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Mr Matthew Sedgwick
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: regmod@treasury.gov.au

Dear Sir

Pitcher Partners' Business Recovery and Insolvency Division submission on the Modernising Business Registers Program – Review of Registry Fees Consultation Paper

Thank you for the opportunity to comment on the Modernising Business Registers Program – Review of Registry Fees Consultation Paper November 2018.

This submission will only address questions 1, 4, 7, 8, and 9 as set out in the consultation paper. We have addressed these questions in the context of the insolvency profession.

We have considered the consultation paper and make the following comments:

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

We agree with the first proposition, but believe that the following principles are also relevant:

- Public interest: The Australian legal system grants individuals the privilege of taking advantage of limited personal liability through the use of a corporate structure. There is an expectation that there should be transparency of the owners and operators who receive this advantage. The principle supports the proposition that access to registry information should be freely and readily available to members of the public who interact with the corporate vehicles.
- Innovation & Competition: Information on the register has numerous uses including investigations, data matching, trend analysis to name but a few. Opportunities to use the registry data in creative and innovative ways exist. These opportunities may shed important information about the Australian economy at macro and micro levels. The monetisation of access to registry data inhibits these opportunities. The principles of innovation and competition support the proposition that access to registry information should be freely and readily available to the Australian community.

Question 4 How could the late fee system be reformed to incentivise compliance and make the system simpler and more equitable?

The late fee is a penalty that exists as an incentive for registry users to comply with their obligations and to maintain the registry as accurately as possible. Accordingly, the registry can be a 'source of truth' for companies. It is our recommendation, that to improve this 'source of truth', there be a scale of late fees depending on the number of days of non-compliance as follows:

Late Period (Days)	Fine
0 -> 31	$79 -$329
32 -> 365	$329
365+	$329 + an obligation to provide a Statutory Declaration or similar detailing the reasons as to why the lodgement is late.

The imposition of a Statutory Declaration or similar for a period of non-compliance of more than 365 days will incentivise compliance within a year.
Filing a lodgement a year late presents increasing difficulties. The disincentives to leave lodgements this late should include the need to concurrently a statutory declaration explaining the lateness. Any lodgements undertaken within that first year should not require a Statutory Declaration.
It is a known practice for some "advisors" to backdate documents to assist their clients to avoid personal liabilities i.e. director penalty notice liabilities or Insolvent Trading claims by liquidators for the minimal cost of $329. A Statutory Declaration or similar may provide further opportunities for ASIC to prosecute individuals or their advisors when it is proven that a document has been backdated for an improper purpose.

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

Providing free-of-charge access to data appears to be the simplest solution to making data more accessible and more equitable. This solution is also congruent to the Government's recently implemented Open Data policy and is consistent with the approach being taken to this issue overseas. However, if fees are to remain a necessary component of the registry system, recognising that ASIC is already legally obliged to charge search fees for access to some data, then we believe that the range of exemptions announced by the government to take effect from 1 July 2019 should be expanded to include insolvency practitioners (registered liquidators and trustees).

Given that ASIC has moved to an industry funding model which includes registered liquidators, we question why insolvency practitioners who have significant statutory investigatory responsibilities were not included in the exemptions announced.

When a company is wound up in insolvency, liquidators are required to use the existing registries to comply with their statutory function to investigation breaches of the law and report them to ASIC. However, to complete these reports, liquidators must pay ASIC its fees to search and obtain documents about the company in liquidation and its directors. Only where company moneys or assets are later found will this outlay be recouped.

Further, Liquidators are at the forefront of tackling phoenix activity. Often, they are hindered in their investigations by a lack of documentary evidence and a lack of funding. Free access to ASIC data is one further way to assist liquidators in their investigations.

More often than not, statutory bodies are creditors in the winding up. In this regard, we are aware that a primary objective of these statutory bodies is the collection of revenue for either the state or the Commonwealth. Alternatively, statutory bodies seek to reform their clients so that they become compliant in their lodgement and payment obligations. Accordingly, liquidators are indirectly working for the benefit of the statutory bodies and any assistance from access to free searches will greatly assist the liquidators in performing their role in the market. It is noted that the ATO do not charge liquidators to access information under Freedom of Information policies.

