



# ASIC

Australian Securities &  
Investments Commission

CONSULTATION PAPER 333

# Implementing the Royal Commission recommendations: Reference checking and information sharing

November 2020

## About this paper

This consultation paper seeks feedback on our proposed approach to implementing aspects of the law reform arising from Royal Commission Recommendations 1.6 and 2.7. These recommendations relate to the reference checking and information sharing protocol for financial advisers and mortgage brokers.

Note: Our proposed approach includes making an ASIC legislative instrument and issuing an information sheet. Draft versions of these documents are available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under [CP 333](#).

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 19 November 2020 and is based on the legislation as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive, or as other circumstances change.

# Contents

<b>Contents</b> .....	<b>3</b>
<b>The consultation process</b> .....	<b>4</b>
<b>A Background to the proposals</b> .....	<b>5</b>
The problem of ‘rolling bad apples’ .....	5
Royal Commission recommendations .....	7
Government response to Royal Commission .....	8
Our proposed approach .....	10
<b>B Proposed legislative instrument—Obligations for licensees</b> ...	<b>12</b>
Obligations for recruiting licensees .....	12
Obligations for referee licensees .....	22
Obligations for all licensees .....	27
<b>C Proposed legislative instrument—Template reference request</b> .	<b>32</b>
Background information on a prospective representative .....	32
Compliance audits of a prospective representative .....	33
Conduct of a prospective representative .....	35
Ongoing matters .....	37
<b>D Proposed information sheet</b> .....	<b>39</b>
Guidance for licensees .....	39
<b>E Regulatory and financial impact</b> .....	<b>40</b>
<b>Key terms</b> .....	<b>41</b>
<b>List of proposals and questions</b> .....	<b>44</b>

## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

Please note that the proposals in this paper are based on draft legislation and the proposals may change depending on the final form of the legislation.

As well as responding to the specific proposals and questions, please describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

See Section [E](#) for information on the regulatory and financial impact of these proposals. Your comments will help us refine our approach.

### Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous, we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 29 January 2021 to:

[referencechecking@asic.gov.au](mailto:referencechecking@asic.gov.au)

### What will happen next?

<b>Stage 1</b>	19 November 2020	ASIC consultation paper released
<b>Stage 2</b>	29 January 2021	Comments due on the consultation paper
<b>Stage 3</b>	June 2021	ASIC legislative instrument and information sheet released
<b>Stage 4</b>	1 October 2021	ASIC legislative instrument commences

## A Background to the proposals

### Key points

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) recommended that:

- Australian financial services licensees (AFS licensees) should be required to comply with a reference checking and information sharing protocol for financial advisers similar to the Australian Banking Association (ABA) *Reference checking and information sharing protocol* (ABA protocol) (Recommendation 2.7); and
- Australian credit licensees (credit licensees) should be bound by information sharing and reporting obligations relating to mortgage brokers similar to those referred to in Recommendation 2.7 for financial advisers (Recommendation 1.6).

To implement these recommendations, the Government has introduced the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Bill). If Parliament passes the Bill, ASIC will be given the power to make a legislative instrument to give effect to a reference checking and information sharing protocol for financial advisers and mortgage brokers.

This consultation paper seeks feedback on:

- ASIC's proposed legislative instrument which gives effect to the proposed ASIC *Reference checking and information sharing protocol* (ASIC protocol); and
- ASIC's proposed guidance on this protocol through an information sheet.

### The problem of 'rolling bad apples'

- 1 In the Royal Commission final report, Commissioner Hayne noted that AFS licensees are not doing enough to share information about the background of prospective financial advisers. They frequently fail to respond adequately to requests for references on their previous employees. Also, if they are the recruiting licensee, they do not always take the information provided to them by referees seriously enough.
- 2 The result is that financial advisers facing disciplinary action from their employer can shop around for another AFS licensee to employ them (leading to the problem of so-called 'rolling bad apples').

Note: See Royal Commission, [Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Final report](#), February 2019 (Royal Commission final report), vol. 1, pp. 82 and 202.

3 A lack of information sharing between AFS licensees can cause serious harm where consumers are exposed to a financial adviser who has a history of poor conduct. This exposure increases the risk of consumers receiving poor quality advice or other unsuitable services.

4 The findings in the Royal Commission final report were informed by ASIC's previous work on background checking of financial advisers by AFS licensees, including the failure to undertake appropriate background checks before appointing representatives.

### **Standards Australia handbook**

5 In October 2007, ASIC and Standards Australia jointly launched a handbook, *Reference checking in the financial services industry* (Standards Australia handbook), to encourage the financial services industry to complete reference checking to help identify dishonest, incompetent or unethical employees or representatives.

6 We developed the handbook with a panel of industry representatives to provide a framework for a reference checking process within the financial services industry.

7 The handbook aims to create a set of expectations about industry sharing of information about applicants and to ensure that reasonable, objective, factual and balanced information is provided for reference checks.

Note: See [Standards Australia handbook](#), p. 5.

### **ASIC Report 515**

8 In March 2017, ASIC released [Report 515](#) *Financial advice: Review of how large institutions oversee their advisers* (REP 515).

9 REP 515 highlighted the continuing deficiencies we observed in the background and reference checking processes of AFS licensees. These included a widespread failure to respond adequately to requests for information about former advisers. To assist industry, we set out a checklist of issues for AFS licensees to consider when conducting background checks on financial advisers.

Note: See [REP 515](#), Appendix 2.

### **ABA protocol**

10 The ABA protocol was introduced in September 2016 to improve reference checking during the recruitment of financial advisers and promote better information sharing about the performance history of financial advisers.

11 It is designed to contribute to improving the quality of financial advice received by consumers while managing the legal and operational risks for

AFS licensees who have subscribed to it (subscribing licensees). The ABA protocol builds on, and refers subscribing licensees to, the [Standards Australia handbook](#).

- 12 The ABA protocol sets minimum standards for subscribing licensees, including:
- (a) obligations for reciprocal information sharing;
  - (b) a standard process and timeframes for providing references and information;
  - (c) fact-based and data-based standard reference checking questions; and
  - (d) record-keeping obligations.
- 13 The scope of the ABA protocol is limited to reference checking and information sharing about an adviser's compliance, risk management and quality of advice. It is intended to sit alongside subscribing licensees' existing processes for reference checking and information sharing about an adviser's experience, qualifications and competency, and other background checks (e.g. police checks and qualification checks). A limited number of AFS licensees currently subscribe to the ABA protocol.

Note: See [ABA protocol](#), pp. 1–2.

## Royal Commission recommendations

- 14 To address the problem of insufficient reference checking and information sharing by AFS licensees, the Royal Commission recommended that AFS licensees should be required to comply with a reference checking and information sharing protocol for financial advisers to the same effect as provided by the ABA protocol: Recommendation 2.7.

Note: Recommendation 2.7 states that AFS licensees 'should be required, as a condition of their licence, to give effect to reference checking and information sharing protocols for financial advisers, to the same effect as now provided by the [ABA protocol]'. See [Royal Commission final report](#), vol. 1, p. 27.

- 15 Commissioner Hayne considered that mortgage brokers should be regulated in a similar way to financial advisers. Given this, the Royal Commission recommended that credit licensees should be required to comply with reference checking and information sharing obligations for mortgage brokers similar to those for financial advisers: Recommendation 1.6.

Note: Recommendation 1.6 states that credit licensees should 'be bound by information sharing and reporting obligations in respect of mortgage brokers similar to those referred to in Recommendations 2.7 and 2.8 for financial advisers; and take the same steps in response to detecting misconduct of a mortgage broker as those referred to in Recommendation 2.9 for financial advisers'. See [Royal Commission final report](#), vol. 1, pp. 81–2.

## Government response to Royal Commission

- 16 The Government agreed to implement Recommendations 1.6 and 2.7 as part of its response to the Royal Commission final report. In August 2019, the Government published its implementation roadmap setting out how it will deliver its comprehensive response to the Royal Commission.

Note 1: See Australian Government, [Restoring trust in Australia's financial system: The Government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#), February 2019, pp. 8 and 16.

Note 2: See Australian Government, [Restoring trust in Australia's financial system: Financial Services Royal Commission implementation roadmap \(PDF 491 KB\)](#), August 2019.

- 17 On 12 November 2020, the Government introduced the Bill and the accompanying Explanatory Memorandum into Parliament.

Note: See [Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) (PDF 1.28 MB) and the [Explanatory Memorandum](#) to the Bill (PDF 2.67 MB) (Explanatory Memorandum).

- 18 If the Bill is passed, ASIC will have the power to make a legislative instrument that implements aspects of Recommendations 1.6 and 2.7—specifically, the reference checking and information sharing protocol for financial advisers and mortgage brokers.

- 19 Consistent with the purpose of the Bill, the intention of the ASIC protocol is to promote better information sharing about the performance history of financial advisers and mortgage brokers—focusing on compliance, risk management and quality of advice.

- 20 Requiring all AFS licensees and credit licensees (together, 'licensees') to comply with the ASIC protocol will ensure there is a consistent practice throughout the advice and mortgage broking sectors, and that employment information will be available about all financial advisers and mortgage brokers.

Note: See [Explanatory Memorandum](#), paragraphs 10.7 and 10.13.

### Current law

- 21 Section 912A of the *Corporations Act 2001* (Corporations Act) requires AFS licensees to implement adequate monitoring and supervision processes, to provide financial services efficiently, honestly and fairly, and to ensure that their representatives provide financial services that comply with the financial services laws. Similar obligations apply to credit licensees under s47(1) of the *National Consumer Credit Protection Act 2009* (National Credit Act).

- 22 We consider that undertaking appropriate background and reference checks of representatives is an essential element of a licensee's general obligations under the current legislation.

- 23 [Regulatory Guide 104](#) *Licensing: Meeting the general obligations* (RG 104) sets out our expectations of AFS licensees’ monitoring and supervision measures, including background and reference checking. [Regulatory Guide 205](#) *Credit licensing: General conduct obligations* (RG 205) sets out similar expectations for credit licensees.

