

# Regulatory Impact Statement: Funding of Companies Office Functions

Purpose of Document	
Decision sought:	<i>Cabinet decisions on best long-term approach to funding registry services provided by the Companies Office</i>
Advising agencies:	<i>MBIE</i>
Proposing Ministers:	<i>Minister of Commerce and Consumer Affairs</i>
Date finalised:	<i>3 November 2021</i>
Problem Definition	
<p>Cost-recovery for the registry services provided by the Companies Office is supported by fragmented fee mechanisms established independently in legislation over time. This necessitates a highly complex and rigid accounting system, and imposes an obligation on the Companies Office to charge fees aimed at full cost-recovery (unless fees are subsidised by Crown funding). The Companies Office has, in good faith, sought for many years to avoid charging fees that would in some cases be disproportionate, inequitable and unviable for users, but in doing so, <span style="background-color: #cccccc;">Legal professional privilege</span></p>	
Executive Summary	
<p>In mid-2021, as part of undertaking a periodic review of the amounts charged for corporate registry services by the Companies Office, MBIE identified that fees collected under various registers were, in good faith, being spent in a way that may be found to be unlawful if challenged because they could amount to unlawful cross-subsidisation.</p> <p>The two policy proposals discussed in this RIA are designed to respectively:</p> <ul style="list-style-type: none"> <li>Put in place a robust funding model that ensures the Companies Office can operate lawfully in future.</li> </ul> <p><span style="background-color: #cccccc;">Legal professional privilege</span></p> <p>Because of the nature of these problems, government intervention, whether in the form of law change (either to make the status quo policy work or to change that policy) or alternatively additional Crown funding is required to resolve them.</p> <p>MBIE’s preferred option address these related problems to:</p> <ul style="list-style-type: none"> <li>seek amendments to the fee charging provisions in each of the relevant statutes to allow costs to be recovered from users holistically across the range of corporate registry functions</li> <li>retrospectively validate <span style="background-color: #cccccc;">Legal professional privilege</span> in respect of the historical practice of cross-subsidisation of charges for Companies Office services under the various statutes.</li> </ul> <p>Because current practice aligns with these options (i.e. this is already the Companies Offices practice), these options should in effect not have a significant impact on users – though they will allow this practice to continue in a transparent way.</p>	

As noted below, we have not undertaken consultation before obtaining policy approvals from Cabinet Legal professional privilege

Accordingly, it is not possible to assess the views of stakeholders or the general public.

### Limitations and Constraints on Analysis

A significant constraint on this analysis is that we have been unable to consult with users of the Companies Office's services to properly understand how they:

- believe they have been affected by the charging practices we are proposing to address, which would inform our assessment of the scale of the problem
- would be affected by each of the options examined in this regulatory impact statement.

We have not undertaken consultation before obtaining policy approvals from Cabinet Legal professional privilege

Our preferred option would require consultation before any fees and levies are set by regulations.

Our analysis of the option involving ongoing Crown funding of Companies Office services is limited by the fact it is contingent on decisions for Budget 2022 that have not been made at the time of writing. For the purposes of assessing that option, we have largely ignored uncertainty about that outcome and assumed the full amount of funding necessary to support it would be obtained through the budget process (i.e. the budget bid necessary to support that option will be successful).

We have adopted certain constraints (discussed in the relevant section) on the options analysed, but are satisfied these reflect genuine feasibility concerns.

Taken together, these limitations and constraints do not in our assessment preclude Ministers from making an informed decision on how best to address the problem identified.

### Responsible Manager(s) (completed by relevant manager)

*Natasha Wells*

*Acting Manager*

*Corporate Governance and Intellectual Property Policy*

*Ministry of Business, Innovation and Employment*

*3 November 2021*

### Quality Assurance (completed by QA panel)

Reviewing Agency: MBIE

Panel Assessment & Comment: MBIE's Regulatory Impact Analysis Review Panel has reviewed the Impact Statement prepared by MBIE. As the proposals were not consulted on and one of the four assessment criteria has not been met, the Impact Statement cannot meet the full requirements. The Panel considers that the information and analysis summarised in the Impact Statement partially meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

