

## Promoting good conduct and ethical behaviour

### Banking Industry Conduct Background Check Protocol

#### 1. Introduction

##### 1.1 Purpose

As an industry, we are working to increase protections for consumers, respond to community interests, increase transparency, and build trust and confidence.

There is an important public and community interest in improving practices to better identify poor conduct in the banking industry. The industry is also firmly committed to promoting ethical behaviour and increasing standards.

The Banking Industry Conduct Background Check Protocol (**protocol**) is intended to promote good conduct and ethical behaviour by formalising obligations for protocol Subscribers to ask a series of fact-based questions as part of the hiring process about whether the individual is subject to an ongoing Misconduct Investigation, or was dismissed or resigned in specific circumstances relating to Misconduct, so they can make their own informed recruitment decisions.

The protocol complements the Financial Adviser Reference Checking & Information Sharing Protocol,<sup>1</sup> which was created to promote improved reference checking during the recruitment of financial advisers.<sup>2</sup>

The protocol sets minimum standards for Subscribers regarding:

- A reciprocal obligation for Subscribers to request the Conduct Background Check for prospective Employees, and to respond to those requests for current Employees and former Employees who worked for the Subscriber at any time within the Request Period
- Standard format, process and timeframes for requesting and responding to Conduct Background Checks
- Fact-based, Conduct Background Check questions, and
- Related record keeping and confidentiality obligations.

This protocol does not specify processes or outcomes relating to appointing prospective employees, other than the requirements for the Conduct Background Check, and Subscribers acknowledge their legal obligation not to enter into any arrangement or understanding with each other about those matters.

##### 1.2 Definitions

**Affirmative Response:** A response where a Former Employer answers 'yes' to one or more of the Conduct Background Check questions in Appendix 1.

**Conduct Background Check:** A request for information as described in Appendix 1.

**Employee:** A person who was, is, or could be employed by a Subscriber in Australia and performing a role based in Australia, other than a person applying for a role as a financial adviser to which the Financial Adviser Reference Checking & Information Sharing Protocol applies.

**Former Employer:** A Subscriber, who is also the former or current employer of a prospective Employee.

<sup>1</sup> <http://www.bankers.asn.au/financial-advice>

<sup>2</sup> Persons providing personal advice on Tier 1 financial products.



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**Hiring Employer:** A Subscriber, who is considering employing, has made an offer of employment to, or has employed an Employee.

**Implementation Date:** In relation to each Subscriber, 1 July 2017 for phase 1 banks, and 1 October 2017 for phase 2 banks, and the date specified in the terms of subscribing for future Subscribers.

**Investigation:** A formal review into an allegation of Misconduct by an Employee, whether individually or as part of a group of employees, which has been notified to the Employee.

**Misconduct:** Any one or more of the defined categories of misconduct set out in Appendix 1.

**Request Period:** Up to 5 years preceding the date of the Conduct Background Check request.

**Subscriber:** An entity that has subscribed to the protocol in writing through the Australian Bankers' Association.

### 1.3 Subscription

The Australian Bankers' Association (**ABA**) will maintain and make publicly available the protocol, and the list of Subscribers.

The ABA will maintain a list of approved contact points from each Subscriber, accessible only by the Subscribers and other authorised agents, to facilitate the operation of the protocol.

### 1.4 Transition and Implementation Dates

The protocol is published on 9 June 2017 and commences on the Implementation Date.

Transitional provisions are set out in Appendix 1.

## 2. Subscriber obligations

The protocol will operate between Subscribers only. Subscribers will make reasonable endeavours to meet the requirements of the protocol to:

- Give and receive information, in accordance with the protocol procedures and timeframes, and
- Ensure that all internal policies and contractual arrangements entered into with Employees from the Implementation Date do not preclude the sharing of information in accordance with the protocol.

### 2.1 Scope of the protocol

The scope of the protocol is limited to requesting Conduct Background Checks in respect of prospective Employees and responding to Conduct Background Checks for current Employees or Employees who were employed at any time within the Request Period. The protocol is intended to supplement Subscribers' existing processes for reference checking and obtaining other information regarding a prospective Employee, for example, experience, qualifications, competency, and other background checks, such as police checks and qualification checks.

