

**Australian Securities and Investments Commission**

*Answers to questions on notice following public hearing on 14 October 2016*

(answers received as of 8 November 2016)

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**RESPONSE BY THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)  
TO QUESTIONS TAKEN ON NOTICE**

**House of Representatives  
Standing Committee on Economics  
Inquiry into Australian Securities and Investments Commission Annual Report 2015**

14 October 2016

**Question 1 (p.12, p.13)**

*Mr THISTLETHWAITE: Okay. Finally, in paragraph 48 on page 11 onwards you make a number of recommendations about strengthening the regulatory framework, strengthening the dispute resolution framework, follow-up surveillance and strengthening industry standard practices. Who were those recommendations made to? Are they made to government or are they made to the insurers?*

*Mr Kell: Some recommendations will go to government. There is some law reform that we are recommending, and we have had discussions with government about these issues already. I think you may have seen in the minister's response that the government is open to considering the issues we have proposed. Some of the recommendations go to the way that dispute resolution schemes operate. We are making part of our submission to the current Ramsay review on the way that dispute schemes operate—what their coverage is, how they deal with different types of complaints—and we are recommending that that coverage be expanded in relation to life insurance. Some of the recommendations go to industry itself about strengthening their own code that they have just come out with. And, of course, some of the follow-up actions are for ASIC and APRA to undertake.*

*Mr THISTLETHWAITE: Could you provide to the committee the recommendations that you made to government? You might want to take this on notice and provide it in writing over the course of the next week.*

*Mr Kell: Sure. We have been quite public in the report around two or three key law reform recommendations.*

**Response:**

The recommendations made to Government in Report 498: Life insurance claims: An industry review (REP 498) are set out on pages 99-102 of the report (paras 365-382).

Our recommendations address areas where changes could be made to augment ASIC's powers and enable effective regulatory intervention to improve outcomes for consumers.

In addition to areas which are currently under review for possible reform, we identified a further area for review where changes could be made to improve how claims handling is regulated: remove the exclusion of claims handling from the definition of 'financial service' in Chapter 7 of the Corporations Act.

The current exclusion means that insurers are not subject to a broad range of standards of conduct that apply to other parts of their business (such as the sale of their policies). The exclusion of claims handling from the definition of financial services (by operation of

Corporations Regulation 7.1.33), limits ASIC's capacity to seek changes in insurer conduct from inappropriate incentives or the way a claims investigator operates. Our view is that removing the exemption in the regulation would enhance our capacity to seek improvements in claims handling practices.

In response to REP 498, the Minister for Revenue and Financial Services has asked Treasury to proceed with this recommendation and undertake targeted consultation on the merits of removing the exemption.

The following is an extract from REP 498 which sets out the current policy reform initiatives, as well as the additional area we recommended for consideration by Government.

### **Policy review**

Our review identified a number of areas where we consider insurers' claims handling practices are inadequate. Our ability to achieve improvements to these practices is constrained due to the limited power given to ASIC under the Corporations Act to regulate insurers in relation to claims handling.

We have identified several areas which are currently under review for possible reform where changes could usefully be made to augment ASIC's powers and enable effective regulatory intervention to improve outcomes for consumers. We have also identified a further area for review where we suggest reform could be made to improve the regulation of claims handling.

### **Current policy reform initiatives**

There are a number of policy reform initiatives already underway that may address some of the matters raised in this report.

### **Penalties**

A review of penalties is underway (noting that ASIC currently cannot seek penalties for breaches of the duty of utmost good faith in the Insurance Contracts Act). This process could consider changes that seek to deter poor conduct by life insurers through enhanced sanctions including by:

- (a) enabling ASIC to seek civil penalties where insurers have breached the duty of utmost good faith under the Insurance Contracts Act; and
- (b) aligning penalties for breaches by directors of life insurance companies of their duties to policyholders with the civil and criminal penalties that apply to directors of managed investment schemes.

## **Review of the Australian Consumer Law**

This includes a review of whether the unfair contract terms in the ASIC Act should continue to be excluded from applying to insurance contracts (by operation of s15 of the Insurance Contracts Act).

## **Upgrading policies' medical definitions**

The FSI report included a recommendation that the Government should introduce a mechanism to facilitate the rationalisation of legacy products in the life insurance and managed investments sectors. The Government has recently accepted this recommendation, noting that rationalisation needs to be considered in the light of consumer, constitutional and fiscal issues (given that there are possible tax implications of facilitating the transition away from legacy products).

