



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429

This is the Explanatory Statement for the *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429* (the **Instrument**).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. From 1 October 2021, Australian financial services licensees (**financial services licensees**) and Australian credit licensees (**credit licensees**) will be required to comply with a reference checking and information sharing protocol in relation to financial advisers and mortgage brokers (see paragraph 912A(1)(cc) of the *Corporations Act 2001 (Corporations Act)* and paragraph 47(1)(ea) of the *National Consumer Credit Protection Act 2009 (Credit Act)*).
2. Subsection 912A(3A) of the *Corporations Act* and subsection 47(3A) of the *Credit Act* provide that ASIC, may by legislative instrument, determine a reference checking and information sharing protocol for financial advisers and mortgage brokers.
3. The Instrument prescribes the specific obligations that apply to financial services licensees and credit licensees (together **licensees**) under the *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) (ASIC Protocol)*.

Purpose of the Instrument

4. The *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (the **Royal Commission**) identified that financial services licensees were not doing enough to communicate between themselves about the backgrounds of prospective employees. In particular:
 - (a) the reference checking and information sharing protocol administered by the Australian Banking Association is limited to signatories and not consistently applied;

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- (b) financial services licensees frequently fail to respond adequately to requests for references regarding their previous employees; and
 - (c) financial services licensees do not always take the information they receive about prospective representatives seriously enough.
 5. As a result of these issues, the Royal Commission found that financial advisers facing disciplinary action from their employer can seek employment from another financial services licensee.
 6. To address these concerns, the Royal Commission recommended that financial services licensees should be required to give effect to reference checking and information sharing protocols for financial advisers, to the same effect now provided by the Australian Banking Association in its 'Financial Advice – Recruitment and Termination Reference Checking and Information Sharing Protocol': see Recommendation 2.7. The intention of the protocol is to promote better information sharing about the performance history of financial advisers – focusing on compliance, risk management and advice quality.
 7. Recommendation 1.6 of the Royal Commission was that the requirement to give effect to the reference checking and information sharing protocol should be extended to credit licensees in respect of mortgage brokers.
 8. In line with Recommendations 1.6 and 2.7, Schedule 10 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the **Financial Sector Reform Act**) amends the Corporations Act and Credit Act to:
 - (a) require financial services licensees and credit licensees to comply with reference checking and information sharing protocols to be made by ASIC in the form of legislative instruments under the Corporations Act and the Credit Act; and
 - (b) create a civil penalty for non-compliance with the obligation.
 9. Financial services licensees and credit licensees are subject to the general obligations under section 912A of the Corporations Act and section 47 of the Credit Act respectively. Under Schedule 10 to the Financial Sector Reform Act, licensees will be subject to a new specific obligation to undertake reference checking and information sharing regarding a former, current or prospective representative, under a reference checking and information sharing protocol to be made by ASIC in the form of legislative instruments: refer paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act.
 10. Subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act provide that ASIC may, by legislative instrument, determine a protocol for licensees to share information in relation to individuals to whom the protocol applies – either by requesting information about the individual or providing information about the individual, as the case may be.
 11. The reference checking and information sharing obligation applies to both financial services licensees and credit licensees. This is intended to enable any

past misconduct by a person to be ascertained and shared between the financial advice and mortgage broking industries, particularly where the person seeks to move from one industry to the other. It also covers representatives of licensees who have not been a financial adviser or mortgage broker and are seeking to move into these roles.

12. ASIC is making the Instrument under the Corporations Act and the Credit Act, to set out the detail of the specific obligations that apply to both financial services licensees and credit licensees under the ASIC Protocol.

Consultation

13. ASIC released [Consultation Paper 333](#) *Implementing the Royal Commission recommendations: Reference checking and information sharing (CP 333)* on 19 November 2020, seeking feedback on ASIC's proposed approach to implementing Recommendations 1.6 and 2.7 in relation to reference checking and information sharing. CP 333 was open for submissions for a period of 10 weeks. Consultation closed on 29 January 2021.
14. ASIC Report 694 *Response to submissions on CP 333 Implementing the Royal Commission recommendations: Reference checking and information sharing*, sets out the key issues that arose out of submissions received, and ASIC's response to those issues.
15. The Office of the Australian Information Commissioner was consulted in making the Instrument, particularly with respect to the requirements relating to the consent of the individual to whom the information relates.
16. The Office of Best Practice Regulation has confirmed that the Government has undertaken a process equivalent to a Regulation Impact Statement in relation to the implementation of the Royal Commission recommendations, which also covers implementation by ASIC of Recommendations 1.6 and 2.7 in the Instrument.

