

Thursday, 28 May 2015

Ms Elizabeth Hristoforidis
Senior Manager
Strategic Policy
Australian Securities and Investments Commission

Copy: *FSC takes up ASIC's offer for ASIC to provide a copy of this submission (or the portion ASIC determines is out-of-scope for ASIC) to the Department of Prime Minister and Cabinet. FSC requests ASIC to provide this submission (or the relevant extract that ASIC determines as out-of-scope for ASIC) to the Department.*

By email only

Dear Ms Hristoforidis

FSC Submission – ASIC KPIs – Measuring and reporting on the administration of regulation (with a focus on the extent to which the regulatory burden is kept to a necessary minimum)

The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees.

1. Thank you for the opportunity, and extension of time, to comment on the Regulator Performance Framework (the **Framework**) which is designed to assess the extent to which the regulator's performance minimises regulatory burden in the course of fulfilling its activities. As this submission is lodged slightly after the due date and we understand there will be limited time for ASIC to consider submissions in readiness for commencement of the Framework on 1 July 2015, this submission is brief and to the point. We think our points are clear, however please contact FSC if you need further elaboration on the points in this submission – we have sought to keep our submission brief to assist consideration of our submission in the limited timeframe ASIC has to consider submissions.
2. ASIC has sought feedback on the draft KPIs. ASIC notes (on page 1 of the Draft KPI's document *Regulator Performance Framework – ASIC Measures* accompanying ASIC's request for feedback) that if submitters "*have feedback on the Framework more generally, including the scope of the Framework and the KPIs, ASIC can pass this on to the Department of Prime Minister and Cabinet*" (the **Department**). **FSC wishes to take up ASIC's offer and therefore we request that ASIC also provide this submission to the Department of the Prime Minister and Cabinet.**
3. This submission contains some general comments on the Framework, as well as some specific comments on the draft KPIs. It is not entirely clear to us as to the demarcation between a

matter that is “within scope” for ASIC’s consultation or “out-of-scope” for ASIC and therefore a matter for the Government. This submission is in two sections – *General Comments on the Framework* and *Comments on ASIC’s KPIs*. We request that ASIC consider all our comments which ASIC considers are in-scope for ASIC, and that ASIC refer any other comment (which ASIC considers out-of-scope for ASIC) to the Department of the Prime Minister and Cabinet.

4. Our attempted demarcation between *General Comments on the Framework* (which may be for the Department or maybe for ASIC to consider) and *Comments on ASIC’s KPIs* (for ASIC to consider) is not determinative, and we expect ASIC to consider all our comments (irrespective of where they appear in this submission) which ASIC considers in-scope for ASIC and to refer the balance to the Department. Our attempted demarcation is designed to assist ASIC but we rely on ASIC’s determination as to what it considers out-of-scope and therefore should be referred by ASIC to the Department.
5. This submission reflects the feedback provided by FSC members on the Framework and KPIs.

General Comments on the Framework

6. While we have some (constructive) criticisms of the design of some aspects of the Framework (namely that the assessment is not independent of the assessed regulator), we do support in general terms the Government’s initiatives in relation to the Regulator Performance Framework and in particular we are pleased with the Government’s focus on reducing regulatory burden in the course of ASIC fulfilling its objectives. We acknowledge ASIC already has an eye to aiming to regulate without unnecessary burdens, for example by modifying the law for unintended or onerous consequences (where the policy objective is met with the modification).
7. We do not support the proposed self-assessment model. Our preference is that any assessment of ASIC’s performance is undertaken by an impartial external independent party, and that the assessment include a mechanism for the option of anonymous feedback from stakeholders. (Some regulated entities may be coy in expressing dissatisfaction with a regulator to the regulator so anonymity should be allowed for.) The stakeholder survey should be annual. Moreover, this assessment process should complement existing methods of oversight / accountability such as Senate Estimates, and not replace these forums. Finally, there should be consideration of benchmarking with other regulators overseas.
8. The Framework is an assessment of the performance of the assessed agency by itself. That is as we understand it, it is a self-assessment finalised by ASIC, then subsequently followed up by engagement with stakeholders (including industry) for comment on ASIC’s self-assessment. This is in our view not a robust assessment process (that is not to suggest ASIC would not robustly seek to assess itself) because it lacks independence in that ASIC is preparing its own performance review/assessment. After that, the Framework requires ASIC to consult with stakeholders – while this is good it is too late. We query why the external validation of the regulator’s assessment of its performance **occurs after** the regulator has already finalised its self-assessment of its own performance. That approach is like a person preparing and

