Law Council
OF AUSTRALIA

Business Law Section

14 February 2020

Mr Andrew Fawcett
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Australian Securities and Investments Commission
Level 7, 120 Collins Street
MELBOURNE VIC 3000

By email: andrew.fawcett@asic.gov.au

Dear Mr Fawcett

Feedback on ASIC's performance against the Australian Government's Regulator Performance Framework over the 2018-19 reporting period

1. The Insolvency and Reconstruction Law Committee and the Corporations Committee of the Business Law Section of the Law Council of Australia (**Committees**) welcome the opportunity to provide this feedback concerning ASIC's performance against the Australian Government's Regulator Performance Framework (**RPF**) over the 2018-19 reporting period.

Key Points

2. The key points the Committees wish to make are:

    a. The Australian Securities and Investments Commission (**ASIC**) allocates a disproportionate amount of resources to the regulation of registered liquidators.
    b. Despite registered liquidators having to report to ASIC (under section 533 of the *Corporations Act 2001* (Cth)) possible offences they have identified, ASIC only takes action in a very small number of cases. Resources should be reallocated from regulation of registered liquidators to prosecution of serious director misconduct in insolvencies.
    c. There remains considerable frustration in the market regarding the administration of the financial services licensing regimes – in particular the timing and perceived bureaucracy involved in seeking licences, and licence amendments. This not only affects the efficiency of business in Australia, it deters foreign businesses from extending their reach to Australia. The regulatory sandbox seems to have had some limited effect, but few applicants qualify.
    d. The process for seeking ASIC relief, and scope of successful applications, has been thrown into question by the commencement of the industry funding regime.
    e. "Standard" ASIC relief should be addressed in class orders, to reduce friction – and there should be a programme for regularly rolling longstanding class

orders into legislative reforms, to improve ease of use of the legislation and reduce corporate costs.

f. ASIC policy with regard to no-action letters, and more novel relief would benefit from being revisited, and market consultation sought, with a view to addressing KPI 1 and KPI 6.
g. More generally, we do wish to acknowledge ASIC's level of engagement with the market and active efforts to seek market consultation on proposed regulatory guides and legislative instruments. We consider that this consultation has been effective, and has improved the ultimate publications and instruments.

Submissions

Over-regulation of registered liquidators

3. ASIC spends what seems to be a disproportionate amount on the regulation of registered liquidators (given the relatively small number of them) which it collects via the Industry Funding Model (**IMF**). In 2018-2019 it spent $7.338m on supervision of liquidators (compared, for example, to $.850m spent on registered auditors). It is difficult to see why ASIC expends so much resources on regulating registered liquidators. Hopefully, the amount of resources allocated by ASIC to regulating registered liquidators will reduce in the coming years given the supervision of liquidators is not listed as a key area of concern or priority in ASIC's Corporate Plan for 2019/20 or 2019 to 2023 (as it should not be).

4. It is of concern that the amount of the IFM levies to be paid by registered liquidators for the 2018-2019 year is 17.4% up on the budgeted metric and 26.5% on the previous year's metric budget (upon which liquidators base how much they will seek to collect from each liquidation during the year to cover the costs of the levy), so liquidators may be out of pocket.

5. This apparent over-regulation is relevant to the following KPIs:

    a. KPI 1 - excessive costs imposed on liquidators can prohibit their ability to operate profitably and so impede their ability to practice; and
    b. KPI 3 - the time and cost spent regulating liquidators appears to be disproportionate to the regulatory risk being managed.

Lack of enforcement action in relation to reported officer misconduct

6. Despite liquidators having to report to ASIC (under section 533 of the Corporations Act) possible offences they have identified in external administrations, ASIC only takes action in a very small number of cases.

7. The Committees understand that this is a factor of ASIC's limited resources which they must balance with their other competing regulatory priorities. However, the Committees consider ASIC would be better placed focusing their limited resources on pursuing serious director misconduct in insolvencies than over-regulating registered liquidators.

8. This lack of action is relevant to the following KPI:

a. KPI 3 - the limited action taken against directors for misconduct reported by liquidators appears to be disproportionate to the regulatory risk being managed (i.e. the prevention of director misconduct).

