



Australian Government

Australian Financial Security Authority

1 July 2018–30 June 2019 Self-assessment report

# AFSA Regulator Performance Framework

# Background

## The Australian Government's Deregulation Agenda, seeks to improve the performance of regulators by supporting them to adopt consistent, risk-based approaches to administering regulation.

The Government has developed a framework to measure the performance of regulators – the Regulator Performance Framework (the Framework).

As a Commonwealth regulator, we are guided by the Framework to minimise our impact on those we regulate, while still delivering the vital regulatory role we perform.

The Framework allows us to report objectively on our efforts to administer regulation fairly, effectively and efficiently. It is also a useful tool for us to identify opportunities for improvement and better target our resources for greater impact.

The Framework assists in highlighting where improvement of our regulatory framework could reduce compliance costs.

The Framework comprises of six outcomes-based key performance indicators (KPIs); performance measures to assess the achievement of the KPIs; a process for an annual externally validated self-assessment against the Framework; reporting on the outcomes of the annual self-assessment; and a selective process for targeted external review every three years.

This report is our self-assessment of our regulatory performance under the Framework for 2018–19. We report on both quantitative and qualitative outcomes, and include appropriate narratives, where relevant, for each of the six KPIs.

The assessment reports on particular relevant activities and, as appropriate, may include summaries of stakeholder engagement, case studies and examples of activity relevant to each of the six KPIs.

The Bankruptcy Reform Consultative Forum (BRCF) externally validates the self-assessment of AFSA's performance under this Framework.

This self-assessment report was provided to the BRCF for validation in August 2019. All feedback received was positive.

# Executive summary

KPI	Status	Commentary
1. Regulators do not unnecessarily impede the efficient operation of regulated entities	Achieved	<ul style="list-style-type: none"> <li>• AFSA undertakes regular liaison activities with key stakeholders.</li> <li>• We communicate key messages to regulated entities through our Insolvency Compliance Program (Compliance Program), Personal Insolvency Regulator (PIR) newsletter, Personal Insolvency Compliance Report, Annual Report, through regular stakeholder engagement, communication and media channels such as LinkedIn posts and the Regulator Performance Framework.</li> <li>• We work with other Commonwealth agencies including the Australian Taxation Office (ATO), the Australian Securities &amp; Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions (CDPP) to provide relevant information to practitioners including via the PIR newsletter.</li> </ul>
2. Communication with regulated entities is clear, targeted and effective	Achieved	<ul style="list-style-type: none"> <li>• We have consulted on and updated all web-based guidance materials for changes under the <i>Bankruptcy Amendment (Debt Agreement Reform) Act 2018</i> that commenced on 27 June 2019.</li> <li>• Information sheets and PIR articles have been released to provide guidance to practitioners.</li> <li>• We maintain ongoing formal and informal liaison with stakeholders, including the Australian Restructuring Insolvency and Turnaround Association (ARITA), Personal Insolvency Professionals Association (PIPA), Association of Independent Insolvency Practitioners (AIIP) and financial counsellors.</li> <li>• We are progressively making it easier for regulated entities to communicate with us by transitioning our existing forms online after seeking feedback through a web based exposure platform (<a href="http://www.sandpit.afsa.gov.au">www.sandpit.afsa.gov.au</a>)</li> </ul>
3. Actions undertaken by regulators are proportionate to the regulatory risk being managed	Achieved	<ul style="list-style-type: none"> <li>• We have adopted a risk-based approach which is documented in our Compliance Program.</li> <li>• We consult with professional associations on industry trends and issues, which influence regulatory action.</li> </ul>
4. Compliance and monitoring approaches are streamlined and coordinated	Achieved	<ul style="list-style-type: none"> <li>• Stakeholder liaison meetings are held with ARITA, PIPA, AIIP, ASIC and the ATO on a regular basis. We discuss compliance and monitoring approaches at those meetings.</li> <li>• Meetings are held with other key stakeholders, including practitioners from South Australia, Northern Territory, North Queensland and Western Australia.</li> </ul>

