



**ASIC**  
Australian Securities &  
Investments Commission

## REPORT 703

# Response to submissions on CP 337 Externally administered companies: Extending financial reporting and AGM relief

October 2021

### About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 337](#) *Externally administered companies: Extending financial reporting and AGM relief* (CP 337) 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.

This report does not contain ASIC policy. Please see [Regulatory Guide 174](#) *Relief for externally administered companies and registered schemes being wound up* (RG 174).

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## A Overview

- 1 In [Consultation Paper 337 Externally administered companies: Extending financial reporting and AGM relief](#) (CP 337), we consulted on proposals to extend our relief in [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#) to provide:
  - (a) a deferral of financial reporting obligations for certain externally administered companies for up to 24 months from the date a relevant external administrator is appointed (deferral relief); and
  - (b) a deferral of the obligation to hold an annual general meeting (AGM) for certain externally administered public companies until two months after the deferral relief expires (AGM deferral relief).
- 2 This report highlights the key issues that arose out of the submissions received on CP 337 and our responses to those issues.
- 3 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 337. We have limited this report to the key issues.
- 4 We received five non-confidential responses to CP 337 from industry associations and a professional services firm. We are grateful to respondents for taking the time to send us their comments.
- 5 For a list of the non-confidential respondents to CP 337, see the appendix. Copies of these submissions are currently on the [CP 337](#) page on the ASIC website.

## Responses to consultation

- 6 Respondents were generally supportive of our proposals to:
  - (a) extend our deferral relief under [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#) to up to 24 months for companies in external administration; and
  - (b) provide consequential AGM deferral relief until two months after the deferral relief expires for companies in external administration.
- 7 The main issues raised by respondents related to:
  - (a) the scope of our proposed deferral relief for externally administered companies, including the duration of the deferral period, early cessation events, and requirements to provide management accounts, [Form 5602](#)

*Annual administration return and [Form 5603](#) End of administration return* (see Section B); and

- (b) the scope of our proposed AGM deferral relief for public companies in relevant external administration (see Section C).

## B Extending financial reporting deferral relief for externally administered companies

### Key points

This section outlines the feedback we received on the key aspects of our proposal in [CP 337](#) to extend our legislative relief from the financial reporting obligations in Pt 2M.3 of the *Corporations Act 2001* (Corporations Act) for companies under relevant external administration, including feedback on:

- the duration of the deferral period;
- the proposed conditions and circumstances of relief; and
- the proposal to include an express power to exclude companies from relying on our relief.

In general, most respondents supported our proposals, but expressed concerns and queries about the details of our proposals.

### Extension of the deferral period to up to 24 months

- 8 In [CP 337](#), we proposed to extend the deferral relief period available under [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#) to a period of up to 24 months for certain externally administered companies. The proposed relief operates to defer any financial reporting obligations outstanding at the time of the appointment of a relevant external administrator, and any financial reporting obligations that arise during the 24-month period after a relevant external administrator is appointed, until the end of the deferral period.
- 9 There was general support for our proposal to conditionally extend the deferral period to up to 24 months and the inclusion of a cessation event. However, some respondents disagreed with our proposal.
- 10 One respondent objected to an extension of up to 24 months, irrespective of conditions, and proposed that an extension of up to 12 months was more appropriate. They commented that a deferral period beyond 12 months could potentially increase the risk of misconduct during external administration if relief from the accountability and independent scrutiny afforded by audited financial reporting was extended beyond 12 months. They acknowledged the cost and time involved in preparing audited financial reports, but noted that this must be balanced against the needs of users of financial reports.

- 11 Another respondent suggested that the deferral period should instead end six months after a relevant cessation event occurs. They suggested the relevant cessation event would be when:
- (a) the external administration comes to an end and the relevant external administrator returns the company to the directors' control; or
  - (b) the company is subject to a deed of company arrangement (DOCA) and the deed administrator returns to the directors such management power and functions to enable the directors to cause the company, within six months, to comply with its financial reporting obligations (including those already outstanding).
- 12 The respondent commented that it would be simpler and reduce the need for external administrators in long and complex administrations to seek individual deferral relief after 24 months.

