



**ASIC**

Australian Securities &  
Investments Commission

**REPORT 694**

# **Response to submissions on CP 333 Implementing the Royal Commission recommendations: Reference checking and information sharing**

July 2021

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 333 *Implementing the Royal Commission recommendations: Reference checking and information sharing* ([CP 333](#)) and details our responses to those issues.

### 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.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

1 The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Financial Sector Reform Act) implements the Australian Government's response to Recommendations 1.6 and 2.7 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission). These recommendations relate to reference checking and information sharing obligations for Australian financial services licensees (AFS licensees) and Australian credit licensees (credit licensees) in respect of financial advisers and mortgage brokers.

Note: See the [final report](#) of the Financial Services Royal Commission, February 2019.

2 The Financial Services Royal Commission recommended that AFS licensees and credit licensees should be required to comply with a reference checking and information sharing protocol to the same effect as provided by the Australian Banking Association (ABA) *Financial Advice – Recruitment and Termination: Reference Checking and Information Sharing Protocol* (ABA protocol) when considering the appointment of a financial adviser or mortgage broker.

3 In [Consultation Paper 333](#) *Implementing the Royal Commission recommendations: Reference checking and information sharing* (CP 333) we sought feedback on:

- (a) a proposed legislative instrument to give effect to a reference checking and information sharing protocol; and
- (b) proposed guidance on the protocol through an information sheet.

4 ASIC's *Reference checking and information sharing protocol* (ASIC protocol) has now been finalised and will commence operation on 1 October 2021.

Note: The [ASIC Corporations and Credit \(Reference Checking and Information Sharing Protocol\) Instrument 2021/429](#) gives effect to the ASIC protocol.

5 This report highlights the key issues that arose out of the submissions received on CP 333 and our responses to those issues.

6 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 333. We have limited this report to the key issues.

## Responses to consultation

- 7 We received four confidential and 18 non-confidential responses to CP 333. Responses came primarily from AFS licensees, credit licensees and industry associations. We are grateful to respondents for taking the time to send us their comments.
- 8 For a list of the non-confidential respondents to CP 333, see the appendix. Copies of these submissions are currently on the [CP 333](#) page on the ASIC website.
- 9 The main issues raised by respondents were in relation to:
- (a) for Proposals B1 to B7—recruiting licensees’ obligation to obtain a reference, the prescribed consent form and obtaining clarification of responses provided under the ASIC protocol;
  - (b) for Proposals B8 to B10—responding to reference requests and updating references;
  - (c) for Proposals C1 to C4—responding to questions about background information on a prospective representative, compliance audits, the conduct of a prospective representative and ongoing matters; and
  - (d) for Proposal D1—guidance for licensees in the proposed information sheet.
- Note: See Table 1 for the definition of ‘recruiting licensee’ and ‘prospective representative’.
- 10 Many submissions also raised issues about matters for the Australian Government and Parliament. We have passed on these issues to Treasury for its consideration.

## Terminology

- 11 In this report, we define ‘current licensee’, ‘former licensee’, ‘prospective representative’, ‘recruiting licensee’ and ‘referee licensee’ as outlined in Table 1.

Note: The definitions of these terms are contained in s4 of the ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429. For the definitions of other key terms used in this report, see CP 333.

**Table 1: Terminology**

Term	Meaning in this document
current licensee	<p>In relation to a prospective representative of a recruiting licensee, means:</p> <ul style="list-style-type: none"> <li>• an AFS licensee of which the prospective representative is currently a representative; and</li> <li>• a credit licensee of which the prospective representative is currently a representative.</li> </ul>
former licensee	<p>In relation to a prospective representative of a recruiting licensee, means:</p> <ul style="list-style-type: none"> <li>• an AFS licensee of which the prospective representative was a representative for any period in the five years preceding a request for a reference by the recruiting licensee, but who is no longer a representative of that AFS licensee; and</li> <li>• a credit licensee of which the prospective representative was a representative for any period in the five years preceding a request for a reference by the recruiting licensee, but who is no longer a representative of that credit licensee.</li> </ul>
prospective representative	<p>An individual who is:</p> <ul style="list-style-type: none"> <li>• an AFS licensee or a credit licensee; or</li> <li>• a former or current representative of an AFS licensee or a credit licensee.</li> </ul> <p>There must be reasonable grounds to suspect that, if the individual becomes a representative of the recruiting licensee, the individual will:</p> <ul style="list-style-type: none"> <li>• provide personal advice to retail clients in relation to a relevant financial product; or</li> <li>• provide credit assistance in relation to credit contracts secured by mortgages over residential property, and be a mortgage broker or a director, employee or agent of a mortgage broker.</li> </ul>
recruiting licensee	<p>An AFS licensee or credit licensee that is considering employing or authorising a prospective representative as a representative of the licensee.</p>
referee licensee	<p>In relation to a prospective representative of a recruiting licensee, means:</p> <ul style="list-style-type: none"> <li>• an AFS licensee or a credit licensee that the recruiting licensee must take reasonable steps to obtain a reference from under section 6(1) of the ASIC protocol; and</li> <li>• any other former licensee from whom the recruiting licensee requests a reference under section 8(3) of the ASIC protocol.</li> </ul>

