

██████████
Lawyer
Financial Advisers Team
Australian Securities and Investments Commission
By email to: referencechecking@asic.gov.au

03 February 2021

Dear ██████████.

The Combined Industry Forum (CIF) welcomes the opportunity to provide feedback in relation to CP333 – *Implementing the Royal Commission Recommendations: Reference checking and information sharing*.

The CIF is supportive of the implementation of the reference checking and information sharing protocol, and recognises the important role that an effective reference checking protocol will play in maintaining the standards of professionalism in the industry and in turn the positive impact on the industry's focus on compliance, risk management and quality of credit assistance.

CIF members are concerned however, that under the current structure of the legislation and the ASIC protocol, aggregators will not be able to provide or receive a reference for a large number of mortgage brokers (up to 50% for some aggregators) who are engaged by a licensee with their own ACL.

Aggregators play a central role in governing the industry, and will often have extensive information about the broker's activities through their compliance monitoring and supervision. If they are not able to access the protections offered by qualified privilege available to other parties in respect to the transfer of prospective representatives, the references may not adequately capture all the brokers activity. Such an outcome does not meet the policy intent outlined in the Explanatory Memorandum:

10.13 Requiring all licensees to comply with the Reference Checking and Information Sharing Protocol will ensure that there is consistent practice throughout the industry, and that employment information will be available about all financial advisers and mortgage brokers¹.

The CIF's position is that aggregators should be required to give and receive references for all aligned brokers. In order to do this, qualified privilege needs to be extended and other consequential amendments made to the enabling legislation. ASIC should take the lead on liaising with Treasury to achieve the consequential amendments.

Finally, we would like to thank you for the opportunity to be consulted, and trust our feedback is of assistance. We are happy to answer any questions you may have.

Yours sincerely,

Mark Hewitt

Co- Chair, Combined Industry Forum & General Manager, Industry & Partnership Development, AFG

Simone Tilley

Co-Chair, Combined Industry Forum & General Manager, Retail Broker, ANZ.

¹ https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6630_ems_4c5698fa-a114-4687-9843-595e795a64cf/upload_word/JC000444.docx;fileType=application%2Fvnd.openxmlformats-officedocument.wordprocessingml.document p200

Combined Industry Forum feedback for ASIC Consultation on CP333.

The CIF has previously responded to the Treasury Consultation in respect to the Financial Services Royal Commission (FSRC) recommendations 1.6, as well as 2.7 and 2.9 in February 2020, and a copy of our previous submission is attached for reference. The CIF notes, and appreciates that most of the concerns raised previously have been addressed in CP333 and the associated documents.

The CIF's main concern relates to ensuring that the protocol and qualified privilege has comprehensive coverage and can be relied upon by all industry participants. Other concerns have also been noted below.

1. Effective application of the ASIC protocol across industry

Members have noted that the lack of protection that currently exists for aggregators and ACLs who have oversight of mortgage brokers, has meant they have been cautious in respect to references due to concerns over potential legal action in the form of defamation cases being raised, or potential breaches of privacy. The ASIC protocol is clearly aimed at addressing this concern, but is not structured in such a way to apply comprehensively to aggregators, who are critical to the operation of the industry.

Aggregator activity not effectively covered in the proposed law and ASIC protocol

The CIF notes that the main issue with the operation of the ASIC protocol is that it does not extend to certain references leaving parties vulnerable to potential legal action. Specifically, this relates to aggregators, who would only be partially included in the requirements in circumstances where the prospective representative operates under the aggregators ACL. In circumstances where the prospective representative operates under a different ACL (as detailed below) the protocol and associated protections would not apply.

Aggregators play a central role in the industry in respect to broker management including training, and compliance monitoring and supervision. They are also the chosen intermediary for lenders, and in addition to compliance activity, also add value through accreditation and payment management for mortgage brokers.

Many mortgage brokers operate under their own ACL, and use the services of an aggregator to provide access to services noted above. Such arrangements can take several forms including mortgage brokers who hold their own credit licence, a representative that operates through an ACL that uses an aggregator, or a credit licensee that operates under a third-party licensee.

