AUSTRALIAN BANKERS' ASSOCIATION INC.

Ian Gilbert
Director

Level 3, 56 Pitt Street
Sydney NSW 2000
Telephone: (02) 8298 0406
Facsimile: (02) 8298 0402

10 March 2008

Senior Project Manager (Credit)
Policy and Strategy Division
NSW Office of Fair Trading
PO Box 972
PARRAMATTA NSW 2124

Email: policy@oft.commerce.nsw.gov.au

Dear Sir/Madam,

National Finance Broking Scheme Consultation Package – November 2007

The Australian Bankers' Association (ABA) appreciates the opportunity to provide comments in relation to the consultation package that it received on 28 November 2007. The extensions of time to 29 February 2008 and to the date of this letter within which the ABA and its members may provide comments to you are appreciated.

It would have been helpful had the consultation period taken greater account of the fact that the months of December and January fell within the consultation period. Of the 56 working days in the period, 17 days were either public holidays or involved times when many bank staff with whom the ABA needed to consult were taking annual leave. Even with an extension to 29 February for providing comments the timeline is still tight. There are continuing consultations taking place on the other Ministerial Council on Consumer Affairs (MCCA) consultation on fringe credit. Further, in this period responses fell due to the Australian Law Reform Commission on its review of privacy laws and the Productivity Commission's draft report on the consumer policy framework.

Moreover, consultation on the proposed regulatory package, other than ad hoc consultation, has not occurred since responses were made to the October 2004 draft Regulatory Impact Statement that followed the roundtable meeting of officials, consumers and industry on 26 June 2003 (the consultation package refer

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to this meeting as "July 2003"). There are provisions in the consultation package on which consultation has not occurred prior to their inclusion in the package, for example the proposal that the broker should conduct an assessment of the consumer's capacity to repay.

We have had the opportunity to read the submission by Mortgage and Finance Association of Australia (MFAA) provided to you on 15 February 2008. This has enabled the ABA to approach its response to the consultation package in this way:

(1) To make some observations about the changes in the regulatory arrangements and market conduct of finance brokers since 2003 and to provide general support for the MFAA submission with the exception of some matters that will be referred to in this ABA response.

(2) The scope of the proposed Bill.

(3) To differentiate the practice of lending from the practice of finance broking.

(4) To raise banks' major concerns over a number of provisions in the Bill.

(5) To raise technical matters particularly the relationship between the proposed Finance Broking Bill 2007 (Bill) and the Consumer Credit Code (UCCC).

MFAA Submission and changes in the regulatory environment and conduct of finance brokers

1. General considerations

The ABA supports the MFAA's submission subject to those matters specifically mentioned in this ABA response to the consultation package.

The MFAA submission is a contemporaneous submission that approaches the finance broking market as it is now not as it was in 2003.

The MCCA should take account of the relevant changes in the finance broking market over the 5 year period since 2003 and ensure that the regulation which it seeks to impose is proportionate and consistent with the current state of the finance broking market and in particular mainstream broking.

The ABA believes that the consultation package has not achieved this necessary balance.

In its submission, the MFAA has pointed out significant self regulatory and disciplinary initiatives that it has taken in relation to its 13,000 member strong association that covers approximately 75% of the finance broking market.

The consultation package identifies one of the major pillars of the legislation as a robust licensing regime that would operate as a barrier to entry to exclude those relatively few brokers who, according to the consultation package, have "captured media and fair trading agencies' attention and distorted the image of the industry". We conclude from this statement that the image of the mainstream finance broking industry is largely of reputable finance broking services providers and that the real problem, the "distortion", lies at the fringe of the finance broking industry.

The ABA is supportive of a scheme that weeds out the undesirable elements whilst at the same time not imposing onerous obligations on finance brokers who behave professionally, ethically and responsibly.

