



ASIC

Australian Securities & Investments Commission

REPORT 252

Overview of decisions on relief applications (February to May 2011)

September 2011

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 February to 31 May 2011. It summarises situations where we have exercised, or refused to exercise, our exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising or financial services provisions of the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009* or *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

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 finding out how the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009* or *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, 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

- 1 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: Chs 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).
- 2 ASIC has powers to give relief under the provisions of Chs 2 (licensing) and 3 (responsible lending) of the *National Consumer Credit Protection Act 2009* (National Credit Act) and from all or specified provisions of the National Credit Code, which is in Sch 1 of the National Credit Act. ASIC also has powers to give relief from the registration provisions under Sch 2 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act).
- 3 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 National Credit Act and the Transitional Act.
- 4 This report covers the period beginning 1 February to 31 May 2011. During this period we received 868 applications. We granted relief in relation to 588 applications and refused relief in relation to 72 applications; 93 applications were withdrawn. The remaining 115 applications were considered outside of this period.
- 5 This report does not provide details of every single decision made in that period. It is intended to provide examples of decisions that demonstrate how we have applied our policy in practice. We use our discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where we can facilitate business without harming other stakeholders.
- 6 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.

- 7 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, or under ‘Credit relief’ on our website (for credit instruments). 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) of the Corporations Act from the requirement to hold an Australian financial services (AFS) licence. It also describes the relevant regulatory guides we updated.

Relief granted

Licensing relief for a water rights tender

- 8 We granted relief to an operator of a water rights tender from the managed investment, licensing, anti-hawking and financial product disclosure provisions of the Corporations Act. Relief was sought on terms substantially similar to Class Order [CO 02/211] *Managed investment schemes—Interests not for money*. The operator conducted a tender for water rights, which allowed vendors to contribute their water rights for sale to purchasers. Under the arrangement the operator pooled, marketed and sold the water rights. The net sale proceeds were then distributed to the vendors in proportion to their contribution. The operator submitted that it was unable to meet the condition set out in paragraph (c) of Schedule B of [CO 02/211] as each offeree (being the vendor of the water rights) did not produce the water rights.
- 9 We granted relief for the following reasons:
- The relief was broadly consistent with our policy in Regulatory Guide 80 *Managed investment schemes—Interests not for money* (RG 80) to provide licensing relief for certain types of transactions that involve the offer or issue of interests in a managed investment scheme not for money. We considered that this policy applied to water rights obtained in the vendors' ordinary course of business.
 - The trading of the water rights was subject to alternative regulation that governs their transfer.
 - The tender was not intended to be ongoing and it would be disproportionately burdensome in the circumstances for the applicant to comply with the licensing, anti-hawking, disclosure and scheme registration requirements under the Corporations Act.

Licensing relief for provision of general advice in advertising

- 10 We granted relief to the operator of a non-cash payment scheme so it could publish advertisements that contained general advice about the non-cash payment products issued by its members. The relief allows the provision of general advice in advertising in the media, on billboards, brochures or flyers, or through electronic services that are similar to the media, billboards, brochures or flyers. The relief granted was based on that available to product issuers for general advice on their own products—that is, the relief only applies where the disclosure in the advertisements is consistent with disclosure that would be required to be given by product issuers in advertisements for their own products.
- 11 We granted this relief for the following reasons:
- We considered that, given the large number of members, it would not be commercially viable for the entity to publish advertisements only as a representative of its members because individual approval from the members would be required.
 - Through the terms of its agreements with the product issuers under the scheme, the entity had knowledge of, and control over, the terms of the non-cash payment products—this limited the risk of generic advertising material being misleading.
 - The disclosure condition imposed—that is, the advertisement refers consumers to the issuer’s Product Disclosure Statement (PDS)—minimises the risk that consumers would rely only on the advertisement and without considering the PDS.

Licensing relief for a scheme of arrangement, trust schemes and related sale facilities

- 12 We granted relief from the managed investment, licensing, anti-hawking and financial product disclosure provisions of the Corporations Act in relation to a transaction involving a contemporaneous scheme of arrangement, trust schemes and an off-market takeover bid. Relief was sought to enable a limited partnership formed under the laws of Bermuda (acquirer) to acquire, through its general partner, all the stapled securities in the target that were not held by its associate. Under the scheme of arrangement and trust schemes, all non-associated holders of stapled securities in the target were offered scrip consideration in the acquirer. Sale facilities were also available to allow the target stapled security holders to receive cash in lieu of scrip consideration. There were separate sale facilities available to ineligible foreign stapled security holders and all other stapled security holders. The takeover bid was conditional upon the scheme of arrangement and trust schemes not becoming effective.

- 13 We granted licensing and anti-hawking relief to the target, acquirer, general partner of the acquirer and associate in relation to the trust scheme for the following reasons:
- The trust scheme is analogous to a Pt 5.1 scheme of arrangement, which is given licensing relief by Class Order [CO 03/606] *Financial product advice—Exempt documents*.
 - The policy rationale behind granting relief from the anti-hawking provisions in Class Order [CO 05/850] *Unsolicited offers under a regulated foreign takeover bid* was analogous in this case.
- 14 We also granted relief from the licensing and anti-hawking provisions in relation to the operation of the sale facilities. Relief under Class Order [CO 08/10] *Share and interest sale facilities* was not available because some, if not all, of the money to be held by a sale facility nominee would not be held following the sale of the scrip consideration on market, but from the payment of cash by the acquirer.
- 15 We considered that relief was within the policy of Regulatory Guide 161 *Share and interest sale facilities* (RG 161), the underlying policy intention of [CO 08/10]. We were also satisfied that the interest of participating stapled security holders would be adequately protected if relief was granted because:
- the use of volume-weighted average price (VWAP) in determining the price under the sale facilities had a sufficient level of objectivity;
 - the proceeds of the sale facilities would be returned to target stapled security holders within the same timeframe required under [CO 08/10]; and
 - disclosure in the explanatory memorandum would provide target stapled security holders with sufficient information for making an informed decision on whether or not to participate in the sale facilities.

