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## **Response to CP340 – draft RG78 and Information Sheet**

The Mortgage & Finance Association of Australia (**MFAA**) is pleased to have the opportunity to comment on draft RG78 and the associated Information Sheet.

### **About the MFAA**

With more than 13,500 members, the MFAA is Australia's leading professional association for the mortgage broking industry, with membership covering mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. The stated purpose of the MFAA is to advance the interests of our members through leadership in advocacy, education and promotion. To achieve this aim, the MFAA promotes and advances the broker proposition to a range of external stakeholders, including governments, regulators and consumers, and continues to demonstrate the commitment of MFAA professionals to the maintenance of the highest standards of education and development.

### **Scope of our submission**

Our response is limited to the impact on credit licensees and their representatives.

### **Serious concern about the structure of the legislation**

As noted before to Treasury and ASIC, the MFAA is very concerned about the structure of the legislation. We will not repeat our detailed comments about those shortcomings in this response, but for the avoidance of doubt we summarise those concerns.

1. A copy of any breach report should be given to affected persons and qualified privilege should apply to that disclosure. Failure to do so is unfair and contravenes the concepts of natural justice. Accordingly, a licensee making a report about one of its representatives should be obliged to provide a copy of that report to the relevant representative. In addition, licensees lodging a breach report in respect of another licensee should be obliged to provide a copy of the report to the relevant mortgage broker. In this regard, see our comments in respect of Table 7 in our responses below.

2. It is essential that aggregators are also provided with copies of any breach report concerning their members and qualified privilege should apply to that disclosure. This is required because aggregators will often not be the licensee of the broker being reported on. Failure to do so means that aggregators cannot discharge their contractual obligations to lenders and members to monitor the quality of brokers. For example, a licensee making a report about its own conduct or the conduct of one of its representatives should be obliged to provide a copy of that report to their aggregator.

If the law cannot be amended to include aggregators, the guidance should deal with the situation where a lender informs an aggregator that a broker has been suspended or terminated but will not provide any information about the reason for that action except perhaps that the broker was not a 'good leaver'. In these circumstances the aggregator is on notice of a possible breach, however, reporting that breach in the absence of any information about the breach is of no utility.

### **Our responses to CP 340**

In response to the specific questions in CP340, we generally approve of the approach taken. Accordingly, we have only responded to the questions when we have suggestions or concerns.

***B1 We propose to give consistent guidance for AFS licensees and credit licensees on how they can comply with the breach reporting obligation, with examples of how the obligation applies in particular situations.***

***B1Q1 Do you agree with our proposed approach? If not, why not?***

Yes

***B1Q2 Are there differences in the structure or operation of credit licensees that require specific guidance on how the breach reporting obligation applies?***

Yes, there are differences. The credit industry is quite different because credit licensees may not interface with product issuers, but rather interface with aggregators. Aggregators play a key role in providing services to credit licensees and their representatives. That is why the law needs to change.

***B2 We propose to include case studies and scenarios to supplement our general guidance and help illustrate key principles as they might apply to different licensees, industries and business models.***

***B2Q1 Are there any specific issues, incidents, challenges or areas of concern you think we should include as examples, case studies or scenarios? If so, please provide details and explain why they should be included.***

Table 7 Example 6(a) graphically illustrates the issues with the legislation in its existing form. The example deals with a mortgage broker who has committed a breach by providing false information. Under the current regime neither the aggregator nor the mortgage broker is informed of the breach. This situation locks in the current unsatisfactory situation where lenders cannot and usually do not tell aggregators why a mortgage broker has been suspended or terminated. This is a dreadful outcome.

**B3 Draft RG 78 identifies where the existing breach reporting obligation (as in force immediately before 1 October 2021) continues to apply to AFS licensees: see draft RG 78.14–RG 78.18.**

**B3Q1 Should we include further guidance to help AFS licensees understand how the existing breach reporting obligation under s912D of the Corporations Act (as in force before 1 October 2021 applies? If so, please provide details.**

No comment.

**B4 We propose to provide high-level guidance to help AFS licensees and credit licensees identify what they must report to ASIC, including guidance on:**

- (a) what is a ‘reportable situation’ (see draft RG 78.19–RG 78.25);**
- (b) whether a breach or likely breach of a core obligation is significant (see draft RG 78.26–RG78.45);**
- (c) when an investigation is a reportable situation (see draft RG 78.46–RG 78.57);**
- (d) what are ‘additional reportable situations’ (see draft RG 78.58–RG 78.60); and**
- (e) what are reportable situations about other licensees (see draft RG 78.61–RG 78.67).**

**B4Q1 Do you agree with our proposed approach? If not, why not?**

We agree

**B4Q2 Should we include further guidance on what constitutes a ‘core obligation’? If so, please provide details.**

Credit licensees are required to report significant breaches of a core obligation. A core obligation is failure to comply with any Commonwealth credit legislation and any of the other general conduct obligations imposed on credit licensees under section 47 of the Credit Act. A breach of a core obligation is only reportable if it is significant determined in accordance with section 50A(4).

A core breach is automatically substantial if it is constituted by offences and civil penalty breaches carrying specific penalties. These breaches may be difficult for licensees to ascertain. It would be useful and aid compliance if RG78 set out a list of these events/relevant provisions. The list would need to be updated regularly to remain current with the law. Such a resource would be of significant value to industry.

**B4Q3 Should we include further guidance on how to determine whether a breach or likely breach of a core obligation is ‘significant’? If so, please provide details.**

See our response to B4Q2.

