ASIC
Australian Securities & Investments Commission

REPORT 203

Overview of decisions on relief applications (August to November 2009)

June 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 August 2009 to 30 November 2009. It summarises situations where we have exercised, or refused to exercise, our exemption and modification powers under 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 to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Contents

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 August 2009 and ending 30 November 2009. During this period we decided 1310 applications. We granted relief in relation to 957 applications and refused relief in relation to 194 applications; 159 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.

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.

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.

Liquidators' funding arrangements

1 We granted relief from the requirement to hold an AFS licence to the liquidators of two companies to enable the liquidators to use funds received from the creditors of the companies to conduct public examinations under s596A and 596B. The liquidators had sought funds from creditors for the purpose of conducting public examinations to gather evidence to enable legal proceedings to be brought against a third party in relation to the disputed ownership of debts that arose from investments in a failed managed investment scheme. The Federal Court of Australia had made orders that prevented the liquidators from seeking new funds from creditors and that restricted the liquidators' use of the funds received for conducting public examinations. The Federal Court decision proceeded on the basis that the funding model used by the liquidators to conduct public examinations might be a managed investment scheme, which would need to be registered under Ch 5C. We granted licensing relief limited to allowing the liquidators to conduct public examinations using the funds received to date because:

- of the uncertainty as to whether the liquidators' arrangements would satisfy the definition of a managed investment scheme, to avoid disruption to the liquidators' conduct of public examinations under the Corporations Act; and
- to avoid a breach of the orders of the Federal Court limiting the liquidators' use of funds received from creditors.

Licensing relief for a company making offers under an employee incentive scheme

2 We granted relief from the requirement to hold an AFS licence in relation to the offer of warrants, options and warrant appreciation rights (WARs) under an employee incentive scheme designed for employees in management. Relief was required in connection with:

- the offer to make available, and making available of, the sale facility feature of the options;

- the arrangement for Australian employees to apply for WARs and options with the sale facility;
- the issue and offer to issue WARs; and
- the offer to arrange for the sale facility of the options to be made by a third party.

Relief was granted because it is within the scope of our policies in respect of both relief from the licensing provisions, as set out in Part A of Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167) and relief from Pt 7.9, as set out in Part A of Regulatory Guide 169 *Disclosure: Discretionary powers* (RG 169).

Licensing relief for a litigation funder

3 We granted relief from the requirement to hold an AFS licence to a litigation funder for its litigation funding activities in relation to a number of legal proceedings commenced before 4 November 2009. Relief was required as a result of the decision in *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, in which the Full Court of the Federal Court concluded that a litigation funding arrangement comprises a managed investment scheme under Ch 5C. Transitional relief was granted until 30 September 2010 to avoid any disruption that could adversely affect plaintiffs in the legal proceedings that are affected by the *Multiplex* decision, or interfere with the timely and efficient conduct of the litigation.

Licensing relief for trustees providing financial services to the Commonwealth

4 We granted relief from the requirement to hold an AFS licence to trustees of unregistered managed investment schemes that were providing financial services to the Commonwealth. The financial services were provided as a result of a Commonwealth initiative to provide temporary and targeted venture capital to companies engaged in research and development in Australia.. We granted relief because:

- the trustee is in effect providing financial services only to the Commonwealth, which is a sophisticated investor;
- the risk to the Commonwealth is minimal because:
  - it is afforded sufficient protection under the terms of the arrangement by virtue of it being able to determine the criteria for a trustee and the proposal, assess the capability, skills and experience of the trustee in managing equity capital investments, and dictate the contents of the funding agreements; and

  - it has common law contractual rights to remedy any breach of that contract; and
- the costs of compliance were likely to be disproportionately burdensome compared to the regulatory benefit if no exemption were provided.

Licensing relief for operators of casual rental scheme

5 We granted relief from the requirement to hold an AFS licence to entities operating and managing accommodation businesses operating on or near university campuses. During the summer university vacations, many students leave their rooms vacant. The operators and managers sought to enter into arrangements with those students to place their rooms into a pool to be made available by the manager to rent out on a casual basis to third parties. We granted conditional relief because:

- the small size of the schemes, the low level of income that is likely to be derived from the schemes and the limited purpose for which the schemes can operate meant that the net regulatory benefit of requiring compliance was limited;
- the costs of compliance are likely to be disproportionately burdensome compared to the regulatory benefit; and
- there was limited financial risk associated with the schemes to the students.

Publications

6 We issued the following media releases and regulatory guide in relation to licensing relief during the period of this report.

Media releases

09-218MR *ASIC grants transitional relief from regulation for funded class actions* (4 November 2009)

7 This media release announced our intention to grant transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions.

09-224MR *ASIC outlines improvements to regulation of credit rating agencies in Australia* (12 November 2009)

8 From 1 January 2010, credit rating agencies are required to hold an AFS licence. Under the AFS licensing regime, general licensee obligations set out in the Corporations Act apply.

