

02 October 2015

Ms Karen Chester  
Chair - Expert Panel  
Capability Review of ASIC  
The Treasury  
GPO Box 89  
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Email: [capabilitypanel@treasury.gov.au](mailto:capabilitypanel@treasury.gov.au)

Dear Ms Chester,

## Capability Review of Australian Securities and Investments Commission

The Australian Bankers' Association (**ABA**) is pleased to provide further comments on the capability review of the Australian Securities and Investments Commission (**ASIC**). This letter is in addition to our initial correspondence dated 14 August 2015 (**Attachment A**) and feedback provided during our meeting held on 21 September 2015.

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.

The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australian consumers continue to benefit from a stable, competitive and accessible banking industry.

Consistent with the considerations set out in your letter dated 27 July 2015, our comments focus on how efficiently and effectively ASIC is operating to achieve its strategic objectives.

### Identification and analysis of immediate and future priorities and risks

#### Statutory objects and powers

The banking industry believes that the legislative settings governing ASIC's statutory objects and powers are appropriate to enable it to respond to immediate and future priorities and risks.

We note that ASIC's Strategic Outlook<sup>1</sup> identifies the challenges and priorities for the regulator over the 2014-2015 period. It would be useful for the priorities to not just reflect the emerging issues and challenges identified by the regulator, but to also relate to the statutory objects. This approach would provide the industry with insight into the immediate and longer term priorities pursuant to ASIC's remit.

We believe that ASIC should be appropriately funded to discharge its obligations and meet its strategic priorities in line with its statutory objects and powers, although this is not, in itself, an argument for industry funding.

#### Additional powers

Additional powers, such as those recommended in the Financial Systems Inquiry (**FSI**), should be considered in the light of the findings of this capability review, and in particular, any findings that indicate that ASIC's existing powers are deficient and further findings on how they can best be

<sup>1</sup> <http://download.asic.gov.au/media/2195181/asic-strategic-outlook-2014-2015.pdf>



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enhanced. Any additional powers should be implemented in a way that reduces unintended consequences, such as stifling competition, innovation and consumer choices.

Importantly, ASIC's statutory powers, both existing and proposed, are most effectively discharged when the regulator has appropriate capability, resourcing and support. A well-resourced and capable regulator should be the starting point and may influence or reduce the need for increased statutory powers.

### ASIC's activities

The banking industry supports ASIC meeting its statutory functions through its current range of activities, including surveillance, enforcement, guidance to industry, policy advice to Government, stakeholder engagement, education (noting that the banking industry supports ASIC's financial literacy programs being delivered as part of this activity), licensing and professional registration, applications for relief, and document compliance review. We believe this range of activities is sufficient to enable ASIC to respond to its strategic priorities and risks.

It would be helpful for industry to better understand the capacity ASIC is acting in when undertaking its activities. ASIC is variously seen as a regulator, supervisor and enforcement agency and this can impact the way regulated entities respond to it. Clarity of roles will help make ASIC more capable and effective.

### Identifying and responding to key risks

ASIC's Strategic Outlook documents the identified drivers of risk for investors, consumers and regulated entities. The Strategic Outlook also documents, at a high level, a description of key risks and how ASIC will respond.

There is scope for ASIC to further develop, or make public, its methodology on assessing and quantifying key risks and to better demonstrate the link between the assessment and quantification of the risk and the development of ASIC's strategic priorities and allocation of resources.

For example, the Financial Conduct Authority (**FCA**) has published its approach to investigating and reporting on regulatory failure.<sup>2</sup> While there are many differences between the regulatory framework and approach of the FCA and ASIC, more clarity on ASIC's approach to quantifying risk and developing its strategic priorities would give the industry a better understanding of why ASIC has identified certain priorities and allocated resources in a particular way.

Importantly, ASIC should be able to demonstrate that its investment of time and resources is proportionate with the likelihood and consequence of the risks it identifies.

Further, a continued and enhanced focus on engagement and collaboration with industry can assist in identifying emerging risks.

### Conduct risk and culture

We note ASIC's enhanced focus on conduct risk and culture, as set out in ASIC's Strategic Outlook. ASIC's public statements on how it will assess the management of conduct risk and cultural indicators, such as the recent speech by Commissioner Price,<sup>3</sup> have been helpful in assisting the industry understand ASIC's approach. We encourage further and ongoing statements and clarification from ASIC regarding its approach and regulatory expectations in order for the industry to have an appropriate understanding on ASIC's approach.