### **Obligation to comply with the ASIC protocol**

- 24 To give effect to Royal Commission Recommendations 1.6 and 2.7, the Bill sets out a licensee’s obligation to undertake reference checking and information sharing. This obligation will apply from 1 October 2021.
- 25 Licensees will be required, as a specific obligation under their licence, to comply with the ASIC protocol.
- 26 Licensees will be required to check references and share information about individuals to whom the ASIC protocol applies—either by requesting or providing information about the individual (who is the prospective representative).
- 27 Specifically, a licensee must comply with the obligation in relation to:
- (a) a former, current or prospective representative of a licensee (e.g. a representative of a licensee that is seeking employment with another licensee as a financial adviser or mortgage broker); and
  - (b) a licensee who is an individual (i.e. a current licensee who is seeking to work for another licensee as a financial adviser or mortgage broker representative).
- 28 The ASIC protocol will apply to a prospective representative where there are reasonable grounds to suspect that, if they are successful in obtaining the job they seek, they will provide:
- (a) personal advice to retail clients about relevant financial products as a representative of an AFS licensee; or
  - (b) credit assistance in relation to credit contracts secured by mortgages over residential property as a mortgage broker representative of a credit licensee.
- 29 In this paper, a ‘prospective representative’ may include:
- (a) a current or former representative of a licensee who has engaged in financial advice or mortgage broking activity and is seeking to act in the same capacity for another licensee;
  - (b) a current or former representative of a licensee who has engaged in other activities for the licensee (e.g. general customer service, para-planning, collections, bank-teller activities) and is seeking to become a financial adviser or mortgage broker;
  - (c) a current or former financial adviser representative who is seeking to become a mortgage broker representative;

- (d) a current or former mortgage broker representative who is seeking to become a financial adviser representative; and
- (e) a person who is a current licensee in their own right and who is seeking to become a financial adviser or mortgage broker representative of a licensee.

30 The Bill provides that ASIC may determine arrangements in the ASIC protocol for licensees to share information about a prospective representative with another licensee.

#### **Non-compliance with the ASIC protocol**

31 Under the Bill, licensees who contravene the obligation to comply with the ASIC protocol will be subject to a civil penalty.

32 ASIC may also take administrative action if a licensee does not comply with the ASIC protocol, which could include suspending or cancelling the licence or imposing additional licence conditions.

Note: See [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151).

#### **Defence of qualified privilege**

33 The Explanatory Memorandum states that it is essential to the operation of the reference checking and information sharing obligations that licensees share information honestly and frankly. For this reason, the Bill provides that the defence of qualified privilege will apply to a licensee who shares information about a prospective representative in accordance with the ASIC protocol.

34 Further, licensees will not be liable for breaches of confidence in relation to any action they take in accordance with the ASIC protocol.

Note: See [Explanatory Memorandum](#), paragraphs 10.42–10.45 and 10.77–10.80. See also s912A(3F) and 912A(3G) of the Corporations Act and s47(3F) and 47(3G) of the National Credit Act (inserted by Sch 10, items 5 and 14 of the Bill).

## **Our proposed approach**

### **Legislative instrument**

35 We intend to exercise ASIC's powers under proposed s912A(3A) of the Corporations Act and s47(3A) of the National Credit Act to prescribe obligations in a legislative instrument to give effect to a reference checking and information sharing protocol for financial advisers and mortgage brokers.

Note: Section 912A(3A) of the Corporations Act and s47(3A) of the National Credit Act are inserted by Sch 10, items 5 and 14 of the Bill.

36 The legislative instrument we intend to make is Draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument

2020/XX (proposed legislative instrument): see Attachment 1 to this paper. The instrument gives effect to the ASIC protocol.

Note: The proposed legislative instrument at Attachment 1 is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under [CP 333](#).

- 37 In developing the proposed reference checking and information sharing obligations in the ASIC protocol, we have:
- (a) given effect to Recommendations 1.6 and 2.7 of the Royal Commission final report;
  - (b) sought to promote the regulatory objects and purposes of the Corporations Act and the National Credit Act;
  - (c) drawn on the [ABA protocol](#) as a set of minimum requirements for reference checking and information sharing in the financial advice and mortgage broking industries;
  - (d) drawn on the [Standards Australia handbook](#), which provides a framework for improved reference checking of employees in the financial services industry more broadly; and
  - (e) drawn on ASIC's existing guidance, including [RG 104](#), [RG 205](#) and [REP 515](#), which consider the conduct and competency of financial advisers and the general obligations of licensees.
- 38 The proposed legislative instrument has been prepared based on the Bill currently before Parliament. If the Bill is amended by Parliament, we will consider the amendments and make any necessary changes to the proposed instrument. In Section [B](#) of this consultation paper we seek feedback on the obligations for licensees under the proposed instrument, and in Section [C](#) we seek feedback on the template reference request.
- 39 Our aim is to sign and register the final legislative instrument in June 2021. This timing gives industry more certainty before the legislation comes into effect on 1 October 2021.

### Guidance for licensees

- 40 We are proposing to issue an ASIC information sheet to give guidance on the reference checking and information sharing obligations in the ASIC protocol: see Attachment 2 to this paper. We seek feedback on the proposed information sheet in Section [D](#) of this consultation paper.

Note: The proposed information sheet at Attachment 2 is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under [CP 333](#).

- 41 The explanatory statement that will accompany our final legislative instrument will also provide guidance on the instrument.
- 42 We will also make any necessary consequential amendments to ASIC regulatory guidance before the ASIC protocol takes effect on 1 October 2021. For example, we will update [RG 104](#) and [RG 205](#), as well as other regulatory guidance and resources.

## B Proposed legislative instrument—Obligations for licensees

### Key points

We propose to issue a legislative instrument to give effect to the reference checking and information sharing obligations that licensees must fulfil under the ASIC protocol.

This section seeks feedback on the proposed obligations for licensees under the ASIC protocol in relation to a prospective representative.

It includes our proposals on:

- obligations for recruiting licensees (see Proposals B1–B7);
- obligations for referee licensees (see Proposals B8–B10); and
- obligations for all licensees (see Proposals B11–B16).

### Obligations for recruiting licensees

**Table 1: Summary of proposed obligations for recruiting licensees**

Proposed obligation	Summary
Taking reasonable steps to obtain a reference: see Proposals B1 and B2	<p>A recruiting licensee must take reasonable steps to obtain a reference about a prospective representative from the referee licensee(s).</p> <p>A recruiting licensee may give consent to a corporate representative to sub-authorise an individual or class of individuals as a representative of the licensee under s916B(3) of the Corporations Act or s65(4) of the National Credit Act.</p> <p>For reference checking purposes, the recruiting licensee is taken to be considering authorising each sub-authorised individual as a prospective representative of the licensee. Therefore, the recruiting licensee must take reasonable steps to conduct reference checking in accordance with the protocol for each sub-authorised individual.</p>
Seeking consent of prospective representative: see Proposal B3	<p>A recruiting licensee must seek the written consent, using the template consent form, of a prospective representative to undertake reference checking.</p> <p>Note: The template consent form is in Sch 1 to the proposed legislative instrument.</p>
Requesting a reference: see Proposal B4	<p>A recruiting licensee must make a written request, using the template reference request, to a referee licensee to answer the template reference questions about a prospective representative.</p> <p>Note: The template reference request is in Sch 2 or Sch 3 to the proposed legislative instrument.</p>
Additional requests for a reference from the same licensee: see Proposal B5	<p>A recruiting licensee may make more than one request to a referee licensee for a reference about a prospective representative (with additional requests being covered by the ASIC protocol as if they were the original request for a reference).</p>

Proposed obligation	Summary
Additional references from other licensees: see Proposal B6	A recruiting licensee may seek additional references in accordance with the ASIC protocol from former licensee(s) that employed or authorised a prospective representative in the five years before a request for a reference is made.
No limitation on requesting additional information: see Proposal B7	Nothing in the ASIC protocol limits or prevents a recruiting licensee from requesting information that is additional to the information sought under the ASIC protocol (e.g. other background checks) about a prospective representative from a referee licensee. However, the additional information requested must not reduce the scope of any of the questions in the template reference request.

## Taking reasonable steps to obtain a reference

### Proposal

- B1** We propose to require a recruiting licensee to take reasonable steps to obtain a reference about a prospective representative from:
- (a) if the prospective representative is a *representative of a current licensee* and, when a request for a reference is made, has been a representative of that licensee for:
    - (i) 12 months or more—that licensee; or
    - (ii) less than 12 months—that licensee and the most recent former licensee (if any) in the five years before a request for a reference;
  - (b) if the prospective representative is not a representative of a current licensee, but was a *representative of the most recent former licensee* for:
    - (i) 12 months or more in the five years before a request for a reference—that licensee;
    - (ii) less than 12 months—the two most recent former licensees (if applicable) in the five years before a request for a reference; and
  - (c) if the prospective representative is a *current licensee*—that licensee (i.e. themselves).

Note 1: A 'former licensee' is a licensee for which an individual described in s912A(3A) of the Corporations Act or s47(3A) of the National Credit Act was a representative for any period in the five years before a request for a reference but who is no longer a representative of that licensee.

Note 2: If a prospective representative is a representative of two or more current licensees, the referee licensee must request a reference from each of these current licensees.

*Your feedback*

- B1Q1 Do you agree with our proposal? If not, why not?
- B1Q2 Do you think the obligation should be limited to obtaining a reference from the current licensee or—if a prospective representative is not currently with a licensee—their most recent former licensee in the five years before a request? If so, please give reasons why.
- B1Q3 Do you think the obligation should be extended to all former licensees who employed or authorised the prospective representative in the five years before the request? If so, please give reasons why.
- B1Q4 If the prospective representative is a current licensee, do you think the recruiting licensee should be obliged to obtain a reference from them? If not, why not?
- B1Q5 Do you think a recruiting licensee should be able to obtain from a current or most recent former licensee previous references provided to them under the ASIC protocol? If so, should a recruiting licensee still be required to obtain a reference directly from the additional licensee(s) about the prospective representative?

- B2** A recruiting licensee may give consent to a corporate representative to sub-authorise an individual or class of individuals as a representative of the licensee under s916B(3) of the Corporations Act or s65(4) of the National Credit Act. For reference checking purposes, we propose that the recruiting licensee is taken to be considering authorising each individual as a prospective representative of the licensee. Therefore, the recruiting licensee must take reasonable steps to conduct reference checking in accordance with the protocol for each sub-authorised individual.

*Your feedback*

- B2Q1 Do you agree with our proposal? If not, why not?