Relief refused

Refused licensing relief for an employee share scheme

- 16 We refused to grant relief from the requirement to hold an AFS licence for the offer of performance rights in a form similar to Class Order [CO 03/184] *Employee share schemes*. The applicant sought to offer performance rights to employees of corporate authorised representatives and employees of entities in which the applicant (or its related bodies corporate) had voting power of not less than 20%. Such ‘employees’ did not fall within the definition of ‘eligible employees’ for the purposes of [CO 03/184]. Relief was refused in this instance because we did not consider there was a sufficient degree of mutual interdependence arising from the authorised representative relationship.

Publications

- 17 We issued the following regulatory guides in relation to AFS licensing relief during the period of this report.

Regulatory guides

RG 36 Licensing: Financial product advice and dealing, RG 121 Doing financial services business in Australia, RG 170 Prospective financial information and RG 175 Licensing: Financial product advisers—Conduct and disclosure

- 18 We released updated versions of RG 36, RG 121, RG 170 and RG 175. The new versions of the guides remove outdated information and incorporate references to regulations released in recent months, including those affecting issuers of standard margin lending facilities, simple managed investment schemes and certain superannuation products. The amendments do not represent substantive policy changes.

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 PDSs and Financial Services Guides (FSGs). It also discusses the relevant guidance and consultation papers we have issued.

Prospectus relief

Disclosure relief to facilitate a renounceable rights issue

- 19 We granted relief from Pt 6D.2 of the Corporations Act for a listed company that sought to undertake a renounceable rights issue with an accelerated institutional component, termed a pro-rata accelerated institutional, traditional retail entitlement offer (PAITREO). The PAITREO structure allowed retail investors to trade their entitlements to rights during the retail offer period.
- 20 The applicant could not rely on the exemption from disclosure available under s708AA of the Corporations Act, as modified by Class Order [CO 08/35] *Disclosure relief for rights issues*, because the terms of each offer were not the same, specifically, the ability to trade rights on the exchange market operated by ASX Limited (ASX) in the manner contemplated was a term of the offer available to retail investors, but not to institutional investors. We granted relief by modifying s9A so that the ability to trade rights in the manner contemplated would be disregarded when determining whether the offer satisfies the conditions in s9A(1) for a ‘rights issue’.
- 21 We granted relief because the PAITREO structure:
- encourages retail participation, since retail investors are able to trade their rights nearer to the time when institutional investors are able to renounce their entitlements, and therefore take advantage of any favourable proximate market conditions and pricing of rights;
 - does not offend the purpose underpinning the rights issue disclosure exemption, and specifically the principle of providing existing members with the opportunity to acquire new securities at the same offer price and in proportion to their holdings (see RG 189.8); and
 - does not compromise the investor protection afforded by the disclosure exemption (see RG 189.15).

PDS relief

PDS relief for a water rights tender

- 22 In the matter referred to in paragraphs 8–9, we also granted relief from Pt 7.9 of the Corporations Act for the reasons discussed.

PDS relief for sales facilities

- 23 In the matter referred to in paragraph 12, we also granted relief from the requirements in Divs 2–5A of Pt 7.9 of the Corporations Act in relation to the operation of the sale facilities for the reasons discussed.

FSG relief

FSG relief for trust schemes

- 24 In the matter referred to in paragraph 12, we also granted relief from the requirement to provide an FSG to the responsible entities of the target managed investment schemes. As target stapled security holders would receive the explanatory memorandum for the trust schemes, we considered that relief would not compromise the protection intended by Parliament and it would be disproportionately burdensome to require the provision of an FSG.

Refused relief to exempt a financial services provider from providing an FSG

- 25 We refused relief to the trustee of a superannuation fund from the requirement to provide an FSG to fund members when financial services were provided by the administrator to the members. The trustee was required to provide an FSG because it caused the advice to be provided. We refused to grant relief because we were not satisfied that the application established that:

- the costs of compliance with the requirements to provide an FSG were disproportionate to the regulatory benefits of the requirements imposed; or
- there were any grounds for distinguishing the applicant from other providers of financial services who would be subject to the same requirements.

The trustee could also issue a joint FSG with the administrator.

Other disclosure relief

Refused disclosure relief for new investment options

- 26 We refused to take a no-action position on past non-compliance with reg 7.9.20(1)(n) of the Corporations Regulations 2001 (Corporations Regulations) by a trustee of superannuation funds. We also refused to grant relief to the trustee for future non-compliance with the regulation. The superannuation funds included investment options that had started operating in the 12 months before the application. The trustee had sent periodic statements to members that did not include long-term return information for the new investment options (as required by reg 7.9.20(1)(n)). The trustee also did not want to include the long-term return information in the periodic statements for next reporting period (ended before 30 June 2011) for the new investment options. The trustee argued that because the investment options had started operating in the last 12 months, there was no relevant information to report on the basis that the returns were not of a long-term nature.
- 27 We refused the applications because it was clear from reg 7.9.20AA(12) and the relevant explanatory memorandum that return information must be disclosed for investment options, regardless of when the investment options started operating. Further, the trustee failed to demonstrate that compliance would impose disproportionate burdens.

