THE Financier

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THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

Welcome to the Winter 2005 edition of The Financiers Association of Australia Limited newsletter.

As usual we try to keep up with any legislative changes in the credit code as well as inserting any interesting general business pieces gleaned from various sources.

A welcome is also extended to new members at this time.

WHO QUALIFIES FOR FINANCE BROKER CONTRACT (FBC) EXEMPTIONS?

On January **21** this year, the long-awaited 'exclusive and first-choice arrangement' exemption from the NSW finance broking legislation was gazetted. What does it all mean and how will it affect you?

The definition of 'finance broker' in the NSW Consumer Credit Administration Act is extremely wide and catches anybody who is paid money for arranging a UCCC -regulated loan.

This could include scheme managers, aggregators, settlement agents, mortgage insurers, and many other businesses that arrange a loan without dealing directly with the customer (called the 'up-the-line' intermediaries).

The legislation was intended to apply to brokers who deal directly with the consumer. It requires finance brokers to enter a finance broking contract (FBC) before starting finance broking, and disclose the commission and other benefits they receive from any source.

What does the new regulation provide? The full text of the new regulation can be accessed at www.legislation.nsw.gov.au. There are now two exemptions – the existing 'up-the-line' exemption in regulation 2B and the new exclusive and first-choice arrangement exemption in regulation 2BA.

Exclusive arrangement

This exemption covers those who represent a single lender such as motor dealers, retail salespersons and mortgage intermediaries who only work with one lender (i.e. tied to a specific bank).

To fall within the exemption, this intermediary must have an agreement with a credit provider, under which the only consumer credit that the intermediary will sell will be from that provider and the finance broker has no discretion to choose between credit providers.

First-choice arrangement

This exemption mostly covers mortgage managers who sell directly to the public. However a mortgage manager not dealing directly with the public may come under the 'up-the-line' exemption. To fall within the first-choice-arrangement exemption, the intermediary must have an agreement with one or more credit providers whereby they market the credit providers' consumer credit first. The agreement must provide that the intermediary may only sell third-party products if, after proper consideration, the client is not eligible for their branded loans or if the client rejects those products.

The prime purpose of the first-choice exemption is to ensure that mortgage managers who act as lenders are on a level playing field with ordinary lenders, and will not need to enter an FBC or disclose commissions or benefits.

As soon as a first-choice arrangement intermediary decides to act as a finance broker, the intermediary's exemption ceases and the intermediary must comply with the legislation. As such, the intermediary must enter an FBC with the borrower.

Other requirements

To fall within the exemptions, intermediaries must advertise and conduct their business in such a way that customers are reasonably likely to assume that the only

consumer credit available from the intermediary is credit advertised under a particular brand. Accordingly, if Mighty Mortgage Manager' has its own branded loans but also markets itself as being a mortgage broker, the exemption would never apply. The exemption will only apply to mortgage managers who solely market their own branded loans (irrespective of how those loans are funded).
Usually in relation to an exclusive arrangement, this brand will be the name of the credit provider funding the loan. In the case of first-choice arrangements, the brand may either be the credit provider's brand or the intermediary's name. For example, 'Mighty Mortgage Managers Limited' may be funded by one or more credit providers, but the loans are marketed under the 'Mighty Mortgage Manager' brand.

Do current agreements require amendment?

Many funding agreements will require amendment so that they become either exclusive arrangements or first-choice arrangements. It is contem-plated that these agreements can be amended quite easily by exchange of letters.

Importantly, unless and until the agreements are amended, intermediaries are not eligible to claim this exemption.

What do businesses need to know about the new super rules?

***Choice of Fund* is tipped to change the superannuation landscape from 1 July 2005. With eligible employees now able to choose their super fund, employers are wondering what it could mean for their superannuation obligations and how to best prepare.**

The new *Choice of Fund* legislation *(Choice)* allows eligible employees to choose which fund they want you to pay their superannuation guarantee (SG) into - that is the 9% compulsory super contribution you pay on their behalf. This means come this July, you will need to be familiar with your responsibilities regarding ***Choice*** and the steps to take to provide ***Choice*** to your eligible employees.