Member banks of the ABA report a very significant improvement over the past 5 years in the quality of credit business referrals from finance brokers from whom they accredit to receive referrals. In addition to the self regulatory arrangements that the MFAA has undertaken with its membership, banks also take steps for the accreditation of finance brokers to ensure that their approach and conduct in relation to the consumer and the interests of the bank are appropriate and sound.

Therefore, the ABA is concerned that the consultation package assumes that all finance brokers are wanting in their conduct and professional skill and knowledge and guilty of malpractice or worst practice.

The MFAA has made out a practical and appropriate case in its submission on the question of proportionality in relation to its members.

Ultimately, the licensing system rather than the detailed imposed operational obligations on brokers that will be the key to ensuring that only reputable professional and ethical brokers remain in the relevant market. This allows a better balance to be struck between the obligations imposed on brokers and their ability to obtain and retain a licence.

2. Differences with MFAA position

The ABA does not support MFAA's position in seeking a role in maintaining a national register. We believe that the register must be established and maintained by government and, as explained later in this letter in connection with proposed clause 29, to ensure that banks are able to rely exclusively on the state of the register in determining the status of a particular broker at any relevant time.

Further the MFAA appears to support an integrated register based on individual states and territories register. The ABA believes that there should be a single national register established and governed overseen by the Australian Securities and Investments Commission (ASIC) to avoid uncertainty in relation the licensing or other wise of a broker or broker representative. ASIC has this expertise with its maintaining the national register of Australian Financial Services licensees for the purposes of the Corporations Act 2001.

On the question of the competency of brokers, the ABA believes that the MFAA proposal for the "grandfathering" of brokers' accreditation standards is not consistent with the objective for finance brokers to be regarded as professional, skilled and competent participants in the credit market. The ABA does not support the MFA approach in this respect.

The ABA is strongly supportive of the proposed clause 40 of the Bill. It is essential that brokers keep true and adequate records of their dealings with their clients and for those records to be kept at the broker's place of business where they can be accessed by a regulator as required. This is particularly important in a case of predatory lending where records evidencing the true purpose of a credit proposal as known to a broker are often non-existent or false. The absence of such records facilitates the taking of a false business purpose declaration and the evidentiary matters that may follow.

The ABA believes that the provisions of clause 40 should be strengthened to make the obligation one of keeping "true and accurate" records.

The Scope of the Bill

The definition of "credit" will extend to all forms of credit both secured and unsecured subject to certain limitations in respect of business broking.

Further, the definition of "finance broking" -

"*For the purposes of this Act, a person provides a finance broking service to another person (the consumer) if, in or from this jurisdiction, the person:*

(a) *provides advice or assistance to the consumer, ……………..*
for the purpose of securing credit for the consumer."

would extend beyond what the community would regard as traditional brokers to include agents that a credit provider engages to promote its credit products. This is despite the policy setting that a broker is to be deemed acting for the consumer. For example, a credit provider's marketing arrangements conducted in public places such as shopping centres, airports, merchants and petrol stations would be covered under this approach.

Many banks have exclusive arrangements with independent mortgage sales representatives. These are contractual arrangements where the representative cannot become involved with the products or services of another credit provider. Given that these representatives do not provide the clients with a choice of products from a number of different providers, they should not be classified as brokers and should be excluded from the definition. Credit providers have their own stringent requirements and take accountability for the representative's actions.

Also, the regulation would extend to agents of credit providers that technically do not meet the exemptions ("exclusive arrangements" and "first-choice arrangements") set out in Schedule 1 of the Bill where those agents may also act on behalf of more than one credit provider.

The provisions of clause 4 (5) of Schedule 1 should be amended to make it clear that such intermediaries having more than one exclusive arrangement while meeting the requirements of clause 4 (1) are exempt.

A further concern is if Bank A out-sources its credit card business to Bank B, and Bank A then seeks to offer its customers credit card products that are actually credit contracts with Bank B. Would Bank A be a finance broker (despite also being a credit provider)? The ABA submits that a credit provider (or at least a credit provider that is an authorised deposit taking institution) should be exempt from being classified as a finance broker.

