



ASIC

Australian Securities & Investments Commission

REPORT 274

Overview of decisions on relief applications (June to September 2011)

January 2012

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 June 2011 to 30 September 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 June and ending 30 September 2011. During this period, we received 1034 applications. We granted relief in relation to 638 applications and refused relief in relation to 60 applications; 102 applications were withdrawn. The remaining 234 applications were decided 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) from the requirement to hold an Australian financial services (AFS) licence.

Relief granted

Licensing relief for trust schemes

- 8 We granted relief from the licensing and anti-hawking provisions of the Corporations Act for a proposed acquisition of interests in two stapled listed management investment schemes. The interests to be acquired were all those not already owned by the acquirer and its associates. It was proposed that the acquisition occur through inter-conditional trust schemes, involving the offer of cash consideration to all members not associated with the acquirer.
- 9 In addition, with the exception of ineligible scrip participants, non-associated members could elect to receive a scrip alternative (interests in a managed investment scheme investing in the acquirer) in lieu of the cash consideration, subject to certain conditions.
- 10 We granted licensing and anti-hawking relief to the acquisition entities on the basis that compliance with the Ch 7 requirements would be disproportionately burdensome, and dispensing with the requirements would not compromise the protection of scheme members because of the extensive disclosure required for trust schemes.

Licensing relief for custodial and depository services

- 11 An advisory firm offering a commercial product by purchasing an insurance contract on behalf of a group of others sought relief in relation to the obligation to hold an AFS licence authorisation to provide custodial and depository services. ASIC granted relief from the requirement to hold a minimum of \$5 million net tangible assets under the authorisation, reducing the net tangible assets required to \$50,000. Relief was granted on the basis that the authorisation would clearly be restricted to holding a group risk insurance contract issued by a registered life insurance company.
- 12 We provided relief in this form because the regulatory and financial burden of the \$5 million net tangible asset requirement for the custodial and depository service provider outweighed the protection the requirement

afforded consumers. Providing relief from this requirement had the potential to result in reduced cost insurance for consumers and the commercial benefit of improving access to insurance in the market. However, restricting the authorisation only to holding a group risk insurance contract issued by a registered life insurance company mitigated the risk consumers would be adversely affected by the modification to the requirement.

- 13 We did not think that granting relief in the form of an exemption from having an AFS licence authorisation to provide custodial and depositary services was warranted. We considered that the requirement to be licensed would help to ensure that the applicant maintained the organisational competence to provide the services.

Licensing relief for an employee share scheme

- 14 We granted relief to an entity for a worldwide employee incentive plan whereby all of the entity's Australian employees are granted an additional element of cash compensation in the form of a dividend equivalent right. Dividend equivalent rights may be settled in cash calculated from dividends declared on the shares of the company (the applicant), which is listed on the New York Stock Exchange. The applicant sought an exemption from the requirement to hold an AFS licence (for dealing in derivatives and providing financial advice), an exemption to allow it to offer financial products for issue or sale during or due to an unsolicited meeting or phone call, and an exemption from the requirement to issue a PDS. The applicant sought relief in the form of Class Order [CO 03/184] *Employee share schemes*, which does not extend to derivatives.
- 15 Relief was granted for all three exemptions because we were satisfied that:
- the relevant offers were not for fundraising purpose as the rights were to be issued for nil consideration;
 - the offers sufficiently support the long term mutual interdependence between the employer and the employees as the quantum of what an employee receives under the dividend equivalent right depends on the amount of cash dividends declared on the applicant's shares, which in turn is tied in with the performance or success of the applicant; and
 - adequate disclosure could be achieved by the applicant making available to the relevant employees all information lodged with the relevant foreign regulator that is available to its shareholders or the general public, given the direct relation between the rights and the dividends declared on the shares of the applicant.

Relief refused

Refused relief for advice and arranging in relation to a superannuation clearing house

- 16 We refused relief sought by the provider of a web-based superannuation clearing house product which is a non-cash payment (NCP) facility. The provider of the facility sought an exemption under s911A(2)(1) for superannuation trustees from the requirement to hold an AFS licence authorising the provision of financial product advice and dealing (by arranging) in an NCP facility product.
- 17 The proposed relief would have been similar to the relief in Class Order [CO 03/705] *Non-cash payment facilities—licensing exemption*, in that it would facilitate AFS licensees (in this case, superannuation trustees) providing financial product advice and arranging for dealings in certain NCP facilities (in this case, a clearing house arrangement that is an NCP facility) without being authorised by their AFS licence to do so. The relief was proposed to apply when these services were provided to employers contributing to the superannuation trustee's superannuation fund through integration of parts of the applicant's website page for the clearing house into the superannuation trustee's website.
- 18 Relief was required because the proposed arrangement may have constituted dealing by a trustee by arranging (as defined in s766C) for the employers to apply for and to acquire the NCP facility or for the applicant to issue it. We also considered that the applicant's proposed arrangement may have implied a recommendation intended to influence employers and amounted to the provision of financial product advice as defined in s766B(1).
- 19 We refused relief for the following reasons:
- The application did not meet the requirements for relief under our policy in Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167) and Regulatory Guide 185 *Non-cash payment facilities* (RG 185). In reference to RG 185.17, we considered that the detriment in granting relief would not have been minimal as it is reasonable to expect that retail clients would place substantial reliance on the relevant financial services.
 - Some non-cash payments would have been made to regulated superannuation funds administered by a related body corporate as their agent, but it was not the case that most non-cash payments were made only to the issuer of the payment or its related bodies corporate (as described in RG 185.8(b)). We also considered that the advice and arranging services offered by the trustees involving integration with the trustee's website could have made it less easy for persons acquiring the product to understand the relative responsibilities of the trustees and the issuer of the product so that it could not be said that the facility would be well-understood by retail consumers (see RG 185.8(d)).

