



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 35

Financial reporting and AGM obligations for companies in external administration under 5.3A

September 2002

What this discussion paper is about

- 1 This discussion paper considers:
 - (a) the financial reporting and annual general meeting (AGM) obligations of companies in external administration under Part 5.3A of the *Corporations Act 2001* (Act); and
 - (b) the nature and scope of relief that ASIC should grant in respect of those obligations.
- 2 In this paper, we set out:
 - (a) guidance on the financial reporting and AGM obligations of companies under administration or a deed of company arrangement (**Section 1**);
 - (b) the nature and scope of our power to grant relief from compliance with these obligations (**Section 2**);
 - (c) our proposed options for granting relief from the financial reporting obligations (**Section 3**); and
 - (d) our proposed option for granting relief from the AGM obligations (**Section 4**).
- 3 At the end of each section, we have included questions and issues for your feedback. We will also consider any further issues you may wish to raise.
- 4 We have developed this discussion paper because of uncertainty about both the financial reporting and AGM obligations of companies under administration or a deed of company arrangement, and when ASIC will grant relief in respect of those obligations.
- 5 Our current Policy Statement 43 *Accounts and audit relief* [PS 43] and Policy Statement 44 *Annual general meeting – extension of time* [PS 44] do not state when we will grant relief to companies under administration or a deed of company arrangement.
- 6 We will use your responses and feedback on the questions and issues raised in this discussion paper in reviewing and amending [PS 43] and [PS 44] to cover such relief.
- 7 We also intend to review [PS 43] and [PS 44] more generally.

Other forms of external administration

- 8** As part of our general review, we may amend [PS 43] so that:
- (a) the relief given to companies in receivership is consistent with relief given to companies under administration or a deed of company arrangement; and
 - (b) it addresses how we will exercise our relief powers for companies in liquidation and provisional liquidation.

Note: We propose to make a class order giving relief from all financial reporting obligations to all companies in liquidation or provisional liquidation.

- 9** We may also amend [PS 44] so that:
- (a) the relief given to companies in receivership is consistent with the relief given to companies under administration or a deed of company arrangement; and
 - (b) it states that ASIC does not intend to take enforcement action for breaches of the AGM obligations by companies in liquidation or provisional liquidation.

Note: ASIC does not have power under s250P to provide that companies in liquidation do not need to hold an AGM at any time. Section 250P only enables ASIC to extend the period within which s250N requires the company to hold an AGM.

Interim relief

- 10** We have provided interim relief from the financial reporting obligations for the following companies:
- (a) companies under administration;
 - (b) companies under a deed of company arrangement;
 - (c) companies in provisional liquidation;
 - (d) companies in liquidation; and
 - (e) companies where a controller has been appointed in relation to substantially all of the property of the company.

See Class Order [CO 02/968].

- 11** The interim relief applies to current obligations and is subject to conditions. It does not extend to financial years and half-years which end after 31 May 2003. We will issue our final policy on relief before 31 May 2003.

Note: You should not rely on this interim relief without reading Class Order [CO 02/968] and making sure that your company falls within its terms.

Your feedback is invited

12 We are seeking your feedback on the proposed options and questions we raise in this paper.

13 The proposed options set out in this discussion paper are not final policy. They do not indicate the scope and nature of any final relief that we may give.

Your comments

Comments are due by Thursday 31 October 2002 and should be sent to:

Erica Gray
Regulatory Policy Branch
Australian Securities & Investments Commission
GPO Box 9827
Sydney NSW 2001

email: erica.gray@asic.gov.au

All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Contact Ceyda Ozsayin on ph (02) 9911 2217 for more information about this paper.

Contents

Section 1: Financial reporting and AGM obligations	6
Section 2: ASIC’s power to grant relief	11
Section 3: Financial reporting relief – proposed options.....	15
Section 4: AGM relief – proposed option.....	28
What happens next	30
Key terms.....	31

Section 1: Financial reporting and AGM obligations

1.1 In this section, we set out our interpretation of:

- (a) the financial reporting obligations: see paragraphs 1.2–1.10;
- (b) the AGM obligations: see paragraph 1.11; and
- (c) how these obligations apply to companies under administration or a deed of company arrangement: see paragraphs 1.12–1.24.

What are the financial reporting obligations of a company?

1.2 The financial reporting obligations are set out in Part 2M.3 of the Act. Different types of companies have different financial reporting obligations. In particular, the financial reporting obligations of a company vary depending on whether it is classified as:

- (a) a public company, large proprietary company or a small proprietary company; and
- (b) a disclosing entity or non-disclosing entity.

Reports

1.3 For each financial year, public companies, large proprietary companies and disclosing entities must:

- (a) prepare a financial report: s292(1);
- (b) prepare a directors' report: s292(1); and
- (c) have the financial report audited and obtain an auditor's report: s301(1).

1.4 In certain circumstances, a small proprietary company must also prepare a financial report and a directors' report for a financial year: s292(2). A financial report of a small proprietary company may have to be audited: s301(2).

