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| **EXPOSURE DRAFT** |

Inserts for

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)

| Commencement information | | |
| --- | --- | --- |
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Schedule [1.6 and 2.7] | 1 July 2020. | 1 July 2020 |
| 2. Schedule [1.6, 2.8, 2.9 and 7.2] | 1 July 2020. | 1 July 2020 |

Schedule [1.6 and 2.7]—Reference Checking and Information Sharing Protocol

Corporations Act 2001

1 Section 910A

Insert:

***Reference Checking and Information Sharing Protocol*** means the protocol determined by ASIC under subsection 912A(3A).

2 Before subsection 912A(1)

Insert:

General obligations

3 After paragraph 912A(1)(cb)

Insert:

(cc) comply with the Reference Checking and Information Sharing Protocol in relation to:

(i) if the licensee is an individual to whom the Protocol applies—the licensee; and

(ii) if a former, current or prospective representative of the licensee is an individual to whom the Protocol applies—the representative; and

4 Before subsection 912A(2)

Insert:

Dispute resolution system

5 After subsection 912A(3)

Insert:

Reference Checking and Information Sharing Protocol

(3A) ASIC may, by legislative instrument, determine a protocol for:

(a) sharing information about any or all of the following:

(i) a financial services licensee who is an individual;

(ii) individuals who are former, current or prospective representatives of a financial services licensee;

by that licensee with another financial services licensee; and

(b) sharing information about any or all of the following:

(i) a financial services licensee who is an individual;

(ii) individuals who are former, current or prospective representatives of a financial services licensee;

by that licensee with a licensee within the meaning of the *National Consumer Credit Protection Act 2009*; and

(c) keeping and retaining records of information shared, and the circumstances under which the information is shared.

(3B) The Reference Checking and Information Sharing Protocol must not:

(a) require or permit personal information (within the meaning of the *Privacy Act 1988*) to be shared, other than with the consent of the individual to whom the information relates; or

(b) require information to be shared in relation to conduct that occurred more than 5 years before the information is shared.

Application of Reference Checking and Information Sharing Protocol

(3C) The Reference Checking and Information Sharing Protocol applies to an individual mentioned in subparagraph (3A)(a)(i) or (ii) if there are reasonable grounds to suspect that the individual will provide personal advice to retail clients about relevant financial products if the individual becomes a representative of the other financial services licensee mentioned in paragraph (3A)(a).

(3D) The Reference Checking and Information Sharing Protocol applies to an individual mentioned in subparagraph (3A)(b)(i) or (ii) if there are reasonable grounds to suspect that, if the individual becomes a representative of the licensee mentioned in paragraph (3A)(b), the individual will:

(a) provide credit assistance in relation to credit contracts secured by mortgages over residential property; and

(b) be a mortgage broker or a director, employee or agent of a mortgage broker.

(3E) Expressions used in subsection (3D) that are also used in the *National Consumer Credit Protection Act 2009* (other than Reference Checking and Information Sharing Protocol) have the same meaning in that subsection as they have in that Act.

Qualified privilege

(3F) A person has qualified privilege in respect of information shared in accordance with the Reference Checking and Information Sharing Protocol about an individual to whom the Protocol applies.

(3G) A person who has qualified privilege under subsection (3F) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

6 Before subsection 912A(4)

Insert:

Adequate resources to provide financial services—APRA regulated bodies

7 Before subsection 912A(5)

Insert:

Adequate risk management systems—APRA regulated bodies

8 Before subsection 912A(5A)

Insert:

Civil penalty provision

9 Subsection 912A(5A)

After “paragraph (1)(a), (aa), (ca),”, insert “ (cc),”.

10 Before subsection 912A(6)

Insert:

Definitions

11 In the appropriate position in Chapter 10

Insert:

Part 10.42—Application provisions relating to Schedule [1.6 and 2.7] to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020

1669 Application of Reference Checking and Information Sharing Protocol

The amendments made by Schedule [1.6 and 2.7] to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020* apply in relation to information shared on or after 1 April 2021.

National Consumer Credit Protection Act 2009

12 Subsection 5(1)

Insert:

***Reference Checking and Information Sharing Protocol*** means the protocol determined by ASIC under subsection 47(3A).

13 After paragraph 47(1)(e)

Insert:

(ea) comply with the Reference Checking and Information Sharing Protocol in relation to:

(i) if the licensee is an individual to whom the Protocol applies—the licensee; and

(ii) if a former, current or prospective representative of the licensee is an individual to whom the Protocol applies—the representative; and

14 After subsection 47(3)

Insert:

Reference Checking and Information Sharing Protocol

(3A) ASIC may, by legislative instrument, determine a protocol for:

(a) sharing information about any or all of the following:

(i) a licensee who is an individual;

(ii) individuals who are former, current or prospective representatives of a licensee;

by that licensee with another licensee; and

(b) sharing information about any or all of the following:

(i) a licensee who is an individual;

(ii) individuals who are former, current or prospective representatives of a licensee;

by that licensee with a financial services licensee within the meaning of the *Corporations Act 2001*; and

(c) keeping and retaining records of information shared, and the circumstances under which that information is shared.

