



**ASIC**

Australian Securities & Investments Commission

## REPORT 184

# Overview of decisions on relief applications (April to July 2009)

February 2010

### About this report

This is a report for participants in the capital markets and financial services industry who are prospective applicants for relief.

This report outlines ASIC's decisions on relief applications during the period 1 April 2009 to 31 July 2009. It summarises situations where ASIC has exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, 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 beginning 1 April 2009 and ending 31 July 2009. During this period we decided 882 applications. We granted relief in relation to 646 applications and refused relief in relation to 133 applications —103 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 businesses 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.

Finally, we have also outlined some publications relating to relevant Class Orders, Media Releases and Advisories, Consultation Papers and Regulatory Guides.

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](http://www.asic.gov.au/co). Instruments are published in the ASIC Gazette, which is available via [www.asic.gov.au/gazettes](http://www.asic.gov.au/gazettes). The advisories

and media releases referred to throughout the report are available via [www.asic.gov.au/mr](http://www.asic.gov.au/mr). The regulatory guides are available via [www.asic.gov.au/rg](http://www.asic.gov.au/rg).

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](mailto:applications@asic.gov.au). More information on applying for relief is available at [www.asic.gov.au/fsrrelief](http://www.asic.gov.au/fsrrelief) and [www.asic.gov.au/cfrelief](http://www.asic.gov.au/cfrelief).

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

### National housing affordability scheme

- 1 We granted relief from the requirement to hold an AFS licence in relation to a series of managed investment schemes that allowed individual property owners to access tax credits and subsidies from the Commonwealth and state governments under the *National Rental Affordability Scheme Act 2008* (NRAS Act). The operator of the schemes coordinated the properties to ensure that the eligibility criteria and other requirements under the NRAS Act were satisfied. The primary purpose of the schemes was to hold Commonwealth government tax credits and state government subsidies on behalf of investors and to distribute the benefits to investors. We considered the primary objective of the schemes was not financial investment, but rather to provide a method by which investors could access benefits under the National Rental Affordability Scheme. Our relief facilitated the objectives of the National Rental Affordability Scheme—that is, to stimulate the supply of affordable rental dwellings to Australian residents—and it would have been disproportionately burdensome for the operator to have complied with the financial services licensing requirements. Relief was conditional on:
  - the preparation and distribution of a Product Disclosure Statement in relation to the offer of interests in the scheme; and
  - the operator becoming a member of an external dispute resolution scheme.

### Shares in a real estate company

- 2 We granted licensing relief similar to that provided by Class Order [CO 00/213] *Real estate companies* to an entity offering shares in a company where the company would be able to rely on [CO 00/213] but for the requirement to hold a crown lease for not less than 99 years. The land held by the company was subject to a maximum statutory lease period of less than 99 years because of national interest concerns. We considered that changing the lease period in this case did not offend the underlying policy rationale for relief in [CO 00/213].

## Share sale facility following a scheme of arrangement

- 3 We granted licensing relief in relation to a share sale facility proposed following a scheme of arrangement that involved the merger of the two companies (Company A and B) and a subsequent listing of the shares of the new company (Company C) on ASX. Company A wished to offer its shareholders the opportunity to sell their shares in Company C. The relief provided for Company A's share sale facility was based on Class Order [CO 08/10] *Share and interest sale facilities*. However, the relief under [CO 08/10] is only available where the share sale facility is to be conducted on-market, and where the operator of the facility is the issuer of the shares. In this case, we granted relief so that Company A could operate the facility when it was not the issuer of the shares (the shares were issued by Company C), and also so that the share sale facility could be conducted prior to the listing of Company C on ASX (i.e. off-market). We granted this relief because we were satisfied that:
- the price to be paid to shareholders was fair (the price was set through a bookbuild process conducted by a broker in which participating institutions submitted bids by price and volume);
  - the shareholders were provided with information sufficient for making an informed decision on whether or not to participate in the facility; and
  - the shareholders were informed that they might be able to obtain a higher price if they sold on-market rather than through the sale facility.

## Publications

- 4 We did not issue any licensing related publications (i.e. advisories, media releases, class orders, consultation papers or regulatory guides) 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 Guide (FSGs).

