9 October 2015

By email: asicfunding@treasury.gov.au

Senior Adviser
Financial System and Services Division
The Treasury
100 Market Street
Sydney NSW 2000

Dear Sir or Madam

Proposed industry funding model for the Australian Securities and Investments Commission

We welcome the opportunity to comment on Treasury's consultation paper proposing an industry funding model for ASIC (**the consultation paper**). The following is a joint submission prepared by

- Care Financial Counselling Service and the Consumer Law Centre of the ACT
- CHOICE
- Consumer Action Law Centre
- Consumer Credit Legal Service WA
- Financial Counselling Australia
- Financial Rights Legal Centre
- Hobart Community Legal Service
- Indigenous Consumer Assistance Network
- National Seniors Australia

Background on each of the contributing organisations is in the appendix.

While we support moving ASIC to an industry funding model, we do not support the model proposed by the consultation paper.

Briefly, this submission argues that:

- the proposed industry funding model will not provide ASIC with more adequate or more stable funding than it receives now;
- the model should be revised to explicitly state an intent for ASIC to have more capacity to regulate problem sectors than it currently has;
- ASIC will need to receive new funding to cover new costs of implementing an industry model;
- funding should be reviewed every three years (as recommended by the FSI final report) rather than annually;
- an industry funding model should mean that all of ASIC's operations, apart from a few limited and well-reasoned exceptions, are funded by industry;
- an industry funding model should also be used to provide funding for financial counselling services and specialist financial services community lawyers;
- financial literacy programs should be funded by industry;
- certain elements of the industry consultation proposed in the consultation paper would create more cost than benefit and, unless tightly controlled, pose a risk to ASIC's independence;
- ASIC is already subject to a range of accountability mechanisms, and a shift to an industry funding model does not, in itself require additional accountability;
- we have particular concerns around the Cost Recovery Implementation Statement and the Cost Recovery Stakeholder Panel proposals;
- if the Cost Recover Stakeholder Panel is established, it must have equal consumer and industry representation;
- ASIC's Consumer Advisory Panel should be given an opportunity to contribute to the risk assessment process.

We have not sought to answer every question put by the consultation paper. Where our responses are relevant to one of the consultation questions we note that in the text.

Support for an industry funding model

We support an industry funding model for ASIC because we believe a well-designed model will mean ASIC is better resourced, has more funding stability, and is better placed to be the regulator the Australian public expects. ASIC needs enough funding to be proactive (able to investigate suspected misconduct rather than waiting for a crisis), independent (accountable to the Government and Parliament, but able to set its own agenda), flexible (able to keep up with rapid change in the industries it regulates) and able to offer salaries in line with the financial services industry.

The final report of the Financial System Inquiry (FSI) expressed a similar view in the course of recommending that ASIC be provided with more stable funding and be funded through industry levies (Recommendations 28 and 29).

The report found that ASIC (and APRA) 'lack stable funding' and

> …are subject to unpredictable budget reductions and unexpected efficiency dividends that limit their capacity to plan how they will dedicate resources beyond the short term.[1]

According to the FSI final report, submissions to the Inquiry supported financial regulator funding having 'a high degree of stability and certainty', and voices from both industry and consumer stakeholders argued

> …that ASIC is not adequately funded to carry out its current consumer protection mandate in relation to the financial services industry, let alone the more proactive role the Inquiry recommends ASIC should adopt in the future.[2]

Recommendations 28 and 29 were very much concerned with adequacy of funding for ASIC. It is notable that Recommendation 29 of the FSI Final Report proposes an industry funding model alongside increased regulatory power—the funding model was designed to increase the resources available to ASIC.

Stability of funding was also a core concern. The panel considered that

> the main benefit of industry funding is its potential to give ASIC more predictable funding as well as strengthen engagement between ASIC and industry on the costs of conduct and market regulation.[3]

The Inquiry panel felt that the current funding models 'do not promote regulator independence and accountability' but these would improve if funding was 'based on periodic funding reviews rather than annual Government decisions'.[4] The final report recommended that 'three-yearly reviews would bring additional rigour to the budget process, and improve the efficiency of the regulators'.[5]

Opposition to the model proposed in the consultation paper

We do not support the industry funding model proposed in the consultation paper because it falls short on ensuring adequacy and stability of funding.