Regulatory guides

Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126)

9 RG 126 was updated to remove the requirement for AFS licensees to obtain automatic run-off cover. Previously, AFS licensees were required to obtain, from 1 January 2010, professional indemnity insurance policies that included 12 months automatic run-off cover.

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

Refusal of relief from the consent to quote

10 We refused to grant an issuer a modification of s716(2) to enable a statement regarding a proposed change by a ratings agency of its ratings methodology to be disclosed in a prospectus without the consent of the ratings agency. We considered the commercial benefit of granting relief did not outweigh the potential regulatory detriment that may occur as neither the issuer nor the ratings agency had any statutory liability for the statement.

PDS relief

Liquidators' funding arrangements

11 In the matter referred to in paragraph 1, we also granted relief from the requirement for two liquidators to provide a PDS to creditors that contributed money to the liquidators for the purpose of the liquidators conducting public examinations under s596A and 596B.

Disclosure relief relating to an employee incentive scheme

12 In the matter referred to in paragraph 2 we also granted disclosure relief from Pts 6D.2, 6D.3 (except s736) and 7.9. Relief was required because the offer of the options and WARs were not eligible offers and so did not comply with Class Order [CO 03/184] *Employee share schemes.*. 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.

Disclosure relief to a litigation funder

13 In the matter referred to in paragraph 3, we also granted disclosure relief from Pt 7.9 on the basis discussed in paragraph 3.

Disclosure relief for operators of casual rental scheme

14 In the matter referred to in paragraph 5, we also granted disclosure relief from Pt 7.9 to entities operating and managing accommodation businesses, so that they were not required to give a PDS to students participating in the casual rental scheme.

Other disclosure relief

Disclosure relief for share sale and purchase facility

15 We granted relief from s1019E–1019J in relation to the offer of shares under a sale and purchase facility (matching facility) made available following a Pt 5.1 scheme of arrangement and demerger. The matching facility was designed to assist shareholders who received shares in the demerged entity to either sell their allocation (or purchase additional shares). The matching facility share price was to be determined by way of an institutional bookbuild. Regulatory Guide 161 *Share and interest sale facilities* (RG 161) requires that the share price under a sale facility needs to be a 'market determined price'. We granted relief on the basis that the matching facility would be beneficial to shareholders as it provided a means for shareholders to sell (or buy) shares they received. Relief was also granted on the basis that the applicant and its associates did not participate in the bookbuild, so that it provided an independent pricing mechanism.

Contemporaneous disclosure relief

16 We granted disclosure relief by way of a modification to the contemporary disclosure provisions for a prospectus in s708A(11) and for a PDS in s1012DA(11), in relation to the issue of convertible securities.

17 Contemporaneous disclosure relief was granted in relation to options issued without disclosure where a combined prospectus/PDS for options in the same class as those issued without disclosure was to be lodged with ASIC approximately four months after the initial options were granted.

18 Relief was granted in the specific circumstances of the application because:

- the issue of the granted options without disclosure occurred in circumstances of financial stress as a result of the global financial crisis and was not orchestrated to avoid disclosure to retail investors;

- timely disclosure to the market of the issue of the granted options was made enabling investors and the market to assess the impact of the issue of the granted options on the market price of the company's securities and on the prospects of the company;
- no exercise or on-sale of the granted options had occurred; and
- a combined prospectus/PDS for options in the same class was to be issued approximately four months after the granted options were issued.

19 As there was no equivalent to Class Order [CO 00/195] *Offer of convertible securities under s713* for options convertible into continuously quoted financial products, a full PDS rather than a transaction-specific PDS would have been required. For the same reasons, we gave relief to enable the use of a transaction-specific PDS in relation to the options.

Secondary sale relief

20 We granted secondary sale relief by way of a modification to s707(3) and 707(4) in relation to convertible securities originally issued under a prospectus where it was proposed to amend the terms of the securities with security holder approval. Relief was granted to enable the amended convertible securities to have the benefit of secondary sale relief for the underlying securities under Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products*. Relief was granted because:

- the proposal to amend the terms of the convertible securities was to be considered at a meeting of security holders and required approval by way of a special resolution of security holders;
- the notice of meeting documents contained substantive disclosure about the proposed amendments, which included the impact of the proposed amendments to the terms of the convertible securities on the rights of security holders and an expert's report;
- the convertible securities were originally issued with disclosure and the proposed amendments to the terms of the convertible securities did not constitute a further offer; and
- the amendments to the terms of the convertible securities were sought in accordance with their terms and the amendments did not fundamentally change the nature of the convertible securities originally issued with disclosure.

