

3 November 2022

Senior Adviser  
ASIC IFM Review  
Regulator Engagement and Powers Unit  
Treasury  
Langton Cres  
Parkes ACT 2600

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

To Whom It May Concern

### **ASIC Industry Funding Model Review**

The Property Council welcomes the opportunity to comment on the review of the Australian Securities and Investments Commission (ASIC) Industry Funding Model (IFM) to ensure its settings remain appropriate in the longer-term.

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, retirement villages, shopping centres, office buildings, industrial areas, education, research and health precincts, tourism and 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 IFM on the understanding that the scheme would 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.

This submission reiterates previous concerns regarding the application of the IFM to property funds and addresses the following questions proposed in the September 2022 Treasury Discussion Paper:

- Is it more important to have a simpler model that can be more readily understood by entities and administered by ASIC which may result in increased cross-subsidisation, or a more equitable model (similar to the status quo) that closely links the recovery of costs to the groups of entities causing the need for those costs?
- Is cross-subsidising costs for entities within a sub sector or sector more appropriate than cross-subsidising costs across all of ASIC's regulated population? If so, why?
- Is it appropriate for ASIC to have the power to set fee amounts, or should this power remain with the Government?

- If ASIC were provided the power to set fee amounts, should there be any limitations on what fees it can adjust, or by how much? For example, setting caps on specific fees in primary law or regulations, or setting principles to guide ASIC's setting of fee amounts?

### **The application of the IFM to Property Funds**

As raised in previous submissions, the IFM 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.

For ease of reference the full submission is enclosed, and outlines how listed stapled property funds and listed externally managed property funds, given their unique features, 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. The quantum of the respective fees highlights the significance of the issue.

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 IFM, 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.

Similarly, with listed externally managed funds, 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 recommend that 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).

**Is it more important to have a simpler model or a more equitable model?**

The Property Council supports a more equitable model that links the recovery of costs to the groups of entities causing the need for those costs. However, a more equitable model should be accompanied by increased transparency as the methodology for allocating costs and activities under the IFM as it is currently complex and unclear. Furthermore, a review of the levies for property funds (as noted above) is necessary to ensure that an equitable model is truly achieved.

#### **What is the appropriate approach to cross- subsidisation?**

The Property Council does not support cross- subsidisation across all of ASIC's regulated entities. It is inappropriate for sub-sectors that have limited compliance and enforcement costs to fund those sub-sectors that incur significant costs – particularly due to poor compliance by entities within that sub-sector. Furthermore, questions remain as to whether the existing model is meeting the key design objective of the IFM to ensure proportionality – the reliance on 'market capitalisation' or 'assets under management' metrics means that larger entities, that typically adopt the high standards of governance expected of them, appear to be funding a lot of ASIC's regulatory activity. The reliance on metrics relating to financial capacity to pay is not aligned to the proportionality principle/level of regulatory activity. To ensure an appropriate level of proportionality, a more risk based approach may warrant consideration.

It is noted that ASIC actively seeks to recover investigation and litigation costs directly from the entity involved when it is successful in a matter before the courts, but that a majority of enforcement costs are recovered from the relevant sub sector, not the individual entity that is the subject of the enforcement activity. Any penalties or fines from litigation activities is not used to offset these sub-sector costs. Consideration should be given to better funding approaches for investigation and litigation costs including using awarded penalties and fines to reduce sub-sector fees and/ or increased entity level financial penalties recovered from the entities subject to enforcement activity. This goes against the reasons outlined in the Discussion Paper justifying an IFM as a mechanism to "promote equity, whereby the recipients who create the need for a government activity... bear its costs".

It is also noted that ASIC undertakes regulatory activities with respect to entities that are subject to regulatory exemptions, such as crypto assets, that are recovered from existing licensed and regulated sub-sectors. The Property Council questions why entities that fulfil their obligations under the IFM are required to fund regulatory activities for those entities that have regulatory exemptions. This is particularly concerning for listed property funds that are already subject to unfair double charging as to both a listed corporation levy and a responsible entity levy to fund regulatory exempt entities.

#### **Is it appropriate for ASIC to set fee amounts? Would there be limitations on fee adjustments?**

The Property Council notes that the types of activities ASIC can charge fees for are set in primary law, with specific chargeable matters and fee amounts set in regulations by the Government and acknowledges that changes to primary law are time consuming.

Parliamentary oversight is necessary to ensure that the policy settings governing the IFM are appropriate, including the fee amounts. The Discussion Paper does not provide any strong evidence as to why ASIC should be able to set fee amounts, nor how fee setting and the efficiency of services provided would be correlated. Furthermore, in the absence of Parliamentary scrutiny, the ability to increase fees without oversight, principles or efficiency improvements would be very concerning given that a stated objective of the IFM is to "improve the fiscal position of government".

We would welcome the opportunity to discuss the IFM and its application to listed property funds in more detail with ASIC at the earliest possible opportunity. Should you have any questions about this submission please do not hesitate to contact me on 0400 356 140 or [bngo@propertycouncil.com.au](mailto:bngo@propertycouncil.com.au).

Yours sincerely





Belinda Ngo

**Executive Director, Capital Markets**