

# ASIC Class Order [CO 98/1418]

## Wholly-owned entities

*Issued 13/8/1998*

*Class Order [CO 98/1418] provides relief to certain companies from the requirements of the Corporations Act 2001 to prepare and lodge a financial report, directors' report and auditor's report. Subject to certain conditions, relief is available to wholly-owned entities whose holding entity is a company or a registered foreign company. See also:*

- *The editorial note following this class order;*
- *Pro Forma 24, Deed of cross guarantee [PF 24];*
- *Pro Forma 25, Notice of disposal [PF 25];*
- *Pro Forma 26, Revocation deed [PF 26]; and*
- *Pro Forma 27, Assumption deed [PF 27].*

*Class Order [CO 98/1418] replaces Class Orders [CO 95/1530], [CO 96/153], [CO 96/805] and [CO 97/1018], with effect from financial years ending on or after 1 July 1998 (8 July 1998 where Class Order [CO 98/95] has been applied).*

This instrument has effect under s341(1) of the *Corporations Act 2001*.

This compilation was prepared on 2 September 2008 taking into account amendments up to [CO 08/618].

Prepared by the Australian Securities and Investments Commission.

### **Australian Securities and Investments Commission Subsection 341(1) — Corporations Act 2001 Class Orders and Revocations**

#### **First order**

[Historical note: [CO 98/1418] amended 31/1/2006 [CO 06/51] by inserting before the first paragraph the heading “First order”.]

Pursuant to subsection 341(1) of the Corporations Act 2001 (“the Act”), the Australian Securities and Investments Commission (“ASIC”) hereby makes an order relieving a company (“the Entity”) from the requirement to comply with the following provisions of the Act in relation to a financial year ending on or after 1 July 1998 (“the Relevant Financial Year”):

[Historical note: Paragraph amended 30/10/1998 [CO 98/2017] by inserting the words “and regulation 2M.6.02 of the Corporations Regulations”.]

Amended 22/6/2004 [CO 04/663] by deleting the words “and regulation 2M.6.02 of the Corporations Regulations”.]

- Paragraphs 292(1)(b) and (c) (the requirements to prepare a financial report and directors’ report);
- Subsection 301(1) (the requirement to have the financial report audited);
- Subsections 314(1), 315(1) and 315(4) and section 316 (the requirements concerning distribution of the financial report, directors’ report and auditors’ report and any concise financial report (“the reports”) to members);
- Section 317 (the requirement for a public company to lay reports before an annual general meeting);
- Subsection 319(1) (the requirement to lodge reports with ASIC); and
- Sections 327A, 327B and 327C (the requirement for a public company to appoint an auditor).

[*Historical note:* Subparagraph (sixth dash point) replaced 1/7/2004 [CO 04/682]. The subparagraph formerly read:

“— Subsections 327(1) to (5) (the requirement for a company, other than a proprietary company, to appoint an auditor)”.

Subparagraph (sixth dash point) replaced 8/2/2000 [CO 00/321]. The subparagraph formerly read:

“— Subsections 327(1) to (5) (the requirement for a company, other than a proprietary company, to appoint an auditor) provided that the Entity is:

- (i) a wholly-owned subsidiary of a body corporate as defined in section 9 of the Law; or
- (ii) a related body corporate of an Australian bank.”

Subparagraph (sixth dash point) originally inserted 30/10/1998 [CO 98/2017].]

**ON CONDITION THAT:**

*Relevant Financial Year*

- (a) The financial year of the Holding Entity ends on the same date as the end of the Relevant Financial Year;

*Restrictions on the Entity, Holding Entity and Trustee*

[*Historical note:* Heading replaced 22/6/2004 [CO 04/663]. The heading formerly read “Restrictions on the Entity and Holding Entity”.]

- (b) The Entity is one of the Wholly-owned Entities of the Holding Entity at the end of the Relevant Financial Year and is:
  - (i) a public company;
  - (ii) a large proprietary company; or

(iii) a small proprietary company to which paragraph 292(2)(b) applies;

(c) The Entity is not a borrower in relation to debentures, a disclosing entity, or a financial services licensee;

*[Historical note: Para (c) amended 4/10/2001 [CO 01/1087] by replacing “borrowing corporation” with “borrower in relation to debentures”.*  
*Para (c) further amended 11/3/2002 [CO 02/248] by replacing “a licensed securities dealer or a futures broker” with the words “or a financial services licensee”.]*

(d) The Holding Entity is not a small proprietary company;

(da) Except in relation to a Deed of Cross Guarantee lodged with ASIC before 1 July 2004 — a company holds office as trustee under the Deed of Cross Guarantee;

(db) Except in relation to a Deed of Cross Guarantee lodged with ASIC before 1 July 2004 — if the person holding office as trustee under the Deed of Cross Guarantee is a Group Entity within the meaning of that Deed, another person that is a company holds office as alternative trustee under that Deed;

*[Historical note: Paragraphs (da) and (db) inserted 22/6/2004 [CO 04/663].]*

*Consolidated financial statements*

(e) The Holding Entity has prepared consolidated financial statements which include a consolidated statement of cash flows together with notes thereto for the Relevant Financial Year (“the Consolidated Financial Statements”);

(f) If the Holding Entity is not a registered foreign company:

(i) where the economic entity comprising the Holding Entity and its controlled entities was not a reporting entity (as defined in accounting standards):

(A) the Consolidated Financial Statements covered at least those controlled entities which were part of the Extended Closed Group and included no entities which were not controlled entities;

(B) where the Consolidated Financial Statements did not cover the entire economic entity, the notes thereto made it clear which entities were covered by those Consolidated Financial Statements;

(C) accounting standard AASB 1024 “Consolidated Accounts” (except paragraph 39) (for reporting periods commencing before 1 January 2005) or AASB 127 “Consolidated and Separate Financial Statements” (except paragraphs 40 and Aus40.1) (for reporting periods commencing on or after 1 January 2005) was applied as if the entities to which the Consolidated

Financial Statements relate were a reporting entity; and

(D) the Holding Entity complied with all of the other requirements of Chapter 2M as if the Consolidated Financial Statements were part of its financial report;

(ii) where s319(4) of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act) applies to the Holding Entity, the Consolidated Financial Statements are lodged with ASIC within 4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months) after the end of the Relevant Financial Year unless all entities in the Closed Group are Exempt Entities; and

(iii) where all entities which are parties to the Deed of Cross Guarantee are Exempt Entities, the Holding Entity lodged with ASIC within 4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months) after the end of the Relevant Financial Year a document signed by one director or the company secretary (in accordance with a resolution of the directors) containing:

(A) the information required by subparagraphs (i)(i) to (iv);

(B) a statement that all entities in the Closed Group are Exempt Entities; and

(C) the statement required to be included in the directors' declaration under paragraph (j);

*[Historical note: Paragraph (f)(iii) amended 31/1/2006 [CO 06/51] by replacing the words "4 months" with the words "4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months)".*

*Paragraph (f)(ii) amended 4/10/2001 [CO 01/1087] by inserting "of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act)" after the words "where s319(4)".*

*Paragraph (f)(ii) further amended 31/1/2006 [CO 06/51] by replacing the words "4 months" with the words "4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months)".*

*Paragraph (f)(i)(C) amended 23/12/2004 [CO 04/1624] by inserting the following text: "(for reporting periods commencing before 1 January 2005) or AASB 127 "Consolidated and Separate Financial Statements" (except paragraphs 40 and Aus40.1) (for reporting periods commencing on or after 1 January 2005)". ]*

(g) If the Holding Entity is a registered foreign company:

(i) the Holding Entity prepared Consolidated Financial Statements in accordance with:

(A) where the Holding Entity is controlled by a disclosing entity formed or incorporated in Australia, a company or a registered scheme — the requirements of Chapter 2M (including s295(4)) as if the Holding Entity were a public

company (and paragraph (f)(i) may be applied as if the Holding Entity was not a registered foreign company);

(B) where (A) does not apply — a requirement of the law in its place of origin, and those Consolidated Financial Statements covered the Holding Entity and at least those controlled entities which are part of the Extended Closed Group (and included a note making it clear which entities were covered by those Consolidated Financial Statements); or

(C) where neither (A) nor (B) applies — the requirements of Chapter 2M as to the form and content of Consolidated Financial Statements, as if the Holding Entity were a public company and covering at least those entities in the Extended Closed Group; and

(ii) the Holding Entity lodged the Consolidated Financial Statements with ASIC no later than 4 months after the end of the Relevant Financial Year;

(h) The Consolidated Financial Statements:

(ii) include adequate provision in relation to the liabilities of any parties to the Deed of Cross Guarantee which are not consolidated where it is probable that those liabilities will not be fully met by those parties;

*[Historical note: Paragraph (h)(i) deleted 14/8/2008 [CO 08/618]. Paragraph (h)(i) previously read:*

