



ASIC

Australian Securities & Investments Commission

REPORT 95

Overview of decisions on relief applications (October to December 2006)

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About this report

1 ASIC has powers under the *Corporations Act 2001* (the Act) to exempt a person or class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons. This report deals with the use of our exemption and modification powers under the provisions of the following Chapters of the Act: 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services).

2 The purpose of the report is to improve the level of transparency and the quality of information available about decisions we make when we are asked to exercise our discretionary powers to grant relief from provisions of the Act.

3 The report covers the period beginning 1 October 2006 and ending 31 December 2006. During this period we decided 582 applications. We granted relief in relation to 494 applications and refused relief in relation to 88 applications.

4 This report does not provide details of every single decision made in that period. It is intended to provide examples of decisions that demonstrate how we have applied our policy in practice. We use our discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where we can facilitate businesses without harming other stakeholders.

5 In this report we have outlined matters in which we refused to exercise our discretionary powers as well as matters in which we granted relief. Prospective applicants for relief may gain a better insight into the factors we take into account in deciding whether to exercise our discretion to grant relief. We have also included some examples of limited situations in which we have been prepared to take a no-action position when instances of non-compliance have been brought to our attention.

6 The appendix to this report details the relief instruments we have executed for matters referred to in the report. Class orders are available from our website via www.asic.gov.au/co. Instruments are published in the ASIC Gazette, which is available via www.asic.gov.au/gazettes. The information and media releases referred to throughout the report are available via www.asic.gov.au/mr.

7 Applications for relief are assessed by the Applications and Advice division of ASIC's Regulation directorate. Applications must be in writing and should address the requirements set out in Policy Statement 51 *Applications for relief* [PS 51]. Relief applications can be submitted electronically to **applications@asic.gov.au**. More information on applying for relief is available at **www.asic.gov.au/fsrrelief** and **www.asic.gov.au/cfrelief**.

8 Throughout this report, references to particular sections, subsections and paragraphs of the law are references to the *Corporations Act 2001* and references to particular regulations are references to the Corporations Regulations 2001 (the Regulations).

Section 1: Licensing relief

1.1 This section outlines some of our decisions on whether to grant relief under s911A(2) and 926A(2) from the requirement to hold an Australian financial services (AFS) licence.

Employee share schemes

Relief to extend scheme to employees of franchisees

1.2 We granted licensing relief to the operator of an employee share scheme for the offer and issue of shares to employees of franchisees of the operator. The operator could not rely on Class Order [CO 03/184] *Employee share schemes* because offers of shares in the operator would be made to employees of franchisees, rather than employees of the operator. We were satisfied that the scheme met our policy because:

- the operator and franchisees operated as part of a single network with common goals;
- the scheme was not for a fundraising purpose; and
- the scheme promoted mutual long-term interdependence between the operator and its employees.

Scheme relying on statutory disclosure exemption

1.3 We granted licensing relief to the operator of an employee share scheme so that it could offer and issue \$1000 worth of its shares to employees and certain contractors and where the shares had been listed for less than 12 months. The operator did not need to provide a prospectus to the employees seeking to participate in the plan as a result of the disclosure exemption under s708(15). The operator therefore could not rely on licensing relief under [CO 03/184] because the class order was drafted such that all other relief, including licensing relief in the Fourth Exemption, was contingent on reliance on the disclosure relief provided in the First, Second or Third Exemptions. Relief was based on our policy in Policy Statement 167 *Licensing: Discretionary powers* [PS 167] rather than Policy Statement 49 *Employee share schemes* [PS 49]. We were satisfied relief should be granted in this circumstance because:

- the cost and administrative burden of holding an AFS licence outweighed the regulatory benefits;
- consumer risk was limited and an employee would only benefit from the offer of shares, because even if there was a drop in the share price, the shares were offered for no consideration other than service; and

- the aim of the scheme was not fundraising.

Other licensing relief

Treating an APRA approved guarantee as an eligible undertaking under [PS 166]

1.4 We allowed a custodian of a superannuation entity to treat an ‘approved guarantee’ obtained for the purpose of meeting its obligations under s123 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) as an ‘eligible undertaking’ when calculating its net tangible assets under Section C of Policy Statement 166 *Licensing: Financial requirements* [PS 166]. The licensee could only treat the approved guarantee as an eligible undertaking while the licensee continued to be subject to the SIS Act requirements. Further, the custodian was under an obligation to notify ASIC as soon as it became aware of certain claims being made against the approved guarantee.

