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AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
SUPERVISORY COST RECOVERY LEVY BILL 2017

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
SUPERVISORY COST RECOVERY LEVY (COLLECTION) BILL 2017

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
SUPERVISORY COST RECOVERY LEVY (CONSEQUENTIAL AMENDMENTS)  
BILL 2017

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EXPOSURE DRAFT EXPLANATORY MATERIALS







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# **Chapter 1**

## **ASIC Supervisory Cost Recovery Levy**

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### **Outline of chapter**

1.1 The ASIC Supervisory Levy Bill 2017 (the ‘Levy Bill’) imposes a levy on persons regulated by the Australian Securities and Investments Commission to recover its regulatory costs.

1.2 The ASIC Supervisory Levy (Collection) Bill 2017 (the ‘Collection Bill’) empowers ASIC to collect the levy and requires entities to submit returns annually so that ASIC is able to calculate the levy.

1.3 The ASIC Supervisory Levy (Consequential Amendments) Bill 2017 (the ‘CA Bill’) makes necessary consequential amendments to other Acts. This includes repealing certain other cost recovery arrangements that ASIC’s Industry Funding Model will replace.

### **Context of amendments**

1.4 On 7 December 2014, the Government released the Final Report of the Financial System Inquiry (‘the Inquiry’). The Inquiry found that ASIC’s costs are not transparent to regulated industry participants.

1.5 This lack of transparency raises two issues for how ASIC is funded:

- industry and consumers have little understanding of the actual costs of ASIC supervision; and
- ASIC has limited accountability to industry and consumers in the activities it undertakes and why it undertakes them.

1.6 In response to these issues, the Inquiry recommended the introduction of an industry funding model for ASIC’s regulatory activities, in conjunction with enhanced accountability arrangements for ASIC. In particular, an industry funding model for ASIC would:

- 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.

1.7 Internationally, a number of comparable financial services and markets regulators recover their costs of operation from industry. As of 2014, 23 foreign financial service and market regulators were industry funded, eight were funded by both Government and industry, and eleven were funded solely by the Government. Regulators wholly funded by industry include the United Kingdom's Financial Conduct Authority, the United States' Securities and Exchange Commission and Germany's Federal Financial Supervisory Authority.

1.8 On 28 August 2015, the Government released a consultation paper for a Proposed Industry Funding Model for ASIC. In response to the consultation paper, the Treasury received 77 submissions, including 15 confidential submissions. The Treasury also held a number of stakeholder meetings and round tables to refine aspects of the model.

1.9 Following feedback from stakeholders, the levies for each sector were refined with a number of design objectives in mind:

- **Simplicity**—The model should be simple to enable any firm to calculate its applicable levy.
- **Certainty**—The levies should, wherever possible, provide enough certainty for entities to allow them to incorporate the levies into commercial decisions.
- **Proportionality**—Levies from each sector should be calculated from readily available metrics of business activity, such as revenue generated or funds under management. Selection of each sector's activity metric should: align to expected regulatory oversight, including the level of anticipated consumer or investor exposure; and ensure that the reporting burden for industry is kept to a minimum.
- **Commercially-based**—Sector definitions should group together entities that are providing similar services, and compete in the same market.
- **Efficient processing**—Billing and business activity collection should be done through a web portal that users find simple, clear and fast to use, and that is seamlessly connected to ASIC databases.

1.10 In addition to these design principles, the Government has developed the Industry Funding Model in accordance with the Australian Government Charging Framework and the Cost Recovery Guidelines. These provide that where an individual organisation creates the demand for a government activity they should generally be charged for it unless the Government has decided to fund the activity. The Charging Framework requires that there is an alignment between the expenses of the regulatory activity and the revenue generated through the charges. Wherever possible there must not be systematic over-or under-recovery of costs over time.

1.11 The characteristics of a government activity determine the type of charge to be used. Where a service is provided to a group of individuals or organisations, rather than to a specific individual or organisation, the charge is more appropriately framed as a general industry levy.

1.12 On 20 April 2016, the Government announced that it would introduce an industry funding model for ASIC, commencing in the second half of 2017. This would use a combination of fees and levies, where appropriate.

1.13 On 7 November 2016, the Government released a proposals paper on the Proposed Industry Funding Model for the Australian Securities and Investments Commission. This paper contained a detailed model that was developed with the benefit of the extensive consultations during 2015. Elements from successful industry funding models in Australia and overseas were incorporated into the design, where appropriate.

1.14 In response to this paper, Treasury received 231 submissions, of which 52 were confidential. Treasury also held extensive consultation and conducted roundtables with various stakeholder groups.

1.15 This exposure draft legislation has been prepared with the benefit of that consultation.

## **Summary of New Law**

1.16 Entities that are regulated by the Australian Securities and Investments Commission 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. The levy will be payable by entities in the following financial year once ASIC has issued them a notice setting out their liability to levy.

