



14 February 2022

Financial Regulator Assessment Authority
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FRAA@treasury.gov.au

Dear Panel Members

First Assessment of the Australian Securities and Investments Commission

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the first assessment by the Financial Regulator Assessment Authority (FRAA) of the Australian Securities and Investments Commission (ASIC) (Assessment).

Financial market participants concur with the objectives of the ASIC (set by the Government), respect its authority and typically work constructively and effectively alongside with it. There needs to be shared interest in the development of financial markets that support confident and well-informed investment, saving and risk management decisions. This in turn provides a solid basis for both the commercial enterprise of financial entities and the effective administration of the law by regulators. Nonetheless, in the same way the Australian community expects regulated financial entities to meet high standards of behaviour, accountability and efficiency, so too must regulators like ASIC meet such expectations and there should be effective checks and balances in the system to ensure this outcome. It is for this reason that AFMA has been a strong supporter for the establishment of the FRAA and the assessment process that is now underway.

Public trust underpins all aspects of economic activity but is especially important to finance. Any gap in the perceived trustworthiness of financial institutions is counterproductive to economic growth. Equally, any perception of weakness in the quality of the regulatory system (that is, the laws and the way they are administered by regulators), is harmful to economic growth. Uncertainty about how a law is meant to apply or about the way it may be applied, or indeed about how it may be changed, by ASIC, imposes a significant, and potentially very serious, risk on financial institutions and

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their employees. This naturally creates risk aversion that is counterproductive to enterprise and innovation which are key drivers of productivity.

Culture is at the heart of a successful organisation. ASIC should look to be a role model in embracing the types of cultural improvement and maintenance programs that is increasingly required of regulated entities. It is the responsibility of ASIC leadership to set the culture and tone and to drive its culture.

The first section of the assessment of ASIC's strategic priorities process goes to the heart of how AFMA believes the organisation can perform better. ASIC clearly has a government process compliant framework for setting strategic priorities and making decisions consistent with those strategic priorities. However, AFMA believes that the public record, particularly the past commentaries coming out of the 2015 ASIC Capability Review and 2019 Final Report of the Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry, provide an accurate objective assessment of how ASIC's strategic priority setting and planning have failed to provide outcomes which meet community expectations.

An important reason for the criticism of ASIC has been its organisational culture which is inward looking. Perceptions of how it sees itself have been quite different to the way industry sees it. This difference in perception can fundamentally affect the way the organisation goes about its work and sets its priorities. This goes directly to identifying priorities and emerging risks. While good contextual knowledge of international developments is helpful in identifying issues, it is important that ASIC is close to what is happening on the ground in Australia and that this is the predominant factor in understanding how to approach regulation in a common sense way. Australia is a small market with a number of idiosyncrasies and specific issues, meaning ASIC often cannot simply read across occurrences from large markets in the United States and Europe as an accurate guide.

AFMA understands the FRAA is reviewing case studies to assist its practical understanding of how ASIC works from an industry viewpoint. While these case studies, which example failings and where improvement needs to be made and present a negative picture of ASIC, are necessary, it is important that FRAA develop a positive vision for the desired end state for ASIC after the assessment. To assist this work we suggest the following:

ASIC in its end state should:

1. Be a confident but careful and conservative regulator.
2. Be predictable and reliable with well-designed processes and protocols to ensure decisions and regulatory outcomes are soundly based and well thought out with appropriate implementation periods that coordinate well with other regulators and industry activities.
3. Adopt a largely appropriately accommodative regulatory stance that supports the business environment and the economy.
4. Be strongly guided by what is in the interests of the jurisdiction .
5. Carefully avoids and manages its internal conflicts of interest.
6. Accept that the great majority of firms are endeavouring to do the right thing and treat these firms as such. Trust the reputable industry and build industry trust in ASIC.

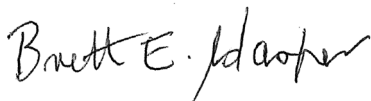
7. Studiously avoid policy making and ensure that regulation is implemented with the appropriate level instrument (regulation/guidance).
8. Be a model litigant, and base actions and policy on a non-aggressive reading of legislation and case law. Fully meet Commonwealth standards and norms for the conduct of investigations and prosecutions. Avoid any bias towards high profile prosecutions in favour of a balanced and prudent enforcement approach.
9. Ensure its regulatory and enforcement focus is on matters of genuine customer or market harm rather than technical breaches or responses to areas of media focus.
10. Ensure all regulatory guides and regulations are kept up to date. Look to refine and reduce regulations where possible.
11. Increase focus and thereby decrease the amount of regulatory work done but increase consistency in the quality of that work.
12. ASIC should build on its ASIC Management Accountability Regime (AMAR) with 'reasonable steps' identified and then implemented by management in line with the Financial Accountability Regime requirements expected from regulated institutions.
13. Undertake ongoing assessment of staff capability and capacity (in the way institutions need to do under APRA's CPS220).

The articulation by FRAA of an end state vision for ASIC would help to guide reform work and present a target for what a good outcome would look like. These end state outcomes generally point to a need for common sense and good judgment in administration of the law and moving away from a defensive reactive stance.

While AFMA strongly supports the principle of rule of law as enabling confident participation in markets, this should not be confused with risk minimisation and excessive legalism, where mechanical application of the law leads to sub-optimal outcomes and imposes too tight a restriction on economic activity. An accommodative stance does not mean being a servile regulator to industry. It means being measured in the administration of the law in a way which allows and encourages persons and firms to confidently participate in the market.

AFMA has optimism in the benefits of the FRAA assessment process and looks forward to further engagement with the Panel and Team. Please contact Damian Jeffree either on 02 9776 7993 or by email djeffree@afma.com.au in regard to this submission.

Yours sincerely



Brett Harper
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