



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

24 July 2020

Australian Securities and Investments
Commission Level 7, 120 Collins Street
Melbourne VIC 3000

Email: policy.submissions@asic.gov.au

Dear Sir / Madam

ASIC Cost Recovery Implementation Statement 2019-20

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback on ASIC's consultation version of the Cost Recovery Implementation Statement 2019-20 (CRIS).

The FPA's feedback focuses on the aspects of the funding model that apply to financial planners. The FPA supports ASIC's oversight role in enforcing the laws it is responsible for in order to protect consumers, however we continue to hold concerns about the equity of the funding levy and its impact on small and medium-sized financial planning businesses.

Increase in levy and expenditure transparency

As discussed with ASIC, the expenditure estimate presented in the consultation CRIS shows a substantial 38 percent increase in the personal financial advice subsector levy for 2019-2020. The resulting 68 percent increase in the personal advice levy over the last two years is unacceptable. Such rapid increases in the levy are a serious risk to the sustainability of small and medium-sized financial planning businesses.

Major financial institutions, including Australia's big banks, are leaving the financial advice business or reducing their presence. Many practitioners are sole traders or work in small and medium-sized practices and their ability to absorb such rapid increases in regulatory costs is extremely limited. Escalating regulatory costs will result in financial advice becoming more unaffordable and unavailable for many Australians.

Unrestrained cost increases will significantly influence competition in financial advice, force the closure of financial planning businesses, reduce employment in the sector and set back the development of the financial planning profession. As discussed below, ASIC is strongly encouraged to consider its new competition mandate in implementing its cost recovery requirements.

The FPA suggest this is a symptom of the lack of transparency of ASIC's expenditure and inappropriate targeting of cost recovery for special projects.

The FPA calls for the release of more detailed expenditure estimates, particularly in relation of



special projects under the Enforcement Special Accounts and ASIC regulatory activity targeting large licensees.

Wealth Management Major Financial Institutions Portfolio

Section 10 of the ASIC Supervisory Cost Recovery Levy Act 2017 (the Act) defines the meaning of 'regulatory costs' for the purposes of the ASIC levy, which includes:

*Amounts that ASIC must **not** include*

*(4) In determining an amount for a financial year under paragraph (2)(a), ASIC must **not** include the following amounts:*

(b) costs giving rise to amounts debited from a special account established under paragraph 78(1)(a) of the Public Governance, Performance and Accountability Act 2013;

*Amounts that ASIC **may** include*

*(5) In determining an amount for a financial year under paragraph (2)(a), ASIC **may**, subject to subsection (4), include the following amounts:*

(c) the total of all amounts that, in the financial year, are debited against an appropriation and credited to a special account of the kind referred to in paragraph (4)(b) (even if the debits from the special account in the financial year fall short of the amount of those credits);

Note: An Appropriation Act provides for amounts to be credited to a special account if any of the purposes of the account is a purpose that is covered by an item in the Appropriation Act.

The FPA appreciates that s10(5) of the Act minimises to some degree, the impact of the ESA on sub-sector levies by attempting to only include the gap between amounts debited against an appropriation and credited into its special accounts in ASIC's recoverable regulatory costs.

However, ASIC has indicated to the FPA that the estimated expenditure for enforcement activity related specifically to its Wealth Management Major Financial Institutions Portfolio (formerly the Wealth Management Project) which focuses only on the conduct of Macquarie and the advice arms of AMP, ANZ, CBA, NAB and Westpac groups, is in the vicinity of \$4.4 million for 2019-2020. Assuming this is the 'gap' amount, this estimated expenditure indicates that approximately 35% of ASIC's enforcement cost recovery fell under the Portfolio project during the financial year. The FPA appreciates ASIC providing this information to the FPA and notes "this is not a precise estimate and it may differ from the actual expenditure, when known, given the challenges in forecasting enforcement-related costs".

As at 8 July 2020, ASIC had banned a total of 76 people from financial services, of which 4 are under appeal. Additionally, 3 of those 76 persons were also banned from credit activities and 4 were subject to additional criminal action. Of the 76 persons banned from financial services 73 were advisers, 3 directors. These figures refer to the Wealth Management Portfolio only.



It is unclear whether this \$4.4m includes expenditure in relation to ASIC's ongoing surveillance and enforcement of the Portfolio entities' review and remediation programs to compensate affected customers who suffered loss or detriment because of non-compliant advice or fees for no service (FFNS) misconduct, and other Portfolio work, or whether it only captures the cost of Portfolio bannings.

The FPA strongly believes that the cost of the Enforcement Special Accounts, and in particular ASIC's Wealth Management Major Financial Institutions Portfolio should be recovered directly from those entities specifically targeted for this regulatory activity – namely Macquarie and the advice arms of AMP, ANZ, CBA, NAB and Westpac groups.

While the Act and Regulations permits ASIC to recover such costs from industry, ASIC has the ability to determine the effective and equitable way to recover the cost of its enforcement activity directly attributable to the Wealth Management Major Financial Institutions Portfolio.

