



OUT18/19955

Matthew Segdwick
Consumer and Corporations Policy Division
Commonwealth Treasury
By email: regmod@treasury.gov.au

Dear Mr Sedgwick

MODERNISING BUSINESS REGISTERS PROGRAM – REVIEW OF FEES

The Office of the NSW Small Business Commissioner (OSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small business in government, and makes it easier to do business through policy harmonisation and reform.

Whether interacting directly or through an intermediary, engaging with the Australian Business Register and company register is a near-unifying experience for small business. It is imperative that these databases are managed in a manner that both adequately serves their customer base, and preserves the broader community interest in their functionality. Plainly, ensuring the ongoing suitability of registry fees is an important aspect of this work.

The OSBC therefore thanks Treasury for the opportunity to comment on its '*Modernising Business Registers Program – Review of Fees*' consultation paper ('the consultation paper'). We are pleased to provide the following comments and recommendations for the review's consideration.

Summary of recommendations

Recommendation 1: The objective of delivering simpler, easier, and more equitable registry fees should guide Treasury's review of those fees.

Recommendation 2: The company registration fee should be reduced to a figure similar or equal to the annual review fee.

Recommendation 3: Small businesses should be charged a reduced company annual review fee, relative to that charged to larger businesses.

Recommendation 4: The reduced annual review fee should be available to businesses that meet the definition of 'small proprietary company' prescribed in Section 45A (2) of the *Corporations Act*.

Recommendation 5: The fee of \$79 for lodgement of an annual review and change of company details up to one month late should be retained. The \$329 fee for lodgement more than one month late should be replaced with a modest interest payment system.

Recommendation 6: The total fee for late lodgement of an annual review and change of company details should be capped at \$329.

Recommendation 7: ASIC should, to the full extent possible, provide registry search services on a no fee basis.

Recommendation 8: Any infrastructure fee must be structured in a manner that ensures the small business community realises a net saving from the registry fees reform process.

1. Do you agree that the principles of making fees simpler, easier to understand and more equitable are the best guide to review registry fees?

The OSBC is wholly supportive of the Commonwealth's vision of transforming its registers, including modernising fee structures, to deliver a simpler and easier environment to start and run a business. In fact, *'Easy to do Business'* - the OSBC's own policy development initiative - is singularly focused on easing the process of starting and running a small business.¹ Improving the customer experience is not simply a matter of ensuring government presents a tidy front of house; it is an issue of real importance to small business. According to the NSW Business Chamber's *Red Tape Survey*, completing regulators' forms and reports, and paying government fees and charges, represents a 'very large' or 'somewhat large' burden to over 60 per cent of small businesses.² These sentiments are essentially mirrored by businesses across Australia - as the Australian Chamber of Commerce and Industry's own red tape survey reflects.³

We are equally firm in our support of a more equitable system of registers and fees. As a small business advocate, fair treatment of the small business community is a foundational objective of our work. But for administrators of business services, simplicity, ease of use, and equity should also be considered highly complementary objectives. Engaging with small businesses in the course of our own policy development, the OSBC repeatedly hears that small businesses are poorly placed, relative to their larger competitors, to navigate the complex regulatory and administrative processes of government. This is a function of limited resources generally, as well as a lack of dedicated expert staff to navigate a business' regulatory needs. Indeed, the NSW Business Chamber's *Red Tape Survey* provides that navigating government fees and charges is a particularly acute burden on small business, relative to the experience of larger operators.⁴ It follows that developing a simpler and easier environment for small business is also an important means of addressing inequity among businesses.

Therefore, simplicity, ease of use, and equity are highly appropriate ideals to guide the review of registries and fees. OSBC encourages Treasury to continue its work according to these same principles.

Recommendation 1: The objective of delivering simpler, easier, and more equitable registry fees should guide Treasury's review of those fees.

2. How could the registration and annual review system be reformed to make it simpler and more equitable?

The disparity between the fees a company is required to pay ASIC for its initial registration, relative to those it pays for its ongoing registration, should be considered for reform on grounds of inequity.

At \$488, the fee for initial registration is almost double the \$263 proprietary company annual review fee - required to ensure a company's ongoing registration. Given the resource strain under which many small businesses operate, this discrepancy is considerable.

