

Explanatory Statement

ASIC (Fees—Complexity Criteria) Instrument 2018/578

Prepared by the Australian Securities and Investments Commission

The Australian Securities and Investments Commission (*ASIC*) makes the *ASIC (Fees—Complexity Criteria) Instrument 2018/578* under subsection 5A(4) of the *Corporations (Fees) Act 2001* (the *Fees Act*).

Under subsection 5A(4) of the Fees Act, ASIC may, by legislative instrument, make a determination specifying criteria for whether a chargeable matter is of low, medium or high complexity for the purposes of subsection 5A(2) of that Act.

Subsection 5A(2) of that Act provides that regulations may prescribe, in relation to a chargeable matter, different fees having regard to whether the matter is of low, medium or high complexity.

A ‘chargeable matter’ includes the lodging of a document with ASIC, and the making of an application to the Minister, or ASIC, in relation to a matter arising under the *Corporations Act 2001* (the *Act*).

1. Background

1.1 On 20 April 2016, the Government accepted a recommendation of the Financial System Inquiry to introduce an industry funding model for ASIC.

1.2 An industry funding model will have significant benefits, including:

- improving equity, as only those entities that are regulated by ASIC and create the need for regulation will bear its costs, rather than ordinary taxpayers;
- encouraging regulatory compliance as good conduct will reduce supervisory levies; and
- improving ASIC’s resource allocation, by providing ASIC with richer data to better identify emerging risks and enhancing ASIC’s transparency and accountability.

1.3 On 1 July 2017, the first phase of the ASIC industry funding model commenced with the introduction of industry levies to recover the costs of ASIC’s regulatory activities. The first phase is reflected in the *ASIC Supervisory Cost Recovery Levy Act 2017*, *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017* and related regulations. This instrument does not relate to industry levies.

1.4 The Government has also committed that ASIC’s costs for specific regulatory activities requested by an entity should be fully recovered from that entity. This is referred to as ‘fees for service’ and is the second and final phase of the ASIC industry funding model. The second phase is reflected in the reforms made on or about 28 and 29 June 2018, including by the *Corporations (Fees) Amendment (ASIC Fees) Act 2018* and the *Treasury Laws Amendment (ASIC Fees) Regulations 2018*. This instrument relates to

‘fees for service’. The instrument commences on 4 July 2018 to align with the commencement of the *Treasury Laws Amendment (ASIC Fees) Regulations 2018*.

- 1.5 The current fees charged for the services and activities ASIC provides is not a true reflection of the actual costs incurred by ASIC. Historically, these services and activities have only attracted a nominal fee. As a result, any difference between the fee an entity pays and the actual costs incurred by ASIC is subsidised by taxpayers.
- 1.6 ASIC’s regulatory services primarily benefit the requesting entities, and as such the fees associated with the regulatory services will be cost recovered. The regulatory activities ASIC provides will no longer be taxpayer funded.
- 1.7 The Government considers that ASIC is best placed to determine the criteria for whether a type of application for a particular service is considered low, medium or high complexity, as ASIC is the regulator administering the service and knows the complexity involved in assessing the application, and therefore the costs involved.
- 1.8 The *Corporations (Fees) Regulations 2001* (the ***Fees Regulations***) prescribe fees for chargeable matters. For some chargeable matters, different fees apply having regard to whether the matter is of low, medium or high complexity.
- 1.9 These chargeable matters are set out in the following table.

Chargeable matter	Complexity level
Application for an Australian financial services licence	High complexity Low complexity
Application for an Australian market licence	High complexity Medium complexity Low complexity
Application for an Australian CS facility licence	High complexity Medium complexity Low complexity
Lodging a notice of changes to the operating rules of a licensed market	High complexity Medium complexity Low complexity
Lodging a notice of changes to the operating rules of a licensed CS facility	High complexity Medium complexity Low complexity

- 1.10 If no such determination is in operation in relation to these kinds of chargeable matters, the applicable fee for the chargeable matter is the fee prescribed in the regulations for low complexity.

