

11 March 2025

Australian Securities and Investments Commission
Level 7, 120 Collins Street, Melbourne, 3000

via email: rri.consultation@asic.gov.au

Dear Sirs

Feedback on CS 16

1 Introduction

The FSC welcomes the opportunity to provide feedback on a proposal (**Proposal**) to provide additional relief under the reportable situations regime.

We note that the Proposal would provide relief from reporting certain breaches when:

- a) the breach has been rectified within 30 days from when it first occurred (this includes paying any necessary remediation), and
- b) the number of impacted consumers does not exceed five, and
- c) the total financial loss or damage to all impacted consumers resulting from the breach does not exceed \$500 (including where the loss has been remediated), and
- d) the breach is not a contravention of the client money reporting rules and clearing and settlement rules

2 Summary

While the relief is welcome, the FSC respectfully submits that the Proposal does not go far enough. As framed, the proposed relief would not extend to many instances of minor misleading or deceptive conduct that do not cause any financial loss or damage.

Example A - a minor breach that causes no financial loss or damage would nonetheless have to be reported under the Proposal if it technically impacts 10 (as opposed to five) consumers, or if it is only 90% (but not 100%) remediated within 30 days of when it first occurred.

Example B – a minor breach that causes no financial loss or damage would nonetheless have to be reported under the Proposal if it impacts less than five consumers, but is only remediated within 30 days of being notified to the licensee (as opposed to occurring without the licensee’s knowledge) and is outside 30 days from when it first occurred.

Example C – a minor breach that causes no financial loss or damage would nonetheless have to be reported under the Proposal if it technically constitutes more than a single reportable situation (despite impacting fewer than five customers and being fully remediated within 30 days of occurring).

To avoid these situations, relief should be extended so that:

- a) the breach can be rectified within 30 days from when the licensee knows (or should know of) the breach, not within 30 days of its occurrence, and
- b) the number of impacted consumers that suffer no financial loss or damage should not be capped, and
- c) it is available when there is a single report made under the grouping provisions (and not limited to a single reportable situation), and
- d) there is some flexibility in applying a monetary cap on total financial loss or damage caused.

The FSC has been calling on both sides of parliament and regulators to cut red tape in the financial services sector, and the breach reporting regime represents a regulatory simplification opportunity that should be addressed urgently to reduce costs for business¹ – for example, a survey of 29 of the FSC’s superannuation, financial advice licensees and funds management members, conducted by Positive Economics, found that it costs \$3,800 in extensive documentation, senior executive time and auditor reviews every time a minor breach is reported to the ASIC portal.

3 *Drafting comments*

We note that ASIC proposes to consolidate this additional relief set out in the Proposal and the existing relief in ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2024/620 (ASIC Instrument 2024/620) into a new instrument. Accordingly we set out below suggested changes and explanations in relation to the draft new instrument.

912D(4AA)(c) Corporations Act and 50A(4AA)(b) National Consumer Credit Protection Act (Credit Act)*there are no more than five persons (clients) who are, or who are likely to be, impacted by the breach.....*

The FSC recommends that this cap of five persons is removed, or at the very least not be applied to persons who suffer no financial loss or damage.

This proposed threshold of no more than five persons being impacted is restrictive. It would be valuable to understand the rationale behind selecting this specific number. There are likely to be instances where a minor breach has impacted, say 10 or 15 customers, none of whom suffer any financial loss or damage and all of whom are remediated within 30 days. It would seem to make little sense for a licensee to be required to report such a minor breach given the other parameters of the Proposal.

A recurring problem is that a person can be misled in a minor or technical way, and therefore ‘impacted’ but suffer no financial loss, and it’s these instances that shouldn’t have to be reported (unless they otherwise infringe the parameters of the relief). There is an inherent difficulty and an undue burden on businesses to assess who has been ‘impacted’ generally by a potentially misleading statement.

There are likely to be many instances where a minor breach that causes no or de minimus financial loss or damage impacts more than 5 customers. For example, a licensee that provides research

¹ See <https://fsc.org.au/news/media-release/media-release-downloads/2804-fsc-media-release-millions-wasted-on-reporting-trivial-breaches/file>

reports (general advice) or data points to thousands of clients, where determining the number of impacted clients can be very problematic, noting that they may not be able to calculate who viewed a report or a particular datapoint on a website or data feed.

