



Law Council
OF AUSTRALIA

Business Law Section

11 March 2021

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Dear Colleague

Externally administered companies: Extending financial reporting and AGM relief

This submission concerning ASIC's consultation paper 337 on extending financial reporting and AGM relief for externally administered companies released 28 January 2021 is made by the Insolvency and Restructuring Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

Submission

1. The Committee's responses to the questions contained in the consultation paper are set out in the attached table.

Conclusion and further contact

2. The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Scott Butler, on [REDACTED] if you would like to.

Yours faithfully

[REDACTED]

Greg Rodgers
Chair, Business Law Section

ASIC – Externally administered companies: Extending financial reporting and AGM relief

No	Proposal (in consultation paper)	No.	Questions / Request for feedback	Comments
B1	We propose to use ASIC's exemption power in s341 to extend the financial reporting deferral relief period available to companies in relevant external administration to a period of up to 24 months, subject to conditions.	B1Q1	<p>Do you agree that we should conditionally extend the current deferral relief to a period of up to 24 months?</p> <p>a) If not, why not?</p> <p>b) If so, do you consider that the deferral period ought to be available for up to a maximum period of 24 months and why?</p>	<p>We do not agree that ASIC should conditionally extend the current deferral relief to a period of up to 24 months.</p> <p>We suggest that the deferral relief period should end six months after a relevant trigger occurs. The relevant triggers would be -</p> <p>(a) the external administration comes to an end and the relevant external administrator returns the company to the directors' control; or</p> <p>(b) the company is subject to a deed of company arrangement (DOCA) and the deed administrator returns to the directors such management powers and functions to enable the directors to cause the company, within six months, to comply with its financial reporting obligations (including those already outstanding),</p> <p>(each a Relevant Trigger).</p> <p>Sub-paragraph (b) above is slightly different to that proposed in paragraph 22 of the Consultation Paper. A DOCA may return some of the directors' powers to them, but not all of them and it will be necessary that the extent of the powers returned to the directors are sufficient to allow them to cause the company to do what is necessary to comply with its reporting obligations.</p>

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				<p>It would be simpler and reduce the need for external administrators in long and complex administrations to seek further financial reporting relief if the relief were not limited to 24 months, but rather was linked to a period after the directors obtained sufficient control to enable them to cause the company to comply with its financial reporting obligations.</p> <p>When the directors of a company regain control after an external administration there will be many competing pressures on them to re-establish and operate the company's business. It is likely that the key finance and accounting personnel necessary to produce financial reports will have left the company during the external administration and that replacement staff will have to be recruited to enable production of the financial accounts. An external audit may need to be undertaken of those accounts. A period of six months after the directors regain control would be a more reasonable period for financial reporting to be brought up to date.</p> <p>Whilst we note ASIC's views in paragraph 27 of the Consultation Paper, the increased proposed reporting requirements referred to in paragraph 31 of the Consultation Paper (subject to our comments in response to B4Q1) should be sufficient to keep members sufficiently informed of the financial position during the deferral period.</p>
		B1Q2	In what circumstances do you consider it is not appropriate to extend the deferral period to up to	See our response to B1Q1.

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			24 months for an externally administered company?	
B2	We propose to include early cessation triggers to bring about an early end to the financial reporting deferral relief where the company is no longer externally administered or where the deed administrator is no longer exercising the powers and functions of the company.	B2Q1	Do you agree that we should include early cessation triggers relating to the end of an external administration? Are there any other situations you consider should bring about an early end to the deferral period?	See our response to B1Q1. The financial reporting deferral relief should end six months after a Relevant Trigger.
B3	We propose to retain all the existing conditions of our individual financial reporting deferral relief.	B3Q1	Do you agree with our proposal? If not, why not?	If the financial reporting deferral relief ended six months after a Relevant Trigger as recommended in our comments to B1Q1, the conditions referred to in paragraph 29 of the Consultation Paper, which impose obligations on the external administrator, would no longer be relevant, as such individual financial reporting deferral relief would only be sought by companies not in a relevant external administration. We otherwise agree that the existing conditions of ASIC's individual financial reporting deferral relief should be retained.
B4	We are consulting on potentially imposing the following new conditions to the proposed 24-month deferral relief:	B4Q1	We are seeking feedback on whether to impose the following new conditions: a) Do you agree with our proposal to require companies to put in place	Rather than impose obligations on the companies and their external administrators to make any Form 5602 and any Form 5603 publicly available free of charge, ASIC should make such forms able to be downloaded free of charge.

