

24 October 2014

Senate Standing Committees on Economics
PO BOX 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

[1] Submission: Committee on Economics – Corporate Tax Avoidance

[1.1] I welcome the opportunity to provide a submission on behalf of Taxpayers Australia Limited (“TAL”) to the Committee on Economics – Corporate Tax Avoidance.

[1.2] The submission is rather brief but I thought it best to briefly outline how the submission fits within the Committee’s terms of reference as well as the main contentions of the submission and then provide an index with details of a slightly more detailed consideration of the relevant issues along with relevant documents. The documents described are then enclosed in the order described.

[2] Main contention

[2.1] The issue of access to financial information for regulators is complex. The regulator must balance the need to allow the efficient functioning of business in a manner that does not impose an overly large regulatory burden on those businesses with the need to ensure compliance with Australian Tax Law.

[2.2] In this context we request that the Committee consider the effect of relevant Class Orders issued by the Australian Securities and Investments Commission (“ASIC”). These Class Orders may result in potentially critical financial information contained in audited Financial Statements prepared in accordance with Chapter 2M of the *Corporations Act 2001 (Cth)* not having to be lodged with ASIC in respect of a multinational group’s Australian subsidiaries. Please consider this issue with reference to the needs and ability of the Australian Taxation Office (“ATO”) to access the relevant financial information for the purposes of assessing relevant tax liabilities.

[2.3] In particular, please consider that although it is common knowledge the Tax Office can independently request Financial Statements of relevant subsidiaries of foreign multinationals, if those subsidiaries are not required to lodge Financial Statements with ASIC, the Financial Statements provided independently to the ATO would not be subject to a legal requirement to be audited by an independent third party or necessarily be prepared in accordance with Chapter 2M of the *Corporations Act 2001 (Cth)*.

[2.3] A secondary issue is consideration of whether the delegated authority that allows ASIC to specify what class of company, registered scheme and disclosing entity contained in s341 of the *Corporations Act 2001 (Cth)* should more appropriately be exercised directly by Parliament. Broadly, as the financial information obtained by ASIC is important not just in respect of the efficient operation of capital markets but also in relation to compliance with taxation laws, is this aspect of the design of these laws being reviewed?

[2.4] As part of this consideration, TAL would be grateful if the Committee could clarify the extent to which ASIC consults the ATO and other parties when formulating Class Orders. We understand that the two bodies talk about the disclosure of Financial Statements more generally. However, we would like greater detail regarding the ATO's specific input into the Class Order system with a particular emphasis on the quality of Financial Statements the ATO requires from Australian subsidiaries of foreign multinationals to ensure quality information is supporting their active compliance.

[3] Terms of Reference

[3.1] The specific terms of reference that this submission fits within are as follows:

- a) the adequacy of Australia's current laws,
- b) any need for greater transparency to deter tax avoidance and provide assurance that all companies are complying fully with Australia's tax laws,
- e) the role and performance of the Australian Securities and Investments Commission in working with corporations and supporting the ATO to protect public revenue

[4] Index of documents

[4.1] The index of documents included in this submission are as follows:

Reference	Description
CO	Slightly more detailed consideration of issues
CO 98-98	Relevant Class Order issued by ASIC

[5] Conclusion

[5.1] The discussion on greater international transparency in relation to tax information by the government and various international bodies is welcomed by TAL. In support of the broad objectives being formulated in this area there is a very real need to review the laws surrounding disclosure of financial information at a national level.

[5.2] This submission is aimed at promoting discussion around a particular aspect of the financial reporting regime that is of concern. This is done in a hope that a rethinking of whether the current framework of laws and indeed the appropriateness of where responsibilities rest, supports an increasing international collaboration and changing expectations in Australian society.

Faithfully,

Vasilios Mavropoulos
Tax Specialist
Taxpayers Australia Limited

ASIC Class Order [CO 98/98]

Small proprietary companies which are controlled by a foreign company but which are not part of a large group

Issued 10/7/1998

Related document: [IR 98/12]

Class Order [CO 98/98] provides relief to small proprietary companies which are controlled by a foreign company from the requirement to prepare and lodge an audited financial report provided that they are not part of a large group.

This class order replaces Class Order [CO 97/2347].

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

This compilation was prepared on 11 August 2009 taking into account amendments up to [CO 09/626]. See the table at the end of this class order.

Prepared by the Australian Securities and Investments Commission.

