

28 January 2022

Financial Regulator Assessment Authority
The Treasury
Langton Crescent
Parkes ACT 2600

By email: FRAA@treasury.gov.au

Dear Sir/Madam

Assessment of the Australian Securities and Investments Commission (ASIC)

1. This submission relates to the assessment of ASIC announced by the Financial Regulator Assessment Authority (**Authority**) on 29 November 2021. It has been prepared by the Financial Services Committee and the Corporations Committee of the Business Law Section (**BLS**) of the Law Council of Australia (**Committees**).
2. The Committees thank the Authority for the opportunity to contribute to the assessment process.
3. Key questions posed by the Authority and responses from the Committees thereto are set out below. Where possible, we have provided some examples, which are based upon the observations of members of the Committees.

Assessment of the effectiveness and capability of ASIC's strategic prioritisation, planning and decision making

1. Does ASIC have a clear and effective framework for setting strategic priorities and making decisions consistent with those strategic priorities?

4. Members of the Committees do not participate in the internal ASIC process for setting strategic priorities. However, the Committees consider that ASIC clearly communicates its strategic priorities to the public through the publication of its Corporate Plan.
5. The Committees' general observation is that ASIC's strategic priorities are commonly factored in to decisions made by more senior staff members. However, among more junior staff members, at times there are decisions made which do not appear to have a strong alignment with those strategic priorities.

6. In particular, the Committees commend the approach that ASIC takes with respect to financial reporting. ASIC publishes media releases for each half-year reporting period outlining the areas of focus. This gives the accounting profession advance notice of the matters which are important to ASIC and improves the quality of financial reports ultimately lodged with ASIC. The Committees are of the view that if ASIC was to adopt a similar approach to regulatory activity impacting other industry sectors, this would be welcomed by the industry and assist ASIC in securing desired behavioural outcomes from its regulated population.

2. How effective is ASIC's process for identifying risks, and addressing these risks through its strategic prioritisation and decision-making? How effectively is data and technology utilised to inform these processes?

7. The Committees believe that ASIC is generally proactive in seeking to identify risks and, to some extent, is effective in doing so.
8. The Financial Services Committee commends the approach taken by ASIC at the beginning of the COVID-19 pandemic with respect to illiquid registered managed investment schemes. ASIC identified the risks associated with consumers potentially becoming short of funds unexpectedly and seeking hardship withdrawals from registered managed investment schemes, based upon its prior experience of the global financial crisis. ASIC granted relief to facilitate withdrawals from frozen funds on hardship grounds. ASIC also reviewed the liquidity management frameworks and practices of responsible entities in the second half of 2020.
9. The Financial Services Committee is of the view that ASIC could be more proactive in identifying unregulated products and services which are not within its regulatory remit but could pose a threat to financial stability and communicating with Treasury, other regulators and the public about these matters.
10. The Committees also strongly believe that ASIC should improve its engagement and coordination with other regulators with respect to risks which are common across different regulatory regimes, such as cyber security, to ensure that affected members of the regulated population receive consistent guidance and treatment from regulators.
11. The Committees do not believe that ASIC's current methods and resources for the collection of data are optimal.
12. The Committees' experience is that ASIC requests significant amounts of data from its regulated population, often at short notice, which results in significant compliance costs to the industry and is not efficient. It appears as though ASIC expects or assumes that data is available or obtainable from its regulated population in the format required by ASIC within these short timeframes, which in the Committees' experience is not necessarily realistic or reasonable. The Committees strongly recommend that ASIC should be encouraged to allow its regulated population sufficient time to provide ASIC with the data and information that ASIC requests, including being sympathetic to requests for extensions of time to provide it.
13. The Committees also note that compulsory notices issued by ASIC to obtain data are on occasions very broadly framed and therefore follow-up discussions are necessary to clarify the true scope of information that ASIC is seeking to obtain.

14. While data and technology, when deployed appropriately, can play a valuable role in the regulatory tool kit, the Committees support ASIC's current practice of having regular informal discussions with industry representative groups to identify risks to inform the setting of strategic priorities and making of decisions.

3. How effective is ASIC in implementing its strategic priorities and decisions, and allocating resources to give effect to them?

