

28 January 2021

Australian Securities and Investments Commission

By email to: referencechecking@asic.gov.au

Dear Sirs,

Submission on CP333 – Reference Checking and Information Sharing

Thank you for the opportunity to comment on the proposals in CP333. Our comments are limited to the operation of the proposals in relation to mortgage brokers.

Introduction

The purpose of the reference checking regime is to establish a scheme in response to recommendation 1.6 of the Financial Services Royal Commission. The final report summarised that recommendation as follows: 'ACL holders should be bound by information-sharing and reporting obligations in respect of mortgage brokers similar to those referred to in Recommendations 2.7 and 2.8 for financial advisers'.

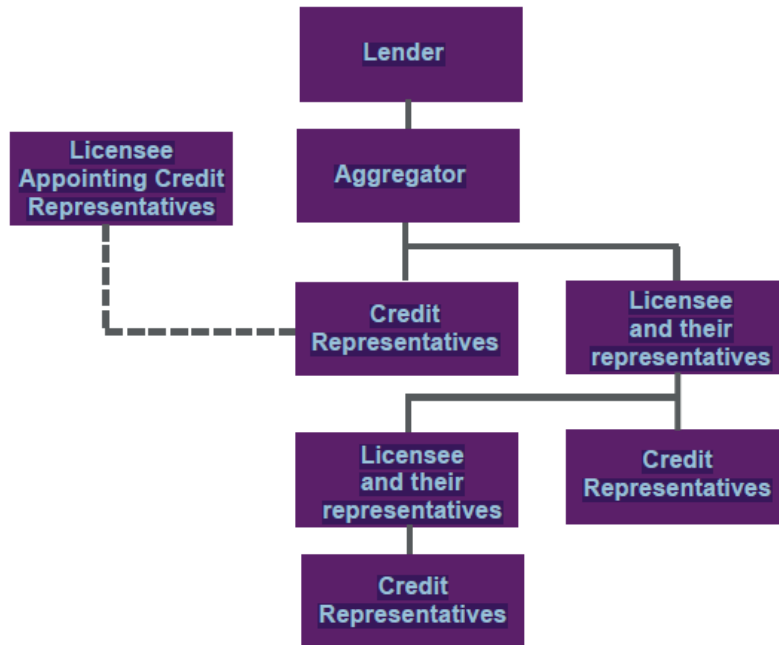
The MFAA strongly supports the introduction of an effective reference and information sharing protocol.

The MFAA and the mortgage industry has been seeking to establish a workable reference checking regime for more than a decade, but those attempts have been frustrated mainly because of the licensees' fear of defamation action and breach of privacy. Those concerns are addressed in the proposed legislation but unfortunately only in respect of reference checking and information sharing between referee licensees and recruiting licensees and not other interested parties such as aggregators.

Other than the major problem about the participants in the regime and the issue raised about s 73 of the Credit Act in our later comments, we are generally in agreement with all the proposals in CP333 subject to any specific comments in our responses to the questions raised in CP333 as set out later in this letter.

Aggregators only partially included in the proposed law and protocol – which presents a major problem

It is important to understand the structure of the mortgage industry in order to understand how a reference checking regime for mortgage brokers should work. The structure is represented diagrammatically by the table below.



Aggregators are the central bodies for broker management and the control of the movement of brokers across the industry. Lenders elect to deal through aggregators rather than direct with brokers because of the value-add provided by aggregators in accrediting, training, and monitoring brokers. It is therefore critical that aggregators are central to the reference checking regime.

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.

Although there are many brokers who are credit representatives of aggregators, there are also a significant number who are not. This second category may be:

- credit representatives of a third-party credit licensee (which may or may not be associated with the aggregator) [Note: these credit licensees may be an active broking business, effectively operating as a sub-aggregator, or they may be an external licensee which provides training and support services];
- credit licensees in their own right;
- credit representatives of the broker's own ACL holding company; or
- a representative (by virtue of being a director or employee) of the broker's own ACL holding company.

In excess of 50% of brokers under an aggregator can often operate under their own licence rather than as a credit representative of the aggregator. These brokers receive aggregation services from the aggregator but would not be considered to be “working for the aggregator” and therefore are not “prospective representatives” as defined in the protocol.

