



Law Council  
OF AUSTRALIA

*Business Law Section*

# Breach Reporting Regulations

**Regulatory Powers and Accountability Unit  
Financial System Division  
The Treasury**

**13 April 2021**

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## Table of Contents

<b>About the Business Law Section of the Law Council of Australia .....</b>	<b>3</b>
<b>For Further Information.....</b>	<b>5</b>
<b>Executive Summary.....</b>	<b>6</b>
<b>Civil penalty provisions.....</b>	<b>7</b>
Corporations Act provisions .....	8
Credit Act provisions .....	9
<b>Infringement notices.....</b>	<b>12</b>

# About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee

- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Greg Rodgers, Chair
- Mr Mark Friezer, Deputy Chair
- Mr Philip Argy, Treasurer
- Ms Rebecca Maslen-Stannage
- Professor Pamela Hanrahan
- Mr John Keeves
- Mr Frank O'Loughlin QC
- Ms Rachel Webber
- Dr Elizabeth Boros
- Mr Adrian Varrasso
- Ms Caroline Coops

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

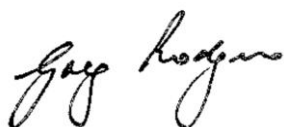
## For Further Information

This submission has been prepared by the Financial Services Committee and the Corporations Committee (the **Committees**) of the Business Law Section (**BLS**).

The BLS would be pleased to discuss any aspect of this submission.

Any queries can be directed to the chair of the Financial Services Committee Pip Bell at [pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com) or chair of the Corporations Committee Shannon Finch at [shannonfinch@jonesday.com](mailto:shannonfinch@jonesday.com),

With compliments

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive, flowing style.

**Greg Rodgers**  
**Chair, Business Law Section**

## Executive Summary

1. The Committees welcome the opportunity to provide a submission to the Department of Treasury with respect to the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures) Regulations 2021* (Cth) (**Amending Legislation**), which sets 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 (**Draft Regulations**).
2. The Draft Regulations were released for consultation on 10 March 2021. The Committees thank the Department of Treasury for accepting this submission after the expiry of the formal consultation period on 9 April 2021.
3. The Draft Regulations support the amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) set out in Schedule 11 of the *Financial Sector (Hayne Royal Commission Response) Act 2020* (Cth), which implements the federal Government's response to recommendations 1.6, 2.8 and 7.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
4. There are three key aspects to the Draft Regulations:
  - prescribing civil penalty provisions that are not taken to be significant under the breach reporting regime if they have been contravened;
  - making certain breach reporting offences and civil penalty provisions subject to an infringement notice; and
  - making minor and technical amendments, including updating references to the Corporations Act.
5. This submission focuses on the first two aspects and sets out the Committees' views on:
  - which civil penalty provisions should be taken not to be significant under the breach reporting regime if they have been contravened; and
  - whether it is appropriate for certain breach reporting offences and civil penalty provisions to be subject to an infringement notice.
6. In summary, the Committees are of the view that:
  - there should be more civil penalty provisions for which a single breach should not automatically be treated as significant under the breach reporting regime; and
  - the infringement notice regime should not be expanded to cover other civil penalty provisions, and in particular it would not be appropriate for a failure by a licensee to report misconduct by another licensee or another licensee's representative to be dealt with under the infringement notice regime.

## Civil penalty provisions

7. With effect from 1 October 2021, under paragraph 912D(4)(b) of the Corporations Act and paragraph 50A(4)(b) of the Credit Act, a breach of a “core obligation” will be taken to be significant if it involves a contravention of a civil penalty provision under any law “other than a civil penalty provision prescribed by the regulations ...”.
8. In March 2020 the BLS Financial Services Committee and the Legal Practice Section’s Superannuation Committee provided a submission with respect to the breach reporting reforms proposed in March 2020. In that submission, the Financial Services Committee expressed its concern that if a breach of any civil penalty provision were to be reportable, this could have a number of potential adverse consequences, including:
  - disproportionately burdensome additional compliance costs imposed on licensees;
  - creation of a skewed perception about the level of risk of the financial services industry in Australia as a result of the publication of information about reported breaches (which could in turn undermine investor confidence in the Australian market and result in higher capital costs); and
  - the lost opportunity cost of directing scarce resources towards compliance rather than innovation and growth.
9. The Committees support the concept of recognising that there are civil penalty provisions a breach of which should not automatically trigger a reporting obligation. This approach recognises that there are some civil penalty provisions which are highly prescriptive in nature and the occurrence of a technical breach does not necessarily mean that a licensee’s compliance arrangements are inadequate. As was noted in paragraph 11.29 of the Explanatory Memorandum to the Amending Legislation:

*... if ASIC is receiving a large number of largely unproblematic breach reports for minor, technical or inadvertent breaches of civil penalty provisions, and those breaches would not otherwise be significant, the Government may decide that the regulatory burden imposed outweighs the benefit of receiving those reports. In those circumstances, the regulation-making power may be used to quickly reduce the regulatory burden on licensees to report breaches where appropriate.*
10. However, the Committees question whether the Draft Regulations in their current form will satisfactorily achieve the above objective, due to the limited number of civil penalty provisions which have been prescribed.
11. The Committees believe that, in order to properly ensure that the Amending Legislation does not create a disproportionate regulatory burden, there ought to be a thorough and rigorous examination of each civil penalty provision and a fully informed (and, ideally, publicly transparent) cost-benefit assessment should then be made as to whether an individual breach of that provision, in and of itself, ought to be reportable. This would better ensure that breach reporting remains meaningful, useful and effective for all stakeholders of the financial services industry – licensees, the regulator and end users.
12. Set out below are some examples of civil penalties under the Corporations Act and the Credit Act, respectively, which the Committees consider to be of a sufficiently minor nature that a single isolated breach, in and of itself, should not be automatically reportable. This list is illustrative only; it is not intended to be exhaustive, and importantly does not seek to cover all civil penalty provisions under all financial

services laws (for example, Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth)).

### Corporations Act provisions

13. Under item 8 of the Draft Regulations, proposed new regulation 7.6.02A(2) of the Corporations Regulations would prescribe the following civil penalty provisions of the Corporations Act for the purposes of paragraph 912D(4)(b) of the Corporations Act:

Provision	Description
Subsection 941A(3)	Failure by a licensee to give a Financial Services Guide ( <b>FSG</b> ) when providing a financial service to a person as a retail client
Subsection 941B(4)	Failure by an authorised representative to give a FSG when providing a financial service to a person as a retail client
Subsection 1012A(5)	Failure to give a Product Disclosure Statement ( <b>PDS</b> ) when giving personal advice recommending a particular financial product
Subsection 1012B(6)	Failure to give a PDS in situations relating to the offer and issue of financial products
Subsection 1012C(11)	Failure to give a PDS in situations relating to the sale of financial products
Subsection 1021E(8)	Giving a defective disclosure document or statement (including a defective PDS or supplementary PDS)

14. The effect of this amendment would be that a breach of any of the above provisions would not, in and of itself, be treated as “significant” so as to automatically require the relevant licensee to report the breach to the Australian Securities and Investments Commission (**ASIC**).

15. The Explanatory Statement to the Draft Regulations explains that these provisions have been prescribed because:

- the breach could be minor, technical or inadvertent in nature;
- due to the frequency with which FSGs and PDSs must be provided, deeming any minor, technical or inadvertent breach to be automatically treated as significant could impose a large regulatory burden; and
- in any event, other limbs of the significance test would capture more material breaches of these provisions.

