ASIC
Australian Securities & Investments Commission

REPORT 162

Overview of decisions on relief applications (December 2008 to March 2009)

August 2009

About this report

This report outlines our decisions on relief applications during the period 1 December 2008 to 31 March 2009. It summarises situations where we have exercised, or refused to exercise, our exemption and modification powers from the financial reporting, managed investments, takeovers, fundraising or financial services provisions of the *Corporations Act 2001*.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal, financial or other professional advice. We encourage you to seek your own professional advice, including to find out how the Corporations Act and other applicable laws apply to you. It is your responsibility to determine your obligations and to obtain any necessary professional advice.

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Overview

ASIC has powers under the *Corporations Act 2001* (Corporations 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 Corporations Act: 2D (officers and employees), 2J (transaction offering share capital), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of listed companies and managed investment schemes), 6D (fundraising) and 7 (financial services).

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 Corporations Act.

The report covers the period from 1 December 2008 to 31 March 2009. During this period we considered 824 applications. We granted relief in relation to 533 applications and refused relief in relation to 148 applications—147 applications were withdrawn.

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 business without harming other stakeholders.

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.

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 advisories and information and media releases referred to throughout the report are available via www.asic.gov.au/mr.

Applications for relief must be in writing and should address the requirements set out in Regulatory Guide 51 *Applications for relief* (RG 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.

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

A Licensing relief

Key points

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.

Option exchange program under employee share scheme

1 We granted relief from the requirement to hold an AFS licence in relation to the offer of an option exchange program under an employee share scheme. The option exchange program offered a smaller amount of replacement options at a lower exercise price in exchange for eligible options that were 'out of the money' (existing options). Relief was required because the offer of the existing options would not comply with Class Order [CO 03/184] *Employee share schemes*. This was because the consideration offered for the existing options was more than nominal consideration. We granted relief because the policy requirements under Regulatory Guide 49 *Employee share schemes* (RG 49) were broadly satisfied and the offer was intended to align the exercise price of the options with the share price of the company to provide renewed incentives for employees. Relief was conditional on:

- an independent expert report finding the value of the replacement options to be approximately equal to the fair value of the existing options; and
- the offer document including the terms of the offer and stating that the existing options and replacement options were of approximately equal value.

Employee share scheme for NSX-listed company

2 We refused to grant relief from the requirement to hold an AFS licence to a company listed on the National Stock Exchange (NSX) in relation to an offer of shares to employees under an employee share scheme. We refused to grant relief because the company's shares were thinly traded such that there was no reliable market price for the shares. In refusing relief, we considered that the absence of a reliable market price meant that employees would not receive adequate information to make an informed investment decision (and were therefore insufficiently protected), contrary to the underlying principles of our policy.

Employee share scheme offering options over stapled securities and a cash settlement

3 We granted relief from the requirement to hold an AFS licence to a listed stapled entity in relation to an employee share scheme. Under the scheme, the stapled entity proposed to offer options over stapled securities to employees in this jurisdiction and a cash settlement to employees outside of this jurisdiction. The issuer could not rely on [CO 03/184] because the definition of 'eligible offer' does not extend to an offer of options over stapled securities or cash settlement offers (which may have been a 'derivative' under s761D). In granting relief we considered that the offer otherwise fell within our existing employee share scheme policy and noted that previous relief provided for similar offers by way of a cash settlement, although not in an employee share scheme context.

Custodial and depository service provider

4 We granted relief, for the avoidance of doubt, from the requirement to hold an AFS licence for the provision of custodial or depository services. The relief was provided on application by an insurance company proposing to provide tax audit insurance cover for clients of accounting firms. The exemption was granted to the accounting firms for any custodial or depository services provided as a result of holding such cover. We previously expressed a view in Consultation Paper 80 *Group insurance arrangements* (CP 80) that the purchase of group insurance may entail the provision of custodial and depository services. We granted relief because Class Order [CO 08/01] *Group purchasing bodies*, which provides licensing relief in certain circumstances, did not apply in these circumstances because the accounting firms charge for the provision of their services.

Providing general advice in scheme booklet

5 We granted relief, for the avoidance of doubt, to the responsible entity of a managed investment scheme and to the bidder for the scheme from the requirement to hold an AFS licence in relation to the provision of general advice contained in a scheme of arrangement explanatory statement. Under the scheme of arrangement, the bidder for the units would acquire 100% of the issued units in the managed investment scheme under a 'trust scheme of arrangement' with the bidder to issue convertible preference shares as consideration. It was arguable that relief was required because both the responsible entity and the bidder (at least in part) were responsible for the content of the explanatory statement and would not have the benefit of Class Order [CO 03/606] *Financial product advice, exempt documents* because this relief does not extend to trust schemes of arrangement. We granted relief because we were of the view that, on balance, the policy considerations

relating to the trust scheme of arrangement in this case were analogous to the policy considerations underlying [CO 03/606].

