

14 December 2017

Manager, Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ASICFunding@treasury.gov.au

Dear Sir/Madam,

Consultation re Australian Securities and Investments Commission (ASIC) Fee for Service under the Industry Funding Model

1. The Financial Services Committee of the Business Law Section of the Law Council welcomes the opportunity to provide this submission to the ASIC Fee for Service under the Industry Funding Model.
2. We refer to the Treasury Consultation paper dated November 2017 entitled *Introduction of Australian Securities and Investments Commission's Fees-for-Service under the Industry Funding Model (the Paper)* and thank Treasury for the opportunity to make this submission.

Treasury has posed 7 questions. We consider these in order below.

Promulgation of cost-recovery based fees in the *Corporations (Fees) Regulations 2001*

3. Treasury has asked for comment on the question of whether the scope of the existing *Corporations (Fees) Regulations 2001 (the Regulations)* should be extended from the current nominal fee regime to also include the proposed cost-recovery based fees. We submit that the objectives of simplicity and transparency would be advanced by a regime in which all fees levied by ASIC, whether calculated on a cost recovery basis or otherwise, may be found in the one comprehensive regulatory instrument. The Regulations are currently structured so as to reflect the subject matter of the relevant fee which we strongly submit should be continued.
4. We suggest that any need to differentiate the fees set using cost-recovery principles from those determined by other means is of secondary importance to the regulated

population. The primary interest of the sector is being able to determine the existence and amount of the relevant fee.

Model Objectives

5. We support the model objectives set out in the Paper subject to the comment that we believe consideration should also be given to the question of whether the full cost recovery model should be extended to those parts of the economy otherwise provided with a measure of taxpayer support for social policy reasons such as the not-for-profit and charitable sector.
6. For example, the company limited by guarantee is a common structure utilised by charities. These entities by their nature are not formed for the financial gain or pecuniary benefit of their promoters and the extension of the cost recovery model to the regulatory filings of these organisations would lead to a corresponding reduction in the resources they have available to pursue their charitable objectives. The public policy reasons such entities are subject to regulation (such as for the protection of investors and the stability of the sector) may not apply or may apply differently to cost recovery considerations. Similarly, we do not believe there is a case for the extension of cost recovery principles to forms such as a s 741 application by a charity to register an identification statement: such entities by their nature have already been accepted by the Australian Taxation Office as worthy of subsidy by the tax payer.
7. An example in the financial services sector is the recent extension of relief from the Australian Financial Services Licence (**AFSL**) regime to retail charitable investment fundraisers including managed investment schemes and debenture issues (see, for example RG 87 – para 87.25). While consumers benefit from the increased disclosure and regulatory oversight resulting from these reforms, there is in our view a case for exempting these regulated entities from the cost recovery principles set out in the Paper. This could be efficiently implemented, for example, by exempting entities registered with the Australian Charities and Not for Profit Commission that have tax concession charity status from these cost-recovery based fees, in full or in part.

Proposed Methodology for calculating fees for service

8. We are generally comfortable with the methodology for calculating fees for service: that is, weighted average hourly staff rate multiplied by the average number of hours to assess and process the form.

Sectors where a tiered approach to setting fees would be appropriate

9. We support the principle that charges should be tiered to reflect the associated effort by ASIC in each of the relevant activities. We submit that there may be utility in including a fee for licence application of a moderate/medium complexity. Further, we note that applications for certain specific AFSL authorisations, such as for intending contract for difference providers to make a market, have recently taken ASIC more than 12 months to consider. If it is considered this trend is likely to continue such outliers should be considered for their own tier, to avoid the

substantial regulatory effort they absorb having to be subsidised by all other applicants.

10. Much like applications to vary an AFSL and an Australian Credit Licence (**ACL**), we submit that applications to vary other licences (e.g. market licence) should also be tiered because the application may be subject to varying complexities in much the same way as applications to vary AFSL and ACL.

Suggested modifications for the modification of the proposed methodology

11. As noted above, we support the tiered approach of charging fees. We note that there are decision points within many of the activities, and a simple fee may result in a cross-subsidisation between different applicants where some of these decision points are disregarded. For example, AFSL licence applications are subject to a preliminary review before substantive consideration commences and are rejected if the application is determined to be defective or incomplete. Consideration should be given to whether part or all of the application fee should be refunded should an application in this category not ultimately proceed. Similarly, for AFSL applications that it is minded to refuse, ASIC provides applicants with an opportunity for review by an ASIC delegate. These cases are resource intensive as a statement of reasons must be prepared by the analyst and the applicant given an opportunity for a hearing.
12. ASIC Report 553 (Overview of licensing and professional registration applications: July 2016 to June 2017) provides an insight into the distribution of applications at each of these stages. For example, of 2,079 AFSL applications over the period, 1,159 were approved, and approximately 10% were rejected for lodgement (i.e. they did not receive more than a brief review for completeness), a further 10% were withdrawn (it is not clear at what stage of consideration) and six were refused¹. Consideration should be given to whether tiering is appropriate for some or all of these stages of application bearing in mind the influence on applicants' behaviour of financial incentives. For example, if an application is rejected for lodgement, should the full cost-recovery fee be levied even though most of those costs have not been incurred? A pure cost recovery model would suggest it should not, but would this reduce incentives to lodge complete and rigorous applications? Even if this is unlikely the outcome is that the costs for preliminary review of 10% of applications are borne by other applicants.
13. ASIC reports of licensing activity show that the regulatory effort required is not evenly distributed across all AFSL authorisations. Only a very small number of authorisations for entities seeking to conduct a derivatives business for example have been approved in recent years.
14. The objective of transparency would be advanced if the tiering of cost-recovery charges could reflect the additional cost of proceeding to a hearing (and the cross-subsidisation of these cases by other successful applicants be avoided).

¹ Para 34.

15. A second proposed modification of the proposed methodology is, as discussed above, to provide for modifications to acknowledge the case for taxpayer support of registered charities.

Accountability Measures

16. While we support the concept of a weighted average hourly rate, we submit that in the spirit of transparency, there needs to be clarity with respect to the governance aspects of the calculation, oversight and ongoing monitoring and review of cost-recovery charges. Relevant risks include strategic behaviour by ASIC decision-makers driven or perceived to be driven by cost considerations rather than an application's merits and a perception that the fee levied exceeds the actual cost of the regulatory effort and/or does not represent value for money. In this regard, we understand that ASIC will implement a program of assessment to ensure that the fees imposed on activities remain accurate and appropriate, and is currently developing the formal assessment process. We look forward to reviewing the details and providing comments in time.
17. In the meantime, we submit that an entity independent to ASIC such as the Auditor-General should be responsible for reviewing and validating that the suggested weighted average hourly rate and average number of hours for each form is appropriate. That same independent entity should also be responsible for regularly reviewing and making recommendations for updates to the value of each component.

Competition and Innovation

18. We do not believe that the order of magnitude of the proposed fees is such that it can plausibly be argued to impact competition or innovation. On the other hand, we support the incentive effects of these fees on the quality of applications. We would anticipate that a significant filing fee will signal that the application itself requires a level of rigour that to the extent this is not always in evidence at present will increase the efficiency with which ASIC resources are utilised.

Please do not hesitate to contact Henrietta Thomas (henriettathomas@gmail.com) if you would like to discuss the views of the Financial Services Committee on this issue.

Yours faithfully



Rebecca Maslen-Stannage
Chair, Business Law Section