## B Obligations for recruiting licensees

### Key points

This section outlines the feedback we received on the following key issues raised in CP 333 in relation to the obligations for recruiting licensees, and our responses to these issues:

- obtaining a reference(s) in relation to a prospective representative;
- obtaining a reference(s) when a prospective representative is a licensee;
- obtaining consent from a prospective representative;
- obtaining clarification of responses provided under the ASIC protocol;
- obtaining previous references given under the ASIC protocol; and
- requesting additional information outside of the ASIC protocol.

### Obtaining a reference(s) in relation to a prospective representative

- 12 In [CP 333](#), we proposed to:
- (a) set a requirement for recruiting licensees to obtain references from certain licensees; and
  - (b) enable recruiting licensees to seek reference(s) from other former licensees that employed or authorised a prospective representative in the previous five years (i.e. former licensees that are additional to the licensee(s) that are required to be contacted).

#### Requirement to obtain references from certain licensees

- 13 We proposed 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—that licensee and the next most recent former licensee (if any) of which the individual was a representative.

14 We sought feedback on:

- (a) whether 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; and
- (b) whether the obligation should be extended to all former licensees who employed or authorised the prospective representative in the five years before the request.

### **Additional references from other licensees**

15 We also proposed 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. We proposed that a former licensee(s) must give answers to the questions in the template reference request if they receive a request for a reference in accordance with the ASIC protocol.

16 Our proposal acknowledged that recruiting licensees may wish to obtain a more comprehensive, longer term picture of a prospective representative's conduct and performance than that which is required under the ASIC protocol.

### **Stakeholder feedback**

17 There were similar levels of support for either implementing our proposed requirement to obtain references or extending the obligation to require recruiting licensees to seek references from all former licensees that employed or authorised the prospective representative in the previous five years.

18 Some respondents suggested alternative time periods for the required period to obtain references (e.g. two or three years).

19 Some respondents suggested that the obligation should be extended to all former licensees in the previous five years. We note that under the ABA protocol, recruiting licensees are required to request a reference from the financial adviser's current/previous licensee only (i.e. one referee licensee irrespective of the length of the role), but the recruiting licensee may contact all of the financial adviser's previous licensees in the preceding five years if they wish to do so.

20 No respondent indicated that the obligation should be limited to obtaining a reference from the current or most recent former licensee only—that is, with



no requirement to seek a further reference when the prospective representative held their position for less than 12 months.

*ASIC's response*

We have considered the feedback received in submissions and think that our proposal strikes an appropriate balance between:

- enabling recruiting licensees to obtain a comprehensive picture of a prospective representative's conduct and performance history; and
- minimising the compliance burden for licensees.

We note that the Financial Services Royal Commission recommendation was that licensees should be required to comply with a reference checking protocol to the same effect as the ABA protocol.

Similar to the ABA protocol:

- the ASIC protocol generally requires a reference only be obtained from a representative's current or most recent licensee, although it sets a higher requirement when the prospective representative was employed or authorised by their current or most recent licensee for less than 12 months; and
- the ASIC protocol also enables recruiting licensees to seek references from all former licensees who employed or authorised a prospective representative in the previous five years. Former licensees that receive a request for a reference from a recruiting licensee will be obliged to give a reference about the prospective representative's conduct for the five years before the reference is given.

## **Obtaining a reference(s) where a prospective representative is a licensee**

- 21 In [CP 333](#), we proposed to require that when a prospective representative is a licensee, the recruiting licensee must obtain a reference from the prospective representative about their work as a licensee. We considered that the reference will, in effect, be a declaration by the prospective representative about their previous conduct. A civil penalty will apply to any false declarations.

