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Corporations (Fees) Amendment Bill 2002

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No. 96 2002-03

Corporations (Fees) Amendment Bill 2002

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Corporations (Fees) Amendment Bill 2002

Date Introduced: 12 December 2002

House: House of Representatives

Portfolio: Treasury

Commencement: 1 July 2003

Purpose

To amend the regulation making power under the *Corporations (Fees) Act 2001* to broaden the range of fees that can be prescribed. The Bill also facilitates an increase in the amount of fees imposed.

Background

This Bill is part of a package of three Bills which implements the Government's response to Corporate Law Economic Reform Program Discussion Paper No.7: *Streamlining paperwork under the Corporations Law* (known as CLERP 7).¹

The other Bills in this package are the Corporations Legislation Amendment Bill 2002 and the Corporations (Review Fees) Bill 2002.

Corporations Fees

ASIC collects fees which are imposed under the *Corporations Fees Act 2001* (the Fees Act).² Funds raised through the imposition of fees are paid into consolidated revenue. ASIC's principal source of funding is an appropriation from the Commonwealth.

The Fees Act provides that the regulations may prescribe fees for 'chargeable matters'. This term include things such as:

- the lodgement of a document under the proposed *Corporations Act 2001*
- the registration of a document under the Act, and
- the submission to ASIC of a document for examination by ASIC.

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The fee for a chargeable matter need not bear any relationship to the cost of providing any service that forms part of, or is related to, that matter.³ Fees charged by ASIC currently range from \$2 to \$1800.

The rationale for imposing fees is to a large degree based on the principle of cost recovery. The CLERP 7 discussion paper stated that:

Successive governments have taken the view that the basic level of corporations fees should be set to ensure that, over time, total revenue from corporations fees approximates the total costs and outlays associated with the national corporate regulation scheme.

The rationale for this is that, because the national scheme provides general benefits to all companies and all market participants, its costs should be borne either directly or indirectly by all companies and market participants rather than through public funding by taxpayers.⁴

In pursuing the goal of cost recovery the Government has taken the view that costs that have to be covered by revenue include:

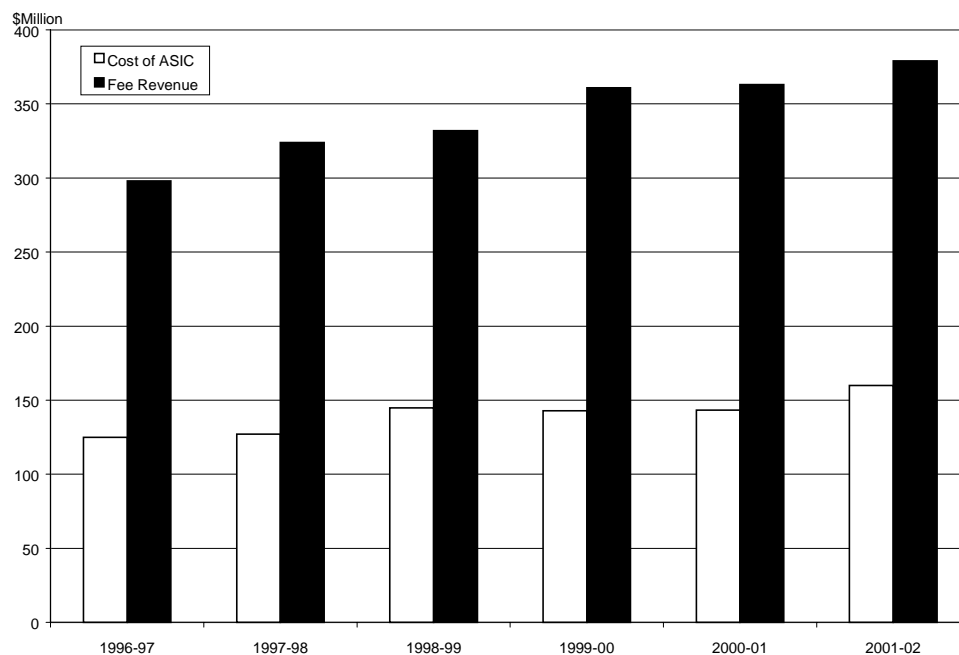
- the costs incurred by ASIC;
- compensation payments to the States and the Northern Territory for corporations revenue forgone as a result of the establishment of the national scheme;
- the costs of other bodies forming part of the national scheme, including the Australian Accounting Standards Board, the Companies Auditors and Liquidators Disciplinary Board, the Companies and Securities Advisory Committee and the Corporations and Securities Panel; and
- national scheme related costs of bodies that, while not part of the national scheme, perform functions arising out of the administration and regulation of the scheme (for example, the Administrative Appeals Tribunal, the Australian Federal Police, the Director of Public Prosecutions and the Federal Court).⁵

As the table below illustrates ASIC recovers funds which are significantly in excess of its operating expenses. The CLERP 7 discussion paper noted that revenue has been set above cost recovery to reduce a deficit of \$217.6 million that was accumulated by the national scheme between 1991/92 and 1995/96.⁶

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The magnitude by which fees exceed the cost of running ASIC has fuelled criticism from business that corporations fees are not about cost recovery but are in fact a disguised form of taxation.⁷ The present fees regime has been described as ‘an unjustified impost on corporations’.⁸

In 2001 the Productivity Commission (PC) conducted an inquiry into cost recovery by Government agencies.⁹ A number of submissions to the inquiry by industry participants suggested that as the community as a whole benefited from corporate regulation ‘a reasonable proportion of the cost should be borne by the whole community through public funding’.¹⁰ The PC rejected this view arguing that the price of regulated products should reflect the administrative costs of regulation.

