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ASIC Industry Funding Model Review

Thank you for inviting the FBAA to make a submission to Treasury's discussion paper regarding the review of the ASIC industry funding model.

Our submission aims to reinforce the key principles of the ASIC industry funding model rather than providing individual responses against each of the 31 questions posed in the discussion paper.

There are a number of issues we think are key to the operation of the IFM.

- A. The IFM needs greater granularity around the credit intermediaries subsector.
- B. The impact of litigation costs needs to be reviewed. Industry has very little control over what matters ASIC chooses to litigate and enforcement expenses remain one of the most significant and highly variable costs to be recovered under the IFM.

We agree with Treasury's observations at page 14 of the paper where it notes that the IFM is complex.....and difficult for stakeholders to understand and engage with. Levy costs are rising while the number of liable entities is falling¹. With or without steps being taken to try to simplify the IFM, it is likely to always remain complex. Providing additional information to industry about the costs identified and ascribed to each sub sector, may not be assistive as there is no way to look beyond the numbers to understand how the costs were incurred (nor would we expect to see the level of detail that would allow deeper interrogation of how the costs were incurred). Some additional detail around litigation expenses may be useful.

A key priority for us and our members is for the levy to remain fair.

We support greater granularity with respect to the industry subsectors. In particular, the credit intermediaries sector should be further broken down to move entities such as those engaging in credit repair and debt management into their own subsector. The credit intermediaries subsector is currently too broad and we believe there is considerable risk of cross-subsidisation happening.

¹ Data from Table 1 of the discussion paper highlights that in the past 5 years there has been a 40% increase in total levy amounts collected while the number of liable entities has fallen by approximately 5%.

Enforcement Expenses

Litigation costs should be an operating expense of ASIC and not be funded by industry. We say this for two reasons namely:

1. Those causing the need for enforcement action are often not law-abiding entities that invest in their own compliance and strong governance. Enforcement costs are not being recovered from those causing the need for enforcement action. They are being recovered from the remainder of industry participants who do the right thing.

The general public benefits from ASIC removing rogue operators the same or more than industry does. It is appropriate that ASIC enforcement action against those failing to comply with the law should be funded by general revenue.

2. We have reservations about how ASIC recovers litigation expenses where it is unsuccessful. We recognise it is the mandate of a Regulator to litigate some matters in the public interest even where there is reasonable prospect of being unsuccessful or not recovering costs from the defendant. Such matters need to be distinguished from litigation that ASIC takes where it exercises poor judgment. *Westpac v ASIC* is an example of where ASIC pursued a particular agenda which much of industry did not concur with. As we saw in the *Westpac* case, ASIC was rightfully admonished by the courts and was unsuccessful in both the primary case and on appeal.

All parties run a risk of incurring costs in litigation. Removing ASIC's costs risks by enabling it to reimburse itself from industry may encourage questionable decision making. Treasury notes at page 19 of the discussion paper:

“The recovery of enforcement costs solely from entities subject to enforcement activity would introduce additional complexity and administrative costs into the model that would likely outweigh the benefits of more targeted recovery. Additionally, there is broader benefit to industry from ASIC's enforcement action, by maintaining trust and integrity in the financial system and promoting consumer confidence”

This is a difficult statement to support. Recovering enforcement costs from entities subject to enforcement activity is precisely what ASIC should do. It does not seem rational to assert that any benefit from recovering enforcement expenses from the entities that create the need administrative costs would be consumed by higher administrative costs. If that is the case, then those administering the program need to become more efficient at what they do so that administration costs are lowered.

In relation to recovery of enforcement expenses, ASIC needs to better identify the difference between matters that could be funded through the industry levy and matters that it should fund out of general revenue (i.e. because the action being taken is not action that has been made necessary by the conduct of those in the industry sector).

Should ASIC take a business risk and run litigation unsuccessfully then costs should come from general revenue – as they always used to before the IFM.

Costs incurred for enforcement action against unlicensed activities should again be from general revenue. There is no relevant industry sub-sector for an entity that is not in the industry because it is acting unlicensed.

We do not subscribe to the thinking that an industry subsector benefits by ASIC taking action against an unlicensed operator who is attempting to engage in activity that would be covered by one of the subsectors. The general population benefits from ASIC taking out unlicensed operators. It is more appropriately recognised as a consumer protection function that is part of ASIC's core mandate.

Capital Expenditure

Capex is an extremely difficult area to gain any degree of transparency. No amount of information provided by ASIC could help industry determine whether certain capital expenditure was necessary, or how it benefitted a particular sub-sector.

ASIC must invest in capex to be able to continue to perform its functions. These are costs incurred by a Government body in the ordinary course of its operations.

We do not support ASIC attributing capex to particular industry subsectors.

Fees for Service

We support any model where a user-pays, fee for service option is selected over cost recovery through levy. Fees for service should be chosen any time consideration is being given to cost recovery via either fees for service or a levy.

We do not support delegation of fee setting power to ASIC. While we note that APRA has had such a power delegated, APRA deals with fundamentally different entities than ASIC. Comparing APRA and ASIC models is incongruous because of the substantial differences between the roles and regulated populations served by APRA and ASIC.

Government is more and more frequently delegating law and rule-making powers to regulators and we do not support it. We are concerned with the steady erosion of separation of powers in the name of convenience.

We support the position that costs of licence registration and cancellations should remain as a fee for service. There is a very direct link between the service and the cost. It is not appropriate for these costs to be recovered through an industry levy.

Conclusion

We appreciate that this is difficult subject to consult on. There is considerable complexity that sits behind this ASIC IFM. From our perspective, the most challenging aspect of consulting on the model is that while we can see costs attributed to industry subsectors, we have no way to evaluate whether the amounts are themselves reasonable. By way of example, we are in no position to evaluate whether it is legitimate for ASIC to attribute \$21m of capex across all Industry groups.

On balance, providing more information rather than less will likely remain the better approach.

Yours faithfully



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