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## **Feedback for ASIC on Report 813**

### ***Introduction***

The FSC is a 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 and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses<sup>1</sup>.

We appreciate the opportunity to provide feedback to ASIC on Report 813.

We support ASIC's commitment to simplify the regulation of financial services and consider this to be an important part of boosting Australia's productivity. As you know, financial services are a key sector in the economy with opportunity both to contribute to productivity increases through increased investment opportunities, and to achieve productivity gains within business through cutting unnecessary regulation with no consumer benefit.

We also refer to our previous letter to ASIC sent on 25 June (**attached**) which contains details of a number of suggested improvements and seek to highlight some of these issues in this letter.

Set out below we first wish to highlight several key issues of importance to our members which have relevance across the financial services industry. We then set out a number of responses to specific questions raised in Report 813.

### ***Key Issues***

#### **Usability of ASIC Portals and Registers**

The FSC acknowledges the ongoing work ASIC is conducting to improve the usability of its Portals and Registers. This should help to reduce inefficiency, costs and regulatory burden in a number of areas. The FSC suggests that ASIC should work to achieve more consistency with the

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<sup>1</sup> The financial services industry is responsible for investing more than \$3 trillion on behalf of over 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 one of the largest pool of managed funds in the world.

The FSC's mission is to assist our members achieve the following outcomes for Australians:

- to increase their financial security and wellbeing;
- to protect their livelihoods;
- to provide them with a comfortable retirement;
- to champion integrity, ethics and social responsibility in financial services; and
- to advocate for financial literacy and inclusion

ASIC portals and ideally, a reduction in the number of portals that are required to be accessed for the same licensed entities. For example, often firms will need to use both the AFS licensees portal and the Regulatory portal for the same licensed entities which require separate logins.

The FSC welcomes the recent launch of ASIC's new digital portal for licensing and note that this is currently essentially aimed at providing functionality to new licensee applications rather than assisting licensees with their ongoing interactions with ASIC. We look forward to seeing the capacity of the new digital portal expanded and would support ASIC consulting with our members to help optimise its functionality. Some of our members have relevant international experience of other jurisdictions, for example the online offerings provided by the UK Financial Conduct Authority and it may be helpful to discuss their international experience.

The FSC respectfully submits that the ASIC Registered Agent Portal is well overdue for an update, particularly as it still requires Internet Explorer mode to function. Additionally, as an example, when lodging forms such as the FS88 PDS in-use notice, we understand that the system often crashes and requires multiple attempts to load successfully.

In addition, the upgrade to the AFSL-Licensing Portal which occurred in May this year has substantially increased delays in the licensing process. One associate member has said they have not had the majority of its applications allocated to an analyst (the first step of processing) since the portal's introduction – a period of over 5 months.

The view of our associate member is that the inclusion of unnecessary questions at initial lodgement is causing this delay. For example, those trustees seeking a custody power for incidental custody are required to lodge a custody agreement. This is not applicable in these cases as an external custodian is not appointed.

#### Recommendation

ASIC should invest in technical and other resources to provide meaningful improvements to the ASIC Portals and Registers and investigate any current issues regarding the AFSL-Licensing Portal.

#### **Remove Duplication in reporting**

The FSC submits that ASIC can do more in working to reduce the cost of regulatory reporting, reduce inefficiencies and increase inter-agency coordination, particularly in the superannuation context.

The FSC notes that the Government has indicated it will be moving forward with legislation to eliminate duplication and compliance burdens under a new "tell us once" principle and would be supportive of this principle also being reflected by the approach adopted by regulators and across the regulatory landscape.

ASIC and APRA have distinct but complementary roles in regulating Australia's superannuation system. APRA is primarily responsible for prudential regulation, while ASIC oversees conduct and disclosure. While both regulators rely on accurate and timely data from superannuation trustees to fulfil their responsibilities, in practice there are a number of areas where trustees are

required to report the same or substantially similar data to both regulators in slightly different formats or through different channels.

