ASIC
Australian Securities & Investments Commission

REPORT 344

Overview of decisions on relief applications (October 2012 to January 2013)

May 2013

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 some of ASIC's decisions on relief applications during the period 1 October 2012 to 31 January 2013. It summarises examples of 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.*

It also refers to a number of publications issued by ASIC during the period 1 October 2012 to 31 January 2013 that may be relevant to prospective applicants for relief, including class orders, consultation papers, regulatory guides and reports.

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.

Contents

Overview

1 ASIC has powers under the *Corporations Act 2001* (Corporations Act) to exempt a person or a 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 (transactions affecting share capital), 2L (debentures), 2M (financial reports 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 and markets).

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 2012 and ending 31 January 2013. During this period, we received 1189 applications. We granted relief in relation to 491 applications and refused relief in relation to 76 applications; 74 applications were withdrawn. The remaining 548 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.

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). For information and media releases on the matters and publications referred to in this report, see www.asic.gov.au/mr.

A AFS licensing relief

Key points

This section outlines some of our decisions on whether to grant relief under Ch 7 of the Corporations Act, including under s911A(2) and 926A(2), from the requirement to hold an Australian financial services (AFS) licence. It also outlines the publications we issued that relate to licensing relief.

Services provided to overseas fund

Relief granted from requirement to hold AFS licence for services provided to overseas fund

7 We granted relief to a company incorporated in the Cayman Islands from the requirement to hold an AFS licence. The applicant was a fund manager who provides investment management services to a fund that is also incorporated in the Cayman Islands. The fund invested in commodity derivatives and did not market to Australian investors. Due to the principal and sole director of the applicant company relocating to Australia, the company, in providing investment management services to the fund from Australia, could have been construed as carrying on a financial services business in this jurisdiction under s911A(1) of the Corporations Act.

8 We noted that the applicant did not undertake any activities in Australia and relief was requested due to the physical relocation of the sole director to Australia. We granted conditional relief under s911A(2)(l) of the Corporations Act from the requirement to hold an AFS licence for the provision of the following financial services to wholesale clients situated outside of this jurisdiction:

- financial product advice in relation to derivatives; and
- dealing in derivatives limited to arranging for the fund to apply for or acquire derivatives.

Adequate compensation arrangements

Relief refused to exempt an AFS licensee from the requirement to have adequate compensation arrangements

9 We refused to grant relief to an AFS licensee from the requirement to have adequate compensation arrangements in the form of professional indemnity insurance under s912B of the Corporations Act. The applicant submitted that it was not commercially viable for it to hold professional indemnity

insurance because it did not have many clients and the majority of those clients were invested in cash.

10 In refusing relief, we considered the information provided by the applicant and Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126). We did not consider there was a sufficient policy basis to grant relief in these circumstances. In particular, we noted that:

- the policy underlying the requirement for all AFS licensees to have adequate professional indemnity insurance is aimed at reducing the risk of consumer losses where they would be unable to be compensated due to a licensee's insufficient financial resources. It also protects a licensee against the risk that they are unable to satisfy claims by consumers—that is, the policy is aimed at protecting both consumers and licensees alike (see RG 126.24–RG 126.25); and
- there was insufficient evidence provided to show that it was impossible for the applicant to obtain a professional indemnity insurance policy compliant with RG 126.

Publications

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

Class orders

Class Order [CO 12/1712] *Variation of Class Order [CO 08/1] (Group purchasing bodies)*

12 [CO 12/1712] extends the transitional period for compliance with the breach reporting conditions in [CO 08/1] by another six months to end on 30 June 2013. [CO 08/1] provided conditional relief from the AFS licensing regime and Ch 5C of the Corporations Act to a limited class of group purchasing bodies who arranged or held risk management products for the benefit of third parties on a non-commercial basis.

13 The extension of the transitional period for compliance from 31 December 2012 to 30 June 2013 will enable the Australian Government to consider how the issues raised by group purchasing bodies can be addressed by amendments to the Corporations Regulations 2001 (Corporations Regulations) and to consult with stakeholders in the development of the regulations. Treasury completed its consultation on a draft Corporations Amendment Regulation on 3 May 2013, which provides for an exemption from the obligations in Div 2 of Pt 7.7A of the Corporations Act where obligations in certain class orders, including [CO 08/1], are satisfied.

