

Draft Determination

Application for Authorisation

Lodged by

The Mortgage Industry Association of Australia

In respect of

MIAA Disciplinary Rules

Date: 26 November 2003

Authorisation no. A90880

Public Register no. C2003/1055

Commissioners:

Samuel
Sylvan
Martin
McNeill
Willett
Wilkinson

Executive Summary

On 19 August 2003 the Mortgage Industry Association of Australia (MIAA) lodged application for authorisation A90880 with the Australian Competition & Consumer Commission (the Commission). The MIAA sought authorisation of its Disciplinary Rules, a copy of which is at [Attachment A](#).

The MIAA also sought interim authorisation. The Commission considered this request and granted interim authorisation on 24 September 2003.

The Commission received several submissions from interested parties in relation to the proposed arrangements, including from the Australian Securities and Investment Commission, consumer groups and State Government departments. No interested party opposed the application.

Anti-competitive detriment

Overall the Commission considers that the MIAA's Disciplinary Rules are likely to generate minimal anti-competitive detriment. In particular the Commission notes that MIAA membership is not mandatory for mortgage brokers, and may not significantly assist agencies to compete.

Public benefit

The Commission considers that the MIAA's governance regime (which includes its Disciplinary Rules) is likely to result in a benefit to the public. The Commission notes the concerns highlighted by interested parties about the potential for unethical conduct in the industry. However, given that the MIAA's Rules appear to be adequate and that no interested party suggested that the Rules have not been effectively enforced, the Commission is satisfied that the Rules generate a public benefit by assisting members to act ethically and professionally within the employment service industry.

Conclusion

Overall, the Commission is satisfied that the public benefit flowing from the proposed arrangements is likely to outweigh any anti-competitive detriment. Therefore, the Commission proposes to **grant** authorisation A90880 as sought by the MIAA for five years.

Interim authorisation will continue to protect the proposed arrangements until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

The Commission notes interested parties' comments, such as:

- The concern raised by CFA that the MIAA may publish Tribunal decisions as it sees fit, rather than being required to do so. CFA considers that such decisions should be publicly available. The Commission considers that such a proposal may enhance the public benefit flowing from the regime.
- Similarly, ASIC and CFA both note that the MIAA's governance regime has never been subject to an external review. The Commission considers that

such a review may lead to further improvements in the regime, and thereby further enhance the standing of mortgage brokers in general.

The Commission notes that the suggestions made by interested parties may improve the operation and effectiveness of the Rules, and therefore enhance the public benefit flowing from the governance regime. The Commission encourages MIAA to adopt these proposals.

The Commission will now seek further submissions from interested parties. In addition, the MIAA or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the TPA.

List of Abbreviations

ADI	Authorised Deposit Institution
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
CCLC	Consumer Credit Legal Centre
CFA	Consumers Federation of Australia
FBAA	Finance Brokers Association of Australia
MIAA	Mortgage Industry Association of Australia
MIOS	Mortgage Industry Ombudsman Service Ltd
NSW OFT	New South Wales Office of Fair Trading
TPA	<i>Trade Practices Act 1974</i>
WA DCEP	Western Australian Department of Consumer and Employee Protection

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INTRODUCTION

Authorisations

- 1.1 The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3 One way businesses may obtain immunity is to apply for what is known as an ‘authorisation’ from the Commission. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5 Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6 The TPA requires that the Commission then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.
- 1.7 Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.8 The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the Commission may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

This Application

- 1.9 On 19 August 2003 the Mortgage Industry Association of Australia (MIAA) lodged application for authorisation A90880 with the Commission, using Form A, Schedule 1 of the *Trade Practices Regulations 1974*. The application was made under section 88(1) of the TPA for authorisation to make and give effect to a contract, arrangement or understanding, where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA.
- 1.10 The MIAA applied for authorisation of its Disciplinary Rules (the Rules). A copy of the Rules is at Attachment A.

Interim authorisation

- 1.11 At the time of lodging the application, the MIAA requested interim authorisation for the proposed arrangements. On 24 September 2003, the Commission granted interim authorisation in respect of the proposed arrangements. Interim authorisation will continue to protect the proposed arrangements until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

Chronology

- 1.12 Below is a chronology of significant dates in the consideration of the application.

DATE	ACTION
19 August 2003	Application for authorisation A90880 received by the Commission.
10 September 2003	The Commission sought submissions from interested parties.
24 September 2003	The Commission granted interim authorisation.
6 October 2003	Closing date for submissions from interested parties.
14 October 2003	The Commission forwarded copies of submissions received to date to the applicant for comment.
26 November 2003	Draft determination issued

BACKGROUND TO APPLICATION

The market for mortgages

- 2.1 Approximately 35 per cent of Australian households have a mortgage, with a total value of \$385 billion.¹ This is nearly a 300 per cent rise since 1993.² The average size of a mortgage is between \$165 000 and \$175 000.³
- 2.2 Each year mortgage writers write 600 000 new home loans, of which approximately 25 per cent are refinances of existing loans⁴. The four major banks (Commonwealth, National, Westpac and ANZ) dominate the market, capturing 80 per cent of new loans.⁵
- 2.3 This growth in mortgages has been underpinned by the Australian housing industry's significant growth in the past few years, with established house prices increasing by 18.1 per cent between 2001-02 and 2002-03 alone.⁶

The broker industry

- 2.4 Essentially, a mortgage broker's role is acting as an agent between lenders and borrowers. They obtain information from the consumer as to their financial situation and requirements, and then select the product that the broker deals with which best suits that consumer. The broker usually then assists the borrower with the paperwork and forwards it to the lender.
- 2.5 The broker industry has grown rapidly over the past ten years, from being a very small industry in the early 1990s to providing approximately 23 per cent of all housing loans made by Authorised Deposit Taking Institutions (ADIs),⁷ with a total dollar value at June 2002 of \$76.3 billion.⁸
- 2.6 Broker introduced housing loans account for 23 per cent of banking industry housing loans, 2 per cent of credit union housing loans and 35 per cent of building society housing loans.⁹
- 2.7 There is a large and increasing number of brokers operating in Australia, with estimates of 10 000 individual brokers operating in Australia, and an extra 50

¹ Source: *Australia's Mortgage Market*, published by Macquarie Research Equities, 14 July 2003 (provided by the applicant), p. 10.

² Ibid.

³ Ibid, p. 12.

⁴ Ibid.

⁵ Ibid, p. 15.

⁶ Source: Australian Bureau of Statistics, 6416.0 House Price Indexes, Eight Capital Cities. This is a weighted average of the capital cities.

