAA. It submits that this would result in a reduced client and member base which would cause the decline of the FBAA and the eventual exit of the FBAA from the market.

50. The FBAA further submits that without the Conduct:

- incidents of misconduct cannot be appropriately investigated

⁶ ASIC Submission, 29 September 2016, pg. 1.

⁷ Applicant submission, 31 August 2016, pg. 3.

- it would be unable to effectively enforce its governance regime and as a result its ethical standards are likely to suffer
- the FBAA will be unable to take a proactive approach to enforcing its governance regime, because it will be unable to effectively investigate potential misconduct of its own volition
- consumers' options if they are affected by an FBAA member's misconduct are limited to complaining to the FBAA (who would be unable to offer a broad range of solutions), ASIC (who may not act in cases of minor or careless misconduct) or to an external dispute resolution scheme (which would only address the current incident and not any underlying issues) thereby leaving consumers potentially dissatisfied.

51. CAFBA submits that the authorisation is unnecessary, because the current regulatory framework adequately protects consumers.

52. ASIC submits that should the ACCC not authorise the FBAA rules, and as a result the FBAA not be in a position to effectively enforce its code of conduct, this would reduce the potential public benefit associated with FBAA membership.

53. The ACCC notes that in the future with the conduct, FBAA will have access to a disciplinary scheme, which allows it to expel or sanction members who are found to have engaged in misconduct or to reject an application for membership.

54. The ACCC considers that in the future without the conduct, the FBAA would be unlikely to enforce its disciplinary scheme due to the risk of breaching the Act but members would be subject to the current regulatory framework.

Public benefit

55. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁸

56. The FBAA submits that the Conduct will deliver the following public benefits:

- ensuring that FBAA members provide a greater level of and more holistic services to their clients
- allowing the FBAA to more efficiently and transparently regulate its members.

57. The ACCC's assessment of the likely public benefits from the Conduct follows.

A higher standard of conduct and compliance for members than is legislated

58. The FBAA submits that:

⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- The scope of the FBAA’s membership is broader than what is regulated under the NCCPA, which is limited to consumer credit activities.⁹ The FBAA’s Code of Conduct also covers the conduct of members who engage in commercial hire purchase, debt factoring, business finance and commercial mortgages.
- The FBAA Code of Conduct imposes obligations in excess of those prescribed in legislation. For example, by specifying what matters a broker must investigate before making a preliminary client assessment the FBAA Code creates a more specific test which the Member must comply with, irrespective of whether the Member may otherwise argue that they have discharged their obligations under the NCCPA.
- The FBAA Code of Conduct has greater educational requirements for brokers than is required by law. For example, the FBAA Code of Conduct requires the completion of an additional 5 hours of continuing professional development a year than the NCCPA.¹⁰

59. ASIC notes that in some places the Disciplinary Rules place a higher obligation on members than what is required under the NCCPA. For example, the FBAA Code of Conduct covers a wider area of credit products than is required under the NCCPA. Further, ASIC submits that the obligation under the FBAA Code of Conduct that members must “act in the best interest of their client” is arguably a slightly higher threshold than the obligations embodied in the NCCPA.

60. As noted earlier, ASIC was initially concerned that there appeared to be circumstances where a member would be able to comply with the Code of Conduct without meeting the obligations of the NCCPA. ASIC has subsequently confirmed that the amended Code of Conduct lodged by the FBAA on 25 October 2016 adequately addresses its concerns and that the obligations contained in the FBAA Code of Conduct now align more closely with those of the NCCPA (and removes the previous inconsistencies with the legislation).¹¹

61. The CAFBA submits that broker clients already have a range of protections, including professional indemnity insurance; external dispute resolution scheme membership (with each scheme compelled by ASIC to report systemic non-compliance) and ASIC enforcement action against brokers under the ASIC Act and the Criminal Code.¹²

ACCC view

62. The ACCC considers that industry associations can generate a public benefit by enforcing a higher standard of conduct and compliance for members than is legislated. This can assist members to act ethically and professionally within the industry and thereby improve consumer confidence and consumer protection.