Consultation papers

CP 191 *Future of Financial Advice: Approval of codes of conduct for exemption from opt-in requirement*

14 CP 191 relates to our approach on code approval and relief powers under the Future of Financial Advice (FOFA) reforms and was aimed at:

- financial advisers who enter into ongoing fee arrangements with retail clients and seek an alternative to complying with the opt-in requirement in s962K of the Corporations Act; and
- code owners or applicants who wish to lodge a code of conduct for ASIC's approval that seeks to obviate the need for complying with the opt-in requirement.

15 CP 191 sought feedback on how Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183) should be amended for FOFA and covered matters such as:

- appropriate content of a code submitted for approval, including methods to obviate the need for opt-in;
- administration, governance, monitoring and enforcement of codes; and
- ASIC's approval and relief process.

Regulatory guide

RG 244 *Giving information, general advice and scaled advice*

16 RG 244 is for AFS licensees, authorised representatives and advice providers who give information and advice to retail clients, and explains:

- the differences between giving factual information, general advice and personal advice; and
- how to meet the advice obligations in Ch 7 of the Corporations Act, including the best interests duty and related obligations, when giving 'scaled' advice (i.e. personal advice that is limited in scope).

Reports

REP 309 *Report on the Australian OTC derivatives market*

17 REP 309 was a joint report by the Australian Prudential Regulation Authority, ASIC and the Reserve Bank of Australia. It reviewed the risk management practices of market participants in the Australian OTC derivatives market. A particular focus of the report was how market participants were using centralised infrastructure, and the prospects for increased usage. It reiterated our view that there are strong in-principle benefits from participants in the Australian OTC derivatives market making

greater use of centralised infrastructure, such as trade repositories, central counterparties and trading platforms.

18 The main recommendations of the report are:

- the Australian Government should consider a broad-based mandatory trade reporting obligation for OTC derivatives;
- central clearing of Australian dollar-denominated OTC interest rate derivatives should be adopted by larger market participants, and that this should be a mandatory obligation if the existing industry-led migration stalls; and
- there is scope for further improvements to operational and risk-management practices for non-centrally cleared transactions.

REP 316 *Review of client money handling practices in the retail OTC derivatives sector*

19 REP 316 sets out our observations of the client money handling practices of issuers of OTC contracts for difference (CFDs) and margin foreign exchange contracts to retail clients in Australia. The report follows a risk-based surveillance conducted by ASIC between December 2011 and August 2012 of 40 issuers, representing the overwhelming majority of the market share in the sector, and focused on issuers' client money handling and reconciliation practices.

20 We identified a number of contraventions of client money rules as part of this review, including:

- 18 issuers (45%) failed to properly designate client accounts as trust accounts; and
- 11 issuers (28%) failed to pay client money into a compliant account by the next business day following receipt.

21 Further weaknesses identified included:

- six issuers (15%) did not perform client money reconciliations on a daily basis;
- five issuers (13%) had inadequate segregation of duties in their back office; and
- 19 issuers (48%) had no formal escalation process for resolving variances in the reconciliation.

REP 319 *Response to submissions on CP 182 on the best interests duty and related obligations and CP 183 on scaled advice*

22 REP 319 highlights the key issues that arose out of the submissions received on Consultation Paper 182 *Future of Financial Advice: Best interests duty and related obligations—Update to RG 175* (CP 182) and Consultation Paper 183 *Giving information, general advice and scaled advice* (CP 183).

23 In CP 182, we consulted on proposals to help people who provide personal advice to retail clients comply with the best interests duty and related obligations in Div 2 of Pt 7.7A of the Corporations Act. Following feedback, we published our final guidance in Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175), which covers:

- acting in the best interests of the client;
- satisfying the 'safe harbour' for the best interests duty;
- providing appropriate personal advice; and
- prioritising the interests of the client.

24 In CP 183, we sought feedback on proposals for practical guidance to help people who provide information and advice to retail clients to comply with their advice obligations under the Corporations Act. We have now released our final guidance in RG 244: see paragraph 16.