- The trustees for whom relief was sought arguably would have derived benefits such as the enhanced ability to retain employers, and by extension default members. Given this and the protections provided by the application of the AFS licensing obligations, we considered that it would not be unreasonably burdensome for the relevant trustees to obtain the necessary licence authorisations.
- The applicant argued that the product should be treated as similar to a product for which relief is given under [CO 03/705]. The applicant argued that it is in effect regulated by the Australian Prudential Regulation Authority (APRA) since it is a custodian who acts for regulated superannuation funds and noted that one of the bodies to which payments are made under the product, or to which the recipient funds are forwarded, is an authorised deposit-taking institution (ADI). We did not consider these matters to constitute a basis for exemption. Custodians for superannuation funds are not as such bodies regulated by APRA. The ADI's role that was envisaged is as a subcontractor. The NCP facility therefore is not issued by a body regulated by APRA nor does prudential regulation apply to ensure that the obligations under the facility are met. Therefore we did not believe that the rationale for the relief in [CO 03/705] applied.

Refused licensing relief for a management rights scheme

- 20 We refused relief to the operator of a management rights scheme from the requirement to hold an AFS licence. The operator proposed to operate the scheme under Class Order [CO 02/185] *Sale of strata units for \$500,000 or more*, which exempts serviced strata schemes from the managed investment, share hawking and disclosure provisions of the Corporations Act if all strata units in the scheme have been purchased for over \$500,000. This class order does not exempt the operator of a scheme from holding an AFS licence. The applicant therefore requested relief under s911A(2)(1).
- 21 Class Order [CO 02/305] *Management rights schemes* provides exemptions from managed investment, sharehawking and licensing provisions of the Corporations Act for management rights schemes. The applicant was unable to rely on this licensing relief because it could not comply with a condition of the class order that investors who wish to participate in the management right scheme not be liable to make contributions toward their furniture and fittings expenditure (FFE) fund that would result in the fund balance exceeding \$5,000: see paragraph (e)(iii)(b) of Sch B of [CO 02/305].

22

We refused relief for the following reasons:

- We considered that the detriment in granting relief would have been significant because investors would be contributing a significant investment and would therefore still require the protections afforded by the licensing requirements of the Corporations Act. The application did not demonstrate that if relief was granted, investors would still have had the protections intended by Parliament.
- We considered the concept of large sums of money being held by the scheme operator over long periods would have raised a significant custodial risk, heightening the importance of the protection of the Corporations Act. Accordingly, we did not consider the regulatory burden of compliance with the relevant requirements to be disproportionately burdensome.

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).

PDS relief

Relief for delivery of scrip PDS

- 23 In the matter referred to in paragraph 8, we also granted relief to enable the issuer of the interests constituting the scrip alternative to send the PDS for those interests accompanying the notice of meeting to each member at the address recorded in the register maintained by the responsible entity of the target schemes (rather than the address nominated by each member). Relief was granted for the avoidance of doubt on the basis that it is consistent with the policy rationale in Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions* and Regulatory Guide 188 *Disclosure in reconstructions* (RG 188).

Relief from the requirement to issue a PDS for an employee share scheme

- 24 In the matter referred to in paragraph 14, we also granted relief from the requirement to issue a PDS for an employee share scheme with an additional element of cash compensation in the form of a dividend equivalent right.

Other relief

Relief from FSG requirements for trust schemes

- 25 In the matter referred to in paragraph 8, we also granted relief from the requirement to provide a FSG to the responsible entity of the target schemes and the acquisition entities. Because members would receive the disclosure required for trust schemes under item 7 of s611 and Takeovers Panel Guidance Note 15 *Trust scheme mergers*, 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.

Publications

- 26 We issued the following publications in relation to disclosure relief during the period of this report.

Class order

Class Order [CO 11/576] *Shorter PDS regime for superannuation and simple managed investment schemes*

- 27 [CO 11/576] provides relief from the commencement of the shorter PDS regime by extending the transition period until 22 June 2012 in which issuers may either:
- continue to issue PDSs in compliance with their obligations before the commencement of the shorter PDS regime; or
 - opt in to the new shorter PDS regime.
- 28 [CO 11/576] expired on 10 December 2011 due to the commencement of legislative amendments that had similar effect to the class order.

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.

Relief for registered schemes

Equal treatment relief for trust schemes

- 29 In the matter referred to in paragraph 8, we granted relief to the responsible entity of the target schemes from the obligation to treat members of the same class of interests equally under s601FC(1)(d). The responsible entity sought this relief because it proposed to treat members differently as follows:
- Members not residing in Australia or New Zealand would not be eligible to elect to receive scrip consideration in lieu of cash consideration.
 - Members who hold less than 9,090 stapled securities would not be eligible to elect to receive scrip consideration in lieu of cash consideration.
 - The acquirer and its associates would receive consideration in the form of one interest in the acquisition entities in exchange for each stapled security instead of the consideration available to other members.
- 30 We granted relief to permit the unequal treatment of ineligible foreign members because these policy requirements were satisfied:
- The ineligible foreign members would be fully informed about the proposed transaction and given an opportunity to vote.
 - The ineligible foreign members comprised a small percentage of interests in the target schemes.
 - The ineligible foreign members would receive cash for their interests for an amount that is, as far as practicable, the same as the value that other members will receive.
 - The issuer of the scrip consideration would otherwise need to comply with foreign regulatory requirements that would be onerous in the circumstances.
- 31 We also granted relief to permit the unequal treatment of small balance members that would not be offered the scrip consideration for the following reasons:
- Given the particular circumstances of the scrip fund, we considered that disproportionate burdens would be imposed if there were a large number of small balance members in the scrip fund which accounted for a small proportion of the scrip fund by value.

