

From the Desk of Director Marija Pajeska



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Australian Securities and Investment Commission

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

Response to Consultation Paper 333 – Implementing the Royal Commission recommendations: Reference checking and information sharing

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of Consultation Paper (CP) 333 – Implementing the Royal Commission recommendations: Reference checking and information sharing

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

Recommendation 2.7 of the Royal Commission Report titled Reference checking and information sharing states :

'All AFSL holders should be required, as a condition of their licence, to give effect to reference checking and information-sharing protocols for financial advisers, to the same effect as now provided by the ABA in its 'Financial Advice – Recruitment and Termination Reference Checking and Information Sharing Protocol'.

The first point of Recommendation 1.6 of the Royal Commission Report titled Misconduct by mortgage brokers states

'ACL holders should:

- be bound by information-sharing and reporting obligations in respect of mortgage brokers similar to those referred to in Recommendations 2.7 and 2.8 for financial advisers;'

We note that the recommendation for reference checking and information sharing stated that the requirements should be to the same effect as now provided by the

ABA and yet ASIC has disregarded those comments and taken the reference checking and information sharing protocols further than that intended and/or required under the ABA Banking industry conduct background check protocol (ABA protocol).

Upon reviewing the ABA protocol we note that the ABA protocol is designed in such a way that a former or current employer is obliged to provide high level information about an employee's misconduct whereby misconduct is defined as follows:

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

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

Under the ABA protocol there is a focus on material matters whereby Material is defined as follows:

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

The ASIC Protocol fails to limit the sharing of information to material and fact based information that relates to misconduct which the proposed representative has been engaged in. Investigations that are incomplete are not fact based and information relating to such investigation should not be shared at the time of request for a business reference unless they are material and fact based.

A licensee should not have the benefit of qualified privilege in circumstances where the information being shared is subjective or based on unsubstantiated allegations and claims, especially in circumstances where a licensee can cause harm to the prospective representative as a result of sharing such information.

The proposed ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX is not similar to the ABA protocol as its focus is not on reference checking but rather on information sharing.

The draft ASIC protocol raises many concerns some of which are:

- Under the proposed ASIC protocol an AFS Licensee is required to share information relating to the prospective representative on the condition that the

prospective representative provides written consent. We note that question 3(c) of the template Reference Request requires the referee licensee to provide details of internal assessments, external notifications and complaints. This information is subject to privacy provisions relating to the prospective representative, the referee licensee and any other party involved in the matter and therefore a referee licensee may not be able to release such information as it does not have consent from all parties to do so.

On this basis the reference checking and information sharing protocols should be limited to high level information, requiring responses to be selected from pre-defined categories similar to those proposed in Section 3(c) of ASIC's draft template reference request.

- A referee licensee should not be obliged under law to release internal and/ or external reports or information to its competitors relating to misconduct or complaints (regardless of whether they are potential or actual).

The information that is provided to the recruiting licensee should be high level information limited to material misconduct and fact based information relating to the prospective representative. The ABA protocol clearly states that the point of the exercise is a fact-based conduct background check. For the ASIC protocol to function as intended and recommended in the Royal Commission report, the ASIC protocol needs to replicate this standard.

- In the ASIC protocol reasonable steps are deemed to be taken when the recruiting licensee requests written consent from the prospective representative. On the other hand, the information sheet takes it further and requires the recruiting licensee to take action that will ultimately force a prospective representative to provide written consent on the basis that their opportunity for employment may be limited or withdrawn on the basis that consent was not provided. In many law books this is considered duress and to force a prospective representative to provide written consent under duress does not work towards improving the professional standards within the industry.

It appears that ASIC has taken its own interpretation of the recommendations and changed the focus from being a reference check to being an information sharing requirement to provide it another avenue to source information from licensees and increase its regulatory powers and create an industry based whistle blower program and/ or self regulatory platform.

The irony is that on 17 November 2020 (2 days prior to the release of this consultation paper CP333) ASIC released another consultation paper, CP332 titled 'Promoting access to affordable advice for consumers'. In CP332 ASIC is asking why good quality advice is not affordable. We ask, how can advice be affordable when advisers who provide good quality advice are treated like children and criminals whereby the costs of providing advice are forever increasing due to policies and procedures that need to be implemented in order to satisfy all the reporting and disclosure requirements defined by ASIC and Treasury as preventative measures.

