

Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Attention: Susie Black
By email: susie.black@acc.gov.au

19 November 2021

Dear Susie

**REQUEST FOR FURTHER INFORMATION – REVOCATION AND SUBSTITUTION FOR
AUTHORISATION OF MFAA DISCIPLINARY RULES (AA1000432)**

We refer to the further information and clarification requested in your email dated 17 November 2021. Adopting your numbering, our responses are below.

- 1. Authorisation AA1000432 included protection for Division 1 of Part IV of the Act (Cartel provisions). Can you please confirm whether MFAA is seeking protection for cartel conduct in respect of its Disciplinary Rules?**

Confirmed.

- 2. At paragraph 22 of the application it states that apart from the MFAA, the other parties to the authorisation are members of the MFAA. Can you please confirm whether authorisation is also sought for future MFAA members?**

Confirmed.

- 3. Provide reasons in support of seeking authorisation for 5 years.**

Prior to Authorisation AA1000432 which as noted was for two years, each prior Authorisation provided by the ACCC being A90880, A91118 and A91396 was for five years. We note also that in its [Guidelines for Authorisation of Conduct \(non-merger\)](#) the ACCC generally grants authorisations for periods of five years and that five years is the default period the ACCC will assume (if a period is not specified) that applicants are seeking authorisation.

We do not expect there to be significant or material changes to our Rules in the next five years. In the unlikely event the MFAA considers it prudent to make significant changes to our Rules, we will apply for a variation to the Authorisation.

4. **There appears to be quite a substantial amount of changes made in Attachment B of the application. Can you please expand on paragraph 6 of the application to explain in more detail the changes to the Disciplinary Rules and the reasons for the changes.**

Please see **Attachment A**. We have set out the more significant changes made to the Disciplinary Rules as well as an explanation of those changes. We note that many changes were made to update language and are minor and self-explanatory. We have not included minor changes in the table at **Attachment A**.

5. **As you would be aware, authorisation AA1000432 was granted for only 2 years in the context of MFAA considering what changes it would make to its governance regime in response to the Financial Services Royal Commission. Paragraph 47 of the application indicates that MFAA has undertaken significant training and awareness raising for its members in relation to certain legislative changes. Can you please: (i) provide further detail about the activities MFAA has taken in this regard and (ii) clarify whether MFAA has made any changes to its governance regime arising from the Royal Commission recommendations.**

- (i) Further detail about the activities the MFAA has taken in relation to significant training and awareness to certain legislative changes.**

The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**) was released on 1 February 2019. The Report made several recommendations with respect to the mortgage broking industry. On 19 August 2019, the Federal Government released its Financial Services Royal Commission Implementation Roadmap setting out how it will deliver on its response to the recommendations made by the Financial Services Royal Commission.

We believe it would be helpful to the Commission to set out those recommendations and the Government's response (being the introduction of significant legislative changes for mortgage brokers) as context for our response to your request for further detail. We have set out that information in a table at **Attachment B**. The table provides details on MFAA activities in response to the recommendations made by the Financial Services Royal Commission and the ensuing introduction of regulatory reforms.

We have also enclosed a number of educational modules that we have released to our members to demonstrate to the Commission some of the work the MFAA have done in supporting the embedment of the regulatory changes into the mortgage and finance industry. We request that the Commission not publish this material as these materials are only accessible to members of the MFAA.

(ii) Clarify whether MFAA has made any changes to its governance regime arising from the Royal Commission recommendations.

As we note above and in **Attachment B**, the Government made significant changes to the law in response to the Royal Commission recommendations. The MFAA governance regime, and in particular, our Code of Practice, requires Members to comply with all relevant laws (including those laws introduced in response to the Royal Commission). We therefore did not necessary to make any changes to our governance regime as a consequence of the Royal Commission recommendations.

6. If possible, please provide email addresses for the interested parties listed at paragraph 79.

Please see below.

Interested party	Name	Email address
ASIC	Robert Allen Senior Manager – Credit and Banking Financial Services and Wealth Group	[REDACTED]
AFCA	Evelyn Halls Lead Ombudsman – Banking and Finance	[REDACTED]
Treasury	Nghi Luu Assistant Secretary, Market Group, Treasury	[REDACTED]
FBAA	Peter White Managing Director	[REDACTED]

We look forward to meeting you and your team to discuss our responses.