- Small balance members would be fully informed of the proposed transaction through the notice of meeting material and they would have an equal opportunity to vote on the proposal.
- Based on the independent expert report, the value of the scrip consideration would be materially less than the cash consideration.
- We considered that this relief was sufficiently analogous to the equal treatment relief for foreign members and relief we previously granted to facilitate a small balance cash out facility.

32 In deciding whether to grant relief regarding the different treatment of the acquirer's associates and other members, we took into account these matters:

- The proposed trust schemes would only proceed if approved by non-associated members under item 7 of s611. The acquirer and its associates would not be entitled to vote.
- Members would be fully informed about the proposed transaction through the notice of meeting material and would receive an independent expert report on whether the trust schemes were fair and reasonable and in the best interests of non-associated members.
- All stapled securities, other than those in which the acquirer has a relevant interest, would be acquired on the same terms.

33 Based on the specific circumstances of the application, we were satisfied that the transaction would not undermine the principles and protections of Ch 6. We were also satisfied that relief was within the policy parameters of Regulatory Guide 51 *Applications for relief* (RG 51) as the commercial benefit of granting relief outweighed any regulatory detriment that may be caused to the non-associated members who would have the benefit of transparency and disclosure under the trust schemes. We noted that this relief was confined to the specific circumstances of the application.

Relief from the requirement to have a scheme's compliance plan audited and to prepare and lodge its financial accounts

34 We granted relief to a responsible entity from the requirement to have its scheme's compliance plan audited under s601HG in circumstances where:

- the scheme had not entered into any transactions or acquisitions other than the initial issue of 100 units to one member;
- the member was a wholly-owned subsidiary of the responsible entity;
- the scheme would be deregistered shortly after the lodgement date and the member approved the deregistration; and
- the responsible entity had complied with s601HG for the previous financial years and there were no compliance issues identified.

35 We considered that, in these circumstances, the regulatory detriment would be minimal and outweighed by the commercial benefits to the applicant. Relief was

conditional upon the responsible entity providing an auditor's statement that the scheme had not entered into any transactions since inception other than the initial issue of units to the one member.

Publications

- 36 We issued the following publications in relation to managed investment relief during the period of this report.

Class orders

Class Order [CO 11/519] *Variation of Class Order [CO 08/1] (Group purchasing bodies)*

- 37 [CO 11/519] extends the transitional period for compliance with the breach reporting conditions in [CO 08/1] by another six months while Treasury consults on the issue. This means that on or after 30 December 2011, group purchasing bodies relying on relief under [CO 08/1] will need to report any breaches of the conditions of [CO 08/1] by no later than 31 December 2012.

Class Order [CO 11/554] *Variation of Class Order [CO 10/630] (Long-term superannuation returns)*

- 38 [CO 11/554] varies [CO 10/630] to extend its maximum period of operation by a further 12 months to allow time for proposed amending regulations concerning superannuation reporting to be made. This means that the relief provided by [CO 10/360] from the operation of the current long-term superannuation performance reporting requirements that are proposed to be refined is extended to the earlier of:
- 19 July 2012; and
 - the date any relevant amendments to regs 7.9.20AA and 7.9.75BA of the Corporations Regulations 2010 (Corporations Regulations) commence.

Class Orders [CO 11/555] and [CO 11/942] *Variation of Class Order [CO 10/333] (Funded representative proceedings and funded proof of debt arrangements)*

- 39 [CO 11/555] varies [CO 10/333] to exempt litigation funders, lawyers and their representatives from the requirements to hold an AFS licence or act as an authorised representative of a licensee to provide financial services associated with litigation funding or proof of debt funding until 30 September 2011. It also varies [CO 10/333] to provide an exemption from the requirement to comply with the disclosure provisions in Pt 7.9 of the Corporations Act in relation to a litigation funding arrangement or a proof of debt funding arrangement to the extent an interest in the arrangement is a financial product.
- 40 [CO 11/942] further extends our relief in [CO 10/333] until 29 February 2012.

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

Refused relief to broaden the rights issue exception to include shares obtained under a shortfall facility

- 41 We refused to grant relief to broaden the rights issue exemption in s606 so that it extended to shares obtained by a member under a shortfall facility for a rights issue. The member had previously made a takeover bid for the issuer, increasing the member's relevant interest significantly over 20%. The member also nominated a number of directors who had been recently appointed by the issuer.
- 42 We were not prepared to grant relief on the basis of our concern that it may be used for control purposes. We also considered the likelihood that the issuer would be able to raise the minimum subscription under the rights issue without relief being granted.

