



8 November 2022

Senior Adviser  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [ASICIFMReview@treasury.gov.au](mailto:ASICIFMReview@treasury.gov.au)

Dear Sir / Madam

**Re: Australian Securities and Investments Commission Industry Funding Model Review - Discussion paper**

The Financial Planning Association of Australia<sup>1</sup> (FPA) welcomes the opportunity to provide feedback on Treasury's discussion paper on the ASIC Industry Funding Model Review.

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 to protect consumers, however we continue to hold significant concerns about the equity of the funding levy and its impact on small and medium-sized financial planning businesses.

We would welcome the opportunity to discuss with ASIC any matters raised in our submission. If you have any questions, please contact me on 02 9220 4500.

Yours sincerely

**Ben Marshan CFP® LRS®**  
*Head of Policy, Strategy and Innovation*  
Financial Planning Association of Australia

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<sup>1</sup> The Financial Planning Association (FPA) is a professional body with more than 10,500 individual members and affiliates of whom around 8,500 are practising financial planners and 5,000 are CFP professionals. Since 1992, 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 the Future of Financial Advice reforms.
- The FPA was 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.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.

## Introduction

The FPA has had concern since the introduction of the ASIC IFM that it was not fit for purpose in relation to the financial planning profession. For this reason, the FPA continues to support the decision by the former Government to provide temporary relief for AFS licensees that provide personal advice to retail clients on relevant financial products (financial adviser levy relief). This was a positive outcome for a component of ASIC's levy framework which was not fit for purpose or fair on a sector who had made significant progress to professionalise but were being charged for past misdeeds undertaken by licensees who were not funding the levy any longer.

While the FPA supports and welcome that the Government has now progressed a review of the IFM and specifically the financial adviser levy by Treasury, we are concerned that with the expiration of the existing freeze, and the outcomes of this review unlikely to be implemented for the current year, the financial advice sector levy will return to previous highs.

### **The FPA recommends urgent action be taken on continuing the freeze of the industry funding model for financial advice.**

Prior to the announcement by the then Treasurer and Minister for Superannuation, Financial Services and the Digital Economy, the ASIC industry levy for financial planners has gone up over 340 per cent in the last four years and is on an unsustainable trajectory.

While the FPA acknowledges the need for an industry-funded regulatory model, two major issues have become apparent since the levy was first applied in the 2017-2018 fiscal year.

1. The levy amount each year has proved to be unpredictable, which makes it practically impossible for a financial planner to effectively budget for this business cost, particularly by a profession that is dominated by small and medium-sized businesses.

The estimate for the 2020/21 year was \$1500 + \$3183, which was a further increase of 31 percent from prior year. The FPA notes 2019/20 estimate was wrong by 54 percent – that is, between the CRIS and the final. This clearly demonstrates the trend of the actual levy figure being significantly higher than estimates.

2. The levy had been increasing at a dramatic rate of 340 per cent over four years, which far surpasses the rate of revenue growth for most financial planning businesses or increases to ASIC's budget. This is being compounded as the number of registered financial planners in Australia have continued to decline, from whom the levy must be recovered.

In any industry, if a cost or a fee was to increase by 340 per cent over four years that industry would be unsustainable.

While the levy is borne by the licensee, these costs are ultimately passed on to the individual financial planner and, in turn, to consumers. If left unaddressed, the ASIC levy, along with other regulatory costs, will continue to impact the affordability of financial advice for Australians.

## Large licensees

ASIC's Report 499: *Financial advice: Fees for no service* outlines the Regulator's enforcement investigations of specific Australian financial services (AFS) licensees charging customers fees to deliver ongoing advice services where those services were not provided. The licensee review and remediation programs of consumers affected by this misconduct has been ongoing since the commencement of ASIC's investigations of this matter 2015. The project focused only on ASF

licensees that were product issuers or provided personal advice to retail clients, and that were part of the following six entities:

1. AMP Limited (AMP)
2. Australia and New Zealand Banking Group Limited (ANZ)
3. Commonwealth Bank of Australia (CBA)
4. Macquarie Group Limited (Macquarie)
5. National Australia Bank Limited (NAB)
6. Westpac Banking Corporation (Westpac)

Report 499 makes it clear that in relation to these entities ASIC “*continue[s] to monitor the advice licensees’ implementation of both the review and remediation processes, and the further reviews instigated at ASIC’s request. This will include regular progress reporting by the licensees to ASIC. We intend to provide a public update, via media release, on the progress and outcomes of these review and remediation activities....*”. This Report was released in October 2016 and focused on misconduct that occurred prior to that date. However, these remediation programs were extended to include other misconduct following evidence presented at the Royal Commission.