⁷ As defined in the *Banking Act 1959*. Essentially, this includes banks, credit unions and building societies.

⁸ Source: *Report on Broker-Originated Lending*, APRA, January 2003, p. 5.

⁹ Ibid.

entering the market each week.¹⁰ The market appears to be dominated by a few large players, but also has a long ‘tail’ of small operators.¹¹

2.8 The average bank has been using brokers for almost 10 years, and currently deals with 740 brokers. Credit unions and building societies have only recently started dealing with brokers (the average is 3-4 years), and on average currently use 13.¹²

2.9 Some 96 per cent of ADIs (on an asset-weighted basis) use brokers to originate loans, and this is set to increase, with 38 per cent of those ADIs currently using brokers planning to increase their use.¹³ In addition 15 per cent of those ADIs not already using brokers plan to start doing so within the next twelve months.¹⁴

Approval rates

2.10 According to APRA, the approval rates at ADIs for broker introduced housing loans are slightly lower than non-broker introduced, with medians of 75 and 81 per cent respectively.¹⁵

Sources of remuneration in the mortgage industry

2.11 Brokers generally receive remuneration from three sources:

- fees charged to the client;
- upfront commissions (generally paid by the institution giving the loan at the time it is established); and
- trail commissions (generally paid by the institution annually over a given period).

2.12 There is currently no regulation of remuneration in Australia, except in respect of fees charged to clients in the Australian Capital Territory and Western Australia.¹⁶

2.13 Studies¹⁷ have found that 97 per cent of brokers received commissions or financial benefits from credit providers. Fifty seven per cent did not charge their clients fees, while 40 per cent charged clients fees and also received commissions. Over half of the institutions using brokers base the broker’s remuneration solely on the volume of business generated,¹⁸ and brokers can earn bonuses where the volume of business placed with a lender over a period of time meets or exceeds specified targets.¹⁹

¹⁰ Source: *Report on the Finance and Mortgage Broker Industry*, Consumer Credit Legal Centre (CCLC), March 2003, p. 12.

¹¹ *Ibid.*

¹² APRA, p. 6.

¹³ *Ibid.*, p. 2.

¹⁴ *Ibid.*, p. 13.

¹⁵ *Ibid.*, p. 16.

¹⁶ CCLC, p. 17.

¹⁷ *Ibid.*

¹⁸ APRA, p. 9.

¹⁹ CCLC, p. 17.

2.14 The average origination fee is 0.57 per cent for housing loans, while trailing fees ranged from 0.21 to 0.25 per cent.²⁰ Based on these figures a rough calculation of the total brokerage commission on housing loans is \$832 million.²¹

Issues in the mortgage broking industry

2.15 Recently some groups have been expressing concern at some practices in the mortgage industry and have been calling for it to be more heavily regulated.

2.16 The *Report on the Finance and Mortgage Broker Industry* by the Consumer Credit Legal Centre and commissioned by ASIC (the CCLC Report) found that current regulation contains a number of gaps and was generally developed prior to the rapid expansion of the broker industry in the 1990s. It also noted that regulation at a State/Territory level tends to be inconsistent.²²

2.17 The CCLC Report found that some practices by brokers cause problems for consumers, particularly those brokers on the fringes of the industry who have developed ‘scams clearly to manipulate consumers who are desperate for finance.’²³ Some of the factors that may affect consumers include:

- *the disparity in market information between brokers and consumers*: consumers rely on the brokers’ knowledge but are unaware that the broker is not under any statutory obligation to undertake inquiries and research in order to determine the best loan for that consumer;²⁴
- *lack of redress for consumers*: due to limited access to an alternative dispute resolution scheme and considerable barriers to legal action.²⁵ The CCLC Report also notes that lenders are unable to discipline ‘bad’ brokers other than by refusing to deal with them again;²⁶
- *lack of disclosure of fees*: the broker survey conducted as part of the CCLC Report finding that 25 per cent of brokers who charged fees to their clients provided that information in an oral form only. In addition 35 per cent of brokers who received a commission from the lender only advised their clients of this orally, and 5 per cent of brokers did not inform their clients about commissions at all;²⁷ and
- *fraudulent conduct*: some brokers have misrepresented a consumer’s personal or financial details in order for the lender to finance a marginal loan application. The CCLC Report also notes more serious cases where finance is obtained

²⁰ Ibid, p. 10.

²¹ Ibid, p. 11.

²² Source: *Report on the Finance and Mortgage Broker Industry*, section 5.

²³ Ibid, p. 29.

²⁴ Ibid, p. 24.

²⁵ Ibid, section 3.

²⁶ Ibid, p. 21.

²⁷ Ibid, p. 28.

through making an application on behalf of a non-existent or reconstructed individual, with the funds advanced simply stolen.²⁸

The APRA Report

2.18 The *Report on Broker-Originated Lending* conducted by the Australian Prudential Regulation Authority²⁹ (the APRA Report) discussed ADIs' systems for accrediting brokers, and whether and how regularly ADIs review their lists of approved brokers. It also noted that the three most common reasons an ADI may cease dealing with a broker are:

- poor quality of business generated (59 per cent);
- lack of business generated (44 per cent); and
- fraud (24 per cent).³⁰

2.19 The APRA Report also noted that 82 per cent of ADIs do not require the broker to take any action when a consumer defaults on a loan (i.e. the loan becomes impaired), and that only 25 per cent of ADIs have recourse to the broker should this occur.³¹

The MIAA

2.20 The MIAA³² states that it is the peak body for the mortgage industry in Australia. It currently has some 5740 members, falling into two categories:

- Full members – being mortgage broker businesses, lenders (both bank and non-bank), and mortgage managers. These comprise about 95 per cent of full members. The remainder are mortgage insurers, trustee companies, solicitors, valuers and other suppliers to the mortgage industry. There are currently some 1820 full members.
- Accredited Mortgage Consultants (AMCs) – a professional designation provided to individual loan writers attached to full members. Accreditation is based on experience, probity checks and educational criteria. There are currently some 3920 AMCs.

2.21 The MIAA also states that it currently has approximately 75 per cent of the potential membership of mortgage brokers, lenders and managers, and about 40-50 per cent of the potential membership of loan writers (eg. MIAA's AMCs).

MIAA's Objectives

2.22 The MIAA's Mission Statement is 'to ensure the orderly and ethical working of the mortgage industry in Australia' and its key objectives are to:

²⁸ Ibid, p. 34-5.