(3B) The Reference Checking and Information Sharing Protocol must not:

(a) require or permit personal information (within the meaning of the *Privacy Act 1988*) to be shared, other than with the consent of the individual to whom the information relates; or

(b) require information to be shared in relation to conduct that occurred more than 5 years before the information is shared.

Application of Reference Checking and Information Sharing Protocol

(3C) The Reference Checking and Information Sharing Protocol applies to an individual mentioned in subparagraph (3A)(a)(i) or (ii) if there are reasonable grounds to suspect that, if the individual becomes a representative of the licensee mentioned in paragraph (3A)(a), the individual will:

(a) provide credit assistance in relation to credit contracts secured by mortgages over residential property; and

(b) be a mortgage broker or a director, employee or agentof a mortgage broker.

(3D) The Reference Checking and Information Sharing Protocol applies to an individual mentioned in subparagraph (3A)(b)(i) or (ii) if there are reasonable grounds to suspect that the individual will provide personal advice to retail clients about relevant financial products if the individual becomes a representative of the financial services licensee mentioned in paragraph (3A)(b).

(3E) Expressions used in subsection (3D) that are also used in the *Corporations Act 2001* (other than Reference Checking and Information Sharing Protocol) have the same meaning in that subsection as they have in that Act.

Qualified privilege

(3F) A person has qualified privilege in relation to information shared in accordance with the Reference Checking and Information Sharing Protocol about an individual to whom the Protocol applies.

(3G) A person who has qualified privilege under subsection (3F) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

15 Subsection 47(4)

After “paragraph (1)(a), (b), (e),”, insert “(ea),”.

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

16 In the appropriate position

Insert:

Schedule 15—Application provisions relating to Schedule [1.6 and 2.7] to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020

1 Application of Reference Checking and Information Sharing Protocol

The amendments made by Schedule [1.6 and 2.7] to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020* apply in relation to information shared on or after 1 April 2021.

Schedule [1.6, 2.8, 2.9 and 7.2]—Breach reporting and remediation

Corporations Act 2001

1 Paragraph 601FC(1)(l)

Repeal the paragraph.

2 Section 910A

Insert:

***core obligation*** has the meaning given by subsection 912D(3).

***reasonably knows*** has the meaning given by section 912DAA.

***reportable situation*** has the meaning given by section 912D.

3 Before section 912A

Insert:

Subdivision A—General obligations

4 Before section 912C

Insert:

Subdivision B—Providing information and assistance to ASIC

5 Section 912D

Repeal the section, substitute:

912D What are *reportable situations*?

(1) There is a ***reportable situation*** in relation to a financial services licensee if:

(a) one of the following is satisfied:

(i) the financial services licensee or a representative of the financial services licensee has breached a core obligation;

(ii) the financial services licensee or a representative of the financial services licenseeis likely to breach a core obligation;

(iii) the financial services licensee has commenced an investigation into whether the financial services licensee or a representative of the financial services licensee has breached a core obligation; and

(b) the breach or likely breach is significant.

(2) There is also a ***reportable situation*** in relation to a financial services licensee if:

(a) in the course of providing a financial service, the financial services licensee or a representative of the financial services licensee has engaged in conduct constituting gross negligence; or

(b) the financial services licensee or a representative of the financial services licensee has committed serious fraud; or

(c) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(3) Each of the following is a ***core obligation***:

(a) an obligation under section 912A or 912B, other than the obligation under paragraph 912A(1)(c);

(b) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b), (ba) and (c) of the definition of ***financial services law*** in section 761A;

(c) in relation to financial services, other than traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this paragraph;

(d) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth, State or Territory legislation, or a rule of common law or equity, that is covered by paragraph (d) or (e) of that definition;

(e) in relation to a financial services licensee that is a responsible entity of a registered scheme—an obligation under section 601FC, 601FD or 601FE.

(4) For the purposes of this section, a person is ***likely to breach*** a core obligation if, and only if, the person is no longer able to comply with the obligation.

(5) For the purposes of this section, a breach or likely breach of a core obligation is taken to be ***significant*** if:

(a) the breach is punishable on conviction by a penalty that may include imprisonment for a maximum period of:

(i) if the offence involves dishonesty—3 months or more; or

(ii) in any other case—12 months or more; or

(b) the breach constitutes a contravention of a civil penalty provision; or

(c) the breach results, or is likely to result, in loss or damage to clients or, in the case of a managed investment scheme, members of the scheme; or

(d) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(6) Otherwise, for the purposes of this section, a breach or likely breach of a core obligation is ***significant*** having regard to the following:

(a) the number or frequency of similar previous breaches;

(b) the impact of the breach or likely breach on the financial services licensee’s ability to provide financial services covered by the licence;

(c) the extent to which the breach or likely breach indicates that the financial services licensee’s arrangements to ensure compliance with those obligations are inadequate;

(d) any other matters prescribed by regulations made for the purposes of this paragraph.

912DAA When does a person *reasonably know* of a circumstance?

(1) In this Part, a person ***reasonably knows*** of a circumstance if:

(a) the person is aware that the circumstance exists or will exist in the ordinary course of events; or

(b) each of the following is satisfied:

(i) the person is aware of a substantial risk that the circumstance exists or will exist;

(ii) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) In subsection (1), the question whether taking a risk is unjustifiable is one of fact.

