



21 May 2021

The Honorable Ben Morton MP
Assistant Minister
Department of the Prime Minister and Cabinet
Parkes ACT 2600

Dear Mr Morton,

SMSF ASSOCIATION SUBMISSION - REGULATOR PERFORMANCE GUIDE

The SMSF Association welcomes the opportunity to provide a submission on the Government's Regulator Performance Guide. We support measures which are designed to assist Regulators to operate effectively and efficiently, executing their remit, servicing, and working with stakeholders.

We appreciate that the purpose of this guide is to service all Government Regulators. However, we have included examples of issues that have affected our Members, with a view to illustrate the adverse outcomes that can occur. Guides can be an important and effective tool, ensuring that a considered, commercial, and practical approach is taken by Regulators.

A principles-based approach allows for the necessary flexibility for Regulators to operate within their remit and adapt as the regulatory environment evolves.

It is essential that a high level of accountability is also incorporated. Measures or data reported needs to tell a complete story and not a chosen narrative.

We agree that hard data collection and reporting is important, but that consideration of other "soft" forms of reporting should also be included. This provides balance and context to the activities undertaken by the Regulator.

Due to the large scale and the multiple (unique) areas of responsibility within large Regulators, divisional frameworks, KPIs, data and measures should be separately reported.

When we examine ASIC, and the number of varied roles it plays, their uniqueness across different industry segments, it highlights the need for unique divisional or segmented accountability and reporting as well as the Regulator as a whole.

Reporting in a consolidated fashion may not adequately report outcomes or highlight issues occurring within one area of responsibility.

An independent review of frameworks and measures to be applied is needed to ensure they are fit for purpose and address the spectrum of the Regulators remit. Particularly for large, complex entities.



When we look to the cost recovery models adopted for Regulator operating costs, it is essential that accountability, commerciality, and efficiency are appropriately considered. These must form a core component in the planning, execution and monitoring of all programs, activities, or processes. This is essential to avoid the incurring of unnecessary costs.

Principle 1: Continuous Improvement and Building Trust

Identify and minimise duplication and harmonise activities with other regulators.

Duplication of processes or poor process design are a significant source of frustration for stakeholders. It can create a perception that the Regulator is disconnected from its stakeholders.

Further, unnecessary processes, increased touch points or steps and communication failures will only serve to add complexity, inefficiency, and cost. They also create unnecessary administrative burden.

To put this in context we refer to an example impacting our members.

The process of reporting and recording an adviser's completion of the FASEA financial adviser's exam is one recent example.

1. Adviser number must be provided, and system verified when registering for the exam.
2. On completion of the assessment, FASEA notifies adviser of their exam result.
3. Adviser must then notify their licensee they have completed the exam.
4. Licensee is required to update Financial Advisers Register, lodging a form with ASIC.
5. Failure to do so on time results in penalty fees.
6. FASEA separately updates its own public register of successful candidates.

A more effective process would have been for direct communication to have occurred between the regulators and to have one public register record. Instead, the result was the inclusion of steps that add no value, cause frustration and result in the duplicated display of the same regulator information by two different regulators.

Simple things such as this can cause a loss of trust and disengagement with regulators. It creates a perception that the Regulator lacks the necessary capability and connection with stakeholders.

Front of mind should always be:

1. Is it necessary?
2. What are the alternatives?
3. Is it commercial?
4. Is it efficient?
5. What are the roadblocks?
6. Does it reduce red tape?

Practical, efficient, and commercial processes are essential. This applies equally where there is an intersection of remit across multiple regulators, and where multiple internal business units are involved.



Principle 2: Risk-based and Data-driven

Compliance and enforcement strategy and modify their regulatory approach to encourage voluntary compliance

Voluntary disclosure needs to be actively encouraged. Where issues are identified, remedied and self-reported, sanctions may still be needed due to the serious nature of the transgression. However, consideration should be given in any sanctions issued, to acknowledge genuine attempts to comply through the identification, remedy, and reporting process.

If stakeholders are still admonished and sanctioned to the full extent and treated the same as those who failed to detect or worse conceal the transgression, there is little motivation for self-reporting or engaging with the Regulator.

Regulators need to work with those who self-report and to report such case examples to inform and encourage stakeholders to engage in this manner.

These will be vital for Regulators such as ASIC who will be taking on an expanded regulatory role with regards to financial advisers.

The Regulator needs to be cognoscente of any elements of retrospectivity that may come into play when issuing or updating guidance and when undertaking regulatory activities. Retrospectivity may be actual or perceived depending on previous guidance issued or prior activities of the Regulator. This can occur where the law can be interpreted and applied various ways and a disconnect occurs between industry and the regulator's interpretation and application of the law.

The Regulators interpretive position must be published as soon as practicable, including a genuine period of stakeholder consultation. Concepts discussed in Principle 3 also have relevance.

Principle 3: Collaboration and Engagement

The SMSF Association welcomes measures that continue to encourage collaboration and genuine consultation with stakeholders. We acknowledge our ongoing working relationships with ASIC and the ATO have been mutually beneficial.