## Section 1: Diagnosing the policy problem

### What is the context behind the policy problem and how is the status quo expected to develop?

#### The nature of corporate registry functions and rationale for cost-recovery

1. The Companies Office is the public facing name of the Business Registries unit within MBIE. It is responsible for performing a range of different corporate registry functions and supporting 16 separate statutory registrars to perform their functions. These functions include:
  - a. operating the various registers on electronic platforms (though, this system was once paper-based);
  - b. collecting, and in some cases verifying, information from persons wishing to register;
  - c. maintaining the ongoing integrity of the registry system through active monitoring of different registered entities and types of registrations; and
  - d. taking regulatory/enforcement action where necessary.
2. The government is a monopoly supplier of these registry services, and provides them on a cost-recovery model. The registry services would best be characterised as ‘club goods’<sup>1</sup>. The Companies Office controls which entities are entitled to the benefit of registration (although those controls are minimal in most cases), and that benefit is not diminished by more entities being registered. The precise nature of the benefit a person receives depends on the register they use and the purpose for which they are doing so.
3. There are broadly four types of register maintained by the Companies Office:
  - a. entity registers such as the Companies Register, the Incorporated Societies Register and the Charitable Trusts Register
  - b. occupational licensing registers such as the Insolvency Practitioners Register and the Auditor Register
  - c. public notice and disclosure registers such as the Disclose Register (on which the documents associated with the offer of financial products are registered) and the Personal Property Securities Register (on which a lender’s right of recourse over a borrower’s assets is registered), and
  - d. other registers which more broadly support the economy by allowing organisations to record their status with the government such as the New Zealand Business Number (NZBN) Register and the Register of Unions.
4. Entities benefit from registration as it legally brings them into existence which then enables them to be recognised for a range of other purposes, for example transacting, owning property and having employees. Registration for these entities enables them to pursue/protect their interests. Users of occupational registers receive the benefit of being able to operate in a given industry, which would not be lawful otherwise. Disclosure registers (such as the Personal Property Securities Register) enable parties to ensure their services or transactions are legally binding. The main positive

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<sup>1</sup> A club good has the property that people can be excluded from its benefits at low cost, but its use by one person does not detract from its use by another.

externalities arising from the use of these registry services (or from the activities enabled by registration) are corporate accountability, greater ease of doing business, the efficient allocation of capital within the economy and consumer welfare.

5. The diverse nature of entities that use these services means we can expect a great deal of variance in their behaviours, incentives and the elasticity of demand for services. Even within user groups, it is challenging to determine the degree of tolerance for increases in charges. However, companies comprise 92 per cent of registered entities, and have strong incentives to accept charges in order to benefit from registration. If companies did not pay these amounts they would be deregistered i.e. they would cease to exist. Around seven per cent of registered entities are incorporated societies or charitable trusts.

### **How cost-recovery mechanisms have developed over time and the practical implications**

6. The functions of these registrars, and fee charging powers in each of the relevant statutes, have been established independently of one another over time. As a result of this, the funding arrangements for the registry services provided by the registrar have developed in an *ad hoc* and uncoordinated way that has resulted in a siloed approach.
7. The fees payable for each service are mostly prescribed in regulations set under the charging provisions in each statute and following a fees review and consultation process. This happens approximately once every three to five years.
8. Each of the fee charging powers was developed in the expectation that each registry service would recover its own costs from users of the service or, where that is not possible, services would be funded by the Crown. Accordingly, none of the relevant legislation allows the fees charged to end users for one service to be used to fund services to other users.
9. This degree of separation made sense when each of the registers operated as separate, paper-based registers and when each register was thought of as independent rather than as a part of a broader, unified registry system. However, this traditional model has been superseded by two developments:
  - a. an organisational structure that produces economies of scale in the delivery of services (e.g. legal and information technology support) to support each register – achieved by appointing the same MBIE employee as Registrar under 15 of the 16 relevant statutes;
  - b. technological developments enabling those services to be centralised/shared across registers, which has also contributed to reduced total costs.
10. The current practice by the Companies Office is to provide shared services across various registers. This enables the cost of providing those registry services to be kept as low as possible.<sup>2</sup>
11. This is permissible under the current fee setting provisions so long as:
  - a. the cost for providing a shared service for each register is recovered from fees charged to the users of that register

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<sup>2</sup> A large proportion of the costs of establishing and maintaining shared infrastructure and services are fixed and unaffected by the number of users.

