

12 May 2017

Mr Jerome Davidson  
ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By Email – [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

Dear Mr Davidson,

Bendigo and Adelaide Bank Ltd and relevant subsidiaries ("BEN") appreciates the opportunity to provide its views on Consultation Paper 1: *Self-reporting of contraventions by financial services and credit licensees* (dated 11 April 2017) ("Consultation Paper").

The BEN Group operates a financial services business and provides a range of financial products and services through its banking and wealth businesses under the following brands:

- Bendigo Bank
- Adelaide Bank
- Delphi Bank
- Alliance Bank
- Rural Finance
- Community Sector Banking
- Rural Bank Limited (separate ADI) Bendigo Financial Planning
- Leveraged
- Adelaide Managed Funds
- Sandhurst Trustees

BEN is the holder of the following licenses regulated by ASIC:

- Australian Financial Services Licence: 237879
- Australian Credit Licence: 237879.

Increased scrutiny and expectations of the self-reporting regime in recent times suggest that a comprehensive review is warranted to improve transparency of misconduct issues and ensure that appropriate resolutions are achieved for those affected. BEN is generally supportive of the improvements proposed as outlined in the Consultation Paper and provides its specific feedback and responses to questions posed in **Annexure A**. BEN welcomes the opportunity to discuss comments further.

Yours Sincerely,



for. **SUSAN CRAGO**  
**HEAD OF GROUP OPERATIONAL RISK**

## **Annexure A: BEN's response to specific positions and questions outlined in the Consultation Paper**

### **Position 1 – The 'significance' test**

BEN supports a review and clarification of the significance test as outlined in the specific response below.

In its current form and as noted, the significance test must be used for all licensees from very simple financial planning businesses to complex businesses such as large banking and wealth operations. A "one size fits all" approach with some subjectivity potentially results in inconsistent assessments of 'significance', which vary depending on the scale and complexity of the licensee, rather than a focus on the impact of an issue to individual customers.

The introduction of enhancements to the significance test to include an objective standard is a positive move forward to strengthen the assessment. The assessment should extend beyond including additional generalised continuous disclosure obligations ("matters that a reasonable person would regard as significant") and prescribe the type of additional factors that should be reported, within the regulations. Additional specificity is required in the regulations to make it clear that certain types of breaches are deemed to be reportable. This could also include an indication of timeframes to report based on the key circumstances of the breach and severity.

Greater specificity and guidance in reportable issues should aid licensees' ability to maintain internal governance and monitoring processes to ensure compliance since the proposal should result in a reduction in the current ambiguity of what is required to be reported.

#### **Responses to Questions Raised**

##### ***1.1 Would a requirement to report breaches that a reasonable person would regard as significant be an appropriate trigger for the breach reporting obligation?***

Yes. However, as noted above, BEN has a preference for more specific guidance in the regulations on what should reasonably be reported. Whilst not intended as a "catch all" definition of reportable issues, the further guidance would provide greater clarity regarding specific and critical reporting obligations.

##### ***1.2 Would such a test reduce ambiguity around the triggering of the obligation to report?***

Whilst BEN appreciates it is not practical to define every possible condition that could lead to a report obligation, BEN's view is that greater guidance assists to remove ambiguity and reduces the need to make subjective assessments. Over time, it is felt that it would be beneficial to develop further guidance in the form of Frequently Asked Questions (FAQs) or case studies which could be shared to further improve licensees' compliance and to meet continuous disclosure objectives.

## **Position 2 – The obligation to report to include significant breaches or significant misconduct by an employee or representative**

As noted above, BEN welcomes additional clarification of reporting obligations and is generally supportive of the position that licensees' self-reporting obligations should be extended to expressly include matters which relate to significant misconduct of its employees or representatives. This position is however qualified by the specific feedback provided in response to question 2.1 below.

It is BEN's view that a requirement to report employee or representative misconduct is a positive step in terms of signalling to individuals working in the industry the extent of their personal obligations and the consequences of serious misconduct. This would ultimately support measures to continuously promote an uplift in the overall professionalism of the financial services sector. As noted, these types of reports are broadly consistent with the Future of Financial Advice (FOFA) reforms and current "Better Banking" initiatives through the Australian Bankers' Association (ABA). The introduction of industry registers of banned persons are aimed at the protection of consumer interests, increased transparency and accountability and building trust and confidence in financial services providers in Australia.

### **Response to Question Raised**

#### ***2.1 What would be the implications of this extension of the obligation of licensee's to report?***

Through the ABA/FOFA initiatives, banks are in the process of implementing standard reference checking procedures which are aimed at reducing the risk of persons who have been responsible for misconduct from continuing to be employed in the industry. Furthermore, ABA member banks are also in the process of implementing a similar approach for retail banking businesses (employees only) as part of the Better Banking initiatives. Therefore, introducing an obligation to report persons who have been responsible for misconduct would, in theory, enhance these measures and provide the necessary legislative backing to address many of the current concerns identified by industry.