1.5 For each half-financial year, a disclosing entity must:

- (a) prepare a financial report;
- (b) prepare a directors' report; and
- (c) have the financial report audited or reviewed and obtain an auditor's report: s302.

Distribution of reports to members

1.6 A company must report to members by:

- (a) sending members copies of:
 - (i) the financial report for the financial year;
 - (ii) the directors' report for the financial year; and
 - (iii) the auditor's report on the financial report; or
- (b) sending members a concise report: s314.

1.7 A public company or disclosing entity must report to members by the earlier of:

- (a) 21 days before the next AGM after the end of the financial year; or
- (b) 4 months after the end of the financial year: s315(1).

Generally, a proprietary company must report to members within 4 months of the end of the financial year: s315(4).

Lodgement with ASIC

1.8 A company, other than a small proprietary company that has prepared reports under s293 or 294, must lodge with ASIC all reports it is required to prepare or obtain under Part 2M.3: s319(1) and 320(1). That is, a company may be required to lodge financial reports, directors' reports, auditor's reports and concise reports.

1.9 A disclosing entity must lodge its yearly reports with ASIC within 3 months after the end of the financial year: s319(3)(a). Other companies must lodge yearly reports within 4 months after the end of the financial year: s319(3)(b).

1.10 A disclosing entity must lodge its half-yearly reports with ASIC within 75 days after the end of the half-year: s320(1).

What are the AGM obligations of a company?

1.11 A public company with more than one member must hold an AGM at least once each calendar year and within 5 months after the end of its financial year: s250N. Under the Act, other companies are not required to hold an AGM.

How do these obligations apply to companies under administration or a deed of company arrangement?

1.12 The financial reporting and AGM obligations are imposed on the company itself. Directors of a company have a specific obligation to take all reasonable steps to comply with or to secure compliance with the financial reporting obligations: s344.

1.13 A company does not cease to have the status of a company on the appointment of an administrator. Accordingly, obligations that are imposed on a company, such as the financial reporting and AGM obligations, continue to apply while the company is under administration or a deed of company arrangement.

1.14 In our view, these obligations are not affected by s451D of the Act, which provides that:

“Where:

- (a) for any purpose ... an act must or may be done within a particular period or before a particular time; and
- (b) this Part prevents the act from being done within that period or before that time;

the period is extended, or the time is deferred, because of this section, according to how long this Part prevented the act from being done.”

1.15 The preparation, distribution or lodgement of financial and other reports or the holding of an AGM is an “act” which must be done within a particular time or before a particular time within the meaning of s451D(a). However, Part 5.3A does not prevent those acts from being done within the particular time or before the particular time and, therefore, s451D(b) is not satisfied.

Who should ensure compliance while a company is under administration?

1.16 While a company is under administration, the powers of the directors and other officers (excluding the voluntary administrator) are suspended: s437C. Without written authority from the voluntary administrator, the directors are unable to perform or exercise any function or power as officers of the company. Therefore, on their own, the directors are unable to either ensure the company complies with the financial reporting obligations or convene an AGM.

1.17 The voluntary administrator, on the other hand, has control of the company’s business, property and affairs and may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration:

s437A. Therefore the voluntary administrator has the power to cause the company to comply with the financial reporting and AGM obligations.

1.18 As an officer of the company, the voluntary administrator is obliged to use their powers to cause the company to comply with its legal obligations, including the financial reporting and AGM obligations.

What can the voluntary administrator do to ensure compliance?

1.19 The voluntary administrator may ensure that the company complies with its financial reporting and AGM obligations by exercising their power under s437A(1)(d) to either:

- (a) prepare, obtain, distribute and lodge reports in accordance with Part 2M.3 of the Act and convene an AGM in accordance with Part 2G.2; or
- (b) make an application for relief under s340 and 250P.

1.20 Alternatively, the voluntary administrator may provide written approval authorising the directors under s437C(1A) to either:

- (a) prepare, obtain, distribute and lodge reports in accordance with Part 2M.3 of the Act and convene an AGM in accordance with Part 2G.2; or
- (b) make an application for relief under s340 and 250P.

1.21 The voluntary administrator may remove and replace directors who fail to co-operate with the voluntary administrator to ensure the company complies with the financial reporting and AGM obligations: s442A.

Who should ensure compliance when a company is under a deed of company arrangement?

1.22 The execution of a deed of company arrangement brings the administration to an end. The powers and functions of the directors and other officers are no longer suspended under s437C. However, the directors are bound by the terms of the deed: s444G.

1.23 As the directors' powers and functions are *prima facie* reinstated upon the execution of the deed of company arrangement, the directors *prima facie* resume their responsibility for ensuring the company's compliance with the Act, including the financial reporting and AGM obligations.

1.24 The deed administrator has the powers specified in the deed of company arrangement. Subject to the terms of the deed, these powers

include the powers set out in clause 2 of Schedule 8A to the *Corporations Regulations 2001* (Corporations Regulations): see s444A(5) and reg 5.3A.06. As an officer of the company, the deed administrator is obliged to use these powers to ensure that the company complies with its legal obligations, including the financial reporting and AGM obligations.