Operation of the Instrument

17. Paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act provide that licensees are required to comply with the reference checking and information sharing protocol for financial advisers and mortgage brokers. ASIC may, by legislative instrument, determine the reference checking and information sharing protocol (see subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act).

Part 1 — Preliminary

18. Section 2 of the Instrument provides that the Instrument commences on the later of 1 October 2021 and the day after the Instrument is registered on the Federal Register of Legislation. The commencement date of the Instrument is intended to align with the commencement date of the reference checking and information sharing legislative regime (i.e. 1 October 2021).

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19. Section 3 of the Instrument provides that the Instrument is made under subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act. These subsections have been enacted and will come into operation on 1 October 2021. Even though the subsections that confer power on ASIC to make the Instrument have not yet come into operation, ASIC can make the instrument as if they had come into operation in reliance on section 4 of the *Acts Interpretation Act 1901*.
20. Subsection 4(1) defines key terms in the Instrument including: ‘recruiting licensee’, ‘referee licensee’, ‘current licensee’, ‘former licensee’ and ‘prospective representative’.
21. A ‘recruiting licensee’ is a licensee that is considering employing or authorising an individual (***prospective representative***) who is a licensee or a former or current representative of a licensee, as a representative, where there are reasonable grounds to suspect that, if the individual becomes a representative of the recruiting licensee, the individual will:
- (a) provide personal advice to retail clients in relation to a relevant financial product; or
 - (b) 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.
22. A ‘representative’ of a financial services licensee has the same meaning as in section 910A of the Corporations Act, and a ‘representative’ of a credit licensee has the same meaning as in subsection 5(1) of the Credit Act. A prospective representative includes an individual who has not been a financial adviser or mortgage broker with a licensee and is seeking to be employed or authorised in these roles by a recruiting licensee.
23. Subsection 912A(3B) of the Corporations Act and subsection 47(3B) of the Credit Act provide the ASIC Protocol must not require information to be provided in relation to conduct that occurred more than five years before the information is shared. The Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (the **Explanatory Memorandum**) states the 5-year period reflects the period of time for which employee records would be expected to be retained: refer paragraphs 10.39 and 10.74 of the Explanatory Memorandum.
24. In relation to the 5-year period, the Instrument imposes obligations on a ‘referee licensee’ to provide specified information in a reference in relation to a prospective representative of a recruiting licensee.
25. A ‘referee licensee’ in relation to a prospective representative, is a ‘current licensee’ or ‘former licensee’ from whom subsection 6(1) of the Instrument requires the recruiting licensee to take reasonable steps to obtain a reference, and any other former licensee from whom the recruiting licensee requests a reference under subsection 8(3), in relation to the prospective representative.

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26. A 'current licensee', in relation to a prospective representative, is a licensee in respect of which the prospective representative is currently a representative.
 27. A 'former licensee', in relation to a prospective representative, is a licensee in respect of which the prospective representative was a representative for any period in the five years before a request for a reference about the prospective representative was made by the recruiting licensee, but who is no longer a representative of that licensee.
 28. Subsection 4(2) of the Instrument provides that where a reference is made to a 'reference, consent (given or withdrawn), notice, request, clarification or update, explanation or record in the Instrument, it is a reference to those things in writing. For example, a referee licensee must provide a reference in writing, not verbally. This requirement will assist licensees with record-keeping. It will also assist with ensuring compliance with the ASIC Protocol.

Part 2 — Protocol

29. Section 5 of the Instrument provides that the ASIC Protocol is made for the purpose of the reference checking and information sharing obligations for licensees under paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act.

Recruiting licensee—obligation to take reasonable steps to obtain reference

30. Section 6 of the Instrument provides from which licensees a recruiting licensee must, at a minimum, obtain reference(s) about a prospective representative. Subsection 6(1) of the Instrument provides a recruiting licensee must take reasonable steps to obtain reference(s) from specified licensees as follows:
 - (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.