Takeovers

Relief for 'joint bid' agreements conditional on shareholder approval and scheme of arrangement proposal

- 43 We granted a modification to s609(7) so that the parties could enter into 'joint bid' agreements restricting disposal of the target company's securities by either party for no more than four months, as opposed to no more than three months. The parties proposed to make a 'joint bid' for the target by way of scheme of arrangement. The 'joint bid' agreements were subject to the approval of target shareholders under item 7 in the table in s611. The parties collectively held approximately 85% of the target.
- 44 Under the 'joint bid' proposal, the shareholder meeting to approve the 'joint bid' agreements and the meeting to consider the scheme of arrangement were convened on the same day and held consecutively (subject to the resolution under item 7 in the table in s611 being passed).

45 We were prepared to grant relief in this case, given the commercial benefits in convening the meetings on the same day and the time required by the target to prepare an independent expert's report for the purposes of both resolutions. The shareholder meetings were in fact held three months and two days after the parties had entered into the 'joint bid' agreements.

Relief to proceed with proposed takeover by way of scheme of arrangement

46 We granted a modification from the requirement under s631 to make offers to target shareholders within two months after the public proposal of a takeover bid where the bidder and target had agreed a revised proposal involving a scheme of arrangement. At the time relief was sought, the parties were in discussions about the scheme proposal, which involved higher cash consideration and fewer defeating conditions than the proposed bid.

47 We granted relief because of the specific terms and conditions of the proposed scheme and our general approach in Regulatory Guide 60 *Schemes of arrangement* (RG 60) that we do not necessarily favour acquisitions by takeover rather than schemes of arrangement where equivalent treatment and protections are maintained.

48 We were not prepared to grant a complete exemption from the requirement to make a bid. Instead, we granted relief to extend the period for making offers in s631 to a date which allowed the scheme to be put to target shareholders, or earlier where the scheme proposal was abandoned or the terms varied from those we reviewed. The relief also exempts the proposed bidder from the requirement to make offers where the scheme becomes effective after approval by target shareholders.

49 Our relief was specific to this case and similar relief will not necessarily be available, or provided on the same terms, in other cases. Potential applicants for similar relief are therefore advised to consult with ASIC as early as possible.

Refused relief to allow a single takeover offer for a bid class comprising preference shares and ordinary shares

50 We refused to grant relief under s655A and 669 to permit a bidder to treat the target's securities comprising two ordinary share classes and an additional converting preference share class (CPS) as a single class for the purposes of making a single takeover bid.

51 Unlike its ordinary shares, the target's CPS conferred a non-cumulative preferential right to receive a dividend based on a percentage of the CPS issue price for a number of financial years. The CPS had been issued on a pro-rata basis, building in the preferential right to give shareholders an incentive to take up their entitlements. It was also apparent that the target had intended the CPS to be treated as a distinct class of shares.

- 52 In determining whether the classes could be treated as a single class for making a single takeover bid, we took into account our policy in Regulatory Guide 10 *Classes of shares* (RG 10) and Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holding notices* (RG 159). We refused relief because we did not consider the CPS and the ordinary shares to be sufficiently similar so that the holders could be seen as having a community of interest.

Other mergers and acquisitions relief

Modification to give effect to agreed changes to address ASIC concerns about combined item 7 and bid

- 53 In relation to an announced transaction, we executed a modification to the voting threshold in item 7 of s611 so that a resolution had to be passed by a majority in number of the members present and voting (either in person or by proxy), and by 75% of the votes cast on the resolution.
- 54 We modified the provisions in this case to increase the voting threshold to that required in a scheme of arrangement to allay our concern about a transaction which combined an item 7 placement with an inter-conditional bid. We were concerned that the transaction was inconsistent with the principles in s602 (including the purpose of the item 7 voting exclusion). This was because:
- shareholders who wished to accept the bid would likely be indifferent to the issue price and dilutive effect of the item 7 placement they are asked to approve as they were exiting the company; and
 - if the item 7 resolution were approved, shareholders might have accepted the bid just to avoid the dilutive effect of the placement (approved, even if only in part, by exiting shareholders). The approval will result in the bidder obtaining a higher voting power than otherwise, placing further pressure on target holders to accept.
- 55 The modification was executed to address our specific concerns in this case and should not be taken as a precedent establishing an acceptable mechanism for use in similar transactions in the future.

Publications

- 56 We issued the following publications in relation to mergers and acquisitions relief or self-acquisition relief during the period of this report.

Consultation paper

CP 162 *Indirect self-acquisition by investment funds: Further consultation—Employee share schemes*

- 57 CP 162 sought additional public comment on conditional relief from s259C to allow certain controlled entities of financial institutions to acquire the holding company's shares for investors, subject to safeguards designed to minimise the risks associated with indirect self-acquisition. CP 162 sought feedback on new proposals relating to employee share schemes since the release of Consultation Paper 1 *Indirect self-acquisition by investment funds* (CP 1) and Consultation Paper 137 *Indirect self-acquisition by investment funds: Further consultation* (CP 137).
- 58 CP 162 invited feedback on whether, and on what terms, an amendment to the 5% limit outlined in CP 1 should be made:
- to include interests held by the company as well as its controlled entities; and
 - for interests acquired under employee share schemes.
- 59 CP 162 also consulted on whether the conditions in our standard relief from s259C for reporting economic exposures acquired through derivatives should be extended to require the disclosure of either:
- the percentage level of voting shares in which group entities have the power to control voting or disposal, and the percentage level of the total net physical and economic exposure of all group entities; or
 - the aggregate of physical shares and long derivative exposures, ignoring short positions.