**B4Q4 Should we include further guidance on reporting an ‘investigation’ to ASIC? If so, what should be clarified? Please provide examples of scenarios (where relevant).**

No

**B4Q5 Should we include further guidance on what constitutes ‘material loss or damage’? If so, what are the challenges licensees face in determining whether loss or damage is material? Please provide examples of how you consider questions of material loss or damage.**

It would be useful to provide guidance on how loss or damage is assessed if there is a breach of brokers' best interests duty. For example, it is clear that the loss should not be the difference for the life of the loan between the interest rate and fees of the loan arranged by the licensee and the interest rate and fees for a loan that would have been in the consumer's best interests and one that the consumer could have qualified for. This is because rates may move over time, and most if not all consumers do not retain a loan for the entire loan term (average loan term ranges between 4 and 5 years). It is also important to remember that the affected consumer may not give the licensee an opportunity to minimise loss and damage by refinancing or other strategies. We suggest that there should be a limitation to the period over which loss should be calculated which may also include reasonable costs of refinancing.

**B4Q6 Should we include further guidance on reportable situations involving serious fraud or gross negligence? If so, what are the challenges licensees face in identifying when serious fraud or gross negligence has occurred?**

There is sufficient guidance.

**B4Q7 Should we include further guidance on reportable situations about other licensees? If so, please provide details.**

It would also be useful to discuss the situation where unknown to the reporting licensee it is found that the breach was not caused by the other licensee but by a person providing information or services to that licensee or a credit representative under than licensee.

**B5 We propose to include guidance in draft RG 78 about the obligation for licensees to report to ASIC within 30 days after they first know that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see draft RG 78.68–RG 78.81.**

**B5Q1 Should we include further guidance to help licensees understand when to report to ASIC? If so, please provide details, including what guidance would be helpful and why.**

There is sufficient guidance.

**B5Q2 Should we include further guidance on what may amount to 'knowledge', 'recklessness' and 'reasonable grounds'? If so, please explain what specific guidance would be helpful and why.**

There is sufficient guidance.

**B5Q3 Should we include any additional or alternative guidance to help licensees provide reports to ASIC in a timely manner? If so, please give details.**

There is sufficient guidance.

**B6 We propose to provide general guidance on the types of information we will include in the prescribed form that licensees must use to provide reports to ASIC: see Table 8 in draft RG 78**

**B6Q1 Do you have any feedback about the types of information we propose must be included in the prescribed form? If so, please provide details, and identify any issues.**

The content seems appropriate.

**B6Q2 Should we include any other information in the prescribed form? If so, please provide details.**

The content seems appropriate.

**B6Q3 Do you have any concerns about the types of information in the prescribed form and whether this information can be provided within the prescribed 30-day time period? If so, please provide details.**

The content seems appropriate.

**B7 We propose to provide high-level guidance on compliance systems for breach reporting to help licensees comply with the breach reporting obligation: see Section D of draft RG 78.**

**B7Q1 Do you agree with our proposed approach? If not, why not?**

We agree.

**B7Q2 Are there any other specific areas that we should consider including in our guidance? If so, please provide details.**

None identified.

**B7Q3 Are there any challenges that you would face in applying our guidance to your specific circumstances (i.e. the nature, scale or type of your business)? If so, please provide details.**

Not applicable to the MFAA.

**C1 We propose to provide guidance for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The new obligations require these licensees to notify, investigate and remediate affected clients in certain circumstances. We have set out our proposed guidance in an information sheet: see draft INFO 000 in Attachment 2 to this paper.**

**C1Q1 Do you agree with our proposed approach? If not, why not?**

We agree.

**C1Q2 Should the guidance we provide on the new obligations be provided in the form of a separate information sheet, or be incorporated into RG 256? Please provide details.**

We think it would be better included in RG78 because that guidance deals with breach reporting and the obligation arises from the same legislation and initiative.

**C1Q3 Should we include further or more specific guidance on the circumstances in which licensees must:**

- (a) notify affected clients of a breach of the law;**
- (b) investigate the full extent of that breach; or**
- (c) remediate affected clients?**

**If so, what other information would be helpful in determining how these obligations apply?**

We have identified no additional information.

**C2 We propose to give high-level guidance to AFS licensees and credit licensees about the types of information we consider should be included in the notices that must be given to affected clients: see in Actions 1 and 3 of draft INFO 000 in Attachment 2 to this paper.**

**C2Q1 Do you agree with our proposed approach? If not, why not?**

We agree.

**C2Q2 Should the form of the notices referred to in Actions 1 and 3 of the information sheet be approved by ASIC? If so, what information, or types of information, should be mandatory, and what should be left to the discretion of the licensee?**

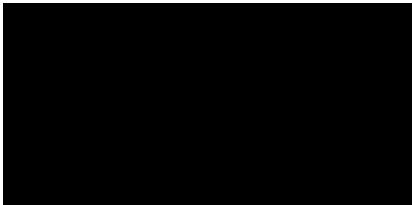
We consider that the information sheet should not be approved by ASIC. The way different licensees like to communicate with their clients differs markedly. Licensees should be able to retain flexibility.

### **Conclusion**

The MFAA appreciates the opportunity to comment on draft RG78 and the information sheet.

If you have any questions or require any further information, please do not hesitate to contact Mike Felton on [REDACTED] or [REDACTED].

Yours sincerely



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