*“(i) include the assets of the Holding Entity and the assets of its controlled entities at values no greater than the values which would have appeared in the financial report of each entity had all entities been subject to section 297 of the Act and applied accounting standards as if they were reporting entities; and”.*

*Paragraph (h)(i) previously amended 31/1/2006 [CO 06/51] by omitting the words “section 305” and substituting the words “section 297”.*

(i) The notes to the Consolidated Financial Statements:

(i) include a short statement of the nature of the Deed of Cross Guarantee;

(ii) list the parties to the Deed of Cross Guarantee, separately identifying:

(A) the members of the Closed Group; and

(B) the other members of the Extended Closed Group;

(iii) give details (including dates) of parties which, during or since the Relevant Financial Year, have been:

(A) added by an Assumption Deed contemplated by the Deed of Cross Guarantee;

- (B) removed by a Revocation Deed contemplated by the Deed of Cross Guarantee; or
- (C) the subject of a Notice of Disposal contemplated by the Deed of Cross Guarantee;
- (iv) give details (including dates and reasons) of any entities which obtained relief under this order or a previous order at the end of the immediately preceding financial year but which were ineligible for relief in respect of the Relevant Financial Year;
- (v) if the Consolidated Financial Statements cover entities which are not members of the Closed Group, set out the information specified in the Schedule in respect of the consolidation of the entities which are members of the Closed Group (after eliminating all transactions between members of the Closed Group);
- (vi) if the Consolidated Financial Statements cover entities which are not parties to the Deed of Cross Guarantee, set out the information specified in the Schedule in respect of the consolidation of the Holding Entity and those entities which are parties to the Deed of Cross Guarantee and controlled by the Holding Entity (after eliminating all transactions between parties to the Deed of Cross Guarantee); and
- (vii) if there are any parties to the Deed of Cross Guarantee which are not controlled by the Holding Entity, set out the information specified in the Schedule in respect of those parties (either individually or in aggregate);

*[Historical note: Para (i) amended 4/10/2001 [CO 01/1087] by inserting "Holding Entity and those" after the words "consolidation of the".]*

- (j) A statement as to whether, as at the date of the relevant document, there are reasonable grounds to believe that the members of the Extended Closed Group (identified in the note required by paragraph (i)(ii)) will be able to meet any obligations or liabilities to which they are, or may become, subject by virtue of the Deed of Cross Guarantee is included in all of the following documents (as applicable):
  - (i) the directors' declaration of the Holding Entity for the Relevant Financial Year (including a directors' declaration prepared pursuant to subparagraph (g)(i)(A));
  - (ii) the document required by paragraph (f)(iii); and
  - (iii) where subparagraphs (g)(i)(B) or (C) apply, a document signed by a director in accordance with a resolution of directors and lodged with ASIC with the Consolidated Financial Statements within 4 months (or for a financial year

commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months) after the end of the Relevant Financial Year;

[*Historical note:* Paragraph (j)(iii) amended 31/1/2006 [CO 06/51] by replacing the words “4 months” with the words “4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months)”.]

*Opt-in and opt-out notices by the Entity*

(k) Unless:

- (i) the Entity took advantage of the relief available under this order in respect of the financial year immediately preceding the Relevant Financial Year; and
- (ii) the Holding Entity of the Entity is the same for the Relevant Financial Year and the financial year immediately preceding it,

a notice signed by a director or secretary is lodged with ASIC using Form 389:

(iii) within 4 months after the end of the Relevant Financial Year; or

(iv) such other time as is approved in writing by ASIC,

containing a statement that the Entity has taken advantage of relief under this order together with the identity of the Holding Entity;

[*Historical note:* Paragraph (k) (including the heading) replaced 31/3/2008 [CO 08/11]; Paragraph (k) previously read:

*“Annual notice by the Entity*

(k) A notice signed by a director or the company secretary is lodged with ASIC within 4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months) after the end of the Relevant Financial Year containing:

- (i) a statement that the Entity has taken advantage of relief under this class order;
- (ii) the same particulars, and statements on the same matters, as mentioned in subparagraphs (i)(i), (ii) and (iii), together with the identity of the Holding Entity; and
- (iii) a statement to the effect that at or about the time of the Entity's balance date the directors reassessed the advantages and disadvantages associated with the Entity remaining a party to the Deed of Cross Guarantee and taking advantage of the relief afforded by this order or a previous order and the directors resolved either that the Entity should continue to remain a party to this Deed of Cross Guarantee, or to seek to revoke the Deed of Cross Guarantee, as the case may be;”.

Paragraph (k) previously amended 31/1/2006 [CO 06/51] by replacing the words “4 months” in the introductory words with “4 months (or for a financial year commencing from 1 January 2005 to 31 December 2005 (both inclusive), 5 months)”.]

(ka) If the relief available under this order is not taken advantage of in respect of a financial year (the ***first non-reliance year***) immediately following a financial year in which relief was taken advantage of then, unless the Entity lodges an annual financial report prepared under Chapter 2M of the Act for the first non-

reliance year, a notice that the Entity has ceased to take advantage of the relief signed by a director or secretary is lodged with ASIC using Form 399:

- (i) within 4 months after the end of the first non-reliance year; or
- (ii) such other time as is approved in writing by ASIC;

[*Historical note:* Para (ka) inserted 31/3/2008 [CO 08/11].]

*Annual resolution*

(kb) At or about the time of the Entity's balance date for the Relevant Financial Year the directors reassess the advantages and disadvantages associated with the Entity remaining a party to the Deed of Cross Guarantee and taking advantage of the relief afforded by this order and the directors resolve either that the Entity should continue to remain a party to the Deed of Cross Guarantee, or seek to revoke the Deed of Cross Guarantee, as the case may be;

[*Historical note:* Para (kb) inserted 31/3/2008 [CO 08/11].]

*Timing requirements in relation to membership of Closed Group and being party to the Deed of Cross Guarantee*

- (l) Before the end of the Relevant Financial Year:
  - (i) the Entity and every other entity in the Closed Group became parties to the Deed of Cross Guarantee; and
  - (ii) an original of that Deed of Cross Guarantee (or the relevant Assumption Deed) has been lodged with ASIC; and
  - (iii) where the lodgement of a Deed referred to in paragraph (ii) occurs on or after 1 July 2004 — an original of a certificate relating to that Deed is also lodged with ASIC, where that certificate conforms with the definition of Certificate as it appeared in this order at the time that the Deed was lodged;

[*Historical note:* Paragraph (l) amended 31/3/2008 [CO 08/11] by inserting the term "of Cross Guarantee" after the word "Deed" (third occurring).

Paragraph (l) previously amended 22/6/2004 [CO 04/663] by inserting subparagraph (iii).

Paragraph (l)(iii) amended 31/1/2006 [CO 06/51] by replacing the words "Certificate relating to that Deed is also lodged with ASIC" with the words "certificate relating to that Deed is also lodged with ASIC, where that certificate conforms with the definition of Certificate as it appeared in this Class Order at the time that the Deed was lodged;".

Paragraph (l)(iii) further amended 16/6/2008 [CO 08/285] by replacing the term "Class Order at the time that the Deed of Cross Guarantee" with the term "order at the time that the Deed".]

(m) Where the Deed of Cross Guarantee has been lodged with ASIC before 1 July 2004, that Deed has been approved by ASIC at least 60 days before the signing of the Holding Entity's directors' declaration for the Relevant Financial Year or the document referred to in subparagraph (j)(iii);

*[Historical note: Paragraph (m) amended 22/6/2004 [CO 04/663] by, at the beginning of the paragraph, replacing the words “The Deed of Cross Guarantee” with the words “Where the Deed of Cross Guarantee has been lodged with ASIC before 1 July 2004, that Deed”.]*

- (n) The Entity and the Holding Entity were members of the Closed Group and parties to the Deed of Cross Guarantee at the end of the Relevant Financial Year and:
  - (i) remain members of the Closed Group and parties to that Deed at all times up to, and including, the date on which the Consolidated Financial Statements (or the document required by paragraph (f)(iii)) are lodged with ASIC; or
  - (ii) if the Entity ceased to be a member of the Closed Group or a party to the Deed prior to the date on which the directors of the Holding Entity lodged the Consolidated Financial Statements, within one month of that cessation the Entity became party to another Deed of Cross Guarantee with another holding entity, an original of which has been lodged with ASIC, and (after making reasonable and diligent enquiries) the Entity's directors have no reason to believe that the Entity may not be able to obtain relief under this order in respect of its next financial year;

*Initial procedures in applying for relief*

- (o) Before the end of the first financial year in respect of which the Entity took advantage of relief under this order or a previous order (being a financial year at the end of which the Entity was one of the Wholly-owned Entities of the Holding Entity):
  - (i) The directors of the Entity have made a statement, signed by at least 1 director, stating that in the directors' opinion immediately prior to the execution of the Deed of Cross Guarantee or Assumption Deed by the Entity there were reasonable grounds to believe that the Entity would be able to pay its debts as and when they become due and payable;

