

Productivity Commission

Review of Cost Recovery by Commonwealth
Agencies

Submission

by

Australian Shareholders' Association Limited

Review of Cost Recovery by Commonwealth Agencies

Introduction

This submission focuses principally on cost recovery by the Australian Securities and Investments Commission (ASIC) as discussed in Appendix F to the Productivity Commission's *Draft Report*.

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Although ASIC is primarily a 'regulatory agency' as defined in the *Draft Report*, it is also an 'information agency' in that it collects and compiles a considerable amount of information about companies incorporated under the *Corporations Act 2001*¹ and other entities licensed and regulated under that Act.

We believe that this information should be made more freely available and accessible to members of the public who deal with the entities regulated by ASIC.

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We agree with the Commission that the proper scrutiny of cost recovery (and the efficient operation of government agencies) requires that better information on cost recovery needs to be made available to users and government on an ongoing basis.

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Current cost recovery arrangements by ASIC appear to be in conflict with the operational principles of cost recovery outlined in the Overview of the *Draft Report* in at least three respects.

Over Recovery of Costs

It is clear from the figures provided below and in Appendix F to the Productivity Commission's *Draft Report* that there is substantial over recovery of costs by ASIC

Cross Subsidisation

As at 30 June 1999 there were 1,102,742 companies on the ASIC register of which 1,087,116 were proprietary companies. The annual fee payable on lodging the annual return of a proprietary company, other than a special purpose company or a company registered part way through the year, was \$200.

Thus it is clear that annual return fees payable by proprietary companies comprised nearly two thirds of the total fees and charges collected by ASIC that year and nearly 160% of the total cost of running ASIC for that year.

On the other hand, as indicated below, the fees charged in relation to fundraising and takeovers are clearly inadequate to recover the costs of those activities.

This impost on small business is clearly excessive and unfair.

¹ Formerly the Corporations Law

Lack of Accountability

No justification is provided in ASIC's Annual Reports or in the CLERP 7 Discussion Paper or elsewhere for the quantum of the fees charged for the various services ASIC provides. There appears to be no reference in ASIC's Annual Reports for 1998-99 or 1999-2000 to the amounts of \$7 million and \$10 million referred to on page F2 of the Productivity Commission's *Draft Report* as having been transferred to ASIC by APRA. The information provided in ASIC's Annual Reports is inadequate to enable the Parliament or the public to assess the efficiency with which ASIC carries out its operations. The audit carried out by the ANAO is a financial statement audit and is not designed to assess the efficiency with which ASIC carries out its functions.

Gold Plating and Cost Padding

Although we do not wish to suggest that there is currently any evidence of gold plating or cost padding on the part of ASIC, the lack of effective accountability means that there is a potential for this to occur in the future.

Australian Shareholders' Association

The Australian Shareholders' Association represents the interests of individual (as opposed to institutional) investors in shares, managed investments schemes, superannuation, life insurance and other financial investment products.

The Association is incorporated as a not-for-profit company limited by guarantee. It is an independent body funded principally by members' subscriptions. We receive no government or industry funding.

We currently have about 6,500 individual members including about 160 corporate members. The corporate members are mainly listed public companies which pay a higher annual membership subscription than individual members but, like individual members, have only one vote.

Our national office is located in Sydney and we have active branches in all Australian mainland States.

The Association is governed by a board of non-executive directors elected by all members. The Executive Officer is based in the national office in Sydney together with the equivalent of two full time support staff. There are branch councils in Victoria and Queensland and committees in all mainland States.

All directors and committee members and all office bearers of the Association other than the Executive Officer and his support staff serve in an honorary capacity.

The Association maintains regular contact with ASIC and relevant industry bodies.

As well as investing in the securities of companies incorporated under the *Corporations Act 2001*², members of the ASA have regular dealings, as clients or otherwise, with industry participants licensed or regulated under that Act.