**Rationale**

- 43 Reference checking is one part of the screening process that a licensee should undertake when deciding whether to employ or authorise a prospective representative.

Note: See [RG 104](#) and [RG 205](#).

- 44 We consider that the proposed obligation that a licensee take reasonable steps to obtain references from current and former licensees in specified circumstances promotes the underlying policy objective of the ASIC protocol.

- 45 We propose that the ASIC protocol applies in relation to a prospective representative who:

- (a) is currently a representative of a licensee;

- (b) was formerly a representative of a licensee for any period in the five years before a request for a reference; or
- (c) is currently a licensee.

46 Proposal B1(c) reflects the Bill and Explanatory Memorandum, which contemplate that a recruiting licensee should seek a reference from a licensee who is a prospective representative. While it is not common practice for a person to provide their own reference, we consider that such a reference will still have some benefit. It will, in effect, be a declaration by the prospective representative about their previous conduct. A civil penalty will apply to any false declarations.

47 To ensure that appropriate reference checking is undertaken no matter how a representative is appointed, we propose that the obligation to take reasonable steps will apply where:

- (a) a licensee directly authorises a representative; and
- (b) a corporate representative, with a licensee's consent, sub-authorises an individual under s916B of the Corporations Act or s65 of the National Credit Act.

48 In both these situations, the recruiting licensee must take reasonable steps to obtain a reference about the prospective representative. This could include authorising a representative as an agent to obtain a reference in accordance with the ASIC protocol.

49 Where a corporate representative sub-authorises an individual to provide personal advice or a mortgage broking activity, it will be for the licensee to determine whether the licensee or the corporate representative undertakes the reference checking in accordance with the ASIC protocol. Licensees must take reasonable steps to ensure that their representatives comply with financial services and credit laws, including compliance with the ASIC protocol.

*What period of conduct is covered?*

50 Under the ABA protocol, a subscribing licensee only needs to contact another subscribing licensee who currently employs or authorises, or previously employed or authorised, the financial adviser. The licensee may also consider contacting all the other licensees who employed or authorised the financial adviser in the last five years.

51 However, we think that a current licensee cannot provide a sufficient picture of a prospective representative's past conduct and performance history if they have employed or authorised them for only a short time.

52 Our proposed obligation ensures that, in these circumstances, a recruiting licensee must obtain information from the most recent former licensee who employed or authorised a prospective representative, to obtain a fuller sense of the representative's conduct and performance history.

53 The obligation sets minimum requirements to obtain references. A recruiting licensee may also wish to seek references from additional licensees: see Proposal B6.

*What are reasonable steps?*

54 Taking ‘reasonable steps’ to obtain a reference about a prospective representative includes:

- (a) seeking the written consent of the prospective representative in accordance with the ASIC protocol (see Proposal B3); and
- (b) if the consent is obtained—requesting a reference from a referee licensee(s) in accordance with the ASIC protocol (see Proposal B4).

55 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.

56 The ASIC protocol also does not prohibit a recruiting licensee from employing or authorising a representative where the recruiting licensee has taken reasonable steps and the referee licensee fails to comply with their obligation to provide a reference, or where the recruiting licensee receives adverse information about a prospective representative in a reference. In these circumstances, the recruiting licensee should consider how they will comply with their general conduct obligations if they decide to employ or authorise the prospective representative.

57 For example, licensees will need to ensure that the prospective representative is adequately trained, is competent and complies with the relevant legislation. This may require the licensee to undertake additional background checks or assessments before employing or authorising the prospective representative if a reference is not available, as well as additional monitoring and supervision after they are employed or authorised.

Note: See [RG 104](#) and [RG 205](#) for guidance on the obligations of an AFS licensee and credit licensee, respectively, for supervising and monitoring representatives.

*No specified time for obtaining references*

58 The ABA protocol does not specify when, or at what stage, during the recruitment process for a financial adviser, a licensee should undertake a reference check.

- 59 We do not propose to prescribe a specific time during the recruitment process when a licensee is to obtain a reference about a prospective representative. This is to balance the interests of representatives who may have concerns about their current licensee prematurely becoming aware that they are seeking alternative employment.

## Seeking consent of prospective representative

### Proposal

**B3** We propose that:

- (a) before requesting a reference from a referee licensee, a recruiting licensee must seek a prospective representative's written consent, using the template consent form, to:
  - (i) collect, use, disclose and store the prospective representative's personal information for the purpose of the recruiting licensee considering their suitability for employment or authorisation as a representative under s912A(1)(cc) of the Corporations Act or s47(1)(ea) of the National Credit Act and the ASIC protocol; and
  - (ii) collect, use, disclose and store their personal information from referee licensees, being one or more of the current and/or former licensees to whom they are or were a representative;
- (b) a recruiting licensee that has not obtained the written consent of a prospective representative, or has obtained written consent which the prospective representative has subsequently withdrawn in writing, must not request a reference from a referee licensee about the prospective representative; and
- (c) a recruiting licensee must give a written notice to the referee licensee if the prospective representative has withdrawn their consent after a reference has been requested but before it is given.

Note: The template consent form is in Sch 1 of the proposed legislative instrument.

#### *Your feedback*

- B3Q1 Do you agree with our proposal? If not, why not?
- B3Q2 Do you think ASIC should prescribe a consent form? If not, why not?
- B3Q3 Should the template consent form prescribed by ASIC require any further information to be disclosed to the prospective representative so they are better informed in providing consent? If so, what other information should be required?
- B3Q4 Will this proposed obligation to obtain and provide written consent cause practical problems for licensees during the recruitment process? If so, please outline these problems and set out any views on how ASIC or industry can address these problems.

## Rationale

60 Under the Bill, the ASIC protocol must not require or permit personal information, within the meaning of the *Privacy Act 1988* (Privacy Act), to be shared other than with the consent of the individual to whom the information relates.

Note: See s912A(3B)(a) of the Corporations Act and s47(3B)(a) of the National Credit Act (inserted by Sch 10, items 5 and 14 of the Bill).

61 We propose to impose this obligation to seek consent consistently with the Bill and the Australian Privacy Principles.

62 Under the Australian Privacy Principles guidelines (APP guidelines), consent must be given for a specific purpose, and information must only be shared where it falls within the scope of that purpose. We intend that information collected by a recruiting licensee must only be disclosed for the purpose of reference checking under the ASIC protocol.

Note: See Office of Australian Information Commissioner (OAIC), [APP guidelines](#), July 2019, paragraph B.35.

63 In line with the APP guidelines, an individual may withdraw their consent at any time. To minimise the likelihood of any disputes over whether consent has been withdrawn, we propose that consent must be withdrawn in writing. This would include withdrawing the consent by email.

Note: See [APP guidelines](#), July 2019, paragraphs B.48–B.51.

### *Template consent form*

64 Our template consent form is modelled on the consent developed for the purpose of the ABA protocol. We have prescribed a standard consent form under the ASIC protocol because it will:

- (a) promote standardisation across the industry, noting that obtaining consent formalises a practice that is standard across a wide range of industries and professions; and
- (b) ensure that the privacy protections under s912A(3B) of the Corporations Act, s47(3B) of the National Credit Act and the relevant consent-related Australian Privacy Principles are met by licensees requesting references under the ASIC protocol.

## Requesting a reference

### Proposal

**B4** We propose that a recruiting licensee:

- (a) must make a written request, using the template reference request, to a referee licensee to answer the template reference questions about a prospective representative;

- (b) must give a copy of the written consent from the prospective representative to the referee licensee at the time of making a request for a reference; and
- (c) may make minor amendments to the form of the template reference request when seeking a reference from a referee licensee, provided the request for a reference still includes all the information required by the template.

Note: The template reference request is in Sch 2 or Sch 3 to the proposed legislative instrument.

*Your feedback*

B4Q1 Do you agree with our proposal? If not, why not?

B4Q2 Should the protocol require a request for a reference to include any other information? If so, what other information should be required?

**Rationale**

65 The proposal that a reference request must be in writing, using the template reference request, is consistent with the ABA protocol. The ABA protocol requires subscribing licensees to answer a set of template questions about a prospective financial adviser in its industry reference checking form: see Appendix A to the ABA protocol.

66 We consider that the template reference request will give industry certainty and ensure consistency when reference checking prospective representatives. We also consider that it will help licensees maintain accurate records and reduce the risk that information requested will fall outside the privacy consent given: see paragraphs 81–84 of this paper.

Note: See Section [C](#) of this consultation paper on our proposed template reference request in Sch 2 and Sch 3 to the proposed legislative instrument.

67 The proposal that recruiting licensees must provide a prospective representative’s written consent to a referee licensee when they are requesting a reference is to ensure that personal information is being handled consistently with the consent given and that the required privacy protections are in place.

68 Our proposal that recruiting licensees may make minor amendments to the format of the template reference request is to ensure that minor or immaterial changes to the format do not amount to a breach of the ASIC protocol. However, a recruiting licensee must not amend or alter any of the questions.

## Additional requests for a reference from the same licensee

### Proposal

**B5** We propose that a recruiting licensee may make more than one request to a referee licensee for a reference about a prospective representative (with additional requests being covered by the ASIC protocol as if they were the original request for a reference).

#### *Your feedback*

B5Q1 Do you agree with our proposal? If not, why not?

### Rationale

- 69 Before a recruiting licensee decides to offer employment or appoint a prospective representative, the licensee may wish to request more than one reference by making additional requests for a reference or seek clarification from a referee licensee about information they gave in a reference in response to questions in the template reference request.
- 70 Any request made by a recruiting licensee for more than one reference must comply with the requirements of the ASIC protocol.
- 71 As discussed in paragraphs 33–34 of this paper, the defence of qualified privilege applies to a referee licensee who is obliged to provide a reference in accordance with the ASIC protocol. The defence extends to information shared in response to additional requests from the same recruiting licensee, where the request and reference are made in accordance with the ASIC protocol.
- 72 When giving an additional reference, a referee licensee will need to provide a new reference which provides a complete response to all questions in the template reference request, including any additional clarification or details they can provide within the scope of the questions. A referee licensee will not be able to simply rely on, or refer to, the response they provided in their original reference.

## Additional references from other licensees

### Proposal

**B6** We propose that a recruiting licensee may seek additional references in accordance with the ASIC protocol from former licensee(s) that employed or authorised a prospective representative in the five years before a request for a reference is made. A former licensee(s) must give answers to the questions in the template reference request.