RG256: *Client review and remediation conducted by advice licensees* further articulates ASIC surveillance, investigation and enforcement activity specifically in relation to the remediation programs of these six licensees:

*There may be times when we will encourage you to initiate a review of client advice and the remediation of clients, or we may require this as part of our enforcement activities. In these instances, and where you voluntarily commence a process of review and remediation that ASIC is aware of, our involvement may include:*

- (a) general monitoring of the review and remediation process;*
- (b) reviewing and commenting on the design and implementation of the review and remediation;*
- (c) requesting regular reporting on the progress of the review and remediation, and providing feedback on those reports; or*
- (d) a combination of the above.*

*Note: This is not an exhaustive list.* <sup>2</sup>

The table below provides a breakdown of the compensation payments made or offered by these institutions as at 30 June 2022.<sup>3</sup>

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<sup>2</sup> RG 256.43

<sup>3</sup> Based on data released by ASIC on 14 February 2022 – 22-020MR ASIC update: Compensation for financial advice related misconduct as at 30 June 2022

Institution	Fees for no service misconduct		Non-compliant advice	
	Compensation paid or offered	No. of customers paid or offered compensation	Compensation paid	No. of customers paid compensation
AMP	\$626,869,836	331,994	\$42,499,477	2,842
ANZ	\$217,301,375	65,489	\$44,700,475	2,123
CBA	\$290,579,310	144,659	\$9,354,027	626
Macquarie	\$4,628,000	1,105	-	-
NAB	\$1,247,058,303	772,235	\$104,774,706	2,727
Westpac	\$942,173,093	117,018	\$58,785,777	3,341
<b>Total</b>	<b>\$3,328,609,917</b>	<b>1,432,500</b>	<b>\$260,114,462</b>	<b>11,659</b>

The FPA notes that in 2013 ASIC accepted an enforceable undertaking from Macquarie Equities<sup>4</sup>, which was largely complete in June 2017<sup>5</sup>. However, it is unclear how the cost of ASIC’s regulatory activity in relation to enforceable undertakings is recovered.

The compensation paid or offered by these six institutions since the inception of this program is over \$3.5billion to 1.4million Australians. The amount of compensation paid or offered, and the substantial number of consumers involved, indicates that there was a significant amount of ASIC surveillance and investigation activity and resources involved in order to provide effective regulatory oversight of these licensees’ ongoing remediation programs during the last financial year.

ASIC in their most recent consultation CRIS<sup>6</sup> states that “*All entities in this subsector will pay a minimum levy of \$1,500, and a graduated levy based on each AFS licensee’s share of the total number of advisers registered on the financial advisers register at the end of the financial year. This is because the greater the number of advisers, the larger the number of clients able to be serviced and the higher the level of regulatory oversight required*”. (Paragraph 320.)

However, these large licensees have progressively and significantly reduced their footprint in the advice market since 2015<sup>7,8</sup>.

<sup>4</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2013-releases/13-010mr-asic-accepts-enforceable-undertaking-from-macquarie-equities-ltd/>

<sup>5</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-177mr-macquarie-equities-remediation-program-update/>

<sup>6</sup> ASIC Cost Recovery Implementation Statement 2021-22 - <https://download.asic.gov.au/media/izkhmteh/cris-asic-industry-funding-model-2021-22-published-21-october-2022.pdf>

<sup>7</sup> Wealth Data - <https://wealthdata.com.au/adviser-movement-fast-facts>

<sup>8</sup> ASIC Financial Adviser Register – <https://data.gov.au/dataset/ds-dga-f2b7c2c1-f4ef-4ae9-aba5-45c19e4d3038/details?q=financial%20adviser%20register> – version 14/07/2022

Institution	Adviser numbers 2015	Adviser numbers 2022
AMP	3,266	1,035
ANZ	1,239	0
CBA	1,159	0
Macquarie	328	182
NAB <sup>9</sup>	1,773	0
Westpac	1,187	0
<b>Total</b>	<b>8,952</b>	<b>1,217</b>

The exodus by these licensees from the personal financial advice to retail clients on relevant financial products subsector has had a marked impact on the advice market. Analysing data from the Productivity Commission and the ASIC Financial Adviser Register (FAR) shows the growing trend of small businesses who hold and operate under their own AFSL - the percentage of advice licensees operating a firm with less than 10 financial advisers increased from 78% in 2017 prior to the Royal Commission, to 88% in November 2022<sup>10</sup>.

The consultation CRIS states that the “*industry funding model for ASIC ... ensures that the costs of the regulatory activities undertaken by ASIC are borne by those creating the need for regulation*” (paragraph 20). However, this levy is charged to licensees based on the number of financial advisers listed on the ASIC FAR as at 30 June 2022. Given the significant withdrawal from the personal advice to retail clients by these six large licensees, they will not incur a levy for this ASIC investigation and enforcement activity.