No-action position for breach of reg 7.9.20AA(5)

21 We adopted a no-action position for the period 1 July 2009 to 31 December 2009 in relation to the requirement in reg 7.9.20AA(5) of the Corporations Regulations 2001. Regulation 7.9.20AA(5) requires that if the trustee of a regulated superannuation fund is providing long-term returns in an insert to

the exit statement and the insert includes the long-term returns of investment options in which the member is not invested, as well as those in which the member is invested, a statement must be included in the exit statement indicating which investment options the member is invested in.

22 This means that, for a trustee granted a no-action position, the relevant statement does not have to be provided in the exit statement itself. The no-action position was requested because of a lengthy delay in the distribution of exit statements due to the substantial system updates that would be required.

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

23 We adopted a no-action position for the period 1 July 2009 to 31 December 2009 in relation to the requirement in reg 7.9.20AA(7). Regulation 7.9.20AA(7) requires the trustee of a regulated superannuation fund to include in the exit statement, and the insert to the exit statement, a statement to the effect that the returns are not the returns of the member's investment in the investment option, sub-plan or fund (relevant statement).

24 This means that, for a trustee granted a no-action position, the relevant statement does not have to be provided in the exit statement itself. The no-action position was requested because of an expected lengthy delay in the distribution of exit statements to members due to the substantial system updates that would be required.

Employee share scheme for foreign company

25 A public company incorporated in Ireland requested relief to enable it to offer securities to Australian-based employees of a group of companies under an employee share scheme. A company incorporated in Bermuda and listed on the New York Stock Exchange (NYSE) was the ultimate parent of the group. The group proposed a restructure under which the company would become the new parent company of the group, listing on the NYSE, with the existing parent becoming a wholly owned subsidiary. The purpose of the restructure was essentially to change the group parent's place of incorporation from Bermuda to Ireland. Before the restructure, offers of shares to Australian-resident employees of the group relied on Instrument 02/868 and Class Order [CO 03/184] *Employee share schemes*. Relief was required because an offer of securities would not satisfy paragraph (a) of the definition of 'eligible offer' in [CO 03/184], because the company would not have been listed on the NYSE throughout the 12-month period immediately prior to the offer. Conditional relief was granted based on the First and Second Exemptions of [CO 03/184], because the restructure was essentially a 'top-hatting' arrangement.

Publications

26 We issued the following class order, consultation papers and advisory in relation to disclosure relief during the period of this report.

Class orders

[CO 09/38] *Revocation of [CO 04/1556] and variation of [CO 05/1270]*

27 [CO 09/38] revokes Class Order [CO 04/1556] *Statements of additional advice* and varies Class Order [CO 05/1270] *Operation of certain instruments*.

28 [CO 04/1556] was redundant as the incorporation of certain Statement of Advice (SOA) information by reference when providing additional advice is now permitted under reg 7.7.09B. The variation to [CO 05/1270] omitted reference to [CO 04/1556] from the definition of 'eligible instrument'.

Consultation papers

CP 117 *Consent to quote credit ratings in disclosure documents and PDSs*

29 We previously gave class order relief for issuers to cite credit ratings from Standard & Poor's, Moody's Investors Service and Fitch Ratings in a disclosure document or PDS without the consent of credit rating agencies.

30 CP 117 sought stakeholder feedback in relation to our proposal to withdraw our existing class order relief under Class Order [CO 07/428] *Consent to quote: Citing trading data and geological reports in disclosure documents and PDS* for issuers to cite credit ratings without consent.

CP 121 *Facilitating online financial services disclosures*

31 Industry had previously expressed concern that there was uncertainty about whether the law permits delivery of financial services disclosures by making the information available via hyperlink.

32 CP 121 sought stakeholder feedback in relation to:

- our proposed relief to allow online delivery of PDSs, FSGs and SOAs via hyperlinks and references to website addresses;
- our proposed good practice guidance on how providers can deliver disclosures online; and
- whether paper disclosure or online disclosure should be the default method of delivering disclosures.

CP 122 *Superannuation forecasts: ASIC relief and guidance for super funds*

33 CP 122 sought stakeholder feedback in relation to our proposal to grant relief to super fund trustees who provide retirement projections to their existing members with their periodic statements.

Advisories

09-225AD *ASIC gives credit ratings agencies improved control over ratings use* (12 November 2009)

34 This advisory announced our decision to withdraw, from 1 January 2010, class order relief that allowed issuers of investment products to cite credit ratings without the consent of credit rating agencies.

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

Liquidators' funding arrangements

35 In the matter referred to in paragraph 1, we also granted the liquidators relief from the requirement of registering funding arrangements, which were established for the purpose of enabling the liquidators to conduct public examinations under s596A and 596B, as a scheme under Ch 5C.

