Breach Reporting Workflow Chart

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About Gadens Breach Manager

Gadens Breach Manager Video

Link to Corps Act

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Financial Sector Reform (Hayne Royal Commission Response - Breach Reporting and Remediation) Regulations 2021

Any **significant** breach, or likely significant breach, of the **core obligation** must be reported to ASIC (s 912D(3) CA and s50A(3) NCCPA).

Key
The boxes coloured grey outline the process for determining whether a breach is deemed significant and thereby automatically reportable.

This is the workflow for determining the reportability, including 1,500+ civil / criminal penalty 'deemed significant breaches', of a potential financial services breach incorporated into the AFSL / ACL module of the Gadens Automated Breach Manager. There are many other modules, including FAR, OAIC, APRA, AML / CTF, LICOP and COBCOP, for which different flow charts have been created.

Step 1. Has a core obligation been breached?

Corporations Act

The following are **core obligations** (s 912D(3) CA)

A. General Obligations s912A and 912B ~ but not s912A(1)(c)
B. Specific Obligations under s912A(1)(c)
C. Other Obligations under other Commonwealth Legislation regarding financial services
D. Traditional Trustee Company Obligations

General Obligations

Ss 912A and 912B C A ~ ***but not** s912A(1)(c)*

- do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly;
- have adequate arrangements to manage conflicts of interest:
- comply with the conditions of your licence;
- take reasonable steps to ensure that your representatives comply with the financial services laws;
- if you are the operator of an Australian passport fund, or a person with responsibilities in relation to an Australian passport fund - comply with the law of each host economy for the fund;
- comply with the ASIC reference checking and information sharing protocol
- have adequate resources to provide the financial services and to carry out supervisory arrangements - unless you are a body regulated by APRA (see RG 79.151--RG 78.152);
- be competent to provide the financial services;
- have trained and competent representatives;
- have an IDR procedure for retail clients that complies with standards and requirements made or approved by ASIC in accordance with the regulations
- have adequate risk management systems - unless you are a body regulated by APRA (see RG 78.151-RG 78.152);
- have compensation arrangements in accordance with s912B; and
- comply with any other obligations prescribed by Corporations Regulations, including the requirement to cooperate with AFCA.

Specific Obligations

To comply with the 'financial services laws' (defined in s761A), but only those parts that are set out in s912D(3)(b) CA, which are:

- Ch 5C of the *Corporations Act* (managed investment schemes);
- Ch 5D of the *Corporations Act* (licensed trustee companies);
- Ch 6 of the *Corporations Act* (takeovers);
- Ch 6A of the *Corporations Act* (compulsory acquisitions and buyouts);
- Ch 6B of the *Corporations Act* (rights and liabilities about Ch 6 and 6A matters);
- Ch 6C of the *Corporations Act* (information about ownership of listed companies and managed investment schemes);
- Ch 6D of the *Corporations Act* (fundraising);
- Ch 7 of the *Corporations Act* (financial services and markets);
- Ch 8A of the *Corporations Act* (Asia Region Funds Passport);
- Ch 9 of the *Corporations Act* (miscellaneous), but only as it applies to the chapters of the *Corporations Act* listed above;
- a provision of the Passport Rules for this jurisdiction; and
- Div2 of Pt 2 of the *ASIC Act* (unconscionable conduct and consumer protections for financial services) and related regulations under the *ASIC Regulations*.

Other Obligations

Obligations under other Cth Legislation regarding financial services (listed in reg 7.6.02A CR):

- *Australian National Registry of Emissions Units Act 2011*;
- *Banking Act 1959*;
- *Carbon Credits (Carbon Farming Initiative Act) 2011*;
- *Clean Energy Act 2011* (no longer in force);
- *Financial Sector (Collection of Data) Act 2001*;
- *Financial Sector (Shareholdings) Act 1998*;
- *Financial Sector (Transfer of Business) Act 1999*;
- *Insurance Acquisitions and Takeovers Act 1991*;
- *Insurance Act 1973*;
- *Insurance Contracts Act 1984*;
- *Life Insurance Act 1995*;
- *Retirement Savings Accounts Act 1997*;
- *Superannuation Industry (Supervision) Act 1993*;
- *Superannuation (Resolution of Complaints) Act 1993*.

