

Our ref GWR:GWR:140366  
Your ref

12 January 2017

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 Authorisations)**

We refer to your letter to us of 16 December 2016 and the **attached** draft determination for the Authorisations (**Draft Determination**).

We provide below our further submissions on behalf of the FBAA regarding the Draft Determination for the proposed Authorisations of the FBAA Code of Conduct (**Code**) and FBAA Disciplinary Rules (**Rules**).

**Paragraph 24 – Rules of Evidence / Balance of Proof**

The Draft Determination states at paragraph 24:

*The Tribunal does not have to have regard to the rules of evidence, nor is there a burden of proof requirement.*

Pursuant to Rule 4.4.2, the Tribunal may have regard to the rules of evidence but may dispense with those rules if it considers it expedient. This does not mean that the Tribunal may disregard the rules of evidence with impunity. Rule 4.4.1 states that the “*principles of natural justice and procedural fairness are paramount to the decisions of the Tribunal*”. Therefore, if the Tribunal wishes to dispense with the rules of evidence, such dispensation must nevertheless be consistent with the principles of natural justice and procedural fairness.

Rule 4.4.3 states:

- (1) *Subject to subsection (2), in any Complaint before the Tribunal, there is no burden of proof.*

- (2) *Where the Tribunal is required to make a decision, the more serious the Complaint, the more probative or stronger the facts or evidence needs to be in support of the substance of the Complaint.*

The Tribunal is not acting as a Court which invites each side to present its argument and upon the conclusion of submissions and the presentation of evidence a judgment is presented. Instead, evidence is provided, either in the Complaint, the Investigation Report or is invited by the Tribunal pursuant to Rule 4.3(4)(b). Subsection (2) is *“a manifestation of the Briginshaw Principles whereby the more serious the Complaint, the stronger and more probative the evidence in support of the Complaint must be.”*<sup>1</sup> Despite there not being a burden of proof on the Complainant or the Member, there is a requirement on the Tribunal to ensure that there is sufficient evidence before it to decide upon. This position is supported by Rule 4.5.1(3) which states:

- (3) *The Tribunal may make any decision pursuant to subsection (2) only if the Tribunal is satisfied that:*
- (a) *there are reasonable grounds to make the decision; and*
  - (b) *the reasonable grounds are based upon facts that are relevant, credible and logically consistent with the conduct that is the subject of the Complaint.*

Therefore, while the observation made in paragraph 24 of the Draft Determination is correct, we submit it should not be taken as a criticism of the effect of the proposed operation of the Rules.

### **Paragraphs 36 and 87 – selection of Chairperson of Tribunal**

At paragraph 36 of the Draft Determination, the ACCC noted a concern raised by MFAA that *“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 ACCC commented at paragraph 87 of the Draft Determination, that -

*“The Disciplinary Rules require the Chairperson 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.”*

Without detracting from the importance of the issue, we do observe that the express disqualification from being appointed as chairperson of the Tribunal appears to be a recent amendment to the MFAA Disciplinary Rules which was added after authorisation had been granted to the MFAA for its rules (and also after such authorisation was renewed). The most current version of the MFAA Disciplinary Rules is dated 14 September 2016 (two weeks after the FBAA application for authorisation and two weeks before MFAA provided its submission) compared to the previous

<sup>1</sup> Page 14 of the FBAA's initial submissions dated 31 August 2016

version dated 29 April 2013. Relevantly, the amendment appears to be as follows: *“The Board will appoint a Chairman, who is a legal practitioner of at least five years' standing who holds the right to operate as a legal practitioner within a State or Territory of Australia. The Chairman will be appointed on such terms and conditions as are determined by the Board. The Chairman may not be a current Member of the Association or an employee of a current Member of the Association.”* (our emphasis added)<sup>2</sup>

We submit that if the FBAA proposed to appoint a Member as a Chairperson of the Tribunal (which is certainly not intended) then, as the ACCC has observed, challenges based on potential actual bias or perceived bias, and/or actual or perceived conflict of interest could result. Nevertheless, to avoid any possible concern in that regard, 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.”*

### **Paragraph 89, 90 and 92 – procedural fairness**

The Draft Determination contains the following:

89. *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.*
90. *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.*
92. *However, the ACCC considers that the Conduct is likely to result in some public detriment due to the fact that the Disciplinary Rules and FBAA Constitution do not currently adequately address issues of procedural fairness and conflicts of interest where the FBAA conducts an investigation or issues a Show Cause Notice. This creates a real chance that the disciplinary scheme could be used to exclude members for anti-competitive purposes.*

We understand the ACCC's concerns in relation to these paragraphs to be:

- Issue of Show Cause Notice without any procedural fairness;
- Conduct of Investigations without any procedural fairness (including where the Investigating party is subject to a Conflict of Interest).

Generally, in relation to the ACCC's concerns regarding procedural fairness, we reiterate our submission dated 25 October 2016 which states:

---

<sup>2</sup> Clause 3.1.4, MFAA Disciplinary Rules dated 14 September 2016.

