

17 May 2017

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 260

By email: ASICenforcementreview@treasury.gov.au

Dear Minister O'Dwyer

Re: ASIC Enforcement Review – Position and Consultation Paper 1

1. This is a submission in response to the Consultation Paper: *ASIC Enforcement Review – Position and Consultation Paper 1 Self-reporting of contraventions by financial services and credit licensees* dated 11 April 2017 (the Consultation Paper). We are commenting on the proposal as it relates to credit licensees only.

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

2. We are generally supportive of the implementation of a self-reporting regime for credit licensees to assist ASIC in the good regulation of the industry. However, this support is subject to the criteria for determining when to self-report being clear and appropriate.
3. It is critical that if obligations are introduced these do not create a disproportionate increase in the administrative burden for credit licensees when compared to the benefits self-reporting provides to the industry. Will ASIC be equipped to investigate breach reports in a timely manner especially if reporting volumes increase substantially?
4. We note that Treasury is separately consulting with the industry regarding the draft *ASIC Supervisory Cost Recovery Levy Bill 2017 (Cth)* (the Industry Funding Bill) which, if implemented, will result in a substantial increase in the fees Connective will need to pay to ASIC.¹ We assume that any introduction of self-reporting obligations on credit licensees will increase ASIC's operating costs in regulating this industry. This increased cost, by operation of the Bill, will be borne by each credit licensee. We do not believe that this has been factored into the estimates that Treasury have shared with the industry as part of the consultation process regarding the Industry Funding Bill.
5. The combination of increased licensing fees payable to ASIC (even without taking into account that the estimates relating to the Industry Funding Bill may be less than what the actual cost will be) and the administrative costs for ensuring compliance with new self-reporting obligations could hurt the industry and possibly make it unfeasible for smaller credit licensees to continue to operate.

¹ Connective paid a lodgment fee to ASIC for its annual compliance certificate of \$23,861 for the financial year ending 30 June 2016. Based on Treasury's estimate circulated earlier this year of \$170 per credit representative, Connective's fee payable to ASIC would be approximately \$215,000 under the new industry funding model. Treasury's estimate was based on ASIC's current levels of activity.



6. Separately, the *Privacy Amendment (Notifiable Data Breaches) Act 2017 (Cth)* (Privacy Act) was enacted earlier this year with mandatory data breach notification obligations taking effect in February 2018. Certain incidents could trigger reporting obligations under both the Privacy Act to the Privacy Commissioner and to ASIC as proposed by the Consultation Paper. Is the expectation that credit licensees make two filings for the same incident? Which regulator would have carriage in the investigation of this incident? Again, this could amount to increased administrative costs for credit licensees.
7. In summary, the proposals set out in the Consultation Paper will require more extensive and earlier self-reporting of incidents than what Connective currently imposes on itself voluntarily. Although we appreciate the benefits that self-reporting of significant breaches to ASIC, it is critical that any regime introduced does not impose excessive and unnecessary administrative burden and cost (both directly and indirectly as identified above) to credit licensees and ASIC with no tangible benefits to the industry and their consumers.

Information about Connective

8. Connective is a mortgage aggregator and, from ASIC's perspective, is regulated as a credit intermediary. We currently hold an Australian credit licence (under Connective Credit Services Pty Ltd) and have approximately 1,260 credit representatives under our licence.
9. In the past, Connective have voluntarily self-reported to ASIC two incidents which we believed were of a significant nature. One related to the corruption of a small percentage of the documents stored in Connective's records management system. The other related to the fraudulent behavior of a significant nature of four of our credit representatives in relation to home loan applications.
10. We would become aware of a potential reportable event through one of the following channels:
 - (a) an investigation request made by one of our lender partners regarding one of our credit representatives;
 - (b) a lender partner terminates the accreditation of one of our credit representatives without an acceptable explanation;
 - (c) notification from an external dispute resolution scheme (the Credit and Investments Ombudsman) of a complaint involving Connective or one of our credit representatives;
 - (d) we become aware of a potential breach by one of our credit representatives through one of our internal controls;
 - (e) we receive a third party tip-off about one of our credit representatives; or
 - (f) an issue arises within Connective which is uncovered through our internal controls.



11. In the last 12 months, 53 incidents have arisen in relation to our credit representatives which required further investigation and could be subject to self-reporting obligations. There were no Connective specific incidents which occurred in that same period (the incident described above in paragraph 9 occurred in 2015).
12. When investigating these incidents, one of the following conclusions is reached:
- (a) If the circumstances established through our investigation are sufficiently serious, the contractual relationship with the relevant credit representative is terminated by Connective with immediate effect (**Immediate Termination**). Examples of such circumstances include fraud, dishonesty and systemic breaches of applicable provisions of the National Consumer Credit Protection Act (NCCPA).
 - (b) If the circumstances were insufficient to warrant immediate termination or, on the balance of probabilities, we believed there to be issues of a serious nature which we are unable to establish beyond reasonable doubt, the contractual relationship with the relevant credit representative is terminated by Connective with 30 days' notice (**Termination with Notice**). An example would be non-compliance not of a significant nature with Connective policies and procedures (which are consistent with NCCPA requirements) which continue to be occur even after warnings from Connective and remedial action such as additional training.
 - (c) If issues are identified but are insufficient to warrant termination, Connective issues a first and final warning notice to the relevant credit representative coupled with required actions for remediation. Examples of such circumstances would include minor, non-systemic non-compliance with Connective policies and procedures where we would prescribe further training and remedial action.
 - (d) No issues or fault are uncovered on the part of the credit representative and therefore no further action is required.
13. Following our investigation of each of the 53 incidents in the last twelve months involving our credit representatives, 9 resulted in either Immediate Termination or Termination with Notice as a result of Connective's findings (4 of those 9 were involved in the incident we self-reported as described above in paragraph 9). We note that a credit representative which does not leave Connective on amicable terms often finds it difficult to continue in this industry with a different mortgage aggregator.