Ideally there should be no cap on the number of customers impacted. At the very least, when a breach occurs but there is no financial loss or damage to a person, that person should not count towards the total cap of five persons who are impacted.

It is important to note in this context that there is also uncertainty within industry as to what extent different breaches affecting different customers count towards the number of “persons” affected. For example, if a breach affects a person who is a family trust, an SMSF or a managed investment scheme, how is the number of persons impacted? There is also uncertainty as to whether clients who have been *positively* impacted should be included toward the number of clients impacted. For example, would a licensee be able to take advantage of the proposed relief if 5 clients were negatively impacted and 2 clients *positively* impacted (i.e. by only counting those who were negatively impacted by the error), assuming the other criteria was met for the proposed relief?

912D(4AA)(d) Corporations Act and 50A(4AA)(c) Credit Act*the total financial loss or damage to all persons resulting from, or likely to result from, the breach does not exceed \$500....regardless of whether it is, or will or may be, remediated).*

The FSC recommends the \$500 cap should not be applied in all cases. If it is retained, the wording should be clarified so that it reads..... total financial loss or damage to all persons resulting from, or likely to result from, the breach does not exceed **or is not expected to exceed**, \$500....

The FSC notes that even minor breaches can result in losses exceeding \$500. A specified cap of \$500 may not adequately account for the nuances of different cases and a more flexible approach could allow for a more practical and effective outcome.

For example, in some cases it may be more appropriate to consider a percentage of an amount invested in an investment product as a measure of materiality.

In other cases (for example certain wholesale investors investing in particular products) a higher threshold may be appropriate.

The FSC suggests that ASIC provide its rationale behind selecting this specific \$500 amount and consider some flexibility with respect to this limb of the Proposal.

However, if the limit is retained, clarification should be provided in respect of applying the \$500 total financial loss criteria - can losses and gains amongst clients be netted off such that a licensee could rely on the relief if net financial loss was less than \$500? Further clarification should also be provided on whether the calculation for “financial loss or damage” should include: (1) theoretical losses; (2) opportunity costs; and/or (3) hypothetical losses.

912D(4AA)(e) Corporations Act and 50A(4AA)(d) Credit Act*the breach has been rectified (including any necessary remediation to clients) within 30 days after the reportable situation first occurred.*

The FSC recommends deleting the reference to “within 30 days after the reportable situation first occurred” and replacing it with “within 30 days after the financial services licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe the reportable situation has arisen.”

The Proposal would appear to assume many breaches are detected and identified almost immediately, allowing for rectification to be completed within a 30-day window. This can be particularly difficult not only for large global organisations due to the size and complexity of their operations, but also for smaller businesses with more limited resources. In practice breaches may not always be identified within 30 days making it challenging to meet this requirement. Even if an entity takes reasonable efforts to monitor for compliance, it’s impractical for such entities to monitor breaches of all provisions within 30 days. Such broad monitoring would lead to disproportionate and unsustainable costs to entities. Many breaches are identified through retrospective reviews, which may make it very difficult or impossible to rectify the breach within 30 days of when the breach occurred. This relief will have greater impact if the clock starts from the date when the reportable situation is detected. Often, the issue may have occurred more than 30 days before it has been identified and notified to the licensee. Additionally, sometimes the necessary remediation is dependent on third parties, such as product providers reversing fees, which may take many weeks to complete. In instances where licensees require further information from the client to complete the remediation, the timing of the remediation will be dependent on the responsiveness of the client.

912D(4A)(b)(i) Corporations Act and 50A(4A)(b)(i) Credit Act only one person [(client) / (affected consumer)] is, or is likely to be, impacted by the contravention....

The FSC recommends expanding the existing relief so it is consistent with the new proposed relief here – that is, it should not have a cap on the number of persons it applies to, or at the very least a cap should not be applied to persons who suffer no financial loss or damage.

