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Curbing lead generation activity

The Finance Brokers Association of Australasia appreciates the opportunity to provide a submission for the above consultation paper.

The FBAA represents more than 14,000 members in Australia. Our member base comprises mostly finance and mortgage brokers, various lenders, aggregators and businesses supporting the finance industry.

Background

We recognise that the focus of this consultation paper is predominantly on lead generation activity in the financial services sector and is prompted by the terrible outcomes caused by the collapse of Shield and First Guardian.

The consumer credit industry is also impacted by lead generation activities and our observations against that framework motivate this submission.

As a general principle, legitimate activities that introduce willing consumers to willing providers of suitable products is an important part of consumers finding suitable products for their requirements and objectives. We support the provisions of the consumer credit legislation that establish parameters for genuine introductions which are made as either a credit licensee (an intermediary) or under the exemption from licensing (referral activity).

We do not support unconnected lead generation activity which tends to focus on volume and harvesting as much personal information as possible and disseminating it widely.

What takes a legitimate referral activity and causes it to take on significant risk is:

1. Entities looking to extract more value from leads and pushing the boundaries of the limitations of the exemption;
2. Entities wanting greater certainty/quality from the leads and therefore pushing introducer channels to do more than the exemptions permit which effectively has these introducers engaging in regulated activities without a licence; and
3. Excessive incentives that drive poor behaviour.

Licensees in the consumer credit space continue to push the limits of legitimate introducer arrangements as they try to acquire customers for the lowest possible cost. It is not enough for some businesses to be given a name and phone number. Businesses want qualified leads that reduce the time spent on validating a potential lead. Introducer programs attempted by some of our largest financial institutions over the years have resulted in serious contraventions. Certain programs were even examined during the Hayne Royal Commission.

This is why the FBAA continues to advocate for brokers and for activities to be conducted within the boundaries of the credit licensing regime. Licensing creates a framework of accountability and professionalism. Brokers hold relevant qualifications and meet minimum annual education requirements. They operate under a statutory duty to act in a consumer's best interests and give their customers detailed disclosure. Consequences for non-compliance are substantial. Exemptions that allow introducers to bypass the initial and ongoing requirements of becoming a licenced broker or intermediary will always have potential to attract the sort of people that regulated activities seek to keep out.

The cost of lead acquisition has contributed to poor behaviour. Businesses seeking to grow their customer bases through leads can be asked to pay significant amounts for leads. They pay more for qualified leads – where the potential customer has been vetted to check that they may be eligible and looking for relevant products.

Consumer Credit

The consultation paper acknowledges the *National Consumer Credit Protection Act* 2009 and the framework established within. Any person interacting with a consumer wholly or partly for the purpose of securing credit is defined as an intermediary. If a person then goes on to recommend a particular product with a particular provider or assist a consumer to apply for a particular product with a particular provider then they are providing credit assistance which triggers additional obligations.

The financial services sector does not have an equivalent of an intermediary. The definition is extremely broad and catches any person who has interacted with a consumer in their journey to obtaining credit. But for the referral exemption in the regulations, referrers would be defined as an intermediary and would require a credit licence (or to be a representative of a credit licensee).

The arrangements under the credit legislation appear more clearly defined than those in financial services. This may be in part due to the age of the NCCP Act and the fact that it was drafted with the benefit of observing the financial services legislation in operation for a number of years before the national regulation of consumer credit.

What has long been problematic for capturing lead generation in financial services is that the regulated activity under the financial services regime revolves around conduct rather than outcomes. The two conduct elements are "arranging a financial service" (dealing) and providing "financial product advice". There is very wide scope for an entity to influence the decision of a retail client about a financial product without triggering either definition of arranging a financial service or the even more restrictive activity of giving financial product advice. Handing a PDS to retail client with a wink might fall outside of the dealing or financial product advice definition whereas it would likely be caught as credit assistance under the credit legislation or at the very least, acting as an intermediary.

The credit legislation focuses more on outcomes than specific conduct whereas financial services laws are still anchored to the idea of 'dealing' in a financial product or 'giving advice'. From our experience, the credit activity definitions of "suggesting someone apply for a product or assisting them to apply for a product" coupled with the very broad definition of acting as an intermediary captures a wider range of activities than the activities under the Corporations Act.

The referral exemption under the NCCP Regulations has strict limits. A downstream referral only permits a downstream referrer from passing the contact details of a licensee on to the consumer. An upstream referral only permits very limited information about a consumer to be passed onto a licensee – namely name, contact details and a brief description of the consumer's objectives. It is the additional element of being able to provide a "brief" description of the consumer's objectives" under upstream referrals that opens the exemption to exploitation. Questionable introducer programs adopt a liberal definition of the notion of "brief" and have introducers collect specific information to qualify leads. Once lead generators know what information licensees are looking for they seek it out, or in some cases manufacture it to increase the number of leads acquired or paid on.

Problems arise the moment lead generators or referral sources have any involvement in collecting or remitting anything other than name and contact details.

Licensees bear responsibility for documenting and reviewing referral arrangements and risk breaching the prohibition against engaging in credit activities with unlicensed persons (NCCP Act s31) if the referrer exceeds the limitations. The referral exemption is only available to those where referral activities are incidental to other activities being carried on. Professional lead generation and referral businesses cannot rely on the referral exemption and must be licensed as intermediaries.

Introducer programs are continually being nuanced to try to maximise value without overstepping the line between licensed and unlicensed activity although we maintain that the line continues to be crossed too often.

Financial services lead generation activities could benefit from stricter requirements more aligned with the credit legislation. Perhaps, as proposed in the consultation paper, the definition of dealing in financial products could be expanded to capture it – however the definition needs to be broader than being confined to a particular financial product or class of financial product. The focus should be on the outcome of the involvement of the lead generator resulting in a client acquiring any financial product rather than whether any specific action crosses a particular threshold.

We support measures that tackle the risks of lead generation activity head on. This is done by making licensees accountable, reducing financial incentives and heavily restricting the permitted actions of any businesses dealing with leads. Leads should consist of no more than a person's contact details. If a lead generator qualifies a lead, obtains or passes on any additional information about a potential lead, then that activity should be recognised as a regulated activity and the lead generator must be licensed which brings with it requirements for education, supervision, monitoring and consequence management.

Licensees engaging entities for lead generation or that acquire leads must be primarily responsible for the conduct of the lead generators. If a licensee does not have sufficient information about the nature in which the lead generator acquired the lead information they should not associate with them.

We do not propose to provide specific submissions to questions in the consultation paper relating to reforms of the Corporations Act or financial advice regime.

There is a place for unlicensed/exempt referral activity in the financial services and consumer credit arenas but the limitations of such activities must be strictly adhered to, continuously monitored and contraventions must carry heavy penalties for all parties involved.

The objective of reforms should be to ensure that the moment any lead is qualified, warmed, or consists of anything more than the name and number of a potential customer, the relevant entity should obtain a licence.

Yours faithfully

Peter J White AM MAICD
Interim CEO

Life Member – FBAA
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