Australian Securities and Investments Commission Corporations Act 2001 — Subsection 341(1) — Class Order and Revocation

Pursuant to subsection 341(1) of the *Corporations Act 2001* (“the Act”) the Australian Securities and Investments Commission (“ASIC”) hereby makes an order in respect of each company in the class of companies mentioned in the Schedule (“the Company”) relieving the Company from compliance with Parts 2M.2 and 2M.3 insofar as Parts 2M.2 and 2M.3 are applicable pursuant to subsection 292(2)(b) of the Act in relation to a financial year (“the Relevant Financial Year”) where:

- (a) the directors of the Company have resolved, no earlier than three months before the commencement of the Relevant Financial Year, that the relief available under this order be applied in respect of the Relevant Financial Year; and
- (b) unless the Company applied the relief available under this order in respect of the financial year immediately preceding the Relevant Financial Year, notice of the resolution mentioned in paragraph (a) signed by a director or company secretary is lodged with ASIC using Form 384 during the period commencing 3 months before the commencement of the Relevant Financial Year and ending 4 months after the end of the Relevant Financial Year; and
- (c) if the relief available under this order is not applied in respect of the financial year (the *first non-reliance year*) immediately following a financial year in which the relief was applied then, unless the Company lodges an annual financial report prepared under Chapter 2M of the Act for the first non-reliance year, notice the Company has ceased to apply the relief signed by a director or company secretary is lodged with ASIC using Form 394:

- (i) during the period commencing 3 months before the commencement of the first non-reliance year and ending 4 months after the end of the first non-reliance year; or
- (ii) such other time as is approved in writing by an ASIC Officer to whom ASIC's powers and functions under s.340 have been delegated.

[Historical note: [CO 98/98] amended 11/8/2009 [CO 09/626] by

- replacing subparagraph (b). Subparagraph (b) previously read:

“(b) unless the Company applied the relief available under this order in respect of the financial year immediately preceding the Relevant Financial Year, notice of the resolution mentioned in paragraph (a) signed by a director or company secretary is lodged with ASIC using Form 384:

 - (i) if the Relevant Financial Year is the first financial year of the Company after its registration, within three months of date of registration of the Company;
 - (ii) if the Company became controlled by a foreign company during the Relevant Financial Year (and has not previously been controlled by a foreign company during the Relevant Financial Year), within three months of date upon which the Company became controlled by the foreign company;
 - (iii) if the Relevant Financial Year ended between 28 June 2007 and 30 June 2007 (inclusive), within 4 months of the end of the Relevant Financial Year;
 - (iv) if the Relevant Financial Year ends between 1 July 2007 and 30 June 2008 (inclusive), by 31 October 2007; and
 - (v) otherwise, before the commencement of the Relevant Financial Year, but not more than three months before the commencement of the Relevant Financial Year,

or such other time as is approved in writing by an ASIC Officer to whom ASIC's powers and functions under s340 have been delegated; and”; and
- replacing subparagraph (c)(i). Subparagraph (c)(i) previously read:

“(i) within 4 months after the end of the first non-reliance year; or’.

[CO 98/98] previously amended 18/12/2007 [CO 07/822] by:

- in paragraph (b) replacing the word “notice” and replacing it with the term “unless the Company applied the relief available under this order in respect of the financial year immediately preceding the Relevant Financial Year, notice”;
- at the end of paragraph (b) replacing the term “delegated.” with the term “delegated; and”; and
- after paragraph (b) inserting new paragraph (c).

[CO 98/98] previously amended 17/7/2007 [CO 07/505] by:

- in the introductory words deleting the words “ending on or after 1 July 1998”. The introductory words formerly read:

“Pursuant to subsection 341(1) of the *Corporations Act 2001* (“the Act”) the Australian Securities and Investments Commission (“ASIC”) hereby makes an order in respect of each company in the class of companies mentioned in the Schedule (“the Company”) relieving the Company from compliance with Parts 2M.2 and 2M.3 insofar as Parts 2M.2 and 2M.3 are applicable pursuant to subsection 292(2)(b) of the Act in relation to a financial year ending on or after 1 July 1998 (“the Relevant Financial Year”) where:”;
- in paragraph (b) deleting the words “(including, in respect of a year ending on or before 30 September 1999, Form 384 as specified by ASIC for the purposes of Class Order 97/0565 or Class Order 97/2347)”. Paragraph (b) formerly read:

“notice of the resolution mentioned in paragraph (a) signed by a director or company secretary is lodged with ASIC using Form 384 (including, in respect of a year ending on or before 30 September 1999, Form 384 as specified by ASIC for the purposes of Class Order 97/0565 or Class Order 97/2347):”;

- in subparagraph (b)(ii) deleting the word “and” (second occurring);
- replacing subparagraph (b)(iii). Subparagraph (b)(iii) formerly read:
“(iii) otherwise, before the commencement of the Relevant Financial Year, but not more than three months before the commencement of the Relevant Financial Year;” and
- inserting subparagraph (b)(iv) and (b)(v).

