

File Name: 2018/12

23 May 2018

Australian Securities and Investments Commission
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Response to the draft Cost Recovery Implementation Statement for ASIC's Fees-for-service regime

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the draft Cost Recovery Implementation Statement for ASIC's Fees-for-service regime for the 2018-19 financial year.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 14.8 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact Andrew Craston, Senior Research Advisor, on (02) 8079 0817 or by email acraston@superannuation.asn.au.

Yours sincerely

Glen McCrea
Chief Policy Officer

Introduction

ASFA supports, in principle, the adequate and appropriate funding of ASIC. Further, ASFA considers that all regulated industries should contribute to that funding. That outcome is, in ASFA's view, far more equitable and appropriate than funding a regulator solely from consolidated revenue.

Industry funding of ASIC – as reflected in the ASIC Fees-for-service regime and the broader ASIC industry funding model – has the potential to significantly change the character of ASIC's dealings with its regulated entities. Importantly, it represents an opportunity for ASIC to provide industry with greater insight into the activities it conducts, and to provide genuine transparency and accountability regarding the manner in which ASIC utilises its funding. This is necessary in order for industry to have confidence that ASIC is functioning well as a regulator. ASFA has discussed these issues in detail in previous submissions on ASIC's broader industry funding model.¹

With respect to the ASIC Fees-for-service regime, ASFA supports, in principle, the recovery of certain costs via fees – specifically where costs are directly attributable to a single, identifiable entity. The information in the draft CRIS on how fees are determined is an improvement on that disclosed in previous stages of the consultation process on the Fees-for-service regime, however there is still not sufficient detail for industry to properly assess most of the fees.

Transparency and accountability are, in ASFA's view, critical features of any industry funding model. With respect to the ASIC Fees-for-service regime, a robust accountability and transparency framework is required in order to provide ASIC's regulated population with confidence that fees appropriately reflect regulatory effort.

The superannuation industry is currently facing increased scrutiny, including as a result of the Productivity Commission's review of efficiency and competitiveness of the superannuation system, and the enhanced disclosure requirements in relation to fees and costs. ASFA therefore considers it appropriate that ASIC, and other regulators for the superannuation industry, should be subject to a high degree of scrutiny regarding the levies and fees imposed on the superannuation industry and their utilisation.

¹ For example, see ASFA submissions regarding the *Draft ASIC Supervisory Cost Recovery Levy Regulations 2017* (<https://www.superannuation.asn.au/ArticleDocuments/427/201713 ASIC industry funding.pdf.aspx?Embed=Y>), the *Proposed Industry Funding Model for the ASIC* (<https://www.superannuation.asn.au/ArticleDocuments/278/ASIC industry funding model-ASFA submission.pdf.aspx?Embed=Y>), and *Response to the Treasury consultation paper: Introduction of ASIC's Fees-for-Service Under the Industry Funding Model* (<https://www.superannuation.asn.au/ArticleDocuments/427/201734 Treasury Introduction of ASIC fees-for-service under the industry funding model.pdf.aspx?Embed=Y>).

General comments on the draft CRIS for the ASIC Fees-for-service regime

1. *The methodology for the Fees-for-service regime lacks detail*

While the information provided in the draft CRIS on how fees are determined is an improvement on that disclosed in previous stages of the consultation process on the Fees-for-service regime, there is still not sufficient detail for industry to properly assess most of the proposed fees.

ASFA considers that ASIC should make available detailed fee data for each service at the earliest convenience, and on an ongoing basis thereafter.

The draft CRIS notes that the fee for each service is calculated using a weighted-average hourly rate (reflecting each team associated with the service, and including indirect costs) multiplied by regulatory effort (that is, the average number hours) required to undertake each type of service. A previous consultation paper *Introduction of ASIC's Fees-for-Service Under the Industry Funding Model* (the 2017 Consultation Paper), which was released on 16 November 2017, noted that hourly rates and average times were determined from "time recording".

While the draft CRIS provides total fee amounts for each service, it provides a breakdown of the hourly rates and required times for only a small number of services – notwithstanding the fact that ASIC would have this information on hand for all services.

Where detailed data is provided, it enables stakeholders to form a view of the appropriateness, or otherwise, of the proposed fees. In particular, the detailed data provides an indication of the required time and hourly rate for each stage of a certain service. For industry, scrutiny of the proposed fees is important given that the fees are, in some cases, significantly higher than current equivalent fees.

As the draft CRIS rightly points out, a potential risk regarding the Fees-for-service model is "the perception that the model lacks transparency about the size of the fees". This risk can be best mitigated by publishing detailed fee information for each service.