# Executive summary

KPI	Status	Commentary
<b>5. AFSA is open and transparent in our dealings with regulated entities</b>	<b>Achieved</b>	<ul style="list-style-type: none"><li>• We published our Personal Insolvency Compliance Report for 2017–18 in December, and spoke about outcomes at conferences and key stakeholder events.</li><li>• We regularly engage with ARITA, PIPA, AIIP, the Insolvency Law Reform Committee (the Law Council’s Insolvency and Reconstruction Law Committee), CDPP and ASIC.</li><li>• We publish key outcomes and discussion points from stakeholder liaison meetings.</li></ul>
<b>6. AFSA actively contributes to the continuous improvement of regulatory frameworks</b>	<b>Achieved</b>	<ul style="list-style-type: none"><li>• We continue to work closely with ASIC and professional associations to assist with the alignment of regulatory processes. This contributes to a consistent and cohesive regulatory framework for insolvencies, both corporate and personal.</li><li>• We liaise with AGD on proposed law reform, providing insight on issues from industry trends.</li></ul>

# Self-assessment report: KPI 1

KPI	Performance measures
<p><b>Regulators do not unnecessarily impede the efficient operation of regulated entities</b></p>	<ul style="list-style-type: none"> <li>(i) AFSA’s risk-based Compliance Program is developed by applying appropriate regulatory principles, using available data and intelligence, including taking into account consultation with the profession prior to the annual release of the program.</li> <li>(ii) AFSA raises awareness of regulatory activity and known compliance risks through targeted delivery of information, including through publishing the results of the Compliance Program and material outcomes.</li> <li>(iii) Complaints about regulatory activity are investigated and responded to in accordance with AFSA’s complaints and compliments framework.</li> </ul>
Self-assessment and supporting evidence	
<p><b>AFSA considers it has met this KPI for the 2018–19 financial year. This assessment is based on the following factors:</b></p>	<ul style="list-style-type: none"> <li>(i) we publicly released our 2018–19 Compliance Program on the AFSA website on 5 July 2018. This was discussed at regular stakeholder liaison meetings, and an AFSA media release and article in the September 2018 PIR highlighted its release. To develop the program, we adopted a risk-based approach and used available data and intelligence – including that obtained during regular meetings with the profession. AFSA consulted with professional associations prior to release of the program.</li> <li>(ii) we raised awareness of regulatory activity, compliance risks and relevant issues through the PIR newsletter and in media releases on enforcement outcomes.</li> <li>(iii) our complaints handling procedure about our regulatory activity is available on the AFSA website. Complex complaints are resolved as soon as possible and AFSA communicates with complainants to provide regular updates. All complaints received were handled in accordance with AFSA’s policy.</li> </ul>

# Self-assessment report: KPI 1

## Case study:

With the introduction of the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018*, the amendments required both individual and corporate debt agreement administrators to hold professional indemnity and fidelity insurance. However, for individuals operating as persons of overall management on behalf of company administrators, there appeared to be a doubling up of the obligation to maintain insurance both as an individual and for the company they acted on behalf of.

To ensure no unnecessary regulatory burden is imposed on these individuals, AFSA introduced guidance under the Inspector-General Legislative Instrument, the *Guidelines for Registration and Cancellation of Registration of a Registered Debt Agreement Administrator*. The guidance stated that these individuals would not be required to hold personal insurance in their own name, so long as they complied with certain conditions, including that the company administrator that they were acting on behalf of, held adequate insurance.

## Case study:

The *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* also introduced new thresholds for notifying creditors of three month arrears defaults under section 185LB of the *Bankruptcy Act 1966*. These only applied to debt agreement proposals lodged after 27 June 2019, effectively creating a requirement for debt agreement administrators to run two notification systems to comply with their obligations under the Act. Debt agreement administrators raised concerns that this would be both costly and time consuming for their practices.