1.17 The objectives of the model are that the total amount of levy paid by all entities should not exceed ASIC's total regulatory costs against all sub-sectors for a particular financial year. 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.

1.18 Each leviable entity will be required to give a return to ASIC that includes information that will be used to calculate the levy. Following this, 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.

1.19 After the amounts of levy have been determined for a financial year, ASIC will issue notices to entities setting out the amount of levy and when it will be due and payable. Failure to pay the levy by this date will attract a late payment penalty at the rate of 20 per cent per annum, unless ASIC has granted the entity an extension.

1.20 If a person fails to give a return to ASIC, or ASIC is not satisfied with the return given by the person, then they may be given a default notice for the amount that, in ASIC's opinion, is the levy payable by the person. A person that fails to give a return will also be liable to a strict liability criminal offence, consistent with other reporting obligations in legislation administered by ASIC.

1.21 Where a person has made a false or misleading statement to ASIC in a return and that statement results in them paying a lesser amount than if the statement was not false or misleading, they will be liable to a shortfall penalty of twice the amount of the shortfall.

1.22 Where levy, shortfall penalty, or late payment penalty remains unpaid for a period of 12 months, a range of administrative actions may be taken against the person, including deregistration, licence suspension or cancellation, as is appropriate in the case.

1.23 ASIC will be required to publish their regulatory costs in relation to each entity type that is required to pay the levy.

1.24 The first year that the Government will recover ASIC's regulatory costs from its regulated population will be the 2017-18 financial year, which commences on 1 July 2017.

## Detailed Explanation of New Law

### *Commencement, application and machinery provisions*

1.25 The Levy Bill will commence with effect on 1 July 2017, as the first year that the Government will be recovering ASIC's regulatory costs will be the 2017-18 financial year. The Collection Bill and CA Bill have commencements linked to the commencement of the Levy Bill to ensure that all aspects of the regime start on the same day. If the Levy Bill does not commence, then the other Bills do not commence. [*Collection Bill section 2; CA Bill section 2; Levy Bill section 2*]

1.26 The Collection Bill and Levy Bill bind the Crown in right of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island. However, it does not bind the Crown in right of the Commonwealth. This means that certain entities that are considered to be the Commonwealth, such as a 'Commonwealth entity' (within the meaning of the *Public Governance, Performance and Accountability Act 2013* (the 'PGPA Act')), cannot be made liable to levy even where it would otherwise apply to them. Certain other entities that are not considered to be the Commonwealth may, however, be liable to levy, such as a Commonwealth company (within the meaning of the PGPA Act). [*Collection Bill subsection 3(1); Levy Bill, section 3*]

1.27 The Collection Bill further provides that it does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence under this Act. [*Collection Bill subsection 3(2)*]

1.28 The Collection Bill and Levy Bill extend to acts, omissions, matters and things outside Australia. They also extend to every external Territory. [*Collection Bill section 4, section 5; Levy Bill section 4, section 5*]

1.29 The Levy Bill does not impose a tax on property of any kind belonging to a State within the meaning of section 114 of the Constitution. [*Levy Bill section 6*]

### *Imposition of Levy*

1.30 The Levy Bill will impose levy on entities that are regulated by ASIC. Section 8 of the Levy Bill, which imposes liability to levy, operates in conjunction with section 7 of the Collection Bill, which makes the levy payable by a leviable entity. [*Levy Bill section 8; Collection Bill section 7*]

1.31 Section 7 of the Collection Bill provides that a person who is a leviable 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. That Act is scheduled to commence on 1 July 2017, so liable entities for the 2017-18 financial year will be liable to pay levy for that financial year. This will recover ASIC's costs for the 2017-18 financial year. [*Levy Bill section 8, Collection Bill, section 7*]

1.32 The term liable entity is used to draw a connection between a regulated entity and the financial year that is being cost recovered that the entity will ultimately be levied for. Liable 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. A regulated entity is defined to mean a number of entity types that are regulated under various Acts that ASIC administers. These two definitions work in conjunction to recover ASIC's costs for the financial year from entities that were actually regulated in that year. An exempt entity is one that is prescribed by the regulations for a financial year. [*Levy Bill section 7, definition of 'liable entity', definition of 'regulated entity' definition of 'exempt entity'; Collection Bill section 6 definition of 'liable entity'*]

1.33 The definitions that make up the definition of a regulated entity include:

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

[*Levy Bill section 7, definition of 'regulated entity'*]

1.34 A full description of the entities covered by each of these definitions is included below in paragraphs 1.40-1.45. The definition of regulated entity provides that a person regulated by ASIC who is in a class of persons prescribed by the regulations is a regulated entity. Classes of

persons who ASIC does not regulate cannot be prescribed by the regulations. Each of the entity type definitions that are set out in the Levy Bill includes a power to prescribe a class of persons as within that definition. Where a new entity is prescribed under each of those sub-definitions, they automatically become part of the definition of regulated entity. [*Levy Bill section 7, definition of 'regulated entity', definition of 'financial services entity', definition of 'credit services entity', definition of 'market infrastructure entity', definition of 'audit entity', definition of 'liquidator entity', definition of 'company-like entity'*]