912DAB Obligation to lodge a report—reportable situations in relation to the financial services licensee

Reporting a reportable situation to ASIC

(1) A financial services licensee must lodge a report with ASIC in accordance with this section if there are reasonable grounds to believe that a reportable situation has arisen in relation to the financial services licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Reporting the outcome of an investigation to ASIC

(2) A financial services licensee must lodge a report with ASIC in accordance with this section if:

(a) the financial services licensee has commenced an investigation into whether the financial services licensee or a representative of the financial services licensee has breached a core obligation; and

(b) the financial services licensee is obliged under subsection (1) to report the investigation; and

(c) the investigation discloses no reasonable grounds to believe that the financial services licensee or a representative of the financial services licensee has breached the core obligation.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Report must be in the prescribed form

(3) A report under this section must be lodged with ASIC in writing in the prescribed form.

Period within which report must be lodged

(4) A report under this section must be lodged with ASIC within 30 days after the financial services licensee first reasonably knows that there are reasonable grounds to believe the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 912DAA.

(5) However, if:

(a) the financial services licensee has commenced an investigation into whether the financial services licensee or a representative of the financial services licensee has breached a core obligation; and

(b) the financial services licensee is obliged under subsection (1) to report the investigation; and

(c) the investigation discloses either that:

(i) there are reasonable grounds to believe that the financial services licensee or a representative of the financial services licensee has breached the core obligation; or

(ii) there are no reasonable grounds to believe that the financial services licensee or a representative of the financial services licensee has breached the core obligation;

the report must be lodged within 10 days after the financial services licensee first reasonably knows the circumstance mentioned in subparagraph (c)(i) or (ii) exists.

Note 1: ***Reasonably knows*** is defined in section 912DAA.

Note 2: Under subsection (4), the financial services licensee is obliged to report the existence of the investigation within 30 days after the licensee first reasonably knows that there are reasonable grounds to believe that that reportable situation has arisen.

If report is received by APRA

(6) A report that a financial services licensee is required to lodge under this section in relation to a reportable situation is taken to have been lodged with ASIC if:

(a) the licensee is a body regulated by APRA; and

(b) the licensee has given a report to APRA that contains all of the information that is required in a report under this section in relation to the reportable situation.

(7) Subsection (1) does not apply to a financial services licensee that is a body regulated by APRA in relation to a reportable situation if:

(a) the auditor or actuary of the licensee gives APRA a written report about a matter to which the reportable situation relates; and

(b) the report is given before, or within 10 business days after, the licensee first reasonably knows that there are reasonable grounds to believe that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 912DAA.

Civil penalty provision

(8) A person contravenes this subsection if the person contravenes subsection (1) or (2).

Note: This subsection is a civil penalty provision (see section 1317E).

912DAC Obligation to lodge a report—reportable situations in relation to other financial services licensees

Reporting a reportable situation to ASIC

(1) A financial services licensee (the ***reporting licensee***) must lodge a report with ASIC in accordance with this section if:

(a) there are reasonable grounds to suspect that a reportable situation has arisen in relation to another financial services licensee; and

(b) an individual who is either:

(i) the other financial services licensee; or

(ii) if, under Division 6, the other financial services licensee is responsible for conduct of a representative of the other financial services licensee that forms part of the reportable situation—the representative;

provides personal advice to retail clients in relation to relevant financial products; and

(c) the individual has engaged in conduct that forms part of the reportable situation (whether in the course of providing personal advice to retail clients in relation to relevant financial products or otherwise).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Report must be in the prescribed form

(2) The report must be lodged in writing in the prescribed form.

Period within which report must be lodged

(3) The report must be lodged with ASIC within 30 days after the reporting licensee first reasonably knows that there are reasonable grounds to suspect that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 912DAA.

If report is received by APRA

(4) A report that a financial services licensee is required to lodge under this section in relation to a reportable situation is taken to have been lodged with ASIC if:

(a) the licensee is a body regulated by APRA; and

(b) the licensee has given a report to APRA that contains all of the information that is required in a report under this section in relation to the reportable situation.

(5) This section does not apply to a financial services licensee that is a body regulated by APRA in relation to a reportable situation if:

(a) the auditor or actuary of the licensee gives APRA a written report about a matter to which the reportable situation relates; and

(b) the report is given before, or within 10 business days after, the licensee first reasonably knows that there are reasonable grounds to suspect that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 912DAA.

If the reportable situation already reported to ASIC

(6) Subsection (1) does not apply in relation to a reportable situation if there are reasonable grounds to believe that ASIC is aware of:

(a) the existence of the reportable situation; and

(b) all of the information that is required in a report under this section in relation to the reportable situation.

A copy of the report must be given to the other financial services licensee

(7) The reporting licensee must give a copy of any report that the reporting licensee is required to lodge with ASIC under subsection (1) to the other financial services licensee within 30 days after the reporting licensee first reasonably knows that there are reasonable grounds to suspect that the reportable situation has arisen.