### Interaction with other regulators

ASIC should continue to work with other financial regulators, in particular, the Australian Prudential Regulatory Authority (**APRA**) through reviews, surveillances and developing policy advice for

<sup>2</sup> <https://www.fca.org.uk/static/fca/documents/how-fca-will-investigate-and-report-regulatory-failure.pdf>

<sup>3</sup> <http://download.asic.gov.au/media/3358612/speech-to-the-custom-owned-banking-convention-2015-published-21-september-2015.pdf>



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Government. For example, ASIC's recent review of interest only loans was conducted in conjunction with APRA. While the two regulators have different statutory objects and focus areas, we believe collaboration would assist in consistency in messaging to the industry and Government and reduce regulatory burden and compliance costs, especially where notices and information requests are made of the industry.

The Council of Financial Regulators has an important role to play in ensuring coordination of the financial regulators and synergy of regulatory interests and outcomes. From time to time, the industry has faced conflicting regulatory expectations which has created legal, operational and practical difficulties for banks. For example, APRA and ASIC have taken positions with regards to the treatment of customers in financial hardship which has resulted in banks finding it difficult to meet both regulatory expectations. It would be useful for an overall regulator position to be established.

There are also circumstances where the Council of Financial Regulators can act to better deal with regulatory overlap, by ensuring there are joint, targeted reviews where necessary rather than overlapping and duplicative approaches. This is especially applicable where there is a single thematic that various regulators are each attempting to address, but which could be addressed in a more efficient manner with more coordination.

We support the Australian Competition and Consumer Commission (**ACCC**) becoming a member of the Council of Financial Regulators.

## Resource prioritisation and responsiveness to emerging issues

### Financial literacy

The banking industry supports ASIC maintaining its delivery of financial literacy programs for consumers, as part of its statutory object to promote the confident and informed participation of investors and consumers in the financial system. We believe these programs deliver value for consumers and consumer advocates and complement the work done by the banking industry through individual bank financial literacy programs as well as the ABA's Broadening Financial Understanding financial literacy program. In undertaking financial literacy initiatives, ASIC should ensure the most efficient use of regulatory resources and there may be further opportunity for ASIC to partner with industry in the development of tools and resources for consumers to drive efficiency and manage costs.

### Financial advice

Government consultation is underway in relation to the regulatory framework for the provision of financial advice, in particular personal advice on Tier 1 financial products. Key drivers for this consultation are the recommendations of the Parliamentary Joint Committee (**PJC**) on Corporations and Financial Services' inquiry into proposals to lift the professional, ethical and education standards in the financial services industry (**PJC Report**) and recommendation 25 of the final report of the FSI.

The PJC Report contemplates establishing a separate standards setting body to set educational, ethical and professional standards for financial advisers.<sup>4</sup> We believe that any assessment of ASIC's future functions or capability should take into account the prospective function of the standards setting body. For example, the banking industry envisages that the standards setting body would assume ASIC's standard setting role in *Regulatory Guide 146: Licensing: Training of financial product advisers* [RG146], including standards setting in relation to general advice and Tier 2 financial products.

Government consultation and a tender process is also underway in relation to the registry business, including the Financial Advisers Register (**FAR**). The FAR has recently been established to provide a tool for consumers to search and verify the details of a financial adviser. Australian Financial Services Licensees (AFS licensees), including banks, are required to submit certain information to ASIC for publication on the register in order to meet their legal obligations. There are penalties for non-compliance and/or the provision of incorrect information. Given these legal obligations and associated

<sup>4</sup> Persons providing personal advice on Tier 1 financial products.



penalties as well as the uncertainty regarding the future financial advice regulatory framework, we believe that the FAR should not be considered for tender along with other registries currently operated by ASIC. Administration of the FAR should remain with ASIC.

## Notices

The ABA has received consistent feedback from our member banks about the volume, scope and timing of notices and other information requests. ASIC has recently issued a number of notices and requests and conducted a substantial program of surveillance activity across different businesses within banks and banking groups. The form of these notices and information requests vary across different business areas of ASIC. In many cases, these notices and requests have resulted in a substantial documentation review and compilation from banks involving staff across businesses, legal and compliance teams, and senior management.

Looking forward, it would be helpful for ASIC to dedicate sufficient internal resources to enable ASIC staff to:

- Work in conjunction with the entity to develop a detailed, specific scope to ensure ASIC obtains the information it needs rather than making broad requests
- Coordinate requests within ASIC to ensure there is no duplication of requests, and
- Share information with other ASIC teams.

A targeted approach will benefit both ASIC and the industry by reducing compliance burden and costs.