Expansion of definition of 'incidental property'

6 We granted relief in a form akin to the relief provided under Class Order [CO 07/74] *Licensing relief for trustees* to a trustee of a fund in order to align the definition of 'incidental property' under [CO 07/74] with the definition of the same term in Pro Forma 209 *Australian financial services licence conditions* (PF 209). The definition of 'incidental property' is much wider in PF 209 than in [CO 07/74] as it includes derivatives and foreign exchange contracts. In granting relief we considered:

- there was no detriment to investors;
- to require the trustees to apply for an AFS licence would have been unduly burdensome; and
- there was no regulatory detriment in expanding the definition of 'incidental property' in [CO 07/74].

Advisories, media releases and class orders

7 We did not publish any advisories, media releases or class orders relating licensing relief during the period of this report.

B Disclosure relief

Key points

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

Prospectus relief

Secondary sales of CDIs

8 We granted ongoing prospectus relief to holders of CHESS Depositary Interests (CDIs) over securities in a foreign entity so that the CDI holders can rely on the secondary sales exemptions in s708A for offers for sale of CDIs within 12 months of their issue. We granted relief because it was consistent with our policy in Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173). The exemptions in the relief mirror s708A except that (among other things) they:

- reflect the fact that CHESS Depositary Nominees Pty Limited, not the foreign entity, is the issuer of CDIs;
- require compliance with s601CK and relevant foreign financial reporting requirements rather than Ch 2M; and
- require adequate disclosure of the differences between holding a CDI as opposed to a share.

Delaware regulated merger: Liability for prospectus

9 We refused to exempt a company (company B) from Parts 6D.2 and 6D.3 in relation to a US (Delaware) regulated merger where another company (company A) had offered its own shares as consideration to company B's members, a number of whom resided in Australia. We refused to grant relief because it was unnecessary. Company B sought relief because it believed that our policy in Regulatory Guide 188 *Disclosure in reconstructions* (RG 188) provided that company B would be making an offer for the purposes of Ch 6D because it was calling a meeting and inviting its members to vote on the resolutions. We refused to grant relief because we considered that s700(3) meant that company B was not making an offer because it would not have the capacity to issue or transfer company A's securities to its members. Therefore, relief was unnecessary.

Issue and on-sale of convertible preference shares under a trust scheme of arrangement

10 In the matter referred to in paragraph 5, we also granted relief from the requirements in:

- Parts 6D.2 and 6D.3 to provide a prospectus for the issue of convertible preference shares to investors in exchange for their units in a managed investment scheme; and
- s707(3) and 707(4) to provide a prospectus where those convertible preference shares are on-sold within 12 months of their issue.

The trust scheme of arrangement was to be implemented subject to the principles enunciated in the Takeovers Panel Guidance Note 15. We granted relief because:

- there was no reason in this case to distinguish the trust scheme from a scheme of arrangement conducted under Part 5.1. In particular, the responsible entity was to apply to the court to oversee the scheme and its implementation; and
- the responsible entity was to distribute an explanatory statement with members required to vote to approve the trust scheme.

Rights issue disclosure exemption: Trading suspension

11 We agreed to grant conditional relief to enable a company to undertake an underwritten rights issue by relying on a cleansing statement under s708AA (as opposed to a prospectus), despite the company having been suspended from trading for more than five trading days in the last 12 months. We gave relief in this instance because we considered the market was likely to be properly informed and the company's shares adequately priced. It was also significant that the company had been trading without suspension for approximately 11 months. The application was ultimately withdrawn prior to a formal instrument being executed.

Employee share scheme under US grantor trust

12 We granted relief from Parts 6D.2 and 6D.3 (except s736) in relation to an employee share scheme offered by a New York Stock Exchange listed company using a US Grantor Trust. We granted relief without imposing conditions 4(b) and (g) of [CO 03/184]. This meant the employee share scheme could be offered without the trustee ensuring its records were audited or the trust deed containing covenants binding the trustee and their agents to the extent a beneficiary would possess the same rights as though they were the legal owners of the shares. We granted this relief because:

- there were only a small number of Australian employees;

- there was a regulatory and contractual framework governing the trust; and
- our policy in RG 49 was otherwise satisfied.