### **Stakeholder feedback**

- 22 Most respondents thought that where a prospective representative is themselves a licensee, the recruiting licensee should not be obliged to obtain a reference from them. Several respondents expressed the view that a reference provided

under these circumstances may be of limited value given the lack of independence.

- 23 Conversely, one respondent submitted that, as a recruiting licensee, they would expect to obtain a reference from a licensed prospective representative as a means of assessing their compliance history.

*ASIC's response*

We acknowledge feedback received in submissions about the lack of independence and objectivity associated with prospective representatives giving references about themselves.

The law is intended to require a recruiting licensee to obtain a reference from a referee licensee about a prospective representative, irrespective of whether the prospective representative is themselves a licensee or a current or former representative of another licensee.

This requirement is clearly contemplated in the Financial Sector Reform Act: see paragraphs 10.14 and 10.50 of the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020. Removal of this obligation would be a matter for the Parliament.

We have included a modified template reference request for use by recruiting licensees where the prospective representative is a licensee. This is because not all information required to be provided for non-licensee prospective representatives will be relevant.

## Obtaining consent from a prospective representative

- 24 In [CP 333](#), we sought feedback on whether consent of the prospective representative must be obtained in writing and whether we should prescribe the consent form to be used under the ASIC protocol.

### Stakeholder feedback

- 25 The majority of respondents supported the requirement to obtain written consent from the prospective representative and agreed that ASIC should prescribe a form. However, two respondents noted the possibility of delays occurring if the consent were required to be in writing.
- 26 We also sought comment on whether further information should be disclosed to prospective representatives, so that they are better informed when providing consent. Four respondents made recommendations for additional information to be included in ASIC's prescribed consent form (e.g. to permit agents to collect, use, disclose or store personal information).

*ASIC's response*

We recognise that obtaining a written consent may, in some instances, delay the recruitment process. However, we think that this risk is significantly outweighed by the certainty, consistency and transparency obtained from requiring written consent. We also note that the ABA protocol requires written consent.

We have considered the responses on further information to be disclosed to prospective representatives, and we have incorporated many of these suggestions in the prescribed consent form.

## Obtaining clarification of responses provided under the ASIC protocol

- 27 In [CP 333](#), we proposed that, before a recruiting licensee decides to offer employment or appoint a prospective representative, the licensee could ask a referee licensee for an additional reference to clarify information the referee licensee had provided in their reference.
- 28 We also proposed that when giving this additional reference, a referee licensee would need to complete a new template reference that provides a complete response to all questions in the template. We proposed that the referee licensee would not be able to simply rely on, or refer to, the response they provided in their original reference.

### Stakeholder feedback

- 29 The majority of respondents did not support the proposed approach.
- 30 Respondents raised concerns about the value of requesting an additional reference, using a new template reference request, where the recruiting licensee only required clarification, or additional information, in relation to a response to a specific question.
- 31 In addition, respondents held reservations that, in the absence of direction to the referee licensee as to the information to be clarified, there was no certainty that the clarification they sought, would be provided.

*ASIC's response*

We acknowledge the feedback and lack of support for this proposal. However, we note that the ABA Protocol states that licensees may make additional requests for information and we expect that circumstances will arise where a recruiting licensee may wish to clarify information provided in a reference.

We have therefore amended the ASIC protocol and made clear in [Information Sheet 257](#) *ASIC reference checking and information sharing protocol* (INFO 257) that requests for clarification by a recruiting licensee need not be made in the form of the template reference request.

However, these additional requests, and the responses, must still be in writing (e.g. an email) and must form part of the records licensees must keep under the ASIC protocol.

## Obtaining previous references given under the ASIC protocol

- 32 In [CP 333](#), we proposed that recruiting licensees take reasonable steps to obtain references about prospective representatives directly from referee licensees. However, we sought feedback on whether recruiting licensees should be able to obtain from current or most recent licensees previous references provided to them under the ASIC protocol.

### Stakeholder feedback

- 33 Most respondents did not support the provision of previous references obtained under the ASIC protocol. Several respondents raised concerns about potential consent issues, and some were concerned that such an approach would increase the complexity of the reference checking process.
- 34 We also note that the ABA protocol does not provide for the provision of previous references, and that the provision of an old reference may omit important information that has come to the former licensee's attention after they provided the reference.
- 35 One respondent suggested that obtaining previous references provided to referee licensees under the ASIC protocol may be of value in circumstances where a former licensee is no longer in operation.