ASIC information requests are not subject to statutory secrecy provisions, as distinct, for example, from APRA prudential reporting. A lack of secrecy provisions curtails attempts to be more open and transparent in engagement particularly with reference to voluntary disclosures. The application of confidentiality on industry requests would support the provision of most efficient and effective responses to ASIC.

## Skills, capabilities and culture of the Commission and its staff

### Skills and capabilities

ASIC should have a comprehensive understanding of the entities it regulates (which includes the markets in which the business operates) and demonstrate a commitment to ongoing learning about those businesses and markets.

We suggest ASIC adopts a formal secondment program with industry to ensure regulatory staff gain commercial acumen and business understanding, and industry gains insight into the functions of Government and the regulator.

Additionally, we suggest that where additional statutory powers are proposed, due consideration should be had as to whether or not ASIC maintains the requisite capability to utilise that power effectively and what steps need to be taken to ensure ASIC develops and maintains that capacity.

### Resourcing

The banking industry observes that ASIC is not always sufficiently resourced to complete its work program in a timely way. For example, there can be significant delays between the commencement of reviews and the eventual publication of findings and reports. Not only is this indicative of insufficient resources, but introduces a risk that ASIC and the industry will not be able to respond in a timely way to emerging, systemic issues identified through such reviews. It is unclear if these delays are due to resourcing shortfalls or ASIC undertaking too broad a range of reviews with inadequate resource allocation and planning.



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## Funding

The banking industry notes that this capability review is not expressly considering proposals for a new ASIC funding model. However, we believe that the findings of the capability review must be taken into account when making final decisions on the ASIC funding model (noting that this may not necessarily be an industry funded model). Regulatory performance, capability and accountability should be factored into further consideration of the ASIC funding model.

## Organisational governance and accountability

### Engagement with regulated entities

ASIC operates a decentralised engagement model, meaning regulated entities liaise with multiple touch points across ASIC. It would be of benefit to consider opportunities for ASIC to work more holistically, especially with larger regulated entities. This may assist, for example, with improved efficiency on the coordination of notices and information requests, and enable entities to respond more efficiently to ASIC's requests.

We believe greater emphasis could be placed on relationship building communications and meetings between ASIC and regulated entities. This could enable a better understanding of the regulated business and its key risk drivers as well as the challenges faced by regulated entities in applying regulatory principles in certain circumstances.

To achieve this engagement, ASIC should consider increased opportunities for collaboration with industry to complement its enforcement approach. We believe ASIC should be looking for an engagement model with cooperation between regulators and licensees.

### Guidance

The banking industry supports ASIC's continued role in issuing regulatory guidance to provide industry with an understanding of ASIC's approach to enforcing the relevant law. In designing guidance, it is important that ASIC distinguish between its expectations in relation to compliance with the law and its observations in relation to industry best practice.

### Best practice engagement and consultation

The banking industry has observed that consultation processes vary between consultations and business areas within ASIC, particularly in relation to confidentiality requirements (who consultation documents can be shared with), consultation response periods, and approaches to sharing draft instruments or guidance.

We encourage a more standardised approach to consultation, including well-understood processes and purpose for the consultation, minimum consultation periods and standardised confidentiality protocols to ensure that the industry is consistently able to provide ASIC with the information that it needs.

We also encourage ASIC to consider convening a financial services industry advisory panel, similar to the External Advisory Panel and Consumer Advisory Panel, to create a formal mechanism for regular industry feedback and discussion with ASIC.

### Stakeholder reporting and Key Performance Indicators

ASIC should remain accountable to the Parliamentary Joint Committee on Corporations and Financial Services. Any decisions on other stakeholder reporting should take into account the Government's response to recommendation 27 of the FSI final report (creation of new financial regulatory assessment board).

The banking industry also supports the creation of a separate ASIC Board to which the ASIC Executive Team reports. This board would receive reporting on ASIC's performance. APRA and the Reserve Bank of Australia (RBA) have governing Boards separate to the senior executive team.



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ASIC stakeholder reporting should include the extent to which ASIC has met Key Performance Indicators (**KPIs**), so that ASIC and its stakeholders can be reassured that ASIC is meeting its statutory objectives in a cost effective and efficient manner. These KPIs should include efficiency and productivity measures. Future decisions about ASIC funding should take into account ASIC's performance against the KPIs.

We hope this letter assists the Expert Panel in its deliberations. We would appreciate the opportunity to discuss these important issues with you.

