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Financial Regulator Assessment Authority
The Treasury
Langton Crescent
PARKES ACT 2600
By email: FRAA@treasury.gov.au

First FRAA Review: The effectiveness and capability of ASIC

The Australian Banking Association (**ABA**) welcomes the opportunity to provide feedback on the Financial Regulator Assessment Authority (**FRAA**) consultation on reviewing the effectiveness and capability of the Australian Securities and Investments Commission (**ASIC**).

Our position

ABA members have a collaborative relationship with ASIC, most recently demonstrated by the design and implementation of the regulatory reforms arising from the Banking Royal Commission. ASIC engaged with industry through the process of implementation and listened to industry concerns to improve both the implementation process and consumer outcomes.

The ABA also welcomes several initiatives introduced by ASIC over the years to strengthen relationships with banks and to better develop collaborative solutions to complex issues. Of note is the introduction of dedicated relationship management teams within ASIC through which banks can communicate, discuss, and proactively engage on matters at senior levels within ASIC. Improvements have also been made to ASICs supervision and audit programs and the accelerated litigation program has increased the efficiency of resolving issues arising from the Banking Royal Commission.

Furthermore, the ABA supports recent announcements to improve the efficiency of ASIC's regulatory activities through the formation of a dedicated regulatory efficiency unit within ASIC. We understand this unit will identify and implement changes to ASIC processes to minimise regulatory costs for businesses and support the more efficient and effective delivery of ASIC's regulatory remit.

Noting this, the ABA considers ASIC could meet its strategic priorities more effectively. ASIC engagement could be enhanced through better internal consistency in applying its strategic priorities through all levels within the organisation. At present, publicly stated objectives of the leadership team are often not matched by the actions of the organisation. While ASIC leaders tend to strike a tone of pragmatism, organisational decisions tend to retain a rigid approach and an unwillingness to change course or escalate issues raised by industry that lead to more efficient regulatory outcomes.

ASIC could also better prioritise regulatory requests, by taking a more holistic approach to the demands placed on industry. The ABA has observed that, at the height of banks implementing solutions to enable the large number of October 2021 Royal Commission reforms, ASIC also initiated several reviews and information requests that ABA members were required to be actively involved in, such as in relation to guarantees, car finance, direct debit processes, and debt collection.

In addition to these general observations, this submission answers questions raised in the consultation paper to provide further detail on how the ABA considers ASIC could better meet its strategic objectives. This submission focuses on the strategy questions raised and on ASIC's use of technology.

Thank you for the opportunity to provide feedback.

Yours sincerely,

Anna Bligh
Chief Executive Officer

Responses to select consultation questions

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

Setting strategic priorities

ASIC has improved over time in developing and communicating its priorities to regulated entities and tends to publish high quality documents that provide insight into some of its proposed activities and priorities. The range of documents that ASIC has published, from its annual reports to corporate plans provide some clarity over its framework for making decisions and reporting on the performance under those set objectives.

In terms of the specific process for setting its strategic priorities, the ABA understands that ASIC employs a strategic planning framework to guide the development of its priorities and actions, and this includes analysing economic trends, identifying threats and referring to external consultants to test and finalise the priorities.

The ABA considers this process can be strengthened through targeted industry consultation to help inform ASIC's thinking on emerging issues that banks are observing directly on the ground. Such consultation would also support more effective and inclusive industry engagement.

In considering the efficiency and effectiveness of a regulatory regime, it is important for all parties to have clarity about what success looks like. In this context, the ABA recommends ASIC include some clear and public KPIs to deliver on its strategic priorities so industry have a more comprehensive understanding of ASIC's intentions to deliver them. For example, more detail is required for banks to understand and respond to ASIC's objectives to promote economic recovery, reduce customer harm and support enhanced cyber resilience. In the interests of transparency, ASIC could set out the initiatives they are undertaking to achieve these goals and confirm associated implementation timeframes to correspond to them such as completing regulatory guidance within a specified timeframe prior to compliance dates.

Making decisions consistent with priorities

The ABA notes that while there is some reporting on how ASIC makes its decisions and how those decisions are consistent with its set outcomes (for example, through its Enforcement Outcomes reporting), it is not always clear how ASIC decisions are aligned with its strategic priorities.

For example, External Priority 1 focuses on promoting economic recovery through more efficient regulation. However, the ABA has observed that ASIC through guidance tends to create additional prescriptive requirements and can reduce the efficient implementation of the law.