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31. 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.
 32. Subsection 6(1) of the Instrument also provides that, where a prospective representative is a licensee in their own right and seeks to become a representative of a recruiting licensee, the recruiting licensee must take reasonable steps to obtain a reference from the prospective representative themselves as a licensee. This requirement is clearly contemplated in the Financial Sector Reform Act: refer paragraphs 10.14 and 10.50 of the Explanatory Memorandum.
 33. If the prospective representative is a licensee in their own right and is also currently employed or authorised by another licensee, or was so employed or authorised in the past five years, the recruiting licensee must also take reasonable steps to obtain a reference from those other licensee(s) as outlined in paragraph 30 above.
 34. A recruiting licensee may also request references from other former licensees in addition to those specified in subsection 6(1), in accordance with the ASIC Protocol, to obtain a more fulsome picture of the representative's conduct and performance history: see subsection 8(3) of the Instrument.

Reasonable steps

35. Subsection 912A(3B) of the Corporations Act and subsection 47(3B) of the Credit Act provide that the reference checking and information sharing 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.
36. Subsection 6(2) of the Instrument provides that taking reasonable steps to obtain a reference from a referee licensee about an individual as a prospective representative includes:
 - (a) seeking the consent of the individual in accordance with section 7 of the Instrument; and
 - (b) if the consent is obtained—requesting a reference from the referee licensee in accordance with section 8 of the Instrument.
37. The concept of 'reasonableness' is referable to the general law meaning. In determining whether the steps taken by a recruiting licensee to request a reference are reasonable, a licensee would take into account the facts and circumstances of the situation.

Sub-authorisations

38. Subsection 6(3) of the Instrument applies in relation to a recruiting licensee who may give consent to a corporate representative to sub-authorise a specified individual or specified class of individuals (the membership of which might

change from time to time) as a representative of the licensee under subsection 916B(3) of the Corporations Act or subsection 65(4) of the Credit Act. For reference checking purposes, the recruiting licensee is taken to be considering authorising:

- (a) each specified individual as a prospective representative of the licensee; and
 - (b) in relation to a specified class of individuals, each individual that, on or after the day of commencement of the Instrument, will fall within the specified class for the first time.
39. A recruiting licensee must take reasonable steps to conduct reference checking in accordance with the ASIC Protocol for each sub-authorised individual. Where a corporate representative sub-authorises an individual (or specified class of individuals) 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. Licensees are expected to have arrangements in place with the corporate representative to facilitate compliance.

Recruiting licensee—obligation to seek consent of representative

40. Subsection 7(1) of the Instrument provides that a recruiting licensee must seek the consent, using the template consent form, of a prospective representative to undertake reference checking and information sharing in accordance with the ASIC Protocol, for the purposes of:
- (a) considering their employment or authorisation as a representative; and
 - (b) complying with the general conduct obligations of a licensee in section 912A of the Corporations Act (for a recruiting financial services licensee) and section 47 of the Credit Act (for a recruiting credit licensee), where the prospective representative becomes employed or authorised by the recruiting licensee as a representative; and
 - (c) collecting, using, disclosing and storing personal information about the prospective representative from a referee licensee for the purposes described in paragraphs (a) and (b) above.
41. Subsection 7(2) of the Instrument further provides that a recruiting licensee must not request a reference from a referee licensee about the prospective representative where the recruiting licensee:
- (a) has not obtained the consent of a prospective representative; or
 - (b) had obtained consent, but this was subsequently withdrawn by the prospective representative or the consent has ceased (which occurs at the

end of the period of 12 months commencing the day after it is given, in accordance with the template consent form).

42. Subsection 7(2) of the Instrument is in line with the Australian Privacy Principles contained in the Privacy Act, where an individual may withdraw their consent at any time. To minimise the likelihood of any disputes over whether consent has been withdrawn, a prospective representative must withdraw their consent in writing (refer subsection 4(2) of the Instrument).
43. If a prospective representative does not provide written consent to undertake reference checking and information sharing in accordance with the Instrument (or consent is withdrawn or ceases), a recruiting licensee will not be able to request a reference under the Instrument. While the Instrument does not prohibit a recruiting licensee from employing or authorising a prospective representative without a reference (because consent is refused or withdrawn), recruiting licensees will need to consider, and be able to demonstrate, compliance with their general conduct obligations under section 912A of the Corporations Act and section 47 the Credit Act if they decide to employ or authorise a prospective representative in such circumstances.
44. Subsection 7(3) of the Instrument provides where the prospective representative withdraws their consent or the consent ceases, the recruiting licensee must give a notice to a referee licensee from whom they have requested a reference, or requested a clarification or update in relation to a reference, about a prospective representative, stating that the prospective representative has withdrawn their consent or the consent has ceased.