16. The Committees submit that, having regard to the rationale expressed above, the following additional civil penalty provisions under the Corporations Act should also be prescribed for the purposes of paragraph 912D(4)(b) of the Corporations Act for the following reasons:



Provision	Description	Why it should be prescribed
Subsection 952E(9)	Giving a defective disclosure document or statement (whether or not known to be defective)	This provision should be treated in the same manner as the corresponding PDS provision (subsection 1021E(8)).  Any situation involving a defective document should be treated in the same manner irrespective of the relevant type of document and whether the requirement to provide it arose under Part 7.7 or Part 7.9 of the Corporations Act.
Subsection 952H(3)	Financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required	This provision should be treated in the same manner as subsection 941B(4).  If the authorised representative's failure to give the FSG is not significant, then the licensee failing to ensure that the authorised representative gave the FSG should also not be treated as significant, given that it relates to the same set of facts.
Subsection 962S(1)	Fee recipient must give fee disclosure statement	It is possible that there will be frequent failures of advisers to give fee disclosure statements and therefore if this type of breach is automatically treated as significant, this could impose a large regulatory burden.

**Recommendation:**

**The Draft Regulations should be amended to refer to the above civil penalty provisions in proposed regulation 7.6.02A(2) of the Corporations Regulations.**

**Credit Act provisions**

17. The Credit Act includes a substantial number of civil penalty provisions, for violations ranging from the minor, such as failing to give a required disclosure or notice, to the very serious, such as failing to comply with contract form and content, or responsible lending, requirements. Consumer lending businesses frequently process a high volume of transactions, such that one violation may be repeated many times, even if the issue is picked up and corrected quickly.
18. With effect from 1 October 2021, section 50A(4) of the Credit Act provides that violations of civil penalty provisions under any law are deemed to be reportable. Criminal offences are only reportable, however, if they are punishable by a term of imprisonment of 12 months or more (three months in the case of offences involving dishonesty). The intention is presumably to pick up offences that are not civil penalty

provisions but the approach also leads to apparent anomalies such as in cases where provisions of the Credit Act are subject to both a civil penalty (typically of 5,000 penalty units) above, and criminal penalties below, the applicable threshold to be deemed reportable.

19. Under item 13 of the Draft Regulations, proposed new regulation 12A of the Credit Regulations would prescribe the following civil penalty provisions of the Corporations Act for the purposes of paragraph 50A(4)(b) of the Credit Act:

<b>Provision</b>	<b>Description</b>
Subsection 52(2)	Failure to cite the licensee's Australian credit licence number in a document of a kind prescribed by the regulations
Subsection 113(1)	Failure to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a credit contract
Subsection 126(1)	Failure to give a consumer the licensee's credit guide before entering a credit contract with the consumer
Subsection 127(1)	Failure to give a debtor the licensee's credit guide after the licensee is assigned any rights or obligations of a credit provider under the credit contract
Subsection 136(1)	Failure to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a consumer lease
Subsection 149(1)	Failure to give a consumer the licensee's credit guide before entering a consumer lease with the consumer
Subsection 150(1)	Failure to give a lessee the licensee's credit guide after the licensee is assigned any rights or obligations of a lessor under the consumer lease
Subsection 158(1)	Failure to give the credit representative's credit guide
Subsection 160(1)	Failure to give a debtor the licensee's or credit representative's credit guide after the licensee or credit representative becomes authorised to collect repayments by the debtor on behalf of the credit provider
Subsection 160(2)	Failure to give a lessee the licensee's or credit representative's credit guide after the licensee or credit representative becomes authorised to collect payments by the lessee on behalf of the lessor

20. The effect of this amendment would be that a breach of any of the above provisions would not, in and of itself, be treated as "significant" so as to automatically require the relevant licensee to report the breach to ASIC.

21. The Committees consider that there are a number of other civil penalty provisions that equally reflect these considerations but which are not also criminal offences (or are offences which incur a fine only) and are not included in proposed regulation 12A. Presumably, those civil penalty provisions that lack criminal consequences are considered to be even more minor than the provisions prescribed in the draft regulation. The Committees respectfully suggest that consideration is given to prescribing additional Credit Act provisions, including those set out below, for exemption under paragraph 50A(4)(b) of the Credit Act:

<b>Provision</b>	<b>Description</b>
Subsections 72(1) (2) and (4)	Failure to notify ASIC in the prescribed form within 15 days of the authorisation, or within 10 days of changes to or revocation of authorisation, of a credit representative.
Subsections 114(1) and 117(1)	Failure to give a quote which has been accepted by the consumer before providing credit assistance to the consumer in relation to a credit contract or consumer lease
Subsections 120(1) and 143(1)	Failure to give a written copy of the preliminary responsible lending assessment within the required period, on request by the consumer.
Subsections 121(1) and 144(1)	Failure to give credit proposal or lease proposal disclosure document (as the case may be) at the same time as providing credit assistance to a consumer
Subsection 124B(1)	Failure to display the required information in the prescribed way before providing credit assistance to consumers in relation to small amount credit contracts
Subsections 132(1) and (2) and 155(1) and (2)	Failure to give a written copy of the responsible lending assessment within the required period, on request by the consumer
Subsections 133AC(2) and 133AD(2)	Failure by a licensee's website to generate (a) Key Facts Sheet(s) in relation to a standard home loan or loans in certain circumstances
Subsections 133BC(1) and 133BD(1)	Failure to ensure that an application form for a credit card contract includes an up-to-date Key Facts Sheet or to enter or offer to enter a credit card contract unless such an application form has been used
Subsections 133BH(3)	Failure to notify a consumer on becoming aware of use of a credit card in excess of the credit limit under the contract
Subsection 133BJ(1)	Failure to maintain records of consents obtained in relation to imposing liability for certain fees and charges

Provision	Description
	or higher rates of interest in connection with use of a credit card in excess of the credit limit
Subsection 133DB(1)	Failure to provide projections of equity, the required information statement and other prescribed disclosures before making a reverse mortgage unsuitability assessment or preliminary assessment in connection with a credit contract with a consumer for a reverse mortgage
Subsections 133DC(2), and 133DD(2)	Failure by a licensee offering reverse mortgages (or credit assistance in relation to reverse mortgages) to make a reverse mortgage information statement available through its website, or on request
Subsections 133DE(1) 160B(1) and 160C(1)	Use of the restricted terms 'reverse mortgage', 'independent', 'impartial', 'unbiased', 'financial counsellor' and other like terms except in certain prescribed circumstances
Subsections 160E(2) and (3)	Failure to give an employer an instrument made by their employee debtor or lessee authorising the employer to make deductions from amounts due to the employee and pay them to the credit provider or lessor
National Credit Code, subsections 72(4) and 177B(4)	Failure to give a consumer or lessor a notice in the required form and within the required period that changes to the credit contract or consumer lease have or have not been agreed, as the case may be

**Recommendation:**

**The Draft Regulations should be amended to refer to the above civil penalty provisions in proposed regulation 12A of the Credit Regulations.**

## Infringement notices

22. The Draft Regulations prescribe the following Corporations Act provisions (due to commence on 1 October 2021) as being subject to an infringement notice:

- subsection 912DAA(1) – failure by a financial services licensee to report a reportable situation to ASIC within the required timeframe in the required form where there are reasonable grounds to believe the reportable situation has arisen in relation to the licensee (Item 9);
- subsection 912DAC(1) - failure by a financial services licensee to notify ASIC as soon as practicable that the licensee has become a participant in a licensed market or a licensed CS facility, or ceases to be such a participant (Item 9); and

