



AUSTRALIAN INSTITUTE of  
SUPERANNUATION TRUSTEES

28 January 2022

Financial Regulator Assessment Authority  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**Email:** [FRAA@treasury.gov.au](mailto:FRAA@treasury.gov.au)

Dear Sir/Madam,

**Re: Scope of assessment of the Australian Securities and Investments Commission**

**In brief:** AIST supports the level of involvement that ASIC has with industry, however we believe that ASIC's effectiveness and capability could be improved.

### **About AIST**

The Australian Institute of Superannuation Trustees ("AIST") is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector superannuation funds. As the principal advocate and peak representative body for the \$1.6 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

### **Comments**

AIST thanks the Financial Regulator Assessment Authority (FRAA) for the opportunity to respond to this review.

AIST agrees that ASIC's approach to the industry is generally proactive, flexible and communicative, however we believe that ASIC's effectiveness and capability could be improved.

AIST supports the twin peaks model of regulation and acknowledges the increasing cooperation between regulatory agencies in their approach to industry. Under the ASIC and APRA Memorandum of Understanding, the agencies have agreed to:

- proactively provide appropriate information and documents that are relevant to the other agency and responding promptly to information and document requests;
- seek input from, or collaboration with, the other agency to achieve or improve regulatory outcomes, particularly in policy development, enforcement actions, consultation with industry and statistical collections; and
- seek to improve efficiencies for the agencies and industry participants.

These are admirable intentions, and while industry has benefitted from a greater release of joint guidance, particularly during the COVID-19 pandemic, more needs to be done to reduce regulatory overlap and duplication of administrative burdens on trustees.

### **Timing, volume and specificity in the collection of information**

AIST member funds have increasingly been requested to provide broad amounts of information to ASIC about the communications released to members in response to regulatory reforms. Such requests have reportedly not been limited to the communications themselves, but all documents and correspondence pertaining to drafting and management decision-making, akin to a broad fishing exercise rather than a targeted concern. Anecdotally, this can be on the order of tens of thousands of documents.

This is neither efficient for industry participants to collate, nor the agency to process. A far better approach would be to target specific requests and then undertake a further deep-dive if required.

Consideration should also be given as to whether such requests are made at times when staff are already at capacity due to other agency data collections, government inquiries, regulatory implementation deadlines and standard annual peak times, or when funds may be under-resourced due to seasonal holiday periods or, as highlighted by current pandemic circumstances, experiencing temporary staffing shortages due to unforeseen environmental impacts. We recognise that it will not always be possible to adjust the timing of requests for information, but where it is being cognisant of such resource pressures would lower the risk of unintentional errors or omissions. Intense member pressure on fund administrators following the Protecting Your Super and Early Release of Super scheme implementations are two such examples of regulatory impacts on funds.

### **Interaction between regimes**

APRA and ASIC regulation often covers similar subject matter but with nuanced differences. This friction provides a challenge to industry which often must spend valuable resources seeking legal interpretations of how to implement new regimes and comply with both. One such example is the

complementary Member Outcomes standard, administered by APRA, and the Product Design and Distribution Obligations covered by ASIC.

While joint guidance was eventually provided when making RG 274 in response to industry requests, it would be helpful if such interactions were addressed at the same time that any new proposals are released. This would demonstrate that agencies have considered the impacts of any new obligations on existing frameworks.

This comment is not being made with the benefit of hindsight. Various industry participants, including AIST, explicitly and persistently suggested to both APRA and ASIC at the early design stage of both Member Outcomes assessment and DDO that the design of both regimes should have regard to the other and be designed to ensure consistency and regulatory efficiency. The absence of a clear statement by both regulatory about the relationship between the regimes added to the regulatory burden of implementation.

Further, in many cases, the regulators have proven unwilling to provide input on policy impasses and interpretations, preferring to take a “matter for industry” position and then providing a position only after the fact which may not align with the advice provided to industry. Settling on a position earlier would reduce confusion and cost.

Ironically, this review is being conducted at the same time as ASIC consults with industry about the establishment and operation of ASIC’s Regulatory Efficiency Unit. From our perspective it appears that we are largely making the same submissions to both this and that review. Again, a statement from both FRAA and ASIC about the relationship of each exercise to the other would assist in more efficient input and more useful outputs.

