



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

ASIC

Email: referencechecking@asic.gov.au

29th January 2020

Dear ASIC

Re: CP 333 Implementing the Royal Commission recommendations: Reference checking and information sharing

The Financial Planning Association (FPA) welcomes the opportunity to provide feedback on the **CP 333 Implementing the Royal Commission recommendations: Reference checking and information sharing**.

The FPA supports the intent of the proposed ASIC regulatory guidance and provides feedback to improve the workability and effectiveness of the proposed obligations. In our submission the FPA recommends:

1. Representative protection with the means to raise a complaint to ASIC if the licensee provides false information or describes unclaimable behaviours.
2. A single register of designated referee details as opposed to individual referee contact details dispersed between licensee websites or 'other arrangements' as described in the draft RG.
3. Extend the ASIC reference checking protocol to other individuals supporting financial planners.
4. Support the information sharing protocol with appropriate privacy references to the Privacy Act.

Our submission relates to financial advice and the Australian Financial Services licensing regime only.

If you have any questions, please contact me directly on [REDACTED].

Yours sincerely

[REDACTED]

Ben Marshan CFP® LRS®

Head of Policy, Strategy and Innovation

Financial Planning Association of Australia



C3 - Conduct of prospective representative

Representative protections

Section 912(3B)(a) of the legislation states that “the Reference Checking and Information Sharing Protocol must not require or permit personal information (within the meaning of the Privacy Act 1988) to be shared, other than with the consent of the individual to whom the information relates...”. As discussed in the Explanatory Memorandum, this is consistent with the Privacy Act 1988 (1.31).

The legislation introduces transparency to the job market for financial planners by requiring reference checks about the formal compliance records of individuals. While the openness of an individual’s desire to change employers may be well established in some professions, such as teaching, this is not common practice in the financial services sector. This creates a concern that there may be implications or repercussions for the person wanting to leave an organisation if they request their current licensee share information with a potential new licensee, therefore divulging to their current licensee that they are intending to leave the organisation.

This measure requires the sharing of objective information to identify if an individual has previously breached a legal obligation, rather than subjective views about a person. The focus of the reference checking on compliance information creates some degree of natural controls in the system as many instances of non-compliance and breaches would have been reported to ASIC by the licensee under the breach reporting regime. In some instances, compliance issues will also be recorded on the Financial Adviser Register. However, there may also be compliance matters that are not required to be reported to ASIC. While the focus of the requirement is on the sharing of factual, objective information, and therefore there are some natural controls in place, it does not eliminate the risk of vexatious motivations.

The FPA suggests an avenue for recourse should be considered for representatives who notify their current licensee of their intent to leave the organisation for the purposes of the reference checking requirements, including against the sharing of unfounded negative information and repercussions for the individual. This could be achieved by including in Protocol the ability for the representative to make a complaint to ASIC for investigation should the individual face repercussions or an unfounded negative reference from the former or current licensee.

As part of this process, consideration could be given to requiring the former or current licensee to provide ASIC with a copy of the shared information in cases where an unfounded negative reference is provided. In addressing the complaint, ASIC should consider whether the unfounded negative reference was not objective nor based on fact.

FPA Recommendation

The FPA recommends the Reference Checking and Information Sharing Protocol include the ability for the representative to make a complaint against a former or current licensee, to ASIC for investigation, should the individual face repercussions or an unfounded negative reference from the former or current licensee.



B15 - Maintaining a contact point for reference checking

We propose that licensees must have in place adequate arrangements to ensure they can be easily contacted by recruiting licensees for reference checking and information sharing under the ASIC protocol - Designated reference checker

The FPA notes and supports that the legislation creates obligations for licensees to participate in a 'compliance check' of prospective representatives, on top of the 'referee check' about the individual's performance.

It is understood that ASIC will not be creating or maintaining a register of 'designated reference checkers' in each licensee. Rather, it has been suggested that each licensee could publish the contact information of the individual responsible for providing reference-checking information on the licensee's website. Concerns have been raised that this may have the effect of mandating that all licensees have websites, which may not currently be the case, particularly for some small licensees and sole traders. There are also examples in the industry of financial planning practices having websites but their licensees do not have a website. While we understand there are in excess of 10,000 licensees, a register will provide a consistent avenue for licensees to find referees and will enable the reference checking protocol to be conducted effectively. The FPA believes that reference details that may or may not be available on websites will cause confusion and significant inefficiency for licensees to fulfil ASIC reference checking protocols obligations.