A prominent example is the duplication of financial reporting obligations. Trustees must lodge financial statements with ASIC, while also reporting similar financial information to APRA through *Superannuation Reporting Standard SRS 340.0 RSE Licensee Financial Statements*. This overlap creates inefficiencies, increases compliance costs, and requires additional resourcing within compliance and finance teams to manage divergent reporting expectations, despite there being limited, if any, benefit to consumers or regulators from this duplication.

There is also a risk that future ASIC data collection initiatives may further exacerbate these issues. For example, in ASIC's recent consultation on private markets, some of the proposed new data requirements may significantly overlap with data already collected by APRA under existing reporting standards. Without clear coordination between the agencies, there is a risk of layering new obligations on trustees without due regard to the existing reporting framework.

More generally, early and co-ordinated engagement on surveillance data requests would be helpful across all areas of financial services.

While transparency and high-quality data are important to support regulatory objectives, these benefits must be balanced against the administrative and compliance costs imposed on industry. ASIC and APRA already have powers under section 55A of the *Australian Prudential Regulation Authority Act 1998* to share information, which should be more actively used to avoid unnecessary duplication.

The FSC also considers that ASIC should, as a matter of practice, consult with APRA prior to implementing any new data collection exercises affecting not only superannuation trustees but all relevant financial services businesses, to assess the extent to which the relevant data may already be available through APRA channels.

#### Recommendation

ASIC should work closely with APRA to identify and eliminate areas of duplicative reporting with a view to enabling licensees to provide relevant data once and have it shared between regulators where permitted.

ASIC should also ensure that any proposed new data collections are preceded by an internal review of existing APRA reporting obligations and should engage with APRA during the development of such proposals to avoid duplication.

#### **Transition away from hard copy document lodgement**

Some ASIC forms are still required to be lodged in hard copy which creates unnecessary expense, inconvenience and delay as well as environmental harm.

The FSC suggests that ASIC should seek to streamline the lodgement of forms by permitting the online lodgement of a wider range of ASIC forms.

A range of ASIC forms, such as Form 5111 (Compliance plan audit report of a registered scheme) and Form 491 (Change to scheme details) are routinely submitted by funds and are currently only permitted to be lodged in hard copy.

Other documents, such as new and updated managed investment scheme (MIS) compliance plans are also required to be lodged with ASIC in hard copy, and the FSC is aware of instances where due to the volume and length of the documents ASIC has requested electronic copies.

The hard copy lodgement of documents is overly burdensome and does not provide value to ASIC or end investors. There are also inconsistencies in ASIC's approach to what must be lodged in hard copy and what must be lodged electronically. For example, Form 388 (Copy of financial statements and reports) must be lodged electronically, but section 601HG(7) of the Corporations Act requires that it be lodged simultaneously with Form 5111 – which is only permitted to be lodged in hard copy.

The lodgement of documents in hard copy generally also creates unnecessary delay for consumers.

#### Recommendation

The FSC recommends that ASIC permit the online lodgement of all forms and other documents whose lodgement is mandated.

#### **Design and distribution obligations (DDO)**

The FSC urges ASIC to remove a number of inefficiencies and uncertainties embedded in the design and distribution obligations (DDO) regime. There are a number of inefficiencies and uncertainties that could be addressed, as follows.

*Distribution conditions* - the legislation requires a target market determination to include “any” distribution conditions and there is a logical and reasonable view that the way the legislation has been drafted means they are not mandatory. But ASIC has taken the contrary view, and this has resulted in practical difficulties for financial services businesses drafting distribution conditions for ‘vanilla’ products. It is a particular problem for exchange traded products (such as ETFs) because investors can access them by buying on market and it is not possible for the issuer to have any control over who acquires them.

