

26 May 2017

Ms Kate Mills
ASIC Enforcement Review
The Treasury
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Per email: ASICenforcementreview@treasury.gov.au

Dear Ms Mills

Self-reporting of contraventions by financial services and credit licensees

The Westpac Group, which includes our Westpac, St.George, BankSA, Bank of Melbourne, RAMS and BT Financial Group (Westpac) businesses, welcomes the opportunity to provide a response to Treasury's *Self-reporting of contraventions by financial services and credit licensees* (ASIC Enforcement Review Position and Consultation Paper 1). We also support the submission made by the Australian Bankers' Association (ABA).

Westpac either supports, or supports in principle, each of the Positions set out in Consultation Paper 1. We have provided in Appendix 1 commentary on specific Positions for Treasury's consideration, however, we emphasise the following:

- our general approach to incident management is, where we have self-identified a contravention (whether significant or otherwise) we consider whether it ought to also be shared with the regulator both in the context of our mandatory reporting obligations and also whether the information should be voluntarily shared as part of Westpac's commitment to building and maintaining trusted working relationships with our regulators;
- this approach to breach reporting is one element within a wider commitment to sharing information and adopting a co-operative approach with the Australian Securities and Investments Commission (ASIC). We also consider that enhancing ASIC's confidentiality regime will add value to its information sharing engagements;
- we do not believe licensees should be rewarded for adhering to their obligations, including breach reporting, but we do support ASIC having the ability to adopt proportionate regulatory responses for licensees that proactively self-identify, resolve and disclose mistakes, errors or breaches;
- we support the six initiatives covered under the ABA's *Better Banking Program*, which include a stronger ASIC through heightened penalties, new intervention powers and, relevantly, an enhanced breach reporting regime. In our view, a strong regulator can more quickly identify and act to mitigate any deterioration in the public's trust and confidence; and
- compliant businesses should not be disadvantaged in the marketplace by having to compete with businesses which ignore or inadequately adhere to their obligations to consumers and investors.

Westpac would welcome the opportunity to discuss our views in more detail with Treasury as these proposals are further developed. If you would like any further information on our views please contact Josh Moyes on 02 8253 3445 or by email at jmoyes@westpac.com.au.

Yours sincerely,



Josh Moyes
Head of Regulatory Response

Appendix 1

The significance test

The legislature intended a strong onus to rest with Australian Financial Services (AFS) licensees in how they structure their breach reporting processes. We support an approach where the particular business and the circumstances of the breach are relevant considerations when determining significance, having regard to the size, nature and complexity of the licensee as reflected in ASIC's *Regulatory Guide 104: Licensing – meeting the general obligations* (RG 104). We believe this is preferable to a more generic, one-size-fits-all, industry benchmark. A significance test should retain the reference to the licensee's particular circumstances, supported by principles-based guidance.

The importance of this approach was recognised in the Revised Explanatory Memorandum to the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007* stated (in the context of self-reporting breaches):

“7... The point when the 10 day reporting period begins is framed in such a way as to not be prescriptive, so the obligation rests with the entity, auditor or actuary to have processes in place which will allow them to meet their breach reporting obligations. This approach acknowledges that entities structure their breach reporting processes in a way which is appropriate for their circumstances...”

Westpac supports enhancements that help licensees better determine the significance of breaches (and likely breaches) and to improve their self-reporting. We caution against measures that lead to an overly prescriptive labelling of breaches as “significant” to mitigate the unintended consequence of over reporting, particularly where the credit regime is to be included.

We note that ASIC is currently conducting a thorough breach reporting review to examine decisions on breach significance by licensees (who are part of an authorised deposit-taking institution (ADI) group) since 2013 and current breach reporting policies and operations. ASIC's review will gather further insights around the nature and level of variation in the breach reporting approaches. The review:

- will afford a valuable opportunity to build on the principles currently enshrined in s912D of the *Corporations Act 2001 (Cth)*;
- will assist with any enhancements to ASIC's *Regulatory Guide: Breach reporting by AFS licensees* (RG 78), which will support a more consistent approach to breach reporting among comparable licensees and set clearer boundaries around what ASIC believes is significant and reportable; and
- evidences ASIC's ability to test and challenge a licensee's significance determination or breach reporting approach more generally.