- subsection 912DAB(8) – failure by a financial services licensee to either lodge a breach report about a financial adviser that is engaged by *another* licensee to ASIC, or provide a copy of that report to the other licensee, as required (Item 10).
23. The Draft Regulations prescribe the following Credit Act provisions (due to commence on 1 October 2021) as being subject to an infringement notice:
- subsection 50B(2) – failure by a credit licensee to report a reportable situation to ASIC within the required timeframe where there are reasonable grounds to believe the reportable situation has arisen in relation to the licensee (Item 14); and
  - subsections 50C(1) and (5) – failure by a credit licensee to lodge a breach report with ASIC about a mortgage broker that is engaged by *another* licensee, or provide a copy of that report to the other licensee, as required (Item 15).
24. The Committees have a well-documented position of opposing the use of infringement notices. In a submission made to the ASIC Enforcement Review on 17 November 2017, the Corporations Committee advocated against extending the infringement notice regime to any additional civil penalty provisions. The views of the Corporations Committee on this subject have not changed.
25. The Committees fundamentally agree with recommendation 12-2 of the Australian Law Reform Commission Report 95 *Principled Regulation: Federal Civil and Administrative Penalties in Australia* [2002] ALRC 95 remain relevant- particularly Recommendation 12-2, which stated that, in civil penalty schemes, “an infringement notice scheme should apply only to minor contraventions in which no proof of a fault element or state of mind is required”.
26. The Committees do not consider it appropriate for infringement notices to be used in connection with civil penalty provisions which are based upon whether a licensee had “reasonable grounds to believe” that a particular thing had occurred. The Committees are particularly concerned about Items 10 and 15 of the Draft Regulations. For reasons set out below, the Committees consider that ASIC should not be permitted to issue infringement notices and extract a penalty from a licensee with respect to reporting on another licensee or its representative without the opportunity for a court of law to properly consider evidence as to whether or not there were reasonable grounds for the licensee to believe that there was a reportable breach by the other licensee or its representative (as applicable).
27. The concept of reasonable grounds has both objective and subjective elements. Whether such grounds exist in a particular case is a question on which differences of opinion might reasonably exist. Where a licensee has acted diligently and formed an opinion, based on the information at its disposal, that such grounds did not exist in a particular case, it does not appear to be fair or reasonable to require that licensee to undertake the expensive and protracted task of attempting to reverse an infringement notice it has received, noting the potential adverse publicity associated with such enforcement action.
28. The commercial relationships between financial and credit product issuers and their distributors and brokers frequently involve contractual obligations to act in each others’ best interests, to protect each others’ commercial reputation and give effect to the intent of the relationship. Brokers and other distributors rely heavily on issuers for the success of their businesses, and vice versa. The Committees consider that both parties would be placed in a difficult situation if licensees were required to monitor the compliance performance of their business affiliates and report suspicions about those affiliates’ compliance failures, with potentially serious consequences for their own and

the affiliates' businesses, without the opportunity to preserve confidentiality (i.e. because a copy of the report made must be shared with the object of that report within 30 days). It is difficult to see how these provisions are therefore, with respect, in the same category as the minor or technical reporting obligations which the Attorney General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (referred to on page 8 of the Explanatory Statement to the Draft Regulations) mentions as examples where infringement notices may be appropriate.

29. This consideration is amplified when it is considered that, given the size and complexity of many financial services and credit licensees, the point at which the entity itself can be said to form a suspicion is not straightforward. Front line operational staff may have detailed lived experience of a key affiliate's compliance performance, but the escalation of such operational frustrations and the limited capacity for the reporting licensee to investigate and obtain the full facts and context required to assess and validate such concerns is surely limited and resources devoted to this task would be to the cost of the entity's core purpose. It would therefore be preferable to require ASIC to prove its case, and firstly confirm that there is no reasonable explanation for the licensee not reporting the non-compliance, before permitting any penalty to be imposed.
30. Further, it is unclear how the infringement notice provision would be used by ASIC, if for example a broker was found to have failed to report a breach. If ASIC were to form a view that all members of the broker's network should have known of the compliance concerns, it would be possible for ASIC to issue infringement notices to all of them, and effectively reverse the onus of proof - requiring the licensees to prove that they did not have reasonable grounds to suspect the contravention.
31. As the reporting licensee is required to give the other licensee a copy of the report, it is to be expected that the subject of at least some such reports, faced with the end of the business relationship, if not their business, may respond strategically with reports against the licensee that has reported them, in retaliation.
32. Similarly, if one member of a network reports a concern, other members of the network are likely to be motivated to also lodge a report for strategic reasons, so as not to risk enforcement action by ASIC for failure to report when others dealing with the licensee have done so.
33. Therefore, the Committees respectfully request that the Treasury reconsider the implementation of Items 10 and 15 of the Draft Regulations for the above reasons.

**Recommendation:**

**Items 9, 10, 14 and 15 of the Draft Regulations should not proceed and most importantly items 10 and 15 should not proceed.**