Regulatory guide

RG 60 *Schemes of arrangement*

- 60 We updated RG 60 to make clear that:
- we will consider any objections to a scheme, in determining whether we will give our typical 'no objection' statement to the court in relation to the scheme;
 - we will closely consider schemes that offer collateral benefits and/or unequal consideration; and
 - we will examine schemes that result in a reverse takeover on a case-by-case basis.

Report

REP 254 Response to submissions on CP 127 Schemes of arrangement: Statements under s411(17)(b)

- 61 REP 254 highlights the key issues that arose out of the submissions received on Consultation Paper 127 *Schemes of arrangement: Statements under s411(17)(b)* (CP 127) and details our responses to those issues.
- 62 REP 254 makes clear that we have not adopted our original proposal in CP 127. Instead, we have updated our guidance in RG 60 to provide that where we are satisfied that a scheme meets our policy in RG 60, we will not withhold a ‘no objection’ statement under s411(17)(b) merely because a member intends to object to a scheme.

E Conduct relief

Key points

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

Financial reporting

Relief from the requirement to lodge an auditor's report

- 63 In the matter referred to in paragraph 34, we also granted relief from the requirement in s989B(3) for the AFS licensee to lodge an auditor's report with ASIC containing the information and matters required by the Corporations Regulations. The only financial service carried out by the licensee was the operation of the relevant scheme and the AFS licence would be cancelled shortly after the lodgement date. Furthermore, all s989 auditor reports were lodged for the past financial years and did not indicate any issues.
- 64 We granted relief on the basis that there were no third parties affected and the regulatory detriment would be minimal and outweighed by the commercial benefits to the applicant.

Relief from the prohibition on hawking for an employee share scheme

- 65 In the matter referred to in paragraphs 14 and 24, we also granted relief from the prohibition on hawking for an employee share scheme with an additional element of cash compensation in the form of a dividend equivalent right.

Financial services providers

Relief from the requirement to pay money into an account with an Australian ADI

- 66 We granted relief to an AFS licensee that makes a market in margin foreign exchange by modifying s981B. This permitted the licensee to pay money to which Div 2 of Pt 7.8 applies (client money) into an account held with a UK bank in certain circumstances. These are where:
- the licensee is legally permitted to provide the relevant financial services in the United Kingdom;

- the licensee is paid client money by a client that is resident in the United Kingdom;
- the bank is regulated by the UK Financial Services Authority or its successors; and
- the licensee has informed the client in writing that the client money will be paid into an account with the bank.

67 We granted relief to reduce the costs and delays associated with repatriating client money paid by overseas clients. However, we would only grant relief where we consider the regulatory framework where the client monies will be held is substantially equivalent to that in Australia.

68 We would also limit relief to instances where the client is a resident of the jurisdiction where the account is held. In this instance, only client money for UK residents could be paid into the account held with the UK bank.

Publications

69 We issued the following publications in relation to conduct relief during the period of this report.

Consultation paper

CP 164 *Additional guidance about how to scale advice*

70 CP 164 sought public comment on our proposal to revoke Class Order [CO 09/210] *Intra-fund superannuation advice*, which gives relief from the requirements in s945A of the Corporations Act where personal advice is provided about a member's existing interest in their superannuation fund.

Information sheet

INFO 144 *Annual general meetings: Voting on the remuneration report resolution*

71 INFO 144 clarified that we could make a declaration that a chairperson of a company is able to vote certain undirected proxies on remuneration report resolutions. We would make such a declaration only where we were satisfied that there would be no unfair prejudice to the interests of any member of the company.

72 The information sheet also detailed information that must be provided in an application for a declaration for us to assess whether there is no unfair prejudice.

F Credit relief

Key points

This section outlines some of our regulatory action in relation to applications under the National Credit Act or the Transitional Act.

Licensing relief

Temporary conditional licensing relief while licence refusal being reviewed by AAT

- 73 We granted conditional licensing relief to a credit provider to allow it to manage existing contracts while its application to review ASIC's decision to refuse a credit licence was being considered by the Administrative Appeals Tribunal (AAT). We granted conditional relief to ensure that consumers with existing contracts with the entity continued to have the necessary protections under the National Credit Act while our decision to refuse a licence was being reviewed. The relief only allowed the credit provider to engage in the passive credit activities of being the credit provider for the relevant contracts and receiving payments from consumers under those contracts.

Licensing relief for premium funder

- 74 We previously granted an exclusion under s6(14) of the National Credit Code to a number of premium funders so that premium funding loans that meet certain restrictions are not a provision of credit to which the Code applies: see our report *Overview of decisions on relief applications (October 2010 to January 2011)* (REP 241) at paragraph 69.
- 75 A premium funder that had been granted an exclusion under s6(14) sought an exemption from the requirement to hold a credit licence for credit contracts that it had entered into as a registered person before the exclusion was granted and that did not comply with the terms of the exclusion. Under the terms of these contracts, the contracts would be completed by 31 December 2011. We granted relief until 31 December 2011 from the requirement to hold a credit licence for credit activities in relation to these credit contracts. We considered that the continued application of the National Credit Code provisions (including obligations in relation to hardship applications) and the conditions of the relief ensured the continuation of adequate consumer protection mechanisms and an appropriate level of regulation.

