

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 153

ISSUED BY AUTHORITY OF THE MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Corporations (Fees) Act 2001

Corporations (Fees) Amendment Regulation 2013 (No. 1)

Section 8 of the *Corporations (Fees) Act 2001* (the Act) provides that the Governor-General may make regulations for the purposes of sections 5, 5A, 6 and 6A of the Act, which deal with the imposition of fees for things done under the *Corporations Act 2001* (the Corporations Act). Section 6A of the Act allows the *Corporations (Fees) Regulations 2001* (the Fees Regulations) to prescribe fees for the performance by the Australian Securities and Investments Commission (ASIC) of its market supervision functions under Part 7.2A (Supervision of financial markets) of the Corporations Act. Fees may be prescribed by specifying an amount as the fee or by specifying a method for calculating the amount of the fee.

The Fees Regulations prescribe, among others, the specific fee amounts and in some cases the methods used for calculating the fee amounts for the recovery of ASIC's costs for the performance of its financial market supervision functions. The *Corporations (Fees) Amendment Regulation 2013 (No. 1)* (the Regulation) would provide the detailed amounts and calculation methods for the period July 2013 to June 2015.

The amounts recovered would include part of ASIC's ongoing costs in performing its market supervision functions as well as the recovery of funding announced at the 2012-13 Budget to enhance ASIC's market surveillance and supervision systems and tools, and deliver improvements to ASIC portals and registers accessed by market participants.

The Regulation would incorporate the following proposals:

- Amendments prescribing the amounts to be recovered by ASIC from market operators and participants for the period commencing on 1 July 2013 and ending on 30 June 2015.
 - The proposed total amount to be recovered during this period is \$42.88 million which would mainly be recovered from the large market operators (the ASX and Chi-X) and market participants, allocated through a formula reflecting their share of transaction-related and message-related activity.
 - ASIC has sought approval from the Parliamentary Secretary to the Treasurer for around \$1.465 million per annum in contributions from the Financial Industry Development Account (FIDA) to reduce the cost recovery burden on industry. FIDA is a special account in the National Guarantee Fund (the NGF), which is the main fidelity fund for the Australian Securities Exchange (the ASX) and other financial markets. It

contains funds that are deemed to be in excess of the amount required by the NGF. Such funds, if available, may be used for certain purposes prescribed in the legislation, subject to approval by the Minister and the NGF itself. Any FIDA contribution received by ASIC would be used to partially offset the cost recovery fees paid by market participants.

- An increase in the fees charged based on message activity which would reflect the increasing costs incurred by ASIC in supervising the large volumes of messages generated by computer-based trading.
- The introduction of a fixed fee component of \$1,835 per quarter for cash equity market participants, reflecting the fact that part of ASIC's regulatory activity is spent on non-issue specific, general reviews of market participants.
- A simplified penalty fee regime that would apply to market operators and participants that do not pay their cost recovery fees on time.

Treasury undertook a public consultation in December 2012 seeking comment on potential amendments to the current ASIC market supervision cost recovery arrangements for the period from 1 July 2013 to 30 June 2015. 18 submissions from current and impending market operators and market participants as well as other industry stakeholders were received. As a result of the feedback obtained a number of potential amendments, in particular a possible exemption for market makers from the cost recovery regime, were not progressed. Other initiatives such as the increased fees for message-based activity and a fixed fee per participant discussed above were supported and have accordingly been progressed.

The draft Regulation was exposed for final public consultation in May 2013, with 5 submissions received. There were no significant changes to the proposed cost recovery arrangements as a result of this consultation.

Details of the Regulation are included in Attachment A.

A statement of the Regulation's compatibility with human rights is set out in Attachment B.

Under the Corporations Agreement 2002, the Commonwealth must consult with the Legislative and Governance Forum for Corporations before making amendments to certain provisions of the Corporations (Fees) Regulations 2001. The Council has been consulted. No adverse views have been expressed. The Act specifies no other conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on 1 July 2013.

ATTACHMENT A

Details of the *Corporations (Fees) Amendment Regulation 2013 (No. 1)*Section 1 – Name of Regulation

Section 1 provides that the name of the Regulation is the *Corporations (Fees) Amendment Regulation 2013 (No. 1)*.