In preparing for these changes, both ABA and FOFA initiatives have highlighted a number of operational matters that must be managed and to date both the financial planning industry and retail banking initiatives provide only partial solutions. The operational issues relate to a number of legal risks which include employment contracts, defamation, privacy, discrimination, competition and misrepresentation. The new protocols have been drafted as widely as practical however limitations in terms of the personnel it can be applied to (i.e. excluded third parties and contractors) means that it cannot capture all situations and risks without legislative measures being in place.

The current protocols have been designed to capture the most serious types of misconduct, such as:

- Fraud, bribery or corruption
- Material theft, including any theft directly against a customer
- Dishonesty in relation to the provision of financial and credit services and products, customer interactions or market integrity requirements

- Material misuse of customer information, including but not limited to breaches of privacy, or using the information to derive a personal benefit, or any misuse that directly affects a customer's safety or the security of their financial transactions
- Material breach of consumer protection laws, including the National Consumer Credit Protection Act, the Corporations Act and the Australian Securities and Investments Commission Act
- Material breach of relevant internal policies that relate to customer outcomes or compliance with financial services laws, including laws regarding market integrity requirements.

In lodging reports currently, it has been identified that internal recruitment processes must address issues around individuals' privacy, potential defamation, restraint of trade, procedural fairness, appeals, confidentiality, legal complexity, disproportionate punishment, improper user and unintended consequence. The financial services industry is addressing these matters in the context of the current initiatives however this process may be more onerous and problematic for small licensees.

In conclusion, BEN considers that legislated reporting obligations together with maintenance of registers of banned persons is a necessary component to enhance and support the industry based initiatives.

### **Position 3 – Breach reports within 10 business days**

BEN recommends that the requirement to report a breach should commence from the time the breach is actually confirmed or deemed likely to have occurred.

The requirement to report within 10 business days after becoming aware of a breach or likely breach is a clear one. However, as noted, from a practical perspective, the commencement of the time period is often complicated by subjective factors, including but not limited to:

- The time taken to properly investigate, assess and conclude that a breach or likely breach has occurred
- The need for further guidance regarding the significance test
- Internal breach reporting processes
- New information coming to light some time later which causes an issue to be reviewed and reassessed and a "significant" assessment being made
- The need to observe principles of procedural fairness if misconduct is suspected.

Balancing these factors can require a longer timeframe to adequately understand the nature of the event and confirm the facts.

### **Responses to Questions Raised**

#### ***3.1 Would the threshold for the obligation to report outlined above be appropriate?***

The change proposed could potentially result in some increase in the volume of reports made to ASIC because a licensee is likely to take a more conservative position and therefore make a report in situations where a breach "may have occurred" and "could be significant". It is not possible to predict the extent to which such reports could be raised but nevertheless it could add an administrative burden to both ASIC and the licensee.

BEN's view is that a more appropriate threshold test is 10 business days from when the licensee determines (or should reasonably have determined) that a breach has occurred and the breach is significant".

***3.2 Should the threshold extend to broader circumstances such as where a licensee "has information that reasonably suggests" a breach has or may have occurred, as in the United Kingdom?***

It is BEN's view that this is not a necessary addition. In any of the cases noted in paragraph 50 of the Consultation Paper, the licensee would still be required to complete a breach assessment and report anyway.

***3.3 Is 10 business days from the time the obligation to report arises an appropriate limit? Or should the period be shorter or longer than 10 days?***

Due to the complications that often exist in confirming a breach, BEN recommends that the timeframe should be 10 business days from the time the organisation deems the breach as significant (refer to comments for 3.1 above). This change also alleviates the issue noted above where new information comes to light some time later which causes an issue to be reviewed and reassessed and a "significant" assessment being made.

Extending the timeframe would allow a reasonable time for a licensee to confirm reporting obligations, undertake initial investigations and make an assessment of the facts and complete internal escalations. This timeframe balances the need for the licensee to make an informed view as to the significance of the breach with the need for ASIC to receive early advice and allow participation in, and oversight of, remediation of the issue where desired.

***3.4 Would the adoption of such a regime have a cost impact, either positive or negative for business?***

BEN considers that the measures proposed are most likely to be cost neutral.

## **Position 4 – Increase penalties for failure to report**

A reporting regime that encourages early notification of issues, via self-reporting, is preferred as BEN is of the view this approach is more likely to produce more positive and efficient outcomes for both consumers and industry. Notwithstanding this objective, BEN is of the view that the criminal penalties for failure to report breaches in the timeframe specified is not necessary as appropriate deterrents can be provided by enhancements to the civil penalties (as noted below).

