

12 May 2017

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

By e-mail: ASICenforcementreview@treasury.gov.au

Property Funds Association of Australia: Self reporting of contraventions by financial services and credit licensees

We welcome the opportunity to make a submission in respect of the Position and Consultation Paper 1 on Self reporting of contraventions by financial services and credit licensees in April 2017.

By way of background, the Property Funds Association of Australia (**PFA**) is the peak body industry body representing the Australian unlisted wholesale and retail property funds sector, currently some \$125 billion in size.

We have provided our comments to each of the questions you have raised in your Position and Consultation Paper in the following pages.

We again thank you for the opportunity to provide this submission.

Should you have any questions in respect of our submission, please do not hesitate to contact myself (paul.healy@propertyfunds.org.au) as we would be happy to be part of the dialogue of the consultation process.

Yours sincerely,

[sgd Paul Healy]

Paul Healy
Chief Executive Officer
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Questions

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

We consider that an objective approach to significance is appropriate as a reporting trigger. However, although it will likely lead to a greater number of breach reports being provided to ASIC, it won't necessarily resolve the current ambiguity around the trigger for breach reporting. While the inclusion of a 'reasonable person' element into the test may give more certainty by inserting an objective standard, the overall impact of any such change to the test will likely depend on the level and type of any updated guidance provided by ASIC. We also consider that it would still be appropriate to have some regard to the nature and scale of the licensee's business. Otherwise, there is a risk that breaches are identified as reportable in circumstances where a reasonable person, if they had regard to the nature of the licensee's business, would not have reached that conclusion.

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

Adopting an objective standard may assist in providing more certainty but we don't consider it will resolve ambiguity. Ultimately, ASIC will need to provide further practical guidance to licensees. In addition, we note that auditors have obligations to report certain breaches under sections 311 and 601HG and we consider that these obligations should also be an area of focus.

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

We do not support extension of the licensee's obligations to report to require licensees to report matters relating to the conduct of employees and representatives. This extension is likely to be onerous for licensees and have significant implications in terms of costs and resources for licensees, particularly in relation to representatives. We don't consider it appropriate for licensees to be obliged to report suspicions of the existence of some of the circumstances enabling ASIC to make a banning order under section 920A. Although licensees already have obligations in relation to representatives, the existence of a suspicion of certain matters relating to the representative (such as not being of good fame and character) should not of itself result in a reporting obligation for the licensee, the breach of which could have enforcement outcomes for the licensee particularly where the licensee does not have actual reason to hold such a suspicion. This appears to be a purported extension of the breach reporting regime to a kind of whistleblowing function.

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

No, we don't consider it is appropriate for the threshold for the obligation to report to be 10 business days commencing from when the licensee becomes aware or has reason to suspect that a breach has occurred, may have occurred or may occur rather than when the licensee determines that the relevant breach has occurred and is significant. This risks significantly increasing the number of breach reports being provided to ASIC in circumstances where the breach is not ultimately deemed to be significant or the breach does not occur, noting that the existing test in section 912D focuses on a breach having occurred or being likely to occur

(rather than the trigger being the fact that a breach may occur). We submit that amending the threshold in this way would not necessarily enhance the effectiveness of the self reporting regime. We also don't consider it appropriate for the licensee to be deemed to be aware of the facts and circumstances that established the breach where the licensee has received information from persons such as governmental agencies or employees, given the potential implications for a licensee if the enforcement regime is broadened in circumstances where the licensee has otherwise acted reasonably. A key concern appears to be to increase certainty and reduce subjectivity in assessing the existence of the obligation to report. We note that the proposal to make the trigger based on an objective standard should go some way to address this concern. We consider there is a balance to be struck between enhancing the existing self reporting regime to improve its effectiveness and not extending in such a way that it becomes a regime whereby licensees are obliged to report compliance concerns before there is any real likelihood of a breach having occurred or the breach being significant.

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

No, we consider that the threshold should not be broadened to circumstances such as where a licensee has information that reasonably suggests a breach has or may have occurred. There is a risk that such a regime could result in ASIC receiving a far greater number of breach reports in circumstances where there is still significant uncertainty as to whether a breach has occurred, making the regime potentially less effective and more difficult to administer.

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

We submit that 20 business days is a more appropriate period, unless the relevant breach involves a matter of urgency for which the usual 10 business day period could apply. A longer time period is warranted particularly if the existing provisions are amended to require more prescriptive information and supporting documents in the breach report. While some breaches could be reported within a shorter time frame, the complexity of issues including the need to obtain legal advice where appropriate means a longer time period may be required. This will potentially result in better information being provided to ASIC.