- b. money collected through fees charged under one act is not spent to fund functions provided under another Act
  - c. revenue is managed in such a way that it is clear where the funds originated from.
12. Because the unit cost for each register depends on the total number of entities registered, users of an identical shared service can be charged materially different fees for what is fundamentally the same service – depending on how many users of the register there are.
13. This would result in disproportionately large fees for the smaller number of users of some registers, including the voluntary sector. For example, to account for the significant fixed costs of registration resources, this would require not-for-profit clubs and societies to be charged \$850 to register as an incorporated society, while companies are charged \$90 for the same process.
14. Setting fees on this basis would run contrary to three objectives we view as important and consider reflect the expectations of users/the public, as well as the Government Expectations for Good Regulatory Practice<sup>3</sup>. These are that the Companies Office should seek to:
- a. to the extent it recovers its costs, distribute these costs fairly and sustainably across its users (i.e. based on the benefit they enjoy and likely means to pay for that benefit);
  - b. take reasonable opportunities to deliver services in a more cost-effective way, thereby minimising the costs it needs to recover from users; and
  - c. be able to respond and adapt to changing circumstances that affect how its services are financially supported.
15. The Companies Office has acted on these objectives by under-recovering the costs of providing services to some users, particularly on smaller registers, with that cost being met from surpluses generated by the bigger registers<sup>4</sup>. We estimate that the total amount of surplus from over-recovery used to subsidise certain services in the 2020/2021 financial year is \$3.75 million.<sup>5</sup> As these fees were spread across a large number of users, the excess amounts per user was in the order of a few dollars.
16. This arrangement arose over successive fee reviews. For example, it enables the registration fee for incorporated societies to be limited to \$89 rather than the \$850 (excluding GST) it would otherwise need to be set at. However, this arrangement is likely to undermine another important expectation: that Crown entities operate lawfully.
17. The Companies Office funding practices Legal professional privilege

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<sup>3</sup> For example, that regulation “is proportionate, fair and equitable in the way it treats regulated parties” and “has scope to evolve in response to changing circumstances or new information on the regulatory system’s performance”.

<sup>4</sup> These surpluses arose as a result of higher than forecast volumes on some registers, rather than deliberate over recovery.

<sup>5</sup> We note that over-recovery would still be required even if other costs were fully-recovered because charging is not permitted by legislation in some cases.

18. The issues canvassed in this section were identified as part of MBIE’s current review of the fees charged for corporate registry services. They became apparent as part of this review because all of the fees being charged were reviewed simultaneously, unlike previous reviews which focussed on specific fees.

#### How we expect the status quo would develop without intervention

19. The status quo cannot persist. The Companies Office cannot continue to operate in manner it knows is **Legal professional privilege**. In the absence of intervention (i.e. Crown funding or legislative change that enables some degree of cross-subsidisation), MBIE would have no other option than to recommend fees be increased to the level of full cost-recovery for each register (to the extent legislation permits). A small amount of Crown funding would continue to be found or reprioritised in order to sustain those services (e.g. registration of charities) for which cost-recovery is not enabled by legislation.
20. The most significant fee increases that would be necessary are set out in the table below as GST exclusive. Other fees for company incorporations and annual returns, and fees in the Personal Property Securities Register, would decrease slightly (the comparatively smaller decreases result from the fact that these decreases would need to be spread across a large number of users).

Register	Fee type	Unit cost (\$)	Current fee (\$)	Difference (\$)
Companies Register	Amalgamation	1,300.17	350.00	<b>950.17</b>
	Restoration	309.60	150.00	<b>159.60</b>
Limited Partnerships Register	Registration	798.43	217.39	<b>581.04</b>
Auditors Register	Auditor licence	636.43	304.35	<b>332.08</b>
	Annual return	694.41	95.65	<b>598.76</b>
Incorporated Societies Register	Annual return	75.93	0.00	<b>75.93</b>
	Registration	850.45	88.89	<b>761.56</b>
	Restoration	448.66	177.78	<b>270.88</b>

21. This is the counterfactual. It would result in:
- significant and in many cases unmanageable fee increases for some users
  - internally inconsistent fee charging systems across the broader registry system.
22. There would be no feasible way to manage the historical problem **Legal professional privilege** without intervention. This risk would therefore need to be tolerated, which we can call ‘the status quo’.