² Formerly the Corporations Law

Over Recovery of Costs by ASIC

Table 1 contains details of the Corporations Law fees and charges collected by ASIC for the years ended 30 June 1998 to 2000, inclusive.

Table 1
Corporations Law Fees and Charges Collected by ASIC
For Years Ended 30 June 1998 to 2000

Administered Revenues	1998 \$'000	1999 \$'000	2000 \$'000
Corporations Law fees and charges			
Mandatory collections	320,340	314,818	330,276
Information broker fees	16,875	20,850	26,310
Court recoveries	423	313	718
Voluntary enquiries	3,965	2,985	2,232
	\$341,603	\$338,966	\$359,536

Source: ASIC Annual Reports 1998-1999 and 1999-2000

These fees and charges are described in the ASIC Annual Reports for 1998-1999 and 1999-2000 as "non-taxation revenues" but, having regard to the advice dated 6 March 2001 received by the Productivity Commission from the Australian Government Solicitor,³ this description does not appear to be correct.

These fees and charges are described in the ASIC Annual Reports as "administered revenues". They are collected by ASIC on behalf of the Commonwealth and paid to the Commonwealth. Their notional disposition is shown in Table 2.

Table 2
Application of Funds Collected by ASIC
During Years Ended 30 June 1998 to 2000

	1998 \$mill	1999 \$mill	2000 \$mill
Cash to Commonwealth Public Account	326.1	331.8	361.0
Appropriations from Commonwealth Government	122.7	137.0	132.4
Net contribution to Commonwealth Government	203.4	194.8	228.6
Compensation to States and Northern Territory	132.6	133.5	135.0
Net surplus retained by Commonwealth Government	\$70.8	\$61.3	\$93.6

Source: ASIC Annual Reports 1998-1999 and 1999-2000 and Productivity Commission *Draft Report*

There are minor differences between the totals shown in Table 1 and the line "Cash to Commonwealth Public Account" in Table 2 because the figures in Table 1 are shown on an accrual basis and those in Table 2 on a cash basis.

³ *Draft Report*, Appendix I

The overall position, however, is clear. On average ASIC retains less than 40% of the fees and charges it collects. In two out of three years the amount paid to the States and the Northern Territory as compensation exceeded the amount appropriated by the Commonwealth Government to ASIC to fund its operating expenses. In each year a substantial net surplus was retained by the Commonwealth Government.

The above figures are consistent with those shown in Table F.1 in the Commission's *Draft Report*.

Suggested Rationale for Over Recovery of Costs

In the Corporate Law Economic Reform Program Proposals for Reform Paper No 7 released by the Minister for Financial Services and Regulation last year (CLERP 7) it was stated that the costs of the national scheme for the regulation of companies and the securities and futures industries administered by ASIC 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).

We agree that the Australian Accounting Standards Board, the Companies Auditors and Liquidators Disciplinary Board, the Companies and Securities Advisory Committee and the Corporations and Securities Panel form an integral part of the national scheme of regulation administered by ASIC.

We also agree that an appropriate part of the costs of such bodies as the Administrative Appeals Tribunal, the Australian Federal Police, the Director of Public Prosecutions and the Federal Court, insofar as they perform functions arising out of the administration of the scheme, should be treated as part of the costs of administering the scheme.

On the other hand 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.

The advice received by the Commission from the Australian Government Solicitor dated 2 and 6 March 2001⁴ confirms that the fees collected by ASIC, at least to the extent that they substantially exceed the cost of the services provided by ASIC, constitute a form of 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.

Cost of Outputs Produced

In its Annual Report for 1999-2000, ASIC provides the following details of the costs of its outputs for the year. National and support costs have been apportioned to these four outputs, but no indication is given of the extent to which the enforcement activity (Output 4) relates, respectively, to the companies and other entities covered by Output 2 and the licensed participants covered by Output 3.