#### *Your feedback*

B6Q1 Do you agree with our proposal? If not, why not?

### Rationale

- 73 A recruiting licensee may wish to contact all of the prospective representative's former licensees within the last five years to obtain references, in addition to the minimum requirement to obtain references from certain licensees: see Proposal B1.
- 74 They may wish to obtain a more comprehensive picture of a prospective representative's conduct and performance over a longer period. This may highlight, for example, any systemic issues relating to the prospective representative, including repeated conduct or performance issues that demonstrate the prospective representative is not responding to remedial action.
- 75 The defence of qualified privilege will extend to information shared by a former licensee in response to voluntary additional requests by a recruiting licensee, provided the requests are made by the recruiting licensee in accordance with the ASIC protocol.

### No limitation on requesting additional information

#### Proposal

- B7 We propose that nothing in the ASIC protocol limits or prevents a recruiting licensee from requesting additional information about a prospective representative from a referee licensee (e.g. other background checks), provided that the additional information requested does not reduce the scope of any of the questions in the template reference request.

*Your feedback*

B7Q1 Do you agree with our proposal? If not, why not?

### Rationale

- 76 [RG 104](#) and [RG 205](#) set out our expectations of licensees' monitoring and supervision measures, including appropriate background checks they should undertake before appointing new representatives. Recruiting licensees may therefore wish to request from a referee licensee information about a prospective representative that is additional to the information provided in the template reference request (e.g. information based on [Part B of the Standards Australia handbook](#)).
- 77 The defence of qualified privilege does not apply to any information that a referee licensee gives to a recruiting licensee about a prospective representative that is in addition to the information provided in the template reference request.

## Obligations for referee licensees

**Table 2: Summary of proposed obligations for referee licensees**

Proposed obligation	Summary
Giving references: see Proposal B8	Where a recruiting licensee has requested a reference about a prospective representative in accordance with the ASIC protocol, the referee licensee must give a response in writing to all questions in the template reference request. The response must be given within 10 business days of the request, or a longer period where agreed between the recruiting licensee and referee licensee (but no more than 20 business days).
Updating a reference: see Proposals B9 and B10	<p>A referee licensee must update a reference they have given to a recruiting licensee, if the initial reference includes information about or reference to outstanding compliance audit issues, unresolved client complaints or ongoing investigations. The referee licensee must do this as soon as reasonably practicable:</p> <ul style="list-style-type: none"> <li>• after the matter is resolved; or</li> <li>• where the matter has not been resolved within six months of the date on which the initial reference was given by the referee licensee—at the end of that six-month period.</li> </ul> <p>The obligation to update a reference does not apply to a referee licensee in certain circumstances.</p>

### Giving references

#### Proposal

- B8** We propose that where a recruiting licensee has requested a reference about a prospective representative in accordance with the ASIC protocol, the referee licensee must give—within 10 business days of the request, or a longer period where agreed between the recruiting licensee and referee licensee, but no more than 20 business days:
- all information that they are aware of and reasonably consider to be relevant to answer the questions in the template reference request;
  - a response that is complete, accurate and based on documented facts; and
  - a response in writing to all the questions in the template reference request, and—if a question cannot be answered—a written explanation as to why the question cannot be answered.

#### *Your feedback*

B8Q1 Do you agree with our proposal? If not, why not?

B8Q2 Should we allow verbal responses to be given under the ASIC protocol? If so, why? How would the licensees manage the potential risks associated with the provision of verbal references?

B8Q3 Are there other ways to facilitate references being given by referee licensees under the protocol? If so, please explain.

## Rationale

78 A referee licensee is only required to give information they are aware of and reasonably consider to be relevant to answer the questions in the template reference request. For example, they are not obliged to provide additional information requested by a recruiting licensee which is not covered by the template reference request.

Note: The referee licensee must not give the recruiting licensee a reference if the recruiting licensee has not provided (in accordance with Proposal B4(b)) a copy of the written consent of the prospective representative or has given written notice to the referee licensee (in accordance with Proposal B3(c)) that the prospective representative has withdrawn their consent.

### *Response in writing*

79 Our proposal to require referee licensees to respond in writing to the questions in the template reference request is consistent with the ABA protocol. We consider this requirement for written responses will help licensees maintain accurate records of references given and received.

80 In our view, verbal reference requests and responses would present a higher compliance burden, as both recruiting and referee licensees would need to keep consistent, timely and accurate file notes. We also consider that providing responses in writing reduces the risk that referee licensees will give information that falls outside the privacy consent given or the scope of the template reference request.

### *Nature of information to be given*

81 Under the ABA protocol, a response to a reference request must be based on 'ascertainable facts'. We similarly intend for a response from a referee licensee to be complete, accurate and based on documented facts that have been verified. Information should be objective and relevant to both the role and the information required by the template reference request.

82 In responding to requests, a referee licensee should provide information that is factual. The licensee should avoid subjective information or opinions about the prospective representative's reputation or character and should ensure that any information provided can be substantiated.

83 The information a referee licensee provides should be complete and up-to-date, accurately addressing current circumstances and historical performance.

84 Providing information of this nature should prevent spurious or vexatious matters being included in a reference.

*Timeframe*

85 Consistent with the ABA protocol, a referee licensee must provide a response within 10 business days of a request being made by a recruiting licensee, unless a longer period is agreed to between the licensees. The maximum limit of 20 business days is to ensure references are given in a reasonable period of time.

*Information given by ASIC about a representative*

86 If we consider it appropriate to do so, ASIC may give information to licensees about a person who we believe is, or will be, a representative of the licensee: see s916G of the Corporations Act and s73 of the National Credit Act.

87 The reference checking and information sharing obligations are not intended to alter the restrictions on the disclosure of information provided by ASIC under these legislative provisions.

88 For the avoidance of doubt, under the ASIC protocol, a referee licensee that has received information from ASIC about the prospective representative under s916G of the Corporations Act or s73 of the National Credit Act is not required to share this information with another licensee in fulfilling their reference checking and information sharing obligations.

89 Section 916G of the Corporations Act and s73 of the National Credit Act do not allow for licensees to share information received under those provisions when sharing information with other licensees under the ASIC protocol.

Note: See [Explanatory Memorandum](#), paragraphs 10.40–10.41 and 10.75–10.76.

*Conduct that occurred more than five years ago*

90 Section 912A(3B) of the Corporations Act and s47(3B) of the National Credit Act provide that the ASIC protocol must not ‘require information to be shared in relation to conduct that occurred more than five years before the information is shared’.

91 Our proposal reflects this and adopts the requirement from the ABA protocol that a referee licensee is not obliged to give information about conduct of the prospective representative that occurred more than five years before the reference is given to the recruiting licensee: see Question 1(a) in Table 4.

Note: Section 912A(3B) of the Corporations Act and s47(3B) of the National Credit Act are inserted by Sch 10, items 5 and 14 of the Bill.

92 We note the Explanatory Memorandum states that licensees may voluntarily provide relevant information about conduct that occurred more than five years ago. For example, it may be that a significant period passes before a complaint is made about an adviser or mortgage broker’s alleged misconduct and for investigations to commence, or that a pattern of conduct exists over more than five years. Information that is provided voluntarily in this way is not protected by the defence of qualified privilege.

Note: See [Explanatory Memorandum](#), paragraphs 10.39 and 10.74.

## Updating a reference

### Proposal

**B9** We propose that:

- (a) a referee licensee must update a reference given to a recruiting licensee if the initial reference includes information about or refers to:
  - (i) outstanding compliance audit issues identified in the last or previous audits for the prospective representative;
  - (ii) unresolved client complaints recorded in relation to the prospective representative; or
  - (iii) an ongoing investigation by the referee licensee in relation to the prospective representative; and
- (b) a referee licensee must give the recruiting licensee an updated reference by including updated answers to the questions in the template reference request:
  - (i) as soon as reasonably practicable following resolution of a matter mentioned in paragraph (a)(i), (ii) or (iii); or
  - (ii) where the matter has not been resolved within six months of the date on which the initial reference was given by the referee licensee—at the end of that six-month period.

#### *Your feedback*

B9Q1 Do you agree with our proposal? If not, why not?

B9Q2 Is the proposed six-month timeframe for an updated reference appropriate? If not, what timeframe would be appropriate?

**B10** We propose that the obligations do not apply to a referee licensee where any of the following apply:

- (a) the recruiting licensee's licence has been suspended or cancelled;
- (b) the recruiting licensee has notified the referee licensee in writing that they no longer propose to employ or authorise the prospective representative;
- (c) the prospective representative is no longer employed by the recruiting licensee; or
- (d) the prospective representative has withdrawn their consent.

#### *Your feedback*

B10Q1 Do you agree with our proposal? If not, why not?

### Rationale

93

The ABA protocol allows a recruiting licensee to make additional requests after a financial adviser has been appointed about the updated status of an inquiry or investigation which was in progress at the time the original reference was given.

- 94 The Explanatory Memorandum states that, in some circumstances, a prospective representative may be appointed to a relevant role before a current or former employer provides a complete reference to the new employer. This may occur, for example, where:
- (a) a current or former employer informs a new prospective employer that an investigation, inquiry or compliance audit is underway, or an unresolved complaint has been raised, in relation to conduct of the individual; and
  - (b) the new employer appoints the prospective representative before the investigation, inquiry or audit is completed or the complaint is resolved.

95 In these circumstances, because the application of the reference checking and information sharing obligation was triggered by the prospective employment of the individual, it continues to apply to require complete reference information to be given on the outcome of the investigation, inquiry or audit once it is finalised, even if the individual has already been employed in the new role.

Note: See [Explanatory Memorandum](#), paragraphs 10.22–10.23 and 10.57–10.58.

96 We propose that the referee licensee’s obligation to provide a reference is not fully discharged until the licensee has given an update on any matters which were not finalised at the time they gave the initial reference. If there are any ongoing matters when the initial reference is given, a referee licensee must provide an updated reference as soon as reasonably practicable following finalisation of the matter, or within six months of the initial reference if the ongoing matter has not been resolved within that time.

97 We do not propose to impose an ongoing obligation on a referee licensee to update a reference they gave to a recruiting licensee. We think a time limit of six months from the date of the initial reference is a reasonable period of time to provide relevant information.

98 The referee licensee will not be required to give an updated reference if the recruiting licensee has given written notice to the referee licensee that the prospective representative has withdrawn their consent.