Three specific examples are provided below to illustrate this point. The first on breach reporting, the second on responsible lending obligations and thirdly on the Design and Distribution Obligations (**DDO**).

First, the significant increase expected in the volume of reports for banks to comply with the new breach reporting reforms meant it was necessary for ASIC to identify the risk, inefficiency and strain on resources required by manual completion of individual reports. The need for a more automated solution such as using dedicated software[1] in time for commencement should have been anticipated. It is not clear whether ASIC used any form of data or modelling to inform the expected increase in the numbers of reported breaches, and if they did it did not translate into an understanding for the need for an automated solution.

Second, in relation to responsible lending, the weight of ASIC guidance and expectation on this issue for banks has contributed to a complex regulatory framework, prompting the Government to consider simplifying the requirements to enable the more efficient flow of credit while maintaining strong

[1] An Application Programme Interface or API is now in development.

consumer protections. In its announcement on this, the Government noted the "prescriptive approach in RLO guidance" as a cause for making changes.

Third, in relation to the Design and Distribution Obligations, banks drafted hundreds of target market determinations before the ASIC guidance was released as the guidance arrived too late and banks could not leave this work to the last minute. After the release of the guidance, banks redrafted the determinations with the understanding that they were finalised. However, ASIC provided further feedback on draft target market determinations to major lenders which were not clearly contained in its regulatory guide. This feedback included ASIC's preference on very minor formatting issues and resulted in banks redrafting the documents again shortly before the law commenced.

In all these examples, ASIC did not provide for an efficient implementation of the law and did not identify risks earlier and/or sufficiently consider the complexities of implementation. It is unclear whether ASIC utilised data or technology to inform many of these decisions, or whether ASIC reflected on the need and extent of systems or technology solutions to implement these policies. To address this, the ABA considers that ASIC should take the time to identify project risks more thoroughly, develop a data-driven approach to analysing the impacts of a policy and actively work in collaboration with industry and other regulators to resolve implementation issues well ahead of time.

ABA members have further observed that it is sometimes unclear whether ASIC guidance is an interpretation of what the law requires as a minimum, ASIC's view of industry best practice or contextual information ASIC has included to assist the understanding of what is required. If ASIC was to adopt clear standardised language in its guidance to indicate each of the above categories, it would assist industry in being able to implement minimum standards that must be met more efficiently.

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?

In its strategic planning framework, ASIC seeks to monitor and identify trends and threats. In the ABA's experience, the processes for identifying risk are designed at a general level with the absence of a deeper understanding of their impact on a case-by-case basis. From this perspective, banks consider that ASIC tends to identify risks of a policy or regulation too late and judge implementation with the benefit of hindsight.

One example is the way in which ASIC implemented the new licensing regime for debt management firms. ASIC published a list of firms that had applied for a licence up until 30 June 2021 but did not provide any guidance to lenders about what to do if a firm was not on that list, e.g., if they did not consent for their information to be published. ASIC also did not consider complexities such as complaints already on foot where a firm was representing a customer, or how banks could give ASIC feedback about a potential licensee where poor conduct was found. A broader consideration of these issues could be driven by earlier and more collaborative industry consultation which would flesh out these issues and lead to more effective regulatory outcomes.

Another example is in relation to the ASIC broker and adviser reference checking protocol. The protocol requires licensees to provide and request employment references to promote better information sharing and address the issue of 'rolling bad apples' as identified in the Banking Royal Commission. In developing the protocol, ASIC did not consider that an efficient implementation would include a centralised register of contact points to enable licensees to efficiently find and provide or request references. This has resulted in each financial institution building their contact lists which requires each entity to update the list and request an update on others lists on a one-to-one basis. This is highly inefficient, will require the same effort repeated across industry, including significant additional effort on smaller licensees that will slow the reference checking process.

As acknowledged by ASIC Chair, Joe Longo, one of ASIC's highest priorities needs to be making the regulator more digitally enabled. ABA member banks have made significant investments in their technological capability both to improve their customer facing products and services as well as to enhance their systems to meet compliance objectives. For ASIC to meet its stated objective of promoting economic recovery through more efficient regulation and facilitating innovation, significant investment in technology capability is overdue and needs to remain one of the highest priorities.