Refused disclosure relief for an employee share scheme

- 28 In the matter referred to in paragraph 16, we refused relief from Pts 6D.2, 6D.3 and 7.9 of the Corporations Act for the offer of performance rights without a regulated disclosure document for the same reasons as discussed.

Publications

- 29 We issued the following regulatory guide and consultation papers in relation to disclosure relief during the period of this report.

Regulatory guide

RG 190 Offering securities in New Zealand and Australia under mutual recognition

- 30 We released updated guidance for Australian and New Zealand issuers offering shares, debentures or interests in managed or collective investment schemes in both countries. RG 190 explains the requirements under the

mutual recognition of securities offering schemes and the role the regulators play in relation to an offer. The key updates are:

- more detailed guidance by inserting references to underlying statutory requirements;
- information relating to relevant forms and lodgement processes;
- comment on the applicability of dispute resolution schemes;
- reference to certain relief powers that enable each regulator to declare a recognised offer if certain requirements are not met by issuers; and
- more guidance on the offers that can be recognised under the scheme where the issuer or offeror has obtained relief in its home jurisdiction.

Consultation papers

CP 147 Hedge funds: Improving disclosure for retail investors

31 CP 147 outlines proposals to improve disclosure for retail investors who invest in hedge funds. CP 147 introduces disclosure principles and benchmarks for hedge funds and sets out the specific characteristics of the fund that we think ought to be addressed in a PDS. The suggested improvements will enable retail investors to make more informed decisions about investing in hedge funds and allow them to compare the products and business models of different issuers.

32 As part of the consultation, we also sought feedback on how the proposed disclosure guidance will interact with the tailored PDS requirements for simple managed investment schemes.

CP 151 Debt securities: Modifying the naming provisions and advertising requirements

33 CP 151 outlines proposals for revising our policy on how debt securities can be described in offer documents and the preferred form of advertising for these instruments. The proposals:

- consult on possible class order relief to provide for a new class of debt security (in addition to the current classes of ‘debenture’, ‘mortgage debenture’ and ‘unsecured note’) called a ‘note’, providing certain conditions (including sufficiency of security) are met; and
- revise our advertising standards for offers of debt securities and interests in mortgage schemes—in particular, the standards relating to risk of loss and comparing these types of securities with bank deposits.

CP 155 Prospectus disclosure: Improving disclosure for retail investors

34 CP 155 sets out proposals to address the problems we have identified with prospectuses and assist issuers and their advisers to produce prospectuses

that help retail investors make informed investment decisions. CP 155 includes a draft regulatory guide which explains the type of disclosure that will generally be required for a prospectus. The key proposals give new guidance on how to:

- word and present prospectuses and other documents in a ‘clear, concise and effective manner’; and
- satisfy the content requirement for prospectuses.

CP 154 *Infrastructure entities: Improving disclosure to retail investors—Further consultation*

- 35 CP 154 outlines further proposed disclosure requirements that will apply to infrastructure entities to improve the quality of information available to retail investors. The proposed benchmarks and disclosure principles are designed to enable retail investors to make more informed investment decisions and compare business models of different infrastructure entities. We previously consulted on proposals for improved disclosure in Consultation Paper 134 *Infrastructure entities: Improving disclosure to retail investors* (CP 134) and have amended some of our proposals in response to submissions provided.

CP 156 *Retail OTC derivative issuers: Financial requirements*

- 36 CP 156 seeks feedback on the financial requirements for issuers of over-the-counter (OTC) derivatives, such as contracts for difference (CFDs) or margin foreign exchange (FX), to retail investors. Our proposals are aimed at ensuring issuers are appropriately capitalised so that equity owners of the business have a sufficient financial interest in the health of the business and its compliance with the law, and the business has the financial strength to cope with anticipated expenses and with costs and losses arising from unexpected operating risks.

- 37 The key proposals are to:
- require rolling 12-month cash flow projections to increase the visibility of cash flow issues in a ‘business as usual’ situation; and
 - change both the quantum and liquidity of the financial resources requirement by requiring a minimum level of net tangible assets (NTA) that must be held in liquid form, pairing this requirement with a reporting framework which encourages issuers to maintain adequate financial resources.

C Managed investment relief

Key points

This section sets out some of the circumstances in which we have granted or refused relief under s601QA from the provisions of Ch 5C of the Corporations Act. It also describes the relevant class order we issued.

Registration

Managed investment relief for a water rights tender

- 38 In the matter referred to in paragraphs 8–9, we also granted relief from s601ED of the Corporations Act in relation to the operation of the managed investment scheme for the reasons discussed.

Managed investment relief for sale facilities

- 39 In the matter referred to in paragraph 12, relief was also granted from the managed investment provisions under Ch 5C in relation to the operation of the sale facilities for the reasons discussed.