The FPA suggest this may be inconsistent with s10(4)(a) of the ASIC Supervisory Cost Recovery Levy Act 2017:

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

*(a) amounts relating directly to the regulation of persons and entities that are not leviable entities;*

The consultation CRIS states that the “*industry funding model for ASIC .... improves our cost transparency and accountability to industry*” (paragraph 20). However, ASIC does not disclose its

<sup>9</sup> On 31 August 2020 NAB entered into a Sale and Purchase Agreement to sell 100% of MLC Wealth (MLC) to IOOF Holdings Ltd - [https://news.nab.com.au/news\\_room\\_posts/nab-announces-agreement-to-sell-mlc-wealth-to-ioof/](https://news.nab.com.au/news_room_posts/nab-announces-agreement-to-sell-mlc-wealth-to-ioof/). The new IOOF will have number of advisers – 1,884 advisers - IOOF financial adviser numbers sourced from ASIC financial adviser register (as at 20 August 2020). MLC adviser numbers sourced from NAB as at 30 June 2020. Assumes all current MLC financial advisers transition to IOOF. Based on active MLC advisers only. - [https://www.ioof.com.au/\\_data/assets/pdf\\_file/0012/403311/IOOF-FY20-results-and-MLC-acquisition-announcement.pdf](https://www.ioof.com.au/_data/assets/pdf_file/0012/403311/IOOF-FY20-results-and-MLC-acquisition-announcement.pdf)

<sup>10</sup> <https://wealthdata.com.au/adviser-movement-fast-facts>

costs in relation to its target oversight of these six large licensees' misconduct investigations and remediation programs.

Table 3: *Regulatory costs to be recovered by statutory levies by activity* of the consultation CRIS states the activities that will be recovered via a statutory levy include ASIC Enforcement Special Account (ESA). For licensees who provide personal financial advice to retail clients on relevant financial products the statutory levy for enforcement activity is \$5.492m<sup>11</sup> based on the capped levy. This is down from an estimated 15.146m<sup>12</sup> in the 2020/21 CRIS, suggesting the estimated levy is significantly below the actual cost to regulate the sector. Historically, the ASIC Wealth Management Project which targeted these six licensees advice failures was funded under the ESA. However, due to the lack of transparency in ASIC expenditure, it is unclear if the ASIC enforcement activity in relation to the ongoing remediation programs of these six licensees is to be recovered via the ESA and therefore the statutory levy, or under the cost recovery levy.

It is unclear whether ASIC recovered the surveillance, investigation and enforcement costs related to these remediation programs from the six large licensees directly or if this activity is funded under the ESA. If ASIC is unable to recover these costs from these large licensees, the remainder of the industry, 98.19 percent of whom are small and medium licensees<sup>13</sup>, will be left to cover these costs again this financial year. This will likely break some financial planners and licensees and potentially lead further to exits from the industry.

The recovery of these ASIC costs via the levy will be felt by smaller businesses immediately. Such businesses do not have the capacity to absorb these costs

## Litigation

The fees for no service misconduct and non-compliant advice failings of the six large licensees investigated by ASIC has also resulted in the Regulator continuing, commencing or planning court action against these entities. The following media releases published by ASIC clearly demonstrate the extent of activity ASIC would have undertaken to pursue these litigations during 2020-2021:

1. 20-190MR *ASIC commences civil penalty proceedings against BT Funds Management and Asgard Capital Management [of the Westpac Group] for charging fees for no service and misleading statements* (20 August 2020) – The matter was listed for a case management hearing in the Federal Court on 6 November 2020, where the Court ordered the filing of a statement of agreed facts and any material both parties will rely upon in relation to penalty and other relief. The matter was listed for a penalty hearing on 22 July 2021.
2. 19-360MR *ASIC takes court action against NAB for fees for no service and fee disclosure statement failures* (17 December 2019) – court case continued throughout the 2020-2021 with the penalty hearing occurring on 17-18 June 2021. Judgment was reserved.
3. 21-115MR *ASIC sues AMP for charging deceased customers* (27 May 2021) – this action is ongoing and was against five companies that are, or were, part of the AMP Limited group, alleging that these entities were involved in charging life insurance premiums and advice fees to more than 2,000 customers despite being notified of their death.

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<sup>11</sup> Table 65: Estimated levies to recover costs to regulate licensees that provide personal advice to retail clients on relevant financial products

<sup>12</sup> Table 64: Estimated levies to recover costs to regulate licensees that provide personal advice to retail clients on relevant financial products

<sup>13</sup> <https://wealthdata.com.au/adviser-movement-fast-facts> - Updated with ASIC Data, Released Aug 5, 2021

4. 20-143MR ASIC sues CBA and Colonial First State for payment of banned conflicted remuneration (23 June 2020) – this case was first heard in July 2020 and was still before the court as at 30 June 2021.
5. 21-196MR Court finds RI Advice liable for failing to supervise financial adviser following ASIC investigation (2 August 2021) – this case was first lodged in October 2019 and was still before the courts in July 2021.

