



ASIC

Australian Securities & Investments Commission

REPORT 288

Overview of decisions on relief applications (October 2011 to January 2012)

May 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 October 2011 to 31 January 2012. 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*, the *National Consumer Credit Protection Act 2009* or the *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*, the *National Consumer Credit Protection Act 2009* or the *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 October 2011 and ending 31 January 2012. During this period, we received 1,160 applications. We granted relief in relation to 763 applications and refused relief in relation to 58 applications; 92 applications were withdrawn. The remaining 247 applications were decided outside of this period.
- 5 This report does not provide details of every single decision made in the 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 Ch 7, including under s911A(2) and 926A(2), from the requirement to hold an Australian financial services (AFS) licence.

Licensing relief for a combined non-cash payment facility

- 8 We granted conditional relief to an entity for a sales-based incentive reward program whereby participating sales outlets and its employees are rewarded for the sale of the entity's products. The program consisted of a combined debit card facility issued by an authorised deposit-taking institution (ADI) and a loyalty scheme operated by the entity to track reward points and points redeemed for cash. The debit card component allowed cardholders to load and reload money that did not exceed \$1,000 in total card value and the card could be used at any merchant that accepts Visa to make non-cash payments.
- 9 Relief was required because the combined facility did not satisfy all the aspects of Class Order [CO 05/736] *Low value non-cash payment facilities* or Class Order [CO 05/737] *Loyalty schemes* because each facility cannot be a component of another financial product. We granted conditional relief on similar terms to [CO 05/736] because we were satisfied that:
- if the combined facility operated as separate facilities, the debit card component would otherwise be entitled to relief under [CO 05/737];
 - the likelihood and extent of potential consumer detriment arising from relief appears to be minimal given that the combined facility is limited to the entity's participating sales outlets and its employees, and the participants do not incur any fees or costs to acquire or use the combined facility; and
 - the combined facility appears to be a simple and easy to use product, which would be well understood by participants as one that rewards them for the sale of the entity's products and allows the use of a debit card facility.

No-action letter to market maker

- 10 We issued a no-action letter to an entity for the provision, without an AFS licence, of market-making financial services in derivatives to retail clients who effect transactions in those derivatives on a licensed financial market through another market participant. Our longstanding view is that the clients of a market maker include investors active in the market who anticipate that they will be able to effect transactions with the market maker through another market participant. We issued the no-action letter because it

is not possible for a market maker to restrict its services to wholesale clients, and because a market maker does not act on behalf of its clients.

- 11 The entity was able to rely on one of ASIC's class orders for foreign financial services providers for the provision of the same market-making services to wholesale clients. The foreign financial services provider class orders conditionally exempt foreign companies regulated by certain overseas regulators from the need to hold an AFS licence for the provision of certain financial services to wholesale clients.

Consent to not treat AFS licensee's receivables as 'excluded assets'

- 12 We conditionally allowed an AFS licensee to treat certain receivables owed by associated unregistered investment schemes as if they were not 'excluded assets' under the terms of its licence. The receivables were for the procurement of third party services and fees on an arm's length commercial basis in the course of the ordinary business of the licensee as manager of the associated unregistered investment schemes.
- 13 We gave conditional consent because we were satisfied that the assets did not arise from a transaction designed to avoid ASIC's financial requirements, that recovery was highly probable and that it would be unreasonably burdensome to have structured the transaction so that the amount owing was not an excluded asset. The conditions of the consent require the AFS licensee to demonstrate on an ongoing basis that in treating the receivables as if they were not excluded assets, the ASIC financial requirements are not avoided.

Refused relief for an online foreign currency exchange service

- 14 We refused to exempt an online foreign currency exchange service from being a financial product under s765A(a) and (in the alternative) from the licensing, conduct and disclosure provisions under s911A(2)(1), 992B(1)(a) and 1020F(1)(a). We were of the view that the product constituted both a derivative and a facility to manage financial risk. We considered that there was an intention by Parliament to regulate contracts to exchange one currency for another where settlement does not occur immediately, in recognition of the risk associated with the settlement period that typically characterises such transactions.

Publications

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

Reports

REP 257 Response to submissions on CP 166 Market integrity rules for non-AFS licensee foreign participants and consequential amendments

16 REP 257 highlights the key issues that arose out of the submissions received on CP 166 and our response to those issues. We received four responses to CP 166 from various stakeholders, including market operators, market participants and industry bodies. Generally, respondents supported the proposed amendments.

