



28 October 2022

Tim Baird
Managing Director
Regulator Engagement and Powers Unit
Treasury
Submitted via email to: ASICIFMReview@treasury.gov.au

Dear Mr Baird,

ASIC Industry Funding Model Review

The Australian Finance Industry Association (AFIA)¹ appreciates the opportunity to respond to the Australian Securities and Investments Commission ('ASIC')'s Industry Funding Model (IFM) Review.²

AFIA is the only peak body representing the entire finance industry in Australia. We represent 158 members, including bank and non-bank lenders, neobanks, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry.

We are the voice for advancing a world-class finance industry, with our members who are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes, and create a resilient, inclusive and sustainable future.

¹ www.afia.asn.au

² [ASIC Industry Funding Model Review | Treasury.gov.au](https://www.treasury.gov.au/industry-funding-model-review)

INTRODUCTORY COMMENTS

AFIA welcomes the opportunity to provide feedback as part of ASIC's IFM Review.

The purpose of the IFM is to ensure entities that cause the 'need for regulatory effort' should fund the cost of that effort, rather than taxpayers at-large.³

AFIA supports this principle. ASIC licensees should always strive to act in accordance with the highest standards of propriety and comply with all their legal obligations. However, the IFM must be designed to ensure good corporate citizens do not disproportionately bear the burden of financing ASIC's efforts to enforce the law against those who may not be meeting the necessary standards.

The IFM must always be designed to ensure costs are apportioned appropriately among the relevant subsectors, according to risk. The scheme should be calibrated to set standards and incentivise good behaviour by encouraging compliance to reduce regulatory enforcement costs.

The current IFM was first introduced in 2017.⁴ It operates pursuant to the *ASIC Supervisory Cost Recovery Levy Regulations 2017*. The scheme includes:

1. Industry funding levies
2. Fees-for-service, and
3. Reporting, transparency, and consultation mechanisms.⁵

Attachment A addresses each of these themes, first outlining the issues then providing AFIA's comments.

CLOSING COMMENTS

Thank you for the opportunity to participate in this consultation.

Should you wish to discuss our submission or require additional information, please contact me at Sebastian.Reinehr@afia.asn.au or 0474 704 992.



Sebastian Reinehr
Senior Policy Adviser

³ AISC, *Industry Funding Model Review Discussion Paper* (September 2022), 6.

⁴ ASIC, *Regulatory costs and levies* (accessed on 24 October 2022): [Regulatory costs and levies | ASIC](#).

⁵ AISC, *Industry Funding Model Review Discussion Paper* (September 2022), 9, 29 and 34: [Review of the Australian Securities and Investments Commission Industry Funding Model | Treasury.gov.au](#).

ATTACHMENT A

1. INDUSTRY FUNDING LEVIES

1.1 An introduction to levies

There are 52 sub-sectors regulated by the IFM, which raised \$1.51 billion in the 2020-21 financial year to fund ASIC's regulatory enforcement activities.⁶

These subsectors include but are not limited to:⁷

- corporate
- deposit taking and credit
- investment management, superannuation and related services
- market infrastructure and intermediaries
- financial advice, and
- insurance.

1.2 Graduated versus flat levies

In its discussion paper, ASIC explored if it is preferable to have a more 'flat' approach to calculating levy amounts payable by entities in relevant sub-sectors.⁸ Alternatively, a more 'graduated' approach would see large entities and larger sub-sectors pay a more significant portion of the total levy amounts.⁹

AFIA believes IFM levies should be graduated, to ensure entities pay their fair share, based on their contribution to the amount of regulatory activity in a particular subsector. This approach ensures smaller entities are not unduly hampered by having to pay large levies for enforcement costs regarding their larger counterparts.

Another reasonable approach to protect smaller regulated entities would be, rather than graduating IFM levies based on entity-size, to assess them with respect to the amount of proven misconduct undertaken by a particular entity or in a particular sub-sector.

This could be done, by ASIC making an assessment over a longer time horizon, for example every three years, to establish which entities or sub-sectors were the causing the most frequent issues with respect to regulatory enforcement.¹⁰

⁶ Danielle Crowe et al, *Five years in: Treasury to review ASIC's funding model* (18 August 2022): [Five years in: Treasury to review ASIC's funding model - Knowledge - Clayton Utz](#)

⁷ Ibid.

⁸ AISC, *Industry Funding Model Review Discussion Paper* (September 2022), 12-13: [Review of the Australian Securities and Investments Commission Industry Funding Model | Treasury.gov.au](#).

