

Qualified privilege under the new breach reporting regimes

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Why this is important

This article examines the defence of qualified privilege in the context of the recent changes to Australian financial services license (AFSL) and Australian credit license (ACL) holders' breach reporting regimes. It is essential that licensees, and their legal, risk and compliance teams, have an understanding of qualified privilege to ensure that they can avail themselves of the defence and to pre-emptively manage this risk.

A key change to the breach reporting regime set out in the Corporations Act 2001 (Cth) (Corporations Act) and the National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) is a requirement for licensees to lodge breach reports with the Australian Securities & Investment Commission (ASIC) about other licensees in certain circumstances, and to provide a copy of those breach reports to the affected licensees.

Given the likely reputational damage the content of these third party breach reports will have, and the commercial and other harm that may be suffered, licensees will be rightly concerned about potentially defamatory statements. Affected licensees and persons referred to in third party breach reports may form the view that a breach is being reported by another licensee for "strategic" reasons, and that this unjustifiably impugns personal reputations.

In many cases, the reporting of potential breaches to ASIC or another licensee in accordance with the reporting regime may result in a company or individual being defamed. While companies, with a few exceptions, cannot sue for defamation in Australia, individuals such as financial advisers and mortgage brokers who might be the subject of or identified in a breach report can.

The defence of qualified privilege has been made available under the new breach reporting regimes to assist in navigating these issues. This article will assist licensees in considering what they need to do to work towards ensuring that qualified privilege will be available to them for those breach reports.

Overview of the new breach reporting regimes

Changes to the breach reporting regime for AFSL and ACL holders commenced on 1 October 2021, greatly

expanding the breadth and nature of the obligations. The key changes for AFSL holders are:

- an expanded set of reportable events known as "reportable situations"
- a requirement to report investigations into potential breaches if those investigations are in progress for more than 30 days
- a lengthier period to report breaches to ASIC (extended from 10 business days to 30 calendar days)
- a requirement on an AFS licensee to notify ASIC if there are reasonable grounds to believe there is a reportable situation for a financial adviser of another AFS licensee, and to give a copy of the breach report lodged with ASIC to that other AFS licensee

Prior to 1 October, there was no breach reporting regime for ACL holders — the closest obligation being a requirement to lodge an annual compliance report. However, from 1 October, a breach reporting regime has been introduced into the NCCP Act. This regime is similar in many ways to the new regime for AFSL holders, except that (relevantly) for ACL holders, there is a requirement to notify ASIC in respect to likely breaches by mortgage brokers (as opposed to financial advisers).

Coinciding with the introduction of these changes, ASIC has provided updated guidance in the form of Regulatory Guide 78 (RG 78). RG 78 provides insight on ASIC's interpretation of licensees' obligations to notify ASIC of reportable events.

RG 78.84 confirms that licensees have the benefit of the defence of qualified privilege under particular Commonwealth statutory provisions against defamation actions resulting from a licensee satisfying their statutory reporting obligations. The reporting of a breach may also be protected by a defence of qualified privilege under the defamation statutes in force in the various states and territories of Australia (UDL) and under the common law.

New requirements: breach reports about other licensees

While previously AFSL holders were only required to self-report, a key aspect of the new breach reporting regimes is the requirement on both AFSL and ACL holders to give a notification about other licensees (Affected Licensees):

- AFSL: under s 912DAB(1) of the Corporations Act, an AFSL holder is required to report to ASIC where there are reasonable grounds to believe that:
 - a reportable situation has arisen in relation to another AFSL holder, where that reportable situation involves a significant breach or likely breach of a “core obligation”, or gross negligence or serious fraud
 - an individual has engaged in conduct that forms part of the reportable situation, and that individual is an AFSL holder, an employee or director of the AFSL holder (or a related body corporate) acting within the scope of their employment or directors’ duties, or representative acting within the scope of their authority
 - the individual has provided personal advice to retail clients in relation to “relevant financial products”. These are financial products other than basic banking products, general insurance products and consumer credit insurance (or a combination of these)
- ACL: under s 50C(1) of the NCCP Act, an ACL holder is required to report to ASIC where there are reasonable grounds for an ACL holder to believe that:
 - a reportable situation has arisen in relation to another ACL holder, where that reportable situation involves a significant breach or likely breach of a “core obligation”, or gross negligence or serious fraud
 - an individual has engaged in conduct that forms part of the reportable situation, that individual is an ACL holder, an employee or director of the ACL holder (or a related body corporate) acting within the scope of their employment or directors’ duties, or representative acting within the scope of their authority
 - the individual is a mortgage broker

Significantly, a reporting licensee (Reporting Licensee) must give its notification to the impacted licensee (Affected Licensee) within 30 days after the Reporting Licensee first knows of, or is reckless with respect to, the reportable situations which apply as above.¹

Licensee breach reports and defamation

In many cases, a Reporting Licensee lodging a third party breach report with ASIC and giving its notification to an Affected Licensee may result in a company or individual being defamed. While companies, with some exceptions, cannot sue for defamation in Australia, individuals, such as financial advisers and mortgage brokers who might be the subject of or identified in a third party breach report, can do so.

In general, defamation involves the publication of something about a person which causes right-thinking people to think less of the person. In order to be actionable as defamation, the publication must be communicated to someone other than the person claiming to be defamed. A third party breach report stating that a financial adviser or mortgage broker has, for example, engaged in conduct constituting gross negligence will likely be defamatory in the absence of a good defence.