15. The Committees note that the setting of strategic priorities and the associated resource allocation needs to be flexible, to allow for unanticipated events that may require diversion of resources away from existing projects (which may result in a need to reconsider the target timeframe). The Committees recognise that ASIC's resources are not unlimited and careful decisions need to be made when it comes to allocation.
16. ASIC clearly communicated which projects were placed on hold and extended compliance deadlines for some regulatory reforms in response to the COVID-19 pandemic in 2020. However, although disruption continued through 2021, there appeared to be less flexibility and willingness to defer the onset of compliance obligations, despite the fact that ASIC guidance on some of the new obligations that commenced in October 2021 (for example, hawking, breach reporting and product design and distribution obligations) was only published a short time before those obligations commenced. This did not allow the industry sufficient time to prepare their compliance arrangements with a view to meeting the final expectations communicated by ASIC. The Financial Services Committee questions whether this delay was a result of:
- (a) a sub-optimal balance between resourcing of enforcement matters versus policy development; and/or
 - (b) internal consultation and decision making procedures within the organisation, which could have slowed down the decision making process and therefore delayed the release of guidance the industry needed to prepare for the onset of new reforms.
17. The Committees would prefer to see, where possible, staggered releasing of new or updated policies, rather than a large number of initiatives being announced simultaneously or within a compressed timeframe.

4. Are there processes and systems in place to effectively monitor and oversee ASIC's decision-making to ensure decisions give effect to the direction and strategic priorities set by ASIC? Do these processes and systems result in appropriate consistency of decision-making across all levels of ASIC decision makers?

18. Overall, the Committees believe that ASIC genuinely strives for consistency in its decision making and to ensure that decisions are consistent with strategic priorities.

As noted above, the Committees consider that there is greater alignment between decisions and strategic priorities at the more senior levels of the organisation.

19. The Committees anticipate that, because staff have worked from home during long periods through the pandemic, it has been more difficult for junior staff to be trained and supervised appropriately (a problem which is of course not unique to ASIC). The Committees believe that some inconsistency in decision making and lack of

understanding in relation to particular issues that members have witnessed could be attributable to this.

5. Is ASIC's strategic prioritisation and decision-making framework clearly communicated to and understood by ASIC staff and external stakeholders?

20. The Committees are comfortable that ASIC clearly communicates its strategic priorities to external stakeholders. Reports on decisions such as relief applications, licensing applications and enforcement outcomes help provide transparency.
21. The Committees also note that as a regulator ASIC has to provide supporting documents, such as regulatory impact statements and statements on compatibility with international human rights standards, for significant policy initiatives. These requirements are aimed at ensuring transparency and accountability in government decisions, but in the Committees' experience they can also slow down the policy development process.
22. The Committees do not consider that it is necessary to change how ASIC communicates its determined strategic priorities and decision making with external stakeholders, but would welcome more informal liaison with external stakeholders earlier on in the process to inform decisions on what the strategic priorities are.
23. The Committees would also like ASIC to be more proactive in external stakeholder engagement when it comes to developing its understanding of the operational changes required to address regulatory obligations and the expectations communicated by ASIC.
24. The Committees are not privy to internal communications at ASIC and has nothing to add to the earlier comment that, on the whole, senior staff members tend to show a greater awareness of ASIC's strategic priorities than those at more junior levels within the organisation.

Assessment of the effectiveness and capability of ASIC's surveillance function

1. How does ASIC make decisions about the prioritisation and resourcing of surveillance activities?

25. The Committees do not have relevant knowledge on this issue.

2. To what extent are ASIC's surveillances targeted, efficient, and proportionate? Are those surveillances effective?

26. The Committees are of the view that ASIC has significantly bolstered the resources allocated to enforcement activities and outcomes in recent times. Significant amounts have also been spent on outsourced legal services to bring some matters before the courts. The Corporations Committee's view is that ASIC could well spend more of the resources which are allocated to enforcement targeting "criminal", "quasi-criminal" or "particularly egregious" behaviour where investors or creditors are at serious risk of suffering a loss.
27. The Financial Services Committee considers that other parts of ASIC may have been under-resourced in favour of enforcement and that the impact of less adversarial regulatory activities (such as licensing and policy development) may be undervalued.

3. To what extent does ASIC have the appropriate data, technology, and systems to allow it to detect risk, harm and misconduct, prioritise issues, and conduct surveillances?

28. As noted above, the Committees are of the view that there is room for improvement in ASIC's data collection methods and technological capability. Some existing processes for collecting information from the regulated population, such as issuing notices that require large volumes of documents to be produced, are costly and inefficient.
29. When ASIC has announced technological changes, implementation has been slow.
30. The Committees also note that the availability of technology does not guarantee the desired results. People need to be appropriately trained in order to make optimal use of technology to aid in analysis of data and making informed decisions.

4. How effectively does ASIC use data and technology to reduce the regulatory impost of its surveillance activities?

31. As noted above, the Committees would like to see a decreased burden on the industry, which could be achieved if data and technology were deployed in a suitable, targeted manner.
32. For example, the ASIC regulatory portal which allows for lodgement of regulatory breach data could be enhanced to allow for the more efficient uploading of information rather than entry of data on a case by case basis.