²⁹ January 2003

³⁰ Source: Report on Broker –Originated Lending, p. 8.

³¹ Ibid, Table 3.

³² The following information is from the MIAA's submission or its website: <http://www.miaa.com.au>.

- be the recognised authority in Australia on all aspects of the mortgage industry;
- maintain quality standards within the industry;
- offer training for members and their staff;
- support the development and range of mortgage products available to the public;
- embrace best practice customer services;
- develop the mortgage industry in Australia; and
- elevate the role of mortgage intermediaries to a profession.

MIAA's Services to Consumers

- 2.23 Among other things, the MIAA has developed the Mortgage Industry Ombudsman Scheme (MIOS) to provide consumers with a modern and effective dispute resolution scheme. Access to the dispute resolution mechanism is free for consumers.
- 2.24 It has also developed standard plain English documentation, such as a real estate mortgage, guarantee and loan contract to ensure consumers understand their obligations.

MIAA's Services to Members

- 2.25 The MIAA states that it provides a range of services for its members, both direct and indirect. These include:
- representing, promoting the development and raising the profile of the mortgage industry by fostering ethical conduct;
 - lobbying governments and providing information on legislative and regulatory matters affecting the industry;
 - monitoring and developing accreditation, professional development and education programs; and
 - providing a forum for all members to promote self-regulation and internal discipline.

The Finance Brokers' Association

- 2.26 The Finance Brokers' Association of Australia (FBAA)³³ also includes mortgage brokers among its membership. The FBAA focuses on finance brokers whether they are engaged in the mortgage industry or other forms of finance broking.
- 2.27 Approximately 55 per cent of its membership is brokers who act as mortgage and home loan intermediaries, while the remaining 45 per cent is brokers who act as intermediaries in the chattel, lease and rental finance, and plant and equipment area. At present the FBAA has 582 members, representing approximately 2500 individuals.

³³ Sources: the CCLC Report or the FBAA website: www.financebrokers.com.au

THE CONDUCT

3.1 The MIAA is seeking authorisation for its Disciplinary Rules which are part of the regime governing the conduct of its members. It is not seeking authorisation of the other parts of its governance regime.

The MIAA's Governance Regime

3.2 The governance regime consists of:

- the MIAA Constitution which sets the governance framework for the Association;
- the MIAA Code of Practice which outlines the standards that members have to adhere to. One of the conditions of membership is agreeing to be bound by the Code;
- the Disciplinary Rules which essentially enforce the Code of Practice and also cover appeals for refused applications for membership; and
- the MIAA's Ombudsman scheme (MIOS) which handles consumer complaints. The Ombudsman is at arm's length from the MIAA itself and is currently managed by Australian Commercial Disputes Ltd.

The Disciplinary Rules

3.3 The Rules outline the processes for investigation of complaints, expulsion of members and refused applications for membership or accreditation. In addition they contain information about the MIAA Tribunal (the Tribunal). This is a brief outline of the main areas covered by the Disciplinary Rules, a copy of which is at Attachment A.

The investigation of complaints

3.4 Complaints are referred to an Investigating Officer,³⁴ appointed by the MIAA.³⁵ An Investigating Officer may only conduct an investigation in certain circumstances including when he/she suspects on a bona fide basis that the member has committed misconduct, and that the complaint is not frivolous or vexatious.³⁶ Misconduct is defined in the MIAA Constitution (see paragraph 3.37).

3.5 Investigating Officers may require members to provide any relevant documents and/or attend an interview.³⁷

³⁴ rule 2.1.2

³⁵ rule 2.1.1

³⁶ rule 2.1.3

³⁷ rules 2.2.1 – 2.2.6

- 3.6 An Investigating Officer, with the agreement of two members of the Tribunal, can suspend a member from the MIAA³⁸ if he/she suspects on reasonable grounds that a member has committed or been involved in an act involving fraud or dishonesty.³⁹ A member who has been suspended can appeal this decision to the Tribunal.⁴⁰
- 3.7 If after investigating a complaint, the Investigation Officer considers that a member should be charged with misconduct, then the member must be informed of the charges in writing and also given a copy of the Investigation Report.⁴¹

The Tribunal's role

- 3.8 Disciplinary charges are heard by the Tribunal. The Tribunal may hold a hearing or chose to rely on written submissions from the parties.⁴²
- 3.9 Hearings are private. Attendees include the Investigating Officer, the member and legal representation (if 5 days notice is given to the Tribunal).⁴³ The Tribunal must conduct hearings with as little formality and technicality as possible.⁴⁴
- 3.10 Where an order for suspension is in effect,⁴⁵ the Tribunal may make an order continuing the suspension or revoking it.⁴⁶ Similarly if the Tribunal has reasons to suspect that a member has been involved in an act involving fraud or dishonesty, the Tribunal may make an order suspending membership.⁴⁷
- 3.11 Under the Disciplinary Rules, members who the Tribunal finds have engaged in misconduct can be censured, suspended, required to undertake education or compliance programs or expelled.⁴⁸ Membership can also be cancelled in certain circumstances.

Appeals processes

- 3.12 If an applicant has his/her membership application refused by the MIAA, the applicant can request that the decision be reviewed either by an Investigating Officer or the Tribunal.⁴⁹ If it is referred to an Investigating Officer, he/she must compile a report and send it to the Tribunal.⁵⁰ Once the Tribunal receives a referral or an Investigation Report, the applicant in question must be given the

³⁸ rule 2.3.1

³⁹ rule 2.3.8

⁴⁰ rule 2.3.3

⁴¹ rules 2.3.7 and 2.4.1

⁴² rules 4.2.2 and 4.2.5

⁴³ rule 4.5.2

⁴⁴ rule 4.5.5

⁴⁵ rule 2.3.1

⁴⁶ rule 4.2.2(a).