Conversely, if a bank branch is conducted under a franchise arrangement then the franchisee is likely to be caught by the proposed legislation.

According to the MFAA, 60% of loans are directly sold by credit providers. Many credit providers have direct sales channel where their staff talk to customers about loans, sell loans and arrange for applications to be submitted and assist with the application and approval process. This activity would seem to be a finance broking services as defined.

The word "securing" may be intending to exclude lenders who "provide" credit but they are not mutually exclusive. A lender can assist a borrower to secure credit by providing that credit.

The section also impacts on a bank's referral source arrangement where the Bank pays a disclosed fee to businesses (such as accountants, lawyers and estate agents) who regularly refer borrowers to the Bank.

The definitions of "engages in finance broking" and "provides a finance broking service" in section 5 of the exposure draft Bill means that if, in the course of discussions with a client, a lawyer or accountant provides advice to their client about a proposed borrowing by the client and arranges to refer them to their local bank, the lawyer or accountant will have engaged in finance broking. The definition will cover other businesses, such as real estate agents who in the course of their business refer clients to lenders. Financial advisers could also be caught if they provide the consumer with advice or assistance "for the purpose of securing credit for the consumer". The credit provider has accountability to interview the clients and to make its own credit assessment.

All such persons who refer consumers to lenders are potentially caught under section 5 and will be required to be licensed under Part 2. Referral agents should not be included in the definition contained in the proposed legislation.

The exemption for exclusive arrangements under clause 4 of Schedule 1 is not clear in excluding a credit provider's employees (including representatives contracted directly by the credit provider or representatives provided by a contracted service provider) from the definition of finance broking. The Bill should be amended to leave in no doubt that a credit provider's employees under a contract of service and representatives engaged under a contract for services (either directly or through a staff agency) are not finance brokers.

The definition of the provision of finance broking services is very broad. In the (perhaps unlikely) event that an unqualified finance broker provides assistance to a customer (a finance broking service), the customer may submit a loan to a credit provider without naming the broker on the application. In such a case, the lender would not be aware of any unqualified finance broker providing the finance broking service to the customer. The credit provider, however, under clause 29 would remain liable in the terms of that provision although no reason known to the credit provider would have arisen for it to search the register.

Differentiating lending from finance broking

Lending is not finance broking. Credit worthiness assessment is the responsibility of a lender and is not the function of a finance broker.

It is the lender and only the lender that has responsibility for the assessment of credit risk and for the determining the amount and terms upon which credit is provided. The lender prices that credit accordingly. It is the lender's risk that its loan may fail. For banks and other authorised deposit taking institutions they are required to hold capital against loans in order that their depositors are protected.

Therefore, a bank will not delegate the role of the credit worthiness assessment of a loan applicant to a finance broker. The assessment criteria that a lender applies are commercially sensitive and would not be provided to brokers.

Under the consultation package the proposed imposition on the finance broker of a credit worthiness assessment role indicates a fundamental misunderstanding of the different roles of lending and finance broking.

If the proposal is implemented, it would be a duplication of the lender's role and would fail the economic test of efficiency in markets, a key principle underpinning regulation. It would result in consumer inconvenience and pose potential privacy issues if the broker seeks information from third parties to verify a consumer's capacity to repay. Further, lenders would be forced to significantly reduce the number of brokers with whom they do business which would significantly harm the broking industry.

The ABA joins with the MFAA in strongly opposing the provisions of proposed clauses 31(b), 33 (3), (4), (5) and (6) that would place the assessment of a consumer's capacity to repay credit upon the finance broker.

Under the proposed Bill, "Low-Doc" and "No-Doc" mortgages products would not be able to be offered as clause 33 (3) (a) (i) sets out that the consumer's credit requirements are to be ascertained ignoring "*any declaration by the consumer for which there is no supporting evidence*".