It is important that the incoming aggregator can obtain a meaningful reference before accrediting the new broker. However, the protocol does not apply to these changes of aggregators (unless the broker is a credit representative of the aggregator) and does not allow or oblige the recruiting aggregator to obtain a reference. In this situation retiring aggregators will also not enjoy the benefit of qualified privilege should they elect to provide a reference for a broker that holds their own license. This risks severely undermining the integrity and effectiveness of the mortgage broker reference checking process and perpetuating the lack of transparency that has existed for many years.

Para 33 and 34 of the Explanatory Memorandum notes *‘that it is essential to the operation of the reference checking and information sharing obligations that licensees share information honestly and frankly. For this reason, the Bill provides that the defence of qualified privilege will apply to a licensee who shares information about a prospective representative in accordance with the ASIC protocol. Further, licensees will not be liable for breaches of confidence in relation to any action they take in accordance with the ASIC protocol. As noted above, currently aggregator and lenders are reluctant to provide information about mortgage brokers because they do not have either of these protections.’*

The objectives of the reform will not be achieved under the law because as currently structured, the sharing protocol is limited to information sharing between;

- licensees for whom the candidate is currently or was previously a representative; and
- a licensee who proposes to appoint the candidate as a representative providing third party credit assistance in respect of residential mortgage loans.

Example 1, 2, and 3 below demonstrate the problems currently encountered in the mortgage broking industry in relation to reference checking. The reform will not apply when mortgage brokers change aggregators and they may be able to continue trading despite material misconduct.

Example 1. Aggregator A has identified material misconduct by a member who holds his or her own licence. The member licensee decides to change to Aggregator B. Aggregator A cannot give a meaningful reference to Aggregator B because the aggregators are neither the recruiting licensee nor the referee licensee and do not benefit from the protection of qualified privilege.

Example 2. ABC Pty Limited is a member of Aggregator A. Sally owns ABC Pty Limited and is a representative of ABC Pty Ltd. ABC Pty Limited is terminated by Big Bank for material misconduct. Big Bank will not tell Aggregator A why ABC has been terminated because of defamation and privacy concerns. Aggregator A decides to terminate ABC because of the termination of accreditation by Big Bank. ABC applies to become a member of Aggregator B. Big Bank and Aggregator A are unable to provide any useful information because neither are a referee licensee. Aggregator B is unable to obtain a reference because it is not the recruiting licensee.

Example 3. Sally is a credit representative of Aggregator A. Sally is terminated by Big Bank for material misconduct. Big Bank will not tell Aggregator A why Sally has been terminated. Sally applies to become a member of Aggregator B as a credit representative. Aggregator

A is unable to provide any useful information because it does not know why Big Bank terminated Sally.

As the law is limited to referee licensees and recruiting licensees, there will be a significant number of cases where licensees are neither:

- required to take reasonable steps to obtain a reference; nor
- obliged to provide references

as contemplated by the recommendation of the Royal Commission.

The law and protocol needs to be amended or other remedial action taken to permit references to be given in the above circumstances. We propose the following regime.

1. An aggregator should be entitled, and indeed required to obtain a reference under the regime when it is accrediting a new broker/member irrespective of whether that broker/member:
 - (a) will be a credit representative of the licensee;
 - (b) holds its own licence; or
 - (c) is a representative or credit representative of any other licensee.
2. Recruiting entities should be able to obtain a reference from an aggregator under the regime in respect of a person who was a broker/member of the aggregator irrespective of whether that broker/member:
 - (a) was a credit representative of the aggregator;
 - (b) held its own licence; or
 - (c) was a representative or credit representative of any other licensee.

Unless aggregators are covered by the ASIC protocol and in particular qualified privilege, 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 will be a missed opportunity for the industry.

Disclosure of reference to prospective representative

We consider transparency to be at the core of the reference checking process and that prospective representatives should always be provided with a copy of the reference unless it would prejudice appropriate action against unlawful activity or misconduct.

Portable unique identifier

The MFAA has previously advocated for the adoption of a portable unique identifier for credit representatives. The introduction of such an identifier by ASIC would enhance the operation of the reference checking regime.

Concerns about section 73 of the Credit Act

As noted in para 89 of CP333, s73 of the National Credit Act does not allow licensees to share information received from ASIC under that provision when sharing information with other licensees under the ASIC protocol. This creates a risk that the reference given will be misleading, deceptive, and incomplete. If the information provided to a licensee relates to

adverse conduct by a representative not otherwise known by the licensee, the objective of consumer protection may be compromised.