Licensing frameworks and timing

9. The framework for Australian Financial Services Licences remains convoluted, and – leaving aside marginal improvements in timing in limited cases via the regulatory sandbox – a lengthy process. While rigour is required in assessing licensing candidates – there are readily available opportunities to improve the process. For instance:
    a. Particularly for lower-risk applicants for wholesale licences – the length of time involved in seeking either a new licence, or a licence amendment, is not readily explained by the content provided with the licence application.
    b. It is difficult to understand why a licence variation (even a simple addition) can take as long to be processed as an application for a new licence.
    c. The online format of licence applications has not significantly assisted the ease of preparation of applications – instead it has required complicated guides to explain what applicants will find in the online forms.
    d. The approach of requiring specific "proofs" to be prepared against different areas of the online form should instead simply call for the provision of customary and existing documentation that most businesses would already have. Specific additional content should only be required to be specially prepared where the existing documentation demonstrates a deficiency. By way of contrast – typically the processes for listing a company require the provision of common categories of existing documentation, rather than requiring documentation to be specifically generated for the process. The same regulatory processes could be served without incurring undue cost.

    The Committees recommend consultation with industry to gather other suggestions for efficiencies and improvements.

10. The Committees' comments regarding licensing frameworks are relevant to:
    a. KPI 1 – as the difficulty of obtaining and updating licences delays and deters growth of businesses in Australia;
    b. KPI 6 – other than the regulatory sandbox (which in our view has had limited benefits for this area of the market as a whole), there has been little evidence of continuous improvement of the regulatory framework for licensing. The Committees acknowledge reforms proposed in the area of market licences – although this has increased the administrative burden, and has created some uncertainty, for foreign markets wishing to expand operations to Australia.

Relief applications, class orders and no-action letters

11. With the introduction of increased fees for straightforward relief applications under the industry funding model, the justification for continuing to require case-by-case applications for routine relief is called in to question. To reduce friction for business – simple applications that are routinely granted in well-established form should be addressed by way of class order.

12. Examples (not an exhaustive list) would include:
    a. pre-prospectus advertising relief to permit employees to be informed about the implications of a proposed capital raising;
    b. relevant interest relief for escrow arrangements; and

c. standard stapled securities relief to facilitate application of the continuous disclosure and related parties' rules.

13. Similarly, where class orders (instruments) have been in place for an extended period of time, and are typically rolled over without substantial change, we consider that there should be a regular programme to move those modifications to the Corporations Act into the legislation, to reduce the need to cross-refer to numerous other legislative instruments in order to be able to interpret the Act. This issue has been compounded where the programme of sunsetting and replacing legislative instruments has led to the relevant instrument numbers periodically changing.

14. Examples (not an exhaustive or representative list) would include:
    a. ASIC Corporations (Non-Traditional Rights Issues) Instrument 2015/84;
    b. ASIC Corporations (Foreign Rights Issues) Instrument 2015/356;
    c. ASIC Corporations (Foreign Small-Scale Offers) Instrument 2015/362;
    d. ASIC CO 13/520 Relevant interests, voting power and exceptions to the general prohibition;
    e. ASIC CO 13/524 Bidder giving substantial holding notice;
    f. ASIC CO 13/522 Compulsory acquisitions and buy-outs; and
    g. ASIC CO 10/654 Inclusion of parent entity financial statements in financial reports.

15. The reports on relief applications provide useful transparency, and reflect a very good level of engagement by ASIC. However, they also reflect that relief applications are granted somewhat around the margin – particularly where there are minor technical points – and that there may be scope for greater innovation and reduction of friction for business without compromising efficacy or integrity of regulation.

16. Similarly – ASIC's policy on no-action letters (RG 108) has not been refreshed since 2009 (other than to update a note around fees). In the Committees' view, it is applied in a restrictive way – and (particularly having regard to the practices of international regulators) there is an opportunity to reduce business friction, and costs driven by the complexity of some areas of the Corporations Act, by increased and more innovative use of no-action letters – including prospective no-action letters. We recommend considering market consultation.

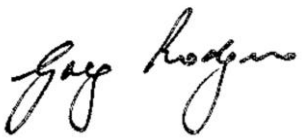
17. The Committees' comments with regard to relief, class orders and no-action letters are relevant to:
    a. KPI 1 – as it leads to legal and compliance costs that are not justified by any issue of principle; and
    b. KPI 6 – because there have been opportunities for improvement for some time, that have not been seized.

Conclusion and further contact

The Committees would be pleased to discuss any aspect of this submission. Should you wish to do so, please contact either of the Chairs of the Committees:

c. Insolvency and Reconstruction Law Committee, Scott Butler, [redacted]
d. Corporations Committee, Shannon Finch on [redacted]

Yours faithfully



Greg Rodgers
Chair, Business Law Section