



**ASIC**

Australian Securities & Investments Commission

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## **Financial Services Reform Act 2001 – Challenges for ASIC**

*An address by Jillian Segal, Deputy Chair, Australian Securities and Investments Commission, to the Committee for Economic Development of Australia (CEDA) FSRB (CLERP 6) Series, Sydney, 28 February 2002.*

### **Introduction**

Thank you for inviting me to join you today. This is a most timely conference as we start to approach the 11 March commencement date for the Financial Services Reform Act 2001 (FSRA).

As you would expect, a major focus for ASIC over the last year has been, and will continue to be, the significant transition to the new financial services disclosure and licensing regime under FSRA. ASIC has dedicated a significant amount of resources to the implementation of FSRA in order to enable a smooth and effective transition to the regime, which is essential to the integrity and confidence of the market.

As the third stage of the Wallis Inquiry, FSRA probably represents the most significant corporate law reform experienced by the financial services sector in Australia – it provides a new regime for the regulation of financial products and services and aims to enhance consumer protection by adding to financial safety and market integrity. FSRA follows the other CLERP reforms and the

restructuring of the financial system regulators, as well as the introduction of the Managed Investments regime in July 1998.

While industry has been working to deal with all this reform, the onus and burden on the regulator is very rarely appreciated. Today, rather than discuss any of the technical detail of FSRA, I would like to give you some insight into the task ASIC has faced to implement FSRA and facilitate, for industry, the transition to the new regime.

### **FSRA – Brief History**

As you may be aware, FSRA (previously known as CLERP 6) provides a legislative response to a number of recommendations of the Wallis Inquiry. It is the culmination of an extensive reform program that examined the regulatory requirements applying to the financial services industry. The three key features of the new regulatory and legislative regime are to provide:

- (a) a harmonised approach to licensing of financial services providers, including a disclosure and conduct framework;
- (b) a single statutory regime for financial product disclosure; and
- (c) the licensing of financial markets and clearing and settlement facilities.

The Federal Government introduced the FSR Bill into Parliament on 5 April 2001. The House of Representatives sent the Bill to the Senate with amendments on 28 June 2001, and a report by the Parliamentary Joint Statutory Committee on Corporations and Securities was tabled in August 2001. After subsequent amendments by the Senate, the Bill was finally passed on 28 August 2001 and assented to on 27 September 2001. As I have mentioned, FSRA will commence on 11 March this year, with a two year period for participants in the industry to

make the transition from their current regulatory structure to the single licensing and product disclosure regime required under the new legislation.

On 8 October 2001, extensive regulations were finalised. Further regulations are planned before 11 March 2002. The style of FSRA is to set out the general principles with the detail to be filled in by regulations and by policy. It is therefore necessary for industry to engage with, and understand, the regulations just as much as the legislation itself.

I should point out that ASIC was involved in dialogue at an early stage with both the Government and Treasury throughout the development and implementation of FSRA and the regulations. A key part of our work over the last twelve months has been to provide quality and timely feedback to Treasury on the draft Bill and draft regulations.

Having said that, I think it is important for industry to appreciate the different areas of responsibility of ASIC and Treasury. Treasury's role is to draft the legislation and the regulations. ASIC's role is to develop administrative policy and processes to implement the legislation and give industry fair guidance on how it will be implemented. ASIC therefore needs to provide feedback to Treasury in order to ensure the effective implementation of the outcomes being sought by FSRA.

I do believe ASIC and Treasury have worked extremely well and closely together on FSRA and the accompanying regulations. Indeed, at one point, one or two ASIC staff were seconded to Treasury to assist in the enormous load they have had.

## **ASIC Policy and Guides**

It would not surprise you to hear that ASIC has encountered a large administrative and resource demanding task in preparing to implement FSRA in a comparatively short space of time.