Note 1: ***Reasonably knows*** is defined in section 912DAA.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Civil penalty provision

(8) A person contravenes this subsection if the person contravenes subsection (1) or (7).

Note: This subsection is a civil penalty provision (see section 1317E).

912DAD Obligation to give notice—participants in licensed market or licensed CS facility

(1) A financial services licensee must give written notice to ASIC in accordance with this section if the licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The notice must:

(a) say when the event happened and identify the market or facility; and

(b) be in the prescribed form.

(3) The notice must be given as soon as practicable after the event happened.

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

912DAE ASIC must publish details of certain reports

(1) ASIC must, for each financial year, publish information about:

(a) reports lodged with ASIC during the financial year under section 912DAB in relation to reportable situations of the kind mentioned in subparagraph 912D(1)(a)(i) or (ii) (breaches and likely breaches of core obligations); and

(b) reports lodged with APRA during the financial year, as described in subsections 912DAB(6) and (7), in relation to reportable situations of the kind mentioned in subparagraph 912D(1)(a)(i) or (ii) (breaches and likely breaches of core obligations); and

(c) the entities in relation to which those reports are lodged with ASIC or APRA.

(2) The information must:

(a) be published within 4 months after the end of the financial year; and

(b) be published on ASIC’s website; and

(c) include the information (if any) prescribed by the regulations, which may include personal information (within the meaning of the *Privacy Act 1988*) in relation to a financial services licensee who is an individual; and

(d) if the regulations prescribe how the information is to be organised—be organised in accordance with the regulations.

(3) The regulations may prescribe circumstances in which information need not be included in the information published by ASIC under this section.

(4) ASIC may correct any error in, or omission from, information published under this section.

6 Before section 912F

Insert:

Subdivision C—Notifying and remediating clients affected by reportable situations

912EA Reporting to clients affected by a reportable situation

Notifying an affected client of a reportable situation

(1) A financial services licensee must take reasonable steps to notify a person (the ***affected client***) of a reportable situation in accordance with this section if:

(a) the licensee, or a representative of the licensee, provides or has provided personal advice to the affected client as a retail client in relation to a relevant financial product; and

(b) there are reasonable grounds to believe that the reportable situation has arisen in relation to the licensee as mentioned in:

(i) subparagraph 912D(1)(a)(i) and paragraph 912D(1)(b) (significant breach of a core obligation); or

(ii) subsection 912D(2) (gross negligence or serious fraud); and

(c) there are reasonable grounds to suspect that:

(i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and

(ii) the affected client has a legally enforceable right to recover the loss or damage from the financial services licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Form and period for giving notice

(2) A notice under this section must be given:

(a) in writing; and

(b) if ASIC has approved the form in which the notice must be given—in the approved form; and

(c) within 30 days after the licensee first reasonably knows of the matters mentioned in paragraphs (1)(a), (b) and (c).

Note: ***Reasonably knows*** is defined in section 912DAA.

Civil penalty provision

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

912EB Obligation to investigate reportable situations that may affect clients

Obligation to investigate

(1) A financial services licensee must conduct an investigation into a reportable situation in accordance with this section if:

(a) the licensee, or a representative of the licensee, provides or has provided personal advice to a person as a retail client (the ***affected client***) in relation to a relevant financial product; and

(b) there are reasonable grounds to believe that the reportable situation has arisen in relation to the licensee as mentioned in:

(i) subparagraph 912D(1)(a)(i) and paragraph 912D(1)(b) (significant breach of a core obligation); or

(ii) subsection 912D(2) (gross negligence or serious fraud); and

(c) there are reasonable grounds to suspect that:

(i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and

(ii) the affected client has a legally enforceable right to recover the loss or damage from the financial services licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Period within which investigation must be commenced

(2) The investigation must be commenced within 30 days after the financial services licensee first reasonably knows of the matters mentioned in paragraphs (1)(a), (b) and (c).

Note: ***Reasonably knows*** is defined in section 912DAA.

Matters to be considered in the investigation

(3) In conducting the investigation, the financial services licensee must:

(a) identify the conduct that gave rise to the reportable situation; and

(b) quantify the loss or damage that there are reasonable grounds to believe:

(i) the affected client has suffered or will suffer as a result of the reportable situation; and

(ii) the affected client has a legally enforceable right to recover from the financial services licensee; and

(c) do anything else prescribed by the regulations for the purposes of this paragraph.

Completing the investigation

(4) The investigation must be completed as soon as is reasonably practicable after it is commenced.

Notifying affected client

(5) The financial services licensee must take reasonable steps to notify the affected client of the outcome of the investigation:

(a) in writing; and

(b) if ASIC has approved the form in which the notice must be given—in the approved form; and

(c) within 10 days after the completion of the investigation.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Compensating the affected client for loss or damage

(6) If, after the investigation is completed, there are reasonable grounds to believe that:

(a) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and

(b) the affected client has a legally enforceable right to recover the loss or damage from the financial services licensee;

the financial services licensee must take reasonable steps to pay the affected client an amount equal to the loss or damage within 30 days after the investigation is completed.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Civil penalty provision

(7) A person contravenes this subsection if the person contravenes subsection (1), (5) or (6).

