



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

10 March 2017

Manager
Corporations and Schemes Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: asicfunding@treasury.gov.au

Dear Sir / Madam

Exposure Draft legislation for ASIC Cost Recovery

The Financial Planning Association of Australia thanks Treasury for the opportunity to comment on the Exposure Draft legislation to enact the legislative framework for ASIC's cost recovery levy.

The introduction of an industry levy to fund ASIC's regulatory activity creates a significant additional regulatory burden for industry, particularly for small businesses. We are concerned by the lack of detail included in the draft Bills and the added uncertainty this creates for industry.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or ben.marshan@fpa.com.au.

Yours sincerely

Benjamin Marshan

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¹ The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. 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 super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Mark Vincent, deals with investigations and complaints against our members for breaches of our professional rules.
- 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 required of professional financial planning practices. This is being exported to 24 member countries and 150,000 CFP practitioners of the FPSB.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional designations, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board



FINANCIAL PLANNING
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ASIC Supervisory Cost Recovery Levy Bill 2017
ASIC Supervisory Cost Recovery Levy (Collection) Bill 2017
ASIC Supervisory Cost Recovery Levy (Consequential
Amendments) Bill 2017

**FPA submission to
Treasury**

10 March 2017



Shell legislation

The draft Bills lacks a significant amount of detail and therefore creates shell legislation where the content of the obligations to be imposed on industry is made by delegated powers. This creates enormous uncertainty for industry when there is the potential for significant cost to be levied from businesses based on presently unknown metrics. The FPA has grave concerns at the lack of transparency being created with the consultation process Treasury is undertaking at this time when consumers will bear the ultimate cost of this funding framework.

The Scrutiny of Bills Committee Terms of Reference specifically test whether new legislation:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The FPA understands the desire to ensure there is flexibility within the legal framework of the ASIC funding model, to allow Government to appropriately amend certain aspects of the obligations as necessity arises and in response to any changing regulatory demands being placed upon the Regulator. However, the ASIC funding model creates both a substantial additional regulatory burden and cost burden for businesses and as such any significant changes should be required to go through appropriate due process with parliamentary oversight.

It is difficult to support the Bills as they merely create the legal framework and ability for ASIC to recover costs, with no information about the cost recovery methodology or sub-sectors so entities can determine which levies will apply to their business, who will be required to pay for what elements of ASIC's activity, or what the reporting requirements will be for which entities and sub-sectors.

It is important to remember that many entities may be forced to pass on the increasing regulatory costs posed by the new ASIC funding levy and other Government charges to consumers. Including more detail in the legislation to put the structure of the funding model in place, will provide certainty and stability for industry and enable them to appropriately plan ahead to manage the accumulative impact of such costs for their clients and the sustainability of their business.

This is a matter of due process and procedural fairness in imposing a very significant levy regime on industry and ultimately Australian consumers.

What should be included in legislation?

a) Risk factors

The legislation should include criteria to enable the transition to a risk-based user-pays model, in whole or in part. This would create a system where the cost of regulation is borne in an equitable, risk-based manner across the entire financial services sector as regulated entities would be required to pay according to their size and the complexity involved in regulating them.



Not all entities within a sector or sub-sector are the same or pose the same risks to consumers or the financial system. The legislation should include criteria for the funding model based on the measurable risks the regulated entities pose to consumers, to encourage businesses to adopt the right behaviours when providing services to consumers, and ensure entities are not unfairly subsidising ASIC's regulatory activity for entities posing a higher risk.

b) Sub-sectors

The ASIC Supervisory Cost Recovery Levy Bill 2017 includes definitions for the regulated entities intended to be captured by and required to pay the new levy. However, it does not include the sub-sectors that fall within each of the regulated entity definitions.

Drilling down to sub-sector level based on business activity, ensures reporting entities are paying for relevant regulatory activity. This is necessary to creating a model that can apply in a fair and equitable way, to ensure that all entities regulated by ASIC are paying their share.

If the levy was calculated at an industry or sector level, many reporting entities would end up paying for the regulation of business activities their counterparts may be licensed for, but they themselves are not authorised to provide. Hence, the definitions of sub-sector levels must be included in the legislation.

Limiting the legislation to the sector level definitions proposed in the draft Bill does not achieve the FSI Panel's objectives of the levy for ASIC to be more transparent and accountable.

c) Levy methodology

1.17 of the EM states that "*The regulations will provide methods and formulas for how ASIC's regulatory costs are to be apportioned across the various sectors and sub-sectors that it regulates*". The FPA questions why such information is to be contained within the Regulations. While ASIC's expenditure in each regulatory activity area may fluctuate year on year, the elements of the formula, that is, what regulatory costs are to be recovered and what regulatory costs are not to be recovered, should remain constant.