Australian financial services licence

- 1.11 A person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence, or otherwise be exempt from doing so. The power to grant an Australian financial services licence in response to an application is conferred on ASIC. The power is exercised by delegates of ASIC who are staff members.

Australian market licence and Australian CS facility licence

- 1.12 A person who operates a financial market in this jurisdiction must hold an Australian market licence that authorises the person to operate the market, or otherwise be exempt from doing so. A person who operates a clearing and settlement (CS) facility in this jurisdiction must hold an Australian CS facility licence that authorises the person to operate the facility, or otherwise be exempt from doing so.
- 1.13 The power to grant an Australian market licence or an Australian CS facility licence in response to an application is conferred on the Minister. The power has been delegated to members of ASIC and certain senior staff members of ASIC.

Operating rules

- 1.14 An operator of a licensed market must have operating rules that govern the operation of the market. An operator of a licensed CS facility must have operating rules that govern the operation of the facility.
- 1.15 If an operator of a licensed market or a licensed CS facility lodges with ASIC a notice of changes to the operating rules of the market or the facility, ASIC must send a copy of the notice to the Minister. The Minister has the power to disallow all or a specified part of the changes to the operating rules. The power to disallow the changes has been delegated to members of ASIC and certain senior staff members of ASIC.

2. Purpose of the instrument

- 2.1 The purpose of the instrument is to allow ASIC to better recover the costs of its regulatory activities. This will ensure entities will pay the appropriate fee based on the complexity of the transaction for the service ASIC provides.
- 2.2 The instrument will also ensure that, so far as is practically possible, persons will know which complexity tier they belong in prior to submitting their application for licences, or lodging notices of changes to operating rules. This will ensure that persons will know what fee they will be required to pay for those kinds of chargeable matters.
- 2.3 Further, particularly in relation to applications for market licences or CS facility licences, or lodging notices of changes to operating rules, such persons are also encouraged to liaise with the relevant ASIC team prior to submitting their applications for licences or lodging notices of changes to operating rules. This is designed to ensure the applicant or lodging party clearly understands the relevant complexity (fee) tier.

3. The operation of the instrument

Australian financial services licence

Complexity criteria

- 3.1 ASIC considers complexity to be a function of the expertise required, and the amount of time required, to assess a matter.
- 3.2 The complexity criteria in relation to an application for an Australian financial services licence has been determined according to the *kind of financial products* and the *kind of financial services* to which the authorisations sought relate.
- 3.3 Applications that seek authorisations in relation to any of the following *kinds of financial products* are of high complexity:
 - (a) a miscellaneous financial investment facility or financial risk management facility (i.e. a facility that is a financial product under the general definition of ‘financial product’ in paragraph 763A(1)(a) or (b) of the Act but is not covered by the list of specific financial products); and
 - (b) a non-standard margin lending facility.
- 3.4 Applications that seek authorisations in relation to those kinds of financial products are high complexity applications, irrespective of the kinds of financial services for which the authorisations are sought.
- 3.5 Applications that seek authorisations in relation to any of the following *kinds of financial services* are also of high complexity:
 - (a) makes a market for a financial product;
 - (b) operate a registered scheme;
 - (c) the provision by a trustee company of a traditional trustee company service;
 - (d) dealing in relation to a derivative (i.e. any kind of dealing within subsections 766C(1) or (2) of the Act in relation to a derivative);
 - (e) underwriting securities or managed investment interests;
 - (f) issuing (i.e. a specific kind of dealing) any of the following financial products:
 - (i) a foreign exchange contract;
 - (ii) a margin lending facility that is a standard margin lending facility;
 - (iii) a non-cash payment facility;
 - (iv) in relation to managed discretionary account (*MDA*) services:

- (A) an interest in a managed investment scheme that is limited to a right to receive MDA services; and
 - (B) a miscellaneous financial investment product that is limited to a right to receive MDA services;
 - (v) an interest in a registered scheme or a managed investment scheme that is not a registered scheme (which includes interests in platforms such as investor-directed portfolio services (*IDPS*) and IDPS-like schemes).
- 3.6 ASIC conducts a higher intensity review of applications seeking authorisations relating to these kinds of financial services and financial products. These applications typically require more in-depth analysis of obligations or risks, such as:
- (a) additional financial resources or insurance coverage;
 - (b) client money and scheme property handling procedures;
 - (c) assessment of the competence and good fame and character of multiple responsible managers;
 - (d) assessment of risk management, conflicts management and compliance systems;
 - (e) dealing (as principal) in derivatives;
 - (f) dealing in other products on behalf of persons on a discretionary basis;
 - (g) assessment of products that are not specifically defined as financial products.
- 3.7 The level of complexity of the application also determines the seniority of the staff involved in assessing an application, including dealing with more complex and novel commercial, legal and policy issues. These factors mean the average time taken to assess the application will be longer. For example, more experienced and qualified staff will assess a highly complex application, resulting in a higher hourly rate, and the assessment will, on average, take longer to finalise.

Australian market licences, Australian CS facility licence and operating rules

Market licences and operating rules of the market

- 3.8. The Minister (or their delegate) must have regard to certain matters in deciding whether to grant an Australian market licence or disallow changes to the operating rules of a licensed market: subsection 798A(2) of the Act.
- 3.9 These matters are as follows:
- (a) the structure, or proposed structure, of the market;
 - (b) the nature of the activities conducted, or proposed to be conducted, on the market;
 - (c) the size, or proposed size, of the market;

- (d) the nature of the financial products dealt with, or proposed to be dealt with, on the market;
- (e) the participants, or proposed participants, in the market and:
 - (i) whether those participants, in effecting transactions through the market, are, or will be, providing financial services to other persons; and
 - (ii) whether those participants acquire or dispose, or will acquire or dispose, of financial products through the market as retail clients or as wholesale clients; and
 - (iii) whether those participants are also, or will also be, participants in any other financial markets;
- (f) the technology used, or proposed to be used, in the operation of the market;
- (g) whether it would be in the public interest to grant the licence or disallow the change to the operating rules;
- (h) any relevant advice received from ASIC.

3.10 The Minister (or their delegate) may also have regard to any other matter that the Minister (or their delegate) considers relevant.

CS facility licences and operating rules of the facility

3.11 The Minister (or their delegate) must have regard to certain matters in deciding whether to grant an Australian CS facility licence or disallow changes to the operating rules of a licensed CS facility: subsection 827A(2) of the Act.

3.12 These matters are as follows:

- (a) the structure, or proposed structure, of the facility;
- (b) the nature of the services provided, or proposed to be provided, by the facility;
- (c) the size, or proposed size, of the facility;
- (d) the nature of the financial products in respect of which the facility provides services, or proposes to provide services;
- (e) the participants, or proposed participants, in the facility and whether those participants:
 - (i) in using the facility's services, are, or will be, providing financial services to other persons; or
 - (ii) use, or will use, the facility's services in respect of financial products they acquire or dispose of as retail clients or as wholesale clients; or

- (iii) are, or will be, participants in a financial market, or other clearing and settlement facilities, as well;
 - (f) the technology used, or proposed to be used, in the operation of the facility;
 - (g) whether it would be in the public interest to grant the licence or disallow the change to the operating rules;
 - (h) any relevant advice received from ASIC or the Reserve Bank of Australia.
- 3.13 The Minister (or their delegate) may also have regard to any other matter that the Minister (or their delegate) considers relevant.