63. The ACCC considers that the proposed disciplinary scheme which enforces the FBAA Code of Conduct provides a mechanism for the FBAA to impose a higher standard than that prescribed under the NCCPA, by:

- requiring compliance for a broader range of member activities than is currently regulated by the NCCPA
- imposing obligations in excess of the NCCPA in certain circumstances and

⁹ Personal, household or domestic use or consumption.

¹⁰ FBAA further Submission, 5 December 2016.

¹¹ ASIC Submission, 30 November 2016.

¹² CAFBA Submission, 29 September 2016, p.2-3.

- requiring a higher continuing professional development standard than under the NCCPA.

64. As such, the ACCC considers that the Conduct is likely to result in public benefit by requiring FBAA members to adhere to standards of conduct and compliance that are higher than what is contained in relevant legislation such as the NCCPA.

More effective and transparent regulation of members

65. The FBAA submits that public benefit is derived from the implementation of the Disciplinary Rules themselves as it allows for the FBAA to more efficiently and transparently regulate its members. More specifically:

- the Disciplinary Rules are integral to the effective enforcement of the governance regime. Currently, the FBAA's only option to discipline members for misconduct is to issue a Show Cause Notice under the Constitution which could result in expulsion or suspension or a decision to ignore the conduct.
- the Disciplinary Rules provide the FBAA with additional avenues to regulate the conduct of its members.

ACCC view

66. The ACCC considers that, compared to the future without the Conduct, the Disciplinary Rules provide the FBAA with more effective enforcement mechanisms including the ability for the FBAA Board to conduct investigations of misconduct and for the FBAA Tribunal to impose sanctions in the appropriate circumstances. The ACCC considers that these mechanisms are likely to provide a deterrent against professional misconduct by FBAA members, in addition to the regulatory role of ASIC.

67. The ACCC notes that decisions made by the FBAA Tribunal will be published by the FBAA on a register available to the public so consumers can determine whether the member they are dealing with has had a history of misconduct. This transparency is also likely to be an important deterrent against professional misconduct by FBAA members.

68. The ACCC considers that the Conduct is likely to result in public benefit by providing measures for more effective and transparent regulation of FBAA members.

ACCC conclusion on public benefits

69. The ACCC concludes that the Conduct is likely to result in public benefit by:

- requiring FBAA members to adhere to standards of conduct and compliance that are higher than what is contained in relevant legislation such as the NCCPA and
- providing measures for more effective and transparent regulation of FBAA members

which is likely to improve consumer confidence and consumer protection in services provided by FBAA members.

Public detriment

70. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹³

71. The FBAA submits that the Disciplinary Rules would be likely to result in a public detriment if:

- membership of an association is necessary in order to compete and
- the code of conduct is broadly and subjectively interpreted to the detriment of members, creating risk that members of the FBAA would be expelled for malicious and potentially anti-competitive purposes or
- where circumstances of misconduct result in such a proportion of members being expelled for misconduct that there is a drastic reduction in the number of competitive finance brokers.

72. The ACCC's assessment of the likely public detriments from the Conduct follows.

Effect of membership on competition

73. The FBAA submits that:

- membership is not a requirement in order for a person or business to compete to provide finance and mortgage related services
- the MFAA is a larger variant of the FBAA and as far as the FBAA is aware does not place weight upon the decisions of the FBAA. Therefore, the FBAA submits that any decision to expel a member does not automatically prevent the person or business from obtaining membership of the MFAA or from another industry association.

74. ASIC submits that membership of an industry association is not a requirement of becoming licensed under the NCCPA.

75. CAFBA submits that many lenders prefer to deal with brokers who are members of a broker association. Loss of membership by a person or business results in exclusion from the market and loss of occupation. CAFBA submit that this is a significant consequence; more so than loss of membership.