Traditional Trustee Company Obligations

Traditional trustee company services provided by a licensed trustee company must also comply with the 'financial services laws' (s761A(d) and (e))
(d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services;
or
(e) in relation to a financial services licensee that is a licensed trustee company (in addition to paragraphs (a) to (d)) - any rule of common law or equity that covers conduct relating to the provision of financial services that are traditional trustee company services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of such services.

NCCPA

For credit licensees, the following are **core obligations** (s50A(3) NCCPA)

A. General Obligations s47 NCCPA- but not s47(I)(d)
B. Specific Obligations under s47(1)(d)
C. Other Legislation under Commonwealth Legislation regarding credit activities.

General Obligations

s47 NCCPA ~ **but not** s47(1)(d)

- do all things necessary to ensure that the credit activities covered by your licence are provided efficiently, honestly and fairly;
- have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives;
- comply with the conditions of your licence;
- take reasonable steps to ensure that your representatives comply with the credit legislation;
- comply with the ASIC reference checking and information sharing protocol;
- be competent to engage in the credit activities covered by your licence;
- have trained and competent representatives;
- have an IDR procedure that complies with standards and requirements made or approved by ASIC in accordance with the regulations;
- be a member of AFCA;
- have compensation arrangements in accordance with s48 of the National Credit Act;
- have adequate arrangements to ensure compliance with your obligations under s47 of the National Credit Act;
- have adequate resources available to engage in the credit activities covered by your licence and carry out supervisory arrangements (unless you are a body regulated by APRA - see RG 78.151-RG 78.152);
- have adequate risk management systems (unless you are a body regulated by APRA - see RG 78.151-RG 78.152); and
- comply with any other obligations prescribed by the National Credit Regulations.

Specific Obligations

To comply with the ***'credit legislation'*** (defined in s5), so far as it relates to all provisions of the:

- *National Credit Act* (including the *National Credit Code*);
- *National Consumer Credit Protection (Transitional and Consequential Provisions)* Act 2009;
- Div 2 Pt 2 of the *ASIC Act* (unconscionable conduct and consumer protections for financial services); and
- related regulations under the *ASIC Regulations*.

Other Obligations

Broad obligation to comply with Commonwealth legislation that covers conduct relating to credit activities, but only in so far as it relates to such conduct.

Step 2. Is the breach 'significant' or 'likely significant?'

The Significance Test

The breach will be sigificant if the breach is:

- Punishable on conviction by a penalty that may include imprisonment and breaches of **civil penalty provisions**; or
- Consitutes misleading or deceptive conduct; or
- Results, or likely results, in **material loss or damage**; or
- '**Significant**' under a subjective test.

Criminal & Civil Provisions

Imprisonment Offences
Breaches that constitute the commission of an offence and the commission of the offence is punishable on conviction by a penalty that may include imprisonment for:

- Three months or more if the offence involves dishonesty; or
- 12 months or more in any other case.

Civil Penalty Provisions
Breaches of a **non-exempted** civil penalty provision.

Misleading or Deceptive Conduct

s1041H(1) of the *Corporations Act*.

s12DA(1) of the *Australian Securities and Investments Commission Act*.

Material Loss or Damage

Breaches that result, or likely result, in material loss or damage to:
(For AFS licensees)

- In all cases - a person or persons to whom the AFS licensee or a representative of the licensee provides a financial provides a financial product or a financial service as a wholesale or retail client;
- In the case of a managed investment scheme - a member or members of the scheme; or
- In the case of a superannuation entity - a member or members of the entity.