Recruiting licensee—requesting a reference

45. Subsection 8(1) of the Instrument provides the section applies where a recruiting licensee has obtained the consent of a prospective representative to request a reference from a referee licensee about them and the consent has not ceased or been withdrawn by the prospective representative.
46. Subsection 8(2) of the Instrument provides that a recruiting licensee must make a request, using the template reference request, to the referee licensee(s) specified at subsection 6(1), and give a copy of the prospective representative's consent to the referee licensee at the time of making a request for a reference. The template reference request, as defined in subsection 4(1) of the Instrument, means, in relation to a prospective representative, the template in Schedule 2 to the Instrument, where the reference is being sought from a licensee who is not the prospective representative. Where the reference is being sought from a prospective representative themselves as a licensee, the applicable template is in Schedule 3 to the Instrument.

Additional references from other former licensees

47. Subsection 8(3) of the Instrument provides that a recruiting licensee may seek additional references from other former referee licensees within the last five years, in addition to the requirement to obtain references from the licensees provided in subsection 6(1) of the Instrument. A request must be made using

the template reference request and otherwise be in accordance with the ASIC Protocol.

48. The defence of qualified privilege will extend to information in a reference shared by other former licensees in response to requests made by a recruiting licensee, provided the request by the recruiting licensee, and a reference given by a former licensee, is in accordance with the requirements of the ASIC Protocol.
49. Subsection 8(4) provides that a recruiting licensee is permitted to make minor changes to the format of the template reference request, provided the reference request contains all the questions in the template. Amendments cannot be made to any of the questions.

Requests to clarify or update information given in a reference

50. Subsection 8(5) of the Instrument provides a recruiting licensee who has been given a reference from a referee licensee, may, in relation to a prospective representative, request the referee licensee clarify specific information, and/or provide an update on unresolved matters mentioned in a reference they have given. The request must be made:
 - (a) in writing; and
 - (b) within 6 months of the date on which the reference was given by the referee licensee.

No limitation

51. Subsection 8(6) of the Instrument provides that the ASIC Protocol does not limit or prevent a recruiting licensee from requesting a referee licensee to provide additional information to that in the template reference request about a prospective representative. For example, recruiting licensees may undertake other background checking and seek related information on the prospective representative with their consent. This is permitted, provided that the additional information requested does not reduce the scope of any of the questions in the template reference request.
52. A referee licensee is not obliged however, under the Instrument, to provide any additional information to that in the template reference request to the recruiting licensee. Further, should the referee licensee do so, they do not benefit from the defence of qualified privileged provided in subsection 912A(3F) the Corporations Act and subsection 47(3F) of the Credit Act, in respect of the information they provide. This is because the defence only applies when acting in accordance with the ASIC Protocol (as provided in the Instrument).

Referee licensee—obligation to give reference

53. Section 9 of the Instrument imposes an obligation on the referee licensee to give a reference to a recruiting licensee where they receive a request for a reference

about a prospective representative from a recruiting licensee, that is made in accordance with section 8 of the Instrument.

54. Subsection 9(1) of the Instrument provides the reference must include all information of which the referee licensee is aware and reasonably considers to be relevant to answer the questions in the template reference request, and is complete, accurate and based on documented facts. If a question cannot be answered, the referee licensee must include an explanation as to why.
55. The Explanatory Memorandum states that it is essential to the operation of the reference checking and information sharing obligation that licensees share information honestly and frankly: refer paragraphs 10.42 and 10.77 of the Explanatory Memorandum. The defence of qualified privilege in subsection 912A(3F) the Corporations Act and subsection 47(3F) of the Credit Act will apply to licensees where they act in accordance with the ASIC Protocol in providing information about an individual who is currently or was formerly a representative of the licensee: see section 89 of the Corporations Act and section 16 of the Credit Act.
56. The information a referee licensee provides in answer to the template reference request should be factual, objective and relevant to the role of the prospective representative. The template reference request should prevent subjective information or opinions about the prospective representative's reputation or character being included in a reference, including spurious or vexatious matters.
57. Subsection 9(2) provides a referee licensee must provide a response within 10 business days of receiving a request, unless a longer period is agreed to between the licensees. This time period provides flexibility for industry, with a maximum limit of 30 business days after receiving a request, to ensure references are given in a reasonable time without undue delay.
58. For the avoidance of doubt, a referee licensee that has received information from ASIC under section 916G of the Corporations Act or section 73 of the Credit Act in relation to the prospective representative is not required to share this information with another licensee in the performance of their reference checking and information sharing obligations under section 9 of this Protocol.

