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Via email: ASICIFMReview@treasury.gov.au

Dear Review Panel

Australian Securities and Investments Commission Industry Funding Model Review

COBA welcomes the opportunity to contribute to Treasury's consultation on the ASIC industry funding model (IFM) review.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has over \$160 billion in assets, around 10 per cent of the household deposit market and around five million customers.

Our submission addresses the following topics:

- Levies.
- Fees-for-service.
- Reporting, transparency, and consultation.

Levies

COBA supports the IFM continuing to prioritise an equitable distribution of levies over simplifying its operation. The intent of the IFM is on ASIC recovering costs it has incurred from regulating entities and ensuring that entities within sub-sectors bear the costs of peer misconduct. We support this approach even if additional effort is needed from ASIC to apportion these costs accurately.

We would like to address four issues concerning ASIC levies:

- Sub-sector definitions.
- Volatility.
- Enforcement costs.
- Funding to address new participants.

Sub-sector definitions

COBA supports the current sub-sector model for allocating levies to regulated entities. However, COBA believes that a full and regular review of the sub-sector definitions, formulas and metrics is appropriate to ensure that they continue to accurately reflect the costs each sub-sector incurs on ASIC.

For example, the current levy for credit providers is calculated using a graduated levy based on the gross amount of credit provided in the financial year. However, the amount of credit provided in and of itself does not reflect the regulatory risk associated with that entity.

Another possible way to measure risk and apportion expenses would be to consider adopting metrics associated with the risk of misconduct. We suggest two possible metrics to determine risk of misconduct:

- **Complaint ratio:** A comparison of the number of complaints for the sub-sector (for example, credit providers) to total customers with products in that sub-sector (for example, borrowers). ASIC could then apportion costs based on the ratio as complaints are a driver of its enforcement activities.
- **Apportioning costs based on ASIC regulatory intervention:** A higher proportion of costs could be applied for a period of time (for example, two to three years) to entities that have been successfully subject to regulatory action by ASIC. The levy would scale based on the seriousness of the regulatory action, so that an action like an enforceable undertaking would attract a lower additional levy used compared to where ASIC had to take court action against an entity.

Levy volatility

A major concern for our members with the IFM is the volatility in the levies issued from year-to-year. The large shifts in levies that can occur raises concerns among members about how effectively ASIC is utilising its funding. COBA understands that there are a few key drivers of this volatility, such as which sub-sectors ASIC is placing its regulatory focus onto as well as any other enforcement actions it might be taking. We also note that the volatility can be exacerbated due to the IFM using ex-post charging to recoup costs from the previous financial year which can see a lag in the cost recovery.

COBA supports the adoption of a smoothing mechanism that would help minimise fluctuations by spreading the costs for a sub-sector over three years. We understand that this smoothing mechanism may mean that some regulated entities would be paying for the regulatory expenses of entities that are no longer being regulated by ASIC as they have left the market. However, the number of entities affected by this should be small and any negative impact would be offset by the benefits obtained from all entities having more certainty in their levies and from having the expenses averaged over time.

Enforcement costs

COBA believes that a broader conversation may be needed on how ASIC is able to fund some of its more expensive enforcement actions. A large variable cost for ASIC year-to-year is the enforcement expenses of taking matters through the courts.

While ASIC should not be disincentivised from taking regulatory actions it does need to focus its attention on targeting court cases that are winnable. In situations where ASIC loses a court case the legal and court expenses should be borne by general revenue rather than seeking to recoup costs from the rest of the sub-sector. This could possibly follow a funding approach that we understand applies for criminal prosecution costs in court action brought by police through the Director of Public Prosecutions, where costs are borne by the taxpayer.

Funding to address new participants

COBA would like to raise a broader issue on funding when ASIC is seeking to address new innovations and entrants into the market. For example, ASIC has had additional regulatory and policy expenses in seeking to address how it will treat Buy Now Pay Later (BNPL) operators which are then paid for by existing regulated entities through the IFM.