## Obligations for all licensees

**Table 3: Summary of proposed obligations for all licensees**

Proposed obligation	Summary
Agents acting on behalf of licensees: see Proposal B11	A licensee may authorise an agent to collect, use, disclose or store personal information on their behalf for a reference check of a prospective representative in accordance with the ASIC protocol, provided the prospective representative consents to an agent being used for this purpose.
Permitted use of information: see Proposals B12 and B13	Information collected by a licensee or their agents in accordance with the ASIC protocol must only be collected, used, disclosed or stored for the purpose of reference checking and information sharing in accordance with the protocol.  A recruiting licensee that is given a reference or an updated reference about a prospective representative in accordance with the ASIC protocol may give a copy of the reference or updated reference to the prospective representative.
No arrangements or agreements to limit information: see Proposal B14	A licensee must not enter into any arrangement or agreement with any individual that limits the licensee's ability to collect, use, disclose and store information under the ASIC protocol.
Maintaining a contact point for reference checking: see Proposal B15	A licensee must have in place adequate arrangements to ensure they can be easily contacted by recruiting licensees for reference checking and information sharing under the ASIC protocol.
Keeping records: see Proposal B16	A licensee must keep for five years written records that are complete and accurate and that demonstrate compliance with the obligations of the ASIC protocol.

### Agents acting on behalf of licensees

#### Proposal

**B11** We propose that a licensee may authorise an agent to collect, use, disclose or store personal information on their behalf for a reference check of a prospective representative in accordance with the ASIC protocol if a prospective representative consents to an agent being used for this purpose. A licensee is responsible for the acts and omissions of its agent in relation to the ASIC protocol.

#### *Your feedback*

B11Q1 Do you agree with our proposal? If not, why not?

B11Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these problems.

B11Q3 Do you think a prospective representative must consent to a recruiting licensee using an agent to collect, use, disclose or store personal information on their behalf to undertake a reference check under the ASIC protocol? If not, why not?

## Rationale

- 99 We recognise that outsourcing recruitment functions is a common practice across licensees. The proposed obligation clarifies that licensees may authorise an agent to collect, use, disclose or store personal information about a prospective representative for the purpose of undertaking a reference check.
- 100 The obligations imposed on a licensee under the ASIC protocol also apply to any agent authorised by the licensee for the purposes of reference checking and information sharing in accordance with the ASIC protocol. The licensee is responsible for the acts or omissions of its agents in relation to the ASIC protocol.
- 101 A similar obligation is set out in the ABA protocol.

## Permitted use of information

### Proposal

- B12** We propose that information collected by a licensee or their agents in accordance with the ASIC protocol must:
- (a) only be collected, used, disclosed or stored for the purpose of reference checking and information sharing in accordance with the protocol; and
  - (b) not be collected, used, disclosed or stored for a purpose other than that for which it was collected, unless the prospective representative has consented or another exception under the Privacy Act applies.

#### *Your feedback*

B12Q1 Do you agree with our proposal? If not, why not?

- B13** We propose that a recruiting licensee that is given a reference or an updated reference about a prospective representative in accordance with the ASIC protocol may give a copy of the reference or updated reference to the prospective representative. We note, however, there will be circumstances where the recruiting licensee may not want to share information, such as information about an ongoing investigation.

#### *Your feedback*

B13Q1 Do you agree with our proposal? If not, why not?

B13Q2 Should the protocol require a recruiting licensee to provide the prospective representative with the reference obtained from a referee licensee(s)? If so, please give reasons why.

B13Q3 Should the reference only be provided to the prospective representative with the consent of the referee licensee(s)? If so, please give reasons why.

B13Q4 What other mechanisms could be included to ensure fairness for the prospective representative?

### Rationale

- 102 The ABA protocol requires that information given under it should be kept confidential and only used by subscribing licensees for the purposes for which it was collected. Specifically, the ABA protocol prohibits a reference being provided to a financial adviser or any third party without consent first being obtained from the subscribing licensee that provided the reference.
- 103 We do not think there is a need for a similar prohibition under the ASIC protocol, given that the defence of qualified privilege (discussed in paragraphs 33–34) applies to information obtained under this protocol.
- 104 However, licensees and their agents should take into account the Privacy Act and comply with the Australian Privacy Principles relating to the collection, use and disclosure of information collected under the ASIC protocol.
- 105 We specifically note APP 12, which requires an entity that holds personal information about an individual to give the individual access to that information on request. APP 12 also sets out other requirements for access, including how access should be given and when access can be refused.
- 106 For example, access may be refused if there are anticipated or existing legal proceedings between the organisation and the prospective representative or if giving access would prejudice appropriate action against unlawful activity or misconduct.

Note: See Office of Australian Information Commissioner, [APP guidelines](#), July 2019, Chapter 12.

### No arrangements or agreements to limit information

#### Proposal

**B14** We propose to prohibit a licensee from entering into any arrangement or agreement with any individual that limits the licensee’s ability to collect, use, disclose and store information under the ASIC protocol.

*Your feedback*

B14Q1 Do you agree with our proposal? If not, why not?

#### Rationale

- 107 The ABA protocol requires a subscribing licensee to ensure that all internal policies and contractual arrangements they enter into allow the sharing of information under the protocol.
- 108 We consider that our proposed obligation is necessary to ensure the integrity of the ASIC protocol and to allow licensees to undertake reference checking under the protocol unimpeded by other arrangements or agreements.

109 Licensees are not liable for any action based on breach of confidence for conduct in compliance with the ASIC protocol: see paragraph 34. This provides protection to the licensee where they divulge confidential information in the course of satisfying the obligation to share information.

Note: See [Explanatory Memorandum](#), paragraphs 10.45 and 10.80. See also s912A(3G) of the Corporations Act and s47(3G) of the National Credit Act (inserted by Sch 10, items 5 and 14 of the Bill).

## Maintaining a contact point for reference checking

### Proposal

**B15** We propose that licensees must have in place adequate arrangements to ensure they can be easily contacted by recruiting licensees for reference checking and information sharing under the ASIC protocol.

#### *Your feedback*

B15Q1 Do you agree with our proposal? If not, why not?

B15Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these and any possible solutions.

### Rationale

110 This obligation ensures that licensees have access to a contact point for reference checking and information sharing under the ASIC protocol.

111 We note that the Explanatory Memorandum contemplates that ASIC may determine requirements for the steps a licensee should take to contact referees.

Note: See [Explanatory Memorandum](#), paragraphs 10.52 and 10.63.

112 We think that arrangements will differ depending on the nature, scale and complexity of a licensee's business. For example, licensees may provide information on a website for requests about reference checking. Where a licensee does not have a website, they will need to have other arrangements to ensure a recruiting licensee can readily identify how to make contact.

113 Under the ABA protocol, subscribing licensees must identify and notify the ABA of a key contact point (this may be a dedicated email address) for reference checking and information requests. The ABA maintains a list of contact details. ASIC does not intend to maintain a list or central register of contact persons, given the large number of licensees (in excess of 10,000 licensees) that must comply with the ASIC protocol.

## Keeping records

### Proposal

**B16** We propose that a licensee must keep, for five years, written records that are complete and accurate and that demonstrate compliance with the obligations of the ASIC protocol. This includes, but is not limited to, written records of:

- (a) consents given, requested, refused or withdrawn;
- (b) references requested by a recruiting licensee;
- (c) references and updated references given by a referee licensee;
- (d) any agreement with any agent in relation to reference checking and information sharing under the protocol; and
- (e) any policies and processes for handling personal information of individuals obtained under the protocol.

#### *Your feedback*

B16Q1 Do you agree with our proposal? If not, why not?

B16Q2 Should licensees be required to keep any other records relating to reference checking and information sharing? If so, what other records should be kept?

### Rationale

114 In line with existing record-keeping obligations under the Corporations Act, we propose that a licensee must keep records under the ASIC protocol for a minimum of five years. The records to be kept will enable:

- (a) licensees to comply with the protocol; and
- (b) ASIC to monitor compliance with the protocol and whether licensees are undertaking reference checking in a timely and efficient manner.

Note: See s1101C(3) of the Corporations Act.

## C Proposed legislative instrument—Template reference request

### Key points

We propose to prescribe a template reference request for licensees to meet their information sharing and reference checking obligations under the ASIC protocol: see Sch 2 and Sch 3 to the proposed legislative instrument.

Schedule 2 applies to all prospective representatives, except where the prospective representative is a licensee. Schedule 3 applies where the prospective representative is a licensee in their own right.

The template reference request will apply to licensees when they are reference checking both financial advisers and mortgage brokers.

This section seeks feedback on the proposed questions in the template reference request in Sch 2 and Sch 3 about:

- background information on a prospective representative;
- compliance audits of a prospective representative;
- the conduct of a prospective representative; and
- ongoing matters.

The proposed questions in the template reference request in Sch 2 and Sch 3 are broadly similar.

## Background information on a prospective representative

### Proposal

- c1 In the template reference request in Sch 2, we propose to prescribe questions about the prospective representative's background. The questions are explained in Table 4.

#### *Your feedback*

- C1Q1 Do you agree with our proposed questions? If not, why not?  
C1Q2 Can you suggest any additional or alternative questions?

### Rationale

- 115 The proposed questions in Table 4 are based on similar questions in the ABA protocol that seek information about a prospective representative's background.
- 116 The ASIC protocol applies to a prospective representative who is currently, or was formerly, providing services other than financial advice or mortgage broking on behalf of the referee licensee and who is now seeking to become a financial adviser or mortgage broker: see paragraph 28.

117 We consider that these questions give a recruiting licensee enough information about a prospective representative's background to contextualise the reference.

**Table 4: Explanation of Question 1—Background information (Sch 2)**

Question	Explanation
1(a) Please confirm the representative's role(s) and period of employment or authorisation.	The referee licensee must provide information about all roles held by the prospective representative in the licensee's business, as well as the tenure of each role, in the preceding five years.
1(b) Please provide a brief description of the representative's main responsibilities.	This question asks for details about the main responsibilities of the prospective representative in their previous role(s) with the referee licensee.
1(c) If applicable, please provide the ASIC reference number (if known) for the representative.	This question asks for details about the prospective representative's ASIC reference number (e.g. authorised representative number, credit representative number or adviser number).
1(d) Please provide details of your work relationship with the representative (include name of the organisation, your role in the organisation and period of time known).	This question asks for details about the person who is providing the reference on behalf of the referee licensee and their relationship with the prospective representative.