76. In its response to interested party views, the FBAA notes CAFBA's concern about possible exclusive dealing but submits 'there is nothing at all in the applications for authorisation that remotely suggests such conduct is occurring, or will or may occur in the future.'

ACCC view

77. The ACCC considers that the Conduct is not likely to reduce competition to provide finance and mortgage related services, given:

- membership of the FBAA (and other industry associations) is voluntary, non-exclusive and not a requirement of becoming licensed under the NCCPA
- the existence of other industry bodies which brokers can join including the MFAA and the CAFBA. If the FBAA attempted to expel a significant number of brokers

¹³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

solely for anti-competitive reasons, it would be open to these brokers to apply to join the MFAA, CAFBA or form a new association. The ACCC notes that the FBAA currently has less than half the number of members as the MFAA.¹⁴

Potential for the Disciplinary Rules to be used for anti-competitive purposes

78. The FBAA submits that the disciplinary scheme is unlikely to be used for anti-competitive purposes, because any abuse of process would likely drive members from the FBAA towards other professional associations. Therefore, it is in the FBAA's interest to ensure a just and equitable disciplinary scheme is maintained.

79. The FBAA further submits that in the event there is an attempt to use the disciplinary scheme for anti-competitive purposes, the Disciplinary Rules are structured in a way to specifically address this concern by:

- ensuring that the FBAA board does not have the power to instruct the FBAA Tribunal on how to decide an issue, through having a Chairperson who is independent of the FBAA's Board decisions
- making the FBAA Tribunal act in accordance with the principles of natural justice and procedural fairness
- allowing the Tribunal to overrule a past decision if it considers that a mistake would have been made (only applicable where the Chairperson considering the current matter did not make the previous decision)
- allowing the Tribunal to have regard to a number of issues in a misconduct complaint, including the intention, whether there is a pattern of behaviour and whether the member has attempted to remedy the conduct
- rejecting further complaints made by the same complainant in a matter that has been determined in favour of the member, to avoid vexatious complaints or an abuse of process.

80. The MFAA submits that the FBAA's investigation process¹⁵ does not provide adequate protections against bias and conflict of interest by those undertaking investigations.

81. The CAFBA submits that brokers who are banned from the FBAA have no appeal mechanism.

82. In response to interested party submissions, the FBAA submits that:

- the FBAA Disciplinary Rules address bias and conflict of interest in a manner superior to the MFAA Disciplinary Rules which have already been approved. For example, the FBAA Disciplinary Rules require that Tribunal members and the Chairperson disclose a conflict of interest whereas the MFAA Disciplinary Rules only require that a Tribunal member declare a conflict of interest.
- it is not inappropriate to be able to delegate an investigation to an external legal adviser because they are likely to have a more in-depth knowledge of the principles

¹⁴ The MFAA had 12,800 members as at 29 September 2016; the FBAA estimates it has 6,000 members

¹⁵ Clause 3.3 of the Disciplinary Rules of the Finance Brokers Association of Australia.

of natural justice, procedural fairness, rules of evidence and the burden of proof which are integral to the efficient and fair conduct of disciplinary proceedings.

83. In the draft determination¹⁶ the ACCC invited the Applicant to respond to the following concerns:

- The Disciplinary Rules require the Chairperson [of the Tribunal] to be a current or retired Australian legal practitioner but are silent on whether the Chairperson may be a member of FBAA. The ACCC expects the FBAA intended that the Chairperson be a non-member in order to avoid the potential for bias and conflict of interest. The ACCC considers that this issue could be more clearly addressed in the Disciplinary Rules.
- The ACCC notes that, in addition to the FBAA Tribunal, the disciplinary scheme also includes the ability for the FBAA Board to conduct investigations and take appropriate action under the Disciplinary Rules or to issue a Show Cause Notice under the FBAA Constitution which could result in expulsion or suspension.
- It is not clear to the ACCC that these disciplinary measures are subject to the same requirements as the FBAA Tribunal in terms of the need to have regard to procedural fairness, or for investigators to manage conflicts of interest. The ACCC invites submissions from the Applicants and interested parties on this point.

