



Draft Determination and interim authorisation

Application for revocation of authorisation AA1000432 and the substitution of authorisation AA1000589 lodged by the Mortgage and Finance Association of Australia in respect of its disciplinary membership rules
Authorisation number: AA1000589

Date: 9 February 2022

Commissioners: Keogh
Brakey
Ridgeway

Summary

The ACCC proposes to grant re-authorisation to enable the Mortgage and Finance Association of Australia (MFAA) to enforce a revised version of its disciplinary rules. The ACCC has granted authorisation to various versions of the MFAA's disciplinary rules since 2004.

The most substantial change the MFAA has made to its disciplinary rules is to widen the scope of its ability to investigate the misconduct of its Members beyond the complaints it receives to also include other matters. The other changes to the disciplinary rules are minor and involve simplifying and updating language, removing duplication, streamlining process and procedures.

The ACCC considers that the revised disciplinary rules are likely to result in public benefits from increasing consumer confidence and protection by encouraging and assisting compliance with a high standard of conduct than is required by law.

The ACCC also considers that the disciplinary rules are unlikely to result in public detriment, including through any reduction in competition as there are mechanisms in place to mitigate the risk of inappropriate expulsions or suspensions of MFAA members, who may compete with each other.

The ACCC proposes to grant re-authorisation for five years.

The ACCC has also granted interim authorisation to enable the MFAA to enforce the revised version of the disciplinary rules while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 2 March 2022 before making its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 19 November 2021, the Mortgage and Finance Association of Australia (the **MFAA**) lodged with the Australian Competition and Consumer Commission (the **ACCC**) an application to revoke authorisation AA1000432 and substitute authorisation AA1000589 for the one revoked (referred to as re-authorisation). Re-authorisation is sought because the existing authorisation is due to expire on 21 March 2022.
- 1.2. This application for re-authorisation AA1000589 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**).
- 1.3. The MFAA is seeking re-authorisation for a revised version of its Disciplinary Rules. The Disciplinary Rules outline the processes for the investigation of complaints, expulsion of members and appeals against refused applications for membership or accreditation. In addition, they include the rules for the MFAA Tribunal regarding its powers and operation. The MFAA Tribunal enforces the MFAA's Code of Practice, which establishes standards of conduct and behaviour for MFAA members.
- 1.4. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the CCA for arrangements that may otherwise risk breaching those provisions in the CCA, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.5. The MFAA also requested interim authorisation for the Disciplinary Rules if a final decision about the current application does not come into effect before 21 March 2022.

Granting interim authorisation prior to the expiry of the current authorisation suspends the operation of the current authorisation and substitutes interim authorisation in its place to enable the ACCC to consider the substantive application. The request for interim authorisation is discussed further in section 6.

2. Background

- 2.1. The MFAA is a national representative body for professional mortgage and finance brokers, mortgage managers and aggregators. It was established in 1980 and now represents over 14,000 members.¹
- 2.2. The MFAA's governance regime consists of:
 - a) the MFAA Constitution, which sets out the governance framework for the MFAA
 - b) the MFAA Code of Practice, which outlines the standards that members of MFAA must comply with, and
 - c) the MFAA Disciplinary Rules, which enforce the Code of Practice.
- 2.3. The Disciplinary Rules outline processes for investigation of complaints, expulsion of members and appeals against refused applications for membership or accreditation. They also include rules for the operation of the MFAA Tribunal.
- 2.4. The MFAA is not seeking authorisation for the other parts of its governance regime. However, some aspects of this governance regime have direct relevance as breaches are acted on under the Disciplinary Rules as are appeals following a refusal to admit an applicant for MFAA membership.
- 2.5. The Disciplinary Rules have been authorised by the ACCC for 5 year periods since 2004. Most recently, the Disciplinary Rules were re-authorised in 2020 for only two years as requested by the MFAA so it could consider and make changes to its governance regime in response to the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
- 2.6. When lodging the current application, the MFAA noted that the Government made significant changes to the law in response to the Royal Commission recommendations. The MFAA submits that as its governance regime, and in particular, its Code of Practice, requires Members to comply with all relevant laws (including those laws introduced in response to the Royal Commission) it did not consider it necessary to make any changes to its governance regime because of the Royal Commission recommendations.
- 2.7. The MFAA also submits that it has provided significant training and awareness to its Members in relation to these reforms.