This process may also provide an opportunity to consider the effect of s9A of the Life Insurance Act, which provides that an insurer can only pass on the benefit of a change to a policy if they do not charge the consumer more as a result.

Currently the effect of s9A is that an insurer can provide increased benefits (e.g. through updating a definition) but cannot change the price to cover that increased risk. The insurer therefore can only pass on the cost of the increased benefits by asking existing insureds to upgrade to a new policy, which is a costly and inefficient way of achieving this outcome. Policy reform may allow upgrades of existing life insurance policies on a portfolio basis to more current definitions, where this is beneficial to policyholders, allowing any premium impact to be spread across the portfolio.

## **External dispute resolution**

In May 2016, the Government established a review of the EDR and complaints framework in the financial services sector. Relevant to consumer disputes about life insurance claims (inside and outside the superannuation environment), the panel conducting the review is tasked with making recommendations on the extent of gaps and overlaps between each of the bodies (including considering legislative limits on the matters each body can consider) and their impacts on the effectiveness, utility and comparability of outcomes for users. A final report will be provided to the Government in March 2017.

ASIC recommends consideration of the jurisdiction of EDR schemes over life insurance claims. In particular, we have highlighted the need to:

- (a) ensure better and more effective consideration of issues of fairness to supplement the existing jurisdiction; and
- (b) give better access to consumers with complaints about delays in claims handling and ensure better remedies when these complaints are found in favour of the consumer.

ASIC will be raising these issues as part of the current review of the EDR and complaints framework in the financial services sector. The terms of reference for this review include

considering the extent of gaps and overlaps between each of the dispute resolution bodies (including the legislative limits on the matters each body can consider) and their impacts on the effectiveness, utility and comparability of outcomes for users. A final report will be provided to the Government in March 2017.

### **Insurance in superannuation**

In relation to life insurance cover provided through superannuation, the Productivity Commission is currently undertaking a study to develop criteria to assess the efficiency and competitiveness of the superannuation system. In the draft report released earlier this year, the Productivity Commission proposed that one system-level objective could be whether group insurance was meeting members' needs.

### **Additional law reform proposal**

The current exclusion in relation to the handling or settling of insurance claims in reg 7.1.33 (see paragraph 141) means that insurers are not subject to a number of broad standards of conduct that apply to other parts of their business (such as the sale of their policies).

The excluded obligations include requirements on the insurer:

- (a) to do all things necessary to ensure that it provides financial services efficiently, honestly and fairly;
- (b) to have in place adequate arrangements for the management of conflicts of interest that may arise in the provision of financial services; and
- (c) to take reasonable steps to ensure that its representatives comply with the financial services laws.

While a breach of the duty of utmost good faith in the handling of a claim does activate ASIC's licensing powers, our capacity to take action for systemic conduct or seek broad improvements to current practices in relation to claims handling is limited. We would only be able to take enforcement action to seek redress for conduct in relation to specific individuals where the insurer had breached either the ASIC Act or the Insurance Contracts Act.

The limitations can be illustrated through two examples of conduct that are impacted by the exclusion:

- (a) incentives for claims handling staff and management, including whether they conflict with the insurer's obligation to assess each claim on its merit; and
- (b) surveillance practices by investigators, particularly for mental health claims.

The exclusion of claims handling from the definition of financial services in reg 7.1.33 limits ASIC's capacity to seek changes in insurer conduct from inappropriate incentives or

the way an investigator operates. Our view is that removing the exemption in reg 7.1.33 would enhance our capacity to seek improvements in claims handling practices.

The next stage of our work will examine insurers' practices in more detail, which may identify further issues that could be addressed through law reform. Examples of the areas where possible changes may be identified include:

- (a) the relationship between sales practices, the failure by the consumer to provide full disclosure at the point of sales, and adverse claims outcomes;
- (b) whether there could be changes to sales practices, including disclosure, so that the way in which policies operated is better aligned with the consumer's expectations; and
- (c) whether the use of standard definitions (particularly for complex medical definitions used in trauma policies) would improve consumer outcomes.