Option exchange program under employee share scheme

13 In the matter referred to in paragraph 1, we also granted relief from the requirement to provide a prospectus in relation to the offer of an option exchange program under an employee share scheme.

Employee share scheme for NSX-listed company

14 In the matter referred to in paragraph 2, we also refused to grant relief from the requirement to provide a prospectus in relation to the proposed employee share scheme for a company listed on the NSX.

PDS relief

Option exchange program under employee share scheme

15 In the matter referred to in paragraph 1, we also granted relief from the requirement to provide a PDS in relation to the offer of an option exchange program under an employee share scheme.

Employee share scheme for NSX listed company

16 In the matter referred to in paragraph 2, we also refused relief to grant relief from the requirement to provide a PDS in relation to the NSX-listed company's proposed employee share scheme.

Employee share scheme offering options over stapled securities and a cash settlement

17 In the matter referred to in paragraph 3, we also granted relief from the requirement to provide a PDS for the offer of options over stapled securities and a cash settlement under the employee share scheme.

FSG relief

Employee share scheme for options over stapled securities and a cash settlement

18 In the matter referred to in paragraph 3, we also granted relief to the responsible entity from the need to provide an FSG to employees who reside outside this jurisdiction in relation to any financial services provided in connection with an eligible offer under the employee share scheme. Under s941A and 941B, the responsible entity would be providing a financial service to eligible employees residing outside of this jurisdiction as these employees would be considered retail clients under s761G. We granted relief because we held the view that the reduced disclosure resulting from the failure to provide an FSG to employees outside this jurisdiction was counterbalanced by the mutual interdependence of the employee share scheme.

Relief from the requirement to give an FSG

19 In the matter referred to in paragraph 5, we also granted the responsible entity and the bidder relief, for the avoidance of doubt, from the requirement to provide an FSG.

Advisories

20 The following advisories relate to disclosure relief granted during the period of this report.

Advisories

AD 08-89 *ASIC issues consultation paper on share purchase plan threshold*

AD 09-26 *ASIC seeks comment on proposals to facilitate equity capital raising and participation by retail investors*

C Managed investment relief

Key points

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

Registration relief

Manager's failure to register managed investment scheme

21 We refused to grant relief to exempt two managed investment schemes from the requirement to be registered under s601ED. At the time of issuing units in the schemes, the manager of the schemes had intended to only issue units to wholesale clients. However, in addition to issuing units to wholesale clients, the manager also issued units to 22 retail investors that meant that both schemes were required to be registered under s601ED at the time the units were issued. The manager of the schemes submitted that if units were now issued to the 22 retail investors, the investors would be 'sophisticated investors' within the meaning of s761GA (which was inserted into the Corporations Act after the units were originally issued) and, as such, registration of the schemes under s601ED(2) would be unnecessary. We refused to grant relief because we held the view that:

- a change in the law is not a sufficient reason to exempt a scheme from registration when that scheme was required to be registered previously; and
- the manager should not receive an advantage from its non-compliance with the law.

Relief relating to registered schemes

Responsible entity making a new investment decision on behalf of members

22 We refused to grant relief to the responsible entity of a managed investment scheme from the requirement to hold a meeting seeking members' approval by special resolution in accordance with s601GC(1)(a). Relief was requested to amend the terms of the scheme's constitution so that the responsible entity would be permitted to apply the proceeds, which would otherwise be payable to members upon termination of the scheme, to acquire a different financial product on each member's behalf. The proposed amendments

would extend the powers of the responsible entity to exercise an investment decision for the member outside the scope of the scheme. We refused relief because:

- members would not have the opportunity to vote on a resolution that would affect their right to make an investment decision outside the scope of the scheme; and
- we considered that non-compliance with the meeting requirements under s601GC(1)(a) was significant in this case.

Off market buy-back of units in an illiquid scheme

23 We granted relief from s601GA(4), 601FC(1)(d), 601FG and Part 5C.6 to permit the responsible entity of a managed investment scheme to undertake an off-market buy-back of quoted interests while the scheme was illiquid. The buy-back would be subject to members' approval by resolution and an independent expert's report would also be provided to members. Units in the scheme were stapled to shares in an Australian company as well as a foreign company, which meant that while Part 2J.1 (Div 2) applied to the share buy-back by the stapled company, the proposed buy-back of interests in the stapled scheme could not proceed without relief from the provisions relating to redemption of interests. We decided to grant relief having regard to these facts and the particular circumstances.

