3 March 2021

Mr Waverley Duong
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By email: policy.submissions@asic.gov.au

Dear Mr Duong

Consultation Paper 337: Externally administered company: Extending financial reporting and AGM relief

Thank you for the opportunity to lodge a submission in the response to ASIC's consultation paper 337 regarding extending financial reporting and AGM relief for externally administered companies.

As the principal professional body for insolvency practitioners, we strongly support steps to improve the deferral relief process.

We agree with the position put forward in the consultation paper that the deferral period be extended to 24 months. However, we do have some concerns with matters raised in the consultation paper which we will now address.

At the end of this submission we have included as an annexure a table responding to the questions raised in the consultation paper.

Timing of meeting financial reporting obligations at the conclusion of the deferral period

Currently the instrument grants a deferral of financial reporting obligations under Pt 2M.3 falling due within six months from the date of the first appointment of a voluntary administrator, controller or provisional liquidator (i.e. a relevant external administrator). The due date for complying with an obligation (that would otherwise fall due within six months from the date of the first appointment of the relevant administrator) is the date that is six months after the relevant external administrator is appointed. [para 8]

The proposal is to extend that deferral relief period to a period of up to 24 months. Any financial reporting obligations arising during the 24-month period will be deferred until the end of the deferral period (i.e. 24 months after the relevant external administrator is appointed). [para 21]

However, it is proposed that there will be a cessation trigger so that the financial reporting deferral relief may end before the 24-month period where:

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 ceases to exercise all of the management powers and functions of the company and powers of the directors. [para 22]

Under the proposed changes, an external administrator will be better or no worse off if the external administration goes for a period of 6 months or longer, but for external administrations that run for a period of less than 6 months, financial reporting obligations may be due much sooner at the time of the cessation trigger.

For example, for a standard voluntary administration or one with only a standard adjournment period, if financial reporting obligations come due during the voluntary administration, the voluntary administrator will need to be preparing financial accounts instead of focusing on the external administration. This is because deferral will cease, and obligations will come due, on the day that the Deed of Company Arrangement is signed that returns control to the directors.

The automatic deferral relief should instead be a minimum of six months and a maximum of 24 months. After the minimum six-month period, the cessation trigger could apply. External administrators should continue to be able to apply for individual relief after this time.

Furthermore, if cessation is triggered between 6 months and 24 months, a reasonable period of time should be given after the end of deferral period for the relevant financial reporting to be prepared. We suggest 3 months. Otherwise, the end of the external administration will occur (triggered the cessation of the deferral relief) and the directors will have insufficient time to attend to the preparation of the reports. This would be mean that the external administrator would have to attend to their preparation during the deferral period, which we do not believe is what is intended.

We note that the paper is silent in relation to restructuring under Part 5.3B. For completeness, we note that restructurings should remain outside the scope of the relief provisions on the basis that control remains with the directors during the restructuring, notwithstanding the appointment of an external administrator.

Reasonable questions by members

We suggest that there should be criteria specified for what is a reasonable request [refer para 29(d)].

The reasonableness criteria in IPS 70-47 and IPR 70-20 for requests for information by members in a members' voluntary winding up should be applied.

Provision of Annual and End of administration returns and management accounts

We note that ASIC is consulting on potentially imposing the following new conditions in relation to our proposed financial reporting deferral relief:

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
b) companies to provide management accounts for:
   (i) each financial year ending during the deferral period—within three months after the end of the financial year; and
   (ii) each half-year ending during the deferral period—within 75 days after the end of the financial year. [para 31]

We disagree with this proposal and our reasoning is set out below. Whatever information is provided to members needs to be low-cost, not contain (or potentially contain) personal or commercially sensitive information and not require additional work by the external administrator or their staff.

Annual and End of administration returns

We disagree that it should be the external administrator providing this information. The external administrator lodges this information with ASIC and ASIC should make the information publicly available free of charge if ASIC wants the information to be available.