#### What is the policy problem or opportunity?

23. The way fee mechanisms have been established over time to support corporate registry functions is no longer fit for purpose. It assumes a fragmented registry system in which each register and group of users is required to meet its own costs independently. This necessitates a highly complex and rigid accounting system, when each of the registers is managed by a single business unit, providing shared services in order to deliver better value to its users.
24. Without Crown funding, relevant legislation imposes an obligation on the Companies Office to charge fees, aimed at full cost-recovery, which would in some cases be

disproportionate, inequitable and unviable for some users. Legal professional privilege

25. It is difficult to identify exactly when this practice of cross-subsidisation first began. We expect it would have started at some point after the registers began to move from paper based to electronic in the 1990s. This predates the formation of MBIE. We have, however, been able to confirm that this issue goes back to at least 2013.
26. There is both an historical error to address ('historical problem') and a need to ensure the Companies Office can operate lawfully in future ('prospective problem'). As resolving the historical problem is independent of the prospective problem, they will be assessed independently in this document.
27. Additionally, fee-charging provisions have not been created uniformly over time. Some of these statutes (e.g. the *Charitable Trusts Act 1957*) require a register to be administered with no ability to set fees for cost-recovery. These inconsistencies exacerbate the administrative difficulties the Companies Office faces in operating in a manner that is likely to be lawful.

### What objectives are sought in relation to the policy problem?

28. We have identified four objectives relevant to the problem and options for addressing it:
  - a. Support the registrar/regulator (MBIE) to operate lawfully.
  - b. Ensure the costs of corporate registry services are recovered (to the extent relevant) by distributing them fairly and sustainably across users (i.e. based on the benefit they enjoy and likely means to pay for that benefit).
  - c. Enable the registrar/regulator to take reasonable opportunities to deliver services in a more cost-effective way, thereby minimising the aggregate costs needing to be recovered from users.
  - d. Enable the registrar/regulator to respond and adapt to changing circumstances that affect how its resources are deployed.

## Section 2: Deciding upon an option to address the 'prospective' policy problem

### What criteria will be used to compare options to the counterfactual?

29. We consider the objectives (specified in the previous section) suitable for use as assessment criteria in this regulatory impact analysis. It is paramount that the regulator is able to operate lawfully. This is not currently possible without significant prejudice to the other three objectives.
30. There are essentially two possible ways to meet the first objective: by bringing the Companies Office's approach to managing fees into compliance with the law (which we consider must happen counterfactually) or by bringing the law into compliance with the Companies Office's approach to managing fees.
31. The second and third objectives are complementary from the perspective of users (who have an interest in being charged more equitably and being charged less). Any additional costs associated with more equitable charging are considered insignificant.
32. There is some potential overlap between objectives three and four. Greater flexibility in the Companies Office's management of its resources may deliver cost savings. To

avoid double counting, we are treating objective four as beneficial in its own right (independently of any fiscal/monetary benefits).

### What scope will options be considered within?

33. In identifying options, we have ruled out two possibilities:
  - a. of endorsing a practice **Legal professional privilege** or tolerating that risk prospectively – we do not consider it feasible or appropriate to allow this to continue
  - b. of ceasing to fund and provide any of the existing corporate registry services – the corporate registries system already exists, is required by statute to be maintained and numerous types of entities rely on it.
34. We have also not considered it worthwhile to examine broader legislative reforms to consolidate or rationalise the separate registry systems. Although this option could resolve the problems associated with fragmentation of registry functions which has in turn resulted in inconsistent charging practices, it is wider than and a disproportionate response to those problems.

### What options are being considered?

#### Option One – Counterfactual

35. To remedy **Legal professional privilege**, the Companies Office would increase fees as necessary to fully recover costs from users of each registry service wherever legislation allows. MBIE would need to continue to find or reprioritise a small amount of Crown funding to support services for which the costs are not recoverable from users (and not be provided to subsidise any fees that can be charged).
36. This option would also require changes to MBIE's accounting practices to individually track the fees charged under each piece of legislation and ensure that those amounts are not spent to provide functions under another piece of legislation. This is the minimum required to ensure that the current problem does not arise again in future.

