Submission to the
Financial Regulator Assessment Authority
on the
Assessment of ASIC

January 2022

29 January 2022

The Chair
Financial Regulator Assessment Authority
c/ The Treasury
Langton Crescent
PARKES ACT 2600

By email: **FRAA@treasury.gov.au**

Dear Sir

Assessment of ASIC

The Institute of Public Accountants (IPA) welcomes the opportunity to provide comments on the review of ASIC, focusing on ASIC's effectiveness and capability in strategic prioritisation, planning and decision-making, surveillance, and licensing functions.

The IPA is one of the three professional accounting bodies in Australia, representing over 47,000 members and students in Australia and in over 80 countries. The IPA Group is the largest accounting body in the world representing the small business/SME sectors.

Whilst the ongoing scrutiny of ASIC over a series of reviews, Royal Commission, inquiries and generally, is welcome, there is also a need to ensure that genuine progress is made in implementing recommendations and improvements. For instance, the Capability Review of 2015 offered 34 recommendations to improve the efficiency and effectiveness of ASIC, to a global best practice level. Even though ASIC rejected some of these recommendations, it would be a useful starting point to benchmark against these recommendations. In addition, we have been involved, like so many other stakeholders, in consultation on ASIC's KPI metrics and an assessment of its performance against these KPIs, and the Cost Recovery Implementation Statement. Undertaking a stocktake of all these various past and ongoing reviews and inquiries would be beneficial for measuring progress.

Our comments below are applicable mostly to the first set of questions relating to the effectiveness and capability of ASIC's strategic prioritization, planning and decision-making.

Please don't hesitate to contact Vicki Stylianou (vicki.stylianou@publicaccountants.org.au) if you require further information or have queries.

Yours faithfully

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

Key questions

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

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?

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

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?

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

IPA RESPONSE

ASIC's strategic prioritization, planning and decision-making frameworks and processes are essentially contained in its Corporate Plan 2021-25, released in August 2021.

The IPA has been involved in numerous consultations dealing with ASIC and many aspects of its operation, regulatory framework, performance, and funding. This includes the May 2021 consultation by the Department of Prime Minister & Cabinet on the Draft Regulator Performance Guide, which sets out three principles:

1. Continuous improvement and building trust
2. Risk-based and data-driven
3. Collaboration and engagement

Whilst we agree with these high-level guiding principles, the focus also needs to be on their implementation, execution, enforcement, and timely revision. We believe this also applies to the FRAA assessment

More specifically, in responding to the FRAA assessment key questions, the IPA refers to the December 2015 Panel Report — *Fit for the Future: A Capability Review of ASIC.* The Government stated at the time that 'The Report presents findings and practical, forward-looking recommendations framed to ensure ASIC has the right governance and leadership, strategy and delivery capabilities to meet its objectives and regulatory challenges today and in the future'. The FRAA may have taken this report into account, and we believe it provides a useful starting point. We have not undertaken an assessment of whether ASIC or government have implemented any of the recommendations. We are aware that ASIC did not accept or agree with all the recommendations or analysis. However, in our view, some are still outstanding.

The Capability Review applied a capability framework using governance and leadership, strategy, and delivery. There is some overlap with the current FRAA assessment including matters relating to governance, organisation structure, leadership talent, culture, strategy development, strategic communications, resource allocation, workforce management, regulatory toolkit, stakeholder engagement and management, and data infrastructure.

Below is a small selection of relevant observations and findings, plus the IPA's comments.

Page 5:   *Finally, there are a number of areas where ASIC's capabilities show material gaps to what the Panel considers to be good practice, and where improvement is required without delay. These include ASIC's governance model and leadership related processes, its IT, data infrastructure and management information systems (MIS), for measurement and reporting of internal efficiency in management dashboards, and its approach to stakeholder management.*

IPA: Even though six years have passed since the review, we believe that some of these 'material gaps' still exist, including ASIC's lack of accountability and transparency (see below); lack of internal efficiency which has led to increased industry levies; inadequacies in stakeholder management (quantity over quality); and lack of adequate use of technology.

Page 6:   *The conclusion that ASIC's Commissioners have insufficient 'strategic bandwidth' is supported by interviews and discussions with the Panel, together with the Panel's own observations and a time-use survey and analysis conducted by PwC.*

Page 9: *The [expectations] gap is much greater, however, than the anticipated disparity and warrants immediate attention to improve clarity over ASIC's mandate, ensure strategic responses are appropriate and to improve performance reporting. This imperative to act would be elevated if a proposed move to a user pays funding model is adopted by the Government.*

IPA: Since the Government has moved to an industry funding model, which is subject to (an announced) review, then it is imperative that ASIC operate efficiently and effectively. We refer to comments below.