Your feedback: Financial reporting and AGM obligations

- Q1.1** Should we provide guidance on the financial reporting and AGM obligations of companies under other forms of external administration, such as controllership under Part 5.2 and liquidation?
- Q1.2** Would it be appropriate for the issues in this paper to be addressed through law reform? That is, should the Act be amended to clarify how the financial reporting and AGM obligations apply to all companies in external administration, including under Part 5.3A?
- Q1.3** If you answered "yes" to Q1.2, how do you think the law should be amended? Do you consider that reforms should provide for the suspension of the financial reporting and AGM obligations for some or all companies in external administration?

Section 2: ASIC's power to grant relief

2.1 This section sets out ASIC's powers to relieve a company from the financial reporting and AGM obligations and our current policy on exercising these powers.

Financial reporting obligations

What relief is available under the Act?

2.2 Under s340 and 341, ASIC may grant relief from any or all of the financial reporting obligations. Under s340, ASIC may grant relief in response to a written application. Under s341, ASIC may issue class order relief.

2.3 The relief may be:

- (a) subject to conditions; and
- (b) indefinite, or limited to a specified period: s340(2).

2.4 Before granting relief under s340 or 341, ASIC must be satisfied that complying with the financial reporting obligations would:

- (a) make the financial or other reports misleading;
- (b) be inappropriate in the circumstances; or
- (c) impose unreasonable burdens: s342(1).

What is our policy on relief?

2.5 Policy Statement 43 *Accounts and audit relief* [PS 43] sets out our current policy on granting relief under s340 and 341 from the financial reporting obligations. It also provides guidance on the meaning of the pre-conditions to relief mentioned in paragraph 2.4.

"Misleading"

2.5 [PS 43.16]–[PS 43.18] state that compliance will only be "misleading" if it would result in:

- (a) a reader of the relevant report forming an incorrect conclusion concerning a feature of the company; or
- (b) distortion of a particular piece of information required by the Act.

2.6 These paragraphs also point out that relief based on this pre-condition will only be granted in rare circumstances. Before relief is granted on this basis, a company must establish that the problem could not reasonably be remedied through inclusion in the reports of appropriate additional information, explanations and notes.

“Inappropriate in the circumstances”

2.7 [PS 43.19]–[PS 43.22] point out that this pre-condition will normally only apply in cases where:

- (a) there is an anomaly in the Act; or
- (b) compliance with the Act will give rise to consequences not intended by the legislature.

It is not sufficient for an applicant to show that the reports are irrelevant, or of no benefit to users of the reports.

“Unreasonable burdens”

2.8 [PS 43.23]–[PS 43.25] observe that this pre-condition will only be satisfied if:

- (a) compliance with the relevant parts of Chapter 2M create burdens; and
- (b) those burdens are unreasonable.

2.9 Compliance with a requirement of the Act may create burdens in one of two ways:

- (a) burdens may be associated with attaining compliance with the requirement; or
- (b) burdens may result from having complied with the requirement.

2.10 Burdens will only be unreasonable if they are disproportionate to the value of the resultant disclosures for the users of the financial and other reports.

Companies in receivership

2.11 [PS 43.34]–[PS 43.38] specifically address how we will treat individual applications for relief from the financial reporting obligations where a company is in receivership.

2.12 These paragraphs state that we will be inclined to grant such relief where directors can demonstrate that a receiver (or receiver and manager) has taken over the management of all, or a significant part, of the day-to-day operations of the company.

2.13 Such relief may be conditional on:

- (a) the directors ensuring that copies of the *Report as to affairs* (Form 507) and *Accounts by scheme administrator/controller/administrator of a deed of company arrangement* (Form 508) are sent to every member in lieu of financial and other reports at about the same time as these documents are lodged with ASIC; and
- (b) the first directors' report after the expiration of relief including a statement that:
 - (i) clearly indicates that relief has been granted; and
 - (ii) gives details of the particular relief.

Note: See [PS 43.44].

2.14 [PS 43.38] states that where the directors continue to be responsible for part of the management of the company, we will not be inclined to grant relief.

AGM obligations

What relief is available under the Act?

2.15 Under s250P of the Act, ASIC may extend the period within which s250N requires a public company to hold an AGM. ASIC may only grant an extension if the company lodges an application for an extension before the end of the period within which the meeting would otherwise be required to be held. ASIC may impose conditions on the extension.

What is our policy on relief?

2.16 Policy Statement 44 *Annual general meeting — Extension of time* [PS 44] sets out our current policy on considering applications under s250P.

2.17 [PS 44.17] states that we will usually be inclined to grant an extension of time only if:

- (a) the inability of a company to hold its AGM on time is due to factors beyond its control (eg temporary or permanent loss of key personnel or the external auditor). Even in such a case the likelihood of an extension being granted will decrease as the extent of external interest in the company increases; or
- (b) we are persuaded that it is in the interests of the members to do so.