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

ASIC has strengthened the way it identifies risk incorporating changes to its strategic actions and plans for regulatory initiatives. However, there is room for improvement. In particular, the ABA observes ASIC practices could more effectively prepare industry for regulatory change consistent with its External Priority 4 which concerns industry readiness. We note that driving this readiness requires:

1. Providing industry with appropriate lead times for industry implementation
2. Supporting industry with industry planning by taking a longer term 'roadmap' approach to ensure industry can plan and allocate resources for implementation, and
3. Taking a more proactive approach to guide industry on key interpretive matters.

Three specific examples illustrating the above are:

Providing industry with appropriate lead times

Recent examples highlight the issue of regulatory guides or ASIC expectations being set very late and just before a new regime commences. The ABA notes that October 2021 was an unprecedented time with the culmination of significant policy reforms all being implemented at once. The extent of these changes placed considerable strain on both banks and ASIC working to challenging timeframes while responding to community needs because of COVID-19. Nevertheless, the ABA considers ASIC could have foreseen this and ensured more timely and consistent guidance on issues, such as:

- Breach reporting (regime commenced 1 October 2021) – ASIC made the legislative instrument addressing an issue with the Credit Act drafting only on 28 September 2021. The final RG 78 was only published on 7 September and included a particular interpretation which was at odds with industry's understanding and a significant departure from previous practice (in relation to its view that for a continuing breach, each further impact to a customer is itself a reportable situation and must be reported within 30 days, discussed in further detail under Q.4 below).
- The DDO regime (commenced 5 October 2021) – ASIC made the legislative instrument carving out certain product types on 1 October, and published guidance on advice licensees on 16 September. In addition, verbal feedback requiring changes to individual bank's target market determinations were in some cases received just days before the regime commenced.

Regulatory changes typically necessitate changes to policy, process, and systems. In large organisations the lead time necessary to enable this can be lengthy. Subsequent guidance can and often does require changes to policy, process and systems and can lead to re-work, significant additional cost, and additional lead times being necessary. At times, implementation efforts may create momentum for effecting other changes within the organisation which require targeted stakeholder consultation and further integration with different bank systems.

In both cases noted above, the late guidance created significant readiness issues for banks due to the complex nature of implementation. While ASIC publicly stated that it would take a reasonable approach to enforcement actions in relation to these reforms in its media release[2], a better approach would have been for ASIC to work more closely with Treasury and industry in designing a timeframe that allowed for the development of guidance and for industry implementation. Further, it is essential that ASIC develops a better understanding of the implementation challenges on each policy and tailor lead times according to complexity. Such an approach is undertaken in the UK where more complex changes are given more time.[3]

[2] 21-213MR ASIC's approach to new laws reforming financial services sector
[3] The FCA in the UK takes a proportionate approach based on the complexity of an issue. For example, a complex matter such as the New Consumer Duty has been scheduled to start in April 2023 giving a long lead time for industry to prepare.

Taking a longer-term approach to regulatory initiatives

As noted in the general comments section at the start of this submission, industry often has very little idea of when ASIC will make requests or conduct its own consultations. Several ad-hoc information requests, reviews and consultations led by ASIC emerged with no industry notice and within weeks of the major October 2021 reforms in a manner that diverted resources and placed a strain on implementation teams.[4]

The ABA would value a 'forward calendar' of ASIC regulatory initiatives. Such a calendar would support the readiness of regulated entities to allocate resources and plan for change. Several jurisdictions publish regulatory forward calendars to better prepare industry for regulatory reform. For example,

- the Council of Financial Regulators of New Zealand publishes a regulatory initiatives calendar that provides clarity to industry on planned consultations updated on a quarterly basis. See: CoFR Regulatory Initiatives - November 2021.
- The UK Regulatory Initiatives Grid, published twice a year, is a similar document with a much broader scope. This would go to both industry readiness for regulatory reform and more efficient regulation (see priority referred to below).

In Australia, APRA publishes its policy priorities, so if ASIC were to adopt a similar approach and coordinate with APRA and possibly the other members of the Council of Financial Regulators (RBA and The Treasury), this would support greater readiness.

More actively guiding industry

ASIC has been reluctant to guide industry on key questions arising from implementation or interpretive issues that impact on the way a policy is implemented. While we understand that banks need to take their own legal advice on issues, there are specific questions and areas of clarity that would benefit from ASIC making their views and/or expectations clear to ensure consistency across industry.

This has been notable in the breach reporting space, where industry via the ABA has presented ASIC with several policy queries but has yet to receive answers on ASIC's expectations. Meetings often provide some clarity, but ASIC is often reluctant to follow up that advice in writing, placing industry in greater uncertainty. Ideally ASIC's interpretation as explained in meetings or communicated clearly should be published promptly so that all industry participants are aware and a more consistent approach is taken.