Page 12: *The Panel also identified three exogenous factors (those outside of ASIC's control) that will impact on ASIC's ability both to respond to the recommendations made in this Report, and on its ongoing and future ability to fulfil its mandate efficiently and effectively. These are [inter alia]:*

> • *Legislative and regulatory complexity: the increasing complexity of the regulatory regime that ASIC is expected to administer, and in particular the application of the Corporations Act, is a source of significant regulatory burden, constrains ASIC's ability to advance regulatory mutual recognition internationally and imposes material costs on the real economy, particularly in relation to Australia's competitiveness in attracting productive capital investment to fund future economic growth and employment.*

IPA: The Australian Law Reform Commission is currently undertaking a review initiated by the Hayne Royal Commission into financial services legislation, with its first interim report released in November 2021 (open for submissions). On page 10 of the summary report (the full interim report is over 600 pages), it states:

A particularly challenging feature of the Corporations Act is that the regulator, ASIC, is given the power to make notional amendments to the Act by legislative instrument in certain circumstances. ASIC has frequently exercised this power in approximately 100 legislative instruments. Notional amendments in legislative instruments make the law deeply inaccessible. A person reading the Corporations Act or Corporations Regulations cannot be confident that the provision they are examining has effect as it is written. The provision may have been notionally omitted or amended, or an additional provision may have been inserted. Such changes may apply only in certain circumstances or may apply universally.

The IPA contends that the fact that ASIC presides over 'impenetrable' legislation and regulation and given that it has the most extensive set of responsibilities of any corporate regulator in the world, then its strategy, decision-making, day-to-day functions, and operations, are all under considerable constraint. Commensurate with this is ongoing inadequate funding. We note that these factors have led some highly regarded domestic and international commentators (ALRC/ Melbourne University Law School) to recently allude to a blurring of the 'twin peaks' model of financial regulation.

Page 19: *ASIC's culture is shaped by its stated values of Accountability, Professionalism and Teamwork, and is also a result of its origins and history. On balance, the Panel considers ASIC's internal culture to be more defensive, inward looking, risk averse and reactive than is desirable for a conduct regulator.*

IPA: There was considerable commentary on ASIC during the Hayne Royal Commission which would seem to support this finding, some six years later.

Data management:

Page 24: *Recommendation 33: ASIC to invest in the development and application of big data 'reg-tech' analytics, through identifying specific applications for regulatory data analytics and building required staff skills/capabilities.*

Recommendation 34: ASIC, in conjunction with the Council of Financial Regulators (CFR), to develop a forward work program to design and implement open data policies and data analytic collaboration.

IPA: We have commented in submissions lodged in 2021, that ASIC has publicly stated (on its website): 'As technology rapidly reshapes global financial markets, services and their regulation, ASIC's strategic priority is promoting regulatory technology (regtech) adoption'.

Given this approach, we would expect to see ASIC leading the way in the use of regtech in its own regulatory activities, with a resulting decrease in costs for regulated entities and an increase in effectiveness. We note that ASIC also mentions 'suptech' (supervisory technology); and is involved with the Innovation Hub and the regulatory sandbox. We would be interested in how the use of regtech and suptech are driving efficiencies, cost reduction and effectiveness at ASIC. We appreciate that progress is being made, however, we have yet to see any benefits and despite requesting more details, this has not been forthcoming. Whilst some data is shared with stakeholders, it falls far short of an open data policy'. However, this is true of government across the board. The IPA Deakin University SME Research Centre is bewildered by the lack of accessibility to data for the purposes of academic research and in the public interest. The Government's so-called open data policy is mythical.

Page 96: *If an industry funding model is to be introduced for ASIC, this would require a greater degree of transparency and accountability (and associated supporting MIS) in relation to the efficiency and effectiveness of resource use. This in turn would increase the pressure on ASIC to demonstrate that it is able to dynamically allocate its resources in line with strategic priorities.*

IPA: Along with many other stakeholders, the IPA has made submissions on the ASIC cost recovery implementation statement (CRIS) which indicates that ASIC has not demonstrated an adequate level of transparency and accountability when it comes to the industry funding model. This is borne out by the fact that the Government has announced a review of the ASIC industry funding model and 'froze' industry levies for financial planners for two years. The IPA continues to advocate for a 'freeze' of all levies.

The CRIS states that the methodology for calculating the costs for fees-for-service activities is based on the Cost Recovery Guidelines. Each of the regulatory activities are broken down into distinct outputs and the key business processes that are used to produce those outputs. The relevant costs are then identified and attributed to the outputs and processes. Costs are attributed using a weighted average hourly rate, which is based on each team involved in the business process and includes indirect costs (made up of property, IT, and corporate services costs), apportioned according to average FTE staff. Other indirect costs have no apparent explanation or benefit for regulated entities.