Non-cash payment facility exceeding low value threshold in [CO 05/736]

1.5 We granted licensing relief to a direct debit and credit card billing and payment provider for the operation of a non-cash payment facility. Under the facility, customers of various businesses authorised the operator to make regular non-cash payments to the business by direct debit or credit card. The operator could not rely on Class Order [CO 05/736] *Low value non-cash payment facilities* because 0.2% of transactions that the operator processed exceeded \$1000. [CO 05/736] only provided relief where the total amount available for the making of non-cash payments under all facilities of the same class held by the one client did not exceed \$1000 at any one time. We considered the requirement to hold an AFS licence for this facility to be disproportionately burdensome to the operator given that only 0.2% of transactions could not come within the relief. The relief was conditional on the amount that was available for the making of non-cash payments under all facilities of the same class for any one person at any one time not exceeding \$15,000 for no more than 1% of clients.

Information releases

1.6 The following information releases relate to licensing relief granted during the period of this report.

[IR 06-34] *ASIC’s approach to superannuation clearing houses and other electronic payment facilities.*

[IR 06-42] *ASIC releases updated policy on real estate companies.*

[IR 06-45] *ASIC further extends transitional compensation arrangements for AFS licensees.*

[IR 06-46] *ASIC further extends interim relief for actuaries.*

Section 2: Disclosure relief

2.1 This section outlines some of the applications we have decided that relate to the Chapter 6D requirements to provide prospectuses and other disclosure documents and the Chapter 7 requirements to provide Financial Services Guides (FSGs), Product Disclosure Statements (PDSs), Statements of Advice (SOAs) and other disclosures.

Relief relating to prospectuses

Employee share scheme disclosure relief

2.2 In the matter referred to at paragraph 1.2, we also granted relief from the need to provide a prospectus for the offers made under the schemes.

Exemption from advertising restrictions to allow reference in prospectus to future fundraising by another

2.3 We granted relief from s734(2) to allow the applicant to publish certain statements in a prospectus for the issue of shares. The statements related to a proposed subscription right for subscribers under the prospectus in a separate offer of stapled securities by another listed party. The proposed subscription right had already been disclosed to the market via an explanatory memorandum issued by the other party. Relief was granted because:

- some potential investors already knew about the proposed subscription right;
- the stapled securities to be offered were in a listed class; and
- the link between the securities under the prospectus and the right to participate in the proposed stapled security offering was sufficiently strong to be material to a decision to invest in the securities under the prospectus.

Modification excluding 'US-style' underwriter from offeror liability

2.4 We granted relief to an underwriter (and its directors) from the liability attaching to an offeror (and its directors) where a disclosure document is defective (s729 and s730(3)). Under the proposed underwriting, the underwriter would purchase the issuer's underwritten securities, which would be on-sold to the subscriber. As a result, the underwriter would be considered an 'offeror' for the on-sold securities. We granted relief where the issuer (and original offeror) would have 'offeror's liability'—both for the issue to the underwriter and the on-sale by the underwriter to subscribers. The underwriter would still be liable in their capacity as underwriter under s729.

Relief relating to FSGs

FSG referring to name and number of surrendered AFS licence

2.5 We refused to issue a no-action letter to a company for the provision of a defective FSG following a group restructure. The applicant wanted to be able to continue issuing an FSG that referred to the name and number of a surrendered AFS licence, until such time an updated version of the FSG had been produced and reprinted. We considered the FSG to be a key disclosure document under the Act that sets out the terms and basis under which a person would provide a financial service and that a no-action letter should not be granted in this circumstance.

FSG and SOA relief for provider of a superannuation calculator

2.6 We refused to grant relief to the provider of a proposed superannuation calculator from the need to provide an FSG (Div 2 of Part 7.7) and an SOA (Div 3 of Part 7.7) on the basis that it was unnecessary. The calculator did not make any recommendations about financial products, it did not advertise or promote financial products, and it enabled all non-statutory assumptions to be changed. We were satisfied from the information provided that the provider could rely on relief already available under Class Order [CO 05/1122] *Relief for providers of generic calculators*.

Relief relating to PDSs

PDS referring to name and number of surrendered AFS licence

2.7 In the matter referred to at paragraph 2.5, we decided to issue a no-action letter to the company for the provision of a defective PDS following a group restructure. The references made in the PDS that were incorrect following the restructure were minor and the company required time and resources to update all documentation to reflect intra-group structural changes. Our no-action position was for a one-month period only.