Section 2 – Commencement

Section 2 provides that the Regulation commences on 1 July 2013.

Section 3 – Authority

Section 3 provides that the Regulation is made under the *Corporations (Fees) Act 2001*.

Section 4 – Schedule(s)

Section 4 provides that each instrument specified in the Schedule is amended or repealed as set out in the applicable items in the Schedule.

Schedule 1 – Amendments**Item [1] – Paragraph 8(1)(a)**

This item provides that the quarterly fee for a small financial market (as defined in the Fees Regulations) is \$8,735.

Item [2] – Paragraph 8(5)(a)

This item provides that the quarterly fee for the ASX 24 financial market is \$344,670.

Item [3] – After subregulation 8(6)

This item prescribes the cost recovery fee payable by FEX Global Pty Ltd (FEX). FEX was granted an Australian Market Licence in April 2013 and is expected to commence operations within 2013.

The quarterly fee prescribed is \$49,930. This item also provides a method for calculating a proportional payment by FEX for its first billing period which may not constitute a full quarter.

Item [4] – Paragraph 8(7)(a)

This item amends the formula for calculating the quarterly fee to be paid by the Australian Securities Exchange (the ASX). As stated above, the numbers in the formula have been adjusted to give a greater weighting to fees calculated based on message activity, to take account of the greater time spent by ASIC staff working on

issues related to increased algorithmic trading. The base amount for the transaction-based fee is set at \$215,000, and the base amount for the message-based fee is set at \$607,000.

Item [5] Paragraph 8(7)(b) (formula)

This item prescribes the formula for calculating the fee to be paid by Chi-X Australia Pty Ltd (Chi-X). The changes and the numbers used in the formula are the same as for the ASX (see proposed Item [4]).

Item [6] – Subregulations 8(7) and 8(9)

This item changes the term used for the IT system used by ASIC for its market surveillance activities to “ASIC’s Market Surveillance System”.

Item [7] Subregulation 8(9) (formula)

This item adjusts the formula used for calculating the quarterly fee payable by participants in the cash equity markets operated by the ASX and Chi-X.

Similar to the changes applied to the formula for calculating the fee payable by the market operators, the new formula gives a greater weighting to the portion of the fee calculated based on message activity. The base amount for the transaction-based fee is set at \$1,977,125, and the base amount for the message-based fee would be set at \$1,985,125. These base amounts represent the maximum possible amounts that could be charged if no Financial Industry Development Account (FIDA) contribution is received.

As discussed above, ASIC has applied for an annual FIDA contribution of around \$1.465 million. Receipt of this contribution is conditional on the approval by the Parliamentary Secretary to the Treasurer of ASIC’s application and the availability of sufficient excess funds in the National Guarantee Fund (NGF) which are used to fund FIDA. The decision on the availability of funds will be made by the board of the NGF’s administering body, the Securities Exchange Guarantee Corporation (SEGC), which is likely to consider the matter at a meeting in late August 2013.

If this contribution is received, it will be used to partially offset the costs recovered from cash equity market participants. The base amounts in the formula in this item will in such a case be reduced by an amount corresponding in total to the FIDA contribution received.

This item also includes the new fixed fee component of \$1,835 per participant in the formula.

Item [8] After subregulation 8(9)

This item inserts a new subregulation 8(9A) which requires ASIC to use any FIDA contribution received with respect to a financial year to reduce the charges imposed for that year on cash equity market participants.

Paragraph (a) requires ASIC to reduce the base amounts in the formula set out in subregulation 8(9) in line with the amount of the FIDA contribution. ASIC will

allocate the contribution between the transaction-related base amount and the message-related base amount using the same ratio it applies to the overall allocation of costs between transactions and messages. The Cost Recovery Impact Statement compiled by ASIC and made available on its website provides full details of the relevant calculations (see particularly paragraph 3.4.2.2 'Allocation of market supervision costs to each market operator and each market participant'). By way of illustration, if an annual FIDA contribution of \$1.465 million is received, the formula will be adjusted as follows:

$$\left(1\,789\,000 \times \frac{TR}{TTR} \right) + \left(1\,807\,000 \times \frac{MR}{TMR} \right) + 1\,835$$

Paragraph (b) requires any fees that have already been paid for that financial year to be reduced based on the adjusted formula. In such an event, any amounts overcharged would have to be refunded. Paragraph (c) clarifies that any fees for remaining billing periods for that financial year will be calculated based on the adjusted formula.

