Law Council
OF AUSTRALIA

*Business Law Section*

**7 March 2025**

Ms Kate Metz
Senior Executive Leader, Regulatory Reform and Implementation
Australian Securities and Investments Commission
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Sydney NSW 2000

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

Dear Ms Metz

**Consultation Statement 16 *Reportable situations—additional relief* (CS 16)**

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) and relates to CS 16, which the Australian Securities and Investments Commission (**ASIC**) released for consultation on 18 February 2025.

2. Together with CS 16, ASIC has released a draft instrument, the *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2025/XX* (the **Draft Instrument**).

3. The Committee thanks ASIC for the opportunity to provide feedback on CS 16 and the Draft Instrument.

***Background***

4. The reportable situations regime in the *Corporations Act 2001* (Cth) and the *National Consumer Credit Protection Act 2009 (*Cth) (the **NCCPA**) commenced in October 2021.

5. The legislation deems breaches of certain core obligations to be significant and therefore reportable. There are provisions (the **MDC Deeming Provisions**) that deem significant a contravention of the following provisions which concern misleading or deceptive conduct (**MDC**) in relation to financial services:

   (a) in the Corporations Act and the NCCPA, a breach that is constituted by a contravention of section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth); and

   (b) in the Corporations Act, a breach that is constituted by a contravention of section 1041H(1) of the Corporations Act.

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6. ASIC granted limited relief from the MDC Deeming Provisions in the *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716* (**Instrument 2021/716**).

7. Instrument 2021/716 provides that a breach is not taken to be significant where:

   (a) the underlying circumstances in relation to the breach have only given rise, and are only likely to give rise, to a single reportable situation;

   (b) the relevant breach only impacts one person (or a joint customer); and

   (c) the relevant breach does not result in, and is unlikely to result in, any financial loss or damage to any person, whether or not remediated.

8. Instrument 2021/716 was due to expire in October 2024, but the relief was extended by ASIC until October 2029 under the *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2024/620* (**Instrument 2024/620**). ASIC consulted on this extension (**CS 10**), and the Committee made a submission on CS 10 in its letter to ASIC of 4 September 2024 (the **4/9/24 Submission**).

9. The Draft Instrument seems to be an amended form of Instrument 2024/620 and the Committee has assumed that ASIC intends to issue a legislative instrument to amend or repeal Instrument 2024/620.

***Submissions***

10. The Committee welcomes the proposal in CS 16, as there are ongoing problems with the reportable situations regime which have not been adequately addressed by the relief in Instrument 2024/620 in relation to the MDC Deeming Provisions.

11. Fundamentally, the problem with the MDC Deeming Provisions is that they deem to be significant matters that are very often insignificant or even trivial.

12. The legislation to introduce the reportable situations regime clearly did not anticipate the effect of deeming to be significant each and every instance of MDC. MDC is an exceedingly broad concept which takes no account of the intent of the person engaging in the conduct and which does not have any *de minimis* threshold of harm or loss to the consumer. The effect of the MDC Deeming Provisions is that a minor instance of MDC, such as an inadvertent and harmless error in an advertisement, becomes reportable under the MDC Deeming Provisions.

13. ASIC's reports on the reportable situations regime (REP 775, REP 800) show that MDC matters comprise the largest category of reports to ASIC by a significant margin: 34% for the period ending June 2022, 44% for the period ending June 2023, and 38% for the period ending June 2024.

14. In its 4/9/24 Submission, having particular regard to the MDC Deeming Provisions, the Committee expressed "widely held financial services and credit industry concerns that the breach reporting regime is not operating in a fair, efficient or effective manner". The Committee called for a significant overhaul of the reportable situations regime to ensure that resources were focused on addressing serious, systemic issues that cause or could cause significant consumer harm.

15. The Committee reiterates those points in this submission. We suggest that the Government should consider amending the reportable situations legislation to better align the MDC Deeming Provisions with actually significant instances of MDC. The simplest option may be to delete altogether the MDC Deeming Provisions, so that an MDC breach would not be deemed significant and would only be reportable if it were significant having regard to the existing default factors in section 912D(5) of the Corporations Act and section 50A(5) of the NCCPA.

16. Until the legislation is amended, it is critical that any relief granted by ASIC provides exemptions that will make a material reduction in the administrative burden of reporting MDC. Unfortunately, the Committee does not believe that the amendments proposed in the Draft Instrument achieve this objective.

17. The Draft Instrument would exempt MDC from being a reportable situation where there are no more than five consumers impacted by the breach, the total financial loss to consumers is no more than $500, and the breach is rectified within 30 days. Contraventions of the client money reporting rules and clearing and settlement rules would be excluded from the relief.

18. The Committee does not believe that the changes proposed to the existing relief will make any material difference for licensees because of the condition that the conduct impacts no more than five persons. In the context of mistakes in advertising and marketing material or standard documentation, this limitation renders the proposed relief practically useless, because most advertisements, marketing material or standard documents will be at least potentially viewed by (and thereby be regarded as having "impacted") more than five people.

19. The Committee suggests that the relief proposed in the Draft Instrument should be amended so that the conditions of the exemption would be satisfied by *either* the five-person limit *or* financial loss of no more than $500, rather than having to satisfy both of these conditions.

**Conclusion and further contact**

20. The Committee hopes the feedback provided above will be useful, and is also happy to be consulted in a more informal manner should ASIC see fit to do so.

21. [redacted]

Yours faithfully

[redacted]