### **Inclusion of a cessation event**

- 13 In [CP 337](#), we also proposed to include a cessation event so that the deferral relief will end before the 24-month period if the cessation event occurs. A cessation event occurs if:
- (a) the external administration comes to an end before the end of the 24-month period and the external administrator returns the company to the directors' control; or
  - (b) the company is subject to a DOCA and the deed administrator ceases to exercise all of the management powers and functions of the company.
- 14 There was general support from respondents to include a cessation event. However, respondents disagreed on when the cessation event should apply. Two respondents considered the automatic deferral period should be a minimum of six months, even if an early cessation event occurs during the first six months of a relevant external administration.
- 15 A few respondents suggested that the scope of our proposed deferral relief be extended to provide 'catch-up relief' at the end of the deferral period. That is, if a cessation event occurs, companies should have a reasonable period of time after the end of the deferral period, when the company exits external administration, to prepare all relevant outstanding financial reports. They commented that the responsibility for preparing the accounts should fall on directors and not the external administrators.
- 16 There were differing opinions as to how long that catch-up period should be after the company exits external administration, or when the directors are able to cause the company to comply with its financial reporting obligations. There was no consensus among the respondents as to what is considered a reasonable period of time after the deferral period ends. One respondent

suggested a period of three months, another respondent stated it should be a period of between three to six months, while a third respondent suggested six months.

#### *ASIC's response*

After considering the responses, we have extended the deferral relief period for a minimum of six months and a maximum of up to 24 months after a relevant administrator is appointed: see [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#). After the minimum six-month deferral period, an early cessation event may apply to cause the deferral relief to end earlier than the 24 months.

We consider a deferral period of up to 24 months, with a minimum six-month deferral period, strikes an appropriate balance between the interests of users of the financial reports and the burden imposed by compliance with financial reporting obligations while the company is under external administration.

A maximum deferral period of up to 24 months, subject to early cessation, means more externally administered companies will automatically be able to benefit from deferral relief that is relevant to their individual circumstances than under the current legislative instrument.

We have retained a minimum six-month deferral period because we recognise a short administration can be disruptive and compliance with the financial reporting obligations during the initial six-month period will generally impose unreasonable burdens. This reflects our previous settings for legislative relief under [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#).

We also consider a deferral period beyond 24 months, subject to early cessation, by way of legislative relief to be inappropriate. This is because of the limited ability of users to independently obtain, in a timely manner, audited or other reliable financial information about the externally administered company. When a company enters external administration, often the only information available about the company will be limited to:

- information that the relevant external administrator must lodge with ASIC under Ch 5 of the Corporations Act; and
- where the company is a listed company, information that the company must disclose under its continuous disclosure obligations.

For this reason, we prefer to continue to consider applications for a deferral period beyond 24 months on a case-by-case basis.

At this time, we are not comfortable with providing catch-up relief under a legislative instrument. We prefer to consider catch-up relief on a case-by-case basis so that we can take into account:

- the timing of when the company will exit external administration;



- the number of financial reports that are due to be lodged; and
- the position of creditors or other users of the company's financial reports after the company has ceased to be under external administration.

Consequently, companies will need to continue to seek individual catch-up relief before the deferral period ends if they require additional time to lodge their outstanding financial reports.

We have updated our guidance on catch-up relief in [Regulatory Guide 174](#) *Relief for externally administered companies and registered schemes being wound up* (RG 174).

## Conditions of financial reporting deferral relief

- 17 We outlined the proposed conditions and requirements of the deferral relief in [CP 337](#). We sought feedback on our proposal to impose the following new conditions in relation to our proposed deferral relief:
- requiring companies to put in place arrangements to make any [Form 5602](#) *Annual administration return* and any [Form 5603](#) *End of administration return* publicly available and free of charge; and
  - requiring companies to provide management accounts for:
    - each financial year ending during the deferral period—within three months after the end of the financial year; and
    - each half-year ending during the deferral period—within 75 days after the end of the financial year.
- 18 Most respondents expressed concerns about requiring external administrators to make the information on Form 5602 and Form 5603 publicly available. The respondents suggested that ASIC should make all the information on the forms publicly available and free of charge.
- 19 Most respondents strongly objected to the proposal to require companies to provide management accounts to members, noting that:
- there are no standards governing their preparation and they are not subject to independent assurance by an auditor, which may mislead rather than inform users of the accounts;
  - management accounts are prepared for internal purposes and often contain commercially sensitive information; and
  - the preparation of management accounts during the deferral period may impose an additional burden on the company and external administrators, depending on the prospects of the company.

- 20 We also sought feedback on our proposal to retain all the other existing conditions of our individual deferral relief, including requirements for the company to do the following:
- (a) prepare and lodge their financial reports before the end of the deferral period;
  - (b) publish a notice that explains the deferral relief in a prominent place on the company's website (if any), and in a place that is readily accessible to the company's members on a website maintained by the relevant external administrator (if any);
  - (c) if the company is listed on a prescribed financial market, the company must provide a copy of the notice of the company's intention to avail itself of the deferral relief to the operator of the prescribed financial market; and
  - (d) the company must have adequate arrangements in place to answer, within a reasonable period of time and without charge, any reasonable questions asked by a member of the company, or debenture holder (if any) about the external administration.
- 21 Most respondents were generally supportive of our proposal to retain all of the existing conditions of our individual deferral relief.