118 Schedule 3 includes similar questions about a prospective representative's background where they are a licensee.

## Compliance audits of a prospective representative

### Proposal

**c2** In the template reference request in Sch 2, we propose to prescribe questions about compliance audits of a prospective representative in relation to that representative's previous activity as a financial adviser or mortgage broker. These questions are explained in Table 5.

#### *Your feedback*

C2Q1 Do you agree with our proposed questions? If not, why not?

C2Q2 Can you suggest any additional or alternative questions?

### Rationale

119 The proposed questions in Table 5 are based on the ABA protocol.

120 We intend that information about compliance audits is only obtained for prospective representatives who were previously employed or authorised as a financial adviser or mortgage broker. We are not proposing that information about compliance audits is obtained where a prospective representative was employed or authorised in a different role.

121 In ASIC’s experience, compliance audits are an important way to monitor a representative’s conduct. Information gained from compliance audits will help the recruiting licensee to better monitor and supervise the representative.

Note: [REP 515](#) provides further information on monitoring and supervising advisers.

**Table 5: Explanation of Question 2—Compliance audits (Sch 2)**

Note: Question 2 only applies to a prospective representative that is or was a financial adviser or mortgage broker.

Question	Explanation
<p>2(a) Have you conducted a compliance audit for this representative?</p> <p><input type="checkbox"/> Yes, please go to questions 2(b)–(e)</p> <p><input type="checkbox"/> No, please go to Question 3</p>	<p>This question is consistent with the ABA protocol which is focused on compliance, risk management and advice quality.</p> <p>A ‘compliance audit’ means an audit, review or observation by a referee licensee of the prospective representative’s compliance with the financial services laws or credit legislation, and the referee licensee’s policies and procedures, as part of the referee licensee’s monitoring and supervision obligations under s912A(1)(ca) and (f) of the Corporations Act or s47(1)(e) and (g) of the National Credit Act.</p>
<p>2(b) For the representative’s last compliance audit undertaken, please provide the following information:</p> <p>(i) Date of the compliance audit</p> <p>(ii) Did the last compliance audit findings lead to remedial action by the licensee?</p> <p><input type="checkbox"/> Yes, please provide details below</p> <p><input type="checkbox"/> No, please go to Question 3</p> <p>(iii) Indicate whether the remedial action was a result of:</p> <p><input type="checkbox"/> non-compliance with financial services laws or credit legislation</p> <p><input type="checkbox"/> non-compliance with licensee processes</p> <p>(iv) Indicate type(s) of remedial action</p> <p><input type="checkbox"/> representative remedial action</p> <p><input type="checkbox"/> client remedial action</p>	<p>This question is consistent with the ABA protocol which covers information sharing about internal monitoring and supervision program (audit) results and outcomes.</p> <p>‘Remedial action’ includes an intervention or action by the referee licensee as a consequence of the compliance audit in order to correct the situation.</p> <p>This question asks the referee licensee whether any remedial action taken was a result of the prospective representative’s non-compliance with financial services laws or credit legislation. This includes all laws that an adviser or mortgage broker must comply with in providing their financial or credit services.</p>

Question	Explanation
<p>2(c) If there was representative remedial action, indicate what type(s) of remedial action:</p> <p><input type="checkbox"/> additional training</p> <p><input type="checkbox"/> increased monitoring and supervision</p> <p><input type="checkbox"/> consequence management (including performance management, financial consequence, formal warnings)</p> <p><input type="checkbox"/> suspension of authorisation</p> <p><input type="checkbox"/> other (please provide details)</p>	<p>In relation to representative remedial action, this question requires the referee licensee to describe the action at the time it was determined and applied by the referee licensee.</p>
<p>2(d) If there was client remedial action, indicate what type(s) of remedial action:</p> <p><input type="checkbox"/> instructed to provide corrective disclosure to client</p> <p><input type="checkbox"/> compensation was given to a client, either as a financial payment offered to a client and/or any other non-financial remedy given to a client</p> <p><input type="checkbox"/> other (please provide details)</p>	<p>In relation to client remedial action, this question requires the referee licensee to describe the action at the time it was determined and applied by the referee licensee.</p> <p>Corrective disclosure relates to information presented in a Financial Services Guide, Statement of Advice or disclosure required under Ch 3 of the National Credit Act.</p> <p>Compensation relates directly to the remedial action taken by the referee licensee.</p>

122 Schedule 3 includes questions about compliance audits conducted on a prospective representative's activities as a licensee.

## Conduct of a prospective representative

### Proposal

**c3** In the template reference request in Sch 2, we propose to prescribe questions about the conduct of the prospective representative. These questions are explained in Table 6.

#### *Your feedback*

C3Q1 Do you agree with our proposed questions? If not, why not?

C3Q2 Can you suggest any additional or alternative questions?

### Rationale

123 The proposed questions in Table 6 are based on the ABA protocol.

124 The ABA protocol includes a similar question that requires its subscribing licensees to provide information about 'material incidents'. Rather than introducing this term—which does not currently exist under the Corporations Act or National Credit Act—we have sought to specify the types of matters

captured by ‘reportable situations’, as defined by proposed s912D of the Corporations Act and proposed s50A of the National Credit Act.

Note: Sections 912D of the Corporations Act and s50A of the National Credit Act are inserted by Sch 12, items 5 and 15 of the Bill.

125 These questions are intended to capture the serious compliance and misconduct concerns the Royal Commission recommended should be included in licensees’ reference checking processes.

Note: See [Royal Commission final report](#), vol. 1, p. 204.

**Table 6: Explanation of Question 3—Conduct of a prospective representative (Sch 2)**

Questions	Explanation
<p>3(a) Did you report a breach to ASIC (whether under s912DAA of the Corporations Act, s50B of the National Credit Act or otherwise) in relation to the representative? [Yes/No]</p> <p>If you answered Yes, provide details of the relevant date, type and nature of the breach.</p>	<p>This question is based on a similar question in the ABA protocol.</p> <p>Note: See <a href="#">Regulatory Guide 78 Breach reporting by AFS licensees</a> (RG 78) for guidance on how an AFS licensee can meet their breach reporting obligations.</p>
<p>3(b) Did (or does) the representative’s conduct in relation to the financial services laws or the credit legislation while employed with, or authorised under, your licence, or circumstances surrounding the representative’s departure from your licence concern the representative’s involvement in:</p> <p>(i) dishonesty [Yes/No]</p> <p>(ii) unprofessional conduct [Yes/No]</p> <p>(iii) conduct justifying instant dismissal or immediate termination of representative status [Yes/No]</p> <p>(iv) refusal, failure or deliberate non-compliance in relation to the financial services laws or the credit legislation [Yes/No]</p> <p>(v) gross incompetence or gross negligence [Yes/No]</p> <p>(vi) a breach of the <a href="#">Financial Planners and Advisers Code of Ethics 2019</a>, made by Financial Adviser Standards and Ethics Authority Ltd [Yes/No]</p> <p>Note: The conduct need not involve a contravention of law.</p>	<p>This question asks the referee licensee to report issues that relate to poor conduct by the prospective representative.</p> <p>Note: See Appendix C of the <a href="#">Standards Australia handbook</a>.</p> <p>‘Unprofessional conduct’ does not need to involve a contravention of any law. It includes:</p> <ul style="list-style-type: none"> <li>• conduct which amounts to impropriety affecting professional character and which indicates a failure to understand or to practise the precepts of honesty or fair dealing in relation to retail clients or the public;</li> <li>• unsatisfactory professional conduct, where the conduct involves a substantial or consistent failure to reach reasonable standards of competence and diligence; and</li> <li>• conduct which is, or could reasonably be considered as likely to be, prejudicial to the interests of an AFS licensee or a credit licensee or retail clients.</li> </ul>

Questions	Explanation
<p>3(c) If you answered Yes to any of the questions in paragraph (b), please provide details, including but not limited to, all internal assessments, external notifications or complaints against the representative in connection with the provision of financial services or credit assistance, about or arising from the representative's conduct or performance (including any act or omission), recorded by the licensee.</p>	<p>A 'complaint' means a complaint as defined in Australian/New Zealand Standard AS/NZS 10002:2014 <i>Guidelines for complaint management in organizations</i>.</p> <p>An 'internal assessment' may include an internal audit by or on behalf of the licensee.</p> <p>An 'external notification' may include a regulatory notification or a notification from another licensee.</p>
126	Schedule 3 includes similar questions about the conduct of the prospective representative as a licensee.

## Ongoing matters

### Proposal

- C4** In the template reference request in Sch 2, we propose to prescribe questions about ongoing matters to do with the prospective representative. These questions are explained in Table 7.

#### *Your feedback*

- C4Q1 Do you agree with our proposed questions? If not, why not?
- C4Q2 Can you suggest any additional or alternative questions?

### Rationale

- 127 The proposed questions in Table 7 are based on the ABA protocol.
- 128 Investigations, compliance audits or complaints regarding a representative's compliance or conduct can take some time to be fully investigated or resolved. In some cases, these matters may not be resolved until after a representative has ceased employment or authorisation with the licensee.
- 129 The questions are intended to alert the recruiting licensee to any ongoing matters. Where a referee licensee indicates that there is an ongoing matter at the time that the reference is given, they have an obligation to provide an updated reference to the recruiting licensee as set out in Proposals B9 and B10.