⁹ Ibid, 13-14.

¹⁰ Ibid, 28.

Costs would then be apportioned according to proven and regular misconduct, rather than on the more speculative assumption that the size of a given sub-sector necessitates more enforcement activity.

This would be more consistent with the principle of the Australian Government Charging Framework that the cost of regulation should be borne by those who 'caused' the need for regulation.¹¹

1.3 Unfair apportionment of the cost of ASIC legal enforcement actions

There is also a serious concern regarding the way industry funding levies are used to recover the costs of legal proceedings initiated by ASIC. Especially where those cases are unsuccessful.¹² In 2020-21 the amount of IFM funds ASIC expended on 'enforcement activity' was \$110 million, up from \$67.6 million in 2017-18.¹³ This is an increase of 63 per cent.

For example, if ASIC brings a legal action in the Federal Court of Australia against one regulated entity and there are 100 entities in the relevant sub-sector, all 99 other firms must effectively subsidise, via their levy contributions, the cost of ASIC's legal action.

One consequence of the IFM effectively funding legal cases brought by ASIC is that, if a regulated entity is found to have breached the law, their competitors (who were not involved at all in the wrongdoing) effectively subsidise ASIC's pursuit of the wrongdoer.

In the worst cases, ASIC may fail in a legal case brought against a regulated entity, yet still recover the costs of undertaking that failed legal action from the IFM. Here, you would have the perverse distorted incentive whereby a regulated entity is paying (through its levy contributions) for the privilege to be proven right.

AFIA suggests a more appropriate approach to funding legal actions brought by ASIC would be:

1. for all or some portion of any fines and penalties ASIC may be awarded by a court to be used to offset the cost of that legal action, and
2. for entities found to have breached the law to have to pay additional levies in subsequent years, and
3. for the cost of ASIC bringing unsuccessful legal actions to be funded by appropriations from Government, not IFM contributions.

¹¹ AISC, *Industry Funding Model Review Discussion Paper* (September 2022), 6: [Review of the Australian Securities and Investments Commission Industry Funding Model | Treasury.gov.au](#).

¹² *Ibid*, 18-19.

¹³ *Ibid*, 18.

This approach would ensure, where regulated entities have breached the law, their competitors are not unfairly punished for their wrongdoing. It also eliminates the situation where ASIC funds its own unsuccessful legal challenges through the IFM.

1.4 Levy volatility

The discussion paper notes ASIC has received considerable feedback from stakeholders concerned about the issue of 'levy volatility'.¹⁴ This issue stems from the difference between the 'estimated levy amounts' ASIC predicts it will require and the actual levy amounts it collects.¹⁵ A separate but related issue is the increase in actual levies collected each year, which has gone from \$232.4 million in 2017-18 to \$312.8 million in 2020-21, a 35 per cent increase.¹⁶ This is despite the population of leviable entities declining by 4 per cent.¹⁷

To smooth levy volatility, AFIA supports ASIC's suggestion of calculating levies based on a 3-year or four-year average of costs previously required to be recovered. This is preferable to yearly figures which are more open to fluctuation.¹⁸ This will increase certainty and predictability for regulated entities and lessen the chance of sudden and unexpected spikes driven by levy volatility.

AFIA further recommends ASIC consider 'maximum caps' on both the difference between estimated and actual levy amounts **AND** the increase in actual levy amounts incurred by individual entities annually. These caps would help to further smooth levy volatility and provide predictability and certainty for regulated entities.¹⁹

1.5 The total number of subsectors for the purpose of calculating levies

ASIC's discussion paper raises the possibility of either merging certain sub-sectors or increasing the number of sub-sectors to recognise the differences between variant activities undertaken by regulated entities.²⁰ Without expressing a view on the appropriate number of sub-sectors, AFIA suggests categories should be based on the *nature of the conduct rather than legal structures or licensing arrangements*. That is to say that sub-sectors should be categorised according to the *substance* of their activities and not the *legal form* particular regulated entities assume.

¹⁴ Ibid at 20 and 24-26.

¹⁵ Ibid.

¹⁶ Ibid, 11.

¹⁷ Ibid, 25.

¹⁸ AISC, *Industry Funding Model Review Discussion Paper* (September 2022), 28: [Review of the Australian Securities and Investments Commission Industry Funding Model | Treasury.gov.au](#).

¹⁹ Ibid.