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

We consider that the adoption of such a regime would have a negative cost impact on business, as it is likely to require more compliance procedures and resources for licensees.

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

We consider the existing regime appropriate in egregious cases of intentional failure to report. It will be important, however, to consider any additional potential enforcement options in light of the broader review being carried out by the ASIC Enforcement Review Taskforce.

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

We consider that a criminal offence should apply only in the most serious cases of intentional failure to report. Although it is acknowledged that the current regime may not be a significant

deterrent for failure to self report significant breaches and that increasing the penalties may have a greater deterrent value, the fact that there is already some uncertainty and ambiguity in the significance test may also be a significant factor in failures to report.

4.3 Should a civil penalty regime be introduced?

It is acknowledged that the existing enforcement regime in respect of failures to report significant breaches is restricted to a criminal offence. Although we do not support the introduction of a civil penalty regime, any such regime should be limited to serious and blatant cases where there has been an intentional failure to report based on actual knowledge of an obligation to report.

4.4 Should an infringement notice regime be introduced?

No, we don't support the introduction of an infringement notice regime. We consider that there is a risk it could act either as a disincentive for reporting breaches or even encourage minor non-compliance in respect of breach reporting which could be dealt with under an infringement notice.

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

Incentives of the nature outlined aimed at enhancing cooperation between ASIC and licensees may be beneficial. However, such incentives should not operate so as to penalise those licensees that do not report at earlier stages than they are required to, where there is still uncertainty in the facts and circumstances applicable to the breach or potential breach. Care also needs to be taken in providing any option whereby there is discretion for ASIC to determine whether the licensee has been cooperative and addressed matters to ASIC's satisfaction, so that any decision is based on reasonable and objective factors. Although these reforms could help to encourage early reporting to mitigate any potential penalty, a balance needs to be struck between introducing more meaningful enforcement options and encouraging licensees to engage with ASIC.

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

We believe this would be helpful. While there should be some flexibility in reporting to account for the different types of breaches that may be reported, it would seem practical and efficient to prescribe the form in which breaches are reported to ASIC, so that both licensees and ASIC are aware of what information will streamline the review process. However, care should be in prescribing the information required, to ensure that a licensee is only required to provide information it has access to at the time it makes the breach report.

5.2 What impact would this have on AFS licensees?

We consider this would assist licensees to ensure they provide relevant information to ASIC which should streamline the review process.

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

We support the alignment of the self-reporting regime for credit licensees with AFS licensees.

6.2 What will be the impact on industry?

We consider there will be a cost impact and compliance burden on the industry. However, aligning the regimes seems to be an extension of obligations already placed on credit licenses to identify breaches and maintain records of non-compliance.

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

Yes, the PFA considers the self-reporting regime for responsible entities should be streamlined. Currently, licensees that are responsible entities need to consider two different reporting regimes with different tests, including as to timing of reporting. It would therefore assist compliance by responsible entities and the review process for breaches if the self-reporting regime is streamlined into one regime.

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

Yes, the PFA considers it appropriate to remove the self-reporting obligation in section 601FC(1)(l) in order to avoid duplication or inconsistency in self-reporting regimes, as responsible entities are already subject to section 912D and a breach of 'financial services laws' for the purposes of section 912D already includes Chapter 5C of the Corporations Act (which applies to registered schemes). We consider it be appropriate to incorporate the threshold for reporting in the factors for significance in section 912D so as to align timing and other provisions applicable to reporting. However, we note that section 601FC(1)(i) only applies to reporting actual breaches in the circumstances outlined in that section and we would support maintaining this rather than extending it as has been suggested for section 912D.

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

The PFA does not agree with the introduction of a requirement for ASIC to publicly report breach data at the licensee level. This could have significant reputational implications for affected licensees, particularly where the breaches have been resolved and ASIC takes no further action in relation to them. It is also likely to be a consideration for licensees in determining whether to report a breach that is borderline as to whether it is significant. It should not be necessary for data on individual licensees to be published in circumstances where ASIC is already able to publish more general information about the nature and extent of breaches reported, which should enable licensees to compare their performance where ASIC is able to provide general information on trends in the nature of the breaches. It would also not necessarily enable a meaningful comparison to publish information on breach reporting at the licensee level given the nature, scale and complexity of licensee business differ.

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

The PFA does not support the publication by ASIC of breach reporting data at the licensee level. However, if introduced, there should be a high threshold applicable, otherwise the information is not likely to be meaningful. If based on number of breaches for the relevant

year, this is likely to be arbitrary so consideration would need to be given as to what is outside the norm for licensees which may differ according to the scale and complexity of the business.

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

No, we don't consider the name of the relevant operational unit or any other information should be included for similar reasons to those outlined in our response to Question 8.1.