Refusal of relief to allow members to lodge an application to deregister a managed investment scheme

24 We refused to grant relief from the requirement in s601PA that a responsible entity lodge an application for deregistration of a managed investment scheme with ASIC where certain conditions are met. Certain members of the scheme sought relief that would allow them, and not the responsible entity, to make an application for the scheme's deregistration because they were of the view that the scheme may have been unnecessarily registered. This is because at the time the scheme was registered it could have relied on relief under Class Order [CO 02/182] *Management rights schemes*, which provides relief from the requirement to register a scheme under s601ED. We refused to grant relief because:

- there was a lawful and effective way of deregistering the managed investment scheme without ASIC granting relief—i.e. the responsible entity could lodge an application for deregistration; and
- a modification to enable a person other than the responsible entity to apply to ASIC to deregister a managed investment scheme would not be consistent with the policy behind s601PA.

Advisories and class orders

25 The following advisory and class order relate to managed investments relief granted during the period of this report.

Advisories

AD 09-40 *ASIC to accept online applications for scheme registration*

Class orders

CO 09/27 *Variation of Class Orders [CO 02/312] and [CP 05/26]*

D Mergers and acquisitions relief

Key points

This section outlines some of the circumstances in which we have granted or refused relief from the provisions of Chs 2J, 6, 6A and 6C under s259C, 655A, 669 and 673 respectively.

Mergers and acquisitions

Acquisition of relevant interest through share sale agreement

26 We granted relief to a company to enable it to enter into a share sale agreement that would, without relief, potentially cause a breach of s606(1). The company proposed to acquire a number of investment management businesses that held relevant interests in numerous ASX-listed companies and schemes. Upon entering into the share sale agreement, the company would acquire a relevant interest in the ASX-listed companies and schemes that would, in conjunction with its own existing holdings, potentially breach s606(1). We granted relief because:

- the proposed acquisition was not being made for the purpose of controlling any of the underlying ASX-listed companies and schemes;
- the company was unable to ascertain whether there would be a breach of s606(1) prior to entering into the share sale agreement; and
- there was minimal potential for mischief given the relief operated on an interim basis during the period between the company entering into the share sale agreement and its completion. Once the acquisition was completed, the company would be subject to the Corporations Act.

Refusal of no-action position for breach of s606

27 We refused to issue a no-action letter to a shareholder that breached s606 as a result of acquiring shares in a listed entity on market. The shareholder had entered into an underwriting agreement with the listed entity whereby their holding would remain at 19.9%. This shareholding was subsequently diluted to 14.78% and then restored as a result of the issue of securities under the underwriting agreement. As a result of the dilution (which the shareholder was unaware of), the shareholder was unable to rely on the 3% creep exception. Their inadvertent acquisition of further shares in the listed entity meant that their shareholding reached 20.9%, in breach of s606. While the shareholder submitted that the breach of s606 was inadvertent and did not

adversely affect third parties, we refused to issue a no-action letter because a breach had already occurred and our policy in relation to the operation of s606 and item 9 of s611 is clear.

Restructure of natural person's shareholding

28 We refused to grant relief to enable a natural person to restructure their share holdings in a listed company held through two companies separately controlled by the natural person. Under the proposed restructure, the share holding held by one controlled company (company A) would be transferred to the other controlled company (company B), which would result in company B breaching s606(1). We refused relief because:

- company B was wholly owned by a company outside of the natural person's group, which meant that a holder outside of the group would increase its relevant interest as a result of the proposed restructure; and
- the proposed restructure in the circumstances was not within the contemplation of our policy outlined in Regulatory Guide 171 *Anomalies and issues in the takeover provisions* (RG 171) or consistent with the policy objectives of the Corporations Act.

Drag along rights

29 We refused to grant relief to modify item 7 of s611 that would facilitate member voting on an AGM resolution stemming from the inclusion of 'drag along rights' in a company's constitution. The drag along rights operate to allow a member or member group holding 50% of the company's shares to require all remaining shareholders to sell their shares on identical terms to the terms obtained by the shareholder or shareholder group. The modification of item 7 of s611 was sought because all members would be subject to the drag along rights and excluded from voting on a resolution because of item 7(a)(ii) of s611, with the relief enabling a bidder to acquire a relevant interest in all shares through a mere 50% member approval. We refused relief partly because:

- consistent with established policy, we will not facilitate the operation of drag along provisions that have the effect of expropriating minority shareholdings or lowering the legislative compulsory acquisition threshold;
- shareholders would not have individually agreed to have their shares dragged along as a result of the AGM's resolutions; and
- the purposes of Ch 6 at s602(a) and (d) would not be met if we facilitated the transaction.