### Prospectus relief

#### Employee share scheme offering options and rights over stapled securities

- 5 We granted relief from Parts 6D.2 and 6D.3 (except s736) in relation to an employee share scheme. Under the scheme, the stapled entity proposed to offer employees options or unsecured rights over stapled securities. Relief was required because the issuer could not rely on Class order [CO 03/184] *Employee share schemes*. This was because the definition of ‘eligible offer’ does not extend to an offer for issue or sale of options or rights over stapled securities. We granted relief because the policy requirements under Regulatory Guide 49 *Employee share schemes* (RG 49) were broadly satisfied and previously relief for similar offers had been given.

#### Share purchase plan relief: Trading suspension greater than 5 days

- 6 We granted relief to permit a company to undertake a share purchase plan with an increased monetary limit, despite trading in its shares having been suspended for more than five trading days in the 12 months preceding the offer. We were prepared to grant relief because:
- the suspension was voluntary and appeared necessary to effect an acquisition of an overseas company;
  - the suspension ended around 11 months prior to the offer;
  - the company made timely announcements to the market after lifting the suspension and addressed the reasons for the suspension; and
  - we considered that the company’s shares were able to be adequately priced and the market was able to be fully informed about its affairs.



### Share purchase plan relief for NZSX-listed company

- 7 We granted relief to a company listed on the New Zealand Stock Exchange (NZSX) so that it could offer a share purchase plan to Australian shareholders without a disclosure document and with a monetary limit of A\$10,000 (NZ\$12,500). We decided to grant relief because:
- the offer to Australian shareholders represented less than 10% of the total offer;
  - the commercial benefit to the company outweighed any regulatory detriment in granting relief, as the investors were entitled to substantially equivalent disclosure under the NZ regulatory regime; and
  - the relief benefited the company's Australian shareholders, as it enabled them to reduce any dilutive impact of other capital raisings conducted by the company.

### Foreign rights issue to Australian shareholders

- 8 We refused to grant relief from Ch 6D (other than s736 and 738) in relation to a proposed accelerated renounceable rights issue. The proposal involved an issuer based in New Zealand seeking to extend offers of an accelerated renounceable rights issue to Australian shareholders. Relief was required because the issuer could not comply with the requirement in Class Order [CO 00/183] *Foreign rights issue* that the aggregate offer price of the shares offered to Australian shareholders be not more than 10% of the aggregate offer price of all the shares offered. This was because the Australian shareholders would hold over 10% by value of the total amount of the issuer's shares currently on issue. We refused relief because we considered that the current 10% limit in [CO 00/183] provided a balance between the benefits of disclosure relief and the regulatory risk to both issuers and investors. We also noted that the issuer had the alternative of proceeding with the proposed rights issue under s708AA.

### Shares in a real estate company

- 9 In the matter referred to in paragraph 2, we granted individual prospectus relief similar to that provided by [CO 00/213] where the company would be able to rely on [CO 00/213] but for the requirement to hold a crown lease for not less than 99 years.

## PDS relief

### Exchange traded fund listed on AQUA market

- 10 We granted the responsible entity of an exchange traded fund listed on the AQUA market relief from s1013H, 1016D and 1016E to allow the applicant to permit continuous offering of units in the exchange traded funds. We granted relief on the basis that it would be unduly burdensome for the applicant to comply with s1013H, 1016D and 1016E. For more information, see paragraph 26.

## Other disclosure relief

### No-action position for breach of reg 7.9.20AA(7)

- 11 We adopted a no-action position for the period 1 July 2009 to 30 June 2010 in relation to the requirement in reg 7.9.20AA(7) of the Corporations Amendment Regulations 2009 (No. 3). Reg 7.9.20AA(7) requires trustees of regulated superannuation funds to include in the periodic statement, and the insert to the periodic statement of the regulated superannuation fund, a statement to the effect that the returns are not the returns of the members' investment in the investment option, sub-plan or fund (relevant statement).
- 12 This means that the relevant statement does not have to be provided in the periodic statement itself for those granted a no-action position. The no-action position was requested on the basis of an expected lengthy delay in the distribution of periodic statements to members.

