

25 September 2015

ASIC Capability Review Panel  
The Treasury  
GPO Box 89  
SYDNEY NSW 2001

Via Email

Email: [capabilitypanel@treasury.gov.au](mailto:capabilitypanel@treasury.gov.au)

Dear sir/madam,

**Re: Capability review of the Australian Securities and Investment Commission**

**In brief:**

AIST supports this review, however believes that better value would be gained through combining both the capability and funding of ASIC together into a single review. Generally, AIST supports the level of involvement with the industry that ASIC has with industry, however we believe that this could be improved with assistance from Government and better resourcing.

AIST thanks Treasury for the opportunity to respond to this review.

AIST notes that this review is being carried out at the same time as a discussion paper that has been circulated by Treasury containing the industry funding proposals.

Whilst we plan to respond separately to that discussion paper, we note with some disappointment that this represents a missed opportunity. There is a timely opportunity to combine various extant reviews into one, so that there is clarity regarding ASIC's capability, performance evaluation, and funding.

Here is a snapshot of the reviews currently underway, which AIST strongly believes would provide a clearer, more efficient outcome through being combined:

- This review into the capability of ASIC.
- The ongoing submissions regarding the need for clarity of ASIC funding so that it is brought into line with the Government's own Cost Recovery Guidelines so that any Cost Recovery Impact Statement provides sufficient information to determine, for example, whether levies are being applied to what appears to be insufficient resources (e.g. ASIC

enforcement and investigation activities). Without such clarity, it is difficult for various stakeholders (ranging from the Government through to licensees and consumers) to gain transparency about whether either further resources are required or if funding is being applied appropriately.

- Implementation of ASIC’s Regulator Performance Framework, which was released only in July 2015.

AIST is most concerned that, given past statements by us with respect to an appropriate level of resources to allow regulators to carry out their roles effectively, this process appears to consider the capability of the regulator at arm’s length to the funding of those activities. We believe that these should be considered together and recommend that the reviews be conducted together, even though we have been made aware that the two reviews are consulting with each other.

Our priority must be to ensure that ASIC is provided with an appropriate level of resourcing in order to carry out its role. We fail to understand how resources can be appropriately prioritised, if financial resources themselves are being reviewed separately.

Such an aggregation of issues would also be in line with the OECD’s Best Practice Principles for Regulatory Policy<sup>1</sup>, where seven principles for good regulatory governance are outlined, being:

- Role clarity.
- Preventing undue influence.
- Accountability and transparency.
- Engagement.
- Funding.
- Performance evaluation.

### Overall approach to the industry

AIST agrees that ASIC’s approach to the industry is generally proactive, flexible and communicative. Recent initiatives by ASIC have been well supported by industry and the willingness of ASIC to deal with both industry groups and participants on matters alike.

Recent projects that ASIC has undertaken with the industry, such as with respect to fees and costs, website disclosure, PDS and periodic disclosure and financial advice. In 2014 and 2015, we consulted with ASIC’s markets areas on changes to the reporting of over-the-counter derivatives by superannuation funds.

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<sup>1</sup> OECD, OECD Best Practice Principles on the Governance of Regulators, OECD 2012. Available at <http://www.oecd.org/gov/regulatory-policy/governance-regulators.htm>

However, it is often the case that overall objectives are all too often clouded by a mass of complexity and enormous detail. It remains the case that the stated objective of clear, simple and concise disclosure is often lost by a legalistic, compliance-driven approach that does not deliver to consumers. Recent consultations, such as those on fees and costs, have considered a “black letter law” approach to the law, which means that draft guidance can be more confusing than the legislation or regulations it seeks to clarify.

This can mean that ASIC can miss or not act on clear and persistent signs of trends that pose a risk to consumers. Promotion of superannuation products promoted as “low fee/no fee” are an example of this.

On the other hand, ASIC also needs to be more proactive in responding to new products and business models, especially where these involve innovative new technologies. The balance between the risks to consumers and the consumer benefits that innovations may bring needs to be carefully gauged. It is important to recognise that the size and compulsory nature of superannuation means that the modern and adaptable regulatory practices with the highest standards must be in place.

We note that there appears to be an increasing trend towards a narrower scope with regards to regulatory guidance by ASIC where the guidance only relates to clarification of the law. AIST points to past guidance issued by the regulator, such as Regulatory Guide 90 (RG 90), as an example of where ASIC often provided best practice guidance to the industry which was valued by the industry in the same way that legislative/regulatory guidance provided by ASIC is also valued.

We understand that with increased pressure on ASIC to cut costs and focus on priority issues, this theme may continue. Consequently, ASIC’s scope to deal with outstanding issues require direction from a higher level, meaning that issues which the Government is yet to respond to cannot be advanced, such as those stemming from the discussion paper, *Better regulation and governance, enhanced transparency and improved competition in superannuation* issued in November 2013. These issues have frustrated consumers, industry and regulators alike and should be addressed as a priority. As a result, ASIC’s hands have been tied, with resulting delays and confusion on such important issues including portfolio holdings disclosure, Choice product dashboard and matters relating to s.29QC of the *Superannuation Industry (Supervision) Act 1993* (the “SIS Act”).