⁴⁷ rule 4.2.2(b)

⁴⁸ rules 4.7.2 (a)-(e)

⁴⁹ rule 3.2.1

⁵⁰ rules 3.3.2

opportunity to provide submissions to the Tribunal as to why his/her application for membership should be allowed. The Tribunal will then consider all of the submissions. It cannot hold a hearing on the issue.⁵¹

- 3.13 There is a similar process if the Tribunal decides that a member does not meet the requirements of the MIAA or has made a misrepresentation on an application form or other document provided to the MIAA, it can cancel the membership.⁵² However in these cases the Tribunal can hold a hearing if there are special circumstances.⁵³

The Tribunal generally

- 3.14 The Tribunal consists of a Chairperson and Deputy Chairperson. They may not be full members or AMCs.⁵⁴ There is also a Tribunal Panel of at least 20 persons.⁵⁵ For a hearing, the Tribunal must consist of a Chairperson and two persons from the Tribunal Panel.⁵⁶
- 3.15 There are a number of general rules that apply to the Tribunal⁵⁷ including that it must act expeditiously in hearing a matter, it must act without bias and that it makes decisions by a simple majority vote.
- 3.16 The Tribunal is not required to issue written reasons for any determination. However if it does, a copy must be provided to all parties.⁵⁸ Tribunal decisions are final and binding on all parties to the proceeding.⁵⁹ They are also recorded on a register available to members for inspection.⁶⁰

Other matters

- 3.17 An AMC who has ceased to be an Officer, employee or contractor of a member will have his/her membership automatically suspended.⁶¹
- 3.18 If a matter is referred by the Mortgage Industry Ombudsman, it will be dealt with as if it were a complaint made under the Rules.⁶²

⁵¹ rule 4.4.2

⁵² rule 4.3.3

⁵³ rule 4.3.2

⁵⁴ rule 4.1.4

⁵⁵ rule 4.1.5

⁵⁶ rule 4.1.7

⁵⁷ rules 4.6.1 – 4.6.9

⁵⁸ rule 4.6.10

⁵⁹ rule 4.8.2

⁶⁰ rules 4.3.3, 4.7.2 and 4.4.3

⁶¹ rule 5.1.1

⁶² rule 6.1.2.

The Code of Practice

3.19 As discussed at paragraph 3.2 above, the Rules essentially enforce the Code of Practice (the Code). Even though the Code itself is not part of this application for authorisation, given that it is intrinsically related to the Rules, this summary is provided as background information. A copy of the Code is at Attachment B.

Objectives of the Code

3.20 The objectives of the Code are to:

- establish professional standards of consumer/member dealings in the mortgage industry;
- promote commitment by MIAA members to compliance with laws and regulations in the spirit of those laws and regulations;
- promote the maintenance of the high public standing of MIAA membership accreditation;
- promote ethical and fair business practices to the benefit of consumers, the public and members; and
- promote education and professional programs for members.⁶³

Application of the Code

3.21 The Code applies to and is binding on every:

- Mortgage Originator;⁶⁴
- Mortgage Manager;⁶⁵ and
- Credit Provider⁶⁶

who is a full member or life member of the MIAA and who acts for a party to a transaction which involves or may involve the provision of credit secured by way of mortgage over real estate.⁶⁷

3.22 The Code also applies and is binding on every Finance Broker who is a member of the MIAA and Accredited Mortgage Consultant (AMC).⁶⁸

⁶³ clause 2.

⁶⁴ Defined as Members who bring together potential borrowers and credit providers.

⁶⁵ Defined as Members who manage mortgages on behalf of credit providers.

⁶⁶ Defined as including banks, credit unions, building societies, mortgage funders, superannuation funds and other providers of credit.

⁶⁷ clause 4.

⁶⁸ clause 5.

Requirements to become and remain a member

- 3.23 *Qualifications and experience*: a member or AMC must have qualifications or experience relevant to the functions to be performed.⁶⁹ They must also undertake continuing education programs recognised by the National Council to maintain membership.⁷⁰
- 3.24 *Professional indemnity insurance*: members must maintain professional indemnity insurance of not less than \$1 million, which is endorsed to cover a determination made by the Mortgage Industry Ombudsman and with an extension for Fidelity cover of not less than \$100 000.⁷¹ Each AMC must be personally covered by professional indemnity insurance for not less than \$1 million for each and every transaction facilitated by that person.⁷²

Practice standards for members

- 3.25 *Compliance with laws*: a member must always comply with the Code, and relevant legislation throughout the time it is dealing with a loan.⁷³
- 3.26 *Appropriate finance*: a member arranging mortgages on residential real estate must only suggest or recommend mortgage finance options that the member reasonably believes are appropriate to the needs of that applicant.⁷⁴ If a member is acting as an agent for a credit provider, the member must recommend that the applicant make his/her own enquiries about the competitiveness and suitability of the loan before signing a letter of engagement.⁷⁵
- 3.27 *Loan applications*: a member must:
- always disclose all relevant details about a proposed loan over residential real estate to an applicant;⁷⁶
 - always make necessary enquiries to determine an applicant's capacity to repay the proposed loan, where the loan is for residential real estate;⁷⁷ and
 - submit a loan application to the credit provider promptly (within 5 working days if possible for residential real estate) after receipt of a correctly completed application form.⁷⁸

⁶⁹ clause 10.

⁷⁰ clause 11.

⁷¹ clause 14, although this does not apply where trust monies are not received.

⁷² clause 16.

⁷³ clause 20.

⁷⁴ clause 21.

⁷⁵ clause 22.

⁷⁶ clause 23.

⁷⁷ clause 24.

⁷⁸ clauses 25 and 26.

- 3.28 *Outcome of a loan application*: a member dealing with a mortgage over residential real estate must advise an applicant of any loan decision made by a credit provider within 5 working days of being notified. If a loan is declined, the member must refund any amounts due to the applicant within 2 business days.⁷⁹
- 3.29 *Confidentiality*: a member must keep information provided by an applicant confidential.⁸⁰
- 3.30 *Fees and commissions*: a member must always disclose if they will be paid a fee or commission in connection with a loan, including the amount of the fee or the formula by which it is calculated.⁸¹ A member must never charge an applicant a non-refundable application fee for a loan where the member suspects there is little chance of the loan being approved.⁸²
- 3.31 *Note*: the Statement of Interpretation adopted by the MIAA National Council on 27 May 2003 states that a member will not be guilty of misconduct if, where the member is paid by or on behalf of a lender, the member discloses that a Commission may be paid to the member by or on behalf of a lender (or a mortgage manager or aggregator if the loan is provided through them). The amount to be paid should be disclosed if it is ascertainable or if not, a statement should be made that the commission comprises of an upfront payment and an ongoing commission throughout the term of the loan. The MIAA has an approved disclosure form, or members can use any form provided it complies with the MIAA's requirements.
- 3.32 *Skill, care and diligence*: a member must act with due skill, care and diligence in their dealings, including ensuring that their staff and associates are knowledgeable in the aspects of the industry in which they work.⁸³ They must also ensure that all matters are completed in a timely fashion.⁸⁴
- 3.33 *Honest and honourable dealings*: a member must establish and maintain honest and honourable relationships with all persons they deal with, must use plain language in written terms and conditions, not engage in any acts or omissions that are misleading, dishonest or fraudulent, including in advertising.
- 3.34 *Complaints handling*: a member must have a 'Complaints Contact Person' and inform any consumer who makes a complaint about this person.⁸⁵ They must also have a written policy on complaints handling.⁸⁶ A member must tell a consumer about the Mortgage Industry Ombudsman Service and keep a leaflet publicising it in their office.⁸⁷

⁷⁹ clauses 28-30.