### No-action position for breach of reg 7.9.20AA(2)

- 13 We adopted a no-action position for the period 1 July 2009 to 30 June 2010 (initial period) in relation to the requirement in reg 7.9.20AA(2) of the Corporations Amendment Regulations 2009 (No. 3). Reg 7.9.20A(2) requires trustees of regulated superannuation funds to include an insert in or with the periodic statement of the regulated superannuation fund to members.
- 14 The no-action position was sought on the basis of an expected lengthy delay in the distribution of periodic statements to members. Our no-action position was conditional on:
- the required insert being dispatched to the relevant member(s) no later than one month after the dispatch of the periodic statement; and

- the trustee of the regulated superannuation fund providing the relevant member(s) with appropriate disclosure with, or attached to, the periodic statement that explains:
  - that the Corporations Regulations require the disclosure of a statement of long-term returns to the member at an investment option, sub-plan or fund level during the initial period in or with the periodic statement; and
  - the trustee will dispatch that statement of long-term returns separately to the member within one month of dispatching the member's periodic statement.

### Extension of time to give a Statement of Advice

- 15 We granted temporary relief extending the time period required by s946C(3) to give a Statement of Advice (SOA) in time-critical cases from five days to 21 days. The applicant was an ASX market participant that had just acquired the advising business of another ASX market participant resulting in the immediate transfer of thousands of clients. We granted relief because the short-term administrative burden of potentially processing this number of new SOAs, each within five days, outweighed the benefit to the clients in receiving the SOA within five days. The relief given was:
- limited to clients transferring across, and who would not have received an SOA if the business transfer had not occurred, due to the s946B(1) 'further advice' exemption;
  - limited to securities (where there is no cooling-off period allowing the client to change their mind); and
  - conditional upon disclosure about the delay.

## Publications

- 16 We issued the following advisories, class orders and regulatory guides in relation to disclosure relief during the period of this report.

### Advisories

#### ***09-110AD New market disclosure measures to enhance capital raising and continuous disclosure by unlisted entities (18 June 2009)***

- 17 This advisory announced the release of new equity raising guidance, including class orders, that seeks to streamline the fundraising process by faster and more effective disclosure. The measures also aim to make it easier to include retail investor participation in fundraisings by expanding situations where a full prospectus or PDS is not required.

## Class orders

### **[CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers***

- 18 This class order provides conditional prospectus and PDS relief for securities and interests in managed investment schemes offered as consideration under certain foreign regulated takeovers where Australian residents hold no more than 10% of the bid class securities.

### **[CO 09/69] *Variation of [CO 03/606] *Financial product advice – exempt documents* and [CO 04/671] *Disclosure for on-sale of securities and other financial products.****

- 19 The purpose of [CO 09/69] is to provide relief from:
- the requirement to hold an AFS licence in relation to financial product advice that is general advice and contained in a document prepared as part of a control transaction that occurs in an approved foreign market; and
  - the prospectus and PDS disclosure requirements to persons who make offers to sell securities or interests in managed investment schemes received under a foreign scrip takeover if the initial offers under the foreign scrip takeover did not need disclosure because of [CO 09/68].

### **[CO 09/425] *Share and interest purchase plans***

- 20 [CO 09/425] facilitates the operation of share and interest purchase plans where ASIC is satisfied that:
- the risk to the securityholder is limited because the amount which may be invested by each investor in a 12-month period under the scheme is restricted; and
  - the benefit to investors (such as savings on brokerage) outweigh the disadvantages and risks of not having full prospectus disclosure.

### **[CO 09/437] *Departed former temporary residents' superannuation—disclosure relief***

- 21 [CO 09/437] provides superannuation fund trustees with relief from the requirement to notify and give exit statements to former temporary residents who have left Australia. The relief applies in the circumstances set out in the *Superannuation (Unclaimed Money and Lost Members) Act 1999* and is subject to various conditions designed to protect investors.

## **Regulatory guides**

### **Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72)**

- 22 RG 72 deals with relief for some foreign offers, in particular where the cost of compliance would be disproportionate to the regulatory benefit of requiring a prospectus.

### **Regulatory Guide 125 *Share purchase plans* (RG 125)**

RG 125 explains the conditional relief we have given to allow offers of ASX quoted shares (or interests) to existing members without a prospectus (or PDS) under a share purchase plan.