The current drafting and associated information only extends the protocol and associated protections to the recruiting licensee and the referring licensee. In practice, this is not reflective of a large proportion (members have indicated this can be over 50% of brokers for some aggregation businesses) of broker operations with ACLs who rely on aggregators for compliance support and other services.

Based on the current law, this structure means that an aggregator, who plays a significant role in the day-to-day compliance of the broker business with an ACL, may not be involved in a reference check, and is not protected by qualified privilege. The absence of this coverage of aggregators and the associated protections offered of qualified privilege for aggregator references about licensees potentially leaves a loophole whereby broker licensees will be able to move aggregator without an aggregator reference being required. Even if an aggregator reference was sought by the recruiting licensee, aggregators will be reluctant to provide such a reference for licensees due to the potential legal risks noted above. This is not consistent with the intent of the legislation.

As noted in the CIF's previous submission, the operation of the reference check and information sharing should occur at both an aggregator and licensee level to the extent they are different entities.

This would extend to a reference provided for any broker who is engaged by a licensee with their own ACL where the licensee uses the services of an aggregator. In such circumstances the party checking the reference would likely need to capture information from both parties. In this case, an aggregator is likely to have a greater breadth of information about the broker's activities than may be captured otherwise. It is suggested that the aggregator should also provide a reference on the licensee with the protections offered by the protocol and qualified privilege extended to the aggregator.

Importance of qualified privilege

The Explanatory Memorandum noted the importance of the operation of qualified privilege, which is strongly supported by CIF members:

10.77 It is essential to the operation of the reference checking and information sharing obligation that licensees share information honestly and frankly. For this reason, the defence of qualified privilege applies to a person who gives information about a representative in the course of complying with their obligation under the protocol.²

10.78 The defence of qualified privilege will apply to an Australian credit licensee where they provide information about an individual who is currently or was formerly a representative of the licensee (see section 16 of the Credit Act).

10.79 The qualified privilege defence in relation to compliance with the protocol is consistent with the defence in similar circumstances under the Credit Act—namely, in relation to certain information shared between licensees and ASIC (see sections 73 and 243 of the Credit Act).

Unless aggregators are covered by the ASIC protocol and in particular qualified privilege in relation to references for member ACLs, they will remain reluctant to provide information about mortgage brokers because they will not have adequate legal protection. This has the potential to detract from the effectiveness of the intent of the reforms, and would be a missed opportunity for the industry.

The CIF recognises that this change will require an amendment of the legislation as currently drafted. As such, it is noted making the necessary changes to close this issue will be beyond the scope of CP333, and that ASIC should refer this issue to Treasury for further consideration given its central importance to the aims of the protocol to “remove bad apples”.

As noted, the CIF intends to also make further representations to Treasury in this regard, and would encourage ASIC to consider supporting such a change to ensure that the legislation both achieves its purpose, and reflects a common operating structure in the mortgage broking industry.

It is recommended that:

In circumstances where a licensee is a member of an aggregator, the aggregator should be covered by the ASIC protocol and the associated protections under the privacy act and qualified privilege, and should also be required to provide a reference on the individual as well as the licensee.

2. Additional information requests beyond the template.

The CIF does not support the proposal that there could be no limitation on requesting additional information (B7). noting that as stated in CP333:

The defence of qualified privilege does not apply to any information that a referee licensee gives to a recruiting licensee about a prospective representative that is in addition to the information provided in the template reference request. (P21)

Members felt that while they had some broader concerns about the template information (these are addressed more directly through CIF member association responses), the information requested in the template which builds on the existing ABA protocol is sufficient. In practice, members noted they would be unlikely to respond to any requests outside the template without the extension of qualified privilege to such additional information requests.

Further, licensee systems will need to be adapted to ensure that standard information under the protocol can be easily captured and extracted to facilitate compliance with the response timeframes. Building greater capacity to respond to additional information requests will further complicate implementation and as it is not clear what the additional requests will contain, Licensees are likely to prioritise meeting the established requirements within the timeline, rather than missing a deadline while seeking ad-hoc information.