Identifying this regulatory burden as an unintended consequence caused by the new reforms, AFSA introduced a process under Inspector-General Practice Direction 17, to allow debt agreement administrators to run one notification system for both pre and post 27 June 2019 debt agreement proposals, therefore reducing the potential cost on their operations.

# Self-assessment report: KPI 2

KPI	Performance measures
<p><b>Communication with regulated entities is clear, targeted and effective</b></p>	<ul style="list-style-type: none"> <li>(i) All guidance materials<sup>1</sup> for regulated practitioners will be monitored to ensure the provision of relevant and current information in the most accessible format for stakeholders.</li> <li>(ii) Consultation periods are actively promoted, feedback is considered and communicated by AFSA with relevant professional bodies prior to any material regulatory changes.</li> <li>(iii) KPIs for completion of complaints and Inspector-General reviews support timely, clear and consistent decisions and advice.</li> </ul>
<p><b>Self-assessment and supporting evidence</b></p>	
<p><b>AFSA considers that it has met this KPI for the 2018–19 financial year. This assessment is based on the following factors:</b></p>	<ul style="list-style-type: none"> <li>(i) the commencement of the <i>Bankruptcy Amendment (Debt Agreement Reform) Act 2018</i> on 27 June 2019, resulted in the update and release of several Inspector-General Practice Statements (IGPS) and Inspector-General Practice Directions (IGPD). IGPSs explain when and how the Inspector-General in Bankruptcy (IG) will exercise specific powers under the <i>Bankruptcy Act 1966</i> (the <i>Bankruptcy Act</i>). IGPDs assist regulated entities by explaining how the law should be interpreted, giving guidance on specific insolvency practice. The following practices were updated during the period: IGPG 1, IGPD 1, IGPD 2, IGPD 3, IGPD 10, IGPD 13, IGPD 14, IGPD 15, IGPD 17, IGPD 20, IGPS 4, IGPS 7, IGPS 8, IGPS 9, IGPS 10, IGPS 11, IGPS 13, IGPS 14, and IGPS 18. The Inspector-General Legislative Instrument under section 186Q of the <i>Bankruptcy Act 1966</i> was also updated. We are undertaking ongoing consultation with stakeholders—and regulated entities in particular — to improve navigation and accessibility of information for users. All IGPDs, IGPSs and IGPG impacted by the <i>Bankruptcy Amendment (Debt Agreement Reform) Act 2018</i> were placed on our web based exposure platform, the AFSA sandpit website. This was to ensure accessibility to stakeholders about our regulatory activities, ensuring they were aware of changes in the legislation and to provide a channel for feedback.</li> <li>(ii) AFSA uses a documented consultative approach to regulatory changes. We seek and consider feedback from relevant stakeholders before finalising any material changes, and we provide a response to feedback we receive. Regular liaison meetings with professional associations are also used for this purpose.</li> <li>(iii) the KPIs for complaints and IG reviews are time-based and monitor completion of activities, and internal KPIs support quality decisions. We investigate exceptions to identify opportunities for improvement. We also internally monitor a KPI for decisions overturned by the Administrative Appeals Tribunal (AAT). One exception occurred in <i>Jones and Inspector-General in Bankruptcy [2018] AATA 3260</i> (5 September 2018) where the Inspector-General’s decision was set aside and substituted. AFSA published a case decision article on the matter in the September PIR.</li> </ul>

<sup>1</sup> These include Inspector-General Practice Statements, Practice Directions and Practice Guidelines.

# Self-assessment report: KPI 2

## Case study:

The Inspector-General in Bankruptcy undertook an own initiative review of a decision made by a trustee to lodge a notice of objection. The issue identified with the trustee's notice of objection included insufficient evidence to support the existence of the ground under section 149D(1)(d) of the *Bankruptcy Act 1966* (Act).

