



2 October 2015

Corporations and Scheme Unit
Financial System and Services Division
The Treasury
100 Market Street
Sydney, NSW, 2000

Via email: asicfunding@treasury.gov.au

Dear Corporations and Scheme Unit

RE: PROPOSED INDUSTRY FUNDING MODEL FOR ASIC

We refer to the Australian Government Consultation Paper released on 28 August 2015 entitled "Proposed Industry Funding Model for the Australian Securities and Investments Commission" (**Consultation Paper**).

The Financial Services Council (**FSC**) has over 115 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The industry is responsible for investing more than \$2.6 trillion on behalf of 11.5 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world.

The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The FSC welcomes the Government's consultation on the proposed industry funding model for the Australian Securities and Investments Commission (**ASIC**). We note that in parallel to this process, that the Australian Government has commissioned a separate review of the capabilities of ASIC. We understand that the intention of the capability review (**Capability Review**) is to ensure that ASIC is fit for purpose to undertake its role effectively and has the capabilities to address future regulatory challenges. We further note that the Capability Review is a response to a specific recommendation contained in the Final Report of the Financial System Inquiry (**Murray Inquiry**), and that the Government has yet to finalise its consideration of the Report.

In order to gain a holistic picture, we encourage the Government to consider our comments below, and those of other stakeholders, in conjunction with relevant earlier submissions relating to the Murray Inquiry and Capability Review. Prior to determining how ASIC should be funded, it is imperative that the Government have a clear picture of what role it wishes ASIC to play. Moreover, ASIC's capability, strategy and performance metrics are all integral components to the form of an industry funding model, should one be introduced.

General comments

The FSC's vision for ASIC is that of a corporate regulator that operates within a clearly defined legislative mandate, enjoys a stable funding model, and delivers a high level of performance in the interests of all market participants (see FSC submissions relating to the Murray Inquiry for further detail).

The FSC supports industry-funding (on a cost recovery basis) of ASIC, so long as the regulator has a clearly defined mandate, is subject to appropriate external oversight (including ongoing industry consultation), and has its budget set by the Government. Our members consider it important that there are appropriate consultation and accountability mechanisms on funding levels, and appropriate incentives to ensure that notwithstanding that an industry funding model is divorced from the broader Government budget (that is, the substantive cost of ASIC will no longer be borne by the public/taxpayers at large), incentives remain to ensure the funding

quantum drives and assumes the most appropriate and efficient use of ASIC's resources. (That is, consistent with the objectives on use of public resources under the *Public Governance, Performance and Accountability Act 2013*.) The structure of an industry funding model should also incentivise the regulator to undertake its activities with optimal efficiency, and seek to foster ongoing enhancements of its productivity.

Calculation of levies

We have some concerns that the current funding model outlined in the Consultation Paper is overly complex. We acknowledge there is a trade off between precision (complexity) and simplicity (less complexity) in fee calculations. Some FSC members have had difficulty determining the quantum of levy they would be required to pay under the proposed model. Greater clarity would assist industry to more fully consider the detail of the funding proposal and in that regard, it may be that industry seeks to make further representations on the proposed funding model once the levies are quantified.

Similarly, it is not entirely clear how the levy amounts have been arrived at (both individually and on a collective/industry-wide basis). To this end, if ASIC has undertaken any financial modelling which sets out what each individual industry sub-sector is estimated to contribute under the proposed model, we request this be shared.

We note that the size *per se* of corporate entities seems to be a key driver behind levies, rather than also other criteria such as risk and/or compliance arrangements. Specifically, while Step 1 of ASIC's proposed mechanism for determining annual levies identifies risks at the sector level, there is no mechanism proposed for identifying risks between entities in the same sector. This is significant because, for example, entities with robust compliance/oversight infrastructure and with a good track record of compliance may generate less need for ASIC regulation.

A funding model that identifies risks between entities is more likely to support the policy objective of providing price signals to regulated entities that motivates them to conduct their activities in a way that reduces the call on ASIC's regulatory functions over time. It will also support the general principle that in a cost recovery model, cross subsidies ought to be avoided as much as possible.

Further, we note that there is a large difference in levy payable by Tier 3 responsible entities (less than \$1bn FUM) and Tier 2 responsible entities (\$1bn to \$10bn FUM) (see page 44, Consultation Paper). To address this, we suggest that a new mid-way category be created (\$1bn to \$5bn FUM) with a fee somewhere between the fee for Tier 3 and Tier 2 responsible entities given there would be responsible entities in this proposed \$1 billion to \$5 billion category.

Finally, the proposed apportionment of levies does not factor efficiencies within corporate groups. Regulatory efficiencies *can* arise from entities operating within the same corporate group, for example, through common frameworks, controls and systems. We believe that consideration should be given to reflecting these efficiencies in the levy apportionment mechanism.

Calculation of fees

The FSC supports regulated entities being charged for services that are provided by ASIC on an individual basis (for example, processing of individual applications for relief).

However we do not consider it appropriate to charge for class order relief. Such relief is typically made to apply to a class of entities, products or services where there are unintended consequences of the law, or where class order modification of the law may provide clarity and certainty to the regulated population.

