



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2024/647*

### *ASIC Corporations and Credit (Repeal) Instrument 2024/648*

This is the Explanatory Statement for *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2024/647* (the **Instrument**) and *ASIC Corporations and Credit (Repeal) Instrument 2024/648* (the **Repeal 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**) have been 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**)) made by ASIC under a legislative instrument.
2. *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429* (**2021 Protocol**) prescribes the specific obligations that apply to financial services licensees and credit licensees for the purposes of paragraph 912A(1)(cc) of the *Corporations Act* and paragraph 47(1)(ea) of the *Credit Act*.
3. The 2021 Protocol does not apply to mortgage intermediaries, such as aggregators, in certain circumstances: refer para 7.77 of the Revised Explanatory Memorandum to the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023* (the **Revised Explanatory Memorandum**).
4. The *Corporations Act* and *Credit Act* were amended by the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (**Treasury Laws Amendment Act**) to ensure that aggregators would be appropriately subject to reference checking and information sharing protocols.

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5. Subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act, as amended by the Treasury Laws Amendment Act, now provide that ASIC may determine by legislative instrument a reference checking and information sharing protocol for licensees recruiting financial advisers and mortgage brokers as their representatives, as well as mortgage intermediaries who are acting or will act as intermediaries to mortgage brokers.
  6. The Instrument prescribes the specific obligations that apply to financial services licensees, credit licensees and mortgage intermediaries.
  7. The Repeal Instrument repeals the 2021 Protocol. However, the Instrument contains a transitional provision that allows financial services licensees and credit licensees to meet their obligations by complying with the 2021 Protocol, as in force immediately before its repeal, until 28 February 2025.
  8. From 1 March 2025, all financial services licensees, credit licensees and mortgage intermediaries must comply with the specific obligations prescribed by the Instrument.

### **Purpose of the instrument**

9. 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.
10. 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**) amended 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 refer paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act; and
  - (b) create a civil penalty for non-compliance with the obligation.
11. ASIC made the 2021 Protocol pursuant to subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act.
12. 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.
13. However, contrary to the policy intention, mortgage intermediaries such as aggregators, who are also credit licensees, may not be subject to the 2021

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Protocol in certain circumstances. Aggregators often work closely with other credit licensees under service agreements and often hold information about activities of other credit licensees and their authorised credit representatives that would be relevant for the Protocol: refer paragraph 7.77 of the Revised Explanatory Memorandum.

14. The Corporations Act and Credit Act were amended by Division 18 of the Treasury Laws Amendment Act to ensure aggregators are appropriately subject to the reference checking and information sharing protocol.
15. The Instrument maintains the specific obligations that apply to licensees under the 2021 Protocol and introduces provisions in relation to mortgage intermediaries, to ensure intermediaries such as aggregators are appropriately subject to reference checking protocols.
16. The Instrument also enables financial services licensees, when recruiting financial advisers, to request and share information relating to certain specified decisions and written warnings and reprimands by ASIC and the Financial Services and Credit Panel (*FSCP*) in respect of the conduct of prospective representatives.
17. The Instrument includes some additional minor and technical consequential updates and clarifications, including in relation to the requirement from 1 October 2021 for licensees to submit notifications about reportable situations (previously breach reports) to ASIC.
18. The Repeal Instrument repeals the 2021 Protocol.
19. To allow industry to transition to the Instrument, the Instrument contains a transitional provision that allows financial services licensees and credit licensees to meet their obligations by complying with the 2021 Protocol, as in force immediately before its repeal, until 28 February 2025. The transitional arrangement enables licensees to rely on compliance with the 2021 Protocol or the Instrument for the purposes of meeting their obligations under paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act.
20. From 1 March 2025, all financial services licensees, credit licensees and mortgage intermediaries must comply with the obligations prescribed by the Instrument.
21. By virtue of section 7(2) of the *Acts Interpretation Act 1901* and section 13 of the *Legislation Act 2003*, the repeal of the 2021 Protocol does not affect any rights, privileges, obligations or liabilities acquired, accrued or incurred under the 2021 Protocol. Consequently, licensees are required to respond to requests made in accordance with the 2021 Protocol that are outstanding at the time of its repeal. Licensees are also required to respond to requests for references made in accordance with the 2021 Protocol that are outstanding at the end of the transitional period.