REP 320 *Response to submissions on CP 177 Electricity derivative market participants: Financial requirements*

25 REP 320 highlights the key issues that arose out of the submissions received on CP 177 and details our responses to those issues. CP 177 consulted on revised financial requirements for over-the-counter (OTC) electricity derivative market participants. It proposed the following changes so that these participants would be required to:

- prepare rolling cash flow projections with anticipated revenue and expenses, have those projections approved by the board of directors, and make them available to ASIC on request;
- hold net tangible assets (NTA) equal to the greater of:
  - $150,000; or
  - 10% of average revenue; and
- ensure at least 50% of the required NTA is held in cash or cash equivalents, with the remainder held in liquid assets.

26 We received 10 written responses to CP 177, including three confidential submissions. Based on the feedback and further consideration, we do not intend to implement the changes proposed in CP 177 at this time. As this work is in line with Australia's Group of Twenty (G20) commitments, we do not wish to pre-empt the process of implementing the G20 reforms to OTC derivative markets in Australia. Consequently, we have delayed our review until this process is completed.

B Disclosure relief

Key points

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

Continuous disclosure

Refusal of application for relief from continuous disclosure

27 We refused to grant relief to a non-listed public company for an exemption from a continuous disclosure obligation under s675 of the Corporations Act. The applicant proposed to acquire another entity by way of a scheme of arrangement. As part of the scheme consideration, the applicant was to make earn-out payments for three years following the acquisition. These payments were considered to be debentures under s111AG of the Corporations Act, as a result of which the applicant would become a disclosing entity and subject to continuous disclosure obligations.

28 We refused to grant relief on the basis that we were not satisfied that:

- it was desirable to grant relief from continuous disclosure obligations given its impact on efficient and effective disclosure to the debenture holders; and
- complying with continuous disclosure obligations was burdensome in these circumstances.

Definition of continuously quoted security

Relief granted to modify the definition of continuously quoted security

29 We granted relief to a bank to modify the definition of ‘continuously quoted security’ under s9 of the Corporations Act so that the bank could satisfy the conditions of continuously quoted security although it currently had exemption orders under s340 and a declaration under s741(1)(b) of the Corporations Act, which were required following the insertion of a non-operating holding company over the corporate group. The modification was required because the bank intended to issue convertible securities under a

transaction-specific prospectus in reliance on Class Order [CO 00/195] *Offer of convertible securities under s713*.

30 Further, we also granted relief which modified s713 of the Corporations Act to extend the application of s713 to circumstances where the convertible securities may convert into ordinary shares in a company that replaces the issuer as the ultimate holding company.

31 Relief was granted on the basis that:

- the existing orders and declaration had not affected the level of information or disclosure about the bank in the market; and
- the non-operating holding company to replace the bank would be substantially the same as the bank in a practical sense.

Employee share schemes

Relief granted to allow a company to disregard cancelled shares for the purposes of complying with the 5% limit in condition 3(b) of [CO 03/184]

32 We granted relief to allow a company to operate an employee share scheme on the same terms as those contained in Class Order [CO 03/184] *Employee share schemes*, except for a minor change to condition 3(b). Condition 3(b) of [CO 03/184] requires companies to limit the shares being issued under an employee share scheme to 5% of its issued shares.

33 We granted this relief because the terms of the applicant's employee share scheme provided for shares issued under the scheme to be bought back and cancelled in certain circumstances. We considered that it was inappropriate to count shares that had been issued and then bought back and cancelled under the scheme within the five-year period before the offer when calculating the 5% limit for the relevant year. We therefore granted relief so that any shares bought back and cancelled in accordance with the terms of the scheme within the five years before the relevant offer would not be included in calculating the 5% limit for the relevant year.

Publications

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

Class orders

Class Order [CO 12/1367] *Variation of Class Order [CO 10/321] (Offers of vanilla bonds)*

35 [CO 12/1367] extends the minimum subscription requirement provided under [CO 10/321] by a further six months due to the release of the Australian Government's discussion paper *Development of the retail corporate bond market: Streamlining disclosure and liability requirements*. [CO 10/321] provided conditional relief to allow a listed body to offer 'vanilla bonds' under:

- a simplified prospectus, which has similar content requirements to a transaction-specific prospectus under s713 of the Corporations Act; and
- a two-part prospectus, comprising a base prospectus that may be used for several different offers and a second part prospectus that relates to a particular vanilla bond offer.