### **Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173) and Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189)**

- 23 RG 173 and 189 were updated to explain our case-by-case relief to increase the maximum 5-day suspension period for cleansing notices.

## C Managed investments 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

#### National housing affordability scheme

- 24 In the matter referred to in paragraph 1, we also granted relief from the requirement for the managed investment schemes to be registered under Ch 5C.

#### Share sale facility following a scheme of arrangement

- 25 In the matter referred to in paragraph 3, we also granted relief from the requirement to register a managed investment scheme in relation to the operation of a share sale facility.

### Other relief relating to registered schemes

#### Equal treatment relief for exchange traded fund listed on AQUA market

- 26 In the matter referred to in paragraph 10, we also granted the applicant relief from the requirement in s601FC(1)(d) to treat members of the same class equally and all members fairly. The responsible entity (RE) of the exchange traded fund sought relief so that foreign members could be restricted from being able to redeem units in the exchange traded fund. This was because of the difficulty the RE would have in complying with certain taxation requirements and obligations for foreign members. We granted relief because the compliance burden on the applicant outweighed any regulatory benefit in this case, particularly given that the number of persons likely to be restricted from being able to redeem units in the exchange traded fund was minimal.

## Publications

- 27 We issued the following variations to existing class orders relating to managed investments relief during the period of this report.

### **Class orders**

**[CO 09/462] *Variation of [CO 05/26] Constitutional provisions about the consideration to acquire interests***

- 28 [CO 09/462] facilitates fundraising by removing the 10% discount limit on placements without approval of a resolution of members.

**[CO 09/465] *Variation of [CO 04/671] Disclosure for on-sale of securities and other financial products and [CO 05/26] Constitutional provisions about the consideration to acquire interests***

- 29 [CO 09/465] varies [CO 05/26] to allow the RE of a managed investment scheme to set the issue price for interests issued under an interest purchase plan on certain conditions.

**[CO 09/532] *Variation of [CO 02/319] Horse racing syndicates***

- 30 [CO 09/532] amends the definition of 'lead regulator' in [CO 02/319] by substituting the Tasmanian Thoroughbred Racing Council with the Tasmanian Racing Board.

## 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.

### Acquisition of relevant interests in voting shares

#### Downstream acquisition of a relevant interest

- 31 We refused to grant relief to permit the downstream acquisition of a relevant interest of greater than 20% in a number of ASX-listed companies resulting from the proposed acquisition of another company which, although listed on ASX, had only one shareholder. In accordance with Regulatory Guide 71 *Downstream acquisitions* (RG 71), we were not prepared to grant relief. We considered the acquirer would obtain effective control of the relevant companies as a result of the acquisition and we did not consider there were otherwise circumstances which justified a departure from our policy. In particular, we considered the fact that the acquisition was part of a sale process conducted by a receiver appointed to the sole shareholder of the upstream company was not grounds to grant relief. Our decision to refuse relief on the conditions sought was appealed to the Takeovers Panel and subsequently affirmed: *Cape Lambert MinSec Pty Ltd* [2009] ATP 12.

#### Aggregation of relevant interests

- 32 We refused to grant a modification of s606 and 671B to apply 15 business days after the completion date of a proposed share sale agreement. We made a decision in-principle to grant a modification of s606 and 671B only up until the completion date of the proposed share sale agreement. We considered the commercial benefit of granting relief past the completion date for an additional period of 15 business days did not outweigh any regulatory detriment.

#### Share sale facility following a scheme of arrangement

- 33 In the matter referred to in paragraph 3, we also granted relief from compliance with s606 (and Ch 6C) to a company (Company A) conducting a share sale facility in relation to the acquisition of a relevant interest in shares to be allotted to participating shareholders in the sale facility. Prior to the



commencement of the sale facility, Company A was required to hold shares issued to shareholders subsequent to a scheme of arrangement, where those shareholders wished to participate in the sale facility rather than continuing as shareholders. Without relief, Company A may have breached the relevant thresholds in s606 (and Ch 6C) as a result.