Dollar disclosure relief for mutual fund offering various mutual risk products

2.8 We granted relief to a company operating a mutual fund for various mutual risk products from s1013D(1)(m), which requires certain amounts to be stated as dollar figures in the PDS. The company could not rely on the relief provided under Class Order [CO 04/1431] *Dollar disclosure: Costs of derivatives, foreign exchange contracts, general insurance products and life risk insurance products* because the company's products did not qualify as general insurance products. In addition, the company could not rely on Class Order [CO 04/1430] *Dollar disclosure: Unknown facts or circumstances*

because the facts were known, but of such a nature it would be unreasonable to have to specify them in the PDS. Although it was arguable that the facts were known, the factors determining level of cover and costs and charges for the product were a range of variables that depended upon the completion of an application form. Further, the company had discretion as to whether to accept applications for cover, pay claims and whether to call for higher subscriptions from members. We were satisfied with the company's submissions that the dollar disclosure requirements would be unreasonably burdensome and not in the interests of the fund's members.

Other disclosure relief

Relief from the disclosure provisions in Part 7.9

2.9 In the matter referred to at paragraph 1.5, we granted relief to the operator from the disclosure requirements in Part 7.9 based on [CO 05/736].

Accountants providing an ATO audit service

2.10 We refused to grant relief to an accounting group from the disclosure requirements in Part 7.9. The accounting group intended to offer its existing clients a service whereby a group member would provide professional services to the client if the ATO audited the client during that year. The service may be considered a facility for managing a financial risk and therefore a financial product. However, we considered that:

- the group's ordinary accounting services did not have a financial product purpose;
- the audit service was incidental to those accounting services; and
- the accounting and audit services when taken as a whole did not have a financial product purpose.

As a result, we refused relief on the basis that the service fell within the incidental product exemption in s763E and relief was therefore unnecessary.

UK basic deposit product offered to persons expatriating to the UK

2.11 We granted relief to an overseas bank from a number of disclosure requirements in Divs 3, 4, 5 and 7 of Part 7.9 (including the need to provide significant event disclosure, periodic statements and cooling off notices) for the issue of its basic deposit product and linked non-cash payment facilities in this jurisdiction. The products were offered through a licensed intermediary to Australian retail clients intending to expatriate to the United Kingdom. We granted relief on condition that:

- the client could not use the product prior to arriving in the country of issue;
- disclosure at the point of sale notified the client that the product was not regulated in Australia and that dispute resolution mechanisms were only available in the country of issue; and
- the bank reasonably believed that the client was relocating to the United Kingdom.

We considered that the broad regulatory equivalence of the United Kingdom provided adequate protection, particularly since the product cannot be used in this jurisdiction.

Trustee of a pooled superannuation trust is also the sole unit holder

2.12 We granted a no-action letter to the trustee of a pooled superannuation trust (PST) for its failure to give a periodic statement (s1017D) and provide information about the trust (s1017DA) for the 2005–2006 reporting period. The trustee of the PST had become the sole unit holder in the PST due to the retirement of other trustees and the redemptions of all other interests in the trust. Without relief, the trustee would have been required to give itself, as a unit holder of the trust, a periodic statement and provide information about the trust. We refused to provide indefinite relief where the trustee was and intended to remain the sole unit holder in the PST. We were concerned about the dual roles as trustee and unit holder, given the requirement in s152 of the SIS Act that a public superannuation entity (including a PST) must be constituted by deed as a trust. We considered that a no-action position for the 2005–2006 reporting period could be granted in accordance with our policy in Policy Statement 108 *No-action letters* [PS 108].

Exchanging interests in registered schemes operated by the same responsible entity

2.13 We granted relief to the responsible entity of a registered scheme from the need to issue the interests in one scheme (merging scheme) without receiving an eligible application under s1016A(2) and from the need to send a PDS to a nominated address under s1015C. Relief was required to facilitate the exchange of interests in the merging scheme for interests of the same value in another scheme operated by the same responsible entity. The merging scheme was originally established to operate for a fixed term that was due to expire. Members were therefore given the opportunity to vote on a proposal to either terminate the merging scheme or to exchange their interests. The proposal was disclosed through a notice of meeting. We allowed the PDS for the issue of interests in the other scheme to be sent along with the notice of meeting, and the issue of interests without an eligible application. We considered the policy

rationale underpinning Class Order [CO 02/262] *Applications to switch managed investment products*, which grants relief from the eligible application requirement where interests in a registered scheme are redeemed and the proceeds are reinvested into another registered operated by the same responsible entity (i.e. a ‘switching’ scenario). We considered the proposal to be a form of switching. Further, we noted that where the proposal is approved, the exchange would be compulsory. We were satisfied that, in this circumstance, the regulatory benefits of strict compliance with the Act were unreasonably burdensome.

Extension of time to provide periodic statements

2.14 We refused to grant relief to the trustee of a superannuation fund to extend the time it had to provide periodic statements to members under s1017D(3). The trustee anticipated that it would not be able to provide all fund members with their periodic statements by the due date. Section 1017D(3) requires periodic statements to be given as soon as practicable, and in event within six months, after the end of the relevant reporting period. We refused relief because the trustee was required to provide those statements to members as soon as practicable after the end of the period even if it could not do so within six months.