Note: This subsection is a civil penalty provision (see section 1317E).

Nothing affects right of affected client to pursue legally enforceable rights

(8) Nothing in this section affects any legally enforceable right of the affected client to recover loss or damage that the affected client suffers, or will suffer, as a result of a reportable situation.

(9) However, a court may take into account the amount paid by the financial services licensee under this section when quantifying the amount of compensation (if any) to be paid by the financial services licensee in relation to that loss or damage.

912EC Obligation to keep records of compliance

(1) A financial services licensee must keep records sufficient to enable the licensee’s compliance with this Subdivision to be readily ascertained.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

Note 2: For preservation of records, see section 1101C.

(2) The regulations may specify records that the financial services licensee must keep as part of the obligation in subsection (1).

Subdivision D—Miscellaneous

7 Subsection 1317E(3) (table item dealing with subsection 912D(3))

Repeal the item.

8 In the appropriate position in subsection 1317E(3)

Insert:

|  |  |  |
| --- | --- | --- |
| subsection 912DAB(8) | failure by a financial services licensee to report to ASIC a reportable situation in relation to the licensee, or the outcome of an investigation | uncategorised |
| subsection 912DAC(8) | failure by a financial services licensee to report to ASIC a reportable situation in relation to another financial services licensee, or to give a copy of the report to the other financial services licensee | uncategorised |
| subsection 912DAD(4) | failure by a financial services licensee to notify ASIC that the licensee has become, or ceased to be, a participant in a licensed market or a licensed CS facility | uncategorised |
| subsection 912EA(3) | failure by a financial services licensee to notify an affected client of a reportable situation | uncategorised |
| subsection 912EB(7) | failure by a financial services licensee to investigate a reportable situation, notify an affected client of the outcome of the investigation or compensate an affected client | uncategorised |

9 In the appropriate position in Chapter 10

Insert:

Part 10.43—Application and transitional provisions relating to Schedule [1.6, 2.8, 2.9 and 7.2] to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020

1670 Definitions

In this Part:

***amending Schedule*** means Schedule [1.6, 2.8, 2.9 and 7.2] to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020*.

1670A Continued application of paragraph 601FC(1)(l) and section 912D

(1) Despite the repeal of paragraph 601FC(1)(l) by item 1 of the amending Schedule, that paragraph (as in force immediately before 1 July 2020) continues to apply in relation to breaches that occur before 1 April 2021.

(2) Despite the repeal of section 912D by item 5 of the amending Schedule:

(a) subsections 912D(1) to (1D) and subsection 912D(3) (to the extent that it relates to subsections 912D(1) to (1D)), as in force immediately before 1 July 2020, continue to apply in relation to breaches or likely breaches that occur before 1 April 2021; and

(b) subsection 912D(2) and subsection 912D(3) (to the extent that it relates to subsection 912D(2)), as in force immediately before 1 July 2020, continue to apply in relation to financial services licensees who become participants, or cease to be participants, in a licensed market or a licensed CS facility before 1 April 2021.

1670B Reportable situations to which sections 912DAB and 912DAC will apply

Sections 912DAB and 912DAC, as inserted by item 5 of the amending Schedule, apply in relation to reportable situations arising on or after 1 April 2021.

1670C Application of section 912DAD

Section 912DAD, as inserted by item 5 of the amending Schedule, applies if a financial services licensee becomes, or ceases to be, a participant in a licensed market or a licensed CS facility on or after 1 April 2021.

1670D Application of ASIC’s obligations to publish information under section 912DAE

Section 912DAE, as inserted by item 5 of the amending Schedule, applies in relation to financial years ending on or after 30 June 2021.

1670E Application of provisions dealing with notifying and compensating a person affected by a reportable situation

Subdivision C of Division 3 of Part 7.6, as inserted by item 6 of the amending Schedule,applies in relation to reportable situations arising on or after 1 April 2021.

10 Schedule 3 (table items dealing with subsections 912D(1B) and 912D(2))

Repeal the items.

11 In the appropriate position in Schedule 3

Insert:

|  |  |
| --- | --- |
| Subsection 912DAB(1) | 2 years imprisonment |
| Subsection 912DAB(2) | 2 years imprisonment |
| Subsection 912DAC(1) | 2 years imprisonment |
| Subsection 912DAC(7) | 2 years imprisonment |
| Subsection 912DAD(1) | 1 year imprisonment |
| Subsection 912EA(1) | 2 years imprisonment |
| Subsection 912EB(1) | 2 years imprisonment |
| Subsection 912EB(5) | 2 years imprisonment |
| Subsection 912EB(6) | 2 years imprisonment |
| Subsection 912EC(1) | 5 years imprisonment |

National Consumer Credit Protection Act 2009

12 Subsection 5(1)

Insert:

***core obligation*** has the meaning given by subsection 50A(3).

***reportable situation*** has the meaning given by section 50A.

13 Before section 47

Insert:

Subdivision A—General obligations

14 Before section 49

Insert:

Subdivision B—Providing information and assistance to ASIC

15 After section 50

Insert:

50A What are *reportable situations*?

