

1 February 2022

Director
Financial Regulator Assessment Authority
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: FRAA@treasury.gov.au

Dear Director

COBA submission to FRAA review of ASIC

COBA appreciates the opportunity to contribute to the Financial Regulator Assessment Authority's (FRAA) review of the Australian Securities and Investment Commission (ASIC).

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies).

Collectively, our sector has more than \$150 billion in assets and more than 4.5 million customers. Customer owned banking institutions account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and market leading levels of customer satisfaction in the retail banking market.

Key points:

- 1. ASIC's strategic prioritisation, planning and decision making could be improved through better coordination with other financial services regulators and policymakers.**
- 2. Breach reporting data collected as part of ASIC's market surveillance should be used to fulfil other compliance obligations.**
- 3. There is an opportunity to streamline the compliance certificate obligations for Australian Credit License holders using data already reported to ASIC for other purposes.**

COBA considers that ASIC generally performs well as a regulator with respect to the three key areas of the review.

COBA highly values its relationship and positive interactions with ASIC, including our regular liaison meetings. We are appreciative of ASIC's collaborative working relationship with COBA and its willingness to engage with us and our members across all levels of the organisation.

Assessment of the effectiveness and capability of ASIC's strategic prioritisation, planning and decision making

ASIC is generally effective in its strategic prioritisation, planning and decision making. However, additional efforts could be made by ASIC and other financial services regulators and policymakers to plan the timing and implementation of regulatory reforms. The increased coordination will help ASIC to better prioritise and plan its own initiatives in the context of the broader regulatory landscape for regulated entities and enable it to deliver more effective outcomes.

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While the FRAA's review is not assessing decisions in relation to specific regulatory matters, COBA members have pointed to October 2021 as an example of where ASIC could have more strategically prioritised reforms, planned for staggered timing and implementation of the regimes, and better coordination with other financial services regulators and the Government. October 2021 saw five key regulatory regimes¹ under ASIC's remit commence within a one-week window.

In the lead up to the October 2021 reforms, key elements of the various regimes, including ASIC guidance and legislative instruments, were not finalised until as late as a week before the regime commenced. Earlier consultation on the draft ASIC guidance was also conducted in a compressed timeframe, without clarity on key exemptions from the regimes, and without the regulations being finalised, as they were not yet completed by the Government.

The management of the October 2021 reforms is illustrative of where ASIC could have improved its prioritisation and planning to provide industry with adequate time to engage with the consultation process, digest the regulatory guidance and implement the new regulatory regimes.

COBA recognises that ASIC's capacity to plan and prioritise its materials relating to October 2021 reforms was impacted by the broader regulatory process, largely managed by the Government and Treasury.

We recognise that ASIC is one of many financial services regulators and that often the timing and process for meeting priorities can be outside of its control. While ASIC maps out its individual strategic priorities, the key issue for regulated entities is that they are subject to regulatory change from a multitude of policymakers, legislators and regulators.

On that basis, COBA recommends that ASIC's strategic prioritisation, planning and decision making could be improved through better regulatory coordination. We understand that regulators do endeavour to coordinate this change e.g. via discussion at the Council of Financial Regulators (CFR) for big ticket reforms, but more industry transparency is needed about the coordination.

COBA suggests that the United Kingdom's Financial Services Regulatory Initiatives Grid, is a useful example of how Australia could implement better regulatory coordination between ASIC and other financial services entities. The UK Grid sets out in one document the regulatory pipeline for multiple regulators for the next two years. This allows the financial services sector and other stakeholders to understand and plan for continual change that will bring significant cost and operational impacts.

In the Australian context, the Grid should cover regulatory initiatives from ASIC, APRA, ACCC, AUSTRAC, the RBA and Treasury. We acknowledge and welcome that the CFR has begun discussions on improving regulatory coordination.²

Separately, COBA supports the creation of ASIC's new Regulatory Efficiency Unit, which is working within ASIC to identify and implement changes to how it administers the law, with a focus on minimising regulatory costs. This Unit should help address more operational concerns of COBA members with respect to the regulatory process. COBA is engaging with the new ASIC Unit and looks forward to ongoing collaboration.

¹ The deferred sales model for add-on insurance (DSM), the design and distribution obligations (DDO), expanded prohibitions for the hawking of financial products, strengthened breach reporting obligations and a broader internal dispute resolution (IDR) regime.

