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Dear Doug

ASIC Consultation Paper 248 Remaking ASIC class orders on reporting by foreign entities

We are pleased to respond to your consultation paper 248 *Remaking ASIC class orders on reporting by foreign entities*. We agree that the relief provided by the proposed new legislative instruments is justified and should be preserved.

However, we note that certain foreign controlled small proprietary companies that qualify as 'significant global entities' will in future have to lodge general purpose financial reports with the ATO under section 3CA of the *Tax Administration Act 1953*. ASIC's legislative instrument should explain how the relief interacts with the requirements of the *Tax Administration Act*.

In terms of ASIC's ability to give notice to an individual entity that it may not rely on the relief, we recommend that the conditions for such a notice should be aligned with the requirements of section 294 of the *Corporations Act 2001* (the Act). This section also gives ASIC the ability to request preparation of financial reports, but provides that any deadlines given by ASIC must be reasonable and sets a 6 year time limit in which any such request can be made.

We support ASIC's intentions of simplifying the drafting of the instruments to make them easier to read. The instruments are for application by preparers of financial reports, who do not necessarily have a legal background. It is therefore important that the instruments are written in a language that is easily understood. We are concerned that this may not necessarily be the case for some sections of the proposed legislative instrument.

We have highlighted one particularly complex paragraph in the Appendix to this letter and we encourage ASIC to consider whether the drafting could be improved by using more plain English and positive rather than negative language. We would be happy to assist with this process. We have also raised a couple of other minor points in the Appendix.

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I would welcome the opportunity to discuss our firm's views at your convenience. Please contact me on (03) 8603 5371 or Meina Rose on (02) 8266 2341 if you would like to discuss our comments further.

Yours sincerely

A handwritten signature in black ink that reads "Margot Le Bars" followed by a period.

Margot Le Bars



Appendix: PwC's specific comments on the Attachment to CP 248

Foreign controlled small proprietary companies that are not part of a large group

Relief where entity ceases to be foreign controlled

The relief can only be applied if the entity is not part of a large group. The definition of group includes any other entity which controlled the entity at any time during or at the end of the financial year and which is incorporated or formed in Australia.

This raises the question of what happens if an entity ceases to be foreign controlled part-way through the year, through sale to an Australian-owned company/group. Following the sale, the entity will no longer be foreign controlled and, as a small proprietary company, would no longer be required to prepare and lodge financial reports.

However, due to the foreign control for part of the year it is still subject to the reporting requirements in section 292(b) of the Act. Assuming the new Australian parent entity is a large company, the small proprietary company will not qualify for relief under the new instrument and it would therefore appear that it would have to prepare and lodge a financial report for the year of the changeover unless it enters into a deed of cross guarantee and obtains relief under class order 98/1418.

This seems unduly burdensome and we would recommend considering whether the instrument could be revised to provide relief for these particular cases. Alternatively, the Explanatory Memorandum should explain the situation and what options, if any, affected entities have (eg applying for individual relief).

Comments on drafting

The definition of 'large group' in section 4 refers to section 45A for both revenue and gross assets, but not for the number of employees. The AASB is currently discussing reporting thresholds with the Treasury and it is likely that these may be changed in the near future. We recommend keeping the whole definition of large group flexible by referring back to section 45A for alternative thresholds, and not only doing so for the revenue and gross asset amounts.

Section 5(2) is setting out the conditions that must be satisfied before the relief can be applied. While it might appear having one single checklist, we consider that the drafting of this has become unduly complex as a consequence. We would recommend streamlining this section along the following lines:

- Conditions for obtaining relief:
 - every year that relief is sought - company must not be part of a large group and directors must resolve to apply the relief
 - first year only - lodge notice of resolution within deadlines
- If relief is not needed in subsequent years: either lodge financial statements or notice 394
- Relief is not available if ASIC gives notice.
- Consequence of ASIC notice for the following financial years - ie the entity can rely on the relief again in a subsequent financial year provided ASIC does not issue another notice.



This would also allow using more positive rather than negative language.

Section 5(2)(c) (i) states that if the entity has relied on the relief in subsection (1) in respect of the preceding financial year, it will not need to lodge a notice with ASIC. However, it is not clear whether this also applies to relief under the previous class order 98/98, or whether a new notice must be lodged by all entities in the first year of the operation of the new instrument.