The consultation CRIS states that:

*We actively seek to recover our investigation and litigation costs directly from the entity involved when we are successful in a matter before the courts. Where possible, we will seek to recover enforcement costs directly from entities involved (e.g. where there is a successful outcome in court). These recoveries are accounted for as ASIC's own-source revenue and are used to offset the levies for relevant subsectors (paragraph 60).*

*Less costs funded by own-source revenue—Our regulatory costs are adjusted downwards to reflect revenue from the recovery of our regulatory costs. This revenue is generated from sources such as .... the recovery of court awarded costs. The revenue is offset against the regulatory costs for the subsector in which the cost has been allocated. For example, if we are successful in a matter before the courts, we will actively seek to recover our costs directly from the entity involved. Any recoveries will be applied back to the subsector initially levied for the enforcement activity. The actual amount we are able to recover in these instances will vary, as not all costs can be recovered (e.g. where the entity or person we took action against does not have sufficient assets to pay the costs awarded). Generally, we are only able to recover costs when there is a court-based outcome (paragraph 64(b)).*

*....an upward or downward adjustment to our regulatory costs will be made in the following year.*

As mentioned above, the consultation CRIS states that the “*industry funding model for ASIC .... improves our cost transparency and accountability to industry*” (paragraph 20). However, similar to its target oversight of the six large licensees’ misconduct investigations and remediation programs, ASIC does not disclose investigation and litigation costs.

ASIC continued its active investigations and litigation of large licensees as indicated by the above media releases, however due to the lack of disclosure of ASIC costs and recoveries in relation to these activities, it is unclear if investigation and litigation costs were recovered from these entities, fell under the ASIC Enforcement Special Account, or are yet to be recovered from these entities and therefore are included in the 2022 ASIC levy for the subsector.

It is also unclear whether ASIC recovered these investigation and litigation costs were recovered from the large licensees involved in these court cases prior to the CRIS estimates being released; or if ASIC will be able to recover such costs prior to the final levy being determined. If ASIC is unable to recover these costs from the large licensees, the remainder of the industry will be left to cover these costs this financial year. As 98.23 percent of the industry are small and medium licensees with less than 100 advisers, this will likely break some financial planners and licensees and potentially lead further to exits from the industry.

The recovery of these ASIC costs via the levy will be felt by smaller businesses immediately. Such businesses do not have the capacity to absorb these costs this year in the hope that ASIC will recover this expenditure from the appropriate entity in the coming 12 months and a downward adjustment made to ASIC’s regulatory in the following year.

## Government Charging Framework

As stated under the Australian Government Charging Framework<sup>14</sup>, the following Charging Principles apply to charging activity by government entities, including charging for regulatory activity:

- Transparency – making available key information about the activity, such as the authority to charge, charging rates, and, where relevant, the basis of the charges
- Efficiency – delivering activities at least cost, while achieving the policy objectives and meeting the legislative requirements of the Australian Government
- Performance – which relates to effectiveness, risk mitigation, sustainability and responsiveness. Engagement with stakeholders is a key element of managing and achieving performance. Entities must regularly review and evaluate charges in consultation with stakeholders to assess their impact and whether they are contributing to government outcomes
- Equity – where specific demand for a government activity is created by identifiable individuals or groups they should be charged for it, unless the Government has decided to fund that activity. Equity is also achieved through the Government's social safety net, to ensure that vulnerable citizens are not further disadvantaged through the imposition of a charge
- Simplicity – whereby charges should be straightforward, practical, easy to understand and collect
- Policy consistency – charges must be consistent with Australian Government priorities and policies, including entity purpose and outcomes. Australian Government agreement may be required for the introduction of new charges and/or changes to charges.

The Australian Government charges the non-government sector for a range of regulatory activities by recovering some or all of the efficient costs of those activities. Regulatory activities are generally those activities where the government wishes to control or influence behaviour, manage risk and/or protect the community.<sup>15</sup>

The FPA suggests controlling or influencing behaviour is most successful if those involved in misconduct are held to full account through enforcement activity and the requirement to reimburse the government for costs directly resulting from ASIC investigation and enforcement activity targeting those specific entity/entities, such as the six large licensees. The Australian Government Cost Recovery Guidelines (the CRGs) also require the cost recovery of regulatory activity to include alignment between expenses and revenue<sup>16</sup>.