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## Consultation

22. ASIC conducted a targeted consultation with industry associations within the financial advice and mortgage broking sectors in relation to the operation of the Instrument and the Repeal Instrument.

## Operation of the instrument

### The Instrument

#### Part 1 – Preliminary

23. Section 2 of the Instrument provides that the Instrument commences on the day after the Instrument is registered on the Federal Register of Legislation.
24. 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.
25. Subsection 4(1) retains and defines key terms in the Instrument including: ‘recruiting licensee’, ‘referee licensee’, ‘current licensee’, ‘former licensee’ and ‘prospective representative’, although these terms have been amended following the introduction of new provisions for mortgage intermediaries. Subsection 4(1) also introduces and defines new key terms including: ‘mortgage intermediary’, ‘future mortgage intermediary’, ‘former mortgage intermediary’, ‘relevant mortgage broker’ and ‘requesting licensee’.
26. A ‘recruiting licensee’ is a ‘recruiting credit licensee’ or a ‘recruiting financial services licensee’.
27. 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.
28. A ‘current licensee’, in relation to an individual, is a current credit licensee or current financial services licensee. A ‘current credit licensee’ or ‘current financial services licensee’ is a credit licensee or financial services licensee in respect of which the individual is a representative.
29. A ‘former licensee’, in relation to an individual, is a former credit licensee or former financial services licensee. A ‘former credit licensee’ or ‘former financial services licensee’ is a credit licensee or financial services licensee in respect of which the individual was a representative at any time in the previous 5 years and is no longer a representative.
30. Subsection 912A(3B) of the Corporations Act and subsection 47(3B) of the Credit Act provide a reference checking and information sharing 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 **Financial Sector Reform Bill Explanatory Memorandum**) states the 5-

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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 Financial Sector Reform Bill Explanatory Memorandum.

31. A ‘mortgage intermediary’ is a credit licensee that is a mortgage intermediary within the meaning of subsection 15C(1) of the Credit Act. A ‘mortgage intermediary’ is a ‘future mortgage intermediary’ in relation to an individual (***relevant mortgage broker***) if they are not a ‘current mortgage intermediary’ in relation to the individual and if there are reasonable grounds to suspect that:
- (a) the mortgage intermediary is acting, or will act, as an intermediary in relation to a credit licensee; and
  - (b) the individual is, or is a current or prospective representative of, the credit licensee and in the capacity provides or will provide credit assistance in relation to credit contracts secured by mortgages over residential property and is, or will be, a mortgage broker or a director, employee or agent of a mortgage broker.
32. A ‘former mortgage intermediary’ in relation to an individual is a mortgage intermediary who is not a ‘current mortgage intermediary’ in relation to the individual and who, at any time in the previous 5 years, has acted as an intermediary in relation to a credit licensee and the individual is, or is or was a representative of, the credit licensee and in that capacity the individual provided credit assistance in relation to credit contracts secured by mortgages over residential property and was a mortgage broker or a director, employee or agent of a mortgage broker.
33. A ‘referee licensee’ in relation to an individual means:
- (a) a credit licensee or financial services licensee from whom the recruiting licensee is required by subsection 5(1) of the Instrument to take reasonable steps to obtain a reference; and
  - (b) a ‘former licensee’, ‘former mortgage intermediary’ or ‘current mortgage intermediary’ from whom the recruiting licensee requests a reference under subsection 5(4) in relation to the individual; and
  - (c) a ‘former licensee’, ‘current licensee’, ‘former mortgage intermediary’ or ‘current mortgage intermediary’ from whom a future mortgage intermediary requests a reference under subsection 5(5), in relation to the individual.
34. A ‘requesting licensee’, defined by reference to section 6(1), is a ‘recruiting licensee’ or ‘future mortgage intermediary’ who is required to take reasonable steps or wishes to obtain a reference about a prospective representative or relevant mortgage broker in accordance with this Protocol.
35. 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

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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 Instrument.