*Mass market advertising* - Table 6 of RG274 states that “mass market advertising or prominent online methods, such as banner advertising, generally are not appropriate for a product with a narrow target market.” Yet, ASIC warns issuers not to describe the target market too broadly (with insufficient granularity) and to essentially define an identifiable class of consumers – see the commentary at RG 274.84 onwards. So, the question arises, what are the parameters in which an issuer can engage in mass market advertising for any product (including one which has a relatively broad, but still sufficiently defined, target market). ASIC could potentially present a framework (safe harbour) within which issuers could mass market their products with regulatory certainty.

*Retail product distribution conduct (RPDC)* - DDO currently applies to all forms of “retail product distribution conduct”, when arguably some of these types of conduct (such as merely providing Product Disclosure Statements (PDSs) to retail clients) should not be captured. PDSs should be freely available on the internet without being captured by DDO requirements so that a core function of the PDS regime can be fulfilled – comparison of different products before the person makes an investment decision. It is only at the point of accessing the application form

that a filtering process, to invite subscriptions only from persons likely to be in the target market, should be applied.

*Excluded conduct* - the definition of “excluded conduct” is arguably too narrow and acts as an unnecessary cost to the financial advice process. Industry has previously suggested to expand the definition to cover the actual issue of products (not just arranging the issue of products) pursuant to personal advice, as well as to cover arranging effected by independent advisers (not just associated advisers).

*Significant dealings* – there is a requirement for advisers to report significant dealings to issuers, but there would seem to be little utility in this given that those dealings are given pursuant to personal advice and are excluded from the issuer’s own ASIC reporting obligations. We note that there is an exemption in s 994G of the Corporations Act to exempt issuers from the requirement to report to ASIC significant dealings which are excluded dealings, but there is no similar exemption in s 994F of the Corporations Act to exempt a distributor from the requirement to report a significant dealing which is an excluded dealing to the issuer. The wider category of significant dealing reports that distributors make to issuers (which the issuer then considers before reporting a narrower subset to the regulator) is causing complexity.

*Certifications from advisors* – the framework could be amended to make it easier for distributors to rely on s994E(6) when engaging in retail product distribution conduct to implement personal advice (that is, remove the need to obtain a certification from an advisor in circumstances where a distributor has reasonable grounds to believe that a person is receiving personal advice).

#### Recommendation

Update RG274 to clarify that DDO “distribution conditions” are not mandatory and the parameters in which an issuer can engage in mass market advertising under DDO.

Introduce legislative instruments to (i) narrow the scope of DDO which currently applies to all forms of “retail product distribution conduct” (possibly ASIC could issue a no action letter on this point), (ii) broaden the definition of “excluded conduct”, and (iii) remove the requirement for advisers to report significant dealings to issuers.

#### **Reportable situations (breach reporting)**

The FSC commends ASIC for working with Government to explore a reduction in the number of minor or technical breaches that need to be reported to ASIC under the breach reporting regime.

The current framework requires firms to spend a significant amount of time in identifying and reporting minor or technical breaches to ASIC. It is not clear whether there is any consumer benefit derived from this. A survey of 29 of the FSC’s superannuation, financial advice licensees and funds management members, conducted by Positive Economics, found that it costs \$3,800 in extensive documentation, senior executive time and auditor reviews every time a minor breach is reported to the ASIC portal. Reporting minor or technical breaches which do not result in material financial loss or damage to the client constitutes a regulatory burden that does not help consumers or the regulatory framework.

The breach reporting regime is an example of the sort of regulatory simplification opportunities that ASIC should be identifying. It is welcome news ASIC has moved forward in response to advocacy from the FSC and other industry stakeholders. ASIC has issued relief from reporting breaches in limited circumstances, such as a single reportable situation where no more than 10 persons are affected and the total financial loss or damage does not exceed \$1,000, provided that the breach has been rectified within 60 days of its occurrence (ASIC Instruments 2024/620 and 2025/289). However, the FSC submits that the proposed relief does not go far enough. A sensible materiality threshold that would filter out breaches that are not useful for ASIC's regulatory surveillance should be applied to all reportable situations. For example, any breaches of the compliance plan of a registered scheme, however slight and insignificant, are still reportable because section 601FC(1)(h) is a civil penalty provision and it could be said that if a compliance plan is breached all members are "impacted", taking the matter outside the 10 person limit in the Instrument in most cases.

