

EXPLANATORY STATEMENT

Issued by authority of the Minister for Revenue and Financial Services

ASIC Supervisory Cost Recovery Levy Act 2017

Corporations (Fees) Act 2001

Corporations (Review Fees) Act 2003

ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018

The *ASIC Supervisory Cost Recovery Levy Act 2017* (the Levy Act) imposes a levy on entities regulated by the Australian Securities and Investments Commission (ASIC) to recover its regulatory costs. Section 13 of the Levy Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Corporations (Fees) Act 2001* (the Fees Act) imposes fees for chargeable matters under the *Corporations Act 2001*. Section 8 of the Act provides that the Governor-General may make regulations for the purposes of sections 5, 5A, and 6 of the Fees Act.

The *Corporations (Review Fees) Act 2003* (the Review Fees Act) provides for an annual review fee with respect to the review date of a company or registered scheme. Section 8 of the Review Fees Act provides that the Governor-General may make regulations for the purposes of the Review Fees Act and section 1351 of the *Corporations Act 2001*.

The *ASIC Supervisory Cost Recovery Levy Regulations 2017* (the Levy Regulations) apply either a basic or a graduated levy to entities in each industry subsector regulated by ASIC. The type of levy and the formula for calculating the amount of levy payable is different for each industry subsector. The Levy Regulations also establish the criteria for determining the subsector/s an entity forms part of, sets out the formulas and metrics to be used for calculating the amount of levy payable for entities in each industry subsector and prescribes certain amounts that should not be part of ASIC's regulatory costs.

The *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018* (the Regulations) amend the Levy Regulations to:

- allow ASIC to recover its enforcement, compliance and surveillance costs relating to individuals regulated by ASIC;
- establish new industry subsectors to reflect the recently introduced licensing schemes for crowd-sourced funding intermediaries and financial benchmark administrators;
- create new subsectors for new and established specialised market operators;
- replace the existing credit rating agencies subsector with separate subsectors for large and small credit rating agencies;

- expand the ‘small amount credit providers’ subsector to also cover medium amount credit providers;
- adjust the operation of the levy as it applies to over-the-counter traders;
- simplify the operation of the large securities exchange participants subsector; and
- provide for the recovery of ASIC’s operating costs incurred under the previous ASIC market supervisory cost recovery regime.

The Regulations also amend the:

- *Corporations (Fees) Regulations 2001* (the Fees Regulations) to remove certain lodgement fees for publishing prescribed notices on AISC’s publication website; and
- *Corporations (Review Fees) Regulations 2001* (the Review Fee Regulations) to factor ASIC’s regulatory costs for proprietary companies into their annual review fee.

The Levy Act requires the Minister to be satisfied that the regulations are consistent with the objectives of the cost recovery regime in subsection 9(2) of the Act.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after registration. Some of the amendments will apply from the 2017-18 financial year onwards while others will only apply from the 2018-19 financial year onwards. The explanation of the amendments provided in the Attachment specifies when each amendment starts to apply.

Attachment

Details of the ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018

This Attachment sets out further details of the *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018* (the Regulations). All references are to the Regulations unless otherwise stated.

Part 1 – Preliminary

Section 1 – Name

This section provides that the title of the instrument is the *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after it is registered. Some of the amendments will apply from the 2017-18 financial year onwards while others will only apply from the 2018-19 financial year onwards. The explanation of the amendments provided below specifies when each amendment starts to apply.

Section 3 - Authority

This section provides that the Regulations are made under the *ASIC Supervisory Cost Recovery Levy Act 2017*, the *Corporations (Fees) Act 2001* and the *Corporations (Review Fees) Act 2003*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other items in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Regulatory costs

Item 1 of Schedule 1 amends the Regulations to provide that ASIC's regulatory costs for a financial year may include its unrecovered past operating costs incurred under the previous market supervisory cost recovery regime. The market supervisory cost recovery regime allowed ASIC to recover its operational costs over a number of years. ASIC had not fully recovered its past operational costs when the market supervisory cost recovery regime was replaced by the industry funding regime established in the Levy Act. Item 29 of Schedule 1 to the *ASIC Supervisory Cost Recovery Levy (Consequential Amendments) Act 2017* preserved ASIC's ability to recover all costs incurred prior to the replacement of the market supervisory cost recovery regime with the industry funding regime on 1 July 2017.

The amendment in Schedule 1 provides that ASIC's previously unrecovered operating costs are regulatory costs that are to be recovered as part of the industry funding

regime. The amendment takes effect from the day after the Regulations are registered and applies in relation to the 2017-18 financial year and future financial years.