Other relief relating to registered schemes

Relief to allow withdrawal payments on hardship grounds for aged care

- 40 Relief was granted to the responsible entity of several registered schemes to vary the terms of existing relief (granted in August 2010) that enables withdrawal payments to be made to members on hardship grounds, without the responsible entity complying with its equal treatment obligation under s601FC(1)(d) and Pt 5C.6 of the Corporations Act. The terms of the relief were varied to extend the hardship criterion for payments to fund specific modifications to a principal place of residence or motor vehicle that are necessary to accommodate special needs arising from a severe disability, to include special needs that arise from ‘aged care’, ‘flexible care’ or ‘community care’, as those terms are defined in the *Aged Care Act 1997* (Cth). We also included a new hardship ground of aged care accommodation payments with a separate hardship cap of \$300,000 per calendar year.

Relief to facilitate withdrawal payments to flood-affected members

- 41 We granted relief to the responsible entity of certain registered schemes from s601FC(1)(d) and Pt 5C.6 to facilitate withdrawal payments to members of the schemes who may not have been able to submit withdrawal requests due to circumstances outside their control. The responsible entity made withdrawal offers to members in December 2010. The period in which members could accept the withdrawal offer by submitting a withdrawal request closed on 19 January 2011. However, because of the significant flooding in areas of New South Wales, Queensland and Victoria, the responsible entity was concerned that some members may have been unable to submit valid withdrawal requests within the offer period.
- 42 We granted relief to allow for withdrawal payments to be made to members who would have otherwise had their withdrawal requests processed on time if they had not been affected by flooding. The relief was granted because members in flood-affected areas would be disadvantaged in not being able to participate in the withdrawal offer due to circumstances outside their control. Further, the schemes had sufficient liquidity to make the maximum withdrawal payments to the members affected by the floods if they had been able to submit a withdrawal request within the offer period. Relief was granted by way of individual relief instrument rather than a variation to the existing hardship relief because the circumstances in this case did not involve the type of hardship contemplated by the standard hardship policy.

Equal treatment relief for trust schemes and sales facilities

- 43 In the matter referred to in paragraph 12, we also granted relief to permit the responsible entities of the target managed investment schemes to treat ineligible foreign members differently from all other members. Relief was required because the terms of the trust scheme required that ineligible foreign members be divested of their target stapled securities and receive cash in lieu of scrip consideration under a sale facility. In addition, the price offered for scrip consideration under the sale facility for ineligible foreign members differed from the price offered to all other members under a separate sale facility.
- 44 We granted the equal treatment relief for the following reasons:
- Offering the scrip consideration to ineligible foreign members would mean that the responsible entities would be required to comply with the regulatory requirements in a number of overseas jurisdictions. This would impose disproportionately high costs and burdens on the responsible entities.

- We were satisfied that the potential consumer detriment would be minimal and outweighed by the commercial benefits in providing relief. The prices under the two sale facilities were essentially market value-based prices based upon the same exchange ratio but with a timing difference. The reason for the differential timing is that the price under the sale facility for ineligible foreign members was calculated close to the implementation date to reflect the value of the scrip consideration. Relief would also enable members to receive information on the price of the scrip consideration offered under the sale facility before voting on the proposals.

Publications

- 45 We issued the following class order in relation to managed investment relief during the period of this report.

Class order

[CO 11/128] Variation to Class Order [CO 10/333]

- 46 Under the Corporations Act, a funded class action constitutes a ‘managed investment scheme’. Class Order [CO 10/133] *Funded representative proceedings and funded proof of debt arrangements* provides temporary relief from the obligations in Chs 5C and 7 to lawyers and funders involved in legal proceedings structured as funded representative proceedings and funding claims lodged with liquidators to prove in the winding up of an involvement company.
- 47 [CO 11/128] amends [CO 10/133] to further enable the temporary operation of a litigation funding scheme and a proof of debt funding scheme without compliance with the requirements of the Corporation Act until 30 June 2011. This is to allow additional time for the Australian Government to implement the legislative reform for litigation funding schemes and proof of debt schemes.

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. It also discusses the relevant consultation paper we issued.

Acquisition of relevant interests in voting shares

Relief to US underwriters

- 48 We granted relief from s606 to underwriters domiciled in the United States of America (US) in relation to an Australian company's initial public offering (IPO) of securities in the US. The US underwriters were unable to rely on item 13 of s611 because the definition of a 'disclosure document' in item 13 of s611 does not extend to a US prospectus. We took the view that the relief was analogous to the statutory exemption provided to Australian underwriters for bona fide underwriting.
- 49 We also granted relief to US underwriters who would acquire a relevant interest in greater than 20% of the shares on issue in an Australian company, by entering into voluntary escrow deeds in relation to an IPO of the company's securities in the US. The relief was analogous to that provided in Class Order [03/634] *Listing rule escrow* and reflected the differing market practices between the US and Australia for voluntary escrow deeds entered into in relation to a US IPO fundraising. The US underwriters were unable to rely on [CO 03/634] because it only extends to voluntary escrow deeds executed in favour of ASX.

Takeovers

Relief to extend the time by which consideration under a takeover bid must be paid

- 50 We granted relief to extend the time by which consideration must be paid under a takeover bid by no more than two weeks. The bidder offered three alternative forms of consideration. The accepting shareholder was able to choose from cash, scrip or a combination of both (with the total amount of scrip to be limited). We granted a short extension for the bidder to pay the bid consideration to maximise the amount of scrip consideration an

accepting shareholder could receive. We granted relief because the disadvantage to shareholders of having to wait a maximum of up to two weeks more to be paid was outweighed by the opportunity to increase the amount of scrip consideration an accepting shareholder could receive.