The information requested in the reference check is information that ASIC and AFCA have access to through the various reporting that licensees have to implement over coming months or have already implemented (eg. reporting requirement prescribed under ASIC Regulatory Guide RG271 titled Internal

dispute resolution and reporting requirements prescribed in ASIC Regulatory Guide RG78 titled Breach reporting by AFS licensees). So why should a licensee be further scrutinised and regulated by its industry peers.

If the whole intent is to increase the professional standards (and reduce the risk of 'rolling bad apples') then these requirements should not be imposed on referee licensees they should be imposed on ASIC and AFCA. ASIC and AFCA should have a duty to provide reference checks and share information with licensees.

We note the lack of information sharing between ASIC and licensees can cause serious harm to a licensee, its employees and/ or clients. If the intent of the reference checking and information sharing legislation is to increase professional standards (and reduce the risk of 'rolling bad apples') there should be a compulsory requirement for ASIC to provide a reference check as part of the registration process that a licensee needs to undertake when they authorise an adviser onto the Adviser Register.

Many licensees and their employees have been treated like criminals by ASIC as part of investigations conducted by it, in circumstances where ASIC was aware of the activities of a prospective representative, person or company and ASIC chose to stay silent rather than inform the licensee under Section 916G of the Corporations Act 2001 and share relevant information with the licensee prior to the licensee authorising the prospective representative, person or company.

For professional standards to improve and for the risk of 'rolling bad apples' to be reduced, industry (including ASIC, AFCA etc ) needs to work together which means information sharing works both ways. ASIC, AFCA, etc should not have the power or right to withhold information and inadvertently mislead and deceive licensees by failing to or choosing not to disclose information to a licensee which could alter its decision as to whether or not to authorise a person or company under its AFS Licence. Reality is that the lack of information sharing by ASIC, AFCA, etc with licensees, at the right time, is a huge part of the problem which this legislation will not fix.

We refer to ASIC's comments relating to non-compliance with the ASIC protocol. In particular the following:

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

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

It's all good and well to define a protocol and state that non-compliance will be penalised but what constitutes non-compliance. No information has been provided in this regard apart from the implication that pressure tactics should be used to force prospective representatives to provide consent. No other profession has standards or protocols which result in civil and administrative action by a regulatory body resulting from non-compliance or forced compliance with the reference checking and information sharing protocols.

Our comments relating to draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX are:

Section of draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX	Comments
1. Name of legislative instrument	No comment
2. Commencement	The majority of AFS Licensees have a financial year end of 30 June 2020 not to mention that it is peak season for advisers to meet their Fee Disclosure Statement and Ongoing Fee Arrangement requirements. So we are of the view that the commencement date should be changed to a time which is less demanding for those in industry that will be obliged to implement the requirements.
3. Authority	No comment
4. Definitions and Interpretations	A materiality test should be incorporated similar to that included in the ABA protocol. As this is a reference check and not a breach reporting or whistleblower platform all terms relating to updated references should be removed as there is no similar requirement in the ABA protocol.
5. Purpose	No comment
6. Recruiting licensee- obligation to take reasonable steps to obtain reference	No comment
7. Recruiting licensee – obligation to seek consent of representative	No comment
8. Recruiting licensee – obligation to request reference	We feel that paragraphs (3), (4), (5) and (6) should be deleted so that prospective representatives have confidence in the system and transparency of the information being requested and being shared. The ABA protocol does not provide for a larger scope or changes to the questions so neither should the ASIC protocol.