Subject to part 5.1, and the transitional arrangements set out in Appendix 1, the protocol requires the Former Employer to disclose to the Hiring Employer whether an Employee has, during their current employment or during the Request Period:

- Been dismissed as a result of Misconduct
- Resigned after the Employee had been notified by the Former Employer of an Investigation, or
- Been notified by the Former Employer of an Investigation where the Employee has not yet resigned or been dismissed.

The protocol does not include obligations on:



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- The criteria for hiring Employees
- Communicating the effect of the protocol to Employees, or
- Internal processes relating to employee relations, governance, risk or compliance processes.

## 2.2 Resourcing and key contact

All Subscribers must identify and notify the ABA of approved contact points (including authorised third party agents) that may request a Conduct Background Check, and the approved contact points that may receive a Conduct Background Check request.

Subscribers must keep the contact points (including authorised third party agents) up to date and accurate, and notify the ABA of any changes within a reasonable period.

Subscribers must only request and respond to Conduct Background Checks through the approved contact points.

## 3. Hiring Employer obligations

### 3.1 Obligation

Subject to the considerations in part 5, and the transitional arrangements set out in Appendix 1, the Hiring Employer must request the Conduct Background Check from Former Employers for final stage prospective Employees whether before or after an offer has been made to the prospective Employee.

The Hiring Employer must obtain the prospective Employee's consent, using the standard consent wording set out in Appendix 2, or other consent wording agreed between the Subscribers from time to time, and provide evidence of such consent to the Former Employer.

If an Affirmative Response to the Conduct Background Check request is provided by the Former Employer, the Hiring Employer may choose to seek further information from the prospective Employee. The Hiring Employer has the discretion to proceed with the recruitment of the prospective Employee.

Hiring Employers are responsible for ensuring compliance with their obligations under Australian Privacy Principle 5.

See also part 6 (record keeping) and part 7 (confidentiality).

## 4. Former Employer obligations

### 4.1 Obligation

Subject to the considerations in part 5, and the transitional arrangements set out in Appendix 1, the Former Employer must respond to a Conduct Background Check request.

Subject to the considerations in part 5, and the transitional arrangements set out in Appendix 1, all questions in the request must be answered (subject to the transitional arrangements) and they must be answered correctly at the time the response is given. Former Employers are not required by this protocol to provide any subsequent updates to their responses.

Former Employers are responsible for ensuring compliance with their obligations under Australian Privacy Principle 5.

See also part 7 (record keeping) and part 8 (confidentiality).

### 4.2 Responding to a request

In responding to a Conduct Background Check request under the protocol, the Former Employer must ensure that:



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- The Conduct Background Check questions are answered correctly at the time they are given.
- All of the Conduct Background Check questions are answered in writing (subject to the transitional arrangements). This protocol does not require the Former Employer to respond to any additional questions outside of those specified in the Conduct Background Check (although it may do so).
- Unless otherwise agreed between the Former Employer and Hiring Employer on a case by case basis, the response must be provided to the Hiring Employer within 10 business days from the date of the receipt of a complete Conduct Background Check request, including evidence of having obtained the prospective Employee's consent, using the standard consent wording set out in Appendix 2.

## 5. Operating and legal considerations

### 5.1 Responses

This protocol does not require a Former Employer to answer the questions in a Conduct Background Check if it forms the view that is unable to do so because:

- Of operational limitations of records held by the Former Employer
- Of legal obligations, including restrictions in an employment contract, deed or other legal documentation entered into prior to the Implementation Date
- Of legislative and regulatory obligations, including privacy, whistleblowing, tipping off, or
- Disclosure would be inconsistent with the *ABA's Guiding Principles – Improving Protections for Whistleblowers*.

If one of these circumstances applies, the Former Employer must respond to the request with “unable to respond”. The Hiring Employer should not draw any specific inference from that response.

### 5.2 Corporate groups

Subscribers who are part of a corporate group with significant parts of the corporate group not involved in retail banking business may choose to apply the protocol only to those Employees involved in the provision of banking services or the banking business of the group generally.