#### *ASIC's response*

We acknowledge concerns raised by respondents about the sharing of previous references and have not provided for this under the ASIC protocol.

We have issued [INFO 257](#) with guidance on how the ASIC protocol applies in circumstances where a prospective representative's most recent former licensee no longer holds a licence.

## Requesting additional information outside of the ASIC protocol

- 36 In [CP 333](#), we proposed that nothing in the ASIC protocol would limit or prevent a recruiting licensee from requesting additional information about a prospective representative from a referee licensee (e.g. other background checks outside the ASIC protocol), provided that the additional information requested does not reduce the scope of any of the questions in the template reference request.

### Stakeholder feedback

- 37 Several respondents raised potential concerns about our proposal, and sought clarity on:
- (a) what types of additional information may be requested and whether they should be limited;
  - (b) whether referee licensees receiving requests for additional information are obliged to provide the additional information to recruiting licensees; and
  - (c) whether referee licensees sharing additional information sought by a recruiting licensee would have the benefit of the defence of qualified privilege in relation to that information.

#### *ASIC's response*

We have clarified in [INFO 257](#) that:

- in addition to the template reference request questions, recruiting licensees can request additional information to assist in making a recruitment decision (i.e. information that is outside of the ASIC protocol, such as background checking information);
- a referee licensee that receives a request for information about a prospective representative that is additional to the questions asked in the template reference request is not obliged to share the requested additional information with the recruiting licensee; and
- the defence of qualified privilege does not apply to any information that a referee licensee shares with a recruiting licensee outside of the ASIC protocol.

## C Obligations for referee licensees

### Key points

This section outlines the feedback we received on the following key issues raised in CP 333 in relation to the obligations for referee licensees, and our responses to these issues:

- responding to reference requests; and
- updating references.

### Responding to reference requests

- 38 In [CP 333](#), we proposed that when a recruiting licensee has requested a reference about a prospective representative in accordance with the ASIC protocol, the referee licensee must give the reference within:
- (a) 10 business days of the request; or
  - (b) a longer period when agreed between the recruiting licensee and referee licensee, but no more than 20 business days.
- 39 We also sought feedback on whether we should allow verbal responses to be given.

### Stakeholder feedback

#### Timeframe for responding to requests

- 40 Many respondents expressed concern that the proposed timeframe for a referee licensee to give a reference (i.e. up to a maximum of 20 business days following the recruiting licensee's request) may be difficult to achieve in all instances. Some respondents suggested alternative outer time limits, including maximums of 25 and 30 business days.

#### *ASIC's response*

In response to this feedback, we have extended the outer time limit that a referee licensee must respond to a recruiting licensee's request for a reference. Referee licensees must respond within 10 business days, unless both licensees agree to a longer period, up to a maximum of 30 business days.

### Verbal responses

- 41 Most respondents did not think that the ASIC protocol should allow for verbal references to be given. The reasons for this included:
- (a) an increased compliance burden for licensees;
  - (b) risks of miscommunication between licensees; and
  - (c) privacy risks.
- 42 Of those respondents who supported verbal references being permitted under the ASIC protocol, most acknowledged that written records (i.e. file notes of conversations) would still need to be created and retained to address record-keeping requirements.

#### *ASIC's response*

While we acknowledge that some respondents support verbal references being given, we will continue to require written responses under the ASIC protocol. We consider this will:

- present a lower compliance burden than verbal references, which would otherwise require licensees to prepare and maintain consistent, timely and accurate file notes; and
- reduce the risk that referee licensees will give information that falls outside the consent given or the scope of the template reference request.

The requirement for written references is also consistent with the ABA protocol.

### Updating a reference

- 43 In [CP 333](#), we proposed that 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.

### Stakeholder feedback

- 44 No respondent agreed with the proposal. Respondents noted that the increased administrative processes and systems required by referee licenses to comply with the obligation would be unduly burdensome.
- 45 Some respondents also suggested that the obligation would likely provide limited benefit for recruiting licensees who, if they decide to proceed with employing the prospective representative after receiving the initial reference, would already be required to have appropriate monitoring and supervisory measures in place for the representative.

46 Many respondents expressed the view that, if an obligation to update references were imposed, the obligation should only arise upon the request of the recruiting licensee, with some respondents suggesting that such requests should be at the discretion of the recruiting licensee and other respondents suggesting that recruiting licensees should be obligated to request updates.