Clarification or update of information previously given in a reference

59. Subsection 9(3) provides that, where a referee licensee receives a request from a recruiting licensee for a clarification or update in accordance with subsection 8(5) of the Instrument, the referee licensee must provide information (in writing) of which the referee licensee is aware and reasonably considers to be relevant to the request, and is complete, accurate and based on documented facts. If a request cannot be answered, the referee licensee must include an explanation as to why.
60. Subsection 9(4) of the Instrument imposes the same time period on a referee licensee to provide a clarification or update to a reference to a recruiting licensee as in subsection 9(2), to ensure information is given in a reasonable time.

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61. Subsection 9(5) of the Instrument provides the referee licensee is not required to give information in relation to conduct of the prospective representative that occurred more than 5 years before the reference is given to the recruiting licensee: refer subsection 912A(3B) of the Corporations Act and subsection 47(3B) of the Credit Act.
 62. Subsection 9(6) provides where a referee licensee has been given a notice from a recruiting licensee that the prospective representative has withdrawn their consent or that the consent has ceased, a referee licensee must not give a reference, or clarification or update to a reference.

Agents

63. Section 10 of the Instrument provides the obligations imposed on a financial services licensee or credit licensee in accordance with the ASIC Protocol, also apply in respect of any agent authorised by the licensee to collect, use, disclose and store personal information on its behalf under the ASIC Protocol. This takes into account that the outsourcing of recruitment functions is a common practice across licensees and that the licensee remains responsible for the acts or omissions of its agents in relation to the ASIC Protocol.

Use of information

64. To ensure appropriate use of information given under the ASIC Protocol and compliance with the Privacy Act, section 11 of the Instrument provides that information given under the ASIC Protocol must only be collected, used, disclosed or stored for the purpose of reference checking and information sharing in accordance with the ASIC Protocol by licensees.
65. It must not be collected, used, disclosed or stored for a purpose other than that for which it was collected, unless the individual has consented to that use or disclosure, or another exception under the Privacy Act applies.

No arrangement or agreements

66. To ensure the integrity of the ASIC Protocol and to allow licensees to undertake reference checking under the ASIC Protocol unimpeded by other arrangements or agreements, section 12 of the Instrument prohibits licensees from entering into any arrangement or agreement with any person that limits the licensee's ability to collect, use, disclose and store information under the ASIC Protocol.

Contact for reference checking and information sharing

67. Section 13 of the Instrument, which provides licensees must have in place adequate arrangements to ensure they can be readily contacted by recruiting licensees for reference checking and information sharing under the ASIC Protocol, ensures that licensees have access to a contact point for reference checking and information sharing under the ASIC Protocol. A licensee may determine the type of arrangements to put in place, depending on the nature, scale and complexity of a licensee's business.

Record-keeping

68. In line with existing record-keeping obligations under section 1101C of the Corporations Act, section 14 of the Instrument provides a licensee must keep specified records under the ASIC Protocol for a minimum of five years. The records to be kept will enable licensees to comply with the ASIC Protocol, and for ASIC to monitor their compliance.