Takeovers

Relief from requirement to dispatch supplementary bidder's statement

30 We granted relief to a bidder from s647(3)(c), which requires a person issuing a supplementary statement in relation to an off-market bid for unquoted securities to send that statement to all holders of the bid class securities who have not accepted an offer under the bid. We granted relief from the requirement to dispatch the supplementary statement because it contained erroneous information that the bidder agreed to quickly correct by dispatching a further supplementary statement containing the correct information. We were also satisfied there was no detriment to target shareholders because they would receive all of the supplementary information relevant to the bid and would not be confused by receiving two very similar supplementary bidder's statements in a short space of time.

Extension of offer to newly issued securities

31 We granted relief to a bidder to enable it to extend its offer to securities issued during the bid period. Prior to the bid, the target announced its intention to make a fully renounceable rights offer to raise capital, which was completed prior to the close of the bid. We granted relief from s617B and 650A to enable the bidder to extend its offer to the rights issue securities coming into the bid class during the offer period in accordance with Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holdings* (RG 159) at RG 159.36. We also granted relief from s651A in relation to the difference between the consideration offered under the bid and the consideration payable in relation to the rights issue.

Other mergers and acquisitions relief

Compulsory acquisition: Deemed payment authorisation

32 We refused to grant relief to a 90% holder who applied on behalf of the company for a modification of the compulsory acquisition notice procedures. The modification was to allow a deemed payment authorisation to be inserted into the compulsory acquisition notices. The deemed payment authorisation would authorise the company to pay the relevant consideration on behalf of the holder to a charity if the holder did not give the company instructions as to how to deal with the consideration within the 14-day statutory objection period. This would relieve the company from the requirement to hold any unclaimed consideration for a period of 12 months

pending instructions from the holder. The consideration payable was expected to be nominal. We refused to grant relief because:

- the 90% holder was able to compulsorily acquire the remaining securities without relief;
- there is already a statutory procedure for a company to follow when dealing with unclaimed consideration; and
- the relief sought did not demonstrably reduce the costs of compliance with, or otherwise facilitate, the compulsory acquisition procedure.

Compulsory acquisition of some classes of securities only

33 We granted relief to enable a 90% holder to compulsorily acquire one class of securities of a company without giving notices to compulsorily acquire a second class of outstanding securities. The 90% holder wished to acquire two classes of preference shares ('hybrids' and 'borrower and depositor shares') in a target company following the acquisition of all other securities of the company by way of schemes of arrangement. Under their terms of issue, the hybrids were to be redeemed by the target company and it was the 90% holder's preference for this process to remain in place. However, the 90% holder could not compulsorily acquire the borrower and depositor shares until the hybrids had been redeemed because s664A(3) would require it to give a compulsory acquisition notice in relation to the hybrids as well. In granting relief we considered that in circumstances where the target company was obliged to redeem the hybrids by a particular date, the protection of minority holders' interests was not reduced.

Transfer of shares to a controlled entity

34 We granted relief to a company from s259C to allow it to purchase up to 4.8% of its issued capital and hold the shares on trust for future transfer to employees who reside outside of this jurisdiction as part of an employee performance incentive plan. Relief was granted as the company's interest in the trust was remote and the amount of issued capital was analogous to the amount that can be held for the benefit of employees under [CO 03/184].

Buy-back at premium to current market price

35 We granted relief to conduct a selective buy-back as an equal access scheme in circumstances where the buy-back involved a tender invitation process, a scale-back mechanism on a pro-rata basis should tenders exceed a specified limit, as well as the exclusion of certain foreign shareholders. While we had previously granted similar relief, in this instance the buy-back price was at a premium to the current market price and the buy-back was conditional on, and subject to, the implementation of a merger with another company by

way of a scheme of arrangement. In granting relief, we considered it important that:

- the company had procured an independent expert report to provide an analysis of whether the buy-back was fair and reasonable;
- in the circumstances, the number of excluded foreign shareholders was not material;
- the transaction was consistent with the purposes of buy-backs as envisaged by s256A and Regulatory Guide 110 *Share buy-backs* (RG 110); and
- granting relief would achieve a net regulatory benefit in facilitating a commercial outcome where the detriment to shareholders was minimal.

