FINANCIAL SERVICES COUNCIL

ASIC performance against the Regulatory Performance Framework

Financial Services Council Submission
16 April 2021

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

2. Introduction

The FSC welcomes the opportunity to make a submission to Australian Securities and Investments Commission (ASIC) on its performance against the Regulator Performance Framework.

The FSC recognises that much of 2019-20 was challenging for all sectors in Australia to due to the COVID-19 health and economic crisis, and ASIC played an important role in helping companies navigate these challenges whilst also managing the challenges facing its own organisation and employees.

The FSC commends ASIC for the role it took on during the COVID-19 crisis and its strong engagement with the financial services industry during this time.

The FSC makes additional submission below focusing on the sectors that we represent, including funds management, life insurance, superannuation, and advice licensees.

3. Funds Management

The FSC has had strong engagement with the Investment Management team at ASIC in relation to a variety of ASIC funds management projects that are underway or on foot.

The FSC has a positive and constructive relationship with the funds management team, and note they have been proactive in giving the industry clear notice of which projects will commence/recommence as the COVID-19 crisis subsided and provides regular updates on projects. This has enabled the FSC to keep the industry updated and allow them to plan/allocate resources that may be required to respond to various ASIC projects/notices or provide input into consultation processes.

ASIC has also been genuinely facilitative and responsive to industry's needs – being mindful of which notices have been issued to which firms and spreading information requests/ or the timing of requests to help mitigate resource constraints on these businesses.

We appreciate the industry/ASIC dialogue with the investment management team at ASIC – sharing information both ways. This was particularly useful and the benefits evident during COVID-19 stress period with weekly calls taking place between ASIC and fund manager members to share insights and an opportunity to seek assistance from the regulator/relief where required and appropriate. ASIC was very accommodating during the difficult covid work period, placing projects on hold and enabling industry to focus on serving clients/manage money to ensure fund managers could continue to service clients during the COVID pandemic.

4. Life Insurance

The FSC's engagement with ASIC significantly improved during the Covid Pandemic in 2020. For example:

- We now have monthly meetings with ASIC to share issues;
- ASIC hosted a series of round tables on a variety of topics;
- ASIC has been better at keeping FSC informed of upcoming project and initiatives;
- FSC now shares industry data with ASIC on the underlying cause and outcomes of life insurance claims; and
- FSC has noticed ASIC working more closely with APRA recently, but see below.

The FSC notes, however, there is room for further improvement. With the aim of developing a constructive relationship between ASIC and the life insurance industry, the FSC proposes that ASIC:

- Demonstrate the standards and behaviours it expects from the entities it regulates.
- Deliver to the timeframes it communicates to industry.
- Ensure that it has sufficient experienced resources to meet those timeframes, for example, on license variation applications.
- Further engage experts from the industry where appropriate.
- Set out its expectations in advance to allow industry to meet them.
- Ensure that those expectations are aligned with other regulators, especially APRA.

TPD Report 633

Relations between FSC and ASIC were strained after FSC pointed out a factual error in ASIC's Report 633 on TPD in Group Insurance in superannuation and the associated media release. The factual error related to an unsourced number which contradicted a corresponding number published by APRA. This had the effect of over-stating the number of potentially affected Australians.

Worse, the unsourced number was used to extrapolate other findings, thereby overstating the issues in the report, which were further overstated by being rounded up in the media release.

While FSC does not disagree with the report's high-level findings, we were disappointed that the issues were significantly overstated. The FSC is concerned that ASIC's response to legitimate criticism was to become defensive, and to date ASIC has remained unwilling to update the information.

ASIC did not therefore demonstrate the behaviour it would expect of regulated entities had one of them published unsourced, misleading or incorrect information.

Unfair Contract Terms

ASIC conducted a desktop review of PDS's to identify potentially unfair terms in anticipation of the Unfair Contract Terms (UCT) regime which started on 5 April 2021. Our expectation was that this would be helpful as we explained that it would be inappropriate to point out terms that are unfair after the regime starts if problematic terms could have been identified and rectified before the regime started.