Companies in receivership

2.18 [PS 44.24]–[PS 44.25] specifically address how we will treat applications for extension of time where the company is in receivership.

2.19 These paragraphs state that we will be inclined to grant an extension of:

- (a) up to 6 months where the receiver has control over the management of all the day-to-day operations of the company; and
- (b) up to 2 months where the directors retain some control over the management of the company, if the applicants demonstrate that the receivership has resulted in a delay in holding the AGM.

2.20 The grant of any extension of time to a company in receivership is conditional on the directors ensuring that copies of the *Report as to affairs* (Form 507) and *Accounts by scheme administrator/ controller/administrator of a deed of company arrangement* (Form 508) are sent to every member in lieu of financial reports at about the same time as these documents are lodged with ASIC.

Your feedback: ASIC's power to grant relief

- Q2.1** Should we review our policy in [PS 43] on granting relief from the financial reporting obligations to companies in receivership? (See paragraph 8 of "What this discussion paper is about") If so, why?
- Q2.2** Should we review our policy in [PS 44] on granting relief from the AGM obligations to companies in receivership? (See paragraph 9 of "What this discussion paper is about") If so, why?
- Q2.3** Should [PS 43] and [PS 44] state how we will exercise our relief powers in relation to controllers of property of corporations under Part 5.2, other than receivers?

Section 3: Financial reporting relief – proposed options

3.1 In this section, we set out our proposed options for granting relief from the financial reporting obligations to companies under administration or a deed of company arrangement.

What is our preferred option for relief?

3.2 Our preferred option is to grant relief from the financial reporting obligations by class order under s341:

- (a) to all companies to which a voluntary administrator is appointed;
- (b) for a period of 6 months from the appointment of the voluntary administrator; and
- (c) subject to certain conditions.

Note: For a description of the conditions, see paragraph 3.5.

3.3 If more than 6 months relief is required, we propose that companies should apply for further relief under s340. We propose to consider such applications on a case-by-case basis.

Proposed class order relief: s341

3.4 The effect of the proposed class order is that financial reporting obligations which, without relief, must be complied with during the 6 months after the appointment of a voluntary administrator, must instead be complied with by no later than the date 6 months after the appointment of the voluntary administrator.

Conditions of relief

3.5 We propose to impose the following conditions on this relief:

- (a) the company must lodge with ASIC and distribute to members the report and statements required to be distributed to creditors under s439A. The report must include a statement about whether the voluntary administrator believes the members are likely to have an ongoing economic interest in the company;
- (b) the first financial report lodged after the end of the relief period must include the following additional disclosures:

- (i) an additional column in the Statement of Financial Position for the company's current financial position as at a date no more than 60 days before the signing of the financial report; and
- (ii) an additional column in the Statement of Financial Performance and Statement of Cash Flows covering the period from the end of the last financial year or half-year to the date of the Statement of Financial Position;
- (c) these additional disclosures must be subject to audit (or review for half-year financial reports) and included in the scope of the auditor's report; and
- (d) notes to the financial statement must state that the additional disclosures have been included in accordance with the conditions of this relief.

Proposed further case-by-case relief: s340

3.6 We propose to consider granting relief, on a case-by-case basis under s340, beyond the 6-month period. We think that such relief will be rarely given.

3.7 When deciding whether to grant this relief, we will consider whether we are satisfied that one of the pre-conditions for relief in s342(1) are met: see paragraphs 3.9–3.23. We will consider factors such as:

- (a) the financial position of the company;
- (b) the time, financial and human resources available to the administrator;
- (c) the extent to which a depletion of resources will occur and whether this may affect the survival of the entity;
- (d) the availability and willingness of the directors to assist in complying with the Act;
- (e) whether additional time is required to substantiate appropriate carrying values for assets and liabilities;
- (f) whether it is likely that the members have any residual economic interest in the company;
- (g) whether the terms of the deed provide for all, or substantially all, of the assets of the company to be realised; and
- (h) other complexities or legal impediments that may prevent compliance.

3.8 We may impose conditions on this relief in addition to those in paragraph 3.5. For example, if the company is under a deed of company arrangement, we may require it to distribute to members the accounts required under clause 10 of Schedule 8A, Corporations Regulations: see s444A(5) and reg 5.3A.06.

Why is this our preferred option?

Section 342(1) pre-conditions to relief

3.9 Our preferred option is consistent with s342(1). As mentioned in Section 2, s342(1) provides that ASIC may only grant relief from the financial reporting obligations in Part 2M.3 if we are satisfied that complying with these obligations would:

- (a) make the financial or other reports misleading;
- (b) be inappropriate in the circumstances; or
- (c) impose unreasonable burdens.

3.10 We believe that for the initial 6-month period after the appointment of a voluntary administrator, compliance with the financial reporting obligations will impose unreasonable burdens. Therefore, ASIC has power to grant relief from the financial reporting obligations to companies during this initial period.

3.11 We believe that after this initial 6-month period, compliance is unlikely to satisfy one of the pre-conditions to relief. However, in limited circumstances it may impose unreasonable burdens. Therefore, before we give further relief, we must consider each company individually to determine whether this pre-condition to relief is satisfied.