However, the policy rationale for the higher registration fee is open to question. The consultation paper provides that the registration fee "*reflects the value of creating a separate legal entity.*"⁵ But payment of the annual review fee is no less necessary to ensure that a company's legal personhood provides value to the registrant; According to ASIC itself, failure to pay the annual review fee is the primary reason for which it may deregister a company.⁶ Indeed, ASIC's right to deregister a company for failure to pay the annual review fee is provided for explicitly in the *Corporations Act*.⁷ Likewise, the consultation paper states that the registration fee "*reduces frivolous applications*".⁸ But it is unclear why a fee more akin to the annual review fee - still far from a nominal figure - would or should not serve this purpose equally effectively.

Furthermore, reducing this fee would not appear to represent a significant impost on the regulator. Registration fees accounted for only 13 per cent of all ASIC registry fees in 2017/18.⁹ The revenue ASIC derives from fee has also risen markedly over the preceding eight years, having increased by at least 47 per cent.¹⁰ Given that growth has been driven by a growing company population and fee indexation, it is reasonable to expect a similar trend over the foreseeable future.

For these reasons, reducing the registration fee, to a figure similar or equal to the annual review fee, would reflect good policy and fiscal responsibility in equal measure. It would deliver a more equitable charge - in light of the reasons for imposition of the fee, and in comparison to the annual review fee - without the loss of significant revenue.

Recommendation 2: The company registration fee should be reduced to a figure similar or equal to the annual review fee.

3. Do you support the introduction of differentiated rates of annual review fees between small and large businesses?

The OSBC supports the introduction of differentiated company annual review fees for small businesses and larger operators. The proposed reform would represent a marginally more complex annual review system.

However, this outcome would be more than offset by the improved equity of the two-tier structure. As the consultation paper itself notes, "*larger businesses generally have better scale and financial capacity to pay Government fees.*"¹¹ We also concur with Treasury's position that larger businesses derive proportionally greater benefit from the accuracy of the register.¹²

Recommendation 3: Small businesses should be charged a reduced company annual review fee, relative to that charged to larger businesses.

3.1 What definition of small business do you support?

The definition of a 'small proprietary company' prescribed in Section 45A (2) of the *Corporations Act 2001* (Cth) represents the most appropriate means of classifying what is and is not a 'small business' for the purpose of the two-tier annual review fee. That is, a business should qualify for the lower fee if it meets two of the following criteria:

- It has consolidated financial revenue of less than \$25 million;
- Its consolidated assets are valued at less than \$12.5 million;
- It has fewer than 50 employees.

This definition is already used by ASIC regulators - most notably, to determine whether a company is required to meet financial reporting requirements.¹³ Use of this definition would therefore deliver consistency in the agency's regulation of small companies, ensuring a familiar and streamlined experience for affected operators. Moreover, all three criteria used in the definition are relatively easy to both understand and apply.

A definition relying on multiple criteria also limits the risk identified by Treasury that a tiered fee system would disincentivise small business growth.¹⁴ In particular, a business could take on an additional employee, or acquire a new asset, without fear of losing access to a reduced annual review fee.

Recommendation 4: The reduced annual review fee should be available to businesses that meet the definition of 'small proprietary company' prescribed in Section 45A (2) of the *Corporations Act*.

4 and 5. How could the late fee system be reformed to incentivise compliance and make the system simpler and more equitable? Do you support the introduction of interest on late payments rather than the late payment fee?

The structure of fees charged for the late lodgement of a business' annual review, or a change of company details, requires a balancing of competing objectives. This is particularly so in relation to the potential introduction of an interest-based incremental charging system.

First and foremost, the OSBC supports measures to incentivise the on-time lodgement of annual review and change of details documents. A very large volume of businesses rely on the prompt lodgement of these documents to provide accurate information as to the status and identity of Australian companies. In our submission, a late fee system relying only on the gradual accrual of interest would not provide as great an incentive to lodge on time as the flat, \$79 fee currently applied lodgement up to one month late. As interest would first build slowly and modestly, businesses would initially have little incentive to remedy a failure to lodge on time. We therefore support Treasury's suggestion that the fee \$79 should be retained for lodgement up to one month late.¹⁵

However, we further submit that any penalty applied to businesses for non-compliance with regulatory requirements should generally be proportionate to the magnitude and effect of that non-compliance. The late fee of \$329 applied to any lodgement made more than one month late does not achieve this proportionality. Clearly, a lodgement made, for example, one year late, represents a significantly greater transgression than one made 32 days after deadline. We therefore support the imposition of a modest interest charge to replace the \$329 fee for lodgement over one month late.