Table 3
Costs of Outputs Produced by ASIC
During Year Ended 30 June 2000

Output	Details	Cost
1	Policy and guidance about laws administered by ASIC	13.9m
2	Comprehensive and accurate information on companies and corporate activity	41.0m
3	Compliance monitoring and licensing of participants in the financial system to protect consumer interests and ensure market integrity	24.1m
4	Enforcement activity to give effect to the laws administered by ASIC	56.3m
		\$135.3

Source: ASIC Annual Report 1999-2000, p 19

Later in the same Annual Report the following figures are given.

Table 4
Costs of Major Operations
During Year Ended 30 June 2000

Regulatory and enforcement operations	About \$73 million
Public information	About \$31 million
National coordination and support services	About \$31 million

Source: ASIC Annual Report 1999-2000, pp 21-23

No attempt is made to reconcile the two sets of figures and no analysis is provided of the costs of the various types of activity that ASIC undertakes

⁴ *Draft Report*, Appendix I

Australian Accounting Standards Board

Apart from the Australian Securities and Investments Commission itself, a number of other bodies are established under the *Australian Securities and Investments Commission Act 2001*.

These comprise the:

- Australian Accounting Standards Board (the AASB)
- Companies Auditors and Liquidators Disciplinary Board (the Disciplinary Board)
- Corporations and Securities Panel (the Panel)
- Companies and Securities Advisory Committee (CASAC)
- Parliamentary Joint Committee on Corporations and Securities

As indicated earlier, these bodies form an integral part of the system of regulation administered by ASIC.

ASIC is funded principally by money appropriated by Parliament for the purposes of ASIC.⁵

Paragraph 135(1)(a) of the Act specifically provides for ASIC's money to be applied in paying or discharging expenses, charges, obligations or liabilities that not only ASIC, but also the Panel, the Disciplinary Board and the AASB incur or undertake in connection with performing or exercising any of their functions or powers.⁶

CASAC, on the other hand, is funded by a separate parliamentary appropriation.⁷

Because of suggestions that it should be funded on a different basis from ASIC it is appropriate to comment separately on the funding, and a proposed basis for the recovery of the costs of, the Australian Accounting Standards Board.

Under section 235B of the *Australian Securities and Investments Commission Act 2001*, the Financial Reporting Council publishes a report on the operations of the FRC and the AASB for each year ending 30 June.

The following figures have been extracted from the Annual Report of the Financial Reporting Council and the Australian Accounting Standards Board for 1999-2000.

New institutional arrangements for setting Australian accounting standards came into effect on 1 January 2000, with the replacement of Part 12 of the *Australian Securities and Investments Commission Act 1989* by a new Part 12 which was enacted as part of the legislative reform package contained in the *Corporate Law Economic Reform Program Act 1999*.

Accordingly the following figures are for the six month period ended 30 June 2000. In the absence of evidence to the contrary, it appears reasonable to assume a budget of approximately \$3 million for the year ending 30 June 2001.

⁵ *Australian Securities and Investments Commission Act 2001*, s 133(1)

⁶ It is acknowledged that under paragraph 225(2)(h) of the *Australian Securities and Investments Commission Act 2001*, one of the functions of the FRC is to seek contributions towards the costs of the Australian accounting standard setting process

⁷ *Australian Securities and Investments Commission Act 2001*, s 159(1)

Table 5
Operating Revenues and Expenses of the Australian Accounting Standards Board
(Including the Financial Reporting Council and the Urgent Issues Group)
For the Period 1 January 2000 to 30 June 2000

Operating revenues	
Revenues from government	
- Appropriations	648,000
- Other	13,745
Sales of goods and services	135,134
Interest	3
Other revenues	
- Grants from States and Territories	83,000
- Industry contributions	
CPA Australia	162,500
The Institute of Chartered Accountants in Australia	162,500
Australian Stock Exchange	20,000
Total operating revenues	1,224,882
Less: Operating expenses	1,438,152
Operating deficit before abnormal items	(213,270)
Abnormal revenue	378,775
Operating surplus	\$165,505

Included in the operating revenues shown above is \$135,134 received from the sale of goods and services, including subscriptions for the supply of AASB publications.