<u>Adequacy of Funding</u>
The consultation paper gives no indication that the proposed funding model will give ASIC more funding than it receives now, and we believe the model proposed in the consultation paper could actually reduce the amount of funding available to ASIC for regulation and enforcement. Pages 17-18 of the consultation paper explains the proposed annual process requiring ASIC to assess

[1] Financial System Inquiry, Final Report, p 247.
[2] Financial System Inquiry, Final Report, p 247-248
[3] Financial System Inquiry, Final Report, p 253
[4] Financial System Inquiry, Final Report, p 248
[5] Financial System Inquiry, Final Report, p 253

sectoral risks and regulatory activities and determine a budget, followed by a period of Government consultation with industry stakeholders. This process, taking at least three months of every year, will presumably cost ASIC thousands of personnel hours both in preparing a plan and then defending it against industry stakeholders, all of whom will argue every year that their sector does not need regulating and that their levies are too high. It is not clear how these costs will be funded.

We accept that the intent behind industry funding model is that there will be incentives for business to improve their conduct and so create less demand for regulation. This should theoretically lead to ASIC having more resources to direct at problem sectors. But the model proposed offers no guarantees that ASIC will end up with the increase in resources for regulation that it demonstrably needs, or even that resources won't reduce. The proposal does, however, introduce a great deal of new consultation and accountability requirements that will drain existing resources and may offset any gains.

<u>Stability of funding</u>
The proposal in the consultation paper does not seem to provide any more funding stability for ASIC, and may make ASIC's funding less predictable than it is now. Under the proposed model, ASIC's funding would still be subject to change each year, meaning (as the FSI panel identified) that ASIC will have little capacity to plan for the longer term. And while industry funding will shield ASIC from cuts driven by pressure on the Government's budget, it will still be at risk each year from industry lobbying.

We recommend that the proposal be amended to:

- explicitly state an intent for ASIC to have more resources to regulate problem sectors than it currently has with funding to remain, at minimum, consistent with the Consumer Price Index;
- give ASIC new funding to cover costs of implementing new consultation and accountability requirements;
- review funding every three years (as recommended by the FSI final report) instead of annually. This will reduce the direct cost to ASIC of implementing the new funding model, and will prevent enormous amounts of money being spent by businesses lobbying for lower levies.

Principles for designing an industry funding model

The rest of this submission is informed by five principles which we think should guide the development of an industry funding model for ASIC.

1. **The industry model needs to leave ASIC with more resources for regulation and enforcement than it has now.** ASIC does not currently have enough funding to conduct the amount of proactive supervision and enforcement that consumers expect. The consultation paper assumes that the proposed funding model will improve the behaviour of some sectors, leaving ASIC with more resources to focus on those that continue to behave poorly. However, we are far from certain that ASIC will have those extra resources once the costs of administering the model are taken into account, and once all sectors have lobbied to reduce their levies.

2. **The industry model needs to give ASIC funding stability.** We support the FSI panel's view that funding should be determined in three year cycles to allow ASIC to plan ahead. The industry funding model should not leave ASIC's funding vulnerable to industry lobbying.

3. **Industry sectors that create the need for regulation should contribute more to ASIC's costs.** This is equitable and it creates incentives for problem industries to properly self-regulate.

4. **ASIC needs to be accountable to the Government, Parliament and the public first, and industry second.** Regulators work for the government and the public, not for the businesses they regulate. ASIC should be able to prove that it treats business lawfully and fairly and that genuine fee-for-service items are reasonably priced. But ASIC should never have to justify its regulatory or enforcement activities, or its budget to industry.

5. **ASIC should be accountable for the funding it receives, but accountability mechanisms are counter-productive if they limit ASIC's independence or effectiveness.** ASIC is already subject to accountability mechanisms. Additional mechanisms shouldn't be introduced unless the benefits of those measures clearly outweigh the costs.

Activities that should be funded by an industry funding model

<u>Broad position</u>
We support the broad position in the consultation paper that an industry funding model should mean that all of ASIC's operations, apart from a few limited exceptions, are funded by industry. We would not support a model which led to a multiple pots of funding for specific purposes, or large bodies of funding that ASIC may use for some things but not others. This would limit ASIC's ability to keep up with the businesses it regulates and broader external changes. Apart from limited and well-reasoned exceptions, ASIC should be free to direct funding received from industry in any way, as long as it is consistent with its stated plan.