ASIC had reviewed the PDSs of a number of life insurers and sent them the early results. However, this was not the whole market so other life insurers were excluded. The full results were therefore important for all life insurers to see to allow them to take any corrective action.

This action was originally expected before Christmas 2020, which would allow minimal time for life insurers to take corrective action. The FSC subsequently received a phone call to explain that the results would be delayed until mid-January, however the final letter was received on 11 March 2021, less than 4 weeks before the UCT regime was due to start.

Public information was placed on ASIC's newshub on 22 March 2021. This was far too late for the content to be used to update product terms and amend PDSs etc. Despite this significant delay, ASIC's letter stated that it expected 100% compliance from the commencement of the regime.

Joined up Regulation

In 2019, to ensure the life industry remained sustainable, APRA intervened in the individual disability income insurance market where the industry sustained losses of around $2.5 billion over two years. This intervention expects life insurers to make significant changes to their product designs, governance and data capabilities.

The product changes required by APRA require life insurers to offer less generous terms, arguably, the most significant change in a decade. The prudential measures in turn raised significant conduct issues for life insurers and advisers.

Despite this, ASIC has remained silent about its expectations in these areas which started to take effect from 31 March 2020. Further changes will take effect on 1 October 2021 but the industry is unclear as to ASIC's expectations in these areas, or the extent to which it supports APRA's expectations.

Supporting Vulnerable Customers

During the Covid-19 pandemic, ASIC set expectations that life insurers that they should offer premium holidays, which means continuing people's cover without premiums. Unlike some general and health insurance lines where the pandemic reduced or deferred claims, for life insurance, the pandemic exacerbated claims.

For example, mental health claims and getting people back to work is harder when the person has no work to go back to. Given the industry losses referred to above, industry was concerned that this measure would exacerbate the sustainability issues and it was unclear whether ASIC has coordinated its response with APRA.

Industry Expertise

The FSC and its members have had some experiences where it is clear that ASIC staff lacked understanding of industry concepts and dynamics.

An example became evident in the draft Information Sheet on the removal of the claims handling exemption. It states that a procedural fairness process should be followed that for all declined claims. While this process is commonly used for some declined claims, especially in claims were the insurer is required by the policy terms to form an opinion on a matter, for other declined claims it is not appropriate. An example would be where a claim is declined due to cover having previously ceased as required by law such as under the Protecting Your Super or Putting Members Interests First regimes.

We would encourage ASIC to continue to ensure that staff have relevant industry experience to ensure accurate and implementable industry guidance.

5. Superannuation & Remediation

ASIC is approachable on superannuation and has taken steps in recent times to be more open and consultative on superannuation issues.

The FSC has concerns, however, that ASIC's approach to regulation and engagement on superannuation issues can be one-sided. The FSC has experienced ASIC 'engaging with industry' on superannuation matters, however we have not been included in this engagement.

Superannuation – Enforcement and Remediation

The FSC is concerned that ASIC's enforcement action in the superannuation industry may be inconsistent across the sector. ASIC revealed in recent House of Representatives committee hearings that it has identified unlawful conduct by a range of superannuation funds that unlawfully blocked customer rollovers. ASIC, however, has elected to not litigate against all funds so as to instead pursue a deterrence approach.

Whilst not litigating may be a prudent use of ASIC's resources, the FSC is concerned that on available information ASIC has also elected not to take any action against the funds that have acted unlawfully, including:

- Issuing infringement notices;
- Issuing financial penalties;
- Entering into Enforceable Undertakings with the funds; or
- Publicly communicating their investigation or actions.

It is difficult to see how ASIC can be genuine in its deterrence message when there has been no public disclosure of the issue apart from the litigation against a single fund. This is despite evidence that the unlawful conduct was systemic in parts of the superannuation industry.

The FSC is also particularly concerned that there is no evidence that ASIC is requiring these funds to remediate customers that incurred harm as a result of the trustees unlawful conduct, such as through the collection of administration and investment fees on duplicate superannuation accounts. ASIC regularly reports on remediation programs, including both their size and timeframes, however there has been no disclosure on the number of superannuation funds that have been required to remediate customers for the long-term unlawful blocking of rollovers.