The law needs to be amended or other remedial action taken to permit this disclosure.

MFAA'S responses to specific questions posed:

We set out below our responses to the specific questions in CP333. Our responses generally do not repeat our concern about the major issues described above.

B1Q1 Do you agree with our proposal? If not, why not? (requirement to obtain a reference)

We agree that reasonable steps should be taken to obtain a reference but are strongly of the view that the law and protocol should be expanded to include aggregators where the broker moves licensee or aggregator and operates under their own licence This will avoid up to 50% of brokers moving aggregators without having to obtain a reference which we do not believe to be aligned to the intent of this reform.

B1Q2 Do you think the obligation should be limited to obtaining a reference from the current licensee or—if a prospective representative is not currently with a licensee—their most recent former licensee in the five years before a request? If so, please give reasons why.

We consider that the obligation should not be limited to the obtaining of a reference from the current licensee (and aggregator if a different entity) and agree with the proposal.

B1Q3 Do you think the obligation should be extended to all former licensees who employed or authorised the prospective representative in the five years before the request? If so, please give reasons why.

Extend only if the prospective representative has been with the current licensee for less than one year.

B1Q4 If the prospective representative is a current licensee, do you think the recruiting licensee should be obliged to obtain a reference from them? If not, why not?

We see limited utility in obtaining a reference from a person who is effectively the applicant, but accept what is said in para 46 of CP333. The absence of a right to obtain a reference from the relevant aggregator is a major defect in the law.

B1Q5 Do you think a recruiting licensee should be able to obtain from a current or most recent former licensee previous references provided to them under the ASIC protocol? If so, should a recruiting licensee still be required to obtain a reference directly from the additional licensee(s) about the prospective representative?

We do not support a right for recruiting licensees to be able to obtain previous references obtained by the referee licensee. Rather, as contemplated in the proposal, in appropriate cases references can be obtained direct from the previous licensees.

B2Q1 Do you agree with our proposal? If not, why not? (credit representatives sub-authorised by corporate representatives).

We agree.

B3Q1 Do you agree with our proposal? If not, why not? (seeking consent from the prospective representative)

We agree.

B3Q2 Do you think ASIC should prescribe a consent form? If not, why not?

Yes, ASIC should prescribe a consent form. However, in addition to specifying the prescribed form, the Protocol should provide that a document in substantially or to the effect of the prescribed form is also permissible.

B3Q3 Should the template consent form prescribed by ASIC require any further information to be disclosed to the prospective representative so they are better informed in providing consent? If so, what other information should be required?

The form should be amended:

- (a) to make it clear that the recruiting licensee may use the information received from referee licensees beyond the six months and is not limited to the purpose stated in the draft Consent Form – see our answer to B12Q1;
- (b) to contain an acknowledgement that the candidate broker understands that the referee licensees have the benefit of qualified privilege and explain what that means;
- (c) to state that a copy of the reference **will** be provided to the prospective representative;
- (d) consent to the provision of additional information as noted in our response to B7Q1;
- (e) to permit agents to collect, use, disclose or store personal information – see our comments at B11Q3; and
- (f) to consent to the referee licensee(s) disclosing the information.

B3Q4 Will this proposed obligation to obtain and provide written consent cause practical problems for licensees during the recruitment process? If so, please outline these problems and set out any views on how ASIC or industry can address these problems.

We have not identified any problems.

B4Q1 Do you agree with our proposal? If not, why not? (form of request for a reference)

We agree with the proposal.

B4Q2 Should the protocol require a request for a reference to include any other information? If so, what other information should be required?

We consider that the requests in Schedule 2 and 3 of the draft instrument are appropriate subject to our comments on specific aspects of those questions made in answer to the other questions in this consultation.

The request should specify that the request only relates to matters which have occurred during the last five years from the date of the request. This is important so that the referee does not need to qualify any response to be limited to that period.

B5Q1 Do you agree with our proposal? If not, why not? (more than one request for a reference)

We consider that clause 8(4) in the Protocol is unclear. It refers to making more than one request. It could be interpreted to mean a request for additional information but in that case 8(6) applies. We understand it is intended to permit clarification of or further details on matters raised in the initial request. If our understanding is correct, the clause should be amended to make the meaning clear.