The FPA is particularly concerned about the impact of the ASIC personal advice levy on small and medium-sized licensees who are less able to absorb such costs, and the flow on effects this may have on market competition and consumers.

Section 1(2a) of the ASIC Act explicitly requires ASIC “consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system”. This requirement is reinforced in the Government's Statement of Expectations – ASIC¹

14. The Government has also committed to require ASIC explicitly to consider competition issues as part of its regulatory function. The Government now expects ASIC, in making its regulatory decisions, to have regard to competition issues to the full extent permitted by its enabling legislation.

15. The Government also expects ASIC to publicly communicate how it has balanced its regulatory responsibilities, including competition aspects, in meeting its objectives. This is necessary to promote confidence in ASIC and to ensure the accountability of ASIC for such decisions.

26. The Government is committed to reducing red tape and compliance costs for business and the community as part of broader regulatory reforms that encourage innovation and competition and enhance productivity and economic growth.

As discussed in the background to the Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018, the level of competition in the financial system is influenced by regulatory interventions. The intent of the Bill included that “policy makers and regulators should take increased account of competition when making regulatory decision”, as recommended by the Financial Systems Inquiry².

Including the Portfolio expenditure in the personal advice subsector levy means that all licensees who provide tier 1 personal advice to retail clients will have to cover the cost of this extensive ASIC regulatory project that focuses solely on the conduct of specific and identified large players. As demonstrated in the consultation CRIS, the inclusion of the Portfolio expenditure significantly exacerbates the impact of the levy on small and single-adviser licensees who end up paying for the

¹ Apr 2018

² [Treasury Laws Amendment \(Enhancing ASIC's Capabilities\) Bill 2018](#), FSI Recommendation on 30



misconduct of the licensees targeted in ESA projects.

This issue is exacerbated by specific elements of the levy combined with market movement following the Royal Commission, which led to increased ASIC enforcement activity of the Portfolio entities:

1. The pro-rata element of the levy - For example, one large licensee (Westpac) exited the advice market in October 2019, meaning it will not pay for 8 months' worth of the levy even though it is still subject to ongoing targeted enforcement activity through the ASIC Wealth Management Major Financial Institutions Portfolio. Even if the entity retained its advice license, with no advisers authorised under its license it would pay the \$1,500 flat component of the levy only, leaving the remainder of the subsector to cover the cost of this targeted and ongoing ASIC activity.
2. The graduated component of the personal financial advice levy – this is based on the number of relevant providers registered on the Financial Advisers Register (FAR) and authorised under an entities license to provide personal advice to retail clients **at the end of the financial year**. With ANZ, CBA, AMP, and Macquarie all drastically reducing the number of advisers under their licence during the 2019/20 financial year, this will unfairly and significantly reduce the amount of the personal advice levy they pay at the end of the financial year, including for ASIC's enforcement activity specifically targeting these entities through the Regulator's Portfolio project.

The benefits of competition are well documented. Competition enhances innovation, choice, efficiency and quality of services for consumers³. It is in the best interests of consumers for the financial advice profession to be effectively regulated, but also for there to be effective competition in the market; the funding model must reflect this consumer best interest principle.

ASIC has the legal ability to recover the Portfolio funds adequately and fairly from those entities subject to that specific and targeted enforcement activity via a direct and separate levy.

The FPA welcomes and supports the inclusion of section *J: Large financial institutions sector* in the consultation CRIS, which introduces a new levy to recover the cost of the implementation of ASIC's Close and Continuous Monitoring of Large Institutions project (CCM Project) directly from the five entities subject to this regulatory activity.

As defined in the consultation CRIS, entities will fall within the *Large financial institutions sector* if

...on 1 July 2018:

b) at least 1,000 relevant providers are:

i) registered on the Register of Relevant Providers; and

ii) authorised to provide personal advice to retail clients on behalf of the entity.

The entities subject to ASIC's Portfolio activity fall within this definition. ASIC set up the specialist Wealth Management Project in October 2014, with the objective of lifting standards in major

³ James A. W. Cox, Professor of Financial Institutions, University of California, Berkeley: *The Increasing Integration and Competition of Financial Institutions and of Financial Regulation*, Published in *Research in Finance*, Elsevier Press, Volume 22, pp. 215-238, 2005.



financial advice providers. Under this project ASIC has carried out a number of investigations and conducted a range of proactive risk-based surveillances with particular focus on compliance in large financial institutions⁴.

The FPA strongly recommends that the recovery of the ESA costs, particularly expenditure related to ASIC's Wealth Management Major Financial Institutions Portfolio, should be recovered in the levy for *Large financial institutions sector*, or a similar special levy for the recovery of costs from the Portfolio activity.

This is not a debate about supporting small business over large business. This is a principal of fairness and encouraging a competitive financial advice market to drive beneficial improvements for consumers. Removing Portfolio expenditure from the personal advice levy and recovering this cost directly from those targeted entities, would reduce the levy for small and medium-sized businesses.