Revisions to the Disciplinary Rules

- 2.8. The most substantial change to the Disciplinary Rules since the previous authorisation is to widen the scope of the MFAA's ability to investigate the misconduct of its Members beyond the complaints it receives to also include other matters. These changes mean that the MFAA is able to investigate misconduct concerns that come to its attention by means other than a complaint.

¹ <https://www.mfaa.com.au/about-us/who-we-are>.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Disciplinary Rules. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations, consumer groups, and state and federal government and relevant regulatory bodies.² The ACCC received no submissions in relation to the application.
- 3.2. Any public submissions received following the release of the draft determination will be available on the [Public Register for this matter](#).

4. ACCC assessment

- 4.1. The ACCC's assessment of the Disciplinary Rules is carried out in accordance with the relevant authorisation test contained in the CCA.
- 4.2. The MFAA has sought authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of section 45 of the CCA. Consistent with subsection 90(7) and 90(8) of the CCA³, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 4.3. In assessing the Disciplinary Rules, the ACCC considers that:
 - Consistent with previous assessments, there are two areas of competition that may be affected by the conduct for which authorisation is sought:
 - the supply of mortgage retail services, and
 - the supply of professional membership services to mortgage brokers and credit providers.
 - In the likely future without the Disciplinary Rules, the MFAA would be unlikely to enforce its Code of Practice. Relevant laws and regulations would continue to apply, however a lower standard of ethical and professional behaviour could be expected if the MFAA does not enforce its Disciplinary Rules.

Public benefits

- 4.4. The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the MFAA Tribunal) which has stated that in considering public benefits:

...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.⁴

² A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

³ See subsection 91C(7) of the CCA.

⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 4.5. In previous authorisations, the ACCC has recognised that the Disciplinary Rules have resulted, and are likely to result, in a public benefit from increasing consumer confidence and protection by enforcing a high standard of conduct beyond what is required by law. The ACCC considers that this public benefit is likely to continue.
- 4.6. For example, the Code of Practice requires that a member:
- Must have qualifications or experience relevant to the functions to be performed. In particular, the MFAA requires a generally higher level of education for MFAA members than under the ASIC regulatory regime (a Diploma for all members compared to a Certificate IV and only for managers). The Code of Practice also has specific continuing education requirements as opposed to the obligation for licensees to ensure that it and its representatives' competence is maintained.
 - Maintain professional indemnity insurance.
 - Comply with practices standards including those relating to confidentiality and recommending appropriate finance products.
- 4.7. The ACCC considers that the Disciplinary Rules which are part of the MFAA's governance regime requires MFAA members to adhere to a higher standard of professional and ethical conduct, above relevant obligations on MFAA members required under ASIC's regulatory regime, and that this higher standard provides a benefit to consumers of services offered by MFAA members.
- 4.8. The ACCC notes that, while these standards of conduct are prescribed in the MFAA's Code of Practice, the MFAA's governance regime is enforced by and, to some extent, relies upon the efficacy of the Disciplinary Rules. The MFAA submits that for a governance regime to be effective it must appropriately progress complaints and impose sanctions on those found to have breached the Code of Practice, and that this is done through the Disciplinary Rules.
- 4.9. The MFAA submits that the Disciplinary Rules enable it to have the ability to apply a broad range of remedies proportional to the severity of the member's alleged breach of the Code of Practice.
- 4.10. The MFAA Tribunal has expelled or suspended approximately 106 members since 2003, after consideration of more than 550 matters.⁵ Other sanctions include additional training, financial contributions to the MFAA compliance program, linking with a mentor and being put on notice in relation to future breaches.
- 4.11. The ACCC considers that the Disciplinary Rules (together with the provisions of MFAA's Code of Practice) provide the MFAA with more efficient enforcement mechanisms for regulating the conduct of its members than would exist in the absence of the Disciplinary Rules. The ACCC considers that these mechanisms are likely to provide a deterrent against professional misconduct by MFAA members, in addition to the regulatory role of ASIC.
- 4.12. The ACCC notes that adverse decisions by the MFAA Tribunal are published by the MFAA on a publicly available register on its website to enable consumers to consider the historic behaviour of the member they are dealing with. The ACCC considers that

⁵ The pre-Tribunal stage of consideration by an Investigating Officer has considered approximately 1100 matters, with some matters dismissed if they do not relate to a breach of the MFAA Disciplinary Rules or if there is insufficient evidence to refer the matter to the MFAA Tribunal.

this transparency can also operate as a deterrent against misconduct by MFAA members.⁶

ACCC conclusion on public benefit

4.13. The ACCC considers that the Disciplinary Rules are likely to result in public benefit by improving consumer protection by enforcing compliance with higher standards of professional conduct than is required by law.