Para (b)(i) of [CO 98/98] previously amended 8/2/2000 [CO 00/321] by replacing all occurrences of the word “incorporation” with the word “registration”.]

SCHEDULE

A small proprietary company which is controlled by a foreign company for all or part of the Relevant Financial Year, other than a company which is a part of a group which is a large group.

Interpretation

In this order:

For the purposes of paragraph (a) of this order, a resolution of the directors of the Company made for the purposes of this order as in force immediately before the commencement of ASIC Class Order [CO 07/505] (the “amending order”) is taken to be a resolution made for the purposes of this order as amended by the amending order;

“combined” means the result of aggregating the financial information of the entities in the group, being financial information in respect of each entity for that part of the Relevant Financial Year that each entity is part of the group, and making all such adjustments as would be required in preparing consolidated financial statements in accordance with accounting standards in force at the end of the Relevant Financial Year (even if the standard does not otherwise apply to the financial year of some or all of the entities concerned in respect of that, or any, financial year);

“entity” means a company, a registered scheme, a disclosing entity, any other corporation, a partnership, an unincorporated body or a trust;

[Historical note: Defn "entity" amended on 7/2/2003 by [CO 03/67] by deleting the words "a recognised company" after the words "a disclosing entity,".]

“group” means the Company together with all of the following:

- (a) any entity which controlled the Company at any time during, or at the end of, the Relevant Financial Year and which was registered or formed in Australia or carries on business in Australia; and
- (b) any other entity (“an Other Entity”) which is both:
 - (i) controlled at any time during, or at the end of, the Relevant Financial Year by any foreign company which at the same time controls the Company; and

- (ii) registered or formed in Australia or carries on business in Australia during that part of the Relevant Financial Year when it is controlled by the same foreign company as controls the Company; and
- (c) any entity which is controlled at any time during, or at the end of, the Relevant Financial Year by the Company (whether or not it carries on business or is formed or registered in Australia); and
- (d) any entity which is controlled by an Other Entity during that part of the Relevant Financial Year when the Other Entity is controlled by the same foreign company as controls the company (whether or not it carries on business or is formed or registered in Australia);

[*Historical note:* Paras (a), (b) and (c) of the Schedule to [CO 98/98] were amended 8/2/2000 [CO 00/321] by replacing all occurrences of the word “incorporation” with the word “registration”.]

“large group” means a group, which for the Relevant Financial Year, satisfies at least 2 of the following paragraphs:

- (a) the combined revenue of the group for the Relevant Financial Year is \$25 million, or any other amount prescribed for the purposes of paragraph 45A(2)(a) of the Act, or more;
- (b) the combined value of gross assets of the group at the end of the Relevant Financial Year is \$12.5 million, or any other amount prescribed for the purposes of paragraph 45A(2)(b) of the Act, or more;
- (c) the group has 50 or more employees (part-time employees being counted as an appropriate fraction of a full-time equivalent) at the end of the Relevant Financial Year;

“revenue” means the revenue calculated in accordance with accounting standards in force at the end of the Relevant Financial Year as if all of the entities were reporting entities (even if a standard does not otherwise apply to some or all of the entities concerned in respect of that, or any financial year); and

“value of gross assets” means the value of gross assets calculated in accordance with accounting standards in force at the end of the Relevant Financial Year as if all of the entities were reporting entities (even if a standard does not otherwise apply to some or all of the entities concerned in respect of that, or any, financial year).