Complexity criteria

- 3.14 ASIC considers complexity to be a function of the expertise required, and the amount of time required, to assess a matter.
- 3.15 The complexity criteria in relation to an application for an Australian market licence, an Australian CS facility licence, and changes to the operating rules of licensed markets and licensed CS facilities, are primarily based on the level of expertise, or the amount of time, required to assess the matters that must be considered under subsections 798A(2) and 827A(2) of the Act.
- 3.16 The complexity criteria are also based on the extent to which the matter requires the development of new policy. ASIC's existing policy is set out in:
- (a) *ASIC Regulatory Guide 172: Market licences – Domestic and overseas operators*; and
 - (b) *ASIC Regulatory Guide 211: Clearing and settlement facilities – Australian and overseas operators*.
- 3.17 The assessment of a matter is of high complexity if it requires a significant level of expertise, a significant amount of time or involves the development of significant new policy. Examples of matters of high complexity might include:
- (a) an application for a licence to operate a market or CS facility in relation to services that are structurally different to those available in the Australian market or which have the potential to create structural changes in the Australian market, such as the historical licensing of a competing platform for trading ASX-listed products or the historical introduction of over-the-counter (OTC) clearing arrangements;
 - (b) notice of changes to the operating rules for a new proposal that is:
 - (i) structurally different to those available in the Australian market or which have the potential to create structural changes in the Australian market, such as the historical introduction of margining for equities or a service for trading securities that altered the sequence or priority in which orders are matched; or

- (ii) materially different to that previously operated by the relevant licensee such as the launch of a new service for listing or quoting managed funds by a licensee that has not previously provided this type of service;
 - (c) an application for a licence to operate a financial market or notice of changes to operating rules to support the market's re-launch under a different business model.
- 3.18 The assessment of a matter is of medium complexity if it requires a moderate level of expertise, a moderate amount of time or involves the development of new policy. Examples of matters of medium complexity might include:
- (a) notice of changes to the operating rules to introduce a new futures product by an existing futures market operator where that new product does not give rise to structural changes to the Australian market; or
 - (b) notice of changes to the operating rules to modernise important admission criteria for listed entities by an established listing market.
- 3.19 The assessment of a matter is of low complexity if the matter is of neither high nor medium complexity. In the case of changes to the operating rules, the matter will also be of low complexity if the changes merely correct typographical or cross-referencing errors, or are merely consequential on changes to legislation, regulations or legislative instruments such as the market integrity rules, or other operating rules. The circumstances for which this is the case for other operating rules, arise where a medium or high complexity change requires other consequential rule changes to give effect to that more complex change.

4. Consultation

- 4.1 In November 2017, the Australian Government released a consultation paper entitled *Introduction of Australian Securities and Investments Commission's fees-for-service under the industry funding model*.
- 4.2 In May 2018, ASIC released the *Cost Recovery Implementation Statement: Fees for service under the ASIC industry funding model (2018–19)* (the **CRIS**) for consultation.
- 4.3 The CRIS provides information about how ASIC will implement fees for service for our regulatory activities under the industry funding model, including the levels of complexity for specified services, and the criteria for determining whether a specified service is considered low, medium or high complexity.
- 4.4 ASIC received 8 responses to the CRIS. One respondent to the CRIS queried whether a two-tiered fee (i.e. low complexity and high complexity) for assessing notices to changes to the operating rules of a licensed market properly reflects ASIC's regulatory effort. In response to this feedback, ASIC reviewed the regulatory effort taken to assess a notice of changes to the operating rules of a licensed market and of a licensed CS facility.

- 4.5 ASIC determined that the introduction of an additional complexity tier (i.e. medium complexity) will better reflect regulatory effort and allow for a more gradual increase in fees depending on the complexity of the changes. This amendment is reflected in the Fees Regulations.
- 4.6 ASIC did not receive any feedback on the criteria for determining the complexity of a service.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC (Fees—Complexity Criteria) Instrument 2018/578

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This legislative instrument specifies criteria for whether certain applications and notices made under Chapter 7 of the *Corporations Act 2001* are of low, medium or high complexity for the purposes of the ASIC industry funding model in relation to fees for service.

The purpose of the instrument is to allow ASIC to better recover the costs of its regulatory activities. This will ensure entities will pay the appropriate fee based on the complexity of the transaction for the service ASIC provides.

The complexity criteria relate to the following kinds of matters:

- (a) an application for an Australian financial services licence;
- (b) an application for an Australian market licence;
- (c) an application for an Australian CS (clearing and settlement) facility licence;
- (d) lodging a notice of changes to the operating rules of a licensed market;
- (e) lodging a notice of changes to the operating rules of a licensed CS facility.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.