



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:JWib010621

1 June 2021

Niki De Mel
Strategic Policy Adviser, Strategy Group
Australian Securities and Investments Commission

By email: BR.submissions@asic.gov.au

Dear Ms De Mel,

Draft Guidance for Breach Reporting Reforms

The Law Society of NSW appreciates the opportunity to comment on the Australian Securities and Investment Commission's (ASIC) proposed regulatory guidance relating to the breach reporting reforms set to commence on 1 October 2021. The Law Society's Business Law Committee contributed to this submission.

We support, in principle, the proposed approach and general guidance provided by ASIC in Draft Regulatory Guide 78 (RG 78) and the draft information sheet, 'Complying with the notify, investigate and remediate obligations' (INFO 000), subject to our comments below. Our comments respond to some of the questions set out in Consultation Paper 340 on "Breach reporting and related obligations", adopting the same numbering.

B2. We propose to include case studies and scenarios to supplement our general guidance and help illustrate key principles as they might apply to different licensees, industries and business models.

B2Q1. Are there any specific issues, incidents, challenges or areas of concern you think we should include as examples, case studies or scenarios? If so, please provide details and explain why they should be included.

AFS licensees often require a party to seek advice from their legal advisor as a way of discharging their obligations under the National Credit Code to explain that party's liability under the relevant financial instruments. Legal advisers are then often faced with explaining to clients that they are borrowing or guaranteeing money under onerous conditions after the clients have psychologically committed to certain commercial arrangements. We suggest including case scenarios which outline the expected proper practice for an AFS provider explaining the terms of common security instruments offered to small to medium enterprise business customers or first-home buyers such as guarantees and indemnities.

B3. Draft RG 78 identifies where the existing breach reporting obligation (as in force immediately before 1 October 2021) continues to apply to AFS licensees: see draft RG 78.14–RG 78.18.

B3Q1. Should we include further guidance to help AFS licensees understand how the existing breach reporting obligation under s912D of the Corporations Act (as in force before 1 October 2021) applies? If so, please provide details.

Yes. It is important for AFS licensees to understand that s 912D(1)(a) applies in the event of a 'breach' or if the person is 'likely to breach'. Section 912D(1A) provides that the phrase 'likely to breach' means 'if the person is no longer able to comply with the obligation'. One example is provided in the current guidance, but we suggest that the inclusion of further examples would be helpful in showing the practical difference between the 'breach' of an obligation and when a person is 'likely to breach' for the purposes of s 912D, to assist AFS licensees to understand their obligations under this section.

B4. We propose to provide high-level guidance to help AFS licensees and credit licensees identify what they must report to ASIC, including guidance on:

- (a) what is a 'reportable situation' (see draft RG 78.19–RG 78.25);**
- (b) whether a breach or likely breach of a core obligation is significant (see draft RG 78.26–RG78.45);**
- (c) when an investigation is a reportable situation (see draft RG 78.46–RG 78.57);**
- (d) what are reportable situations about other licensees (see draft RG 78.61–RG 78.67).**

B4Q1. Do you agree with our proposed approach? If not, why not?

We agree with the proposed approach of ASIC in principle.

B4Q2. Should we include further guidance on what constitutes a 'core obligation'? If so, please provide details.

Yes. RG 78.28 could be amended to better describe a 'core obligation' to comply with the 'financial services laws' for the purposes of s 912A(1)(c). After the words "but only those parts of the definition set out in s 192D(3)(b)" the guidance should set out the implications of the definitions in full.

B4Q3. Should we include further guidance on how to determine whether a breach or likely breach of a core obligation is 'significant'? If so, please provide details.

We are satisfied with the guidance provided by ASIC on 'significant breach' under RG 78.32-RG 78.45.

B4Q4. Should we include further guidance on reporting an 'investigation' to ASIC? If so, what should be clarified? Please provide examples of scenarios (where relevant).

We are satisfied with the guidance provided by ASIC on reporting an 'investigation' under RG 78.46-RG 78.57.

B4Q5. Should we include further guidance on what constitutes 'material loss or damage'? If so, what are the challenges licensees face in determining whether loss or damage is material? Please provide examples of how you consider questions of material loss or damage.

Yes, with the following qualification. As a matter of general law, matters involving 'material' and 'substantive' losses will be determined by the courts on a case-by-case basis. If the test for 'significance' involves a breach which is likely to result in a material loss or damage to clients or members then examples should be given showing what is and what is not a material loss for the purposes of the significance test, while noting that what is a material loss will always be subjective.

B4Q6. Should we include further guidance on reportable situations involving serious fraud or gross negligence? If so, what are the challenges licensees face in identifying when serious fraud or gross negligence has occurred?

No. Serious fraud is clearly defined in s 9 of the *Corporations Act 2001*.

B4Q7. Should we include further guidance on reportable situations about other licensees? If so, please provide details.

Subject to the comments above, we are satisfied with the guidance provided by ASIC in the draft RG in relation to reportable situations.

B5. We propose to include guidance in draft RG 78 about the obligation for licensees to report to ASIC within 30 days after they first know that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen: see draft RG 78.68– RG 78.81.

B5Q1. Should we include further guidance to help licensees understand when to report to ASIC? If so, please provide details, including what guidance would be helpful and why

Subject to the comments below, we are satisfied with the guidance provided by ASIC in the draft RG 78.68-78.81.

B5Q2. Should we include further guidance on what may amount to 'knowledge', 'recklessness' and 'reasonable grounds'? If so, please explain what specific guidance would be helpful and why.

Yes. We consider that providing an explanation regarding 'recklessness' and 'knowledge' as fault elements will be useful. The Explanatory Memorandum quoted in RG 78.71 repurposes the language used in s 5.4 of the Criminal Code to explain what constitutes recklessness at law; however, the language used in s 5.3 to explain 'knowledge' is not used. It would be helpful to include this definition: "A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events." We note that the scale of knowledge/recklessness requirements in *Baden Delvaux & Lecuit v Societe Generale pour Favoriser le Development du Commerce et de l'Industrie en France SA* [1992] 1WLR 509 as tests for what constitutes knowledge, could be included in RG 78.71 – being (summarily):

- (i) Actual knowledge;
- (ii) Wilfully shutting one's eyes to the obvious;

- (iii) Wilfully and recklessly failing to undertake such inquiries as an honest and reasonable person would undertake;
- (iv) Knowledge of circumstances that would indicate facts to an honest and reasonable person; and
- (v) Knowledge of circumstances which would put an honest and reasonable person on inquiry.

C2. We propose to provide guidance for AFS licensees who are financial advisers and credit licensees who are mortgage brokers. The new obligations require these licensees to notify, investigate and remediate affected clients in certain circumstances. We have set out our proposed guidance in an information sheet: see draft INFO 000 in Attachment 2 to this paper.

C2Q1. Do you agree with our proposed approach? If not, why not?

We agree with the approach of ASIC in principle.

C2Q2. Should the guidance we provide on the new obligations be provided in the form of a separate information sheet, or be incorporated into RG 256? Please provide details.

We suggest a separate information sheet should be provided as well as incorporating the guidance into RG 256. If this is not considered practicable, then we consider that a separate information sheet is more likely to be circulated, displayed and read by AFS licensees.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at [REDACTED] or on [REDACTED].

Yours sincerely,

[REDACTED]

Juliana Warner
President