Self-certification products such as "Low-Doc" and "No-Doc" have become standard in the mortgages marketplace. A customer certifies that the amount of income currently being received and based on the customer declaration, the lender provides a loan based on the capacity to repay. These loans are popular with the customer and the broker as the documentation is easy to complete.

They are offered to primarily self-employed persons who do not have the usual documentation from employers to certify income. The nature of the documentation does not, in any way, equate to a less rigorous lending decision, that is still based on the borrower's capacity to repay. It is the customer to whom such a product is offered that is of fundamental importance to the bank.

The ABA has a further concern with proposed Section 33 (2) which will be mentioned later in this submission under "Small business finance broking".

Concerns over certain key proposals

In addition to the ABA's strong opposition to finance brokers undertaking the credit assessment of a prospective bank customer (Clause 33 of the Bill) the ABA also has major concerns with Clauses 29 (Liability of credit provider for conduct of unqualified persons), 54 (Stay of enforcement action), 30 (Register of licensees and broker representatives), the inclusion of small business finance broking under the package and that some well intentioned exemptions are not fully effective.

Clause 29 – Liability of credit provider for conduct of unqualified persons

At the 2003 roundtable there was agreement that a finance broker would not be deemed agent of the credit provider. In fact the Bill is to confirm that the broker is acting as the agent of the consumer.

Clause 29 of the Bill undermines this agency principle.

The ABA understands the regulatory objective behind Clause 29 and supports the principle that a national finance broker regulatory regime should be sufficiently robust to ensure that all finance broker activity is subject to a licensing regime.

One problem with Clause 29 (and which is discussed further in relation to Clause 30) is that there is no proposed national licensing regime. Each jurisdiction will be responsible for licensing and in particular cancellation of licenses and renewals of licenses and the maintenance of a register for this purpose.

The only means by which a credit provider will be able to establish with certainty whether a finance broker is either a licensee or a broker representative will be through a search of each register. Further, lenders would be forced to significantly reduce the number of brokers with whom they do business which would significantly harm the broking industry.

It follows that the state of the register must be the final determinant of the whether a finance broker is or is not a licensed person or broker representative.

A specific provision making reliance on the register the sole determinant of a broker's status should be inserted in the proposals to remove any uncertainty for credit providers. Otherwise, clause 29 should be deleted.

This highlights the needs for a national reciprocal licensing scheme. As the legislation is State based, it applies to finance broking services provided to a consumer ordinarily resident in the particular state or territory (clause 7). If the consumer while in another state deals with a broker in that other state the broker

must be licensed in the consumer's home state. The bank would therefore have to have a system to determine where the borrower is ordinarily resident and how to deal with borrowers moving interstate or borrowers buying an investment property in another state. The location of the security will not necessarily determine residency. The bank would therefore have to check the residency of the borrower and that the broker is licensed in the consumer's state of residence.

At the time of accrediting the broker, a bank can search the register to ensure the licensing requirements have been met. But an onus on a credit provider to continuously check the register at the time of approving each loan application is too onerous. When a broker's licence is cancelled there should be a more effective process put in place to ensure the cancellation is notified to all credit providers if there is no period of grace after cancellation and a credit provider becoming aware of the cancellation, for example through the publication of banning orders.

There should be a mechanism for a credit provider to check if a person previously licensed is disqualified and some period of grace allowed (provided the credit provider had previously checked that the broker was licensed or the person was an authorised broker representative) to obviate the credit provider having to check the register each time a loan application is received.

Differences in daytime between jurisdictions also could add uncertainty. A search of a register in one jurisdiction should be conclusive of the status of a finance broker at the time the search was conducted from the jurisdiction in which the credit provider is located.

In the event that the register cannot be relied upon there will be uncertainty as to what party has an obligation to advise a credit provider (or indeed an aggregator) of changes to a broker license. It is our firm position that the liability for this should reside with the broker and/or the register manager and not the lender and that there would need to be an agreed timeframe in which this must be undertaken. A lender cannot be exposed due to any uncertainty in relation to status of broker licenses.