We believe that in the interests of transparency, full discussion and debate and general knowledge and awareness of their contents, exposure drafts and accounting standards and other documents published by the AASB and the UIG should be made publicly available, without charge, on the AASB website. Where paper copies are supplied, a charge could be made to cover the cost of printing and distribution with a reasonable margin to cover overheads.

On page 12 of the Annual Report it is stated that accommodation is being provided for the AASB by the Australian Stock Exchange Limited (ASX) on a rent free basis for a period of four years from 1 March 2000.

Note 1.4 on page 37 states that services received free of charge are recognised in the Operating Statement as revenue when a fair value can be reliably determined and that use of these resources is recognised as an expense.

Note 6B to the accounts shows operating lease rental of \$20,000 which implies a current rent of \$60,000 per annum.

The Schedule of Commitments on page 35 of the Annual Report shows operating lease commitments \$293,195 offset by commitments receivable from the ASX as lessor of the AASB's premises of \$242,000.

Note 3 to the accounts states that the AASB is significantly dependent on appropriations from the Parliament of the Commonwealth and on grants from the States and Territories and from

CPA Australia, The Institute of Chartered Accountants in Australia and the Australian Stock Exchange to carry out its normal activities.

No reference has been made to the funding provided by these bodies in Note 14 dealing with related party disclosures notwithstanding that three of the members of the Financial Reporting Council are nominees of these bodies.

Although the AASB is referred to in CLERP 7 as funded by ASIC, there appears to be a reluctance on the part of Treasury to provide adequate funding to support the activities of the AASB, FRC and UIG.

For example, unlike members of other similar bodies such as the Companies and Securities Advisory Committee and ASIC's Consumer Advisory Panel, members of the FRC are not paid a sitting fee and are not even reimbursed their travelling expenses of attending FRC meetings.

We understand that it has been suggested by Treasury that further "voluntary" funding will be sought from stakeholder bodies represented on the Financial Reporting Council and from other industry participants.

We are concerned that reliance on funding from stakeholder bodies and industry participants may lead to regulatory capture, to a perception of lack of independence of the FRC and AASB and to a concern that more weight may be given to the views of those members of the FRC who have been nominated by bodies which have made the largest contribution to the funding of the Board.

Beneficiaries of Accounting Standards

The main functions of the AASB as specified in subsection 227(1) of the *Australian Securities and Investments Commission Act 2001* are:

- (a) ...
- (b) to make accounting standards under section 334 of the *Corporations Act 2001* for the purposes of the corporations legislation ... ;
- (c) to formulate accounting standards for other purposes;
- (d) ...
- (e) to advance and promote the main objects of Part 12 of the Act.

As Note 1 to the subsection indicates, the standards made under paragraph (b) are given legal effect by the *Corporations Act 2001*. The standards formulated under paragraph (c) do not have legal effect under the *Corporations Act 2001* but may be applied or adopted by some other authority.

Following its reconstitution, the AASB has accepted responsibility for making accounting standards for the public and not-for-profit sectors as well as for the purposes of the *Corporations Act 2001*.

Section 224 of the *Australian Securities and Investments Commission Act 2001* indicates that the main objects of Part 12 are:

- (a) To facilitate the development of accounting standards that require the provision of financial information that, *inter alia*, allows users to make and evaluate decisions

about allocating scarce resources, assists directors to discharge their obligations in relation to financial reporting and is relevant to assessing performance, financial position, financing and investment;

- (b) To facilitate the Australian economy; and
- (c) To maintain investor confidence in the Australian economy

In the light of the foregoing, it seems reasonable to conclude that the principal beneficiaries of the standards produced by the AASB are companies and other entities incorporated under the *Corporations Act 2001* although there is also a significant benefit to the public and not-for-profit sectors as well as to the public in general.

Because in most cases they will be able to pass on the cost of any fees and charges they incur to their shareholders, clients and other persons benefiting from the improved financial information provided as a consequence of effective accounting standards, it seems appropriate to recover a major portion, if not all, of the cost of the accounting standard setting process from those companies and other entities.