*[Historical note: Subparagraph (o)(i) amended 31/3/2008 [CO 08/11] by replacing the term “The Entity has provided ASIC with a statement of the directors of the Entity signed by at least 2 directors (one director if the Entity had only one director) ...” with the term “The directors of the Entity have made a statement, signed by at least 1 director ...”.]*

- (ii) The directors of the Entity have resolved that the Entity should obtain the benefit of this order or a previous order and the directors have not revoked that resolution or resolved to the contrary;

*[Historical note: Subparagraphs (o)(iii) and (o)(iv) deleted 31/3/2008 [CO 08/11]. Subparagraphs (o)(iii) and (o)(iv) previously read:*

*“(iii) The Entity has provided ASIC with evidence that the Entity is entitled to the benefit of this order or a previous order;*

*(iv) The Entity paid to ASIC any fee due by the Entity in respect of the perusal of that evidence and in the case of a Deed of Cross Guarantee or an Assumption Deed lodged with ASIC before 1 July 2004 — that Deed; and”.]*

- (v) In respect of every other entity (the “Other Entity”) which has become a party to the Deed of Cross Guarantee after the date of this order (irrespective of whether the Other Entity has taken advantage of relief under this order) the directors of that Other Entity have made a statement, signed by at least 1 director, and made before the end of the financial year in which it became a party to the Deed of Cross Guarantee, stating that in the directors' opinion immediately prior to the execution of the Deed of Cross Guarantee or Assumption Deed by the Other Entity there were reasonable grounds to believe that the Other Entity would be able to pay its debts as and when they become due and payable,

except that subparagraph (o)(i) does not apply where the Entity became a party to the Deed of Cross Guarantee prior to 1 July 1997 and has lodged with ASIC a financial report or financial statements containing an unqualified directors' declaration (required by section 295(4) of the Act) or directors' statement (required by section 301 or section 302 of the Corporations Law as it stood prior to the Company Law Review Act 1998) in respect of a financial year which ended after becoming a party to the Deed of Cross Guarantee and before the Relevant Financial Year);

*[Historical note: Paragraph (o)(v) amended 31/3/2008 [CO 08/11] by replacing the term “Every” with the term “In respect of every” and replacing the words “has provided ASIC (before the end of the financial year in which it became a party to that Deed of Cross Guarantee) a statement of the directors of that Other Entity signed by at least 2 directors (one director if the Other Entity had only one director)” with the words “the directors of that Other Entity have made a statement, signed by at least 1 director, and made before the end of the financial year in which it became a party to the Deed of Cross Guarantee,”.*

Paragraph (o) previously amended 22/6/2004 [CO 04/663] by replacing subparagraph (iv) which formerly read:

“(iv) The Entity paid to ASIC any fee due by the Entity in respect of the perusal of that evidence and the perusal of the Deed of Cross Guarantee or, if applicable, an Assumption Deed; and”.]

*[Historical note: Para (p) (including the heading) deleted 31/3/2008 [CO 08/11]. Para (p) previously read:*

*“Compliance with Act by the Entity and the Holding Entity*

(p) In relation to the last 3 financial years prior to the first financial year in which the Entity took advantage of relief under this order or a previous order (that first financial year being a financial year at the end of which the Entity was one of the Wholly-owned Entities of the Holding Entity) and since the end of the last of those 3 financial years:

(i) the Entity and the auditor of the Entity have substantially satisfied all of their obligations under Chapters 2M and 2N of the Act or the Corporations Law (or Parts 3.6 and 3.7 of the Corporations Law in relation to any financial year ending before 1 July 1998 (8 July 1998 where Class Order 98/0095 was applied));

(ii) if the Holding Entity is not a registered foreign company, the Holding Entity and the auditor of the Holding Entity have substantially satisfied all of their obligations under Chapters 2M and 2N of the Act (or Parts 3.6 and 3.7 in relation to any financial year ending before 1 July 1998 (8 July 1998 where Class Order 98/0095 was applied));

(iii) if the Holding Entity is a registered foreign company, the Holding Entity and its auditor (if applicable) have substantially satisfied all of their obligations under Part 5B.2 of the Act or the Corporations Law (or Division 2 of Part 4.1 of the Corporations Law in relation to any period prior to 1 July 1998);”.]

Para (p)(i) previously amended 4/10/2001 [CO 01/1087] by replacing “of the Law” with the words “of the Act or the Corporations Law” and by inserting “of the Corporations Law” after the words “Parts 3.6 and 3.7”.

Para (p)(iii) amended 4/10/2001 [CO 01/1087] by replacing the words “of the Law” with “of the Act or the Corporations Law” and by inserting “of the Corporations Law” after the words “Division 2 of Part 4.1”.]

### *Foreign entities*

- (q) No entity was a member of the Closed Group unless it:
- (i) was a company;
  - (ii) was a body corporate incorporated or formed in Australia, the United Kingdom, New Zealand, Singapore or Hong Kong; or
  - (iii) was the Holding Entity;

[*Historical note:* Para (q)(iii) amended 4/10/2001 [CO 01/1087] by inserting “Singapore” after the words “New Zealand”.]

- (r) So long as any entity (including the Holding Entity, where applicable) which is not a body corporate incorporated or formed in Australia or a company (“the foreign entity”) is a party to the Deed of Cross Guarantee the directors of the Entity and the Holding Entity are satisfied (as evidenced by resolutions of the directors of those two entities), before the Holding Entity lodges the Consolidated Financial Statements, that, on the basis of appropriate recent advice, the Deed of Cross Guarantee is in a class of documents generally enforceable in the foreign entity's place of incorporation or formation as against the foreign entity;

### *Variations to Deed of Cross Guarantee*

- (s) Neither the Entity nor the Holding Entity have terminated, repudiated or attempted to repudiate or terminate or agreed to any variation of the Deed of Cross Guarantee except by:
- (i) an Assumption Deed contemplated by the Deed of Cross Guarantee and either:
    - (A) lodged with ASIC together with a certificate relating to that Deed, where that certificate conforms with the definition of Certificate as it appeared in this order at the time that the Deed was lodged; or

[*Historical note:* Subparagraph (s)(i)(A) amended 16/6/2008 [CO 08/285] by replacing the term “Certificate relating to that Deed:” with the term “certificate relating to that Deed, where that certificate conforms with the definition of Certificate as it appeared in this order at the time that the Deed was lodged;”.]

- (B) where the Assumption Deed is lodged with ASIC before 1 July 2004 —approved by ASIC;

- (ii) a Revocation Deed contemplated by the Deed of Cross Guarantee pursuant to which the Deed of Cross Guarantee ceases to apply to one or more entities other than the Entity;
- (iii) the the substitution of a trustee, or addition or substitution of an alternative trustee, contemplated by the Deed of Cross Guarantee and where the variation is lodged with ASIC before 1 July 2004 — approved by ASIC; or

[*Historical note:* Subparagraph (s)(iii) amended 14/8/2008 [CO 08/618] by replacing the term “the addition or substitution of an alternative trustee” with the term “the substitution of a trustee, or the addition or substitution of an alternative trustee.”]

Subparagraph (s)(iii) previously amended 16/6/2008 [CO 08/285] by replacing the word “addition” with the words “addition or substitution”.]

- (iv) any variation to reflect any amendment of the ASIC Pro Forma *Deed of Cross Guarantee* (ASIC Pro Forma 24) that may be made by ASIC from time to time;

[*Historical note:* Paragraph (s) amended 4/10/2001 [CO 01/1087] by deleting the words “of the terms” after the words “or agreed to any variation”.

Further amended 22/6/2004 [CO 04/663] by replacing subparagraph (i) and (iii) Paragraph (i) formerly read:

“(i) an Assumption Deed contemplated by the Deed of Cross Guarantee and approved by ASIC”.

Paragraph (iii) formerly read:

“(iii) the addition of an additional trustee contemplated by the Deed of Cross Guarantee and approved by ASIC”.]

[*Historical note:* Paragraph (t) deleted 31/1/2006 by [CO 06/51].]

#### *Companies which cease to be members of the Closed Group*

- (u) Within 2 months of ceasing to be a Wholly-owned Entity, the Entity prepares a financial report and directors' report for the Relevant Financial Year and lodges those documents with ASIC, except where:
  - (i) within one month, the Entity becomes a party to another Deed of Cross Guarantee and (after making reasonable and diligent enquiries) the directors of the Entity have no reason to believe that it will not be relieved from preparing a financial report under this order in respect of its next financial year;
  - (ii) the Entity was also subject to relief from the requirement to prepare a financial report pursuant to a provision of the Act or another ASIC order in respect of the Relevant Financial Year;
  - (iii) at the time the Entity ceases to be a member of the Closed Group it is less than 1 month until, or is after, the end of the first financial year immediately after the Relevant Financial Year; or

- (iv) the Entity was a small proprietary company for the Relevant Financial Year;

*Auditor of the Holding Entity*

- (v) If the Holding Entity's financial report is required to be audited, the auditor of the Holding Entity is satisfied that paragraphs (e), (f)(i), (g)(i), (h), (i) and (j) (as applicable) have been complied with; and

*Entities excluded from relying on this order*

- (w) ASIC has:
- (i) not notified the Entity in writing that it may not rely on this order or may not rely on this order for the Relevant Financial Year; or
  - (ii) notified the Entity in writing that it may not rely on this order or may not rely on this order for the Relevant Financial Year but has subsequently revoked or varied that notice so that it does not cover the Relevant Financial Year.