Concern has also been expressed that it is unclear whether qualified privilege applies to the additional responses and that should be made clear.

Subject to such amendment we support the proposal.

B6Q1 Do you agree with our proposal? If not, why not? (references from prior licensees for five years)

We consider that clause 8(5) of the Protocol is unclear. It refers to seeking additional references. This could be interpreted to mean seeking additional references from the initial referee licensee. We understand it is intended to relate to obtaining references from other prior licensees. If our understanding is correct, the clause should be amended to make the meaning clear.

Concern has been expressed that it is unclear whether qualified privilege applies to responses by those other referee licensees and that should be made clear. We are strongly of the view that qualified privilege should apply.

Subject to such amendment we support the proposal.

B7Q1 Do you agree with our proposal? If not, why not? (requesting information other than prescribed information)

We do not object to recruiting licensees being able to request additional information but are concerned that any such additional information may not be covered by the privacy consent from the representative nor have the benefit of qualified privilege. Reasonable additional information requested for bona fide reasons will enhance the effectiveness of the scheme and should be covered by the privacy consent and the benefit of qualified privilege.

We suggest that the Protocol makes it clear that:

- any response to such a request is covered by qualified privilege; and
- nothing in the Protocol requires licensees to retain information relating to additional information; and
- nothing in the Protocol obliges referee licensees to provide that additional information.

Referring Licensees may hold references from previous employers. Referring licensees may have received those references in confidence or there may be other reasons why they feel they cannot provide information derived from those references. Although our understanding is that ASIC's proposals would not require answers relating to those referrals, concern about this issue has been expressed. We suggest that clause 9 of the Protocol be amended by adding 'for the avoidance of doubt, nothing in this Protocol requires the referee licensee to provide copies of or information derived from references obtained by the referee licensee'.

B8Q1 Do you agree with our proposal? If not, why not? (response to requests for references)

We agree with the proposal.

B8Q2 Should we allow verbal responses to be given under the ASIC protocol? If so, why? How would the licensees manage the potential risks associated with the provision of verbal references?

Verbal responses should not be allowed and all responses should be required in writing.

B8Q3 Are there other ways to facilitate references being given by referee licensees under the protocol? If so, please explain.

We have not identified other ways.

B9Q1 Do you agree with our proposal? If not, why not? (updating a reference)

We agree with the proposal.

B9Q2 Is the proposed six-month timeframe for an updated reference appropriate? If not, what timeframe would be appropriate?

We agree with the proposal.

B10Q1 Do you agree with our proposal? If not, why not? (when no reference need be given)

We agree with the proposal.

B11Q1 Do you agree with our proposal? If not, why not? (use agents)

We agree with the proposal, subject to our comment in B11Q3.

B11Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these problems.

None identified.

B11Q3 Do you think a prospective representative must consent to a recruiting licensee using an agent to collect, use, disclose or store personal information on their behalf to undertake a reference check under the ASIC protocol? If not, why not?

The consent of the candidate to the use of an agent should not be a part of the standard consent. Schedule 2 and 3 should be amended to permit agents to collect, use, disclose or store personal information. The recruiting licensee may decide to use an agent for part of the engagement process or may decide to enlist the services of an agent late in the engagement process. The process could be delayed if it was then necessary to obtain the prospective representative's consent.

B12Q1 Do you agree with our proposal? If not, why not? (use of information received only for reference checking)

We see this as impractical. The recruiting licensee should be able use the information to decide what role the candidate can play and in connection with educating, mentoring, and

monitoring the performance of the candidate. As noted in our response to B3Q3, the Template Consent Form in Schedule 1 should be amended to permit this use.

B13Q1 Do you agree with our proposal? If not, why not? (provide candidate with a copy of the reference)

As transparency is at the very foundation of the reference checking process, we do not believe the proposal goes far enough in ensuring that the prospective representative is given a copy of the reference.

Consideration should also be given to what steps are available to a broker where a reference is believed to be false or not based on facts.

If you agree with our proposal that disclosure to the prospective representative is important:

- clause 12 of the Protocol which provides that the information stored must only be used for the purpose of sharing with the recruiting licensee will need amendment to provide that the information stored about the candidate can be used for disclosure to the candidate;
- page 5 of the Protocol under the heading 'Recruiting licensee must seek consent' (which appears on page 4) and 'Use of information' on page 11 will also need amendment for the same reason;
- it must be clear that the referee licensee is not liable for damages or other claims by the prospective representative.