(1) There is a ***reportable situation*** in relation to a licensee if:

(a) one of the following is satisfied:

(i) the licensee or a representative of the licensee has breached a core obligation;

(ii) the licensee or a representative of the licenseeis likely to breach a core obligation;

(iii) the licensee has commenced an investigation into whether the licensee or a representative of the licensee has breached a core obligation; and

(b) the breach or likely breach is significant.

(2) There is also a ***reportable situation*** in relation to a licensee if:

(a) in the course of engaging in a credit activity, the licensee or a representative of the licensee has engaged in conduct constituting gross negligence; or

(b) the licensee or a representative of the licensee has committed serious fraud; or

(c) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(3) Each of the following is a ***core obligation***:

(a) an obligation under section 47, other than the obligation under paragraph 47(1)(d);

(b) the obligation under paragraph 47(1)(d), so far as it relates to this Act, the Transitional Act and Division 2 of Part 2 of the ASIC Act and regulations made for the purpose of that Division;

(c) the obligation under paragraph 47(1)(d), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of the definition of ***credit legislation***.

(4) For the purposes of this section, a person is ***likely to breach*** a core obligation if, and only if, the person is no longer able to comply with the obligation.

(5) For the purposes of this section, a breach or likely breach of a core obligation is taken to be ***significant*** if:

(a) the breach is punishable on conviction by a penalty that may include imprisonment for a maximum period of:

(i) if the offence involves dishonesty—3 months or more; or

(ii) in any other case—12 months or more; or

(b) the breach constitutes a contravention of a civil penalty provision; or

(c) the breach results, or is likely to result, in loss or damage to a credit activity client of the licensee; or

(d) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(6) Otherwise, for the purposes of this section, a breach or likely breach of a core obligation is ***significant*** having regard to the following:

(a) the number or frequency of similar previous breaches;

(b) the impact of the breach or likely breach on the licensee’s ability to engage in credit activities covered by the licence;

(c) the extent to which the breach or likely breach indicates that the licensee’s arrangements to ensure compliance with those obligations are inadequate;

(d) any other matters prescribed by regulations made for the purposes of this paragraph.

(7) For the purposes of this section, a person is a ***credit activity client*** of a licensee if the person is a consumer who:

(a) is a party to a credit contract, or will be a party to a proposed credit contract, in relation to which the licensee, or a representative of the licensee, performs the obligations, or exercises the rights, of a credit provider; or

(b) is a person to whom the licensee, or a representative of the licensee, provides a credit service; or

(c) is a party to a consumer lease, or will be a party to a proposed consumer lease, in relation to which the licensee, or a representative of the licensee, performs the obligations, or exercises the rights, of a lessor; or

(d) is a mortgagor under a mortgage, or will be the mortgagor under a proposed mortgage, in relation to which the licensee, or a representative of the licensee, performs the obligations, or exercises the rights of a mortgagee; or

(e) is the guarantor under a guarantee, or will be the guarantor under a proposed guarantee, in relation to which the licensee, or a representative of the licensee, performs the obligations, or exercises the rights, of a beneficiary under the guarantee; or

(f) is a person in relation to whom the licensee, or a representative of the licensee, engages in a prescribed activity mentioned in item 6 of the table in subsection 6(1).

50B When does a person *reasonably know* of a circumstance?

(1) In this Division, a person ***reasonably knows*** of a circumstance if:

(a) the person is aware that the circumstance exists or will exist in the ordinary course of events; or

(b) each of the following is satisfied:

(i) the person is aware of a substantial risk that the circumstance exists or will exist;

(ii) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) In subsection (1), the question whether taking a risk is unjustifiable is one of fact.

50C Obligation to lodge a report—reportable situations in relation to the licensee

Reporting a reportable situation to ASIC

(1) A licensee must lodge a report with ASIC in accordance with this section if there are reasonable grounds to believe that a reportable situation has arisen in relation to the licensee.

Civil penalty: 5,000 penalty units.

Reporting the outcome of an investigation to ASIC

(2) A licensee must lodge a report with ASIC in accordance with this section if:

(a) the licensee has commenced an investigation into whether the licensee or a representative of the licensee has breached a core obligation; and

(b) the licensee is obliged under subsection (1) to report the investigation; and

(c) the investigation discloses no reasonable grounds to believe that the licensee or a representative of the licensee has breached the core obligation.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1) or (2); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Report must be in the approved form

(4) A report under this section must be lodged with ASIC in writing in the approved form.

Period within which report must be lodged

(5) A report under this section must be lodged with ASIC within 30 days after the licensee first reasonably knows that there are reasonable grounds to believe that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 50B.

(6) However, if:

(a) the licensee has commenced an investigation into whether the licensee or a representative of the licensee has breached a core obligation; and

(b) the licensee is obliged under subsection (1) to report the investigation; and

(c) the investigation discloses either that:

(i) there are reasonable grounds to believe that the licensee or a representative of the licensee has breached the core obligation; or

(ii) there are no reasonable grounds to believe that the licensee or a representative of the licensee has breached the core obligation;

the report must be lodged with ASIC within 10 days after the licensee first reasonably knows the circumstance mentioned in subparagraph (c)(i) or (ii) exists.