*ASIC's response*

In response to this feedback, we have not included an obligation in the ASIC protocol requiring referee licensees to update references.

We also have not imposed an obligation on recruiting licensees to request an updated reference in all cases because this would fall outside the scope of the Financial Sector Reform Act, which is limited to obtaining information about 'prospective representatives' before they are employed as a financial adviser or mortgage broker.

However, we have noted in [INFO 257](#) that, when a reference under the ASIC protocol identifies there are unresolved matters relating to the prospective representative, the recruiting licensee may choose to defer their decision about whether to employ or authorise the prospective representative and make an additional request(s) for a reference(s) from the referee licensee at a later stage as a means of seeking an update on the unresolved matter.



## D Obligations for all licensees

### Key points

This section outlines the feedback we received on the following key issues in CP 333 that relate to obligations for all licensees, and our responses to these issues:

- the permitted use of information in a reference;
- maintaining a contact point for reference checking; and
- keeping records.

### Permitted use of information in references

- 47 In [CP 333](#), we noted that 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. We did not think there is a need for a similar prohibition under the ASIC protocol (given the defence of qualified privilege applies to information obtained under the protocol) and we proposed that a recruiting licensee may give a copy of the reference to the prospective representative. We noted, however, that there will be circumstances where the recruiting licensee may not want to share information, such as information about an ongoing investigation.

#### Stakeholder feedback

- 48 While many respondents expressed the view that access to the reference by the prospective representative would promote transparency, some respondents were very concerned that access may act as a constraint on the referee licensee providing full and frank feedback. Concerns were also raised that a prospective representative may seek to take legal action against a licensee, despite the defence of qualified privilege. In addition, one respondent noted that providing copies of references is not normal commercial practice.
- 49 Some respondents suggested that a reference should only be provided with the consent of the referee licensee, and/or be provided directly by the referee licensee to the prospective representative. However, some of these respondents suggested limitations should apply as follows:
- (a) there should be no obligation on the referee licensee to respond to questions or challenges from the prospective representative around the content of the reference; and

- (b) the referee licensee should have the discretion to decide not to provide information in the reference, for example, where it may prejudice appropriate action against unlawful activity, including ongoing matters/investigations.

50 A few respondents also indicated that, if a prospective representative were permitted to access the reference, ASIC should provide guidance on options available to a prospective representative who considers that a referee licensee has acted in bad faith or not acted in accordance with the ASIC protocol.

*ASIC's response*

There was a strong divergence of views on ASIC's proposals relating to the provision of references to prospective representatives.

In light of this divergence, and because the *Privacy Act 1988* (Privacy Act) enables an individual to request access to personal information in certain circumstances, we have not mandated an obligation or prohibition on either the recruiting licensee or referee licensee to provide a copy of a reference to a prospective representative in the ASIC protocol.

However, we have provided guidance in [INFO 257](#) that the provisions of the Privacy Act and the Australian Privacy Principles (APPs) may enable a prospective representative, in certain circumstances, to obtain personal information in a reference from a recruiting licensee.

We have also provided additional guidance in [INFO 257](#) about the steps a prospective representative may take when they consider a referee licensee has not acted in accordance with the ASIC protocol.

51 One respondent suggested that the use of information by recruiting licensees should be broadened in relation to education, mentoring and monitoring the representative once they are employed or authorised. It was proposed that the Template Consent Form in Schedule 1 should also be amended to permit this broader use.

*ASIC's response*

We acknowledge that a recruiting licensee who employs or authorises a prospective representative may wish to use the information from reference checking for the purposes of training or monitoring the representative.

We have amended the Template Consent Form to permit a recruiting licensee to collect, use, disclose and store personal information for the purposes of complying with their general conduct obligations should they employ or authorise the prospective representative, including:

- taking steps to ensure that a licensee’s representatives comply with financial services laws or credit legislation; and
- ensuring that representatives are adequately trained, and are competent, to provide financial services or credit activities.

## Maintaining a contact point for references

- 52 In [CP 333](#), we proposed 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. We considered that arrangements will differ depending on the nature, scale and complexity of a licensee’s business.
- 53 We noted in [CP 333](#) that, while the ABA maintains a list of contact details for subscribing licensees, 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) that must comply with the ASIC protocol.