Conditional relief for loans to members, or eligible persons preparing to be members, of a ministry

- 76 We granted conditional relief from the requirement to hold a credit licence for the provision of loans to members, or eligible persons preparing to be members, of a ministry. Conditional relief was granted to bring the provision of loans to members, or eligible persons preparing to be members, of a ministry into line with the employee loan exemption in s6(11) of the National Credit Code. We granted this relief because we considered that if relief was not granted, there was a potential consequence that the loan program would be withdrawn, or there would be an increase to interest rates and credit fees and charges. This would have a detrimental effect on the ability of members, or eligible persons preparing to be members, of a ministry to obtain and repay the loans. Conditions were imposed on the relief to retain key protection mechanisms for consumers.

Refused licensing relief to an entity seeking comfort relief

- 77 We refused to grant licensing relief to an entity that provides a direct debit and credit card billing and payment service. The applicant did not believe it was intended to be captured as an intermediary for the purposes of the National Credit Act, but sought relief in the interests of certainty. ASIC decided not to grant relief because we considered that the applicant could rely on the exemption in reg 24(9) of the National Consumer Credit Protection Regulations 2010 (National Credit Regulations) for a clerk or cashier that engages in a credit activity in the ordinary course of activities as a clerk or cashier. To the extent the applicant may engage in additional credit activities outside this exemption, we were not satisfied that the licensing requirements would be disproportionately burdensome.

Responsible lending relief**Conditional relief for loans to members, or eligible persons preparing to be members, of a ministry**

- 78 In the matter referred to in paragraph 76, relief was also granted from the responsible lending obligations.

National Credit Code relief

Conditional relief for loans to members, or eligible persons preparing to be members, of a ministry

- 79 In the matter referred to in paragraph 76, we also granted partial relief from the National Credit Code to mirror the conditions of the employee loan exemption in s6(11).

No-action position on mortgage exit fee ban

- 80 An industry association, on behalf of its members, sought comfort relief from the prohibition on mortgage exit fees in s23(1) of the National Credit Code and reg 79A of the National Credit Regulations for credit contracts that had been offered to consumers before 1 July 2011 (the start date of the prohibition) but that would not be accepted until after that date.
- 81 We considered that the withdrawal of loan offers made before 1 July 2011 would be difficult and potentially disadvantage consumers who had received those offers. On this basis, we granted a no-action position on the breach of the prohibition for a period of three months. To address the risks that consumers would be discouraged from switching loans by the presence of a contractual provision for an exit fee, even if not subsequently charged by the credit provider, we imposed conditions to require credit providers that rely on the no-action position to agree to not charge the fee included in the credit contract, notify consumers who accept the loan offer that the fee would not be charged, and vary the credit contract to remove the prohibited exit fee.

No-action position on inadvertent breach of the National Credit Code

- 82 A number of licensees sought a no-action position on the contravention of s22 of the National Credit Code when the licensees entered into credit contracts that did not include a pre-contractual statement setting out financial information in a tabular format as required under s16 of the National Credit Code and reg 72 of the National Credit Regulations. The licensees had relied upon an external information technology (IT) service provider to develop the form of their pre-contractual statements.
- 83 We granted a no-action position because we considered that the breach was inadvertent and that the licensees had taken action to rectify the breach as soon as they became aware the contracts were non-compliant, made remedial disclosures to consumers, and implemented improved ongoing compliance strategies and audit processes.

Relief from exit fee ban for equity finance mortgage loans

- 84 We granted relief to two credit providers from the prohibition on mortgage exit fees in s23(1) of the National Credit Code and reg 79A of the National Credit Regulations in relation to a form of credit contract, known as an 'equity finance mortgage loan' or 'shared appreciation loan' (EFM loan), that requires payment by the consumer of a percentage of an increase in value of secured property upon termination of the loan, instead of a traditional interest charge. We granted conditional relief on the basis that:
- the payments did not penalise consumers for early termination of the EFM loan because they were calculated in the same way at both the loan expiry date and in the event of early repayment, and so did not appear to discourage consumers from switching credit providers; and
 - if relief was refused, there was a risk that these loan products, which provide flexibility to consumers by offering an alternative to traditional interest bearing loans, would no longer be available.
- 85 We considered that the method of calculation may be difficult for consumers to understand and that in some circumstances consumers could be at risk of being obliged to pay a significant lump sum upon termination of the loan. We imposed conditions on the relief to ensure that:
- the terms of the contract that specified the method of calculation of the payments could not be varied during the term of the contract; and
 - the pre-contractual statement and the contract document prominently disclose information about how the payments would be calculated, including worked dollar examples, and a warning that the payments may constitute a significant lump sum amount in the event of a significant increase in the value of the residential property or if the contract remains in force for a lengthy period of time.

Other credit relief

Relief to reinstate invalid credit representative authorisations

- 86 We granted relief to modify s64 and 65 of the National Credit Act to reinstate the invalid authorisations of credit representatives by providing new (deemed) authorisations. Relief was granted because a large number of persons were inadvertently given invalid authorisations as credit representatives because they were not a member of an approved external dispute resolution scheme when the authorisation was initially given. The relief also exempted the person who gave the invalid authorisation from the requirement to notify us of the new (deemed) authorisation.

Publications

- 87 We issued the following publications in relation to managed investment relief during the period of this report.

Class order

Class Order [CO 11/760] *Restoration of extension of transitional period for credit disclosure obligations*

- 88 [CO 11/760] gives effect to the intention of reg 28N of the National Credit Regulations. It replicates until 1 October 2011 the effect of the exemption under reg 28N of the regulations as in force immediately before 2 August 2011, as affected by Class Order [CO 10/1230] *Clarification of credit disclosure obligations—including commencement*.

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.