<u>Funding for financial counselling and specialist community lawyers</u>
We believe the funding model should also be expanded to boost funding for financial counselling services and specialist community legal centres that focus on financial services (in particular, credit). Financial counsellors and specialist community lawyers provide free, professional and confidential advice and support to people with credit and debt problems. They are a necessary part of the consumer protection framework in credit and financial services, improving the resilience of consumers facing financial shocks, building financial capability, helping consumers challenge poor conduct on an individual basis and working with industry and regulators to respond to systemic problems.

The argument for industry funding of financial counselling and specialist community lawyers is much the same as the argument for industry funding of the regulator: much of the demand for financial counselling and free specialist legal advice is driven by unscrupulous business conduct and those businesses rather than the taxpayer should bear the cost of that conduct.

Recent research demonstrates that the argument for a boost in funding for financial counselling and specialist legal advice is well founded. The draft report *Consumer Credit Legal Services in Australia*, commissioned by ASIC, Treasury, the Commonwealth Attorney-General's department and the legal assistance sector found that service provision (when the research was conducted in 2010) may meet demand for credit legal services for as little as 19 per cent of the population in legal need. The report also found that the expressed demand is far greater than the ability of current services to meet, and that there were 'significant disparities' in availability of legal services in different states and territories, 'which further indicate significant levels of unmet need.'[6] Industry funding is an excellent vehicle to extend access to specialist free credit lawyers to those who cannot afford legal advice. More recently, cost-benefit analysis by the University of Adelaide in 2014 found that further investment in financial counselling would be well spent. This research found that financial counselling creates five dollars of benefit for every dollar spent.[7]

The submission from Financial Counselling Australia will cover the proposal for financial counselling funding in more depth.

Responses to consultation questions

Question 1:Do you agree that the exclusion of [the activities listed on page 6] are appropriate?

Page 6 of the consultation paper lists five activities that are proposed would not be funded by an industry funding model. This submission only has a view on the third point, financial literacy programmes. We believe that financial literacy programs should be funded by industry.

While some might argue that general financial literacy (for example, the provision of information about different products, calculating repayments on a loan or savings over time), should be government funded, much of ASIC's financial literacy activity is actually targeted messaging designed to protect consumers against unsafe products.

For example, when we visited the MoneySmart homepage on 1 October 2015, there were 13 links to different articles on the main part of the page (that is, excluding the menu bars on the top and right of page). Half of those articles (seven of the 13) were warning consumers about specific problem products: payday loans, debt consolidation, investment seminars, land banking, complex investment products and two articles on consumer leases. If financial literacy activities are necessary because of poor conduct by business, business should pay for financial literacy just as they pay for other ASIC activity.

Business also benefits when consumers make sound financial decisions. For example, financially literate consumers will manage their money so that they can repay loans or invest in financial products, such as insurance or seek financial advice. Financially literate consumers also unlock competition between financial service participants.

[6] Draft Report, *Consumer Credit Legal Services in Australia*, 2011, unpublished, pages 5-6.
[7] Parvin Mahmoudi, Ann-Louise Hordacre & John Spoehr. 2014. Paying it forward: *Cost benefit analysis of The Wyatt Trust funded financial counselling services.* Adelaide: Australian Workplace Innovation and Social Research Centre, The University of Adelaide. Accessed from http://www.adelaide.edu.au/wiser/docs/WISeR_wyatt-report2014.pdf

Question 5: The Government currently recovers most of the costs of operating the MoneySmart website through APRA's supervisory levies. Should these costs no longer be recovered from industry? Why or why not?

We believe MoneySmart should be industry funded. See our response to Question 1, above.

The proposed industry funding model

This submission focuses on the model for determining industry levies, as discussed on page 17 of the consultation paper. We agree with much of the theory underpinning the model, particularly that the levy calculation should start with ASIC determining its strategic priorities, and that industry sectors creating more need for regulation should pay higher levies. However, we have three concerns with the detail of the proposed model.