ASFA appreciates that publishing detailed data for each of the 180 services would be onerous – particularly given the short time frame provided to ASIC to produce the draft CRIS. As such, ASFA considers that ASIC should make available detailed data for each of the services at the earliest convenience, and on an ongoing basis thereafter – for example, as part of the annual CRIS process.

2. *The review process for fees is appropriate*

ASFA supports ASIC's process for reviewing the Fee-for-service regime.

ASFA supports the proposal – as reflected in the Exposure Draft legislation for the Fees-for-service regime – that each of ASIC's fees will be reviewed every three years. ASFA considers it appropriate that ASIC's fees for service are reviewed regularly, to ensure they reflect required regulatory effort and provide effective 'price signals' to regulated entities. This process should include analysis of the actual regulatory costs of each service, compared with the fee amounts.

Any changes to ASIC's formal assessment process for reviewing fees should be included in the annual CRIS for the Fees-for-service regime.

3. Fees for relief applications should be graduated

While ASFA does not support fixed fees for relief applications, ASFA supports the effective fee cap for 'novel' relief applications.

ASFA does not support fixed fees for relief applications, as per ASFA's previous submissions on ASIC's Fees-for-service regime. As is the case for complex matters such as licence applications, graduated relief fees would allow ASIC to charge fees that more closely align with the regulatory effort involved with particular relief applications.

This is important given the additional costs that applicants generally incur with respect to relief applications. Prior to lodging any relief application a regulated entity will generally incur significant compliance costs, including with respect to analysing its circumstances against the relevant regulatory requirements, forming a view whether relief is required (which would typically involve obtaining legal, actuarial or other professional advice), and preparing the application itself. Indeed, some entities may consider that the total costs of a relief application outweigh the potential benefits of proceeding with the application.

That said, ASFA supports the effective fee cap for 'novel' relief applications. The draft CRIS notes that novel applications for relief often have a wider industry benefit, such as drawing ASICs' attention to the need for regulatory change or clarification where there are unintended consequences of the law. The draft CRIS also notes that high fees for novel applications could deter some entities from seeking relief and hinder innovation. ASIC has determined that additional costs associated with novel applications in excess of the flat fee (of \$3,487) will be recovered from industry via levies (under the new ASIC Industry Funding Model).

4. Fees for relief applications should be refunded under certain circumstances

ASFA considers that where ASIC provides general relief from regulatory requirements via a class order after it has provided relief from those requirements to licensees in response to specific applications for relief, the fees paid by those licensees should be refunded.

The experience of some superannuation fund trustees during the implementation of the Stronger Super reforms highlights the need for such an arrangement.

A number of trustees enquired of ASIC about the likelihood of class order relief being provided – to ameliorate particular impacts or to defer certain commencement dates. We understand that in many of these cases the trustees concerned were informed that no general class order relief would be forthcoming and that they would need to make a specific application for relief. However, in several instances, ASIC ultimately issued class order relief with general application to all affected trustees. The positions adopted in those class orders were informed by the work undertaken by ASIC to respond to the earlier specific relief applications. Those trustees that did not make specific relief applications effectively received a benefit that was funded by the trustees that did make such applications.

In effect, the current model penalises licensees that take early, proactive action. In ASFA's view, this is inequitable and should be remedied, via the refund of any fee paid for a specific relief application which falls within the terms of any subsequent general class order relief. The cost attributable to developing the class order should then be recouped as part of the levies imposed on the industry sectors or sub-sectors to which it applies (under the new ASIC Industry Funding Model).

5. *The Fees-for-service regime should be accompanied by clear guidance for regulated entities*

To minimise compliance costs for industry, ASIC should provide clear and detailed guidance regarding the proper completion and lodgement of all applications, registrations and documents for review.

ASFA is of the view that the overwhelming majority of participants in the financial services industry exhibit a strong commitment to complying with the regulatory requirements imposed upon them, including the need to obtain professional registration or a licence before undertaking particular activities, or to lodge documents with ASIC for review where prescribed. ASFA does not consider it likely that the proposed fee amounts would act as a disincentive for entities to comply with their obligations.

However, we note that many of the proposed fees are significantly higher than those currently charged by ASIC for the same service, and repeated incurrence of such fees may have a significant financial impact on some regulated entities. This is particularly the case given that the preparation of many of the applications/documents in question would already involve a potentially significant compliance cost to the entity in terms of the time invested and, frequently, a material outlay for legal or other professional advisory services.

To ameliorate this, ASFA considers it important that ASIC provide clear and detailed guidance regarding the manner in which the various applications, registrations and documents for review are to be completed and submitted to ASIC. This would help reduce compliance costs with respect to particular applications, registrations and review documents, and minimise the likelihood that they will be rejected.