Our approach to implementing FSRA has been guided by a number of key principles. These are that we should:

- give full effect to the legislation enacted by the Parliament – recognising that the legislation is the result of detailed consultation with industry and consumer groups over the last four years;
- develop policy that is consistent with the main objectives of FSRA;
- recognise that the new legislative framework changes how financial products and services are regulated and that for some industries this change will be greater than for others;
- provide guidance that will help people comply with their obligations under the new regime;
- focus on administrative implementation of FSRA, taking into account any amendments to the legislation during its progress through the Parliament and the issue of any draft and final regulations;
- develop policies by working closely with those developing internal ASIC systems and processes to implement the legislation (for example, those working on the development of application forms, IT systems and surveillance programs); and
- help consumers understand how we will implement the new legislative framework.

The ways in which we have sought to provide guidance to industry include:

- 1) A suite of policies and process guides;
- 2) A licensing kit;
- 3) Industry consultation visits;
- 4) ASIC Speaks seminars;
- 5) Information on our website including Q&A's; and

- 6) The ability to deal with individual problems and questions through the national FSR Project Office.

### *ASIC's Policy Suite*

We have tried to provide as much up-front information and guidance as possible to assist regulated bodies in planning for the transition to the new regime, and in complying with their new legislative obligations. We have sought to do this both to be of assistance to industry, but also to ensure that industry can engage in as much "self help" as possible. Given the number of Australian Financial Services Licences we expect to issue (potentially between 7,000 and 8,000) and our resources, we will not be able to help parties individually in the manner in which we assisted many parties with the transition to the Managed Investments regime.

As with Managed Investments, we have had to develop our systems, policies and procedures at the same time as the legislation was being prepared, debated in Parliament and enacted. This has created its own difficulties for industry and for ASIC and, as a result, we have released a number of guides as well as policies in order to assist industry in managing the proposed changes.

Over recent months, we have issued a number of documents informing the industry of ASIC's implementation approach to FSRA. The basis of our approach was to follow industry priorities in order that they can plan more efficiently.

ASIC has issued seven policies in order to implement the provisions of the legislation. These policies were preceded by policy proposal papers (PPPs), which were subject to extensive consultation and were then, on the basis of industry feedback, developed into policies. The policies are:

- PS 146 Licensing: Training of financial product advisers (replaces PPP No 3 Licensing: Adapting IPS 146 to the Financial Services Reform regime);

- PS 164 Licensing: Organisational capacities (replaces PPP No 2 Licensing: Organisational capacities and PPP No 6 Licensing: Principles and representatives);
- PS 165 Licensing: Internal and external dispute resolution (replaces PPP No 7 Licensing: External and internal dispute resolution procedures);
- PS 166 Licensing: financial requirements (replaces PPP No 10 Licensing: Financial requirements);
- PS 167 Licensing: Discretionary powers and transition (replaces PPP No 8 Licensing: Discretionary powers);
- PS 168 Disclosure: Product disclosure statements (and other disclosure obligations) (replaces PPP No 4 Disclosure: Product Disclosure Statements and other disclosure obligations); and
- PS 169 Disclosure: Discretionary powers and transition (replaces PPP No 5 Disclosure: Discretionary powers and transition).

I should also mention PPP No 9 Approval of Codes, which has the status of interim policy. ASIC is also currently developing its policy on Australian market licences following our PPP No 11 Australian Market Licences: Australian Operators, which was released on 2 November 2001.

Just to give you an idea of what is involved in developing a policy, the draft of a policy is reviewed by our Regulatory Policy Group (RPG - a group of eight or so senior executives), the responses from industry are then assessed, the policy is revised and then reviewed again by RPG. We estimate that RPG would have spent over 50 hours in such review (400 person hours) whilst ASIC officers would have spent over 1,000 person hours in consulting on, and preparing, the policies.

ASIC's policy statements are designed to support the smooth transition to the new regime and to complement the objectives of FSRA. All the policies that make up the FSR suite of policies are subject to ongoing review. The contents of

these policies are based on FSRA and the regulations made on 8 October 2001 for the purposes of FSRA. Whilst ASIC does not expect the substance of these policies to be materially affected by any further regulations, we will revise these regulations and, if necessary, amend any details of the policies.

As well as formal policy statements, we have also issued process guidelines. These guidelines are designed to assist those who have to undertake specific administrative processes under the legislation. They intentionally are not policy statements. They are a response to industry's request for further guidance.