Relief from registration for a litigation funder

36 In the matter referred to in paragraph 3, we also granted relief to the litigation funder from the requirement to register under Ch 5C on the basis discussed under paragraph 3.

Registration relief for operators of casual rental scheme

37 In the matter referred to in paragraph 5, we also granted relief from the requirement to register the casual rental scheme as a managed investment scheme.

Other relief relating to registered schemes

Equal treatment relief regarding consideration offered in connection with restructure

38 We granted relief to the responsible entity of a listed scheme from the obligation to treat members of the same class of interests equally under s601FC(1)(d). Under a restructure proposal, a company that was in the same corporate group as the responsible entity of the scheme would acquire all of the interests in the scheme, apart from the interests already held by the acquirer. Two consideration options were proposed—cash and interests in another scheme, or interests in the other scheme only. The entitlement to

cash consideration was capped at a maximum number of units held. Further, the responsible entity offered a sale facility under which any member of the scheme could have the scrip component of their consideration sold using a bookbuild process, with the net proceeds to be paid in cash to the member. The responsible entity sought relief from the equal treatment obligation because it proposed to treat members differently in the following respects:

- members not residing in Australia and New Zealand would not be eligible to receive scrip consideration (these members were deemed to participate in the sale facility to the extent of the scrip consideration they would otherwise have been entitled to receive); and
- for the purpose of applying the cap for the cash consideration, a look-through process would be used for members that held their interest through a custodian, so that the beneficial ownership of interests would be used as the determinant.

39 We granted the equal treatment relief in relation to the different treatment of foreign members because offering the scrip consideration to foreign members would mean that the responsible entity would be required to comply with disclosure requirements in numerous overseas jurisdictions. This would impose disproportionately high costs and burdens on the responsible entity. In relation to the different treatment of members that held interests beneficially through a custodian, we granted relief from the equal treatment obligation, so that all members, regardless of whether they held interests directly or beneficially, could be treated equally for the purpose of determining their entitlement to the cash component of the consideration.

Extension of hardship relief for frozen funds

40 We granted relief from the equal treatment provisions and withdrawal provisions in Ch 5C to facilitate the ability for members suffering hardship to withdraw from several frozen mortgage schemes. Our relief was an extension of relief already granted to frozen mortgage schemes in 2008. The relief extended the amount and frequency with which the mortgage schemes could make hardship payments, as well as the categories of hardship. We granted conditional relief because the responsible entity had already been granted hardship relief and it appeared that all schemes had current cash balances that enabled them to make increased hardship payments, without detrimentally affecting members that remained invested in the mortgage schemes.

Publications

41 We issued the following class order and media releases in relation to managed investments relief during the period of this report.

Class orders

[CO 09/552] *Changing scheme constitutions*

42 [CO 09/552] provides relief to enable a responsible entity of a registered scheme to modify or repeal and replace the scheme's constitution where a meeting of members cannot be held or where all interests in the scheme have been issued in circumstances where a PDS was not required. The relief is conditional on members providing unanimous written consent to the proposed change to the constitution.

Media releases

09-148MR *ASIC expands relief for hardship withdrawals from frozen mortgage funds* (17 August 2009)

43 This media release announced changes to hardship withdrawals from frozen mortgage funds. These changes expanded the circumstances in which operators were able to make payments to fund members who demonstrated the need to access funds on hardship grounds.

09-218MR *ASIC grants transitional relief from regulation for funded class actions* (4 November 2009)

44 This media release announced our intention to grant transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions.

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

Relief to attach documents to a substantial holder notice

45 We granted relief from s671B(4) to an acquirer (Company A) of shares in a company (Company B). Section 671B(4) requires the information in a substantial holding notice to contain a copy of any document setting out the terms of any relevant agreements that contributed to the situation giving rise to the acquisition of substantial holdings. Company A had entered into a share sale agreement for the purchase of shares in Company B, which had relevant interest in listed Australian companies and registered managed investment schemes. At the time of entering into the agreement, Company A was not aware of the precise nature and extent of such holdings. Relief was granted on the basis that the agreement:

- did not relate to the downstream acquisition;
- was only remotely connected to Company B's interests in shares and schemes;
- did not contain any reference to any of Company B's interests in shares and schemes; and
- was in standard form (and the notice provided would include a summary of the key terms of the agreement).

Relief to extend existing instruments in connection with a change to instalment receipts

46 We varied existing relief instruments in connection with a listed property trust that had issued instalment receipts to members. This effectively provided an ongoing exemption from s606 and Ch 6C, and an ongoing modification to Pt 7.9 and s1017A(2), 1017D and 1017F. The listed property trust had proposed a restructure to the terms of its instalment receipts. Relief was considered necessary because the conditions of the existing relief

instruments should not extend to cover the amended instalment receipts, had members of the trust approved the restructure.