The Inspector-General in Bankruptcy determined that the evidence referred to in the trustee's notice of objection did not comply with the requirements of section 149D(1)(d) of the Act, in particular because the trustee's written requests for information did not specify that the information required to be provided by the bankrupt must be provided in writing – one of the key elements of section 149D(1)(d) of the Act.

The Inspector-General in Bankruptcy provided the trustee with his preliminary view on the notice of objection and referred to the decision in *Jones and Inspector-General in Bankruptcy* [2018] AATA 3260 (5 September 2018).

As a result, the trustee ceased to object to the discharge of the bankrupt on the ground of section 149D(1)(d) of the Act.



# Self-assessment report: KPI 3

KPI	Performance measures
<b>Actions undertaken by regulators are proportionate to the regulatory risk being managed</b>	<ul style="list-style-type: none"> <li>(i) AFSA’s risk-based Compliance Program is developed by applying appropriate regulatory principles and using available data and intelligence, including taking into account consultation with the profession prior to the annual release of the program.</li> <li>(ii) AFSA raises awareness of regulatory activity and known compliance risks through targeted delivery of information, including through publishing the results of the Compliance Program and of material outcomes.</li> <li>(iii) AFSA maintains a risk-based process prior to initiating investigation about regulated practitioners.</li> </ul>
<b>Self-assessment and supporting evidence</b>	
<b>AFSA considers it has met this KPI for the 2018–19 financial year. This assessment is based on the following factors:</b>	<ul style="list-style-type: none"> <li>(i) refer to KPI 1 (i).</li> <li>(ii) refer to KPI 1 (i) and (ii).</li> <li>(iii) We have outlined our risk-based process and regulatory framework in IGPS 1, which was updated in July 2018 after feedback from practitioner associations was sought. Internal processes and guidance reflect and adopt that risk based approach, enabling AFSA’s resources to focus on areas of most potential harm.</li> </ul>

## Case study:

A bankrupt submitted a proposal to their trustee which included sufficient funds to annul the bankrupt estate under section 153A of the Act. Notwithstanding the quantum of funds, the trustee was reluctant to proceed with an annulment, until the bankrupt had responded to information requests regarding a potential equitable interest in a property formerly owned by the bankrupt’s spouse.

AFSA sought further information from the trustee before forming a preliminary view that there were insufficient reasons to (1) pursue an investigation of the property formerly owned by the bankrupt’s spouse and (2) withhold an annulment under section 153A of the Act. The trustee subsequently agreed to cease enquiries in relation to the property formerly owned by the bankrupt’s spouse and proceed with an annulment of the estate under section 153A of the Act. AFSA facilitated compliance through regulatory influence, achieving the correct and equitable outcome for all stakeholders in the process.

