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Manager  
Financial Services Reform Taskforce  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [enforceablecodes@treasury.gov.au](mailto:enforceablecodes@treasury.gov.au)

Dear Sir or Madam

### **Consultation Paper - Enforceability of financial services industry codes**

As the peak national body representing the mortgage broking industry, the Mortgage & Finance Association of Australia (MFAA) welcomes the opportunity to provide this submission to Treasury in response to the above consultation.

This submission begins by providing an overview of the MFAA's role within the mortgage broking industry and, in the interest of clarity, defines a series of terms that are used throughout this submission. Part A then provides background information about the work of the Combined Industry Forum (CIF) and the proposed Mortgage Broking Industry Code (MBIC). Part B responds to individual questions in the consultation paper.

The MFAA supports the proposition to make select, appropriate industry codes *mandatory* and for particular provisions within those codes to be made *enforceable*, for reasons discussed below. In particular, we envisage that the proposed MBIC, currently being prepared by the CIF, should be made *mandatory* and *enforceable*.

### **About the MFAA**

With more than 13,500 members, the MFAA is Australia's leading professional association for the mortgage broking industry with membership covering mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. The stated purpose of the MFAA is to advance the interests of our members through leadership in advocacy, education and promotion. To achieve this aim, the MFAA promotes and advances the broker proposition to a range of external stakeholders including governments, regulators and consumers, and continues to demonstrate the commitment of MFAA professionals to the maintenance of the highest standards of education and development.

### **Definitions**

<b>Term</b>	<b>Meaning</b>
CIF	Combined Industry Forum.

<i>credit services</i>	As defined in section 7 of the <i>National Consumer Credit Protection Act 2009</i> (Cth) in relation to finance for the purchase or refinance of residential property.
<i>enforceable</i>	Specified breaches of a code would be subject to civil penalties to be administered by ASIC. Importantly, in addition we envisage all provisions of codes would comprise a contractual obligation upon all subscribers for the benefit of consumers. Like the Australian Banking Association's Banking Code of Practice, subscribers' written terms and conditions for credit services must include a statement to the effect that the provisions of the code apply without the need for the terms of the code to be specified in the written terms and conditions.
<i>industry participants</i>	Providers of credit (lenders), aggregators and mortgage brokers providing <i>credit services</i> .
<i>mandatory</i>	All industry participants would be required to comply with a code, irrespective of whether they voluntarily subscribe to a code.
<i>subscribers</i>	Persons bound by a code irrespective of whether they voluntarily subscribe or are bound, because the code is <i>mandatory</i> .

Please note that this submission is limited to industry codes relating to *credit services*.

## **Part A: The proposed Mortgage Broking Industry Code (MBIC)**

The Combined Industry Forum (CIF) brings together representatives from across the mortgage broking industry in an unprecedented way. It includes bank and non-bank lenders, aggregators and brokers, the Australian Banking Association (ABA), the Mortgage & Finance Association of Australia (MFAA), the Finance Brokers Association of Australia (FBAA), the Customer Owned Banking Association (COBA) and the Australian Finance Industry Association (AFIA). This cross-industry commitment has resulted in unified, rapid change to introduce an initial but significant package of reforms that demonstrates an industry driven by a desire to build greater trust with customers and deliver good customer outcomes.

CIF members have been working closely together since June 2017 to develop enhanced new standards to apply to mortgage brokers who provide *credit services*. The CIF's objectives are to ensure better customer outcomes, to preserve and promote competition and customer choice and to improve standards of conduct and culture in mortgage broking.

### The CIF Reform Package

The CIF has previously implemented a number of reforms across the industry that have been accepted by lenders and intermediaries. The CIF is intent on delivering an enhanced governance framework under which the industry will self-assess, self-correct and continuously improve, to closely monitor customer outcomes and the impact of reforms. To this end, the CIF has implemented reforms to introduce enhanced disclosure obligations (including disclosure of broker statistical loan data over the previous 12 months and on the external ownership structures of a broker's business where applicable), higher training and education standards, appropriate event administration and management, changes to remuneration arrangements

(including ceasing some remuneration processes) and improved data sharing arrangements, amongst other changes.

Specifically, the new governance framework will comprise:

- Key Risk Indicators, which would act as triggers/flags for potential poor customer outcomes;
- Unique identifiers, to allow for more complete reference checking and identification of poor performers;
- Annual reviews of individual aggregator and broker governance frameworks;
- Data-based broker monitoring;
- Customer feedback and shadow shopping to ensure reforms are ensuring good customer outcomes;
- Reporting and ongoing review of remuneration structures, including upfront, trail and clawbacks, to the extent they negatively impact customer outcomes; and
- Remediation, such as training, education, and recognition.

### Development of the MBIC

As part of the governance framework, the CIF is now working towards the development and implementation of the MBIC to apply in the delivery of *credit services*. We envision that the MBIC, once fully implemented, will support the delivery of good customer outcomes by significantly clarifying expected standards of conduct within the industry.