Acquisition of relevant interest through share sale agreement

36 In the matter referred to in paragraph 26, we also granted relief from the requirement to lodge a substantial holding notice upon entering into the share sale agreement as a result of the acquisition of a relevant interest in ASX-listed companies and schemes.

Advisories, media releases and class orders

37 We did not publish any advisories, media releases or class orders relating to mergers and acquisitions relief during the period of this report.

E Conduct relief

Key points

This section outlines some of our decisions to grant relief from certain conduct obligations imposed by Chs 2D, 2M, 5C and 7.

Financial reporting

Variation of a deed of cross guarantee

38 We granted relief similar to that provided in Class Order [CO 98/1418] *Wholly-owned entities* to enable a group of companies to continue to use a deed of cross guarantee varied in a way other than permitted by cl 10.1 of the deed. Members of the holding company under the deed had approved the disposal of several wholly-owned entities to a third party. However, because of way the transaction was structured, the subsidiaries in question were initially transferred to a company that was an associate for the purpose of the deed. Under the terms of the deed, subsidiaries cannot be disposed of to an associate, meaning that the disposal was technically ineffective such that the subsidiaries in question remained members of the closed group. We granted relief so the closed group could continue to rely on the relief provided under the deed by varying the definition of 'associate' in a way that meant the disposal of the subsidiaries would not render the deed ineffective. The terms of relief required the trustee under the deed to hold the opinion that the variation would not result in a breach of its fiduciary duties. In the circumstances, we were of the view it would impose unreasonable burdens on group entities if they were required to enter into a new deed of cross guarantee to continue to be eligible for financial reporting relief.

Change of financial year

39 We refused to grant relief to an Australian group of companies, all with the same foreign parent, from the requirements of s323D(2) with respect to the financial year commencing 1 July 2007. Relief was sought to enable the companies to synchronise their respective financial years with that of the foreign parent by way an of 18-month financial year. According to the information provided, most of the companies, being small proprietary companies, reported for the period to 30 June 2006 through the consolidated accounts of their holding entities. However, there was no evidence of reporting or information about the companies for the period ending 30 June 2007. Despite several requests, the applicant did not provide us with sufficient information to establish the structure of the group or the recent

group acquisitions, to determine whether the companies were compliant with the obligation under the Corporations Act to lodge financial reports for previous financial years. On this basis, we did not use our powers under s340 to grant the requested relief.

No-action letter for failure to submit a report as to the affairs of a company

40 We granted a no-action letter to a company in relation to its breach of s429(2)(b), which requires that within 14 days of the company receiving notice that receivers were controllers of the company's property, the company's reporting officers must prepare and submit a report as to the affairs of the company. A practical issue arose because the receivers ceased to act as receivers (only spending eight days in the role) before the deadline fell due for the company's reporting officers to submit the report. We granted a no-action letter because:

- we had no specific power to modify or grant an exemption from s429(2)(b) (see Regulatory Guide 108 *No-action letters* (RG 108) at RG 108.7);
- the no-action letter served a clear regulatory purpose and it would not advance the policy of the legislation to take other regulatory action (see RG 108.29); and
- the factors making it more likely we would give a no-action letter were satisfied (see Table 1 at RG 108.30).

Financial services providers

Option exchange program under employee share scheme

41 In the matter referred to in paragraph 1, we also granted relief from the hawking provisions in relation to the offer of an option exchange program under an employee share scheme.

Employee share scheme for NSX-listed company

42 In the matter referred to in paragraph 2, we also refused to grant relief from the hawking provisions in relation to the proposed employee share scheme for a company listed on the NSX.

Employee share scheme offering options over stapled securities and a cash settlement

43 In the matter referred to in paragraph 3, we also granted relief from the hawking provisions in relation to the proposed offers of options over stapled securities and a cash settlement under an employee share scheme.

Anti-hawking relief for scheme of arrangement

44 In the matter referred to at paragraph 5, we also granted relief from the anti-hawking provisions in Div 5A in relation to the proposed scheme of arrangement.

Advisories, media releases and class orders

45 During the period of this report we did not publish any advisories, media releases or class orders relating to financial reporting relief or relief relating to the conduct of financial services providers.

F Short selling relief

Key points

This section outlines some of the circumstances in which we have issued no-action letters stating that we do not intend to take regulatory action in relation to breaches of the short selling provisions in s1020B and in notional s1020BC and 1020BD (as set out in ASIC Class Order [CO 08/751] *Covered short sales*).