## **Position 5 – Civil penalties for failure to report**

BEN supports the proposal to introduce new civil penalties which would allow ASIC options to pursue matters of serious or blatant disregard for reporting obligations. The civil penalty regime should be more effective in both encouraging observation of reporting requirements and also in providing penalties for non-reporting. It is noted that the civil penalty regime will be the subject of a separate review by the taskforce.

## **Position 6 – Introduction of infringement notice regime for failure to report breaches**

Whilst it is noted that the taskforce will be undertaking a specific review of infringement notices as an enforcement tool, BEN disagrees with the proposal (at paragraphs 60-64 of the Consultation Paper) to introduce an infringement notice regime for relatively minor contraventions.

Whilst there is a rationale that this would allow ASIC to impose some small penalties for minor matters, BEN is concerned that there is a potential risk that some licensees may be prepared to accept some level of fines as an alternative to meeting some of the more minor reporting obligations. If this situation eventuates, it could be argued that reduced reporting is not in the best interest of the market or consumers and could actually lead to a reduced level of breach reporting which could have an impact on the effectiveness of ASIC's surveillance.

## **Position 7 – A co-operative approach for reporting (suspected or potential breaches or employee/representative misconduct)**

Whilst noting the concerns raised in response to reporting in relation to position 1, BEN is generally supportive of the concept of the proposed collaborative approach as outlined in the consultation paper, particularly the suggested inclusion of provisions to provide ASIC with flexibility in determining not to take action against licensees who report potential breaches early (pending further investigation). However, BEN is concerned that if this position is implemented that this may result in ASIC actually receiving an increased volume of "potential breach" reports which would then need to be managed, including monitoring and ensuring appropriate closure, either by further notification of a complete report and remediation details or a "no report necessary" update.

### **Responses to Questions Raised**

#### ***4.1 What is the appropriate consequence for a failure to report breaches to ASIC?***

It is BEN's view that a deliberate or systemic failure to report breaches to ASIC should not result in criminal prosecution of Responsible Managers for deliberate or indifferent cultivating of poor or non-reporting cultures. This can be appropriately dealt with via the introduction of additional civil penalty provisions.

#### ***4.2 Should a failure to report be a criminal offence? Are the current maximum prison term and monetary penalty sufficient deterrents?***

BEN is of the opinion that serious, deliberate and/or repeated failure to report should not become a criminal offence. As noted above, additional civil penalties should be a sufficient deterrent.

#### ***4.3 Should a civil penalty regime be introduced?***

As noted above, it is BEN's opinion that ASIC should have a range of penalties available and sufficient discretion to determine the most appropriate penalty or penalties in the circumstances.

#### **4.4 Should an infringement notice regime be introduced?**

The criminal liability standard under section 912D should be maintained. BEN is not supportive of the introduction of infringement notices as part of the breach reporting regime for the reasons outlined above.

#### **4.5 Should the self-reporting regime include incentives such as that outlined above? What will be effective to achieve this? What will be the practical implications for ASIC and licensees?**

As noted above in relation to Position 7, BEN is supportive of the collaborative approach described in the Consultation Paper. However BEN is concerned that ASIC may experience an increased volume of "potential breach" reports which would then need to be managed, effectively creating a greater administrative overhead which could reduce the effectiveness of the surveillance effort.

As indicated (for Position 3), BEN considers there is benefit to considering an enhanced approach where a more appropriate test might be "10 business days from when the licensee determines (or should reasonably have determined) that a breach has occurred and the breach is significant". This would allow licensees to provide better quality "early" reporting and also assist ASIC in managing the volume of reports by only raising reports which are more likely to be an actual breach.

### **Position 8 – Prescribe the required content of reports**

BEN considers the most efficient way for ASIC to conduct industry surveillance is via a standardised breach lodgement process which includes prescribing the data and information that must be provided. This approach logically requires a standardised capture form. However, BEN believe that there should still be the ability for licensees to provide additional information via attachments as they determine necessary to provide additional explanation in relation to the breach. The additional information, if provided, should not substitute any of the information identified on the standardised capture form but provide additional, relevant contextual information to better explain the breach.

BEN notes comments in relation to Position 12 and the potential for ASIC to provide regular, periodic feedback on the nature of breach reporting and other matters annually. Should this occur, a standard form is the best way to achieve regulatory and industry efficiency to consistently raise and analyse issues and more easily generate consistent reporting for the purposes of providing industry feedback.

#### **Responses to Questions Raised**

##### **5.1 Is there a need to prescribe the form in which AFS licensees should report breaches to ASIC?**

As noted above, it is BEN's view that this is appropriate. The form should prescribe the specific information that is required by ASIC in relation to the breach being reported. The form should be electronic but still allow licensees with the option to provide additional, relevant information as attachment documents.