#### *ASIC's response*

After considering the responses, we have decided not to impose the proposed new conditions as part of the 24-month deferral relief.

We acknowledge Form 5602 and Form 5603 are already publicly available from ASIC and ASIC must charge a fee under the Corporations (Fees) Regulations 2001 to provide a copy of these documents to a member of the public.

In relation to the provision of management accounts, we recognise there are issues with imposing this requirement on companies during the deferral period, including commercial sensitivities, uncertainty over the disclosures that would need to be included, and the absence of any independent assurance.

We will retain the existing conditions of our individual deferral relief. We consider these conditions are operating effectively and provide transparency to members of the company.

## Exclusion power

- 22 In [CP 337](#), we proposed to include an express exclusion power for ASIC to use its discretion to exclude entities from relying on the deferral relief in certain circumstances. We also proposed to make this exclusion decision reviewable by the Administrative Appeals Tribunal (AAT).

- 23 Respondents were supportive of the proposal to allow ASIC to exclude entities from relying on the deferral relief and make the decision reviewable by the AAT.

*ASIC's response*

In [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#), we have included an express power for ASIC to exclude an externally administered company from relying on the deferral relief. We consider this power to be important in ensuring that the relief is not misused or gives rise to unintended consequences. We may exercise our exclusion power when:

- it is in the public interest to do so; or
- the benefit of financial reporting outweighs the cost to the company of preparing and lodging financial reports while the company is under external administration.

We will afford procedural fairness to the affected externally administered company before exercising the exclusion power in accordance with our policy in [Regulatory Guide 92 Procedural fairness to third parties](#) (RG 92).

Our decision to exclude an externally administered company from relying on the deferral relief is reviewable by the AAT.

## C AGM deferral relief for public companies in relevant external administration

### Key points

This section outlines the feedback we received on our proposal in [CP 337](#) to grant legislative relief to extend the time by which externally administered public companies must hold an AGM.

Respondents were supportive of our proposal to:

- provide AGM deferral relief for public companies in external administration; and
- include an express exclusion power.

### AGM deferral relief

- 24 In [CP 337](#), we proposed to allow public companies in external administration to defer holding an AGM until two months after the proposed deferral relief expires, subject to certain conditions.
- 25 Respondents were supportive of our proposal and did not object to our relief being conditional on:
- (a) where the company is listed on a prescribed financial market, the company providing a notice of intention to rely on the legislative relief to the relevant market operator(s);
  - (b) the company publishing a notice of intention to rely on the legislative relief on the website maintained by the company and/or external administrator; and
  - (c) the company laying before the next AGM all outstanding financial reports deferred as a result of the deferral relief.

#### *ASIC's response*

In [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#), we have provided relief for externally administered public companies to extend the time by which they must hold an AGM until two months after the deferral relief expires. The AGM is an important safeguard for members and other interested parties. We consider this period to be appropriate because it ensures that the AGM is held shortly after the outstanding financial reports must be lodged.

We also consider that it is important for companies to publish a notice of intention to rely on the legislative relief so that relevant parties are aware that the company is relying on the AGM deferral relief.

## Exclusion power

- 26 In [CP 337](#), we proposed to include an express exclusion power for ASIC to use its discretion to exclude an externally administered company from relying on the AGM deferral relief in certain circumstances. We also proposed to make this exclusion decision reviewable by the AAT.
- 27 Respondents were supportive of the proposal to allow ASIC to exclude entities from relying on the AGM deferral relief and make the decision reviewable by the AAT.

### *ASIC's response*

In [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#), we have included an express power for ASIC to exclude companies from relying on the AGM deferral relief. We consider this power to be important in ensuring that the relief is not misused and does not give rise to unintended consequences. We may exercise our exclusion power when it is in the public interest for members to have the opportunity to meet with and ask questions of the external administrator. As indicated in [CP 337](#), we are unlikely to exercise this exclusion power if we have not also exercised the exclusion power in relation to deferral relief.

We will afford procedural fairness to the affected externally administered public company before exercising the exclusion power in accordance with our policy in [RG 92](#).

Our decision to exclude an externally administered public company from relying on the AGM deferral relief is reviewable by the AAT.

## Appendix: List of non-confidential respondents

- Australian Restructuring Insolvency & Turnaround Association
- Chartered Accountants Australia & New Zealand and CPA Australia (joint submission)
- KordaMentha
- Law Council of Australia
- Property Council of Australia