Determining who is eligible is the starting point - some of your employees may be exempt from the new rules, including those covered by:

- A Workplace Agreement or a Certified Agreement under the Workplace Relations Act 1996; or
- A State Industrial Award. These employees will not be affected by ***Choice***.

For most other employees who arenot covered by these agreements or awards, you must comply with the new legislation (there are however some additional exemptions).

Meeting the requirements

Any existing eligible employees you have at 1 July 2005, will need to receive a Standard Choice Form from you by 28 July 2005. This form will be designed by the Government and likely to be available on the ATO web-site. It will probably include a statement telling employees they may choose any eligible super fund, the name of the default fund that the employer will contribute to if no choice is made by the employee and other relevant information.

Where one of your employees makes a choice you need to begin paying contributions to the new fund within 2 months of receiving the relevant details from them. Be aware that Superannuation Guarantee and tax deadlines will still apply.

Your obligations are ongoing - if any eligible new employees join you after 1 July 2005 you will need to provide a Standard Choice Form to them within 28 days of their starting date. And under the regulations employees will be able to make changes to their super fund once a year, or more often if you allow it. There are also additional circumstances where employers must provide a Standard Choice Form as well.

For those employees who do not make a choice, you need to select a default fund. Under ***Choice***, the default fund must be a complying super fund or scheme and offer life insurance that complies with the requirements prescribed in the regulations due out in March. The default fund may be your existing super fund.

To prove that you have met your obligations, you will need to keep records to show that:

- Employees have been given a Standard Choice Form within 28 days.
- Payments have been made into the employee's ***Choice*** fund within 2 months or into the default fund.

Employers must keep the employees nomination of super fund (which must be in writing) and any additional documentation provided by the employee for 5 years.

Employees have more responsibility

Choice provides employees with greater control for their superannuation savings. Correspondingly, under the new rules, if they elect to make a choice they are responsible for providing you with details of their chosen fund:

~ the name of the fund
~ confirmation that it's a complying super fund
~ the relevant account number

and
bank account details for payment
of contributions, and
- confirmation that the fund will accept contributions from the employer (this is likely to take the form of a letter from the fund's Trustee).

If they do not provide this information to you, you are not required to make payments to the fund they have chosen, although you will need to contribute to the default fund on their behalf.

Breaking the rules

There are penalties for not meeting your *Choice* requirements:

25% of the notional SG shortfall (even if you have paid SG, the penalty is calculated as if it has not been paid) +
nominal interest +
administration component

The 25% of the notional SG shortfall is capped at a maximum of $500 per employee per notice period.

Getting good advice

To ensure that you avoid any penalties under ***Choice***, it's a good idea to seek professional advice. A financial planner or lawyer should be able to explain the regulations in detail to you once they have been finalised. They can show you how your business could be impacted and what you need to do initially and on an ongoing basis.

extract from inbusiness Autumn 2005

CALL FOR GREATER LICENSING

The MIAA believes that a nationally uniform and reciprocal licensing regime is essential for the mortgage industry. This was the thrust of its submission on the National Finance Broking Regulation discussion paper.

Regulation without licensing is tantamount to no legislation at all. That's the view of the MIAA National Legislative and Regu-latory Affairs Committee headed by Jon Denovan of Gadens Lawyers.

Much discussion took place within the committee and the MIAA Board about the type of licensing that should be introduced.

"We looked at whether every loan writer should be licensed or whether we should opt for the model where loan writers can either be licensed or act as an authorised representative for a full licensee," says Denovan.

"After lengthy debate, we decided to go with the model where all loan writers should be licensed."

Under this model all loan writers, whether an employee or a contractor, must either hold a full licence or a qualified licence.

All licensees must meet probity, PT insurance, alternative dispute resolution (ADR) and education entry standards. In addition, full licensees must have at least two years' industry experience.