36. Section 4A of the Instrument is a transitional provision containing an exemption from the requirement to comply with the Instrument. Section 4A(1) provides that a recruiting licensee that is considering employing or authorising an individual as its prospective representative does not have to comply with the Instrument in relation to the individual. Further, section 4A(2) provides that, where a recruiting licensee relies on the exemption in subsection (1), the 2021 Protocol, as in force immediately before its repeal, applies in relation to the employment or authorisation of the individual. This transitional provision is repealed at the end of 28 February 2025, pursuant to section 4A(3).
37. By virtue of section 7(2) of the *Acts Interpretation Act 1901* and section 13 of the *Legislation Act 2003*, the repeal of section 4A does not affect any rights, privileges, obligations or liabilities acquired, accrued or incurred under section 4A. Consequently, licensees are required to respond to requests for references made in accordance with the 2021 Protocol, and in reliance on the exemption contained within section 4A, that are outstanding at the time section 4A is repealed.

## **Part 2 – Protocol**

### ***Recruiting licensee and future mortgage intermediary—when a reference must or may be obtained***

#### *When a recruiting licensee must obtain a reference*

38. Section 5(1) of the Instrument provides from which licensees a recruiting licensee must obtain reference(s) about a prospective representative. Subsection 5(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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39. 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.
  40. Subsection 5(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 Financial Sector Reform Bill Explanatory Memorandum.
  41. 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 38 above.
  42. A recruiting licensee may request references in addition to those specified in subsection 5(1) to obtain a more fulsome picture of the representative's conduct and performance history: see subsection 5(4) of the Instrument.

#### *Reasonable steps*

43. 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.
44. Subsection 5(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 6 of the Instrument; and
  - (b) if the consent is obtained—requesting a reference from the referee licensee in accordance with section 7 of the Instrument.
45. 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*

46. Subsection 5(3) of the Instrument applies to a recruiting licensee who gives or is considering giving consent to a corporate representative to sub-authorise a specified individual or class of individuals as a representative of the licensee under subsection 916B(3) of the Corporations Act or subsection 65(4) of the

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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.

*Recruiting licensee—additional references*

47. Subsection 5(4) of the Instrument provides that, subject to section 6 of the Instrument, a recruiting licensee may also request in accordance with the Protocol references from any of the following:
- (a) a former licensee in addition to those from whom subsection 5(1) requires the recruiting licensee to take reasonable steps to obtain a reference;
  - (b) a current or former mortgage intermediary.
48. The defence of qualified privilege will extend to information in a reference shared by other former licensees, or a current or former mortgage intermediary, in response to requests made by a recruiting licensee, provided the request by the recruiting licensee and reference given are in accordance with the requirements of the Protocol.

*Future mortgage intermediary—references*

49. Subsection 5(5) provides that, subject to section 6 of the Instrument, a future mortgage intermediary may request a reference in accordance with the Protocol about a relevant mortgage broker from any of the following:
- (a) a former licensee;
  - (b) a current licensee;
  - (c) a former mortgage intermediary;
  - (d) a current mortgage intermediary.
50. The defence of qualified privilege will extend to information in a reference shared by a current or former licensee, or a current or former mortgage intermediary, in response to requests made by a future mortgage intermediary, provided the request by the future mortgage intermediary and reference given are in accordance with the requirements of the Protocol.

*Requesting licensee—obligation to seek consent of individual*

51. Subsection 6(1) of the Instrument provides that a requesting licensee, being either the recruiting licensee or the future mortgage intermediary, must seek the consent, using the template consent form, of a prospective representative or

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relevant mortgage broker to undertake reference checking and information sharing in accordance with the Protocol.

52. The requesting licensee must seek consent using the correct template consent form. In the case of a recruiting licensee, the template consent form in Schedule 1 to the Instrument must be used. Future mortgage intermediaries must use the template consent form in Schedule 2.

