National Insurance Brokers Association.

10 March 2017

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

Email: asicfunding@treasury.gov.au

National Insurance Brokers Association of Australia (NIBA) submission on ASIC Supervisory Cost Recovery Levy Bill 2017 and related Bills

The National Insurance Brokers Association of Australia (**NIBA**) appreciates the opportunity to make a submission in response to the ASIC Supervisory Cost Recovery Levy Bill 2017 and related Bills.

NIBA member firms include large multinational corporations, large Australian broking companies and over 300 medium and small brokerages operating in the cities, towns and regions right across Australia.

Insurance broking firms provide insurance broking and risk management advice in all areas of property and liability insurance, and in many cases broking firms also provide advice in relation to life risk insurance (as opposed to life investment products). Brokers usually act for clients and not insurers.

NIBA RESPONSE

The key focus for NIBA in the proposed regime, given the limited regulatory issues affecting its members when compared to other sectors, is on achieving:

- a fair allocation of levies to reflect this; and
- a cost and time effective reporting regime to assist ASIC in allocating levies and to assist members in meeting their reporting obligations.

The above Bills provide limited information on such matters, with the important detail to be contained in the rules and regulations. NIBA has already made a submission on the last proposal paper regarding levy allocation between sectors and looks forward to further consultation and discussions on the matters raised in that submission.

NIBA sets out it understanding of the proposed regime below, with its comments on any issues of merit.

OVERVIEW

On 20 April 2016, the Government announced that it would introduce an industry funding model for the Australian Securities and Investments Commission (**ASIC**) which will recover ASIC's regulatory costs though annual levies and fees-for-service, commencing in the second half of 2017.

As a result of consultation with industry and other stakeholders, the following has been released for further consultation:

- ***ASIC Supervisory Cost Recovery Levy Bill 2017*** - imposes a levy on persons regulated by ASIC to recover its regulatory costs;

- ***ASIC Supervisory Cost Recovery Levy (Collection) Bill 2017*** - empowers ASIC to collect the levy and requires entities to submit returns annually so that ASIC is able to calculate the levy; and

- ***ASIC Supervisory Cost Recovery Levy (Consequential and Transitional) Bill 2017*** - makes necessary consequential amendments to other Acts such as repealing certain other cost recovery arrangements that ASIC's Industry Funding Model will replace.

In short, entities that are regulated by ASIC will be required to pay a levy that will recover ASIC's regulatory costs for a financial year from entities that were regulated in that financial year. It is payable by entities in the following financial year once ASIC has issued them a notice setting out their liability for the levy.

WHEN DOES IT START

The first year will be the 2017-18 financial year starting on 1 July 2017.

CONSULTATION

The Government is continuing to consult on the mechanisms that will be used to calculate the levies payable by each class of regulated entity, with this detail to be included in subsequent draft regulations.

Additional public consultation will be held on the regulations necessary to support the model, prior to their consideration by the Executive Council.

NIBA Comment – NIBA looks forward to further consultation, especially in relation to the questions and comments contained in our December 2016 submission on the ASIC funding model.

OBJECTIVES OF THE NEW REGIME

The objectives of the regime are to:

- ensure that the costs of the regulatory activities undertaken by ASIC are borne by those creating the need for regulation, rather than all taxpayers;

- establish price signals to drive economic efficiencies in the way resources are allocated in ASIC; and

- improve ASIC's transparency and accountability to industry.

NIBA Comment – NIBA supports these objectives but notes the real issues of significance will be in the Rules and Regulations yet to be finalized. NIBA has already made a submission on a number of practical matters relevant to the initial concepts put forward that will be contained in the Rules and Regulations. NIBA looks forward to further consultation in this regard.

ASIC SUPERVISORY COST RECOVERY LEVY BILL 2017 (the Levy Bill)

General purpose and operation

This imposes a levy on persons regulated by ASIC to recover its regulatory costs. It sets out how the levy will be calculated and the supporting concepts which will be clarified in regulations.

Leviable entity means a person who is a regulated entity at any time in the financial year, and is not an exempt entity for that financial year. The definitions that make up the definition of a regulated entity include:

- a company that is registered under the Corporations Act 2001 [this will catch most brokers]; or

- a company that is a disclosing entity under subsection 111AC(1) of the Corporations Act 2001; or

- a financial services entity [this will catch most brokers] – this means an Australian financial services licensee (within the meaning of the Corporations Act 2001), as well as a person who is exempt from the requirement to hold a financial services licence. This includes entities that are exempt from the requirement to hold a licence under:
  - a paragraph in section 911A(2); or
  - an exemption granted by ASIC (under section 926A); or
  - an exemption granted under regulations made for the purpose of section 926B; or

- a credit services entity; or

- a market infrastructure entity; or

- an audit entity; or

- a liquidator entity; or

- a company-like entity; or

- a person regulated by ASIC who is in a class of persons prescribed by the regulations.