The legislation must allow for immediate cancellation of a license in some instances, for example fraud. Further, the legislation should not restrain a lender from ensuring that contractual arrangements with a broker allow for termination at any time.

The ABA has more to say about the multi-jurisdictional licensing regime below in relation to clause 30.

Clause 54 – Stay of enforcement action

The ABA has consistently opposed the policy behind this clause, at the 2003 roundtable and to the present. It is bad policy. The ABA confirms its strong opposition to this clause for the following reasons:-

1) The proposed provision would in practice undermine the clear policy decision that the finance broker shall be the agent of the customer. The proposed provision makes the credit provider a stakeholder in the

outcome of a dispute between the principal (consumer) and the agent (broker).

2) A credit provider, having conducted its own credit assessment of the customer, satisfied itself about the security arrangements for the loan and has advanced the loan accordingly then faces the prospect of delay, risk, cost and potential loss in enforcing its security on default by the customer. These outcomes also disadvantage the customer because the cost of ultimately discharging the mortgage will be higher.

3) Making provision for the Supreme Court to have regard to the interests of the mortgagee in the period of the pending proceedings is of no comfort to our members. Banks' experiences with the way in which the courts have applied amendments to the Family Law Act that enable the court to order a mortgagee to act or refrain from acting in relation to property the subject of a matrimonial dispute have been of considerable concern to them.

4) The Supreme Court has no jurisdiction or control over the conduct, timing and procedures of the pending proceedings particularly where the complaint is being managed through an EDR scheme. The Supreme Court proceeding is left to abide the outcome of the pending proceedings however long that might take.

5) It can be expected that the provisions would become the tactic of choice whereby the defaulting borrower is advised to raise a complaint against the finance broker who introduced the loan and need do no more than raise that claim within an approved EDR scheme and then file an application with the Supreme Court. In this way the proposed provision creates scope for a debtor to avoid making payments under the mortgage on the pretext of a claim (to be judged) in relation to a finance broker's recommendation.

6) Inevitably, the credit provider will be required to incur the costs of preparing for and appearing at the Supreme Court to put its case for its interests to be taken into account. Who would pay the legal costs of this? In one way or another the proceeding would add further to the mortgagee's costs of enforcement and credit risk and flow through to the customer's detriment.

7) It seems that this provision would apply where security for the loan has been provided by a third party guarantor who may apply to the Supreme Court under the provision but who has had no relationship with the broker or was party to the circumstances giving rise to the complaint. Further, the guarantor may themselves be in default on their own account under other facilities with the bank, possibly business facilities secured over the guarantor's principal place of residence. The provisions could be employed tactically to avert what otherwise could be legitimate enforcement activity by the bank.

8) Despite a decision taken at the 2003 roundtable that such a provision should not apply in respect of business finance broking this provision appears intended to apply to business finance broking (see Schedule 1 Clause 2).

9) The prohibition in the proposal that a mortgagee must take no action in relation to the mortgage is extremely wide and would prevent a mortgagee from:

- Issuing a notice of demand
- Initiating debt collection recovery of overdue instalments under the loan even by calling the customer
- Commencing debt recovery proceedings
- Enforcing a provision in the mortgage for the preservation or protection of the property
- Making payment on the mortgagor's behalf of an unpaid insurance premium
- Standing in the shoes of the mortgagor to oppose a planning or development application on or adjacent to the property
- Making a claim under a relevant insurance policy.

These are only some examples that come to mind.

The proposal is poorly conceived policy and confuses the roles of lender and finance broker. It should be dispensed with and proposed clause 54 deleted from the package.

Clause 30 Register of licensee and broker representatives and clause 27 – reportable acts

Clause 30 does not guarantee a single nationally uniform register but rather a federation of up to 8 registers. While mutual recognition of licensing and registration is helpful the consultation package acknowledges that there will be differences in licensing arrangements including we assume qualifications for licensing and licence renewal and factors relevant to the cancellation of licenses.