The CIF has played a critical role in identifying common principles and best practices across the industry to form the basis of joint action where appropriate and otherwise guide the decisions of individual participants in implementing the reform package, while preserving competition between them. Importantly, we maintain that the vast majority of mortgage brokers already maintain high standards and provide a valued service to consumers. However, there is scope to codify reforms via the MBIC in order to prescribe standards which the industry has implemented, or will implement in the near future.

We therefore envisage that the MBIC, once finalised and road tested, should be considered to be made *mandatory* and for specific provisions within the MBIC to be made *enforceable*.

## **Part B: Responses to consultation paper questions**

### 1. What are the benefits of subscribing to an approved industry code?

Appropriate codes of conduct deliver a number of shared benefits to industry participants, consumers, and government. For example, consumers can be assured that certain standards will be met in the delivery of services. Because codes of conduct are typically developed using a collaborative approach between industry and government, they can be better tailored and offer more innovative solutions to industry-specific issues. These 'soft law' initiatives are more cost effective for government than the passage of legislation, and can be implemented in an efficient, flexible and less complex way. The inherent flexibility of codes allows industry to adapt and respond to emerging issues with greater expediency, thereby providing clear professional benchmarks that reflect contemporary community standards.

A difficult issue is to decide when standards should be prescribed via legislation or by industry codes of conduct. We believe that standards that are likely to change reasonably quickly, or are general standards of conduct, will often better be prescribed in codes

because they can more easily be changed and may be more readily adopted and respected by industry because they are industry-developed and consideration has been given to their practical implementation.

2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?

Industry codes such as the MBIC should be consumer-focused with the objective of delivering good customer outcomes in respect of its subject matter. The practicality for industry to be able to implement system changes and the time necessary to integrate these into current business systems and procedures should be considered. Before code provisions become *enforceable*, they need to demonstrate rigour and effectiveness and may require amendment to arrive at a point where this can be established.

Civil penalties should only be imposed when the subject matter:

- deals with an important matter directly relating to consumer protection; and
- has been described with sufficient precision to make what is required to comply, and what comprises a breach, clear.

3. What criteria should ASIC consider when approving voluntary codes?

The consultation paper states that to meet ASIC's current threshold, a code must:

- (a) require subscribers to be contractually bound by the code (either by contracting with the enforcement body or with consumers or both);
- (b) have an independent person or body that is empowered to administer and enforce the code, including imposing any appropriate sanctions;
- (c) provide that consumers have access to internal dispute resolution and an appropriate external dispute resolution scheme for any code breaches resulting in direct financial loss; and
- (d) give consumers broad standing to complain about any other code breach to the independent body.

The MFAA supports the above criteria for ASIC approval. Regarding criterion (b), we believe that appropriate oversight is necessary for an industry code such as the MBIC in order to meet the high standards it will set for industry participants, and thereby deliver good customer outcomes. In our view, the MBIC should therefore become an ASIC approved code.

Prior to ASIC approval, we envisage that participating organisations will be responsible for the administration and enforcement of the MBIC during its initial development and testing phase. This will be delivered through applicable industry codes. For example, the MFAA Code of Practice will be amended to require that members must observe requirements under both the MFAA Code of Practice and the MBIC. We note that the MFAA Code of Practice is applicable to brokers, lenders and aggregators that are MFAA members.

The consultation paper also refers to ASIC's Enforcement Review Team (ERT) report which states in Recommendation 19 that "Entities should be required to subscribe to the approved codes relevant to the activities in which they are engaged." ERT Recommendation 20 similarly requires that codes must be binding on subscribers which supports a requirement that all entities engaged in the supply of *credit services* must be subscribers.

This proposed two-stage process will be used to most efficiently introduce improved industry standards via the MBIC and the CIF governance framework.

4. Should the Government be able to prescribe a voluntary financial services industry code?

The MFAA is of the view that the Government should have the ability to prescribe voluntary financial services industry codes. We consider that industry association codes, such as the MFAA Code of Practice, are not suitable for becoming *mandatory* or *enforceable* because while the MFAA Code of Practice is a mature and valuable code with important functions, compliance is only *mandatory* for MFAA members and has no general industry application.

On the other hand, we envisage that the MBIC should be an industry-wide code and so is suitable to be made *enforceable* in due course because the five major industry associations are involved in its development. The MBIC is intended to have general and therefore much wider industry application.

5. Should subscribing to certain approved codes be a condition of certain licences?

We support this proposition and consider that subscribing to certain approved codes could be an effective way to make the proposed MBIC *mandatory*.

6. When should the Government prescribe a mandatory financial services industry code?

The consultation paper notes that, as a general rule, government only steps in to prescribe codes (particularly *mandatory* codes) when they are necessary to support the efficient operation of markets or the welfare of consumers, and it is appropriate for this matter to be dealt with in the form of a code rather than more general law. The consultation paper notes that this is likely to remain the key benchmark and that a fundamental consideration is whether a material and important regulatory gap will be filled by the code.

The MFAA supports this policy, and therefore believes that association codes, such as the MFAA Code of Practice, are not suitable for becoming *mandatory* or *enforceable* when the industry-wide MBIC provides a better option for monitoring and enforcement across the sector.