ASIC has developed four process related documents to implement the provisions of the legislation. These include:

- Building the FSRB Administrative Framework: Policy to Implement the Financial Services Reform Bill 2001; (in September 2001 we released a supplement to this guide updating ASIC's publication timetable for the administrative implementation of FSRA);
- Licensing: The scope of the licensing regime – Financial Product Advice and Dealing – An ASIC Guide; (replaces PPP No 1 Licensing: The Scope of the Licensing Regime: Financial Product Advice and Dealing);
- Licensing and Disclosure: Making the Transition to the FSR Regime – An ASIC Guide. This document explains how the key financial services licensing and financial product disclosure transition provisions work. It also outlines the processes ASIC will have in place to assess existing financial service providers seeking an Australian financial services (AFS) licence under the FSR legislation; and
- Licensing Process Guideline: How do you get an Australian Financial Services Licence? (Version 2 – released in October 2001). This document informs existing and potentially new providers of financial services about ASIC's licensing process, and details the types of AFS

licence authorisations that someone can apply for. I should note that our Licensing Kit has now replaced this process guideline.

### ***AFS Licensing Kit***

On 1 February this year, ASIC released the Australian Financial Services Licensing Kit as part of its implementation of FSRA. The release of this Kit was an important step for industry and practitioners in preparation for the commencement of FSRA on 11 March.

The Kit was developed in consultation with industry and related industry associations. ASIC has had at least two meetings with each industry group to date to develop these specialist kits. Many of the industry associations that assisted us will also be producing additional specialist guidance for their members.

The Kit essentially explains the licensing process and our thinking behind each of the questions in the application. Of course, most applicants filling in the electronic application for an AFS Licence will not have to complete all the questions. However, all the background is provided in the Kit. It also includes industry specific examples, provided by industry bodies, demonstrating how the licensing process works for that industry and using jargon that will be easily understood by members of the industry.

The Kit will be reviewed over the transition period to address practical process issues as they emerge.

### ***Consultation process***

As I mentioned earlier, ASIC's consultation with the financial services sector in relation to the implementation of FSRA has been quite extensive. We consider that the best way for us to understand the majority of the industry issues is to liaise regularly with industry associations. Consequently, we liaised widely on

our policy and process related documents. We encouraged members of the industry to engage themselves in the policy development process, and to make comments on our PPPs and process guidelines as they were issued. Our PPPs, for example, were each released for a public consultation period of five weeks.

I should point out that during this consultation process, ASIC received over 100 detailed submissions from many industry groups in response to our PPPs. Of course, in light of the industry specific nature of many of the concerns raised, we did not expect each and every industry group to agree with the stance that we ultimately adopted. Having said that, we are very grateful for the input we have received, which we believe led to the policies being as practical and fair as possible.

### ***Consultation visits***

ASIC has also supplemented the formal written submission / consultation process with numerous presentations and structured discussions with consumer and industry groups to provide guidance about key issues, and to hear the thinking behind their submissions.

To date, in 2002, ASIC has presented at (or has committed itself to presenting at) approximately 30 internal and external conferences and seminars. In 2001, we presented at 293 conferences and, in 2000, we presented at 85 conferences.

Unfortunately, we have not had the time to speak to everyone, given the large number of players likely to be affected by the new regime. Consequently, in order to ensure that our consultation was as effective as possible, we concentrated on liaising with the main industry representative association, who could act as a conduit between ASIC and their members, for example, IFSA, AFSA, ABA, FPA, ACA. This process has worked well to date, most recently in relation to the financial requirements PPP and the Licensing Kit.

Through the two-year transition period, we intend to hold formal liaison meetings each quarter in the capital cities of Brisbane, Sydney, Melbourne and Perth, and bi-annual meetings in the other capital cities with industry organisations. The meetings will cover such issues as FSRA implementation, relief applications, amendments to policy and the law, surveillance outcomes and trends in consumer protection. Some members of the industry may also be invited to participate in small focus groups to discuss particular industry issues. Further details about the FSR Liaison Groups can be accessed on the FSR page of our website.