36 The minimum subscription requirement is a condition of the relief provided under [CO 10/321], which provides that the aggregate size of the bond issue must be at least $50 million if the offer is made on or before 12 May 2012. This date was later extended to 12 November 2012 by Class Order [CO 12/543] *Variation of Class Order [CO 10/321]*.

37 Class Order [CO 13/552] *Variation of Class Order [CO 10/321]*, issued on 1 May 2013, extended the minimum subscription requirement by a further six months and will now lapse on 12 November 2013 unless we renew it further.

Class Order [CO 12/1482] *When debentures can be called secured notes*

38 [CO 12/1482] introduces a new 'secured notes' category for the purposes of s283BH(4) of the Corporations Act where security has been provided over intangible property, subject to various conditions. Our relief provides issuers who offer debentures with sufficient first ranking security that do not satisfy the higher 'debenture' or 'mortgage debenture' naming tests with an alternative to 'unsecured notes' for the purposes of s283BH.

39 Relief under [CO 12/1482] is conditional on:

- the issuer having provided a first ranking security interest in favour of the trustee;
- the security under the security interest being sufficient and reasonably likely to be sufficient to meet the liability for the repayment of investors' money;
- any advertisements for the product clearly stating that the secured note is not a bank deposit and there is a risk that investors could lose some or all of their money;

- the issuer making ongoing disclosure about the nature of the security interest and the secured property and related party exposures; and
- the issuer making available on its website its most recent quarterly reports, its current disclosure document and the last 12 months of continuous disclosure notices.

Class Order [CO 12/1592] *Variation of Class Order [CO 12/749] (Relief from the shorter PDS regime)*

40 [CO 12/1592] extends the transitional period provided under [CO 12/749] to responsible entities of hedge funds, which had prepared and given a shorter PDS before the commencement of [CO 12/749], to 22 June 2013. The transitional period for hedge funds is now aligned with the commencement of the disclosure obligations under Regulatory Guide 240 *Hedge funds: Improving disclosure* (RG 240).

41 We released an updated RG 240 on 23 May 2013 which extended the transitional period under [CO 12/749] to 1 February 2014, which is the new commencement date of the disclosure obligations under RG 240.

C Managed investment relief

Key points

We did not make any relevant relief decisions under s601QA of the Corporations Act from the provisions of Ch 5C. This section outlines the publications we issued that relate to managed investment relief.

Publications

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

Class order

Class Order [CO 13/19] *Variation of Class Order [CO 10/333] (Funded representative proceedings and funded proof of debt arrangements)*

43 [CO 13/19] varies [CO 10/333] to extend the relief from the requirement to comply with Chs 5C and 7 of the Corporations Act for lawyers and funders involved in legal proceedings structured as funded representative proceedings and funded proof of debt arrangements that are managed investment schemes.

44 [CO 13/19] extends the relief to allow time for the commencement of the Corporations Amendment Regulations 2012 (No. 6), which will commence on 12 July 2013. From that date:

- a litigation scheme and a proof of debt scheme will be exempt from the definition of a managed investment scheme in s9 of the Corporations Act; and
- funders and lawyers providing financial services for litigation schemes and proof of debt schemes will be exempt from the requirements that would otherwise apply under Ch 7 of the Corporations Act.

45 In the meantime, [CO 10/333] has been extended to avoid any interim disruption that could adversely affect plaintiffs, or interfere with the timely and efficient running of litigation.

Consultation papers

CP 194 *Financial requirements for custodial or depository service providers*

46 CP 194 is for custodial or depository service providers (providers), their advisers, counterparties and other interested parties. It sets out our proposed financial requirements for providers and requirements that apply to

responsible entities of registered managed investment schemes and platform operators that hold scheme or other property and assets.

47 CP 194 sought feedback on:

- doubling the net tangible assets (NTA) requirement for custodians (other than incidental providers) from $5 million to the greater of $10 million or 10% of average revenue;
- increasing the NTA requirement for responsible entities holding scheme property or assets and investor-directed portfolio service (IDPS) operators responsible for holding IDPS property or assets in certain circumstances from $5 million to the greater of $10 million or 10% of average revenue;
- defining the term 'incidental custodial or depository services';
- introducing an NTA requirement for incidental custodial or depository service providers equal to the greater of $150,000 or 10% of average revenue;
- requiring providers to produce 12-month cash flow projections; and
- specifying liquidity requirements for custodial or depository service providers.