Note 1: ***Reasonably knows*** is defined in section 50B.

Note 2: Under subsection (5), the licensee is obliged to report the existence of the investigation within 30 days after the licensee first reasonably knows that there are reasonable grounds to believe that that reportable situation has arisen.

If report is received by APRA

(7) A report that a licensee is required to lodge with ASIC under this section in relation to a reportable situation is taken to have been lodged with ASIC if:

(a) the licensee is a body regulated by APRA; and

(b) the licensee has given a report to APRA that contains all of the information that is required in a report under this section in relation to the reportable situation.

(8) Subsection (1) does not apply to a licensee that is a body regulated by APRA in relation to a reportable situation if:

(a) the auditor or actuary of the licensee gives APRA a written report about a matter to which the reportable situation relates; and

(b) the report is given before, or within 10 business days after, the licensee first reasonably knows that there are reasonable grounds to believe that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 50B.

50D Obligation to lodge a report—reportable situations in relation to other licensees

Reporting a reportable situation to ASIC

(1) A licensee (the ***reporting licensee***) must lodge a report with ASIC in accordance with this section if:

(a) there are reasonable grounds to suspect that a reportable situation has arisen in relation to another licensee; and

(b) an individual who is either:

(i) the other licensee; or

(ii) if, under Division 4 of Part 2‑3, the other licensee is responsible for conduct of a representative of the other licensee that forms part of the reportable situation—the representative;

is a mortgage broker; and

(c) the individual has engaged in conduct that forms part of the reportable situation (whether in the course of providing credit assistance in relation to credit contracts secured by mortgages over residential property or otherwise).

Civil penalty: 5,000 penalty units.

Report must be in the approved form

(2) The report must be lodged with ASIC in writing in the approved form.

Period within which report must be lodged

(3) The report must be lodged with ASIC within 30 days after the reporting licensee first reasonably knows that there are reasonable grounds to suspect that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 50B.

If report is received by APRA

(4) A report that a licensee is required to lodge with ASIC under this section in relation to a reportable situation is taken to have been lodged with ASIC if:

(a) the licensee is a body regulated by APRA; and

(b) the licensee has given a report to APRA that contains all of the information that is required in a report under this section in relation to the reportable situation.

(5) This section does not apply to a licensee that is a body regulated by APRA in relation to a reportable situation if:

(a) the auditor or actuary of the licensee gives APRA a written report about a matter to which the reportable situation relates; and

(b) the report is given before, or within 10 businessdays after, the licensee first reasonably knows that there are reasonable grounds to suspect that the reportable situation has arisen.

Note: ***Reasonably knows*** is defined in section 50B.

If the reportable situation already reported to ASIC

(6) Subsection (1) does not apply in relation to a reportable situation if there are reasonable grounds to believe that ASIC is aware of:

(a) the existence of the reportable situation; and

(b) all of the information that is required in a report under this section in relation to the reportable situation.

A copy of the report must be given to the other licensee

(7) The reporting licensee must give a copy of any report that the reporting licensee is required to lodge with ASIC under subsection (1) to the other licensee within 30 days after the reporting licensee first reasonably knows that there are reasonable grounds to suspect that the reportable situation has arisen.

Civil penalty: 5,000 penalty units.

Offence

(8) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1) or (7); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

50E ASIC must publish details of certain reports

(1) ASIC must, for each financial year, publish information about:

(a) reports lodged with ASIC during the financial year under section 50C in relation to reportable situations of the kind mentioned in subparagraph 50A(1)(a)(i) or (ii) (breaches and likely breaches of core obligations); and

(b) reports lodged with APRA during the financial year, as described in subsections 50C(7) and (8), in relation to reportable situations of the kind mentioned in subparagraph 50A(1)(a)(i) or (ii) (breaches and likely breaches of core obligations); and

(c) the entities in relation to which those reports are lodged with ASIC or APRA.

(2) The information must:

(a) be published within 4 months after the end of the financial year; and

(b) be published on ASIC’s website; and

(c) include the information (if any) prescribed by the regulations, which may include personal information (within the meaning of the *Privacy Act 1988*) in relation to a licensee who is an individual; and

(d) if the regulations prescribe how the information is to be organised—be organised in accordance with the regulations.

(3) The regulations may prescribe circumstances in which information need not be included in the information published by ASIC under this section.

(4) ASIC may correct any error in, or omission from, information published under this section.

16 Before section 52

Insert:

Subdivision C—Notifying and remediating consumers affected by reportable situations

51A Reporting to consumers affected by a reportable situation

Notifying an affected consumer of a reportable situation

(1) A licensee must take reasonable steps to notify a consumer (the ***affected consumer***) of a reportable situation in accordance with this section if:

(a) the licensee, or a representative of the licensee, provides or has provided credit assistance to the affected consumer in relation to a credit contract secured by a mortgage over residential property; and

(b) the licensee, or the representative of the licensee, is a mortgage broker; and

(c) there are reasonable grounds to believe that a reportable situation has arisen in relation to the licensee as mentioned in:

(i) subparagraph 50A(1)(a)(i) and paragraph 50A(1)(b) (significant breach of a core obligation); or

(ii) subsection 50A(2) (gross negligence or serious fraud); and

(d) there are reasonable grounds to suspect that:

(i) the affected consumer has suffered or will suffer loss or damage as a result of the reportable situation; and

(ii) the affected consumer has a legally enforceable right to recover the loss or damage from the licensee.