Relief granted

Variation to AFS licence conditions for time-sharing schemes

- 89 We granted a variation to the AFS licences of two responsible entities of time-sharing schemes to expand the definition of 'special custody assets' to cover:
- interests in real property; and
 - interests in time-sharing schemes which are registered or have been granted an exemption from registration.
- 90 The licensees sought a variation so that they could hold these types of assets in their capacity as the responsible entities of the schemes without having the higher net tangible assets (NTA) requirement of \$5 million. The assets were held for the purpose of broadening the variety of accommodation options available to members of the schemes.
- 91 We considered that, in the particular circumstances, the variation was within the policy parameters in RG 51 and RG 167 as the costs of compliance were likely to be disproportionately burdensome compared to the regulatory detriment. We were also satisfied that the application of the lower NTA requirement would be consistent with our policy on time-sharing schemes in Regulatory Guide 160 *Time-sharing schemes* (RG 160) and the policy objectives of setting licence conditions for financial requirements in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).
- 92 We considered these factors in making our decision:
- It would be unreasonably costly for the licensees to either meet, or retain a custodian that can meet, the \$5 million NTA requirement for the custody of these assets.
 - The likelihood and extent of potential consumer detriment resulting from the proposed variation is minimal given the nature of time-sharing schemes and the nature of the assets.
 - These types of assets have a low risk of loss due to custodial failure and are analogous to examples of similar types of assets in RG 166.

Relief refused

Refused selective buy-back relief for a structured buy-back

- 93 We refused selective buy-back relief for a structured buy-back. We are aware that structured buy-back arrangements are available in some foreign jurisdictions where safe harbour provisions exist to sanction them.
- 94 On the basis of the information provided, we were not prepared to grant relief to facilitate such a buy-back arrangement in the absence of legislative sanction. Our main concern is that it may lead the issuer to breach the insider trading prohibition by 'procuring' the acquisition of shares by a third party for the benefit of the issuer, or to obtain a price advantage to the detriment of selling shareholders.

Refused extension of time to call meeting under s252B(6)

- 95 The responsible entity of a listed real estate investment trust (which was the subject of an off-market takeover bid at the time) received a request from certain members to convene a meeting to consider and vote on a resolution to wind up the trust. Section 252B(6) requires a responsible entity to call a members' meeting within 21 days of receiving the request from members to call the meeting. The responsible entity of the trust sought relief so that it could call the members' meeting within a specific number of days longer than a 21-day period. The main reason for requesting relief was to seek further time to provide an independent expert report for the meeting.
- 96 We refused to grant relief. The following factors were relevant to our decision:
- The Corporations Act has provided strict timeframes for the calling and holding of requisitioned meetings and the circumstances in this case did not warrant a departure from these timeframes.
 - The applicant was in a position to provide supplementary information (including the independent expert report) after the meeting was called but before the meeting was scheduled. Further, the applicant could provide appropriate disclosure in the notice of meeting to explain that any supplementary disclosure would be despatched at a later date before the meeting and therefore mitigate any confusion that might arise from the distribution of two sets of materials.
 - When members request a meeting, directors are required to assemble all material in a timely manner and call a meeting within the 21-day period under the Corporations Act. It was possible for the directors to comply with s252B(6) and the delay in organising an independent expert report or other material did not justify extending the time for calling the meeting.

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 (marked with asterisks), 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
8–10	Horizon Roads Pty Limited (ACN 152 097 875) Horizon Roads Holdings Pty Limited (ACN 152 097 937)	11-0821 (in A07/11)	19/08/2011	s911A(2)(l) and 1020F(1)(a), Div 5A of Pt 7.9, Corporations Act This instrument provides relief from the requirement to hold an AFS licence under s911A and to comply with Div 5A of Pt 7.9 in relation to the trust schemes.	
14–15, 24, 65	Goldman Sachs Group, Inc.	11-0630 (in A051/11)	24/06/2011	s911A(2)(l), 992B(1)(a) and 1020F(1)(a), Corporations Act This instrument grants conditional relief from the requirement to hold an AFS licence (for dealing in derivatives and providing financial advice), an exemption to allow the applicant to offer financial products for issue or sale during or due to an unsolicited meeting or phone call, and an exemption from the requirement to issue a PDS.	
23	WHTM Capital Management Limited (ACN 082 494 362) in its capacity as responsible entity of the CP2 EastLink Investment Fund (ARSN 151 397 358)	11-0822 (in A07/11)	19/08/2011	s1020F(1)(c) and 1015C, Corporations Act This instrument modifies s1015C to permit the issuer of the scrip fund to send the scrip PDS accompanying the notice of meeting to each member at the address recorded in the register maintained by the responsible entity of the target schemes.	