However, the current ASIC funding model for licensees who provide personal financial advice to retail clients on relevant financial products allows licensees to reduce or avoid the levy by removing advisers from the FAR before 30 June. As discussed above, due to the lack of transparency of ASIC expenditure, it is unclear whether entities who have exited or significantly reduced membership of a subsector yet continue to be subject of targeted surveillance, investigation and enforcement activity of

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<sup>14</sup> <https://www.finance.gov.au/government/managing-commonwealth-resources/managing-money-property/managing-money/australian-government-charging-framework/charging-framework>

<sup>15</sup> <https://www.finance.gov.au/government/managing-commonwealth-resources/managing-money-property/managing-money/australian-government-charging-framework/charging-regulatory-activities-cost-recovery>

<sup>16</sup> <https://www.finance.gov.au/government/managing-commonwealth-resources/managing-money-property/managing-money/australian-government-charging-framework/charging-regulatory-activities-cost-recovery>



historic breaches of the law, including litigation, are required to reimburse the government for this regulatory activity.

## **FPA Recommendations – personal advice levy**

It has been four years since the levy was first introduced, and the FPA welcomes this critical review by Treasury of its implementation and impact on the financial services sector. Making financial advice more affordable for all Australians starts with making financial planning more affordable to practice.

There are activities that we're aware ASIC undertakes that have nothing to do with financial planners, yet they are placing that cost on financial planners through his levy.

The FPA notes that "*Departments of State must conduct periodic reviews of all existing and potential charging activities within their portfolios at least every five years, in accordance with the published schedule of portfolio charging reviews or at other times agreed by the Finance Minister*"<sup>17</sup>.

Given the significant inequity of the ASIC industry levy, the FPA strongly supports a framework be developed to provide a more equitable and predictable annual levy, and for the year-on-year increases to better reflect the capacity of the financial planning profession, before more financial planning practices are forced to close.

The FPA recommends the following must be implemented to address the immediate and ongoing issues of the ASIC levy for the personal financial advice to retail clients on relevant financial products subsector.

### 1. Urgent and immediate intervention needed

**Retrospective Regulations be created and applied to cordon off and charge the six large licensees directly under a separate and specific levy for the cost of ASIC's ongoing oversight of their remediation programs and litigation.** Additionally, this provision should be extended to any additional large licensees with remediation programs as and when they occur to ensure small business is not paying for the misconduct of large corporations.

Section 10(8) of the ASIC Supervisory Cost Recovery Levy Act 2017 permits the retrospective application of regulations made for the purposes of amounts ASIC must not include (s10(4)(c)) and may include (s10(5)(e)) in determining an amount for a financial year:

*(8) Subsection 12(2) (retrospective application of legislative instruments) of the Legislation Act 2003 does not apply in relation to the following:*

*(a) regulations made for the purposes of paragraph (4)(c) or (5)(e);*

*(b) a legislative instrument made for the purposes of subsection (2).*

It is unclear whether ASIC is obligated under legislation or regulations to recover the cost of litigation and investigations relating to court action in the industry levy. Consideration should be given to excluding these costs from the levy where these matters are ongoing, until the litigation proceedings are complete and the matter has been determined by the court. This will make it clear whether ASIC has achieved a successful outcome in relation to the litigation, and therefore whether costs will or will not be recovered from the entity subject to litigation investigation and proceedings.

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<sup>17</sup> <https://www.finance.gov.au/government/commonwealth-resources/managing-money-property/managing-money/australian-government-charging-framework/portfolio-charging-reviews>

This will alleviate the inequitable upward pressure on the levy incurred by licensees not subject to this enforcement activity.

## 2. Improve predictability and transparency of Levy

There appear to be ongoing challenges with ASIC accurately predicting the levy between the draft and final CRIS which has resulted in dramatic levy increases for the financial advice sector. It is unclear if there is an accounting or capability issue, but the data provided in this report shows the dramatic variability between predicted and actual outcomes in the financial advice sector on an annual basis. To the point of Question 2 of the discussion paper, there is no transparency on where the costs associated with the financial advice sector are coming from, neither in the current CRIS papers, nor in this discussion process.

**We recommend Treasury investigate the reasons behind the variability in estimates and actual levy for the financial advice sector including the capability of ASIC staff.**

## 3. ASIC resourcing

While we generally note that ASIC resourcing appears constrained through a combination of budget and efficiency dividends, we would highlight that at times during consultation meetings, sector specific and direct meetings with ASIC, large numbers of ASIC staff are often in attendance. We can only assume this is charged back to sectors involved in the meetings on a pro-rata basis, however we question the need to large numbers of staff to be present in many meetings and the cost this adds to sectors.

