Australian Banking Association

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Senior Adviser
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Treasury
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By email: FSRCconsultations@treasury.gov.au

Dear Ms Keall

Recommendations 1.6 and 2.7 - Reference checking and information sharing

At the release of the Final Report of the Royal Commission last year, the banking industry committed to learning the lessons, fixing the problems and making things right.

One year on from the Royal Commission the banking industry has tougher rules imposed by the Government and regulators, a back to basics approach to banking which is squarely centred on the customer and a renewed focus on fixing culture.

The banking industry strongly supports the Government acting on the recommendations of the Royal Commission and is committed to working together to see recommendations 1.6 and 2.7 of the Royal Commission are fully and effectively implemented.

The ABA's position

The ABA supports the Government implementing a reference checking and information-sharing protocol for financial advisers, to the same effect as the ABA's 'Financial Advice — Recruitment and Termination Reference Checking and Information Sharing Protocol', and that this be extended to apply to mortgage brokers.

The existing ABA protocol is in place for signatories, is operating well and, consistent with recommendation 1.6 and 2.7 of the Royal Commission, should form the basis for the development by ASIC of the specific elements of the protocols.

Key points

The ABA's comments on the Bill and Explanatory Memorandum are outlined in the attachment.

Yours sincerely

Justin Mining
Policy Director

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

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ABA response to Reference Checking and Information Sharing Protocol: Exposure draft legislation

1. Background

The Australian Banking Association ("ABA") has established a Reference Checking and Information Sharing Protocol ('**ABA protocol**') to improve reference checking during the recruitment of financial advisers by member banks (and subsequently other financial advice licensees). The protocol has operated since March 2017 to promote information sharing about the performance history of financial advisers focusing on compliance, risk management and advice quality. The protocol sets minimum standards for checking references and sharing information, through a series of standardised questions and record keeping practices.

The application of the protocol on a mandatory basis will help to ensure there is consistent practice throughout the industry and that employment information will be available about all financial advisers and mortgage brokers.

We understand that the specific elements of the protocol will be developed by ASIC and included in a legislative instrument. In that respect, The ABA looks forward to liaising with ASIC in the development of its approach.

2. Exposure draft legislation

The ABA notes that much of the detail of the proposed protocol will be determined by ASIC in its development of the legislative instrument. However, we provide comments on some key aspects of the protocol below.

Issue	ABA comment
Time period – timing of five year period	The Bill stipulates that the protocol must not require information to be provided in relation to conduct by a financial adviser or mortgage broker that occurred more than five years before the information is shared. It is unclear when this five year period commences and clear guidance needs to be provided to licensees. **ABA recommendation:** the ABA submits that the five year period should be from the date that the financial adviser or mortgage broker provides consent for the reference check.
Time period – scope of disclosure	It is unclear how a licensee is to consider conduct by an adviser or broker that occurred outside of the five year period but the formal and final outcome of an investigation was determined within the period. It can take a significant period of time for a complaint to be made, misconduct to identified and investigations to be completed. Given that five years is a reasonable time period for a compliance and competency assessment of an adviser or broker, it may be appropriate to only consider issues that were opened and were subsequently investigated during the period.

	ABA recommendation: that the Bill and Explanatory Memorandum provide that only issues opened and investigated during the five year period need to be disclosed in response to a request.
‘Honestly and frankly’	The protocol will operate on the basis that licensees will share information ‘honestly and frankly’. There is no further guidance provided to licensees as to how they can fulfil this requirement (e.g., whether licensees should take an approach relying on only fact-based information, opinion or suspicion). The ABA protocol sets out a series of questions in a standard industry reference checking form that are to be completed by a current or previous employing licensee covering: • the scope of a financial adviser’s authority whilst at the licensee • the adviser’s compliance, risk management and advice quality, including reporting of any breaches to ASIC / identified material incidents caused by an adviser / compensation paid to clients of an adviser • any inquiry or investigations being conducted at the time of the adviser’s resignation or termination. However, a current/previous licensee is able to provide information and seek consent to do so to explicitly allow information to be shared beyond the set questions if it deems it appropriate. **ABA recommendation:** the protocol should require licensees to provide responses to a set list of questions seeking factual information in a similar manner to that currently in practice under the ABA protocol. However, licensees should be able to share information beyond the set questions if appropriate.
Relevant conduct	As noted above, the ABA protocol involves information relating to the financial services conduct of an adviser (e.g., their compliance, risk management and advice quality). It is unclear whether the legislated protocol will cover information relating to only the financial services conduct or all conduct by a broker (e.g., a broker is terminated for breach of an IT policy with the conduct not directly related to their conduct as an adviser). **ABA recommendation**: the ABA submits that the protocol should only cover information that directly relates to the financial services conduct of a broker or adviser.
Materiality threshold	The Bill and Explanatory Memorandum does not appear to provide any guidance on whether a licensee should provide information based on a materiality threshold. Under the existing ABA protocol, a licensee should provide information on a number of matters including a “material incident” involving the adviser. In assessing the materiality, the guidance lists a number of factors for a licensee to consider, including: • the actual or potential impact on the client, including financial loss • the number or frequency of similar previous incidents