Time critical disclosure ‘in writing’ by distributors

2.15 We clarified the administrative intention of a condition in Class Order [CO 05/1070] *General insurance distributors* that required certain information to be provided to a client. [CO 05/1070] modifies the Act so that a distributor of an AFS licensee authorised to deal in general insurance products does not need to hold an AFS licence or be formally appointed as an authorised representative. We considered the administrative intention behind [CO 05/1070] was such that distributors could provide oral disclosure for time-critical PDSs and FSGs in the same way as licensees and authorised representatives. Individual insurers seeking administrative certainty on this issue should apply for individual relief to clarify their respective positions.

Information releases and class order

2.16 The following information releases and class order relate to the disclosure relief granted during the period of this report.

Information releases

[IR 06-34] *ASIC’s approach to superannuation clearing houses and other electronic payment facilities.*

[IR 06-35] *ASIC urges authorised reps to refer to licensees in business documents.*

[IR 06-39] *ASIC reports on monitoring superannuation fees and costs.*

[IR 06-42] *ASIC releases updated policy on real estate companies.*

[IR 06-43] *PDS relief for multiple deemed issuers of exchange traded derivatives.*

Class order

[CO 06/682] *Multiple derivative issuers.*

Section 3: Managed investments relief

3.1 This section sets out some of the circumstances in which we have granted or refused relief under s601QA from the provisions of Chapter 5C.

On-market buy-back of interests in listed schemes

3.2 We granted relief to the responsible entity of two registered schemes (the interests of which formed part of a listed stapled security) so that it could conduct an on-market buy-back of the stapled interests. We granted relief from the withdrawal procedures for non-liquid schemes (Part 5C.6), the need for an independently verifiable withdrawal price in the schemes' constitutions (s601GA(4)), the prohibition on certain acquisitions (s606) and, for the avoidance of doubt, the equal treatment rule (s601FC(1)(d)). Relief was conditional and aimed at providing sufficient protection (e.g. from dilution) and disclosure to the members of the schemes. For instance, the buy-back was limited to 10% of the smallest number of votes attaching to voting interests in the stapled scheme at any time in the last 12 months (10/12 limit), which was similar to the 10/12 limit under Chapter 2J. In granting relief, we noted that the buy-back of interests in listed schemes could not be equated exactly with the buy-back of shares in listed companies.

3.3 We later amended the relief to the responsible entity of the same schemes so that the 10/12 limit could be increased to 17.5% of the smallest number, at any time during the last 12 months, of votes attaching to voting interests in the stapled scheme. This was the estimated maximum percentage of interests to be bought back. The relief was subject to additional conditions that:

- there be a pricing control mechanism; and
- the responsible entity and its associates were not permitted to vote on the buy-back resolution, unless voting in a fiduciary capacity to the extent allowed under s253E.

We also released a consultation paper about this and other similar applications (see Information Release [IR 06-44] *ASIC consults on listed managed investment scheme buy-backs policy*).

[CO 05/26] where sale of forfeited interest occurs within 10 weeks

3.4 We granted relief to the responsible entity of a registered scheme, which formed part of a stapled security, to enable it to rely on relief under s601GAA(8), as notionally inserted by Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests*, to set the price for the sale of forfeited interests where part of the issue price of the interest remains unpaid. Section 601GAA(8) requires the sale of the forfeited interests to be

made in accordance with s254Q. Section 254Q(2) requires the forfeited interest to be offered for sale within six weeks. The responsible entity sought an extension to a 10-week period. We were satisfied that relief did not diminish consumer protection in the circumstances.

[CO 05/26] where interests are quoted on the APX

3.5 We refused to modify s601GAA(2) and 601GAA(8), as notionally inserted by [CO 05/26], so that the constitution of a registered scheme gives the responsible entity the discretion to set the price for interests quoted on the Australian Pacific Exchange (APX). The interests in the scheme form part of the stapled security quoted on the APX. [CO 05/26] only applies to interests in a class of interests quoted on the financial market of the Australian Securities Exchange (ASX). We refused relief because we were not satisfied that investor protection would not be reduced. Further, we were not satisfied the financial market for this particular product had sufficient depth and liquidity to enable it to act as a reliable independent pricing mechanism.

Information release

3.6 The following information release relates to the managed investments relief granted during the period of this report.

[IR 06-44] *ASIC consults on listed managed investment scheme buy-backs policy.*

Section 4: Mergers and acquisitions relief

4.1 This section outlines some of the circumstances in which we have granted or refused relief under s655A and 673 from the provisions of Chapters 6 and 6C and in which we have exercised our powers under s672A.

