

9 October 2015

Ms Karen Chester
Commissioner
Productivity Commission
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Dear Ms Chester

ASIC Capability Review

Thank you for the opportunity to discuss the industry's views for enhancing and supporting ASIC's operation into the future.

The Property Council is the peak body for owners and investors in Australia's \$670 billion property investment industry. We represent, owners, fund managers, superannuation trusts developers and investors across all four quadrants of property investments: debt, equity, public and private.

We are strong supporters of ASIC and champion closer, cooperative relations between industry and the regulator.

Introduction

It is in the best interests of industry and government for ASIC to be a strong and effective regulator that is seen as an active supporter of a robust and nimble financial market.

Ultimately our members consider that ASIC's strongest contribution to the market is served by developing practical rules, preventing non-compliance and as a last resort, enforcing rules where there are breaches of law sensibly and consistently.

This encourages investor and market confidence.

All of these primary aims are facilitated by ASIC establishing and maintaining timely dialogue with market participants on all sides of the transaction. A deep engagement with industries and understanding of the market facilitates:

- 1) the design of practical rules that help all market participants understand investment without unnecessary cost and compliance burdens;
- 2) the detection and education on issues that are confusing the market to prevent inconsistent compliance;
- 3) the identification of areas of risk requiring closer monitoring.

Each of these activities are far more cost efficient than legal enforcement and have the added benefit of resolving issues before they become areas of market failure.

Over the last several years we have deepened our engagement with ASIC on a more proactive basis, through closer, timely communication with the ASIC senior executives involved with our issues.

This usually means providing advice to ASIC to help formulate their views **prior** to public consultation.

The productive benefit of these outreach opportunities has confirmed that industry and ASIC can enhance regulation through more engaged processes that “cut issues off at the pass” before they become problems.

Often this can be difficult as we are mindful that ASIC has protocols and stakeholders it needs to satisfy which can mean industry and ASIC do not get the opportunity to meet in a timely way before positions are proposed in public consultations. This often means that solving practical issues created by the proposals becomes considerably harder to the detriment of the outcome.

Balancing the ASIC aims

Importantly Parliament’s own legislative definition of ASIC’s objects (“aims”), in the *Australian Securities and Investments Commission Act 2001* ('ASIC Act') set out in subsection 1(2) equally emphasise the need for ASIC to perform its functions and powers to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- (b) promote the confident and informed participation of investors and consumers in the financial system; and
- (c) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
- (d) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
- (e) ensure that information is available as soon as practicable for access by the public; and
- (f) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

Industry is acutely aware that achieving each of these aims and in particular aims (a) and (b) is challenging but critical to ensure ASIC’s capability properly serves all stakeholders.

We see that ASIC’s capability will be enhanced by putting in place processes and practices that emphasise striking a balance between these aims.

Recommendations to Enhance ASIC’s capability

There are some simple and effective recommendations that will help cement that balance:

- 1) **Undertake to involve industry in policy formulation before positions are taken in ASIC for public consultation** – This is a practice widely adopted by other Government institutions. As an example, Currently, the ATO works with industry to formulate views for interpretation well before a decision is made which ensures, industry and ATO understand each other, have jointly designed practical rules and are mutually supportive of the outcomes.

ASIC would benefit from broadly adopting a similar approach across a wide group of industry participants to ensure affected industries is brought in early to ensure valuable and important issues can be more easily incorporated and implemented.

In addition, members often find that an issue that was slated to avoid impacting industry becomes more refined and suddenly impacts industry without the benefit of industry's early views. By the time industry is at the table, it is a much more difficult proposition for change.

Our own experience over the last two years indicates that there are spectacular win-win results for ASIC and industry when the dialogue is entered early in the piece to help shape regulatory approaches.

The most notable example is ASIC's guidance on use of non-IFRS performance measures in reporting. ASIC made early changes to the regulatory approach which were extremely well received and industry gained critical understanding of the concerns of ASIC which could be ameliorated – it meant that industry and ASIC were pulling in the same direction in all public releases to follow.

- 2) **Implement ASIC/Industry Liaison Officers** – Large business are often dealing with complex issues that require ongoing consultation with ASIC, but without a dedicated liaison officer for a particular organisation, businesses are forced to “start again” on each call and there is risk of inconsistent dealings or conflicting advice.

This can be avoided if a dedicated liaison officer were assigned to large organisations. It would also help ASIC maintain a friendly and collaborative relationship that can detect and solve compliance discrepancies before problems can develop.

- 3) **Increased secondment of ASIC personnel to industry and vice versa** – Many industry members feel that ASIC would gain considerable advantages from placing its personnel on secondment into corporate offices so they can learn first-hand and obtain up to date information on how business is conducted in key sectors/industries.

Industry organisations in some circumstances need to educate ASIC officers on business processes and the market environment that can't be easily picked up if you are not in the industry experiencing it first-hand.

ASIC has a history of doing this in the past and is a good way to enhance knowledge and build rapport with industry.