CP 196 *Periodic statements for quoted and listed managed investment products and relief for AQUA products*

48 CP 196 is for issuers, industry bodies, investors, consumer groups and other interested parties. It seeks feedback on our proposals for relief to allow issuers of interests in registered managed investment schemes that are able to be traded on a licensed financial market to report the balances and values required under s1017D of the Corporations Act on a modified basis, including:

- allowing issuers to use either net asset value or last market price in preparation of the statement based on the scheme's circumstances;
- requiring issuers to provide a clear and prominent explanation of the price used to determine the dollar values on the statement;
- requiring issuers to report on the statement whether the scheme has met its investment objective over the last one-year and five-year periods; and
- allowing issuers to not include the termination value of investors' interests in the scheme.

49 CP 196 also covers proposals for relief to facilitate the trading of interests in a registered managed investment scheme on the AQUA market of ASX (to be introduced by way of class order).

CP 197 *Holding scheme property and other assets*

50 CP 197 sought feedback on our proposals to update our guidance for responsible entities of registered managed investment schemes on holding scheme property and other assets. The proposals in this paper are also relevant for:

- licensed providers of custodial or depository services (licensed custody providers);
- operators of managed discretionary account (MDA) services who are responsible to clients for holding assets under an MDA service; and
- IDPS operators who are responsible to clients for holding assets under an IDPS.

51 CP 197 also included a draft updated version of Regulatory Guide 133 *Managed investments: Scheme property arrangements* (RG 133) and sought feedback on a number of proposals, including the role of the custodian and its responsibilities and the proposed renewal and modification of Class Order [CO 98/51] *Relief from duty to separate assets of a managed investment scheme*.

Report

REP 324 *Money market funds*

52 REP 324 was released following a proactive review of managed investment schemes that are money market funds. Money market funds refer to investments in government bills, very short-term bank certificates and other loans that are highly liquid and offer daily redemption. The aim of our review was to examine money market funds and their risks, and to determine whether regulatory intervention is appropriate in Australia. We also considered the relevance of the policy recommendations of the International Organization of Securities Commissions (IOSCO) for money market funds, which were released in October 2012.

53 REP 324 concluded that:

- our analysis to date does not support regulatory intervention for money market funds;
- current regulation and market practice in Australia are substantially aligned with the IOSCO recommendations;
- further liaison with industry bodies is necessary to encourage industry to adopt more standardised product branding, to better distinguish enhanced money market funds from the other money market funds; and
- we will seek amendments from Treasury to the concept of liquid assets in the Corporations Act to provide more certainty about whether a scheme is liquid or not.

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, of the Corporations Act. This section also outlines the publications we issued that relate to mergers and acquisitions relief.

Foreign nominee relief

Withdrawal of application for relief from the requirement to appoint a foreign nominee in connection with a rights issue

54 We considered an application for an exemption from the requirement to appoint a nominee for foreign shareholders under s615 of the Corporations Act in connection with a non-renounceable rights issue. The applicant submitted that it had only three foreign shareholders, with an aggregate relevant interest of approximately 1.34% of the company's issued capital, and that it was unlikely that any proceeds resulting from a sale of shares by a nominee would be remitted to foreign shareholders (given the offer price was at a premium to the current market price).

55 We were minded to refuse the relief in the circumstances because facilitating the transaction would be inconsistent with the principles in s602 of the Corporations Act. This is because the applicant had not taken adequate steps to minimise the potential control implications of the rights issue. The proposed pricing of the rights issue (at a 40% premium to the current market price):

- would likely result in a substantial shortfall with the result that holders who participated in the rights issue (including a substantial holder with an interest of approximately 28%) were likely to significantly increase their voting power in the company;
- was inconsistent with the offer being genuinely available to all shareholders; and
- was not sufficiently explained by the applicant, particularly in the light of its current financial situation and urgent need for capital.

56 The application was subsequently withdrawn. The applicant made substantial changes to the offer, including making it renounceable and lowering the offer price (thus reducing the premium to market price), and subsequently applied for approval under s615 to appoint a nominee for foreign shareholders. In light of the changes made to the offer, we granted s615 approval.