Item [9] Subregulation 8(11) (definition of *billing period*)

This item makes the necessary changes to apply the new fee arrangements to the quarterly periods from 1 July 2013 to 30 June 2015.

Item [10] Subregulation 8(11) (after the definition of *exempt market*)

A new definition of 'initial billing period' is inserted, which will be used in calculating the proportional fee payable by FEX for the first quarter in which it commences operations.

Item [11] Subregulation 8(11) (subparagraphs (a)(iv) and (v) of the definition of *small financial market*)

The definition of 'small financial market' is amended to take into account the inclusion of FEX in the cost recovery arrangements.

Item [12] Regulation 9

This item abolishes the existing late payment arrangements and substitutes new, simplified arrangements. The key change is that a fixed penalty fee is introduced tiered according to the amount outstanding (including any unpaid penalties) and the number of overdue billing periods.

Subregulation 9(1) clarifies that the provisions in this item apply if one or more market supervision cost recovery fees remain unpaid at the end of the quarter in which they are incurred. Existing subregulation 8(10) states that liability for such a fee is incurred on the day after the period during which ASIC performs its supervision functions. Since ASIC sends out its invoices in the first month of the quarter in which fees are incurred, parties invoiced in effect have over two months' time in which to pay the invoices.

Subregulation 9(2) prescribes a penalty fee for late payment to be paid in addition to the fee itself.

Subregulation 9(3) clarifies that liability for the penalty fee is incurred once the fee becomes overdue, which occurs on the day after the billing period in which liability for the fee itself is incurred. As explained above under subregulation 9(1), this means that parties invoiced in effect have over two months' time in which to pay invoices before a penalty fee is incurred.

Subregulation 9(4) sets out the detailed calculation method for the penalty fee. The new regime applies a fixed quarterly penalty fee once a market supervision fee becomes overdue. An additional, higher fixed penalty fee is then applied if the fee still remains unpaid at the start of the next billing period. The fixed penalty fees are tiered according to the total amount of unpaid fees, including any previous unpaid late payment penalty fees. A summary of the tiers and the related penalty fees (of which there are two, depending on whether the original fee has remained unpaid for only one billing period or for more than one billing period) are set out in the table in subregulation 9(4).

An example is added to clarify the detailed working of the rules.

Item [13] At the end of regulation 9

This item clarifies transitional arrangements and provides that the current cost recovery fee arrangement and late payment penalty fee provisions contained in existing regulations 8 and 9 continue to apply to fees relating to billing periods prior to 1 July 2013.

ATTACHMENT B**Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Corporations (Fees) Amendment Regulation 2013 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Corporations (Fees) Amendment Regulation 2013 (No. 1)* (the Regulation) makes a number of amendments to the Corporations (Fees) Regulations 2001 (the Fees Regulations). The Regulation sets out the cost recovery arrangements for the period from 1 July 2013 to 30 June 2015, which will enable the Government to recover over the period:

- costs incurred by the Australian Securities and Investments Commission (ASIC) in the performance of its market supervision functions and the implementation of market competition; and
- costs associated with the Enhanced Market Supervision (EMS) measure announced at the 2012-13 Budget to replace ASIC's integrated market surveillance system (IMSS), enhance its market surveillance and supervision systems and tools and deliver improvements to those ASIC portals and registers accessed by market participants.

The Regulation implements the following policy decisions:

- The detailed amounts, or the formulae used to calculate such amounts, to be charged to various classes of market operators and participants, including small financial markets (as defined in the Fees Regulations), wholesale markets, a number of designated market operators including the Australian Securities Exchange (ASX) and Chi-X Australia (Chi-X), and participants in the cash equity markets operated by the ASX and Chi-X.
- The introduction of a fixed fee component of \$1,835 per quarter for cash equity market participants;
- Increased message-related fees to reflect the increased costs incurred by ASIC in supervising the large volumes of messages generated by computer-based trading; and
- Changes to the late payment fees to make them administratively simpler and more efficient.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