Provision 10 of the draft ASIC Supervisory Cost Recovery Levy Bill defines regulatory costs as:

- (1) ASIC's **regulatory costs** for a financial year means the lesser of:
 - (a) the sum of all amounts appropriated by the Parliament for the purposes of ASIC for the financial year; and
 - (b) the amount determined in an instrument under subsection(2) for the financial year.
- (2) ASIC must, by legislative instrument, determine the amount that is the cost to ASIC of regulating leviable entities for a financial year.
- (5) The regulations may prescribe amounts that ASIC may not include in the amount determined under subsection (2).

This is as far as the legislation goes in identifying an amount or criteria for imposing the levy on entities and consumer.

The FPA in principle supports the inclusion of provision (5) as it will permit government to appropriately exclude specific ASIC regulatory activity funded by Government or other sources. For example, the Government commitment that the industry funding model will exclude the additional



\$121.3 million over four years to Improve Outcomes in Financial Services, a funding package announced by the Government on 20 April 2016, consisting of:

- \$61.11 million to enhance ASIC's data analytics and surveillance capabilities as well as modernise ASIC's data management systems
- \$57 million to enable increased surveillance and enforcement of financial advice, responsible lending, life insurance and breach reporting. This funding is also to cover additional 'Business as Usual' resourcing which would be ongoing, and
- \$3.3 million to accelerate implementation of key Financial System Inquiry recommendations.²

The FPA encourages Government to specifically exclude this funding amount from the levy as per provision (5).

1.18 of the draft EM states that "*ASIC will issue a legislative instrument that will set out what its regulatory costs were in relation to a financial year, as well as matters that are required by the methods or formulas to apportion its regulatory costs across leviable entities*".

This highlights the importance of the underlying methods and formulas ASIC must use to equitably calculate how much industry participants should pay to fund the Regulator based on its previous year's regulatory activity. The methods or formulas are the basis of the levy model and should not be mandated in the Regulations using delegated legislative powers. Legislation should enable the structure of the funding model to be put in place.

Recommendation

The legislation should enable the structure of the ASIC funding model to be put in place and therefore include:

- risk-based criteria for regulated entities within each sector and sub-sector
- the methodology/formula for determining the annual levy for each sector and sub-sector, and
- the defined business activity sub-sectors subjected to the levy.

It may be appropriate to include powers to amend certain provisions via Regulations.

The industry funding model must specifically exclude ASIC's regulatory activity performed under the additional \$121.3 million over four years to Improve Outcomes in Financial Services, a funding package announced by the Government on 20 April 2016.

Regulations

The FPA is disappointed that the draft Regulations were not released as part of the regulatory package for the ASIC funding model, particularly given all the detailed information regarding the application and operation of the proposed legal framework is to sit in the Regulations under the shell legislation of the draft Bills.

² Proposed Industry Funding Model for the Australian Securities and Investments Commission, Government Proposal Paper, November 2016, p.7



Recommendation

Consultation on the draft legislation be extended or re-released as a package with the draft regulations for the ASIC cost recovery levy.

ASIC Accountability

In our December 2016 submission to Treasury on the proposed industry funding model for ASIC, we recommended the separation of the ASIC funding model and the ASIC accountability measures.

While we are pleased to see this suggestion may have been given appropriate consideration, we are concerned that the ASIC accountability measures have not been released or even referred to in this consultation process or the Explanatory Material. Rather, Division 4 – Transparency, of the exposure draft ASIC Supervisory Cost Recovery Levy (Consequential Amendments) Bill 2017 imposes obligations on ASIC to produce an annual dashboard report about its regulatory costs only.

As stated in the Explanatory Materials of the Bills, the Government supported the Financial System Inquiry recommendation to “*improve ASIC’s transparency and accountability to industry*” (1.6). The draft Bills do not deliver on this recommendation.

Recommendation

ASIC accountability measures be subjected to appropriate consultation processes, be finalised and released prior to the commencement of the ASIC funding model on 1 July 2017.

Specific provisions in the draft Bills

It is very difficult to provide feedback on the draft Bills given the detail that underscores how the provisions will operate and impact entities is to be housed in the Regulations, which have not been provided.

Hence, our comments on the provisions and operations of the draft Bills are limited. We would like to request a future opportunity to provide more considered feedback once more detail of the ASIC funding model is released.

Commencement date

The FPA questions whether the commencement date of 1 July 2017 is achievable given the consultation on draft legislation is only now occurring, in the absence of the details of the regime which is proposed to be housed in the regulations.