REP 266 Response to submissions on CP 122 Superannuation forecasts: ASIC relief and guidance for super funds

17 In Consultation Paper 122 *Superannuation forecasts: ASIC relief and guidance for super funds* (CP 122), we consulted on proposals to give class order relief from the licensing provisions of the Corporations Act to superannuation fund trustees who provide retirement estimates to their existing members with their periodic statements.

18 We received 16 responses to CP 122 from industry bodies, superannuation fund trustees and actuarial firms. Submissions were generally supportive of relief being granted from the licensing and personal advice requirements in the Corporations Act.

Regulatory guides

RG 226 Guidance on ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets

19 RG 226 provides guidance on ASIC market integrity rules for capital and related requirements for the ASX, ASX 24 and Chi-X markets. It also explains our approach in developing these rules based on the previous capital and related requirements in the ASX and ASX 24 Operating Rules.

20 RG 226 also outlines that, from 1 August 2011, non-clearing market participants will need their AFS licences to exempt them from having to comply with the standard financial requirements in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166) where they are complying with the ASIC market integrity rules for capital. Where appropriate, we will take a no-action position where a non-clearing market participant has complied with our market integrity rules for capital at all times from 1 August 2011.

RG 229 Superannuation forecasts

21 We released RG 229 to assist superannuation fund trustees in providing their members with superannuation forecasts and to explain the licensing relief we have given to fund trustees.

- 22 To fall within our relief, a retirement estimate must:
- include certain mandatory content;
 - be calculated taking into account all of the required variables, and using the default assumptions; and
 - be given at the same time as the periodic statement and be included in, or accompany, the statement.
- 23 RG 229 aims to help superannuation members engage more with their superannuation and retirement planning and get the most out of their retirement income.

Class orders

Class Order [CO 11/927] *Australian financial services licensing exemption for NGOs (non-government organisations) providing basic deposit advice*

- 24 [CO 11/927] gives a limited exemption from the AFS licensing requirements to money management service providers for the provision of financial product advice limited to advice about basic deposit products where it is provided as part of the money management service.
- 25 Similar to Class Order [CO 11/926] *Credit licensing exemptions for NGOs (non-government organisations) providing credit assistance to consumers*, the purpose of the exemption for money management service providers is to ensure that their services can continue to be provided to consumers, principally Indigenous consumers in regional and remote Australia.

Class Order [CO 11/1227] *Relief for providers of retirement estimates*

- 26 [CO 11/1277] grants relief to trustees of superannuation entities so that they do not have to comply with the requirement to hold an AFS licence for any financial product advice they give in providing members with a retirement estimate made and provided.
- 27 Without relief, providers of retirement estimates may need to hold an AFS licence with a personal advice authorisation and comply with the personal advice requirements of the licensing regime because a retirement estimate may be personal advice under s766B of the Corporations Act. The relief aims to facilitate superannuation fund trustees providing members with retirement estimates for their planning.

Class Order [CO 11/1262] Variation of Class Order [CO 11/407] (Trustee companies—deemed licensees—extension of transitional arrangements)

- 28 Some trustee companies are exempt from holding an AFS licence under transitional arrangements set out in the Corporations Regulations 2001 (Corporations Regulations). These transitional arrangements were extended by [CO 11/407], and [CO 11/1262] seeks to further extend the transitional arrangements until 31 December 2012.

Class Order [CO 11/1277] Variation of Class Order [CO 02/1176] (Credit union member shares)

- 29 We made minor amendments to [CO 02/1176] by way of [CO 11/1277]. The variation was to allow continuation of the licensing relief for ‘member shares’ granted by [CO 02/1176] to credit unions that have been approved by the Australian Prudential Regulation Authority (APRA) to use the words ‘mutual bank’ or ‘bank’ in their names.

B Disclosure relief

Key points

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

Prospectus relief

Relief granted for on-sale relating to convertible preference shares issued without disclosure

- 30 We granted relief from the on-sale provisions in s707(3) and 707(4) in relation to the issue of convertible preference shares to be issued to wholesale investors without disclosure. The convertible preference shares would convert into continuously quoted securities in a company that owned 50% of the company issuing the convertible preference shares. Relief was granted on the basis that the relief sought was broadly consistent with relief provided under Class Order [CO 10/322] *On-sale for convertible notes issued to wholesale investors*.
- 31 Relief was granted on conditions similar to those set out in [CO 10/322], with the additional requirement that both the issuer of the continuously quoted securities and the issuer of the convertible preference shares would take responsibility for the 'cleansing notice' and subsequent disclosure required to be made to the market.