Schedule 1 - Template Consent Form

69. Paragraph 912A(3B)(a) of the Corporations Act and paragraph 47(3B)(a) of the Credit Act provide the ASIC Protocol must not require or permit personal information within the meaning of the Privacy Act, to be shared without the consent of the individual to whom the information relates. Obtaining consent formalises a practice that is standard across a wide range of industries and professions: refer paragraphs 10.38 and 10.73 of the Explanatory Memorandum.
70. Schedule 1 to the Instrument provides a standard Template Consent Form for a recruiting licensee to seek the consent of a prospective representative for the purpose of undertaking reference checking under the ASIC Protocol. This will:
- (a) promote standardisation and consistency across industry; and
 - (b) ensure that the privacy protections under subsection 912A(3B) of the Corporations Act, subsection 47(3B) of the National Credit Act and the relevant consent-related Australian Privacy Principles are met by licensees requesting references under the ASIC Protocol for specified purposes: refer sections 1 and 2 of the Template Consent Form.
71. Section 3 of the Template Consent Form provides the recruiting licensee will collect specified information from referee licensees, being one or more of the current and/or former licensees to whom the prospective representative were/are a representative in the preceding five years (see subsection 6(1) and subsection 8(3) of the Instrument), and only in relation to the five-year period preceding the date the reference was given.
72. Section 4 of the Template Consent Form provides the purposes for which information will be collected, used, disclosed and stored by the recruiting licensee, unless use or disclosure is required or authorised by law, including the Privacy Act, or the prospective representative consents to collection, use, disclosure or storage for a different purpose.
73. Section 5 of the Template Consent Form provides information collected by the recruiting licensee will be collected, used and disclosed for a period of 12 months from the date consent is given, for the specified purposes, unless the prospective representative has notified the recruiting licensee in writing that they have withdrawn their consent. Unless it is withdrawn earlier, the Consent will cease at the end of that 12-month period.
74. Section 6 of the Template Consent Form provides information collected by the recruiting licensee will be stored for five years in accordance with the ASIC

Protocol, which requires records to be kept for the same period (refer section 14 of the Instrument).

Schedule 2 - Template Reference Request

75. Schedule 2 to the Instrument provides a template reference request for licensees to meet their information sharing and reference checking obligations under the ASIC Protocol where a reference is being sought from a licensee who is not a prospective representative.
76. The template reference request applies to licensees when they are reference checking both prospective financial advisers and mortgage brokers. This will promote certainty and consistency in reference checking and information sharing across both the financial advice and mortgage broking industries. It will also help licensees to maintain accurate records of reference checking and information sharing, and reduce the risk that information requested from a referee licensee falls outside the consent given by the prospective representative.
77. The template reference request contains questions about the following matters relating to the prospective representative, and in relation to financial services or credit activities:
 - (a) background information – refer Question 1;
 - (b) compliance audits – refer Question 2;
 - (c) conduct of the representative – refer Question 3; and
 - (d) matters that are unresolved in relation to an inquiry or investigation by the referee licensee at the time the reference is given – refer Question 4.
78. Question 1 relates to identifying the prospective representative, seeking details about their previous role and responsibilities, and asking when and by whom the reference was completed.
79. Question 2 requests information about the results and outcomes of compliance audits of the prospective representative in relation to their financial advice or mortgage broking activity. Compliance audits are important for licensees to effectively monitor a representative's performance and conduct. Information about compliance audits in references provided under the ASIC Protocol, is only required for prospective representatives who were previously employed or authorised as a financial adviser or mortgage broker with a licensee.
80. Question 3 requests information about breach reports made to ASIC and other conduct-related matters. The relevant conduct covered by the question is intended to capture the serious compliance and misconduct concerns the Royal Commission recommended should be included in licensees' reference checking processes.

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81. Question 4 requests information on matters relating to an unresolved inquiry or investigation in progress in relation to the prospective representative. This question takes into account that matters can take time to be fully investigated or resolved by a licensee and may not be resolved until after a representative has ceased employment or authorisation with the licensee. The questions are intended to alert the recruiting licensee to these matters. Under subsection 8(5) of the Instrument, the recruiting licensee may then request in writing an update from a referee licensee on an unresolved matter, before they decide to employ or authorise the prospective representative.

Schedule 3 - Template Reference Request

82. Schedule 3 to the Instrument provides a template reference request for licensees to meet their information sharing and reference checking obligations under the ASIC Protocol when they are undertaking a reference check where a reference is being sought from a prospective representative themselves as a licensee. The template contains questions based on Schedule 2 to the Instrument.

Legislative authority

83. The Instrument is made under subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act and is a disallowable instrument. The Instrument will sunset in accordance with the *Legislation Act 2003*.