While COBA agrees that it is appropriate for ASIC to explore these issues and seek to understand if and how it should regulate these new markets, we question the appropriateness of charging existing entities for these costs. We do not think it is equitable to have existing entities and sub-sectors paying

for these regulatory costs when these entities are not in the existing model. In these situations, we believe that it should be funded as a form of special project through general revenue. There would then be the possibility for the Commonwealth to recoup costs at a later date if a new sub-sector or set of entities are added to the IFM.

This approach would ensure that the Commonwealth Government has more 'buy in' in seeking to address challenges in the market and not simply expect existing and compliant businesses to bear the costs of new entrants.

Fees-for-service

Fee increases

COBA supports the principle of fees-for-service being cost reflective. We understand the need for changes to be made to these fees so that they accurately reflect the actual costs incurred by ASIC. On the issue of increasing fees to make up for the existing gap, we support a gradual increase in fees over a period of several years to minimise any cost shocks to our members.

ASIC fee-making powers

COBA is not supportive of the proposal for ASIC to be granted fee-making powers that would allow it to establish new types of fees and for it to set the amount that fees can be charged. We support the current approach where different types of fees are either prescribed in the Act or the Regulations, and the fee amounts are prescribed in the Regulations.

COBA believes that revenue raising powers should remain vested with the Parliament or if delegated to the Executive that these amounts be prescribed in Regulations. Prescribing fees by Regulations provides sufficient flexibility to the Executive to adjust the amounts from time to time while also ensuring appropriate Parliamentary oversight. This oversight is provided through the ability for either House to consider the Regulations and for the Regulations to be disallowed.

We do not believe that the Discussion Paper has made a convincing argument on why this power should be provided to ASIC. It is not at all clear how providing ASIC with this power would lead to better fees and decisions being made then is currently the case. The granting of such power to an Executive Agency does not provide the same level of oversight or accountability that the current model does.

Delegating this power to an agency creates the risk that the power could be further expanded in future, thereby further diluting Parliament's role, or could be misused by the agency. COBA acknowledges Treasury's assurances that this proposed power is not intended to be misused, but unfortunately the granting of such power creates the risk regardless of the intended effect.

COBA notes that APRA has existing powers in this space, however, we do not think that this creates an argument for granting ASIC a similar power. While APRA and ASIC do have overlap in the entities that they regulate, they are not like-for-like regulators. APRA regulates a relatively small number of entities that are on average much larger and more complicated than the average ASIC-regulated entity. ASIC regulates millions of small corporate entities who are at a much greater risk if ASIC fee-making powers were misused than those entities currently regulated by APRA.

Further, based on the above principle, the question for COBA is not whether ASIC should be granted the power, but whether APRA can justify it continuing to have the power.

Restrictions on ASIC fee-making powers

If, however, these powers are to be granted to ASIC then COBA would support strong safeguards to prevent their misuse. There would need to be clear set of principles enshrined into the Act setting out how these powers are to be exercised and in what circumstances. There would need to be a cap set on how much fees could go up each year and a limit on how large a fee could be if ASIC were to establish a new fee.

Additionally, we would also want to see some form of reporting to both Houses of Parliament if a fee were created or adjusted, and for the fee instruments to be disallowable by either House.

Reporting, transparency, and consultation

COBA agrees that it is appropriate to shift the purpose and role of the Cost Recovery Implementation Statement (CRIS) to focus on transparency. However, if the CRIS is to be changed in the way proposed then there would need to be other opportunities provided to our members to query the annual CRIS and to discuss levy invoices issued to them. This would allow our members to ask any questions that they may have and provide an opportunity to challenge the levy amount if they do not agree with the calculation. COBA believes that an appropriate alternative consultation method would be for a regular review of the IFM every three or four years.

COBA supports shifting to publishing one CRIS at a consistent time each year. All COBA members currently operate on a 1 July to 30 June financial year, and we would support the publication of the CRIS to coincide at a time to best allow for our members to properly budget for their levies.

Another way for the CRIS to be improved would be to explore whether better links could be made between the CRIS and ASIC's corporate plan. This would help allow our members to better understand why funds are being raised and how they are intending to be spent.

If you wish to discuss any aspect of this submission, please contact Robert Thomas (RThomas@coba.asn.au).

Yours sincerely



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