Takeovers

Joint bid relief refused—minimum acceptance defeating condition

47 We refused to grant relief to modify existing joint bid relief by removing the minimum acceptance defeating condition, or allowing the joint bid entity to waive the minimum acceptance defeating condition in its discretion. Our decision was upheld on review by the Takeovers Panel in *Lion-Asia Resources Pte Ltd* [2009] ATP 25. The minimum acceptance defeating condition required that, during or at the end of the offer period, the bidder had received valid acceptances for not less than 50.1% of the target securities that the bidder offered to acquire under the offer excluding:

- any bid class securities in which the bidder and its respective associates had a relevant interest at the beginning of the offer period; and
- any bid class securities the subject of a pre-bid acceptance agreement between a substantial shareholder and a rival bidder.

48 The modification to the existing relief was refused because:

- the joint bid policy is concerned to ensure that joint bidders do not get an unfair advantage over non-associated shareholders and other potential bidders;
- if the minimum acceptance condition is not imposed so as to give non-associated shareholders a power of veto, joint bidders are effectively able to enter into joint bid agreements, make a bid, and then retain any relevant interest acquired as a consequence of the joint bid agreement and any acceptances;
- it remained open for the bidder to make its bid more attractive so as to improve its prospects of satisfying the minimum acceptance defeating condition, and the bidder had already done so by announcing its intention to increase the consideration being offered;
- the removal of the minimum acceptance defeating condition would undermine our policy on joint bids, have the potential to create market uncertainty, and would reduce certainty for rival bidders competing against a joint bid because it would be more difficult to plan their bid if they thought there was a risk that we would subsequently change the conditions of the joint bid relief during the bid process;
- shareholders could be adversely affected because they may have already based their decision to accept the rival offer on, among other things, the

fact that the joint bid offer was subject to a minimum acceptance defeating condition, in determining the relative prospects for success of the two bids; and

- the only way to address any adverse effect would be to offer the shareholders a right of withdrawal, which would be inconsistent with the efficient, competitive and informed market principle, given the potential impact on the rival bid.

Joint bid relief refused—higher rival bid condition

49 We refused to grant relief to modify existing joint bid relief by removing the higher rival bid condition in circumstances where a rival bid offers scrip or a combination of cash and scrip. Our policy on rival bids where the consideration offered is scrip or a combination of cash and scrip is that we will make the determination whether or not to require the joint bidders to accept the rival bid on a case-by-case basis, taking into account factors such as the liquidity of the scrip and any expert's report assessing the value of the scrip being offered. We refused relief to substitute our case-by-case assessment of whether a rival bid is higher for an assessment by an expert appointed by the joint bidders or an assessment based on the volume weighted average price of the offered securities (where those offered securities were quoted on ASX). This application was refused because:

- the factors specified in Section Z in RG 159 that we will consider when assessing a rival bid in these circumstances are not exhaustive; and
- it is important for ASIC to assess whether a rival bid is higher at the time the rival bid is made.

Exemption from obligation to proceed with bid

50 We refused relief to a bidder for an extension of time or otherwise an exemption from the obligation to proceed with a takeover bid as required by s631, after the takeover bid had been announced. The bidder submitted that it was no longer able to proceed with its bid due to matters rendering its financial position uncertain. Relief was refused on the basis that the policy underpinning s631 is to prevent the manipulation or disruption of the market by irresponsible or deceptive announcements. We will generally not grant relief if a bidder merely claims that it cannot reasonably be expected to make a bid at all or if the bidder may take advantage of a defence under s670F.

Relief to proceed to general compulsory acquisition of options in a company following a takeover bid

51 We granted relief to modify the compulsory acquisition provisions to allow a bidder in a takeover to compulsorily acquire all the target options, including the non-transferable options, in the event that the bidder met the compulsory

acquisition thresholds in s664A(2). There were several tranches of target options but only some were to be bid for. This type of relief is analogous to Class Order [CO 03/636] *Takeovers: non-transferable employee securities*. In the circumstances, [CO 03/636] was not available to the bidder because the non-transferable options had different exercise prices and expiry dates to those options being bid for. The relief was granted because it was within the policy of RG 159 and the underlying policy intention of [CO 03/636]. Section 664A operates outside the context of takeover bids and so it is not relevant that some options will not be bid for under the takeover. Despite the relief granted, the bidder still had to reach the thresholds required to proceed to compulsory acquisition.