# Self-assessment report: KPI 4

KPI	Performance measures
<p><b>Compliance and monitoring approaches are streamlined and coordinated</b></p>	<ul style="list-style-type: none"> <li>(i) AFSA’s risk-based Compliance Program is developed applying appropriate regulatory principles and using available data and intelligence, including taking into account consultation with the profession prior to the annual release of the program.</li> <li>(ii) Stakeholder meetings, including with relevant professional associations, ASIC as key co-regulator and international regulators, including the International Association of Insolvency Regulators (IAIR), occur regularly throughout the year to inform updates to the risk-based compliance program.</li> <li>(iii) Professional associations are provided with various channels to provide feedback about AFSA’s regulatory processes.</li> <li>(iv) AFSA maintains and participates in appropriate information sharing arrangements and relationships with relevant entities to enhance regulatory intelligence and coordinate regulatory activity where possible.</li> </ul>
<p><b>Self-assessment and supporting evidence</b></p>	
<p><b>AFSA considers it has met this KPI for the 2018–19 financial year. This assessment is based on the following factors:</b></p>	<ul style="list-style-type: none"> <li>(i) refer to KPI 1 (i).</li> <li>(ii) regular meetings were held with ARITA, PIPA, ASIC, AIIP, CDPP, ATO and the New Zealand Insolvency &amp; Trustee Service. The Chief Executive (and Inspector-General) of AFSA attended the annual IAIR conference and AGM from 15-19 October 2018. The Annual Forum for debt agreement administrators was jointly held with PIPA in October 2018. Other meetings occurred with the following stakeholders: <ul style="list-style-type: none"> <li>• Practitioner meetings in Northern Territory, Tasmania and North Queensland with the Chief Executive</li> <li>• Major creditors</li> <li>• Consumer Action Law Centre (CALC)</li> <li>• Law Council</li> <li>• Australian Financial Complaints Authority (AFCA)</li> <li>• Attorney-General’s Department</li> </ul> </li> </ul> <p>Relevant outcomes from these meetings influence AFSA’s compliance program activities and planning.</p> <ul style="list-style-type: none"> <li>(iii) communication channels available to professional associations and practitioners included LinkedIn posts, media releases, industry liaison meetings, contribution of articles to the PIR and provision of direct feedback on the Compliance Program. The Annual Forum for debt agreement administrators continued to provide an additional channel to receive feedback and provide regulatory information to and from PIPA and its members in October 2018. An RDAA Information Session was held in May 2019 to provide information to debt agreement administrators about the new reforms introduced by the <i>Bankruptcy Amendment (Debt Agreement Reform) Act 2018</i>. A major creditors’ forum was held in February 2019, where an overview of the new debt agreement reforms was provided to attendees. A Personal Insolvency Stakeholder forum was also held in November 2018 and June 2019 (see case study below).</li> </ul>

# Self-assessment report: KPI 4

## Self-assessment and supporting evidence

**AFSA considers it has met this KPI for the 2018–19 financial year. This assessment is based on the following factors:**

(iv) AFSA is a regular participant in meetings of the Law Council’s Insolvency and Reconstruction Law Committee where implementation of legislative amendments to the Bankruptcy Act via the ILRA have been a regular topic.

AFSA is a member of the multi-agency Phoenix Taskforce and continues to share information and contribute to taskforce initiatives as required.

### Case study:

Building on existing contacts by engaging collectively with the main personal insolvency stakeholders assists AFSA to build confidence in the system, improve services, and identify ideas, risks and issues which help shape the design and implementation of the future of the system.

Key outcomes of the Personal Insolvency Stakeholder Forum

1. Build on existing productive and collaborative relationships between our key stakeholders, with whom we meet separately. This forum provides an opportunity for industry participants to collaborate with each other and with AFSA on personal insolvency related issues.

2. Share information and intelligence regarding industry trends and emerging issues and risks.
3. Provide an opportunity for further engagement by all key stakeholder groups and thereby improve public confidence in the personal insolvency system.
4. AFSA is keen to work with industry groups and representative bodies – although we will always maintain an independent view on issues.
5. Engage with stakeholders to identify key areas for service delivery improvement.
6. Establish an ongoing personal insolvency forum, which can be a lead group to identify and address key issues.

# Self-assessment report: KPI 5

KPI	Performance measures
<b>AFSA is open and transparent in our dealings with regulated entities</b>	<ul style="list-style-type: none"> <li>(i) IGPS1 Regulatory Framework is reviewed and updated at least annually. It is published on the AFSA website in accessible format.</li> <li>(ii) Practitioners have various channels to provide feedback about AFSA's regulatory practice.</li> <li>(iii) AFSA's annual Compliance Report is publicly available and includes results for all regulatory performance measures.</li> </ul>
<b>Self-assessment and supporting evidence</b>	
<b>AFSA considers it has met this KPI for the 2018–19 financial year. That assessment is based on the following factors:</b>	<ul style="list-style-type: none"> <li>(i) we updated the IGPS 1 Regulatory Framework in July 2018 after consulting with the professional associations. It's available on the AFSA website in HTML format and is under continuous review. Users are able to share the page via Facebook, Twitter, LinkedIn and email.</li> <li>(ii) refer to KPI 4 (iii). AFSA's compliance report for 2017–18 was published in December 2018. Feedback about AFSA's regulatory practice is sought from PIPA and ARITA as a standing agenda item at liaison meetings. There is also an online portal on the AFSA website for practitioners to provide feedback about AFSA's services.</li> <li>(iii) we published our 2017–18 compliance report on the AFSA website in December 2018. All regulatory performance measures were included in addition to the achievements against our Personal Insolvency Compliance Program 2017-18. Key outcomes and issues are identified and discussed with stakeholders, including at practitioner conferences and forums.</li> </ul>