²⁰ Ibid, 14-15.

2. FEES-FOR-SERVICE

The discussion paper details the ‘fee-for-service’ approach taken to many ASIC activities.²¹ Fees for service are distinct from the funds raised by ASIC through the industry funding levies in Part 1 of this submission.

Levies are raised on a general basis to fund ASIC enforcement activity, for example initiating legal proceedings where ASIC believes the law has been breached. These activities serve a *general* law enforcement purpose.²²

By contrast, fees for service are charged to recover the cost of ASIC providing a *specific* service to an individual entity which has *requested* that service from ASIC.²³ The kind of services provided for these fees include functional matters like licence registrations and cancellations.

Revenues raised from fees have risen from \$13.6 million in 2018-19 to 14.5 million in 2020-21, an increase of 7 per cent.²⁴ However, ASIC notes this amount does not cover the total cost of the services provided under this aspect of the IFM and the shortfall is covered by grants from government.²⁵

ASIC suggests there is an issue with the specific types of fees they can charge being set in primary legislation and the specific amounts they can charge being set by Government regulations.²⁶

ASIC seeks feedback on if it would be appropriate for ASIC itself to have delegated authority to decide either of the following matters for themselves:

- i. The type of services for which ASIC can charge fees **AND**
- ii. The amount of those fees.²⁷

AFIA does not support this suggested change. It is appropriate that parliamentary oversight, and the scrutiny that comes with government issued regulations, remain in place. This allows for these important matters to be adequately considered and debate prior to changes. It also provides essential clarity and certainty for businesses, by ensuring costs are fixed, clear and publicly transparent.

²¹ Ibid, 29-33.

²² Ibid, 18.

²³ Ibid, 30.

²⁴ Ibid, 31.

²⁵ Ibid, 30.

²⁶ Ibid, 31.

²⁷ Ibid, 32.

If greater flexibility is required in these matters, AFIA recommends this be done through a provision in the current Act and regulations which requires Government to reconsider these matters annually. This is preferable to delegating this authority to ASIC without any ministerial or parliamentary oversight.

If the option of giving ASIC complete delegated authority over these matters is pursued, contrary to our recommendation, AFIA recommends the following:

1. Fee increases should not occur more than annually and at a fixed time each year, preferably the end of the financial year.
2. Fee increases should be capped to no more than the increase in the Consumer Price Index (CPI) in the preceding financial year.
3. ASIC should have to issue an itemised, public, written statement justifying the increases in fees for each individual service provided. In this statement, ASIC should be required to provide the specific factors which informed each increase decision.
4. Each service category in this itemised list should be subject to a key performance indicator (KPI), which benchmarks ASIC's targeted performance in this area (i.e. licence application processing times) and compares it to outcomes for the previous financial year.
5. This written statement should be issued 30 days prior to the proposed increase date, with a process for public comment.
6. Any changes to the fee levels or categories of services provided should be subject to both ministerial and parliamentary overrides.

3. REPORTING, TRANSPARENCY & CONSULTATION MECHANISMS

ASIC's discussion paper explores at length the important issue of cost recovery and transparency mechanisms.²⁸ The major concern in this area is the convoluted and inaccessible structure of the current format of ASIC's *Cost Recovery and Implementation Statement* (CRIS).

The CRIS is the core document which outlines how the costs of ASIC's regulatory activities will be recovered from industry.²⁹ However, the most recent CRIS was 200 pages long.³⁰

²⁸ Ibid, 34-34.

²⁹ ASIC, *Cost Recovery Implementation Statement* (accessed on 24 October 2022): [Cost recovery implementation statement | ASIC](#).

³⁰ Cost Recovery Implementation Statement - ASIC industry funding model (2021-22): [Cost Recovery Implementation Statement: ASIC industry funding model \(2021-22\)](#).

AFIA suggests the following to make the CRIS more accessible and comprehensible:

1. That the first section of the CRIS, on the history of the IFM, be moved to an appendix (as should other extraneous details). The CRIS should be streamlined to concentrate on the detail of the situation for the coming funding year.
2. That the draft CRIS be released closer to the timing of the release of the final CRIS. This way, ASIC will have more time to gather accurate data to inform cost estimates in the final CRIS. This will increase predictability and certainty of costs for regulated entities and facilitate forward planning.
3. Alongside the CRIS each year, ASIC should release a short-form CRIS or 'one-pager', which can guide regulated entities in their approach to consuming the 200-page CRIS and highlight key issues.