⁸⁰ clause 32.

⁸¹ clause 33.

⁸² clause 34.

⁸³ clauses 35-37.

⁸⁴ clause 38.

⁸⁵ clause 44.

⁸⁶ clause 46.

⁸⁷ clauses 49-50.

- 3.35 *Conflict of interest*: a member must fully disclose any conflict of interest if it concerns a consumer.⁸⁸
- 3.36 *Monies held on trust*: there are various procedures for how members and AMCs should deal with any money received from a consumer and held in trust.⁸⁹ Any money received from a client must be deposited with the third party on the next business day.⁹⁰ They must also keep a record of all transactions on trust and ensure that these records are audited regularly.⁹¹

The MIAA Constitution

- 3.37 Misconduct is defined in section 39 of the MIAA's Constitution as including:
- conduct involving fraud or dishonesty;
 - failure to comply with a provision of the Constitution, the Code of Practice, the MIOS Rules or the Disciplinary Rules;
 - misrepresentation of facts in relation to accreditation as an Accredited Mortgage Consultant (AMC) or professional development points earned;
 - misrepresentation of facts in relation to any borrower or guarantor; or
 - conduct involving a breach of any legislation governing or relating to the mortgage industry.

⁸⁸ clause 53.

⁸⁹ clauses 56 and 61.

⁹⁰ clauses 57 and 62-63.

⁹¹ clauses 58-60 and 64.

SUBMISSIONS RECEIVED BY THE COMMISSION

4.1 The MIAA provided a supporting submission with its application for authorisation. The Commission also sought submissions from some 50 interested parties, including regulators, consumer groups, mortgage brokers and other participants in the finance industry. It received submissions from several interested parties, including:

- Australian Securities and Investment Commission (ASIC);
- Consumers' Federation of Australia (CFA);
- the Financial Services Consumer Policy Centre; and
- NSW Office of Fair Trading.

4.2 It also received short written or oral submissions from the Finance Brokers Association of Australia (FBAA), St George Bank and Aussie Mortgage Market supporting the MIAA's application for authorisation.

4.3 Copies of all submissions were placed on the Commission's public register.

Submission from the Applicant

Claimed public benefits

4.4 In its supporting submission, the MIAA states that in its view, self regulation aims to promote confidence in the relevant market by ensuring that the market is sound, orderly, fair, transparent and ethical, and that proper and correct information is provided to consumers and others who rely on that information.

4.5 The MIAA notes that while it expects that most complaints under the Disciplinary Rules will come from members or potential members, the existence of the Rules and their processes will be available to the general public and publicised by members. The MIAA will also use its website for this purpose.

4.6 The MIAA argues that the whole governance regime is aimed to benefit the public. With it there is a clear public benefit, without it there is a public detriment. The Rules are an 'essential part of the governance regime and are its cleansing agent.'

Anti-competitive detriment

4.7 The MIAA submits that there is little anti-competitive detriment flowing from the conduct. It notes that while under the Rules brokers can be refused or stripped of membership, or sanctioned in some way, this would be due to misconduct and not conduct that has an impact on the competitive dynamics of the industry.

4.8 MIAA also notes that the industry is not only comprised of brokers. As lenders also directly provide mortgages, an exclusionary provision affecting brokers 'would have little, if any, impact on the broking market or the wider financial services sector.'

- 4.9 MIAA states that the mortgage market is generally very competitive and that very little will reduce this unless interest rates increase or there is a downturn in home buying or building.
- 4.10 MIAA argues that any reduction in competition arising from excluding those who engage in misconduct or without the necessary skills or ethics is clearly countered by the public benefits that arise from such exclusions. It states that ‘competition must be ethical. If competitors are profiting from misconduct, then that is sham competition and should not be encouraged or tolerated.’

Submissions from Interested Parties

ASIC

- 4.11 ASIC states that it is generally in agreement with the MIAA, and expects that if the Disciplinary Rules are vigorously enforced, the following should result:
- enhanced public confidence in the mortgage industry and the financial system generally;
 - enhanced likelihood (rather than certainty) of proper and correct information being provided to consumers and others relying on that information; and
 - minimal unconscionable and/or dishonest conduct by MIAA members.
- 4.12 ASIC considers that the Rules set out a credible investigation and decision-making structure, with an appropriate degree of separation from the MIAA itself. It also states that the MIAA’s disciplinary provisions appear to be sufficiently encompassing to deal with, at least, most potential misconduct.
- 4.13 However ASIC also notes that the MIAA Code has never been subject to an independent external review, and that it remains in substantially the same form as it has been for a number of years. This is notwithstanding the rapid evolution and diversification of the mortgage broking industry and the increasing range and diversity of complexity of home loan and other finance products. ASIC suspects that there is considerable uncertainty both within and outside of the industry, as to what constitutes appropriate and inappropriate conduct by mortgage brokers. ASIC considers that an external review of the Code would engage a range of stakeholders in considering issues relevant to the industry, and it might be something that the mortgage industry will need to consider moving forward.
- 4.14 ASIC notes that, in its observation, there is considerable concern among industry participants, including lending institutions, about the impact of misconduct on consumer confidence and its potential for damage to reputation.
- 4.15 ASIC considers that it is highly unlikely that the Rules, if applied in a bona fide manner, could be used to unfairly exclude brokers from the MIAA, or to lessen competition with the industry. It notes that the Rules do not impose a highly prescriptive regulatory regime, but are for the most part simply general requirements directed at representations and/or conduct that is illegal, fraudulent, dishonest, misleading, incompetent and/or inefficient. As such they do not

impose a significant or inappropriate hurdle to brokers seeking to belong to, or remain members of, the MIAA.

- 4.16 ASIC notes that what impact not being a member of the MIAA might have on the ability of a broker to participate in the industry is not clear.
- 4.17 ASIC also considers that the Rules could be expected to have a positive influence on the competitiveness of the broker market, thereby allowing more efficient and confident comparison of brokers' services, in as far as enforcement of the Rules serves to improve the accuracy and comprehensiveness of information provided to consumers.
- 4.18 ASIC also notes that the Mortgage Industry Ombudsman Service Limited (MIOS) has applied to ASIC for approval under *ASIC Policy Statement 139: Approval of external complaints resolution schemes*. ASIC expects to make a decision in relation to the MIOS application before the end of the year.