What should constitute a significant breach?

14. If there is an obligation to self-report, we agree that the definition of "significant breach" needs to be determined by objective standards to provide certainty to the industry as to what is reportable.
15. We believe that these objective standards need to be considered at licensee level, taking into account the specific facts and circumstances applicable to that licensee including their size, complexity of business and the consumers that they interact with. This reflects the level of self-reporting Connective has voluntarily made in the past and reflects a level we believe is appropriate and representing the right level of "significance". Bearing in mind ASIC's obligation to investigate report filings, we would be concerned that moving the testing of "significance" away from entity level could



result in ASIC being inundated with report filings, many of which are not significant nor justify the regulator's involvement.

16. As mentioned above, any increase in ASIC's workload relating to investigations will ultimately be borne by the industry through the operation of the Industry Funding Bill.
17. The Consultation Paper references in paragraph 29.2 that reportable matters could arise in the suspension, demotion, termination or resignation of a licensee's representative or employee or in relation to which there has been a referral to a law enforcement agency. This broadening of scope from licensee level down to individual representative or employee level could lead to a large increase in the amount of reporting required as evidenced by the metrics quoted above. Is this the intention of ASIC to collect this level of data and investigate each and every case reported? Would this increased amount of work result in a comparable improvement in how the industry operates which consequently leads to better consumer outcomes?
18. Notwithstanding our position stated above, if the expectation is that reporting be considered at an individual employee or representative level, we believe that only the incidents described above which resulted in either an Immediate Termination or a Termination with Notice would meet the threshold of being a "significant breach" and require reporting.
19. This is not our preferred approach and we do express our concerns as to what are the repercussions for the relevant credit representative or Connective especially in a circumstance where we have not actually established beyond reasonable doubt a breach has occurred (let alone whether it is a significant breach).

When does the self-reporting obligation arise?

20. The Consultation Paper indicates that reporting could be required of "potential or suspected breaches". The Consultation Paper does acknowledge that licensees could be allowed to continue with the carriage of the investigation but at least ASIC is afforded the opportunity to get involved early.
21. Our strong preference is to allow credit licensees to investigate without the obligation to self-report until the relevant investigation is concluded. Connective aims to complete investigations of its credit representatives within 30 days (usually, failure to meet this target is due to third parties not providing information within a timely fashion of our request).
22. As per the metrics described above, only 17% of the incidents we investigated in the last twelve months actually resulted in an Immediate Termination or a Termination with Notice. Conversely, 57% resulted in no further action required (as no issues identified). 17% concluded with a first and final warning coupled with remedial actions with the remaining 9% of incidents still under investigation.
23. If significance was measured at Connective entity level, only 7.5% of the incidents in the last twelve months would be reported, whereas if measured at individual level, 17%. These metrics would indicate, in Connective's case, that if the requirement was to report all potential or suspected breaches, the greater majority of breach reports involved no actual significant breach.



24. We believe that the licensee is best placed initially to conduct initial investigations of these incidents since they understand the relevant business, its customary practices and applicable regulation. Any obligation to self-report prior to the licensee conducting sufficient due diligence would be premature and there may be unjustified negative consequences associated with reporting an incident to ASIC which may prove to have no substance.
25. On this basis, we are of the view that potential or suspected significant breaches should not require reporting. If a standard less than beyond reasonable doubt is required, we would strongly recommend that be a test of whether, on a balance of probabilities, the licensee believes a significant breach has occurred. Ensuring licensees are appropriately protected from any claims arising from it complying with these self-reporting obligations would also be required to encourage compliance.

Time allowed for reporting

26. Provided the obligation to report only arises on conclusion of our investigations (and we have reached an Immediate Terminate or Termination with Notice conclusion using the examples above), we are comfortable with the obligation to report within 10 business days.
27. If the obligation to report arises earlier than this point in time, then we do not believe 10 business days is sufficient as it does not allow adequate time for us to properly investigate the incident and come to a determination as to whether a significant breach has occurred. If this were the case, we believe 45 days from the date the licensee first becomes aware of the potential or suspected significant breach would be an appropriate period for reporting. This would allow the licensee a reasonable period of time to make its own enquiries and decide whether a significant breach has actually occurred.
28. Either approach would minimize the number of reports filed with ASIC where no actual significant breach occurred.

Publication of breach data

29. We do not support the publishing of any breach report or associated data. As discussed in the Consultation Paper, the purpose of the breach reporting regime is to enhance ASIC's intelligence and better enable it to carry out its function. We do not believe that publication of any reports or associated data assists in this purpose and instead, could have unjustified negative consequences on a licensee or a licensee's credit representative.



Yours faithfully



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