Yours sincerely

[REDACTED]

Naveen Ahluwalia
Head of Legal and Compliance

Attachment A

Rule	Comments
Preamble, 2.1.2 & other	<p>Remove words 'complaint' and 'complainant' as stated above and clarify how matters can arise. The word 'matter' is more appropriate because sometimes there is no complaint or allegation made (e.g. media reports).</p> <p>The preamble has also been simplified to ensure that it is fit for purpose and avoids conflicts with other governance documents.</p>
2.1.3	Clarifies that the MFAA may refer matters that it identifies itself through day-to-day business.
2.1.5	Deletes a sub-clause that serves no purpose.
2.1.6	Removes requirement to provide details of the person that referred the Matter or details of that referral except with consent of the referring party. This is to preserve confidentiality. As a matter of due process, the requirement to provide details of the Matter to enable the Member in question to address the Matter is preserved.
2.1.7	Removed as it duplicates the process in clause 2.1.1
2.3.1	Sub-clauses add nothing and have been removed.
2.3.6	Language simplified, removed duplication with clause 2.3.5.
3.1.1	Simplifies language and provides additional flexibility to describe Tribunal functions.
3.1.6	Clarifies establishment of more than one Panel.
3.3.5	Deleted. Removes duplication with clause 3.2.3
3.4.2	Removes redundant language
3.4.4	Deleted. Removes duplication with 3.2.5
3.4.8	Deleted. Removes duplication with 5.2
3.4.9	Clarifies that the Tribunal must notify a Member within 5 business days of making a determination.
3.4.11	Extends period for making written decisions to 28 days. Tribunal Chair noted 15 business days was too short.
3.4.12	As noted above, insertion of liability disclaimer as recommended by external legal advisers.
3.4.13	As noted above, amendment clarifies that neither the MFAA, IO nor Tribunal are obliged to provide information about the source of a matter. Legal representatives have endeavoured to frustrate investigation or Tribunal

	consideration by seeking the source and copy of a complaint (which is protected by confidentiality).
3.5.1, 3.5.2 and 3.5.3	Clarifies, removes duplication and simplifies content.
3.6.3	Removes time period which is restrictive and simplifies wording.
3.6.4	Rule removed as not practical. If the Tribunal sees an error, or made a decision based on incorrect information then the process will be for it to review the decision based on correct information. The requirement for different Tribunal members to review the decision is not necessary or practical.
3.8.1	The Rule has been amended so that there is no obligation to provide the register of determinations to other Members. The information made available to Members is contained in 3.8.2 and is at the discretion of the MFAA. It is to be noted that under the Rules, the MFAA publishes decisions to cancel, suspend or expel a member on its website, and provides the Member the subject of the Determination with the full Determination. The full Determination is also provided to ASIC.
3.8.2	Includes the liability disclaimer in relation to the publication of decisions by the MFAA.
3.8.3	Deleted as amendments to 3.8.2 makes this Rule redundant.
3.8.4	As noted above, amendment to remove requirement to allow Members to make representations in relation to publication of determinations on MFAA website. It is strict MFAA policy that all cancellations, suspensions and expulsions determinations are published on the website. Therefore, the provision of the right to make representations is redundant and should be removed.
3.9.2	Deleted to remove duplication.
Definitions:	
Complaint and Complainant	Deleted (See item 1 above).
Contractual Dispute	Amended to include contracts related to appointment of credit representatives and arrangements between brokers and aggregators which are appropriately excluded from the purview of the Tribunal.
Fit and Proper	Amended to reflect definition in the Code of Practice which mirrors definition in ASIC regulatory guidance.

Attachment B

Our education and training includes training modules, webinars, targeted regulatory updates, articles and professional development days. We have enclosed our training modules with this letter. These modules are available to our members through our Learning Management System.