Notices of variation to shareholders who are no longer members of the target

4.2 We granted relief to a takeover bidder from the requirement in s650D to send notices of variation extending the offer period of an off-market bid to certain target shareholders. The relevant shareholders had not accepted the offer but were not members of the target company at the time of the variation. The shareholders ceased to be members of the target company because they had transferred their shares to another person. Relief was conditional on the bidder sending notices of variation to all target shareholders to whom such shares had been transferred and who were therefore entitled to accept the bidder's offer under s653B(1) at the time of the variation.

Takeover bids for voting shares

4.3 We modified item 1 of s611 to clarify that the takeover bid exemption to the prohibition in s606 applied only where a bid is made for voting shares themselves, and not to some other right. The modification was stated to apply 'for the avoidance of doubt', given ASIC's general view that the intention of item 1 of s611 should not provide an exemption for bids made for third party securities (i.e. securities issued by a party other than the body who issued the securities underlying the third party securities).

Limited cash pool consideration

4.4 We granted relief to extend, by a maximum of another two weeks, the time at which full consideration must be paid under a takeover bid (s620(2)). The relief applied where the bid offered two alternative forms of consideration, at the acceptor's discretion—either all scrip, or a mixture of cash and scrip (where the total amount of cash to be used as consideration was limited). The short extension gave the bidder time to maximize the amount of cash received by acceptors who had indicated an interest in the cash and scrip alternative. The relief was conditional on the bidder paying part of the cash component as an 'instalment' within the usual statutory timeframes.

Procedural relief for compulsory acquisition and compulsory buy-out notices

4.5 We granted relief from s661B and 662A to a bidder undertaking a compulsory acquisition of the target's securities. Section 661B requires the

bidder to prepare a compulsory acquisition notice, lodge the notice with ASIC and give the notice to the relevant market operator. The relief required that only a pro-forma compulsory acquisition notice be lodged. Without relief, it was arguable that s661B required each individual notice to be lodged with ASIC and given to the market operator. In addition, s662A requires a bidder to offer to buy out the remaining holders of bid class securities where the bidder and their associates have relevant interests in at least 90% of the bid class securities at the end of the bid. The relief ensured that the bidder was not required to send a compulsory buy-out notice to persons to whom the bidder had already sent a compulsory acquisition notice.

Bidder's statement approval relief for a director with a conflict of interest

4.6 We granted relief by modifying s637(1), which allowed the bidder to finalise its bidder's statement without the approval of one of its directors. The director had not participated in the preparation for the transaction because he had a conflict of interest in connection with the transaction. We considered relief was appropriate given that:

- the nature of the conflict of interest was inextricably linked to the takeover bid;
- relief was not sought for the predominant purpose of limiting the relevant director's liability under the takeover bid;
- relief was not sought because of a dispute over the content of the bidder's statement; and
- the concerns relating to the conflict of interest outweighed the concerns regarding liability.

'Joint bid relief' under a scheme of arrangement

4.7 We granted relief from s606 to the members of a consortium proposing to acquire all of the ordinary shares in an ASX-listed company (Company) via a scheme of arrangement under Part 5.1. Some of the consortium members could not enter into agreements to initiate the proposal without acquiring a relevant interest in issued voting shares in the Company held by another consortium member. While any acquisitions of a relevant interest in the Company under the scheme of arrangement itself would have been covered by an exemption from s606 (under item 17 of s611), entry into the relevant agreements was not covered. The relief was broadly consistent with our policy: see Media Release [MR 01/295] *ASIC clarifies its position on joint bids*. The relief was conditional on:

- the approval of the scheme of arrangement by a separate and distinct class of shareholders that comprised neither the consortium members or their associates;
- the merger implementation deed containing a clause requiring the consortium members to consult with ASIC if a competing proposal emerged; and
- the consortium agreeing to use its best endeavours to have the Company engage an independent expert to assess the merits of the proposal.

Extension of a bid to recently issued securities

4.8 We modified Chapter 6 to allow a bid to extend to securities issued after the date set by the bidder for determining the composition of the bid class under s617(1)(b). During the bid period the target had entered into an agreement with a third party for that third party to cancel certain rights it held over an asset of the target in exchange for target shares. The bidder sought to include the newly issued securities in the bid class. We considered relief was consistent with the policy objective of extending the opportunity to participate in a bid, and the application of the compulsory acquisition provisions to securities issued up until the end of the offer period. The target company and the third party holder of the new securities did not object to the relief. Relief was granted on the conditions contemplated in our policy as stated in Policy Statement 159 *Takeovers, compulsory acquisitions and substantial holding notices* [PS 159] at [PS 159.37] and [PS 159.38].

