

28 October 2022

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The Treasury
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By email: ASICIFMReview@treasury.gov.au

Dear Sir / Madam,

Australian Securities and Investments Commission Industry Funding Model Review Discussion Paper (Discussion Paper)

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public, not-for-profit and charity sectors. As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study and professional qualifications. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in listed, unlisted and private companies, as well as not-for-profit organisations including charities and the public sector. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC, the ATO and other government and industry stakeholders.

Many of our members serve as officers and/or provide services to ASIC registered entities of all sizes and interact daily with ASIC. We have drawn on their experience and expertise in this Submission.

General comments

Governance Institute has always strongly supported ASIC's roles and responsibilities in maintaining and facilitating the performance of the financial system and the entities within that system. Our members recognise that its role is central to maintaining trust and confidence in the market, which funds the broader Australian economy. They also recognise that a well-funded regulator is vital and consider it essential that there is proper accountability and transparency in relation to any funding it receives.

Our members also support in principle an industry-funding model, recognising that the price of having an efficient market with integrity is ensuring the regulator has sufficient funding. They also consider that joint government and industry funding was the right model.

While our members welcome the opportunity to respond to the Discussion Paper, they note that a number of the issues they highlighted as potentially problematic in earlier submissions prior to introduction of the Industry Funding Model (IFM) have evolved as they anticipated.¹

¹ See Governance Institute of Australia Submission [Proposed Industry Funding Model for the Australian Securities and Investments Commission](#), 9 October 2015 and Submission [Proposed Industry Funding Model for the Australian Securities and Investments Commission, Proposals Paper](#), 16 December 2016.

The issues which our members consider remain problematic are set out below.

Impact on listed entities

Our members were concerned that the IFM was neither proportional nor aligned to the expected need for regulatory oversight and activity but was predicated on size and financial capacity. As our members predicted, one unintended consequence flowing from the absence of a risk weighting attached to the market capitalisation metric is that well-run and governed listed entities that interact very little with ASIC and require no regulatory effort pay significant levies based purely on their size and financial capacity. The policy underlying the IFM should encourage good conduct and governance and send a pricing signal to entities about their value, and act as a deterrent to poor conduct and governance. If companies are well-run and treat their shareholders and customers fairly, they are behaving as good corporate citizens and will have very little interaction with the regulator. The IFM should not result in well-run entities subsidising badly behaved entities. As noted at page 18 of the Discussion Paper following the Financial Services Royal Commission while ASIC received additional funding for enforcement activities it also had the capacity to recover increased amounts from industry through the IFM.

While we advocated at the time that the IFM should include a risk weighting this was not built in to its design because it was considered it would be overly complex. However, as we noted at the time the IFM does in fact make a risk assessment based on size when it comes to listed entities. While the collapse of a large listed entity would have a market impact so far as our members are aware, there is no data available about the rate of regulatory intervention with large listed entities as opposed to smaller or non-listed entities. For example, feedback from our members indicates that some listed entities with high market capitalisation sustained substantial increases in fees but did not require any regulatory focus or dedicated regulatory activity.

Duplication of fees

As we noted in our 2016 Submission the IFM is not aimed at regulating entities as a whole but rather individual components of an entity's business, notwithstanding the level of interaction by the entity with the regulator. Listed entities not only have a market capitalisation levy but other levies depending on whether they are active in other sub-sectors such as AFSLs, credit providers, deposit takers or as a responsible entity. Some examples are:

- A listed entity that is an investment management business not only pays a levy it may also pay fees as a:
 - non-listed, disclosing public company
 - responsible entity
 - wholesale trustee
 - as a general financial advice provider.
- Listed stapled Australian real estate investment trusts (REITs) are in a particularly unenviable position. Firstly, they incur a levy based on market capitalisation. As REITs also have responsible entities, they incur responsible entity fees as well as a funds under management (FUM) levy. FUM is defined as total gross assets of a registered scheme. In the listed REIT sector, FUM is a proxy for market capitalisation, and therefore, members in this industry consider that fees are being levied twice. Being a responsible entity is not necessarily indicative of higher ASIC oversight. As a result of the various fee levies, feedback from members indicates that they experienced significant fee increases following introduction of the new model.

We also noted in our 2016 Submission that listed entities already pay significant fees to the Australian Securities Exchange (ASX) — listing fees. Under the IFM listed entities pay two sets of fees in relation to oversight of their compliance with the Corporations Act and the ASX Listing Rules (which interact with the Corporations Act). There is no offset by way of reduced listing fees for listed entities, despite the fact that ASIC conducts market surveillance and has

oversight of ASX compliance as well as other matters. In our 2016 Submission we advocated for such an offset and our members continue to consider there should be such an offset.