Relief to treat securities as being in the same class

- 51 We granted relief to modify s605(1), 618(1) and 619(2) of the Corporations Act to treat different classes of securities as one class for the purposes of a takeover bid. The bidder sought to issue one class of options as consideration on the same terms as the target's eight classes of options on issue. The bidder provided a report from an independent expert stating that in the expert's opinion the offer was equitable as between the classes based on Black Scholes valuation.
- 52 Notwithstanding the expert's opinion, we considered the difference in the premiums between the classes. We considered that there was an incentive for both the in-the-money option holders and out-of-the-money option holders to accept the offers. We were guided by the decision in *Re Hills Motorway Ltd* (2002) 43 ACSR 101 and looked at the rights of the different groups in totality. We considered that although there was a difference between the premiums of each of the classes of options, the offers being made to each holder appeared to be mutually advantageous and were sufficiently similar that the holders had a community of interest.

Refused a partial exemption from the requirements to respond to a tracing notice

- 53 We refused to grant a partial exemption from s672B of the Corporations Act in relation to a company's response to a beneficial tracing notice. The company was issued a beneficial tracing notice (first notice). The company responded to the notice within the relevant time period but provided insufficient information for s672B(1)(b). As a consequence, another beneficial tracing notice was served (second notice). The company sought a no-action letter for the partial compliance with the first notice and relief from s672B for the second notice. The company submitted that if it was required to comply with the first notice, the time period would have expired and there may have been an unintentional contravention of s672B(1)(b).
- 54 We refused to grant the relief on the basis that the company had all the necessary information to fully respond to the second notice and we were not satisfied that there were any special reasons why the information should be withheld. We also refused to take a no-action position for the first notice on the basis that the company complied and therefore, relief was not necessary.

Publications

- 55 We issued the following consultation paper in relation to mergers and acquisitions relief during the period of this report.

Consultation paper

CP 159 Acquisitions approved by members: Update to RG 74

- 56 CP 159 outlines proposals to update guidance on the takeovers exception for acquisitions approved by members in item 7 of s611 of the Corporations Act. The proposed update of Regulatory Guide 74 *Acquisitions agreed to by shareholders* (RG 74) emphasises that members need to be fully informed when deciding whether to give approval to acquisitions. The update will also take into account the substantial developments to the law since RG 74 was initially published in 1994. These developments include more specific disclosure requirements and an extension of the regime to listed managed investment schemes. There is also significant new guidance on the circumstances in which we will provide relief for 'trust schemes'.

E Short selling relief

Key points

This section outlines the relevant class orders and guidance we issued in relation to the short selling provisions in s1020B, and in notional s1020BC and 1020BD of the Corporations Act. There are no individual relief items to report during this period.

Publications

- 57 We issued the following class orders and regulatory guide in relation to short selling relief during the period of this report.

Class orders

[CO 11/269] Variation of Class Order [CO 09/774]

- 58 [CO 11/269] amends Class Order [CO 09/774] *Naked short selling relief for market makers* to allow licensed market makers to short sell securities in the Standard & Poor's (S&P)/ASX300 index, in order to hedge risk. [CO 09/774] previously only allowed licensed market makers to short sell securities in the S&P/ASX200 index.

[CO 11/272] Substantial holding disclosure: Securities lending and prime broking

- 59 [CO 11/272] notionally modifies numerous provisions of the Corporations Act to achieve better disclosure of substantial holdings arising from securities lending and prime broking activities.
- 60 In particular, [CO 11/272] notionally modifies:
- the operation of s608(8) as it applies to a lender's relevant interest arising from its right to recall for the purposes of the substantial holding provisions;
 - the information requirements under s671B(3) so that the consideration paid under a securities lending arrangement does not need to be included in any substantial holding notice; and
 - the information requirements under s671B(4) so that a standard form securities lending agreement and prime broking agreement does not need to be attached to a substantial holding notice.

Regulatory guide

RG 222 *Substantial holding disclosure: Securities lending and prime broking*

- 61 We released new guidance aimed at achieving better disclosure by parties that are engaging in securities lending of substantial holdings in listed entities. RG 222 sets out our expectations on how:
- parties involved in securities lending (including securities lenders and borrowers) will disclose substantial holdings in listed entities (interests of 5% or more); and
 - prime brokers who may have ongoing borrowing agreements with the clients will disclose substantial holdings.
- 62 RG 222 also sets out our expectations on the content of substantial holding notices that parties engaged in securities lending will have to provide.

F Conduct relief

Key points

This section outlines our decisions on relief from certain conduct obligations imposed by Chs 2D, 2M, 5C and 7 of the Corporations Act. There are no decisions to report for this period. We issued a consultation paper in relation to Ch 2M of the Corporations Act.

Publications

- 63 We issued the following consultation paper in relation to conduct relief during the period of this report.

Consultation paper

CP 150 Disclosing financial information other than in accordance with accounting standards

- 64 CP 150 sets out proposals for draft guidance to improve the quality of financial information to limit the likelihood of investors and other users of financial information being misled by information that is prepared and presented other than in accordance with accounting standards. The proposed guidance includes providing reconciliations to statutory financial statements and being consistent in the modifications applied to statutory financial information from year to year.
- 65 The draft regulatory guide attached to CP 150 also provides tailored guidance on the use of non-conforming financial information in:
- financial reports;
 - documents accompanying a financial report (e.g. the directors' report), market announcements, presentations to investors and briefings to analysts; and
 - transaction documents such as prospectuses.