<u>Industry consultation, unless tightly controlled, is a risk to ASIC's independence:</u>
The consultation paper says that, once ASIC has determined its priorities and decided a budget, Government will consult with industry 'on the proposed levy calculation mechanisms'.

It is reasonable for industry to be consulted on technical matters regarding the levies—for example, which proxies are appropriate and how payment of the levies should be spread across the sector. However, we believe this consultation process will quickly turn into a much broader lobbying exercise where businesses will argue that they are a lower risk than ASIC believes, or that levies are too high based on the identified risk. Any consultation allowing these kinds of discussions is a risk to ASIC's independence as it allows business to influence ASIC's overall funding and where ASIC spends its resources.

ASIC should be accountable for its assessments of sectoral risk and its decisions over which industries to focus on. But it should be accountable to the Government, Parliament and the public for these decisions, not to the industries it regulates. Consumers will rightly lose faith in the independence of their regulator if business is permitted to lobby, behind closed doors, for less attention from ASIC.

<u>Costs of industry consultation may well exceed benefits</u>
Running these consultations will require significant resources from ASIC and Treasury. This cost has not been quantified anywhere in the consultation paper. It is critical that this cost be assessed and measured against the benefits it is expected to create.

<u>Annual process:</u> the two problems above are compounded if the process for determining levies is conducted every year (rather than in three year cycles as recommended by the FSI panel). Determining the budget annually also leaves ASIC without the ability to plan beyond the short term.

<u>Consultation question</u>
Question 9: Is the proposed methodology for determining the levy mechanisms appropriate? If not, why not?
We do not believe the proposed methodology for determining levies is appropriate, for the reasons given above. We recommend that:

- ASIC's budget is determined on a three year funding cycle, rather than annually; and
- the industry consultation process should be limited to matters around calculation of the levy, and how the levy should be spread across the industry. Consultations should not be permitted to question ASIC's assessment of sectoral risk or total amount of the levy itself. This will limit the cost of consultation and protect ASIC's independence.

Accountability structure

Broad position

ASIC is a public agency and should be accountable for the resources it spends and how it spends them. This applies whether ASIC is funded by the Government or by industry. But accountability mechanisms need to be fit for the task. They should not be so burdensome that the costs of complying outweighs benefits, and critically, accountability mechanisms should not limit ASIC's independence or effectiveness.

It is worth noting that ASIC is already subject to a number of accountability measures. ASIC is:

- directly accountable to the Government;
- accountable to Parliament through the Senate Estimates process and ad hoc parliamentary committees;
- since July 2015, subject to periodic capability reviews;
- subject to audits by the Australian National Audit Office;
- subject to review of its decisions at law (for example, people who have been banned from managing corporations can seek merits review from the Administrative Appeals Tribunal);
- open to regular consultation with business, consumer advocates, academics and other experts through a series of committees and panels;[8]
- required to meet normal accountability standards like public annual reporting;
- subject to increasing media attention; and
- subject to additional government assessments such as the Regulator Performance Framework as part of the deregulation agenda.[9]

With so many accountability processes already in place, Government should be wary of adding more. We do not believe that a shift from taxpayer funding to industry funding necessarily calls for more scrutiny. Under either model ASIC should be spending its resources wisely, and regardless of the funding model, ASIC's primary responsibility is to the Government and the public, not to industry.

Proposed new accountability measures

The consultation paper lists four accountability measures that will be introduced along with an industry funding model. The following two raise concerns:

- an annual Cost Recovery Implementation Statement (CRIS), to reflect the costs behind each fee and levy and how these costs have been determined, which industry may comment on before it is finalised; and

[8] http://asic.gov.au/about-asic/what-we-do/how-we-operate/external-committees-and-panels/
[9] https://cuttingredtape.gov.au/resources/rpf

- a new Cost Recovery Stakeholder Panel including representatives from Treasury, ASIC, and each industry sector, supported by multiple working groups reporting each sector, to report on the implementation of the industry funding model.

