

QSuper Responses to the ASIC Enforcement Review

Position and Consultation Paper 1 'Self-reporting of contraventions by financial services and credit licensees'

Question Number	Question	QSuper Response
1.1	Would a requirement to report breaches that a reasonable person would regard as significant be an appropriate trigger for breach reporting obligation?	Bringing in a reasonable person test would provide a level playing field across Licensees allowing for breaches of a similar type and nature to be reported to ASIC despite the operational scale of the AFSL. This removes any ambiguity with regard the interpretation of 'significance' in relation to the scale of a Licensees operation.
1.2	Would such a test reduce ambiguity around the triggering of the obligation to report?	While a 'reasonable person' test would reduce the level of ambiguity, the definition is still open to a level of interpretation. Specific guidance on what breaches ASIC expects to be reported regardless of the operational scale would assist to further remove ambiguity.
2.1	What would be the implications of this extension of the obligation of licensee's to report?	Large Licensees may need to report potential or actual breaches more often to ASIC however, this change if implemented may provide ASIC and the industry with valuable data on issues faced by the industry to meet their obligations.

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3.1	Would the threshold for the obligation to report outlined above be appropriate?	This measure is supported as it is QSuper's belief this will add consistency across all organisations regarding reporting breaches.
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?	QSuper's view is that this will impose a regulatory burden on licensees as well as an administrative burden on ASIC in having to deal with an influx of minor and significant reports, as well as potentially introducing a further layer of ambiguity on the standard of breach required to trigger the obligation to report.
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?	The current 10 day threshold can pose challenges where an assessment and decision to report is necessary. As such QSuper supports the introduction of measures to reduce ambiguity and facilitate timely decision making by Licensees.
3.4	Would the adoption of such a regime have a cost impact, either positive or negative, for business?	It is QSuper's views that clearer guidelines that remove some of the current ambiguity with regarding to reporting will be a positive outcome. The cost impact will be determined by the effectiveness of the measures introduced.

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4.1	What is the appropriate consequence for a failure to report breaches to ASIC?	The suggested introduction of civil penalties, infringement notices and increasing the monetary and custodial penalties is supported.
4.2	Should a failure to report be a criminal offence? Are the current maximum prison term and monetary penalty sufficient deterrents?	<p>Failure to report should be a criminal offence.</p> <p>A criminal offence may also be appropriate for repeated breaches where civil penalty or infringement notices have been ignored.</p> <p>An increase in the monetary and custodial penalties applied to reflect the importance of the obligation and community expectations is supported.</p>
4.3	Should a civil penalty regime be introduced?	<p>We agree with ASIC's view that the sanction of a criminal offence for non-reporting is essential.</p> <p>As stated above, we agree with the suggested introduction of a civil penalty regime, infringement notices and increasing monetary and custodial penalties</p>
4.4	Should an infringement notice regime be introduced?	<p>QSuper is supportive of ASIC issuing infringement notices for simple and minor breaches that do not involve a deliberate failure to report.</p> <p>An appropriately governed infringement notice regime will give ASIC more flexibility in responding to failures to report minor breaches</p>

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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?	<p>Incentives as outlined may be suitable during an initial period following the introduction of a new reporting regime.</p> <p>After the initial period has concluded, ASIC should have discretion to continue using incentives depending on the type of breaches and non-reporting detected.</p>
5.1	Is there a need to prescribe the form in which AFS licensees report breaches to ASIC?	QSuper is of the understanding that there is a prescribed form now available to Licensees to report breaches however its use is not currently mandated.
5.2	What impact would this have on AFS licensees?	The mandated use of a prescribed form will enable Licensees to quickly and efficiently supply ASIC with requisite information.
6.1	Should the self-reporting regime for credit licensees and AFS licensees be aligned?	QSuper supports the alignment of the self-reporting requirements between AFSL and ACL holders.

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6.2	What will be the impact on industry?	QSuper believes the aligning of the self-reporting regime will lift standards regarding reporting of breaches, and place participants on a level playing field.
7.1	Should the self- reporting regime for responsible entities be streamlined?	This measure is supported. Streamlining may encourage more regular reporting of breaches as well as standardising breaches under the various entities and, establish consistency between AFS Licensee, ACL and Responsible Entities.
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?	It is QSuper's view that s601FC should be incorporated into section 921D with references to the former self reporting obligations that applied under that section. There are inconsistencies in the trigger and time frame for reporting between the two sections and we believe incorporating the obligations can address these inconsistencies.
8.1	What would be the implications for licensees of a requirement for ASIC to report breach data at the licensee level?	<p>QSuper are concerned that ASIC publically reporting breach data to the licensee level may result in licensees adopting a more conservative approach when determining if a matter is considered significant and should be reported to ASIC.</p> <p>Whilst the measures proposed in the consultation paper should assist to reduce subjectivity, it will not be eliminated. Given the potential associated reputational risk licensees may elect to withhold reporting borderline matters. Thereby removing valuable intelligence regarding the adequacy of licensee compliance arrangements from ASIC.</p> <p>"Bad Apples" in the industry are also less likely to report significant matters to ASIC. As a result the public publication of breach information at a licensee level will likely reflect unfairly on the honest licensees.</p>

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8.2	Should ASIC reporting on breaches at a licensee level be subject to a threshold? If so, what should that threshold be?	<p>As indicated in 8.1 above, QSuper are concerned that publically reporting breaches at the licensee level may work against the transparency for consumers ASIC seeks to achieve.</p> <p>Introducing a threshold will likely exacerbate behaviour to either under report matters to or invest in systems process and controls to identify compliance breaches.</p> <p>The introduction of a breach reporting threshold may have the effect of Licensees trying to limit the scope or scale of their breach reporting in order to gain an advantage from comparing favourably to their peers in ASIC reporting.</p>
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?	<p>As indicated in 8.1 above, QSuper are concerned that publically reporting breaches may work against the transparency for consumers ASIC seeks to achieve. Due to the varied structure and scale of licensees across the industry, QSuper questions the value to consumers of providing further information such as operational unit.</p>