When determining how to apply the protocol, the corporate group should, at a minimum, take into account the branding of the business the Employee has worked in or will work in, reasonable consumer expectations and understanding of the place of that business in the corporate group, and the day to day tasks and activities of the Employee.

*For example:*

*ABC operates a retail bank, together with a large general insurance business and a superannuation fund. General insurance and superannuation represent the majority of ABC's business.*

*ABC intends to hire call centre operators to serve customers of the general insurance business. The general insurance business does not have the same brand as the retail bank. ABC decides not to apply the protocol to Employees who work in the general insurance call centre.*



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## 5.3 Application

Subscribers are expected to exercise judgment to avoid unintended outcomes, while maintaining the intent of the protocol. For example, records should be updated for future application of the Protocol if new information becomes available.

## 6. Updating records

Subscribers must have procedures in place to update their records based on new information or circumstances, such as a determination of a court or tribunal that there was no valid reason for the dismissal, or the evidence did not establish the person was guilty of the Misconduct.

If an Employee believes that the response to the Conduct Background Check request provided by the Former Employer is incorrect, they may request that the Former Employer correct the record in accordance with the Subscriber's relevant policy.

The Former Employer should consider whether the Conduct Background Check was undertaken in accordance with the requirements of the protocol, including whether the questions were answered correctly.

## 7. Record keeping

Subscribers must take all reasonable steps to maintain records that will enable them to demonstrate compliance with the requirements of the protocol and that those records be maintained for a period that is in line with a Subscriber's internal record keeping requirements.

Subscribers are responsible for ensuring they maintain records in accordance with their obligations under the *Privacy Act 1988*.

## 8. Confidentiality

Subscribers must maintain appropriate confidentiality in respect of information disclosed under the protocol.

Information collected by Subscribers will only be used for the Purpose and will be treated confidentially (unless disclosure is required or authorised by law or regulatory order, or the Employee consent to a particular disclosure).

In complying with this protocol, Subscribers must have regard to their legal obligations, including those under confidentiality arrangements and the *Privacy Act 1988*.

## 9. Implementation guidance

### 9.1 Systems, policies and processes

Subscribers may need to make changes to their existing hiring practices, internal systems and processes, and record keeping practices in order to implement the protocol. Subscribers may have in place policies and procedures, tools, templates, training and systems to enable compliance with the protocol.

Subscribers may develop their own internal policies and processes for investigations, including taking reasonable steps to complete an investigation after an Employee resigns where the subscriber considers it appropriate to do so; disciplinary / dismissal procedures; and hiring policy (other than the requirement to complete the Conduct Background Check).

Subscribers may need to make changes to their own internal policies and processes to communicate the effect of the protocol to Employees, in particular in relation to notifying Employees of the effect of resigning where an Investigation has been notified to them, but has not been completed.



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## 9.2 Resources

Staff and third parties responsible for the Conduct Background Check activities under the protocol should have access to required information, resources and systems, and be appropriately experienced and trained to meet the requirements of the protocol.

## 10. Document governance and review requirements

Version: 1.0

Owner: Australian Bankers' Association

Date published: 9 June 2017

Implementation Date: 1 July 2017

Next review date: 1 July 2018

The protocol will be reviewed periodically and updated for any changes in legal requirements and industry standards. As part of the review, the ABA will take into consideration feedback from Subscribers and other stakeholders in relation to the practical application and operationalisation of the protocol and the ability for non ABA members to subscribe to the protocol.

Subsequent reviews will be commenced by the next review date set out in the next version of the protocol.



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## Appendix 1 - Conduct Background Check

### Prospective Employee information

The Conduct Background Check must include the prospective Employee's full name, former name(s), and date of birth (as provided in each case by the prospective Employee).

When responding to a Conduct Background Check, the Former Employer must make sufficient enquiries to confirm the identity of the prospective Employee if necessary, including requesting more information from the Hiring Employer.