## Question 2 (p.17)

*Mr CONROY: You have provided that testimony and you have made the point that you are working with APRA on a joint project because APRA has different legislative confines than you. Since 2013 have you made any submissions to government to amend the ASIC Act to give you those powers of disclosure that prevent you from disclosing this information?*

*Mr Kell: This is not just in respect of insurers; this goes right across the board.*

*Mr Price: I think we should take that on notice. There have been several inquiries that have touched on ASIC's enforcement powers. I think it is important for us to be complete in our answer, so I would like to take that question on notice.*

*Mr CONROY: I just want to confirm what I am requesting. I would like to know if ASIC has provided any advice to government, both public and private, recommending amending the ASIC Act to allow you to disclose information that was collected using compulsory orders?*

### Response:

Since 2013, ASIC has not made any submissions specifically on amending s 127 of the ASIC Act to allow public disclosure of information that was collected using ASIC's compulsory information gathering powers.

ASIC has made submissions advocating the benefits of compelling industry to publicly release more data to inform consumers and assist their decision making. This includes data like the claims data in ASIC's Report 498 Life Insurance Claims: An Industry Review, that the Committee was discussing. This is consistent with overseas developments. Specifically:

- ASIC's public submission to the Financial System Inquiry (April 2014) said (at [140] - see also pp 38-40):

ASIC thinks that there is merit in considering making more data available to Australian investors and financial consumers, particularly in situations of market failure where disclosure is failing to facilitate adequate choice and competition. As has been considered overseas, this could include both:

- a) encouraging or compelling the provision of data and information (particularly personal data) to investors and financial consumers to help them make decisions and ensure they can benefit from the 'big data' trend; and
  - b) going further in situations of market failure (e.g. evidence of poor investor and financial consumer decision making and outcomes, mis-selling of products, ineffective or distorted competition, products and services that are objectively poor value for money, high levels of complaint and dispute), and mandating the provision of more data and information designed to address that market failure and promote.
- ASIC's public submission to the Financial System Inquiry interim report (August 2014) said (at [119, 123] - see also pp 31 - 34):

Internationally, governments and regulators are increasingly considering ways to enhance consumer outcomes and drive competition by requiring product and service providers to make machine-readable data available to third parties, who may then be able to aggregate such data into useful 'choice engines'.

...

Mandated data could relate to product terms and price; however, it could also extend to important product features that could facilitate more powerful and useful comparisons. For example, issuers of insurance products could be required to provide data on the level of cover (e.g. high, medium and low), claims ratios, withdrawn claims, and complaint and EDR disputes data. Such data would be a far more direct and powerful indicator of the quality or value for money of a financial product or service than a detailed comparison of lengthy disclosure documents.

- ASIC's public submission to the Productivity Commission Inquiry into Data Access and Use (August 2016) provided further examples (at [46] - see also pp 10 -12):

Some examples of data on financial services that might be of benefit to consumer purchasing decisions include the following:

- c) Average insurance claims processing times and/or claim payout rates, which could provide better assistance for decision making than long and complex disclosure documents for insurance products;
- d) The frequency of Managed Investment Scheme fund distributions;
- e) Financial product provider complaints data; and
- f) Natural disaster risk data specific to areas of residence.

For completeness, ASIC has, since 2013, provided advice about restrictions in the ASIC Act on ASIC's ability to share information with other domestic or international agencies and regulators. For example, ASIC has:

- made various general submissions about current restrictions on quick and efficient sharing of information with other Australian agencies;
- responded to queries from Treasury and the ATO about proposed amendments to the ASIC Act in relation to sharing information with the ATO;
- made submissions to the Legal and Constitutional Affairs Reference Committee Inquiry into the AFP's Oil for Food Taskforce about difficulties with sharing information with the AFP;
- responded to queries from Treasury and the Parliamentary Joint Committee on Human Rights about amendments to the ASIC Act that commenced in July 2013 in relation to sharing information with international business regulators.



### Question 3 (p. 21)

*Mr KEOGH: I notice that in the first half of 2015 there were no pending actions against directors of small business, but there was also no resultant increase in the number of completed actions against directors for small business. Is that an error in the report? Because it seems to—*

*Mr Tanzer: I will take that on notice and take a look at it.*

#### **Response:**

ASIC publishes an enforcement outcomes report twice a year, and also includes information about enforcement outcomes in our annual report and on our website.

ASIC's enforcement outcomes reports include information about the enforcement activities and outcomes we receive, within a relevant six-month period. This includes information about matters where we have achieved an enforcement outcome and pending matters.