Disaggregation of group holdings for purposes of s606

4.9 We refused to modify s611 to disaggregate certain interests held by the responsible entity of a registered scheme. The responsible entity also acted as the scheme's investment manager and as a promoter and underwriter of the scheme. The responsible entity proposed to be issued interests in the scheme in lieu of cash fees. For the purposes of applying the prohibition in s606, the responsible entity sought to disaggregate the 'fee' interests from other interests held in the scheme by the responsible entity's related entities. We refused relief because we considered it inappropriate to disaggregate interests where the holders of the various interests (the responsible entity and its related entities) could work together to influence the control of the scheme.

Section 5: Conduct relief

5.1 This section outlines some of our decisions on whether to grant relief from certain conduct obligations imposed by Chapters 2D, 2M and 7.

Financial reporting and auditor requirements

Extension of term for playing a significant role in an audit of a listed company

5.2 We granted relief from s324DA(1) to allow an auditor to play a significant role in the audit of a listed company for a further financial year. Section 324DA(1) restricts an individual from playing a significant role in the audit of a listed company for more than five successive financial years. The listed company had a shortened financial year because of a change in its balance date. We granted relief because the usual statutory period of five financial years was shortened by the change in the balance date.

Wholly owned entities unable to rely on [CO 98/1418]

5.3 We granted relief to several groups of companies who could not rely on Class Order [CO 98/1418] *Wholly owned entities* due to the failure of one or more companies in the group to comply with the conditions of [CO 98/1418]—e.g. the condition that each member of the relevant deed of cross guarantee have a three-year history of compliance with certain financial reporting provisions. Some of the companies could not meet this condition because they were incorporated or had become large proprietary companies within the preceding three years. In granting relief, we considered whether the companies' compliance with the requirements of Chapter 2M would:

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

The relief granted was similar to the relief given under [CO 98/1418]. The relief was conditional on the companies entering into an individually tailored deed of cross guarantee' similar to Pro Forma 24 *Deed of cross guarantee* [PF 24]. The relief is structured to expire at the future point in time when the companies are able to rely on [CO 98/1418].

Subordinated debt under [CO 98/1417]

5.4 We refused to alter the standard terms of Pro Forma 183 *Deed of subordination* [PF 183] so that the borrower under that deed could repay part (or all) of a subordinated loan at its discretion, without ASIC's written

approval. The applicant intended to subordinate certain ‘revolver loans’ so that it could meet the annual financial requirements in Class Order [CO 98/1417] *Audit relief for proprietary companies*. The revolver loans required full repayment at the end of each specified period, but were generally rolled over after repayment. We refused relief because the proposed amendment was contrary to the policy underlying cl 6.2 of [PF 183], i.e. to ensure protection of the company’s financial position from any deterioration caused by the requirement to service subordinated debt.

Financial service provider requirements

Hawking relief

5.5 In the matters referred to at paragraphs 1.2 and 1.5, we also granted relief from the hawking provisions.

UK basic deposit product offered to persons expatriating to the UK

5.6 In the matter referred to at paragraph 2.11, we also granted relief to the overseas bank from Div 3 of Part 7.6 (except s912C, 912CA and 912E), including provisions on compensation arrangements, breach notifications and the citation of licence numbers in documents.

Accountants providing ATO audit service

5.7 In the matter referred to at paragraph 2.10, we also refused to grant relief to an accounting group from the conduct requirements in Part 7.8.

Information and media releases

5.8 The following information and media releases relate to the conduct relief granted during the period of this report.

Information release

[IR 06-34] *ASIC’s approach to superannuation clearing houses and other electronic payment facilities.*

Media release

[MR 06-390] *Rotation a focus of the next round of ASIC’s audit inspections.*

Section 6: Other relief

6.1 This section outlines some of the decisions we have made that do not fall within any of the categories mentioned earlier and that may be significant to other participants in the financial services and capital markets industries.

Interests issued to large regulated superannuation fund not as a ‘retail client’

6.2 We granted relief to the trustee of a pooled superannuation trust (PST) from having to treat certain superannuation funds as retail clients, as required under s761G(6)(a). The PST only issued interests to large sophisticated superannuation funds with expertise in financial services. The relief granted only applied to clients that were regulated superannuation funds with at least \$10 million in net assets, which was consistent with other exemptions in the Act relating to PSTs.

Definition of ‘sophisticated investor’ and ‘wholesale client’

6.3 We refused to modify the definition of ‘sophisticated investor’ to align it with the ‘wholesale client’ provisions. The applicant intended to make invitations in single offer documents for both interests in unregistered managed investment schemes and securities. The applicant submitted that regs 7.6.02AB and 7.6.02AC, which modified s761G, had made the wholesale client test in s761G broader than the equivalent sophisticated investor provisions in s708(8), which was not modified by those regulations. We refused to grant relief on the basis that such relief was a matter for law reform and was not an appropriate use of ASIC’s discretionary powers.