*Effect of not having consent of individual*

53. Subsection 6(2) of the Instrument further provides that a requesting licensee must not request a reference from a referee licensee about the prospective representative or relevant mortgage broker where the requesting licensee:
- (a) has not obtained the consent of a prospective representative or relevant mortgage broker; or
  - (b) had obtained consent, but this was subsequently withdrawn by the prospective representative or relevant mortgage broker, 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 forms).
54. Subsection 6(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 or relevant mortgage broker must withdraw their consent in writing (refer subsection 4(2) of the Instrument, explained at paragraph 35 above).
55. If a prospective representative or relevant mortgage broker does not provide written consent to undertake reference checking and information sharing in accordance with the Instrument (or consent is withdrawn or ceases), a requesting 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.

*Giving notice of withdrawn or ceased consent*

56. Subsection 6(3) of the Instrument provides where the prospective representative or relevant mortgage broker withdraws their consent or the consent ceases, the requesting 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 or relevant mortgage broker, stating that the individual has withdrawn their consent or the consent has ceased.

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## ***Requesting licensee—requesting a reference***

### *Where this section applies*

57. Subsection 7(1) of the Instrument provides the section applies where a requesting licensee has, under section 6, obtained the consent of a prospective representative or relevant mortgage broker to request a reference from a referee licensee about them and the consent has not ceased or been withdrawn by the prospective representative or relevant mortgage broker.

### *Providing a copy of the consent*

58. Subsection 7(2) of the Instrument provides that a requesting licensee must give a copy of the consent to the referee licensee at the time of making a request for a reference.

### *Use of template reference request*

59. Subsection 7(3) of the Instrument provides that a requesting licensee must request a reference using one of the relevant template reference requests in Schedules 3 to 5 to the Instrument.
60. Where a requesting licensee seeks to obtain a reference in relation to a prospective representative where the referee licensee is not the prospective representative, in accordance with subparagraphs 5(1)(a)(i) to (iv), subparagraphs 5(1)(b)(i) to (iv), or subsection 5(4) of the Instrument, the requesting licensee must use the template reference request in Schedule 3.
61. Where the reference is being sought from a prospective representative themselves as a licensee, in accordance with subparagraph 5(1)(a)(v) or 5(1)(b)(v), the applicable template reference request is in Schedule 4 to the Instrument.
62. Where the reference is being sought by a future mortgage intermediary about a relevant mortgage broker, in accordance with subsection 5(5) of the Instrument, the applicable template reference request is in Schedule 5.
63. Subsection 7(4) provides that a requesting licensee is permitted to make minor amendments to the format of the relevant template reference request, provided the reference request contains all the information required by the template.

### *Clarification or update requests*

64. Subsection 7(5) of the Instrument provides a requesting licensee who receives a reference about a prospective representative or relevant mortgage broker may 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 commencing after the day on which the reference was received.

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65. Pursuant to section 6(2) of the Instrument, a requesting licensee cannot make a clarification or update request to a referee licensee in accordance with the ASIC Protocol if the consent of the prospective representative or relevant mortgage broker has ceased or been withdrawn.

*No limitation*

66. Subsection 7(6) of the Instrument provides that the Protocol does not limit or prevent a requesting licensee from requesting a referee licensee to provide additional information to that in the applicable template reference request about a prospective representative or relevant mortgage broker. For example, recruiting licensees may undertake other background checking and seek related information on the prospective representative with their consent.
67. A requesting licensee is permitted to request additional information, provided that:
- (a) the additional information requested does not reduce the scope of any of the questions in the applicable template reference request;
  - (b) the additional information is not sought by way of a clarification or update request; and
  - (c) the requesting licensee obtains the consent of the prospective representative or relevant mortgage broker in accordance with section 6 of the Instrument.
68. A referee licensee is not obliged, however, under the Instrument, to provide any additional information to that in the applicable template reference request to the requesting licensee. Further, should the referee licensee do so, they do not benefit from the defence of qualified privilege 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 Protocol (as provided in the Instrument).

***Referee licensee—obligation to give reference***

69. Section 8(1) of the Instrument imposes an obligation on the referee licensee to give a reference, clarification or update to a requesting licensee where they receive a request under subsection 7(3) or 7(5) of the Instrument.

*Requirements for a reference, clarification or update*

70. Subsection 8(2) of the Instrument provides the reference, clarification or update must:
- (a) include all information of which the referee licensee is aware and reasonably considers to be relevant to answer the questions in the reference request; and
  - (b) be complete, accurate and based on documented facts.