*Entity types liable to pay levy*

1.35 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 liable entities, different sectors or different sub-sectors. [*Levy Bill section 7, definition of 'regulated entity', definition of 'sector', definition of 'sub-sector'*]

1.36 The entity types that make up the definition of 'regulated entity' include classes of persons who have been granted an exemption from various licensing provisions under Acts administered by ASIC. These entities are included in the regulated population because ASIC may still incur some regulatory costs or exert regulatory effort in relation to those entities, because they are part of the Australian market place. For example, a foreign financial service provider may operate in Australia with an exemption from the requirement to hold an Australian financial services licence, but ASIC still incurs regulatory costs in relation to their regulation. [*Levy Bill section 7, definition of 'financial services entity', definition of 'credit services entity', definition of 'market infrastructure entity'*]

1.37 Because some of the entity types that make up the definition of regulated entity are not legal persons, section 11 extends the meaning of person so that levy is imposed on those entities as if they were a person. The levy is, however, applied with certain modifications so that it applies similarly to how it would if those entity types were legal persons. 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. The Levy Bill imposes levy on the following people that are part of a collective:

- each partner in a partnership;
- member in an association;

- trustee that is part of a group of individual trustees that hold an RSE licence;
- multiple trustees of a trust treated as a single ‘notional entity’ for the purposes of the Levy Bill.

*[Levy Bill subsections 11(1), 11(2), 11(3)]*

1.38 In the case of a partner, member, or trustee that is part of a group of individual trustees that holds an RSE licence, the levy is imposed on each partner, member or trustee. However, the obligation may be discharged by any of the partners, members or trustees on behalf of all of them. *[Levy Bill subsections 11(1), 11(2), 11(3)]*

1.39 The treatment of a ‘notional entity’ is different to the treatment of the other types because the notional entity may only exist for a period of time. Under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009* a reference to a person can include a reference to where there are multiple trustees of a trust for a period of time. During that period where there are multiple trustees, the Levy Bill treats the multiple trustees as a ‘notional entity’ for the purpose of imposing the levy, and imposes the levy on each of those trustees separately. Any of the trustees may discharge the liability on behalf of the other trustees. However, if during the period, or an part of the period, that the trust has only one trustee, an obligation that would otherwise be imposed on the notional entity is imposed on that single trustee. This means that where there ceases to be multiple trustees of the trust, the obligation does not remain on entities that cease to be a trustee. *[Levy Bill subsections 11(4), 11(5), 11(6), 11(7)]*

1.40 A ‘financial services entity’ 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 paragraphs 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.

*[Levy Bill section 7, definition of ‘financial services entity’]*

**1.41** A ‘credit services entity’ includes a credit services licensee within the meaning of the *National Consumer Credit Protection Act 2009* (‘NCCP Act’), as well as a class of persons who are exempt from the

requirement to hold a licence under section 29 of that Act. This includes entities that are exempt from the requirement to hold a licence under:

- an exemption granted by ASIC under section 109 of the NCCP Act; or
- an exemption granted under regulations made for the purpose of section 110 of the NCCP Act.

*[Levy Bill section 7, definition of ‘credit services entity’]*

1.42 An ‘audit entity’ means a range of different entities under both the *Corporations Act 2001* and the *Superannuation Industry (Supervision) Act 1993*, including:

- a registered company auditor (within the meaning of the *Corporations Act 2001*); or
- a partnership or unincorporated association that is an audit firm (within the meaning of the *Corporations Act 2001*); or
- an audit company (within the meaning of the *Corporations Act 2001*); or
- an authorised audit company (within the meaning of the *Corporations Act 2001*); or
- an individual auditor (within the meaning of the *Corporations Act 2001*); or
- an approved SMSF auditor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*).

*[Levy Bill section 7, definition of ‘audit entity’]*

1.43 A ‘company-like entity’ means a range of entities that are regulated under the *Corporations Act 2001*, including:

- a Part 5.1 body; or
- a Part 5.7 body; or
- a body (other than a company) that is a disclosing entity under subsection 111AC(1) of the *Corporations Act 2001*.

It is necessary to include each of these bodies in the Levy Bill as they include entities, other than companies, such as partnerships or

unincorporated associations. [*Levy Bill section 7, definition of ‘company-like entity’*]

1.44 A ‘liquidator entity’ means a range of entities that are regulated under the Corporations Act 2001, including:

- a registered liquidator (within the meaning of the *Corporations Act 2001*); or
- a person registered as a liquidator of a company under subsection 1282(3) of the *Corporations Act 2001*.