#### Option Two – Commit ongoing Crown funding to keep fees manageable

37. Under this non-regulatory option, Crown funding would be provided each financial year to supplement full cost-recovery from users of each registry service. This would enable compliance with the original policy of each register meeting its costs (including its share of costs for shared services/infrastructure) through a combination of fees and Crown funding where necessary, without legislative change. During each fees review (which typically happens every three to five years), MBIE would estimate how much Crown funding is necessary:
  - a. for services where cost-recovery is not possible under legislation; and
  - b. to subsidise fees that would otherwise have a disproportionate or unreasonable impact on users.
38. If in any year, insufficient funding is obtained to operate any one register, where a surplus has not previously been accumulated, that deficit will need to be met by the Crown or otherwise from within MBIE's baselines. These registers would be removed from the memorandum account and managed separately, on a partial cost-recovery basis.
39. There is currently minimal crown funding with the appropriation that is able to be reprioritised to meet any such shortfall and MBIE is not currently in a position to take such costs onto its own balance sheet.



### Option three – Amend charging provisions to enable fees and levies to be charged flexibly for companies office services

40. This option would involve amendments to the fee charging provisions in each of the relevant statutes to allow costs to be recovered from users holistically across the range of corporate registry functions. This would include recognising the possibility of Registrars for all registers being a role occupied by a single statutory officer, providing oversight of the broader regulatory system and how resources are allocated within it.
41. These amendments would be made in the expectation that the Companies Office would fully recover its costs from most users, but on a basis that can include a levy on users of services provided under one statute to recover the costs of services that wholly or partially benefit users of services provided under another statute. Levies<sup>6</sup> (as opposed to fees) would be charged to moderate or smooth out charges for other users that would otherwise have a disproportionate or unreasonable impact on those users. Practically, this would result in slight over-recovery from users of larger registers (likely in the order of a few dollars each) but would result in significant fee reductions for users of smaller registers (potentially in the order of hundreds of dollars each).
42. Current charging practices are a reasonable guide to how this could work. However, the charging provisions would be subject to certain safeguards that contribute to the policy objectives and would take account of Treasury's *Guidelines for Setting Charges in the Public Sector*. Before making regulations prescribing any fees or levies that are expected to result in over-recovery of costs of a particular service, the Minister of Commerce and Consumer Affairs would need to be satisfied, following public consultation, this is appropriate to avoid a disproportionate or unreasonable impact on other users of registry services. The consultation process would involve disclosing full details of costs needing to be recovered through fees and levies.
43. The opportunity would also be taken under this option to insert charging provisions (i.e. the ability to charge fees and levies) where they are notably absent and ensure they are consistent in their design.

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<sup>6</sup> A fee is a defined payment from a specified party to another in return for the provision of a specific good or service. A levy will also be charged to a particular party or group, for a specified purpose, but not necessarily for a specific good or service. In this way, a levy is more akin to a tax.

## How do the options compare to the counterfactual?

	<b>Option One – Counterfactual</b>	<b>Option Two – Crown funding to keep fees manageable</b>	<b>Option three – Flexible charging provisions (including levies)</b>
<b>Support lawful operation</b>	<p><b>0</b></p> <p>The Companies Office would aim to operate lawfully but according to fragmented and overly complex accounting requirements created by statute, which risk resulting in errors.</p>	<p><b>+</b></p> <p>Legal professional privilege However, without addressing the fragmented and overly complex accounting requirements there remains some risk of erroneous cost-recovery or reversion to legally questionable practices in future. This risk is not so elevated as under the counterfactual, given the significant strain that fee increases would place on many entities.</p>	<p><b>++</b></p> <p>This option would further reduce legal risk in the long-run by increasing discretion to set and manage fees for the range of registry services.</p>
<b>Fair and sustainable distribution of costs</b>	<p><b>0</b></p> <p>Materially different amounts would be charged to users for similar services without regard to the ability of users to absorb those costs. Fee increases would not be sustainable for many non-corporate entities, and as they drop off registers the burden on others increases.</p>	<p><b>+++</b></p> <p>This option would significantly increase both the fairness and sustainability of fees charged compared with those that would be charged counterfactually. This option would also achieve this without any need for cross-subsidisation (a practice which arguably involves a degree of unfairness). The amount of excess charges per user is marginal / fairly immaterial. The sustainability of current fees would not differ from the counterfactual.</p>	<p><b>+++</b></p> <p>This option would also significantly increase both the fairness and sustainability of fees charged compared with those that would be charged counterfactually. However, this option is outperformed by option 2 in terms of fairness of charges because it would involve ‘impure’ or less direct cost-recovery through levies. On the other hand, it compares favourably with option 2 in terms of sustainability of charges because it is not contingent on security of funding from external sources in order to avoid fee increases. We view this as an even trade-off.</p>
<b>Cost-effective operating model (minimise costs needing)</b>	<p><b>0</b></p> <p>The Companies Office would be bound to complex and fragmented accounting practices</p>	<p><b>+</b></p> <p>This option would be essentially comparable to the counterfactual, which involves complex and fragmented accounting practices under each of the 18 separate registers. However, it would avoid further</p>	<p><b>++</b></p> <p>This option would streamline accounting practices compared with the counterfactual, which we expect would avoid additional costs.</p>