The FSC has also learnt after the fact that ASIC has consulted with other superannuation associations on remediation in superannuation. ASIC appeared to have crystalised its views on issues that not only applied to the industry as a whole, but may also be wrong in law, after having only consulted with some industry participants. As a result the FSC has taken a more proactive approach to engaging superannuation issues.

The FSC is also concerned that ASIC is permitting superannuation funds to use trust assets to pay for both remediation for unlawful conduct, and for insurance that indemnifies the trustees for their unlawful conduct, both of which are likely in breach of superannuation law.

These practices are inconsistent with enforcement action across the financial services industry more broadly and undermines the position that the regulator is acting impartially.

Remediation

The FSC appreciates that ASIC has undertaken consultation on how financial services companies should implement remediation programs. The FSC is concerned, however, that ASIC has not been working closely enough with other regulators (particularly APRA and ATO) on resolving issues with remediation.

Our experience is that the regulators often work at cross purposes and that engagement between ASIC and the ATO, in particular, could be improved.

ASIC has publicly criticised businesses for being slow with remediation when there are a complex array of issues slowing down remediation, many of which are outside business control (eg privacy rules, tax rules, superannuation preservation rules, SIS Act requirements, lost money regimes). It is not appropriate to portray businesses as the sole cause of delays in remediation when there are other factors outside business control.

6. Design and Distribution Obligations

ASIC has proactively engaged with the FSC and our members on the Design and Distribution Obligations (DDO) over the course of 2021, and we recognise and appreciate this support.

As ASIC is aware, however, there were significant delays in releasing the DDO Regulatory Guidance, which has jeopardised timely and accurate implementation of the new regime.

Further, the intensive engagement between ASIC and industry on DDO commenced after a long period of minimal engagement and the delay in formal guidance.

Given the uniqueness and complexity of the DDO regime, there are also clear gaps in knowledge across both the industry and ASIC on how the regime will operate. The FSC is concerned that ASIC at times makes mistakes of interpretation on how the regime should be implemented, whilst at the same time taking a zero-tolerance approach towards industry implementation.

7. Advice

The FSC has appreciated more frequent communication between the FSC and ASIC's Financial Advice team. Cooperation between industry and the Regulator following on from the pandemic has been evident in a number of ways:

- COVID-19 financial advice related relief;
- Regular meetings with the Regulator between the FSC as well as joint industry meetings;
- Sustained collaboration approach to consultation on scaled/limited advice;
- ASIC executives attending our Advice Board Committee meetings;
- Proactive communication by the Financial Advice team ahead of some announcements (such as updates to Regulatory Guides, or Legislative Instruments) of FAQs, Q+As and other material

Resolving outstanding performance issues is vital as the single disciplinary regime for financial advice is implemented in which ASIC will have a central role. A number of areas of improvement and proposals have been identified for consideration.

Regulatory Guidance

A rigid application of the law to its role has stifled ASIC's ability in part to regulate the financial advice industry. Consistent feedback from our Members notes that Regulatory Guidance continues to provide a source of frustration for industry who look to this guidance for clarification of statutory requirements only to find guidance that often lacks practical and technical awareness.

Legal obligations in financial advice carry significant penalties for individuals and organisations, and instruments play an important role to ensure regulation can be digested and applied by compliance systems. The FSC routinely catalogues such improvements in submissions to government and ASIC, most recently in its submission on personal advice.

Data

There is a distinct lack of data across industry impeding the accuracy and precision by which ASIC monitors compliance. The absence of advice data also undermines the capacity to have meaningful debates on how regulation either reduces risks to the consumer or is unnecessarily costly to industry.

The FSC recommends ASIC work with industry on measures to standardise industry data to reduce the cost of providing financial advice. Measures could include mapping:

- Consumer numbers;
- Adviser numbers (cross checked with ASIC's Financial Advisers Register);
- Regulatory and operating costs;
- Types of advice provided; and
- The prices consumers are paying for different types of advice.