Our members work in industries which by their nature are subject to ongoing regulatory change. Our financial planning and advice members are currently experiencing significant change in their industry.

Any time significant change occurs, there will be an element of pain involved for some. It is at these times that Regulators need to be hyper vigilant to how stakeholders are being impacted and consider what activities or actions can be taken to assist, guide or educate.

An essential component to this is active engagement, use of consulting panels that are reflective of the diversity of stakeholders.



Engage Genuinely with Stakeholders

The SMSF Association welcomes any measures or processes that seek to improve or expand upon engagement with stakeholders. This is essential in ensuring that the Regulator remains connected with and understands stakeholders, can identify emerging issues in a timely manner, and retain currency and relevancy.

Following *Principles case study 3* of the Guide, example performance indicators and measures are included. Performance indicator and measures are included in the illustration.

Outcomes-focused performance indicator:

- Regulator's interactions with regulated entities and other stakeholders are open, transparent and consistent.

Measured by:

- Number of workshops held with stakeholders, including regulated entities and industry peak bodies on their obligations under legislation.
- Target a specified per cent or more of regulated entities who rate the regulator's approach as 'good' or 'excellent'.

A further third layer of reporting is needed that considers the outcomes of these activities. Outcomes based reporting should be both qualitative and quantitative to demonstrate the value of the engagement activities. This is needed to demonstrate the value of the activities undertaken.

The purpose, objective and outcome must all be considered in the design of KPIs and associated activities. If they are not, the risk is a rich layer of activity and reporting occurs without due consideration as to whether they have been effective or beneficial.

Further, it is essential that there is clear accountability.

Engagement across Regulators should be actively encouraged beyond the intersection of their respective remits. There is an opportunity to observe and learn from other agencies on the activities, models, systems, and processes employed.

As an example, with ASIC's role in the Regulation of the financial advice sector, there is an increasing need for information and guidance. Particularly with respect to the interpretation and application of the *Financial Advisers Code of Ethics 2019*.

An opportunity exists to look at the activities and programs implemented by the Australian Taxation Office (ATO). Examples could include the ATO community, private rulings and the issuance of various guidance material and publications.

This will both inform and save time, helping to shape the design of an engagement solution for stakeholders from current working models.

Provide Guidance and Information

The need for Regulators to prepare and publish detailed, technical, regulatory guides is acknowledged. However, the issuance of legalistic style regulatory guides can be of limited benefit to all stakeholders.



Consideration must be given to how the key messages in these documents can also be made available to a wider audience, with the inclusion of more supporting materials, simplified supplementary factsheets and infographics. Wider use of practical, real world case studies is essential in improving engagement and understanding.

To ensure that regulatory materials maintain relevance and currency, there is a need for regular and ongoing review. The review process should also provide for a continuous feedback mechanism and ongoing engagement with stakeholders. This will allow for issues that arise in practice to be considered in a more real time approach and address any unintended consequences or ambiguities. This will benefit all parties and avoid protracted delays in addressing issues which can lead to uncertainty and ultimately create a larger body of work for Regulators.

It will also ensure that the materials reflect the current legislative or Regulatory environment and consider the activities of and impacts on stakeholders.

User friendly information hubs or a single depository system need to be implemented. One of the greatest challenges for many stakeholders, is being able to easily locate key information and materials.

This can be particularly challenging for stakeholders of Regulators with large, diverse areas of responsibility, each with distinctly separate groups of stakeholders and information needs. The result are monolithic websites that are difficult to navigate, search and locate relevant content. The result of which is unsatisfactory user experience.

Regulators need to consider the perception and impact their publications and activities will have on stakeholders. The purpose and tonality of messaging and the nature of the information published must be clear. Particularly where the publication and its contents are not intended to be prescriptive or black letter law. We see many examples with ASIC publications, where Licensees will adopt these as blackletter law processes into their businesses and impose unworkable standards on financial advisers.

This outcome was never the intent of ASIC and it is acknowledged that ASIC cannot control those behaviours or influence commercial arrangements. However, the messaging, purpose and intent of the published material must be made very clear to avoid incorrect interpretation or application.

Greater use of stakeholder-based focus groups and consulting committees should be more widely consulted to test the impact and interpretation of such publications prior to release.

Transparent decision making and reasons for regulatory decisions

The SMSF Association encourages the use of active consultation processes where new Regulator guidance or instruments are being considered. Engaging with stakeholders ensures that any response from the Regulator is proportionate, appropriate and considers the impacts to stakeholders, and avoids unintended consequences or administrative burden.



For disciplinary matters, it is essential that clear governance guidelines and processes are documented and implemented. These need to consider how the disciplinary process is to practically function within the blackletter law framework.

We recommend that disciplinary decisions are made public and published in a timely manner. This can be through the publishing of relevant statistical data through to case summaries (whether anonymised and identifying as appropriate).

Transparency in both process and outcomes is vital in building trust.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Peter Burgess', written over a horizontal line.

Peter Burgess
Deputy CEO/Director of Policy and Education
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.