Nonetheless, an unfettered interest system would also risk perverse outcomes. It would be highly inequitable for any business, and particularly a small business, to be made liable for potentially unlimited fees - as the indefinite accrual of interest allows. This would be of particular concern where a small business continued to accrue interest for failing to pay an annual review fee over more than 12 months. Under these circumstances, it would be open to ASIC to move to commence deregistration, rather than allow the company's ever-greater liabilities to compound.¹⁶ We therefore suggest that total late fees be capped at the current maximum of \$329.¹⁷

While the balance of policy objectives in this space is notably challenging, these reforms represent the ideal marriage of equity, simplicity, and preservation of the integrity of the register itself.

The OSBC makes no firm recommendation on the rate of interest that should be applied. However, it would represent a suitable confluence of our concerns in relation to this issue if total late fees reached the \$329 mark 12 months after payment was due.

Recommendation 5: The fee of \$79 for lodgement of an annual review and change of company details up to one month late should be retained. The \$329 fee for lodgement more than one month late should be replaced with a modest interest payment system.

Recommendation 6: The total fee for late lodgement of an annual review and change of company details should be capped at \$329.

7. How could search fees be removed to make data more accessible, the system simpler and more equitable?

Ensuring that registry search fees are not levied unreasonably is important to ensure that access to the register is provided on equitable grounds. This is most particularly an issue for the many small businesses of limited resources that are required to pay search fees. Accordingly, the OSBC strongly supports the Commonwealth's efforts to reduce fees applied for electronic registry searches, to reflect the administrative savings realised from modernisation of the registry.¹⁸

However, there appear to be grounds to further reduce search fees. Ideally, no fee should be levied for this service.

Search fees were set at a time when the register was largely paper-based, and required customers to be served in person.¹⁹ We note the planned reduction of some search fees from \$40 to \$19.²⁰ It is not clear that any discount of that magnitude reflects the extent of the administrative efficiencies the Commonwealth will realise from its move to a near-wholly digital register, offering automated customer service.²¹ This shift would appear to have eliminated most costs associated with the administration of search services. A recent study of company registries across all European Union Member States posits that there is no substantial cost associated with administering a digital register.²²

In addition, reducing search fees as low as possible supports the registry to realise its overarching purpose of providing certainty to the business community.²³ Maximising the accessibility of the register for resource-strained small businesses, by minimising fees, ensures they are provided with the certainty they require as to the status and identity of the companies they trade with.

Indeed, the abovementioned European Union study identifies the imposition of search fees as the principal barrier to realising the policy benefits of company registers.²⁴ Numerous international jurisdictions have also abolished registry search fees; The New Zealand,²⁵ United Kingdom,²⁶ and United States company registers²⁷ can all be accessed without charge. The OSBC also recognises the benefits to small business realised by the abolition of fees in general. All services we have delivered through the *Easy to do Business* program are available on a no fee basis.

We also support Treasury's suggestion that applying a registry search fee is inconsistent with the position that the Commonwealth generally takes to data administration.²⁸ In our view, this inconsistency is clear. We note, in particular, the Commonwealth's Public Data Policy Statement. This recognises that data collected by government is, "*a strategic national resources that holds considerable value for growing the economy*", and commits the Commonwealth, "*to release non sensitive data as open by default.*"²⁹ The statement is reflective of a wider trend occurring

across governments, in response to the increasing recognition of the economic value of open data.³⁰

For these reasons, we contend that a substantial reduction in ASIC register search fees is appropriate. Ideally, these services should be offered on a no fee basis. If ASIC is legally or otherwise obligated to charge a fee for particular search,³¹ these should be set at a nominal rate.

Recommendation 7: ASIC should, to the full extent possible, provide registry search services on a no fee basis.

8. Should an infrastructure fee be introduced if it is payable by users of an application programming interface or comparable technology?