A risk rating system is a useful overlay when deciding on the level of supervision and surveillance and this should be reflected in the fees and charges. It is not evident whether this is part of the ASIC CRIS methodology. If not, this would make the outcomes more equitable, even if the methodology becomes marginally more complex.

The Cost Recovery Guidelines note under the heading of 'accountability' that meeting the principle of transparency and accountability involves reporting on performance for the activity on an ongoing basis. The Guidelines add that access to information about ASIC's fees-for-service activities can help stakeholders determine whether cost-recovered activities are being implemented efficiently and effectively.

It would be useful to have information on the actual break down of the activities, the indirect costs and the linkages between the costs and performance metrics. This information has been requested on numerous occasions but not received.

Based on the fact that approximately three-quarters of the IPA's members work in or advise small business, we believe that many of these smaller entities are less complex and present a lower (systemic) risk. We note that they do not appear to receive much supervision, surveillance, or enforcement, which make up the bulk of ASIC's costs. Accordingly, the low level of regulatory activity given to this sector, does not justify the level of fees and charges levied upon them.

A recent survey of IPA members practicing in financial advice has found that the overwhelming impediment to consumers being able to access affordable and competent financial advice is the amount and cost of compliance. This is directly linked to ASIC's approach to its regulatory responsibilities.

Seaview Consulting which advises financial services licensees and has extensive experience in the sector, has provided feedback that almost every Australian Financial Services Licensee has materially increased the fees charged to Advice businesses for the provision of services they require to operate their business. In many instances this increase has been in excess of 50% per annum.

Another common theme is that it would be useful if ASIC was available to the sector to provide interpretation on some matters which are confusing rather than to direct each participant to seek their own advice. An example is where there is a sale or transfer of a business and the need to understand what documentation is required when:

1. An adviser changes
2. A Corporate Authorised Representative (CAR) changes
3. A Licensee changes

Each Licensee has differing interpretations and it should be clarified.

Another example is whether a CAR or an Authorised Representative can be a representative of more than 1 Licensee? Locum operators are eternally confused.

MLC (now IOOF), Centrepoint Alliance, Count as a sample, have all materially increased the fees by Adviser, the X Plan fees and the professional indemnity insurance costs. This is a direct hit to profitability to businesses as they cannot pass this cost on other than by increasing client fees.

The most overwhelming response was to the question on whether the current regulatory framework and compliance should be simplified, and if so, how. Almost 100 per cent of respondents answered 'yes'. Some of the comments were 'obviously', 'definitely', 'it's a disgrace', 'really???', 'absolutely', 'it's insane', 'totally over the top madness', 'we've built a $3 trillion super pool but you can't get advice on it', 'cost structures advantage the large players', 'complete review is needed' (this was a common theme), 'ASIC needs to get out of the way' and other similar remarks.

Seaview Consulting has advised that they are seeing a significant increase in the number of smaller businesses who are becoming "non-viable" at the scale they are at. This is leading to "forced merger discussions" or exit forced sales. It is Seaview's opinion that the increase in compliance costs is the major contributor to this consequence.

In addition, it would be useful to have more information in one place rather than scattered across numerous documents. We note that the CRIS contains a long list of related information (pages 205ff). Many of these are relevant to understanding the CRIS including the annual report (which includes the annual performance statement), annual corporate plan, Australian Government Charging Framework and its Resource Management Guide 302, Cost Recovery Guidelines, Regulator Performance Framework (RPF) and ASIC's self-assessment against the RPF.

However, there are many other related documents such as numerous industry levy instruments, related legislation, ASIC Service Charter, ASIC (Fees—Complexity Criteria) Instrument 2018/578, numerous reports (eg Report 650 licensing and professional registration, Report 659 compliance review of documents, Report 654 assessing applications for relief), numerous regulatory guides, market integrity report, enforcement update report and so on.

A simplified document for users/stakeholders, perhaps on an industry/sector basis, with relevant information only, would be useful.

Page 126: *Consultation process: The Panel also observed an expectations gap with regard to the quality of consultation in policy guidance, with 97 per cent of ASIC leadership rating ASIC as good or excellent on its willingness to consult with industry on policy guidance compared to 33 per cent of the regulated population. …key shortcomings in the process including …a lack of documented evidence of how input is incorporated.*

IPA: An example of where a regulator does not seem to have genuinely listened to stakeholder feedback is ASIC and the industry funding levy model. There has been widespread and serious concern about the levies and the cost impact on regulated entities, with exorbitant, unexplained increases in most of the levies. ASIC also consults on its own KPIs and metrics for the KPIs and its regulator performance framework. However, in our experience it is the least responsive regulator with which we deal. For example, ASIC has so far failed to explain or justify how levies for financial planners can increase by up to 160% in 1-2 years even when assessed against its own methodology. There are many examples which can be provided. In our experience, ASIC rarely explains how input is incorporated.