**We therefore recommend ASIC be required to consider meeting resources for all stakeholder meetings.**

## **Insurance sector**

Due to the definition of insurance product distributors in s70 of the ASIC Supervisory Cost Recovery Levy Regulations 2017, personal advice licensees continue to be charged an additional flat levy under this subsector if their AFS licence authorises them to deal in general insurance, life risk insurance products or investment life insurance products. This authorisation is required for financial planners to provide life risk advice to retail clients, which is subject to the financial advice obligations in the Corporations Act and legally obliges them to act on behalf of the client, not the insurer.

The ASIC regulatory activity that relates to the personal advice to retail clients on life insurance products includes the review of the Life Risk Framework (LIF) and is clearly covered under the appropriate financial advice subsector as detailed in the consultation CRIS.

The consultation CRIS states that 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 providers (paragraph 335).

Financial advisers act on behalf of the client, not the insurer, and are not involved in any of the regulatory activity detailed in Table 69: Focus areas in the insurance sector (2021–22) of the consultation CRIS which are relevant to “insurance product distributors”.

Focus area	Description
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Mis-selling	<ul style="list-style-type: none"> <li>• Analysing the risk of inappropriate product design and distribution in the current environment by monitoring: <ul style="list-style-type: none"> <li>– the design and sale of poor value insurance products;</li> <li>– the use of potentially unfair contract terms;</li> <li>– the distribution practices that may lead to poor outcomes for consumers and may breach the law; and</li> <li>– the mis-selling of unsuitable insurance products.</li> </ul> </li> <li>• Taking swift action to deter misconduct and punish breaches of the law.</li> </ul>
Financial Services Royal Commission recommendations	<p>Continuing to progress the implementation of Financial Services Royal Commission recommendations, including those relating to:</p> <ul style="list-style-type: none"> <li>• a deferred sales model for add-on insurance—see <a href="#">Regulatory Guide 275 <i>The deferred sales model for add-on insurance</i></a> (RG 275);</li> <li>• making insurance claims handling and settling services a ‘financial service’ under the Corporations Act—see <a href="#">Information Sheet 253 <i>Claims handling and settling: How to comply with your AFS licence obligations</i></a> (INFO 253);</li> <li>• applying the hawking prohibition to insurance—see <a href="#">Regulatory Guide 38 <i>The hawking prohibition</i></a> (RG 38))</li> </ul> <p>We will also:</p> <ul style="list-style-type: none"> <li>• collect data to support the Australian Government’s response to Financial Services Royal Commission recommendation 2.3 (Review of measures to improve quality of advice); and</li> <li>• assist the development of a data request to support the Australian Government’s response to Financial Services Royal Commission recommendation 2.6 (General insurance and consumer credit insurance commissions), relating to how remuneration structures affect consumer outcomes in the sale of general insurance.</li> </ul> <p>We will analyse insurance terms to monitor compliance with Financial Services Royal Commission recommendation 4.7 (Extending unfair contract terms law to insurance) and take regulatory action where appropriate.</p>
Stakeholder engagement	<ul style="list-style-type: none"> <li>• Influence our regulated population to improve compliance and minimise consumer harm, while improving our understanding of issues and industry developments.</li> <li>• Undertake outreach work, communicate and consult with ASIC’s stakeholders, including professional bodies and associations (e.g. Financial Services Council and Insurance Council of Australia), agencies, and other regulators.</li> </ul>

As financial advisers act on behalf of the client, not the insurer, the Parliament amended the Corporations Act to exempt advisers from the claims handling obligations in the law.

Financial advisers are not involved with virtually any of the regulatory activity listed above (with the exception of Financial Services recommendation 2.3 which could more appropriately be charged to the financial advice subsector) for this subsector. Therefore their continue inclusion is not in line with the Australian Government Charging Framework.

This is a fundamental flaw in licensing system and the ASIC funding model.

### **FPA recommendation**

The FPA recommends s70 of the ASIC Supervisory Cost Recovery Levy Regulations 2017 be amended to specifically exclude the provision of personal advice to retail clients on relevant financial products from the definition of the insurance product distributors.

### Future operation of single disciplinary body

The Cost Recovery Levy Regulations prescribe that certain amounts are not part of ASIC’s regulatory costs and therefore will not be recovered under the industry funding regime, including the costs of operating the committees convened on an ad-hoc basis to consider disciplinary matters relating to registered liquidators (registered liquidators disciplinary committees).

The FPA considers a similar approach should be adopted for Financial Services and Credit Panels convened to consider disciplinary matters relating to registered relevant providers following the establishment of the new single disciplinary body for financial advisers within ASIC.

The FPA would welcome the opportunity to provide input into discussion of possible funding options of the single disciplinary body.