“Qualified privilege” – a potential defence to defamatory statements in licensee breach reports

What is “qualified privilege”?

“Qualified privilege” is a defence that encourages freedom of communication by protecting publishers in certain relationships from defamation claims notwithstanding that what they may have said about a person may ultimately be found to be untrue. It is a defence based on public policy and recognises that, in certain circumstances, freedom of communication is more important than an individual’s right to protection of their reputation.

When does the qualified privilege defence potentially apply to licensee breach reports?

Each of the Corporations Act and NCCP Act makes qualified privilege available to persons giving ASIC information where those persons are required to do so. Section 1100A of the Corporations Act provides that a person has qualified privilege “in respect of the giving of any information to ASIC” that the person is required to give in accordance with Ch 7 of the Corporations Act, which includes the breach reporting provisions for AFSL holders. Section 243 of the NCCP Act is a similar provision. Notably, however, as these provisions apply only to information given to ASIC, they will only apply to a third party breach report lodged by a Reporting Licensee with ASIC. Neither s 1100A of the Corporations Act nor s 243 of the NCCP Act will apply to a third party breach report given by a Reporting Licensee to an Affected Licensee.

This gap is addressed by s 912DAB(6) of the Corporations Act and s 50C(6) of the NCCP Act. These provisions state that Reporting Licensees have qualified

privilege in respect to third party breach reports given to Affected Licensees. Section 89 of the Corporations Act and s 16 of the NCCP Act (Statutory Qualified Privilege Defences) each contains the elements of the qualified privilege defence for the purposes of s 912DAB(6) of the Corporations Act and s 50C(6) of the NCCP Act.

What are the elements of the Statutory Qualified Privilege Defences?

Section 89 of the Corporations Act states that where that Act provides that a person has qualified privilege:

... the person:

- (a) has qualified privilege in proceedings for defamation; [and]
- (b) is not, in the absence of malice on the person's part, liable to an action for defamation at the suit of a person[.]

For this purpose, "malice" includes "ill will to the person concerned or any other improper motive".²

Section 16 of the NCCP Act is in similar terms to s 89 of the Corporations Act. Accordingly, if a Reporting Licensee gives a third party breach report to ASIC or to an Affected Licensee which a Statutory Qualified Privilege Defence applies to, then in the absence of malice the defence of qualified privilege applies to the third party breach report and the Reporting Licensee will not be liable in proceedings for defamation for that document.

"Malice" and license breach reports

The definition of "malice" in the Statutory Qualified Privilege Defences accords with the concept of malice at common law. The onus of proving malice falls on the person claiming to be defamed. "Malice" is a term of art used to describe the motive of a person who uses a "privileged occasion" for some reason not referable to the duty or interest pursued. In the context of the Statutory Qualified Privilege Defences, the "privileged occasion" is the Reporting Licensee giving the third party breach report to ASIC or to the Affected Licensee in accordance with the obligations that apply to the Reporting Licensee under the Corporations Act, s 912DAB(1) and NCCP Act, s 50C(1).

It follows that for the Statutory Qualified Privilege Defences to be available, a third party breach report must not be used by the Reporting Licensee for a purpose or motive that is foreign to the obligation that protects the giving of information to ASIC or to an Affected Licensee. A Reporting Licensee which gives a third party breach report to ASIC or to an Affected Licensee for an improper purpose or with ill-will will not be protected by a Statutory Qualified Privilege Defence in defamation proceedings. This is consistent

with the position in the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020, which introduced the new breach reporting regimes and states at [11.95] in respect to AFS licensees:

... A licensee who lodges a false report with ASIC under this section with an improper motive, for example to undermine a competitor, will not have the benefit of qualified privilege in an action for defamation.

ASIC adopts this language in RG 78.84.

While establishing malice could be a complex exercise, malice may be inferred in circumstances where, for example, a licensee does not have "reasonable grounds" for their belief that a reportable situation has arisen. The courts have held that irrationality or stupidity is, without more, insufficient to establish malice. While the Statutory Qualified Privilege Defences have not been subject to detailed judicial consideration, the courts have noted in respect to s 89 of the Corporations Act that the reference to an absence of malice in that provision means that the threshold for establishing that defence is lower than establishing that conduct has been motivated by good faith (see *Quinlan v ERM Power Ltd*³).

Action steps for licensee breach reports and the Statutory Qualified Privilege Defences

Given the importance of the availability of the Statutory Qualified Privilege Defences in respect to third party breach reports, we recommend AFS and ACL holders to:

- adopt additional arrangements where a third party breach report may arise. These arrangements could include external legal review of the draft third party breach report, and relevant supporting documentation such as papers considered by a breach reporting decision maker
- test any commercial rationale for making a third party breach report
- include the scope and limitations of the Statutory Qualified Privilege Defences in training about the new breach reporting regimes



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Footnotes

1. Corporations Act 2001 (Cth), s 912DAB(3) and National Consumer Credit Protection Act 2009 (Cth), s 50C(3).
2. Corporations Act, above, s 89(2).
3. *Quinlan v ERM Power Ltd* (2021) 303 IR 200; [2021] QSC 035; BC202101143 at [18].