G Credit relief

Key points

This section outlines some of our regulatory action in relation to applications under the National Credit Act (including the National Credit Code) or the Transitional Act. It also describes the relevant guidance we issued.

Licensing relief

Conditional licensing relief to a registered charity

- 66 We granted conditional licensing relief to a registered charity that provides credit to widows and dependents of deceased veterans. The relief preserved baseline protections under the National Credit Code and access to an external dispute resolution scheme for the borrowers. We granted relief because we considered that the costs of compliance greatly exceeded the likely benefits and that any potential consumer detriment would be minimised by the relief conditions.
- 67 We also considered that there are other existing exemptions that indicate the willingness of Parliament and ASIC to grant an exemption where:
- there is a charitable purpose for the credit;
 - the credit provides benefits to the debtor that credit under the National Credit Code does not;
 - the product is simple;
 - there are other redress mechanisms available to the debtor; and
 - the impact on competition is minimal.

Refused licensing relief to a solar power installation business

- 68 We refused to grant licensing relief to a provider of solar power systems. The applicant was in the practice of informing its customers of the availability of third party finance and introduced its customers to a particular credit provider over the telephone. The applicant also assisted clients by completing parts of the finance application forms and provided clients with the credit provider's prescribed documents (such as its credit guide). Some of the applicant's business resulted from cold calling, door knocking and mailouts.

- 69 We refused relief for the following reasons:
- The applicant could not establish that the cost of compliance with their obligations under the National Credit Act is disproportionately burdensome to the regulatory benefits and that the potential for detriment to consumers was minimal.
 - We considered that Parliament's intention is for such activity to be regulated, even if the activity is only a small part of the applicant's business.
 - We considered that the applicant had a number of alternatives to relief, which would reduce the compliance burden (e.g. providing credit services as a credit representative of another licensee or restricting its activities to only those that fall within an existing exemption, such as the exemption for the suppliers of goods or the referrer exemption).

Refused licensing relief to an entity seeking comfort relief

- 70 We refused to grant licensing relief to an entity that provides commercial funding to insurance companies who in turn, offer pay-by-the-month insurance contracts to consumers. The applicant proposed to enter into arrangements with the insurance companies to collect the monthly payments from consumers. The applicant held the view that it was not engaging in a credit activity because the insurance companies provided the credit to the consumers and, therefore, the applicant could rely on the exemption in s6(8) of the National Credit Code. However, the applicant sought 'comfort' relief in relation to this arrangement. We refused relief because the operation of s6(8) of the National Credit Code and s6 of the National Credit Act are clear and, therefore, relief was not necessary.

National Credit Code relief

Partial relief from compliance for a registered charity

- 71 In the matter referred to in paragraphs 66–67, we also granted relief under s203A(1) of the National Credit Code from all the provisions of the Code, except Div 3 of Pt 2 (limits on interest charges, default interest), Div 3 of Pt 4 (hardship and unjust transaction protection provisions) and Pt 5 (requirements for ending and enforcing credit contracts).

Other credit relief

Relief to change the annual compliance date

- 72 We granted relief to bring forward the annual compliance date for two related credit licensees to better suit the business needs of the entities. Relief was granted to facilitate business and was subject to the applicant paying the full annual fee for a period of operation of less than 12 months.

No-action position for inadvertent breach of the National Credit Act when authorising credit representatives

- 73 We adopted a no-action position in relation to the contravention of s29 and 30 of the National Credit Act by a number of invalidly authorised credit representatives. We also adopted a no-action position in relation to the contravention of s69 and 31 of the National Credit Act by the licensee that invalidly authorised the credit representatives. The licensee authorised its franchisees as body corporate credit representatives and also directly authorised the directors and employees of those franchisees as credit representatives. The authorisations of the directors and employees were invalid at the time because they did not hold membership in an external dispute resolution (EDR) scheme. We adopted a no-action position because the entity rectified their breach immediately. There has also been some confusion in the industry about how to validly appoint credit representatives.

No-action position for inadvertent breach of the National Credit Act

- 74 We adopted a no-action position for a breach of the prohibition on engaging in credit activities in items 4 and 6 of Sch 2 of the Transitional Act. The no-action position was granted in circumstances where an entity acquired another entity and, when integrating the operations of that entity, identified that a small part of the business of the acquired entity involved the lease of health care equipment to consumers.
- 75 Relief was granted because the entity, after it identified the breach:
- properly obtained legal advice and applied to be a member of an EDR scheme;
 - applied for an Australian credit licence;
 - ceased to enter into any new consumer leases until an Australian credit licence was granted by ASIC; and
 - provided an undertaking that it had complied, and would continue to comply, with the National Credit Code.
- 76 We also took into consideration the size of the leasing business operations and the effect on consumers of recalling the health care equipment in circumstances where the consumer is heavily reliant on that equipment.

Refused to approve alternative compensation arrangements

- 77 We refused to grant a class exemption from the obligation under reg 12 of the National Credit Regulations to hold professional indemnity (PI) insurance to the members of an industry body, when those members enter into joint venture transactions with property owners selling a property under a vendor finance contract. We refused to grant the relief because a clearly defined class had not been established and we considered the members who hold an Australian credit licence did not require relief from the requirement to obtain PI insurance to enter into vendor finance arrangements where the only credit activity they undertake is the provision of credit.