Pending matters are publicly announced enforcement matters that have yet to result in a formal outcome, such as the imposition of an administrative remedy, court ordered penalty, or sentence. In the case of criminal matters, these include matters where charges have been laid but are yet to be heard by a court.

ASIC will generally issue a media release where we lay criminal charges for an enforcement action. This is in accordance with our policy set out in ASIC Information Sheet 152 Public comment on ASIC's regulatory activities.

ASIC may not make a specific public announcement about matters that we prosecute in our small business compliance and deterrence area. These include matters that ASIC prosecutes by agreement with the Commonwealth Director of Public Prosecutions against company directors of small businesses as part of our liquidator assistance program for failing to assist a liquidator.

Table 4 of ASIC Report 444: ASIC enforcement outcomes: January to June 2015 indicates that we had no pending criminal matters against directors and no criminal matters related to efficient registration and licensing in our small business compliance and deterrence area during that period. Unfortunately, the figures in this part of Table 4 are incorrect.

From January to June 2015, ASIC's small business compliance and deterrence area had 155 pending criminal actions against directors and 12 pending criminal actions related to efficient registration and licensing.

ASIC will update the table to reflect these figures.

From January to June 2015, ASIC's small business compliance and deterrence area achieved 204 enforcement outcomes, including 182 criminal actions against directors, 12 administrative actions against directors, and 10 criminal actions related to efficient registration and licensing.

**Question 4 (p.23)**

*Mr HOGAN: What do you have to say to the newspaper allegation and the court case allegation that there is a bullying culture within ASIC?*

*Mr Price: Two things. First of all, in respect of the specific court case mentioned, I understand that it may be under appeal, so I cannot speak specifically to that. More generally, we do regularly measure things like employee engagement. One of the questions that is put up as part of our internal staff surveys which have a very high response rate is around bullying. That metric has actually declined over the years, showing that staff indicate that they are less concerned about bullying. That has been a consistent trend over the last four or five years.*

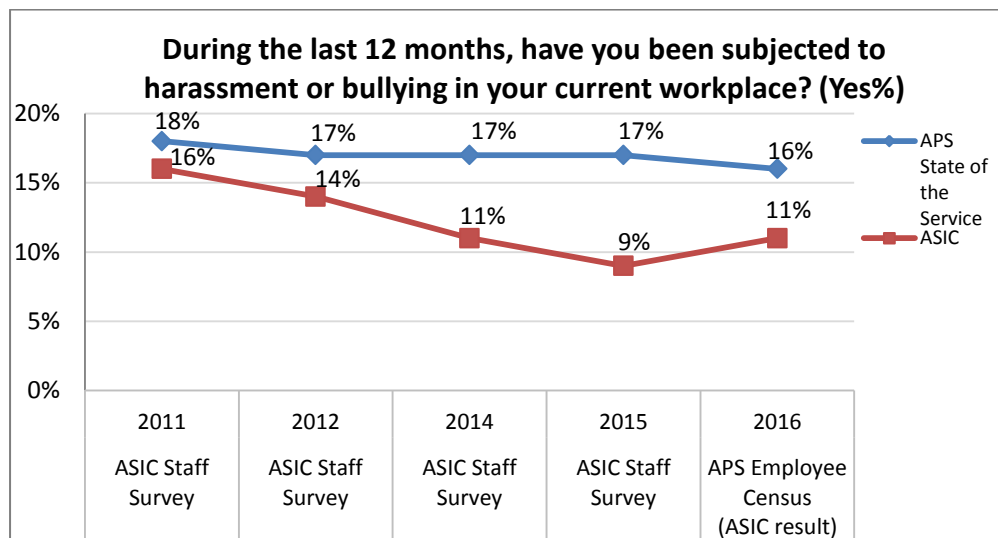
*Mr Medcraft: We have undertaken programs to actually deal with bullying and harassment within ASIC.*

*Mr Price: I should say that in the recent state of the service report that looks at this issue across all public service agencies, my recollection is that ASIC acquits itself very well. Perhaps we can take that information on notice and give it to you.*

**Response:**

In the 2016 APS Employee Census, 11% of ASIC employees indicated that they had experienced bullying or harassment in the past 12 months. This result is 5.1% lower (that is, more positive) than the APS at 16.1%.

**Tables: ASIC results – % of people experiencing bullying or harassment**



**Note**

- Chambers Workers Compensation Case - the conduct discussed in the litigation occurred in 2012.