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?

As noted in the general observations section above, the ABA has observed a disconnect between the stated objectives of ASIC's leadership team and the actions of the organisation in relation to priorities and messaging. There are clear instances of decisions from ASIC which are inconsistent with their publicly stated objectives.

For example, in relation to breach reporting, senior ASIC representatives indicated to members that they would take a pragmatic and facilitative approach to the implementation of the new breach reporting laws. However, this has not been the case with respect to some requirements under the new RG 78.

[4] In addition to the ad-hoc requests for data and information on different topics such as remediation, several reviews were held within three months of the October reforms, such as:
• August 2021 – ASIC Industry Review in relation to Guarantees
• August 2021 - Car Finance Industry Review
• August 2021 - ASIC direct debit processes for consumer credit product consumers receiving financial hardship assistance
• September and October 2021 - ASIC requests in relation to PDDO and a particular product type
• September 2021 (extension given to late October 2021) - ASIC Industry Review on Debt Collection
• October 2021 - ASIC information request regarding breaches relating to financial hardship

The revised RG 78 set out circumstances in which licensees may include multiple reportable situations arising from a single, specific root cause, in a single report to ASIC and that, where issue had not yet been stopped, that report be updated as additional customer impacts occurred or were identified.

ABA considered this to be sensible and reflects practice under the breach reporting regime that applied prior to 1 October 2021. It was also consistent with ASIC statements during 2021 about how updates could be made under the portal. However, this pragmatic approach was accompanied by a statement in the regulatory guide that "the law requires that each individual reportable situation must be reported within 30 days. If you choose to report 15 contraventions of a civil penalty provision that occurred over a 30-day period on various dates in one single report, it is your responsibility to ensure that you have met the 30-day reporting requirement for each reportable situation."

Members were concerned that the effect of this statement might be that for multiple reportable situations arising from a single, specific root cause where customer impacts were continuing, ASIC expected to be notified of each additional customer impact within 30 days of its identification. The implication of this is that ASIC would need to be updated every 30 days for such a continuing reportable situation. Members had not interpreted the legislation as requiring this and ASIC did not anticipate this would cause a concern, nor that it was inconsistent with their previous communication on this issue.

ABA members proposed a range of interpretations were open to ASIC that would be more efficient without adversely impacting the integrity of the information being given to ASIC. It was also noted that this interpretation had only been communicated three weeks prior to the commencement of the new regime and members would have significant difficulties adapting their policy, processes and systems to address this. ASIC officers indicated that they did not accept these proposals to improve the efficiency of the policy and did not propose to adopt an alternative approach.

In this instance, ASIC has taken a rigid position that undermines the idea of efficient regulation and is different to the pragmatic tone struck in public messaging.

A solution the ABA recommends is for ASIC to set out publicly stated KPIs on best practice efficient regulation committing to clear actions such as publicly releasing a regulatory guide 4 – 6 weeks before implementation.

5. On surveillance, 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?

The ABA notes that ASIC is actively considering ways to improve the way it uses technology to deliver its services as its workload and regulatory scope continues to grow.

The ABA agrees that there is room for ASIC to improve how it employs technology to better achieve its outcomes. In some instances, ABA members have seen examples of poor data practices from ASIC such as sending unencrypted files via less secure email channels. Some parts of ASIC are also quite advanced in the use of data analytics while others are poorer. There is also at times a lack of defined and consistent data standards that are used to collect information. This means that industry can at times be required to interpret what is being asked for. A recent example is where s912D of the *Corporations Act 2001* defines 'investigation' differently to the way that ASIC uses the term in the ASIC regulatory portal for breach reporting and RG 78. A critical terms data dictionary is needed that is consistent with industry terminology, publicly available and used consistently in all public communications.

We have also observed broader concerns in relation to setting up systems. For example, in relation to breach reporting, there is a good deal of portal functionality that is lacking. We consider that ASIC should have better planned and prioritised resources for the development of the relevant systems of an API before the regime commenced. We consider that ASIC could better plan for technological change and better understand the technology challenges faced by industry in implementing reforms and translate that into assisting industry prepare for change through appropriate lead times.

Finally, we note that some ABA members were involved in a pilot program on the portal without visibility to many other members. ABA considers all affected entities should be kept involved in the process of understanding the issues and challenges where a pilot is conducted with a select few banks, so that all banks are better prepared.