With respect to reportable situations and the reporting of breaches via the Regulatory Portal using ASIC's prescribed form, the FSC has previously provided detailed suggestions to ASIC as to how its functionality can be improved, but the feedback we received was that there was no budget available [at the time] to address these concerns. The FSC would be happy to share these suggestions again with the relevant ASIC team members.

We reiterate that ASIC should update their portal for licensees to submit reportable situations to ensure that the portal is aligned with the latest regulatory requirements in this space.

The more noticeable discrepancies are:-

- the current portal setup still shows investigation period of 30 or more is considered reportable rather than 60 days.
- the exclusion of certain breaches of the misleading or deceptive conduct provisions in section 1041H(1) of Corporations Act or section 12DA(1) of the ASIC Act (as updated by ASIC in October 2023) have not been reflected.

### Recommendation

The scope of the proposed relief should be extended so that a) the breach can be rectified within 30 days from when the licensee knows (or should know of) the breach, not within 30 days of its occurrence, b) the number of impacted consumers that suffer no financial loss or damage should not be capped, c) it is available when there is a single report made under the grouping provisions (and not limited to a single reportable situation), and d) there is some flexibility in applying a monetary cap on total financial loss or damage caused. Reasonable materiality tests should be applied to all deemed reportable breaches.

The aforementioned problems with the Regulatory Portal should be addressed.

### **Rationalise requirements for PDS content**

ASIC could make it easier to locate and address PDS content requirements.

The requirements for what must be included in a PDS are scattered over a large number of sources, including ASIC resources (legislative instruments, media releases, information sheets and regulatory guides). It is very difficult for firms to navigate all the requirements for a PDS

because they are located in a large number of places. Firms waste time consulting these different sources and often incur unnecessary fees on obtaining outside legal advice to assist.

This is clearly a situation that should be rationalised. We recognise that ASIC does not have jurisdiction to amend Acts of Parliament or the Corporations Regulations, but it is able to look at the content of its legislative instruments, media releases, information sheets and regulatory guides with a view to rationalising, improving and updating as relevant. For example, Information Sheet 155 on Shorter PDSs could be updated to remove the requirement to notify ASIC about every change to incorporated fee information which is not in the primary document (but is incorporated by reference).

Similarly, the law regarding periodic statements is also difficult to access, navigate and understand.

#### Recommendation

ASIC should review and rationalise the PDS content requirements contained in its legislative instruments, media releases, information sheets and regulatory guides.

#### **Financial Accountability Regime**

The FSC commends ASIC for announcing that it intends to reduce the level of duplication between FAR and other regimes which currently results in unnecessary uncertainty and cost, notably APRA's Prudential Standards on *Fit and Proper*.

The FAR added an additional layer of regulation in 2024 for certain "accountable entities" in the banking, insurance and superannuation sector and their senior executives. It has introduced additional ASIC and APRA notification requirements regarding, relevantly, accountable persons and their responsibilities, key functions and primary areas of focus. Some of these notification requirements cause confusion and/or overlap with requirements under APRA Prudential Standards.

The 6 March APRA Governance Review discussion paper contains an acknowledgement under *Proposal 2: Fitness and propriety* of overlapping reporting obligations between APRA's fit and proper regime and FAR. APRA has indicated that they will be examining whether role definitions could be aligned and also reliance on reports received under FAR rather than requiring two sets of reports.

We urge ASIC and APRA to also take this opportunity to address regulatory complexity arising from various requirements under FAR (including a combination of regulatory requirements, regulator guidance and the FAR Minister Rules) that potentially overlap or are duplicative with each other, e.g., the concepts of "key functions", "primary areas of focus" and "prescribed responsibilities". The requirement to allocate key functions is confusing and the regulators noted that this concept was introduced to assist them (rather than firms). As a concept, key functions could be removed by the regulators.