- the relevance or importance of the breached obligation in managing risk for the client and/or the current/previous licensee
- whether the incident resulted in an intervention or action by the current/previous licensee as a consequence of the incident and in order to correct the situation
- complaints received including the nature, type and frequency of the complaints, and/or
- known civil actions resulting from the provision of financial advice.

ABA recommendation: that the protocol should require a materiality threshold for requiring information about a broker or adviser.

Licensees no longer operating

The Bill and Explanatory Memorandum does not appear to provide any guidance on what obligations apply where an entity no longer operates or ceases providing relevant financial advice or broking services.

The ABA believes there needs to be a consistent approach to this across industry to ensure the integrity of the process. For an entity to continue to comply with the protocol after it ceases holding an AFSL, it still needs to exist in some form and have a designated representative listed to complete required actions. This may be possible for large organisations that have multiple businesses but it is less likely for small to medium size firms.

We also note that it is possible that a licensee may not consider employing the broker or adviser without the reference check for a relevant period of recent employment. Therefore, we suggest that guidance needs to be provided that licensees should not draw adverse inferences about a broker or adviser merely because it cannot obtain a reference check in these circumstances.

ABA recommendation: the obligations under the protocol should not apply to an entity no longer providing relevant financial advice or broking services and a hiring licensee should not be required to seek information from such an entity. Guidance should be provided to ensure that advisers and brokers are not adversely impacted due to a previous employer no longer operating and complying with the protocol.

New information post-reference

Under the ABA protocol, information must be accurate at the time it is given, and there is no ongoing obligation on licensees to ‘update’ the responses about an adviser. However, it does facilitate the ability for a recruiting licensee to make additional requests about the updated status of an inquiry/investigation notified in the reference check and the adviser was hired.

The Bill and Explanatory Memorandum do not specify whether there is any intention for the protocol to require licensees to provide updates on references where new information becomes available.

ABA recommendation: the ABA submits that there should not be an obligation for a licensee to have to ‘update’ reference checking information unless a further formal request is made and consent is provided for a new reference check to consider any changes.

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Licensing of mortgage brokers	ASIC's Financial Advisers Register (**FAR**) provides a reliable and public record of financial advisers who provide personal advice to consumers. It allows consumers and potential employers to check that a financial adviser is authorised to provide financial advice and seek information about the adviser. It is an important element underpinning the operation of the ABA protocol. The ABA notes that there is currently no equivalent register for mortgage brokers, which would make it more difficult to accurately identify whether brokers are properly licensed and they have not acted in a manner resulting in adverse customer outcomes. We therefore support the development of a Portable Unique Identifier (**PUI**) for mortgage brokers that would be an important step towards a register similar to the FAR. We note the commitment of industry to the development of the PUI through the Combined Industry Forum. **ABA recommendation:** the ABA supports the establishment of a PUI and register for mortgage brokers as this will assist in the operation of an effective protocol.
Agents and related entities	It is unclear whether the protocol is intended to apply to related entities and agents involved in the recruitment process. Under the existing ABA protocol, 'Subscribing licensees' include all AFS licensees who have subscribed, their related entities which have financial advisers and agents involved in their recruitment process. The confidentiality provisions also apply to these other related entities or agents. **ABA recommendation:** the ABA submits that the protocol should apply to related entities and agents involved in the recruitment process.
Application to retail advisers only	The Bill and Explanatory Memorandum does not explicitly specify that the protocol will not apply to financial advisers providing wholesale advice. The ABA protocol defines a 'financial adviser' as an individual person providing personal advice to retail clients on Tier 1 financial products and is/was a representative of a Subscribing Licensee as per section 910A of the *Corporations Act 2001.* We do not believe it is the intention to apply the protocol to financial advisers providing wholesale advice. **ABA recommendation:** the ABA submits that the protocol should apply to individual persons providing personal advice to retail clients on Tier 1 financial products and is/was a representative of a Subscribing Licensee as per section 910A of the *Corporations Act 2001.*