### ***"ASIC Speaks"***

In addition to our consultation visits, we have hosted a number of "ASIC Speaks" seminars on FSRA. In May last year, we held our first national "ASIC Speaks" seminar series on FSRA and our PPPs. These seminars were held in all major Australian cities and over 2,500 people attended.

Given the success of our first series, we are currently holding the second series of our "ASIC Speaks" seminars, the purpose of which is to focus on immediate implementation issues of FSRA. Although final figures are not available for this series, attendance from Sydney and Melbourne alone has been close to 2,500 people. We believe these seminars have been useful in adding to the up-front guidance we sought to provide through our policies.

### **System and Process Initiatives to Facilitate Implementation**

As you have heard, ASIC has worked extremely hard with the limited resources available to us in developing policies and processes to ensure that FSRA is implemented as effectively as possible. However, these policies need to be supported by appropriate systems and structures, which will facilitate, or complement if you like, the policies and processes that will be used to implement the new regime.

Some of these system / process initiatives include; ASIC's website, ASIC's Infoline & National FSR Project Office, our new "national" structure, our electronic licensing system, and our staff training initiatives.

### ***ASIC's website***

As you would expect, ASIC has developed a site on its website, which specifically deals with FSRA. It consists of Commission speeches on FSRA, "ASIC speaks" seminars, the PPPs, policy statements and other information on FSRA. Since the dedicated FSR web pages were added to the ASIC website, the pages have received in excess of 65,000 hits. We will also be using websites of industry associations to relay specific messages to industry groups.

As you would suspect, we are continuing to manage a large number of industry queries in relation to FSRA and its implications. In response to these queries, we have developed systems and processes whereby industry enquiries are handled in an efficient manner.

We have, for example, published a series of Frequently Asked Questions (FAQs) on our website to share process-related answers to commonly asked questions. These FAQs provide general information about how ASIC is implementing FSRA, although, of course, ASIC is not able to provide legal advice or interpretations of the legislation.

We will continue to develop and update the FAQs on our website on a regular basis as new queries arise, or to alleviate any hot spots as they become apparent.

### ***Infoline and National FSR Project Office***

Other communication channels used by ASIC to deal with industry queries has been the ASIC Infoline and the FSR Project Office email query address.

The ASIC Infoline has been a valuable service, providing guidance to members of the industry in relation to many FSRA queries. The ASIC Infoline has had

approximately 752 telephone enquiries to date, 110 of those being related to licensing issues. It is also no surprise that the number of queries has increased most recently in light of our rapid approach towards March 11.

The FSR Project Office has also been a valuable tool. The ASIC-wide FSR project team, which has a project management office and four sub-project teams: Licensing, Disclosure, Markets, and Codes, Dispute Resolution & Credit, was set up by ASIC to facilitate the implementation process of FSRA, and to deal with industry queries in relation to FSRA. These specialist industry teams will service particular sections of the industry through the transition process.

Since July 2000, approximately 2,517 people have subscribed to our email subscription service, with an additional 1,134 independent emails being received by the FSR project office since August 2000.

The project team has also been responsible for developing the necessary policy, guidance documents, internal processes, training material and IT systems to ensure that the transition from the current regime to the new one is as seamless as possible. The team has been focussing on priorities that have already been identified by industry, and have been testing their early thinking on industry groups and some key industry players.

### ***ASIC's "national" structure***

As you may be aware, in November 2000, ASIC announced a restructure of its senior management to deal with the growing workload in regulating Australia's more competitive financial markets and in integrating ASIC's growing responsibilities across all financial services. The restructure created a new directorate for Financial Services Regulation, which has now been subdivided into three separate divisions; Legal & Technical, Regulatory Operations and Licensing & Business Operations.

This shift to a "national" structure is both coincidental and useful in facilitating the implementation of FSRA as it brings a strong operational focus to national management and clears bottlenecks in decision-making. The subdivision of the FSR Directorate is also beneficial in facilitating the implementation of FSRA as relief applications and applications for licenses are dealt with specialist industry teams.