#### Recommendation

The FSC recommends that ASIC should work with APRA to remove these areas of confusion and overlap that increase the regulatory burden on industry without any benefit to consumers. This

could involve sensible modification of *CPS520 Fit and Proper* as well as publishing additional guidance as to how to comply with FAR. It could also entail removing the concept of key functions from guidance.

### **Input on specific questions**

#### **Website redesign and launch**

*1. Has our new website improved searchability and access to useful information for you? Do you have any suggestions for further improvement?*

While the new website is improved, feedback from our members is that there are still too many buttons/clicks to get to business name search.

It would also be helpful to make it possible to search the content of ASIC instruments without having to know the title or number of the relevant instrument and download it from the Federal Register of Legislation.

We suggest that incorporating AI powered search functionality would be of assistance.

The new Regulatory resources search page is helpful in listing relevant topics based on user needs.

#### **Regulatory guidance**

*2. Which of the proposals to enhance our guidance materials do you think will have the biggest impact and should be prioritised – or do you have other suggestions?*

Consolidating all guidance on a particular topic would have the biggest impact. We also note that a number of regulatory guides are outdated and would benefit from a holistic review and consultation. For example, RG 53 Use of past performance in promotional material and RG 94 Unit Pricing.

The current complexity of RG 97, whilst having the laudable outcome of a single management fee and cost number, justifies a broader review than the current review regarding superannuation fund investment into real estate. Whilst the reviews undertaken to date have been appreciated, further simplification would be helpful.

For example, the current definition of *indirect costs* includes a cost that:

1. either a responsible person knows, or reasonably ought to know cost has reduced or will reduce (directly or indirectly) return or amount or value of:
  - income or property of Fund or
  - of an interposed vehicle; **or**
2. satisfies both of following:
  - is an amount paid or payable by or for person who may make payments forming part of return or value of Fund (whether directly or via interposed vehicle); and
  - is an amount is a benefit that increases returns or value of product or provides benefit to issuer for product that is retained by issuer & if paid from Fund would be a

management costs- section 101A, *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070*

Without limiting this definition, all underlying costs or expenses of an investment made by a fund will have the effect of reducing its return or amount of value of income or property (of a fund. Wording limiting this to indirect costs not otherwise being the type of expenses or costs ordinarily payable for this type of investment would be helpful.

*3. How can we present our guidance materials more clearly for different audiences (for example, consumers, small businesses, technical users and representative organisations)? Should we focus on principles-based guidance or more prescriptive guidance which outlines our expectations of complying with the law?*

The FSC suggest that it would be helpful to include more examples / case studies which set out ASIC expectations is helpful, and clarity around circumstances when ASIC would not take action.

Readers should be able to rely on an RG to fully set out all the requirements under Act, Regulations and ASIC Instruments. To that end, RGs could append an extract of the relevant Act as amended by regulations / ASIC Instrument setting out all the amendments in mark-up.

We also submit that consultation periods for changes to RGs or Instruments are usually too short.

### **Regulatory roadmaps**

*4. Do you think the small-company and financial advice regulatory roadmaps are helpful? Would you suggest any improvements?*

Regulatory road maps look like they would be helpful starting points, although they could be more detailed. Again, we think they could benefit from also including references to relevant sections of the Act, Regulations, ASIC Instrument, RGs. In some instances, case law is also important – key cases could be mentioned such as *ASIC v Lewski* on constitution amendments, *ASIC v BPS Financial* (appeal case) on appointment of representatives and *ASIC v LGSS* on greenwashing.