Section of draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX	Comments
9. Referee licensee – obligation to give reference	<p>We are of the view that:</p> <ul style="list-style-type: none"> <li>• A reference check should be in relation to the last 2 years of a prospective representative’s employment history. The proposed period of the last 5 years is too long;</li> <li>• It should be compulsory for the referee licensee to provide a copy of the reference and information shared with the recruiting licensee under the ASIC protocol to the prospective representative. They have a right to this information and should not be forced to take additional steps to seek a copy of the reference and information provided.</li> <li>• ASIC should review its notation about sharing information that ASIC has provided as there are limitations on the circumstances under which a person can share information it obtained under Section 916G of the Corporations Act and reference checking and information sharing does not appear to be one of those circumstances.</li> </ul>
10. Referee licensee – obligations to update reference	<p>This whole section should be deleted as there is no similar protocol in the ABA protocol and the costs associated with these requirements outweigh the benefits and inadvertently will result in increases in the cost of advice to clients.</p>
11. Agents	<p>If the reference check is simplified to be similar to the ABA protocol then we have no objections with the use of Agents.</p> <p>If the reference check is retained as per the draft template then we object to the use of Agents as the information that needs to be provided is highly sensitive and should only ever be provided directly to the recruiting licensee.</p>

Section of draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX	Comments
12. Use of information	<p>The issue we have here is that ASIC can obtain confidential information about one licensee from another licensee by issuing a Section 33 Notice under the Australian Securities and Investment Commissions Act 2001 whereby the licensee is required to produce books and records about another licensee that it holds as a result of the reference check and information sharing requirements without the first licensee's knowledge or consent.</p> <p>This is precisely why it is critical that the information that a referee licensee is obliged to share with the recruiting licensee is limited to information relating to the prospective representative relating to material misconduct and fact based information whereby the information is provided to the recruiting licensee at a high level only by answering template questions. If a recruiting licensee requires further information then they should be asking the prospective representative to answer the questions and provide relevant information. The prospective representative also has a right to provide their side of the story to the recruiting licensee so that the recruiting licensee can make an informed decision.</p> <p>The draft legislation is encouraging licensees to set up a self-regulatory platform whereby judgement is passed on a prospective representative's credibility in circumstances where they may not have had a chance to present their side of story.</p>
13. No arrangement or agreements	The protocol does not take into consideration the treatment of existing arrangements.
14. Contact for reference checking and information sharing	ASIC currently maintains the professional register and as part of the process a licensee must provide an email address which is not publicly displayed. ASIC should update the professional register such that all licensees are required to provide an email address which is publicly displayed and that should be used for the purpose of reference checking. The draft laws should be changed to reflect this.
15. Record-keeping	No comments
Schedule 1 – Template Consent Form	<p>The consent should be limited to material and fact based matters and the information that the consent relates to should be limited to the items listed in the consent.</p> <p>A referee licensee should not have the right to disclose information other than the information that is specifically listed and authorised by the prospective representative.</p> <p>The statement in point (v) '...and any findings relating to these ongoing matters for a period of up to six months from the date that the reference is given' should be removed as this is neither cost-effective or warranted.</p>

Section of draft ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2020/XX	Comments
Schedule 2 – Template Reference Request	Section 2 titled Compliance Audits should be amended so that the detail provided is limited to the completion of check-boxes which replicate those listed in Section 3(b).
Schedule 3 – Template Reference Request	Section 3(a) should be modified such that the description of the type and nature of the breach is limited to the information provided in Section 3(b). If the recruiting licensee wants or needs more information they should be speaking to the prospective representative.
	Section 3(c) should be removed as this is not relevant for a reference check, it may contain personal sensitive information that relates to the referee licensee and/ or other parties that have not consented to the sharing of such information.
	<p>Section 4 should be modified such that it requires Yes/ No answers to alert the recruiting licensee of any material and fact based matters that may be under review.</p> <p>If the recruiting licensee wants or needs more information they should be speaking to the prospective representative.</p> <p>If the referee licensee is reviewing a matter and has not disclosed the review to the prospective representative then (unless that matter deals with AMLCTF requirements) it can't be considered a material or fact based matter as the prospective representative has not been afforded the opportunity to a defence.</p> <p>If the matter relates to AMLCTF requirements the referee licensee is prohibited under law from disclosing the matter to any third party so therefore these matters would naturally be excluded from the reference checking and information sharing requirements.</p>

Our comments in relation to ASIC's information sheet titled 'ASIC reference checking and information sharing protocol' are as follows:

- regardless of any changes made to the ASIC protocol there should not be any repercussions, implied or otherwise, to the recruiting licensee or the prospective representative resulting from the prospective representative declining to give consent or withdrawing consent;
- there should be no implications within the information sheet that a recruiting licensee can accept a written consent or encourage the acceptance of a written consent where the prospective representative fears that they have to sign the written consent under duress;
- the defence of qualified privilege should not extend to subjective information and opinions provided by the referee licensee, a referee licensee should not have the safety net knowing that they can potential ruin a person's reputation without any repercussions or consequences; and
- it should be compulsory for the referee licensee to provide to the prospective representative a copy of the reference and information shared under the ASIC protocol at the same time as such information is provided to the recruiting licensee.

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure A of this letter.

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email [brad@asdaa.com.au](mailto:brad@asdaa.com.au).

Yours Sincerely

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## ANNEXURE A: RESPONSE TO ASIC QUESTIONS

### Taking reasonable steps to obtain a reference

B1 proposal: ASIC proposes to require a recruiting licensee to take reasonable steps to obtain a reference about a prospective representative from:

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

ASIC Question		Response
B1Q1	Do you agree with our proposal? If not, why not?	We are of the view that the five year period is too long and that the requirement should be limited to the current or most recent licensee in the two years prior to the request.
B1Q2	Do you think the obligation should be limited to obtaining a reference from the current licensee or—if a prospective representative is not currently with a licensee—their most recent former licensee in the five years before a request? If so, please give reasons why.	We are of the view that the requirement should be limited to the current or most recent licensee in the two years prior to the request. The information sought should be material, fact based, current and relevant.
B1Q3	Do you think the obligation should be extended to all former licensees who employed or authorised the prospective representative in the five years before the request? If so, please give reasons why.	No, on the basis that cost and time involved in conducting the reference check will not necessarily add value and that the information sought should be material, fact based, current and relevant.

ASIC Question		Response
B1Q4	If the prospective representative is a current licensee, do you think the recruiting licensee should be obliged to obtain a reference from them? If not, why not?	<p>The idea of a reference check and information sharing is for a person who is independent of the adviser to provide the reference check and/ or share the information.</p> <p>In the case where the individual is the licensee or the company has a sole director and adviser there generally is no one but the individual so it is not possible for an independent person to provide the reference check or information. So this seems a bit redundant.</p>
B1Q5	Do you think a recruiting licensee should be able to obtain from a current or most recent former licensee previous references provided to them under the ASIC protocol? If so, should a recruiting licensee still be required to obtain a reference directly from the additional licensee(s) about the prospective representative?	<p>No, as a referee licensee provides a reference to the recruiting licensee on the basis that the prospective representative has <u>freely</u> provided written consent for them to provide such information to the recruiting licensee.</p> <p>A recruiting licensee should seek written authorization from the prospective representative to obtain a copy of or a new reference directly from any former licensee on a case by case basis.</p> <p>The reference checking process should not be structured such that prospective representatives are made to feel like criminals knowing a case file is being developed in the background each time they change roles.</p> <p>No other profession is subject to such scrutiny and standards so why should a financial adviser be treated any different.</p>

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

ASIC Question		Response
B2Q1	Do you agree with our proposal? If not, why not?	Yes, we are of the view that the same standards should apply to Sub-Authorised Representatives of a Corporate Authorised Representative.

## Seeking consent of prospective representative

B3 proposal: ASIC proposes that:

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

ASIC Question		Response
B3Q1	Do you agree with our proposal? If not, why not?	Yes on the basis that the reference checking process should not be structured such that prospective representatives are made to feel like criminals knowing a case file is being developed in the background each time they change roles. Like every other profession the prospective representative should have a choice as to whether or not a reference is requested and/ or provided by a current or former licensee. They should not be forced under duress to provide their written consent.
B3Q2	Do you think ASIC should prescribe a consent form? If not, why not?	If ASIC is responsible for setting up a protocol for reference checking then that protocol should include a prescribed consent form which is designed to protect the interest of the prospective representative and ensure that the process is not used by former licensees to damage the reputation of a prospective representative by making unsubstantiated claims and allegations.