Schedule 2 – Regulated entities

Item 1 of Schedule 2 amends the Regulations to provide that individuals regulated by ASIC fall within the definition of ‘regulated entities’ under section 7 of the Levy Act and therefore become leviable entities under the industry funding regime. The effect of this amendment is to ensure that ASIC’s costs relating to the individuals it regulates can be recovered under the industry funding regime.

As there is no specific subsector for the individuals regulated by ASIC, the relevant costs will be allocated to the various existing subsectors the costs relate to. Individuals regulated by ASIC will not therefore have to directly pay the levy. For example, as there is no specific subsector for company directors, ASIC’s costs in relation to company directors will be recoverable through the proprietary and public companies subsectors. The amendment takes effect from the day after the Regulations are registered and applies in relation to the 2017-18 financial year and future financial years.

Schedule 3 – Small and medium amount credit provider subsector

The amendments in schedule 3 will extend the existing ‘small amount credit providers’ subsector in section 24 of the Regulations so that it also includes medium amount credit providers as defined in the *National Consumer Credit Protection Act 2009*. The amendments only apply to levies payable in relation to the 2018-19 financial year and later financial years.

As a result of the amendments, an entity will now fall within the ‘small and medium amount credit providers’ subsector for the 2018-19 financial year and later financial years if it holds an Australian credit licence authorising it to engage in credit activities as a credit provider and the entity provides credit under a small or medium amount credit contract.

Entities in the subsector will pay a levy calculated in accordance with the basic levy component formula in section 9 of the Levy Regulations. However as the subsector will also include medium amount credit providers, ASIC’s costs in relation to those entities will also be attributed to the subsector. The subsector regulatory costs will be shared between entities based on each entity’s share of the total amount of credit provided under small and medium amount credit contracts in the financial year.

Schedule 4 – New and established specialised market operators subsector

The existing ‘small derivatives market operators’ subsector in section 50 of the Levy Regulations will be repealed so that it does not apply from the 2018-19 financial year onwards. The subsector will be replaced with two new subsectors from 2018-19 onwards that differentiate between operators of new specialised markets and operators of established specialised markets.

Section 52A - New specialised market operators

The amendments in schedule 4 of the Regulations provide for a subsector for new specialised market operators. An entity will fall within this subsector for a two year period after it is licensed to operate a specialised market under subsection 795B(1) of the *Corporations Act 2001*.

An entity will only fall within the subsector if it is operating a new market that has never been previously operated in Australia or overseas and the entity has never previously held an Australian Market Licence. However, an entity will not fall within this subsector if the market being operated is:

- an overseas market (see section 46 of the Levy Regulations);
- a small securities (self-listing) exchange (see section 47 of the Levy Regulations);
- a small securities exchange (see section 48 of the Levy Regulations);
- a small futures exchange (see section 49 of the Levy Regulations);
- a large securities exchange (see section 51 of the Levy Regulations); or
- a large futures exchange (see section 52 of the Levy Regulations).

Entities that fall within this subsector will pay a levy calculated in accordance with the basic levy component formula in section 9 of the Levy Regulations. Under this formula, ASIC's regulatory costs for the subsector will be shared between all entities in the subsector in proportion to the number of days each entity operates each market that falls within the subsector. ASIC will prescribe its regulatory costs for the subsector and the cumulative number of days all relevant markets in the subsector were operated as part of its annual legislative instrument.

After operating the market for two years, an entity will cease to fall within the 'new specialised market operators' subsector and instead fall within the 'established specialised market operators' subsector.

Section 52B - Established specialised market operators

The amendments in schedule 4 of the Regulations provide for a subsector for established specialised market operators. An entity will fall within this new subsector if it:

- operates a new market that has previously been operated by it or another entity in Australia or overseas; or
- operates a new type of market that has never been previously operated in Australia or overseas but the entity holds or previously held an Australian Market Licence; or
- has already operated a new market that has never been previously operated in Australia or overseas for more than 2 years.

An entity will not however fall within this subsector if the market being operated is:

- an overseas market (see section 46 of the Levy Regulations);
- a small securities (self-listing) exchange (see section 47 of the Levy Regulations);
- a small securities exchange (see section 48 of the Levy Regulations);
- a small futures exchange (see section 49 of the Levy Regulations);
- a large securities exchange (see section 51 of the Levy Regulations); or
- a large futures exchange (see section 52 of the Levy Regulations).