Legislative instrument and primary legislation

84. The general obligation for licensees to comply with a reference checking and information sharing protocol is contained in paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act. ASIC has been given a specific power in subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act respectively, to determine the obligations in the reference checking and information sharing protocol.
85. The Explanatory Memorandum states that the protocol to be made by ASIC is subject to disallowance and sunset under the *Legislation Act 2003*. Further, the Explanatory Memorandum states:
- (a) it is appropriate to delegate the particular requirements of the obligation to a disallowable instrument because it contains detail that is machinery and technical in nature; and
 - (b) the delegation of particular requirements to the reference checking and information sharing protocol allows ASIC to ensure the integrity of the scheme. It is important that the protocol can be made and amended quickly so as to accommodate rapidly changing industry practices: refer paragraphs 10.15-10.17 and 10.52-10.53 of the Explanatory Memorandum.
86. The Instrument is not a modification or exemption of the primary legislation.

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87. It is appropriate for the Instrument to sunset in accordance with the *Legislation Act 2003*. Parliament clearly intended for the ASIC Protocol to be made by legislative instrument and, although a shorter period was considered, the usual 10-year sunset period promotes certainty for industry given the Instrument imposes ongoing obligations that licensees must comply with.
88. To the extent that the information sharing and reference checking framework as provided in the ASIC Protocol constitutes a limitation of a person's right to be protected from interference with his or her privacy, this is also addressed in the Statement of Compatibility with Human Rights in the Attachment.

Incorporation by reference

89. The Instrument does not incorporate any matter by reference for the purposes of section 14 of the *Legislation Act 2003*. The templates in Schedule 2 and Schedule 3 of the Instrument define a 'complaint' by reference to Australian / New Zealand Standard AS/NZS 10002:2014 *Guidelines for complaint management in organizations* published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force or existing on 29 October 2014.

Statement of Compatibility with Human Rights

90. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429 (Instrument).

Overview

1. From 1 October 2021, Australian financial services licensees and Australian credit licensees will be required to comply with a reference checking and information sharing protocol in relation to their prospective employment or authorisation of financial advisers and mortgage brokers as their representatives (see paragraph 912A(1)(cc) of the *Corporations Act 2001 (Corporations Act)* and paragraph 47(1)(ea) of the *National Consumer Credit Protection Act 2009 (Credit Act)*).
2. ASIC, may by legislative instrument, determine a reference checking and information sharing protocol for financial advisers and mortgage brokers.
3. The Instrument prescribes the specific obligations that apply to financial services licensees and credit licensees (together **licensees**) under the *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol)* (the **ASIC Protocol**).

Assessment of human rights implications

Right to privacy

4. This Instrument engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights.
5. The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the International Covenant on Civil and Political Rights and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.
6. To the extent that the information sharing and reference checking framework as provided in the ASIC Protocol constitutes a limitation of a person’s right to be

protected from interference with his or her privacy, as stated in the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (the **Explanatory Memorandum**), the limitation is justified as follows:

- (a) The framework is prescribed by law and contingent on the affected person giving consent to the disclosure of information—accordingly, section 6 of the Instrument provides that taking reasonable steps to obtain a reference about an individual as a prospective representative includes seeking the consent of the individual in accordance with section 7 of the Instrument, and if the consent is obtained, requesting a reference from a referee licensee in accordance with section 8 of the Instrument;
- (b) The framework is in pursuit of the legitimate objective identified by the Financial Services Royal Commission—namely, to improve existing reference checking practices and to prevent representatives of an Australian financial services licensee or Australian credit licensee ‘shopping around’ for alternative employment when faced with disciplinary action; and
- (c) The framework is rationally connected and proportionate to the objective sought. In this regard it is noted that the framework implements in law practices that are currently a feature of the industry. In particular, ASIC’s Regulatory Guide 104 *Licensing: Meeting the general obligations* and Regulatory Guide 205 *Credit Licensing: General conduct obligations* set out measures for monitoring and supervising representatives and ASIC expects licensees to have in place appropriate background checks before appointing new representatives. Additionally, the Australian Banking Association’s ‘Financial Advice – Recruitment and Termination Reference Checking and Information Sharing Protocol’ is intended to promote better information sharing about the performance history of financial advisers – focusing on compliance, risk management and advice quality: refer paragraphs 15.172—15.176 of the Explanatory Memorandum.

Conclusion

- 7. The Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate: refer paragraph 15.177 of the Explanatory Memorandum.