From a national consistency perspective this is an inferior outcome. The package should provide for nationally consistent qualification and disqualification requirements that are administered consistently. The provisions of Chapter 7 of the Corporations Act (FSR) setting out professional requirements for financial planners and advisers together with the material developed by the Australian Securities and Investments Commission (ASIC) in RG 146 could be drawn upon to provide a nationally consistent approach.

Otherwise, if the MCCA is unable to assure the industry that there will be national uniformity in these respects the ABA strongly recommends that a single national

register of finance brokers is established, administered by ASIC and able to be searched electronically.

Banks have developed a range of accreditation requirements for finance brokers seeking to refer credit proposals to them. Despite the proposed licensing regime, banks still need to have the flexibility to impose stricter or lesser requirements on the brokers they accredit. This may include internal checks. They also require the ability to refuse an accreditation application or cancel an existing accreditation of a broker irrespective of whether the broker remains licensed under the law and with immediate effect in instances such as fraud. In instances where a contract is terminated for fraud, what obligation would the lender have to report this to the regulator and what protection would be afforded the lender in doing so. There are material concerns about defamation and by extension brand and reputation. This is reflective of the significant changes that have occurred in the market's own "regulation" of finance brokers and should be recognised or at least not derogated from in the package.

We strongly support accreditation of brokers however would not want to see the level of bureaucracy that PS146 introduced for financial planners. We do not support grandfathering of brokers particularly if they are not members of the MFAA which imposes its own standards.

Lenders will, when entering into a contract with a broker, look to evidence of accreditation in addition to its own requirements. However, it should not be the responsibility of the lender to monitor for ongoing status of accreditation. The role of the regulator would be important in this regard and it is our view that if ASIC is the regulator they would be able to provide press releases in the same way they currently publish banning orders.

We do not accept liability for the conduct of a broker. If the legislation in any way results in a lender being liable for the conduct of a broker then the lender would need to significantly reduce the number of brokers with which it contracts which again would be an unintended consequence for the broking industry.

The management process for the register also needs to consider revocation of a license if a broker is convicted of a crime after having been granted a license. National regulator could monitor for this and update accordingly.

Small business finance broking

The 2003 roundtable determined that finance where there is no consumer interest involved such as commercial asset financing should be excluded from coverage.

The exclusion discussed then about commercial equipment finance broking was submitted on the basis that equipment finance brokers largely maintain ongoing relationships with their business customers through the process of advising and obtaining the most commercially viable financing alternative. Ongoing relationships in these forms of financing are a predominant feature. It was clear at the time that there had been no research to identify any market failures in this sector or that there were any anecdotal market failures that would support the inclusion small business finance broking in the regime.

The consultation package provides that certain information and procedural aspects of the regime would not apply in respect of a bona fide business transaction. However, this does not reflect the agreement reached at the 2003 roundtable that commercial asset financing be excluded from the regime.

The ABA recognises that the finance broking market has changed since 2003 and that there is now more active business finance broking activity and notes that there is no research in the consultation package to support the inclusion of this activity in the proposed regime.

The ABA does not have a common view of its members on the need or desirability for business finance broking to be regulated at this stage given the research upon which the regulatory package is based covered only consumer finance broking. The range of options includes full exemption, partial exemption or none at all in which the full regime would apply or deferral of the regime allow time to assess the market and particularly whether the self-regulatory measures being taken by the MFAA and the broker accreditation measures taken by banks are effective. This approach would be more consistent with current regulatory policy development.

Individual member banks may address this aspect in their own submissions to you.

There are some issues with the model that has been adopted for business finance broking that are mentioned here.