Relief to treat multiple classes of options as a single class under a takeover bid

52 We refused to grant relief to a bidder so that it could treat multiple classes of options in a target company as a single class for the purposes of an off-market takeover bid. In this case, the target had on issue one class of options that was 'in the money' and multiple classes of options that were 'out of the money'. We refused to grant relief so that the bidder could treat both sets of options as being in the same class, as the classes of options were not sufficiently similar: see RG 159.24. Further, we also refused to treat all of the out of the money options as one class, as each class had different strike prices and the bidder did not demonstrate that the offers under the bid would be equitable to each class of options in the situation where we grant relief to allow the classes to be merged: see RG 159.17.

Proportional bid relief

53 We granted relief to a bidder making a proportional takeover bid to ensure the terms of s618(2) (which extends proportional offers to full parcels where a holder would otherwise be left with a non-marketable parcel upon acceptance) could not be abused, for example, through the splitting of holdings. The relief limited the scope of s618(2) such that offers automatically extend to full parcels only where:

- the holder's entire interest in the parcel was acquired prior to the bid being publicly proposed; and
- if the parcel is part of a larger parcel held in part as nominee or trustee for others—details of the holding are provided to the bidder in writing before, or at the same time as, acceptance.

54 The relief was an announced condition of the bid and accorded with general comments made by the Takeovers Panel, in *GoldLink IncomePlus Limited 04* [2009] ATP 2, suggesting that a bidder making a proportional bid apply for such relief.

Others mergers and acquisitions relief

Treatment of foreign holders under equal access issue—exception 10

55 We refused relief from s615 to allow the applicant to appoint a nominee for foreign holders of the applicant's securities and transfer to the nominee the securities that would otherwise be issued to the foreign holders who accepted the offer. We refused relief on the basis that:

- with respect to the number of foreign shareholders and the shares held, being 10% of total shareholders, exceeds what is considered by ASIC to be minimal; and
- we were unable to establish whether any proceeds from the sale of securities would be remitted to the foreign shareholders because the costs of the nominee were not disclosed.

Extension of time limit to lodge compulsory acquisition notice

56 We refused to grant relief allowing an extension of the six-month time limit in s664AA(b) for lodgement of a general compulsory acquisition notice by the applicant. The applicant owned more than 98% of a proprietary company and wished to acquire the remainder by compulsory acquisition, almost two years after the applicant became a 90% holder. We refused the relief in accordance with our policy in Regulatory Guide 171 *Anomalies and issues in the takeover provisions* (RG 171) at RG 171.188, as we were not satisfied that relief was consistent with the underlying policy of protecting minority shareholders from ongoing uncertainty in relation to the status of their holding.

Refusal to treat a selective buy-back as an equal access scheme

57 We refused to grant relief from s257D to treat a selective buy-back as an equal access scheme. The buy-back proposed to exclude foreign registered and beneficial shareholders holding approximately 4.5% of the company's shares. The proposed pricing of the buy-back would be at a premium to the market price. We refused relief because the pricing meant the buy-back would be attractive to foreign shareholders because they would have the opportunity to sell into the buy-back at a price greater than that of their current shares. Shareholder value may also be diluted if the buy-back price is too high. We considered a decision to grant relief would be inconsistent with s256A(b), which provides a purpose of the buy-back provisions is to ensure fairness between the company's shareholders. We were reluctant to change the buy-back provisions where a group of shareholders may have been

treated unfairly. In making the decision we considered both foreign registered and beneficial shareholder numbers.

Publications

58 We issued the following regulatory guide in relation to mergers and acquisitions relief during the period of this report.

Regulatory guides

Regulatory Guide 31 *Acquisitions by a broker acting as principal for client facilitation purposes* (RG 31)

59 RG 31 was updated to simplify the conditions to individual relief from the 20% threshold specified in s606, which allows a broker to acquire as principal a large parcel of securities from a client. To be granted relief, a broker must not be acquiring the securities with the purpose of holding or voting any of the securities. The updated conditions provide that the broker:

- must reduce its voting power in the relevant entity to 20% or less within 14 days after acquiring the securities;
- must not exercise any voting rights attached to those securities in excess of 20% without our consent; and
- in selling any securities acquired under the relief, must use its best endeavours to obtain as wide a placement as practicable, for the highest practicable price.

E Short Selling Relief

Key points

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

60 We issued the following class order in relation to short selling relief during the period of this report.

Class orders

[CO 09/774] ***Naked short selling relief for market makers***

61 [CO 09/774] permits a market maker to make naked short sales where all of the following apply:

- the market maker makes a market for a financial product;
- the market maker holds, or is exempt from holding, an AFS licence for making a market;
- the naked short sale is a bona fide transaction to hedge the risks arising from the market maker's market making activities;
- at the time of the sale, the financial product sold is a constituent of the S&P/ASX 200 index; and
- at the time of sale, the market maker believes on reasonable grounds that a securities lending arrangement can be put in place before delivery of the financial product sold so that a financial product of the same class as the financial product sold can be delivered to the purchaser.