Question 5 (p.24)

*Mr BUCHHOLZ: In the space of credit, I notice that you had a specific area for credit cards under the borrowings tab. I do not suspect that you would be able to answer at the moment, so I ask that you take it on notice: can you just, if you are able to, give some advice as to how many complaints would be in and around credit cards.*

*Mr Day: Absolutely. I can take that on notice and provide that.*

**Response:**

In the three financial years from 2013-14 to 2015-16, ASIC received 225 reports of alleged misconduct raising concerns about credit cards. This represents 6 per cent of the 3,645 reports of alleged misconduct we received about credit matters generally, and 0.8 per cent of the 29,957 reports of alleged misconduct we received in total during the same period.

Broadly, ASIC provides guidance to consumers about how we approach disputes with credit card providers and concerns about credit provide conduct in ASIC Information Sheet 174 Disputes with financial services or credit providers.

Question 6 (p.27)

*Mr THISTLETHWAITE: I understand that the registry employees currently work in Traralgon and Latrobe Valley. Is that right?*

*Mr Tanzer: The larger proportion are in Traralgon and the Latrobe Valley. We also have registry employees in Melbourne and Adelaide.*

*Mr THISTLETHWAITE: Can you tell us what proportion are in the regional areas?*

*Mr Tanzer: The vast proportion, probably 80 per cent—I can give you specific numbers—are in Traralgon.*

*Mr THISTLETHWAITE: If you could take that on notice.*

*Mr Tanzer: Happy to.*

**Response:**

Traralgon employees (headcount): 279

Percentage of ASIC workforce: 15%

(ASIC workforce headcount: 1831)

### Question 7 (p.15)

*Mr EVANS: I might get you to provide on notice some further information around some of the general audit spaces where you are proactively measuring compliance. And I give notice that in future sessions on this I might like to explore further how some of those proactive measures of compliance might be able to be turned into higher level measures of your success over time.*

#### **Response:**

ASIC's Small Business Compliance & Deterrence team has a compliance/enforcement program focused on relevant companies that fail to lodge their financial reports with ASIC.

Generally, there are two types of companies that need to lodge financial reports with ASIC:

- Public companies (listed and unlisted), and
- Large proprietary limited companies - as defined by s.45A(3) of the CA

Generally speaking, there is no obligation for small proprietary limited companies [see s.45A(2)] to lodge financial reports, unless it meets the criteria set out in s.292(2).

Public companies are required to lodge end-of-year reports and half-year reports with ASIC. They are required to lodge end-of-year reports within 3 months of the end of financial year and half-year reports within 75 days of the end of the half year [see s.319(3)(a)].

Large proprietary limited companies are required to lodge only end-of-year reports within 4 months of the end of financial year [see s.319(3)(b)] - there is no requirement to lodge half-year reports.

ASIC identifies companies required to lodge financial reports with ASIC. We then writes to the relevant companies (a number of times) to explain their obligations and seek compliance. Where companies fail to comply and the breach is systemic (two of more years of outstanding reports), a list is provided to ASIC's Small Business Compliance & Deterrence team to pursue a more vigorous compliance campaign to seek compliance.

ASIC tries to seek compliance by writing to companies and explaining that if the outstanding reports are not lodged, civil orders under s.1274 will be obtained against the companies. If the companies do not comply, ASIC, s.1274 orders are obtained. The companies are referred for surveillance and enforcement activity. ASIC's Small Business Compliance & Deterrence team will engage the companies (phone or in person) and again explain the obligations imposed on it, providing one last opportunity to lodge outstanding financial reports.

Should the companies / director fail to comply, ASIC's Small Business Compliance & Deterrence team takes enforcement action - generally for breaches of ss.319 / 320. These are criminal offences and are prosecuted by our internal prosecutors.

In the 2015/ 16 financial year, ASIC\*:

- Obtained 42 s1274 Civil Orders;

- 54 compliance outcomes where companies lodged their financial reports after ASIC contacted them;
- 44 surveillances;
- 44 companies investigated and referred for prosecution; and
- 41 companies successfully criminally prosecuted.

\*These figures relate to all companies that have an obligation to lodge financial reports with ASIC - that is, all public companies (listed and unlisted) and and/or large propriety limited companies.

