

19 December 2018

Better Business Reforms Implementation
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Level 5, McKell Building
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SYDNEY NSW 2000

By email to: policy@finance.nsw.gov.au

To whom it may concern

Exemptions from the provisions of section 47B of the *Fair Trading Act 1987* (NSW)

This letter, in response to the Government's *Better Business Reforms 'Implementation Options Paper'* issued on 22 November 2018, requests an exemption by regulation to exclude arrangements undertaken by the holder of an Australian Credit Licence and their credit representatives from the operation of section 47B of the *Fair Trading Act 1987* (NSW).

About the MFAA

With over 13,800 members, the MFAA is Australia's leading professional association for the mortgage broking industry with membership covering mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. The stated purpose of the MFAA is to advance the interests of our members through leadership in advocacy, education and promotion. To achieve this aim, the MFAA promotes and advances the broker proposition to a range of external stakeholders including governments, regulators and consumers, and continues to demonstrate the commitment of MFAA professionals to the maintenance of the highest standards of education and development.

Request for exemption

Section 47B of the *Fair Trading Act 1987*, introduced by the *Fair Trading Legislation Amendment (Reform) Act 2018*, requires intermediaries to take reasonable steps to ensure that consumers are aware of the existence of any arrangement under which financial incentives including commissions and referral fees are paid to an intermediary in respect of goods or services to be provided to consumers. This will include commissions paid by banks and other lenders to finance brokers and other payments (including some service fees) paid in relation to credit.

The provision commences on 1 July 2020 or an earlier date set by proclamation.

The provisions of s47B do not apply to any person, or class of persons, prescribed by regulation. For the reasons set out below it is important that arrangements undertaken by Australian Credit Licensees and their credit representatives should be exempt from the operation of s47B.

The disclosure of commissions and other benefits paid by or to Australian Credit Licensees and their credit representatives are the subject of significant regulation by the Commonwealth Government pursuant to the *National Consumer Credit Protection Act 2010* (Cth) (**NCCP Act**). The NSW Parliament has referred to the Commonwealth the power to make laws in relation to regulated credit. It is inappropriate for NSW having referred those powers to make laws relating to that subject matter for the following reasons:

1. The purpose of the referral of laws to the Commonwealth was to ensure that there is uniform regulation of credit throughout Australia. Prior to the delegation in 2010, the laws of states and territories differed significantly causing unnecessary cost, confusion, and inconsistent regulation. This uniformity should not be lost by the application of s47B.
2. The NCCP Act and its regulations have codified in significant detail how and when credit regulated entities, including Australian Credit Licensees and their credit representatives, must disclose commissions. These provisions require significant and appropriate disclosure to consumers. Additional or inconsistent regulation is not required and will add confusion and needless cost.

We are able to provide additional information and arguments in support of our request if required. However, given the compelling reasons set out above, we see no need to raise those matters here.

Application to unregulated credit – disclosure to be made as if regulated

Section 47B will have application to ‘arrangements’ (as described in the section) in relation to credit that is not regulated by the NCCP Act and its schedule, the National Credit Code.

Many of our members provide or arrange both regulated and unregulated credit. It is important that the exemption from s47B we are requesting in this letter should extend to arrangements in relation to unregulated credit if:

- the parties involved are Australian Credit Licensees or their credit representatives; and
- disclosure of financial incentives is made as if the loan was regulated by the National Credit Code.

This will allow those businesses to continue the existing widespread practice of having a uniform system for regulated and unregulated loans and will avoid creating additional cost and confusion.

Application to unregulated credit – disclosure to be made otherwise

If the exemption we request is made, that will mean that s47B will still apply to many businesses that deal with unregulated credit, that is, credit not regulated by the NCCP Act and the National Credit Code. Those businesses which are MFAA members have for many years been obliged under clause 10 of the MFAA’s [Code of Practice](#) to disclose commissions. Clause 10 is set out below.

10. Fees and Commissions Disclosure

10.1. If a commission or other benefit will or may be paid by or to a Member for, or in connection with, provision of Credit to a customer, the Member must always disclose to the Customer that fact and:

- a. the name of the person by whom the commission or other benefit is payable;
and
- b. the name of the person to whom the commission or other benefit is payable;
and
- c. the amount of the commission or other benefit, if ascertainable; and
- d. if the amount of the commission or other benefit is not ascertainable, the basis of or formula for such commission or other benefit;

but this disclosure requirement does not apply to:

- e. the amount payable in connection with a credit related insurance contract; or
- f. the commission or other benefits paid to employees of the Member.

Commissions and other benefits need not be disclosed by Managers or Servicers where the Customer is provided with the Manager's or Servicer's own Credit product.

This disclosure requirement has been in place for many years and works well. We request that any regulation made in respect of unregulated credit is not inconsistent with this requirement.

Notice of commencement

We note that the relevant section is scheduled to commence on 1 July 2020 or such earlier date that is prescribed. We ask that not less three months' notice of commencement is given to allow industry time to make the necessary arrangements for implementation, which may involve significant and, in many cases, very expensive system changes. We will need time to alert industry to the need to make changes and assist the industry in the execution of those changes. It would be very useful if you would inform us when commencement is likely or programmed to occur.

The MFAA extends its thanks to the Minister for the opportunity to respond to the passing of the legislation and the reform package's Implementation Options Paper.

Yours sincerely

Mike Felton
Chief Executive Officer
Mortgage & Finance Association of Australia