### Stakeholder feedback

- 54 Many respondents did not support the proposal. They suggested that ASIC should develop a central database or portal for contact information, and/or make use of registers currently administered by ASIC (such as the Financial Advisers Register). They raised concerns that contact information may otherwise be difficult to locate, particularly for smaller firms without a website or dedicated resources for reference checking.
- 55 Conversely, some respondents supported the proposal and suggested that licensees should be required to make publicly available either a central contact point or standard email address on their website.

#### *ASIC’s response*

ASIC does not intend to develop a central database or portal for contact information. Developing such a database would not be an efficient or appropriate use of ASIC resources.

We remain of the view that licensees should have the flexibility to determine and implement adequate arrangements for contacting them for reference checking because the nature, scale and complexity of licensees’ business models will differ. Our position also recognises concerns raised by respondents that not all licensees have a website and/or dedicated human resources personnel. We expect that licensees may also be contacted by telephone or through an industry association.

## Keeping records

- 56 In [CP 333](#), we proposed 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.

### Stakeholder feedback

- 57 Most respondents broadly supported the proposal. Some respondents suggested requiring a licensee to keep additional records—for example:
- (a) one respondent suggested the ASIC protocol should require records to be kept of:
    - (i) any extensions agreed to between the recruiting licensee and the referee licensee on the time a reference is to be provided; and
    - (ii) any complaints with respect to the reference checking process; and
  - (b) a few respondents suggested that:
    - (i) the ASIC protocol should require recruiting licensees to record the number of attempts made to seek a reference; and
    - (ii) ASIC should provide guidance on when a request could be ‘closed’ by a recruiting licensee following no response from the referee licensee.

#### *ASIC’s response*

We consider that the requirement to keep records should be read broadly to also include records of the number of attempts made by the referee licensee to request a reference and any extensions agreed between the recruiting licensee and referee licensee. We have provided additional guidance in [INFO 257](#) to clarify this.

We have also amended the ASIC protocol to require that a licensee must keep records of complaints made in relation to the ASIC protocol.

In relation to when a recruiting licensee may ‘close’ a request for a reference, the ASIC protocol imposes an obligation on the recruiting licensee to take reasonable steps to obtain a reference about the prospective representative. In this context, the ASIC protocol applies the general law meaning of ‘reasonableness’. As such, we do not think it is appropriate for the ASIC protocol to specify the number of requests a recruiting licensee should make or when the request can be closed.

Our guidance in INFO 257 provides that a recruiting licensee should determine whether the steps they have taken to request a reference are reasonable, taking into account the facts and circumstances of the situation.

## E Template reference request

### Key points

This section outlines the feedback we received on the following key issues in CP 333 in relation to the template reference request, and our responses to these issues:

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

### Background information on a prospective representative

58 In [CP 333](#), we proposed to prescribe questions about the prospective representative's background. We considered that these questions give a recruiting licensee enough information about a prospective representative's background to contextualise the reference.

59 We also proposed to ask for information about:

- (a) all roles held by the prospective representative in the referee licensee's business, and the tenure of each role, in the preceding five years;
- (b) the main responsibilities of the prospective representative in their previous role(s) with the referee licensee; and
- (c) the relationship between the person providing the reference on behalf of the referee licensee and the prospective representative.

### Stakeholder feedback

60 A few respondents recommended that the questions be removed from the template reference request and aligned with the ABA protocol, which only asks for the scope of the financial adviser's authority and the period the authorisation was held.

61 Some respondents did not support details being required about the person who is providing the reference on behalf of the referee licensee and their relationship with the prospective representative. They expressed the view that the question implies that the person completing the reference has a relationship with the representative, which is not always the case.

*ASIC's response*

We remain of the view that the questions about a prospective representative's background ask for an appropriate level of detail.

However, we acknowledge that a number of people and/or departments may be involved in preparing a response to a reference request on behalf of the referee licensee. In response to this feedback, we have:

- removed the requirement for details about the person providing the reference on behalf of the referee licensee, such as their relationship with the prospective representative and the period of time they have known the prospective representative; and
- included organisation name, who the reference was completed by and date of completion, which is consistent with the ABA protocol.

## Compliance audits of a prospective representative

62 In [CP 333](#), we proposed to prescribe questions about the most recent compliance audit of a prospective representative, where that representative's previous activity was as a financial adviser or mortgage broker.

63 We also proposed to include questions on whether the audit findings led to remedial action by the licensee and the type(s) of remedial action taken.

