ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251

ASIC Corporations (Repeal) Instrument 2015/275

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (***ASIC***) makes ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 (the ***principal instrument***) under sections 250PAA, 341, 601QA and 992B of the *Corporations Act 2001* (the ***Act***).

ASIC makes ASIC Corporations (Repeal) Instrument 2015/275 (the ***repealing instrument***) under section 341 of the Act.

Chapter 2G of the Act relates to general meetings of companies. Section 250N of the Act requires a public company to hold an annual general meeting at least once in each calendar year and within 5 months after the end of the company's financial year. Section 250PAA of the Act provides that ASIC may exempt a specified class of companies that are being wound up from section 250N of the Act.

Chapter 2M of the Act relates to the financial reporting and audit requirements imposed on certain companies, registered schemes and disclosing entities. Section 341 of the Act provides that ASIC may relieve any of these entities from all or specified requirements of Part 2M.3 of the Act. To make an order under section 341, ASIC must be satisfied that complying with the relevant requirements of Part 2M.3 of the Act would make the financial report or other reports misleading, or be inappropriate in the circumstances or impose unreasonable burdens.

Chapter 5C of the Act relates to managed investment schemes and the requirements to audit scheme compliance plans and for the winding up of registered schemes. Section 601QA of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act. Section 601QA of the Act also provides that ASIC may declare that Chapter 5C applies to a person as if specified provisions were modified as specified in the declaration. "Modifications" includes additions.

Chapter 7 of the Act relates to the regulation of financial services and markets including the requirements for providers of financial services to hold an Australian financial services licence. Subdivision C of Division 6 of Part 7.8 of the Act relates to the requirements imposed on Australian financial services licensees to prepare and lodge an annual profit and loss statement and balance sheet. Section 992B of the Act provides that ASIC may exempt a person from a provision of Part 7.8 of the Act.

1. Background

Chapter 2M of the Act contains the financial reporting and audit requirements imposed on certain companies, registered schemes and disclosing entities. The financial reporting provisions impose requirements about keeping financial records, annual financial reporting, half-year financial reporting and disclosure obligations. The audit provisions provide users with an independent opinion on the information in the financial report.

These provisions are directed at maintaining investor confidence, enhancing market efficiency and ensuring the accountability of management through the provision of timely and reliable financial information.

The purpose behind requiring entities to prepare and lodge with ASIC financial reports that comply with the requirements of Chapter 2M of the Act is to make information available that is useful to a wide range of users to help them make economic decisions. The legislative policy underlying these requirements indicates an expectation that there are users of the financial reports. Each of the different types of users may have varying information requirements.

Chapter 2M of the Act requires public companies, large proprietary companies, disclosing entities and registered schemes to prepare and lodge an audited annual financial report and to report to members. It also requires disclosing entities to prepare and lodge audited or reviewed half-year reports. Small proprietary companies and small companies limited by guarantee may also have financial reporting requirements if they are directed to prepare a financial report by members or by ASIC.

For companies, the financial reporting obligations are imposed on the company itself. Because a company does not cease to have company status when an external administrator is appointed, the financial reporting obligations continue. For registered schemes, the obligations are imposed on the responsible entity and the financial reporting obligations continue notwithstanding that the registered scheme may be being wound up or the responsible entity itself may be under external administration. A responsible entity of a registered scheme is a public company and must comply with the financial reporting obligations both in its corporate capacity and in its capacity as responsible entity for the registered scheme.

ASIC Class Order [CO 03/392] *Externally administered companies: Financial Reporting* exempted public companies that have a liquidator appointed from all the financial reporting obligations in Part 2M.3 of the Act. The class order also extended the time for companies under administration, in controllership or in provisional liquidation to lodge reports and report to members. The class order also provided for an alternative distribution method where the company under external administration had to report to members and had more than 100 members.

The main policy objectives of ASIC Class Order [CO 03/392] were:

(a) to achieve an appropriate balance between the statutory objectives of Part 2M.3 and Chapter 5 of the Act;

(b) in the case of companies that have a liquidator appointed, to avoid the preparation and lodgement of financial or other reports that would impose unreasonable burdens; and

(c) in the case of companies under administration, in controllership or in provisional liquidation, to:

    (i) reduce the severity of the burdens during the period following the appointment of the relevant external administrator and preserve the company's limited assets for the benefit of all parties whilst its prospects are being determined; and

    (ii) give the external administrator time to attend to the most urgent post appointment matters, become familiar with the affairs of the company and cause the financial reports to be prepared, audited, lodged and distributed.