Significant breaches by employees or representatives

In light of ASIC's recent focus on financial adviser conduct, we expect ASIC's breach reporting review will also reveal useful insights around the breaches and other misconduct of employees or representatives. Drawing on those findings, and any further analysis among non-ADI licensees, the type of express provision required for reporting of employee or representative misconduct may become clearer.

Westpac would support clear guidance on when employee or representative's misconduct should be considered significant. Such guidance needs to be sensitive to the principles of procedural fairness and mitigate any unintended consequences (such as a stronger resistance to self-reporting), which a public naming of individuals may influence. Further, we caution against narrowing any provision's scope too much to address particular types of incidents or conduct, rather than enhancing broader principles-based guidance referencing the licensee's position.

Westpac agrees with the Taskforce's view and considers the breach reporting regime serves a different purpose to a regime addressing concerns around senior executive accountability. The objective of breach reporting is to support early identification of emerging risks and issues. In the Budget delivered on 9 May 2017, the Federal Government announced the Bank Executive Accountability Regime (BEAR) measures, which may be the way forward for addressing senior executive accountability.

When does a licensee become aware of a significant breach?

Westpac has in place incident management processes and systems applicable to all staff. Our incident management process supports the prompt identification, assessment and escalation of matters for consideration, remediation and, in the relevant circumstances, reporting to the regulator. For AFS licensee matters this is further supplemented in our *AFSL Breach Policy*, which was developed with regard to ASIC's RG 78.

It is a critical plank in the regulatory framework for ASIC to be able to act quickly when issues arise that may undermine the public's trust and confidence in the industry. Westpac supports refinement of the reporting trigger, to drive earlier reporting of breaches, provided it works in lockstep with the significance test. Put simply, Westpac supports the proposal where a licensee's obligation to self-report is triggered, not by a mere suspicion, but where it becomes aware of information that reasonably suggests a significant breach has occurred (or is likely to occur).

In this regard, the concept of 'awareness' as currently set out in s912D(1B), which crystallises the reporting obligation, must be supported by policies and processes (informed by clear regulatory guidance) to navigate the tension between disclosing an issue to ASIC early enough (often where only a suspicion exists and before sufficient information is available or certainty established) against waiting to complete an investigation (which may delay ASIC's ability to act on the information). Therefore, we believe 'awareness' needs to be carefully considered and referenced to the licensee's circumstances.

A 'safe harbour' mechanism for licensees who demonstrate they have followed reasonable steps or implemented reasonable processes may help licensees structure policies and processes supporting the 'awareness' decision making process. For example, if a licensee adopts ASIC's regulatory guidance and designs, and implements, an incident and breach management process (for identifying, assessing, escalating and determining if reportable) appropriate for its circumstances, it should be protected from penalty for alleged failure to report a significant breach where it reasonably follows that process and arrives at a genuine determination that the breach is not significant. If ASIC reviews the licensee's determination at a later date (whether new information is available, or not), and considers the original decision not to report was incorrect, the licensee should not be penalised if it can demonstrate it followed its process reasonably and appropriately.

Suitably framed 'safe harbour' mechanisms benefit both ASIC and licensees. They help licensees streamline and standardise the issue identification and assessment process, which leads to earlier and more valuable breach reporting. For ASIC, it helps focus its enforcement activities on uncommon areas where the 'safe harbour' provisions do not apply and/or licensees whose breach reporting processes are less mature or do not adequately incorporate the 'safe harbour' provisions.

Penalties for failure to report when required

Westpac supports in principle the introduction of appropriate penalties and a civil penalty regime for a licensees (rather than individuals) failing to report significant breaches when required. It will be very important for there to be meaningful consultation on, and careful drafting of, any proposed reforms lowering the standard of proof of a contravention.

Clear and unambiguous guidance around ASIC's proposed application will need to be prepared with stakeholder consultation and input. Also, it will be important to mitigate the risk of any unintended consequence, which may include an aiding and abetting breach reporting contravention for individuals involved in investigating breaches. Any civil penalty regime and guidance should make it easy for licensees to know where the 'safe harbour' lies to ensure policies and processes align with those expectations.