**Table 7: Explanation of Question 4—Ongoing matters**

Questions	Explanation
<p>4(a) Is there an inquiry or investigation in progress by your organisation in relation to the conduct of this representative? [Yes/No]</p> <p>If Yes:</p> <p>(i) please provide:</p> <p>(A) a brief description of the nature of the circumstances that triggered the inquiry/investigation (e.g. a breach, complaint, compliance audit or other circumstance); and</p> <p>(B) details of the progress and status of the inquiry/investigation;</p> <p>(ii) was the representative made aware of the inquiry or investigation? [Yes/No]</p>	<p>This question asks whether there are any unresolved investigations or inquiries at the time the reference is given.</p> <p>An investigation or inquiry includes a review by a referee licensee about the representative's conduct, whether individually or as part of a group of representatives. This question takes a similar approach to the ABA protocol.</p>
<p>4(b) Are there any client complaints recorded by your organisation relating to this representative that remain unresolved? [Yes/No]</p> <p>If Yes:</p> <p>(i) please provide brief details of the relevant circumstances of the unresolved complaints and their status;</p> <p>(ii) was the representative made aware of the complaints? [Yes/No]</p>	<p>This question asks whether there are any unresolved complaints at the time the reference is given.</p>
<p>4(c) Are there any matters arising from a compliance audit relating to this representative that remain unresolved? [Yes/No]</p> <p>If yes:</p> <p>(i) please provide brief details of the relevant circumstances of the unresolved compliance audit matters and their status;</p> <p>(ii) was the representative made aware of the compliance audit matters? [Yes/No]</p>	<p>This question asks whether there are any unresolved compliance audit matters at the time the reference is given.</p>

130

Schedule 3 to the proposed legislative instrument includes questions about any client complaints and unresolved matters arising from a compliance audit relating to a prospective representative's conduct as a licensee.

## D Proposed information sheet

### Key points

We propose to issue an information sheet to help recruiting licensees understand their obligations when employing or authorising representatives to act as financial advisers or mortgage brokers on their behalf.

The information sheet will also help a prospective representative's current or former licensee to understand their obligations when receiving a request for information from the recruiting licensee and sharing information with the recruiting licensee about the prospective representative.

## Guidance for licensees

### Proposal

D1 We propose to issue an information sheet that:

- (a) contains guidance on the obligations for referee licensees and recruiting licensees when obtaining, giving or updating a reference; and
- (b) includes a high-level overview of the questions in the template reference request, along with general guidance on answering the questions.

See Attachment 2 to this paper.

### *Your feedback*

D1Q1 Do you agree with our proposal? If not, why not?

D1Q2 Can you suggest any further or additional guidance that should be included in the information sheet?

### Rationale

131 The proposed information sheet will provide guidance for licensees on meeting their obligations under the ASIC protocol.

132 The explanatory statement accompanying our final legislative instrument will also provide guidance on the requirements in the instrument.

133 In due course, we will also make any necessary consequential amendments to ASIC regulatory guidance and resources in response to amendments made by the Bill. For example, changes will be required to [RG 104](#) and [RG 205](#).

134 An information sheet, rather than a regulatory guide, will provide concise guidance on specific processes and compliance issues relating to the reference checking and information sharing obligations.

## E Regulatory and financial impact

135 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. Based on the information available to us, we think they will strike an appropriate balance between:

- (a) ensuring that licensees are doing enough to share information about their previous representatives; and
- (b) ensuring that only necessary information about a prospective representative is shared under the ASIC protocol.

136 The Government has confirmed that a process equivalent to a Regulation Impact Statement has been undertaken through the Royal Commission.

Note: See [Independent Review—Department of the Treasury](#) on the Department of Prime Minister and Cabinet’s website.

## Key terms

Term	Meaning in this document
ABA	Australian Banking Association
ABA protocol	<i>Reference checking and information sharing protocol</i> , issued by the ABA
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
APP guidelines	<i>Australian Privacy Principles guidelines</i> issued by the Office of Australian Information Commissioner in July 2019
ASIC	Australian Securities and Investments Commission
ASIC protocol	Proposed legislative instrument which gives effect to the ASIC <i>Reference checking and information sharing protocol</i>
Bill	Financial Sector Reform (Hayne Royal Commission Response) Bill 2020
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of the Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds a credit licence under s35 of the National Credit Act
current licensee	A person that is: <ul style="list-style-type: none"> <li>• an AFS licensee for which an individual described in s912A(3A) of the Corporations Act is currently a representative at the time a request for a reference is made; and</li> <li>• a credit licensee for which an individual described in s47(3A) of the National Credit Act is currently a representative at the time a request for a reference is made.</li> </ul> Note: This is a definition contained in s4 of the proposed legislative instrument.
Explanatory Memorandum	Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020

Term	Meaning in this document
former licensee	<p>A person that is:</p> <ul style="list-style-type: none"> <li>• an AFS licensee for which an individual described in s912A(3A) of the Corporations Act was a representative for any period in the five years before a request for a reference but who is no longer a representative of that licensee; and</li> <li>• a credit licensee for which an individual described in s47(3A) of the National Credit Act was a representative for any period in the five years before a request for a reference but who is no longer a representative of that licensee</li> </ul> <p>Note: This is a definition contained in s4 of the proposed legislative instrument.</p>
individual described in s47(3A) of the National Credit Act	<p>An individual who is:</p> <ul style="list-style-type: none"> <li>• a credit licensee; or</li> <li>• a former, current or prospective representative of a credit licensee</li> </ul>
individual described in s912A(3A) of the Corporations Act	<p>An individual who is:</p> <ul style="list-style-type: none"> <li>• an AFS licensee; or</li> <li>• a former, current or prospective representative of an AFS licensee</li> </ul>
licensees	Both AFS licensees and credit licensees, unless otherwise specified
National Credit Act	<i>National Consumer Credit Protection Act 2009</i> , including regulations made for the purposes of the Act
Privacy Act	<i>Privacy Act 1988</i>
proposed legislative instrument	Draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX
prospective representative	<p>An individual described in s912A(3A) of the Corporations Act or s47(3A) of the National Credit Act that a recruiting licensee is considering employing or authorising as a representative to provide:</p> <ul style="list-style-type: none"> <li>• personal advice to retail clients about a relevant financial product; or</li> <li>• credit assistance for credit contracts secured by mortgages over residential property where that individual will be a mortgage broker or a director, employee or agent of a mortgage broker</li> </ul> <p>Note: This is a definition contained in s4 of the proposed legislative instrument.</p>
recruiting licensee	An AFS licensee or credit licensee that is considering employing or authorising a prospective representative
referee licensee	A current licensee or former licensee from whom a reference about the prospective representative is sought by a recruiting licensee
REP 515 (for example)	An ASIC report (in this example numbered 515)

Term	Meaning in this document
representative	<p>Means:</p> <ul style="list-style-type: none"> <li>• an authorised representative of the licensee;</li> <li>• an employee or director of the licensee;</li> <li>• an employee or director of a related body corporate of the licensee; or</li> <li>• any other person acting on behalf of the licensee</li> </ul> <p>Note: This is a definition contained in s910A of the Corporations Act and s5(1) of the National Credit Act.</p>
RG 4 (for example)	An ASIC regulatory guide (in this example numbered 4)
Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Royal Commission final report	<i>Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Final report</i>
s912A (for example)	A section in the Corporations Act or National Credit Act (in this example numbered 912A), unless otherwise specified
Sch 1 (for example)	A schedule to the proposed legislative instrument (in this example numbered 1), unless otherwise specified
Standards Australia handbook	<i>Reference checking in the financial services industry</i> , developed by ASIC and Standards Australia
subscribing licensee	An AFS licensee who subscribes to the ABA protocol
template consent form	Sch 1 to the proposed legislative instrument, containing the proposed standard consent form that a recruiting licensee must use when seeking the written consent of a prospective representative
template reference request	Sch 2 and Sch 3 to the proposed legislative instrument, containing the proposed reference checking template questions that a licensee must answer in response to a reference checking request under the ASIC protocol

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to require a recruiting licensee to take reasonable steps to obtain a reference about a prospective representative from:</p> <p>(a) if the prospective representative is a representative of a current licensee and, when a request for a reference is made, has been a representative of that licensee for:</p> <p>(i) 12 months or more—that licensee; or</p> <p>(ii) less than 12 months—that licensee and the most recent former licensee (if any) in the five years before a request for a reference;</p> <p>(b) if the prospective representative is not a representative of a current licensee, but was a representative of the most recent former licensee for:</p> <p>(i) 12 months or more in the five years before a request for a reference—that licensee;</p> <p>(ii) less than 12 months—the two most recent former licensees (if applicable) in the five years before a request for a reference; and</p> <p>(c) if the prospective representative is a current licensee—that licensee (i.e. themselves).</p>	<p>B1Q1 Do you agree with our proposal? If not, why not?</p> <p>B1Q2 Do you think the obligation should be limited to obtaining a reference from the current licensee or—if a prospective representative is not currently with a licensee—their most recent former licensee in the five years before a request? If so, please give reasons why.</p> <p>B1Q3 Do you think the obligation should be extended to all former licensees who employed or authorised the prospective representative in the five years before the request? If so, please give reasons why.</p> <p>B1Q4 If the prospective representative is a current licensee, do you think the recruiting licensee should be obliged to obtain a reference from them? If not, why not?</p> <p>B1Q5 Do you think a recruiting licensee should be able to obtain from a current or most recent former licensee previous references provided to them under the ASIC protocol? If so, should a recruiting licensee still be required to obtain a reference directly from the additional licensee(s) about the prospective representative?</p>
<p>Note 1: A 'former licensee' is a licensee for which an individual described in s912A(3A) of the Corporations Act or s47(3A) of the National Credit Act was a representative for any period in the five years before a request for a reference but who is no longer a representative of that licensee.</p>	
<p>Note 2: If a prospective representative is a representative of two or more current licensees, the referee licensee must request a reference from each of these current licensees.</p>	

Proposal	Your feedback
<p>B2 A recruiting licensee may give consent to a corporate representative to sub-authorise an individual or class of individuals as a representative of the licensee under s916B(3) of the Corporations Act or s65(4) of the National Credit Act. For reference checking purposes, we propose that the recruiting licensee is taken to be considering authorising each individual as a prospective representative of the licensee. Therefore, the recruiting licensee must take reasonable steps to conduct reference checking in accordance with the protocol for each sub-authorised individual.</p>	<p>B2Q1 Do you agree with our proposal? If not, why not?</p>
<p>B3 We propose that:</p> <ul style="list-style-type: none"> <li>(a) before requesting a reference from a referee licensee, a recruiting licensee must seek a prospective representative's written consent, using the template consent form, to: <ul style="list-style-type: none"> <li>(i) collect, use, disclose and store the prospective representative's personal information for the purpose of the recruiting licensee considering their suitability for employment or authorisation as a representative under s912A(1)(cc) of the Corporations Act or s47(1)(ea) of the National Credit Act and the ASIC protocol; and</li> <li>(ii) collect, use, disclose and store their personal information from referee licensees, being one or more of the current and/or former licensees to whom they are or were a representative;</li> </ul> </li> <li>(b) a recruiting licensee that has not obtained the written consent of a prospective representative, or has obtained written consent which the prospective representative has subsequently withdrawn in writing, must not request a reference from a referee licensee about the prospective representative; and</li> <li>(c) a recruiting licensee must give a written notice to the referee licensee if the prospective representative has withdrawn their consent after a reference has been requested but before it is given.</li> </ul> <p>Note: The template consent form is in Sch 1 of the proposed legislative instrument.</p>	<p>B3Q1 Do you agree with our proposal? If not, why not?</p> <p>B3Q2 Do you think ASIC should prescribe a consent form? If not, why not?</p> <p>B3Q3 Should the template consent form prescribed by ASIC require any further information to be disclosed to the prospective representative so they are better informed in providing consent? If so, what other information should be required?</p> <p>B3Q4 Will this proposed obligation to obtain and provide written consent cause practical problems for licensees during the recruitment process? If so, please outline these problems and set out any views on how ASIC or industry can address these problems.</p>