B13Q2 Should the protocol require a recruiting licensee to provide the prospective representative with the reference obtained from a referee licensee(s)? If so, please give reasons why.

As references are to be based on facts, we believe it is essential that a prospective representative is given a copy of any reference obtained unless it would prejudice appropriate action against unlawful activity or misconduct.

Transparency is at the core of a reference checking process and the broker should in most instances be supplied with a copy.

B13Q3 Should the reference only be provided to the prospective representative with the consent of the referee licensee(s)? If so, please give reasons why.

No, the consent of the referee licensee should not be required unless the referee licensee has specifically requested the submission to remain confidential in order not to prejudice appropriate action against unlawful activity or misconduct.

B13Q4 What other mechanisms could be included to ensure fairness for the prospective representative?

In addition to being provided with a copy of the reference, consideration should also be given to the steps available to a broker where a reference is believed to be false or not based on facts.

B14Q1 Do you agree with our proposal? If not, why not? (no contracting out)

We agree with the proposal.

B15Q1 Do you agree with our proposal? If not, why not? (easy contact with referee)

We agree with the proposal.

B15Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these and any possible solutions.

We have not identified any problems.

B16Q1 Do you agree with our proposal? If not, why not? (keep records five years)

We agree with the proposal. There should be no requirement to delete the information at the end of five years.

B16Q2 Should licensees be required to keep any other records relating to reference checking and information sharing? If so, what other records should be kept?

We have not identified other records that should be kept.

C1Q1 Do you agree with our proposed questions? If not, why not? (questions about background)

We agree with the proposed questions.

C1Q2 Can you suggest any additional or alternative questions?

No, we do not have any additional background questions to suggest.

C2Q1 Do you agree with our proposed questions? If not, why not? (questions about compliance audits)

Question 2 of Schedule 2 asks questions about the **last** compliance audit conducted in respect of the candidate. This may be too limiting to provide a good overview of the conduct of the candidate. The question should be amended to relate to any compliance audit undertaken in the last two years.

We recommend a more expansive description of a compliance audit to ensure that any review of the candidate's conduct is captured.

Question 2(b)(ii) refers to remedial action **by the licensee** but it should refer to any remedial action – e.g. taken by the broker or the licensee.

The question should be limited to material issues identified in the audit. The question should also ask about any other matters of material concern, not just events that led to remedial action.

C2Q2 Can you suggest any additional or alternative questions?

See C2Q1 above.

C3Q1 Do you agree with our proposed questions? If not, why not? (questions about conduct)

We agree with the proposed questions subject to the following.

In proposed Question 3(b)(iv) 'failure' has an unclear meaning and does not fit well with the paragraph. We suggest '*refusal to comply with or material non-compliance in relation to...*'

C3Q2 Can you suggest any additional or alternative questions?

The questions are focussed on candidates who are currently mortgage brokers or financial advisers. We understand that the regime applies to all former representatives of financial services and credit licensees. There should be an additional question asking about conduct generally, requiring a response in relation to any matters of material concern about the general conduct of that representative not limited to compliance with financial services or credit laws.

This additional question should apply not only to these other representatives but also to candidates who are currently mortgage brokers or financial advisers.

C4Q1 Do you agree with our proposed questions? If not, why not? (questions about ongoing matters)

We agree with the proposed questions, subject to the following.

We consider that question 4(b) is covered by 4(a) and question 4(c) is covered by question 3. Accordingly, clauses 4(b) and (c) should be deleted.

C4Q2 Can you suggest any additional or alternative questions?

Not in relation to ongoing matters.

D1Q1 Do you agree with our proposal? If not, why not? (provide an information sheet for licensees)

We agree with the proposal. However, page 5 states that if additional information is requested, the entire response must be reproduced. This seems unnecessary and creates additional work.

D1Q2 Can you suggest any further or additional guidance that should be included in the information sheet?

No

The MFAA extends its thanks to ASIC for the opportunity to respond to Consultation Paper 333 and these important reforms that have the potential to improve trust and confidence and further strengthen the mortgage broking industry.

Should you require further information to supplement this submission, please do not hesitate to contact me on [REDACTED].

Yours sincerely

Mike Felton
Chief Executive Officer
Mortgage & Finance Association of Australia