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Via Email: policy.submissions@asic.gov.au

Dear Sarah

**Application of Cost Recovery Implementation Scheme for Listed Property Funds**

The Property Council welcomes the opportunity to provide comment on the *ASIC Cost Recovery Implementation Scheme (CRIS) indicative levies for 2019/2020.*

The Property Council of Australia champions the industry that employs 1.4 million Australians and shapes the future of our communities and cities. Property Council members invest in, design, build and manage places that matter to Australians: our homes, our schools, hospitals, retirement villages, shopping centres, office buildings, industrial areas, research, tourism, hospitality venues and more.

The Property Council and its members are committed to, and strongly support, measures which encourage good corporate governance practices for all industry participants, and this importantly includes a robust regulatory body.

The Property Council has previously noted its support for the ASIC industry funding model on the understanding that the scheme would equitably allocate ASIC costs across financial market participants and licensed entities; and improve ASIC's resourcing capabilities, service delivery and increase stakeholder engagement during policy formulation.

Unfortunately, the CRIS appears to have been unfairly, and in our view incorrectly, applied for listed property funds – which are subject to both a listed corporation levy and a responsible entity levy, with both fees calculated predominantly on the same assets under management. This highly uncompetitive and anomalous result is due to the unique nature of listed property funds, particularly stapled groups, and was a concern that the Property Council raised during the design of the legislation and its regulations.

There are three fund structures common to Australia's property funds industry:

- **listed stapled property groups** (with both retail and wholesale investors);
- **listed externally managed property funds** (with both retail and wholesale investors); and
- **unlisted externally managed property funds** (many restricted to wholesale investors but there are also unlisted retail funds).

In each case, the focus of the funds is on (one or more of) investing in, developing and managing real estate. Our comments in this letter relate to the application of the CRIS to the first two categories above - listed stapled property funds and listed externally managed property funds, given their unique features, which have attracted two overlapping levies under the *ASIC Supervisory Cost Recovery Regulations (2017)* (the ***Regulations***) – namely, the levy that applies to the 'listed corporations' subsector and the separate levy that applies to the 'responsible entities' subsector.

**Listed stapled property funds**

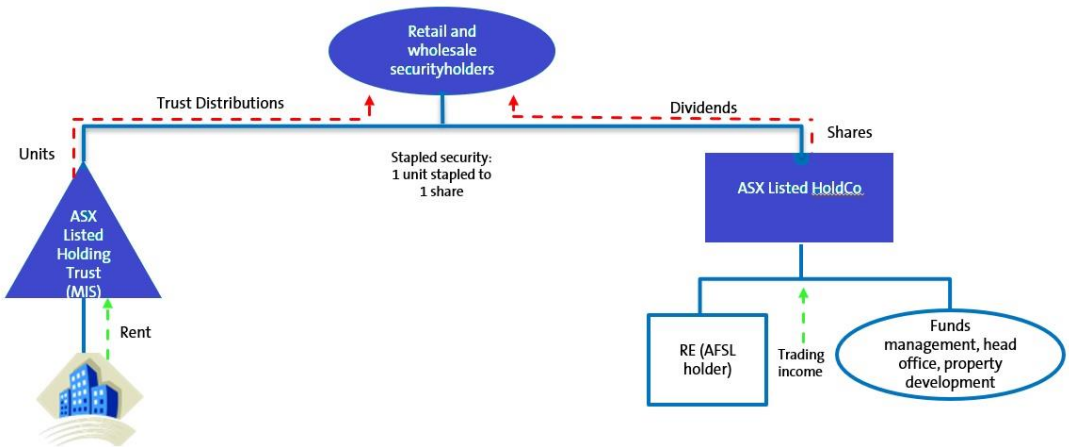
Listed stapled groups typically have an internally managed structure, which means that the investors ultimately have economic exposure to ***both*** the responsible entity of the fund as well as the real estate assets held by the fund. This is achieved by the investors holding stapled securities, comprising shares in a public company (which is the holding company of the responsible entity and other operating companies that may provide services to the fund and its assets), stapled to units in a registered managed investment scheme (***MIS***) that holds the real estate assets. The shares and units are jointly quoted on the ASX as a single stapled security and cannot be transferred separately.

A stapled structure ensures there is a clear separation between passive rental activities (via property owned by the MIS (trust), and active property management and trading activities (held under a company structure).

From an investor's viewpoint this is a single investment in a property group, and functions in a way that is economically equivalent to an investment in a listed company. However, from a taxation and legal viewpoint, this remains an investment in the securities of two (or more) separate entities and structures (albeit that they can only be traded together).

On the corporate side of the staple, investors own an indirect stake in the responsible entity of the stapled MIS. The responsible entity is required to hold an AFSL for, amongst other things, issuing securities in, preparing and distributing information about, and operating, the MIS. The corporate side of the staple may also engage in a range of other activities, including property design, construction, development and management.

A typical (simplified) listed stapled group structure is depicted below:




Listed stapled property groups are currently being charged two relevant levies under the Regulations:

- a listed corporations levy based on market capitalisation under regulation 19; and

- a responsible entities levy (***RE levy***) based on assets under management under regulation 35.

We understand that the industry model can result in an entity being charged levies in respect of more than one sub-sector. For example, an entity that is both a responsible entity and an IDPS operator would be subject to levies under each of those categories. This is appropriate as those regulated activities relate to distinct sets of clients and distinct pools of assets.

By contrast, it is our view that the application of both of the levies described above to listed stapled property groups is distinguishable because both levies:

- are calculated, in large part, by reference to the same pool of assets (that is, the value of the assets of the MIS is used as the reference point for calculating both levies) – which results in double-counting. This is contrary to the policy objective of the CRIS, as evidenced by various carve-outs to avoid similar examples of double counting, such as that contained in regulation 35(3); and
- relate to functions / services provided to the same group of securityholders (being the holders of stapled securities – that is, the shareholders of the listed corporation who are also the unitholders of the listed MIS operated by the responsible entity).