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
25, 29–33	<p>ConnectEast Management Limited (ACN 071 292 647) as responsible entity of the ConnectEast Investment Trust (ARSN 110 713 481) and the ConnectEast Holding Trust (ARSN 110 713 614)</p> <p>Horizon Roads Pty Limited (ACN 152 097 875) in its own capacity and in its capacity as trustee of the Horizon Roads Investment Trust</p> <p>Horizon Roads Holdings Pty Limited (ACN 152 097 937) in its own capacity and in its capacity as trustee of the Horizon Holdings Trust</p>	11-0820 (in A07/11)	19/08/2011	<p>s601QA(1)(a), 601FC(1)(d) and 951B(1)(a), Div 2 of Pt 7.7, Corporations Act</p> <p>This instrument provides relief from the requirement to provide an FSG and the equal treatment requirement under s601FC(1)(d) in relation to the trust schemes.</p>	
34-35	AVJennings Syndicate No 2 Limited (ACN 122 861 161)	11-0967 (in A085/11)	29/09/2011	<p>s601QA(1)(a), Corporations Act</p> <p>This instrument grants conditional relief from the requirements under s601HG(1) and (7) to prepare and lodge the audit report of a managed investment scheme.</p>	
43-45	Australian Coal Holdings Pty Limited (ACN 000 066 491), Mitsubishi Development Pty Ltd (ACN 009 779 873) and Hunter Valley Resources Pty Ltd (ACN 151 471 242)	11-0908 (in A079/11)	20/09/2011	<p>s655A(1), Corporations Act</p> <p>This instrument extends the period under s609(7)(c) to allow an agreement to restrict disposal of securities for up to four months to allow shareholders to consider a joint-bid proposal and inter-conditional scheme of arrangement.</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
46–49	SABMiller plc, a body incorporated under the laws of England and Wales and SABMiller Beverage Investments Pty Limited (ACN 150 900 093)	11-0917 and 11-0918 (in A081/11)	21/09/2011 and 22/09/2011	s655A(1), Corporations Act These instruments extend the date for making bid under s631 to allow target shareholders to consider a scheme of arrangement.	
53–55	Gold One International Limited (ACN 094 265 746)	11-0764 (in A065/11)	3/08/2011	s655A(1), Corporations Act This instrument modifies the voting threshold in item 7 of s611 to provide for the resolution to be passed by a majority in number of the members present and voting (either in person or by proxy), and by 75% of the votes cast on the resolution.	
63–64	AVJennings Syndicate No 2 Limited (ACN 122 861 161)	11-0968 (in A085/11)	29/09/2011	s992B(1)(a), Corporations Act This instrument grants conditional relief from the requirement under s989B(3) for an AFS licensee to lodge an auditor's report.	
66–68	Hantec Markets (Australia) Pty Ltd (ACN 129 943 086)	11-0907 (in A081/11)	26/09/2011	s992B(1)(c), Corporations Act This instrument modifies s981B to enable the applicant to pay money received from clients residing in the United Kingdom into an account held at Standard Chartered Bank, provided that bank is regulated by the FSA (or its successor) and that the applicant informs affected clients that their money will be paid into the UK account.	
73	Rent to Own (Aust) Pty Ltd (ACN 066 878 091)	11-0690*	08/07/2011	s109(1)(a) and (c), National Credit Act This instrument provides temporary conditional relief from the requirement to hold an Australian credit licence.	01/09/2011

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
74–75	Premier Funding Services Pty Ltd (ACN 093 585 178)	11-0653*	30/06/2011	s109(1)(a), National Credit Act; s41(1)(a) of Sch 2, Transitional Act This instrument provides temporary conditional relief from the requirement to hold an Australian credit licence in relation to particular premium funding contracts.	
76–79	UCA Cash Management Fund Limited (ACN 075 948 444) The Uniting Church in Australia Property Trust (Victoria) (ABN 39 703 442 583), a corporation constituted under <i>The Uniting Church in Australia Act 1977</i> of Victoria, in its corporate capacity and in its capacity as trustee of the Uniting Church in Australia Synod of Victoria Ministers Home Endowment Fund (ABN 94 914 136 687)	11-0609*	23/06/2011	s109(1)(a), National Credit Act; s41(1)(a) of Sch 2, Transitional Act; s203A(1), National Credit Code This instrument provides conditional relief from the registration (Transitional Act) and licensing obligations (National Credit Act) and from specified provisions of the National Credit Code.	
76–79	The Uniting Church in Australia Property Trust (N.S.W.) (ARBN 134 487 095), a corporation constituted under <i>The Uniting Church in Australia Act 1977</i> of New South Wales. The Uniting Church (NSW) Trust Association Limited (ACN 000 022 480)	11-0611*	23/06/2011	s109(1)(a), National Credit Act; s41(1)(a) of Sch 2, Transitional Act; s203A(1), National Credit Code This instrument provides conditional relief from the registration (Transitional Act) and licensing obligations (National Credit Act) and from specified provisions of the National Credit Code.	

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
84–85	Permanent Custodians Limited (ACN 001 426 384) as trustee for Rismark International Funds Management Limited (ACN 114 530 139)	11-0523*	30/06/2011	s203A(1)(a), National Credit Code This instrument grants relief under s203A(1) of the National Credit Code to exempt an equity finance contract from s23(1) of the Code to the extent the contract provides for a credit fee or charge described as an appreciation payment or minimum cost payment covered by reg 79A(1) of the National Credit Regulations to be paid on or in relation to the termination of the contract.	
84–85	HomeStart Finance, a statutory corporation under the <i>Housing and Urban Development (Administrative Arrangements) Act 1995</i> of South Australia	11-0580*	30/06/2011	s203A(1)(a), National Credit Code This instrument grants relief under s203A(1) of the National Credit Code to exempt a shared equity contract from s23(1) of the Code to the extent the contract provides for a credit fee or charge described as a shared appreciation payment covered by reg 79A(1) of the National Credit Regulations to be paid on or in relation to the termination of the contract.	
86	Relief to reinstate invalid credit representative authorisations (individual relief to a large number of entities)	11-0569*	17/06/2011	s109(1)(a) and (c), National Credit Act This instrument modifies s64 and 65 and exempts affected people from requirements in s71.	