It should be noted however that a large portion of the fees collected by ASIC are transferred to the States and the Northern Territory as compensation for their support of national corporate regulation. Since 1991/92 the states have received over \$1.4 billion in compensation payments. In 2001/02 \$147 million dollars was divided between the States and Territories. Clause 701 of the Corporations Agreement requires the Commonwealth to make payments to the Northern Territory and the States. The amount is indexed in line with movements in the Consumer Price Index. Funds are distributed in accordance with the percentages set out in clause 702.

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New South Wales	33.23%
Victoria	29.05%
Queensland	16.36%
Western Australia	10.07%
South Australia	7.49%
Tasmania	2.32%
Northern Territory	1.48%

The use of corporations fees to recover the cost of compensation payments to the States and the Northern Territory was criticised in submissions to the PC. The Australian Shareholders Association commented:

We can see no possible justification for the continuing payment of ‘compensation’ to the States and the Northern Territory.

It is clear that when the administration of company law was handled at a State level by State Corporate Affairs Commissions and similar bodies, the amounts collected by the States as fees significantly exceeded the amounts applied in the regulation of companies and the securities industry. In other words these fees constituted a form of State taxation.

There is no justification for the Commonwealth Government, through the agency of ASIC to continue to levy taxation on companies and other participants in the securities industry on behalf of the States and the Northern Territory.¹¹

In a practical sense however, it may be argued that compensation payments to the States and Northern Territory is the price that companies need to pay in order to obtain the benefits of a uniform national system of corporate regulation.

Main Provisions

Item 1 inserts **new section 5A** which provides that the regulation may prescribe a different fee in relation to a chargeable matter if the matter is complied with electronically.

According to the Explanatory Memorandum, this amendment will ‘allow the fees prescribed to reflect lower processing costs for documents lodged electronically and encourage electronic lodgement.’¹²

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The amendment runs contrary to the view expressed in the CLERP 7 discussion paper that ‘no adjustments should be made to the fees schedule at this time to further encourage electronic lodgement or to discourage paper lodgement.’¹³ The report commented:

In view of the proposals outlined in this paper for the abolition of annual returns, and the fact that many documents either currently do not or, under the CLERP 7 proposals, will not have a lodgment fee, there is little scope for an incentive based on a reduction of the lodgment fee for documents that are lodged electronically.

Section 6 provides that in the case of all but two chargeable matters the regulations may specify an amount not greater than \$5 000 for a particular matter or specify a method for calculating the fee. In any event, the fee or sum of fees for a particular chargeable matter must not exceed \$25 000.¹⁴ **Items 2** and **3** amend section 6 of the Fees Act to increase the maximum amount of fee that can be charged to \$10 000 from the present \$5 000. The sum of fees for a particular chargeable matter will be capped at \$50 000 up from \$25 000.

According to the Explanatory Memorandum, the new ceiling reflects the fact that periodic adjustments based on changes to the consumer price index would mean that fees would approach the existing limit.¹⁵ The amount of fee for a particular chargeable matter is set out in schedule 1 to the Corporations (Fees) Regulations 2001. Consequently, any proposal to increase the fees applying to chargeable matters would be subject to Parliamentary disallowance.

Item 4 amends section 8 to permit the Governor-General to make regulations in relation electronic compliance.

Endnotes

- 1 A copy of the CLERP 7 paper may be found at the following link:
<http://www.treasury.gov.au/documents/287/PDF/clerp7.pdf>
- 2 A separate Act is necessary to exact fees in order to comply with the requirements of section 55 of the Constitution. That section provides in part that ‘Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.’
- 3 See subsection 5(2) of the Fees Act.
- 4 Corporate Law Economic Reform Program, *Simplified Lodgments and Compliance: Streamlining paperwork under the Corporations Law, 2000*, p. 33.
- 5 *ibid.*, p. 36.
- 6 CLERP 7, p. 34.
- 7 Tony Harris, ‘A tax by any other name’, *Australian Financial Review*, 24 January 2001.

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- 8 Tony Harris, 'Business paying taxes disguised as fees', *Australian Financial Review*, 19 May 2000.
- 9 Productivity Commission, *Cost Recovery by Government Agencies*, August 2001. A copy of the report may be found at: <http://www.pc.gov.au/inquiry/costrecovery/finalreport/>
- 10 Submission of the Investment and Financial Services Association, cited in Productivity Commission, *Cost Recovery by Government Agencies*, August 2001, p. F.13.
- 11 Cited in Productivity Commission, *Cost Recovery by Government Agencies*, August 2001, p. F.10.
- 12 p. 3.
- 13 CLERP 7, p. 51.
- 14 Fees up to \$100 000 may be charged in relation to ASIC's role in supervising self listed markets. ASIC presently supervises the self-listing of the Australian Stock Exchange Limited. ASIC also has the power to perform other functions involving a conflict of interest (see subsections 6(4) and 6(5).
- 15 Explanatory Memorandum, p. 4.

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