Royal Commission Recommendation	Government Response	MFAA activities
<p>Recommendation 1.2 – Mortgage broker best interests duty</p> <p>The law should be amended to provide that, when acting in connection with home lending, mortgage brokers must act in the best interests of the intending borrower. The obligation should be a civil penalty provision</p>	<p>The Government passed the Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020 which requires mortgage brokers to act in the best interests of the consumer in relation to credit assistance and must give priority to the consumer’s interests when providing credit assistance. The duty came into effect on 1 January 2021.</p>	<p>The MFAA actively participated and worked closely with Treasury and ASIC in the development of the best interests duty legislation and ASIC regulatory guidance. The MFAA also continues to collaborate with AFCA to ensure alignment in thinking and understanding with respect to the implementation of the best interest duty regulatory reforms within the industry.</p> <p>The MFAA also released a training module on Best Interests Duty and the Conflict Priority Rule. The training module is a core requirement of MFAA membership ie all members are required to complete this module as a requirement of membership.</p>

Royal Commission Recommendation	Government Response	MFAA activities
		We have enclosed the module with this letter.
<p>Recommendation 1.3 – Mortgage broker remuneration</p> <p>The borrower, not the lender, should pay the mortgage broker a fee for acting in connection with home lending. Changes in brokers’ remuneration should be made over a period of two or three years, by first prohibiting lenders from paying trail commission to mortgage brokers in respect of new loans, then prohibiting lenders from paying other commissions to mortgage brokers.</p>	<p>The Government passed the Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020 (the Act) making changes to mortgage broker remuneration by:</p> <ul style="list-style-type: none"> • requiring the value of upfront commissions to be linked to the amount drawn down by borrowers instead of the loan amount. • banning campaign and volume-based commissions and payments; and capping soft dollar benefits. • limiting the period over which commissions can be clawed back from aggregators and mortgage brokers to two years and prohibiting the cost of clawbacks being passed on to consumers. <p>This legislation came into force on 1 January 2021.</p>	<p>This recommendation was implemented by the Combined Industry Forum (CIF) prior to the enactment of this legislation.</p> <p>This recommendation was given legislative effect through the Act. The reforms required lenders to make certain changes to the ways in which lenders remunerated mortgage brokers for the provision of credit assistance to consumers.</p>
<p>Recommendation 1.4 – Establishment of working group</p> <p>A Treasury-led working group should be established to monitor and, if necessary,</p>	<p>The ACCC will be aware that the ACCC and the Council of Financial Regulators (CoFR) have been requested by the Government to undertake a review into broker remuneration in 2022 (the 2022 Review).</p>	<p>With the extensive reforms that have been implemented through regulatory reforms and the CIF, the broking industry has aligned interests and expectations, mitigated conflicts and improved information sharing and reporting and collection of data. The MFAA looks forward to engaging with CoFR and the ACCC in the 2022 Review.</p>

Royal Commission Recommendation	Government Response	MFAA activities
<p>adjust the remuneration model referred to in Recommendation 1.3, and any fee that lenders should be required to charge to achieve a level playing field, in response to market changes.</p>		
<p>Recommendation 1.5 – Mortgage brokers as financial advisers</p> <p>After a sufficient period of transition, mortgage brokers should be subject to and regulated by the law that applies to entities providing financial product advice to retail clients</p>	<p>The Government agreed to impose a best interests duty for mortgage brokers which aligns the regulatory frameworks for mortgage brokers and financial advisers.</p>	<p>As above– the MFAA has released a training module on Best Interests Duty and the Conflict Priority Rule.</p>
<p>Recommendation 1.6 – Misconduct by mortgage brokers</p> <p>ACL holders should:</p> <ul style="list-style-type: none"> • be bound by information-sharing and reporting obligations in respect of mortgage brokers similar 	<p>The Government passed the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 which introduced a number of new reforms for mortgage brokers. These are:</p> <ul style="list-style-type: none"> • The Reference Checking and Information Sharing Protocol. • Breach Reporting • Remediation <p>These reforms commenced on 1 October 2021.</p>	<p>As above, the MFAA actively participated and worked closely with Treasury and ASIC in the development of these reforms. The MFAA released three training modules to members with respect to each of these reforms. We have enclosed these modules with this letter.</p>

Royal Commission Recommendation	Government Response	MFAA activities
<p>to those referred to in Recommendations 2.7 and 2.8 for financial advisers; and</p> <ul style="list-style-type: none"> take the same steps in response to detecting misconduct of a mortgage broker as those referred to in Recommendation 2.9 for financial advisers. 		