² https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6630_ems_4c5698fa-a114-4687-9843-595e795a64cf/upload_word/JC000444.docx;fileType=application%2Fvnd.openxmlformats-officedocument.wordprocessingml.document p214

It is recommended that:

The reference should be confined to the content of the template. Any proposed information requests beyond the template should not be permitted.

3. Written reference only.

The CIF does not support verbal references, and agrees with ASIC's comments noted at Paragraph 80 of CP333 that:

In our view, verbal reference requests and responses would present a higher compliance burden, as both recruiting and referee licensees would need to keep consistent, timely and accurate file notes. We also consider that providing responses in writing reduces the risk that referee licensees will give information that falls outside the privacy consent given or the scope of the template reference request.

It is recommended that:

That references should only be accepted in a written format.

4. Providing a prospective representative with the reference.

The CIF supports the provision of references to prospective representatives, subject to the following:

- The suggested changes noted in relation to the ASIC protocol being applied to aggregators overseeing ACLs and the associated qualified privilege are adopted and applicable to all references provided to recruiting licensees. Further, the provision of a reference would not impact on qualified privilege;
- That the referring licensee *and aggregator providing the reference (where a different party to the referring licensee)* would be the only party who could provide a prospective representative with access to a reference, and that the referee licensee is not obliged to respond to queries from the prospective representative around the content of the reference;
- That as noted in para 106, the reference may not be provided in circumstances where providing the reference may “*prejudice appropriate action against unlawful activity or misconduct*”. This may include:
 - ongoing matters in relation to unlawful activity or misconduct; and/or
 - Breach of licensee policies;
- In such circumstances, the reference would only be made available to the broker once the investigation into either a breach of law, other misconduct or a breach of licensee policies was complete, and the referring licensee is not otherwise prevented by law from providing the reference (for example, whistleblowing, tipping off, matter being investigated by a regulator or the police). The referring licensee may choose to provide this information on a voluntary basis to the prospective licensee prior to finalisation of an investigation; and
- Noting the above points in respect to the provision of the reference to the prospective representative, qualified privilege would extend to factual information, and any information that the referring licensee has ‘a reasonable belief is correct’.

The provision of references needs to strike a balance of appropriate transparency for the prospective representative and that of the referring licensee (and aggregator if the above changes are adopted) being confident that they are sufficiently protected. CIF members recognise that these protections should not apply where false or misleading information has been provided to the recruiting licensee.

It is recommended that:

That references should be provided to prospective representatives from the referring licensee or the aggregator providing the reference on the basis that:

- ***the ASIC protocol being applied to aggregators overseeing ACLs and the associated qualified privilege are adopted, and that the provision of a reference would not impact on qualified privilege;***

- ***the referring licensee and aggregator providing the reference (where a different party to the referring licensee) would be the only parties who could provide a prospective representative with access to a reference;***
- ***a reference may not be provided where to do so may “prejudice appropriate action against unlawful activity or misconduct”. In such circumstances it will be provided once the investigation is complete, and the referring licensee is not otherwise prevented by law from providing the reference (for example, whistleblowing, tipping off, matter being investigated by a regulator or the police) ; and***
- ***qualified privilege would extend to factual information, and any information that the referring licensee has ‘a reasonable belief is correct’.***

5. Portable unique identifier.

It is noted in CP333 (table 4:1(c), P33) that the background information required to be entered in the template reference request asks respondents to provide an *ASIC reference number* if available.

In its 2017 response to *ASIC 516: Review of mortgage broker remuneration*, the CIF supports the development of a portable unique identifier (PUI) for parties providing credit assistance in relation to credit contracts secured by mortgages over residential property.

CIF members consider that such a PUI would greatly assist in the flow of information between parties and over time, and assist in possible simplification of systems. It is understood that some CIF members have left a facility in system builds to include a PUI at a later time subject to ASIC adoption.

Further, the CIF has previously made representations to ASIC and provide industry information to support the development of the identifier for mortgage brokers, and feels that the information sharing and reference checking requirements further adds to the potential benefits of such an identifier being established by ASIC.

It is recommended that:

An ASIC portable unique identifier be developed to support the efficient flow of information between parties undertaking reference checking for those who engage in Credit Activities (as defined in the NCCP Act).