² See CFR Quarterly Statement June 2021: "Members also discussed Government and Reserve Bank reviews of the payments system, progress on a new cross-agency response protocol for cyber security incidents, lessons from the recent exit of a small ADI, and regulatory coordination."

Assessment of the effectiveness and capability of ASIC's surveillance function

An increasingly important element of COBA members' engagement with ASIC's surveillance function is via the breach reporting regime.

As part of the October 2021 reforms, the breach reporting regime was significantly expanded, meaning COBA members are required to report considerably more incidents as breaches to ASIC.

While COBA understands that ASIC is not responsible for setting the legislative provisions that dictate the scope and nature of breaches required to be reported under the regime, members have suggested the new reporting requirements are onerous, time consuming, and in some instances, not proportionate to the level of risk posed by the purported breaches.

The breach reporting obligations apply in a financial services laws environment that has been strongly criticised by the Australian Law Reform Commission (ALRC) in the first phase of its three-year review of the Legislative Framework for Corporations and Financial Services Regulation.³ The ALRC has highlighted six key problems with the existing financial services laws:

1. Incomplete understandings of legislative complexity.
2. Complex use of definitions.
3. Difficulties navigating definitions.
4. Overly prescriptive legislation.
5. Obscured policy goals and norms of conduct.
6. Difficulties administering complex legislation.

The volume of breaches being reported by entities is generating considerable data for ASIC. We understand that ASIC is working on how it will share the data it collects from the breach reporting regime, to be finalized in 2022.

COBA suggests that there is an opportunity for ASIC to utilize the data collected through the breach reporting regime to:

- Satisfy other data requests, compliance and reporting obligations that regulated entities are required to produce to ASIC (i.e. in reporting the number of incidents for the purposes of annual Australian Credit License (ACL) compliance certificates). This will allow ASIC to use data and technology to reduce its' regulatory impost, and
- Following a sufficient period since the commencement of the new regime, ASIC should review the volume and nature of data being collected and assess it the context of the policy objectives of the regime versus the compliance burden on regulated entities. This will enable ASIC and policymakers to understand whether ASIC is obtaining sufficient data to detect risk, harm and misconduct, to shape priorities in its wider surveillance function, and to provide timely feedback to policymakers and legislators about the effectiveness and efficiency of the breach reporting regime.

With respect to the technology for the ASIC breach reporting portal, members have mixed reviews on the functionality and capability. One member raised particular concerns with the functionality of the portal when updating details on breaches that have previously been reported.

³ <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>

Assessment of the effectiveness and capability of ASIC's licensing function

COBA members have flagged opportunities to improve ASIC's licensing function with respect to the compliance certificate required for the ACL. The compliance certificate must be lodged annually by ACL holders in order to maintain their licenses.

As part of the compliance certificate process, ACL holders are required to:

"provide information about your dispute resolution and compensation activity – the number of accounts you held, the number of complaints you received and the number of voluntary, proactive compensation programs you ran"⁴

Members have suggested that they are unsure of ASIC's expectations in calculating the data for this requirement. They would benefit from additional guidance, particularly on what constitutes compensation activity, and what ASIC means by "voluntary, proactive compensation" (i.e., the automatic refunding of small value fees that were incorrectly charged to a consumer, compared with the formal payment of compensation for larger-scale issues).

Notwithstanding the additional need for clarity, the increased data reported to ASIC under the breach reporting regime and the upcoming mandatory reporting requirements for Internal Dispute Resolution (IDR), provides an opportunity to streamline the data reporting required in the ACL compliance certificate process.

ASIC could consider using the data reported by entities under the breach reporting regime and in the forthcoming IDR reporting framework as a substitute for selected data points requested in the ACL compliance certificate. This would reduce the need for entities to submit similar data to ASIC on multiple occasions, cutting down time and resource demands. It would also provide ASIC with a broader, more consistent view of how the entity is performing with respect to its dispute resolution and compensation activities and provides points of comparison against other ACL holders.

I hope this submission assists the FRAA in its review. Please do not hesitate to contact Maryanna Vasilareas (mvasilareas@coba.asn.au) if COBA can be of any further assistance.

Yours sincerely



MICHAEL LAWRENCE
Chief Executive Officer

⁴ <https://asic.gov.au/for-finance-professionals/credit-licensees/your-ongoing-credit-licence-obligations/annual-compliance-certificates-for-credit-licensees/>