Civil penalty: 5,000 penalty units.

Form and period for giving notice

(2) A notice under this section must be given:

(a) in writing; and

(b) if ASIC has approved the form in which the notice must be given—in the approved form; and

(c) within 30 days after the licensee first reasonably knows of the matters mentioned in paragraphs (1)(a), (b), (c) and (d).

Note: ***Reasonably knows*** is defined in section 50B.

Offence

(3) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

51B Obligation to investigate reportable situations that may affect consumers

Obligation to investigate

(1) A licensee must conduct an investigation into a reportable situation in accordance with this section if:

(a) the licensee, or a representative of the licensee, has provided credit assistance to a consumer (the ***affected consumer***) in relation to a credit contract secured by a mortgage over residential property; and

(b) the licensee, or the representative of the licensee, is a mortgage broker; and

(c) there are reasonable grounds to believe that a reportable situation has arisen in relation to the licensee as mentioned in:

(i) subparagraph 50A(1)(a)(i) and paragraph 50A(1)(b) (significant breach of a core obligation); or

(ii) subsection 50A(2) (gross negligence or serious fraud); and

(d) there are reasonable grounds to suspect that:

(i) the affected consumer has suffered or will suffer loss or damage as a result of the reportable situation; and

(ii) the affected consumer has a legally enforceable right to recover the loss or damage from the licensee.

Civil penalty: 5,000 penalty units.

Period within which investigation must be commenced

(2) The investigation must be commenced within 30 days after the licensee first reasonably knows of the matters mentioned in paragraphs (1)(a), (b), (c) and (d).

Note: ***Reasonably knows*** is defined in section 50B.

Matters to be considered in the investigation

(3) In conducting the investigation, the licensee must:

(a) identify the conduct that gave rise to the reportable situation; and

(b) quantify the loss or damage that there are reasonable grounds to believe:

(i) the affected consumer has suffered or will suffer as a result of the reportable situation; and

(ii) the affected consumer has a legally enforceable right to recover from the licensee; and

(c) do anything else prescribed by the regulations for the purposes of this paragraph.

Completing the investigation

(4) The investigation must be completed as soon as is reasonably practicable after it is commenced.

Notifying affected consumer

(5) The licensee must take reasonable steps to notify the affected consumer of the outcome of the investigation:

(a) in writing; and

(b) if ASIC has approved the form in which the notice must be given—in the approved form; and

(c) within 10 days after the investigation is completed.

Civil penalty: 5,000 penalty units.

Compensating the affected consumer for loss or damage

(6) If, after the investigation is completed, there are reasonable grounds to believe that:

(a) the affected consumer has suffered or will suffer loss or damage as a result of the reportable situation; and

(b) the affected consumer has a legally enforceable right to recover the loss or damage from the licensee;

the licensee must take reasonable steps to pay the affected consumer an amount equal to the loss or damage within 30 days after the investigation is completed.

Civil penalty: 5,000 penalty units.

Offence

(7) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1), (5) or (6); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Nothing affects right of affected consumer to pursue legally enforceable rights

(8) Nothing in this section affects any legally enforceable right of the affected consumer to recover loss or damage that the affected consumer suffers, or will suffer, as a result of a reportable situation.

(9) However, a court may take into account the amount paid by the licensee under this section when quantifying the amount of compensation (if any) to be paid by the licensee in relation to that loss or damage.

51C Obligation to keep records of compliance

Obligation to keep records of compliance

(1) A licensee must keep records sufficient to enable the licensee’s compliance with this Subdivision to be readily ascertained.

Civil penalty: 5,000 penalty units.

(2) The regulations may specify records that the licensee must keep as part of the obligation in subsection (1).

Offence

(3) A person commits an offence if:

(a) the person is subject to a requirement in relation to records under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes subsection (1).

Criminal penalty: 5 years imprisonment.

Subdivision D—Miscellaneous

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

17 In the appropriate position

Insert:

Schedule 16—Application and transitional provisions relating to Schedule [1.6, 2.8, 2.9 and 7.2] to the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020

1 Definitions

In this Schedule:

***amending Schedule*** means Schedule [1.6, 2.8, 2.9 and 7.2] to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Act 2020*.

2 Reportable situations to which sections 50C and 50D of the National Credit Act will apply

Sections 50C and 50D of the National Credit Act, as inserted by item 15 of the amending Schedule, apply in relation to reportable situations arising on or after 1 April 2021.

3 Application of ASIC’s reporting obligations under section 50E of the National Credit Act

Section 50E of the National Credit Act, as inserted by item 15 of the amending Schedule, applies in relation to financial years ending on or after 30 June 2021.

4 Application of provisions dealing with notifying and compensating a person affected by a reportable situation

Subdivision C of Division 5 of Part 2‑2 of the National Credit Act, as inserted by item 16 of the amending Schedule,applies in relation to reportable situations arising on or after 1 April 2021.