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A Review of ASIC Relief from Financial Reporting Obligations

The Australian Securities & Investments Commission has this month released Regulatory Guide 43 in relation to obtaining relief from financial reporting obligations under the Corporations Act 2001 (Cth).

The Corporations Act generally requires all public companies, large proprietary companies and small proprietary companies that are controlled by a foreign company, to prepare financial reports each financial year. ASIC has the power under the Corporations Act to grant a company relief from its reporting obligations if compliance with those obligations would:

- make the financial report or other reports misleading;
- be inappropriate in the circumstances; or
- impose unreasonable burdens.

Compliance would make the financial report or other reports misleading

ASIC has stated that to fall within this criterion a company must demonstrate that compliance will cause readers of the reports to be misled. If the insertion of appropriate notes to a financial report could rectify its misleading nature, ASIC will not grant financial reporting relief under this criterion. ASIC has also stated that it considers that this criterion will rarely be satisfied.

Compliance would be inappropriate in the circumstances

In *Mazda Australia Pty Ltd and Ors v ASIC* (1992) 8 ACSR 613, the Administrative Appeals Tribunal held that disclosure would be "inappropriate in the circumstances" where, if the company was required to comply with its financial reporting obligations, the law would be applied in a way that was not intended by the legislature. For example, ASIC may grant financial reporting relief if other legislation specifically provides that that company is not required to disclose its financial reports.

Relief will not be available to a company under this criterion merely because that company:

(a) is only required to prepare financial reports because it falls within the definition of a "large proprietary company" under the Corporations Act; or

(b) is not a "reporting entity" under accounting standards.

Compliance would impose unreasonable burdens

A company may be entitled to obtain financial reporting relief under this criterion where disclosure of its financial reports would cause it economic harm – for example, because competitors would gain access to the company's cost structure and financial operations which could be the company's source of competitive advantage.

In *Re SAQ and ASIC* (2005) 55 ACSR 243, the Administrative Appeals Tribunal found that disclosure of the applicant's financial reports would impose unreasonable burdens because there was a likelihood that competitors could take advantage of the information in its financial reports to price the company out of the market. The Tribunal took into account that the company was a new, small company trying to succeed in a highly competitive and over-supplied market and that, due to the type and potential importance of products sold by the applicant, there would be a consequential economic impact on the government and the community if the applicant's business failed.

In assessing what constitutes an "unreasonable burden", the Tribunal stated that:

"The notion of unreasonableness imports an objective standard just as it does in other contexts. In assessing unreasonableness, regard must be had, as Heerey J said in Incat Australia Pty Ltd v Australian Securities and Investments Commission, to the nature of the requirement, the policy objective of the legislation and the extent of the economic detriment, if any, likely to flow to the company or entity making the application for relief."

Relief will not be available to a company under this criterion merely because:

(a) competitors of the company would find out the company's unit cost of production. There must be evidence to the effect that disclosure of the prescribed information would result in the company suffering serious economic detriment because of the nature of the company's business and the market;

(b) disclosure would amount to an invasion of privacy of the remuneration received by the directors or senior officers of the company;

(c) the company has limited funds or faces financial uncertainty; or

(d) the company is a charitable or other not-for profit organisation.

Further information and advice concerning financial reporting obligations and relief can be obtained by contacting our team.

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