[*Historical note:* Para (w) (including the heading) replaced 31/3/2008 [CO 08/11]. Para (w) formerly read:

*“ASIC request that the Entity prepare financial reports*

*(w) ASIC has not requested the Entity to prepare a financial report.”]*

## SCHEDULE

For reporting periods commencing before 1 January 2009 and where the version of accounting standard AASB 101 “Presentation of Financial Statements” (“AASB 101”) dated September 2007 has not been adopted early by the Holding Entity for the Relevant Financial Year, the following information for the Relevant Financial Year with comparative information for the immediately preceding financial year:

- (i) An Income Statement setting out the information specified by paragraphs 81 to 85 of accounting standard AASB 101 “Presentation of Financial Statements” issued in July 2004 (as applicable to the financial statements of the Holding Entity for the Relevant Financial Year) (“old AASB 101”);
- (ii) Opening and closing retained earnings, dividends provided for or paid, and transfers to and from reserves; and
- (iii) A Balance Sheet complying with paragraphs 68 to 73 of old AASB 101.

In any other case, the following information for the Relevant Financial Year with comparative information for the immediately preceding financial year:

- (i) A Statement of Comprehensive Income setting out the information specified by paragraphs 82 to 87 of AASB 101 and, where paragraph 84 of AASB 101 is applied, an Income Statement;
- (ii) Opening and closing retained earnings, dividends provided for or paid, and transfers to and from reserves; and
- (iii) A Statement of Financial Position complying with paragraphs 54 to 59 of AASB 101.

Comparative information is only required where the Holding Entity was a holding entity in a deed of cross guarantee for the purposes of this order at any time during the immediately preceding financial year.

*[Historical note: Schedule amended 14/8/2008 [CO 08/618] by inserting the words “Comparative information is only required where the Holding Entity was a holding entity in a deed of cross guarantee for the purposes of this order at any time during the immediately preceding financial year.” at the end.]*

Schedule previously amended 16/6/2008 [CO 08/285] by replacing the words “on or after 1 January 2009” with the words “before 1 January 2009”.

Schedule previously replaced 31/3/2008 [CO 08/11]. The Schedule formerly read:  
“For reporting periods commencing before 1 January 2005, the following information for the Relevant Financial Year with comparative information for the immediately preceding financial year:

- (i) A Statement of Financial Performance setting out the information specified by subparagraph 4.1(b) of accounting standard AASB 1018 “Statement of Financial Performance” and, in the case of consolidated financial statements, the information specified in paragraph 34 of accounting standard AASB 1024 “Consolidated Accounts”;
- (ii) Opening and closing retained profits/accumulated losses, dividends provided for or paid, and transfers to and from reserves; and
- (iii) A Statement of Financial Position complying with paragraphs 4.1, 4.2, 7.1, 7.3 and 7.4 of accounting standard AASB 1040 “Statement of Financial Position”, except that if the entities concerned are, or comprise, a “financial institution” as defined by paragraph 10.1 of accounting standard AASB 1032 “Specific Disclosures by Financial Institutions” (“AASB 1032”), the information specified by paragraphs 5.1 and 5.2 of AASB 1032 may be provided instead of that specified by AASB 1040.

For reporting periods commencing on or after 1 January 2005, the following information for the Relevant Financial Year with comparative information for the immediately preceding financial year:

- (i) An Income Statement setting out the information specified by paragraphs 81 to 85 of accounting standard AASB 101 “Presentation of Financial Statements” (“AASB 101”);
- (ii) Opening and closing retained earnings, dividends provided for or paid, and transfers to and from reserves; and
- (iii) A Balance Sheet complying with paragraphs 68 to 73 of AASB 101, except that if the entities concerned are, or comprise, an entity to which AASB 130 “Disclosures in the Financial Statements of Banks and Similar Financial Institutions” applies, the information specified by paragraphs 18 and 19 of AASB 130 may be provided instead of that specified by AASB 101.”.

Schedule previously replaced 23/3/2005 [CO 04/1624]. The Schedule formerly read:

“The following information for the Relevant Financial Year with comparative information for the immediately preceding financial year:

- (i) A Statement of Financial Performance setting out the information specified by subparagraph 4.1(b) of accounting standard AASB 1018 “Statement of Financial Performance” and, in the case of consolidated financial statements, the information specified in paragraph 34 of accounting standard AASB 1024 “Consolidated Accounts”;
- (ii) Opening and closing retained profits/accumulated losses, dividends provided for or paid, and transfers to and from reserves; and
- (iii) A Statement of Financial Position complying with paragraphs 4.1, 4.2, 7.1, 7.3 and 7.4 of accounting standard AASB 1040 “Statement of Financial Position”, except that if the entities concerned are, or comprise, a “financial institution” as defined by paragraph 10.1 of accounting standard AASB 1032 “Specific Disclosures by Financial Institutions” (“AASB 1032”), the information specified by paragraphs 5.1 and 5.2 of AASB 1032 may be provided instead of that specified by AASB 1040.

However, instead of the information specified above, the following information may be given for a Relevant Financial Year ending between 30 June 2001 and 30 September 2001 (both inclusive) with comparative information for the immediately preceding financial year:

- (iv) A profit and loss statement setting out the information specified by paragraphs 12, 13, 14 and the first sentences of paragraphs 16 and 19 of accounting standard AASB 1018 “Profit and Loss Accounts”, dividends provided for or paid, opening and closing retained profits/accumulated losses and, in the case of consolidated financial statements, the information specified in paragraph 34 of AASB 1024 “Consolidated Accounts”; and
- (v) A balance sheet setting out the information specified by paragraphs 5.1, 5.2 and 5.3 of accounting standard AASB 1034 “Information to be Disclosed in Financial Reports” (“AASB 1034”), except that if the entities concerned are, or comprise, a “financial institution” as defined by paragraph 10.1 of accounting standard AASB 1032 “Specific Disclosures by Financial Institutions” (“AASB 1032”), the information specified by paragraphs 5.1 and 5.2 of AASB 1032 may be provided instead of that specified by AASB 1034.

Schedule previously amended 4/10/2001 [CO 01/1087] by:

- 1. replacing the introductory paragraph. The paragraph formerly read: “The following information for the current year with comparative information for the preceding year (comparatives only required in relation to the financial years ending on or after 1 July 1999):”
- 2. Inserting new paras (i), (ii) and (iii) and inserting new para after (iii) commencing “However, instead of the information...”.
- 3. Renumbering former paras (i) and (ii) as (iv) and (v) respectively.

Schedule further amended 26/7/2002 [CO 02/1017] by replacing the words “subparagraphs 4.1(e) to (k)” with the words “subparagraph 4.1(b).”]

## Interpretation

In this order:

“borrower in relation to debentures” means a body that is or will be liable to repay money under a debenture, but does not include a body that only has debentures on issue that were issued or allotted:

- (i) by excluded issues to which paragraph 66(2)(d) of the Corporations Law applied as that Law stood prior to 13 March 2000; or

- (ii) pursuant to offers which did not need disclosure to investors under Part 6D.2 of the Act because of s708(1) of the Act.

*[Historical note: defn "borrower in relation to debentures" inserted 4/10/2001 [CO 01/1087].]*

*[Historical note: defn "borrowing corporation" deleted 4/10/2001 [CO 01/1087]. The definition formerly read: "borrowing corporation" does not include such a borrowing corporation if the only debentures of the borrowing corporation were issued or allotted by excluded issues to which paragraph 66(2)(d) of the Law applies.]*

“Certificate” in relation to a Deed of Cross Guarantee or an Assumption Deed to which an Entity is a party, means one or more certificates in writing addressed to the Entity, the trustee and any alternative trustee under the Deed of Cross Guarantee and to ASIC which together include statements to the following effect:

- (a) that the Deed is in exactly the same terms as ASIC Pro Forma 24 or 27 as the case requires except for the following:
- (i) all instructions for the inclusion of specified information have been replaced by that information in a complete and accurate manner and any consequential changes of a minor or editorial nature that are necessary for the effective operation of the deed have been made;
  - (ii) execution clauses have been added, deleted, modified or varied as required in order to facilitate the proper execution of the deed;
  - (iii) the date has been completed;
  - (iv) the headnote, the headings before the headnote and any editorial note have been omitted;
  - (v) in the case of an Assumption Deed which covers more than one Entity — such variations as are necessary to enable the additional entities to be covered;
  - (vi) in the case of an Assumption Deed which covers making the trustee of the Deed of Cross Guarantee to which the Assumption Deed relates a member of the Closed Group — such variations as are necessary to enable the Assumption Deed to have that effect;
- (b) that, in relation to the execution of the Deed by each party to it that is a company, either:
- (i) the Deed appears to be signed in accordance with subsection 127(1) of the Act; or
  - (ii) the company’s common seal appears to have been fixed to the Deed, and the fixing of the seal appears to have been witnessed, in accordance with subsection 127(2) of the Act;

and the provider of the certificate does not know and has no reason to suspect that the Deed has not been duly executed by the company; and

- (ba) that the provider of the certificate, after having made such inquiries as were reasonable in the circumstances, is of the opinion that the Deed has been duly executed by each party to it that is not a company;

where:

- (e) the certificates referred to in paragraphs (a), (b) and (ba) are given by a lawyer who holds a practising certificate.