### Questions

- 1A. Was the person dismissed for Misconduct?
- 1B. If the answer to question 1A is yes, has there been a final determination from a court or tribunal that:
  - i) there was no valid reason for the dismissal, or
  - ii) the evidence did not establish the person was engaged in Misconduct?
- 2A. Did the person resign from their employment whilst the subject of an open and continuing Investigation into their alleged Misconduct of which they had been notified?  
  
\*If an investigation was concluded subsequent to the resignation of the employee and the allegation of Misconduct was not substantiated, answer "No" to Question 2A.
- 2B. Did the person resign from their employment after they were notified of a finding that they engaged in Misconduct following an Investigation but before any dismissal took effect?
- 2C. Is the person still employed but been notified by the employer of an Investigation into their alleged Misconduct and the investigation is still ongoing?
3. What is/was the category of actual or alleged Misconduct?

### Transitional arrangements

Each of the Conduct Background Check questions set out in Appendix 1 will apply to Conduct Background Checks covering dismissal or resignation that occurs after the Implementation Date.

For Conduct Background Checks covering dismissal or resignation that occurred before the Implementation Date, the Former Employer is only required to respond to questions 1A, 1B, 2C and 3.

If the transitional arrangements apply, the Former Employer must respond not applicable 'N/A' to questions 2A and 2B. The Hiring Employer should not draw any specific inference from that response.

### Misconduct

Misconduct means any one or more of the following types of actual or alleged conduct, that, if found may give the Employer a basis for dismissal:

- Fraud, bribery or corruption
- Material theft, including any theft directly against a customer
- Dishonesty in relation to the provision of financial and credit services and products, or market integrity requirements
- Material misuse of customer information, including but not limited to breaches of privacy, or using the information to derive a personal benefit, or any misuse that directly affects a customer's safety or the security of their financial transactions



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- Material breach of consumer protection laws, including the National Consumer Credit Protection Act, the Corporations Act and the Australian Securities and Investments Commission Act, or
- Material breach of internal policies that relate to customer outcomes or compliance with financial services laws, including laws regarding market integrity requirements.

## Definitions

**Material** means wilful, serious, deliberate or grossly negligent.





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## Appendix 2 – Standard candidate consent

### Conduct Background Check - Consent to the collection, use and disclosure of information

By applying for this position you consent to and expressly authorise:

- <<Subscriber>>, (which for the purposes of this consent includes any of its related entities) and any persons or organisations acting on its behalf, to collect and use; and
- any current or previous employers to disclose to <<Subscriber>>.

to use your personal information and information about your current or previous employment requested by <<Subscriber>> in accordance with the ABA’s Conduct Background Check Protocol (**Protocol**) for the purpose of <<Subscriber>> assessing your application for employment for this position and complying with the Protocol (**Purpose**).

You agree that the information that may be collected, used and disclosed includes, but is not limited to, information about whether you are currently subject to an investigation into alleged Misconduct against you or, if in the last five years, you were dismissed for Misconduct, or resigned when there were findings or outstanding Investigations of Misconduct against you.

“Misconduct” for the purpose of this consent means any one or more of the following types of actual or alleged conduct, that, if found may give the Employer a basis for dismissal:

- Fraud, bribery or corruption
- Material theft, including any theft directly against a customer
- Dishonesty in relation to the provision of financial and credit services and products, or market integrity requirements
- Material misuse of customer information, including but not limited to breaches of privacy, or using the information to derive a personal benefit, or any misuse that directly affects a customer’s safety or the security of their financial transactions
- Material breach of consumer protection laws, including the National Consumer Credit Protection Act, the Corporations Act and the Australian Securities and Investments Commission Act, or
- Material breach of internal policies that relate to customer outcomes or compliance with financial services laws, including laws regarding market integrity requirements.

"Material" for the purpose of this consent means wilful, serious, deliberate or grossly negligent.

Information collected by <<Subscriber>> will only be used by <<Subscriber>> for the Purpose and will be treated confidentially (unless disclosure is required or authorised by law or regulatory order, or you consent to a particular disclosure).

#### Declaration

I declare that I have read and understood the content of this consent form.

Full name (print):

\_\_\_\_\_

Signature:

\_\_\_\_\_

Date:

\_\_\_\_\_