Budget transparency

It is critical that there be clear transparency and accountability mechanisms built into any new funding model for ASIC. In particular, industry would value the opportunity for stakeholder consultations prior to ASIC's final budget *being finalised by the Government* (as part of the annual Government budget process). Given that an industry funded model involves direct recoupment for regulator activities from the regulated population (rather than the wider group of taxpayers) it is particularly important that there be Government consultation with the industry on

the funding level, prior to it being set by Government. As part of that consultation, we think Government should specify ASIC's proposed allocation of funding amongst ASIC's objectives.

For example, this may be as simple as leveraging and expanding on the information in ASIC's Corporate Plan which sets out allocation of ASIC's budget among enforcement, surveillance, licensing, guidance, industry engagement and so on; but with more detail provided by Government or ASIC at a sectoral level among industry sectors (e.g. financial advice, managed investments, listed entities etc.) (see *ASIC's Corporate Plan 2015-16 to 2018-19*, page 28).

An articulation by ASIC as to how it intends to allocate resources among its objectives is imperative. ASIC should continue to strive to operate and use its allocated resources efficiently. So as to ensure that funding is allocated in furtherance of identified priorities, the FSC supports ASIC funding being aligned with ASIC's "Strategic Outlook" (subject to the decision on funding levels being determined by Government following consultation with the regulated population).

As part of efficient use of resources (and facilitating efficiencies in engagement or ASIC lodgements) FSC supports ASIC's initiatives to continue to deliver deregulatory and efficiency benefits such as ASIC's confirmation (in its *ASIC Corporate Plan 2015-16 to 2018-19*) that ASIC is promoting a transition to digital processes, including digitising the data capture of managed investment scheme and financial adviser forms and lodgements. We look forward to this transition to assist efficiency in lodgements.

We note that in the United Kingdom, although industry levies to fund the Financial Conduct Authority (FCA) have risen year-on-year following the introduction of an industry-funding model, these increases have been accompanied by a high-level of public consultation and industry engagement.

Accountability and oversight mechanisms

Should the Government adopt an industry-funding model for ASIC, it is critical that appropriate additional accountability and external and independent oversight mechanisms be put in place to ensure an efficient and effective use of allocated resources. The FSC would welcome the introduction of a Financial Regulator Assessment Board, operating under a clear mandate, which would provide independent oversight of key regulators such as ASIC.

As recommended in the Murray Inquiry final report, the Financial Regulator Assessment Board should carry out annual ex post reviews of overall regulator performance against their mandates, including assessing how regulators have used the powers and discretions available to them. Increased scrutiny of the exercise of regulatory powers will be particularly important if ASIC is provided with new and additional powers.

The Financial Regulator Assessment Board should consist of representatives of a range of stakeholders including consumers and those with industry experience (but not currently employed by a regulated institution).

In parallel, the FSC would support the proposed Cost Recovery Stakeholder Panel being formed with the objective of providing views to the Government on the implementation and delivery of an industry funding model. Given the FSC membership comprises a large majority of the financial services/wealth management sector, we would be happy to be a representative on this Panel.

To maximise its effectiveness, the Cost Recovery Stakeholder Panel should have an independent Chair appointed by Government. There should be a formal requirement that its views are taken into account by ASIC, and that it is furnished with necessary information regarding ASIC's budget to support its capacity to provide effective consultation and oversight of an industry-funded model.

We note that these proposed accountability and oversight mechanisms should operate alongside, rather than instead of, existing arrangements (for example, the Senate Estimates process and Parliamentary oversight). Collectively, these arrangements should be designed to ensure funding levels are appropriate and to guard against regulatory cost creep.

Enforcement costs and the civil penalty regime

Currently, ASIC may recover costs associated with the enforcement of the corporations legislation via the mechanism outlined in section 91 of the *Australian Securities and Investments Commission Act 2001*. We believe that any monies recovered under this mechanism should be set-off against the overall industry levy funding envelope for the following financial year, excluding, of course, recouped enforcement costs associated with the Enforcement Special Account (which is not proposed to be funded by industry – see page 6 of the Consultation Paper).

Monies recovered by ASIC, on behalf of the Commonwealth, via the civil penalty and infringement notice regime contained in the Corporations Act, currently flow through to consolidated revenue. Clearly it would be unwise for these monies to supplement ASIC's budget (given the conflict of interest and misaligned incentive it would create), or equally, to reduce the amount of money which would be levied upon industry (given the perception that it would be "rewarding" potential or actual breaches of the law).

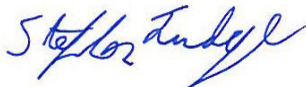
This notwithstanding, we believe the Government should give consideration to the approach of the United Kingdom whereby all money recovered in penalties is transferred to HM Treasury, which uses the pool to help support charitable causes.

Conclusion

Thank you for the opportunity to provide a submission to the consultations on the proposed ASIC industry funding model. If you have any questions in relation to material outlined in this letter, or the FSC submissions in relation to the Murray Inquiry or Capability Review, please do not hesitate to contact us on the details listed below.

Should the Government announce its response to the Murray Inquiry after this submission has been lodged, we reserve the right to provide a supplementary submission. We may also engage further with Government on the structure of the proposed industry funding model following the outcomes of the ASIC Capability Review.

Yours sincerely



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