



**ASIC**

Australian Securities & Investments Commission

**REPORT 520**

# **Response to submissions on CP 248 Remaking ASIC class orders on reporting by foreign entities**

April 2017

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 248 *Remaking ASIC class orders on reporting by foreign entities: [CO 98/98] and [CO 02/1432]* (CP 248) and details our responses to those issues.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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## A Overview/Consultation process

- 1 In [Consultation Paper 248](#) *Remaking ASIC class orders on reporting by foreign entities: [CO 98/98] and [CO 02/1432]* (CP 248) we consulted on our proposals to remake the following class orders, which were due to sunset on 1 April 2017:
- (a) Class Order [CO 98/98] *Small proprietary companies which are controlled by a foreign company but which are not part of a large group in Australia;* and
  - (b) Class Order [CO 02/1432] *Registered foreign companies: Financial reporting requirements.*

### [CO 98/98]

- 2 Section 292(2)(b) of the *Corporations Act 2001* (Corporations Act) requires a small proprietary company that was controlled by a foreign company for all or part of a financial year to comply with the financial reporting obligations under Pt 2M.3 of the Corporations Act unless it is consolidated for that period in financial statements lodged with ASIC by a registered foreign company, a company, a disclosing entity or a registered managed investment scheme.
- 3 Section 292(2)(b) results in more onerous financial reporting requirements applying to small foreign-controlled proprietary companies than apply to their Australian counterparts that are not foreign controlled.
- 4 [CO 98/98] put the reporting requirements of small foreign-controlled proprietary companies on a par with other Australian small proprietary companies. However, a condition of the relief was that the company seeking relief cannot be part of a large group. This condition prevented disaggregation of foreign-controlled companies into smaller companies to avoid financial reporting obligations.

### [CO 02/1432]

- 5 A registered foreign company must lodge with ASIC a copy of its balance sheet, cash flow statement, and profit and loss statement (financial statements) for its last financial year at least once in every calendar year. The requirements are set out in s601CK of the Corporations Act.
- 6 These financial statements are those required by the law in the company's place of origin. If not required in the place of origin or if the disclosures are not sufficient, then ASIC can require the company to prepare and lodge financial statements prepared as if the company were a public company incorporated under the Corporations Act. The financial statements must be

audited if required by the law in the company's place of origin or if requested by ASIC.

- 7 For some registered foreign companies, particularly those that are not required by the law in their place of origin to prepare financial statements, these requirements are more onerous than those that apply to some proprietary companies incorporated under the Corporations Act.
- 8 [CO 02/1432] relieved a registered foreign company that has characteristics similar to an Australian proprietary company from the requirements of s601CK of the Corporations Act provided certain conditions were satisfied. One condition was that the company is not large or part of a large group (for the same reasons as [CO 98/98]).

### **Senate Economics References Committee**

- 9 The Senate Economics References Committee issued an interim report, [\*Part 1: You cannot tax what you cannot see\*](#), on 18 August 2015 summarising the findings of the Senate Inquiry into corporate tax avoidance and aggressive minimisation, after holding five public hearings and receiving more than one hundred submissions.
- 10 One of the recommendations in the report was that 'ASIC amend Class Order 98/98 so that a company is not eligible for financial reporting relief, where the ATO notifies the company and ASIC that the relief does not apply to that company' (Recommendation 17).
- 11 This recommendation was in response to concerns that some small proprietary companies relying on the relief under [CO 98/98] may not be paying sufficient tax in Australia as a result of tax minimisation strategies. Greater transparency through financial reporting and possible media or other attention was seen as a possible means to encourage entities to pay more tax in Australia. This concern needs to be balanced with the cost to entities of preparing financial reports.
- 12 In response to the recommendation, we proposed to modify the relief in both [CO 98/98] and [CO 02/1432] so that the relief would not apply if we notify the entity that it may not rely on the relief for a financial year and we have not subsequently revoked or varied that notice. Stakeholders were specifically asked whether they agree that we should have the ability to notify an entity that the relief may not be relied on and, if so, what restrictions should be placed on that ability.
- 13 In CP 248, we proposed to remake both [CO 98/98] and [CO 02/1432], as a single legislative instrument, because they are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. Following the consultation, the class orders have been remade as

[ASIC Corporations \(Foreign-Controlled Company Reports\) Instrument 2017/204.](#)

- 14 This report highlights the key issues that arose out of the submissions received on CP 248 and our responses to those issues.
- 15 This report is not meant to be a comprehensive summary of all responses received. We have limited this report to the key issues.
- 16 We received seven non-confidential submissions to CP 248. We are grateful to respondents for taking the time to send us their comments.
- 17 For a list of the non-confidential respondents to CP 248, see the appendix. Copies of these submissions are currently on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 248.