Publications

- 78 We issued the following regulatory guides in relation to credit relief during the period of this report.

Regulatory guides

RG 165 Licensing: Internal and external dispute resolution and RG 139 Approval and oversight of external dispute resolution schemes

- 79 We issued new guidance for financial institutions to settle simple disputes internally with customers. The guidance also provides coverage of internal dispute resolution (IDR) and external dispute resolution (EDR) procedures for customers who have loans from bodies which make or buy loans or leases, and repackage and sell them to investors. The updated guidance outlines what businesses that provide traditional trustee company services (traditional services businesses) must do to have a compliant dispute resolution system, so customers and beneficiaries can access IDR and EDR complaints avenues. The key changes made to RG 165 and RG 139 reflect the unique nature of traditional services complaints, especially complaints involving more than one beneficiary under a will, estate, trust (not including a charitable trust) or common fund managed by a traditional services business (multiple beneficiary complaints).

RG 209 Credit licensing: Responsible lending conduct

- 80 We updated RG 209 to provide further guidance and clarity for lenders on assessing borrowers' capacity to repay under the responsible lending requirements of the National Credit Act. The changes to our guidance include:
- clarification that a conclusion of substantial hardship (where a borrower appears to have no obvious continued income stream for the full life of

the credit contract) can often be rebutted with reasonable enquiries about the borrower's financial situation, requirements and objectives;

- further guidance on issues a lender should consider when assessing the relevance of income from a person other than the borrower in assessing the borrower's capacity to repay; and
- clarification that the use of sophisticated automated systems and tools for testing the reliability of information about income may play a role in satisfying the requirements to take reasonable steps to verify such information.

H Other relief

Key points

This section outlines a decision we made that does 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. We also issued two relevant regulatory guides.

No-action position

Refused to take a no-action position where a company acted outside the scope of the insider trading exemptions

81 We refused to take a no-action position on the insider trading provision in s1043A(1) of the Corporations Act, where a company instructs the trustee of the company's employee share scheme to acquire shares on-market. Regulation 9.12.01(b) of the Corporations Regulations creates a specific exemption to s1043A(1) in the case of:

applications for, and acquisitions under that application of, financial products of a body corporate by, or by a trustee for, employees of that body, or of a body corporate that is related to the first-mentioned body under a superannuation scheme, pension fund or other scheme established solely or primarily for the benefit of the employees.

82 The applicant submitted that reg 9.12.01(b) as drafted was a regulatory oversight and was not intended to exclude on-market acquisition of shares and, in any event, it was aware of other issuers relying on the exemption in similar circumstances. We adopted this position because the exception, as drafted, is unambiguous and operates with respect to newly-issued shares, rather than on-market acquisitions.

Publications

83 We issued the following regulatory guides in relation to other relief during the period of this report.

RG 76 *Related party transactions*

84 We released updated guidance aimed at improving the disclosure and decision making in public companies and managed investment schemes that propose or enter into related party transactions. The guidance covers:

- voting restrictions for directors at director's meetings;

- the ‘arm’s length’ exception in the Corporations Act, including factors to consider when applying this exception;
- the requirements of s218 and 219 of the Corporations Act; and
- the focus of our review of meeting materials.

RG 111 *Content of expert reports*

85 We released updated guidance aimed at enhancing the reliability and quality of expert reports that are commissioned to assist security holders and others to make major decisions, including on takeover bids, schemes of arrangement and related party transactions.

Appendix: ASIC relief instruments

This table lists the relief instruments we have executed for matters that are referred to in this report and which are publicly available. The instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes, except for credit instruments, which are published on our website under 'Credit relief'.

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
8–9, 22 & 38	Waterfind Pty Ltd ACN 105 979 664	11-0107 (in 11/11)	03/02/2011	s601QA(1)(a), 911A(2)(l), 992B(1)(a) and 1020F(1)(a), Corporations Act This instrument grants an exemption from the requirement to register a managed investment scheme, the requirement to hold an AFS licence, the anti-hawking provisions and the financial product disclosure provisions in relation to the operation of a tender for water rights.	
10–11	BPAY Pty Limited ACN 079 137 518	11-0471 (in 43/11)	26/05/2011	s911A(2)(l), Corporations Act This instrument grants an exemption from the requirement to hold an AFS licence to enable it to publish advertisements that contain general advice about specified non-cash payment facilities.	