Under section 292 of the *Corporations Act 2001* a financial report and a directors' report must be prepared for each financial year by:

- (a) all disclosing entities;
- (b) all public companies;
- (c) all large proprietary companies; and
- (d) all registered schemes.

The financial report for a financial year must comply with Australian accounting standards⁸ and must be lodged with ASIC.⁹

In addition a disclosing entity must prepare and lodge with ASIC financial statements and reports for each half-year¹⁰ and is subject to the continuous disclosure requirements of sections 1001A and 1001B.

Section 1001A applies to listed disclosing entities and requires them to comply with certain obligations in the ASX Listing Rules requiring the notification of market sensitive information. Section 1001B applies to unlisted disclosing entities and requires them to lodge documents containing information with ASIC.

Disclosing entities and, in particular, listed disclosing entities tend to be responsible for the lodgment with ASIC of a significantly larger volume of documents than other entities and, by definition, are entities in which the public, or at least a significant segment of the public, are likely to have an interest.

Under ASIC Practice Note 61 and Class Order 98/104 listed disclosing entries may lodge certain documents with the ASX as agent for ASIC. These documents are then processed by ASX and the details transmitted electronically to ASIC. A substantial part of the processing costs are thus borne by ASX rather than by ASIC and financed out of ASX listing fees.

⁸ *Corporations Act 2001*, s 296

⁹ *Corporations Act 2001*, s 319

¹⁰ *Corporations Act 2001*, ss 111AO and 303

In the light of the foregoing, it appears reasonable that a major part of the cost of the accounting standard setting process should be recovered through fees paid to ASIC by disclosing entities, other public companies and other companies and entities which are required to prepare and lodge with ASIC financial statements that comply with Australian accounting standards.

CLERP 7 Proposals

Details of the fees charged under the Corporations Law, which were last revised on 1 August 1997, are contained in Appendix B to the CLERP 7 Discussion Paper.

Part 7 of the Discussion Paper proposes a number of changes to the fees regime.

Appendix C to the Discussion Paper contains a draft schedule of fees proposed to apply from 1 July 2000. It is proposed that the fees as at 1 July 2000 would be used as the base for determining the fees in 2001-2002 and subsequent years which would be increased on the basis of changes in the Consumer Price Index. The CPI for the December quarter of 1999 would be used as the base index figure and fees for subsequent years would be increased in accordance with the CPI for the December quarter immediately preceding the financial year in which the revised fees would apply.

Indexation of fees, without any allowance for savings resulting from technological and other changes in procedures, must be regarded as an unacceptable basis of cost recovery.

Although the Discussion Paper states¹¹ that the principles that have been used for undertaking the review of corporations fees are cost recovery, equity and simplicity, it is clear that there has been no genuine attempt to apply these principles.

For example it is acknowledged in Appendix C¹² that the proposed fees are based on the fees introduced on 1 July 1994, adjusted for anticipated changes in the CPI between the December quarters of 1993 and 1999 and the four supplementary increases made in 1995-96 and subsequent years. There has been no attempt to justify the fees proposed for particular services on the basis of the cost of providing those services.

It is acknowledged that the current fee for lodging a prospectus fails to cover the costs associated with that activity and that in 1998-99 fees in respect of fundraising activities covered only about 35 per cent of the cost of regulating those activities.¹³ Even the proposed fees of \$1,730 for lodging an offer information statement and a profile statement and \$4,000 for lodging a prospectus would cover only about 60 per cent of the cost of regulating those activities.¹⁴

Similarly, in 1998-99 fees in respect of takeover activities generated less than 10 per cent of the cost of regulating those activities. The Discussion Paper acknowledges that, on the basis of activity levels in 1990-99, fees set at the proposed increased amount of \$4,000 would cover only about 20 per cent of the cost of regulating these activities.¹⁵

¹¹ Discussion Paper, paragraph 7.4, p 35

¹² Discussion Paper, p 69

¹³ Discussion Paper, p 44

¹⁴ Discussion Paper, p 45

¹⁵ Discussion Paper, p 46

On the other hand, as indicated earlier, the annual return fee of \$200 paid by proprietary companies grossly exceeds the cost of regulating that sector of the industry.