[*Levy Bill subsection 7, definition of ‘liquidator entity’*]

1.45 A ‘market infrastructure entity’ includes a range of entity types within the meaning of Chapter 7 of the *Corporations Act 2001*. These include entities that are required to hold various types of licences, as well as entities that are exempted from the requirement to hold those licences under various provisions. This includes:

- a market licensee (within the meaning of Chapter 7 of the *Corporations Act 2001*); or
- a person who operates a financial market that is exempt under section 791C from the operation of Part 7.2 of the *Corporations Act 2001*; or
- a person who is exempt under section 907D of the *Corporations Act 2001* from the operation of section 905A of that Act; or
- a participant in a licenced market for the purposes of the *Corporations Act 2001*; or
- would be a participant if the definition of participant in section 761A of that Act covered a person who is allowed to indirectly participate in the facility or market concerned. This expanded meaning of the term participant ensures that persons such as ‘shadow brokers’ who indirectly participate are liable to levy; or
- a CS facility licensee (within the meaning of Chapter 7 of the *Corporations Act 2001*); or
- a person who operates a clearing and settlement facility that is exempt under section 820C from the operation of Part 7.3 of the *Corporations Act 2001*; or

- a derivative trade repository licensee (within the meaning of Chapter 7 of the *Corporations Act 2001*).

*[Levy Bill subsection 7, definition of ‘market infrastructure entity’]*

*Amount of levy*

1.46 The amounts payable each year are set through a combination of regulations and legislative instruments. The regulations will set out the methods or formulas that will be used to apportion ASIC’s regulatory costs. The annual legislative instrument will set out certain information that will be required by the methods or formulas.

1.47 The amount of levy payable by a leviable entity for a financial year is the amount worked out in accordance with the regulations. This power is broad, and allows for amounts or methods for determining amounts to be specified. *[Levy Bill subsection 9(1), paragraph 9(5)(a), 9(5)(c)]*

1.48 The regulations are made by the Governor-General, whereas the legislative instrument is made by ASIC. This is because the matters that will be included in the annual legislative instrument are peculiarly within the knowledge of ASIC, such as their regulatory costs and aggregated sub-sector information that is contained in returns. *[Levy Bill subsection 9(4), subsection 9(5)]*

1.49 In setting the formulas or methods the Minister that is responsible for administering section 9 of the Levy Bill must be satisfied that the regulations are consistent with the objectives set out in subsection 9(2). These objectives are:

- 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; 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.

*[Levy Bill subsection 9(2)]*

1.50 The rationale behind these objectives is that the Government should not be able to recover more than ASIC’s regulatory costs, and that there should not be cross-subsidisation of particular entities regulated by ASIC. This means that regulatory costs that do not relate to a particular sector or subsector should not be recovered from that sector or subsector. *[Levy Bill subsection 9(2)]*

1.51 The Minister, as the rule-maker, must be satisfied that the regulations are consistent with these objectives as a pre-condition to the Governor-General making the regulations. [*Levy Bill subsection 9(4)*]

1.52 Similarly, ASIC must be satisfied, having regard to information given to it by leviable entities in their return, that the legislative instrument will be consistent with these objectives. [*Levy Bill subsection 9(7)*]

1.53 The calculation of all amounts of levy payable is taken to include any amounts that have been waived under section 12 of the Collection Act. This is so that an amount cannot be set that includes a portion that ASIC has waived, or may waive, against particular entities. This includes any amounts that may have been waived in relation to a previous financial year, but are included in the definition of regulatory costs because of paragraph 10(4)(b) (which deals with amounts that were not recovered in the previous year). [*Levy Bill subsection 9(3), paragraph 10(4)(b)*].

1.54 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. [*Levy Bill subsections 9(2)*]

1.55 The regulations may specify different formulas and methods for different classes of leviable entities, sectors or sub-sectors. The sectors or sub-sectors will be defined in the regulations. If an amount of levy was set for entities that form part of a sub-sector, each entity that formed part of that sub-sector would have to pay that amount, in accordance with the Collection Bill. There is no restriction on the regulations' ability to specify that an entity may be able to form part of more than one sub-sector. An entity's total amount of levy payable will be the result of all the subsectors that it was part of. [*Levy Bill subsection 7(1) definition of 'sector', definition of 'sub-sector', paragraph 9(5)(b)*]

1.56 The methods or formulas that are specified may refer to acts done or circumstances existing before either the commencement of the Act or regulations, or both. [*Levy Bill paragraph 9(5)(d)*]

1.57 The calculation of all amounts of levy payable is taken to include any amounts that have been waived under section 12 of the Collection Act. This is because if an amount is waived under section 12 it will result in a shortfall of collections, and because of the operation of paragraph 10(4)(b) any shortfall would normally be included in ASIC's

regulatory costs for the following year. [*Levy Bill subsection 9(3), paragraph 10(4)(b)*]