Meaning
Material Loss or Damage has its ordinary meaning of financial and non-financial loss or damage.

Whether the breach does, or is likely to result in material loss or damage is circumstantial.

Otherwise Significant Test

s912D(5) *Corporations Act*

The breach's significance will be determined having regard to:

- The number or frequency of similar breaches;
- The breach's impact on the licensee's ability to provide financial services covered by the licence;
- The extent to which the breach indicates that the licensee's arrangement to ensure compliance with those obligations are inadequate;
- Any other matters prescribed by the regulations for the purposes of this paragraph.

Step 3. Do any exceptions apply?

Exceptions

The following civil penalty provisions will not be significant breaches of a core obligation - CR 7.6.02A(2):

- **798H** - Not complying with Market Integrity Rules.
- **901E** - Not complying with Derivative Transaction Rules.
- **922M** - Not lodging a notice in compliance with s922L.
- **941A-941B** - Not providing a financial Services Guide in compliance with Part 7.7 Div 2.
- **962G** - Not providing annual fee disclosure statements for ongoing fee arrangements.
- **962S** - Fee recipient arranging for ongoing fee deduction without account holder acceptance or consent.
- **962U** - No confirmation provided where fee recipient withdraws or varies fee deduction.
- **962V** - Failed to notify account holder that the fee recipient's consent to fee deductions has ceased.
- **981B** - Failed to pay money into an account.
- **981C** - Failed to maintain accounts relating to s981B in a manner required by the *Regulations*.
- **1012A-1012C** - Not providing Product Disclosure Statement.
- **1017BA-1017BB** - Trustee of SuperFund failed to make the following publicly available:
  - product dashboard;
  - asset investment information.
- **1021E** - Provided defective disclosure document or statement.

AND

- all civil penalty provisions of Commonwealth legislation that is specified in CR 7.6.02A(1).

Step 2. Is the breach 'significant' or 'likely significant?'

The Significance Test

The breach will be sigificant if the breach is:

- Punishable on conviction by a penalty that may include imprisonment and breaches of civil penalty provisions; or
- Consitutes misleading or deceptive conduct; or
- Results, or likely results, in **material loss or damage**; or
- 'Significant' under a subjective test.

Criminal & Civil Provisions

Imprisonment Offences
Breaches that constitute the commission of an offence and the commission of the offence is punishable on conviction by a penalty that may include imprisonment for:

- Three months or more if the offence involves dishonesty; or
- 12 months or more in any other case.

Civil Penalty Provisions
Breaches of a **non-exempted** civil penalty provision.

Credit Code Key Requirements
For credit licensees, breaches that constitute a contravention of a **non-exempted key requirement** under s111 of the National Credit Code.

Misleading or Deceptive Conduct

s1041H(1) of the *Corporations Act*.

s12DA(1) of the *Australian Securities and Investments Commission Act*.

Material Loss or Damage

Breaches that result, or likely result, in material loss or damage to a **'credit activity client'** of the licensee.

Meaning
Material Loss or Damage has its ordinary meaning of financial and non-financial loss or damage.

Whether the breach does, or is likely to result in material loss or damage is circumstantial.

Otherwise Significant Test

s50A(5) Credit Act

The breach's significance will be determined having regard to

- The number or frequency of similar breaches;
- The impact of the breach on the credit licensee's ability to provide financial services covered by the licence;
- The extent to which the breach indicates that the credit services licensee's arrangement to ensure compliance with those obligations are inadequate;
- Any other matters prescribed by the regulations for the purposes of this paragraph.

Credit Activity Client

s50A(6) National Credit Act

A person is a credit activity client if the person is a consumer who:
(a) is party to a credit contract, or will be party to a proposed credit contract, in which the licensee, or a representative, performs the obligations, or exercises the rights, of a credit provider; or
(b) is a person to whom the licensee, or a representative, provides a credit service; or
(c) is party to a consumer lease, or will be party to a proposed consumer lease, in which the licensee, or a representative, 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 which the licensee, or a representative, performs the obligations, or exercises the rights of a mortgage; or
(e) is the guarantor under a guarantee, or will be the guarantor under a proposed guarantee, in which the licensee, performs the obligations, or exercises the rights, of a beneficiary under the guarantee; or
(f) is a person in which the licensee, or a representative, engages in a prescribed activity mentioned in item 6 of the table in subsection 6(1).