[*Historical note:* Interpretation section amended 17/7/2007 [CO 07/505] by:

- inserting before the definition of “combined” the paragraph beginning “For the purposes of paragraph (a) ...” and ending “... as amended by the amending order;”;
- deleting the definition of “gross operating revenue”. The definition formerly read:
““gross operating revenue” means the gross operating revenue calculated in accordance with accounting standards in force at the end of the Relevant Financial Year as if all of the entities were reporting entities (even if a standard does not otherwise apply to some or all of the entities concerned in respect of that, or any, financial year);”;
- replacing paragraph (a) of the definition of “large group”. The definition formerly read:
“(a) the combined gross operating revenue of the group for the Relevant Financial Year is \$10 million or more;”;

- in paragraph (b) of the definition of “large group” replacing the term “\$5 million” with the term “\$12.5 million, or any other amount prescribed for the purposes of paragraph 45A(2)(b) of the Act,”;
- in paragraph (c) of the definition of large group deleting the word “and”; and
- inserting the definition of “revenue” after the definition of “large group”.]

Pursuant to subsection s341(1) of the Corporations Law the Australian Securities and Investments Commission hereby revokes Class Order Number 97/2347 dated 23 December 1997 with effect from:

- (i) in respect of entities which apply the relief provided by Class Order 98/0095 dated 10 July 1998, financial years ending after 7 July 1998; and
- (ii) in all other cases, financial years ending after 30 June 1998.

Dated the 10th day of July 1998

Signed by George Durbridge
as a delegate of the Australian Securities and Investments Commission

[*Historical note:* [CO 98/98] further amended 7/2/2003 [CO 03/67] by replacing references to the Corporations Law with the Corporations Act 2001.]

EDITORIAL NOTE

Class Order [CO 98/98] should be read in conjunction with Policy Statement 58 [PS 58] Financial reporting requirements — Registered foreign companies and Australian companies with foreign company shareholders.

Notes to ASIC Class Order [CO 98/98]**Note 1**

ASIC Class Order [CO 98/98] (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 98/98]	10/7/1998 (<i>see</i> F2006B01085)	10/7/1998	
[CO 00/321]	8/2/2000 (<i>see</i> F2006B00369)	8/2/2000	-
[CO 03/67]	7/2/2003 (<i>see</i> 2006B01086)	7/2/2003	-
[CO 07/505]	13/7/2007 (<i>see</i> F2007L02228)	17/7/2007	-
[CO 07/822]	18/12/2007 (<i>see</i> F2007L04829)	18/12/2007	-
[CO 09/626]	11/8/2009 (<i>see</i> F2009L03131)	11/8/2009	-

Table of Amendments

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

Provision affected	How affected
Introductory words.....	am. [CO 07/505]
Para (b).....	am. [CO 07/505] and [CO 07/822] rs. [CO 09/626]
Para (b)(i).....	am. [CO 00/321]
Para (b)(ii).....	am. [CO 07/505]
Para (b)(iii).....	am. [CO 07/505]
Para (b)(iv).....	ad. [CO 07/505]
Para (b)(v).....	ad. [CO 07/505]
Para (c).....	ad. [CO 07/822]
Para (c)(i).....	rs. [CO 09/626]
Schedule – Interpretation.....	am. [CO 03/67] and [CO 07/505]
Schedule Para (a).....	am. [CO 00/321]
Schedule Para (b).....	am. [CO 00/321]
Schedule Para (c).....	am. [CO 00/321]

[CO] Detailed Consideration – Class Order exemptions ‘Small’ Proprietary Companies

ISSUE 1 – Quality of information and type of entity able to use exemption

[CO-1] Section 341 of the *Corporations Act 2001 (Cth)* delegates authority to ASIC in relation to determining what class of disclosing body may be exempted from providing disclosures, including the lodgement of audited Financial Statements in accordance with Chapter 2M of the *Corporations Act 2001 (Cth)*.

[CO-2] The specific Class Order [CO 98/0098] exempts ‘Small proprietary companies controlled by foreign companies which are not part of a large group’ from appointing auditors or preparing and lodging Financial Reports in accordance with Chapter 2M.

[CO-3] The definition of a ‘large group’ contained within CO98/0098 is as follows:

“large group” means a group, which for the Relevant Financial Year, satisfies at least 2 of the following paragraphs:

- (a) the combined revenue of the group for the Relevant Financial Year is \$25 million, or any other amount prescribed for the purposes of paragraph 45A(2)(a) of the Act, or more;*
- (b) the combined value of gross assets of the group at the end of the Relevant Financial Year is \$12.5 million, or any other amount prescribed for the purposes of paragraph 45A(2)(b) of the Act, or more;*
- (c) the group has 50 or more employees (part-time employees being counted as an appropriate fraction of a full-time equivalent) at the end of the Relevant Financial Year;*