In relation to the design of the form, and required content, consideration could also be given to the scale of the licensees business or operations. There may be an opportunity to improve efficiency for some licensees, such as very small, or very simple businesses by modifying the breach report



form to cater for such businesses, rather than having a “one size fits all model” which is designed for large, complex licensees.

### ***5.2 What impact would this have on AFS licensees?***

As noted above, the use of a more standard form should ensure the required information is captured early and reduce the need for ASIC to follow up when some required information has been omitted from the breach report.

## **Position 9 – Introduce an equivalent self-reporting regime for credit licensees**

BEN’s view is that there should be a similar self-reporting regime introduced for credit licensees to remove breach reporting inconsistency across the respective regimes.

There should be alignment of related regulation and consistency in reporting of breaches, surveillance and enforcement actions. If an alignment of self-reporting regimes were to occur, such a regime for credit licensees should be consistent with the AFSL self-reporting to allow licensees to leverage their existing compliance governance practices thereby creating efficiencies.

### **Responses to Questions Raised**

#### ***6.1 Should the self-reporting regime for credit licensees and AFS licensees be aligned?***

BEN advocate that there should be greater regulatory consistency and have a view that self-reporting for credit licensees would support improved regulatory and consumer outcomes in the provision of credit and responsible lending regulation.

A self-reporting regime is aligned with political and regulatory objectives of improving industry conduct.

#### ***6.2 What will be the impact on industry?***

Since credit licensees are required to identify breaches and maintain records of non-compliance, reporting of any significant credit related compliance breaches should not add in any material way to current compliance obligations. Furthermore, given an AFSL self-reporting regime is in place, it is not envisaged that extending similar obligations to credit licensees would be particularly onerous and the impact would be outweighed by improved provision of credit oversight and surveillance outcomes. However, if such an obligation is introduced then it is BEN’s view that the need for the annual compliance certificate should be removed.

## **Position 10 – Ensure qualified privilege continues to apply to licensees**

BEN confirms that it expects that should there be any changes to self-reporting obligations that existing qualified privilege provisions would continue to AFS licensees to ensure protection from third party claims when reports are made in good faith.

## **Position 11 – Remove the additional reporting requirement for responsible entities**

BEN concurs that there is no benefit in retaining the existing self-reporting obligations for responsible entities under both s601FC (1) (I) and 912D.

### **Responses to Questions Raised**

#### ***7.1 Should the self-reporting regime for responsible entities be streamlined?***

BEN is supportive of the proposal to streamline self-reporting for responsible entities so that all breaches are reported under section 912D. BEN concurs that this suggestion removes the current complexity and provides a practical solution to the current reporting contention.

#### ***7.2 Is it appropriate to remove the separate self-reporting obligation in section 601FC? If so, should the threshold for reporting be incorporated in the factors for assessing significance in section 912D?***

BEN is supportive of the proposal to remove the separate self-reporting obligation in section 601FC. BEN concurs that the change would effectively remove the current complexity and duplication. BEN is of the view that the threshold for reporting should be incorporated into considerations for assessing significance under section 912D.

## **Position 12 – Require annual publication by ASIC of breach report data for licensees**

BEN is not supportive of the proposal to supplement ASIC's current breach report data with licensee level breach data, even if it is limited only to significant breaches. Whilst BEN are understanding of the drive to improve accountability and creating incentives for improved behaviour, BEN is concerned that the publication of data with limited facts or information that provides additional context may cause unnecessary alarm, particularly for licensees with otherwise strong compliance practices and isolated breaches.

The publication of annual data is also of limited assistance to other licensees to learn from real time industry issues and review or respond to these same issues within their own organisations.

### **Responses to Questions Raised**

#### ***8.1 What would be the implications for licensees of a requirement for ASIC to report breach data at the licensee level?***

BEN already provide breach data to the Code Compliance Monitoring Committee (CCMC) under the Code of Banking Practice at the licensee level, so the impacts are likely to be minimal. However, to ensure process efficiency, BEN propose that this information should only need to be provided once for use by both ASIC and the CCMC.

**8.2 Should ASIC reporting on breaches at a licensee level be subject to a threshold? If so, what should that threshold be?**

BEN believe that no separate threshold should be applied and that information relating to significant breaches is reported. BEN refers to its previous responses (Positions 1 – 3) regarding the significance test and reiterates that further regulatory guidance is needed on the application of the objective test and specific guidance on the types of breaches that should be reported. However, if a threshold were to be introduced then BEN is of the view that this needs to consider a range of consequences such as dollar losses to customers and/or the licensee, number of customer's impacted and/or the specific regulatory requirement/s breached.

**8.3 Should annual reports by ASIC on breaches include, in addition to the name of the licensee, the name of the operational unit within the licensee's organisation? Or any other information?**

No, please refer to related comments provided in relation to Position 12.