On page 47 of the Discussion Paper it is stated that the ultimate objective, in terms of simplicity, would be to have a fees schedule that prescribes one fee for each of the following matters:

- registration as a financial service provider, auditor or liquidator;
- registration of a company or other entity;
- annual fee for financial service providers, auditors and liquidators;
- annual fee for companies and other entities;
- fundraising;
- charges;
- matters concerning the licensing of financial product markets and clearing and settlement facilities;
- acquisition of shares;
- other applications (not covered by the above items);
- late lodgment;
- supply of information and documents; and
- other matters that ASIC is required or authorised to do.

However, the Discussion Paper does not adopt this approach.

It states that while such a schedule could be prepared, its simplicity would almost certainly be at the expense of equity. For example it would be difficult to justify a small not-for-profit company having to pay the same annual fee as a large listed corporation.¹⁶

We agree that some modifications would be needed to this list, but they would be only minor.

For example the fee for registration as a financial service provider might be different from that for registration as an auditor or liquidator and the annual fees for financial service providers different from the annual fees for auditors and liquidators.

Similarly the fee for registration of a proprietary company would be different from the fee for registration of a managed investment scheme involving the approval of the scheme's constitution and compliance plan and other matters.

Financial Services Reform Bill 2001

The Financial Services Reform Bill 2001 provides for the issue of three types of licence:

- An Australian CS Facility Licence that authorises a person to operate a clearing and settlement facility
- An Australian Financial Services Licence that authorises a person who carries on a financial services business to provide financial services
- An Australian Market Licence that authorises a person to operate a financial market.

¹⁶ Discussion Paper, pp 47-48

It would appear that under the new regime, persons who currently hold a dealers licence, an investment advisers licence, a future brokers licence or a futures advisers licence, who are referred to in the CLERP 7 paper as occupational licence holders, will now be required to hold an Australian Financial Services Licence.

It is also clear that registration as an auditor or a liquidator is a type of licensing and that the annual registration fee payable by these persons can be regarded as an annual licence fee.

Furthermore the proposal in CLERP 7 to separate the payment of an annual fee by companies and other registered entities from the lodgment of an annual return makes it clear that this fee is in effect also an annual licence fee to maintain their registered status.

Proposed Basis for Cost Recovery

Fees and charges payable to ASIC can therefore be conveniently classified into:

- Annual licence and registration fees, and
- Fees for specific services, including application fees for a licence or for registration of a company or other entity and fees for lodgment or approval of documents and transactions.

When an application is lodged for a licence or for registration of a company or other entity or as an auditor or liquidator the fee should cover the cost of examining and checking the application and any other supporting documents or evidence and of establishing the necessary entries in ASIC's registers.

Annual licence and registration fees on the other hand should cover not only the costs of maintaining the relevant register but also the costs of regulating and monitoring the relevant industry sector, where sectors are defined in terms of the entity regulated.

For example, industry sectors could comprise:

- Clearing and settlement facilities
- Financial Service Providers
- Financial Markets
- Auditors and Liquidators
- Companies and other entities.

In establishing fees it may be appropriate in the interests of equity and efficient cost recovery to further subdivide these groups on the basis of the risk characteristics of the entities regulated and the costs of regulation.

For example it may be appropriate to classify financial service providers on the basis of the type of services provided and the size and complexity of the entity. For example in the CLERP 7 paper it is suggested that the annual fee payable by the holder of a dealers licence should be based on the number of authorised representatives of that dealer.