### Stakeholder feedback

64 Some respondents were of the view that requesting information about the most recent compliance audit would be insufficient to gain an accurate and complete picture of a financial adviser's or mortgage broker's compliance, risk management, advice quality or credit activities. Respondents suggested requesting audit results for periods between two and five years.

65 Some respondents also thought the question could be simplified further and more aligned with the ABA protocol.

*ASIC's response*

We acknowledge that an accurate and complete picture of a financial adviser's or mortgage broker's compliance, risk management, advice quality or credit activities may not be gained from the most recent compliance audit.

In response to this feedback, we have amended the compliance audit question in the template reference request to apply to all compliance audits undertaken in the period the prospective representative was employed or authorised by the referee

licensee in the five-year period preceding the reference request. This is consistent with the ABA protocol.

In order to simplify the question, and to align more closely with the ABA protocol, we have also amended the question to require a brief description, using free text, of the remedial action taken by the referee licensee (where relevant).

We have also provided additional guidance on the level of detail required in responses, both in the body of the template reference request and [INFO 257](#).

## Conduct of a prospective representative

- 66 In [CP 333](#), we proposed to prescribe questions about the conduct of the prospective representative in the template reference request. These questions are intended to capture the serious compliance and misconduct concerns that the Financial Services Royal Commission recommended should be included in licensees' reference checking processes.

### Stakeholder feedback

- 67 Several respondents sought clarification of the scope of the conduct to be included in response to the conduct related questions in the template reference request and an explanation or examples of what is meant by 'unprofessional conduct', 'gross incompetence' and 'gross negligence'.
- 68 A few respondents raised concerns that the template reference request requires excessive detail about the conduct identified, including copies of internal assessments, external notifications or complaints against the representative. Respondents indicated that this information may also be irrelevant, personal or sensitive. They suggested that a high-level summary of the conduct should be sufficient.
- 69 Some respondents also suggested that the questions could be simplified and more aligned with the ABA protocol, which asks about a reported breach to ASIC and a 'material incident'.

#### *ASIC's response*

We acknowledge that our questions could be simplified and have made some amendments to simplify the template reference request form. It was not our intention to require referee licensees to provide additional documents in order to satisfy a request that details about specific conduct be provided as part of a reference. We have therefore updated our guidance in [INFO 257](#) to clarify that only a summary of relevant details about the conduct should be provided by a referee licensee.

The areas of conduct covered are based on similar questions in the [Standards Australia handbook](#). In our view, these areas of conduct are commonly understood and do not require additional clarification. The definition of ‘unprofessional conduct’ is also consistent with other ASIC legislative instruments.

We have also not adopted the approach under the ABA protocol that requires subscribing licensees to provide information about ‘material incidents’ because this would introduce a new term that does not currently exist under the Corporations Act or National Credit Act. Not only would introduction of a new term add complexity and regulatory uncertainty, it may also be inconsistently applied by licensees.

## Unresolved matters

- 70 In [CP 333](#), we proposed to prescribe questions about ongoing matters associated with the prospective representative in the template reference request. We proposed a referee licensee would provide a brief description of the nature of the circumstances that triggered the inquiry/investigation (e.g. a complaint, compliance audit or other circumstance), and details of the progress and status of the inquiry/investigation. We also proposed a question on whether the representative was made aware of the inquiry or investigation.

### Stakeholder feedback

- 71 Many respondents raised concerns about the level of detail required in the template reference request in relation to unresolved matters at the time of providing the reference, suggesting it should be no more than that provided under the ABA protocol. Other respondents noted that the question could be simplified given information about compliance audits is already captured elsewhere in the template reference request.
- 72 A few respondents also indicated that they were uncertain about whether a referee licensee is required to provide information where an inquiry/investigation is a result of the referee licensee’s regular compliance activities (e.g. a regularly scheduled compliance review) rather than any action or inaction of the prospective representative. They requested ASIC provide further guidance to clarify this.

#### *ASIC’s response*

We remain of the view that the proposed questions are based on, and closely aligned with, the ABA protocol. The questions are intended to alert the recruiting licensee to any unresolved matters.



For the information to be meaningful to a recruiting licensee, we consider that the referee licensee should provide brief details about the cause and status of the inquiry or investigation.

However, in response to feedback provided, we have simplified and limited the number of questions asked. We have also provided additional guidance in [INFO 257](#) to clarify the level of detail required.

