

5 February 2021

Mr Andrew Choi  
Lawyer  
Financial Advisers Team  
Australian Securities and Investments Commission

By email to: [referencechecking@asic.gov.au](mailto:referencechecking@asic.gov.au)

Dear Mr Choi

**CONSULTATION PAPER 333 – IMPLEMENTING THE ROYAL COMMISSION RECOMMENDATIONS:  
REFERENCE CHECKING AND INFORMATION SHARING (CONSULTATION PAPER).**

The Australian Finance Industry Association (AFIA) appreciates the opportunity to respond to ASIC's Consultation Paper.

As context for our submission, AFIA is a leading advocate for the Australian financial services industry. Our role<sup>1</sup> is to support our members to finance Australia's future. We believe that our industry can best support Australia's economy by promoting choice in and access to consumer and business finance, driving competition and innovation in financial services, and supporting greater financial, and therefore social, participation across our community.

AFIA represents over 100 providers of consumer, commercial and wholesale finance across Australia. These banks, finance companies, and fleet and car rental providers, and fintechs provide traditional and more specialised finance to help businesses mobilise working capital, cashflow and investment. They are also at the forefront of financial innovation in consumer finance.

## OUR SUBMISSION

In principle, we support the Australian Government's commitment to improve reference checking and information sharing protocols in financial institutions. We recognise the important role ASIC has in developing and facilitating an effective reference checking protocol that will allow for consistent standards of

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<sup>1</sup> [Australian Finance Industry Association \(afia.asn.au\)](http://www.afia.asn.au)

professionalism in the industry, and ultimately minimise the risk of consumers receiving poor quality advice or other unsuitable services.

We understand that the Australian Bankers' Association's 'Financial Advice - Recruitment Termination Reference Checking and Information Sharing Protocol' (ABA Protocol) has been used as a basis for the proposed reference checking protocol.

The ABA Protocol was designed for their membership, which consists primarily of larger, prudentially-regulated financial institutions with substantial compliance systems and human resources functions.

When implementing this recommendation, it will be important for the ASIC Protocol to include standards and processes that are proportionate and appropriate for different size financial institutions with different business models and capabilities.

We note ASIC's timeline is to release the final legislative instrument and information sheet in June 2021, ahead of the 1 October 2021 commencement date. Given the cumulative impact of changes underway in the financial services industry, including legislative and regulatory changes, compliance system changes and technology changes, it will be critical that the instrument and information sheet provide clarity and can be dovetailed into our members' current processes as much as possible, without the requirement for major technical and systemic changes. The compliance burden and costs involved in implementing this ASIC protocol should not be underestimated.

## **OUR RECOMMENDATIONS**

Attachment A provides more detail, but in summary, we recommend that:

1. Aggregators should be covered by the ASIC Protocol and the associated protections.
2. The Explanatory Memorandum clarifies that the ASIC Protocol is only limited to the financial advice and mortgage broking industries.
3. There are minimum requirements outlined for people who can provide a reference check.
4. There are specific grounds outlined about when to seek ASIC intervention for instances of employers acting in 'bad faith'.
5. Only written references are permitted under this change.
6. ASIC should create a process where all notifiable breaches are reported immediately by ASIC to a current employer.

## CLOSING REMARKS

A continued focus on improving efficiency, competition and innovation within the finance sector will support Australia's economic recovery. If implemented, we believe our recommendations will:

- promote choice in and access to consumer and business finance
- drive competition and innovation in Australia's financial services industry
- support economic and social participation across our community.

AFIA would appreciate the opportunity to discuss our recommendations and provide further information about the specialised products, services, and technologies offered across our diverse membership and the expectations of their customers.

Should you wish to discuss our submission or require additional information, please contact me or Chalisa Parekowhai, Associate Director Policy at [chalisa@afia.asn.au](mailto:chalisa@afia.asn.au) or 02 9231 5877.

Kind Regards,

A handwritten signature in black ink, appearing to read 'Karl Turner', with a long horizontal flourish extending to the right.

**Karl Turner**

Chief Operating Officer and Executive Director, Policy & Risk Management

## **ATTACHMENT A:**

### **RECOMMENDATION 1 - AGGREGATORS SHOULD BE COVERED BY THE ASIC PROTOCOL AND THE ASSOCIATED PROTECTIONS**

It is critical that aggregators are covered by the ASIC Protocol and that they are afforded the same protections, such as qualified privilege in relation to references for member ACLs.

Currently:

- The ASIC Protocol only applies where the prospective representative operates under the aggregators Australian Credit Licence (ACL).
- In circumstances where the prospective representative operates under a different ACL, the ASIC Protocol and associated protections does not apply.

In practice, this means that an aggregator, which 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.

Failure to cover the aggregators with the ASIC Protocol will mean that 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.