It is expected that most new entrants to the industry will start as qualified licensees who must operate as authorised representatives of full licensees.

The names of both full licensees and authorised representatives should be listed on a register that is publicly available.

The MIAA submission defines a loan writer as someone who deals with the customer in a substantive fashion. It excludes individuals who contact customers purely for administrative purposes such as telephonists and office clerks.

This more intrusive level of regulation is considered necessary to avoid loopholes through which loan writers operate under a third party's licence without any bona fide control.

In addition, it is important that consumers should have recourse to the entity with whom they believe they are dealing. Accordingly, if an individual loan writer is trading as Big Broker then the loan writer and the Big Broker licence should both be accountable for their actions.

Advantages

The MIAA supports a positive licensing scheme that is uniform nationwide and if maintained on a state-by-state basis, then the licensing should be reciprocal.

It is understood that there is no uniform agreement across the jurisdictions to maintain a licensing system. Consequently, the MIAA has offered to undertake the management of such a licensing scheme on an outsourced basis.

Administering such a scheme by the MIAA has numerous advantages.

It would provide:

- Minimal disruption to the industry as most industry members are MIAA members.
- A tried and tested uniform national system.
- No change to lender systems as they are integrated with the MIAA.
- No cost to government.
- An assurance of a proactively and uniformly managed industry to avoid state differences creeping in and the risk that one or more jurisdictions may enforce the legislation less rigorously.

In its submission, the MIAA outlines the minimum requirements for a licence. These include Certificate IV or equivalent; that a broker should not be bankrupt; they should have no material criminal records; they should provide two written business references as to character; have P1 insurance cover for $1 million; and be a member of an approved dispute resolution scheme.

It proposes that licences be

renewed every three years with the provision of new bankruptcy search and police clearances. In addition, there should be requirements for continuing education.

Powers to cancel

The MIAA also calls for powers to be put in place to initiate proceedings to cancel an individual's licence, where there are serious breaches.

"It is important that procedures arc in place to actually withdraw licences because of the historical reluctance of public bodies to do so, says Denovan. "There needs to be adequate resources to enforce the legislation otherwise none of the benefits claimed for the proposals will be realised."

Licensees also need to be responsible for the actions of their employees and associates. As a result there should be capacity to ban people from working in the industry even those who have never held a licence before.

Again, the MIAA proposes that it takes on the role of enforcing cancellation of licences through an outsourcing arrangement. The key reason is that the MIAA already has mature procedures in place to undertake such actions.

FBC contract

The MIAA also plans to make a separate submission on the Finance Brokers Contract.

"We believe the FBC is the most significant intervention in business practices proposed by the legislation and so it is important it works well for the industry" says MIAA National President Gerald Foley.

"The MIAA considers that neither the NSW nor Victoria models have got it quite right and so we are working on a pro forma FBC that addresses all the key concepts."

Other issues addressed in the national submission include anti-avoidance provisions and the impact of the legislation on business borrowers.

Industry views

Most players in the mortgage industry welcome the discussion paper.

Mortgage Choice Managing Director, Paul Lahiff, for example says that recommendations are consistent with the views expressed by his company over the years including greater regulation that is nationally based and involving some form of licensing.

But Lahiff says he is disappointed at the paper's suggestion that states and territories be allowed to opt out of the licensing regime.

This view is certainly shared by the MIAA which strongly supports a positive licensing scheme.

Gadens Lawyers' Jon Denovan also welcomes the paper.

"It is a well-balanced readable document that fairly states that most of the problems (in the industry) come from fringe players and not mainstream brokers."

What's next?

All submissions by interested parties were made by February 15. The MIAA hopes that the state and territory governments will deal with the submission promptly and that some form of nationally consistent legislation is in place in the not too distant future.

Mortgage Brief March 2005

If you come across or would like to contribute any article that may be of interest for the newsletter please fax on (02) 9299 1433 or post to the Association c/- GPO Box 3463 Sydney NSW 1043.

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