## Case study:

AFSA created a dedicated webpage for debt agreement administrators to access information about the changes from the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* (<https://www.afsa.gov.au/about-us/agency-overview/law-reforms/bankruptcy-amendment-debt-agreement-reform-bill-2018>). It included a general overview of the changes from the reforms and a Frequently Asked Questions webpage which clarified issues identified by debt agreement administrators at the RDAA Information Session in May 2019.

AFSA is also making it easier for our regulated entities to communicate with us with the use of our webpage AFSAsandpit. A number of Inspector-General and Official Receiver guidance documents impacted by the recent debt agreement reforms were placed on AFSAsandpit (<https://sandpit.afsa.gov.au/blog/debt-agreement-reform-whats-changing>). This was to ensure that debt agreement administrators were fully aware of changes being introduced and of the expectations of the Inspector-General prior to the commencement of the reforms. This gave our regulated entities time to provide feedback to AFSA and to get ready and plan for any changes to their systems and processes.

# Self-assessment report: KPI 6

KPI	Performance measures
<b>AFSA actively contributes to the continuous improvement of regulatory frameworks</b>	<ul style="list-style-type: none"> <li>(i) Stakeholder meetings occur regularly throughout the year, including with AGD, relevant professional associations, and ASIC (as key co-regulator), to inform updates to the risk-based compliance program.</li> <li>(ii) Feedback is provided to practitioners, professional associations and stakeholders at least annually on key regulatory outcomes and issues.</li> <li>(iii) Practitioners have various channels to provide feedback to improve regulatory practice and procedure. Feedback is used to inform AFSA's regulatory practice and procedure amendments, with stakeholders informed about improvements made in response to feedback received.</li> </ul>
<b>Self-assessment and supporting evidence</b>	
<b>AFSA considers it has met this KPI for the 2018–19 financial year. That assessment is based on the following factors:</b>	<ul style="list-style-type: none"> <li>(i) refer to KPI 4 (ii).</li> <li>(ii) refer to KPI 4 (iii). The PIR is published quarterly and is used to communicate with practitioners on feedback received and key regulatory outcomes and issues. The most recent publication date was June 2018.</li> <li>(iii) refer to KPI 4 (iii), KPI 4 (iv) and KPI 5 (ii).</li> </ul>

## Case study:

A registered trustee is required under sections 19(1)(h) and (i) of the Bankruptcy Act, to consider and refer evidence of a bankrupt committing an offence to the Inspector-General. In 2014, AFSA introduced a short-form referral option now known as a PRE (pre-referral enquiry) to reduce the regulatory burden on registered trustees to comply with this obligation. In early 2019, AFSA's Client Experience Team researched the PRE and offence referral process with the view to use any research findings to explore opportunities to improve the process for registered trustees, their staff, and AFSA staff.

We analysed qualitative and quantitative data to understand the client (registered trustee) and AFSA journeys. The research included calling on stakeholders for feedback on the AFSA'sandpit website, conducting interviews with stakeholders (including registered trustees) and holding a multi-disciplinary explore workshop. In May 2019, the research report was finalised and revealed three issues that require attention by AFSA:

- some confusion about the dual process of PREs and offence referrals
- instances where there was a difficulty in completing the forms
- examples of practitioner's dissatisfaction with the outcomes of the matters they refer.

This research will inform changes to guidance materials and forms scheduled to be completed in 2019-20.