

Submission

to the

Commerce Commission

on the

Consultation Draft: *Self-reporting Guidance for Lenders*

28 June 2024



About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - China Construction Bank
 - Citibank N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank N.A.
 - KB Kookmin Bank Auckland Branch
 - Kiwibank Limited
 - MUFG Bank Ltd
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Commerce Commission (**Commission**) on the Consultation Draft: *Self-reporting Guidance for Lenders* (**Guidance**). NZBA commends the work that has gone into developing the Guidance.
5. Our member banks are supportive, in principle, of the purpose of the Guidance to facilitate proactive self-reporting of potential breaches of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) and / or the Fair Trading Act 1986 (**FTA**).
6. However, as expanded upon below, we have identified concerns relating to the:
 - 6.1. distinction between “early flag reporting” and “self-reporting”;
 - 6.2. level of detail and timeframes required in Stage One and Stage Two reports; and
 - 6.3. uncertainty regarding investigation and enforcement processes, including the implications for potential class-action suits.

Early flag reporting

7. The Guidance indicates that only a “self-report” that meets all of the requirements set out in the Guidance (i.e. that the self-report must include certain detailed and specific information that will take time to gather) will be taken into consideration when the Commission is considering which enforcement response is appropriate, and distinguishes a “self-report” from “early flag reporting”.
8. The Guidance is not clear whether a lender will get any credit (or the same credit) for “early flag reporting”, or whether it will just receive credit for self-reporting that meets the two-stage reporting set out in the Guidance. If it is intended that no credit will be provided for early flag reporting:
 - 8.1. We are concerned that the Commission intends to treat lenders differently from traders in other industries, noting that the Guidance relates to lenders only. If, for example, an energy company reported an issue, we understand that the Commission does not require that company to provide certain information up front and within certain timeframes to get credit for that report. It is important that the Commission takes a consistent approach to co-operation and self-reporting, and that the Commission does not require lenders to proactively provide more information or comply with a stricter process than other industries in applying its enforcement criteria.
 - 8.2. Depending on the nature of the issue (i.e. complexity, duration, number of customers impacted and dollar value), it may take banks some time to get to the self-reporting stage. Implementing the process set out in the Guidance is likely to result in a delay of a “self-report” until all the information is obtained.



We are concerned that a “delay” in self-reporting would be treated as an aggravating factor. There are instances where the FMA has expressed concerns about delays in bringing compliance issues to their attention.

9. NZBA therefore submits that the Guidance should be clearer about how the Commission will treat “early flag” reporting at an early stage, rather than an entity waiting until it has compiled all of the information required for a “stage one” self-report.
10. Further, we submit that the Commission should treat self-reporting to another regulator as a qualifying report if it receives a copy of the notification. Self-reports should not remove the requirement for regulators to discuss whether something falls within their enforcement remit or not. Lenders should do their best to report to the most appropriate regulator, but financial services regulation is complex and overlapping. Lenders should not be penalised for getting it wrong.

Self-reporting requirements

General

11. NZBA submits that the level of detail proposed in the Guidance for reporting during initial investigative stages is too granular and rigid. The level of granularity required does not align with how investigations into incidents and subsequent remediation programmes play out, particularly within the timeframes set by the Guidance.
12. As noted above, the level of detail required within each stage of reporting may have an unintended consequence of some organisations delaying the initial self-report in order to be able to complete the required information, effectively acting as a disincentive to self-report matters in a timely manner – particularly for investigations that are complex or of a significant scale.
13. A more flexible, principle-based approach would, in our view, be preferable, as the circumstances of potential breaches can greatly vary.

Stage One

14. It is helpful that the Guidance acknowledges the time that it can take to fully assess a matter. However, it still says that the minimum requirements of a first report are that an entity should have gathered sufficient information, and include a full description of the issue (including the six listed details). This can be challenging due to the complexity of the relevant legislation (particularly the CCCFA) and when dealing with historic matters or issues that occur across different customer groups or channels, and that have a broad fact base.
15. While it is helpful to have a comprehensive list of factors that the Commission would like to see in a Stage One self-report, this level of prescriptive detail does pose risk of



unintended consequences for organisations that are not able to provide all of the specified information in a timely manner due to complexity. The Stage 1 process will likely lead to slower self-reports, as outlined above.

16. For example, it is unreasonable to expect a lender to explain why they are reporting an issue and to specify the sections of the CCCFA and / or FTA that are applicable. Situations warranting a self-report are often complex, and this seems like a requirement to admit liability, which should not be part of self-reporting requirements. Admissions of liability are subject to separate consideration in respect of negotiated settlements. Further (and as expanded upon below), this requirement could increase the risk of class action lawsuits and could disadvantage the lender if the situation escalates.

Stage Two

17. NZBA submits that the three-month timeframe to provide further information under a “Stage Two” report is unrealistic, arbitrary and does not account for the varied range of issues that lenders would expect to provide the Commission, which can range from straightforward to highly complex.
18. For example, in assessing a potential issue, a lender may need to:
 - 18.1. identify and scope the issue, and determine the root cause;
 - 18.2. fix the issue (which may be a lengthy process if a technology solution is required), and prepare the remediation business rules;
 - 18.3. contract with external data consultants to build the data set necessary to determine the number of customers affected by the issue and the financial impact (which could take between one to three months, or more depending on the complexity of the remediation); and
 - 18.4. throughout this process, obtain all relevant approvals from internal stakeholders.
19. Although we suspect the Commission would approach an extension request with reasonableness, it seems to be a requirement that lacks fairness and that will place organisations that are trying to be compliant on the back foot.
20. We submit that it would be more consistent with natural justice for the Commission to strike a balance between efficiency and fairness, and to allow organisations adequate time to close out their processes and reporting.
21. Further, the concept of the two-stage reporting process raises more general questions – e.g. if a Stage Two report isn’t provided, would that mean the initial self-report doesn’t qualify? We submit that continued engagement with the Commission on a



self-reported matter should constitute ongoing co-operation, rather than being a requirement of the self-report itself.

Investigation / Enforcement

22. It is unclear how the Guidelines interact with the Commission's Investigation Guidelines, particularly in circumstances where it may take a long time to get to a Stage One or Stage Two report. We would appreciate clarification on whether a decision on an investigation would go through screening and prioritisation only once a Stage Two report has been provided.
23. There may also be self-reported matters that the Commission does not consider to be a priority and that would otherwise not pass screening – it is unclear whether any indication would be given prior to a Stage Two report for these matters too.
24. There could be implications for organisations that have obligations to disclose material investigations (e.g. to insurers or investors) if material matters continue for extended periods without confirmation on whether an investigation will go ahead.
25. We submit that the Commission needs to ensure it appropriately calibrates its enforcement response so as not to deter self-reporting by compliant, conscious industry participants.

Class Actions

26. The Guidance reiterates that all information provided to the Commission, including self-reports, can be requested under the Official Information Act (**OIA**), and that the Commission may not have grounds to withhold it.
27. We submit that the Guidance needs to take account of the changing litigation landscape, in particular the emergence of class actions that might make use of any settlement or other outcome with the Commission. The details of a report, if obtained by class action funders, could be used to bring further claims, and this potential risk may inform how and what participants can self-report. We consider this risk would be mitigated if the Commission acts on our feedback regarding the proposed level of detail for self-reporting.

Conclusion

28. NZBA is happy to provide further detail on the above submission if useful.