

Regulatory regimes guide: Breach reporting

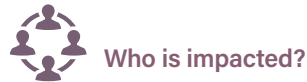
March 2021

Snapshot

At a glance...



A strengthened breach reporting regime for AFSL holders and the introduction of breach reporting obligations for ACL holders. New and express obligations to report serious compliance concerns about mortgage brokers and financial advisers. Significant civil and criminal penalties apply to breaches of the new obligations.



AFSL and ACL holders.



1 October 2021.

Considerations

Education and monitoring

The enhanced breach reporting regime for licensees will require a skills uplift within organisations to ensure a base level understanding of when breach reporting obligations are triggered. The strengthened regime is highly technical and requires accurate translation into practical, easily digestible concepts. Education of staff goes hand in hand with the need for elevated proactivity in monitoring complaints, inquiries and incidents to determine whether or not they constitute reportable situations under the regime.



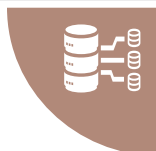
Credit licensees

ACLs have not previously been bound by the current breach reporting regime under the Corporations Act. The changes represent new and uncharted territory for ACL holders who are not otherwise AFSL holders, and they therefore have a lot to do to be ready by 1 October 2021. Entirely new practices will need to be designed and implemented – it is not simply a matter of adapting an existing system to meet the new requirements. There are cultural as well as practical and logistical matters to get right given ACLs will be starting from scratch.



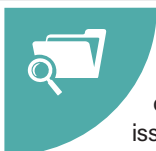
Interconnected regulatory reform

The strengthened (and new) breach reporting regime comes into play, together with the new design and distribution obligations and ASIC's updated guidance on internal dispute resolution. On the face of it, the regulatory changes appear distinct and unrelated to each other. However, what may look like a simple complaint could trigger the need for a breach report, and ultimately translate into a complex remediation program.



Enterprise wide transparency and vigilance

Do your teams talk to each other? Do the complaints and breach reporting teams know what issues the other team is dealing with? Given the interconnectedness between the new regulatory changes, it is now more critical than ever that structures are in place to enable different teams to collaborate and share information. Organisations will easily trip up with a siloed approach and without enterprise wide transparency and vigilance.



Breach Reporting – What’s new?

Overview

The Financial Sector Reform (Hayne Royal Commission Response) Act 2020 implements many recommendations of the Hayne Royal Commission, including Commissioner Hayne’s recommendation in relation to the breach reporting regime. This includes:

- strengthening the breach reporting regime for financial services licensees in the Corporations Act
- introducing a comparable breach reporting regime for credit licensees in the National Consumer Credit Protection Act (Credit Act)
- requiring all licensees to report serious compliance concerns about mortgage brokers and financial advisers.

The new regime will come into operation on 1 October 2021.

Details



Terminology

The legislation introduces new terminology – reportable situations, core obligations, core reportable situations.



Significance test

There are two separate tests for when a breach is significant, with the introduction of a deemed significance test for core reportable situations, as well as a second test based on the existing significance test.



Reportable situations

There has been an expansion of the kinds of situations that need to be reported by licensees to ASIC to include:

- investigations into whether a significant breach has occurred or will occur if the investigation continues for more than 30 days and the outcome of those investigations (even if the investigation finds that there is no reportable situation)
- conduct that constitutes gross negligence or serious fraud
- conduct that amounts to misleading or deceptive conduct under the financial services law
- serious compliance concerns about individual financial advisers or mortgage brokers operating under another licence

There is no significance test or threshold required if the reportable situation relates to gross negligence or serious fraud. The mere existence of gross negligence or serious fraud is enough to make the impugned conduct a reportable situation

Breaches of general obligations under section 912A of the Corporations Act and section 47 of the Credit Act (other than the obligation to comply with the financial services law/credit legislation) are deemed significant and are therefore reportable.