ASIC reviewed our policy in Regulatory Guide 174: *Externally administered companies: Financial reporting and AGMs*. ASIC's review looked at expanding the scope of the relief. ASIC publicly consulted on proposals to expand the scope of the relief to:

(a) provide an exemption from the financial reporting obligations to certain insolvent registered schemes that are being wound up;

(b) provide an exemption from the obligation to hold an annual general meeting (AGM) for public companies that have a liquidator appointed;

(c) clarify that the exemption for companies that have a liquidator appointed applies to providing outstanding financial reports as well as current obligations; and

(d) provide an extension of time for reporting obligations of Australian financial services (AFS) licensees under in Subdivision C of Division 6 of Part 7.8 of the Act, subject to conditions.

In addition, we consulted on proposals to amend the current relief to:

(a) remove the ASIC notification condition for extensions of time; and

(b) exclude AFS licensees from relying on our relief for companies that have a liquidator appointed.

In light of this review, ASIC has reissued the relief with certain changes.

2. Purpose of the ASIC instruments

The purpose of the principal instrument is to reduce the regulatory burdens on financially distressed companies that are under a form of external administration, and insolvent

registered schemes that are being wound up, by relieving them from various statutory obligations, including:

(a) the financial reporting obligations imposed on companies and registered schemes;
(b) the AGM obligations imposed on public companies; and
(c) the AFS licensee financial reporting obligations.

The burden of compliance with the financial reporting obligations by an externally administered company (including an AFS licensee) or insolvent registered scheme being wound up will ultimately be borne by either its members or creditors or both. The relief may reduce the costs of an externally administered company or insolvent registered scheme being wound up and be of benefit to members and creditors.

The purpose of the repealing instrument is to discontinue ASIC's previous policy as implemented by ASIC Class Order [CO 03/392].

3. Operation of the ASIC instruments

Companies being wound up

Section 5 of the principal instrument exempts all companies that have a liquidator appointed from all future financial reporting obligations under Part 2M.3 of the Act, as well as any continuing financial reporting obligations that the company had not complied with before the appointment of the liquidator. For companies that have a liquidator appointed, complying with the financial reporting obligations will impose unreasonable burdens because the company will be wound up and will ultimately be deregistered. Consequently, there are no users of the financial reports who require the information for the purposes of making decisions about the allocation of their resources as if the company was a going concern. Instead, the members and creditors have access to information that the liquidator is required to provide directly to them or lodge with ASIC under Chapter 5 of the Act. For example, liquidators must file accounts of receipts and payments with ASIC every six months within one month of the expiration of the six-month period. The account form incorporates a statement of the position in the winding-up and the liquidator's estimated outcome of their appointment: see s539 if the Act and Form 524.

The exemption in subsection 5(1) means that a company that has a liquidator appointed is not required to prepare, send to members and lodge with ASIC the audited annual financial report for each financial year during which a liquidator is appointed. The exemption is prospective i.e. it applies to the company's financial reporting obligations that arise after the date of the appointment of the liquidator.

The exemption applies where a liquidator is appointed as at the day that the company would otherwise have been required to lodge a report. The exemption however does not apply where a company that has a liquidator appointed also has an administrator appointed under Part 5.3A of the Act. This is because winding-up is suspended if a voluntary administrator is appointed by the liquidator, or while a company is subject to a deed of company arrangement:

see *Mercy & Sons Pty Ltd v Wanari Pty Ltd* (2000) 35 ACSR 70, and *Re Nardell Coal Corporation Pty Ltd* [2004] NSWSC 281.

The relief is also conditional on the company not holding an AFS licence. AFS licensees are excluded from the exemption because they are subject to minimum financial requirements at all times. The obligation under paragraph 912A(1)(d) for an AFS licensee to have available adequate financial resources to provide the financial services covered by the AFS licence and to carry out supervisory arrangements continue to apply for so long as the AFS licence is held by the licensee.

The exemption in subsection 5(1) also means that a company that has a liquidator appointed to it is not required to prepare, send to members and lodge with ASIC any outstanding financial reports of the company that were due prior to the appointment of the liquidator. A company that is required to do an act under Part 2M.3 of the Act within a particular time continues to be subject to an obligation to do the act even after the period has ended or the time has passed. This exemption only applies to the continuing obligation of the company from the date the liquidator is appointed. It does not apply to relieve the company or its directors of any contraventions prior to the appointment of the liquidator.

