justice connect
Not-for-profit Law

Not-for-profit Law
Melbourne Office
PO Box 16013
Melbourne VIC 8007
Tel +61 3 8636 4400
Fax +61 3 8636 4455
Sydney Office
PO Box 436
Darlinghurst NSW 1300
Tel +61 2 8599 2100
Fax +61 2 8599 2105

Manager, Corporations Policy Unit
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email: ASICFunding@treasury.gov.au

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ASIC Industry Funding Levies Regulation Enhancements

Thank you for the opportunity to provide feedback on draft regulations and explanatory material for the *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018.*

We have been advised by Treasury that this consultation process is an appropriate mechanism to raise our objection to the application of the *ASIC Supervisory Cost Recovery Levy Act 2017 (Cth) (***the Levy***)* and associated regulations on companies limited by guarantee (**CLG**s) that are also registered charities with the Australian Charities and Not-for-profits Commission (**ACNC**).

In our view the Levy is an unreasonable cost-recovery mechanism which imposes an unfair burden upon a subset of unlisted public companies, being ACNC registered charities. We submit the Levy not be applied to ACNC registered CLGs.

To be clear, we do not disagree with the overall premise of the ASIC Industry Funding Model (that is, ASIC be funded appropriately for regulatory activities it conducts), and therefore do not object to the fee-for-service increases.

Our expertise

Not-for-profit Law is a specialist service of Justice Connect which is an ACNC registered charity and accredited community legal centre. The Not-for-profit Law team is comprised of experienced charity lawyers (who also have firsthand experience by working for Justice Connect and volunteering for a range of other charities). We provide free and low cost legal advice to not-for-profit organisations across Australia. On an annual basis, we respond to more than 1,750 legal enquiries, train more than 3,000 people and our website (www.nfplaw.org.au), with more than 350 free legal resources, has more than 400,000 visits annually.

We advocate for an improved legal and regulatory framework for the not-for-profit sector, and for law reform that takes account of the impacts (and costs) of regulation on not-for-profits.

With this background and expertise we know the imposition of the (new) Levy will be of concern to many CLGs. Very few charitable CLGs are large public companies – ACNC data shows most charities have an annual turnover of less than $50,000 and operate with no paid staff. Many are small organisations which only incorporate under the Corporations Act because they also seek registration as a charity with the ACNC – that way they enjoy streamlined single annual reporting and have the ability to operate nationally (which is easy enough simply with an online presence). Most of these organisations do not engage with ASIC after the point of incorporation (or upon winding up). They only report to the ACNC and the ACNC is effectively also the regulator of their 'corporate form'– it is the ACNC that they are answerable to if they breach mandated core governance standards, for example.

It is for these reasons that since the establishment of the ACNC we regularly advise organisations to incorporate as a CLG (rather than an incorporated association). We need to reconsider this advice in light of the Levy, but note that for some they will have no alternative. For example, because of the requirements of some funding streams and for groups operating close to State borders (to reduce later cost and the burden of registering as a Registrable Australian Body).

Why are we objecting to this levy?

Unfair burden on public companies recognised to be delivering a public benefit

It is unreasonable to charge a flat levy fee to a company where little, if any, administration is undertaken by ASIC. If specific regulatory work is undertaken by ASIC then it is appropriate an (increased) fee-for-service is charged to the company. We note Parliament passed legislation (the ACNC Act 2012) where the intent was explained as:

> 8.6 The ACNC will take this role over from these other Commonwealth government agencies and will therefore centralise the assessment of the adequacy of NFP governance structures and financial position.
>
> 15.74 The consequential amendments also clarify the responsibilities of ASIC and the ACNC, as entities registered with the ACNC will be primarily regulated by the ACNC, rather than ASIC, in relation to the day to day activities of the registered entity.
>
> 15.75 Under the new regime, ASIC will continue to register companies, including companies limited by guarantee, but will have limited oversight of the financial reporting and governance arrangements of those companies that choose to register with the ACNC, as oversight of these arrangements will be performed by the ACNC.
>
> 15.76 Currently, ASIC conducts surveillance of financial reports prepared by companies, registered schemes and disclosing entities, and their compliance with Part 2M.3 of the Corporations Act. ASIC will not continue to be responsible for financial reporting surveillance in respect of entities registered with the ACNC from 1 July 2013, as this function will instead be performed by the ACNC. *(emphasis added)*

The imposition of this levy seems inconsistent with Government policy that:

1. ASIC would no longer have general regulatory oversight of registered charity CLGs upon establishment of the ACNC (as set out above).

   If Government has indeed overturned this decision, then further information on the supervisory functions of ASIC (rather than the ACNC) should be made clear: so that the imposition of a levy on these companies is legitimate

2. Charges would not be imposed by the ACNC, including for functions previously administered by ASIC (for regulation of registered charity CLGs).

   If Government has overturned this decision, without consultation or communication, then seemingly any charge (however, described) should be payable to the ACNC not ASIC.

Recommendation

We recommend that the *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018* be amended to include an exemption from the supervisory levy for unlisted public companies that are registered with the ACNC.

The Levy is not reflective of a service being provided by ASIC and, therefore, is not a legitimate form of cost recovery from unlisted public companies that are registered ACNC charities.

Yours sincerely,

Sue Woodward
Director - National Projects
Not-for-profit Law
sue.woodward@justiceconnect.org.au
+613 8636 4468

Nadine Clode
Manager, Education and Advocacy
Not-for-profit Law
nadine.clode@justiceconnect.org.au
+613 8636 4455