Timeframes

The requirement will be for the lodgement of breach reports, in a prescribed form, within 30 calendar days of the reportable situation becoming known to the licensee.



Publication

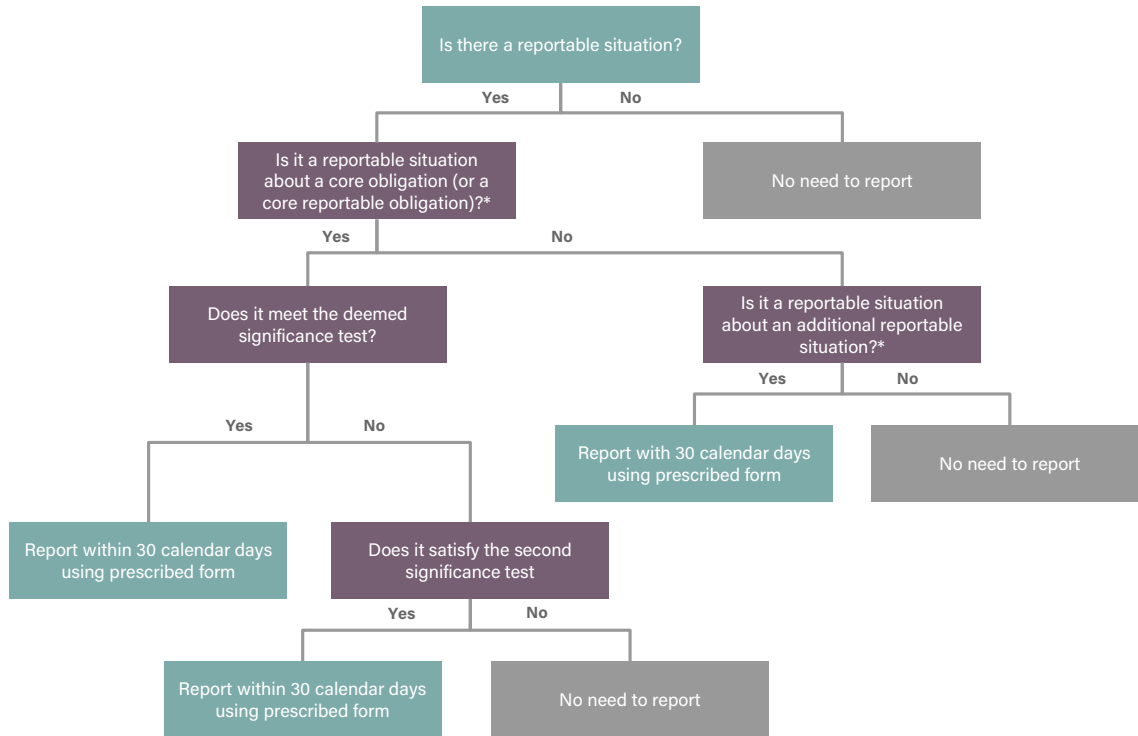
ASIC will be publishing breach report data.



Other licensees

Under the new regime there is a new obligation on licensees to report serious compliance concerns about financial advisers and mortgage brokers engaged by another licensee.

How will the new reporting regime work?



*A reportable situation can potentially be both a core reportable obligation and an additional reportable situation.

Contacts



Claudine Salameh
Partner
Tel +61 2 9330 8195
claudine.salameh@nortonrosefulbright.com



Helen Taylor
Partner
Tel +61 2 9330 8218
helen.taylor@nortonrosefulbright.com



Danielle Avery
Senior Advisor, Risk Advisory
Tel +61 2 9330 8077
danielle.avery@nortonrosefulbright.com



Rebecca Laban
Special Counsel
Tel +61 2 9330 8113
rebecca.laban@nortonrosefulbright.com



Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3700 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices. The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

© Norton Rose Fulbright Australia. Extracts may be copied provided their source is acknowledged.
31948_AU - 03/21