<b>to be recovered)</b>	which may impede its ability to provide services in a cost effective manner.	complications in cost-recovery efforts likely to arise counterfactually when large fee increases mean the number of entities able to maintain their place on registers is likely to be volatile.	
<b>Ability to respond and adapt to changing circumstances</b>	<p><b>0</b></p> <p>The Companies Office would continue to be bound to use revenue collected under each register in a specific way and would not be able to reprioritise that in response to changing circumstances.</p>	<p><b>+</b></p> <p>This option would marginally improve on the counterfactual in terms of responsiveness/ adaptability. The Companies Office would continue to be bound to use revenue collected under each register in a specific way. It's discretion to seek Crown funding would slightly improve its ability to respond to change (particularly in the means or needs of users) but this funding would be subject to external decisions.</p>	<p><b>++</b></p> <p>This option best improves the Companies Office's ability to adapt to changing circumstances. The Executive (through regulation-making) would have far greater discretion to set charges, and the Companies Office far greater discretion to manage its revenue, in ways that are consistent with the other three criteria, despite changing circumstances – for example, to meet the reasonable needs of users that may arise or change in future.</p> <p>For the purposes of this criterion, we view internal reallocation of resources as slightly superior to seeking funding externally to support registry functions.</p>
<b>Overall assessment</b>	<p><b>0</b></p>	<p><b>+6</b></p> <p>Far preferable to the counterfactual, in that it avoids significant disruption and harm to some users, but involves inefficiencies associated with rigid adherence to fragmented cost-recovery obligations.</p>	<p><b>+9</b></p> <p>Most reliably addresses the problem in the long-run, with some potential to better support the efficient delivery of services and operation of the Companies Office.</p>

## What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

44. Charging provisions in relevant legislation that afford greater flexibility to set fees and levies for corporate registry services (option three) best meets the objectives as assessed in the table above.
45. However, the Crown funding option (option two) outperforms option three in terms of distributing the costs of registry services fairly or equitably. This is important because it is recognised as one of the ways to assess who should pay cost recovery charges in the Treasury's *Guidelines for Setting Charges in the Public Sector* (April 2017). If we assume \$3.75 million per annum is the amount the Companies Office should under-recover for certain services or from certain users in order to avoid disproportionate or unsustainable charges, we can ask who should pay this amount.
46. The answer offered by option two is: the tax-payer. The answer offered by option three is: other users of the Companies Office's services. The Treasury guidelines then suggest we should assess the possibility of charging each of the possible groups on the basis of:
  - a. legislative authority – this favours option two, as option three involves changing the legislative authority
  - b. administrative feasibility – in our view, this favours option three, as it is far more straightforward to manage the extra costs within the memorandum account than to determine, aggregate for each separate under-recovered service and obtain an amount to be subsidised by the taxpayer
  - c. behaviour and incentives on the parties – considered neutral between options two and three because the amount is spread so thinly across either group that the impact would be negligible
  - d. equity – for the reasons given in the table above (against 'fair and sustainable distribution of costs'), this favours option two.
47. On this basis, there appear to be more reasons to require the subsidy to come from taxpayers than from other users. However, there is very little in either of these two reasons to influence our overall conclusion that option three is preferable. Firstly, there are notable benefits in changing the legislative authority (identified in the table above). Secondly, the inequities created by over-charging other users would be negligible in practice (i.e. when spread across the large number of users affected) and of questionable concern.
48. Having considered all these factors, we prefer option three.