Naked short selling relief for market makers in ETFs

46 We issued no-action letters permitting market makers of certain exchange traded funds (ETF) products to make naked short sales of those ETF products subject to the following conditions:

- the market maker and ASX have entered into an agreement in relation to the market maker's obligations regarding the ETFs, or the market maker is an AQUA Product Market Making Agent appointed to make a market in the ETFs;
- the market maker's short selling of ETFs is undertaken in the course of its function of making a market in ETFs;
- the market maker must, before making an offer to sell ETFs, record in written or electronic form that the proposed sale would be a short sale;
- after the short sale of ETFs by a market maker has occurred, the market maker must, as soon as possible, purchase or apply for the issue of equivalent ETFs to settle the short sale;
- the market maker must use its best endeavours to avoid failure in the settlement of the sale of the ETFs; and
- the market maker must inform ASX of the short sale in the same manner as it would inform ASX of a reportable short sale in accordance with notional s1020BC(5) as set out in [CO 08/751].

In issuing these no-action letters we recognised that ETF market makers could apply for the creation of new ETFs to fulfil settlement obligations and that the sales were not directional. We also had regard to the important role of ETF market makers who are appointed to provide liquidity to markets for ETF products.

We are considering industry submissions made in response to the proposed relief set out in Consultation Paper 106 *Short selling to hedge risk from market making activities* (CP 106). The consultation period closed on 8 June 2009 and we anticipate publishing our final policy on the proposed relief in August 2009.

Advisories

47 The following advisories relate to short selling relief granted during the period of this report.

Advisory

AD 09-36 *ASIC extends ban on covered short selling of financial securities*

G Other relief

Key points

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

Request to approve an alternative compensation arrangement

48 We refused a request to approve a self-insurance arrangement as an alternative compensation arrangement under s912B(2)(b). Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) at RG 126.97 provides that we will only approve arrangements that give no less protection than adequate professional indemnity (PI) insurance. We were not satisfied that the submissions in support of the application, including the accompanying expert report, demonstrated that the self-insurance arrangement proposed was one which would give no less protection than adequate PI insurance. This was because the applicant was unable to demonstrate that it was a body with sufficient financial substance. For example, the arrangement did not include setting aside cash reserves and the arrangement was, in part, reliant on borrowing and capital raising in order to meet claims.

Relief from unsolicited offer requirements for New Zealand entity

49 We granted relief from Div 5A of Part 7.9 to a New Zealand company listed on the New Zealand Exchange in relation to the company's proposed profit distribution plan. Under the profit distribution plan, both Australian and New Zealand shareholders would receive distributions in respect of their shares in the form of bonus fully paid ordinary shares together with an offer to buy back some or all of those shares. With the buy-back to be implemented under New Zealand law, it was subject to the unsolicited offer provisions of Div 5A of Part 7.9. In granting relief we considered that:

- Div 5A is unlikely to have been designed to capture transactions of this type, particularly since buy-backs under Australian law are exempt from Div 5A; and
- the company's shareholders would receive adequate disclosure in accordance with the buy-back provisions under New Zealand law, including information otherwise required to be included in a statement prepared in accordance with the Div 5A disclosure requirements.

Appendix 1: 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.

Table: ASIC relief instruments

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 13 15 41	Starbucks Corporation, a body corporate incorporated under the laws of Washington, United States	09-00128 (in 26/09)	24/03/2009	s741(1)(a), 991A(2)(l), 951B(1)(a), 992B(1)(a), 1020F(1)(a), 1020F(1)(b) This instrument provides relief to the entity in relation to an employee share scheme offering an option exchange program.	
3 17 18 43	Macquarie Leisure Management Ltd (ACN 079 630 676), Macquarie Leisure Trust (ARSN 093 193 438), Macquarie Leisure Operations Ltd (ACN 104 529 106)	09-00087 (in 12/09)	6/02/2009	s741(1)(a), 991A(2)(l), 951B(1)(a), 992B(1)(a), 1020F(1)(a), 1020F(1)(b) This instrument provides relief to the entities in relation to the employee share plan offering options over stapled securities and a cash settlement.	
4	CGU Insurance Limited (ACN 004 478 371)	09-00062 (in 10/09)	28/01/09	s911A(2)(l) This instrument exempts an accounting firm that enters into a Tax Audit Insurance Policy with an insurer from the requirement to hold an AFS licence for any custodial or depository services provided when making cover available under the policy to associates and clients of the accounting firm.	

