



Law Council
OF AUSTRALIA

Business Law Section

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The Treasury
Regulatory Powers and Accountability Unit
Financial System Division

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Dear Treasury,

Breach Reporting Regulations – Supplementary Consultation

On 13 April 2021 the Corporations Law Committee and the Financial Services Committee from the Business Law Section of the Law Council of Australia provided a submission on the exposure draft *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures) Regulations 2021 (Cth) (Breach Reporting Regulations)*, which set out proposed amendments to the *Corporations Regulations 2001 (Cth) (Corporations Regulations)*, the *National Consumer Credit Protection Regulations 2010 (Cth) (Credit Regulations)* and related fees regulations (released on 10 March 2021).

One aspect of the Draft Regulations was to amend the Corporations Regulations and Credit Regulations to prescribe some civil penalty provisions which should be taken not to be automatically treated as significant under the breach reporting regime in the event of a contravention.

On 9 June 2021 representatives of the Financial Services Committee attended a meeting with representatives of Treasury and the Australian Securities and Investments Commission (**ASIC**) to discuss some follow-up matters ahead of the finalisation of the Breach Reporting Regulations. During that meeting, Treasury shared a request made by the Australian Banking Association (**ABA**) that the scope of “credit legislation” that will be treated as “core obligations” under the *National Consumer Credit Protection Act 2009 (Cth) (Credit Act)* be better aligned with the scope of “financial services laws” that will be treated as “core obligations” under the *Corporations Act 2001 (Cth) (Corporations Act)*.

We have been asked to provide our input to Treasury on how this might be achieved.

Background information

Under provisions of the Corporations Act which are introduced by *the Financial Sector (Hayne Royal Commission Response) Act 2020 (Cth) (Amending Act)* and are due to commence in October, a “reportable situation” can arise if there has been a breach of a “core obligation” that is significant. The definition of “core obligation” to be provided in subsection 912D(3) will include (as well as other specified provisions) paragraphs (a), (b), (ba) and (c) of the definition of “financial services law” in section 761A and relevantly those laws cover:

- (a) Chapters 7, 5C, 5D, 6, 6A, 6B, 6C, 6D and 8A;
- (b) Chapter 9 (as it applies to any provisions of a Chapter already mentioned in paragraph (a) above),
- (c) the Passport Rules for Australia;
- (d) a provision of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001 (Cth)*; and

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- (e) for financial services other than traditional trustee company services, the obligation under paragraph 912A(1)(c), to the extent it relates to Commonwealth legislation covered by paragraph (d) of the “financial services laws” definition (which says “any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services”) and is specified in regulations made for the purposes of paragraph 912D(3)(c), which will be those which are currently set out in regulation 7.6.02A, namely:
- (i) the *Australian National Registry of Emissions Units Act 2011* (Cth);
 - (ii) the *Banking Act 1959* (Cth) (**Banking Act**);
 - (iii) the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth);
 - (iv) the *Clean Energy Act 2011* (Cth);
 - (v) the *Financial Sector (Collection of Data) Act 2001* (Cth) (**FSCD Act**);
 - (vi) the *Financial Sector (Shareholdings) Act 1998* (Cth) (**FSSA Act**);
 - (vii) the *Financial Sector (Transfer and Restructure) Act 1999* (Cth) (**FSTR Act**);
 - (viii) the *Insurance Acquisitions and Takeovers Act 1991* (Cth);
 - (ix) the *Insurance Act 1973* (Cth);
 - (x) the *Insurance Contracts Act 1984* (Cth);
 - (xi) the *Life Insurance Act 1995* (Cth);
 - (xii) the *Retirement Savings Accounts Act 1997* (Cth);
 - (xiii) the *Superannuation Industry (Supervision) Act 1993* (Cth); and
 - (xiv) the *Superannuation (Resolution of Complaints) Act 1993* (Cth).