- finalising their own performance review and then providing it to their stakeholders after the event. To ensure a robust and strong assessment process, we think it would be better if the assessment of ASIC was undertaken by an external independent party, rather than ASIC.
9. In our view the way the Framework ought to work is that ASIC is assessed by an independent body, perhaps the Australian National Audit Office (which we understand was suggested in another submission, and we hold the same view). The independent body would engage with ASIC and stakeholders (consumers and industry) to obtain feedback as to how ASIC has performed against the KPIs in terms of the Government’s policy objective evident in the Framework of reducing unnecessary regulatory burdens. The independent body could and would of course obtain ASIC’s own views of ASIC’s own performance and this would feed into the review of ASIC by the independent body along with other stakeholder comment (e.g. consumers and industry).
 10. Our members have noted that even though the Government’s response to the Financial System Inquiry is pending, the Regulatory Performance Framework may be a good opportunity to progress FSI Recommendation 30 on rebalancing the regulatory focus towards promoting competition in the system.
 11. If notwithstanding our comments above the Framework proceeds with ASIC finalising its own self-assessment prior to having it reviewed by stakeholders, we think that some stakeholder comment is appropriate to input into the regulator’s assessment of its performance prior to the regulator finalising the self-assessment. This is to ensure that the self-assessment can transparently and appropriately reflect the view of all stakeholders (e.g. consumers and industry).
 12. If the self-assessment model proceeds in its current form, we request that the Regulator Performance Framework (and KPIs) require that ASIC release publicly a summary report of the external validation feedback ASIC receives on its annual self-assessment, and the actions that ASIC proposes to take in response to the external validation from stakeholders (including regulated entities and industry bodies). We note this is a similar approach in response to significant consultations ASIC undertakes.

Comments on ASIC’s KPIs

ASIC KPI 2: Communication with regulated entities is clear, targeted and effective

Transition periods KPI – reasonable timeframes

13. A significant, on-going and consistent concern of FSC members is the provision of insufficient transition periods (for example when ASIC changes the law or its practice in a Regulatory Guide). This is not to suggest that in all cases transition periods are not sufficient. There absolutely needs to be a KPI which requires that ASIC provide for reasonable transition periods. The assessment of “reasonable” can be subjective, and therefore may be difficult to

assess. However, as a guiding principle, the following transition periods should ordinarily apply:

- (a) Where the change impacts existing documents, existing systems or existing procedures: a minimum of 12 months after finalisation of all the material that regulated entities need to refer to (such as the final Regulatory Guide and any related Class Orders); and
- (b) Where the change is to newly issued documents (i.e. documents to be first issued after the ASIC change), a minimum of 3-6 months.

These are guides only, and they should not be taken to suggest that in all cases in relation to new systems or new documents, 3-6 months is a sufficient transition period – such period may be insufficient depending on the implementation steps required to comply with the change.

- 14. Deviations from these general timeframes (longer or, in exceptional and reasonably justified circumstances, shorter) may be appropriate depending on the extent of the changes. FSC does not buy the argument that having sighted drafts of changes should count towards the transition period – industry cannot be expected to hard-code systems, practices and documents on non-final (that is, draft) changes as this requires industry to incur potentially significant costs on matters which are not final and may change. This unnecessarily duplicates costs.
- 15. These minimum transition periods should be included in KPI 3 (or provided as a new and additional KPI). The metric for assessing ASIC's performance is the number of times the timeframe was less than the general minimum transition period. Having this metric will drive ASIC accountability in ensuring implementation timeframes are reasonable.

Consultation periods – reasonable consultation timeframes

- 16. ASIC generally (but not universally) provides reasonable consultation timeframes in our view. (ASIC is generally accommodating in facilitating a late submission where that is feasible.) We accept that consultation timeframes are a function of a number of matters including Government timing. However, as a general principle, consultation timeframes should be around 3 months. The metric for assessing ASIC's performance is the number of times the consultation timeframe was less than the general minimum consultation period of 3 months. Having this metric will drive ASIC accountability in ensuring consultation timeframes are reasonable. Whether a consultation timeframe should be longer or could be less will clearly be a function of the breadth and complexity of the subject matter being consulted on.
- 17. FSC applauds ASIC's open engagement with industry – ASIC regularly consults with FSC and is responsive to FSC requests for further consultation or an opportunity to discuss matters. A KPI in relation to reasonable consultation timeframes would assist recording ASIC's target and

achievements in this regard. ASIC regularly engages with FSC on a range of matters impacting industry.