Consumers' Federation of Australia

- 4.19 Consumers Federation of Australia (CFA) states that the public benefit of the Disciplinary Rules is likely to outweigh any detriment. However, it outlined a number of concerns with the Rules, and with the industry in general.
- 4.20 *The Mortgage Industry* - consumer representatives are concerned about the large role played by brokers in the provision of credit, as not only is the industry largely unregulated, but the involvement of a broker in the loan application process can severely limit a consumer's rights under the current consumer credit laws. CFA notes that brokers who do not belong to MIAA cause the majority of serious problems.
- 4.21 *The MIAA Code* – to CFA's knowledge no consumer representatives have been consulted in relation to the development of MIAA's disciplinary procedures.
- 4.22 However in relation to the current Code, CFA considers that it is too general and lacks detail. It believes that a Code would be more effective if specific practices were prohibited in the Code. An example is loan introducers or others that are not MIAA members sometimes obtain credit for consumers through brokers who may be MIAA members. CFA does not consider there is anything in the Code that places any responsibility on MIAA members to ensure they were not taking referrals from others who were misleading consumers.
- 4.23 *The Disciplinary Rules* – CFA states that it cannot, at this stage, foresee any reason why the Disciplinary Rules would not allow the MIAA to vigorously enforce the Code of Practice. However CFA considers that any decisions made by the Tribunal should be publicly available, as it is only by releasing information about Tribunal determinations that consumers, regulators and the public can ascertain whether the process is effective.
- 4.24 *Public benefits* – CFA expresses concern at MIAA's claim that authorisation of its Rules would promote public confidence in the mortgage industry and financial system. It considers that there are many traps for consumers, and despite the MIAA's self-regulatory measures, consumers will continue to lack adequate

protection until law reforms are implemented. It is CFA's experience that many problems are caused by misplaced confidence in brokers.

- 4.25 However it also notes that it is likely that the Rules will improve the conduct of MIAA members, although this benefit will rely on MIAA having sufficient industry coverage. It notes that it is possible the Rules could lead to some members resigning from MIAA, and that this may further increase the risk of unethical practices.
- 4.26 CFA notes that Codes of Practice and disciplinary procedures can enable an industry association to establish benchmarks to be referred to by industry members, regulators and the government. However it considers that the MIAA Code does not yet provide a clear guide for industry best practice.

The NSW Office of Fair Trading (NSW OFT)

- 4.27 The NSW OFT states that following a National Competition Policy review of legislation governing finance and mortgage brokers in NSW, the NSW Government passed the Consumer Credit Administration Amendment (Finance Brokers) Act 2003 in June. The Act provides that before commencing finance broking, a broker must enter into a written contract with the consumer and, in a similar manner to that required by the MIAA Code, must disclose any commissions that the broker will receive from lenders, and the number of lenders that the broker deals with.
- 4.28 The NSW OFT notes that while the other provisions of the Code are not addressed in the above Act, the proposed arrangements will in many cases enhance competition. It also notes that while it does not have a view on some of the other provisions of the Code that may have an impact on competition, the need for requirements such as these is currently being considered by a national Working Party, set up under the auspices of the Ministerial Council of Consumer Affairs which is examining possible uniform national regulation of the finance and mortgage broking industry. The Working party is due to report in March 2004.

Other

- 4.29 The WA Department of Consumer and Employee Protection (WA DCEP) did not comment on the MIAA application, noted that the WA Government will seek to amend the *WA Finance Brokers Control Act 1975* later this year, abolishing the Finance Brokers Supervisory Board and making the Commissioner for Fair Trading the licensing and supervising authority in its place.

THE PUBLIC BENEFIT TEST

- 5.1 The Commission may only grant authorisation where the public benefit test in section 90 of the TPA is satisfied.
- 5.2 The MIAA lodged an application for authorisation under sub-section 88(1) of the TPA to make and give effect to a contract, arrangement or understanding, a provision of which is or may be exclusionary within the meaning of section 45 of the TPA.
- 5.3 The relevant formulation of the public benefit test is found in sub-section 90(8) of the TPA. Sub-section 90(8) provides that the Commission shall not grant authorisation unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract, arrangement or understanding should be allowed to be made, or the proposed conduct should be allowed to take place.
- 5.4 Generally, section 90 contains three variations of the public benefit test, one being the test in section 90(8). However, the Commission adopts the view taken by the Trade Practices Tribunal (now the Australian Competition Tribunal) that in practice the tests are essentially the same.⁹² Accordingly, the Commission will assess the likely benefit and detriment, including the effects on competition, resulting from the proposed arrangements.

Definition of public benefit and anti-competitive detriment

- 5.5 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁹³

- 5.6 Similarly, anti-competitive detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public constituted by a lessening of competition includes:

...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.⁹⁴

⁹² *Re Media Council of Australia* (No. 1) (1978) ATPR 40-774 at 48419.

⁹³ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

⁹⁴ *Ibid* at 42683.

Future with-and-without test

- 5.7 The Commission also applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 5.8 Under this test, the Commission compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Whether arrangements breach the TPA

- 5.9 As indicated above, the MIAA’s application seeks to make and give effect to a contract, arrangement or understanding, a provision of which is, or may be, exclusionary within the meaning of section 45 of the TPA.
- 5.10 However, in assessing an application for authorisation, the Commission does not form a view about whether the MIAA’s Disciplinary Rules contain provisions which breach section 45. It only determines whether the public benefit test has been satisfied.

Term of authorisation

- 5.11 Section 91(1) of the TPA allows the Commission to grant authorisation for a specific period of time.
- 5.12 The Commission may authorise different aspects of conduct for which authorisation is sought for different periods.

Conditions

- 5.13 Section 91(3) allows the Commission to grant authorisation subject to conditions.

COMMISSION EVALUATION

This application for authorisation

6.2 The MIAA has only sought authorisation of its Disciplinary Rules (the Rules). However as discussed at 3.2 above, the Rules essentially enforce the MIAA Code of Conduct (the Code), and the other elements of its governance regime for which the MIAA has not sought authorisation. However, discussion of the anti-competitive detriment and public benefits flowing from the Rules will inevitably involve some discussion of the Code and the other governance instruments that the Rules enforce.

Market definition

6.3 The first step in assessing the competitive effects and the public benefit/detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.

