

18 November 2020

Ms Danielle Press  
Commissioner  
Australian Securities and Investments Commission  
100 Market St  
Sydney NSW 2000

Dear Danielle

## **FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE) BILL 2020**

The Stockbrokers and Financial Advisers Association (SAFAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms which provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SAFAA is writing to you in relation to the matter of reference checking in the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (the Bill). We note that the Bill provides for the requirement for an Australian financial services licensee, as an obligation under their licence, to comply with reference checking and information sharing protocols will be made by ASIC in the form of legislative instruments under the Corporations Act.

SAFAA wishes to recommend a tested means of conducting reference checking that will protect consumers and not cause harm to financial advisers legitimately seeking new employment opportunities.

SAFAA expressed significant concern over the draft Bill issued earlier this year that proposed compelling the hiring licensee to request information from the adviser's current employer. We provide further detail about these concerns later in this submission, as we strongly recommend that ASIC *not* put in place the framework proposed by Treasury in the draft Bill. We hope that our detailing of the implications of the proposed framework in the draft Bill will clarify its defects.

### **SAFAA recommendation for reference checking framework**

SAFAA has for over a decade been prominent in calling for a Bad Apples framework to address the issue of advisers who have engaged in misconduct moving freely throughout the industry from employer to employer without any details of their previous record being available to investors or to licensees.

SAFAA recommends a central register of the information, which would be an extension of the ASIC Financial Adviser Register (FAR), and we strongly submit that this remains the preferable approach.

The model we recommend has a central source of information about the compliance record of an adviser, which is capable of being checked not only by prospective employers but also potentially by members of the public, who may be looking to see for themselves whether there is any issue with an adviser whom they are looking to entrust with their investment.

We note that the US has adopted this central repository approach. For many years now FINRA has administered a framework under which licensees and advisers are obliged to file reports of any compliance issues relating to advisers (and other relevant information). If an adviser leaves a firm, there is required to be lodged a form which will indicate whether there were any compliance issues in connection with the departure. The information is able to be searched by the public.

If this is a function that FINRA is able to carry out effectively in the US market, it is difficult to see why ASIC could not do so as an adjunct to the FAR in the Australian market. Alternatively, in the context of the separate question of consideration of a single disciplinary body to deal with financial advisers, which is the subject of Recommendation 2.10 of the Financial Services Royal Commission, if ASIC does not consider that it should perform this function, then this could be a function for any new disciplinary body.

SAFAA urges ASIC to adopt this approach. This would avoid the problems that we identify below with the compulsory reference checking framework proposed in the draft Bill.

### **Concerns with the framework proposed in the draft Bill**

The draft Bill was well-intentioned in its proposed framework of compulsory record checking provisions. However, SAFAA expressed significant concerns that there were serious issues with the framework, calling into question whether the framework could be effective.

#### **Potential for harm to the adviser**

There was a fundamental defect in the framework in that it compelled the hiring licensee to request information from the adviser's current employer. There is a real risk that this can expose the adviser to retribution or serious harm from the existing employer, if they were so minded. The fact is that not all employers will look favourably on an adviser seeking to leave their current position. Some employers may adopt a vindictive approach as soon as they become aware, and the adviser may suffer some form of retribution or dismissal. Firms may not always be motivated by ill-will, but in the case of advisers with a client base, a firm may view the prospective departure of an adviser, who may seek to take with them the clients they had been servicing, as a potential threat to their business, requiring steps to minimise any potential threat.

In the case of advisers who are currently not employed, these risks may not be great; however, the likelihood more often than not is that advisers will be looking to move while they are currently in employment. It is natural for any employee to look for opportunities that might be more rewarding, and it is also not uncommon for approaches to be initiated by other licensees looking to attract good advisers to change firms.

The enhanced breach reporting obligations set out in the Bill are of relevance to the question of reference checking. Given the more far-reaching regime of reporting "reportable situations", significant breaches and the commencement of investigations to ASIC that is in the Bill, then ASIC would be in an ideal position to maintain a searchable source of information about a whole range of compliance concerns about advisers.

In our view, this reinforces the model that SAFAA recommends, of there being a central source for enquiries rather than enquiries directed to the adviser's current employer.

#### **Consent by the adviser**

We note that the reference checking framework in the draft Bill made the information sharing dependent on the consent of the financial adviser.

On the one hand, SAFAA acknowledges that this could address the concerns that are raised above regarding potential harm to the adviser once the reference check is made. If an adviser believes that they may suffer harm, then they could decline to consent to the reference check.

However, there is a real uncertainty surrounding the question of consent, and what is to happen if an adviser were to refuse consent. This was left entirely silent in the draft Bill.

If it were the case that an adviser could simply refuse consent, then the entire scheme could potentially become ineffective.

If it is the case that a licensee who hired an adviser who had refused to give consent faced action from ASIC for a breach of its AFS licence for having done so, then this puts both the licensee and the adviser in a predicament. On the one hand, refusing consent for a reference check could be a red flag; on the other hand, in view of our comments above, there may be entirely reasonable fears that an adviser may have if they were to consent to a check. Quite simply, a licensee may not know one way or another whether the refusal to give consent is a red flag or not. If the only safe course for a licensee is to treat every refusal to give consent as being a red flag, then the end result of the reference checking framework could be to chain advisers to their current licensee for fear of the consequences if they were to seek a change in employment. Advisers who are being under-remunerated could lose the ability to seek better positions elsewhere, which would be unreasonable.

Once again, this question would disappear if the central repository approach which SAFAA recommends were to be adopted instead of the reference checking framework originally proposed in the draft Bill.

## Conclusion

SAFAA's members hope that our explanation as to why we strongly recommend a central register in order to ensure consumer protection and no harm to advisers legitimately seeking new employment opportunities finds favour with ASIC. Our members are more than happy to discuss our recommended framework with ASIC. Please let us know if you would like to meet to discuss this further.

Yours sincerely

A handwritten signature in black ink, appearing to be 'J Fox', written in a cursive style.

Judith Fox  
**Chief Executive Officer**

cc  
Joanna Bird, Executive Director, Financial Services & Wealth  
Kate Metz, Senior Executive Leader, Financial Advisers