[CO-4] However, the entities to be considered when determining whether a ‘group’ is considered a ‘large group’ are as follows:

“group” means the Company together with all of the following:

- (a) any entity which controlled the Company at any time during, or at the end of, the Relevant Financial Year and which was registered or formed in Australia or carries on business in Australia; and*
- (b) any other entity (“an Other Entity”) which is both:*
 - i. controlled at any time during, or at the end of, the Relevant Financial Year by any foreign company which at the same time controls the Company; and*
 - ii. registered or formed in Australia or carries on business in Australia during that part of the Relevant Financial Year when it is controlled by the same foreign company as controls the Company; and*
- (c) any entity which is controlled at any time during, or at the end of, the Relevant Financial Year by the Company (whether or not it carries on business or is formed or registered in Australia); and*
- (d) any entity which is controlled by an Other Entity during that part of the Relevant Financial Year when the Other Entity is controlled by the same foreign company as controls the company (whether or not it carries on business or is formed or registered in Australia);*

[CO-5] The striking thing is that the foreign parent entity does not seem to be included in a ‘group’ when determining whether that group is a ‘large group’ that cannot avail itself of the ‘Small’ Proprietary Companies exemption. The implication is that where a foreign multinational has Australian based subsidiaries that collectively satisfy two of the following three factors:

- Combined revenues under \$25 million,

- Gross assets under \$12.5 million or a prescribed amount, and
- Less than 50 employees

[CO-6] They will be able to avail themselves of this concession notwithstanding the size of their foreign parent. There is no consideration of the size of the foreign parent entity as far as we can tell. This determination is made by the subsidiary and communicated to ASIC. Importantly a detailed consideration of RG95 *Disclosing entity provisions relief* has not been undertaken. However it stands to reason that foreign resident multinational parent companies would ordinarily not be required to lodge audited Financial Statements in compliance with Australian laws unless they were listed on an Australian stock exchange.

[CO-7] The implications for the ATO are not obvious to ordinary people in the street. The ATO is still able to request documents such as Financial Statements from the Australian subsidiaries of foreign multinationals. However, the Financial Statements of entities that apply this Class Order do not (seemingly) have to have these Financial Statements audited or have them comply with Chapter 2M of the *Corporations Act 2001 (Cth)*. This raises obvious issues in relation to combatting tax evasion or avoidance on the part of foreign multinational corporations.

[CO-8] Taxpayers Australia Limited understands that changing this current exemption to include some consideration of a parent entities size would push costs onto some foreign multinational corporations in order to comply with a higher regulatory burden. However, we would like the Committee and indeed ASIC and the ATO to consider, in light of the Australian community's expectations as well as the ability of the foreign parent entities to absorb relevant costs the benefits of this heightened level of disclosure.

[CO-9] This type of change would enhance assurance of the financial information of multinational corporations and allow a greater level of uniformity of information reported to the ATO. The compliance risk profile of Australian subsidiaries of foreign multinational corporations would be lowered and the ability to conduct audits in this space would be improved. The added benefit is that this type of change would be in congruence with international objectives in relation to reporting by multinationals.

ISSUE 2 – Responsibility to determine eligibility to exemption

[CO-10] The second major issue under discussion is the appropriateness of allowing ASIC to determine what class of disclosing entity will be exempted from auditing their Financial Statements and having them comply with Chapter 2M *Corporations Act 2001 (Cth)*.

[CO-11] ASIC clearly has the most suitable personnel and expertise to understand how foreign multinational businesses will apply relevant Class Orders. However, aside from the issue of independence the regulator faces in both determining eligibility to exemptions from reporting as well as policing the application of those exemptions, another issue arises. The reliance on Financial Statements by the ATO means any determination made by ASIC will affect the type of information the ATO is obtaining from the subsidiaries of multinationals.

[CO-12] It is understood that on consolidation of Financial Statements subsidiaries would need to adjust their accounts before they are amalgamated with those of a large foreign holding corporation. However, the critical requirement to independently audit Financial Statements separately from those of the foreign parent and also to have Chapter 2M of the *Corporations Act 2001 (Cth)* apply should be considered with reference to both the ATO and ASIC's needs.

[CO-12] Perhaps revisiting whether the delegated authority under Section 341 of the *Corporations Act 2001 (Cth)* is still appropriate is worthwhile in this context. Note that this power could be retained by Parliament with input being given to it from both the ATO and ASIC. Alternatively, the power to make these determinations could legislatively be split between ASIC and the ATO.