Relief granted to appoint a nominee for foreign shareholders

57 We granted approval of a nominee for foreign holders of a company's securities for the purposes of s615 of the Corporations Act in relation to a rights issue that was to be partially underwritten by three of the applicant's directors.

58 Under the terms of the underwriting agreement, the directors were committed to underwrite up to a maximum of $3 million. No underwriting fees were payable to the directors. Each of the underwriting directors was also a shareholder of the company. The underwriting arrangements had been structured so that the underwriting directors would participate in the shortfall facility together with any shareholders wishing to take up additional shares under the shortfall. If the shortfall was not large enough to satisfy all applications under the shortfall facility, then the company was proposing to allocate the shortfall between shortfall facility applicants and the underwriting directors in proportion to their relative shareholdings in the company.

59 We considered that an arrangement that permitted the underwriter to participate rateably with shareholders in a shortfall facility was not a bona fide arrangement to assume the 'risk' of the offer. Accordingly, we did not consider such an arrangement constituted 'underwriting'. As we were of the view that the offer was not underwritten, the company was unable to rely on the exemption in item 10 of s611 of the Corporations Act.

60 The company changed the structure of the underwriting so that the underwriting directors would participate in the shortfall after all other applications by shareholders under the shortfall facility had been satisfied. On this basis, we granted approval under s615 to enable the company to appoint a nominee for foreign shareholders and to rely on the exception in item 10 of s611 of the Corporations Act.

Takeover bids

Relief granted to allow an off-market bid to extend to shares issued under a rights issue

61 We granted relief to allow an unconditional off-market takeover bid to extend to shares issued under an announced rights issue. Under the respective timetables for the bid and rights issue, although offers under the rights issue would commence before the date under s633(2) of the Corporations Act, the securities would not be issued until after that date.

62 Our relief was required because, while s617(2) (as modified by Class Order [CO 01/1543] *Takeover bids*) allows a bid to extend to securities that come

to be in the bid class after the s633(2) date, the provision only applies with respect to bid class securities issued on the conversion or exercise of other securities that exist as at the s633(2) date. The rights issue rights are not 'securities' as defined in s92(3) for this purpose.

63 We granted relief because we considered that it was consistent with our policy outlined in Section D of Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holding notices* (RG 159). Relief was granted only in relation to shares that came into the bid class as a result of the rights issue. We did not include the requirements listed in RG 159.37 because the takeover bid was unconditional.

Takeovers prohibition

Refusal of a no-action position regarding the prohibition in s606

64 We refused to take a no-action position in relation to a breach of the prohibition in s606 of the Corporations Act, which occurred as a result of the applicant having increased its relevant interest in another company in which it already held an interest above 20%. The applicant could not rely on any of the exemptions under s611 of the Corporations Act.

65 We considered that taking a no-action position in the circumstances would be inconsistent with the principles in s602 because the applicant did not exercise due care by failing to ascertain that:

- it had a relevant interest above 20% in the other company because it was required to combine its interest in the other company with the interests of its associates in the other company under s608 of the Corporations Act; and
- it could not increase its interest in the other company if it was not able to rely on an exemption in s611.

Refusal of relief for an exemption from the prohibition in s606 for an issue of convertible notes

66 We refused to grant relief under s655A of the Corporations Act from the prohibition under s606 for an issue of convertible notes to institutional investors. This issue was a part of a broader transaction. The applicant was intending to list on ASX and sought relief regarding the potential change of voting power that would be triggered by the conversion of convertible notes into listed units after listing.

67 We considered that the issue was one that could be more appropriately dealt with in a general meeting of members. Given the small number of affected

noteholders, there was no impediment to the company seeking member approval under item 7 of s611 of the Corporations Act.

Scheme of arrangement

Withdrawal of request for waiver under reg 5.1.01(b) for a scheme of arrangement

68 We considered an application for a waiver under reg 5.1.01(b) of the Corporations Regulations from the requirement in Sch 8 to provide certain information in an explanatory memorandum for a Pt 5.1 scheme of arrangement. The scheme of arrangement was part of a proposal to deregister a small wholly owned subsidiary in a large corporate group. The scheme involved transferring all the scheme company's assets and liabilities to another company within the group.