3.12 Paragraphs 3.13–3.23 discuss in more detail our view of how the pre-conditions to relief under s342(1) apply to companies under administration or a deed of company arrangement.

“Misleading”

3.13 Compliance with the financial reporting obligations while the company is under administration or a deed of company arrangement should not result in the financial or other reports being misleading.

Where a company is placed into administration after reporting date, a true and fair presentation of the company's financial information can be made in the financial report through:

- (a) adjustments to carrying values of assets and liabilities to be reflected on the face of the company's Statement of Financial Position in accordance with paragraph 4.2 of accounting standard AASB 1002 "Events Occurring After Reporting Date" and paragraph 6.1 of accounting standard AASB 1029 "Interim Financial Reporting"; or
- (b) the inclusion of appropriate additional disclosures in the notes to the financial statements in accordance with paragraph 5.1(e) of AASB 1002 and paragraph 7.4(c) of AASB 1029.

Note: For further details about AASB 1002 and AASB 1029 see paragraphs 3.32–3.25.

"Inappropriate in the circumstances"

3.14 The pre-condition of "inappropriate in the circumstances" is normally only satisfied if:

- (a) there is an anomaly in the Act; or
- (b) compliance with the Act will give rise to consequences not intended by the legislature.

3.15 Nothing in Part 5.3A of the Act was intended to negate the financial reporting obligations imposed on a company under administration or a deed of company arrangement. It is our opinion that no anomalies are created by the interaction between Parts 5.3A and 2M.3. Therefore, companies under administration or a deed of company arrangement will not be able to satisfy this pre-condition.

"Unreasonable burdens"

3.16 To determine whether this pre-condition is satisfied, we must consider whether:

- (a) compliance with the financial reporting obligations create burdens; and
- (b) those burdens are unreasonable.

3.17 During the initial period after the appointment of a voluntary administrator, compliance with the financial reporting obligations will create significant burdens.

3.18 The burdens arise from the combination of time, financial and human resource constraints on a company under administration:

- (a) *Time constraints* — Under the Act, the voluntary administrator is required to complete a number of tasks within a short timeframe. For example, the voluntary administrator must convene and hold 2 creditors meetings and investigate the company's business, property, affairs and financial circumstances: s436E, 438A and 439A. It may be extremely difficult for a voluntary administrator to complete these tasks and prepare or obtain the financial and other reports required under Part 2M.3.
- (b) *Financial constraints* — Compliance with the financial reporting obligations will deplete the already limited financial resources of a company under administration.
- (c) *Human resource constraints* — In light of the company's time and financial constraints, the voluntary administrator has limited human resources available. The efforts of the voluntary administrator will be directed to meeting the needs and objectives of the administration.

3.19 These considerable burdens may be exacerbated by the fact that preparation of financial reports for a company under administration may be more difficult than for most companies. Where a company has gone into administration after the reporting date, it will often be burdensome to undertake the difficult and time-consuming task of determining the realisable values of the company's assets and liabilities for recognition or disclosure in the financial report and still meet the normal reporting deadlines. This is especially so when there is no active and liquid market for the company's assets.

3.20 We believe that, in the context of an administration, these burdens are unreasonable. In determining whether burdens are unreasonable, we must balance the likely detriment caused to the company by the burdens against the value of the financial and other reports for the users of the reports. The burdens in paragraphs 3.18–3.19 are severe and we believe they are disproportionate to the value of the financial and other reports for the users of those reports.

3.21 Users of the financial and other reports, such as creditors, members, potential creditors and employees, clearly have an interest in the financial and other affairs of a company that has entered administration. However, they also have an interest in the preservation of the company's limited assets and its possible revitalisation. It is unlikely that they would want the company's resources unnecessarily depleted in order to provide them with information about the company's financial

and other affairs, when such information may be available through other sources.

3.22 At least during the initial period after the appointment of an administrator, compliance with Part 2M.3 is likely to unnecessarily deplete the company's resources because users of the financial and other reports can obtain some information about the affairs of the company under administration, even if the company does not comply with its obligations under Part 2M.3. Under s439A(4), the voluntary administrator must provide creditors with a report about "the company's business, property, affairs and financial circumstances". In light of this requirement and the burdens created by compliance with the financial reporting obligations, creditors do not need access to financial and other reports prepared in compliance with Part 2M.3. Moreover, the voluntary administrator can make this report available to others by forwarding it directly to members and by lodging it with ASIC. This would assist the users of the financial and other reports in obtaining information about the company's affairs even if the company does not comply with its financial reporting obligations.

3.23 Compliance with the financial reporting obligations may also impose unreasonable burdens on a company under a deed of company arrangement, at least in the initial period after the execution of the deed. However, we note that for most companies under a deed of company arrangement, the burdens created by financial, time and human resource constraints will be less severe. They are unlikely to be disproportionate to the value of the financial and other reports for the users of those reports.