### **RECOMMENDATION 2 – THE EXPLANATORY MEMORANDUM CLARIFIES THAT THE ASIC PROTOCOL IS ONLY LIMITED TO THE FINANCIAL ADVICE AND MORTGAGE BROKING INDUSTRIES.**

We recommend that clarification is provided to exclude mortgage brokers and financial advisers from requiring a reference check when they move to other industries, such as motor.

In clause 10.81 of the Explanatory Memorandum, it discusses the interaction of the amendments i.e. to enable sharing of information between the financial advice and mortgage broking industries, particularly where a person seeks to move from one industry to another.

We recommend that the Explanatory Memorandum should explicitly outline that the ASIC Protocol:

- Will only apply when a person is moving within the financial advice and mortgage broking industries.
- Does not apply to movements to other industries, such as when a mortgage broker seeks to become a finance and insurance manager at a car dealership.

Failure to do so would cause an inadvertent extension of the ASIC Protocol and would be inconsistent with its purpose i.e. to monitor movement of financial advisers and mortgage brokers only.

### **RECOMMENDATION 3 – THERE ARE MINIMUM REQUIREMENTS OUTLINED FOR PEOPLE WHO CAN PROVIDE A REFERENCE CHECK**

We note that unlike the ABA Protocol, ASIC does not propose to maintain a list or central register of contact persons, given the large number of licensees that must comply with the ASIC Protocol.

Unlike the ABA Protocol, which covers prudentially-regulated institutions, many ASIC licensees will be small organisations, with immature human resources functions.

We therefore recommend that there should be minimum requirements for people who can provide a reference check. For example, for smaller licensees, it may not be appropriate for the human resources person to be the contact, as they may have also been the prospective representative's direct line manager and therefore are unlikely to provide an unbiased reference.

### **RECOMMENDATION 4 – THERE ARE SPECIFIC GROUNDS OUTLINED ABOUT WHEN TO SEEK ASIC INTERVENTION FOR INSTANCES OF EMPLOYERS ACTING IN 'BAD FAITH'**

We recommend that there should be a clear process that outlines how a prospective representative can discuss any issues they may have with their reference directly with their referring licensee.

Further clarity should also be provided that the referring licensee is to be the only party to provide a prospective representative with access to their reference.

In instances of 'bad faith', where a referring licensee does not act in accordance with the ASIC Protocol, ASIC should outline what options are available to the prospective representative.

We recommend that in instances where the prospective representative believes the referring licensee has acted in 'bad faith' when completing their reference and the two parties are unable to come to an

agreement over the reference, then the prospective representative should be able to contact ASIC to lodge a complaint.

For example, Craig currently works at Basic Loans as a mortgage broker and has applied for a job at XYZ Loans, a local competitor. Craig has worked at Basic Loans for the past 5 years. Under the ASIC Protocol, XYZ Loans asks Basic Loans to complete the reference on Craig. The owner of Basic Loans, James, is also the HR person and the only person at the firm senior to Craig. James is upset that Craig has applied with XYZ Loans and in bad faith puts in the reference that there is an ongoing investigation into misconduct by Craig. XYZ Loans advises Craig that his application will not proceed to the next round as he failed to mention the ongoing investigation. Craig asks James to provide a basis for the investigation, which James is unable to provide. Craig then asks James to amend the reference, which James refuses to do. Craig should have the opportunity in this instance to lodge a complaint to ASIC about Basic Loans.

#### **RECOMMENDATION 5 – ONLY WRITTEN REFERENCES ARE PERMITTED UNDER THIS CHANGE**

We recommend that only written references are allowed, noting ASIC's comments at paragraph 80 of the Consultation Paper that verbal reference requests would present a higher compliance burden and increase the risk of information being provided that is outside the scope of the ASIC Protocol.

#### **RECOMMENDATION 6 – ASIC SHOULD CREATE A PROCESS WHERE ALL NOTIFIABLE BREACHES ARE REPORTED IMMEDIATELY BY ASIC TO A CURRENT EMPLOYER**

We recommend that ASIC considers carefully how the ASIC Protocol will intersect with the proposed ACL Breach Reporting Requirements due to come into effect on 1 October 2021.

We understand that ASIC will be consulting on their regulatory guidance for this in early 2021, in particular, the excluded list of civil penalty provisions that will not need to be deemed as a notifiable breach.

Due to the potential scope of proposed notifiable breaches, if certain employee conduct is already having to be reported to ASIC, then ASIC should look to utilise this data and implement a process where the new employer would be immediately notified by ASIC, rather than giving the obligation to the licensee who provided the reference.

We would recommend that because of the number of major systemic changes currently being asked of members, if ASIC is unable to provide notification to the current employer, it should be made clear

that a licensee will only need to update a reference once, rather than having to update the reference for all further instances.