The burden of proof in establishing a transaction is a bona fide business transaction would rest on the finance broker. Clause 33(2) of the proposed legislation would remove the ability of a broker to rely on a business purpose declaration within the meaning of the UCCC. This would be replaced with, it is assumed, the production of an ABN as provided in Schedule 1 clause 2(4). But proposed clause 33(2) requires the broker to undertake enquiries of third parties to rebut the presumption under the UCCC that the finance to be provided is for consumer purposes. The two provisions are potentially contradictory. Further, clause 33(2) purports to amend section 11 of the UCCC or at least will create uncertainty as to how section 11 might be interpreted in the future. The ABA submits that clause 33(2) should be replaced with a new provision that a broker must not provide to a credit provider a business purpose declaration that the broker knows or ought to know is false. A breach of this provision should be a criminal offence given the seriousness of such conduct for the consumer.

Some well intentioned exemptions are not fully effective

Schedule 1 Small business exemption

The exemption from some parts of the regime for finance broking does not go far enough.

The ABA regards the bona fide business transaction test as problematic and suggests there should be a test that provides more certainty. To better align this aspect with the UCCC the test should be based on a business purpose declaration

under section 11 of the UCCC that the purpose of the transaction is wholly or predominantly for a business purpose as alluded to in the above discussion on small business finance broking.

At the 2003 roundtable it was agreed that if objections to the inclusion of finance broking for small business in the regime were to be overridden, the proposed stay of enforcement provision (clause 54) should not apply to this category of broking.

The ABA's position that proposed section 54 should be deleted from the draft Bill altogether is supported by the position taken at the 2003 roundtable on business finance broking. By deleting proposed section 54 from the package entirely obviates any further need to consider that clause in the context of small business finance broking.

Schedule 1 exemption for exclusive arrangements

The scope of clause 5 particularly 5(2) (b) is wide and could catch intermediaries that are not engaged in finance broking as such. For example, an arrangement between a bank and a mortgage manager in which the bank is the wholesale funder to the mortgage manger could be captured.

The involvement of mortgage brokers with mortgage managers can be classified into 3 categories:-

1. Brokers that are exclusively contracted to the mortgage manager;
2. Brokers that are franchisees of the mortgage manager;
3. Brokers that are employees of the mortgage manager.

With the mortgage manager structure, the credit provider assesses applications from the mortgage manager for accreditation under the wholesale funding program, through which the mortgage manager provides loan products to brokers and end consumers. As the process of obtaining finance through this wholesale arrangement is a layered one, the credit provider has no direct contact with the consumer.

When accepted to the program, an accredited mortgage manager is provided funding on a "white label" basis. The funding is provided through an independent third party directed by the bank. The use of the third party is for branding purposes by the manager. Often the consumer sources the loan through a broker who will have an origination agreement with the mortgage manager. The bank is not a party to this agreement, nor does the bank accredit the broker. The mortgage manager controls the application, credit assessment, approval, documentation, settlement and post settlement processes. Where consumers are sourced directly by a mortgage manager the consumer relationship is managed by that manager and, where consumers are sourced via a broker, the broker usually maintains the consumer relationship, in terms of the agreement between them and the mortgage manager.

A bank may also enable some mortgage managers to sub-brand to smaller mortgage managers (much like aggregators) and some brokers. These entities

are independently accredited by the mortgage manager, with minimal information provided to the credit provider other than expected business volume.

As described in detail, with the mortgage management loans, it is impossible for the bank to identify the broker. The onus of only dealing with "licensed" brokers should be made the responsibility of the mortgage manager, whose branded loan is contracted to the consumer, with no flow on effect on the credit provider who provides the wholesale funds to the mortgage manager. The mortgage manager would lend, using its own its badged product, to a consumer on a referral from a broker down the line but in essence the bank is the credit provider. This arrangement could be construed as an intermediary relationship necessitating the mortgage manager is licensed.

However, the exemption in Schedule 1 clause 4 "Finance broking under exclusive arrangements" ignores the fact that the intermediary collects fees and charges including application, fees valuation fees and establishment fees for the credit facility. Where the credit facility has a re-draw facility a re-draw fee may be payable to the mortgage manager. These are not broking fees

The policy behind this fees restriction seems to be that any fee is to be characterised as a "broking fee" (see Summary of Finance Broking Exposure Bill) provisions when in reality none of the fees could be characterised that way. If it is intended that all fees charged by the intermediary will mean the exemption does not apply then the policy behind the clause is obscure, appears to be an exercise in price control and should be explained to permit further submissions on the policy.

