

4 November 2022

Senior Adviser  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [ASICIFMReview@treasury.gov.au](mailto:ASICIFMReview@treasury.gov.au)

Dear Sir/Madam,

**Australian Securities and Investments Commission Industry Funding Model Review**

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the Discussion Paper issued on 28 September 2022 (the **Discussion Paper**) with respect to the Australian Securities and Investments Commission Industry Funding Model Review which was announced by the Government on 8 August 2022 (the **Review**).
2. The Committee thanks Treasury for the opportunity to comment on the Discussion Paper, for hosting roundtable discussions (some of which were attended by Committee representatives) and for the extension of time to provide this response.
3. The purpose of the Review is to identify any refinements to the Industry Funding Model (**IFM**) for the Australian Securities and Investments Commission (**ASIC**) that may be required to ensure that its settings remain appropriate in the longer term.
4. The Committee has set out responses to questions raised in the Discussion Paper, as well as general observations, in the Attachment, and also provided the Attachment in Word format for accessibility reasons, as requested by Treasury on page 4 of the Discussion Paper.
5. The Committee does not object to this letter and the Attachment being shared in the public domain in secure PDF format.
6. Please contact the Chair of the Committee, Pip Bell, at [pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com) if you would like to further engage with the Committee.

Yours faithfully



**Philip Argy**  
**Chairman**  
**Business Law Section**

This document sets out the response of the Law Council of Australia's Business Law Section's Financial Services Committee (**Committee**) to matters and specific questions raised in the Discussion Paper issued on 28 September 2022 with respect to the Australian Securities and Investments Commission Industry Funding Model Review (**Review**).

In addition to comments on matters mentioned in the Discussion Paper below, the Committee submits that the Review should take into account the proposed statutory compensation scheme of last resort and associated levy collection law reforms contained in Bills that were introduced into Parliament on 8 September 2022 because, if Parliament passes these Bills, the costs of doing business for some ASIC-regulated entities will be increased.

## Industry funding levies

The Committee is disappointed that the Discussion Paper does not contain any information about how much it costs the Australian Securities and Investments Commission (**ASIC**) to administer the Industry Funding Model (**IFM**) itself, and how those costs might be expected to be impacted if different options canvassed in the Discussion Paper were adopted. The Committee has found it difficult to provide meaningful responses to some of the questions canvassed in the Discussion Paper without having this information.

The Committee would also be interested to know how the burden of administering the IFM over the past few years has impacted upon the productivity of ASIC's resources in terms of the opportunity cost of using that money to pursue other initiatives.

1. Appendix D provides a catalogue of sub-sector definitions, metrics and formulas. If the status quo remains (that is, there are no substantial changes to the IFM framework), are any changes required to ensure the existing industry sub-sectors, levy formulas and entity metrics remain fit for purpose in the longer-term and/or can respond to changes within industry sub-sectors?

Note: Changes to sub-sector definitions, formulas and metrics would change the way levies are calculated and distributed amongst entities in a sub-sector and would impact the levy amounts for individual entities but would not change the total amount recovered from the relevant sub-sector.

The Committee considers that there needs to be sufficient flexibility in the IFM to make appropriate adjustments to the sectors and sub-sectors to deal with changes in the commercial and regulatory environment – for example, to accommodate buy-now pay-later and crypto asset service providers if these types of entities become regulated in future.

2. Do stakeholders understand ASIC's methodology for allocating costs of activities that impact multiple sub-sectors? Is the current level of transparency relating to this approach appropriate?

The Committee does not wish to comment.

3. Is it more important to have a simpler model that can be more readily understood by entities and administered by ASIC which may result in increased cross-subsidisation, or a more equitable model (similar to the status quo) that closely links the recovery of costs to the groups of entities causing the need for those costs?

As noted in the Discussion Paper, there are competing interests of equity and fairness on the one hand, and simplicity and certainty for affected stakeholders, on the other.

The Committee would be supportive of arrangements which allow for more cross-subsidisation *provided that* it would lower the costs to ASIC of administering the IFM and allow for more timely transmission of accurate levy information to regulated entities so that they could more easily plan and budget.