The definitions that are included in the definition of ‘regulated entity’ group similar entity types that ASIC regulates together. Different rates of levy or levy amounts may be payable for entities within each of these groupings, as the regulations allow rates to be specified for different classes of leviable entities, different sectors or different sub-sectors.

NIBA Comment – NIBA repeats its comments above regarding the rules and regulations.

NIBA supports the extended definition of a “financial services entity” which catches exempt entities and looks forward to further consultation regarding fair allocations between sectors, and within groups of similar entity types.

Any regulations made by the Governor-General must be consistent with the following objectives:

- that the total amount of levy payable by all leviable entities in relation to a financial year equals the amount of ASIC’s regulatory costs for the financial year (NIBA notes in particular that non – regulatory costs should not be included); and

- that the total amount of levy payable by all leviable entities in a particular class, sector, or sub sector in a financial year equals the amount of ASIC's regulatory costs relating to that class, sector, or sub sector for that financial year.

The regulations can specify:

- an amount or a method for determining an amount;
- different amounts or methods for different classes of leviable entities, different sectors or different sub sectors;
- a nil amount, or a method resulting in a nil amount; or
- methods that refer to acts done or circumstances existing before either the commencement of the regulations or the commencement of this Act, or both.

Regulations may provide for ASIC to make, by legislative instrument, for each financial year (after the last day by which returns relating to the financial year must be lodged with ASIC under section 10 of the ASIC Supervisory Cost Recovery Levy (Collection) Act 2017), a determination specifying one or more of the following:

- amounts to be used for that financial year in a method or methods specified in the regulations; and
- the number of leviable entities in a particular class, sector or sub sector in that financial year.

Before ASIC does this, it must be satisfied, *having regard to information contained in returns relating to the financial year lodged with ASIC under section 10 of the ASIC Supervisory Cost Recovery Levy (Collection) Act 2017* that the legislative instrument is consistent with the objectives.

The explanatory materials at paragraph 1.54 provide:

> "Nothing in the objectives restricts ASIC's ability to allocate its resources to particular business areas that regulate sectors or subsectors, and then recover its regulatory costs from those sectors or subsectors. It is not, however, within the objectives to recover regulatory costs from entities that did not drive the cost of that regulation. Through allocating its resources to different business areas ASIC does not have a discretion in the amounts of levy that are to be recovered from each sub-sector".

NIBA Comment – NIBA is pleased to see the comment that it is not within the objectives to recover regulatory costs from entities that did not drive the cost of that regulation. The reality does however appear to be that ASIC, by allocating resources to certain areas at its discretion, can then justify the allocation of levies to that area even where the allocation of resources to that area may not have been justified e.g because of minor market misconduct issues. We would like to discuss how Government believes this risk will be managed.

Obviously consultation with stakeholders will be required regarding this important concept.

Timing and the industry's ability to seek change if unhappy with the ASIC approach needs further consideration. See comments below regarding the Annual "dashboard".

How are ASIC's regulatory costs determined?

ASIC's regulatory costs for a financial year are defined to mean the lesser of:

- the sum of all amounts appropriated by the Parliament for the purposes of ASIC for the financial year; and
- the amount determined in an instrument by ASIC for the financial year "that is the cost to ASIC of regulating leviable entities for a financial year".

If the amount of levy collected in relation to a financial year falls short of, or exceeds, the amount of ASIC's regulatory costs for the financial year, ASIC must, in making an instrument for the next financial year:

- for an excess of collected levy—reduce the amount of its regulatory costs for the following financial year by the amount of the excess; or
- for a shortfall of collected levy—increase the amount of its regulatory costs for the following financial year by the amount of the shortfall.

The regulations may prescribe amounts that ASIC may not include in the amount determined above.

NIBA Comment – The above, subject to Parliament setting a capped figure and the power in regulations to include carve outs, effectively allows ASIC to determine the total levy collected. It is difficult to see how total costs in any year per the first dot point above could exceed regulatory costs per the second dot point. NIBA also queries whether ASIC recoveries by way of fines or penalties will be taken into account to the extent they may reduce the ASIC costs and expenses. Obviously consultation with stakeholders will be required regarding this important concept. See comments below regarding the Annual "dashboard".

Other

Because some of the entity types that make up the definition of regulated entity are not legal persons, there are provisions providing how partnerships, unincorporated associations and multiple trustees will be treated as if they were a person. This is achieved by imposing the liability on each member of various collectives that are treated as a person, but allowing the obligation to pay levy to be discharged by any member of the collective on behalf of all of them.

ASIC SUPERVISORY COST RECOVERY LEVY (COLLECTION) BILL 2017 (Collection Bill)

General purpose and operation

This deals with when a person who is a leviable entity for a relevant financial year is liable to pay levy for that financial year.

Obligation to pay a levy

ASIC will issue a notice to the leviable entity for the relevant financial year. That entity can nominate another person to discharge their obligation but if the other entity fails to pay, the leviable entity remains liable.

Late payments attract a penalty of 20 per cent simple interest on the outstanding amount, calculated monthly.