Public companies being wound up: AGMs

Section 6 of the principal instrument exempts all public companies that have a liquidator appointed from all current and future obligations under Division 8 of Chapter 2G of the Act to hold an AGM, as well as any continuing obligations to hold an AGM that the company had not complied with before the appointment of the liquidator. For public companies that have a liquidator appointed, the safeguard function served by the AGM in ordinary circumstances is diminished when a company enters into liquidation. The business ordinarily conducted at an AGM—including the appointment and replacement of directors, and the presentation of financial reports to members—will no longer be relevant and the AGM will be an unnecessary expense.

Schemes being wound up

Section 7 of the principal instrument exempts insolvent registered schemes from all current and future financial reporting obligations under Part 2M.3, and section 601HG (audit of compliance plan) of the Act, and also regulation 5C.9.01 (final report on completion of the winding up) of the Regulations in certain circumstances. Complying with the financial reporting obligations will impose unreasonable burdens on a registered scheme where it is clear that the scheme property has been insufficient to meet the debts of the responsible entity incurred in that capacity as and when they were due and payable. An insolvent registered scheme that is being wound up will ultimately be deregistered. Consequently, there are no users of the financial reports who require the information for the purposes of making decisions about the allocation of their resources as if the scheme were a going concern.

The exemption is available where:

(a) the responsible entity has notified ASIC of the commencement of the winding-up of the registered scheme or, if a person other than the responsible entity has been appointed by the Court to take responsibility for winding up the scheme, that person has notified ASIC of their appointment; and

(b) the responsible entity or person appointed by the Court has lodged with ASIC a 'scheme insolvency resolution' stating that, for at least 12 months, the scheme property has been insufficient to meet the debts of the responsible entity incurred in that capacity as and when they were due and payable.

The requirement that a registered scheme be insolvent for 12 months provides sufficient certainty that scheme property has not been available to meet the debts of the responsible entity in its capacity as responsible entity of the scheme.

Subsection 7(2) of the principal instrument also provides relief from the obligation in section 601HG of the Act to obtain a compliance plan audit report and the obligations in regulation 5C.9.01 and approved form 5138 to lodge a final audited financial report and auditor's reports on completion of the winding up of an insolvent registered scheme. While compliance plan audit reports are important to ASIC, they are likely to be of limited value in these circumstances and create an unreasonable burden. Similarly, audited financial reports and auditor's reports on completion of the winding up may also be of limited value in these circumstances and create an unreasonable burden in these circumstances.

The burden of compliance with these obligations by the responsible entity of an insolvent registered scheme may ultimately be borne members and creditors of the scheme and/or the responsible entity. The exemption may reduce the costs of winding up the insolvent scheme.

Companies under other external administrations

Section 8 of the principal instrument extends the time for financial reporting (full-year and half-year) for companies that are either under administration (but not including under a deed of company arrangement), or have a managing controller or provisional liquidator appointed (relevant external administrator).

The exemption applies to financial reporting obligations that fall due in the six month period after date on which the first external administrator is appointed. The due date for complying with the obligation (that would otherwise fall due within 6 months from the date of the first appointment of the relevant external administrator) will be the date that is 6 months after the relevant external administrator is appointed. For example, if a voluntary administrator is appointed on 1 January and a managing controller is appointed on 10 January, the deferral period will commence on 1 January.

The exemption also applies to any outstanding financial reporting obligations which were due before the appointment of the first relevant external administrator. This exemption only applies to the continuing obligation of the company from the date the relevant external

administrator is appointed. It does not apply to relieve the company or its directors of any contraventions prior to the appointment of the relevant external administrator.

Compliance with financial reporting obligations during the six-month period following the appointment of a voluntary administrator, managing controller or provisional liquidator will generally impose unreasonable burdens.

The burdens arise from the combination of time constraints, and financial and human resource constraints, imposed on the company and the relevant external administrator in these forms of external administration. The overall burden is disproportionate to the value that the company's financial reports may have for relevant users during this period. A deferral of the financial reporting obligations for these companies reduces the severity of the burden during this period, and preserves the company's limited assets for the benefit of all parties while its prospects are being determined. The deferral period of up to six months gives the relevant external administrator time to attend to the most urgent post-appointment matters, become familiar with the affairs of the company and cause the reports to be prepared, audited, lodged and distributed. The deferral will extend the due date for lodgement, reporting to members or having to send a report to members on request by up to 6 months depending on when the relevant external administrator is appointed and when the particular financial reporting obligation falls due.