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	<p>a) 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</p> <p>b) companies to provide management accounts in relation to each financial year and half-year during the proposed 24-month deferral period.</p>		<p>arrangements to make any Form 5602 and any Form 5603 publicly available free of charge? If not, why not?</p> <p>b) Do you consider that we should require companies to provide management accounts to members?</p> <p>i. If not, why not?</p> <p>ii. What type of management accounts would external administrators be comfortable with providing to members, and why?</p> <p>iii. Please outline any unintended consequences as a result of ASIC imposing this requirement and the appropriate strategies to deal with each of the identified unintended consequences.</p>	<p>We do not consider that companies should be required to provide management accounts to members. We consider there will often be the following issues associated with having to provide them -</p> <p>(a) Access to sufficient financial information to prepare them. The books and records may not have been properly kept and so there may not be sufficient financial information to prepare management accounts for the period before the external administrator's appointment.</p> <p>(b) Who has to prepare these? The company's finance team or the external administrators? If it is the external administrators, do they have to reconstruct financial information to prepare them? This could be very time consuming and expensive.</p> <p>(c) What if there are not sufficient funds available to cover the cost of preparing the management accounts? External administrators should not have to incur the costs associated with preparing management accounts if there are insufficient funds in the administration to do so.</p>
			<p>Do you consider that we should impose any other additional conditions during the deferral period?</p>	<p>No, we do not.</p>

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B5	We propose to include an express exclusion power for ASIC to exclude entities from relying on the financial reporting deferral relief in certain circumstances. We also propose to make our exclusion decision reviewable by the AAT. We will update our guidance in RG 174 to include examples or scenarios of when our power may be exercised.	B5Q1	Do you agree with our proposal to exclude certain entities from relying on our financial reporting deferral relief? If not, why not?	Subject to being able to consider and comment on a draft of the proposed updated RG 174, we agree conceptually with the idea that ASIC should be able to exclude entities from relying on the financial reporting deferral relief in certain circumstances.
		B5Q2	In what circumstances do you consider that ASIC should exercise the proposed power to exclude certain entities from relying on our financial reporting deferral relief?	<p>While not able to pinpoint specific examples, conceivably, financial reporting requirements may be relevant not just in support of members' interests but those of other stakeholders. For example, if an entity continues to operate as trustee or responsible entity of a scheme during its external administration, it is conceptually possible requiring continued financial reporting might be appropriate.</p> <p>However, we make the following observations:</p> <ul style="list-style-type: none"> (a) Reporting relief is generally appropriate because the expending money on the protection of members' interests is not a priority during an external administration. (b) The prospect that members' interests might be prejudiced by restructure transactions during an external administration are already well addressed by, for example, the requirement to show no

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				<p>prejudice under section 444GA, and requirements for shareholder approval for capital raisings that would result in material dilutions in listed entities.</p> <p>(c) Material dilution by way of a DOCA might be possibly to the detriment of shareholder interests in unlisted entities, though requiring financial reporting or the calling of AGMs will not address that risk.</p> <p>(d) Whether there are sufficient assets available to cover the costs of meeting financial reporting obligations should be a relevant factor in ASIC exercising its power to exclude an entity from relief. That is, external administrators should not have to incur the costs of meeting financial reporting obligations where there are insufficient assets in the administration to cover the costs of doing so.</p>
B6	Other than as set out in proposals B1–B5, we do not propose to extend the scope or availability of financial reporting relief under ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251.	B6Q1	Do you agree that the relief and our guidance is operating effectively? If not, please provide details of any concerns or issues that you have so that we may consider addressing these when updating our policy and guidance.	<p>We do not agree that the relief and ASIC’s guidance is operating effectively. The current six-month relief period is not sufficient and so we applaud ASIC’s suggestion that it be extended.</p> <p>We do not believe that an external administrator (and hence creditors) should have to spend the cost (including the substantial fee) of applying for individual financial reporting deferral relief. If our recommendation in answer to B1Q1 was adopted, it would avoid an external administrator ever having to make such an application. If ASIC maintains a position where such applications are necessary, we believe there should be no application fee.</p>

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C1	We propose to amend ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 to give public companies with a relevant external administrator appointed an extension of time to hold its AGM. We propose to defer AGM obligations until two months after their reporting deferral relief expires.	C1Q1	Do you agree with our proposal to extend the period of time by which a public company under relevant administration must hold an AGM until two months after the reporting deferral relief expires? If not, why not?	Yes, we agree with this proposal.
C2	We propose to impose conditions on the relief, including that: a) a notice of the intention to rely on the AGM relief must be given to the market operator(s) where the public company is listed and must be placed on the website of the company and/or external administrator whether listed or unlisted; and	C2Q1	Do you agree with the conditions proposed? If not, why not? Should any other conditions be imposed?	Yes, we agree with these conditions.

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	b) members will be able to consider any outstanding financial reports at the next AGM.			
C3	We propose to include an express exclusion power for ASIC to exclude entities from relying on the proposed AGM deferral relief in certain circumstances. This is to mitigate any risks and the potential for unintended consequences as a result of our proposed AGM deferral relief. We also propose to make our exclusion decision reviewable by the AAT. We will update our guidance in RG 174 to explain when our power may be exercised.	C3Q1	Do you agree with our proposal to include an exclusion power so ASIC can exclude certain entities from relying on the proposed AGM deferral relief? If not, why not?	Subject to being able to consider and comment on a draft of the proposed updated RG 174, we agree conceptually with the idea that ASIC should be able to exclude entities from relying on the proposed AGM deferral relief in certain circumstances.
		C3Q2	In what circumstances do you consider that ASIC should exercise the proposed exclusion power?	We refer to our comments above in response to B5Q2.