[Historical note: defn "Certificate" inserted 22/6/2004 [CO 04/663].

Amended 23/12/2004 [CO 04/1624] by replacing paragraphs (a)-(e) with new paragraphs (a)-(f). Paragraphs (a)-(e) formerly read:

“(a) that the Deed:

- (i) is in exactly the same terms as ASIC Pro Forma 24 or 27 as the case requires except for the following:
    - (A) all instructions for the inclusion of specified information have been replaced by that information in a complete and accurate manner and any consequential changes of a minor or editorial nature that are necessary for the effective operation of the deed have been made;
    - (B) execution clauses have been added, deleted, modified or varied as required in order to facilitate the proper execution of the deed;
    - (C) the date has been completed;
    - (D) the headnote, the headings before the headnote and any editorial note have been omitted;
    - (E) in the case of an Assumption Deed which covers more than one Entity — such variations as are necessary to enable the additional entities to be covered;
    - (F) in the case of an Assumption Deed which covers making the trustee of the Deed of Cross Guarantee to which the Assumption Deed relates a member of the Closed Group — such variations as are necessary to enable the Assumption Deed to have that effect;
  - (ii) has been properly executed by the parties to it; and
  - (iii) is binding on, and enforceable against the parties to it in accordance with its terms;
- (b) that the Entity has satisfied all of its obligations under subsections 319(1) and (3) of the Act in relation to the 3 financial years before the first financial year for which the Entity seeks to take advantage of relief under this order; and
- (c) that none of the auditor’s reports referred to in paragraph (b) are qualified;
- where:
- (d) the certificate referred to in paragraph (a) is given by a lawyer who holds a practising certificate; and
  - (e) the certificates referred to in paragraphs (b) and (c) are given either by such a lawyer or a registered company auditor;”

Further amended 20/6/2005 [CO 05/542] by replacing para (b) and inserting new para (ba). Para (b) formerly read:

“(b) that the provider of the certificate, after having made such inquiries as were reasonable in the circumstances, is of the opinion that the Deed:

- (i) has been properly executed by the parties to it; and
- (ii) is binding on, and enforceable against, the parties to it in accordance with its terms;”

Further amended 20/6/2005 [CO 05/542] by in para (d) inserting the words ‘for the financial years’ after the word ‘reports’ and in para (e) by inserting reference to paragraph (ba).

Further amended 31/3/2008 [CO 08/11] by:

- (a) in paragraph (b) replacing the term “company:” with the term “company; and”;
- (b) deleting paragraphs (c) and (d). Paragraphs (c) and (d) formerly read:
  - “(c) that the Entity has satisfied all of its obligations under subsections 319(1) and (3) of the Act in relation to the 3 financial years before the first financial year for which the Entity seeks to take advantage of relief under this order; and
  - (d) that none of the auditor’s reports for the financial years covered by paragraph (c) are qualified;”;
- (c) in paragraph (e) replacing the term “certificate; and” with the term “certificate.”; and
- (d) deleting paragraph (f). Paragraph (f) formerly read:
  - (f) the certificates referred to in paragraphs (c) and (d) are given either by such a lawyer or a registered company auditor;”.]

“Closed Group” means the Holding Entity and the Wholly-owned Entities;

“Control” has the same meaning as that term has in accounting standard AASB 1024 “Consolidated Accounts” (for reporting periods commencing before 1 January 2005) or AASB 127 “Consolidated and Separate Financial Statements” (for reporting periods commencing on or after 1 January 2005);

*[Historical note: defin “Control” replaced 23/12/2004 [CO 04/1624]. The definition formerly read:*

*“‘Control’ has the same meaning as that term has in accounting standard AASB 1024 ‘Consolidated Accounts’.”]*

“Deed of Cross Guarantee” means the deed to which the Entity is a party which:

- (i) is in exactly the same terms as ASIC Pro Forma 24 except for the following:
  - (A) all instructions for the inclusion of specified information have been replaced by that information in a complete and accurate manner and any consequential changes of a minor or editorial nature that are necessary for the effective operation of the deed have been made;
  - (B) execution clauses have been added as required in order to facilitate the proper execution of the deed;
  - (C) the date has been completed;
  - (D) the headnote, the headings before the headnote and any editorial note have been omitted;
- (ia) in the case of a deed lodged with ASIC before 1 July 2004 — is substantially in the form set out in ASIC Pro Forma 24 and which has been approved by ASIC under this order;
- (iaa) in the case of a deed lodged with ASIC on or after 1 July 2004 but before 31 March 2008—is in exactly the same terms as ASIC

Pro Forma 24 as at the date the deed was lodged except for the matters set out in subparagraphs (i)(A) to (D);

[*Historical note:* Paragraph (ia) inserted 16/6/2008 [CO 08/285].]

- (ii) has been approved for the purposes of a previous order; or
- (iii) is in the form required for the purposes of Class Order [CO 95/1530], has been lodged with ASIC between 1 July 1998 and the date of this order, and has been approved by ASIC for the purposes of this order or Class Order [CO 95/1530] (even if the Entity never obtains relief under Class Order [CO 95/1530]),

and includes such a deed as varied by:

- (iv) an Assumption Deed contemplated by the Deed of Cross Guarantee and either:
  - (A) lodged with ASIC together with a certificate relating to that Deed, where that certificate conforms with the definition of Certificate as it appeared in this order at the time that the Deed was lodged;

[*Historical note:* Subparagraph (iv)(A) amended X/6/2008 [CO 08/285] by replacing the term “Certificate relating to that Deed;” with the term “certificate relating to that Deed, where that certificate conforms with the definition of Certificate as it appeared in this order at the time that the Deed was lodged;”.]

- (B) where the Assumption Deed is lodged with ASIC before 1 July 2004 — approved by ASIC;

- (v) a Revocation Deed contemplated by the Deed of Cross Guarantee;

[*Historical note:* defn “Deed of Cross Guarantee” amended 22/6/2004 [CO 04/663]. by replacing paragraph (i) with new paragraphs (i) and (ia). Paragraph (i) formerly read:

“(i) is substantially in the form set out in ASIC Pro Forma 24 and which has been approved by ASIC under this order”.

Further amended 22/6/2004 [CO 04/663] by replacing after paragraph (iii) the words “and includes such a deed as varied by an Assumption Deed contemplated by the Deed of Cross Guarantee and approved by ASIC or a Revocation Deed contemplated by the Deed of Cross Guarantee” with the words “and includes such a deed as varied by” and by inserting new paragraphs (iv) and (v).]

“Exempt Entity” means a company which is not controlled by a foreign company and which is:

- (a) a small proprietary company; or
- (b) a large proprietary company which:
  - (i) satisfied all of the requirements of s319(4) of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act), or would have satisfied all of those requirements except that its financial statements or financial reports during 1993 or a later financial year were not audited before the deadline for reporting to members for that year

pursuant to relief obtained under this Class Order, Class Order [CO 95/1530] or Class Order [CO 96/1579]; and

- (ii) has not at any time during 1993 or a later financial year been a member of a Closed Group for the purposes of this Class Order or Class Order [CO 95/1530] where that Closed Group included a company which was not an Exempt Entity;

*[Historical note: defn "Exempt Entity" amended 4/10/2001 [CO 01/1087] by replacing in para (i) the words "satisfied all of the requirements of s319(4), or would have satisfied all of the requirements of s319(4) of the Law" with the words "satisfied all of the requirements of s319(4) of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act), or would have satisfied all of those requirements".]*

"Extended Closed Group" means the Closed Group and any other entities which are parties to the Deed of Cross Guarantee and which are controlled by the Holding Entity;

*[Historical note: Defn "financial services licensee" inserted 11/3/2002 [CO 02/248]. Deleted 22/6/2004 [CO 04/663]. The definition formerly read: "'financial services licensee" means:*

- (a) a financial services licensee within the meaning of the Act; and
- (b) during the transition period (within the meaning of subsection 1431(1) of the Act) for a regulated principal, also includes a reference to a regulated principal referred to in items 1 and 3 of the table in subsection 1430(1) of the Act;'.]