1.58 Because of the diversity of entities and activities that ASIC regulates, and how this can change over time, there is a need to have a degree of flexibility in the methodologies that are used to apportion ASIC's costs, so that they can change when circumstances change and remain consistent with the objectives. In the proposals paper released in November 2016 it was suggested that over 40 different methods for apportioning ASIC's regulatory costs would be required, and each of these may periodically need to be updated or amended as circumstances change. The legislative model provides this flexibility by having the methods for determining the amounts of levy set in the regulations, rather than in the primary legislation. [*Levy Bill subsections 9(1), 9(2), 9(3), 9(4), 9(5)*]

1.59 The annual legislative instrument that ASIC issues will only be used to specify limited matters, including:

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

[*Levy Bill subsection 9(6)*]

1.60 This is information that is peculiarly within the knowledge of ASIC, so it is appropriate that they are able to specify this information in a legislative instrument. [*Levy Bill subsection 9(6)*]

1.61 It is also appropriate that the power to create the legislative instrument is set out in the regulations, rather than the primary legislation. This is because the specific matters that will be used to apportion liability will be included in the regulations. If the power to issue instruments was under a provision of the Act then it could only be framed generally (to cover a range of matters), rather than specifically (which covers the actual matters that will be used to apportion the levy). This is reflected in how the legislative instrument will only be able to specify the matters permitted under subsection 9(6). [*Levy Bill subsection 9(6)*]

1.62 The annual legislative instrument can only be made after the last day on which returns must be lodged with ASIC. This is to ensure that ASIC has regard to the information in those returns when issuing the legislative instrument. [*Levy Bill subsection 9(8)*]

1.63 Subsection 12(2) of the *Legislation Act 2003*, which deals with the retrospective application of legislative instruments, does not apply to

regulations made for the purpose of determining the amount of levy payable by a liable entity for a financial year, or a legislative instrument made by ASIC mentioned in subsection 9(4). [*Levy Bill subsection 9(7)*]

*ASIC's regulatory costs*

1.64 A key concept in the Industry Funding Model is that ASIC's regulatory costs are to be apportioned across its regulated population. For a financial year, ASIC's regulatory costs means 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 under subsection 9A(2) for the financial year.

*[Levy Bill subsection 10(1)]*

1.65 Each year, ASIC must determine its costs of regulating liable entities for a financial year. This instrument can only be made, for a financial year, after the last day on which returns must be lodged with ASIC. [*Levy Bill subsection 10(2) subsection 10(3)*]

1.66 Some aspects of ASIC's regulatory costs may not be suitable for recovery even though they would otherwise be within the meaning of the cost to ASIC of regulating liable entities for a financial year. Accordingly, the regulations may prescribe amounts that ASIC may not include in the amount determined under subsection 9A(2). Because these excluded matters are set out in the regulations, Government retains control over what costs may be considered not suitable to be recovered from industry. [*Levy Bill subsection 10(5)*]

1.67 The matters that are required to be dealt with in the regulations may need to be updated relatively frequently as ASIC's activities change, so it is more appropriate that they are set out in the regulations. [*Levy Bill subsection 10(5)*]

1.68 The regulations may not include matters other than costs to ASIC that are to be determined under subsection 9A(2). [*Levy Bill subsection 10(5)*]

1.69 In making an instrument under subsection 9A(2) that determines ASIC's regulatory costs, ASIC must reduce its regulatory costs by the amount by the amount of any excess levy paid in relation to the previous financial year. Similarly, where there has been a shortfall in the recovery of its costs in relation to the previous financial year, ASIC must increase its regulatory costs by the amount of that shortfall. [*Levy Bill subsection 10(4)*]

*When levy due for payment*

1.70 A levy becomes due and payable by a person for a financial year on issuance of a notice given by ASIC in relation to that financial year. That notice must specify a business day on which the levy is due and payable, provided that the business day specified is not earlier than 30 days after the day on which the notice is given. *[Collection Bill subsection 8(1)]*

1.71 If the person who ASIC would give a notice to nominates in writing that ASIC should give the notice to another person, then the notice may be given to the other nominated person. The obligation that is imposed by issuance of a notice may also be discharged by that nominated person. This does not, however, otherwise affect the person's liability to pay levy for that financial year. *[Collection Bill subsection 8(2) subsection 8(3)]*

*Late payment penalty*

1.72 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 of 20 per cent simple interest on the outstanding amount, calculated monthly. This is worked out using the following formula:

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

*[Collection Bill subsection 9(1)]*

1.73 Late payment penalty for a levy month is due and payable at the end of the levy month. *[Collection Bill subsection 9(2)]*

1.74 ASIC may, by written notice given to the person before, on or after the day on which late payment penalty would be due and payable, specify a later day as the day on which the late payment penalty is due and payable. The notice has effect, and is taken always to have always had effect, according to its terms. *[Collection Bill subsection 9(3)]*

*Annual returns*

1.75 A person who is a leviable entity in relation to a financial year must lodge with ASIC a return in the approved form. *[Collection Bill paragraph 10(1)(a)]*