## Takeovers

### Extension of the offer period for a takeover bid

- 34 We granted relief to a bidder so that it could extend the offer period for a takeover bid where the bidder had lodged a notice under s630(3) in relation to the bid (which meant that the bid could only be varied in certain ways). The need to extend the offer period arose as the bidder had failed to send bidder's statements and offer forms to the target's escrowed shareholders, whose shares came out of escrow during the offer period. The escrowed shareholders accounted for 36% of the target's shares. These shareholders had not yet received the bidder's statements and acceptance forms, and would be unlikely to receive these documents until just prior to the closing date of the bid. We considered that without relief these shareholders would not have had a reasonable time to consider the bid. We made a decision to grant relief due to the apparent unequal treatment of the escrowed shareholders under the bid, and to ensure that each shareholder had a reasonable and equal opportunity to participate in any benefits accruing to the holders through the bid.

## Others mergers and acquisitions relief

### Unclaimed consideration

- 35 We refused to grant relief to modify s668B(1) to facilitate a company transferring unclaimed shares and options to ASIC before the end of 12 months after publication in the ASIC Gazette. In accordance with s1339(2)(b), shares and options are sold upon receipt by ASIC. We refused relief as we were not satisfied this would be in the best interests of the holders.

### Voluntary escrows following mandatory listing rules escrows

- 36 We refused to grant voluntary escrow relief to a listed company to enable it to have a relevant interest in its own securities. The company had entered into a voluntary escrow arrangement with certain security holders and the

securities had already been subject to a 12-month mandatory escrow under the ASX listing rules. More than 30% of the company's securities would have been subject to voluntary escrow and the securities subject to the voluntary escrow had been issued pursuant to an acquisition approved by shareholders under item 7 of s611. We considered that the proposed escrow might discourage potential bidders because they may have more difficulty building a pre-bid stake.

### **Relevant interest (and substantial shareholder) relief for exchange traded fund listed on AQUA market**

- 37 In the matter referred to in paragraph 26, we also granted relief from s609 and 671B so that members in the exchange traded funds did not acquire a relevant interest in the underlying securities upon lodging a redemption request under a redemption facility.

## **Publications**

- 38 We issued the following class order and regulatory guide in relation to mergers and acquisitions relief during the period of this report.

### **Advisories**

#### **09-117AD *Improving disclosure of securities lending (3 July 2009)***

- 39 This advisory announced the release of consultation paper *Securities lending and substantial interest disclosure* (CP 107) which seeks to improve disclosure of substantial holdings in practice and makes it clear that securities lending transactions and prime broking arrangements need to be taken into account in calculating a substantial holding.

### **Class orders**

#### **[CO 09/459] *Takeovers relief for accelerated rights issues***

- 40 [CO 09/459] provides an exemption from the takeovers provisions in Ch 6 for accelerated rights offers. Relief is conditional on the retail allotment occurring within two months after the allotment to institutional investors. [CO 09/459] is directed at facilitating equity capital raising. At the same time, it seeks to ensure that investor protections will not be unduly compromised, and to increase the access that retail investors have to upcoming equity capital raising opportunities that otherwise would likely occur via institutional placements.

## Regulatory guides

### **Regulatory Guide 199 *Broadening the rights issue and dividend reinvestment plan exceptions for takeovers (RG 199)***

- 41 RG 199 sets out the circumstances in which we may provide relief from the takeovers provisions to persons who may contravene the takeovers provisions of the Corporations Act as a result of participating in a rights issue or dividend reinvestment plan by a listed company or unlisted company with more than 50 members, or a listed managed investment scheme.

## E Short selling relief

### Key points

- 42 This section outlines some of our regulatory action in relation to the short selling provisions in s1020B, and in notional s1020BC and 1020BD. There are no individual relief items to report during this period.

### Publications

- 43 We issued the following advisory and variation to an existing class order in relation to short selling relief during the period of this report.

#### Advisories

##### ***09-94AD ASIC lifts ban on covered short selling of financial securities (25 May 2009)***

- 44 Covered short selling of securities was temporarily banned on 21 September 2008 in circumstances of extreme market volatility. This advisory announced that we were lifting the ban on covered short selling of financial securities from 10am on 25 May 2009. We lifted the ban on covered short selling of non-financial securities on 19 November 2008.