The Committee also submits that it might be appropriate to put in place arrangements so that, if a sector or sub-sector is taking up a proportion of expenditure that exceeds a specified percentage of ASIC's overall regulatory spend, ASIC has the discretion to concentrate its recovery of those costs on that sector or sub-sector rather than the regulated population, spread the costs over a longer period of time than one year and/or negotiate alternative funding arrangements with the Government.

4. Is cross-subsidising costs for entities within a sub-sector or sector more appropriate than cross-subsidising costs across all of ASIC's regulated population? If so, why?

The Committee notes that, while it may seem "fair" to charge a sector or sub-sector for costs associated with the regulation of that sector or sub-sector, this can cause greater volatility in the quantum of levies – particularly because ASIC's priorities for a particular financial year or longer period can target different industry participants, sectors and sub-sectors at different times.

If ASIC is going to continue to charge affected sectors or sub-sectors as per the current IFM, the Committee considers that it would be useful for ASIC to provide greater upfront transparency about its budget allocations to particular priorities and provide some indicative guidance on how industry levies for relevant sectors and sub-sectors might be impacted – e.g. ASIC might announce that, due to a particular surveillance campaign with respect to market participants, members of that sub-sector might expect to pay levies which were 20-40 per cent higher than the previous financial year.

5. Are there other opportunities to simplify the design, structure and legislative framework for levies? If so, what opportunities and what benefits would they provide?

The Committee does not wish to comment.

6. Does the design, structure and legislative framework of the levy component of the IFM have sufficient flexibility to respond to changes in markets, sectors and products ASIC has oversight of? If not, what aspects require more flexibility and what changes could be made?

As noted above in response to Question 1, the IFM should be able to promptly respond to changes in markets, sectors and products ASIC has oversight of, so that appropriate adjustments can be made to the sectors and sub-sectors.

7. How can costs associated with enforcement activity be recovered most equitably? What changes could be made to the current approach, and what benefits would they provide?

The Committee submits that, as a matter of fairness, strictly speaking, where there is a breach of the law by a regulated entity, then it is appropriate to recover the costs of enforcing the law from that entity's sub-sector. However, the Committee notes that, where there are disproportionately high costs in a particular year (which could be for a number of reasons, including ASIC's priorities or serious misconduct), the costs can become difficult for

members of the sub-sector, particularly those which are smaller businesses, to absorb. The Committee submits that the regime should have built-in flexibility to prevent outcomes that could significantly burden members of a sub-sector (for example, where costs are a certain threshold percentage above the year-on-year average, alternative arrangements should be considered to reduce the severity of the impact for affected entities in a particular financial year).

If a less precise recovery method would materially lower ASIC's costs of administering the IFM, materially lower the degree of volatility in levies year on year and materially increase certainty and reliability for regulated entities' budgeting purposes, then the Committee would support further exploring this option.

8. Are there opportunities to improve the transparency and reporting of enforcement costs? If so, what changes could be made and what benefits would they provide?

As noted above in response to Question 4, it would be helpful if, when ASIC announces its priorities for a particular financial year or longer period, ASIC also shared information about how much it intended to spend in pursuit of those priorities, how and from whom it intended to recover its costs.

9. Is the approach of attributing costs of illegal unlicensed conduct to the most 'relevant' sub sector the most appropriate recovery method? Alternatively, how should these costs be recovered, and why?

The Committee is of the view that there is a significant difference between conduct by a regulated entity operating within the regulatory framework, on the one hand, and an unregulated entity that is operating outside the regulatory framework, on the other.

The Committee considers that it is not fair to penalise a sector or sub-sector because a "rogue" operator who does not have the requisite registration or licensing status has chosen to engage in the kind of activities in which the members of the sector or sub-sector lawfully engage in. The Committee submits that it would be more equitable to recover those costs from the regulated population more broadly or, if possible, from other sources (for example, by including such amounts in the Enforcement Special Account).

10. Are there alternative ways to recover the costs of ASIC's activity relating to emerging sectors and legal unlicensed conduct from current industry sub-sectors, and why?

The Committee has nothing further to add to its earlier responses.