Entities that fall within this subsector must pay a levy calculated in accordance with the basic levy component formula in section 9 of the Levy Regulations. Under this formula, ASIC's regulatory costs for the subsector will be shared between all entities in the subsector in proportion to the number of days each entity operates each market that falls within the subsector. ASIC will prescribe its regulatory costs for the subsector and the cumulative number of days all relevant markets in the subsector were operated as part of its annual legislative instrument.

Schedule 5 – Benchmark administrators subsector

The amendments in schedule 5 of the Regulations provides for a new industry subsector for benchmark administrator licence holders. Entities that hold a benchmark administrator licence to administer a financial benchmark during the 2018-19 financial year and future financial years will have to pay a levy calculated in accordance with the basic levy component formula in section 9 of the Regulations. Under this formula, ASIC's regulatory costs for the subsector will be shared in proportion to the number of days each entity administers each financial benchmark it is licensed to administer. ASIC will prescribe its regulatory costs for the subsector and the cumulative number of days all relevant financial benchmarks are administered as part of its annual legislative instrument.

Schedule 6 – Crowd-sourced funding (CSF) intermediaries subsector

The amendments in schedule 6 of the Regulations provides for a new industry subsector for CSF intermediaries. As a result of the amendments, an entity that has an Australian Financial Services Licence (AFSL) that expressly authorises the licensee to provide a CSF service during a financial year will fall within this subsector for the financial year. The new subsector will apply in relation to the 2018-19 financial year and later financial years.

CSF intermediaries will pay a levy calculated in accordance with the graduated levy formula in section 10 of the Levy Regulations. All CSF intermediaries will pay a minimum levy of \$5,000 and then a variable amount depending on each entity's share of the sum of the maximum subscription amounts of all CSF offers. The levy is based on the maximum subscription amount of each CSF offer as first published on the platform of a CSF intermediary and does not double count amounts in supplementary or replacement offer documents. ASIC will prescribe its regulatory costs and the sum

of the maximum subscription amounts of all CSF offers for each financial year as part of its annual legislative instrument. There is no pro-rata of the levy amount as the formula already provides for an effective scale of business activity.

Schedule 7 – Over-the-counter traders subsector

The amendments in schedule 7 adjust the over-the-counter (OTC) traders subsector (section 66 of the Levy Regulations) to clarify the scope of the subsector.

At present, an entity will not fall within the OTC traders subsector if it is part of any the following subsectors:

- responsible entities (section 35);
- superannuation trustees (section 36);
- wholesale trustees (section 37).

The purpose of the carve out was to exempt entities in those subsectors from having to also pay the OTC traders subsector levy where they only deal in OTC products pursuant to their activities related to those subsectors. However, as a large number of OTC traders have a broad range of licence authorisations, the existing carve-out may have the effect of excluding OTC traders from the subsector merely because they have a licence authorisation that would make them part of the responsible entities, superannuation trustees or wholesale trustees subsectors. To address this, the carve-out is being amended so that an entity will only qualify for the exemption if at all times the entity is part of that other subsector, the entity deals in or holds out that it deals in OTC financial products only as part of its activities relevant to those subsectors. The amendment takes effect from the day after the Regulations are registered and applies from the 2017-18 financial year onwards.

Schedule 8 – Review fee for small proprietary companies

The amendments in schedule 8 provide for ASIC's regulatory costs in relation to small proprietary companies to be recovered through a \$4 increase to the annual review fee for proprietary companies in the *Corporations (Review Fees) Regulations 2003*. This approach will minimise the regulatory burden of the Industry Funding Model on small proprietary companies by ensuring that they only have to pay one fee each year.

The \$4 increase will apply from 1 July 2018 to ensure it operates consistently with the payment of levies under the industry funding regime which only occur after the end of the 2017-18 financial year. The \$4 fee will be subject to indexation together with the rest of the annual review fees.

The \$4 increase is also incorporated into the cost for the 10 year upfront payment option for proprietary companies that pay their review fees in advance.

As the \$4 increase applies to all proprietary companies, ASIC will reduce its regulatory costs for large proprietary companies (section 16 of the Levy Regulations) by an amount equal to the additional \$4 large proprietary companies will pay through the increase to the annual review fee in the *Corporations (Review Fees) Regulations 2003*.

Schedule 9 – Repeal of lodgement fees for insolvency related notices on ASIC’s publication website

The amendments in schedule 9 of the Regulations will repeal section 4 of the *Corporations (Review Fees) Regulations 2003* which prescribes a \$5 fee for publishing prescribed notices on ASIC’s publication website. The fee is being removed as it relates to activities that will be cost recovered under the Levy Regulations.