Duration of relief

3.24 In determining the duration of the relief, we must balance:

- (a) the interests of users of the financial and other reports, especially members; and
- (b) the burdens created by compliance with the financial reporting obligations.

We believe that, other than in exceptional circumstances, the 6-month limit on relief provides an appropriate balance.

3.25 As stated in paragraph 3.21, members and other users of the financial and other reports continue to have an interest in the affairs of the company after the appointment of a voluntary administrator. In light of this interest, relief of a long duration is inappropriate. Under our proposal, in the earlier stages of the administration, users of the financial and other reports will be provided with some information about the company because the company must lodge with ASIC and distribute to

members the report and statements required to be distributed to creditors under s439A. However, as the administration or deed of company arrangement progresses, users of the financial or other reports should generally be given access to the full range of information that must be disclosed under Part 2M.3.

3.26 Moreover, the burdens created by compliance with the financial reporting obligations will generally decrease after the end of the 6 month period. In particular, the time constraints mentioned in paragraph 3.18(a), should be less acute.

Conditions of relief

Information be provided to ASIC and members

3.27 We believe that a form of reporting and lodgement of information should be a condition of relief provided to companies under administration or a deed of company arrangement.

3.28 We consider that the information required to be prepared under s439A(4) or, if the company is under a deed of company arrangement, clause 10 of Schedule 8A, Corporations Regulations, should be lodged with ASIC and sent to members. Although this information would not provide the level of detail which is available in the financial and other reports prepared in accordance with Part 2M.3 of the Act, it will keep members and others informed to an extent, while preserving the resources of the company and voluntary administrator. Lodgement with ASIC, in particular, ensures that the information is available to potential creditors and other users of the financial and other reports.

Additional disclosures required in financial reports filed after relief expires

3.29 Some people have questioned the relevance of reporting historical financial information in circumstances where the company's financial position has materially changed after reporting date as a result of the appointment of a voluntary administrator.

3.30 For example, a company that is placed under administration may be subject to asset sales, business closures, debt compromises or other reconstructions. Further, some of the assumptions underlying asset valuations may no longer be applicable. However, under our preferred option, where such a company has been placed under administration after reporting date but before it has reported to members and lodged financial reports, the company would still be required to report its financial position as at reporting date after the 6-month period expires. This

recognizes that there should be accountability and complete financial information for the entire life of a company.

3.31 We believe that, to an extent, compliance with the following accounting standards will ensure that the delayed financial reports contain all relevant information:

- (a) AASB 1002 — for full-year financial reports; and
- (b) AASB 1029 — for half-year financial reports.

AASB 1002

3.32 Paragraph 4.2 of AASB 1002 states:

“The financial report must reflect the financial effect of an event occurring after reporting date that:

- (a) provides additional evidence of conditions that existed at reporting date; or
- (b) reveals for the first time a condition that existed at reporting date.”

The appointment of a voluntary administrator after reporting date might provide additional evidence that the company was not a going concern at the reporting date and thus constitute an event that requires adjustment to carrying values of assets and liabilities to be reflected on the face of the company’s Statement of Financial Position.

3.33 Paragraph 5.1 of AASB 1002 states:

“Where an event occurring after reporting date provides new information that does not relate to conditions existing at reporting date, the following information must be disclosed:

- (a) a description of the event
- (b) a statement that the event occurred after reporting date
- (c) a statement that the financial effect of the event has not been recognised
- (d) subject to sub-paragraph (e), the financial effect of the event or, where it is not possible to estimate the effect reliably, a statement to that effect

- (e) where the event provides evidence that the going concern basis is not appropriate for the entity or for a subsidiary of the economic entity (where the reporting entity is an economic entity) after the reporting date
 - (i) assets for which the going concern basis is not appropriate, the carrying amounts and the amounts for which the assets are expected to be realised
 - (ii) liabilities for which the going concern basis is not appropriate, the carrying amounts and the amounts for which the liabilities are expected to be settled.”

Assuming that a company was a going concern at reporting date, the appointment of a voluntary administrator after reporting date will require disclosure in the notes to the full-year financial statements in accordance with the requirements of this standard.

AASB 1029

3.34 Under paragraph 6.1 of AASB 1029, the company must follow the accounting methodology in other accounting standards, such as paragraph 4.2 of AASB 1002. This means that if the appointment of a voluntary administrator after the half-year reporting date provides additional evidence that the company was not a going concern at the half-year reporting date, the carrying values of assets and liabilities reflected on the face of the company’s Statement of Financial Position should be adjusted accordingly.

3.35 Paragraph 7.4(h) of AASB 1029 provides that the notes to the half-year financial report must include, in summarised form, if not disclosed elsewhere in the half-year financial report:

“material events subsequent to the end of the interim period [ie half-year] that have not been recognised in the interim [ie half-year] financial statements and an indication, where possible, of the financial effect of each event.”

Again, assuming that a company was a going concern at the half-year reporting date, the appointment of a voluntary administrator after the half-year reporting date will require disclosure in the notes to the half-year financial statements in accordance with the requirements of this standard.