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71. If a question cannot be answered, the referee licensee must include in the reference, clarification or update an explanation as to why.
  72. The Financial Sector Reform Bill 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 Financial Sector Reform Bill Explanatory Memorandum. The defence of qualified privilege in subsection 912A(3F) of the Corporations Act and subsection 47(3F) of the Credit Act will apply to licensees where they act in accordance with the 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.
  73. Subjecting mortgage intermediaries, such as aggregators, to the Protocol requirements means that aggregators may request, share, maintain and store information related to credit licensees. Consistent with the pre-existing protections provided to credit licensees and financial services licensees, aggregators have qualified privilege protections relating to the information they share: refer paragraph 8.43 of the Revised Explanatory Memorandum.
  74. 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 or relevant mortgage broker. The template reference request should prevent subjective information or opinions about the prospective representative or relevant mortgage broker's reputation or character being included in a reference, including spurious or vexatious matters.
  75. 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 or the relevant mortgage broker is not required to share this information with another licensee in the performance of their reference checking and information sharing obligations under this Protocol.

*When reference, clarification or update must be given*

76. Subsection 8(3) of the Instrument provides that the referee licensee must give the reference, clarification or update requested in accordance with subsection 7(3) or 7(5) to the requesting licensee within 10 business days of receiving a request, unless the licensees agree to a longer period (up to 30 business days after receiving a request). This provides flexibility for industry while ensuring references are given in a reasonable time without undue delay.

*Limitation*

77. Subsection 8(4) of the Instrument provides the referee licensee is not required to give information in relation to conduct of the prospective representative or relevant mortgage broker that occurred more than 5 years before the reference, clarification or update is given to the requesting licensee: refer subsection 912A(3B) of the Corporations Act and subsection 47(3B) of the Credit Act.

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78. Subsection 8(5) provides where a requesting licensee has notified a referee licensee that the prospective representative or relevant mortgage broker has withdrawn their consent or that the consent has ceased, the referee licensee must not give a reference, clarification or update to the requesting licensee.

### ***Agents***

79. Section 9(1) of the Instrument provides the obligations imposed on a financial services licensee or credit licensee by the 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 Protocol. This takes into account the common practice across licensees to outsource recruitment functions. Further, section 9(2) provides that the licensee remains responsible for the acts or omissions of its agents in relation to the Protocol.
80. Where a recruiting licensee and future mortgage intermediary intend to request a reference in relation to an individual who is a prospective representative and relevant mortgage broker, either the recruiting licensee or future mortgage intermediary may authorise the other as their agent to obtain the reference. This will allow one reference to be obtained from the referee licensee in relation to the relevant individual by either the recruiting licensee or the future mortgage intermediary on their own behalf and as agent for the other party.
81. For a reference to be obtained by the recruiting licensee or future mortgage intermediary as agent for the other, the parties must ensure that the individual who is a prospective representative and relevant mortgage broker provides consent for the recruiting licensee and future mortgage intermediary to obtain a reference. Consent may be obtained by one party acting as agent for the other.

### ***Use of information***

82. To ensure appropriate use of information given under the Protocol and compliance with the Privacy Act, section 10 of the Instrument provides that information collected by a licensee about an individual 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 Protocol by licensees.
83. 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***

84. To ensure the integrity of the Protocol and to allow licensees to undertake reference checking under the Protocol unimpeded by other arrangements or agreements, section 11 of the Instrument prohibits licensees from entering into any arrangement or agreement with any person that limits the licensee's ability to share and disclose information under the Protocol.

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### ***Contact for reference checking and information sharing***

85. Section 12 of the Instrument provides licensees must have in place adequate arrangements to ensure they can be readily contacted by requesting licensees for reference checking and information sharing in accordance with the Protocol. This ensures that licensees have access to a contact point for reference checking and information sharing under the 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***

86. In line with existing record-keeping obligations under section 1101C of the Corporations Act, section 13 of the Instrument provides a licensee must keep specified records under the Protocol for a minimum of five years. The records to be kept will enable licensees to comply with the Protocol, and for ASIC to monitor compliance.