We will have three licensing teams: one in Adelaide (Financial Planners), one in Melbourne (Superannuation, Insurance, Financial Planners and Responsible Entities), and one in Sydney (all conglomerates and responsible Entities). We will start with 35 staff, but by year-end will have built up to 100 staff members.

### ***Electronic licensing system***

ASIC has developed an electronic licensing system, which was released on 11 February this year. The e-licensing system for the AFS Licence application is a key element of our suite of systems facilitating the implementation of FSRA. E-licensing is a fast and efficient method for industry to apply for an AFS licence. It will minimise the level of incomplete applications, it will reduce errors by cross-checking information with other ASIC databases, it will speed up processing times by eliminating the need to re-enter information, and using it will result in a substantially reduced application fee for applicants.

The system contains a number of measures to assist the applicant and ensure that all questions are fully completed. The e-licensing system interactively "tailors" each AFS licence application so that applicants are asked only the questions relevant to them. The licence "adjusts" its length in response to the answers given. All answers sought require Yes/No replies. The questions on the electronic application also link into our policy and licensing kit in order to provide on-line help to each applicant. It also provides a tailored checklist to help people submit the correct documents in support of their application.

### ***Internal consultation and staff training***

Another activity in facilitating the implementation of FSRA has been ASIC's commitment to internal consultation and staff training.

In contributing to the development and implementation of FSRA, ASIC has consulted internally with relevant staff to understand the issues they foresee regarding implementation.

We have also been training our staff so that they have the necessary skill set to assess applications and finalise our Licensee Register and Authorised Representative Register. We have, for example, developed internal assessment guides to ensure assessment is nationally consistent, as well as risk based.

To date, we have rolled out a number of training modules (including videos) for the FSR Directorate staff to enable them to deal with the large number of queries we are currently receiving. Concurrent with the external "ASIC Speaks" series, a further round of FSR training, designed for all FSR Directorate staff, will be delivered between now and late March 2002 to ensure that staff will be able to manage the core business requirements under FSRA as of 11 March 2002. Training for all ASIC staff will be rolled out later in 2002.

To give you an indication of the enormity of this task, ASIC has 1,322 staff members nationally. While all ASIC staff will require some form of training to be aware of, and have some understanding of FSRA, staff within our FSR Directorate, Complaints, Enforcement, Consumer Protection and Communications areas (comprising of approximately 286 members nationally) will require more detailed training so that they have the necessary skill set to assess applications and manage the transition to the new regime.

## **Some reflections – past and present challenges**

### ***Balancing 'guidance' and 'flexibility'***

FSRA introduces a number of wide-ranging substantive reforms, yet it intends to provide a "flexible and adaptable framework that encourages innovation" and is able to respond to a changing regulatory environment.

The present era of rapid market and technological change will continue to produce innovation in the structure and modes of delivery of financial products and services. ASIC is conscious of the changing nature of the Australian financial sector, and in particular the extent to which globalisation and increased cross border activity by product issuers and service providers has an impact on our markets. It is not realistic to expect that legislation can be drafted in a way that will be capable of incorporating this change. Regulatory flexibility will inevitably be needed to provide clarity and certainty, to prevent unintended consequences, and to promote the objectives of the law.

The challenge for the regulator in the exercise of its discretion is to implement the legislation by ensuring that there is sufficient certainty for market participants as to how the proposed changes will be implemented and/or enforced, whilst maintaining sufficient flexibility to facilitate innovation and promote business.

### ***Day 1 compliance challenges***

As you are aware, there are certain provisions in the Corporations Act (as amended by FSRA), which commence on 11 March – Day 1 of the new regime.

These provisions include:

- Hawking – ss 992A and 992AA;
- Cooling off;
- Confirmation of transactions – s 1017F;
- Application monies to be placed in a trust account – s 1017E; and

- Some periodic reporting obligations for superannuation trustees – s 1017DA.

Some of the uncertainties concerning some of these provisions are expected to be resolved by regulations still to be issued.

Nevertheless, we expect to receive a barrage of relief applications, not to mention queries from industry, to modify the law or to clarify the application of these provisions. This will be a huge resource challenge for us.