ASIC Question		Response
B3Q3	Should the template consent form prescribed by ASIC require any further information to be disclosed to the prospective representative so they are better informed in providing consent? If so, what other information should be required?	<p>The consent form should be designed in such a way that the prospective representative gives consent to the former licensee to provide a reference based on material, fact based, current and relevant information.</p> <p>There is a real risk that licensees may use this process (especially considering they have the benefit of qualified privilege) to damage the reputation of a prospective representative by making unsubstantiated claims and allegations, so the consent form will be a key tool to give prospective representatives some form of certainty that the system will be used as intended. We note ASIC's comment in paragraph 63 that the intention is for information collected by the recruiting licensee to only be disclosed for the purpose of reference checking under the ASIC protocol. The consent provided by the prospective representative for the sharing of information under the ASIC protocol should be limited to sharing information between the recruiting licensee and the referring licensee. The consent provided by the prospective representative should prohibit the sharing of the references and information with any other party.</p>
B3Q4	Will this proposed obligation to obtain and provide written consent cause practical problems for licensees during the recruitment process? If so, please outline these problems and set out any views on how ASIC or industry can address these problems.	<p>The consent process itself should not cause practical problems depending on what the repercussions are for not obtaining a reference from a current or former licensee.</p> <p>The reality is, anytime the law is structured such that a licensee is required to take reasonable steps to action something, the interpretation of reasonable steps is never clear and subject to the person's opinion who is passing judgment at that time.</p> <p>The manner in which the ASIC Information Sheet is drafted implies that a prospective representative will be forced under duress to provide written consent if they will have any opportunity for future employment elsewhere and this is a big problem.</p>

### Requesting a reference

B4 proposal: ASIC proposes that a recruiting licensee:

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

ASIC Question		Response
B4Q1	Do you agree with our proposal? If not, why not?	We do not agree with part (c) of ASIC's proposal as the process should be standardized such that no licensee should be entitled to make changes to the standard form.
B4Q2	Should the protocol require a request for a reference to include any other information? If so, what other information should be required?	This is important for at least the first two to three years after the ASIC protocol is implemented on the basis that industry needs time to assess how the reference checking and information sharing process will be utilized and to place trust in the process. In an environment where companies compete for good staff the reference checking and information sharing protocol can also be used in an adverse manner, ie. employers threatening to provide bad references in order to prevent a staff member from leaving.

### Additional requests for a reference from the same licensee

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

ASIC Question		Response
B5Q1	Do you agree with our proposal? If not, why not?	We do not understand why a recruiting licensee would need to request an additional reference during the recruitment process if the reference requires full disclosure of material, fact based, current and relevant information. The role of the recruiting licensee is not that of a regulator and to drill down into information and undertake formal investigations into a person's conduct whilst not employed by it is unreasonable and unfair on the basis that the person reviewing the information will most likely form an opinion without discussing the matter with the prospective representative. The intent of the recommendation 2.7 and 1.6 of the Royal Commission report is the provision of a reference check not the conduct of a formal investigation by a prospective employer (ie. the recruiting licensee).

### Additional references from other licensees

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

ASIC Question		Response
B6Q1	Do you agree with our proposal? If not, why not?	<p>The process should be subject to the same requirements such that the prospective representative needs to give prior written consent and the same templates should be used.</p> <p>The prospective representative should have the right to decline to provide written consent knowing that the recruiting licensee will not have the right to judge them or decline them an employment opportunity on the basis that they did not provide written consent.</p> <p>No other profession is subject to this type of scrutiny and here ASIC and Treasury are proposing protocols and standards that treat prospective representatives as almost criminals even when they have done nothing wrong.</p>

### No limitation on requesting additional information

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

ASIC Question		Response
B7Q1	Do you agree with our proposal? If not, why not?	<p>The ASIC protocols should be limited to the reference checking process using prescribed templates which form part of the ASIC protocol.</p> <p>Anything that is done by a licensee as part of its recruitment process should be outside the scope of the ASIC protocol reference checking and information sharing and not subject to the requirements of the ASIC protocol for reference checking and information sharing.</p> <p>If the requirements extend beyond that then it is clear that ASIC is forcing licensees to act as regulators to source information for ASIC which the licensee may need to make available to ASIC at some point in time if they receive a Section 33 Notice under the ASIC Act.</p> <p>After all, the duty to regulate the activities of financial service providers falls on ASIC and hence why ASIC has implemented reporting frameworks upon licensees which require it to report directly to ASIC.</p>