The FPA suggests flexibility should be given to the means in which licensees make available relevant information about the 'designated reference checker'. The FPA recommends one-off funding be provided by the Government to ASIC to make this register available if it is currently outside their capabilities or budget. The FPA considers ASIC should be responsible for the 'designated reference checker' register as it is imperative that the Information Sharing and Reference Checking Protocol works well and consistently in order to deliver protection benefits for consumers and increased trust in the financial planning profession.

However, to ensure any ASIC register is cost-effective and does not create additional costs for the industry or Government, consideration could be given to including the licensee's nominated contacts for compliance reference checking ('designated reference checker') in the ASIC professional register for AFSL holders. This register lists all the authorised representatives operating under the license and should be extended to include the licensee's 'designated reference checker'.

FPA Recommendation

The FPA recommends one-off Government funding be made available to ASIC to establish and maintain a register of 'designated reference checkers'. This information could be incorporated into ASIC's existing Professional Register for AFSLs.



Application of the reference checking requirements

The FPA notes that in relation to financial advice, the protocol will only apply to financial planners who will potentially be providing personal advice to retail clients under the new licensee. Whereas, in relation to the credit licensees, the application of the protocol is significantly broader and applies to a "...mortgage broker or a director, employee or agent of a mortgage broker" (s912A(3D)).

Evidence provided at the Royal Commission and discussed by Commissioner Hayne in his final report included potential misconduct in relation to representatives providing general advice, directors, management and other employees of AFS licensees.

The FPA has clear examples of financial planners who have been banned from providing financial advice by ASIC who move into management overseeing the provision of financial advice by employed or authorised financial planners of the licensee.

The FPA recommends the Reference Checking and Information Sharing Protocol should therefore be extended to include individuals:

1. employed or authorised by AFSLs to provide general advice, and
2. with the responsibility or ability to influence the advice process, and
3. in management and directorships, including responsible managers.

The FPA notes that Commissioner Hayne identified cultural, behavioural and misconduct issues by other participants in the financial services industry such as product providers including insurers and superannuation entities. Like all industries, there is also mobility in the financial services industry whether individuals may move across the sectors or within sectors within financial services. The FPA suggests consideration should be given to extending the principles of the reference checking requirement to all AFSLs.

FPA Recommendation

The FPA recommends the Reference Checking and Information Sharing Protocol:

1. should be extended to include individuals:
 - a. employed or authorised by AFSLs to provide general advice, and
 - b. with the responsibility or ability to influence the advice process, and
 - c. in management and directorships, including responsible managers.
2. apply to all financial services and AFS licensees.



B16 - Keeping records / C1 Background information on a prospective representative / B3 - Seeking consent of prospective representative

Record keeping

Section 912A(3A)(c) of the legislation permits ASIC to determine the protocol for the “keeping and retaining records of information shared, and the circumstances under which the information is shared”. The Explanatory Memorandum explains that ASIC may also determine the types of information that should be sought and shared about an individual.

The legislation references the Privacy Act in regard to the meaning of ‘personal information’. However, the Privacy Act 1988 also includes an exemption from certain aspects of the Act in relation to an employee’s personal information. It sets meanings of the ‘employment relationship’ and what constitutes an ‘employee record’¹.

“This means that the exemption will not apply to the collection of personal information about prospective employees who are subsequently not employed by an organisation, such as unsuccessful job applicants. However, once an employment relationship is formed with an individual, the records the employer holds relating to that individual’s pre-employment checks become exempt.”²

The FPA recommends ASIC RG should appropriately reference the Privacy Act 1988 beyond just the meaning of personal information. It should include references to the requirements and exemptions in relation to the collection and retention of personal information about a former, current or potential employee/representative. This will ensure the ASIC protocol will incorporate and enable licensees to comply with the requirements of both the Privacy Act and Corporations Act.

FPA Recommendation

The FPA recommends the ASIC RG should appropriately reference the Privacy Act 1988 and include references to the requirements and exemptions in relation to the collection and retention of personal information about a former, current or potential employee/representative.

¹ <https://www.oaic.gov.au/privacy/privacy-for-organisations/employee-records-exemption/>

² <https://www.oaic.gov.au/privacy/privacy-for-organisations/employee-records-exemption/>