The MFAA Code of Practice is binding on MFAA members. It provides valuable standards for arranging finance for both residential and non-residential lending and also provides a mechanism for the MFAA to deal with complaints about members' conduct. However, much of its content replicates legislation and in some circumstances will specify a different (usually higher) standard of conduct. This code predates the *National Consumer Credit Protection Act 2009* (Cth) and established standards that have largely been adopted by the Act and the *National Consumer Credit Protection Regulations 2010* (Cth). Currently, the MFAA Code of Practice does not fill any material regulatory gap in relation to residential mortgage broking. In any event, it is not suitable for becoming *mandatory* and to contain *enforceable provisions* because, although it is a mature and valuable code performing important functions, compliance is only *mandatory* for MFAA members. It therefore has no general industry application. We understand that the FBAA's Code of Conduct is similar.

On the other hand, the proposed MBIC will set new standards for *industry participants* in key areas of reform. Because of the involvement of the five major industry associations in its development, it is intended to have general and therefore much wider industry application.

7. What are the appropriate factors to be considered in deciding whether a mandatory code ought to be imposed on a particular part of the financial sector by Government?

As stated in our comments above, the consultation paper notes that, as a general rule, government should only step in to prescribe codes (particularly *mandatory codes*) when they are necessary to support the efficient operation of markets or the welfare of consumers, and it is appropriate for this matter to be dealt with in the form of a code rather than the more general law.

While this is likely to remain key, it should remain a fundamental consideration that there is a material and important regulatory gap that will be filled by such a code.

8. What level of supervision and compliance monitoring for codes should there be?

In broad terms, the level of supervision and compliance monitoring will depend on the nature of a given code. In relation to the MBIC, we recommend an annual review during the first three years, followed by a review undertaken every three years.

We consider that the supervision and compliance monitoring of the MBIC would be facilitated via ASIC, following approval. During the interim, supervision and compliance monitoring of the MBIC would be undertaken through participating associations.

9. Should code provisions be monitored to ensure they remain relevant, adequate and appropriate? If so, how should this be done and what entity should be responsible?

If ASIC approves a code, we consider it appropriate for ASIC to monitor the code and ensure it remains relevant, adequate and appropriate. Ongoing monitoring of the MBIC, particularly during its development and testing, will be undertaken through participating associations.

10. Should there be regular reviews of codes? How often should these reviews be conducted?

We consider that a code should be reviewed not less than once every three years provided that no systemic issues are identified that require changes to a code, or demonstrable ineffectiveness or deficiency of a code.

11. Aside from those proposed by the Commissioner, are there other remedies that should be available in relation to breaches of enforceable code provisions in financial service codes?

We consider the proposed remedies as outlined to be adequate and appropriate.

12. Should ASIC have similar enforcement powers to the Australian Competition and Consumer Commission (ACCC) in Part IVB of the Competition and Consumer Act in relation to financial services industry codes?

The MFAA agrees that ASIC should be granted similar enforcement powers to the ACCC under Part IVB of the *Competition and Consumer Act 2010* (Cth). For example, the regulator should be able to issue an infringement notice or a public warning notice, be able to seek orders in relation to redress of loss suffered by non-parties, and should be able to issue a notice to investigate matters relating to a potential breach of a code.

13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?

We envisage that compliance with the MBIC will be contractually enforceable by consumers in addition to breaches creating a liability for civil penalties for *enforceable* provisions.

14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?

The MFAA supports the proposition that only egregious, ongoing or systemic breaches of enforceable provisions should attract a civil penalty.

15. In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?

We believe that the current regime under which consumers can resort to court proceedings if unsatisfied with a decision reached via EDR, such as through the Australian Financial Complaints Authority (AFCA), to be unreasonable and exposes licensees to unfair tactics. The MFAA considers that both consumers and licensees should be able to refer a decision of AFCA to court only in the case of denial of natural justice or a material error of law or fact.

16. To what matters should courts give consideration in determining whether they can hear a dispute following an Australian Financial Complaint Authority (AFCA) EDR process?

We consider that, in order to prevent a significant number of appeals, a mechanism will need to be developed to determine whether there are reasonable grounds for alleging a denial of natural justice or a material error of law or fact.

17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?

Prohibiting consumers from resorting to court action without due cause will result in a fairer system (see above answers to questions 15 and 16). Internal and external dispute resolution services provide consumers with adequate protection; the MFAA is not aware of any demonstrated need for consumers to have a right to appeal an AFCA determination on grounds beyond a denial of natural justice or a material error of law or fact. In the interest of fairness, a consumer's rights to appeal should match the rights of a financial service provider, as noted above.

The MFAA extends its thanks to Treasury for the opportunity to respond to this consultation paper. Should you require further information to supplement this submission, please do not hesitate to contact me on (02) 8905 1301 or by emailing [Mike.Felton@mfaa.com.au](mailto:Mike.Felton@mfaa.com.au).

Yours sincerely



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