Companies could be classified according to the different levels of regulatory cost applicable to different types of company. The CLERP 7 paper considered and rejected a 'five-tier approach' under which companies would be classified as:

- Listed corporations
- Other public companies
- Large proprietary companies
- Small proprietary companies
- Special purpose companies

Of the 18,000 public companies in Australia, less than 2,000 are disclosing entities with shares or other securities listed on the Australian Stock Exchange.¹⁷

On the other hand, more than 500 proprietary companies are classified as disclosing entities because some of their securities are classified as enhanced disclosure securities for the purposes of the *Corporations Act 2001*.¹⁸

Almost half of the public companies registered with ASIC are companies limited by guarantee, suggesting that most have been formed for charitable, professional, sporting, social or recreational purposes.¹⁹ Under the current Corporations (Fees) Regulations, such companies as well as "home unit" companies may qualify for reduced annual return fees.

As all States and Territories now have legislation providing for the incorporation of associations, it is arguable that those associations which have a need or desire to be incorporated under the *Corporations Act 2001* should be prepared to pay an annual registration fee equivalent to that payable by a proprietary company.

In the light of the foregoing, and on the basis of the extent of regulatory supervision required, it may be appropriate to introduce the following three tier structure for the annual fees payable by companies and registered schemes:

- (a) Disclosing entities comprising public companies and registered schemes that are disclosing entities
- (b) Other entities required to prepare and lodge annual reports and financial statements comprising public companies and registered schemes that are not disclosing entities and large proprietary companies
- (c) Companies not required to prepare and lodge annual reports and financial statements.

Both annual fees and fees for specific services or "chargeable matters" would then be based on the cost of providing the relevant services including an appropriate allowance for overheads and for the cost of services provided by bodies external to ASIC such as the Australian Federal Police, the Director of Public Prosecutions and the Administrative Appeals Tribunal and the Federal Court, insofar as the costs of those bodies are not recovered by separate fees or charges.

This may require improved internal accounting systems and should be accompanied by some form of independent review by a body such as the ANAO.

We have made some further suggestions in relation to accountability in our comments on the Wallis Committee Recommendations.

¹⁷ Discussion Paper, p 38

¹⁸ Discussion Paper, p 39

¹⁹ Discussion Paper, pp 38-39

Other Legislation

As a consequence of the replacement of the Corporations Law and related legislation by the *Corporations Act 2001*, a number of Bills dealing with fees and charges were introduced into the Federal Parliament.

These included:

- Corporations (Fees) Bill 2001
- Corporations (Fees) Amendment Bill 2001
- Corporations (National Guarantee Fund Levies) Bill 2001
- Corporations (National Guarantee Fund Levies) Amendment Bill 2001
- Corporations (Securities Exchanges Levies) Bill 2001
- Corporations (Futures Organisations Levies) Bill 2001
- Corporations (Compensation Arrangements Levies) Bill 2001

Some of these commenced at the same time as the *Corporations Act 2001* and others will commence at the same time as the *Financial Services Reform Act 2001*.

This legislation imposes various fees and other levies.

Subsection 5(2) of the Corporations (Fees) Act 2001 acknowledges that the fees prescribed by the regulations for chargeable matters are imposed as taxes.

We are particularly concerned by subsection 6(2) of that Act which provides that 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.

We believe this provision is completely contrary to the principles of cost recovery outlined in the Productivity Commission's *Draft Report*.

Wallis Committee Recommendations

Reference is made on pages F6 and F7 of the *Draft Report* to three of the recommendations of the Wallis Committee concerning cost recovery by financial regulators.

Our comments regarding these recommendation are as follows.

Recommendation 104: Regulatory agencies' charges should reflect their costs.

We agree that regulatory agencies, such as ASIC, should collect from the entities which they regulate enough revenue to fund themselves, but not more.

We have indicated above what we believe to be an appropriate basis for allocating these costs between annual licensing and registration fees and fees for services.

Recommendation 106: Regulatory agencies should set their charges, subject to approval by the Treasurer.