## Giving references

B8 proposal: ASIC proposes that where a recruiting licensee has requested a reference about a prospective representative in accordance with the ASIC protocol, the referee licensee must give—within 10 business days of the request, or a longer period where agreed between the recruiting licensee and referee licensee, but no more than 20 business days:

- (a) all information that they are aware of and reasonably consider to be relevant to answer the questions in the template reference request;
- (b) a response that is complete, accurate and based on documented facts; and
- (c) a response in writing to all the questions in the template reference request, and—if a question cannot be answered—a written explanation as to why the question cannot be answered.

ASIC Question		Response
B8Q1	Do you agree with our proposal? If not, why not?	<p>We note that no other former employer within a profession is subject to protocols which make reference checking and information sharing compulsory to the extent that if a referee licensee does not provide a reference they are then faced with potential civil penalties and administrative action.</p> <p>ASIC in Consultation Paper CP332 titled 'Promoting access to affordable advice for consumers' is asking question why good quality advice is not affordable and accessible. When you take into consideration that protocols like this that ASIC and Treasury are looking to implement and the mere fact that individuals and licensees are required to comply with so many redundant and inefficient standards that do not add value to the process and treat them like criminals every step of the way then why would anyone want to be part of the industry. If there are more people exiting the industry than entering into the industry advice will only become more expensive as a result of supply and demand.</p>
B8Q2	Should we allow verbal responses to be given under the ASIC protocol? If so, why? How would the licensees manage the potential risks associated with the provision of verbal references?	<p>A business reference is only ever of any value if it is in written form.</p> <p>Verbal references are effective however someone needs to record the information and taking into consideration the ramifications for someone if the wrong information is recorded we do not support verbal references.</p>
B8Q3	Are there other ways to facilitate references being given by referee licensees under the protocol? If so, please explain.	<p>We are unable to think of any other means that will protect all parties involved and limit the amount of misinformation being exchanged.</p>

Updating a reference

B9 proposal: ASIC proposes that:

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

ASIC Question		Response
B9Q1	Do you agree with our proposal? If not, why not?	No, once a reference check is provided then that should be the end of the obligations placed on the referee licensee.
B9Q2	Is the proposed six-month timeframe for an updated reference appropriate? If not, what timeframe would be appropriate?	<p>The whole process of reference checking is a snapshot of the prospective representatives behavior, performance and compliance history. The duty to provide ongoing updates to future employers of the prospective representative makes the process onerous and expensive and hence counterproductive.</p> <p>There should be no requirement under the ASIC protocol for a referee licensee to provide an updated reference. If a recruiting licensee wishes to obtain an update they should seek separate written consent from the prospective representative (or representative, if employment or authorization has been granted) and issue a separate request to the referee licensee or better still speak to the prospective representative.</p> <p>The onus should not be on the referee licensee to manage which references they have issued and when they have a legal obligation to update those reference, regardless of whether or not the prospective representative is or is not currently authorized by them.</p> <p>If ASIC includes these requirements within the ASIC protocols for reference checking and information sharing then the ASIC protocols will not reflect the process involved in reference checking rather they will reflect protocols relevant to breach reporting to ASIC and hence send a message to industry that ASIC believes that all representatives are criminals and should be treated as such.</p>

B10 proposal: ASIC proposes that the obligations do not apply to a referee licensee where any of the following apply:

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

ASIC Question		Response
B10Q1	Do you agree with our proposal? If not, why not?	We refer to our response to proposal B9 and do not agree that a referee licensee should have any obligation to provide an updated reference unless specifically requested to do so in writing on the condition that the prospective representative has provided a new written consent.

