

Dear Sir/Madam

Property Funds Association of Australia - ASIC Consultation Paper 248: Remaking ASIC class orders on reporting by foreign entities: [CO 98/98] and [CO 02/1432]

We welcome this opportunity to make a submission on the proposal by the Australian Securities and Investments Commission (**ASIC**) to remake its class orders relating to financial reporting by foreign entities.

We note that ASIC is proposing in ASIC Consultation Paper 248 (**CP 248**) to remake the following class orders:

- Class Order [CO 98/98] *Small proprietary companies which are controlled by a foreign company but which are not part of a large group*, due to expire on 1 April 2017 (**CO 98/98**); and
- Class Order [CO 02/1432] *Registered foreign companies: financial reporting requirements*, due to expire on 1 April 2017 (**CO 02/1432**).

CP 248 currently envisages that ASIC will make a number of changes to the substance of the existing relief provided under CO 98/98 and CO 02/1432.

Importantly, ASIC is proposing to modify CO 98/98 and CO 02/1432 so that the relief provided does not apply to an individual entity in circumstances where:

- ASIC has notified the entity that it may not rely on the relief; and
- ASIC's notification has not been revoked or varied to allow the relief to be relied upon for the relevant financial year.

The Property Funds Association of Australia (**PFA**) is supportive of ASIC's proposal to remake CO 98/98 and CO 02/1432, as the relief currently provided by these two class orders significantly reduces the compliance burden and costs for those PFA members who are either small proprietary companies controlled by a foreign company or registered foreign companies.

However, the PFA is very concerned by ASIC's proposal to modify the terms of CO 98/98 and CO 02/1432, which would have the effect of significantly narrowing the scope of the existing relief which is currently being relied upon by small proprietary companies and registered foreign companies.

For the reasons set out below, the PFA considers that what ASIC is proposing is inappropriate and that ASIC should instead re-make CO 98/98 and CO 02/1432 on substantially the same terms.

About the Property Funds Association of Australia

The PFA is an industry body representing the Australian unlisted wholesale, retail and private property investors.

Proposed changes to terms of the existing class order relief

The PFA's primary objections to ASIC's proposed changes to the terms CO 98/98 and CO 02/1432 are as follows:

1. The PFA notes ASIC's statement in CP 248 that ASIC has formed the view that CO 98/98 and CO 02/1432 are "operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework". Moreover, ASIC goes on to state in CP 248 that "We are not aware of significant issues with the current operation of these class orders."

Accordingly, the PFA questions the rationale for ASIC's proposal to reduce the scope of the existing relief by allowing ASIC to effectively withdraw the relief at its discretion.

2. The PFA considers that giving ASIC the ability to withdraw the relief and effectively impose financial reporting obligations on an entity which has previously been exempt from these requirements is an unnecessary and unanticipated regulatory burden, the regulatory and public interest benefits of which are very limited. Moreover, this is contrary to the Government's stated intention, and ASIC's own goal, of reducing regulatory red tape.
3. The prospect of ASIC being able to withdraw the relief will create uncertainty amongst companies relying on the existing class order relief and discourage new companies from establishing a presence in Australia due to the potential implications and compliance costs, particularly in circumstances where the foreign company would not be required to provide this information in its own jurisdiction. This is likely to significantly impact competition and discourage foreign entrants into the Australian property market. Giving ASIC this power will fundamentally undermine the relief itself and weakens its effect and use by those companies that it is intended to benefit.
4. ASIC provides that in deciding whether to notify a company that it may not rely on the relief it will have regard to information provided by the Australian Tax Office (ATO) or other regulators, and will consider whether preparing and lodging a financial report is in the public interest and whether the benefits of reporting outweigh the additional costs to the entity. We note that despite this commentary, the revised instrument does not qualify ASIC's ability to give notice at all. Further, is it administratively appropriate for ASIC to respond to processes and actions undertaken by other regulators in circumstances where it does not have sufficient balanced information and is not close enough to the process to make a decision on whether to withdraw the relief? We are concerned that the ATO and other regulators could call upon ASIC to withdraw the relief in circumstances where it would not be justified e.g. the ATO may wish to see a company's financial reports as a 'fishing expedition' without having a real basis for a review but to see what it could find. In practice, ASIC may find it difficult to say resist.
5. The PFA notes that under the terms of the draft instrument prepared by ASIC, ASIC proposes to provide itself with an unfettered discretion effectively to prevent an entity from relying on the relief. The PFA considers if that if ASIC is to have such a power (and the PFA does not concede that it would be appropriate for ASIC to have such a power), then it should at least be subject to clearly articulated limitations and conditions, to provide potentially affected entities with greater transparency and certainty.

Accordingly, at a minimum, ASIC's ability to issue such a notice to an entity should be:

- limited to applying in a few specific circumstances: for example where ASIC has acting reasonably and fairly formed the view that an entity, which is relying on the relief, is in fact not complying with the conditions of the relief; or
- subject to some clearly articulated fetters: for example, there should be a mandatory process whereby ASIC must give the relevant entity notice in advance that ASIC is considering issuing the entity with a notice which would have the effect of disentitling the entity from relying on the relief; the entity has a specified time-frame in which to make submissions to ASIC as to why the entity should be able to continue to rely on the relief. If ASIC does ultimately issue a notice to the entity, the entity should have a reasonable period in which to start complying with the reporting obligations or choose to cease operations without being required to lodge a financial report.

Next steps

We would be pleased to discuss any aspect of this submission with you further and be involved in any further consultation in relation to ASIC's proposals.

Yours sincerely



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