



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC (Fees–Complexity Criteria) Amendment Instrument 2019/130*

This is the Explanatory Statement for *ASIC (Fees–Complexity Criteria) Amendment Instrument 2019/130*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

### Summary

1. 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. These fees are tiered to better reflect ASIC's regulatory cost because more complicated applications take longer to assess and require more experienced and qualified staff to assess them.
2. *ASIC (Fees–Complexity Criteria) Instrument 2018/578* (the **principal instrument**) sets out the criteria ASIC will apply to determine the complexity of a chargeable matter. If no such determination is in operation, the applicable fee for the chargeable matter is the fee prescribed in the Fees Regulations for low complexity.
3. From 1 April 2019, the *Treasury Laws Amendment (ASIC Cost Recovery and Fees) Regulations 2019* (the **Amendment Regulations**) will amend the Fees Regulations to, amongst other things, introduce new tiered fees for an application to impose, vary or revoke conditions on an:
  - a) Australian Market Licence; and
  - b) Australian clearing and settlement (CS) facility licence.
4. The *ASIC (Fees—Complexity Criteria) Amendment Instrument 2019/130* sets out the criteria ASIC will apply to determine the complexity of an application to impose, vary or revoke conditions on an Australian market licence and an Australian CS facility licence.

### Purpose of the instrument

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5. 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.
  6. The instrument will also ensure that, so far as is practically possible, persons will know which complexity tier they fall under prior to submitting their application to impose, vary or revoke conditions on an Australian market licence or an Australian CS facility licence. This will ensure that persons will know what fee they will be required to pay.
  7. Further, such persons are also encouraged to liaise with the relevant ASIC team prior to submitting their application. This is designed to ensure the applicant or lodging party clearly understands the relevant complexity (fee) tier.

### **Consultation**

8. 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*.
9. 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.
10. 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.
11. ASIC did not receive any feedback on the criteria for determining the complexity of a service.
12. In January 2019, the Australian Government released the exposure draft of the Amendment Regulations for consultation. The exposure draft of the Amendment Regulations included new tiered fees for an application to impose, vary or revoke conditions on an Australian CS facility licence and an Australian market licence.

### **Operation of the instrument**

#### *Conditions on an Australian Market licence*

13. The Minister (or their delegate) must have regard to certain matters in deciding whether to impose, vary or revoke conditions on an Australian market licence: subsection 798A(2) of the Corporations Act 2001 (the Act).
14. These matters are as follows:
  - (a) the structure, or proposed structure, of the market;

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- (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 impose, vary or revoke conditions on the Australian market licence;
  - (h) any relevant advice received from ASIC.
15. The Minister (or their delegate) may also have regard to any other matter that the Minister (or their delegate) considers relevant.

*Conditions on an Australian CS facility licence*

16. The Minister (or their delegate) must have regard to certain matters in deciding whether to impose, vary or revoke conditions on an Australian CS facility licence: subsection 827A(2) of the Act.
17. 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;

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- (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 impose, vary or revoke conditions on the Australian CS facility licence;
  - (h) any relevant advice received from ASIC or the Reserve Bank of Australia.
18. The Minister (or their delegate) may also have regard to any other matter that the Minister (or their delegate) considers relevant.

*Complexity criteria*

19. ASIC considers complexity to be a function of the expertise required, and the amount of time required, to assess a matter. The level of complexity of the application 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.
20. The complexity criteria in relation to an application to impose, vary or revoke conditions on an Australian market licence and an Australian CS facility licence are primarily based on the level of expertise, or the amount of time, required to assess the matters that must be assessed under subsections 798A(2) and 827A(2) of the Act.
21. 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*.
22. The assessment of a matter is considered high complexity if it requires a significant level of expertise, a significant amount of time or involves the

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development of significant new policy. Examples of high complexity might include the assessment of an application to impose, vary or revoke conditions on an Australian market licence or CS facility licence to allow:

- (a) the introduction of services that are structurally different to those available in the Australian market or CS facility which have the potential to create structural changes in the Australian market or CS facility;
  - (b) the re-launch of an existing market under a different business model;
  - (c) the CS facility to provide clearing and settlement services to a new licensed financial market;
  - (d) the introduction of a new class of products to a CS facility; or
  - (c) the change of the overseas jurisdiction under which an overseas market or CS facility operates, if that jurisdiction has not been assessed for equivalence by ASIC.
23. The assessment of a matter is regarded as 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 changes to the conditions of an Australian market licence to introduce a new class of product by the market operator or CS facility where that new class of product does not give rise to structural changes to the Australian market or CS facility.
24. The assessment of a matter is regarded as low complexity if the matter is neither high nor medium complexity. The imposition, variation or revocation of conditions will be low complexity matters if they are merely consequential on changes to legislation, regulations or legislative instruments.

### **Legislative authority**

25. The Australian Securities and Investments Commission (ASIC) makes the ASIC (Fees—Complexity Criteria) Amendment Instrument 2019/130 under subsection 5A(4) of the Corporations (Fees) Act 2001 (the Fees Act).
26. 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.
27. Subsection 5A(2) of the Fees 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.
28. A ‘chargeable matter’ includes the making of an application to the Minister, or ASIC, in relation to a matter arising under the Act.

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29. Under subsection 33(3) of the Acts Interpretation Act 1901, where an Act confers a power to make an instrument, the power is construed as including a power exercisable in the like manner to amend the instrument.

**Statement of Compatibility with Human Rights**

30. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

## **Statement of Compatibility with Human Rights**

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***ASIC (Fees—Complexity Criteria) Amendment Instrument 2019/130***

#### Overview

1. This legislative instrument specifies criteria for whether certain applications 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.
2. 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.
3. The complexity criteria relate to the following kinds of matters:
  - (a) an application to impose, vary or revoke conditions on an Australian market licence; and
  - (b) an application to impose, vary or revoke conditions on an Australian CS (clearing and settlement) facility licence.

#### Assessment of human rights implications

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

#### Conclusion

5. This 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*.