ASIC KPI 2: Communication with regulated entities is clear, targeted and effective

And

ASIC KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed

18. In relation to KPI 3 (and arguably KPI 2), ASIC is wanting to show a commitment to proportionate actions in managing regulatory risk. We welcome those aspects of the KPIs. As a suggestion, it would be helpful to the regulated population if ASIC proposed evidence metrics which include a commitment to communicate to industry where ASIC sees market failures when updating policies/guidance/requirements for industry; i.e. ASIC setting out what in ASIC's view is the market flaw or failure which justifies the regulatory approach on the matter. For example, while naturally there may be different views between ASIC and other stakeholders (such as industry) from time to time, if ASIC reports as to the flaw that in ASIC's view justifies the regulatory approach, that would assist in ensuring regulation is proportionate and effective. Conversely, if there is no market flaw to be addressed or rectified, industry would expect that there would generally be no need for additional regulation.

ASIC KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed

And

ASIC KPI 6: Regulators actively contribute to continuous improvement of regulatory frameworks

19. This comment is we think relevant to KPI 3 or KPI 6 or both KPI 3 and KPI 6. KPI 3 refers to ASIC's stakeholder engagement with various Panels. KPI 3 should also include a KPI and a metric around that to provide feedback and consult with industry bodies (such as the FSC). KPI 6 refers to engagement with key stakeholders. KPI 6 should be amended to expressly refer to regular ASIC consultation with industry bodies, quarterly. (ASIC already does this in the case of FSC, further ASIC has regular contact with FSC on a wide range of matters relevant to our members who operate in superannuation, funds management, life insurance, financial advice and act as licenced trustees or as public trustees.)

ASIC KPI 4: Compliance and monitoring approaches are streamlined and coordinated

20. In KPI 4, in relation to the percentage of information shared and received among regulators, we think that the third evidence metric (“Memoranda of understanding with peer regulators detail coordination approach”) should go further than merely agreeing an MOU with peer regulators detailing the coordination approach. At a minimum, this MOU should be publicly available.
21. FSC members report (as a longstanding concern) that some ASIC information requests are duplicative and increasingly ad-hoc. Our members report that by “duplicative”, this means the same request going separately to different business units across a regulated group (with multiple regulated entities) or multiple requests for further information. Where possible, this should be streamlined by having a single request (for a collective of regulated entities within a group) and avoiding ad-hoc requests as much as possible. Sometimes this may not be feasible due to (legal) procedures, but at a minimum the matter should be managed by ASIC contacting (by phone initially) the regulated group, and flagging the information request or requests which are about to be made by ASIC and working with the regulated group as to the right person (within the regulated group) and most efficient way to provide the requests (subject to any legal procedural requirements). KPI 4 appears to broadly capture these issues, which is supported. However we consider that the KPIs (probably specifically, KPI 4) needs to incorporate reporting on actual requests and the extent/quantity to which the (pre-streamlined) requests have been streamlined so that there is accountability on ensuring efficient information requests by ASIC, and metrics around this. (We have not suggested a form of metric/target in the limited time available.)
22. Our members report that where ASIC informally engages with a regulated group before submitting a formal information request, this is very effective in tailoring the request and ensuring multiple follow up requests are not necessary. KPI 4 probably captures this but we suggest KPI 4 be expanded to expressly mention this as part of the KPI. (We have not suggested a metric in the limited time available.)
23. Our members request that ASIC consider appointing a single “Contact Person” or prime “Relationship Person” at ASIC for each significant regulated Group, to assist in ASIC providing a co-ordinated approach to information requests. This would be particularly useful for a conglomerate entity with multiple regulated entities and/or regulated businesses. APRA already adopts a Relationship Contact approach. FSC requests that KPI 4 be amended to refer to ASIC appointing a main contact person for larger or conglomerate regulated institutions.
24. Our members seek that, where appropriate, further information be contained in ASIC information requests as to what purpose the information is requested for, as this will assist the regulated entity in responding to ASIC. We think this comment is likely to be captured by KPI 4 (“Regulators information requests are tailored and only made when necessary to secure regulatory objectives, and only then in a way that minimises impact”.) If however ASIC

considers KPI 4 does not capture this comment, then FSC requests ASIC expand on KPI 4 to capture our comment.

25. In relation to KPI 4, ASIC is proposing a formal sign-off process involving senior staff and legal officers to precede all formal information requests. We consider the sign-off process should include a requirement for ASIC to have regard to existing information requests already sent by other parts of ASIC to the regulated entity or (where appropriate and feasible) to the same functional group of which the regulated entity forms part. This will require ASIC to be more coordinated and hopefully have regard to the existing information requests already being fielded by the same people within a regulated entity.

Please contact Stephen Judge on (02) 9299 3022 if you have any questions on our submission. Thank you for allowing us an extension to lodge our submission.

Yours sincerely

Stephen Judge
General Counsel