The lodgement fee for these publications was temporarily reduced to the current \$5 fee from 1 September 2017 under the *ASIC Supervisory Cost Recovery Levy (Consequential Amendments) Regulations 2017* to allow modifications to be made to the technology portal to allow lodgements to be made without requiring a fee to be paid. The total amount of fees recovered through the prescribed lodgements for the 2017-18 financial year will be deducted from ASIC’s regulatory costs for regulating registered liquidators under the Levy Regulations to ensure that the Government does not recover an amount greater than ASIC’s regulatory costs for that subsector for the year.

Schedule 10 – Large securities exchange participants subsector

The amendments in schedule 10 of the Regulations amend the large securities exchange participants subsector (section 65 of the Levy Regulations) to simplify the calculation of the graduated component of the levy for the subsector. The graduated component will continue to be based on each entity’s share of the total number of messages sent and transactions entered on or reported to a large securities exchange that are recognised by ASIC’s Market Surveillance System. However, the split between information technology costs and non-information technology costs will be removed.

Instead, 90 per cent of ASIC’s costs relating to the subsector will be recovered based on the number of recognised transactions reported to a large securities exchange and the remaining 10 per cent of ASIC’s costs relating to the subsector will be recovered based on the number of recognised messages reported to a large securities exchange.

All entities will continue to pay the existing \$9,000 minimum levy amount and ASIC will continue to prescribe its regulatory costs and the total number of reported messages and transactions recognised by the Market Surveillance System for the financial year as part of its annual legislative instrument.

The amendments only apply to levies payable in relation to the 2018-19 financial year and later financial years.

Schedule 11 – Credit rating agencies

The existing ‘credit rating agencies’ subsector in section 60 of the Levy Regulations is being repealed and will be replaced with two separate subsectors for large and small credit rating agencies. The amendment applies from the 2017-18 financial year onwards.

Section 60 - Large credit rating agencies

An entity will fall within the large credit rating agencies subsector if at any time during a financial year:

- it holds an AFSL that authorises it to provide general advice by issuing a credit rating; and
- there is a credit rating agency supervisory college for that entity.

Entities that fall within this subsector must pay a levy calculated in accordance with the basic levy component formula in section 9 of the Regulations. Under this formula, ASIC's costs for the subsector will be shared equally between all entities in the subsector. However, if an entity does not fall within the subsector for the full financial year, it will only share in the costs for the subsector in proportion to the number of days in the financial year that it was a part of the subsector. ASIC will prescribe its costs for the subsector and the number of entities that are part of the subsector as part of its annual legislative instrument.

Section 60A - Small credit rating agencies

An entity will fall within the small credit rating agencies subsector if at any time during a financial year:

- it holds an AFSL that authorises it to provide general advice by issuing a credit rating; and
- there is no credit rating agency supervisory college for that entity.

Entities that fall within this subsector must pay a levy calculated in accordance with the basic levy component formula in section 9 of the Regulations. Under this formula, ASIC's costs for the subsector will be shared equally between all entities in the subsector. However, if an entity does not fall within the subsector for the full financial year, it will only share in the costs for the subsector in proportion to the number of days in the financial year that it was a part of the subsector. ASIC will prescribe its costs for the subsector and the number of entities that are part of the subsector as part of its annual legislative instrument.

Schedule 12 – Application provisions

Schedule 12 (in conjunction with section 4 of the regulations) prescribes the application provisions for each of the amendments in the regulations. The table below groups the amendments based on their commencement and application.

| Applies from the 2017-18 financial year onwards | Applies from the 2018-19 financial year onwards | Fee change takes effect 1 July 2018 |
|--|--|---|
| <ul style="list-style-type: none"> ASIC's recovery of previous operating costs (schedule 1) | <ul style="list-style-type: none"> Extending the small amount credit provider subsector to also include medium amount credit providers (schedule 3) | <ul style="list-style-type: none"> Increasing the review fee for proprietary companies (schedule 8) |
| <ul style="list-style-type: none"> ASIC's costs relating to the individuals it regulates (schedule 2) | <ul style="list-style-type: none"> New and established market operators subsectors (schedule 4) | <ul style="list-style-type: none"> Removing the fee for publishing prescribed notices on AISC's publication website (schedule 9) |
| <ul style="list-style-type: none"> Clarifying the over-the-counter traders subsector (schedule 7) | <ul style="list-style-type: none"> Creating a new subsector for benchmark administrators (schedule 5) | |
| <ul style="list-style-type: none"> Splitting the credit rating agency subsector (schedule 11) | <ul style="list-style-type: none"> Creating a new subsector for CSF intermediaries (schedule 6) | |
| | <ul style="list-style-type: none"> Simplifying the large securities exchange participant subsector (schedule 10) | |