6.4 The Commission may use market analysis to identify and measure the public benefit and anti-competitive detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

6.5 The Commission did not receive any submissions from the applicant or interested parties in relation to market definition.

6.6 In its consideration of this application for authorisation, the Commission considers that it is not necessary to fully define the scope of the relevant markets. The proposed arrangements will apply whatever definition is adopted.

6.7 In respect of the product market, the Commission notes that it could be defined to include all mortgage retail services, that is, including mortgage retailing by banks, building societies and credit unions directly to consumers, as well as through mortgage brokers. The MIAA noted that approximately 23 per cent of all housing loans are provided through brokers (see paragraph 2.5). Alternatively, the product market may be defined more narrowly as only those mortgages arranged by brokers. In this draft determination the Commission has, for convenience, considered a narrow view of the product market. However the Commission considers that even if it were to adopt a broader view, its conclusions would be the same. As such it does not consider it necessary to resolve this issue.

6.8 As such, in respect of the geographic market, the Commission does not consider it necessary to determine whether it is national or regionally based. In either case, the MIAA governance regime applies to its members. In general the Commission notes the following features of the market:

- *Services are offered throughout Australia* - mortgage broking services are offered throughout Australia, in both capital cities and in rural and regional

areas, although with minor differences in the products they offer depending on location (for example, a local credit union loan may only be available to those living in a certain area).

- *Consumer preferences* – while mortgage broking services are offered throughout Australia, consumers are likely to prefer using a locally based broker rather than one located some distance away, due to considerations of convenience and time.
- *Businesses operating in the industry* - there are many small locally based mortgage broking businesses, and also several large national businesses such as Mortgage Choice or Aussie Mortgage Market, offering similar products and services.
- *Few regulatory differences* - there are some slight differences in the level of regulation between different States and Territories. However, the differences are not so significant as to lead to marked differences in industry's operation in different States and Territories. Indeed, interested parties' submissions indicate that the industry is generally characterised by a lack of regulation, regardless of the region.
- *The MIAA's coverage* - The MIAA has members from every State and Territory in Australia, and membership is open to any participant that meets the required standards, regardless of where they are located. Similarly the MIAA governance regime (including the Disciplinary Rules) applies to all members nationally.

Other characteristics of the market

- 6.9 There are a number of other market features that may have some impact on the Commission's consideration of this application for authorisation, including:
- 6.10 *Rapid growth of the housing market:* As discussed at paragraph 2.3, the housing market throughout Australia has experienced a rapid increase in prices in recent years, leading to a corresponding increase in the size of mortgages. Mortgage brokers' commissions are generally based on a percentage of the value of the mortgage, or an upfront fee plus a trailing commission based on the outstanding balance of the loan.⁹⁵ Therefore, this increase in prices has arguably led to a corresponding increase in mortgage brokers' commissions, and hence increased the number of individuals entering the mortgage broking industry.
- 6.11 *Lack of regulation:* Given that the mortgage industry has only recently developed, a characteristic of the industry is that there is little government regulation, either at a State or Commonwealth level. At the Commonwealth level, from March 2002 the Australian Securities and Investment Commission (ASIC) has been responsible for overseeing conduct in relation to financial products, which includes credit facilities. At a State level, the main legislative instrument is the Uniform Credit Code (UCC), which has been adopted by all States and Territories, (except Western Australia, which has adopted its own version of the

⁹⁵ Source: CCLC Report, p. 17.

UCC). However the UCC does not apply for loans for business or investment purposes, and nor does it seek to specifically regulate the conduct of brokers.⁹⁶

- 6.12 *Low barriers to entry*: The barriers to entry are minimal in most jurisdictions. According to the CCLC, in order to practice a broker only requires a license in WA, Victoria and the ACT, and only WA requires that brokers satisfy certain requirements to obtain this license. As discussed at paragraph 2.7, it is estimated that there are approximately 10 000 new brokers operating in the industry, with another 50 new brokers entering each week.

Future with-and-without test

- 6.13 As noted at paragraph 5.7, in order to identify and measure the public benefit and public detriment generated by the conduct for which authorisation is sought the Commission applies the ‘future with-and-without test’. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The Commission will compare the public benefits and public detriment that will result in the future if authorisation is granted with the counterfactual.
- 6.14 The Commission did not receive any submissions from the applicant or interested parties on what an appropriate counterfactual would be.
- 6.15 The Commission considers that the likely counterfactual is a situation where the MIAA will not sanction or expel members who are found to have committed misconduct (as defined in the MIAA’s Constitution) under its Rules.

Effect on Competition

- 6.16 Public detriment arising from a lessening of competition may flow from disciplinary processes for enforcing a code of conduct of an industry association where membership of the association is necessary to compete or significantly assists a business to compete, and either:
- the code of conduct contains broadly-expressed provisions open to subjective interpretation by disciplinary tribunals, and the disciplinary processes do not provide association members with sufficient procedural fairness. A risk might then arise that members could be expelled for anti-competitive purposes (in particular, so as to exclude them from the market) and that this would happen enough times to reduce the intensity of competition in the market; or
 - there is evidence that the number of members likely to be expelled for actually acting unethically is likely to constitute such a proportion of the market that the expulsion of these businesses from the association (while

⁹⁶ Source: CCLC Report, Sections 2.1-2.3.

likely to generate offsetting public benefits) would reduce the intensity of competition in the market.⁹⁷

The effect of membership on a business' ability to compete

- 6.17 MIAA membership is not mandatory for mortgage brokers. The MIAA states that it is the peak body for the mortgage industry in Australia, and has around 75 per cent of mortgage brokers, lenders and managers, and about 40-50 per cent of the potential membership of loan writers, that is, individual brokers who deal face to face with consumers (eg. MIAA's AMCs).
- 6.18 The Commission also notes the existence of a competing professional association, the Finance Brokers' Association of Australia (FBAA), which includes mortgage brokers among its membership. It seems likely that the FBAA would offer similar benefits to its members to those offered by the MIAA.
- 6.19 Given these factors, the Commission considers it unlikely that loss of MIAA membership would significantly impede mortgage brokers' ability to compete.
- 6.20 This conclusion is reinforced by an examination of whether the MIAA's governance regime could be used for anti-competitive purposes.
- 6.21 Indicators exist which suggest some potential for this to happen. For example, the MIAA Constitution defines misconduct as including 'conduct prejudicial to the reputation or interests of the Association,' which is very subjective. In addition there is no provision for an appeals process contained in the Disciplinary Rules.
- 6.22 However the Commission is of the view that in practice, if the MIAA attempted to expel a significant number of mortgage brokers solely for anti-competitive reasons, these brokers would typically be likely to simply join the FBAA or form a new association, meaning that competition would be unlikely to be significantly affected.