84. In response to these concerns the FBAA submits the following.¹⁷

- Regarding the issue of the membership of the Chairperson, the FBAA accepts the ACCC's suggestion and will amend the Rules to include a new provision as Rule 4.2.2(2) –

“The Chairperson must not be a current Member or an employee of a current Member”.

- Show Cause Notices are issued by the FBAA Board, who are required to comply with the *Corporations Act 2001*, which provides, relevantly:

“A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) In good faith in the best interests of the corporation; and

(b) For a proper purpose.”¹⁸

- Regarding the conduct of investigations, the rights of a member to be afforded natural justice in such matters can only be excluded by the clearest expression of such intent in the rules of the organisation.¹⁹ In the case of the FBAA Disciplinary Rules, not only do the rules not contain any exclusion of obligations of fairness but in fact the requirements of natural justice are enshrined in provisions of the FBAA Disciplinary Rules. The FBAA also submits that if the Board were to delegate responsibility for the conduct of an investigation to a person who had a conflict of interest or was biased, then such delegation would be unfair or prejudicial, and as

¹⁶ Draft determination A91554-91555, 16 December 2016.

¹⁷ FBAA Further Submission, 12 January 2017.

¹⁸ *Corporations Act 2001* s 181(1).

¹⁹ The FBAA cites *McCelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759. Per Campbell J [97] in support of this proposition.

such the exercise of such a power by the Board would likely be improper, and in breach of the duties of the directors.²⁰

ACCC view

85. The ACCC considers that the potential for disciplinary rules to be used for anti-competitive purposes is likely to be limited where there is an independent review process.
86. In this case, the FBAA Disciplinary Rules establish the FBAA Tribunal to adjudicate upon and determine misconduct and membership complaints that are referred to it.
87. The ACCC recognises that the Chairperson of the FBAA Tribunal, while elected by the FBAA Board, is independent of the Board's decisions so that the Board does not have the power to instruct the Tribunal on how to decide an issue.
88. The ACCC notes that the FBAA will amend the Disciplinary Rules to specify that the Chairperson is not a member of FBAA in order to avoid the potential for bias and conflict of interest.
89. Overall, the ACCC considers that the FBAA Tribunal represents a workable independent review process which is likely to limit the potential for the Disciplinary Rules to be used for anti-competitive purposes.
90. As mentioned above at paragraph 86, the ACCC noted in the draft determination that the FBAA Board retains the ability to implement a range of disciplinary measures. The ACCC was concerned that these measures do not appear to be subject to the same requirements as the FBAA Tribunal in terms of the need to have regard to procedural fairness, or for investigators to manage conflicts of interest where the task is delegated to another FBAA member.
91. The FBAA's specific responses are set out at paragraph 87 above. In general terms, the FBAA submits that the FBAA Board is required to comply with very clear and long standing obligations under the law (including affording natural justice) and that its members must comply with their duties under the *Corporations Act 2001*.
92. The ACCC recognises these obligations on the Board but remains concerned that the risk the disciplinary scheme is used for anti-competitive purposes is only mitigated by the option of enforcement of those obligations under legislation (contravention of which must be litigated).
93. However, the ACCC also recognises that the FBAA can currently expel members through the Show Cause Notice process (without the option to refer the Notice to the Tribunal for determination) and in the last five years, this process has been used on 15 occasions with only four members expelled as a result of such action.²¹
94. On balance, the ACCC considers that there is potential for the disciplinary measures available to the FBAA Board (apart from referral to the FBAA Tribunal) to result in public detriment arising from use of the rules and constitution to exclude members for anti-competitive purposes but the evidence available does not suggest that this is likely.

ACCC conclusion on public detriments

95. Overall, the ACCC considers that:

²⁰ *Corporations Act 2001* ss 180, 181(1).

²¹ FBAA Submission, 31 August 2016, pg. 15.

