



3 February 2021

Australian Securities and Investments Commission
Level 5, 100 Market Street
NSW 2000

Email: referencechecking@asic.gov.au

Dear Sir/Madam

Re: ASIC CP 333 - ASIC Reference Checking and Information Sharing Protocol

AFMA welcomes the opportunity to comment on the proposed ASIC reference checking and information sharing protocol. The Australian Financial Markets Association (AFMA) represents the interests of over 110 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.

AFMA supports efforts to improve the provision and availability of financial advice. As ASIC is aware the costs of financial have increased greatly because of regulatory changes over the last 10 years. Advice is no longer affordable for many, and so we strongly support minimising additional costs for firms resulting from the protocol.

Please find below for our initial comments on the draft protocol. With the need for operational clarity we see this as the first step in a process to refine the proposal. We would welcome ongoing involvement in any further design work to assist the Government achieve its objectives.

Yours sincerely

Damian Jeffree
Senior Director of Policy

AFMA Response

Introduction

Reference checking and information sharing protocols create risks for both firms participating in information sharing and for the individuals who are the information subjects.

The industry has led the way with the ABA Protocol and respects the Government's decision to implement the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's recommendation of making similar requirements for financial advisors requirements for financial services licensees¹.

From the firms' perspective it is important that any protocol is sharply defined so that firms can always be confident that they are acting within it and thereby not accruing additional risk exposures. We caution against going further than the ABA protocol which was the extent of the requirement recommended the Royal Commission.

Express exclusion of wholesale financial advisers

We note that the protocol will require the Referee Licensee to only give a statutory reference where there are reasonable grounds to ascertain that the prospective representative will be providing personal advice to retail clients about relevant financial products. AFMA member businesses provide a wide range of financial services including wholesale financial advice. To reduce the incidence of reference requests for applicants where there is no obligation to provide a reference (e.g. wholesale only financial advisers, support staff, etc.), AFMA suggests the protocol specifies a requirement for the Recruiting Licensee to confirm that the person will be employed in a qualifying, i.e. a retail role. Such confirmation could be attained through the addition of a declaration on the reference request template completed by the Recruiting Licensee.

Where permission is not granted

At paragraph 55 the consultation paper notes:

If a prospective representative does not provide written consent to a reference request, a Recruiting Licensee will not be able to request a reference under the ASIC protocol. While the protocol does not prohibit a Recruiting Licensee from employing or authorising a prospective representative without a reference because consent is refused, Recruiting Licensees will need to consider, and be able to demonstrate, compliance with their general conduct obligations if they decide to employ or authorise a prospective representative in such circumstances.

AFMA supports the requirement to ask for consent before making a request of employers, particularly for current employers. Many employees will not wish to advise their current employers that they are considering alternative employment, as this could negatively impact their prospects. We caution that there is a risk that if the ability to hire is in effect restricted to employees happy to disclose to their

¹ We note that mortgage brokers are outside our scope of consideration.

current employer that they have applied elsewhere this could have a substantial negative effect on competition and lead to inefficient economic outcomes. The guidance should reflect the reasonable reality of employees sensibly managing the risks around maintaining their current employment while considering opportunities elsewhere.

Compliance audit information requirements

The current draft of the protocol indicates that a Referee Licensee only needs to give information regarding the most recent compliance audit, which may have occurred any time in the past five years. Information on the most recent compliance audit alone, which may be recent, may not fully inform a decision on hiring suitability by the Recruiting Licensee. Accordingly, we suggest where a fuller history of the individual exists within the five-year maximum and this is requested by the Recruiting Licensee, this should be provided by the Referee Licensee under the protocol.

Conduct of a prospective representative

Question 3(b) of the template reference request - Conduct of the representative seeks to determine information about the individual's conduct in general. AFMA notes that while the information sought is reasonable, the wording of the question could be improved. The current wording is not entirely clear and could potentially lead to differences in disclosures depending on the Referee Licensee interpretation.

The question asks whether the person's conduct "in relation to financial services laws or credit legislation" concerns their involvement in dishonesty, unprofessional conduct, deliberate non-compliance etc. This wording may suggest focus on whether the representative's conduct concerned only with breaches of law and not the matters of other concern such as breaches of internal policy, procedures, rules, or codes of conduct. However, we note that the draft information sheet specifies that "the conduct need not amount to a contravention of the law for you to refer to it in response to the template reference request", suggesting these breaches should be included.

Accordingly, AFMA suggests the question on the reference template be amended in a manner to be clear about the scope of breaches that should be included.

Requirement to report on ongoing investigations

AFMA notes that question 4(a) pertains to inquiries or investigations in progress at the time of the requested reference. Referee Licensees will find it challenging to respond to this question because ongoing reviews into a representative are likely to be highly sensitive both to the employee and the firm itself, incomplete by definition and potentially misleading. Employers will be hesitant to report on them, in particular to a Recruiting Licensee who is quite likely to be a competitor.

Further, from the employee's perspective the reporting of the detail of an incomplete investigation, inquiry or complaint could be prejudicial. Particularly if there is to be an obligation to report the outcome of on-foot investigations and inquiries, detailed reports on those in progress may not be necessary or appropriate.

For these reasons, AFMA does not believe it is reasonable to require the Referee Licensee to disclose full details of such matters as is currently proposed. AFMA suggests that the question should be limited to: (1) disclosure of ongoing matters which – when concluded – might trigger a ‘conduct’ report; and (2) be confined to an obligation to report the existence of such matters (with an obligation to provide an update on conclusion of the review).

AFMA suggests careful review of the proposed approach in view of the domestic and international obligations that are applicable to employment arrangements. We note also that as the range of financial services licensees is far broader than APRA ADI licenced entities, consideration might be given to supporting less well-resourced Referee Licensees ensure their procedures deliver fair outcomes that can be relied on by Recruiting Licensees.

FASEA Financial Planners and Advisers Code of Ethics 2019

AFMA draws attention to FASEA’s Code of Ethics 2019. We have a number of concerns with the Code our primary concern remains with Code of Ethics Standard 3.

Standard 3 states:

You must not advise, refer or act in any other manner where you have a conflict of interest or duty.

As drafted, Standard is incompatible with the standard legal understandings of conflict of interest, creates uncertainty and risk for provider firms, and unavoidable exposure for many advisors. In the context of the proposed protocol it could be subject to misuse. AFMA suggests a careful review of other requirements that might be too broadly cast, incompatible with standard legal understandings or too unclear before the protocol is adopted.

Administrative burdens

The proposed protocol requires that Referee Licensees must respond in writing to a Recruiting Licensee’s request for a reference within 10 business days, unless both parties agree to a longer period (up to a maximum of 20 business days).

In the event of an obligation to provide information dating back five years, AFMA cautions that compliance with these time frames may be challenging, in particular where the responses are prepared by numerous individuals across different teams (e.g. Compliance, HR, Risk Management) whose primary functions constitute matters other than preparing responses to reference requests. Based on member feedback, AFMA would suggest the timeframe for the response to be provided should be set at 20 business days (instead of 10 business days) unless otherwise agreed by both parties up to a maximum of 25 business days.

For more information or if you have questions in relation to our letter please do not hesitate to contact me at [REDACTED].