"Holding Entity" is a company, a disclosing entity which is a body corporate incorporated or formed in Australia, or a registered foreign company:

- (i) of which the Entity is one of the Wholly-owned Entities;
- (ii) which is not controlled by another member of the Closed Group; and
- (iii) which is a party to the Deed of Cross Guarantee;

"previous order" means any one of ASIC Class Orders [CO 91/996] dated 19 December 1991, [CO 92/770] dated 20 July 1992, [CO 93/1370] dated 4 November, [CO 94/1862] dated 13 December 1994, [CO 95/1530] dated 10 November 1995 or [CO 96/153] dated 12 March 1996; and

*[Historical note: Defn "previous order" amended 31/3/2008 [CO 08/11] by replacing the term "1996" with the term "1996; and".]*

*[Historical note: Defn "substantially satisfied" deleted 31/3/2008 [CO 08/11]. Defn formerly read:*

*"substantially satisfied" means satisfied apart from formal defects or irregularities or matters essentially of a procedural nature or clerical mistakes or errors arising from an accidental slip or omission; and".]*

"Wholly-owned Entities" collectively mean companies and foreign companies:

- (i) all of which are controlled by the Holding Entity;
- (ii) no member of any of which is a person other than the Holding Entity, another one of the Wholly-owned Entities, a nominee for

the Holding Entity or a nominee for another one of the Wholly-owned Entities; and

(iii) all of which are parties to the Deed of Cross Guarantee.

## **Second order**

And under subsection 341(1) of the Act ASIC relieves a company that is a Holding Entity for the purposes of the first order from the requirement to comply with subsections 295(2) and (3) of the Act to the extent they would prevent:

- (a) the inclusion of Consolidated Financial Statements (for the purposes of paragraph (f) of the first order) where the consolidated group is not a reporting entity for the purposes of accounting standards under subsection 296(1) of the Act; or
- (b) the notes to the Consolidated Financial Statements (within the meaning of the first order) from including the information specified in paragraph (i) of the first order.

*[Historical note: [CO 98/1418] amended 31/1/2006 [CO 06/51] by inserting the Second order before the last paragraph.]*

Second order replaced 31/3/2008 [CO 08/11]. The text of the Second order formerly read:

“And under subsection 341(1) of the Act ASIC relieves a company that is a Holding Entity for the purposes of the first order from the requirement to comply with subsection 295(3) of the Act to the extent that it would prevent the notes to the Consolidated Financial Statements (within the meaning of the first order) from including the information specified in paragraph (i) of the first order.”.]

## **Revocations**

Pursuant to subsection 341(1) of the Corporations Act 2001 (“the Act”), the Australian Securities and Investments Commission hereby revokes Class Orders [CO 95/1530] dated 10 November 1995, [CO 96/153] dated 12 March 1996, [CO 96/805] dated 28 May 1996 and [CO 97/1018] dated 9 July 1997, with effect for financial years ending on or after 1 July 1998 (8 July 1998 where the Holding Entity adopts Class Order [CO 98/0095]).

*[Historical note: [CO 98/1418] amended 31/1/2006 [CO 06/51] by inserting the heading “Revocations” after the second order before the last paragraph.]*

*[Historical note: [CO 98/1418] amended 4/10/2001 [CO 01/1087] by replacing references to “Corporations Law” with “Corporations Act 2001”, “Corporations Regulations” with “Corporations Regulations 2001” and references to “the Law” with “the Act”.]*

Dated the 13th day of August 1998

Signed by Brendan Byrne  
as a delegate of the Australian Securities and Investments  
Commission

## Notes to ASIC Class Order [CO 98/1418]

### Note 1

ASIC Class Order [CO 98/1418] (in force under s341(1) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the Tables below.

### Table of Instruments

Instrument number	Date of making or FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 98/1418]	13/8/1998	13/8/1998	-
[CO 98/2017]	30/10/1998	30/10/1998	-
[CO 00/321]	8/3/2000	8/2/2000	-
[CO 01/1087]	4/10/2001	4/10/2001	-
[CO 02/248]	2/3/2002	11/3/2002	-
[CO 02/1017]	26/7/2002	26/7/2002	-
[CO 04/663]	22/6/2004	22/6/2004	-
[CO 04/682]	1/7/2004	1/7/2004	-
[CO 04/1624]	23/12/2004	23/12/2004	-
[CO 05/542]	20/6/2005	20/6/2005	-
[CO 06/51]	31/1/2006	31/1/2006	-
[CO 08/11]	31/3/2008	31/3/2008	-
[CO 08/285]	16/6/2008	16/6/2008	-
[CO 08/618]	14/8/2008	14/8/2008	-

### Table of Amendments

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
Class order	am. [CO 98/2017]; am. [CO 01/1087]; am. [CO 04/663]; am. [CO 06/51]
Subpara (6 <sup>th</sup> dash point)	ad. [CO 98/2017]; rs. [CO 04/682]
Para (b) heading	rs. [CO 04/663]
Para (c)	am. [CO 01/1087]; am. [CO 02/248]
Para (da)	ad. [CO 04/663]
Para (db)	ad. [CO 04/663]
Para (f)(i)(c)	am. [CO 04/1624]
Para (f)(ii)	am. [CO 01/1087]; am. [CO 06/51]
Para (f)(iii)	am. [CO 06/51]
Para (h)(i)	am. [CO 06/51]; rep. [CO 08/618]

Para (i)	am. [CO 01/1087]
Para (j)(iii)	am. [CO 06/51]
Para (k)	am. [CO 06/51]; rs. [CO 08/11]
Para (ka)	ad. [CO 08/11]
Para (kb)	ad. [CO 08/11]
Para (l)	am. [CO 08/11]
Para (l)(iii)	ad. [CO 04/663]; am. [CO 06/51]; am [CO 08/285]
Para (m)	am. [CO 04/663]
Para (o)(i)	am. [CO 08/11]
Para (o)(iii)	rep. [CO 08/11]
Para (o)(iv)	rs. [CO 04/663]; rep [CO 08/11]
Para (o)(v)	am. [CO 08/11]
Para (p)	rep. [CO 08/11]
Para (p)(i)	am. [CO 01/1087]
Para (p)(iii)	am. [CO 01/1087]
Para (q)(iii)	am. [CO 01/1087]
Para (s)	am. [CO 01/1087]
Para (s)(i)	rs. [CO 04/663]
Para (s)(i)(A)	am. [CO 08/285]
Para (s)(iii)	rs. [CO 04/663]; am. [CO 08/285]; am. [CO 08/618]
Para (t)	rep. [CO 06/51]
Para (w)	rs. [CO 08/11]
Schedule	am. [CO 01/1087]; am. [CO 02/1017]; rs. [CO 04/1624]; rs. [CO 08/11]; am. [CO 08/285]; am. [CO 08/618]
Interpretation	am. [CO 01/1087]; am. [CO 02/248]; am. [CO 04/663]; am. [CO 04/1624]; am. [CO 05/542]; am. [CO 08/11]; am [CO 08/285]
Second order	am. [CO 06/51]; rs. [CO 08/11]
Revocations	am. [CO 06/51]

## EDITORIAL NOTE

This editorial note does not form part of the Class Order and does not control its interpretation.

### Introduction

1. Class Order [CO 98/1418] (“the order”) was executed so as to provide relief to certain Wholly-owned Entities and replaces Class Order [CO 95/1530] dated 10 November 1995.

### Extent of relief

2. Class Order [CO 98/1418] provides relief from the following sections, subsections and paragraphs of the Corporations Act 2001 (“the Act”) — s292(1)(b) and (c) (the requirement to prepare a financial report and directors' report); s301(1) (the requirement to have the financial report audited); s314(1), 315(1), 315(4) and 316 (the requirement to distribute the financial report, directors' report and auditors' report (“the reports”) to members); s317 (the requirement for a public company to lay the reports before an annual general meeting); s319(1) (the requirement to lodge the reports with ASIC); and, in certain cases, s327A, 327B and 327C (the requirement to appoint an auditor).
3. The order also has the effect of providing relief from:
  - (i) the requirement for the financial report to comply with accounting standards and regulations under s296; and
  - (ii) various other sections and subsections which only apply to companies which are required to prepare and distribute reports and to have their financial reports audited.
4. [para 4 deleted]
5. The relief does not reduce the rights or responsibilities of the auditor of Consolidated Financial Statements prepared by the Holding Entity in a Closed Group. In some cases, it will be necessary for a Holding Entity to prepare consolidated financial statements even though the Act does not otherwise require such consolidated financial statements (eg if the Holding Entity is the parent entity in an economic entity which is not a reporting entity, or if the Holding Entity is a registered foreign company which is not required to prepare consolidated financial statements in its place of origin).

6. The First Order does not provide relief from the requirement contained in s989B of the Act for a financial services licensee to prepare and lodge financial statements and lodge an auditor's report.
7. No relief is provided from the obligation to hold an annual general meeting (where such obligation exists). Relief is provided from s314, 315 and 316 of the Act which require certain reports to be distributed to members.