Question 8 (p.15)

*Mr EVANS: ....The financial advisers register—how is that coming along?*

*Mr Kell: It is going well. It has actually ended up having greater interest than I think we had anticipated. As at the end of last month there were 24,908 financial advisers listed on the register, and there have been over 1.2 million searches of the register completed as at the end of last month. So, it is certainly demonstrating that there is an appetite for that information about advisers.*

*Mr EVANS: Do you have any metrics about people using it, as you would expect consumers to—in terms of visits to pages, navigating it, searching it and those sorts of things?*

*Mr Kell: We do. I do not have all of those on me at the moment, but—*

*Mr EVANS: That is all right. Perhaps I could get you to provide those on notice.*

**Response:**

The financial advisers register was launched on ASIC's Moneysmart website on 31 March 2015.

As of 3 November 2016 the register has had 608 thousand unique page views and over 1.3 million conducted searches.

This has resulted in an advisers record being viewed 723 thousand times by customers of ASIC's MoneySmart website.

### Question 9 (p.15)

*Mr EVANS: I have received a few inquiries from some accountants in Brisbane who have been advised that their applications for Australian financial services licences are unlikely to be assessed in the usual time frames under your service charter standards. It appears that there is a significant backlog of applications. Can you tell us more about that?*

*Mr Tanzer: Yes. There was a something like 2½-year transition period provided for accountants—sorry, three years—to apply to obtain an Australian financial services licence, because an exemption for accountants was being removed. That exemption was removed from 1 July 2016. So there was a substantial transition period provided. I can, under notice, provide you with all the information that we and the accounting associations put out to assist people to make their applications for registration in a timely way. We have received about 1,000 applications. Nearly half of those were received in the last month, before the end of that transition period. We put out communications well before the end of that saying that unless people got their applications in three months before they would not get their licence.*

*Mr EVANS: Well I guess we are sort of approaching the three months after that deadline, and I know some of them would have had to proactively engage in training and so on.*

*Mr Tanzer: Exactly.*

*Mr EVANS: When are people who were caught in that trap likely to have their applications assessed?*

*Mr Day: There is not a straightforward answer to that question. The point I would make is that this is the longest transition period we have ever had for a regime like this—three years. We received 66 per cent of applications in the last four months, after a huge amount of work done between ASIC and the joint accounting bodies to get people to apply early. We put very public notices out through the accounting bodies and publicly that we wanted people to apply by March this year. If they had applied by March this year we gave a guarantee that we would have finished their application assessment by the deadline and handed that out. Unfortunately a lot of practitioners did not heed that message and took until the end. But government funding for that transition period ended on 30 June, so we have no extra resources that we can deploy, but we have deployed resources dedicated to dealing with this. At this stage our expectation is that we will get through most of the backlog probably by the end of this year. However, I would still expect, given that a high number of the applications we have on hand at the moment are poor, in terms of their content, that we would still have in the low hundreds still on hand into the next year. So, it depends on what the nature of that application is.*

*Mr EVANS: I might get you to provide me more information around that on notice.*

*Mr Day: I would be happy to do so.*



**Response:**

### **Limited Australian financial services licences**

As part of the Future of Financial Advice reforms, on 23 June 2012 the then government announced that the exemption under regulation 7.1.29A of the Corporations Regulations 2001 (Corporations Regulations) allowing recognised accountants to give advice about self-managed superannuation funds (SMSFs) without holding an Australian financial services (AFS) licence would cease with effect on 1 July 2016.

In order to facilitate accountants moving into the AFS licensing regime, the then government proposed to amend the Corporations Regulations to create a new form of AFS licence, to be called a limited AFS licence. People could apply for a limited AFS licence from 1 July 2013 and there would be a three year transitional period to comply with the new regulatory arrangements.

The then government introduced these reforms in the Corporations Amendment Regulation 2013 (No. 3), which were made on 30 May 2013.

### **Applications for limited AFS licences**

ASIC received 1,152 applications for a limited AFS licence within the three year transitional period, which ended on 30 June 2016. Of these:

- 758 applications (66%) were lodged in the last four months of the transition period
- 443 applications (38%) were received in the last month of the transition period
- 279 applications (24%) were lodged in the last week of the transition period
- 96 applications (8%) were lodged on the last day of the transition period

### **ASIC's assessment of limited AFS licence applications**

ASIC assesses all applications for a limited AFS licence in a consistent and rigorous way. This is an important regulatory function for ASIC, and we approach our licensing responsibilities seriously and diligently.

