

Senior Adviser

Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

28 February 2020

By email

Dear Sir/Madam

Strengthening breach reporting

Thank you for the opportunity to provide a submission in response to the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.6, 2.7, 2.8, 2.9 and 7.2 (Reference checking and information sharing, breach reporting and remediation)* (the draft Bill).

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include Australia's leading banks, credit unions, finance companies, fintechs, and credit reporting bodies. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

Our comments are directed to the changes as they are applicable to credit under the National Consumer Credit Act, however we expect that they would also have relevance to the changes to be made to the Corporations Act.

In addition, our comments relate mainly to the provisions relating to the handling of 'reportable situations'. However, we also make a short comment in relation to the reference checking and information sharing requirements.

Reportable situations

Our primary concern with the draft Bill relates to the new breach reporting obligations. We acknowledge the concerns raised in the ASIC Enforcement Review Taskforce that the inclusion of a ‘significance test’ for AFS licensees is seen to have “given rise to ambiguity in terms of the threshold for the obligation to report as the test has a high degree of subjectivity”. However, we consider that the proposed formulation of a ‘reportable situation’ is likely to *recreate* the “large regulatory burden on licensees in addition to an administrative burden on ASIC to process and appropriately action an influx of minor and insignificant reports”¹ that was identified by the Review Taskforce in relation to the pre-2003 breach reporting obligation.

That is, in attempting to remove the perceived ambiguity in the current AFS breach reporting obligations, the draft Bill will result in too much information being disclosed to ASIC; much of which will be of little use.

We consider that this is primarily the result of subsection 50A(5) deeming the following as “significant” (in relation to a breach of a “core obligation”):

- “the breach constitutes a contravention of a civil penalty provision”²; and
- “the breach results, or is likely to result, in loss or damage to a credit activity client of the licensee”.

We note example 2.8 in the explanatory materials describes the reporting of the commencement of an investigation into whether a representative has failed to give a consumer a credit guide. This is followed by a further report once the licensee has concluded that it has breached a core obligation that is significant (because it is a civil penalty provision). We consider that, in the absence of any aggravating circumstances (e.g. any potential suggestion of a deliberate attempt to withhold information from the consumer), this is clearly a waste of time and resources in respect of what appears, at most, to be a minor disclosure failing where such disclosure – as noted in ASIC’s own report *Disclosure: Why it shouldn’t be the default* – has limited benefits to the consumer.

The following example further illustrates our concern with the above two elements of s50A(5):

Customer A took out a credit card a year before with the first annual fee waived. At the start of the second year, Customer A rings the bank’s call centre to query the amount of the annual fee and says to the call centre, “I thought the bank person told me the annual fee was \$129, not \$159”.

In the ordinary course of business, the call centre operator would apologise to the customer for any potential misunderstanding and credit the customer’s account for the difference in fee for that year (in fact, it’s possible that the customer would get a full credit of the annual fee). This would be done based on the customer’s word and would not typically trigger an investigation (particularly as the circumstances are over

¹ Page 2, ASIC Enforcement Review Taskforce Report

² We note also s50A(5)(a) defines certain breaches as significant if the penalty involves a certain period of imprisonment. We have not conducted a review of all penalty provisions within the “credit legislation”, however it would not be surprising if some of those penalty provisions may be breached in circumstances that involve relatively insignificant conduct (and which are unlikely to ever be prosecuted).

a year old and would not be recorded). The call centre operator would also record the outcome of the conversation which would feed into reports about complaints or disputes that are prepared for the top management of the organisation (as per Guiding Principle 4.9 of RG 165).

However, under the draft Bill, the above conversation is likely to create “reasonable grounds” for the licensee to believe that a reportable situation had arisen as section 154 of the National Consumer Credit Act (that deals with false or misleading representation in relation to a matter that is material to entry into a credit contract) is a civil penalty provision. Likewise, the suggestion that the customer was told the wrong fee is likely to cause the customer “loss or damage” (being a total of \$30 in that second year).

As a result significant time and effort will be required to conduct an investigation of the facts of the matter and to make the report to ASIC; either that the licensee has reasonable grounds to believe a reportable situation has arisen or that the investigation has disclosed no reasonable grounds that the licensee has breached the core obligation (noting that, as the matter is likely to be a simple misunderstanding and would involve consideration of a 12-month old unrecorded conversation, it is probable that no firm conclusion would be made).

To be clear, it is not simply the requirement to report to ASIC but the expectation to conduct an “investigation” - which is almost certainly going to be inconclusive (where, instead, the compliance value of making a record of the customer complaint is already addressed through Guiding Principle 4.9).

In addition, the above example would first require the call centre operator to recognise that a relatively benign complaint regarding a fee could, in fact, result in a potential breach of a ‘core obligation’. This is likely to require a credit provider to develop an extensive list of potential ‘core obligation’ breaches arising from everyday situations that happen within a credit provider and to require every customer-facing employee to memorise that list. In effect, each employee will need to exercise the skills of a lawyer in order to avoid breaching the new obligations. This is not a reasonable expectation to be placed on front-line employees.

We strongly recommend that subsections 50A(5)(b) and (c) be amended so that the circumstances as described in Example 2.8 and in our example above are not subject to the reporting requirements. We suggest that this could be done by:

- Removing subparagraph (b) that deems all breaches of civil penalty provisions as being “significant” as it is superfluous given the other provisions relating to ‘significance’; and
- Imposing minimum thresholds (potentially based on a dollar and/or customer number threshold) on the “loss or damage” in subparagraph (c); where such thresholds could be set under regulations.

Reference checking and information sharing

We note that the provisions relating to reference checking and information sharing protocols raise significant issues about the privacy of individuals. In the circumstances, we consider that the legislation should require ASIC to consult with the Office of the Australian Information Commissioner prior to determining a protocol.

If you have any questions about this submission please feel free to contact me or Michael Blyth.

Yours sincerely,

Mike Laing

Chief Executive Officer

Australian Retail Credit Association