### FPA response to Discussion Paper Questions

<b>Question 1</b>
<p>While the FPA supports an industry funding model which is fair and sector specific costs are paid for by the specific sector, the current model in relation to the financial advice sector has led to perverse outcomes. Specifically small financial advice licensees bearing the cost of ASIC supervision and enforcement related to large licensees who no longer provide financial advice, but have legacy remediation programs. While these programs are the result of misconduct, ASIC’s surveillance of these licensees was such that misconduct was allowed to continue for significant periods of time, and remediation programs have been ineffective. Additionally, examples such as at the BT Super case which involved a superannuation licensee inappropriately providing personal advice has been charged to the financial advice subsector despite no financial advice licensee being involved rather than the superannuation sector at fault.</p> <p>For this reason, the FPA recommends that a mechanism be (re)introduced to allow ASIC to directly charge large licensees for supervision and enforcement activity, rather than the whole sector, especially when the licensee is no longer active in the sector.</p>
<b>Question 2</b>
<p>While the sub-sector levy calculations are clear, transparent, and based on reasonable metrics (for example – the number of financial planners a licensee has authorised) the FPA has two concerns with the model.</p> <p>Firstly, there is an incentive for licensees to remove representatives from being authorised close to the end of the financial year to minimise their ASIC Levy, despite contributing to the costs of the sector through the financial year.</p> <p>Secondly, there is no transparency on what costs are charged to sectors. It is impossible to assess at any point whether the costs charged to a specific sector are reasonable or appropriate or allocated fairly. To be clear, this is both in relation to this discussion paper, and more broadly the lack of transparency provided in either of the CRIS reports.</p>
<b>Question 3</b>

While a simpler framework would obviously reduce administrations costs across ASIC, the current model is not fundamentally unfair except in narrow examples such as financial advice. Generally speaking a model which aligns the fee paid by a sub-sector to the costs of regulating it is fair. It is also not fair to charge clients (who ultimately pay through the fees they pay the financial services entity) for regulation of different sub-sectors they don't purchase financial services or products from. To this point, it is also fair for ASICs costs to be charged directly to financial services entities rather than ask the Australian population to broadly pay for ASIC's activities through taxes.

However, in relation to financial advice specifically, there are large organisations who have for the most part driven the majority of cost for the sector, who through the operation of the financial advice sector model have born little (if any) of the cost to regulate the sector. Specifically the licensees referred to in Report 499, and more recent cases such as Aware Super and Dixon Advisory. For this reason, the IFM should have the ability, where appropriate, for ASIC to directly charge licensees who create a particularly large cost for the sector, particularly where they do not participate in that sector.

#### Question 4

Yes, subsidisation within a sector is more appropriate than across sectors, however, only where the costs are clearly relevant to the monitoring, supervision and enforcement of the entire sector, or are otherwise unrecoverable by ASIC due to failure of the licensee. Where ASIC cost is expended on a specific licensee for misconduct, this cost should not be born across the entire sub-sector unless it is otherwise unrecoverable.

Additionally, court costs should be segregated until a determination of the case has been made including a ruling on costs by the court.

#### Question 5

The FPA notes the lack of information provided in the data provided by Treasury or is made available through the CRIS process as to how costs are assigned to specific sub-sectors for specific work undertaken by ASIC has not been provided. The FPA has therefore been unable to consider alternate suggestions.

#### Question 6

Given the sub-sector metrics are set annually by legislative instrument, there is sufficient flexibility and regular opportunity to review and ensure the metrics remain fit for purpose for each subsector. We would recommend however that these are reviewed and measured for appropriateness every two to three years to ensure there is ongoing appropriateness and the variable measures are being set effectively.

#### Question 7

In the first instance, enforcement costs should be charged directly to the licensee responsible for creating the enforcement cost, but where this is unable to be collected, it is reasonable to spread this cost over the sub-sector as it encourages accountability across the sub-sector for all participants to improve protection for consumers.

#### Question 8

There is a balance between transparency and privacy in relation to enforcement activity depending on the underlying issue.

For the purpose of the discussion paper, it would have been useful to understand the underlying cause of enforcement activity and how it affects the levy to each sub-sector rather than an accumulated figure. For example, what proportion related to conduct by specific types licensees; what kinds of conduct have resulted in what proportion of the cost; what size licensees has specific conduct required enforcement activities by ASIC; where ASIC splits costs across sub-sectors, how is this determined. This kind of information may have assisted in answering a number of questions in the discussion paper.

#### Question 9

The concern with this approach is the lack of transparency and concern of the sector in how these costs are assigned to a specific sector. In two recent examples ASIC have assigned costs to the financial advice sector for misconduct by a superannuation licensee who was not licensed to provide advice; and an unlicensed individual who ran a ponzi investment scheme. We are therefore concerned with ASIC's ability to assign these costs to the correct sector and the transparency of how this occurs.