We are also concerned that there may be wider issues with the external administrator making this information publicly available when not required to do so under law (for example, provision of information that breaches of the Privacy Act). More and more external administrators are moving towards password protecting the information that is made available on their websites due to concerns such as this. If distribution were to be limited to members, it would be administratively burdensome for the external administrator to provide each member with a password.

Notwithstanding this, we are aware that there may be some technical difficulties with the PDF generated by the ASIC system after lodgement of the information in the Annual and End of administration returns. Sometimes numbers are replaced with n/a, particularly in larger administrations with lots of transactions. Due to the portal nature of these forms, this issue would have to be resolved if external administrators were required to provide them.

Management accounts

External administrators account for transactions in their administrations on a cash basis – not accrual. Therefore, management accounts prepared by an external administrator are likely to be similar to the Annual and End of administration returns.

Accounting on a cash basis is standard practice in insolvency administrations (even very large ones) and it is recognised by the ATO such that external administrators are not bound by the usual accrual accounting requirements for GST (refer Goods and Services Tax: Choosing to Account on a Cash Basis Determination (No 39) 2015 – representatives of incapacitated entities).

Therefore, we question the value of providing this information if Annual and End of administration returns are to be provided.

Similarly to Annual and End of administration returns, we hold concerns about wider issues with the external administrator making this information publicly available when not required to do so under law (for example, provision of information that breaches of the Privacy Act such as employee names and salaries). There is also the issue of any commercially sensitive information that may be contained within a set of traditional style management accounts. It is obviously not appropriate that confidential information is provided widely during a time when an external administrator is either trying to sell or restructure the distressed business.

We also have significant concerns about the potential costs of providing this information as the consultation paper does not address how the information is to be provided.

Finally, we comment that in no circumstances are a company's management accounts ever provided externally to the company (which is why they are called management accounts – being accounts for the management of the company) and we hold significant concerns about the change of approach that would require management accounts to be publicly provided. These accounts are not financial statements and are not audited, may contain commercially sensitive information, and we do not think it appropriate that they are provided to members.

General

AAT Appeals

It is our view that all decisions made by ASIC in respect of deferral relief and the imposition of any conditions should be able to be appealed to the AAT.

Flexibility

ASIC needs to be flexible in their approach to dealing with deferral requests and the imposition of conditions.

External administrations, particularly voluntary administrations and deeds of company arrangement can provide for a vast array of arrangements, ranging from full trade-ons and a return to the control of the directors, s444GA transfer of shares, creditors' trusts though to

quasi liquidation arrangements that provide for a distribution and then deregistration of the company.

Unreasonable requirements that do not meet the needs of the situation result in significant increased costs for creditors as the ultimate stakeholder in an insolvent company. External administrators face increasing criticism from creditors, government and ASIC (as regulator of the profession) about the cost of insolvency processes, and unreasonable regulatory burdens simply result in increases in cost that are of no benefit to any party with a true stake in the outcome of the insolvency process.

Example 1

ASIC required additional reporting to members where a court had granted a section 444GA application, so the members clearly no longer had an economic interest in the company.

The voluntary administrator already has significant reporting requirements, including to members, during a s444GA process. Additional reporting obligations should not be imposed.

Example 2

Business was not able to be sold as a going concern and the business was wound down.

The directors proposed a contribution DOCA where a pool of funds was made available for distribution to creditors - all employees and the secured creditor were paid in full and unsecured creditors were paid a dividend of cents in the dollar.

The company was a wholly owned subsidiary of another entity, which was privately owned. There was no surplus available to the member.

The company was a 'grandfathered' large proprietary company, such that it was required to comply with the financial reporting obligations but did not need to lodge the reports with ASIC.

Financial reports as at 30 June 2018 were outstanding when the external administrators were appointed as voluntary administrators. No financial reports were required for subsequent years as the entity no longer met the definition of a large proprietary company.