62 This relief is subject to conditions that, by the end of the day, the market maker must:

- acquire a financial product of the same class as the financial product short sold; or
- enter into a contract to acquire a financial product of the same class as the financial product short sold; or
- have entered into a securities lending arrangement in relation to a financial product of the same class as the financial product short sold,

so that the financial product can be unconditionally vested in the purchaser at the time of delivery.

F Conduct and financial reporting 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

Cash flow statement for a registered foreign company

63 We granted relief to a registered foreign company from s601CK(5A), so that it would not be required to lodge with ASIC a cash flow statement that is prepared in accordance with the International Financial Reporting Standards (IFRS) that apply to Australian public companies. It would have been required to prepare a cash flow statement in accordance with the accounting standards if the company were a public company under the Corporations Act. Instead, as a condition of the relief the company was required to lodge a cash flow statement prepared in accordance with the United States Generally Accepted Accounting Principles (US GAAP). We granted relief because we considered the cost to the company in lodging a cash flow statement prepared under IFRS in accordance with s601CK(5A) outweighed any regulatory detriment resulting from the lodgement of a cash flow statement prepared in accordance with US GAAP, being the accounting standards recognised in its jurisdiction of origin. Under S.601CK, the remainder of the financial statements are required to be lodged using US GAAP and the differences in the cash flow statements under US GAAP and IFRS are unlikely to be significant in this case.

Extension of time to lodge financial report, etc. for a managed investment scheme—rare and exceptional circumstances

64 We granted a registered managed investment scheme an extension of time to lodge the scheme's annual financial reports under s319(3)(a) and to report to the members of the scheme under s315(3). The responsible entity sought relief on the basis that, among other things, the former responsible entity had refused to hand over most of the accounting records for the scheme, resulting in delays in completing valuations of scheme property required for the completion of the annual financial reports. We granted relief as the circumstances of the scheme were rare and exceptional and compliance with

the reporting requirements of the Corporations Act created unreasonable burdens in the circumstances of the scheme.

Extension of time to lodge reports for managed investment schemes in administration

65 We granted three registered managed investment schemes that were in administration extensions of time for lodgement of:

- annual financial reports under s319(3)(a);
- compliance plan audit reports under s601HG(7); and
- the AFS licensee's accounts under s989D(1).

66 The administrators sought relief for the lodgement of annual financial reports on the basis that the schemes were insolvent and strict compliance with the reporting requirements by the statutory deadline would be unreasonable or disproportionately burdensome. In granting relief, we applied the principles of Regulatory Guide 174 *Externally administered companies: Financial reporting and AGMs* (RG 174) and Class Order [CO 03/392] *Externally administered companies: Financial reporting relief*. Although [CO 03/392] does not apply to registered managed investment schemes, we considered that the policy that underpins [CO 03/392] was relevant on the basis that strict compliance would be impossible or disproportionately burdensome.

67 We granted an extension of up to six months from the date of the appointment of the administrators, as contemplated by [CO 03/392] on the basis that strict compliance would be impossible or disproportionately burdensome. We did not agree to the administrators' request to grant the extension to three months after the lodgement deadlines under s319 and 989D.

Financial reporting relief for a deregistered managed investment scheme

68 We granted an extension of 15 days for the responsible entity of a deregistered managed investment scheme to prepare and lodge annual financial statements. The scheme was deregistered on 4 July 2009 and only had two members, both of whom received monthly reports on the financial position of the scheme. The responsible entity was unable to lodge the financial statements on time and required a short extension in circumstances that were beyond its control.

Financial reporting relief for an externally administered company where members may have ongoing economic interest

69 We refused to grant financial reporting relief to an externally administered listed company in circumstances where the members may have had an ongoing economic interest in the company as a result of a proposed recapitalisation: see RG 174.31. Relief was refused because it would have meant the company would not have to comply with the requirement to prepare a financial report that contains comparative information for its previous reporting period. Our policy in Regulatory Guide 43: *Financial Reports and Audit Relief* (RG 43) at RG 43.33, states that we will generally not grant relief that is inconsistent with any standards made by the Australian Accounting Standards Board. Furthermore, RG 43.34 notes that we are unlikely to provide relief from compliance with Australian accounting standards based on IFRS requirements.

Publications

70 We issued the following class order in relation to conduct and financial reporting relief during the period of this report.

Class orders

[CO 09/626] ***Financial reporting relief – changes to notice lodging arrangements***

71 [CO 09/626] varies the terms of Class Order [CO 98/98] *Small proprietary companies which are controlled by a foreign company but which are not part of a large group* to give companies a longer period of time in which to lodge an opt-in or opt-out notice and to remove the discretion for us to grant an extension of time to lodge an opt-in notice.