### **Schedule 1 – Template Consent Form (Recruiting Licensee)**

87. 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 Financial Sector Reform Bill Explanatory Memorandum.
88. 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 Protocol. This:
- (a) promotes standardisation and consistency across industry; and
  - (b) ensures 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 Protocol for specified purposes: refer sections 1, 2 and 3 of the template consent form.
89. Updates to section 3 of the template consent form provide that the personal information the recruiting licensee may collect includes information about a prospective representative who is a mortgage broker in relation to a mortgage aggregator regarding the arrangements under which the aggregator has acted as an intermediary to the mortgage broker.
90. Section 3 also includes a consequential update due to the requirement for financial services licensees and credit licensees to submit notifications about reportable situations (previously breach reports) to ASIC.

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91. Section 4 of the template consent form provides the recruiting licensee will collect specified information from referee licensees, being:
- (a) (where the prospective representative is a representative of a licensee) one or more of the current and former licensees for whom the prospective representative is or was a representative in the preceding five years;
  - (b) (where the prospective representative is a licensee) the prospective representative; and
  - (c) (where the prospective representative is a mortgage broker in relation to a mortgage aggregator) one or more of the current or former mortgage intermediaries who acted as an intermediary in relation to the mortgage broker in the preceding five years.
92. Section 5 of the template consent form provides the information collected by the recruiting licensee will only relate to the five-year period before the information is shared.
93. Section 6 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 the collection, use, disclosure or storage for a different purpose.
94. Section 7 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.
95. Section 8 of the template consent form provides information collected by the recruiting licensee will be stored for five years in accordance with the Protocol, which requires records to be kept for the same period (refer section 13 of the Instrument).

#### **Schedule 2 – Template Consent Form (Future Mortgage Intermediary)**

96. Schedule 2 to the Instrument provides a separate standard template consent form for future mortgage intermediaries to seek the consent of a relevant mortgage broker for the purpose of undertaking reference checking under the ASIC Protocol. The template consent form is based on the information in Schedule 1 to the Instrument.
97. As provided at section 4 of the template consent form, a future mortgage intermediary will collect specified information from referee licensees, the referee licensees being:

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- (a) where the relevant mortgage broker is a representative of a licensee – one or more of the current or former licensees for whom the relevant mortgage broker is, or was, a representative in the preceding five years; and
  - (b) where the relevant mortgage broker is a broker in relation to a mortgage aggregator – one or more of the current or former mortgage intermediaries who acted as an intermediary in relation to the relevant mortgage broker in the preceding five years.

### **Schedule 3 – Template Reference Request (Recruiting Licensee from Referee Licensee)**

- 98. Schedule 3 to the Instrument provides a template reference request for recruiting licensees to meet their information sharing and reference checking obligations under the Protocol where a reference is being sought from a licensee who is not a prospective representative.
- 99. The template reference request applies to licensees when they are reference checking both prospective financial advisers and mortgage brokers. This promotes certainty and consistency in reference checking and information sharing across both the financial advice and mortgage broking industries. It also helps 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 individual.
- 100. 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 individual – 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.
- 101. Question 1 relates to identifying the individual, seeking details about their previous role and responsibilities, and asking when and by whom the reference was completed.
- 102. Question 2 requests information about the results and outcomes of compliance audits of the individual in relation to their financial advice or mortgage broking activity. Compliance audits are important for licensees to effectively monitor an individual's performance and conduct. Information about compliance audits in references provided under the Protocol, is only required for individuals who were previously employed or authorised as a financial adviser or mortgage broker with a licensee.