1.76 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. The latter rule is to deal with situations where it is administratively easier for a person to provide data on behalf of

another person. For example, a market participant may be required to report information on behalf of a securities dealer relating to particular matters that the participant may readily have at their disposal. [*Collection Bill subsection 10(3)*]

1.77 A return will be in the approved form where it is in the form prescribed by the regulations and when it is lodged in the manner prescribed in the regulations. If the regulations have not, however, prescribed a form, then both of those matters may be approved by ASIC in writing. This is consistent with the approved form provision in the *Corporations Act 2001* and provides ASIC with administrative flexibility to specify the form that it requires information. [*Collection Bill subsection 10(2)*]

1.78 The general rule is that a return must be lodged with ASIC by 31 October unless ASIC has determined an earlier date for the return to be lodged. If ASIC has determined an earlier date, then they must publish a notice on their website setting out what day returns will be due, and the manner in which ASIC requires the return to be lodged. [*Collection Bill subsection 10(4), paragraph 10(1)(b)*]

1.79 While ASIC may choose to specify an earlier date than 31 October of the following financial year, they cannot set a date earlier than 31 August of that financial year. They also cannot specify a date if it would be within two months from the date on which the notice is first published on their website. ASIC is able to specify a different day for different classes of leviable entity. [*Collection Bill subsection 10(5)*]

1.80 Where a person has failed to lodge a return they are subject to a strict liability offence. A person commits this offence if the following elements are satisfied:

- the person is subject to a requirement to lodge with ASIC a return in the approved form by the applicable date specified in paragraph 10A(1)(b); and
- the person omits to do an Act; and
- the omission breaches the requirement.

[*Collection Bill subsection 10(6)*]

1.81 There are a range of similar offences under the *Corporations Act 2001*, where if a person fails to comply with a reporting obligation they are guilty of a strict liability offence. This is because it would be difficult to prosecute fault provisions in relation to this offence. [*Collection Bill subsection 10(7)*]

1.82 The penalty for failing to lodge a return is 5 penalty units, which is consistent with a failure to lodge an income tax return. [*Collection Bill subsection 10(6)*]

1.83 An offence against this Act is taken to include certain offences that may be committed under the Criminal Code, that relate to this Act. This may include giving false or misleading information including false in a return, which would be prohibited under section 137.1 of the Criminal Code. [*Collection Bill section 6 definition of 'offence against this Act'*]

1.84 The offence provision does not apply to the extent that 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 they have a reasonable excuse, the offence does not apply. [*Collection Bill subsection 10(8)*]

1.85 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. [*Collection Bill subsection 10(9)*]

1.86 As discussed above in paragraphs 1.37-1.39, because a partnership, unincorporated association, RSE licensee or certain notional entities are collectives and not legal persons, the obligation to lodge a return under the Collection Act is modified to treat them as though they are legal persons. This is achieved by imposing the obligation to lodge a return on each member of the collective, and allowing that obligation to be discharged by any member of the collective. This means that only one member of the collective needs to lodge a return. [*Collection Bill subsections 19(1), 19(2), 20(1), 20(2), 21(1), 21(2), 22(1), 22(2), paragraph 22(3)(a), paragraph 22(4)(a)*]

1.87 Because that obligation is supported by a strict liability criminal offence, it is also necessary to have specific rules about the circumstances in which each member of the collective are guilty of the offence. For the purpose of imposing liability the offence is taken to have been committed by each member of the collective who at the time the offence was committed:

- did the relevant act or made the relevant omission; or
- aided, abetted, counselled or procured the relevant act or omission; or
- was in any way knowingly concerned in, or party to, the relevant act or omissions (whether directly or indirectly and whether by any act or omission).

*[Collection Bill subsections 19(3), 20(3), 21 (3), paragraphs 22(3)(b), 22(4)(b)]*

1.88 Criminal liability is also extended in this way for offences that apply under Chapter 7 of the Criminal Code, as they are taken to be offences under this Act if they relate to matters under the Collection Act. *[Collection Bill section 7 definition of ‘offence against this Act’]*

*Default notice*

1.89 In certain circumstances ASIC may give a liable entity a notice stating the amount that, in ASIC’s opinion, is the levy payable by the liable entity for a financial year. ASIC may do this where a person was required to lodge a return containing information relating to the liable entity and the person fails to give the return as required, or ASIC is not satisfied with the return given by the person to the extent that it relates to the liable entity. ASIC may not, however, give a default notice to a liable entity where another liable entity is required to lodge a return on their behalf, and ASIC is not satisfied with that return. *[Collection Bill subsection 11(1)]*

1.90 If a person is issued with a notice setting out a default assessment, that amount is taken to be the levy payable by the person for the financial year, unless the contrary is proved. *[Collection Bill subsection 11(2)]*

*Shortfall penalty*

1.91 Where a person makes a false or misleading statement to ASIC in a return and that statement has resulted in a person having paid less levy than that person would have if the statement was not false or misleading, then that person is liable to a shortfall penalty. *[Collection Bill subsection 12(1)]*