### **Requirements for relief**

8. An Entity which is one of the Wholly-owned Entities must meet certain conditions of the order to obtain relief (refer paragraphs and subparagraphs (a) to (c), (k), (ka), (l), (m), (o)(i) to (iv), (q), (r), (s), (u) and (v) of the order). In addition, relief will not be available unless certain requirements are met by, or in relation to, the Holding Entity (refer paragraphs and subparagraphs (a), (d) to (j), (l) to (n), (q), (r), (s), and (v)) and in relation to other parties to the Deed of Cross Guarantee (subparagraph (o)(v) and paragraph (q)).
9. Paragraph (g)(ii) of the order requires a Holding Entity which is a registered foreign company to lodge the Consolidated Financial Statements with ASIC within 4 months after the end of the financial year. ASIC does not offer a separate lodgment facility for this purpose and the registered foreign company would need to lodge the Consolidated Financial Statements with its financial report for the purposes of s601CK within the 4 month period (even if more time is available under s601CK(1)).

### **Grandfathered large proprietary companies**

10. Large proprietary companies which are “grandfathered” under s319(4) of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act) are required to prepare audited financial reports but are not required to lodge those reports with ASIC. Such companies may choose to take advantage of relief under the order but will lose the benefit of grandfathering. Companies taking advantage of the order are not required to have their financial reports audited before the deadline for each year and cease to meet one of the conditions for grandfathering under s319(4). When a company ceases to obtain relief under the order, it will not be able to take advantage of grandfathering.
11. The basis for grandfathering was outlined in paragraph 6.23 of the Explanatory Memorandum to the First Corporate Law Simplification Act 1995. This paragraph states that “To avoid disrupting established commercial arrangements, those existing exempt proprietary companies which have their annual accounts

audited, which are large and elect to continue operating under the existing rules will not need to lodge their accounts with the ASC.”

12. A decision by a company that it will become a party to a Deed of Cross Guarantee and adopt the relief under the class order is a decision to change its commercial arrangements and to take advantage of more extensive relief than that offered under s319(4). Similarly, where the company is disposed, ceases to be a member of a Closed Group, ceases to be a party to the Deed of Cross Guarantee, or the other parties to the deed terminate the arrangements, that is a decision by the company, its Holding Entity or siblings to change rather than maintain commercial arrangements. There is no reason why such companies should be able to be grandfathered upon ceasing to obtain relief under the class order.

### Initial procedures

13. Subparagraph (l)(ii) and paragraph (o) of the order require:
- (a) the Entity (either through itself or its Holding Entity) to provide to ASIC an original of the Deed of Cross Guarantee (refer to ASIC Pro Forma 24) or Assumption Deed (refer to ASIC Pro Forma 27) to which it is a party;
  - (b) a statement of the directors of the Entity, signed by at least one director, to the effect that in the directors' opinion immediately prior to the execution of the Deed of Cross Guarantee by the Entity there were reasonable grounds to believe that the company would be able to pay its debts as and when they become due and payable (note that the Entity may have been required to lodge this statement in an earlier year pursuant to paragraph (o)(v) of the order); and
  - (c) [para (c) deleted]
  - (d) [para (d) deleted]
  - (e) statements similar to that in (b) by the directors of each of the other parties to the Deed of Cross Guarantee (unless previously provided to ASIC).

The Deed of Cross Guarantee and statement of the directors must comply with the general requirements for documents set out in regulation 1.07 of the Corporations Regulations 2001. It would assist ASIC if, in addition to the original, a copy of the deed were also provided.

14. Given that the stamp duty payable in respect of a Deed of Cross Guarantee will depend upon the particular circumstances of the parties to the deed, the order makes no requirement that a Deed of Cross Guarantee lodged with ASIC be stamped.

- 15.1 [para 15.1 deleted]
- 15.2 From 1 July 2004, ASIC no longer approves new Deeds of Cross Guarantee or Assumption Deeds. Deeds lodged from that date must be accompanied by a certificate from a lawyer holding a practicing certificate (and in some cases by an auditor). The matters to be covered in these certificates are set out in the definition of "certificate" contained in the Class Order [CO 98/1418]. The lodgement of an appropriate certificate or certificates with the other material required for relief, is a condition of obtaining relief under the Class Order.
16. Paragraph (l) of the order requires the deed to be lodged with ASIC before the end of the financial year for which relief is sought. Under paragraph (m) of the order relief will only be available where the Deed "has been lodged with ASIC at least 60 days before the signing of the Holding Entity's directors' declaration for the Relevant Financial Year or the document referred to in subparagraph (j)(iii)".
17. [para 17 deleted]
18. In January 2008, the fee payable to ASIC in respect of the lodgement of a Deed of Cross Guarantee and other required material is \$33.00 (item 27 of Corporations (Fees) Regulations 2001). Only one fee is payable in respect of each Deed of Cross Guarantee lodged with ASIC regardless of the number of entities which are parties to such Deed.
19. ASIC will include a copy of the Deed of Cross Guarantee and supporting documentation on the publicly available records of each entity which is a party to the Deed. Accordingly a person who searches ASIC's records in relation to that entity will be able to ascertain whether or not the entity is a party to such a deed.

### **Deed of Cross Guarantee (ASIC Pro Forma 24)**

#### *Appointment of trustee*

20. The Deed of Cross Guarantee contemplates the appointment of a company as trustee who will hold on behalf of creditors the benefit of the covenants made by the other parties to the deed. If desired the trustee may be a related company. If, however, the trustee is a Group Entity (within the definition in the Deed of Cross Guarantee), it will be necessary to appoint two trustees — the first to hold as trustee the benefit of the promises made by all other Group Entities and the second to act as trustee in respect of the covenants made by first trustee (the alternative trustee). The alternative trustee is provided for as a party to the deed (if necessary).

*Release of a party to Deed of Cross Guarantee*

21. Clause 4.2 of the Deed of Cross Guarantee permits a party to the deed, which is sold in certain circumstances, and a wholly-owned entity of such an entity, to be released from their obligations under the deed. Where a party to the deed is so sold, a Notice of Disposal and, in certain circumstances, a directors' certificate must be lodged with ASIC by the entity sold. The notice must disclose the names of all the sold entity's wholly-owned entities which are a party to the deed. ASIC Pro Forma 25 *Notice of disposal* [PF 25] must be used for this purpose. No fee is payable to ASIC in respect of the lodgment of such documents.
22. As a result of clause 4.5 of the Deed of Cross Guarantee, a party to the Deed of Cross Guarantee may also be released from the obligations imposed by the Deed by executing a Revocation Deed. A Revocation Deed must be executed by all parties to the Deed of Cross Guarantee. An original of a Revocation Deed must be provided to ASIC — no fee is payable — and must comply with the general requirements for documents in reg 1.07. Further, each party to the Deed, including the entity to be released, must give notice by public advertisement to its creditors.
23. If a Revocation Deed is executed in respect of an entity which owns shares or units in other entities which are parties to the Deed of Cross Guarantee (“sub entities”) and those sub entities are not at the same time released from their obligations under the Deed, the sub entities will continue to be bound by the covenants in the Deed of Cross Guarantee but will no longer be eligible for relief.
24. The Deed of Cross Guarantee does not impose any time requirement in relation to the lodging with ASIC of a Notice of Disposal or a Revocation Deed. The covenants contained in the Deed will, however, continue to apply to the entity sold and its wholly-owned entities or the entity attempting to cease to be bound by the Deed (whichever is applicable) until such time as ASIC has been notified as required.

*Extension of Deed of Cross Guarantee to additional entity*

25. By executing an Assumption Deed a further entity may become a party to a Deed of Cross Guarantee. An Assumption Deed must be executed by the new entity, the Holding Entity and the trustee. An Assumption Deed must be lodged with ASIC. From 1 July 2004, ASIC does not approve Assumption Deeds. ASIC Pro Forma 27 must be used as the wording for an Assumption Deed. An original of an Assumption Deed, a statement by the directors (see paragraph 13(b)), a statement by the directors of any other new parties to the Deed of Cross Guarantee (see paragraph 13(b)) and a certificate (see paragraphs 15.1 and 15.2) must be provided to ASIC together with required fee (\$33.00 in January 2008, refer

item 27 of the Corporations (Fees) Regulations 2001). An Assumption Deed must comply with the general requirements for documents set out in regulation 1.07.

26. The statement by the directors under paragraph 13(b) in relation to the lodgment of an Assumption Deed should state, in the opinion of the directors of the entity immediately prior to the execution of the Assumption Deed joining the entity to the Deed of Cross Guarantee that there were reasonable grounds to believe that the entity would be able to pay its debts as they become due and payable.

27. [para 27 deleted]

- 27A. A new holding company cannot be added by way of Assumption Deed. It will be necessary to revoke any existing Deed of Cross Guarantee (using a Deed of Revocation) and to enter into a new Deed of Cross Guarantee.