PDS relief

Refused relief for an online foreign currency exchange service

- 32 In the matter referred to in paragraph 14 we also refused to exempt an online foreign currency exchange service from the disclosure obligations.

Other relief

Relief permitting use of cleansing notices

- 33 We granted relief to modify s708AA(7) and 708A(6) of the Corporations Act permitting a disclosing entity to raise funds via cleansing notices in relation to rights issues and sales offers, respectively. Relief was granted because the disclosing entity was precluded from using cleansing notices when it failed to comply with the deadline for lodgement of its annual financial report imposed by s319(3) of the Corporations Act five years ago due to circumstances largely outside of its control. The only condition imposed on that relief was that the disclosing entity not have contravened any provision of Ch 2M in the five years before the date of the cleansing notice.

Relief from financial product disclosures for a sales-based incentive rewards scheme

- 34 In the matter referred to in paragraph 8, we also granted relief from the financial product disclosure requirements in Pt 7.9 of the Corporations Act for a sales-based incentive reward scheme that consisted of a combined low value debit card and loyalty scheme facility.

Refused relief from the requirement to obtain express consent before delivering financial services disclosures online

- 35 We refused relief to a general insurance provider from the requirement to obtain express agreement to providing a statement about its driver protection cover (DPC) on its website from renewing compulsory third party insurance customers under s1015C(1)(a)(iii) of the Corporations Act, as inserted by Class Order [CO 10/1219] *Facilitating online delivery of PDSs, FSGs and SOAs*.
- 36 Relief was refused because:
- We had already considered and addressed the practical difficulties for online disclosures under [CO 10/1219].
 - We considered that a provider must obtain a client's express consent before delivering financial services disclosures online (see RG 221.28 of Regulatory Guide 221 *Facilitating online financial services disclosures* (RG 221)) and not obtaining prior express consent would be a significant departure from ASIC policy.
 - There was a risk that customers who do not have access to the internet would not be informed of proposed changes to the statement.

- We considered the cost of over \$1.5 million of obtaining express consent under s1015C(1)(a)(iii) to be an ordinary cost of compliance: see RG 51.58 of Regulatory Guide 51 *Applications for relief* (RG 51).
- We considered that Parliament intended for the DPC to be provided in conjunction and at no extra cost to compulsory third party insurance (reg 7.1.14(2)(d)), but did not modify the requirements for giving disclosure about this product under s1015C of Pt 7.9 of Ch 7, except for the relief provided under s1019C(4) of the Corporations Act.

Publications

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

Reports

REP 258 *Response to submissions on CP 144 Giving a PDS in telephone sales of general insurance products*

- 38 In Consultation Paper 144 *Giving a PDS in telephone sales of general insurance products* (CP 144), we proposed class order relief to change the time for giving a PDS from at the time of giving the quote to before the client applies for the general insurance product, and a number of disclosure requirements and limitations on any relief to minimise risks to retail clients.
- 39 REP 258 highlights the key issues that arose out of the submissions received to CP 144 and our responses to those issues. In summary, we received seven written responses to CP 144, including from industry bodies, licensees involved in the general insurance industry and consumer representative groups. We also met with four consumer representative groups who provided comments on the proposals in CP 144. The majority of submissions were not supportive of the type of relief proposed in CP 144.

REP 261 *Response to submissions on CP 155 Prospectus disclosure: Improving disclosure for retail investors*

- 40 In Consultation Paper 155 *Prospectus disclosure: Improving disclosure for retail investors* (CP 155), we sought feedback on proposed guidance for issuers and their advisers on how to prepare effective prospectuses for retail investors.
- 41 We received 22 submissions on CP 155 from relevant industry associations, accounting firms, law firms, investment banks and investor representatives. Overall, the responses were very supportive of our proposal to provide guidance on prospectuses. The responses were also mostly supportive of key aspects of the guidance, such as the proposal for an investment overview,

effective risk disclosure and guidance on business models. Some responses raised concerns or asked for clarification on:

- the nature of our guidance;
- the disclosure of financial information and financial ratios;
- how to make risk disclosure more specific;
- the disclosure of directors' track records;
- the disclosure of confidential information in business models; and
- the use of photographs (including celebrities).

REP 269 *Response to submissions on CP 150 Disclosing financial information other than in accordance with accounting standards*

42 In Consultation Paper 150 *Disclosing financial information other than in accordance with accounting standards* (CP 150), we consulted on proposals to provide guidance on when it is and is not appropriate to use non-conforming financial information in financial reports, documents related to a financial report and transaction documents.