The principal instrument also allows an externally administered company that relies on the extension of time to then use alternative methods of distributing a deferred annual report to members, instead of sending it to them personally. The company and the relevant external administrator must give prominent notice on the company's website and notice on the relevant external administrator's website that the annual report has been lodged with ASIC and is available to members free of charge on request. The costs involved in sending information to members imposes a burden on the company, and the greater the number of members, the greater the burden. When a company is externally administered, the cost of sending the annual report may be borne by the creditors, even though that information is not sent to creditors.

The exemption does not apply to small proprietary companies or small companies limited by guarantee that have received a direction from their members requesting financial reports. It also does not apply where ASIC has issued a direction to a company requiring the company to lodge a financial report.

Financial services licensees being wound up

Section 9 of the principal instrument exempts all companies that have a liquidator appointed and that have previously held an AFS licence from any current AFS licensee financial reporting obligations under Subdivision C of Division 6 of Part 7.8 of the Act, as well as any continuing AFS licensee financial reporting obligations that the company had not complied with before the appointment of the liquidator and before cancellation of the AFS licence. Complying with the AFS licensee financial reporting obligations in these circumstances will impose unreasonable burdens because the company will be wound up and will ultimately be

deregistered. ASIC will have access to information that the liquidator is required to lodge with ASIC under Chapter 5 of the Act.

AFS licensees are subject to minimum financial requirements at all times. The obligation under paragraph 912A(1)(d) for an AFS licensee to have available adequate financial resources to provide the financial services covered by the AFS licence and to carry out supervisory arrangements continue to apply for so long as the AFS licence is held by the AFS licensee. We consider that it would be inconsistent to grant a class exemption from the financial reporting obligations in Part 2M.3 and the AFS licensee financial reporting obligations while the body corporate continues to hold an AFS licence.

The exemption however does not apply where a company that has a liquidator appointed also has an administrator appointed under Part 5.3A or is subject to a deed of company arrangement.

Financial services licensees under other external administrations

Section 10 of the principal instrument extends the time for reporting under Subdivision C of Division 6 of Part 7.8 of the Act for companies that hold an AFS licence and are either under administration, or have a managing controller or provisional liquidator appointed. The exemption applies to AFS licensee financial reporting obligations that fall due in the six-month period following the appointment of the relevant external administrator and also any outstanding AFS licensee financial reporting obligations that were due before the appointment the relevant external administrator.

The exemption also applies to any outstanding AFS licensee financial reporting obligations which were due before the appointment of the first external administrator. This exemption only applies to the continuing obligation of AFS licensee from the date the relevant external administrator is appointed. It does not apply to relieve the AFS licensee of any contraventions prior to the appointment of the relevant external administrator.

Compliance with the financial reporting obligations under Part 2M.3 and the AFS licensee financial reporting obligations during the six-month period following the appointment of a relevant external administrator will generally impose unreasonable burdens. The burdens arise from the combination of time constraints, and financial and human resource constraints, imposed on the AFS licensee and the relevant external administrator in these forms of external administration. A deferral of the AFS licensee financial reporting obligations may reduce the severity of the burden during this period, and preserve the AFS licensee's assets for the benefit of all parties whilst its prospects are being determined.

Effect of specifications under section 915H of the Act

Section 11 of the principal instrument ensures that any AFS licensee whose licence has been cancelled or suspended and who has been given a specification under section 915H must comply with the specification in the event of any inconsistency with the relief under the principal instrument. Under section 915H of the Act, ASIC may, in the written notice of suspension or cancellation of an AFS licence specify the licence continues in effect as though

the suspension or cancellation had not happened for the purposes of specified provisions of the Act.

A specification under section 915H is an important regulatory tool by which ASIC may require the AFS licensee to comply with a scheme's financial reporting obligations under Part 2M.3 or its AFS licensee financial reporting obligations.

Transitional arrangements

Section 12 of the principal legislative provides for certain transitional arrangements for a period of 12 months in relation to the repeal of ASIC Class Order [CO 03/392]. We have included arrangements for a transitional period so that any companies that are currently relying on an extension of time to report under paragraph 4 of that class order will continue to have the benefit of that relief.