1.92 Shortfall penalty only applies where the statement maker and the shortfall entity are the same entity. Where an entity provides a false or misleading statement on behalf of another entity, the second entity will not be liable to any shortfall penalty as a result of the statement. *[Collection Bill subsection 12(1)]*

1.93 The amount of penalty that the person is liable to pay is twice the amount of shortfall that results from the statement being false or misleading. *[Collection Bill subsection 12(3)]*

1.94 However, a person is not liable to shortfall penalty if they reasonably believed the statement, when made, was correct. *[Collection Bill subsection 12(2)]*

1.95 Shortfall penalty is due and payable on a day specified in a notice given by ASIC to the person. The date specified cannot be less than 30 days after the day on which the notice was given. However, ASIC may, by written notice given to the person before, on or after the day on which the shortfall penalty would be due and payable specify a later day as the day on which the shortfall penalty is due and payable. The notice has effect, and is taken always to have always had effect, according to its terms. *[Collection Bill subsection 12(4), 12(5)]*

*Payment to ASIC on behalf of the Commonwealth*

1.96 Each of the following are payable to ASIC on behalf of the Commonwealth:

- levy;
- late payment penalty;
- shortfall penalty.

*[Collection Bill section 13]*

1.97 ASIC is authorised, as agent of the Commonwealth, to bring proceedings in the name of the Commonwealth to recover the above amounts when they are due and payable by the person as a debt due to the Commonwealth. *[Collection Bill section 15]*

1.98 ASIC may also, on behalf of the Commonwealth, waive the payment of the whole or a part of any of those amounts, if they are satisfied that there are exceptional circumstances justifying the waiver. They may do this on their own initiative or on written application by a person. *[Collection Bill section 14]*

*Review of certain decisions*

1.99 A person who is affected by a decision of ASIC to waive levy may, if dissatisfied with the decision, request that ASIC reconsider the decision. *[Collection Bill subsection 17(1)]*

1.100 A request to review the decision must be made by notice given to ASIC within 21 from the day on which the person first received notice of the decision, or any further period that ASIC allows. The notice given to ASIC must also set out the reasons for making the request. *[Collection Bill subsection 17(2)]*

1.101 After receiving the request, ASIC must review the decision or cause the decision to be reviewed by a person:

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

*[Collection Bill subsection 17(3)]*

1.102 Within 42 days after receiving the request, the person reviewing the decision must reconsider the decision, and either confirm, revoke or vary the decision, as they think fit. *[Collection Bill subsection 17(4)]*

1.103 In the event that a person reviewing the decision has not made a decision after the period of 42 days, they are taken to have confirmed the earlier decision. *[Collection Bill subsection 17(5)]*

1.104 A 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 the reasons for their decision. *[Collection Bill subsection 17(6)]*

1.105 A decision of ASIC that has been confirmed, varied or revoked, or a decision that has been taken to have been confirmed, may be appealed to the Administrative Appeals Tribunal on application for a review of that decision, or decision that is taken to be made. *[Collection Bill subsection 18]*

#### *Exempting laws ineffective*

1.106 To make it clear that no law passed prior to the commencement of the Collection Bill is intended to exempt a person from liability to levy, there is a specific provisions that provides for that effect. It also makes it clear that for a law passed after the commencement of the Collection Bill to exempt a person from liability to levy, they must expressly confer an exemption from levy under this Act: there cannot be an implied exemption from the liability to levy. These rules do not, however, apply to an exemption that is granted under the Collection Bill or the Levy Bill. *[Collection Bill section 16]*

#### *Administrative sanctions for non-payment of levy for twelve months*

1.107 A range of administrative actions may be taken against entities where an amount of levy, late payment penalty, or shortfall penalty in relation to the levy remains unpaid for a period of twelve months from the date that those amounts are payable by the entity. What action is taken

will depend on the entity type, and the various licences the entity holds. These administrative actions include:

- company deregistration by ASIC under section 601AB of the *Corporations Act 2001*; and
- immediate suspension or cancellation of an Australian Financial Services Licence by ASIC under section 915B of the *Corporations Act 2001*; and
- suspension or cancellation of an Australian Credit Licence without hearing by ASIC under section 54 of the *National Consumer Credit Protection Act 2009*; and
- immediate suspension or cancellation of an Australian market licence by the Minister under section 797B of the *Corporations Act 2001*; and
- immediate suspension or cancellation of an Australian CS facility licence by the Minister under section 826B of the *Corporations Act 2001*; and
- immediate suspension or cancellation of a derivative trade repository licence by ASIC under section 905H of the *Corporations Act 2001*; and
- suspension of a liquidator's registration by the Inspector-General under section 40-25 of Schedule 2 to the *Corporations Act 2001*; and
- suspension or cancellation of an auditor's registration by the Board under subsection 1292(1) of the *Corporations Act 2001*; and
- suspension or cancellation of the registration of an authorised audit company by ASIC under section 1299I of the *Corporations Act 2001*.