Effect of AASB 1002/AASB 1029 and our condition of relief

3.36 Applying AASB 1002 and AASB 1029 will result in:

- (a) the financial report containing a Statement of Financial Position and notes which disclose the financial position of the

company as at reporting date, having regard to events occurring after reporting date and before the date of signing the financial report that provide additional or new evidence of conditions that existed as the reporting date; and

- (b) additional disclosures in the notes to the financial statement which describe the material events occurring between the reporting date and the date of signing of the financial report that do not relate to conditions existing at the reporting date.

3.37 Under our preferred option, relief would be granted on condition that certain additional financial information is presented in additional columns on the face of the company's first financial statements after the 6-month period expires, in addition to the information required by AASB 1002 and AASB 1029. This additional financial information would be in the form of financial statements covering the period from the last reporting date to a date not less than 60 days before the date that the financial report is signed and would allow users of the financial report to see clearly changes in the company's financial position that have occurred as a result of the administration process.

3.38 This additional financial information should not be regarded as sufficient to fulfil the requirements of AASB 1002 and AASB 1029, although it may contribute towards satisfying those obligations. Satisfaction of our condition of relief should also not be seen as satisfying other periodic reporting requirements of the company (eg the company's next half-year financial report).

What are our other options?

Duration of relief

3.39 We considered granting relief for the length of the administration, plus the statutory period for compliance with the obligation. This would mean, for example:

- (a) the reports referred to in s314 would have to be sent to members by the earlier of:
 - (i) 21 days before the next AGM after the end of the administration; or
 - (ii) 4 months after the end of the administration;
- (b) full-year reports would have to be lodged with ASIC:
 - (i) within 3 months after the end of the administration for a disclosing entity; and

- (ii) within 4 months after the end of the administration for any other entity; and
- (c) half-year reports would have to be lodged with ASIC within 75 days after the end of the administration.

3.40 This option would ensure that the company under administration would not have to use its limited resources to prepare financial or other reports during the administration. Nevertheless, this is not our preferred option because, in some cases, it would lead to a significant delay in the lodgement with ASIC and distribution to members of financial and other reports. A lengthy delay is contrary to the interests of members and other users of the reports. As stated in paragraph 3.21, these users of the financial and other reports retain an interest in the affairs of the company.

3.41 We also considered granting relief from the appointment of the administrator until 2 months after the second creditors' meeting is held, but subject to a maximum period of relief of 6 months.

3.42 This is not our preferred option because:

- (a) the duration of the relief will not be known until the second creditors' meeting is convened; and
- (b) the period of relief may be insufficient. It will usually take an administrator at least 6 months to get the company into a position where compliance with the financial reporting obligations does not create significant burdens.

Conditions of relief

Adjusted reporting period in financial reports filed after relief expires

3.43 In order to ensure that the financial report remains relevant and comprehensible to the users, we considered requiring the company's first financial report after the relief expires to be prepared for a period which has, as its reporting date, the end of the month during which the voluntary administrator was appointed. For example, where a voluntary administrator was appointed on 15 September 2002 for a company with a financial year ending on 30 June, the financial report would be prepared for the financial period 1 July 2001 to 30 September 2002.

3.44 The advantage of this option is that the Statement of Financial Position would, to the extent necessary, reflect adjusted carrying values of assets and liabilities because it should be clearer that the conditions existing as at the date of appointment warrant such adjustments. This may assist in the preparation of a financial report that is not otherwise cluttered with significant additional note disclosures under AASB 1002 and AASB 1029. (However, additional note disclosures may still be

generated by AASB 1002 and AASB 1029 because of the material events that can occur between the appointment of the voluntary administrator and the date that the reports are signed.)

3.45 This is not our preferred option because it has several disadvantages:

- (a) *Lack of comparability* — Due to the extended reporting period, the company's financial performance would not be comparable to the previous period and to other companies. The following financial reporting period would also be affected where the company was required to restore its traditional reporting date. Added complications are evident for disclosing entities that are required to prepare and lodge a half-year financial report.
- (b) *Length of financial reporting period* — In some circumstances, the length of the financial reporting period would be excessive.
- (c) *Reduced accountability* — The company and auditor would not be required to consider and disclose the position of the company as at the company's traditional reporting date (eg 30 June).

Your feedback: Financial reporting relief – proposed options

- Q3.1** Do you agree that financial or other reports prepared while a company is under administration or a deed of company arrangement are not misleading for the purposes of s342(1)? If not, why not? Are there other factors that we should consider?
- Q3.2** Do you agree that compliance with the financial reporting obligations by a company under administration or a deed of company arrangement is not inappropriate in the circumstances for the purposes of s342(1)? If not, why not? Are there other factors that we should consider?
- Q3.3** Do you agree that compliance with the financial reporting obligations by a company under administration or a deed of company arrangement imposes unreasonable burdens for the purposes of s342(1)? If not, why not? Are there other factors that we should consider?
- Q3.4** Is class order relief from the financial reporting obligations appropriate for all companies to which a voluntary administrator has been appointed regardless of their individual financial and operational circumstances? If not, why not?