43 We received 33 responses to CP 150 from accounting firms, accounting and auditing standard setters, companies and professional bodies. Most respondents were supportive of ASIC issuing guidance. The main issues raised by respondents related to:

- the proposed title of the guide and proposed definitions for ‘non-conforming financial information’ and other terms;
- whether the guide should be more principles-based;
- whether it was appropriate for ASIC to interpret accounting standards;
- whether transaction documents should be covered by the guide; and
- the concept of ‘prominence’ in the context of reducing the risk of disclosure of non-conforming financial information being misleading.

Regulatory guides

RG 55 *Statements in disclosure documents and PDSs: Consent to quote*, RG 65 *Section 1013DA disclosure guidelines* and RG 97 *Disclosing fees and costs in PDSs and periodic statements*

44 RG 55, RG 65 and RG 97 have been updated to include references to regulations released in recent months, including those affecting users of standard margin lending facilities, simple managed investment schemes and certain superannuation products.

45 The amendments made to these regulatory guides are not substantive.

RG 168 Disclosure: Product Disclosure Statements (and other disclosure obligations)

46 RG 168 was updated following our consultation in CP 144 and the release of Class Order [CO 11/842] *PDS requirements where a quote for a general insurance product is given*, which changes the time for giving a PDS for a general insurance product when a retail client seeks a quote for the product during a telephone call.

RG 228 Prospectuses: Effective disclosure for retail investors

47 RG 228 sets out how to word and present prospectuses and other documents in a 'clear, concise and effective' manner. RG 228 also outlines our guidance about how to prepare prospectuses that satisfy the content requirement in s710 of the Corporations Act, and our guidance on circumstances where we may grant relief from s711(3). The main issues discussed in our guidance include the disclosure of risks, financial information, related party interests, the effect and terms of the offer, and the inclusion of an investment overview.

RG 230 Disclosing non-IFRS financial information

48 RG 230 sets out our guidance on the use of financial information in financial reports and other corporate documents, such as transaction documents and market announcements, where that information is presented other than in accordance with International Financial Reporting Standards (IFRS) (non-IFRS financial information). RG 230 outlines:

- our definition of non-IFRS financial information and related terms;
- our guidance on when it is and is not appropriate to use non-IFRS financial information in financial reports, documents other than financial reports and transaction documents, and transaction documents; and
- our guidelines to assist directors and preparers of financial information in presenting non-IFRS financial information

49 RG 230 also outlines that we may exercise our discretionary relief powers under s340 and 341 of the Corporations Act to grant relief from s295 and 303 to allow an entity to include non-IFRS financial information in financial reports and directors' declarations in exceptional circumstances.

RG 231 Infrastructure entities: Improving disclosure for retail investors

50 We issued RG 231 to provide new benchmarks and disclosure principles for infrastructure entities to improve investor awareness of the risks associated with investing in these products.

51 RG 231 outlines nine benchmarks and eleven disclosure principles that apply to infrastructure entities, aimed at addressing the risks peculiar to infrastructure entities. The benchmarks should be addressed on an 'if not,

why not' basis and disclosure against the benchmarks should be in table form.

- 52 In addition to the benchmarks and disclosure principles, RG 231 also outlines the standards we expect responsible entities to meet when advertising infrastructure entities to retail investors.

RG 232 *Agribusiness managed investment schemes: Improving disclosure for retail investors*

- 53 We issued RG 232 to provide new benchmarks and disclosure principles for agribusiness managed investment schemes. Agribusiness schemes pose particular risks because an investment in an agribusiness scheme is a long-term commitment and investors may have ongoing obligations in relation to the operation of their agribusiness enterprise.
- 54 RG 232 outlines five benchmarks and five disclosure principles for agribusiness schemes that can help retail investors understand the risks, assess the rewards being offered, and decide whether investment in these products is suitable for them.
- 55 Responsible entities of agribusiness schemes in which retail investors invest should address the benchmarks in their disclosures on an 'if not, why not' basis and apply the disclosure principles.

Class orders

Class Order [CO 11/842] *PDS requirements where a quote for a general insurance product is given*

- 56 [CO 11/842] modifies the requirement to give a PDS to enable a quote for a general insurance product to be given to a retail client during a solicited telephone call where the client does not give an instruction or take action that would enable reliance by the regulated person on either s1012D(9J) or 1012G.

Class Order [CO 11/1277] *Variation of Class Order [CO 02/1176]*

- 57 In the class order referred to in paragraph 29, the amendments to [CO 02/1176] also had the effect of ensuring continuation of relief from the financial services disclosure requirements under Pt 7.7 and the requirement to confirm transactions under s1017F of the Corporations Act in relation to the relevant credit unions' dealings in member shares.