*[CA Bill Schedule 1 item 3, items 8 to 17, and item 26, Corporations Act 2001 subsections 601AB(1B), paragraphs 797B(e), 826B(e), 905H(d), 915B(1)(f), 915B(2)(e), 915B(3)(e), 915B(4)(e) 1292(1)(c), 1299I(c), Corporations Act 2001 Schedule 2, paragraph 40-25(1)(h), National Consumer Credit Protection Act 2009 paragraph 54(1)(d)]*

1.108 Many of these provisions use the automatic suspension, cancellation or deregistration powers. This is because the condition for these actions being taken is that the amounts have been unpaid for twelve months. Prior to suspension action being taken, entities have the ability to

apply to ASIC for waiver of their liability to levy if there are exceptional circumstances justifying waiver, or for extensions to the date on which levy is due and payable. *[CA Bill Schedule 1 item 3, items 8 to 17, and item 26, Corporations Act 2001 subsections 601AB(1B), paragraphs 797B(e), 826B(e), 905H(d), 915B(1)(f), 915B(2)(e), 915B(3)(e), 915B(4)(e) 1292(1)(c), 12991(c), Corporations Act 2001 Schedule 2, paragraph 40-25(1)(h), National Consumer Credit Protection Act 2009 paragraph 54(1)(d)]*

1.109 Certain amendments are made so that ASIC may reinstate the registration of a company that has been deregistered. ASIC may reinstate the company where they have received an application, and the company has paid the levy, any late payment penalty or shortfall penalty in full. *[CA Bill Schedule 1 items 4 to 5, subsection 601AH(1A), paragraph 601AH(3)(a)]*

1.110 Once a company has been reinstated, ASIC must give a notice of the reinstatement to that company, and publish note of that reinstatement in the Gazette. *[CA Bill Schedule 1 items 6 to 7, subsection 601AH(4), 601AH(4A)]*

#### *ASIC's annual 'Dashboard' reports*

1.111 To increase the transparency of ASIC's costs to its regulated population, as soon as practicable after 31 October each year ASIC must publish on its website information in relation to its regulatory costs for the previous financial year. This information must relate to the financial year that finished on 30 June of that year. As this obligation applies to financial years that end after the commencement of the *ASIC Supervisory Cost Recovery Levy Act 2017*, the first year that ASIC will be required to publish this in relation to will be the 2017-18 financial year. *[CA Bill Schedule 1 item 2, Australian Securities and Investments Commission Act 2001, Division 4 of Part 8, section 138].*

1.112 The information that ASIC will be required to publish must include its total regulatory costs in relation to leviable entities, and how it has apportioned those costs across each sector and sub-sector. In relation to each sector, ASIC will also be required to publish how it has apportioned its costs by reference to the types of activities undertaken, and the different kinds of expenses incurred by ASIC in the financial year. ASIC may also be required to publish other information that is included if that information is required by the regulations. *[CA Bill Schedule 1 item 2, Australian Securities and Investments Commission Act 2001, Division 4 of Part 8, section 138].*

#### *Privacy of information*

1.113 To ensure that information that is given to ASIC in a returns is treated as protected information, the Collection Act and Levy Act are listed in section 12A(1) of the ASIC Act. *[CA Bill Schedule 1 item 1, paragraphs 12A(1)(a), 12A(1)(b)]*

1.114 Although information given in an annual return is treated as protected information, the publication of summaries of information or statistics derived from the information is permitted under the ASIC Act. This will allow ASIC to publish aggregated sector-level information in the annual legislative instrument, and its dashboard report.

*Repeal of existing Market Supervision Cost Recovery Regime*

1.115 Because of the introduction of the industry funding model, the existing market supervision cost recovery regime is no longer necessary. This is because those costs will be recovered through the Industry Funding Model from 2017-18. Accordingly, certain amendments are made to the *Corporations (Fees) Act 2001* that if left would allow ASIC to charge for those matters. [CA Bill, Schedule 1 items 18 to 25, *Corporations (Fees) Act 2001*, sections 6A and 8, subsections 5(1), 6(6), paragraphs 4(1)(l), 4(1)(m), 4(1)(n), 7(1)(m) and 7(1)(n), and subparagraph (7)(1)(l)(ii)]

*Regulations and Rules made for the purposes of the Levy Bill and Collection Bill*

1.116 The Levy Bill and Collection Bill give a general regulation making power to the Governor-General to make regulations prescribing matters required or permitted, or necessary or convenient for the Act. [Collection Bill subsection 23(3); Levy Bill section 12]

1.117 The Collection Bill also includes a power for the Minister to make rules by legislative instrument prescribing matters for the same purposes as the regulations, but with additional limitations. Those limitations are that the rules may not:

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

[Collection Bill subsections 23(1), 23(2)]