Agents acting on behalf of licensees

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

ASIC Question		Response
B11Q1	Do you agree with our proposal? If not, why not?	No, taking into consideration the nature and sensitivity of the questions being asked agents should not be permitted to conduct the reference check prescribed under the ASIC protocol. Protecting the privacy of prospective representatives and the referee licensee is critical under the ASIC protocol.
B11Q2	Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these problems.	
B11Q3	Do you think a prospective representative must consent to a recruiting licensee using an agent to collect, use, disclose or store personal information on their behalf to undertake a reference check under the ASIC protocol? If not, why not?	If ASIC is of mind to implement this proposal then we agree that an agent should only be permitted to undertake the reference check under the ASIC protocol on the condition that all parties (ie. the prospective representative, the recruiting licensee and the referee licensee) agree to the use of an agent.

Permitted use of information

B12 proposal: ASIC proposes that information collected by a licensee or their agents in accordance with the ASIC protocol must:

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

ASIC Question		Response
B12Q1	Do you agree with our proposal? If not, why not?	<p>We agree with the proposal however believe that the wording 'in accordance with the protocol' needs clarification. This should specifically be limited to 'reference checking and information sharing for the purpose of offering or granting employment or authorization to a prospective representative.</p> <p>The consequences of the proposed ASIC protocol is that one AFS Licensee will have information about other AFS Licensees, ie conduct of representatives, complaints, issues, etc. This information is considered personal information relating to the applicant but it is also personal information relating to the licensee and potentially the licensee's clients.</p> <p>So, the law should specifically prohibit the recruiting licensee from sharing this information with any third party or regulator as the purpose of the ASIC protocol is not to create a whistleblower program or self regulatory industry platform as a source of information for ASIC.</p> <p>Some licensees may consider that this is a good way to eliminate competitors and tarnish the reputation of other licensees, especially considering they will have the benefit of qualified privilege.</p>

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

ASIC Question		Response
B13Q1	Do you agree with our proposal? If not, why not?	<p>The onus should be on the referee licensee to provide a copy of the reference to the recruiting licensee and prospective representative at the same time.</p> <p>A reference check is an independent process however the prospective representative is entitled to a copy of the reference and any reference given by a referee licensee should only be given on the condition that a copy is provided to the prospective representative at the same time as it is provided to a recruiting licensee.</p>
B13Q2	Should the protocol require a recruiting licensee to provide the prospective representative with the reference obtained from a referee licensee(s)? If so, please give reasons why.	
B13Q3	Should the reference only be provided to the prospective representative with the consent of the referee licensee(s)? If so, please give reasons why.	
B13Q4	What other mechanisms could be included to ensure fairness for the prospective representative?	

#### No arrangements or agreements to limit information

B14 proposal: ASIC proposes to prohibit a licensee from entering into any arrangement or agreement with any individual that limits the licensee's ability to collect, use, disclose and store information under the ASIC protocol.

ASIC Question		Response
B12Q1	Do you agree with our proposal? If not, why not?	<p>The law should specifically prohibit the sharing of information obtained as a result of reference checking under the ASIC protocol with any third party or regulator as the purpose of the ASIC protocol is not to create a whistleblower program or self-regulatory industry platform as a source of information for ASIC it is solely for the purpose of reference checking.</p> <p>The fact that ASIC is proposing to include measures that cover some principles of the Privacy Act to ensure that a prospective representatives privacy is protected (ie. obtaining written consent from the prospective representative) clearly shows that ASIC's intent for the use of information obtained through the reference checking process is not limited to a reference checking process, especially considering that licensees will be obliged to retain records for 5 years.</p> <p>In effect ASIC and Treasury are being misleading and deceptive as they are using the reference checking front as a means to create a whistleblower program and self-regulatory platform within the industry.</p>

### Maintaining a contact point for reference checking

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

ASIC Question		Response
B15Q1	Do you agree with our proposal? If not, why not?	We agree with this proposal
B15Q2	Will this requirement cause any practical problems for carrying out a reference check? If so, please outline these and any possible solutions.	It should not as there is usually one contact point for the recruitment process and that contact point can be the same person. We understand that ASIC does not intend to maintain a register for the contact point and yet this would be a very simple task for ASIC to undertake. ASIC already maintains an AFS Licensee register on its website and all it would need to do is include a publicly available email address on the register which can be used for the purpose of reference checking. The responsibility will fall on the licensee to keep that information up to date as per all other information contained in the register.