Additionally, there is a concern with how long ASIC take to deal with unlicensed activity which has the effect of ultimately increasing the costs associated with ASIC dealing with it. The FPA regularly reports misconduct and unlicensed activity to ASIC and is often concerned with the delays and decisions of ASIC to not investigate at that time, only to see action taken against the individual or organisation after significant delay. This delay adds significant cost to the sub-sector, both in dollar terms, and reputational damage.

#### Question 10

As noted in our response to Question 6, a regular review of subsectors, including emerging sectors should be undertaken on a regular basis.

#### Question 11

Given capital expenses should ultimately improve the efficiency and effectiveness of ASIC's regulatory activities, ASIC's capital expenditure is therefore for the benefit of the entire financial services system, so unless it relates to a specific sector, it is appropriate to share this cost equally to all sectors and licensees.

#### Question 12

As per Question 11.

#### Question 13

As per Question 11. We additionally note, as we have through this response, that there is insufficient transparency broadly in the data, information and outcomes provided in the data of this discussion paper or provided by ASIC as part of the CRIS, so improved transparency would be welcome as a broad outcome of this review.

#### Question 14

As a general concept and to support businesses budgeting for regulatory costs, there is a benefit to the provision of estimated levies. To date however, no, there has been little value in estimates given the variability between estimates for the financial advice sub-sector and the actual levy over

the relevant period ASIC IFM levies have been in place with the exception of last financial year where the levy was frozen and known in advanced.

**Question 15**

Sectors will benefit from having more certainty and the ability to budget from year to year with lower volatility in levies, particularly smaller licensees without the capital manage large volatility. We are aware of many small licensees maintaining capital well in excess of the sub-sector levy amount to ensure they have covered the cost in the absence of certainty. On the other hand, a user pays systems should appropriately assign cost to the regulated entities which create the cost. Therefore, as we have noted in earlier responses, improved transparency, improved estimates and improved trust in the accounting of ASIC will improve the certainty for sub-sectors.

**Question 16**

For small businesses in particular, there would be a benefit to reducing the volatility of the ASIC levy from year to year, but this needs to be balanced against the risk of larger shocks if the levy need to be reset at a later date.

**Question 17**

Generally, there are no issues with the fee for service model. However, specifically in relation to the financial adviser register (FAR), where there are legislated or mandatory reporting obligations which require reporting on the FAR, there is an unfairness in charging a fee to update the information on the FAR for the authorised representative. For this reason, consideration in the fee for service model should be given to fees for meeting general regulatory obligations (Such as authorisation or de-authorisation) verse one off compulsory obligations (such as recording having met the exam obligation) which would be more appropriate to charge through the sub-sector levy to account for both the obligation and the IT expenses for modify the systems.

**Question 18**

As per Question 17.

**Question 1**

The FPA would support a gradual increase to fee for service costs until the deficit is met, noting the variability in cost needs to be managed appropriately.

**Question 20**

No, it is not appropriate for ASIC to set the fees. This should remain set by Government to ensure appropriate accountability and governance is maintained.

**Question 21**

As per Question 20.

**Question 22**

As per Question 20.

**Question 23**

Costs for activities should be born by the entity which creates the cost. For this reason, the FPA does not support license application and closure fees being charged collectively to the sub-sector.

Secondly, the ongoing cost of maintaining a license (ASIC levies, financial reporting etc.) is significantly higher than the cost of cancelling a license, so we do not believe there is a disincentive to maintaining a license verse closing one.

**Question 24**

As per Question 23.

**Question 25**

Yes, the FPA supports this model.

**Question 26**

Given the variability in outcomes and the most recent levy freeze, the FPA has found little engagement in the transparency and consultation mechanisms in the financial advice sub-sector. The FPA's members generally rely on the FPA providing a summary of costs and impacts rather than reviewing the CRIS or responding to it directly.

**Question 27**

The FPA questions the transparency of the consultation process given the high level information is provided at. Significantly more granular detail should be able to be provided by ASIC as part of its regulatory reporting obligations. There has also been significant variability in the timing of the CRIS over the last few years which has added to the lack of transparency of and use of the consultation process.

**Question 28**

As per Question 27.

**Question 29**

Theoretically, it is both useful and beneficial to understand the work, trends and upcoming costs disclosed in the CRIS. As noted in earlier responses, there is little benefit given the variable outcomes and lack of consideration submission to the CRIS process have in affecting an improvement to the final outcome.

**Question 30**

Yes. The financial advice sector has seen significant differences between draft and final CRIS levy figures with little or no explanation of how costs can vary so significantly, sometimes as little as 2 or



3 months between publications. This variability should be explained given the significant differences noted.

**Question 31**

While ASIC regularly publishes regulatory priorities each year, there is little or no reporting against these priorities in annual reports, or the impact priorities have financially on the sub-sector to justify the cost charged.