An important area where we believe that ASIC can improve, is in its relationships with industry. ASIC needs to have strong, constructive & cooperative relationships with industry associations & other financial system gatekeepers. Industry participants, such as AIST, can assist ASIC to progress these matters, and we believe that the government should give ASIC the appropriate assistance to conclude these matters.

### Twin peaks financial regulator model

AIST supports the twin peaks regulator model for financial services in Australia.

The increasing regulation and complexity of superannuation has led to calls from some quarters for a mega-regulatory to replace the role of APRA and ASIC. AIST does not believe that moving from the current twin peaks model to a mega-regulator model or to a lead regulator model would lead to a significant reduction of the regulatory burden.

The twin peaks model has the advantage of two specialist bodies with very clearly defined roles. This is also in line with the OECD 7 best practice principles we refer to above. APRA and ASIC have distinct and recognisable cultures, and there is transition risk in bringing them together. We believe that the multi-faceted consumer protection role demonstrated through ASIC's MoneySmart website and clear regulatory guidance has functioned successfully, and have no wish to see this role diminish. This role complements APRA's role in looking after prudential matters.

As super funds are "customers" of both regulators, and regulators are aware that the effectiveness and efficiency of their operations are observed and commented on by their customers, there is some competition between regulators. This dynamic tension is limited and controlled; it is healthy competition that keeps the bureaucracy in check, and adds to the efficiency of the financial system.

Until the implementation of Stronger Super changes, the division between APRA and ASIC on functional lines was generally clear and understood by the superannuation industry.

During the GFC and its aftermath, both APRA and ASIC separately monitored fund and member behaviour and trends in transactions. While this may have resulted in some duplication of effort, more importantly it was scrutiny that was proportionate to the potential threat posed by the adverse market conditions.

Recently however, there has been increased possibility for regulatory overlap and duplication. The implementation of Stronger Super has resulted in APRA and ASIC being given additional powers. This has meant that there has been further blurring in the boundaries between regulators.

For example, the implementation of MySuper has required APRA to become a product regulator. MySuper is the mandated default investment option, and has higher levels of trustee obligations and member protections. APRA is now responsible for the prudential regulation of this product as well as overall prudential regulation of super funds. Throughout the design and implementation process this has raised issues about the boundaries between APRA and ASIC, and

has required continual monitoring and coordination to appropriately delineate regulatory responsibilities.

These issues have also been evident in relation to reporting requirements, where the disclosure of super fund information (regulated by ASIC) has to be based on the information (methodologies) reported to APRA as part of the section 29QC requirements of the SIS Act.

This requires continual monitoring and inter-regulatory coordination to appropriately delineate regulatory responsibilities. However, the size, complexity and continual changes in the finance sector mean that simply improving these bilateral arrangements between ASIC and APRA may not be sufficient.

In addition, we note the increasing involvement of the ATO, the Fair Work Commission and others over aspects of superannuation and express concerns that all relevant issues need to be integrated at a whole of Government level and for each regulator to be able to explain their activities from both their and a whole-of-Government perspective. If this does not occur, there will be fragmentation that may not be in the interest of members.

#### **Additional protections**

There also needs to be additional protections put in place to protect the integrity of the regulatory structure.

A model for this may be found in the Inspector-General of Taxation. The Inspector-General of Taxation (IGT) was set up as an independent government agency to (amongst other things) improve the administration of the tax system for the benefit of all taxpayers by undertaking broader reviews and making recommendations to the ATO and to the Government. Its report on superannuation non-compliance for example has greatly assisted the ATO on refocusing on this issue, with substantial community benefits as result.

AIST sees merit in the office of an Inspector-General of Financial Services and believe that it should be given a similar scope to the IGT.

#### **Misconduct by financial advisers**

AIST once again points to the need to ensure that ASIC is properly resourced to continue to investigate financial adviser misconduct. However, we also point to the scale of the problem, noting that since the report from the inquiry into the performance of ASIC handed down by the Senate Economics References Committee in June 2014, other problems have arisen at other large financial services firms.

We wrote in our submission to the inquiry that there appeared to be undue focus on the general delay in ASIC's response to the details of irregularities provided to ASIC by whistleblowers.

Although it is reasonable to expect that ‘a few bad apples’ should be reasonably easily investigated and resolved by a properly resourced regulator, we question whether this could be more accurately described as systemic misconduct, which even a highly resourced regulator would have difficulty processing.

AIST believes that the appearance of systemic misconduct is itself reason to revisit the recommendations of the Senate Economics inquiry, which recommended that a Royal Commission be set up to investigate this.

If you have any further questions regarding this submission, please contact David Haynes, Executive Manager Policy & Research on 03 8677 3800 or at [dhaynes@aist.asn.au](mailto:dhaynes@aist.asn.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Garcia', is written over a horizontal line.

Tom Garcia  
**Chief Executive Officer**

*The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.*

*As the principal advocate and peak representative body for the \$600 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.*

*AIST provides professional training, consulting services and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.*