### Keeping records

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

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

ASIC Question		Response
B16Q1	Do you agree with our proposal? If not, why not?	We agree with this proposal and do not feel that this changes anything for licensees.
B16Q2	Should licensees be required to keep any other records relating to reference checking and information sharing? If so, what other records should be kept?	We feel the above listed records would be sufficient.

### Background information on a prospective representative

C1 proposal: In the template reference request in Sch 2, we propose to prescribe questions about the prospective representative's background. The questions are explained in Table 4

ASIC Question		Response
C1Q1	Do you agree with our proposed questions? If not, why not?	We agree with the proposed questions and do not feel any other questions would add value in this section.
C1Q2	Can you suggest any additional or alternative questions?	

### Compliance audits of a prospective representative

C2 proposal: In the template reference request in Sch 2, we propose to prescribe questions about compliance audits of a prospective representative in relation to that representative's previous activity as a financial adviser or mortgage broker. These questions are explained in Table 5.

ASIC Question		Response
C2Q1	Do you agree with our proposed questions? If not, why not?	We agree with the proposed questions and do not feel any other questions would add value in this section.
C2Q2	Can you suggest any additional or alternative questions?	

### Conduct of a prospective representative

C3 proposal: In the template reference request in Sch 2, we propose to prescribe questions about the conduct of the prospective representative. These questions are explained in Table 6.

ASIC Question		Response
C3Q1	Do you agree with our proposed questions? If not, why not?	<p>No</p> <ul style="list-style-type: none"> <li>Section 3(a) should be modified such that the description of the type and nature of the breach is limited to the information provided in Question 3(b). If the recruiting licensee wants or needs more information they should be speaking to the prospective representative.</li> <li>Section 3(c) should be removed as this is not relevant for a reference check, it may contain personal sensitive information that relates to the referee licensee and/ or other parties that have not consented to the sharing of such information.</li> <li>No licensee should be obliged or required under law to provide copies of assessments, notifications and reports to another licensee. The recruiting licensee is not a regulator and should have no right to obtain that information under law.</li> </ul>
C3Q2	Can you suggest any additional or alternative questions?	

### Ongoing matters

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

ASIC Question		Response
C4Q1	Do you agree with our proposed questions? If not, why not?	<p>Section 4 should be modified such that it requires Yes/ No answers to alert the recruiting licensee of any material and fact based matters that may be under review.</p> <p>If the recruiting licensee wants or needs more information they should be speaking to the prospective representative.</p> <p>If the referee licensee is reviewing a matter and has not disclosed the review to the prospective representative then (unless that matter deals with AMLCTF requirements) it can't be considered a material or fact based matter as the prospective representative has not been afforded the opportunity to a defence.</p> <p>If the matter relates to AMLCTF requirements the referee licensee is prohibited under law from disclosing the matter to any third party so therefore these matters would naturally be excluded from the reference checking and information sharing requirements.</p>
C4Q2	Can you suggest any additional or alternative questions?	

## Guidance for licensees

D1 proposal: ASIC proposes to issue an information sheet that:

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

See Attachment 2 to this paper.

ASIC Question		Response
D1Q1	Do you agree with our proposal? If not, why not?	<p>No</p> <ul style="list-style-type: none"><li>• regardless of any changes made to the ASIC protocol there should not be any repercussions, implied or otherwise, to the recruiting licensee or the prospective representative resulting from the prospective representative declining to give consent or withdrawing consent;</li><li>• there should be no implications within the information sheet that a recruiting licensee can accept a written consent or encourage the acceptance of a written consent where the prospective representative fears that they have to sign the written consent under duress;</li><li>• the defence of qualified privilege should not extend to subjective information and opinions provided by the referee licensee, a referee licensee should not have the safety net knowing that they can potentially ruin a person's reputation without any repercussions or consequences; and</li><li>• it should be compulsory for the referee licensee to provide to the prospective representative a copy of the reference and information shared under the ASIC protocol at the same time as such information is provided to the recruiting licensee.</li></ul>
D1Q2	Can you suggest any further or additional guidance that should be included in the information sheet?	