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.

Anti-hawking relief for operators of a casual rental scheme

72 In the matter in paragraph 5, we granted relief from the anti-hawking provisions in s992A in order that the entities managing and operating the casual rental schemes could contact students to invite them to participate in the schemes.

Publications

73 We did not issue any publications on other 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 and which are publicly available. 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 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 11	Nicholas David James Crouch in his capacity as liquidator of Merilbah Investments Pty Ltd (In Liquidation) (ACN 002 979 893) Nicholas David James Crouch and Shabnam Amirbeaggi in their capacity as joint and several liquidators of Tumut River Orchard Management Limited (ACN 003 501 611)	10-00010 (A006/10)	12/1/2010	s601QA(1)(a), 926A(2)(b) and 1020F(1)(b) This instrument provides exemptions from the managed investment scheme provisions in Ch 5C, the requirement to hold an AFS licence and the PDS requirements under Pt 7.9.	
2	ABB Limited (ACN 107 290 380)	09-01008 (98/09)	1/12/2009	s741(1)(a), 911A(2)(l), 992B(1)(a), 1020F(1)(a) and (b) This instrument provides exemptions from fundraising provisions at Pts 6D.2 and 6D.3 (except s736), the PDS requirements at Pt 7.9, the licensing requirements and the hawking restrictions under the Corporations Act.	

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	IMF (Australia) Ltd (ACN 067 298 088)	09-00986 (100/09)	17/11/2009	s601QA(1)(b), 926A(2)(a) and 1020F(1)(b) This instrument declares that until 30 June 2010, the definition of 'managed investment scheme' in s9 is modified to include 'a scheme for participating in, conducting and funding legal proceedings' and provides an exemption from s911A(1) and Pt 7.9A in relation to that scheme.	
15	Lion Selection Limited (ACN 123 217 112)	09-00876 (86/09)	19/10/2009	S1020F(1)(a) This instrument provides an exemption from Pt 7.9 in relation to a share sale facility.	
16	Goodman Limited (ACN 000 123 071) and Goodman Funds Management Limited (ACN 067 796 641)	09-00663 (74/09)	9/9/2009	s741(1)(b) and 1020F(1)(c) This instrument provides relief by way of a declaration modifying s708A(11) and 1012DA(11) with respect to the secondary sale of securities issued by reason of the exercise of options.	
20	Insurance Australia Group Limited (ACN 090 739 923)	09-00657 (88/09)	22/10/2009	s741(1)(b) This instrument provides relief by way of a declaration modifying s707(3) and (4) in relation to the secondary sale of convertible securities issued with disclosure in circumstances where the terms of those convertible securities were amended with the approval of security holders in accordance with their terms.	
38	Mirvac REIT Management Limited (ACN 002 060 228)	09-00856 (84/09)	13/10/2009	s601QA(1)(a) This instrument exempts the responsible entity of a registered scheme from the obligation to treat members that hold interests in the same class equally.	

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
45	National Australia Bank Limited (ACN 004 044 937)	09-00819 (AO46/10)	30/9/2009	s673(1)(b) This instrument modifies the operation of s671B(4) to the extent necessary to provide that the information in s671B(3) does not need to include a sale agreement.	
46	Westpac Office Trust (ARSN 103 853 523)	09-00742 (76/09)	10/9/2009	s1075A(1) This instrument varies Instrument 03/0382 dated 23 May 2003.	
	Westpac Custodian Nominees Limited (ACN 002 861 565) Westpac Securities Limited (ACN 087 924 221) Westpac Funds Management Limited (ACN 085 352 405)	09-00748 (76/09)	10/9/2009	s1020F(1)(c) This instrument varies Instrument 03/0594 dated 24 June 2003.	
51	Glengarry Resources Limited (ACN 009 468 099)	09-01048 (100/09)	3/12/2009	s669(1)(b) This instrument modifies the operation of Div 1 of Pts 6A.1 and 6A.3.	
53	Blue Capital Limited (ACN 082 568 456)	09-00644 (66/09)	10/8/2009	s655A(1)(b) This instrument provides a modification restricting the application of s618(2) to parcels that existed prior to the public proposal of a bid and that have not increased in size since that time. Further, where the parcel is part of a larger parcel held in part as nominee or trustee for others, it is also necessary to provide details of the holding to the bidder in writing before or at the same time as acceptance.	

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
63	Bank of America, National Association (ARBN 064 874 531)	09-00757 (80/09)	23/9/2009	s601CK(7) This instrument declares that s601CK(5A) does not apply to Bank of America, National Association on the condition that the company lodges cash flow statements that are prepared in accordance with the United States Generally Accepted Accounting Principles.	