**What are the marginal costs and benefits of the option?**

<b>Affected groups</b> <i>(identify)</i>	<b>Comment</b> <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	<b>Impact</b> <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	<b>Evidence Certainty</b> <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			
Regulated groups	Because fees have already been set in reliance on a degree of cross-subsidisation, the preferred option is likely to have little impact. However, compared with the fee changes we would expect under the counterfactual, some users are charged slightly more under the preferred option.	Low	Medium, as the actual impact of charges on each group would be subject to future decision-making and consultation.
Regulators	The Companies Office would need to operationalise the changes to how it collects amounts from users.	Low	Low
Others (eg, wider govt, consumers, etc.)	None		
<b>Total monetised costs</b>			
<b>Non-monetised costs</b>			
	<i>Low</i>	<i>Low</i>	<i>Low</i>
<b>Additional benefits of the preferred option compared to taking no action</b>			
Regulated groups	Because fees have already been set in reliance on a degree of cross-subsidisation, the preferred option is likely to have little impact. However, compared with the counterfactual, some users would avoid significant fee increases under the preferred option.  There are also possible benefits downstream from those enjoyed by the regulator (below).	Medium	Medium, as the actual impact of charges on each group would be subject to future decision-making and consultation.

Regulators	Benefit: better able to ensure compliance with the law	Medium	Medium, as the likelihood and costs of legal challenge are unclear
	Benefit: can respond and adapt to changing circumstances with more confidence (and greater efficiency)	Low	Medium, as this assumes there will be changes in expenditure/ revenue that are not easily accommodated by current policy
Others (eg, wider govt, consumers, etc.)	No direct benefits		
<b>Total monetised benefits</b>			
<b>Non-monetised benefits</b>	<i>Medium</i>	<i>Medium</i>	<i>Medium</i>

49. Option three would have little practical impact, positive or negative, relative to current practice, but significant positive impact in terms of avoiding the fee increases necessary under the counterfactual. Option three would effectively empower the Companies Office to collect and manage revenue in much the same manner as it does currently, but without doubts about the lawfulness of this approach and in a way that is transparent to users so that they can be consulted on the degree of cross subsidisation they are prepared to bear. We expect that decisions on what amount to charge each group for each service would be based on essentially the same considerations that have necessitated the current practice and are reflected in the objectives in this regulatory impact statement.

### Risks of additional costs associated with MBIE's preferred option

50. There is a theoretical risk of charges being set inappropriately, but there would be safeguards (such as a statutory requirement to consult with affected parties, principles enshrined in the legislation as well as universal administrative law principles) protecting against this possibility.
51. There is also a theoretical risk of the Companies Office misusing the flexibility it is afforded under this option to use revenue for purposes other than for which it was collected.
52. A final implementation risk is that stakeholders will lose confidence in the Companies Office's practices (or MBIE more generally) and/or object to the new charges proposed. This, as well as the possible risk of litigation, can be mitigated to some extent by consultation and a communications strategy that explains the interests the Companies Office has been acting to protect, as well as by the democratic process involved in amending charging provisions in primary legislation. MBIE's consultation and a communications strategy will therefore be critical to managing the legal and reputational risks to MBIE.

## Section 3: Deciding upon an option to address the 'historical' policy problem

### What criteria will be used to compare options to the status quo?

53. We consider three criteria suitable for assessing the 'historical' problem and options for addressing it:
  - a. Minimise the Crown's exposure to litigation for acts done in good faith
  - b. Equity and natural justice for disadvantaged parties
  - c. Feasibility/public value.
54. It should be noted that we view the historical practice of cross-subsidising charges for corporate registry services between beneficiaries as being done in good faith to avoid charging some groups disproportionate or unreasonable amounts. This gives the first criterion substantive weight in our analysis.
55. Given the negligible amounts each affected entity is likely to have been over-charged, and the reduced interest in natural justice concerning acts done in good faith, we have given the second criterion lower weighting than the other two criteria.

### What scope will options be considered within?

56. The scope of options we have identified as feasible ways to address the problems has not been limited.

### What options are being considered?

#### Option One – *Status Quo*

57. This would be to accept the risk of historical practices being legally challenged after they have been rectified.

#### Option Two – Reimburse entities for any over-recovery of costs

58. This option would be to review records to identify entities that may have paid fees in excess of what the relevant charging provision allows and obtain Crown funding to pay them what they are owed if that can be established and the entities still exist.