Schemes being wound up

Section 13 of the principal instrument notionally inserts a new section 601NFA into Chapter 5C of the Act. Insolvent registered schemes that are being wound up and relying on the exemption in section 7 of the principal instrument must comply with section 601NFA as notionally inserted by the instrument.

Section 601NFA requires a responsible entity or person appointed by the Court to take responsibility for winding up the insolvent registered scheme to make available to members a report which includes the following information unless the disclosure of that information would be prejudicial to the winding up:

(a) information about the progress and status of the winding up of the scheme, including details (as applicable) of:

  (i) the actions taken during the period;

  (ii) the actions required to complete the winding up;

  (iii) the actions proposed to be taken in the next 12 months;

  (iv) the expected time to complete the winding up; and

(b) financial information about receipts and payments for the scheme during the period; and

(c) the following information as at the end of the period:

  (i) the value of scheme property; and

  (ii) any potential return to scheme members.

External administrators of companies have reporting obligations under Chapter 5 of the Act. Members and creditors of an externally administered company will have access to any public information that is prepared and lodged with ASIC by an external administrator in

accordance with the provisions in Chapter 5 of the Act. For example, liquidators must file accounts of receipts and payments with ASIC every six months within one month of the expiration of the six-month period. The account form incorporates a statement of the position in the winding-up and the liquidator's estimated outcome of their appointment: see s539 and Form 524. The reporting obligations under Chapter 5 do not apply to responsible entities of registered schemes or other persons appointed by the court to take responsibility for winding up a registered scheme. The reporting requirements under section 601NFA will ensure that scheme members receive important information about the winding up both during and on completion of the winding up similar to that available to creditors and members of an externally administered company.

Conditions on the exemptions

The exemptions in sections 5 and 6, and the deferral exemption in section 8, of the principal instrument are conditional on the company having adequate arrangements in place to answer, within a reasonable period of time and without charge, any reasonable questions asked by a member about the external administration. These conditions ensure that members are able to ask questions during the course of an external administration of a company.

A similar requirement in section 601NFA of the Act applies in relation to the winding up of an insolvent registered scheme to ensure scheme members are able to ask questions of the responsible entity or person appointed by the court to take responsibility for the winding up during the winding up of the scheme.

The deferral exemptions in sections 8 and 10 are conditional on the company complying with the relevant financial reporting obligation before the last day of the deferral period.

4. Transitional arrangements

ASIC Class Order [CO 03/392] will be repealed by the repealing instrument. ASIC recognises that the repeal of this class order may have adverse consequences for companies that are relying on an extension of time to report under paragraph 4 of that class order. To minimise the potential adverse consequences, and to facilitate transition to the principal instrument in an orderly way, the principal instrument includes arrangements for a transitional period so that any companies that, on the day immediately before the repeal of the class order, were relying on an extension of time to report under paragraph 4 of that class order will continue to have the benefit of that extension.

5. Consultation

On 25 August 2014, ASIC released Consultation Paper 223 *Relief for externally administered companies and registered schemes being wound up: RG 174 update* (CP 223) seeking feedback on proposals to update ASIC's policy and regulatory guide. The consultation period closed on 20 October 2014.

ASIC received 6 written submissions in response to CP 223. Details of the submissions received are contained in REP 434 *Response to submissions on CP 223 Relief for externally*

administered companies and registered schemes being wound up – RG 174 update which is available on ASIC's website at www.asic.gov.au.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251

ASIC Corporations (Repeal) Instrument 2015/275

These legislative instruments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the instruments

ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 applies to companies that have a liquidator, administrator, deed administrator or provisional liquidator appointed and also to registered managed investment schemes being wound up. The instrument gives relief from requirements in the *Corporations Act 2001* in relation to annual general meetings, financial reporting, compliance plan reporting by registered schemes and financial reporting by Australian financial services licensees.

ASIC Corporations (Repeal) Instrument 2015/275 repeals ASIC Class Order [CO 03/392], which was the class order that gave effect to ASIC's previous policy.

These instruments update ASIC's policy to grant various heads of relief for externally administered companies and registered schemes being wound up.

Human rights implications

Neither of these instruments engage any of the applicable rights or freedoms.

Conclusion

Both instruments are compatible with human rights as they do not raise any human rights issues.