We note that the existing relief relating to misleading and deceptive conduct or false or misleading representations excludes misstatements in any documentation sent to 2 or more clients, regardless of how minor the mistake. It is often difficult to confirm whether only one person has been misled.

The FSC recommends that the existing relief relating to misleading and deceptive conduct or false or misleading representations is made consistent with the proposed relief (preferably as widened pursuant to the FSC’s recommendation above but in any event consistent with the final parameters). Widening the scope of the existing relief to make it consistent with the scope of the new relief would be logical given that in both situations we are dealing with minor or technical breaches. It would also reduce reports of little intelligence value. The limitations contained in the other limbs of the relief are sufficient to appropriately constrain the relief, given that they restrict the relief to instances where there is no or little loss or damage caused to the client.

912D(4B)(b) and (c) of the Corporations Act and 50A(4B)(b) and (c) Credit Act:(b) subsection (4B)²—the circumstances in which there is a single reportable situation ... paragraphs (4)(a) and (b) ...

(c) subsections (4A) and (4B)—a person is...)

The FSC recommends deleting the words “single reportable situation” and replacing them with “single report”.

The FSC has previously commented that the reference to a “single reportable situation” makes the relief unduly narrow and of limited use. As proposed, the same minor misrepresentation contained in two different documents sent to one client would arguably be reportable, but if contained in only one document it would not be. Relating the breaches to a single report would follow the logic of “grouping” reportable situations as set out in RG.78 (notably Table 9).

We note that the Proposal already limits relief to breaches that cause minimal financial loss or damage to a maximum of 5 persons.

Licensees often group reportable situations together in one breach report when they relate to similar or identical conduct and have the same root cause. The relief as currently drafted does not make sense as it allows up to 5 clients to be impacted but limits the application to a single reportable situation occurring. This does not make sense as each contravention of a rule impacting a client is to be treated as a separate reportable situation under the examples 12(a), (c) and (e) in Table 9 of RG78. Taking 12(c) as an example, this breach involved 25 additional customers being overcharged the same fee in the same circumstances as the original reportable situation and these represented a further 25 reportable situations. Therefore, the current drafting is at odds with the guidance provided in RG78. The proposed new criteria should have the number of reportable situations as being higher than or at least the same as the number of clients impacted for the relief to make sense. For example, if a performance report is sent to 4 clients containing an inaccuracy the licensee will input ‘4’ as the number of reportable situations that relate to the misleading and deceptive conduct breach, based on the examples provided in Table 9 of ASIC RG78, and input ‘4’ as the number of clients impacted. Alternatively, it would be less confusing if the number of reportable situations was removed as a condition making the relief dependent on the other criteria only, given it makes sense that the focus is better placed on the number of clients impacted and loss incurred.

4 other matters

The FSC notes there are other matters that should be clarified in the next edition of RG.78.

For example, an immaterial or administrative non-compliance of the compliance plan is a breach of

² The FSC notes for completeness that there are typographical errors in the cross-references of Proposed 912D(4B)(b) and (c), the correct references should be as set out in bold:

(b) subsection (**4AA**)—the circumstances in which there is a single reportable situation ... paragraphs (4)(b) and (c) ...

(c) subsections (4A) and (**4AA**)—a person is...

s601FC(1)(h) Corporations Act and deemed reportable. Industry would benefit from more guidance on what is deemed non-compliance with a scheme's compliance plan. We are aware of different responsible entities applying different approaches. For example, does it relate to non-compliance to an Obligation, Control and/or Compliance Monitoring of controls etc. Depending on the approach, this can result in a large number of immaterial or administrative non-compliance with a compliance plan being deemed reportable.

The RG could also provide clarity that there is relief for unit pricing errors that are within the tolerance threshold outlined in ASIC's Regulatory Guide 94 Unit pricing: Guide to good practice (RG 94) are not deemed reportable.

The FSC would welcome the opportunity to provide more feedback on the RG as part of a separate discussion.

The FSC would welcome a further opportunity to discuss the matters raised and recommendations at your earliest convenience.

If you have any queries or wish to discuss any matters raised in this submission, [REDACTED]
[REDACTED]

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

Financial Services Council