## **Responses to consultation**

- 18 The main issues raised by respondents related to:
- (a) ASIC's power to deny relief;
  - (b) small proprietary companies that cease to be foreign controlled;
  - (c) the requirements relating to a company reapplying the relief in a subsequent financial year; and
  - (d) the transition from [CO 98/98] to the new instrument.

## B Remaking ASIC class orders

### Key points

This section outlines the key issues raised by respondents—and our responses to those issues.

### ASIC's power to deny relief

- 19 Two respondents did not agree with our proposal to provide ASIC with the ability to give notice to an individual company that it may not rely on the relief.
- 20 In summary, one respondent was concerned that the proposal:
- (a) was inconsistent with our view that the class orders are operating effectively and efficiently;
  - (b) created an unnecessary and unanticipated regulatory burden and was contrary to the Government's stated intention to reduce regulatory red tape;
  - (c) would create uncertainty for companies considering establishing a presence in Australia; and
  - (d) could result in other regulators calling on ASIC to give notice to an entity in circumstances where giving notice is not justified.
- 21 The other respondent thought that the proposal was unnecessary because we already have sufficient powers under the Corporations Act to enable us to demand financial information from small proprietary companies and registered foreign companies.
- 22 Other respondents raised no objection to the proposed change. However, two respondents commented that a time period during which we may give notice needs to be established. One suggested the six-year time limit that applies to an ASIC direction under s294 of the Corporations Act.

#### *ASIC's response*

In ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204, we have proceeded with our proposal to give ASIC the power to give notice to an entity that it may not rely on the relief. The power will only be used in limited circumstances, having regard to the general public interest and the need for greater transparency in financial reporting in specific circumstances.

In coming to our decision, we have given greater weight to the recommendation of the Senate Economics References Committee than to the existence of our general powers.

Should we choose to exercise our power, we will ordinarily allow a company a reasonable opportunity to show cause as to why we should not give notice. If notice is given, we will allow the company a reasonable period of time to comply with Pt 2M.3 of the Corporations Act.

## Small proprietary companies that cease to be foreign controlled

- 23 Two respondents pointed out that if a small proprietary company ceases to be controlled by a foreign company during the financial year it is required to prepare a directors' report and financial report for the financial year, absent the availability of other relief (e.g. the relief available to wholly owned entities under [ASIC Corporations \(Wholly-owned Companies\) Instrument 2016/785](#)). This is seen to be burdensome for those companies.

### *ASIC's response*

The requirement to prepare a directors' report and financial report in these circumstances is a consequence of the operation of s292(2)(b) of the Corporations Act and not of ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204. To relieve small proprietary companies from the requirement to prepare a directors' report and a financial report on ceasing to be foreign controlled is a broader policy decision.

## Reapplying the relief in a subsequent financial year

- 24 Some respondents questioned the operation of paragraph 5(2)(d) of the draft instrument, whereby a company could avail itself of the relief if:
- (a) it is not part of a large group controlled by a foreign company; and
  - (b) the directors resolve no earlier than three months before the commencement of the financial year to rely on the relief for the financial year; and
  - (c) the relief was relied on in the previous financial year; or
  - (d) notice of the resolution is lodged with ASIC using [Form 384 Resolution by directors of a small proprietary company controlled by a foreign company which is not part of a 'large group'](#) during the period commencing three months before the commencement of the financial year and ending four months after the end of the financial year.

- 25 A company may not rely on the relief for a subsequent financial year (for reasons other than ASIC notifying it that it cannot rely on the relief). To reapply the relief in a subsequent financial year, the company must:
- (a) lodge an annual financial report for that financial year with ASIC; or
  - (b) notify ASIC that the company has stopped relying on the relief by lodging a notice using [Form 394 Notice of cessation of reliance on ASIC Corporations \(Foreign-Controlled Company Reports\) Instrument 2017/204](#) during the specified time period.
- 26 If it does not do so, the company is precluded from reapplying the relief in the future.

*ASIC's response*

There is no change to the way [CO 98/98] operates. This is clarified in the Explanatory Statement accompanying ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204.

## Transition to the new instrument

- 27 As noted in paragraph 24(c) above, the relief can be relied on for a financial year if the relief was relied on in the immediately preceding financial year. However, the draft instrument referred to reliance 'on the relief in subsection (1) in respect of the financial year immediately before the relevant financial year'.
- 28 One respondent pointed out that, practically, companies relying on [CO 98/98] for the financial year immediately preceding the year in which the new instrument first applies would not satisfy that condition and would be required to re-lodge Form 384.

*ASIC's response*

ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204 includes a transitional provision that allows companies that relied on [CO 98/98] in the immediately preceding financial year to rely on the relief in the new instrument.

## Appendix: List of non-confidential respondents

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- CPA Australia
  - Deloitte
  - Hardidge, Mr David
  - KPMG
  - PricewaterhouseCoopers
  - Property Funds Association
  - Young, Mr Brian
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