While we strongly advocate for our profession to have no cost electronic access due to the public purpose element for which the access is needed, we also argue that publicly available data encourages good governance by greatly increasing transparency and disrupting opportunities for inaccurate, incomplete or fraudulent data being recorded.

We refer to our previous submission of 15 August 2018 in relation to the MBR program, more specifically Attachment D – Director Identification Number. In this submission, we describe the data collected by ASIC as falling into one of two categories and further provide a classification, access level and data inclusions of those categories. That table is provided again below.

Category	Classification	Description	Access	Available data
1	Public	Public	Data that may be freely disclosed to the public	- Director's: - Name/former names/aliases - Date of birth - DIN *(if applicable)* - Email address - Residential address (opt-in) - Alternate address for service (if opt-out of residential address publication) - Registered address (e.g. company address or registered agent address) - Current and historical directorship and shareholding appointments (note that historical records would be 12-month transition or earlier by election for existing individuals) - Offence history (i.e. director banning)
2	Private	Sensitive	1. Data that is not freely disclosed to the public 2. Government agencies' automatic access to data 3. Interested parties' access to directors' residential addresses on application.	▪ Category 1 ▪ Residential address ▪ Full date of birth ▪ Place of birth

This information is not only used by journalists. It is good business practice to research organisations and individuals with which you intend to do business.

In support of no cost electronic access to the public, we make the following comments:

- There are fair and legitimate obligations attached to the creation of a corporate entity and a business register is the tangible requirement of transparency that comes with the privilege of using a limited liability company.
- There is a reasonable public expectation that following the incorporation of an entity, the name, basic contact details and corporate history of those connected with the incorporated entity be made available to the public. While past company failure is not necessarily an indicator of future difficulties, it can be, particularly if there is a pattern. The information held by ASIC is held in the public interest, however the current costs associated with accessing the data is prohibitive and runs contrary to the principles of public interest and transparency. The only beneficiaries from maintaining a prohibitive cost structure and preserving the unnecessary secrecy will be those who would like access to details of their historic business failures to remain prohibitive and those who exploit the opportunity to provide inconsistent personal details not independently verified.

- If the public is given the right tools for proper due diligence, the balance for accurate and up-to-date data shifts from a regulatory burden to shared public.

It is essential that an entity's stakeholders can identify the parties involved in an entity, however non-prohibitive access to data is useful for many reasons beyond those listed above. The alternative is that ASIC continues to be a compulsory mailbox that sells access to their data holdings to the public as a way of raising revenue. We believe that the benefits from making data freely available surpass the revenue generated.

Question 8 Should an infrastructure fee be introduced if it is payable by users of an API or comparable technology?

No.

A public API should allow third parties to access the same data that is publically available at no cost for use in their own services which greatly expands the usefulness of the data collected. Behind this idea is the core principle that access to ASICs data holding should be made freely available to harness the power of data to drive innovation and opportunity for the economy.

We consider the new system would increase the range of functions available to external users and would streamline the workflows and activities of registry staff by significantly reducing the volume of manual data entry and processing performed. This combination would allow increased volumes of transactions to be handled by fewer staff with targeted savings that could be used to fund future upgrades without the need to introduce an infrastructure fee.

We believe there should be no charge for using (most) of what will be the available APIs. We expect that fees will still be charged for some transactions (i.e. filing of annual returns) however the cost of using an API for these transactions should be lower than if filed directly with the registry.

We could list numerous uses of data, however we believe that in the event that ASICs data is made freely available, this can only encourage innovation and competition amongst third party users of this data. Opportunities to make more productive use of data and the benefits that could be achieved are not known until the data is made available to a wider range of users to explore innovative uses. i.e. it will not be just the collectors of data that are able to determine its uses and realise its value.

Question 9 Should funds raised from an infrastructure fee be set aside to cover the costs of upgrading the registry and/or a testing environment?

While we do not agree with an infrastructure fee being imposed, we agree that *if* an infrastructure fee is introduced, then these fees should not go towards consolidated revenue, rather they should go towards the costs of upgrading the registry and/or a testing environment.

Should you have any queries in relation to this submission, please do not hesitate to contact me on 02 9221 2099.

Yours faithfully
PITCHER PARTNERS

PAUL GERARD WESTON
National Chairman
Business Recovery and Insolvency