Please contact Leonnie Steen at [lsteen@bankers.asn.au](mailto:lsteen@bankers.asn.au) or (02) 8298 0401 if you would like to arrange a meeting.

Regards

A handwritten signature in black ink that reads 'Tony Pearson'. The signature is written in a cursive, flowing style.

Tony Pearson  
**Acting Chief Executive Officer**  
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14 August 2015

Ms Karen Chester  
Chair - Expert Panel  
Capability Review of ASIC  
By email [capabilitypanel@treasury.gov.au](mailto:capabilitypanel@treasury.gov.au)

Dear Ms Chester

## Capability Review of the Australian Securities and Investments Commission

Thank you for your letter of 27 July and the opportunity for the Australian Bankers' Association (**ABA**) to provide comments on the capability review of the Australian Securities and Investments Commission (ASIC).

Your letter stated that this review was recommended by the government's Financial System Inquiry (Recommendation 29 - *Strengthening ASIC's funding and powers*).

The ABA, in our comments on that recommendation, supported the notion that ASIC's powers should only be strengthened, if at all, after an independent assessment determined in what way ASIC's powers were deficient and how they should best be enhanced.

The work of the Expert Panel will be critical in assessing the performance of ASIC and making any determinations about ASIC's powers. The review should consider among other things ASIC's priorities, resourcing, skills, capabilities and culture, and organisational governance and accountability arrangements.

Although it is not specifically mentioned in your letter, the industry is concerned that the capability review will be used as a basis to adopt greater user pays or industry funding by ASIC as a complement or alternative to funding through appropriations in the Federal Budget. I note Recommendation 29 provides that the government should recover the cost of ASIC's regulatory activities directly from industry participants through fees and levies calibrated to reflect the cost of regulating different industry sectors. This would build on the existing partial recovery of ASIC's costs through the Financial Institutions Supervisory Levies, application fees, and fees for market supervision.

The industry believes that a change of this nature should only be made if there is a clear and substantial public benefit. In our view, a strong case for the public benefit from adopting greater industry funding for regulators, has not been made.

In this respect, I note that the Financial System Inquiry's arguments in reference to ASIC are: "The main benefit of industry funding is its potential to give ASIC more predictable funding as well as strengthen engagement between ASIC and industry on the costs of conduct and market regulation."

These are not strong arguments.

The government can itself directly provide more certainty in funding for regulators. It could do this by adopting multi-year funding guarantees. There is nothing inherently more certain about industry funding in a system where the government continues to set the regulator's budget.



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There is also no public benefit in making industry more aware of the costs of conduct and regulation. The industry is already acutely aware of the heavy costs of the implementation and operation of regulation and of the substantial levies and fees they already pay to regulators.

Greater reliance on industry funding for ASIC would further increase the costs for participants in the financial services industry. The industry urges careful consideration of the consequences of further increasing the cost base of the Australian financial services industry, including the impact on the competitive position of the industry internationally. Increases in the cost base of the industry will also inevitably lead to increases in costs for consumers, to the extent such costs cannot be reasonably absorbed or offset through innovation.

Any adoption of industry funding must be accompanied by appropriate checks that contributions are utilised efficiently and are consistent with the services provided rather than based on capacity to pay. Benchmarking against overseas peers would be a key element. In this respect, it is important that the burden of cost recovery should fall on fee for service arrangements rather than on regulatory activities that have the characteristics of a public good. The public paying for the public good is true user pays.

Better governance must be a key requirement of industry funding of ASIC. There would need to be an appropriate framework, with clearly defined objectives agreed with the industry, and a strong architecture for ensuring performance assessment and accountability for these objectives. There would need to be clear prioritisation of tasks and objectives, together with an appropriate model for determining spending envelopes and funding arrangements, with decisions in the hands of Parliament rather than the regulator itself.

Consultation with industry on these issues is critical. While there is already significant engagement between ASIC, the ABA and our members, there are areas where improvements could be made to ensure greater collaboration. A more formal structure might be appropriate.

The ABA has not been able to collate a formal response for your consideration within the timeframe stated in your letter. However, given the significance of this review, the ABA feels further consultation is required and would like to discuss these important matters with you.

It would be appreciated if your office could contact Ms Leonnie Steen at [lsteen@bankers.asn.au](mailto:lsteen@bankers.asn.au) or (02) 8298 0401 to arrange a suitable time.

Finally, the ABA would also be pleased to prepare a formal submission to the review if this would assist the Expert Panel in its deliberations.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Steven Munchenberg', is written over a blue horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Steven Munchenberg  
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