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
12–13	<p>Prime Infrastructure Holdings Limited ACN 100 364 234</p> <p>Prime Infrastructure RE Limited ACN 099 717 638 as responsible entity of the Prime Infrastructure Trust ARSN 100 375 479 and the Prime Infrastructure Trust 2 ARSN 108 288 204</p> <p>Brookfield Infrastructure Partners L.P and its general partner Brookfield Infrastructure Partners Limited</p> <p>BIP Bermuda Holdings IV Limited</p>	10-1917 (A090/10)	07/10/2010	<p>s911A(2)(l), 1020F(1)(a) and Div 5A of Pt 7.9, Corporations Act</p> <p>This instrument grants an exemption from the requirement to hold an AFS licence and to comply with Div 5A of Pt 7.9 in relation to a scheme of arrangement and trust schemes.</p>	
14, 23, 39	<p>Brookfield Infrastructure Partners Limited in its capacity as Brookfield Infrastructure Partners L.P</p> <p>Credit Suisse Equities (Australia) Limited ACN 068 232 708</p>	10-0916 (A090/10)	07/10/2010	<p>s601QA(1)(a), 911A(2)(l), 1020F(1)(a), 601ED and Divs 2–5A of Pt 7.9, Corporations Act</p> <p>This instrument grants an exemption from the requirement to hold an AFS licence, register a managed investment scheme and Divs 2–5A of Pt 7.9 in relation to the operation of sale facilities.</p>	
24, 43–44	<p>Prime Infrastructure RE Limited ACN 099 717 638 as responsible entity of the Prime Infrastructure Trust ARSN 100 375 479 and the Prime Infrastructure Trust 2 ARSN 108 288 204</p>	10-0911 (A086/10)	24/09/2010	<p>s601QA(1)(a), 601FC(1)(d), 951B(1)(a) and Div 2 of Pt 7.7, Corporations Act</p> <p>This instrument grants an exemption from the requirement to provide an FSG and the equal treatment obligation under s601FC(1)(d) in relation to trust schemes.</p>	

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
19–21	Origin Energy Limited ACN 000 051 696	11-0238	15/03/2011	s741(1)(b), Corporations Act This instrument modifies s9A of the Corporations Act so that the rights issue undertaken by the applicant falls within the definition of 'right issue' under s9A(1), despite the terms of the offers not being the same.	
40	Colonial First State Investments Limited ACN 002 348 352, in its capacity as responsible entity of Colonial First State—FirstChoice Investments—Fixed Interest Fund Number 2 ARSN 100 130 685, Colonial First State Wholesale Income Fund ARSN 087 406 942, Colonial First State Bricks & Mortar Fund ARSN 092 184 168, Colonial First State Mortgage Income Fund—Entry Fee Option ARSN 088 902 783, Colonial First State Mortgage Income Fund—Nil Entry Fee Option ARSN 096 011 988, Colonial First State Wholesale Guaranteed Mortgage Fund ARSN 088 902 425	10-1195 (in 106/10) 10-1197 (in 106/10) Variations: 11-0438 (in 37/11) 11-0439 (in 37/11)	03/12/2010 03/12/2010 04/05/2011 04/05/2011	s 601QA(1)(a) and 601QA(1)(b), Corporations Act These instruments exempt the responsible entity of several registered schemes from their equal treatment obligation under s601FC(1)(d) of the Corporations Act, and vary the provisions governing withdrawal from an illiquid scheme under Pt 5C.6 to enable the responsible entity to make withdrawal payments to members on hardship grounds. The instruments vary previous 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
41–42	Colonial First State Investments Limited ACN 002 348 352 in its capacity as responsible entity of Colonial First State—FirstChoice Investments—Fixed Interest Fund Number 2 ARSN 100 130 685, Colonial First State Wholesale Income Fund ARSN 087 406 942 and Colonial First State Bricks & Mortar Fund ARSN 092 184 168	11-0264 (in 25/11)	18/03/2011	s601QA(1), Corporations Act This instrument exempts the responsible entity of certain registered schemes from s601FC(1)(d), and varies the provisions governing withdrawal from an illiquid scheme under Pt 5C.6, to enable the responsible entity to make withdrawal payments to those members of the schemes affected by the floods occurring in New South Wales, Queensland or Victoria in January 2011.	
48	Chardan Capital Markets LLC, Rodman & Renshaw LLC, Northland Capital Markets, Maxim Group LLC	11-0383 (in 31/11)	12/04/2011	s655A(1)(a), Corporations Act This instrument grants an exemption from the operation of s606 to underwriters domiciled in the US who were unable to rely on item 13 of s611, subject to certain conditions.	
49	Chardan Capital Markets LLC, Rodman & Renshaw LLC, Northland Capital Markets, Maxim Group LLC	11-0380 (in 31/11)	12/04/2011	s655A(1)(b), Corporations Act This instrument modifies s609 so that a US underwriter would not contravene s606 by entering into voluntary escrow deeds, subject to certain conditions.	
50	Southern Cross National Network Pty Ltd ACN 148 894 231 (a wholly owned subsidiary of Southern Cross Media Group Limited ABN 91 116 024 536)	11-0153 (in 17/11)	16/02/2011	s655A(1)(b), Corporations Act This instrument modifies s620(2) to extend the time by which payment of bid consideration must be made, where the bid involves three alternative forms of consideration.	
51–52	Westgold Resources Limited ACN 009 260 306	11-0149	21/02/2011	s655A(1)(b), Corporations Act This instrument modifies s605, 618 and 619 to allow a bidder to treat securities as being in the same class for the purposes of an off-market bid.	

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
66–67 & 71	Sydney Legacy ACN 000 048 868	11-0167*	24/05/2011	s41(1)(a), Sch 2, Transitional Act; s109(1)(a), National Credit Act; and s203A(1), National Credit Code This instrument exempts the applicant from the requirement to be licensed under the National Credit Act and provides partial relief from the National Credit Code.	
72	Waratah Management No 1 Pty Ltd ACN 144 484 882, Waratah Management Securities Pty Ltd ACN 135 446 990	11-0362*	12/04/2011	s109(1)(c), National Credit Act This instrument modifies s53 regarding the date on which an annual compliance certificate is due.	

* This instrument is published on our website at www.asic.gov.au under 'Credit relief', not in the *ASIC Gazette*.