Class Order [CO 11/1340] *Financial Claims Scheme contact number*

- 58 [CO 11/1340] seeks to change the reference to the APRA hotline telephone number to a new number, 1300 55 88 49.

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

Relief to allow a responsible entity to apply for deregistration of registered schemes

- 59 We granted relief from s601PA to permit a responsible entity of two registered schemes to lodge an application to deregister the schemes with ASIC where all the members are wholesale clients and have agreed to deregister the scheme. Relief was required because the responsible entity did not satisfy the preconditions in s601PA(2) for applying for deregistration because:
- the schemes were still managed investment schemes and had been promoted by a person who was at the time in the business of promoting managed investment schemes; and
 - interests in the schemes were initially offered to retail clients under a PDS.
- 60 We granted relief on the basis that:
- relief would not compromise the protection intended by Parliament because all of the members are wholesale clients, whom the legislature deemed do not require the protections under Chs 5C and 7 of the Corporations Act; and
 - the responsible entity had demonstrated that it would be disproportionately burdensome to comply with Ch 5C.
- 61 We considered that relief would also be consistent with our policy stated in Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* (RG 136) that we will give relief so that a scheme does not have to be registered when all interests on issue were issued as excluded issues and members have agreed that the scheme does not have to be registered.
- 62 We also granted relief from s601ED so that an immediate obligation on the part of the responsible entity to register the schemes did not arise following deregistration.

Publications

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

Report

REP 259 *Response to submissions on CP 140 Responsible entities: Financial requirements*

- 64 In Consultation Paper 140 *Responsible entities: Financial requirements* (CP 140), we set out our proposals on the financial requirements that should apply to AFS licensees that act as a responsible entity for registered managed investment schemes. This report highlights the key comments contained in the submissions received on CP 140, and during subsequent industry consultation, and our responses to those comments. The majority of respondents agreed with the need to revisit the financial resource requirements imposed on responsible entities.

Class orders

Class Order [CO 11/1140] *Financial requirements for responsible entities*

- 65 [CO 11/1140] expands on the requirements for responsible entities to have adequate financial resources and risk management systems.
- 66 The purpose of [CO 11/1140] is to ensure that:
- there are arrangements to meet operating costs throughout the life of the registered schemes;
 - there is some level of assurance that, if the responsible entity does fail, there is money available for the orderly transition to a new responsible entity or to wind up the scheme; and
 - there is alignment of the interests of responsible entities and scheme investors by imposing adequate minimum capital requirements.

Class Order [CO 11/1287] *Variation of Class Order [CO 08/1] (Group purchasing bodies)*

- 67 [CO 11/1287] extends the transitional period for compliance with the breach reporting conditions in [CO 08/1] by another six months while the Government considers the issue. This means that, on or after 30 June 2012, 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 30 June 2013.

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.

Takeovers

Relief for a downstream acquisition as a result of acquisition of shares in a foreign body

- 68 We granted a modification to s611 to facilitate a downstream acquisition transaction so that the bidder would not breach s606.
- 69 The bidder did not have the benefit of item 14 of s611 because the upstream foreign body was not included in the official list of a prescribed financial market. As the upstream foreign body's major asset was a substantial holding (over 40%) in the downstream Australian company, we considered control of the downstream company was the main purpose of the upstream acquisition. Accordingly, we granted relief on condition that the bidder make a takeover bid for all the shares in the downstream company. The terms of our relief instrument were different from downstream acquisition relief granted previously.
- 70 The instrument inserted a new item 14A that was more closely aligned to the policy settings in Regulatory Guide 71 *Downstream acquisitions* (RG 71). In addition, if the bidder did not make a takeover bid for the downstream company, the item ceased to apply and the bidder was not to be taken to be exempt from s606. The new item 14A exception also required the bidder to declare the downstream bid free of conditions before completing any contracts arising from acceptances under the upstream bid.
- 71 We also granted related relief to the downstream target from s640(1) in accordance with policy because the bidder did not have a relevant interest in the downstream entity before making the upstream bid and there was no other reason why the bidder was considered to be connected with the downstream target.
- 72 Relief was also granted to the bidder to extend the two month timeframe in s631(1) after the bids were announced to take into account the timing considerations in the upstream jurisdiction.
- 73 Potential applicants contemplating similar relief should consult with ASIC as early as possible.