Under provisions of the Credit Act which are also introduced by the Amending Act and due to commence in October, similarly a breach of a “core obligation” that is significant will give rise to a “reportable situation”. The definition of “core obligation” under subsection 50A(3) of the Credit Act will include (as well as other specified provisions):

- (a) an obligation section 47(1) of the Credit Act (excluding paragraph 47(1)(d) (which is an obligation to comply with the “credit legislation”);
- (b) an obligation under paragraph 47(1)(d) (ie, comply with the “credit legislation”) to the extent it relates to the Credit Act, transitional legislation and Division 2 of Part 2 of the ASIC Act and regulations made for the purpose of Division 2 of Part 2; and
- (c) an obligation under paragraph 47(1)(d) (ie, comply with the “credit legislation”) to the extent it relates to Commonwealth legislation covered by paragraph (d) of the definition of “credit legislation” which covers “any other Commonwealth ... legislation that covers conduct relating to credit activities”. Unlike the Corporations Act regime, this limb of the “core obligation” definition is open-ended, which leads to potential uncertainty about what the scope of breaches which credit licensees should report to ASIC.

Our suggestion

We wish to confirm that we support the recommendation of the ABA to better synchronise the Corporations Act and Credit Act regimes in this respect so as to improve regulatory symmetry. In particular, we would note that, based upon the current drafting, there are numerous civil penalties in certain other pieces of legislation which would fall within the scope of “core obligations” for credit licensees but would not be “core obligations” for financial services licensees. In our view, this is not a satisfactory outcome.

We recommend specifying the following provisions in a provision of the Credit Regulations which would correspond with the role played by regulation 7.6.02A of the Corporations Regulations:

- (a) firstly, those of the laws listed in regulation 7.6.02A which have relevance to credit activities, which we consider to be:
 - (i) the Banking Act;
 - (ii) the FSCD Act;
 - (iii) the FSSA Act; and
 - (iv) the FSTR Act; and
- (b) Part IIIA of the *Privacy Act 1988* (Cth) and the *Privacy (Credit Reporting Code)* made under Part IIIA, which imposes obligations on credit providers relating to the use of credit reports.

Further observation and suggestion

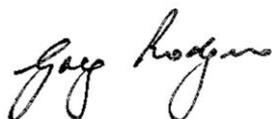
In making any amendment to the “core obligations” and associated definitions, we also suggest that Treasury consider how the relevant laws will interact with the reporting obligations for APRA-regulated entities under the Banking Executive Accountability Regime (**BEAR**), which imposes its own reporting obligations, and the financial services laws. On the Amending Act taking effect, some credit licensees will be subject to separate breach reporting regimes under BEAR and the Credit Act, as well as section 912D and Part 7.8A of the Corporations Act, each with different scope and threshold tests that trigger the applicable reporting obligation. This situation is reminiscent of the position faced by institutions regulated by APRA and ASIC prior to the harmonisation of the breach reporting of the prudential legislation¹ with section 912D of the Corporations Act several years ago.

Treasury may wish to consider measures to strengthen the current mechanisms APRA and ASIC have in place to avoid the potential need for licensees to make multiple reports of the same event. An example of such an event might be a breach of the consumer protection provisions of the ASIC Act that impacts both regulated credit and financial products.

While we consider that there are a number of shortcomings with the approach taken in the Breach Reporting Regulations (which we have already communicated to Treasury), we nonetheless appreciate the opportunity to be closely involved in the consultation process which will lead to the finalised Breach Reporting Regulations.

Please let us know if we can be of further assistance. Any queries can be directed to the chair of the Financial Services Committee Pip Bell at pbell@pmclegal-australia.com or Committee Member Andrew Ham at Andrew.Ham@lodlaw.com.

Yours faithfully



Greg Rodgers
Chair, Business Law Section

¹ Section 62A of the *Banking Act 1959*, s 38AA of the *Insurance Act 1973*, s 132A of the *Life Insurance Act 1995*, and s 29JA of the *Superannuation Industry (Supervision) Act 1993*.