### **A need for test cases**

In its submission to Consultation 332: Promoting access to affordable advice for consumers Industry Fund Services called for a private ruling service within ASIC to enable businesses to consult and obtain certainty ahead of releasing any potentially non-compliant services.

“A lack of meaningful quality engagement between ASIC and advice businesses leads to a reliance on external consultants and lawyers to interpret regulation. This drives up costs and leads to criticisms of Licensees being too conservative due to the fear of implementing a non-compliant service and being deemed to have broken the law only after the fact.

The traditional way our industry approaches regulatory uncertainty – being to seek further guidance with more examples to cover every possible scenario – is not fit for purpose. We need a different approach that recognises that many ideas in the creative stage are left on the table for fear of whether they would satisfy the relevant regulatory requirements.

While the parliamentary inquiry into Financial Technology and Regulatory Technology, in its interim report, recommended establishing a culture of innovation and competition in financial services, super funds and advice businesses still require assurance from ASIC. The enhanced regulatory sandbox permits financial service providers to test services for which they are not currently licensed but does not allow testing of new services which may fall within the remit of their existing licence.

We see a major opportunity for ASIC to offer a private ruling service to enable advice businesses to consult and obtain certainty during the design process when building new advice offers. This would greatly expedite the innovative thinking and new approaches to the advice affordability and access problem.<sup>1</sup>

AIST echoes this call for a consultative body within ASIC or provision of test cases as, despite best efforts to obtain legal advice on matters under ASIC's remit, legal opinions oftentimes differ. Such a service would aid ASIC in delivering its vision to "Promote strong and innovative development of the financial system<sup>2</sup>".

### **Technology neutrality and electronic execution**

A lot of work has been done by the Government and ASIC to ensure that the regulatory regime operates in a technologically neutral way, however, more means to be done on specific issues and ongoing oversight (so that the need for future amendments are limited).

We note that the Government adopted recommendation 39 of the 2015 Financial System Inquiry about technology neutrality, but submit that the principle embedded in that recommendation remains relevant:

"Identify, in consultation with the financial sector, and amend priority areas of regulation to be technology neutral. Embed consideration of the principle of technology neutrality into development processes for future regulation. Ensure regulation allows individuals to select alternative methods to access services to maintain fair treatment for all consumer segments."

At the start of the pandemic, the Treasurer provided Corporations Act relief to temporarily permit the electronic execution of business documents that would have ordinarily required a physical 'wet'

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<sup>1</sup> Industry Fund Services submission to ASIC Consultation 332, available at <https://tinyurl.com/ycku4mzx>

<sup>2</sup> ASIC Corporate Plan 2021-25

signature. After a hiatus of a few months from March 2021, the *Treasury Laws Amendment (2021 Measures No. 1) Act* was passed by parliament in August 2021, extending the temporary relief until March 2022. AIST supports efforts now underway to make these changes permanent.

Changes should make sure document execution is secure, consistent and accessible – recognising that not everyone has either access to technology or the capacity to use it. A technology-neutral approach that allows electronic execution as well as wet signatures is needed.

While the Government’s Deregulation Agenda is focussed on reducing regulatory barriers, the Government’s September 2021 consultation paper on Modernising Document Execution was still able to comment:

“Commonwealth and state laws have not kept pace with the way Australians engage with digital communications and technologies. For example, a combination of laws prevent people from adopting new technologies in common processes like executing statutory declarations and deeds.<sup>3</sup>”

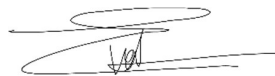
In 2018, ASIC Commissioner Cathie Amour stated:

“We like to think that our regulatory regime is sufficiently principles based that it operates in a technology neutral way. But we do know that this is not always so; pragmatism means that we frequently amend our regime to facilitate new technologies. For example, we have facilitated electronic securities offering documents<sup>4</sup>.”

While we support the sentiment expressed, this should be overlaid with a determination to embed technology neutrality as much as possible in the regulatory regime so as to limit the requirement to amend the regime to amend new technologies.

If you have any further questions regarding this submission, please contact Kate Brown, Senior Manager Advocacy & Research on [kbrown@aist.asn.au](mailto:kbrown@aist.asn.au)

Yours sincerely,



Eva Scheerlinck  
**Chief Executive Officer**

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<sup>3</sup> Modernising Document Execution <https://tinyurl.com/2p8mhcma>

<sup>4</sup> ASIC’s approach to innovation <https://tinyurl.com/2p9yzzme>