Publications

- 74 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 170 Downstream acquisitions: Update to RG 71 Downstream acquisitions

- 75 CP 170 sought industry feedback on proposed updates to our policy relating to downstream acquisitions. A downstream acquisition can occur when a person acquires a relevant interest in the voting shares of a downstream Australian company, listed body or listed managed investment scheme as a result of an acquisition in an upstream entity, including a foreign body corporate.
- 76 CP 170 also clarified our approach to applications for downstream acquisition relief and factors that we will take into account when considering whether to grant relief for a downstream acquisition that is not exempt under item 14 of s611 of the Corporations Act.

Report

REP 270 Response to submissions on CP 159 Acquisitions approved by members: Update to RG 74

- 77 In Consultation Paper *159 Acquisitions approved by members: Update to RG 74* (CP 159), we sought feedback on our proposed update of Regulatory Guide *74 Acquisitions agreed to by shareholders* (RG 74). RG 74 gives guidance on the takeovers exception for acquisitions approved by members—now in item 7 of s611 (item 7) of the Corporations Act.
- 78 In response to CP 159, we received two submissions. The key policy or technical issues raised in the submissions, and our response to these, are explained in the report. We have reissued RG 74, incorporating the updates contained in the draft guide attached to CP 159, as modified through the consultation process.

Regulatory guide

RG 74 Acquisitions approved by members

- 79 We updated RG 74 to reflect an extension of the takeovers regime to listed managed investment schemes and to impose more specific disclosure requirements. Updated RG 74 provides entities and advisers with our views on how the item 7 exception applies, how we monitor compliance with the requirements of item 7 and our policy on relief in relation to those requirements.

E Conduct relief

Key points

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

Financial reporting

Financial reporting relief granted for a public company limited by guarantee and by shares

- 80 We granted relief from the requirements of Pt 2M.3 of the Corporations Act for a public company limited both by guarantee and by shares under s1378(3) of the Corporations Act. We were satisfied requiring compliance with Pt 2M.3 would impose unreasonable burdens on the company in view of its revenue being less than the threshold amount outlined in s45B to be considered a small company limited by guarantee.
- 81 In granting relief we had regard to s292(3) providing that small companies limited by guarantee only be required to prepare financial reports if directed to do so under s294A or 294B. Our relief included several conditions to place the company in the same position as other small companies limited by guarantee, including that it would cease to apply if the company paid a dividend or if its revenue exceeded the threshold amount.

Meetings of members

Refused a no-action letter on conduct following remuneration resolution vote

- 82 We refused to issue a no-action letter in relation to a company's proposed course of conduct in addressing the voting outcome of a resolution put to members at its 2011 annual general meeting.
- 83 After the meeting the company announced that more than 25% of members had voted against the resolution to approve the remuneration report in its 2011 annual report. The company then reviewed the voting result for the remuneration resolution and subsequently concluded that in fact less than 25% of members had voted against the resolution. In doing so, the company believed that it would not be required to comply with s300A(1)(g) or 250V(1) of the Corporations Act, and sought no-action comfort from ASIC to confirm our view.

- 84 We refused to provide a no-action letter because we were not convinced that it would serve a clear regulatory purpose to do so where the law and the requirements in Div 9 of Ch 2G of the Corporations Act are clear. We were also concerned that issuing a no-action letter in the circumstances could undermine the policy of the legislation.

Financial services providers

Relief from the prohibition on hawking for a sales-based incentive rewards scheme

- 85 In the matter referred to in paragraph 8, we also granted relief from the prohibition on hawking for a sales-based incentive reward scheme that consisted of a combined low value debit card and loyalty scheme facility.

Refused relief for an online foreign currency exchange service

- 86 In the matter referred to in paragraph 14, we also refused to exempt an online foreign currency exchange service from the conduct obligations.

Refused relief to modify general insurance definitions

- 87 We refused an application to modify the definition of consumer credit insurance (CCI) in reg 7.1.15 of the Corporations Regulations so it would apply to a greater range of products. The applicant was proposing to include a financial product under which an amount determined by the product holder's outstanding balance on a home loan would be paid in the event of death or diagnosis of a specified trauma event. The relief was sought to enable the proposed new product to be sold as a CCI product, and therefore enable its distribution through representatives with Tier 2 training.
- 88 Under training requirements for representatives, CCI products are treated as general insurance products, which are subject to Tier 2 training requirements. We considered that the product was more akin to a life insurance product, and that it would be inappropriate to treat it as a CCI product and therefore as general insurance. We consider that it was inappropriate to modify the usual or intended effect of the legislation, particularly for products we considered were more complex.
- 89 We also refused relief to insert a new product category into the definition of general insurance product in s761G(5)(b) of the Corporations Act. The applicant proposed a new product under which a specified amount would be paid for living expenses in the event of involuntary unemployment, sickness or injury. We considered that the new product category was significantly different from general insurance products but similar to other products that

appropriately fell outside of the general insurance definition due to complexity.