As at 3 November 2016, ASIC has granted 440 limited AFS licences.

306 applications have been withdrawn or returned to applicants because they were incomplete, deficient, or missed mandatory information.

ASIC Delegates have refused two applications. Three limited AFS licensees have cancelled their licences voluntarily.

ASIC currently has 410 applications to assess.

### **Constraints on ASIC's assessment of applications**

Given the volume of applications and that applications have not generally included the information that we require for assessment, we expect the applications on hand will take time to assess, and we expect we will require further information or clarification from most applicants.

As the transitional period funding has now elapsed, ASIC assesses these applications out of our existing, on-going resources. To manage these applications, we have re-assigned a small number of staff to dedicate their time to these applications. Other staff members

are balancing some limited AFS licence applications as part of their broader licensing workload.

For these reasons, it is hard to predict a time when we will have completed our assessments, so we are unable to confirm a date when we expect to complete this work. We will aim to complete all pre-30 June 2016 lodged applications by the end of March 2017.

We were clear in our communications of the need for accountants not to leave it to the end of the three year transition period. Unfortunately, this situation has meant that it is affecting our ability to service other licence and professional registration applicants.

#### **ASIC's communication with limited AFS licence applicants**

ASIC updates remaining applicants regularly about our progress. Most recently, we communicated with each applicant via email on 27 September 2016.

On 1 June 2013, ASIC published ASIC Information Sheet 179 Applying for a limited AFS licence to assist persons intending to apply for a limited AFS licence.

On 25 August 2015, ASIC issued media release 15-227MR (<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-227mr-applying-for-a-limited-afs-licence-the-time-to-act-is-now/>) to alert people wishing to apply for a limited AFS licence to allow enough time to prepare their application and undertake the relevant training. We also noted that applications lodged after 1 March 2016 may not be assessed and approved by ASIC before the accountants exemption was repealed on 1 July 2016.

On 7 June 2016, ASIC released a further media release 16-182MR (<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-182mr-limited-afs-licensing-regime-transitional-arrangements-end-30-june-2016/>) regarding ASIC's general approach to applications for limited AFS licences lodged after 1 March 2016.

ASIC also wrote to limited licence applicants, whose applications were still being assessed in mid July 2016 to explain how ASIC was approaching its assessment of such applications, and to note we were dedicating as many resources to the process as possible.

During this time, ASIC released information to the public in other forums, such as a CCH Webinar and our own ASIC View podcast. ASIC commissioners and senior staff presented to industry and accounting body functions on the limited AFS licence regime to engage with people about the requirements and licensing process.

ASIC met with representatives of the joint accounting bodies before and during the transition period, every three months (quarterly). This allowed ASIC the opportunity to provide feedback about the quality or issues being seen in applications to the joint accounting bodies. The joint accounting bodies then provided this feedback to their members in communications and their own training programs and guidance materials.

On 7 July 2016, ASIC published a media release 16-220MR (<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-220mr-transition-period-for-recognised-accountants-providing-smsf-related-financialproduct-advice-has-ended/>) which included information in relation to the significant volumes received by ASIC, including in

the final week of transition and noting that from 1 July 2016, accountants intending to make recommendations to acquire or dispose of an interest in a self-managed superannuation fund (SMSF) must hold a limited AFS licence (or full AFS licence) or be an authorised representative of an AFS licensee.

Further, from the reform announcement, throughout the transitional period, and since the commencement of the limited AFS licence regime, ASIC has worked closely with the joint accounting bodies to ensure that all affected accountants are clear about what ASIC requires to obtain a limited AFS licence, as well as complying with licensee obligations.

We are working with the joint accounting bodies about addressing application deficiencies (where they exist) to assist in speeding up the processing of the applications.

In each application for a limited AFS licence, ASIC has requested and received consent from the applicant for ASIC to communicate with the applicant's relevant accounting body (when necessary) about their application. This allows ASIC to continue discussion with the joint accounting bodies following the transition date and in to the future about issues with applications still on hand.

#### **Concerns with unlicensed conduct**

Any accountant without an AFS licence, limited AFS licence, or an appropriate authorisation from an AFS licensee or limited AFS licensee, must not provide advice in relation to the acquisition or disposal of an interest in an SMSF or provide any other financial service.

Providing unlicensed financial services is a criminal offence. Where ASIC becomes aware of accountants providing unlicensed advice, ASIC may take regulatory action.