Obligation to lodge a return

A leviable entity is require to lodge a return in an approved form with ASIC:

- by 31 October of each year; or
- such other date ASIC determines which must be on or after 31 August of the following financial year and 2 months or more after the day on which the notice is first published on ASIC's website. It may also be a different day for different classes of leviable entity.

The return will either:

- be in the form prescribed in the regulations; or
- if the regulations do not prescribe a form, it is in a form approved, in writing, by ASIC

The approved form may require the return to contain:

- information relating to the leviable entity; and
- information relating to one or more other leviable entities.

A failure to lodge a return is a strict liability offence (intent is irrelevant) attracting 5 penalty units ($180 per unit), which is consistent with a failure to lodge an income tax return. There is an exception where the person has a reasonable excuse. Under subsection 13.3(3) of the Criminal Code, a defendant bears an evidential burden in relation to proving that they have a reasonable excuse.

If a person fails to lodge a return or ASIC is not satisfied with the return given, ASIC may issue a notice stating the amount that, in ASIC's opinion, is the levy payable by the leviable entity for a financial year which is taken to be the levy payable unless the contrary is proved.

NIBA Comment – Obviously consultation with stakeholders will be required regarding the return content to ensure only useful information is collected in an efficient and cost effective manner that avoids duplication.

If the information provided in the return is false or misleading in a material particular, whether because of things in it or omitted from it and this results in a shortfall of the amount payable, a penalty of twice the amount of the shortfall applies, unless the person reasonably believed the statement was correct.

A return is not, however, considered to be a document lodged with ASIC for the purposes of the Corporations Act 2001, so the provisions that apply to forms 'lodged with ASIC' do not apply

Waiver and recovery of levy, late payment penalty and shortfall penalty

ASIC may waive any of the above on its own initiative of on application by the relevant person, if ASIC is satisfied that there are exceptional circumstances justifying the waiver.
It can also bring recovery proceedings.

Exempting laws

Nothing in a law passed before the commencement of this section exempts a person from liability to pay levy. For laws passed after the commencement, it will not operate to exempt the person from liability to pay levy unless the exemption expressly refers to the levy under this Bill.

Appeals

A person who is affected by a decision of ASIC not to waive any payment obligation may, if dissatisfied with the decision, request ASIC to reconsider the decision by notice given to ASIC within 21 days after the day they first received the decision or any further period that ASIC allows.

Within 42 days after receiving the request, ASIC must review the decision or cause the decision to be reviewed by a person:

- to whom ASIC's power under this section is delegated; and
- who was not involved in the making of the decision; and
- who occupies a position in ASIC that is senior to that occupied by a person involved in the making of the decision.

They must reconsider the decision and confirm, revoke or vary the decision, as the person thinks fit in a written notice setting out the result of the reconsideration and reasons for the decision.

If no decision is made within the period of 42 days, the person is taken to have confirmed the decision.

If dissatisfied, a person may apply to the Administrative Appeals Tribunal for review.

Rules and Regulations

The Minister may, by legislative instrument, make rules or regulations prescribing matters required or permitted by the Bill to be prescribed by rules/regulations or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Minster may not using rules do any of the following:

- create an offence or civil penalty;
- provide powers of:
    - arrest or detention; or
    - entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in the Bill; or
- directly amend the text of the Bill.

ASIC SUPERVISORY COST RECOVERY LEVY (CONSEQUENTIAL AMENDMENTS) BILL 2017

Annual "dashboard" report about ASIC's regulatory costs

As soon as practicable after 31 October in each year, ASIC must publish on its website the following information in respect of the financial year ending on 30 June in that year:

- its total regulatory costs in relation to leviable entities;
- the total regulatory costs from the above, apportioned on the basis of sector and sub sector;
- the sector costs from the above apportioned on the basis of costs relating to different kinds of activities undertaken by ASIC in the financial year;
- the sector costs in bullet point two apportioned on the basis of costs relating to different kinds of expenses incurred by ASIC in the financial year; and
- any other information required by the regulations.

NIBA Comment – it should be made clearer that the information should be in relation to sub - sectors as well, not just higher level sectors. If this is not done, it will be difficult to realistically test the fairness of the allocation.

NIBA also believes the explanatory materials should specifically point out to industry and other stakeholders how the Government believes the ASIC process will be subject to proper review and scrutiny.

For example, if industry is concerned with ASIC's determination of regulatory costs or information requested in returns, what realistically can be done to seek change or is it all too late? Much can depend on when ASIC issues an instrument. What comfort can be given in this regard?

This obligation applies to financial years that end after the commencement of the ASIC Supervisory Cost Recovery Levy Bill. The first publication year should be the 2017-18 financial year.

ASIC deregistration power

ASIC may decide to deregister a company if the company is liable to pay levy and the company has not paid in full at least 12 months after the due date for payment the amount of the levy and any late payment penalty and shortfall penalty payable. ASIC can also use its powers to suspend or cancel a licence.

Please do not hesitate to contact us if you would like to discuss any aspect of this submission.

Dallas Booth
Chief Executive Officer
National Insurance Brokers Association of Australia