- the Conduct is not likely to reduce competition to provide finance and mortgage related services
- the FBAA Tribunal represents a workable independent review process which is likely to limit the potential for the Disciplinary Rules to be used for anti-competitive purposes
- there is potential for the disciplinary measures available to the FBAA Board (apart from referral to the FBAA Tribunal) to result in public detriment arising from use of the rules and constitution to exclude members for anti-competitive purposes but the evidence available does not suggest that this is likely.

Balance of public benefit and detriment

96. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

97. In the context of applying the net public benefit test in subsection 90(8)²² of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²³

98. The ACCC considers that the Conduct is likely to result in public benefit by:

- requiring FBAA members to adhere to standards of conduct and compliance that are higher than what is contained in relevant legislation such as the NCCPA and
- providing measures for more effective and transparent regulation of FBAA members

which is likely to improve consumer confidence and consumer protection in services by provided by FBAA members.

99. The ACCC considers that:

- the Conduct is not likely to reduce competition to provide finance and mortgage related services
- the FBAA Tribunal represents a workable independent review process which is likely to limit the potential for the Disciplinary Rules to be used for anti-competitive purposes
- there is potential for the disciplinary measures available to the FBAA Board (apart from referral to the FBAA Tribunal) to result in public detriment arising from use of the rules and constitution to exclude members for anti-competitive purposes but the evidence available does not suggest that this is likely.

²² The test at subsection 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

²³ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

100. Overall, the ACCC is satisfied that on balance the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
101. Accordingly, the ACCC is satisfied that on balance the relevant net public benefit tests are met.

Length of authorisation

102. The Act allows the ACCC to grant authorisation for a limited period of time.²⁴ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period. In this respect, the ACCC encourages the FBAA, in any application for re-authorisation, to provide the ACCC with statistics relating to the operation of the proposed Disciplinary Scheme, including how many complaints it received and what the outcomes were.
103. In this instance, the FBAA seeks authorisation for five years. Given the ACCC's conclusion on the likely public benefits and detriments, the ACCC grants authorisation for five years.

²⁴ Subsection 91(1).

Determination

The application

104. On 31 August 2016 the Finance Brokers Association of Australia lodged applications for authorisations A91554 and A91555 with the ACCC.
105. Application A91554 was made using Form A, Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1) and (1A) of the Act to give effect to the FBAA Disciplinary Rules and changes to the FBAA Constitution, which enforce the FBAA Code of Conduct.
106. Application A91555 was made using Form B, Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88 (1) and (1A) of the Act to give effect to the FBAA Disciplinary Rules and changes to the FBAA Constitution, which enforce the FBAA Code of Conduct.
107. The Finance Brokers Association of Australia seeks authorisation of this Conduct as it may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act. The arrangement may also contain an exclusionary provision within the meaning of section 45 of the Act that may also be a cartel provision.

The net public benefit test

108. For the reasons outlined in this determination, the ACCC considers that in all the circumstances the Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the Conduct.
109. For the reasons outlined in this draft the ACCC is satisfied that the Conduct for which authorisation is sought is likely to result in such a benefit to the public that the Conduct should be allowed to take place.
110. The ACCC therefore grants authorisation to applications A91554 and A91555

Conduct for which the ACCC grants authorisation

111. Authorisation extends to the Finance Brokers Association of Australia to give effect to the FBAA Disciplinary Rules and changes to the FBAA Constitution which enforce the FBAA Code of Conduct until 15 March 2022.
112. Further, the authorisation is in respect of the FBAA Disciplinary Rules and changes to the FBAA Constitution which enforce the FBAA Code of Conduct as it stands at the time authorisation is granted. Any changes to the FBAA Disciplinary Rules and changes to the FBAA Constitution which enforce the FBAA Code of Conduct during the term of the authorisation would not be covered by the authorisation.

Date authorisation comes into effect

113. This determination is made on 21 February 2017. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 15 March 2017.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
 - i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the

proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.