Step 3. Do any exceptions apply?

Exempted Key Requirements

The following key requirement under the National Credit Code will not be significant breaches of a core obligation - *NCCPR* s12B:

- **17(3)** - Credit contract not containing credit amount.
- **17(4)** - Credit contract not containing percentage rate under contract.
- **17(5)** - Credit contract not containing the method of interest calculation and frequency of interest debits.
- **17(6)** - Failing to outline total interest charges in 7 year period.
- **17(8)(a)-(b)** - Failing to state fees and charges that are or may become payable under the contract or, failing to state fee or charge amounts, or if not ascertainable the calculation method for fees or charges.
- **17(9)** - Failing to state in the credit contract that the annual percentage rate, fee amount or, frequency of payment or instalment may be changed.
- **17(11)** - Failing to include default rates in a credit contract.
- **17(15)(a)-(b)** - Failing to identify, under a credit-related insurance contract, the insurer and the amount payable to the insurer.
- **17(15A)** - Credit contract for reverse mortgage not containing provisions which:
  - allow the debtor to, at any time, nominate a person to occupy the property and revoke such a nomination by notice;
  - grants a nominated person the same rights to occupy the property as the debtor.
- **34(6)** - Credit contract not containing a statement of the interest debited and any change to the annual percentage rate since the last statement period.
- **35** - Opening balance shown on successive statement of account exceeds the closing balance shown on the last statement of account.

Excempted Civil Penalty Provisions

The following civil penalty provisions under the *NCCPA* will not be significant breaches of a core obligation - *NCCPR* s12A:

Licensing -

- **52(2)** - Failing to cite Australian credit licence number in a prescribed document.
- **53(1)** - Failing to lodge annual compliance certificate within 45 days, or prescribed time by ASIC.
- **53(4)** - If the signators to the compliance certificate fail to ensure the certificate is lodge in accordance with this section.
- **71(1)-(2)** - Failing to, within 15 days, provide ASIC with written notice of a new credit representative being authorised.
- **71(4)** - Failing to, within 10 days, provide ASIC with written notice of any changes or revocations of credit representative authorisations.
- **88(1)** - Failing to keep financial records that correctly record and explain the transactions and financial position of any business engaging in credit activities carried on by the licensee.

Credit Contracts -

- **113(1)** - Failing to, as soon as practicable after it becomes apparent that the licensee is likely to provide credit assistance to a consumer, provide a consumer with the licensee's credit guide.
- **120(1)** - Failing to, upon request, provide the consumer with a copy of their preliminary assessment within:
  (a) 7 business days if request made within 2 years of quote; otherwise -
  (b) before the end of 21 business days.
- **124B(1)** - Failing to, in accordance with the regulations and at a place prescribed, display information about the small amount credit contracts, after a representation was made that the licensee provides, or is able to provide, credit assistance in the form of small amount credit contracts.
- **126(1)** - Failing to, as soon as practicable after it becomes apparent to the licensee that it is likely to enter a credit contract, provide the consumer (who will be the debtor under contract) with a credit guide in accordance with subsection (2).
- **127(1)** - Failing to, as soon as practicable after the licensee becomes a credit provider under a credit contract, provide the consumer (who will be the debtor under contract) with a credit guide in accordance with subsection (2).
- **- 132(2)** - Failing to provide a copy of the credit contract assessment:
  - if requested within 2 years of credit contract's start date - within 7 business days; otherwise -
  - before the end of 21 business days.
    Note: Only applicable if consumer requests assessment within 7 years of the credit contract's start date.