Our members consider there should be a:

- Second metric of risk weighting to market capitalisation to ensure the model is proportional and not based purely on size and financial capacity.
- Move from the subsector approach to a broader approach.
- Smaller flat rate for surveillance, which is a cost spread across the listed entity subsector, with enforcement costs recovered as larger financial penalties by incorporating a loading factor for those entities that have been the subject of *substantiated* regulatory action in the previous three years. They do not consider the current methodology outlined in the Discussion Paper adequately addresses this issue.

Current state of the ASIC registry and legislative infrastructure

Our members interact with the ASIC Register and its staff on a daily basis. They also note that as part of the Modernising Business Registers (MBR) Project, ASIC's registers are transitioning to the Australian Business Registry Services (ABRS). Our members are concerned that some of their chief areas of concern and frustration in relation to their interactions with ASIC, the registry and some of ASIC's legislative infrastructure, are not within the scope of this consultation.

In recent times our members in all sectors have experienced poor Contact Centre service levels, conflicting advice from ASIC's public facing staff, out of date and inconsistent filing requirements and a register that does not meet users' needs. They report that it is increasingly difficult for them to complete the simplest of tasks such as filing documents without considerable effort. For example, a member reports that they recently encountered difficulty when they attempted to lodge two separate forms in relation to an entity on the same day. When they finally succeeded in speaking to the Contact Centre staff, they were advised that the system can only manage one form per day per entity. The fact that some forms can still only be lodged in hard copy is another example of an area of difficulty. We also understand from recent interactions with the ABRS that moving all forms online is not in scope in the transition to the new Register. For the foreseeable future to meet their obligations under the Corporations Act, entities will be required to file paper forms in a number of circumstances.

Governance Institute is a member of the Business Advisory Group for the MBR Project and we and our members have played an active role in various aspects of this Project for some years. Our members also acknowledge that the pandemic has increased the need for and the demand for digital services in a way that was not anticipated at the commencement of the Project. They also understand that the transition to the new Register and improving digital services will take time. Nonetheless ASIC continues to be the Corporations Act regulator and entities must interact with the ASIC Register so they can meet their obligations under the Act. Our members consider that the services required for ASIC to fulfil its regulatory role should be delivered efficiently without adding to the already substantial costs of maintaining registration as an Australian company.

Our members consider that there needs to be a wholesale improvement in the delivery and quality of the provision of registry services in the short term with the aim of improving service levels and functionality as opposed to allowing these functions to limp on pending the new Register coming into full operation.

Responses on specific questions

Our members responses on specific questions in the Discussion Paper are set out below.

Question 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?

Our members universally report that the methodology for allocating costs and activities is confusing and opaque. As noted above the large number of sub-sectors and the complexity of the allocation of costs has led to significant complexity and inequities. Our members consider that there should be a move from the sub-sector approach to a broader approach.

Question 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?

Question 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 our members consider it would be more equitable to recover enforcement costs as larger financial penalties by incorporating a loading factor for those entities that have been the subject of *substantiated* regulatory action in the previous three years. This should be accompanied by greater transparency and reporting of enforcement costs.

Question 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?

Our members consider that licensed entities should not bear the costs of illegal, unlicensed conduct. They would also welcome more transparency about which groups of entities are causing these issues. They also consider that the current practice of recovering these costs from the 'relevant' sub-sector via levies is inequitable. It does not align with what our members consider should be the policy underlying the IFM namely that it encourages good conduct and governance and sends a pricing signal to entities about their value, and acts as a deterrent to poor conduct and governance. Rather it penalises entities that are complying with their licence obligations.

Question 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?

As a proportion of ASIC's overall costs education and policy advice are very small. Our members consider that these activities should be considered business as usual for an Australian Government body. Our members would also be interested to understand the nature of the activities included under these headings.

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

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

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

Our members report that the estimated levies are useful. Noting the potential trade-offs in this area they consider that accuracy is more important, so that it may be preferable to provide more accurate estimates slightly later.

Question 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?

Given their answer to Question 14 above our members preference is for greater certainty however, as noted above the current complexity related to the various sub-sectors as well as the fact that there is duplication of fees for some entities our members consider that there should be a second metric of risk weighting to market capitalisation to ensure the model is

proportional and not based purely on size and financial capacity. There should also be a move from the subsector approach to a broader approach.

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

One area our members have identified as an opportunity to simplify the design, structure and legislative framework for fees-for-service would be for the Regulatory Portal to offer an organisational view for corporate groups to reduce the administrative burden that comes with managing multiple entities.

Question 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?

Our members consider that it is difficult to provide feedback on this question. It would also be important to model the alternative proposals as they are likely to have a disproportionate impact on smaller entities.

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

Of the Options for setting fees outlined in the Discussion Paper, our members' preference would be to delegate the power to ASIC to set and adjust fee amounts in legislative instruments, rather than the Government setting fee amounts in regulations, but with Government continuing to determine the activities for which ASIC is able to charge fees.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,



Megan Motto
CEO