11. How can costs associated with capital expenditure be recovered most equitably and transparently? What changes could be made to the current approach, and what benefits would they provide?

The Committee recognises that, as a practical matter, ASIC may need to make payments for capital expenditure items up-front and in full.

However, the Committee considers that, if the purpose of the IFM is to have participants pay for costs based on the resources that are deployed to regulate industry in a particular financial year, then it may be more appropriate to apportion capital expenditure over multiple years based upon the length of time over which ASIC expects to use the relevant item in relevant regulatory activities.

The Committee submits that it may be appropriate to introduce a threshold amount for a single item of capital expenditure and, if the item's cost is above the threshold, it should be expensed over its expected "useful life" rather than charged in its entirety in a single financial year.

12. How can costs associated with education and policy advice be recovered most equitably and transparently? What changes could be made to the current approach, and what benefits would they provide?

The Committee considers that education activities may be more likely to benefit the public than any particular sector(s) or sub-sector(s). This begs the question of whether they should be recovered through the IFM.

The Committee considers that, assuming these amounts will continue to be recovered through the IFM, as a general principle it is appropriate to recover these costs from the regulated population as a whole.

The Committee has a different view on policy advice, because it is more likely to benefit the regulated population and/or particular sectors or sub-sectors. Therefore the Committee considers that it is fair to recover costs of policy advice from the regulated population, sector or sub-sector, depending on who the relevant policy advice impacts and benefits.

13. What changes could be made to the reporting of indirect costs to improve stakeholder understanding of these costs?

As noted in responses to earlier questions, the Committee would welcome ASIC providing more transparency on how much it is intending to spend in the pursuit of its priorities at the time when those priorities are announced, and the sector(s) and sub-sector(s) to which it intends to allocate such expenditure.

14. Do regulated entities find estimated levies useful, and how is this information used by entities?

14.1. Noting the trade-off between timing and accuracy, when is it most beneficial for entities to receive estimated levy amounts?

14.2. Would alternative information, such as a range for estimated levies, be more useful?

The Committee considers that the current approach could be improved upon if ASIC was able to provide a range early on and then provide a more accurate and reliable estimate at a later point in time.

15. Is it more important to have less volatile/more stable levy amounts year-on-year, or more granular and equitable apportionment of costs each year?

The Committee has nothing further to add to earlier responses.

16. Are there other ways to manage or reduce volatility in levy amounts year-on-year, including other approaches to spreading costs? If so, why, and what benefits would it provide?

The Committee would support initiatives to spread recovery of costs over multiple years if it assisted regulated entities to plan ahead and budget accurately for their levies.

## **Fees-for-service**

The Committee notes that ASIC increases some of its fees for service from 1 July each year, based upon upon Consumer Price Index movements. This has been the case for a number of years. The Committee is surprised that the Discussion Paper did not make reference to this.

17. In relation to the design, structure and legislative framework for fees-for-service:

17.1. Are any changes required to ensure it remains fit for purpose in the longer-term and/or can respond to changes in industry?

17.2. Are there opportunities to simplify the design, structure, and legislative framework for fees-for-service?

The general view of the Committee is that the fees-for-service regime is easier to understand and provides greater certainty than the industry levy framework.

However, the Committee notes that, where a flat fee is charged, this has a greater proportionate impact upon smaller businesses than on larger, more established businesses.

18. Are there any costs currently recovered through fees-for-service that would be more appropriate to recover through industry levies? If so, why?

The Committee considers that the activities for which fees-for-service are currently recovered are appropriate, as there is a clear direct outcome for a specific regulated entity.

19. If fee amounts are to be changed, should this be amended via a one-off increase or staged to spread the impact over multiple years?

The Committee submits that a staggered increase would be preferable to a larger, one-off increase.

20. Is it appropriate for ASIC to have the power to determine which of its regulatory activities/services it can charge a fee for?

The Committee submits that it is reasonable for ASIC to have input but there should also be some independent, external oversight (for example, approval by the relevant Minister or a Panel).