The request for an individual exemption from financial reporting obligations was not granted.

The cost of the financial reports was $50,000, which reduced the amount available to creditors.

The financial reports did not provide any benefit to the member, who was already fully aware of the financial situation of the company and had provided the funding for the deed of company arrangement.

We look forward in continuing to work with ASIC to improve external administration processes. Should you wish to discuss any aspect of our submission, please contact Kim Arnold, Policy & Education Director, at [redacted].

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,200 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 80% of Registered Liquidators and Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2019, ARITA delivered 118 professional development sessions to over 5,300 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 15 inquiries, hearings and public policy consultations during 2019.

Annexure

	ASIC's question	**ARITA's comments**
B1Q1	Do you agree that we should conditionally extend the current deferral relief to a period of up to 24 months? (a) If not, why not? (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?	Yes, but note the concerns raised in our submission about the effect on timing of the early cessation triggers.
B1Q2	In what circumstances do you consider it is not appropriate to extend the deferral period to up to 24 months for an externally administered company?	No comment
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?	Early cessation triggers are reasonable, but a minimum deferral period of six months should be maintained.
B3Q1	We propose the retain all the existing conditions of our individual financial reporting deferral relief. Do you agree with our proposal? If not, why not?	Yes, however, guidance should be provided on what is a reasonable question and we suggest incorporation of the reasonableness criteria in IPS 70-47 and IPR 70-20.
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 arrangements to make any Form 5602 and any Form 5603 publicly available free of charge? If not, why not?	If ASIC believes these documents should be publicly provided, ASIC should provide access free of charge. We have concerns about public disclosure by external administrators resulting in breaches of the Privacy Act. We also note that there are currently technical difficulties with the PDF generated on lodgement of the Form 5602 and 5603 which would need to be rectified.
B4Q1	(b) Do you consider that we should require companies to provide management accounts to members? (i) If not, why not? (ii) What type of management accounts would external administrators be comfortable with providing to members, and why? (iii) Please outline any unintended consequences as a result of ASIC imposing this requirement and the appropriate strategies to deal with each	Management accounts are likely to contain similar information (possibly more detailed) to the Forms 5602 and 5603 as external administrators account on a cash basis not accruals basis. It is inappropriate that accounts normally generated for internal management use are provided publicly – they are not financial statements and are not audited. Such accounts may contain commercially sensitive information and may result in making private information public in breach of the Privacy Act.

	ASIC's question	ARITA's comments
	of the identified unintended consequences.	
B4Q2	Do you consider that we should impose any other additional conditions during the deferral period?	Only in exceptional circumstances. Any additional requirements should be required after consideration of the specific circumstances of the particular external administration so that unnecessary costs are avoided.
B5Q1	Do you agree with our proposal to exclude certain entities from relying on our financial reporting deferral relief? If not, why not?	As ASIC has indicated in the consultation paper that ASIC anticipates that it will rarely be exercised, it seems reasonably to include it. However, we cannot comment on whether the examples or scenarios that ASIC intends to include in RG174 are reasonable as they have not been provided.
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?	No comment
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.	We do not agree that the relief and ASIC's guidance is operating effectively. We have been provided with several examples by our members where the process has not operated effectively resulting in significant unnecessary costs for the particular external administration. This may be because ASIC does not have sufficient discretion in its decision making. It would be beneficial if all decisions relating to deferral relief and the impositions of conditions could be reviewable by the AAT.
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
C2Q1	Do you agree with the conditions proposed? If not, why not? Should any other conditions be imposed?	Yes
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?	As ASIC has indicated in the consultation paper that ASIC anticipates that it will rarely be exercised, it seems reasonably to include it. However, we cannot comment on whether the examples or scenarios that ASIC intends to include in RG174 are reasonable as they have not been provided.
C3Q2	In what circumstances do you consider that ASIC should exercise the proposed exclusion power?	No comment