Schedule 1 Exemption for "first choice arrangements"

Similar issues as highlighted in the MFAA submission are relevant in respect of this exemption.

Technical Issues

Clause 38 (2) (b)

A consumer may not have a greater capacity to repay however may have a greater ability. For example, a lender applies a variety of assessment criteria to a lending decision. Over time a customer may become more financially secure although their 'capacity' may not have changed. We believe 'greater capacity' needs to be more clearly defined.

Disclosure generally

It should be clear that although that lender will only be responsible for disclosure of fees, charges etc as they relate to the credit contract the broker is responsible for the disclosure of their fees and charges relating specifically to the broking serves they provide. There should be a requirement to make this clear under broker disclosure obligations. Brokers should also be responsible for keeping information up to date.

The documentary obligations proposed to be imposed on brokers –

1. the disclosures generally,
2. the finance broking agreement, and
3. the credit proposal

should be carefully considered to reduce the risk that consumers may be provided with a large volume of material that could be a disincentive for them to read it while at the same time imposing on credit providers a need to peruse and record these documents to the extent they are provided to them.

Keeping records

Generally the ABA suggests a retention period for brokers of 7 years so that it is in keeping with all other legislation covering records retention. However there may be special requirements under certain legislation where documentation retention periods differ depending on whether the record is of a transaction or of customer information. The proposed regime should cater for these differences.

Clause 82

If a lender is required to provide information in relation to an audit or other inquiry that information should not become available to any other party including the broker.

Clause 11 (2) - Refusal to grant a licence.

There are grounds to refuse to provide a licence if an individual has been convicted of an offence punishable by imprisonment for 12 months or more, or any offence involving fraud, dishonesty or unjust conduct, or their authority to trade under any Act has been terminated on the grounds of fraud, dishonesty or unjust conduct. There may also be other prescribed grounds for refusing a licence.

This may have serious effect on the ability of a credit provider to obtain leads for potential credit contracts. For instance, assuming the effect of clause 5 is that a merchant (whose business is not finance-related) must become a licensee before they can refer a consumer to a credit provider for credit, and they failed to gain a licence after being refused because of an unrelated prosecution, they would be excluded from making the referral.

Clause 12 - Offshore corporations.

Where the licence is granted to a corporation, the corporation will be required to have its head office in the jurisdiction in which it is applying for a licence.

Where a credit provider out-sources some of its Australian customer service functions to offshore corporations or may receive leads from corporations whose head offices are offshore, this provision may have the effect of making those leads impossible.

Clauses 16, 17 and 18 - Cancellation of a licence.

These clauses set out the grounds for cancellation of a licence.

It is unclear if and how the cancellation of a licence would affect a former licensee's ability to continue to receive trail commission for a credit contract that was formed during the period in which they held a licence.

Clause 35(2)/32(1) – Disclosure of Commissions and Calculation method

Clause 35 (2) (f) refers to disclosure of commission received by the broker or associates from the lender. Clause 32 (1) refers to information on commission received from the lender and method of calculation. These calculations would be extremely complex and difficult to implement due to the nature and structure of aggregator groups and also the use of volume based incentives.

The ABA agrees with the MFAA's recommendation that commission disclosure should occur only at credit provider and broker level, and "up the line" intermediaries and related commissions should be excluded. The MFAA suggestion that there should be a general obligation for the broker to act in good faith is supported.

Final Comment

The submission by the MFAA and this submission indicate a range of important issues dealing with scope and proportion with the proposed regulatory package that warrant closer examination and consultation with broker representatives, the ABA and other organisations that represent credit providers.

The ABA looks forward to hearing about further plans for consultation with industry and the likely timing in which this will occur before any Bill is taken forward into legislation.

Yours sincerely

Ian Gilbert