#### Class orders

##### ***[CO 09/39] Variation of [CO 08/751] Covered short sales***

- 45 This class order:
- removed the ban on covered short selling of financial securities; and
  - made technical amendments to clarify the disclosure and reporting obligation that apply to covered short sales.

## F Conduct relief

### Key points

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

## Financial reporting

### No-action letter for resignation of all officers of a public company for the duration of the voluntary administration

- 46 We refused to issue a no-action letter to a public company and its administrators for breaches of s201A(2) and 204A(2) for the duration of the voluntary administration. The company and its administrators requested relief because the company secretary and the entire board of directors had resigned shortly after the company was placed into voluntary administration. We refused to issue a no-action letter to the company because we were not convinced it was consistent with the policy of the legislation. We thought it unnecessary to grant the administrators a no-action letter because we were not convinced they had breached the Corporations Act in the circumstances.

### Six-month financial year for not-for-profit entity

- 47 We refused to grant relief to facilitate the change of financial year-end for a not-for-profit entity by way of an 18-month financial year. Instead, we granted relief to allow a six-month transitional year end. The not-for-profit entity requested the change of financial year end to enable it to align its financial year with that of an affiliate. We decided to allow a six-month transitional year end rather than an 18-month financial year because:
- a transitional six-month financial year met the objective of aligning the not-for-profit entity's financial year with its affiliate;
  - the benefit to users and potential users of the accounts, particularly public donors, was significant;
  - a prolonged delay in the provision of financial information may cause that information to lose its relevance; and
  - the nature of charitable and not-for-profit organisations in receiving a large proportion of cash donations warrants a level of transparency and accountability, which is facilitated by the lodgement of timely and reliable financial information.

### **Lodgement of balance sheet for a foreign registered company**

- 48 We refused to grant relief to a registered foreign company from the requirements under s601CK(1) to lodge a copy of the balance sheet and profit and loss and cash flow statements for the company. The company proposed to lodge the consolidated financial statements of its parent company prepared in accordance with laws applicable in the parent's home jurisdiction (the United States). Our policy in Regulatory Guide 58 *Reporting requirements: Registered foreign companies and Australian companies with foreign company shareholders* (RG 58) expressly states that we will not grant relief under s601CK(7) if it will result in a foreign company lodging less information than an equivalent Australian company. In this case, lodging consolidated financial statements of the parent company would result in less information than an equivalent Australian company (in this case an Australian public company). We were not satisfied that the costs burden was unreasonable and any burden was outweighed by the potential detriment to Australian users of the accounts.

## **Anti-hawking relief**

### **National housing affordability scheme**

- 49 In the matter referred to in paragraph 1, we also granted relief from the anti-hawking provisions in Div 8 of Part 7.8 in relation to unsolicited offers of interests in the national rental affordability managed investment schemes.

### **Share sale facility following a scheme of arrangement**

- 50 In the matter referred to in paragraph 3, we also granted relief from the prohibition in s1019F.

## **Publications**

- 51 We issued the following class order in relation to financial services relief during the period of this report.

### **Class orders**

#### **[CO 09/210] *Intra-fund superannuation advice***

- 52 [CO 09/210] provides relief from s945A to superannuation fund trustees (and their authorised representatives) who provide personal advice to fund members about their existing superannuation fund.

## 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.

### Bank guarantee as alternative compensation arrangement

- 53 We refused to approve a bank guarantee as an alternative compensation arrangement under s912B(2)(b). Relief was refused because the bank guarantee:
- fell short of the \$2 million minimum professional indemnity insurance requirement in Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) at RG 126.97; and
  - mirrored a security bond as contained in Pro Forma 13 *Performance bond—Licence* (PF 13), contrary to RG 126.94.

### Request for no action letter for distribution of a companion credit card

- 54 We refused a request for a no action letter from a card issuer for proposed breaches of s12DL of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) in relation to the applicant's intention to send out a companion credit card to existing credit cardholders without a request in writing from those cardholders. The companion card was to be used as a separate access card and linked to the cardholder's existing credit account. Section 12DL(1) of the ASIC Act prohibits a person from sending another person a credit card or debit card except in accordance with s12DL(2). We refused the application on the basis that the proposal did not fall within any of the exceptions in s12DL(2) and it would not advance the policy of the legislation to grant the no-action letter.