We agree that fees and charges imposed to recover costs of financial regulatory agencies, such as ASIC, should be determined by the agencies, subject to approval by the Treasurer.

However we believe that these agencies should be accountable to the entities which bear these fees and charges and that an independent body such as the ANAO should review the basis on which they are calculated

Recommendation 107: Regulatory agencies should be off-budget.

We agree that if agencies, such as ASIC, are funded through the Commonwealth Government budget, they should have their funding levels determined by reference to policies for financial system regulation rather than targets for the overall budgetary balance. However, because of the justified public interest in the cost, efficiency and effectiveness of the regulatory functions performed by ASIC (and APRA) we believe it is appropriate for ASIC's budget to continue to be subject to Parliamentary review.

There are two other recommendations of the Wallis Committee which have not been mentioned in the *Draft Report* but are potentially relevant to the issues discussed.

Recommendation 108: Regulatory agencies should have boards, with majorities of independent directors.

We believe there is a strong argument for the appointment of independent, non-executive members of the Commission.

There is already provision in section 9 of the *Australian Securities and Investments Commission Act 2001* for the appointment of up to an additional five part-time members of the Commission. The appropriate qualifications of persons nominated for appointment are specified in subsection 9(4).

The appointment of independent, part time members to the Commission, who were seen to be representative of the entities regulated by ASIC and of the beneficiaries of that regulation (for example, representatives of industry and consumer bodies) would be a means of demonstrating and ensuring the accountability of ASIC to the entities it regulates and for the revenues it collects.

It would also help to ensure that ASIC's policies and priorities were in harmony with the needs and desires of the public and of the entities regulated.

We believe that the appointment of independent, part time members of the Commission would be preferable to the establishment of a "Business Advisory Board" appointed and chaired by ASIC as proposed in Part 5 of the CLERP 7 discussion paper.

Consideration might also be given to the appointment of a Chief Executive Officer and a Chief Financial Officer in recognition of the increased size and changing nature of the activities of ASIC since its predecessor, the National Companies and Securities Commission, was first established.

Recommendation 109: Regulatory agencies should improve their reporting.

The Wallis Committee recommended that, to ensure adequate accountability, and to assist the application of efficient cost-recovery arrangements, each regulatory agency should develop internal accounting systems and reporting arrangements to identify its effectiveness and efficiency, both in aggregate and in respect of each major regulatory objective. It recommended that reports should include the results of internal assessments of efficiency, compliance costs and cost effectiveness. Where possible, comparisons with international best practice should be provided.

We strongly support this recommendation.

Currently little information is provided in ASIC's Annual Reports concerning the costs of its various regulatory activities and, so far as we are aware, there is no publicly available information justifying the basis of calculation of ASIC's fees and charges

Summary

We support the principle of full cost recovery by ASIC.

We agree that the revenue collected by ASIC should cover 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, which we see as an integral part of the scheme.

We also acknowledge that the costs of bodies which, while not part of the national scheme, perform functions arising out of the administration of the scheme (for example, the Administrative Appeals Tribunal, the Australian Federal Police, the Director of Public Prosecutions and the Federal Court) should be covered by the revenues collected by ASIC. However we believe that the funds of between \$61.3 million and \$96.3 million currently retained by the Commonwealth Government out of the revenues collected by ASIC are more than sufficient to cover those costs.

On the other hand we strongly oppose the over recovery of costs and the imposition of fees and charges for revenue raising purposes. In particular, we strongly oppose the imposition of fees by ASIC to fund the general purpose revenues of the States and the Northern Territory.

We also oppose the cross-subsidisation of the regulation of one segment of the market (large public companies and disclosing entities) by fees imposed on another segment (small proprietary companies).

However we believe that the subsidisation of free public access via the internet to the various registers maintained by ASIC out of the annual licensing and registration fees paid by the companies and other entities whose details are recorded in these registers is a valid part of the cost of regulating these entities.

We have suggested what we believe is an equitable and simple basis for the recovery of the costs incurred by ASIC in regulating the financial services industry.