Publications

- 90 We issued the following publication in relation to conduct relief during the period of this report.

Consultation paper

CP 173 Trustee companies: Transfer determinations by ASIC

- 91 CP 173 sought public comment on our proposal on the information a trustee company will be required to supply to us when the trustee company seeks to transfer the administration of trust estates to other trustee companies.

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

Conditional licensing relief for charitable body

- 92 We granted conditional licensing relief to a charitable body providing credit to its registered members. We granted this relief because we considered that, if relief were not granted, the costs of maintaining this service to registered members would be prohibitive and there was a potential consequence that the loan program would be withdrawn or the costs of the loans for registered members would be increased.
- 93 Conditions were imposed on the relief to retain key consumer protection mechanisms, including the hardship and enforcement provisions of the National Credit Code, access to an external dispute resolution scheme and a cap on the amount of the total outstanding liability under credit contracts entered between the charitable body and its registered members.

Transitional relief from disclosure obligations for credit licensees

- 94 We granted conditional transitional relief to two credit licensees from the obligation to provide a credit proposal disclosure document and, to one of those licensees, relief from the obligation to provide a credit guide. We granted relief because we considered that meeting the commencement date would be disproportionately burdensome in their circumstances. In both instances the licensees were implementing a new IT system to ensure compliance, but were unable to deliver the automated solution by the date the obligations commenced.
- 95 To ensure that any consumer detriment resulting from the relief would only be minimal we imposed conditions. In one instance we required alternative disclosure and required the credit licensee to provide a manually generated credit proposal disclosure document to consumers on request. In the other instance we required that the credit guide be available electronically on the licensee's website and a credit proposal disclosure document be provided to consumers on request.

National Credit Code relief

Refused relief from the prohibition on financing insurance premiums over mortgaged property for a period exceeding one year

- 96 We refused to grant relief from s144(1) of the National Credit Code, which prohibits the provision of credit to pay the premium on insurance taken out over mortgaged property for a period exceeding one year. We were not satisfied that the applicant had established that compliance with s144 was disproportionately burdensome to the regulatory benefits of compliance or that if relief were granted the potential for detriment to consumers would only be minimal.

Other credit relief

Refused relief for the annual compliance certificate

- 97 We refused relief to a number of credit licensees seeking to enable a person with less authority and responsibility to sign the annual compliance certificate (ACC) because we considered this to be contrary to the intention of the requirement.
- 98 We considered that a person with a level of responsibility and authority that can substantially affect the direction of the organisation and the allocation of resources within that organisation is required to sign the ACC. We also did not consider this requirement overly burdensome and considered sufficient flexibility was already provided for in the legislation.

Publications

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

Regulatory guide

RG 206 Credit licensing: Competence and training

- 100 We revised RG 206 to give additional flexibility for credit licensees that provide home loans and to set out our minimum expectations on how credit licensees must maintain organisational competence and ensure their representatives are adequately trained.
- 101 The main changes from our earlier policy are:

- Responsible managers of credit providers providing home loans will no longer need to complete a Certificate IV in Finance and Mortgage Broking, but will instead be able to hold any relevant credit industry qualification to at least the Certificate IV level, or another general relevant higher level qualification.
- We will no longer prescribe a particular training course for representatives and, instead, we have provided more principles-based guidance on the types of skills and knowledge these representatives should acquire.
- For ongoing training requirements, we will also give these representatives the option of a regular ‘knowledge update review’ as part of meeting their continuing professional development obligations.

Class orders

Class Order [CO 11/926] *Credit licensing exemptions for NGOs (non-government organisations) providing credit assistance to consumers*

102 [CO 11/926] gives two exemptions from the credit licensing requirements in relation to the provision of ‘credit assistance’ to the following classes of service provider:

- rural financial counselling service providers; and
- money management service providers.

103 Similar to the class order referred to in paragraph 24, the purpose of the exemption for rural financial counselling service providers is to ensure that their services can continue to be provided to primary producers and rural small businesses in financial difficulty. This exemption recognises the important assistance and support these services provide to rural small businesses.

104 The purpose of the exemption for money management service providers is to ensure that their services can continue to be provided to consumers, principally Indigenous consumers in regional and remote Australia. This exemption recognises the important assistance and support money management services give to consumers to access and use credit in more cost effective and sustainable ways.