Standard Home Loans -

- **133AC(2) -** Website fails to:
  - display that the consumer may use the website to generate and print an up-to-date Key Facts Sheet for standard home loans; or
  - detail what information is needed to generate the Key Facts Sheet/s; or
  - comply with other regulator requirements.
- **133AD(2)** - Generally failing to provide consumer with a Key Facts Sheet containing up-to-date information for the standard home loan/s, and any other relevant information required under regulation.
- **133AE(2) -** Failing to tell the consumer what information is needed to prepare a Key Facts Sheet.

Credit Card Contracts -

- **133BC(1)** - Failing to provide Key Facts Sheet upon providing the consumer with an application form for a credit card contract.
- **133BD(1)** - Credit card contract entered into or offered without providing an up-to-date Key Facts Sheet.
- **133BFA(2)** - Website fails to:
  - display how a consumer may request a reduction in credit limit through the website;
  - detail what information is needed to request a reduction;
  - be available on the online reduction date.
- **133BJ(1)** - Failure to keep record consents under s 133BI and/or withdrawals of consents.
- **133BU(2)** - Website fails to:
  - display how the consumer may terminated the credit card contract;
  - detail what information is needed to request a termination;
- be available on the online termination day.

Exempted Civil Penalty Provisions Continued

Supplying information to Credit Reporting Bodies -

- **133CR(3)** - Failure of an eligible licensee to provide the mandatory initial bulk supplies of credit information to each eligible credit reporting body before the required time frames under subsection (a).
- **133CU(1)** - Failure to provide ongoing credit information to credit reporting body within specified time (see the provision for specifics).

Reverse Mortgages -

- **133DC(2)** - Failure to make available through the website a reverse mortgage information statement.
- **133DD(2)** - Failure to provide a reverse mortgage information statement which is in accordance with the regulations.
- **133DE(1)-(2)** - Using the phrase 'reverse mortgage' (or another term of similar import) when providing or offering an credit contract or mortgage.

Consumer Leases -

- **136(1) -** Failing to, as soon as practicable after it becomes apparent that the licensee is likely to provide credit assistance to a consumer, provide a consumer with the licensee's credit guide;
- **143(1)** - Failing to, upon request, provide the consumer with a copy of their preliminary assessment within:
  - (a) 7 business days if request made within 2 years of quote; otherwise -
  - (b) before the end of 21 business days.
- **149(1)** - Failing to, as soon as practicable after it becomes apparent to the licensee that it is likely to enter a consumer lease, provide the consumer (who will be the lessee under lease) with a credit guide in accordance with subsection (2).
- **150(1)** - Failing to, as soon as practicable after the licensee becomes a credit provider under a consumer lease, provide the consumer (who will be the lessee under lease) with a credit guide in accordance with subsection (2).
- **155(2)** - Failing to provide a copy of the consumer lease assessment:
  - if requested within 2 years of consumer lease's start date - within 7 business days; otherwise -
  - before the end of 21 business days.
    Note: Only applicable if consumer requests assessment within 7 years of the consumer lease's start date.

Credit Representatives

- **158(1) -** Failing to, upon providing the consumer the licensee's credit guide, give the credit representative's credit guide at the same time and in accordance with subsection (2).

Debt Collectors -

- **160(1)-(2)** - Failure to, as soon as practicable after it becomes authorised by a credit provider/lessor to collect repayment, give credit guide in accordance with subsection (3).

General Rules -

- **160B(1) -** Using the words 'independent', 'impartial', 'unbiased' (or another term of similar import) when providing or offering a credit service.
- **160C(1)** - Using the terms 'financial counsellor', 'financial counselling', or another term of similar import when providing or offering a credit service.
- **238D** - Breaching an enforceable code provision if the person holds out that they comply with an code of conduct.

AND

- **174(3)** (*National Credit Code*) - Consumer lease entered into without adhereing to the disclosure requirements of subsection (1).