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
5 10 19	Bendigo and Adelaide Bank Limited (ACN 068 049 178)	09-00224 (in 26/09)	23/03/2009	s741(1)(a), 741(1)(b) This instrument provides disclosure and secondary sales relief to a company in relation to offers of convertible preference shares under a trust scheme of arrangement.	
		09-00240 (in 26/09)	26/03/2009	s911A(2)(l), 951B(1)(a), 1020F(1)(a) This instrument provides relief from the requirement to hold an AFS licence, the obligation to provide an FSG and the soliciting prohibition in Div 5A in Part 7.9 in relation to the provision of general product advice as a result of the offer of convertible preference shares under a trust scheme of arrangement.	
6	Gresham Nominees 1 Pty Limited (ACN 095 975 965) and Gresham Nominees 2 Pty Limited (ACN 107 377 060)	09-00193 (in 24/09)	13/03/2009	s911A(2)(l) This instrument provides relief in a form akin to Class Order [CO 07/74] *Licensing relief for trustees* to the trustees of certain funds.	
8	Henderson Group Plc (ARBN 133 992 766)	09-00254 (in 34/09)	31/03/2009	s741(1)(b) This instrument modifies s708A so that the secondary sales exemptions in s708A can be used for an offer for sale of CDIs within 12 months of their issue where those CDIs have been issued in relation to the securities of a foreign entity.	
12	Covidien Limited, a company incorporated under the laws of Bermuda	09-00152 (in 18/09)	25/02/2009	s741(1)(a) This instrument exempts a company from Parts 6D.2 and 6D.3 (except s736) to facilitate a US Grantor Trust employee share scheme unable to comply with conditions 4(b) and 4(g) of [CO 03/184].	

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
23	Macquarie Media Management Ltd (ACN 115 524 017) in its capacity as responsible entity of the Macquarie Media Trust (ARSN 116 151 467)	09-00173 (in 22/09)	6/03/2009	s601QA(1)(a), 601QA(1)(b) This instrument provides relief to a responsible entity from s601GA(4), Part 5C.6, s601FC(1)(d) and s601FG in relation to an off-market buy-back of stapled securities.	
26 36	Aberdeen Asset Management Plc, a company incorporated under the laws of Scotland, United Kingdom	08-01047 (in 02/09)	31/12/2008	s655A(1)(b), 673(1)(b) This instrument provides relief to a company from the takeovers prohibition in s606 and the substantial holding notice requirements in relation to the acquisition of a relevant interest through entering into a share sale agreement.	30/06/2009
30	Metminco Limited (ACN 119 759 349)	09-00084 (in 12/09)	04/02/09	s655(1)(a) This instrument exempts a company from s647(3)(c) to the extent that it would require a bidder to send a supplementary bidder's statement to all holders of securities the subject of the bid who have not accepted an offer under the bid.	
31	Queensland Gas Company Limited (ACN 089 642 553)	08-00709 (in 98/08)	03/09/2008	s655(1)(b) This instrument provides relief to enable a bidder to extend its bid to securities issued by the target under a rights issue during the bid period.	
33	St George Bank Limited (ACN 055 513 070)	09-00083 (in 12/09)	04/02/2009	s669(1)(b) This instrument modifies s664A(3) to exclude a class of securities that a target company is able to redeem from the classes of securities for which a bidder is required to give a compulsory acquisition notice.	

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
34	Boart Longyear Limited (ACN 123 052 728)	09-00186	26/03/09	s259C This instrument exempts the entity from s259C to allow it to purchase up to 4.8% of its issued capital and hold the shares on trust for future transfer to employees who are outside of this jurisdiction, as part of an employee performance incentive plan.	
35	Progen Pharmaceuticals Limited (ACN 010 975 612)	09-00075	03/02/2009	s257D(4) This instrument exempts the company from s257D so that it may treat a selective buy-back as an equal access scheme.	
38	Consolidated Media Holdings Limited (ACN 009 071 167)	09-00836	15/05/2009	s340(1) This order relieves various wholly-owned subsidiaries of the company from s292(1), 301(1), 314(1), 315(1), 315(4), 317, 319(1), 327A, 327B and 327C for financial years where they would be eligible to take advantage of relief under Class Order [98/1418] *Wholly-owned entities* as modified by the order.	
49	Contact Energy Limited (ACN 080 480 477)	09-00141 (in 18/09)	23/02/2009	s1020F(1)(a) This instrument exempts a company from Div 5A of Part 7.9 in relation to an unsolicited buy-back of ordinary shares.	