*5. Should we consider piloting additional roadmaps? If so, for which sectors?*

A regulatory roadmap could also be a useful way to summarise relevant requirements for a particular topic. For example:

- Design and Distribution Obligations (DDO)
- Product disclosure / continuous disclosure for managed investment schemes
- Conflicted remuneration
- General advice in marketing (clarity around factual information and general advice)

### **Simplification of platform instruments**

*9. Is our simplification of the platform instruments helpful? If not, please provide any feedback on how it could be improved.*

The FSC supports improvements to formatting and removing of duplicated or redundant definitions/terminology. As a general comment, we have received feedback to the effect that it is not clear what the benefit is in combining the two existing Instruments (given that IDPS and IDPS-like-schemes are distinct and have two separate audiences).

In terms of specific comments, we note as follows.

First, under proposed change 8 to Attachment D, there is a simplification of the content requirements for an IDPS guide to reduce the level of prescription and apply the general principle that an IDPS guide include all information a person would reasonably require when deciding whether to become a client of the IDPS. While simplification is welcome, ASIC should be mindful that guidance is provided to reduce the risk of inconsistency across the industry on what investors receive or have access to.

Second, we also note that under proposed change 23 to Attachment D, ASIC seeks to simplify the additional content requirements for the PDS of an IDPS-like scheme by relying on the existing disclosure requirements for PDSs in Ch 7 of the Corporations Act. It may be helpful to avoid any doubt to signpost the new section to the relevant disclosure requirements in Chapter 7 that ASIC are intending to rely more on.

Third, to reduce administrative overhead, ASIC could provide relief from the requirement to give an annual investor statement for zero balance accounts or accounts where there have been no transactions during a financial year.

Finally, for electronic access to information about accounts, ASIC could clarify that:

- when providing/displaying a portfolio value, an operator can use the sell price for managed funds and market price for ETFs / shares, provided it includes information explaining the prices that have been used; and
- when providing details of revenue and expenses, an operator only needs to include direct revenue/expenses on the platform (that is, it should not need to consider any indirect costs associated with underlying investments).

### **Other relief or instruments?**

*10. Are there other ASIC relief or categories of instruments you consider should be simplified or consolidated? If consolidation were to occur, would it be most valuable for this to be organised by industry sector, topic or Corporations Act chapter?*

The DDO framework should be simplified – see our comments above under *Design and distribution obligations (DDO)*.

### **Interactions with ASIC**

*11. With respect to interacting with ASIC, other than the work we've outlined, is there anything else we should prioritise?*

*15. How would you prefer to interact with ASIC more generally? What can we improve?*

The FSC supports the work outlined. An additional item for ASIC to consider is digitally secure options so that licensees can more securely and efficiently share information with ASIC (for example where a section 33 notice is issued and the licensee must provide books and records).

### **ASIC registers**

*13. With respect to how you use ASIC's registers, other than the work we've outlined, is there anything else you would like us to improve?*

See our comments above under *Usability of ASIC Portals and Registers*.

### **Engaging earlier on surveillance data requests and improving regulatory consultation with other regulators**

*14. Do you have feedback on our proposal to engage earlier with industry on data requests and revise our consultation approach?*

See our comments above under *Remove Duplication in the Superannuation Reporting Framework*.

### **Reportable situations regime**

*16. What changes, if any, should be made to the reportable situations regime and substantial holding notices?*

See our comments above under *Reportable situations (breach reporting)*.

On substantial holding notices, the FSC is in principle supportive of a simpler form but requests further consultation to ensure it is operationally achievable.

### **Exploring further law reform opportunities**

*17. Are there any other regulatory reform ideas within ASIC's remit that could simplify the application of the law, or otherwise make it easier for individuals and businesses to meet their compliance obligations?*

See our comments above.

### **Next steps**

As noted, this letter sets out at a high-level various proposals. As a next step, we would welcome the opportunity to work with ASIC to develop further detail to what has been provided in this letter on how these proposals can be achieved, including seeking to quantify the benefits of these proposals to financial services businesses.

The FSC is available to discuss at your convenience. In the first instance please contact [REDACTED]

**Enclosure:**

***Letter from FSC to ASIC dated 25 June***