The OSBC recognises that any infrastructure fee charged on users of an application programming interface or comparable technology must be designed in a considered manner. Although the primary users of these services are larger businesses, small businesses would be significantly affected by the imposition of any such charge. Clearly, infrastructure fees will be passed on to them as clients of those principal users.

However, without a firm proposal as to the structure or quantum of a potential infrastructure fee, the OSBC cannot comment as to whether or not the fee may be appropriate. In particular, we would need to weigh the potential infrastructure fee against any savings small business would realise through the registry fees reform process as a whole. To ensure the principles of the reform process are met, it is imperative that the small business community realise a net saving.

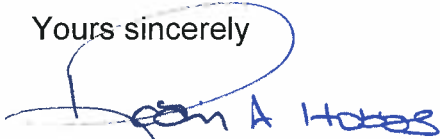
It is also important that we can compare the potential infrastructure fee to the equivalent fees currently levied on primary users.

We encourage Treasury to provide information allowing the OSBC to undertake this analysis in subsequent consultations, and anticipate providing more detailed commentary at that point.

Recommendation 8: Any infrastructure fee must be structured in a manner that ensures the small business community realises a net saving from the registry fees reform process.

The OSBC would welcome the opportunity to engage further with Treasury, as it progresses with the registry modernisation program. To discuss this submission, please contact Thomas Mortimer, Senior Advisor, Advocacy and Strategic Projects, on (02) 8222 4196 or thomas.mortimer@smallbusiness.nsw.gov.au.

Yours sincerely

A handwritten signature in blue ink that reads "Robyn A Hobbs". The signature is written in a cursive style and is positioned below the "Yours sincerely" text.

Robyn Hobbs OAM
NSW Small Business Commissioner

21 December 2018

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- ¹ See NSW Small Business Commissioner (2018), '[Easy to do Business gets even easier](#)'
- ² NSW Business Chamber (2016), '[Red Tape Survey Report](#)', p. 5
- ³ Australian Chamber of Commerce and Industry (2015), '[National Red Tape Survey](#)', p. 11
- ⁴ NSW Business Chamber (2016), '[Red Tape Survey Report](#)', pp. 5-6
- ⁵ Consultation paper, p. 12
- ⁶ ASIC (2016), '[ASIC-initiated deregistration of company](#)'; ASIC n.d., '[Deregistration](#)'
- ⁷ *Corporations Act 2001* (Cth), s601AB (1A)
- ⁸ Consultation Paper, p. 12
- ⁹ Consultation Paper, p. 13
- ¹⁰ Present value calculation using the revenue and growth figures provided at Consultation Paper, p. 7
- ¹¹ Consultation Paper, p. 14
- ¹² Consultation Paper, p. 14
- ¹³ *Corporations Act 2001* (Cth), s292
- ¹⁴ Consultation Paper, p. 15
- ¹⁵ Consultation Paper, p. 15
- ¹⁶ *Corporations Act 2001* (Cth), s601AB (1A)
- ¹⁷ Consultation Paper, p. 10
- ¹⁸ Consultation Paper, pp. 15-16
- ¹⁹ Consultation Paper, p. 13
- ²⁰ Consultation Paper, p. 13
- ²¹ Consultation Paper, pp. 15-16
- ²² Sorensen, K.E. (2018), '*Nordic & European Company Law Research Paper - Access to information in company registers*', forthcoming in *The Transparency of Stock Corporations in Europe* (Veil, R. & Tountopoulos, V. eds), p. 17
- ²³ Consultation Paper, p. 12
- ²⁴ Sorensen, K.E. (2018), '*Nordic & European Company Law Research Paper - Access to information in company registers*', forthcoming in *The Transparency of Stock Corporations in Europe* (Veil, R. & Tountopoulos, V. eds), pp. 16-17
- ²⁵ New Zealand Companies Office (2018), '[Search the companies register](#)'
- ²⁶ United Kingdom Companies House (2018), '[Search the register](#)'
- ²⁷ US Securities and Exchange Commission (2018), '[Company filings](#)'
- ²⁸ Consultation Paper, p. 15
- ²⁹ Department of Prime Minister and Cabinet (2015), '[Australian Government Public Data Policy Statement](#)', p. 1
- ³⁰ See, for example, the NSW digital government strategy; NSW Government (2017), '[Digital NSW – Designing our digital future](#)'
- ³¹ Consultation Paper, p. 11