The FPA recommends:

- The regulatory costs of ASIC's Wealth Management Major Financial Institutions Portfolio should NOT be recovered via the tier 1 personal financial advice levy.
- Portfolio regulatory costs should be recovered directly from the entities involved, possibly through the levy for *Large financial institutions sector*, or a similar Portfolio specific levy.
- The model should include control mechanism to ensure an individual entity or a group of 'like' entities are held liable for excessive surveillance and enforcement costs that are directly attributed to their misconduct.
- Costs for very specific and substantial surveillance and enforcement activity that targets a specific group of entities should be recovered through a special project levy applied only to those entities.

Insurance product distributors

Regulation 70 of the ASIC Supervisory Cost Recovery Levy Regulations 2017 states that the insurance product distributor sub-sector includes entities that:

(a) hold, at any time in the financial year, an Australian financial services licence that authorises the holder to deal in general insurance, life risk insurance products or investment life insurance products.

Due to the structure of the licensing regime established nearly 20 years ago with the introduction of the FSR in 2001, financial planners are commonly authorised under their licence to 'carry on a financial services business' to "deal in a financial product", including in life insurance products, as this is the only way planners can implement insurance related advice strategies for their clients under the licensing structure. However, financial planners 'deal in insurance products' on behalf of the client, not on behalf of the product provider. This highlights a fundamental difference in the services provided under the 'deal in a financial product' authorisation that is not recognised in the licensing system or in the current allocation of the cost recovery insurance distributors definition.

⁴ https://as.c.gov.au/about/as.c/news_centre/fnd_a_med_a_re_ease/2015_re_eases/15_081mr_as.c_update_on_wealth_management_project_nvestgat_onto_chargng_of_adv_ce_fees_wthout_prov_dng_adv_ce/



In the CRIS and the cost recovery model, ASIC clearly yet inconsistently recognises the difference between insurance product distributors and financial planners acting on behalf of clients. For example, the consultation CRIS states:

The insurance sector consists of AFS licensees, including life and general insurance product providers, insurance product distributors (such as insurance brokers and AFS licensees who distribute products on behalf of an insurer), and risk management product providers⁵.

Where insurance product distributors, such as insurance brokers, provide general advice or personal advice to a client, this will also be examined by ASIC through our work in the financial advice sector (see Section H)⁶.

Financial planners do not 'distribute' insurance products, or provide brokerage services, and never act as an 'agent' of the insurer to sell their products. Financial planners provide personal financial advice including establishing insurance policies and claims management on behalf of the client.

The FPA assumes it is this recognition by ASIC that brokers and planners perform fundamentally different roles, that justifies why the cost recovery of expenditure related to the Regulator's Life Insurance Framework (LIF) review has been allocated to the personal advice levy and not the insurance distributors levy.

The FPA believe this is inconsistently policy – either the LIF review expenditure should be recovered via the insurance distributors levy; or entities who provide personal financial advice to retail clients on insurance products, including the implementation of that advice on behalf of the client, should be exempt from the insurance distributors levy.

Expenditure on education, guidance and policy advice

The FPA notes that only \$1.324m, or 3 percent of ASIC estimated total operating expenditure of \$36.329m (without adjustments) for regulating licensees that provide personal advice to retail clients on relevant financial products, is spent on industry engagement, education, guidance and policy advice.

Given the positive, preventative potential of such proactive activity and the importance of and need for guidance and policy advice particularly to assist smaller licensees, the FPA suggest the expenditure and activity in these areas appears very low.

The FPA recommends ASIC review its commitment to guidance and policy advice, particularly for small and medium-sized licensees.

COVID-19

Based on ASIC's introductory statement for the consultation CRIS, the FPA assumes and welcomes assurance that the final CRIS 2019-20 will reflect the Regulator's actual work program and expenditure as adjusted in response to the impact of the COVID-19 pandemic, including delays in ASIC's work.

⁵ Paragraph 324

⁶ Paragraph 335



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We would welcome the opportunity to discuss with ASIC the issues raised in our submission. If you have any questions, please contact me on [REDACTED] or [REDACTED].

Yours sincerely

[REDACTED]

Ben Marshan CFP® LRS®

Head of Policy, Strategy and Innovation

Financial Planning Association of Australia

The Financial Planning Association (FPA) has more than 14 000 members and affiliates of whom 11 000 are practising financial planners and 5 720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally.

- Our first "policy pillar" is to act in the public interest at all times
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA
- We have an independent Conduct Review Commission chaired by Dale Boucher dealing with investigations and complaints against our members or breaches of our professional rules
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175 570 CFP practitioners that make up the FPSB globally
- We have built a curriculum with 18 Australian Universities or degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold or be working towards as a minimum an approved undergraduate degree
- CFP certification is the pre-eminent certification in financial planning globally
- We are recognised as a professional body by the Tax Practitioners Board