*Changes to Deeds of Cross Guarantee*

- 27B. Clause 10.1 of the Deed of Cross Guarantee provides that variations may be made to a Deed of Cross Guarantee by the Group Entities and the Trustee to reflect any amendments of ASIC Pro Forma 24 that may be made by ASIC from time to time.

- 27C. Clause 10.1 was added to ASIC Pro Forma 24 in June 2005. If your Deed of Cross Guarantee does not contain Clause 10.1 because it was executed prior to June 2005 and you want to take advantage of any recent changes made to ASIC Pro Forma 24, you will need to seek legal advice on the best way to do this.

*Companies not eligible for relief*

28. An entity in respect of which relief is not sought either by choice or because of ineligibility for relief may nevertheless be a party to the Deed of Cross Guarantee. However, ASIC considers that it would not usually be appropriate for a non-Wholly-owned Entity to be a party to a Deed of Cross Guarantee. A solvency statement is required by paragraph (o)(iv).
29. Where an entity is party to the Deed of Cross Guarantee or is joined as a party to the Deed of Cross Guarantee under an Assumption Deed and is not eligible for relief but subsequently becomes eligible for relief, an opt-in notice (Form 389) should be lodged with ASIC in accordance with paragraph (k) of Class Order [CO 98/1418]. For instance, this may occur because a small proprietary company which is a party to the Deed of Cross Guarantee becomes a large proprietary company during the course of the financial year. ASIC recognises that it may be appropriate for a small proprietary company to continue to be a

party or joined as a party of a Deed of Cross Guarantee where it does not hold shares directly or indirectly in any entities seeking relief and it is on the verge of being a large proprietary company.

*Governing law*

30. The Deed of Cross Guarantee provides that it shall be governed by and construed in accordance with the laws of a specified Australian state or territory and each party agrees to submit to the non-exclusive jurisdiction of the courts of that state or territory. The Deed of Cross Guarantee may be governed by the laws and courts of any Australian state or territory provided that any subsequent Assumption Deeds or Revocation Deeds are governed by the laws and courts of the same jurisdiction (refer paragraph (t) of the class order).

*Processing of Deeds of Cross Guarantee and other documents lodged with ASIC*

31. A Deed of Cross Guarantee, Notice of Disposal, Revocation Deed or Assumption Deed may be lodged at any ASIC Business Centre, or direct to ASIC's Information Processing Centre in Victoria.

*Revocation of deed established in accordance with NCSC Class Order 633*

32. Companies which are parties to a Deed of Indemnity established in order to qualify for relief pursuant to NCSC Class Order 633 may wish to revoke that Deed. Such a Deed is not effective for the purposes of obtaining relief under Class Order [CO 98/1418]. Companies which revoke a Deed of Indemnity should lodge a Notice of Cessation (in the form annexed to NCSC Class Order 633) with ASIC following the revocation.

*Pro Formas*

33. For copies of the relevant Pro Formas, see Pro Forma 24 *Deed of Cross Guarantee* [PF 24]; Pro Forma 25, *Notice of Disposal* [PF 25]; Pro Forma 26, *Revocation Deed* [PF 26]; and Pro Forma 27, *Assumption Deed* [PF 27].

**Annual notice by grandfathered Holding Entity not lodging consolidated financial statements**

34. A Holding Entity which is a large proprietary company will not be required to lodge the consolidated financial statements with ASIC where the Holding Entity and each other party to the Deed of Cross Guarantee is an "Exempt Entity" (refer subparagraph (f)(iii) of the order). Essentially, an "Exempt Entity" is an entity which is not controlled by a foreign company and which is:

- (a) a small proprietary company;
- (b) a large proprietary company which satisfies the requirements of s319(4) of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act); or
- (c) a large proprietary company which would have satisfied the requirements of s319(4) of the Corporations Law (as taken to be included in the Act by s1408(2) of the Act) except that it took advantage of relief under Class Order 98/1418 or a corresponding previous order,

and none of these companies was during 1993 or a later financial year a member of a Closed Group which included a non-Exempt Entity.

35. Holding Entities to which subparagraph (f)(iii) of the order applies are required to lodge Form 390 with ASIC within 4 months after the end of the Relevant Financial Year.

**Opt-in and opt-out notices by Wholly-owned Entities receiving relief**

36. Paragraph (k) of the class order requires each entity receiving relief under the class order to lodge an opt-in notice as follows:
- (a) if the entity did not take advantage of relief available under the class order in the immediately preceding financial year, within 4 months of the end of the Relevant Financial Year in which it takes advantage of the relief; or
  - (b) where the Holding Entity of the Entity changes, within 4 months of the end of the Relevant Financial Year in which the change occurs. Along with the opt-in notice, the Entity or its Holding Entity may need to lodge other documents required by the class order that relate to the change in the Holding Company, eg a new Deed of Cross Guarantee or Assumption Deed.

The opt-in notice should be in the form of Form 389. If an entity ceases to take advantage of relief under the class order then, unless the Entity lodges an annual financial report for the financial year in which relief ceased to apply, an opt-out notice should be lodged with ASIC using Form 399. A company that does not lodge either an annual financial report or a Form 399 after it ceased to take advantage of relief under the class order will not be able to take advantage of the relief under the class order for a future financial year.

37. The class order provides that ASIC may extend the time to lodge an opt-in or an opt-out form. ASIC will only grant such an extension of time in rare and exceptional circumstances.

38. In preparing an application for extension of time, reference should be made to Policy Statement 51 *Applications for relief* [PS 51]. In particular, the application must:
- (a) be made to the ASIC Regional Office in the state or territory in which the company's registered office is located;
  - (b) confirm that all of the other requirements of the class order have been met within the required time;
  - (c) detail the rare and exceptional circumstances which the company believes ASIC should consider in assessing the company's application;
  - (d) be made in writing and be signed by a director or by the company secretary; and
  - (e) be accompanied by the completed form.

### **Comparative information**

39. Entities which cease to qualify for relief under the order will normally be required to include comparative information in their first financial report in accordance with the requirements of the accounting standards. This includes cases where an entity is required to prepare a financial report pursuant to paragraph (u) of Class Order [CO 98/1418]. Auditor's report on Holding Entity financial report
40. Under paragraph (v) the auditor of the Holding Entity must be satisfied that the applicable requirements of paragraphs and subparagraphs (e), (f)(i), (g)(i), (h), (i) and (j) relating to the Consolidated Financial Statements have been satisfied. Paragraph (v) does not apply in relation to Holding Entities which are not required to have their financial report audited (eg a Holding Entity which obtains audit relief under Class Order [CO 98/1417]).
41. The requirements of paragraph (v) of the order will normally be evidenced by the auditor's report on the Holding Entity's financial report pursuant to s308. This auditor's report will not normally need to be modified to reflect the specific requirements of the order. However, where the Consolidated Financial Statements are not required to cover all controlled entities, appropriate modifications to the "scope" paragraphs of the auditor's report may be necessary.

### **Other extensions of time**

42. Unless all of the requirements for relief specified in the order have been met, a company will not have the benefit of relief under

the order and will be required to comply with the requirements of Chapter 2M concerning the preparation and lodgment of audited financial statements and reports. The requirements of the order include:

- (a) a requirement that the holding entity's financial statements contain certain information (paragraph (i)) and be lodged no later than 4 months after the end of the Relevant Financial Year (subparagraphs (f)(ii) and (g)(ii)); and
- (b) [para (b) deleted]
- (c) a requirement that Form 390 be lodged within 4 months of the end of the financial year by the holding entity where all parties to the deed of cross guarantee are Exempt Entities (paragraph (f)(iii)).

43. ASIC is not empowered to grant relief under s340 or 341 of the Act after the deadlines for reporting under Chapter 2M have passed (4 months after balance date for the types of entities which may seek relief under the order). That is, ASIC will not be able to grant relief after the reporting deadline to companies which have failed to meet the requirements of the class order, irrespective of the reasons for that failure. Such companies will be required by the Act to lodge financial statements.

44. However, ASIC may consider an extension of time where an application is made for relief pursuant to s340 of the Act prior to a company's reporting deadline. Such applications should comply with the requirements of s340 and applicants should refer to ASIC Policy Statement 43 *Financial Reports and Audit Relief* [PS 43] and Policy Statement 51 *Applications for relief* [PS 51].

44A. Refer to paragraphs 37 – 39 of this editorial note for information about applying for an extension of time to lodge opt-in or opt-out notices under paragraphs (k) and (ka) of the class order.

#### **ASIC's discretion under paragraph (w)**

45. Under paragraph (w), ASIC may exclude an Entity from relying on relief available under the class order. If ASIC makes such an exclusion and has not revoked it, the Entity must prepare a financial report, directors report and obtain an audit if the Act otherwise requires it. For example, ASIC may exercise the discretion in paragraph (w) when it has reason to believe that:

- (a) a Deed of Cross Guarantee is not effective; or
- (b) a Consolidated Financial Report will not be properly prepared or lodged in a timely manner.