Westpac would expect the number of enforcement actions, concerning failure to report when required, may increase after the implementation of a civil penalty regime. Accordingly, a reasonable level of consideration should be committed to including appropriate negotiated outcome and penalty reduction mechanisms within any civil penalty framework. Further, a licensee's action to ensure it operates in a 'safe harbour' should be recognised by an offer of statutory protection from civil liability. Such legislative reform would encourage transparency and facilitate ASIC's assessment of reporting conduct.

Encouraging a co-operative approach between ASIC and licensees

Westpac adopts an open approach to its relationship with ASIC, including early engagements and reporting of suspected or potential breaches. To embed this approach further, it would be useful for ASIC to elaborate on what good looks like for a licensee – that is, a licensee should not be punished for doing the right thing when it self-identifies issues, corrects (and remediates) adverse customer impacts and voluntarily discloses suspected or potential breaches to ASIC.

Clarity around when ASIC will commence regulatory action following early notification, but before a licensee has concluded its own investigation, may lower the risk of barriers to early reporting and co-operation among some licensees and for ASIC to be able to deliver swift and credible outcomes. Enhancing ASIC's confidentiality regime (such as adding qualified privilege to the breach reporting regime – see below) will add value to ASIC's information sharing engagements.

Prescribed forms for s912D reports

Westpac supports prescribed forms for breach reporting. Where a prescribed form requires explanation about the cause, remediation or impact (among other elements) of a breach it should be recognised there can be limitations surrounding this type of information, particularly when reporting early. Where licensees may not have all relevant information, it is critical that the forms and ASIC's regulatory approach supports a co-operative approach to avoid premature conclusions.

Westpac understands ASIC is also considering breach report formatting within the scope of its current review of the ASIC Portal. When designing any prescribed forms or reporting portals, consideration could also be given to the advantage in streamlining cross-regulatory notifications (for example, reporting to the Australian Prudential Regulation Authority (APRA)) to reduce or eliminate duplicate reporting.

Credit licensee and responsible entity self-reporting regime changes

Westpac supports the proposal to establish a self-reporting regime for Australian Credit Licence (ACL) that is aligned to the AFS licensee regime. Westpac already applies a comparable discipline to the identification, assessment and escalation (and where appropriate reporting) of credit-related breaches and incidents. Implementing the expansion of the reporting obligation to ACLs will require adjustments to credit licensees' systems and operations. Furthermore, credit-specific guidance will need to undergo industry consultation and careful drafting to ensure any principles-based guidance appropriately covers both AFS licensee and ACL businesses. Accordingly, a reasonable transition period will be necessary. The ACL's Annual Compliance Certificate (ACC) obligation should also be reviewed and any duplication removed.

We also support streamlining the self-reporting regime for responsible entities and the removal of the obligation in s601FC(1)(l) of the Act. Section 912D includes an actual or potential financial loss threshold. The interests of members of a managed investment scheme is predominantly (if not exclusively) a financial interest. Accordingly, incorporating the "*materially adverse effect on the interests of members*" threshold from s601FC(1)(l) into s912D may be redundant.

Qualified privilege

Westpac supports the application of qualified privilege to the breach reporting regime. To further encourage co-operation between licensees and ASIC, we believe extending qualified privilege to voluntary disclosures should be considered. This type of proposal requires law reform. Any legislative protection should cover both mandatory and voluntary reports and require voluntary reports to be treated as confidential by ASIC, with secrecy provisions similar to the *Banking Act* for APRA. The qualified privilege protection may reduce instances of delay, in reporting significant breaches, occasioned by observing and providing procedural fairness owed to representatives, managers and employees. Care is also needed whenever a proposal may impact the rights of the individuals to benefit government or corporations.

Annual publication of breach report data

Westpac supports the publication of industry and licensee-specific breach reporting data, subject to the limitation that such reporting should only include mandatory reporting data, not voluntary disclosures. The annual public reporting by ASIC should also be supported by ASIC providing licensees with regular (perhaps quarterly) industry level and licensee level feedback on breach and misconduct activity to help licensees understand and address trends, themes and outcomes. This allows licensees to respond to trends more quickly to ensure that their controls and compliance measures remain attuned to the risks as they are known and understood.