[CO 05/26] where interests are quoted on the APX

6.4 In the matter referred to at paragraph 3.5, we also refused to grant relief to the responsible entity of the registered scheme and the company (the shares of which are stapled to the interests in the scheme) from the need to prepare and provide certificates or other title documents on the issue and transfer of stapled securities under s1017H. The applicants proposed an alternative procedure of maintaining a stapled securities register. We were not satisfied that the applicants had met the statutory threshold in s1075A(2), in particular, that:

- the proposal would ensure that future transfers of the stapled securities would be carried out on the basis of secure and reliable evidence of title; or
- the proposal would make the transfer of the stapled securities more efficient.

Media release

6.5 The following media release relates to other relief granted during the period of this report.

[MR 06-402] *ASIC welcomes regulation review proposals paper.*

Appendix: ASIC relief instruments

This table lists the relief instruments we have executed for matters that are referred to in the report. The class orders are available from our website via www.asic.gov.au/co. The instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes.

Note that references in the table to particular provisions of the law are references to the *Corporations Act 2001* and references to particular regulations are references to the Corporations Regulations 2001.

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
1.2 2.2 5.5	Bendigo Bank Limited (ACN 068 049 178)	[06/0809] (in 39/06)	25/09/2006	s741(1)(a) and s911A(2)(l) This instrument grants relief to the operator of an employee share scheme for the offer and issue of its shares to eligible employees, including employees of its franchisee.	
1.3	Wotif.com Holdings Limited (ACN 093 000 456)	[06/0913] (in 43/06)	23/10/2006	s741(1)(a) and s911A(2)(l) This instrument grants relief to the operator of an employee share scheme so that it could offer and issue \$1000 worth of its shares to employees and certain contractors for no monetary consideration and where the shares have been listed for less than 12 months.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
1.5 2.9 5.5	Ezypay Pty Limited (ACN 003 340 734)	[06/1123] (in 01/07)	20/12/2006	s911A(2)(l), s926A(2)(a), s951B(1)(a), s992B(1)(a) and s1020F(1)(a) This instrument grants relief to a direct debit and credit card billing and payment provider for the operation of a non-cash payment facility.	
2.3	Magellan Flagship Fund Limited (ACN 121 977 844)	[06/0962] (in 47/06)	02/11/2006	s741(1)(a) This instrument allows the company to make reference to a future offer by another company in its prospectus.	
2.4	Suncorp-Metway Limited (ACN 010 831 722) and Citigroup Global Markets Australia Pty Limited (ACN 003 114 832)	[06/1080] (in 50/06)	07/12/2006	s741(1)(b) This instrument ensures that the issuer, rather than a 'US-style' underwriter, of a rights issue is liable as offeror, and limits the underwriter's liability to that of an underwriter.	
2.8	Medical Indemnity Protection Society Limited (ACN 007 067 281)	[06/1032] (in 48/06)	27/11/2006	s1020F(1)(a) This instrument exempts the operator of a mutual fund for various mutual risk products from the requirement under s1013(1)(m) to disclose certain amounts in dollar figures in the PDS for its miscellaneous financial risk product.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
2.11 5.6	Barclays Bank plc (ARBN 062 449 585)	[06/0896] (in 42/06)	17/10/2006	s926A(2)(a) and s1020F(1)(a) This instrument exempts an overseas bank from s912A, 912B and 912F and Divs 3, 4, 5 and 7 of Part 7.9 for the issue of its basic deposit product and linked non-cash payment facilities in this jurisdiction.	
2.13	National Mutual Funds Management Limited (ACN 006 787 720)	[06/0908] (in 43/06)	20/10/2006	s1020F(1)(a) and s1020F(1)(c) This instrument grants relief to the responsible entity of a registered scheme from the need to receive an eligible application form (s1016A(2)) and the requirements concerning the method of dispatch (s1015C) for the issue of interests in connection with a proposal to merge the scheme with the interests of another scheme.	
2.16	<i>Multiple derivative issuers</i>	[CO 06/682]	14/12/2006	1020F(1)(c) This class order modifies the requirement to prepare a PDS, and the PDS content requirements, where s761E(6) of the Act deems more than one licensee to be the issuer of an exchange traded derivative. The class order places the obligation for preparing the PDS on the market participant that enters the derivative on the market, and relieves the market participant from some of the PDS content requirements to the extent that those requirements relate only to another licensee that is also an issuer of the derivative and the information is otherwise available from the licensee.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