Public detriments

4.14. The CCA does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the MFAA Tribunal which has defined it as:

...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.⁷

4.15. Membership of the MFAA may provide an advantage to mortgage brokers over those who do not have membership, as membership indicates that a broker complies with a higher standard of conduct (as discussed in the public benefits section). The ACCC considers that there is potential for competitive harm if members are inappropriately expelled or excluded from membership, as this affects their ability to compete with brokers who do have MFAA membership.

4.16. However, the ACCC considers that the Disciplinary Rules have appropriate mechanisms in place to mitigate the risk of decisions by the MFAA to inappropriately expel or suspend members. In particular, the ACCC notes that the Disciplinary Rules provide members with an avenue of appeal for any expulsion or suspension of their MFAA membership. Further, the ACCC has not received information that indicates the MFAA has used its powers to inappropriately exclude members.

ACCC conclusion on public detriment

4.17. For the reasons outlined, the ACCC considers that the Disciplinary Rules are unlikely to result in significant public detriments from a lessening of competition in the supply of mortgage retail services, in particular because there are mechanisms in place to mitigate the risk of inappropriate membership decisions by the MFAA, including an avenue for appeal for members who are expelled or suspended.

Balance of public benefit and detriment

4.18. For the reasons outlined in this draft determination, the ACCC is satisfied that the Disciplinary Rules are likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Disciplinary Rules.

Length of authorisation

4.19. The CCA allows the ACCC to grant authorisation for a limited period of time.⁸ This enables the ACCC to be in a position to be satisfied that the likely public benefits will

⁶ The MFAA Tribunal has expelled or suspended approximately 106 members since 2003, after considering more than 550 matters. Other sanctions include additional training, financial contributions to the MFAA compliance program, linking with a mentor and being put on notice in relation to future breaches. The pre-Tribunal stage of consideration by an Investigating Officer has considered approximately 1100 matters, with some matters dismissed if they do not relate to a breach of the MFAA Disciplinary Rules or if there is insufficient evidence to refer the matter to the MFAA Tribunal.

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

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.

- 4.20. The MFAA seeks authorisation for 5 years. The MFAA submits that this is consistent with previous authorisations granted by the ACCC, other than the most recent two year authorisation that was shorter due to the unique circumstances at the time. The MFAA submits that it does not expect there to be significant or material changes to the Disciplinary Rules over the next five years.
- 4.21. Having regard to the current and past assessments that the Disciplinary Rules are likely to deliver a net public benefit, the ACCC proposes to re-authorise the Disciplinary Rules for 5 years.

5. Draft determination

The application

- 5.1. On 19 November 2021 the MFAA lodged an application to revoke authorisation AA1000432 and substitute authorisation AA1000589 for the one revoked (referred to as re-authorisation). The MFAA seeks authorisation for its Disciplinary Rules.
- 5.2. The application for re-authorisation AA1000589 was made under subsection 91C(1) of the CCA. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Disciplinary Rules are likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Disciplinary Rules.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Disciplinary Rules would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Disciplinary Rules, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisation AA1000432 and grant authorisation AA1000589 in substitution. Authorisation AA1000589 is to enable the MFAA to enforce a revised version of its Disciplinary Rules.
- 5.7. The Disciplinary Rules may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
- 5.8. The ACCC proposes to grant authorisation AA1000589 for five years.

⁸ Subsection 91(1)

5.9. The proposed authorisation is in respect of the Disciplinary Rules as they stand at the time authorisation is granted. Any changes to the Disciplinary Rules during the term of the proposed authorisation would not be covered by the proposed authorisation.

5.10. This draft determination is made on 9 February 2022.

6. Interim authorisation

6.1. The ACCC has decided to suspend the operation of authorisation AA1000432 and grant interim authorisation in substitution for the authorisation suspended. Interim authorisation is granted to allow MFAA to enforce the version of the Disciplinary Rules provided to the ACCC with the application for re-authorisation.

6.2. Interim authorisation was sought because the MFAA's existing authorisation expires on 21 March 2022. Interim authorisation enables the ACCC to consider the substantive application for re-authorisation.

6.3. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for re-authorisation is withdrawn.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 2 March 2022. In addition, consistent with section 90A of the CCA, the MFAA or an interested party may request that the ACCC hold a conference to discuss the draft determination.