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103. 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.
104. A minor and technical update to Questions 3(a) and 3(b) includes a request for information in relation reportable situations to ASIC.
105. Additional questions at paragraph 3(e) request information in relation to whether ASIC or the FSCP has given the referee licensee:
- (a) a copy of a written warning or reprimand in relation to the individual under subsection 921S(2) or 921T(2) of the Corporations Act; and
  - (b) a copy of an instrument under subsection 921M(1) of the Corporations Act in relation to a decision by the FSCP to take administrative action against the individual.
106. Question 3(f) requests that the referee licensee provide a copy of the warning, reprimand or instrument and a copy of the statement of reasons for the decision given to the licensee by ASIC or the FSCP.
107. Question 4 requests information on matters relating to an unresolved inquiry or investigation in progress. This question takes into account the time taken by a licensee to fully investigate or resolve a matter, that may not be resolved until after an individual has ceased employment or authorisation with the licensee. The questions are intended to alert the recruiting licensee to these matters. Under subsection 7(5) of the Instrument, the recruiting licensee may then request in writing an update from a referee licensee on an unresolved matter, before deciding to employ or authorise the prospective representative.
108. Subparagraph 4(b)(i) also includes a minor and technical update to include a request for information relating to reportable situations.

#### **Schedule 4 – Template Reference Request (Recruiting Licensee from Prospective Representative Licensee)**

109. Schedule 4 to the Instrument provides a template reference request for licensees to meet their information sharing and reference checking obligations under the 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 3 to the Instrument.

#### **Schedule 5 – Template Reference Request (Future Mortgage Intermediary)**

110. Schedule 5 to the Instrument provides a template reference request for future mortgage intermediaries to request a reference about a relevant mortgage broker under the Protocol for the purposes of considering whether to act as a mortgage intermediary (i.e. a mortgage aggregator) in relation to the individual. The template contains questions based on Schedule 3 to the Instrument.

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## **The Repeal Instrument**

### **Part 1 – Preliminary**

111. The Repeal Instrument repeals *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429* on the day after the Instrument is registered on the Federal Register of Legislation.

### **Incorporation by reference**

112. The templates in Schedule 3, Schedule 4 and Schedule 5 to 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.

### **Legislative instrument and primary legislation**

113. The subject matter and policy implemented by the Instrument are more appropriate for a legislative instrument rather than primary legislation because:
- (a) The Instrument contains detail that is machinery and technical in nature; and
  - (b) The Instrument 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 10.51-10.53 of the Financial Sector Reform Bill Explanatory Memorandum.

### **Duration of the instrument**

114. It is appropriate for the Instrument to sunset in accordance with the *Legislation Act 2003*.
115. The Financial Sector Reform Bill Explanatory Memorandum states that the protocol to be made by ASIC is subject to sunset under the *Legislation Act 2003*: refer paragraphs 10.15 and 10.51 of the Financial Sector Reform Bill Explanatory Memorandum.
116. Parliament clearly intended for the 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 with which licensees must comply.
117. The Repeal Instrument is automatically repealed in accordance with the *Legislation Act 2003*.

### **Legislative authority**

118. Subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act provide that ASIC may determine, by legislative instrument, a

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reference checking and information sharing protocol for licensees recruiting a financial adviser and mortgage broker as their representative, as well as mortgage intermediaries considering whether to act as an intermediary in relation to a mortgage broker.

119. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
120. The Instrument and Repeal Instrument are made under subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act and are disallowable legislative instruments. The Financial Sector Reform Bill Explanatory Memorandum states that the protocol to be made by ASIC is subject to disallowance under the *Legislation Act 2003*.

### **Statement of Compatibility with Human Rights**

121. 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 2024/647*** (the ***Instrument***) and ***ASIC Corporations and Credit (Repeal) Instrument 2024/648*** (the ***Repeal Instrument***).

### Overview

1. From 1 October 2021, Australian financial services licensees (***financial services licensees***) and Australian credit licensees (***credit licensees***) have been 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***)) made by ASIC under a legislative instrument.
2. *ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2021/429* (***2021 Protocol***) prescribes the specific obligations that apply to financial services licensees and credit licensees for the purposes of paragraph 912A(1)(cc) of the Corporations Act and paragraph 47(1)(ea) of the Credit Act.
3. The 2021 Protocol does not apply to mortgage intermediaries, such as aggregators, in certain circumstances: refer para 7.77 of the Revised Explanatory Memorandum to the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023* (the ***Revised Explanatory Memorandum***).
4. The Corporations Act and Credit Act were amended by the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (***Treasury Laws Amendment Act***) to ensure that aggregators would be appropriately subject to reference checking and information sharing protocols.
5. Subsection 912A(3A) of the Corporations Act and subsection 47(3A) of the Credit Act, as amended by the Treasury Laws Amendment Act, now provide that ASIC may determine by legislative instrument a reference checking and information sharing protocol for licensees recruiting financial advisers and mortgage brokers as their representatives, as well as mortgage intermediaries who are acting or will act as intermediaries to mortgage brokers.
6. The Instrument prescribes the specific obligations that apply to financial services licensees, credit licensees and mortgage intermediaries.
7. The Repeal Instrument repeals the 2021 Protocol. However, the Instrument contains a transitional provision that allows financial services licensees and