3.2	Macquarie Infrastructure Investment Management Limited (ACN 072 609 271)	[06/0707] (in 34/06)	24/08/2006	s601QA(1)(a), s601QA(1)(b) and s655A(1)(b) This instrument grants relief to the responsible entity of two registered schemes (the interests of which form part of a listed stapled security) to enable it to conduct an on-market buy-back of stapled interests.	
3.3	Macquarie Infrastructure Investment Management Limited (ACN 072 609 271)	[06/1027] (in 48/06)	24/11/2006	s601QA(1)(a), s601QA(1)(b) and s655A(1)(b) This instrument varies the relief granted to the responsible entity of two registered schemes (the interests of which form part of a listed stapled security) in [06/0707]. The instrument varies the conditions of relief for the on-market buy-back of stapled interests.	
3.4	Macquarie Media Management Limited (ACN 115 524 019)	[03/0914] (in 43/06)	23/10/2006	s601QA(1)(b) This instrument grants relief to the responsible entity of a registered scheme (interests of which form part of a stapled security) to enable it to set the price for the sale of forfeited interests where part of the issue price remains unpaid. The relief enables the forfeited interest to be offered for sale by public auction in a 10-week period.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
4.2	Rank Group Australia Pty Ltd (ACN 121 366 041)	[06/0834] (in 40/06)	29/09/2006	s655A(1)(b) This instrument grants relief from the requirement for the bidder to send notices of variation extending the offer period to former shareholders of the target company, on the condition that the bidder sends notices to all persons entitled to accept an offer under s653B(1) at the time of the relevant variation.	
4.3	Telstra Corporation Limited (ACN 051 775 556)	[06/0873] (in 41/06)	06/10/2006	s655A(1)(b) This instrument modifies item 1 of the table in s611 to ensure that the exemption to the prohibition in s606 applies only where a bid is made for voting shares and not third party securities.	
4.4	Transurban Holdings Limited (ACN 098 143 429), Transurban Investments Pty Ltd (ACN 112 649 466), and Transurban Infrastructure Management Limited (ACN 098 147 678)	[06/1136] (in 01/07)	20/12/2006	s 655A(1)(b) This instrument modifies s620(2) regarding timing of payment of bid consideration in circumstances where the bid involves the offer of consideration forming a mixture of cash and scrip where the total amount of cash is limited.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
4.5	Rank Group Australia Pty Limited (ACN 121 366 041)	[06/0956] (in 46/06)	09/11/2006	s669(1) This instrument grants relief to clarify that only a pro forma notice is required to be lodged with ASIC and given to the market operator under s661B. The instrument also modifies s662A so that a buy-out notice is not required to be sent to persons receiving a compulsory acquisition notice.	
4.6	Transurban Holdings Limited (ACN 098 143 429), Transurban Investments Pty Ltd (ACN 112 649 466), and Transurban Infrastructure Management Limited (ACN 098 147 678)	[06/1138] (in 01/07)	19/12/2006	s 655A(1) This instrument grants relief from s637(1), which requires a bidder's statement lodged with ASIC to be approved by a unanimous resolution passed by all directors of the bidder.	
4.7	Flight Centre Limited, Gainsdale Sub Pty Limited (ACN 122 337 188), Gainsdale Sub Holdings Pty Limited (ACN 122 611 741)	[06/960] (in 47/06)	21/11/2006	s655A(1) This instrument exempts consortium members from s606 where, in order to acquire an ASX-listed company by way of a scheme of arrangement under Part 5.1 of the Act, the consortium members acquired another member's relevant interest in excess of 20% of the issued voting shares in the company by entering into agreements to initiate the proposal.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
4.8	Aztec Resources Limited (ACN 078 548 562)	[06/0961] (in 47/06)	17/10/2006	655A(1)(b) This instrument enables a takeover offer to be extended to bid class securities issued by the target during the bid period.	
5.2	Great Southern Plantations Limited (ACN 052 046 536)	[06/0943] Not gazetted	08/11/2006	s342A(1)(a) This instrument grants relief to extend the term for eligibility to play a significant role in the audit of a listed company as a consequence of a short financial year following a change of balance date.	
5.3	Lion Nathan Limited (ACN 093 160 448)	[06/0863] Not gazetted	26/09/2006	s340 This instrument grants relief to a group of companies by extending [CO 98/1418] to situations where the companies could not comply with the financial reporting requirements of the Act.	
6.2	Industry Funds Management Limited (ACN 095 974 100)	[06/0890] (in 42/06)	18/10/2006	s1020F(1)(a) This instrument grants relief to the trustee of a pooled superannuation trust from treating certain superannuation funds as retail clients under s761G(6)(a).	