

3 June 2021

Ms Niki De Mel  
Strategic Policy Adviser  
Strategy Group  
Australian Securities and Investment Commission  
Level 7, 120 Collins Street  
Melbourne, 3000

Via email: [BR.submissions@asic.gov.au](mailto:BR.submissions@asic.gov.au)

Dear Ms De Mel

### **COBA submission to ASIC on CP 340 Breach Reporting**

COBA appreciates the opportunity to provide a submission to ASIC's consultation on the expanded breach reporting regime.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has \$146 billion in assets, around 10 per cent of the household deposits market and more than 4 million customers.

Customer owned banking institutions account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition, choice and market leading levels of customer satisfaction in the retail banking market.

All COBA members are AFS and credit licensees.

#### **Key points:**

- **The extent of provisions that are *not taken to be significant* under the expanded breach reporting regime remain unknown. COBA and the broader industry have called for a range of additional provisions to be excluded from the breach reporting regime. While COBA appreciates that this is outside of the control of ASIC, we ask that ASIC to take this uncertainty for licensees into account in its approach to administration and enforcement of the regime.**
- **COBA members have raised questions on the interpretation of "serious fraud" and welcome further guidance in the next iteration of RG 78.**
- **Members are also seeking further clarification regarding reportable investigations.**

#### **Scope of breaches exempt from reporting obligations**

Our sector's ability to respond to ASIC's consultation materials is hindered due to the uncertainty around the regulations which will prescribe civil penalty provisions that are *not taken to be significant* under the expanded breach reporting regime.

COBA provided Treasury with a submission in April 2021 on the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021: breach reporting* (breach reporting regulations) (see [Attachment A](#)).

COBA's submission to Treasury highlights the broad scope of the expanded breach reporting regime and supports Treasury's proposed list of provisions that are *not taken to be significant*.

Suite 403, Level 4, 151 Castlereagh Street,  
Sydney NSW 2000

Suite 4C, 16 National Circuit,  
Barton ACT 2600

However, our submission noted that the extent of further civil penalty provisions that should be prescribed will only become clear after the breach reporting regime is implemented and operationalised by licensees.

COBA called for the regulation-making power is intended to be used to reduce the regulatory compliance burden on licensees and to target ASIC's surveillance to problematic areas.

*"We expect the Government to use the regulation-making power to quickly reduce the burden on licensees should ASIC start receiving a large number of largely unproblematic breach reports for minor, technical or inadvertent breaches of civil penalty provisions. We urge the Government to publicly commit to:*

- *review the breach reporting regime after six months and at regular intervals, and*
- *to move quickly to add civil penalty provisions to the prescribed list as needed."*<sup>1</sup>

We are also working with other industry associations in making representations to Government about addressing the likely substantial increase in breach reports that will flow from the new regime.

Given these processes are unresolved at this late stage in terms of commencement of the breach reporting regime, we ask that ASIC to take this uncertainty for licensees into account in its approach to administration and enforcement of the regime.

### **Treatment of serious fraud**

Draft RG 78 requires AFS or credit licensees to report to ASIC a range of conduct that the law describes as reportable situations, based on provisions of the Corporations Act 2001 and the National Consumer Credit Protection Act 2009.

It also outlines additional reportable situations that licensees must report to ASIC, which includes "conduct that constitutes gross negligence of serious fraud."<sup>2</sup>

COBA members have asked for additional clarity about the treatment of "serious fraud". Specifically:

- Draft RG 78 does not define "serious fraud", although members note definitions in the Corporations Act and the National Consumer Credit Protection Act. COBA requests confirmation that ASIC will apply these definitions in considering additional reportable situations.
- At what point in time will ASIC consider "serious fraud" to have been committed and therefore trigger reporting obligations?
  - Members noted that internal management of employee fraud would vary across organisations and that investigations are often a long process, ranging from when the potential fraud is identified to the resolution of the fraud by employment termination, criminal process, or by another outcome. COBA suggests there could be benefit in further clarifying when ASIC will deem the fraud as 'serious' and therefore reportable.

COBA notes ASIC's question at page 12 of CP 340 regarding the inclusion of further guidance on reportable situations involving serious fraud or gross negligence.<sup>3</sup>

We support the inclusion of further guidance on reportable situations involving serious fraud and our members would benefit from further guidance on ASIC's expectations.