Conclusion

- 6.23 Overall the Commission considers that the MIAA's Disciplinary Rules are likely to generate minimal public detriment constituted by any lessening of competition.

Public Benefit

- 6.24 The CCLC Report highlighted the potential for unethical conduct in the mortgage broking industry. Consequently, the Commission considers there is potential for a public benefit to arise from the MIAA's governance regime, including the Disciplinary Rules. Whether it actually does depends on if the regime:
- contains appropriate ethical rules; and

⁹⁷ In either case, detriment could also arise if other penalties (eg. financial) for breaching the code might affect a sufficient number of firms so that the intensity of competition in the market is reduced.

- is effectively enforced.
- 6.25 The Commission notes CFA’s submission that the provisions of the Code are too general and lack detail, and also that both CFA and ASIC state that the MIAA’s governance regime has not been subject to an external review. However, the Commission considers it is unlikely that the Rules would be completely ineffective, particularly given that both CFA and ASIC support authorisation being granted.
- 6.26 For the governance regime to be effectively enforced, the Commission considers that this would involve effective progressing of complaints and the imposition of appropriate sanctions on those found to have breached the Code and disciplined under the Rules. The Commission notes that no interested party has suggested that:
- the MIAA has not effectively enforced its regime in the past;
 - it is too expensive for complainants to effectively progress their complaint – in this respect the Commission notes that MIAA appoints the Investigating Officer; and
 - the MIAA has failed to impose sanctions sufficient to deter breaches have not been imposed in the past.
- 6.27 Indeed, statements by interested parties indicate that the regime is likely to provide appropriate conditions for vigorous enforcement of the Rules.⁹⁸
- 6.28 Overall the Commission is satisfied that the Rules generate a public benefit by assisting members to act ethically and professionally within the mortgage broking industry. It is satisfied that this public benefit is likely to be more than minimal although (as is likely to be the case with many codes and particularly new codes) it is difficult to estimate the precise size of the public benefit.

Balance of public benefit and detriment

- 6.29 The Commission may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment constituted by any lessening of competition.
- 6.30 At paragraph 6.23, the Commission concluded that minimal public detriment is likely to flow as a result of the arrangements. Therefore the public benefit likely to flow from the arrangements needs only to be more than minimal. At paragraph 6.28, the Commission has concluded this is the case.

⁹⁸ ASIC’s submission, p. 2.

- 6.31 Given the Commission considers that the proposed arrangements meet the authorisation test set out in the TPA and discussed in section 5, the Commission has not, at this stage imposed conditions upon the proposed authorisation. Having said this, conditions need only be imposed in the final determination if information was provided in response to this draft determination that warranted the Commission reviewing its conclusion that the Disciplinary Rules generate minimal public detriment and more than minimal public benefit.
- 6.32 The Commission notes interested parties' comments, such as:
- The concern raised by CFA that the MIAA may publish Tribunal decisions as it sees fit, rather than being required to do so. CFA considers that such decisions should be publicly available. The Commission considers that such a proposal may enhance the public benefit flowing from the regime.
 - Similarly, ASIC and CFA both note that the MIAA's governance regime has never been subject to an external review. The Commission considers that such a review may lead to further improvements in the regime, and thereby further enhance the standing of mortgage brokers in general.
- 6.33 The Commission also notes that the Taskforce on Industry Self-Regulation⁹⁹ found that both transparency of schemes and periodic reviews can help to improve credibility and accountability of self-regulatory schemes. Similarly in the Commission's Draft Guidelines for developing and endorsing effective voluntary industry codes,¹⁰⁰ transparency and independent reviews are listed as code essentials.
- 6.34 The Commission notes that the suggestions made by interested parties may improve the operation and effectiveness of the Rules, and therefore enhance the public benefit flowing from the governance regime. The Commission encourages MIAA to adopt these proposals.

Authorisation is not endorsement

- 6.35 It is important to note that the Commission has a role in endorsing effective industry codes of conduct that aim to achieve best practice within an industry. The endorsement process is quite distinct from the authorisation process. The authorisation process is set out in the TPA and only indicates that a code passes a certain legal test. Authorisation does **not** indicate that a code is best practice and, this proposed authorisation can in no way be held out as endorsement or approval by the Commission of the MIAA Disciplinary Rules.

⁹⁹ *Industry Self-Regulation in Consumer Markets* Report prepared by the Taskforce on Industry Self-regulation, August 2000. Available from <http://www.selfregulation.gov.au/>

¹⁰⁰ Australian Competition & Consumer Commission, October 2003. Available from <http://www.accc.gov.au>

DRAFT DETERMINATION

The Application

7.1 On 19 August 2003, the Mortgage Industry Association of Australia (MIAA) lodged application A90880 with the Australian Competition and Consumer Commission (the Commission). The application was made using Form A, Schedule 1, of the *Trade Practices Regulations 1974*. The application was made under subsection 88 (1) of the *Trade Practices Act 1974* (the TPA), and sought authorisation to:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA; and
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA.

7.2 The application relates to the MIAA's Disciplinary Rules.

The Statutory Test

7.3 For the reasons outlined in section 5 of this determination, the Commission concludes that in all the circumstances the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place. The Commission proposes to **grant** authorisation to application A90880 under subsection 88 (1) of the TPA.

Conduct for which the Commission proposes to grant authorisation

7.4 The Commission proposes to grant authorisation to the Disciplinary Rules, and also proposes to grant authorisation for the MIAA to give effect to the Disciplinary Rules.

7.5 Pursuant to subsection 88(10) the proposed authorisation extends to future members of the MIAA.

7.6 Further, the proposed authorisation is in respect of the Disciplinary Rules as it stands at the time authorisation is granted. As a result, any amendment to the Disciplinary Rules during the term of the authorisation would need to be the subject of an application for minor variation of the authorisation under section 91A of the TPA, or revocation and substitution of the authorisation under section 91C of the TPA.

7.7 This draft determination is made on 26 November 2003.

Interim authorisation

- 7.8 At the time of lodging the application, the MIAA requested interim authorisation for the proposed arrangements. On 24 September 2003, the Commission granted interim authorisation in respect of the proposed arrangements. Interim authorisation will continue to protect the proposed arrangements until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

Further submissions

- 7.9 The Commission will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the TPA.