#### Option Three – Make legislation extinguishing historical legal liability

59. This option would involve legislative change to retrospectively validate (i.e. extinguish the Crown's legal liability) in respect of the historical practice of cross-subsidisation of charges for Companies Office services under the various pieces of legislation.

## How do the options compare to the status quo?

	Option One – <i>Status Quo</i>	Option Two – <i>Reimburse entities for any over-recovery of costs</i>	Option three – <i>Make legislation extinguishing historical legal liability</i>
<b>Minimise</b> <small>Legal professional privilege</small> for acts done in good faith	0	<b>+(+)</b> Legal professional privilege	<b>++(+)</b> This option would completely address the historical problem.
<b>Equity and natural justice for disadvantaged parties</b>	0	<b>++</b> If successfully implemented, this option would <small>Legal professional privilege</small> However, the degree of disadvantage in material terms is negligible.	<b>-</b> This option would remove rights to natural justice, including the possibility of entities recovering any amounts due. However, the degree of disadvantage in material terms is negligible.
<b>Feasibility/ public value</b>	0	<b>---</b> We have significant doubts this option would be feasible or a responsible use of public resources. Firstly, it would be a very laborious and costly exercise to identify all historical cases of over-recovery. The costs involved would be far out of proportion to the payments made. Secondly, many of the entities historically affected would either have ceased to exist or be very difficult to contact. Thirdly, the actual payment of amounts due would involve tens of thousands of transactions. Fourthly, we are unlikely to secure the funding to make these payments given the amounts per entity are insignificant.	<b>0</b> This option would require legislative change. However, legislative change would already be necessary under our preferred solution to the prospective problem. <small>Legal professional privilege</small>
<b>Overall assessment</b>	0	<b>+1</b> We consider the benefits of this option would be entirely defeated by the practical challenges of implementing it. This is reflected in the greater weighting of the first and third criteria.	<b>+2</b> This option would have a negligible impact on the rights and interests of parties who have historically been over-charged. This impact would in our view be far outweighed by the benefits of addressing the historical problem.



## What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

60. We believe there is a fairly clear case for option three: legislative change extinguishing historical legal liability.
61. We acknowledge it is an unusual step for the Crown to retrospectively correct a historical error it has made. However, the charging practice in question has caused minimal disadvantage, in material terms, and would have complied with the policy we are recommending in relation to the prospective problem. We view it as in the public interest that the Crown is able to manage its corporate registry functions with confidence that it will not be penalised for historical actions it took in good faith.

## Section 4: Delivering an option

### How will the new arrangements be implemented?

62. If Cabinet approves the policies recommended in this statement, they will be implemented by an omnibus bill and fees and levies set by regulations (made under the amending powers in each relevant piece of legislation). We would work with the Parliamentary Counsel Office on the exact parameters and design of new charging provisions in relevant legislation.
63. Legal professional privilege [REDACTED] This elevated risk may affect how quickly legislation is enacted and the opportunity for stakeholders to participate in the legislative process. This would present some risk to successful implementation. However, the need for stakeholder input on the actual regulations setting fees and levies is likely to be greater than on how the empowering provisions are formulated.
64. The Companies Office would remain responsible for forecasting its expenditure for the purpose of setting these fees and levies. MBIE would also undertake consultation to determine what fees and levies are reasonable for each group based on the service provided, equity, and the incentives of parties, etc. This would include disclosure of the costs needing to be recovered and proposed allocation methodology. However, these allocative decisions would ultimately be made by the Minister of Commerce and Consumer Affairs and the Executive.

### How will the new arrangements be monitored, evaluated, and reviewed?

65. Companies Office expenditure and revenue to support delivery of registry services is subject to regular review. Under the preferred option, this review process will continue to inform changes to the charges set by regulations. The main difference is that there will be greater flexibility in allocating charges across groups to avoid adverse outcomes and the need for Crown funding.
66. MBIE will be closely monitoring use of the new charging provisions to ensure consistency with the policy intent and objectives in this regulatory impact statement. After the first year of charging under the preferred option, it would undertake a detailed comparison of its actual costs and the assumptions it used to calculate the charges necessary for cost-recovery across all registers.