The Cost Recovery Implementation Statement could be a standard part of ASIC's budget proposal to Government. Government could then rightly hold ASIC to account if ASIC's proposed fees or levies did not reflect ASIC's operating costs. Industry is also entitled to proof that fees charged for individual services are reasonable. But we do not see the value in allowing industry comment on how ASIC has determined how much it needs to gather in levies. This simply creates the opportunity for different business sectors to argue for reduction of ASIC's overall funding and so influence ASIC's capability to do its job.

An effective financial regulator will be criticised by some of the entities it regulates. This is a sign of effective monitoring and enforcement work. Opening up ASIC's total funding needs to industry assessment will inevitably lead to calls for reduced funding. Funding levels, particularly for crucial consumer protection work, should be determined by consumer need or similar strategic goals, not industry whim.

The Cost Recovery Stakeholder Panel seems to us costly, unnecessary and counter-productive. ASIC will be accountable to Government, Parliament and many other bodies for the implementation of any industry funding model. Industry can and will make its voice heard on whether the funding model is working in public forums and through the many existing committees and panels ASIC already has with business without any of the cost that the stakeholder panel would create.

However, if Government does decide to create the stakeholder panel, it is critical that one consumer or investor representative be given a seat for every industry member. ASIC's Consumer Advisory Panel should be given an opportunity to contribute to the risk assessment process (whether or not the stakeholder panel is established). It is consumers who ultimately pay for ASIC, whether it is funded through the Commonwealth budget or industry levies. It is also consumers that have most interest in ASIC being independent and effective. A forum with industry but not consumer voices simply creates more opportunity for business to influence public policy at the expense of consumers.

<u>Consultation questions</u>

Question 17: Do you have any further suggestions for enhancements to be made to ASIC's accountability structure or industry funding model? If so, please provide details.

We do not believe that shifting to an industry funding model in itself calls for more accountability mechanisms. Government should be wary about adding further accountability mechanisms. New mechanisms should ensure consumer voices are as well represented as industry.

Question 18: How should the Cost Recovery Stakeholder Panel operate? How should the membership be determined?

We do not believe the proposed stakeholder panel will be useful or necessary. However, if the panel is established, it must have equal consumer and industry representation.

Contact

Thank you again for the opportunity to comment on this consultation paper. Please contact David Leermakers (Senior Policy Officer, Consumer Action Law Centre) on 03 9670 5088 or at david@consumeraction.org.au at first instance if you have any questions about this submission.

Yours sincerely

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Indigenous Consumer Assistance Network Ltd

Michael O'Neill
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Appendix – about the contributors

Care Inc. Financial Counselling and The Consumer Law Centre of the ACT
Care and the CLC have been the main providers of financial counselling, consumer legal advice and related services for low income and vulnerable consumers in the ACT since 1983. Our core services include provision of information, financial counselling casework, advocacy, legal advice and legal casework for consumers experiencing problems with credit and debt. We also provide community development and education on financial and related legal issues, and make comment on policy matters affecting our clients.

CHOICE
Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

Consumer Action Law Centre
Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Consumer Credit Legal Service (WA) Inc.
Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) is a not-for-profit organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and consumer issues. CCLSWA also takes an active role in community legal education; as well as law reform and policy issues affecting consumers. Solicitors and volunteer paralegals work together with other consumer advocates to deliver fair and just outcomes for WA consumers.

Financial Counselling Australia (FCA)
FCA is the peak body for financial counsellors in Australia. Financial counsellors assist individuals and families in financial difficulty to get back on track. Working in community organisations, their services are free, independent and confidential.

Financial Rights Legal Centre
The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

Hobart Community Legal Service

Hobart Community Legal Service provides a range of legal information and advice services to assist and foster community awareness of the law throughout Tasmania and to provide free legal information, advice and referral to the general public in southern Tasmania.

Indigenous Consumer Assistance Network Ltd (ICAN)

Indigenous people living in regional and remote communities are one of the most disadvantaged consumer groups in Australia. A combination of low literacy levels, lack of services and an uncompetitive marketplace leave the population open to financial exploitation. With a vision of "Empowering Indigenous Consumers", the Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy and financial counselling services to Indigenous consumers in North Queensland and Indigenous Community Services across Australia.

National Seniors

With 200,000 individual fee-paying members, National Seniors is by far the country's largest organisation for the over-50s. For almost 40 years National Seniors has had a strong record of independently representing older Australians in a broad range of community, business and government environments.