Note: In *Westpac Banking Corporation v Australian Securities and Investments Commission [2009] FCA 1506* (15 December 2009), the Federal Court considered s12DL of the ASIC Act in a different context to that in this particular application.

## Publications

- 55 We did not issue any publications (i.e. advisories, media releases, class orders, consultation papers or regulatory guides) in relation to

'miscellaneous' financial services and capital markets relief during the period of this report.



## 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](http://www.asic.gov.au/co). The instruments are published in the ASIC Gazette, which is available via [www.asic.gov.au/gazettes](http://www.asic.gov.au/gazettes).

**Table 1: 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 24 49	Affordable Management Corporation Pty Ltd (ACN 135 826 185)	09-00553 (58/09)	10/07/2009	s 601QA(1)(a), 911A(2)(l) and 992B(1)(a)  This instrument provides Ch 5C relief, licensing relief and anti-hawking relief to the operator of a managed investment scheme under the Commonwealth national housing affordability scheme.	
2 9	Da Vinci Airport Precinct Pty Ltd (ACN 127 169 975)  CB Richard Ellis (C) Pty Ltd (ACN 003 205 552)  DTZ Australia (Queensland) Pty Ltd (ACN 121 110 763)  Jones Lang Lasalle (Qld) Pty Ltd (ACN 010 411 140)  Knight Frank Australia Pty Ltd (ACN 004 973 684)  The trust trading as Ray White Commercial (Queensland) (ACN 399 312 159)  FPD Savills (Qld) Pty Ltd (ACN 010 654 109)	09-00347 (in 38/09)	01/05/2009	s 741(1)(a), 911A(2)(l)  This instrument provides licensing and prospectus relief to a group of entities in relation to a share transfer in a real estate company.	

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 25 33 50	MyState Financial Credit Union of Tasmania Limited (ACN 067 729 195)	09-00543 (in 56/09)	07/07/2009	s601QA(1)(a), 655A, 673, 911A(2)(l), 1020F(1)(a)  This instrument provides licensing, registration, relevant interest and anti-hawking relief to an entity in relation to a share sale facility.	
5	Infigen Energy Limited (ACN 105 051 616) Infigen Energy (Bermuda) Limited (ARBN 116 360 715) Infigen Energy RE Limited (ACN 113 813 997)	09-00460 (in 48/09)	12/06/2009	s741(1)(a), 911A(2)(l), 992B(1)(a), 1020F(1)(a) and 1020F(1)(b)  This instrument provides prospectus relief to a group of entities in relation to an employee share scheme involving options and rights over triple-stapled securities through a trust structure.	
6	Bathurst Resources Limited (ACN 125 679 469)	09-00456	17/06/2009	s741(1)(a)  This instrument provides prospectus relief to an entity in relation to a share purchase plan offer.	
7	Freightways Limited (a company incorporated under the laws of New Zealand)	09-00360 (in 38/09)	06/05/2009	s741(1)(a)  This instrument provides prospectus relief to an entity listed on the New Zealand Stock Exchange in relation to a share purchase plan offered to its Australian shareholders.	
10 26 37	Vanguard Investments Australia Ltd (ACN 072 881 086)	09-00310 09-00311 09-00312 (in 34/09)	21/04/2009	s601QA(1)(b) , 655A(1), 673(1), 1020F(1)(c),  This instrument provides relief for a responsible entity of an exchange trade fund from the equal treatment requirement in s601FC(1)(d). We also granted relief to permit continuous offering of units and relief so that members did not acquire a relevant interest in the underlying securities upon lodging a redemption request under a redemption facility.	

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
15	Patersons Securities Limited (ACN 008 896 311)	09-00269 (in 30/09)	6/04/2009	s951B(1)(a)  This instrument provides relief to a company giving it additional time to provide Statements of Advice in certain circumstances.	
36	Drillsearch Energy Limited (ACN 006 474 844)	09-00418 (in 44/09)	26/05/2009	s655A(1)(a)  This instrument provides relief to an entity to extend a takeover bid where it was otherwise precluded from doing so.	