- 4) **Adopting consistent administrative and policy interpretation across ASIC** – Industry members can often find inconsistent interpretation from ASIC officers across different business lines even when dealing with the same legislation.

This is often evident in the past when dealing with trust and company issues.

- 5) **Increased resourcing and focussed training** – ASIC inevitably has the problem of too many jobs and not enough people, which means that skilled staff are unable to concentrate sufficiently on specific tasks

This can be seen in some circumstance where industry approaches on a specific issue such as licencing. Organisations that have had to deal with ASIC on fairly similar licencing issues will find vastly different service responses depending on who they are dealing with. Sometimes it will be a very quick process and other times a similar licence will become a long and drawn out process for no visible reason.

Industry is strongly supportive of resources being delivered to ASIC to allow it to:

- 1) increase headcount that will allow ASIC to reduce the number of tasks per employee;
- 2) recruit from industry and private sector on competitive salaries to guarantee the continuous pool of talent necessary to achieve the goals of the regulator;
- 3) increased budget and resourcing for rolling out consistent service protocols and training through Government and private sector courses.

If additional resources are not made available to ASIC, the industry is supportive of re-allocation of current resources to better fund these activities.

- 6) **KPI's linked to the 6 functional aims of ASIC to ensure a balanced approach** – ASIC has six key functions it strives to achieve and to the extent not already reflected in performance KPI's for employees, one way to obtain balance between the functional aims is to make sure there is a KPI for each.

In performing its functions and exercising its powers, ASIC must strive to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- (b) promote the confident and informed participation of investors and consumers in the financial system; and
- (c) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
- (d) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
- (e) ensure that information is available as soon as practicable for access by the public; and
- (f) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

To prevent on overt focus on one or more aims to the detriment of the others, KPI's to achieve each will help balance the approach.

This is critical to resolving conflicting tensions between information dissemination and minimising cost to parties - both are aims of ASIC.

As requested, we have reviewed the Regulator Performance Framework and make the following observations and recommendations:

- (a) All KPI's – should include a metric that states: *“ The regulator complies with all 6 functional aims stated in the Australian Securities and Investments Commission Act 2001 (or 'ASIC Act') subsection 1(2) in achieving this KPI.*
- (b) KPI 1:
 - i. Delete the word “unnecessary” from KPI 1 – regulators should never impede efficient operation of regulated entities – inefficient operation of entities violates the balance between ASIC's 6 functional aims and aims 1 and 2 in particular.
 - ii. The metrics should include *“Relevant industry bodies will be consulted on all issues that impact their regulatory environment prior to formulation of proposed regulations in a timely manner”.*

- (c) KPI 2:
- i. The last KPI metric should be reworded to state: *“ASIC engages meaningfully with relevant industry, professional body representatives and consumer advocates before ASIC policy proposals are formulated for consultation”.*
- (d) KPI 3:
- i. The second last metric should state: *“The consultation papers will articulate and balance cost benefit analysis on all proposals in addition to clearly stating where market failures are or may be.”*
 - ii. The “stakeholder panel” metric should more fully detail their purpose as a measure of success. We recommend that the purpose and composition of the stakeholder panels reflect the intent of engaging with a true representation of participants in the financial markets on all market matters. A charter, basis of composition and structure should be available for each as part of the metric.
- (e) KPI 5:
- i. The KPI metrics should include: *“ASIC engages meaningfully with relevant industry, professional body representatives and consumer advocates before ASIC policy proposals are formulated for consultation”.*
 - ii. The KPI metrics should include: *“ASIC will adopt one consistent interpretation of regulations across all ASIC departments.”*
- (f) KPI 6:
- i. The second KPI metric should state: *“ASIC holds regular meetings or as issues arise with key stakeholders – including industry, professional body representatives, consumer advocates and small business – through internal contact points.”*
 - ii. The KPI metrics should include: *“ASIC engages meaningfully with relevant industry, professional body representatives and consumer advocates before ASIC regulatory proposals are formulated for consultation”.*

- 7) **Update the ASIC business plan to balance the six ASIC aims and reflect earlier engagement with industry/stakeholders as part of all detection and response activities** – The current business plan eruditely outlines ASIC’s primary areas of focus but consistently lists industry/stakeholder engagement as responses to wrongdoing or as a part of solving identified problems, but it has a valuable role in helping to detect issues before they even become problems.

This provides an opportunity to circumvent the need for enforcement and provides a cost effective deterrent for non-compliance for ASIC.

The business plan also should make the six ASIC aims outlined above a key performance indicator for activities involving design of guidance, education, and policy, to balance each of the six aims so no one issue becomes the primary focus.

As broadly stated above, industry considers that ASIC achieves a considerable amount on difficult tasks within the current resource constraints. These recommendations should be viewed as positive opportunities to enhance ASIC’s capability and are in no way intended to detract from the dedicated work of the regulator.

We look forward to talking through any queries you may have on the issues raised above.

Yours sincerely



Andrew Mihno
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