21. Is it appropriate for ASIC to have the power to set fee amounts, or should this power remain with the Government?

21.1. If ASIC were provided the power to set fee amounts, should there be any limitations on what fees it can adjust, or by how much? For example, setting caps on specific fees in primary law or regulations, or setting principles to guide ASIC's setting of fee amounts?

The Committee would be supportive of ASIC being able to make legislative instruments which were subject to disallowance if there were set parameters as to maximum amounts and maximum increases and a minimum period of notice that needed to be given before the increases became effective.

22. What transparency and accountability mechanisms would be appropriate if ASIC were setting fee amounts?

Please refer to the response to question 21 above.

23. Do fees for licence and registration cancellations provide a disincentive to cancel licenses and registrations? If so, would a lower fee or no fee remove this disincentive?

The Committee does not have a clear understanding of whether the costs of cancelling or deregistering are proportionate to the costs that ASIC actually incurs.

The Committee is aware that some regulated entities find it burdensome when they need to make variations to their licences to remove authorisations which they are no longer using (so that they will not be charged the corresponding sector or sub-sector industry levy for services which they no longer provide).

24. Would it be more appropriate for the costs associated with licence and registration cancellations to be recovered through industry levies (noting that there are wider benefits to ensuring entities and individuals that are no longer undertaking a particular licensed activity do not continue to hold a licence for that activity)?

The Committee does not wish to comment.

25. Is it appropriate for ASIC's work on individual relief applications to be recovered via fees, with the costs associated with ASIC's work on relief provided to a class of entities to be recovered through industry levies?

The Committee considers that this approach strikes an appropriate and fair balance.

## **Reporting, transparency and consultation**

26. How do regulated entities and other stakeholders engage with ASIC's transparency and consultation mechanisms relating to the IFM? What aspects are most useful?

26.1. What do stakeholders seek from mechanisms to engage with the IFM? Is it more important for these mechanisms to provide transparency, or to allow for stakeholder consultation and feedback?

The Committee does not believe that providing transparency and allowing for stakeholder consultation and feedback are mutually exclusive outcomes.

The Committee's view is that regulated entities value certainty so that they can appropriately plan and budget.

The Committee submits that consultation should be meaningful and should not result in unreasonable delay to the release of reliable estimates.

27. Are the existing transparency and consultation mechanisms in relation to the IFM appropriate?

27.1. Would changes to existing mechanisms or alternative mechanisms be beneficial? If so, what changes could be adopted and what benefits would they provide?

Please refer to the response to Question 26. The Committee makes no further comment.

28. How is the CRIS used by regulated entities and other stakeholders, and do stakeholders find the information in the CRIS useful?

28.1. Could improvements be made to the CRIS, including the form/format and nature of information provided? If so, what improvements and what benefits would they provide?

28.2. At what time is it most beneficial for the CRIS to be published?

The Committee acknowledges that there is a trade-off between providing advance notice of estimated charges, on the one hand, and providing reliable figures, on the other.

The Committee considers that it would be useful for ASIC to produce a brief and simple summary document or statement, which can be more readily understood by the regulated population, together with a more detailed document for those who are interested.

29. Noting that changes to the IFM are for the most part decisions for the Government, is annual consultation by ASIC via the CRIS useful? Would less frequent but more substantive consultation be preferable?

The Committee submits that consultation by ASIC should concentrate on matters which are within ASIC's control.

The Committee submits that the IFM should be reviewed by Government on a regular basis (say every five years) to ensure it remains fit for purpose.

30. Are changes required to the criteria determining material variance? If so, what should be changed – the percentage and/or dollar value amount, or be based on the number of entities impacted?

30.1. When should information regarding material variations be published?

The Committee makes no comment on the criteria for determining material variance.

The Committee submits that the sooner information about material variations is published, the greater the opportunity for the affected regulated entities to plan ahead, budget and accommodate the additional costs.

31. What other information would be useful to regulated entities or other stakeholders to understand how ASIC sets its regulatory priorities and/or to understand the relationship between ASIC's costs and the amounts recovered from industry? What benefits would additional information provide?



The Committee submits that if announcements about ASIC's priorities were accompanied by allocated budget amounts and details of which sectors and sub-sectors the amounts would be recovered from, this might assist regulated entities with budgeting and planning.