105 These exemptions are given to rural financial counselling and money management service providers that deliver services within the parameters set by the relevant government funding and supervisory arrangements. These exemptions are designed to support the continuing provision of these services within a consistent regulatory framework without imposing a disproportionate regulatory burden on service providers that would otherwise make their services unviable.

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.

Publications

106 We issued the following publications in relation to other relief during the period of this report.

Consultation Papers

CP 168 *Australian equity market structure: Further proposals*

107 CP 168 further develops some of the issues raised in Consultation Paper 145 *Australian equity market structure: Proposals* (CP 145) in 2010. Among a range of matters, we sought feedback on market making in the Australian cash equity market, including whether there was a basis for providing short selling relief.

CP 169 *Term deposits that are only breakable on 31 days' notice: Proposals for relief*

108 CP 169 sought public comments on our proposals for relief to enable ADIs to issue term deposits of up to two years that can only be broken upon 31 days' notice, while being subject to the same regulatory requirements as 'basic deposit products' under s761A of the Corporations Act.

109 CP 169 also sought feedback on whether the relief should be conditional on ADIs implementing one or more of the following possible conditions:

- using a new product name for the term deposits;
- providing a warning to consumers before the issue of the product;
- making a pre-maturity contact, to either obtain express consent to rollover, or provide a pre-maturity letter to the investor; and/or
- providing and disclosing a grace period on rollover and sending a post-maturity letter.

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.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
8–9, 34, 85	Citizen Watches Australia Pty Ltd (ACN 000 496 720)	11-1180 (in A094/11)	9/9/2011	s911A(2)(l), 992B(1)(a) and 1020F(1)(a), Corporations Act Relief from the financial product disclosure requirements in Pt 7.9 of the Corporations Act for a sales-based incentive reward scheme.	
30–31	Brain Resource Limited (ACN 094 069 682)	11-1311 (in A104/11)	8/12/2011	s741(1), Corporations Act Relief to permit the on-sale of quoted securities to sophisticated investors upon conversion or exchange of convertible preference shares issued by a related company.	
33	Lion Energy Limited (ACN 000 753 640)	11-1284 (in A001/12)	20/12/2011	s741(1), Corporations Act Relief permitting a disclosing entity to raise funds via cleansing notices in relation to rights issues and sales offers where it had complied with Ch 2M in the five years before the date of the notice.	
59–62	ConnectEast Management Limited (ACN 071 292 647) as responsible entity of the ConnectEast Investment Trust (ARSN 110 713 481) and ConnectEast Holding Trust (ARSN 110 713 614)	11-1309 (in A104/11)	12/12/2011	s601QA(1), 601PA, 601ED, Corporations Act Relief to permit a responsible entity of two schemes to apply for deregistration where all members are wholesale clients who have consented to deregistration. We also granted relief so that an immediate obligation to register the schemes would not arise following deregistration.	

Report para no.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
68–73	CGNPC Uranium Resources Co Ltd (and related entities)	11-1314 and 11-1315 (both in A104/11)	08/12/2011	s655A, Corporations Act Declaration to provide relief for a downstream acquisition.	
68–73	Extract Resources Ltd (ACN 057 337 952)	12-0180 (in A015/12)	14/02/2012	s655A, Corporations Act Exemption from s640(1) relating to a downstream acquisition.	
80–81	Fitzroy Football Club Limited (ACN 005 881 201)	11-1354	16/12/2011	s340(1), Corporations Act Conditional relief from Pt 2M.3 of the Corporations Act for the financial year ending 31 October 2011 and for future financial years.	
92–93	Temple Society Australia (ACN 004 279 001)	11-0761	24/11/2011	s109(1)(a), National Credit Act s203A(1), National Credit Code (Sch 1 to the National Credit Act) Relief from compliance with credit licensing obligations in the National Credit Act and with obligations in the National Credit Code (except for (a) interest charges, (b) changes on grounds of hardship and unjust transactions, and (c) ending and enforcing credit contracts, mortgages and guarantees).	
94–95	AHL Investments Pty Ltd (ACN 105 265 861)	11-1156	21/11/2011	s163(1)(a), National Credit Act Conditional transitional relief from the requirement to provide a credit proposal disclosure document to consumers until 2 July 2012.	
94–95	Westpac Banking Corporation (ACN 007 457 141) and RAMS Financial Group Pty Limited (ACN 105 207 538)	11-1149	10/11/2011	s163(1)(a), National Credit Act Conditional transitional relief from the requirement to provide a credit proposal disclosure document and credit guide to consumers until 5 December 2011.	