ASIC Supervisory Cost Recovery Levy Bill 2017

9(5)(d) specify methods that refer to acts done or circumstances existing before either the commencement of the regulations or the commencement of this Act, or both

The FPA is concerned by the retrospective nature of this provision. The Act and ASIC funding model is set to commence on 1 July 2017, with the first levy to be collected in 2018-19 for the 2017-18 financial year, in line with the Government's stated policy.

The objectives in provision (2) of the Levy Bill clearly set the parameters and ability for ASIC to recover its regulatory costs for each financial year. The Dashboard requirements in Division 4 of the Consequential Amendments Bill provide transparency about ASIC's expenditure for the regulatory activity conducted in each financial year which the levy amount is to be based on. Therefore it should not be necessary to include a retrospective provision for the operation of the cost recovery model.

Recommendation

Remove provision 9(5)(d) from the Levy Bill

Collections Bill

7 Liability to levy

A person who is a liable entity for a financial year that ends after the commencement of the ASIC Supervisory Cost Recovery Levy Act 2017 is liable to pay levy for that financial year.

We seek clarity as to the application of this provision if a person becomes a liable entity during the financial year. That is, the person was not a liable entity for the full duration of the financial year. Would the levy amount be charged in full or would it be applied pro rata for the timeframe of the financial year that the person was a liable entity? The same would apply for an entity which may cease to be a liable entity prior to the end of a financial year.

9 Late payment penalty

(1) If any levy payable by a person remains unpaid at the start of a levy month after the levy became due for payment, the person is liable to pay the Commonwealth, for that levy month, a penalty worked out using the following formula:

$$\text{Amount of the levy remaining} \\ \text{unpaid at the start of the levy month} \times \frac{0.2}{12}$$

The FPA notes that it is not aware of any Government justification which currently imposes a 20% monthly penalty. We seek clarification as to the Government's justification of this figure, and recommend that this justification is provided in the EM.



10 Returns

- (5) *A day determined by ASIC under paragraph (4)(a):*
- (c) *may be a different day for different classes of leviable entity.*

Provision 10(5)(c) permits ASIC to determine the day on which a return must be lodge, which may be a different day for different classes of leviable entities. The FPA is concerned this may add complexity to the levy for entities who fall under more than one class of leviable entity, whether at the sector or sub-sector levy. This adds additional red tape, regulatory burden and cost to complying with this obligation. There does not appear to be any justification for why this additional complexity is being introduced.

17 Internal review of certain decisions

- (1) *A person who is affected by a decision of ASIC under section 14 may, if dissatisfied with the decision, request ASIC to reconsider the decision.*
- (4) *Within 42 days after receiving the request, the person reviewing the decision must:*
 - (a) *reconsider the decision; and*
 - (b) *confirm, revoke or vary the decision, as the person thinks fit.*
- (5) *If the person reviewing the decision does not confirm, revoke or vary the decision within the period of 42 days after receiving the request, he or she is taken to have confirmed the decision under subsection (4) immediately after the end of that period.*
- (6) *The person reviewing the decision must give a notice in writing to the person that made the request that sets out the result of the reconsideration of the decision and gives the reasons for his or her decision.*

Provision (1) applies the ability to seek a review solely to ASIC decisions regarding waiving the levy (as detailed in the EM 1.1). The FPA believes the ability to have a decision reviewed should not be restricted. Rather it should apply to all ASIC decisions related to the levy, including:

- the default notices required under s11(1)
- when ASIC is not satisfied with the return given by the leviable entity, and
- the levy amounts imposed on leviable entities.

Provision (5) creates significant uncertainty for entities who have requested a review of an ASIC levy decision, and undermines the requirements in provision (4). Of most concern is that it substantially reduces the accountability requirements of ASIC to respond in a professional and transparent manner to questions regarding its decisions.

Further, it is unclear by when ASIC would be required to provide a notice in writing to the person (as per provision (6)) if ASIC had relied on provision (5).

One of the key elements of the FSI Panel recommendation, which was supported by the Government, was to improve ASIC's accountability and transparency to industry. Provision (5) significantly undermines the requirements of an internal review process and removes all accountability to industry for the Regulator's decisions.



If the Regulator is unable to give a person's review request due consideration, form an appropriate view of the Regulator's initial decision, and provide a notice in writing to the person of the review outcome within the required 42 days, this must be by exception and alternative requirements must be stipulated. This is in line with industry-based Codes of Practice for ASIC's regulated population.

Recommendation

Expand the application of 17(1) of the Collections Bill.

Remove provision 17(5) of the Collections Bill.

Alternative requirements and timeframes must be placed on the Regulated for exceptional circumstances when it is unable to meet the 42 day deadline and requirements of provision (4).