“we point out that the duty on private organisations to act fairly and afford natural justice arises from the rules of the organisation "being construed on the basis that fair procedures are intended, but recognising the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part" (*McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 per Campbell J at [97]). **In other words, 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.** In the case of the FBAADR, 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 FBAADR.”<sup>3</sup>

We make the following more specific submissions in relation to these concerns:

### 1. Issue of Show Cause Notice without any procedural fairness

A decision by the FBAA to issue a Show Cause Notice is empowered by the Constitution of the FBAA in its current form. By ordinary corporate governance, when resolving to issue a Show Cause Notice, the Board is required to comply with very clear and long standing obligations under the law. In addition to the over-arching requirement to afford natural justice, as stated above, directors must comply with duties imposed upon them:

Section 181 of the *Corporations Act 2001* states:

- (1) *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.*

Additionally, any decision to issue a Show Cause Notice in circumstances where a member of the Board is the subject of a conflict of interest may constitute a breach of section 181 and may also breach sections 182 and 183 of the *Corporations Act 2001*.

Further, the very idea of issuing a Show Cause Notice is to provide the Member with the opportunity to respond to matters of concern. In other words, the very notice is a manifestation of the requirement for procedural fairness. It should also be noted that the Member is given the opportunity, in response to a Show Cause Notice, to refer the matter to the Tribunal for determination (see Rule 3.2.3(2)).

There is nothing extraordinary, inherently prejudicial or draconian in the quite common process (observed elsewhere) of an organisation giving a member the opportunity to respond to allegations by means of the show cause notice process. One such example can be seen in the By-laws of Chartered Accountants Australia and New Zealand (CAANZ)<sup>4</sup> where, under by-law 4.4 “A Member

<sup>3</sup> Page 9, Submissions dated 25 October 2016.

<sup>4</sup> Revised 28 July 2016

*must respond in writing to the Professional Conduct Committee within 14 days of notification, unless the Professional Conduct Committee allows a longer period. The Member's written response must address all matters raised in the notification to the satisfaction of the Professional Conduct Committee.*" We are not aware of any person having raised any objection to the CAANZ's procedures.

## **2. Conduct of Investigations without any procedural fairness (including where the investigator is subject to a conflict of interest)**

The Rules do not contain any express exclusion of the requirements for natural justice. The general observation reliant on *McClelland's* case (cited above) equally applies. Hence, the mechanisms imposed by the Rules must be executed consistently with the principles of natural justice. The conduct of an Investigation where the investigating party is subject to a conflict of interest would likely be inconsistent with the principles of natural justice.

Further, not only do the Rules not exclude the principles of natural justice in relation to an Investigation, they actually mandate that natural justice be observed. To illustrate this, we make the following observations in relation to some of the Rules.

Firstly, pursuant to Rules 3.3.1(2) and (3), the Complainant and the Member must be notified of the Investigation unless there is a reasonable belief that such notice would prejudice an Investigation.

Secondly, even though anonymity may be desired by the Complainant, disclosure of the identity may be required in the interests of natural justice. Hence, Rule 3.3.2(2) balances these two competing considerations and states:

- (2) *If, in the course of an Investigation conducted under section 3.3:*
    - (a) *The Board reasonably believes that the Complainant's identity must be disclosed to the Member or any other person **in order to ensure procedural fairness or the effective conduct of the Investigation**;*
    - (b) *The Complainant refuses to provide written consent allowing the disclosure; and*
    - (c) *The Board cannot verify the substance of the Complaint without reference to the Complainant's identity*
- then the Board may:*
- (d) *Dismiss the Complaint and take no further action; and*
  - (e) *Notify the Member and Complainant that the Complaint has been dismissed.*

Thirdly, if the Board were to delegate responsibility for the conduct of an Investigation under to Rule 3.3.1(4) to a person who had a conflict of interest or was biased, then such delegation would

be unfair or prejudicial, and as such the exercise of such a power by the Board would likely be improper, and in breach of the duties of the directors.<sup>5</sup>

While the above provisions are examples of where the Rules manifest a requirement to adhere to the principles of natural justice, including to give procedural fairness, it would be reckless to attempt to codify what may be required to afford adequate protection in every case. Determining proper protection requires a case-by-case judgment. For example, in some (hopefully rare) cases it may be entirely appropriate to pursue an Investigation, either in whole or in part, without disclosure to the relevant Member where there may be a material risk that disclosure would be prejudicial to the proper conduct of an Investigation (such as where there may be a risk of evidence being fabricated).

## Conclusion

We obviously agree with the ACCC's Draft Determination that authorising the Rules will constitute a Public Benefit. We believe the above submissions, including the indication that the additional provision of Rule 4.2.2(2) will be added to the Rules, further supports the making proposed Authorisations.

We confirm that this submission may be published on the ACCC's public register.

Yours faithfully  
**RBG Lawyers**



**Greg Rodgers**  
Director  
(07) 3009 9303  
[greg.rodgers@rbglawyers.com.au](mailto:greg.rodgers@rbglawyers.com.au)

**Contact: Matthew Rodgers**  
Solicitor  
(07) 3009 9330  
[matthew.rodgers@rbglawyers.com.au](mailto:matthew.rodgers@rbglawyers.com.au)

---

<sup>5</sup> Sections 180, 181, Corporations Act.