- Q3.5** Do you agree that relief should extend for 6 months from the appointment of a voluntary administrator? If not, why not? Please justify your preferred duration.
- Q3.6** Do you agree that companies that are given relief should be required to lodge with ASIC and distribute to members:
- (a) the reports and statements required to be distributed to creditors under s439A?
 - (b) the accounts required under clause 10 of Schedule 8A, Corporations Regulations?
- Q3.7** If you answered no to Q3.6, do you think that other information should be distributed to:
- (a) members; and/or
 - (b) other users of the financial reports?
- If so, what information?
- Q3.8** Should the financial reports that are lodged or distributed after the proposed relief expires contain additional financial statement information covering the period from the last reporting date to a date not less than 60 days before the financial report is signed? If not, why not? Should any other additional information be required to be disclosed?
- Q3.9** What factors should we take into account when deciding whether to grant relief that extends beyond 6 months from the appointment of a voluntary administrator? (See paragraph 3.7)

Section 4: AGM relief – proposed option

4.1 In this section, we set out our proposed option for granting relief from the AGM obligations to companies under administration or a deed of company arrangement.

What is our proposed option?

4.2 We will consider each application for relief from the AGM obligations by a company under administration or a deed of company arrangement on a case-by-case basis.

4.3 We propose to generally give relief to companies under administration or a deed of company arrangement which, without relief, would be required to hold an AGM during the first 7 months after the appointment of a voluntary administrator. Such relief will generally extend the period of time within which s250N requires the company to hold an AGM until the earlier of:

- (a) 7 months after the appointment of a voluntary administrator; or
- (b) 1 month after the lodgement of the financial report for the year.

4.4 If we give relief from the financial reporting obligations beyond the 6-month period after the appointment of a voluntary administrator (see paragraph 3.6), we propose to generally also extend the period within which the AGM must be held beyond the 7-month period from the appointment of a voluntary administrator.

Why is this our proposed option?

4.5 When considering an application under s250P, we must keep in mind that an extension of the period in which the company is required to hold an AGM is an exception to the general rule in s250N. We must weigh those matters put forward as justification for the extension against those matters which tend to indicate that the AGM should be held on time. We must only grant an extension if we consider that, on balance, there is a good reason to postpone the important safeguard provided for members by s250N.

Note: See *Exicom v Futuris Corporation* (1995) 61 FCR 337, 342. See also *Re Gem Exploration & Minerals NL* [1975] 2 NSWLR 584 and *Re Oilmin NL* (1981) 6 ACLR 219; (1981) 1 ACLC 279.

4.6 We believe that during the first 7 months after the appointment of a voluntary administrator, there is good reason to postpone an AGM. The holding of an AGM during this period would be contrary to the interests of members, in that it would diminish the assets of the company without providing any benefit for members. The AGM would not benefit members because during the administration period, the AGM would be unable to perform the functions normally performed by an AGM, such as electing directors and considering the annual financial and other reports.

4.7 Because consideration of the financial and other reports is one of the major functions of an AGM, we believe that we should align the period of relief from the AGM obligations with the period of the relief from the financial reporting obligations. That is, we believe that in most circumstances, it will be appropriate for us to grant relief under s250P so that the AGM can be held the standard 1 month after the distribution of the annual financial and other reports.

Your feedback: AGM relief – proposed option

- Q4.1** Do you agree with our proposed approach to granting relief under s250P to companies that are under administration or a deed of company arrangement? Please explain your answer.
- Q4.2** Should we tie the duration of this relief to relief granted from the financial reporting obligations? If not, why not?

What happens next

This discussion paper will be open for public comment for **8 weeks** from 5 September 2002–31 October 2002.

We propose to settle our policy on relief from the financial reporting and AGM obligations for companies in external administration under Part 5.3A by **March 2003**.

Key terms

In this discussion paper, unless the context otherwise requires, a reference to:

“Act” means the *Corporations Act 2001*;

“administrator” has the same meaning as in s9 of the Act;

“AGM” means annual general meeting;

“AGM obligations” means the obligation in s250N of the Act;

“ASIC” means the Australian Securities and Investments Commission;

“Corporations Regulations” means the *Corporations Regulations 2001*;

“deed administrator” means the administrator of a deed of company arrangement;

“financial and other reports” means the financial reports, directors’ reports, auditor’s reports and concise reports required under Part 2M.3 of the Act;

“financial reporting obligations” means the obligations in Part 2M.3 of the Act to prepare, obtain, distribute and lodge the financial and other reports;

“receiver” has the same meaning as in s9 of the Act;

“reg 7.6.04” (for example) means a regulation of the Corporations Regulations (in this example numbered 7.6.04);

“reporting date” means the end of the reporting period to which the financial or other reports relates;

“s250N” (for example) means a section of the Act (in this example numbered 250N);

“voluntary administrator” means an administrator in relation to a body corporate but not in relation to a deed of company arrangement.