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credit licensees to meet their obligations by complying with the 2021 Protocol, as in force immediately before its repeal, until 28 February 2025.

8. From 1 March 2025, all financial services licensees, credit licensees and mortgage intermediaries must comply with the specific obligations prescribed by the Instrument.

#### Assessment of human rights implications

##### ***Right to privacy and reputation***

9. The 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 (**ICCPR**). It also includes the right to protection by law of one's reputation.
10. The right to privacy and reputation is not an absolute right and is subject to permissible limits. The right can be limited as long as it can be demonstrated that the limitation meets the limitation criteria.
11. To the extent the information sharing and reference checking framework as provided in the Instrument limits the right to privacy and reputation, as stated in the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (the **Financial Sector Reform Bill Explanatory Memorandum**), those limitations are 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 5 of the Instrument provides that taking reasonable steps to obtain a reference about an individual includes seeking the consent of the individual in accordance with section 6 of the Instrument, and if the consent is obtained, requesting a reference from a referee licensee in accordance with section 7 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 a financial services licensee or credit licensee 'shopping around' for alternative employment when faced with disciplinary action;
  - (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 were a feature of the industry prior to the introduction of the 2021 Protocol: refer paragraphs 15.172–15.176 of the Financial Sector Reform Bill Explanatory Memorandum.
12. To the extent that provisions of the Instrument in relation to mortgage intermediaries limit the right to privacy and reputation, as provided in the Revised Explanatory Memorandum to the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023 (the

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**Revised Explanatory Memorandum**), those limitations are justified as follows:

- (a) The limitations are in pursuit of the legitimate objective of enhancing the application of the Protocol to ensure that employment information about all financial advisers and mortgage brokers are readily available across the financial advising and mortgage broking industry. The objective improves reference checking measures for credit licensees and ensures consistent practice across the sector;
  - (b) There is a rational connection between the limitations on the right to privacy and reputation and the legitimate objective described above. The limitations are likely to be effective in achieving the objective because information sharing about credit licensees and their representatives by aggregators ensures that:
    - (i) employment information about all financial advisers and mortgage brokers is readily available;
    - (ii) reference checking protocols of credit licensees are enhanced, helping to remove ‘bad apples’ from the industry;
  - (c) The Instrument is reasonable and necessary in pursuit of the legitimate objective. Financial services licensees and credit licensees are required to comply with the Protocol made by ASIC in the form of a legislative instrument. Requirements of the Protocol are provided under section 912A of the Corporations Act and section 47 of the Credit Act.
  - (d) Aggregators often work closely with other Australian credit licensees under service agreements and often hold information about activities of other credit licensees and their credit representatives that would be relevant for information sharing under the Protocol. The Instrument ensures that mortgage intermediaries such as aggregators, who are credit licensees, are appropriately subject to the Protocol, in the same way other credit licensees and financial service licensees are subject to the Protocol; and
  - (e) To the extent the Instrument limits the right to privacy, the limitations are proportionate to the legitimate objective to which they seek to give effect. The Instrument is sufficiently precise to ensure that the Protocol captures aggregators and operates as intended to ensure consistent practice across the financial advice and mortgage broking sectors. The limitations do not impose further restrictions on individual credit licensees under the Protocol: refer paragraphs 8.45–8.49 of the Revised Explanatory Memorandum.
13. The Repeal Instrument does not engage any of the applicable rights or freedoms.

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## Conclusion

14. The Instrument and Repeal Instrument are 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*. The Instrument does not unnecessarily, unreasonably, or disproportionately limit the right to privacy and reputation.