We have also clarified that the reference is only concerned with ongoing inquiries or investigations that result from any action or inaction by the prospective representative, rather than those arising because of a licensee's regular compliance activities.

## F Proposed information sheet

### Key points

This section outlines the feedback we received on the proposed information sheet included as Attachment 2 to CP 333, and our response to this feedback.

### Guidance on licensee obligations

- 73 In [CP 333](#), we proposed to issue an information sheet that contains guidance on the obligations for referee licensees and recruiting licensees when obtaining or giving a reference. The proposed information sheet included an overview of the questions in the template reference request, along with general guidance on answering the questions.

#### Stakeholder feedback

- 74 Respondents broadly supported guidance about the ASIC protocol being provided through an information sheet.
- 75 Some respondents suggested that we could provide further guidance by providing examples of completed questions in response to the template reference request.
- 76 Some respondents also sought further guidance from ASIC on the following aspects of the ASIC protocol:
- how the ASIC protocol applies when a prospective representative's former licensee no longer holds a licence;
  - the circumstances in which a recruiting licensee would request additional references about a prospective representative from a referee licensee; and
  - how our proposal that nothing in the ASIC protocol would limit or prevent a recruiting licensee from requesting additional information would work in practice.

#### *ASIC's response*

We have issued [INFO 257](#) which provides guidance for licensees on meeting their obligations under the ASIC protocol. INFO 257 provides an overview of the questions in the template reference request, along with general guidance on answering the questions.

In response to feedback requesting examples of completed questions asked in the template reference request, we have included links to examples of completed template reference requests within INFO 257.

INFO 257 now clarifies our guidance on:

- how the ASIC protocol applies when a prospective representative's former licensee no longer holds a licence;
- circumstances in which a recruiting licensee would request additional references about a prospective representative; and
- how our proposal about requesting additional information would work in practice.

INFO 257 now reflects the changes we have made to ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429.

We have also made consequential amendments to ASIC regulatory guidance and resources, including [Regulatory Guide 104](#) *AFS licensing: Meeting the general obligations* (RG 104) and [Regulatory Guide 205](#) *Credit licensing: General conduct obligations* (RG 205).

## G Scope of the ASIC protocol

### Key points

This section outlines additional feedback that respondents provided in their submissions about who the ASIC protocol should apply to, and our response to that feedback.

### Who the ASIC protocol applies to

- 77 Several respondents suggested that the scope of the ASIC protocol should be extended to require references to be sought from and provided by aggregators in circumstances where a mortgage broker operates through an aggregator, but is not their representative (e.g. mortgage brokers that are licensees, or that are representatives of mortgage broker licensees).
- 78 Respondents indicated that aggregators play a key role in the oversight of mortgage brokers and that they often hold detailed information about individual mortgage brokers (e.g. relating to compliance and conduct matters). Some respondents expressed the view that without the benefit of the defence of qualified privilege that is provided under the ASIC protocol, aggregators may be reluctant to voluntarily share information with other licensees about mortgage brokers that have operated through them but have not been their representatives.
- 79 Some individual respondents also suggested that the scope of the ASIC protocol should be extended to require references to be sought for other certain individuals, including finance brokers that are not mortgage brokers, referrers of credit services and individuals supporting financial advisers and mortgage brokers.

#### *ASIC's response*

ASIC does not have the power to expand the scope of the ASIC protocol. The power given to ASIC by Parliament under s47 of the National Credit Act enables us to determine a reference checking and information sharing protocol that applies to certain individuals in circumstances where there are reasonable grounds to suspect that, if an individual is successful in obtaining the job they seek, they will become a mortgage broker representative of a credit licensee. Any expansion to the scope of the legislation is a matter for the Parliament.

Note: See s47(3A) and s47(3C) of the National Credit Act.

## Appendix: List of non-confidential respondents

- Association of Financial Advisors
- Association of Securities & Derivatives Advisors of Australia
- Astute Financial Management Pty Ltd
- Australian Banking Association
- Australian Finance Group Ltd
- Australian Finance Industry Association
- Australian Financial Markets Association
- Australian Small Business and Family Enterprise Ombudsman
- Combined Industry Forum
- Finance Brokers Association of Australia
- Financial Planning Association
- Financial Services Council
- Home Loan Experts
- Industry Fund Services Limited
- Legal Aid Queensland
- Mortgage & Finance Association of Australia
- Stripe Payments Australia
- Stockbrokers and Financial Advisers Association