5. Has ASIC appropriately prioritised investment and focus on enhancing its data and technology capabilities in its surveillance activities?

33. The Committees do not have relevant knowledge on this issue.

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Assessment of the effectiveness and capability of ASIC's licensing function

1. How does ASIC's licensing function support its regulatory mandate i.e. ASIC's statutory objectives, legislative requirements, risk appetite and strategic priorities?

34. The Financial Services Committee is of the view that the licensing function plays a critical gatekeeping role in setting minimum standards that proposed providers of financial and credit services must meet in order to conduct their business in Australia.
35. The Committee is uncertain whether the importance of the licensing function is fully appreciated, as it often seems to be short of sufficiently skilled resources, and resources generally (which is disappointing).

2. Are licensing and registry application decisions timely and consistent? Does ASIC ensure that clear guidance for applicants is made available and that stakeholders are engaged appropriately?

36. Financial Services Committee members have expressed frustration with the time that ASIC takes to decide licensing applications. Timeframes for Australian financial services licence applications are often within 6 – 9 months, which the Committee considers is significantly longer than what is justified by the nature of these applications, and the commercial timeframes which relate to them. The Committee believes that this is a matter that could be substantially improved if the licensing function had sufficient and appropriately skilled resources. These delays adversely impact on the efficiency and competitiveness of the financial markets (and the Corporations Committee shares this view).
37. The Committee believes that ASIC strives for, but does not always achieve, consistency in licensing decisions. The challenge of having junior staff working remotely during the pandemic, noted above, may contribute to some inconsistency that Committee members have observed. However, the Committee notes that such inconsistency was also manifest for many years prior to the pandemic.
38. The Committee considers that the licensing function generally endeavours to be transparent, but believes that the transparency could be improved where there is a change in ASIC's risk appetite with respect to licensing so that potential applicants know where they stand and whether it is worth their while applying for a licence.
39. From an operational perspective, the Committee notes that often only junior staff interact directly with applicants and their advisors, with a heavy focus on written correspondence. Transparency of the involvement of more senior staff would be welcomed (for example, by junior staff copying more senior staff on emails to applicants), as would disclosure of phone numbers and willingness to engage in telephone or videoconference discussions. The Committee expects that, by engaging in telephone or video discussions with applicants or their advisers, ASIC's licensing officers will increase their understanding of the applicant and their application, and that this could help reduce processing times for licence applications.
40. The Committee commends the use of the ASIC Licensing Liaison Forum to communicate with, and obtain feedback from, the regulated population and their advisors. The licensing function is generally open to feedback, which the Committee commends. When feedback is provided, Committee members have generally found that the senior management team are responsive.
41. The Committee also commends the Licensing function's use of Information Sheets, which are regularly updated, to communicate process. Regulatory guides relevant to licensing are also frequently updated.
42. In the registry function, the Committee is aware of some challenges in registration of foreign companies due to ASIC staff members being excessively pedantic about form rather than substance.
43. At times, the Committee has also observed pre-lodgement rejection of licensing applications on technical grounds which, realistically, could have been quickly addressed if ASIC had communicated the issue to the applicant and given them the opportunity to supplement the material rather than just rejecting the application. These

rejections often cause considerable concern to applicants and their professional advisers.

3. Does ASIC have the appropriate data, technology, and systems to efficiently manage licensing and registrations?

44. The Financial Services Committee believes that there is room for improvement to ASIC's data, technology and systems.

45. The reasons are set out in response to question 4 below.

4. How effectively does ASIC use data and technology to reduce the regulatory impost of its licensing activities?

46. The Financial Services Committee considers that there is room for improvement in the processes used for submitting applications. While a new licensing system has been flagged for some time, it has yet to materialise.

47. A large number of government and private institutions now run application processes that allow for copies of supporting documents to be uploaded to a portal. However, licence applicants still need to send supporting documents to ASIC via email and the size of attachments to a single email cannot exceed 10 MB. This is well out of step with current standards of modern technology.

48. The Committee would also welcome the use of video conferencing platforms to allow licensing staff to communicate more clearly and openly with applicants and their advisers, as is becoming customary as a consequence of the continuing pandemic and a feature likely to continue post-pandemic. The Corporations Committee is of a similar view in relation to the engagement of its members with ASIC.

49. Please contact the Chair of the Financial Services Committee Pip Bell at pbell@pmclegal-australia.com, or the Chair of the Corporations Committee Robert Sultan at robert.sultan@nortonrosefulbright.com if you would like to discuss any aspect of this submission.

50. The Committee Chairs would be grateful for an opportunity for Committees' representatives to meet with the Authority so that the Committees can provide further meaningful engagement with the process.

Yours faithfully



Philip Argy
Chairman
Business Law Section