## Question 10 (p.21)

*Mr BUCHHOLZ: I am just interested in some further comment on that and how you would see ASIC play that role, and whether or not you see it as a shift of responsibility from the ACCC to you, or would it be a shared responsibility? I do not expect you to answer that now, so could you just take it on notice.*

*Mr Medcraft: I will come back to you and we will provide you details about what the FCA is.*

### Response:

- *ASIC supports the Financial System Inquiry (FSI) recommendation and Government response to give ASIC a competition mandate.* In our submission to the FSI ASIC advocated for the inclusion of competition in our mandate to enable us to:
  - promote competition in regulated financial markets and services, including factor competition in our regulatory decision-making
  - use our existing functions and powers to consider whether competition is working effectively in the markets we regulate, and
  - do so in the long-term interests of consumers or end-users.
- A useful formulation of such a mandate would be similar to the one set out in the mandate of the Financial Conduct Authority (UK) (FCA). The FCA competition mandate under the Financial Services and Markets Act (2000) is to "promote effective competition in the interests of consumers".
  - This approach is consistent with the expectations of the FSI in Recommendation 30 for ASIC to "take competition issues into account as part of its core regulatory role".
  - It is also consistent with principles of competition policy set out in the Report of the Competition Policy Review (March 2015) led by Professor Ian Harper, that competition policy should make markets work in the long-term interests of consumers.
- It will enable us to actively consider competition issues when we are using our existing regulatory tool-box.
- The Australian Consumer and Competition Commission (ACCC) would remain the competition regulator across the whole economy -as well as the financial system, including powers to enforce breaches of the competition law. Thus provision of a competition mandate to ASIC would result in shared responsibility rather than a shift of responsibility.

### Key points

Context: Financial System Inquiry - Competition

The FSI assessed that while competition in our financial system is generally adequate, the high concentration and increasing vertical integration in some parts of the Australian financial system has the potential to limit the benefit of competition in the future and should be proactively monitored over time.

Financial System Inquiry - Competition recommendation

- Recommendation 30 of the FSI set out that to strengthen the focus on competition in the financial system, there should be:
  - a review of the state of competition in the sector every three years
  - improve reporting of how regulators balance competition against core objectives
  - identify barriers to cross-border provision of financial services, and
  - include consideration of competition in ASIC's mandate.
- Specifically, it set out that Government should update ASIC's mandate to include a specific requirement to take competition issues into account as part of its core regulatory role. Among other things, it noted that:
  - ASIC lacked an explicit competition mandate
  - there is no current requirement for regulators to explain how they balance competition considerations with other regulatory objectives in reaching decisions, and
  - strengthening a regulator's consideration of competition issues as part of ordinary regulatory processes was likely to have more effect for strengthening the focus on competition than other suggested options.

#### **Government Response**

- In response to the FSI, the Government agreed to strengthen the focus on competition in the financial system by explicitly including consideration of competition in ASIC's mandate.

#### **United Kingdom - Financial Conduct Authority**

- The Financial Services Act 2012 (UK) established the Financial Conduct Authority (FCA) (analogous to ASIC) and gave it a specific competition objective to promote effective competition in the interests of consumers in regulated markets (see section 1E of the Financial Services and Markets Act (2000)).
- Matters to which the FCA may have regard in considering the effectiveness of competition in the market include:
  - the needs of different consumers who use or may use those services, including their need for information that enables them to make informed choices
  - the ease with which consumers who may wish to use those services, including consumers in areas affected by social or economic deprivation, can access them
  - the ease with which consumers who obtain those services can change the person from whom they obtain them - the ease with which new entrants can enter the market, and
  - how far competition is encouraging innovation.
- Since the establishment of the competition mandate, the FCA has:
  - examined existing regulatory requirements for anti-competitive effects to ensure it does not unduly impede entry and innovation

- undertaken an extensive program of market analysis and studies (including behavioural studies) to determine the state of competition in UK financial markets
  - taken account of competition across policy, supervisory, authorisation and enforcement work, and sought to find pro-competitive solutions to concerns where possible, and
  - established programmes to assist innovation, including a 'Regulatory Sandbox' for firms to trial innovative ideas.
- Having been provided with a mandate to promote competition in 2012, in a separate and additional step in April 2015, the FCA was given powers to enforce competition law concurrently with the Competition and Markets Authority (CMA) for the market sectors they regulate.