In addition, although we have provided extensive guidance, and advised industry repeatedly to get in early and ensure that they are ready for the transition to the new regime, I have no doubt that there will be some groups within industry who will not be ready and will not be capable of complying with their obligations on March 11.

### ***Technical challenges***

As with any new regime, there is also no doubt that we will experience some "technical" challenges. A new law always comes with new terms and new interpretations. While we have provided some guidance in relation to the interpretation of certain terms, we are not in the business of providing legal advice to industry. Nevertheless, we will no doubt have our disagreements with some industry participants who choose to adopt, on advice of course, the more aggressive interpretation of the Act.

### ***Staffing challenges***

I am sure you can all appreciate that there is a huge workload involved in implementing a piece of legislation such as FSRA, which profoundly changes the way the financial services industry is regulated in Australia.

Implementation of FSRA has straddled many areas of ASIC, not just our FSR Implementation Project team. We have had staff from areas such as Regulatory Policy, Complaints, Surveillance, Enforcement, Consumer Protection, Information Technology, Information Processing Centre, Human Resources, and Communications working on implementation of FSRA. Indeed, over 200 staff nationally are working on FSRA implementation.

Underlying the overall FSR implementation project, there have been 21 sub-projects including three separate Information Technology builds. As I have already mentioned, we have consulted with industry on our policies and guides, we have provided feedback to Treasury on the draft regulations, we have worked on over 36 drafts of the electronic application and Licensing Kit, we have had to design new "notice forms" that comply with the new regime (not to mention the work involved in putting them onto our systems), our Communications staff have worked overtime in setting up our FSR website and preparing the FAQs, we have developed training materials and 15 process diagrams at a time when the final legislation had not been released, we have had to develop forecasts in relation to the level of staff that will be required in the future, we have had to develop licence conditions etc etc. I should also mention that in addition to FSRA implementation, these staff members have had to continue working on their daily operational matters.

Implementation of FSRA has already demanded, and will no doubt continue to demand, high levels of ASIC resources in order to be ready for commencement on March 11 this year.

## **Future Challenges**

We have noted that we will review our FSRA policies after all the regulations have been finalised and issue further guidance if required. We have also highlighted that there are parts of relevant pre FSR policy that will need to be reviewed in light of FSRA. We have set some priorities and these priorities are

outlined in Policy Statement's 167 *Licensing: Discretionary powers and transition* and 169 *Disclosure: Discretionary powers and transition*. As you may be aware, we have started issuing class orders as a result of changes introduced by FSRA, the nature of which is described in Policy Statement 167 and 169.

We have been working on our standard licence conditions and aim to release them as early as possible before March 11. The regulations, however, are likely to have an impact on licence conditions. Therefore, our standard licence conditions will be released once the impact of the regulations have been assessed and incorporated.

We are developing a Licensee Handbook, which will highlight the obligations of licensees under the new regime and assist industry members to ensure that they comply with their licence conditions and reporting requirements.

We are also developing a reporting system so that we can track industry transition and predict workload peaks in a timely manner.

An added challenge is to ensure that our staff are sufficiently trained and have the requisite knowledge and capabilities to deal with the fluctuation of licence applications and other issues once FSRA commences on 11 March.

## **Conclusion**

At the risk of stating the obvious, let me conclude by saying that it will be a challenging year for all of us as we move forward under the FSR legislation. As you can see FSRA has been a huge task for ASIC staff – policy and implementation staff have done an outstanding job to prepare. They have lived on sandwiches and pizza and have requested gym membership from their families for birthdays this year! ASIC has done a tremendous amount of work to provide as much upfront guidance as possible to enable financial service providers to make a smooth transition to the new FSR regime. It is important that providers prepare early for their move to the new FSR regulatory regime –

let me say that we believe our strategies will assist planning for that move. We are committed to continuing our consultation role with industry in a constructive and professional manner.

Let me also take this opportunity to thank you all for the work you have done in helping us develop our policy, application and licensing kit under what have sometimes been vary big asks in very short time frames. I hope I have managed to give you some insight into how ASIC has sought to deliver FSRA to you all.