---

<sup>1</sup> COBA submission to Treasury consultation on Breach Reporting Regulations, April 2021

<sup>2</sup> <https://asic.gov.au/media/dejuvcl/attachment-1-to-cp340-published-22-april-2021.pdf>

<sup>3</sup> <https://asic.gov.au/media/x4darycv/cp340-published-22-april-2021.pdf>

## Commencement of reportable investigations

The draft RG 78 identifies “investigations into breaches or likely breaches of core obligations that are significant” as a reportable situation.<sup>4</sup>

This includes “investigations that continue for more than 30 days into whether there is a breach or likely breach of a core obligation that is significant; and the outcome of such an investigation if it discloses there is no breach or likely breach of a core obligation that is significant.”<sup>5</sup>

At RG 78.51, ASIC states that “The time at which an investigation commences is a matter of fact and is not a matter for subjective determination by the licensee.”<sup>6</sup>

Members have reflected on their own internal investigation processes and would benefit from further clarity and examples on when a ‘reportable investigation’ commences, to ensure compliance with the 30-day threshold for reporting ongoing investigations to ASIC.

Members highlighted that internal processes are nuanced and may not start as a potentially reportable investigation from the outset. Rather, some investigations start off as other internal practices and procedures and progress into an investigation based once new information becomes available to the institution.

This creates uncertainty about when the “investigation” commences and challenges in determining when the 30-day reportable threshold would be triggered, based on guidance in the draft RG 78.

### *Transition periods for reportable investigations*

Noting the new regime’s commencement, COBA members would appreciate guidance from ASIC on the treatment of investigations that started prior to 1 October 2021, which conclude post-October and reach the 30-day reportable threshold.

For clarity, COBA urges ASIC to consider only applying the reportable obligation to investigations that commence on or after 1 October 2021.

Thank you for the opportunity to provide these comments. If you wish to discuss any aspect of this submission please contact Maryanna Vasilareas, Senior Policy Adviser (████████████████████).

Yours sincerely,

████████████████████

**MICHAEL LAWRENCE**

**Chief Executive Officer**

<sup>4</sup> <https://asic.gov.au/media/debjuvcl/attachment-1-to-cp340-published-22-april-2021.pdf>

<sup>5</sup> <https://asic.gov.au/media/debjuvcl/attachment-1-to-cp340-published-22-april-2021.pdf>

<sup>6</sup> <https://asic.gov.au/media/debjuvcl/attachment-1-to-cp340-published-22-april-2021.pdf>

9 April 2021

Ms Ly Reeve  
Regulatory Powers and Accountability Unit  
Financial System Division  
Treasury  
Langton Cres  
Parkes ACT 2600

By email: [breach.reporting@treasury.gov.au](mailto:breach.reporting@treasury.gov.au)

Dear Ly

COBA appreciates the opportunity to provide feedback on the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021: breach reporting* (breach reporting regulations).

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has \$146 billion in assets, around 10 per cent of the household deposits market and more than 4 million customers. Customer owned banking institutions account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition, choice and market leading levels of customer satisfaction in the retail banking market.

Under the breach reporting regime, a breach of a core obligation is taken to be significant if the breach is constituted by a contravention of a civil penalty provision under any law, other than a civil penalty provision that is prescribed by the regulations.

However, as noted in the Explanatory Memorandum to legislation<sup>1</sup>, even if a civil penalty provision is prescribed by the regulations, the breach may still be significant and reportable if one of the other circumstances in the deemed significance test apply, or if the breach is significant under the second significance test.

This underlines the broad scope of the regime.

There will be a very broad obligation on licensees, and potentially a very significant compliance burden, so we support the capacity to prescribe certain civil penalty provisions to reduce the number of provisions where any breach is automatically significant.

We support the list of prescribed civil penalty provisions proposed in the draft regulations but we are concerned that the initial list may prove inadequate.

The extent of further civil penalty provisions that should be prescribed will only become clear after the breach reporting regime is implemented and operationalised by licensees.

The regulation-making power is intended to be used to reduce the regulatory compliance burden on licensees and to target ASIC's surveillance to problematic areas.

---

<sup>1</sup> Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 Explanatory Memorandum

As foreshadowed in the Explanatory Memorandum, we expect the Government to use the regulation-making power to quickly reduce the burden on licensees should ASIC start receiving a large number of largely unproblematic breach reports for minor, technical or inadvertent breaches of civil penalty provisions.

We urge the Government to publicly commit to:

- review the breach reporting regime after six months and at regular intervals, and
- to move quickly to add civil penalty provisions to the prescribed list as needed.

Thank you for the opportunity to provide these comments. If you wish to discuss any aspect of this submission please contact Maryanna Vasilareas ( [REDACTED] ).

Yours sincerely,

A large black rectangular redaction box covering the signature of Michael Lawrence.

**MICHAEL LAWRENCE**

**Chief Executive Officer**