

**ASIC Consultation Paper 333 –  
Implementing Financial Services  
Royal Commission  
Recommendation: Reference  
Checking and Information Sharing**

Submission by Legal Aid Queensland

## ASIC Consultation Paper 333- Implementing Financial Services Royal Commission Recommendation: Reference Checking and Information Sharing

### Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to ASIC Consultation Paper 333 – Implementing the Royal Commission recommendations: Reference Checking and Information Sharing.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals.

LAQ's Civil Justice Services Unit lawyers provide advice and representation in banking and finance, credit and debt, insurance and consumer law, regularly assisting clients with complaints about credit, banking, debt, broker issues in relation to obtaining credit. Our Farm and Rural Legal Service (FRLS) provides advice and assistance to rural producers and rural small businesses that have severe debt related problems or are in dispute with their lenders or are otherwise facing financial hardship directly related to their business of primary production.

This submission is informed by the knowledge and experience of LAQ's Consumer Protection Unit and Farm and Rural Legal Service (FRLS) and our previous submission/s to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the response to Consultation on CP 327 Mortgage Broker and the Best Interests Duty.<sup>1</sup>

### Consultation Questions

Legal Aid Queensland is not answering the individual questions in the consultation paper as we generally support the proposed legislative instrument and the Reference Checking and Information Sharing Protocol ('the Protocol'), however we have some general comments.

The amendments to the *National Consumer Credit Protection Act 2009*, *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* and the *Corporations Act 2001* seek to:

- impose an obligation on licensees to share information about a mortgage broker or financial advisor with other licensees; and
- require reference checking of mortgage brokers and or financial advisors who they employ or who they are considering authorising as a representative.

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<sup>1</sup> <https://financialservices.royalcommission.gov.au/Submissions/Documents/interim-report-submissions/POL.9100.2000.0035.pdf>

LAQ supports reference checking and information sharing for mortgage brokers but we are of the view that the “rolling bad apples<sup>2</sup>” in the industry will continue to thrive if there is not reference checking or information sharing for those brokers:

- that only provide credit assistance outside of residential mortgages such as credit cards , small amount loans, personal loans or car loans where no security or non-residential mortgages are taken; or
- that provide assistance to borrowers seeking commercial loans regardless of whether security for the loan is residential, investment or farming property.

The requirement to undertake reference checking and information sharing imposes additional obligations on licensees only with respect to mortgage brokers. Compliance may become difficult for licensees if the additional obligations do not extend to all brokers. Unintended consequences for licensees may result unless it is clear that any inadvertent disclosure of information by the licensee about a current or prospective representative, that is not required under the Protocol, is protected by the “defence of qualified privilege” provided in the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (‘the Bill’).<sup>3</sup> The Bill only makes available the defence of qualified privilege if the information provided complies with the licensee’s obligations under the protocol.

The Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry found issues with credit licensees authorising or employing mortgage brokers. One was the failure of licensees to share information about brokers with each other, and the second was licensees who were aware of adverse information failing to act on that information. The Protocol, whilst addressing the first issue, gives no direction as to what if anything the licensee is required to do with any adverse information about the broker that they obtain as a result of conducting a reference check beyond the licensee’s general conduct obligations in RG 205.<sup>4</sup> This is despite the historical ineffectiveness of RG 205 in ensuring that licensees took appropriate action upon receiving adverse information about a mortgage or other broker.

### Future Reviews and resourcing of the community sector

Legal Aid Queensland supports a mandatory review being conducted of the protocol in three of years. Given in our view there is a need to extend the obligation to other brokers and a need to ensure that the information collected is used appropriately to determine whether to employ or authorise a mortgage broker, three years would be a reasonable period of time within which to conduct a review and consider these omissions from the current proposed protocol. . It is critical that adequate provision is made for the resourcing of the community sector so that they can contribute meaningfully to reviews.

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<sup>2</sup> See Royal Commission, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Final report*, February 2019 (Royal Commission final report), vol. 1, pp. 82 and 202.

<sup>3</sup> [Schedule 10, item 14, section 47(3F) of the Bill]

<sup>4</sup> Regulatory Guide 205 Credit licensing: General conduct obligations (RG 205)