This anomalous outcome results from what we consider to be the inappropriate calculation of the listed corporation levy with respect to listed stapled property groups. In particular:

- Under the Regulations, regulation 19 states:

  *A leviable entity forms part of the **listed corporations*** (emphasis added) *sub-sector in a financial year if, at any time in the financial year, the entity is a listed corporation.*

- 'Listed corporation' is not defined in the Regulations, but under section 9 of the *Corporations Act*, a listed corporation is defined as:

  *…a body corporate that is included in an official list of a prescribed financial market.*

- This is consistent with the definitions of the 'listed corporations' sub-sector that had been proposed by Treasury in the consultation papers relating to the ASIC industry funding model that were issued in August 2015 and in April 2016.
- The listed corporations levy is calculated by reference to the listed corporation's 'market capitalisation' which is worked out by multiplying '*the price for the [listed corporation's] main class of securities'* by the number of securities on issue (regulation 19(5)).
- Even though a listed corporation forms part of a stapled group, *its* securities are only the shares that form part of the stapled securities – not the units in the MIS that also form part of the stapled securities. The shares and the units are quoted jointly on the ASX (see ASX Guidance Note 2 *Stapled Securities*), but this does not alter the fact that the securities of the listed corporation are shares only (and the securities of the listed MIS are units only). Moreover, 'main class' is defined in the ASX Listing Rules as the 'ordinary securities of the 'entity' that is admitted to the official list of the ASX (being the listed corporation).
- Despite this, ASIC is currently applying the listed corporation levy to listed property stapled groups based on the ASX market capitalisation of the stapled securities.
- The ASX market capitalisation of a listed stapled group encompasses ***both*** the listed corporation and the listed trust.
- In our view, this aggregation is inconsistent with the calculation methodology set out in regulation 19, as the listed corporations levy should be calculated only by reference to

the market capitalisation attributable to the shares in the listed corporation. Stapled groups are from time to time required to apportion their (aggregate) market capitalisation as between the 'corporate' and 'trust' sides of the stapled group for various other reasons, including tax, accounting and unit pricing. As such, the mechanism for achieving this apportionment for the purposes of the CRIS should also be a relatively straightforward exercise.

- As a MIS (being a trust) is not the 'listed corporation' to which regulation 19 applies, the assets of the trust should *not* be counted when applying the market capitalisation for the levies.
- The assets of the trust should, and are, counted for the purposes of the separate RE levy, based on assets under management. They should not, however, be double counted under the listed corporations levy.

In making this submission, we are aware of, and acknowledge, the content of the explanatory statement that accompanied the draft Regulations in 2017, which implied that the listed corporations levy may apply to stapled groups, with the market capitalisation calculation referable to the price of the stapled securities, being attributable to both the listed corporation as well as the listed MIS. However, the final Regulations do not refer to stapled groups of the kind referred to in the explanatory statement.

ASIC's current methodology for calculating the listed corporations levy has resulted in listed stapled groups being charged twice in respect of the same assets, and in total levies that are disproportionately high:

- when compared to ASX-listed companies with a similar market capitalisation because listed stapled groups (which are economically equivalent to listed companies) are also charged an RE levy calculated by reference to assets that have already been taken into account for the listed corporations levy;
- when compared to other responsible entities with a similar level of assets under management because listed stapled groups are also charged a listed corporations levy calculated by reference to the assets that have already been taken into account for the RE levy; and
- having regard to the types of regulatory activities in relation to responsible entities that the RE levy is intended to cover. For example, the focus areas for the responsible entities subsector as set out in Table 27 of the Cost Recovery Implementation Statement (2019-20), very few of which would be relevant to a responsible entity of an internally managed stapled group which is functionally and economically equivalent to a listed company.

Listed stapled property groups cannot adjust the listed corporations levy charged in the invoices issued to them, as the market capitalisation and fee amounts are pre-populated fields. This should be remedied to allow listed stapled property groups to adjust its market capitalisation so that it is referable only to the shares in the listed company and disregards the units in the trust (which should not be taken into account in calculating the listed corporations levy).

**Listed externally managed property funds**

Our comments above apply equally to listed externally managed funds because, in those structures, the responsible entity is charged an RE levy calculated by reference to the assets under management, and the listed fund is also (incorrectly in our view) charged a 'listed corporations' levy based on its market capitalisation (being the same assets). Again, there is a duplication of levies being charged.

Even though these structures do not involve the same investors having an ownership interest in both the responsible entity and the listed fund, it is still the case that the application of both levies creates an uneven playing field between listed externally managed property funds and listed companies.

To level the playing field, and to ensure that listed funds are not being charged a disproportionate volume of levies when compared to other listed entities (or responsible entities), we believe there should be an adjustment to the calculation to remove the double-counting similar to adjustments of the kind provided for in regulation 35(3), referred to above.

* * *

We would welcome the opportunity to discuss this matter in more detail with ASIC at the earliest possible opportunity. Our members have serious concerns that the manner in which the levies have been imposed on listed property funds is intrinsically unfair and anti-competitive when compared to other entities within the responsible entity and listed corporation sub-sectors. The duplicate levies that are being charged to listed funds also make it cost prohibitive for new entrants and smaller-scale funds, and therefore lessens competition in the market.

Should you have any questions about this submission please do not hesitate to contact myself or Collin Jennings, Policy Manager – Capital Markets at [redacted] or on [redacted].

Yours sincerely

[redacted]

Belinda Ngo
**Executive Director – Capital Markets**