Proposal	Your feedback
<p>B4 We propose that a recruiting licensee:</p> <ul style="list-style-type: none"> <li>(a) must make a written request, using the template reference request, to a referee licensee to answer the template reference questions about a prospective representative;</li> <li>(b) must give a copy of the written consent from the prospective representative to the referee licensee at the time of making a request for a reference; and</li> <li>(c) may make minor amendments to the form of the template reference request when seeking a reference from a referee licensee, provided the request for a reference still includes all the information required by the template.</li> </ul> <p>Note: The template reference request is in Sch 2 or Sch 3 to the proposed legislative instrument.</p>	<p>B4Q1 Do you agree with our proposal? If not, why not?</p> <p>B4Q2 Should the protocol require a request for a reference to include any other information? If so, what other information should be required?</p>
<p>B5 We propose that a recruiting licensee may make more than one request to a referee licensee for a reference about a prospective representative (with additional requests being covered by the ASIC protocol as if they were the original request for a reference).</p>	<p>B5Q1 Do you agree with our proposal? If not, why not?</p>
<p>B6 We propose that a recruiting licensee may seek additional references in accordance with the ASIC protocol from former licensee(s) that employed or authorised a prospective representative in the five years before a request for a reference is made. A former licensee(s) must give answers to the questions in the template reference request.</p>	<p>B6Q1 Do you agree with our proposal? If not, why not?</p>
<p>B7 We propose that nothing in the ASIC protocol limits or prevents a recruiting licensee from requesting additional information about a prospective representative from a referee licensee (e.g. other background checks), provided that the additional information requested does not reduce the scope of any of the questions in the template reference request.</p>	<p>B7Q1 Do you agree with our proposal? If not, why not?</p>

Proposal	Your feedback
<p>B8 We propose that where a recruiting licensee has requested a reference about a prospective representative in accordance with the ASIC protocol, the referee licensee must give—within 10 business days of the request, or a longer period where agreed between the recruiting licensee and referee licensee, but no more than 20 business days:</p> <ul style="list-style-type: none"> <li>(a) all information that they are aware of and reasonably consider to be relevant to answer the questions in the template reference request;</li> <li>(b) a response that is complete, accurate and based on documented facts; and</li> <li>(c) a response in writing to all the questions in the template reference request, and—if a question cannot be answered—a written explanation as to why the question cannot be answered.</li> </ul>	<p>B8Q1 Do you agree with our proposal? If not, why not?</p> <p>B8Q2 Should we allow verbal responses to be given under the ASIC protocol? If so, why? How would the licensees manage the potential risks associated with the provision of verbal references?</p> <p>B8Q3 Are there other ways to facilitate references being given by referee licensees under the protocol? If so, please explain.</p>
<p>B9 We propose that:</p> <ul style="list-style-type: none"> <li>(a) a referee licensee must update a reference given to a recruiting licensee if the initial reference includes information about or refers to: <ul style="list-style-type: none"> <li>(i) outstanding compliance audit issues identified in the last or previous audits for the prospective representative;</li> <li>(ii) unresolved client complaints recorded in relation to the prospective representative; or</li> <li>(iii) an ongoing investigation by the referee licensee in relation to the prospective representative; and</li> </ul> </li> <li>(b) a referee licensee must give the recruiting licensee an updated reference by including updated answers to the questions in the template reference request: <ul style="list-style-type: none"> <li>(i) as soon as reasonably practicable following resolution of a matter mentioned in paragraph (a)(i), (ii) or (iii); or</li> <li>(ii) where the matter has not been resolved within six months of the date on which the initial reference was given by the referee licensee—at the end of that six-month period.</li> </ul> </li> </ul>	<p>B9Q1 Do you agree with our proposal? If not, why not?</p> <p>B9Q2 Is the proposed six-month timeframe for an updated reference appropriate? If not, what timeframe would be appropriate?</p>

Proposal	Your feedback
<p>B10 We propose that the obligations do not apply to a referee licensee where any of the following apply:</p> <ul style="list-style-type: none"> <li>(a) the recruiting licensee's licence has been suspended or cancelled;</li> <li>(b) the recruiting licensee has notified the referee licensee in writing that they no longer propose to employ or authorise the prospective representative;</li> <li>(c) the prospective representative is no longer employed by the recruiting licensee; or</li> <li>(d) the prospective representative has withdrawn their consent.</li> </ul>	<p>B10Q1 Do you agree with our proposal? If not, why not?</p>
<p>B11 We propose that a licensee may authorise an agent to collect, use, disclose or store personal information on their behalf for a reference check of a prospective representative in accordance with the ASIC protocol if a prospective representative consents to an agent being used for this purpose. A licensee is responsible for the acts and omissions of its agent in relation to the ASIC protocol.</p>	<p>B11Q1 Do you agree with our proposal? If not, why not?</p> <p>B11Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these problems.</p> <p>B11Q3 Do you think a prospective representative must consent to a recruiting licensee using an agent to collect, use, disclose or store personal information on their behalf to undertake a reference check under the ASIC protocol? If not, why not?</p>
<p>B12 We propose that information collected by a licensee or their agents in accordance with the ASIC protocol must:</p> <ul style="list-style-type: none"> <li>(a) only be collected, used, disclosed or stored for the purpose of reference checking and information sharing in accordance with the protocol; and</li> <li>(b) not be collected, used, disclosed or stored for a purpose other than that for which it was collected, unless the prospective representative has consented or another exception under the Privacy Act applies.</li> </ul>	<p>B12Q1 Do you agree with our proposal? If not, why not?</p>

Proposal	Your feedback
<p>B13 We propose that a recruiting licensee that is given a reference or an updated reference about a prospective representative in accordance with the ASIC protocol may give a copy of the reference or updated reference to the prospective representative. We note, however, there will be circumstances where the recruiting licensee may not want to share information, such as information about an ongoing investigation.</p>	<p>B13Q1 Do you agree with our proposal? If not, why not?</p> <p>B13Q2 Should the protocol require a recruiting licensee to provide the prospective representative with the reference obtained from a referee licensee(s)? If so, please give reasons why.</p> <p>B13Q3 Should the reference only be provided to the prospective representative with the consent of the referee licensee(s)? If so, please give reasons why.</p> <p>B13Q4 What other mechanisms could be included to ensure fairness for the prospective representative?</p>
<p>B14 We propose to prohibit a licensee from entering into any arrangement or agreement with any individual that limits the licensee's ability to collect, use, disclose and store information under the ASIC protocol.</p>	<p>B14Q1 Do you agree with our proposal? If not, why not?</p>
<p>B15 We propose that licensees must have in place adequate arrangements to ensure they can be easily contacted by recruiting licensees for reference checking and information sharing under the ASIC protocol.</p>	<p>B15Q1 Do you agree with our proposal? If not, why not?</p> <p>B15Q2 Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these and any possible solutions.</p>
<p>B16 We propose that a licensee must keep, for five years, written records that are complete and accurate and that demonstrate compliance with the obligations of the ASIC protocol. This includes, but is not limited to, written records of:</p> <ul style="list-style-type: none"> <li>(a) consents given, requested, refused or withdrawn;</li> <li>(b) references requested by a recruiting licensee;</li> <li>(c) references and updated references given by a referee licensee;</li> <li>(d) any agreement with any agent in relation to reference checking and information sharing under the protocol; and</li> <li>(e) any policies and processes for handling personal information of individuals obtained under the protocol.</li> </ul>	<p>B16Q1 Do you agree with our proposal? If not, why not?</p> <p>B16Q2 Should licensees be required to keep any other records relating to reference checking and information sharing? If so, what other records should be kept?</p>

Proposal	Your feedback
<p>C1 In the template reference request in Sch 2, we propose to prescribe questions about the prospective representative's background. The questions are explained in Table 4.</p>	<p>C1Q1 Do you agree with our proposed questions? If not, why not?</p> <p>C1Q2 Can you suggest any additional or alternative questions?</p>
<p>C2 In the template reference request in Sch 2, we propose to prescribe questions about compliance audits of a prospective representative in relation to that representative's previous activity as a financial adviser or mortgage broker. These questions are explained in Table 5.</p>	<p>C2Q1 Do you agree with our proposed questions? If not, why not?</p> <p>C2Q2 Can you suggest any additional or alternative questions?</p>
<p>C3 In the template reference request in Sch 2, we propose to prescribe questions about the conduct of the prospective representative. These questions are explained in Table 6.</p>	<p>C3Q1 Do you agree with our proposed questions? If not, why not?</p> <p>C3Q2 Can you suggest any additional or alternative questions?</p>
<p>C4 In the template reference request in Sch 2, we propose to prescribe questions about ongoing matters to do with the prospective representative. These questions are explained in Table 7.</p>	<p>C4Q1 Do you agree with our proposed questions? If not, why not?</p> <p>C4Q2 Can you suggest any additional or alternative questions?</p>
<p>D1 We propose to issue an information sheet that:</p> <ul style="list-style-type: none"> <li>(a) contains guidance on the obligations for referee licensees and recruiting licensees when obtaining, giving or updating a reference; and</li> <li>(b) includes a high-level overview of the questions in the template reference request, along with general guidance on answering the questions.</li> </ul> <p>See Attachment 2 to this paper.</p>	<p>D1Q1 Do you agree with our proposal? If not, why not?</p> <p>D1Q2 Can you suggest any further or additional guidance that should be included in the information sheet?</p>