

ASIC CLASS ORDER [CO 08/285]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Class Order [CO 08/285] under section 341 of the *Corporations Act 2001* (the *Act*).

Section 341 provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the following persons from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Act:

- (a) directors;
- (b) the companies, registered schemes or disclosing entities themselves;
- (c) auditors of the companies, registered schemes or disclosing entities.

1. Background

Part 2M.3 of the Act requires many entities to prepare and lodge audited financial reports for each financial year.

ASIC Class Order [CO 98/1418] *Wholly-owned entities* provides relief from the requirement to prepare and lodge audited annual financial reports to certain wholly-owned subsidiaries that enter into a Deed of Cross Guarantee with their holding companies, subject to various conditions including the lodgement of consolidated financial reports by the holding company.

Under the terms of a Deed of Cross Guarantee, a trustee (often the holding entity or one of the subsidiaries) is appointed to hold on behalf of the creditors the benefit of the covenants made by the other parties to the deed. If the trustee is one of the parties to the Deed of Cross Guarantee it is necessary to appoint a second trustee (referred to as an *Alternative Trustee*) to act as trustee in respect of the covenants made by the trustee.

On 31 March 2008, ASIC Class Order [CO 08/11] varied some of the conditions of [CO 98/1418]. Before [CO 08/11] became effective, all entities wishing to take advantage of relief in [CO 98/1418] and their holding entities were required to have substantially complied with their financial reporting obligations under the Act for the 3 financial years prior to first taking advantage of relief (*Compliance History*). [CO 08/11] removed the Compliance History requirement from [CO 98/1418].

Further, the relief in [CO 98/1418] is conditional on the holding entity preparing and lodging consolidated financial statements covering all the entities that are parties to a Deed of Cross Guarantee. If the consolidated financial statements cover other entities, the notes to the statements are required to set out certain financial information set out in the Schedule to the order.

2. Purpose of the class order

As stated previously, on 31 March 2008 ASIC Class Order [CO 08/11] varied some of the conditions of [CO 98/1418]. Following implementation of the variations in [CO 08/11], several problems with the way [CO 98/1418] operates have come to ASIC's attention. The purpose of ASIC Class Order [CO 08/285] is to vary [CO 98/1418] to overcome those problems so that [CO 98/1418] operates more effectively and in the way intended.

3. Operation of the class order

Class Order [CO 08/285] varies [CO 98/1418] so that:

- (i) consistent with the changes to the order implemented by [CO 08/11], subsidiaries which do not have a Compliance History can take advantage of relief under the order by becoming parties to Deeds of Cross Guarantee entered into between 1 July 2004 and 31 March 2008;
- (ii) a Deed of Cross Guarantee can be amended to replace an Alternative Trustee with another Alternative Trustee;
- (iii) the financial years to which the disclosure requirements in the Schedule apply align with the financial years to which the relevant accounting standards apply; and
- (iv) entities do not inadvertently fall outside the relief if ASIC makes changes to the order in relation to the Deed of Cross Guarantee, provided that the entities had complied with the requirements in the order in relation to the Deed of Cross Guarantee at the time that Deed was lodged with ASIC.

4. Consultation

The variations made by [CO 08/285] were in response to submissions and consultation with various users of [CO 98/1418] about the way the order operates following the changes effected by [CO 08/11] on 31 March 2008.

ASIC did not consult with other outside parties as the variations effected by [CO 08/285] are considered to be of a minor or machinery nature.