69 The scheme company sought a waiver from the requirement in cl 8302(i) of Sch 8 of the Corporations Regulations to provide information that is material to the making of a decision on the proposed scheme and that is within the knowledge of any director of a related company. This waiver was sought on the basis that:

- it would be difficult to consult with the directors of all the related companies in a large corporate group;
- the directors were unlikely to have any relevant information on the scheme; and
- the scheme company had conducted due diligence and consulted key personnel within the group.

70 We were minded to refuse the request for a waiver because it was unnecessary because cl 8302(i) does not necessarily require a company to consult with directors of related companies and we considered that the scheme company would not need to do so if the group had efficient internal reporting requirements. Unlike in some other requests for relief from cl 8302(i), there was no legal impediment to the scheme company obtaining relevant information from directors of related companies. The request for relief was subsequently withdrawn.

Publications

71 We issued the following publications in relation to mergers and acquisitions relief during the period of this report.

Consultation paper

CP 193 *Takeovers, compulsory acquisition and substantial holdings: Update of ASIC guidance*

72 CP 193 sought feedback on our proposal to update and consolidate our takeover regulatory guidance by condensing 17 existing regulatory guides covering Chs 6 and 6C of the Corporations Act into four new guides (attachments to CP 193). We also sought feedback on our proposal to reissue the class orders associated with our updated guidance and to make new class orders addressing some discrete policy issues. These guides will also contain updated policy to reflect our current views on takeovers and will also address some discrete issues we have identified in the administration of the law.

73 CP 193 sought submissions in the following areas:

- relevant interests and substantial holding notices;
- exceptions to the general takeovers prohibition;
- takeover bids; and
- compulsory acquisitions and buy-outs.

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 of the Corporations Act.

Material personal interest

Relief granted from restrictions on voting

74 We granted relief from s195 of the Corporations Act to facilitate directors of a superannuation trustee company who held a material personal interest in a matter that is being considered at a directors' meeting to be present while the matter is being considered at the meeting, vote on the matter, or be present and vote, despite the director's interest. The board comprised employee and employer representatives.

75 We granted relief in these circumstances because the requirements in our Regulatory Guide 76 *Related party transactions* (RG 76) were met because:

- the number of directors entitled to be present and vote on the matter would be less than the quorum for a directors' meeting if the directors were not allowed to vote on the matter at the meeting (RG 76.39(a)). This arose as a result of the company's compliance with the requirements under reg 4.08 of the Superannuation Industry (Supervision) Regulations 1994, which requires that a decision of the board is not taken to be made if fewer than two-thirds of the total number of directors voted for it; and
- we considered that there were compelling reasons for the matter being dealt with at the directors' meeting rather than by a general meeting of the company (RG 76.39(b)).

Publications

76 We did not issue any relevant publications in relation to conduct relief during the period of this report.

F Credit relief

Key points

We did not make any relevant relief decisions in relation to credit during the period of this report. This section outlines the publications we issued that relate to credit relief.

Publications

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

Class order

Class Order [CO 13/18] *Funded representative proceedings and funded proof of debt arrangements exclusion from the National Consumer Credit Protection Act 2009*

78 [CO 13/18] provides funded representative proceedings and funded proof of debt arrangements exclusion from the National Credit Code until 12 July 2013. This will provide the Australian Government with time to consider its policy position on the regulation of litigation funding arrangements and proof of debt funding arrangements. The relief means funded representative proceedings and proof of debt arrangements can commence or progress without needing to comply with specific requirements, including holding an Australian credit licence and complying with the conduct, disclosure and responsible lending requirements.

79 [CO 13/18] was issued as a result of the High Court decision in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, which highlighted that, depending on the terms of a litigation funding agreement, the National Credit Act may apply to funded representative proceedings and funded proof of debt arrangements. The High Court held that a litigation funding agreement was a credit facility within the meaning of reg 7.1.06 of the Corporations Regulations.

Consultation papers

CP 190 *Small business lending complaints: Update to RG 139*

80 CP 190 invited industry, consumer representatives, external dispute resolution (EDR) schemes and other interested persons to comment on our proposal to update guidance in Regulatory Guide 139 *Approval and*

oversight of external dispute resolution schemes (RG 139). Our consultation was in relation to how a scheme's debt recovery legal proceedings jurisdiction should apply to small business lending complaints.

81 CP 190 sought feedback on the policy settings in RG 139, particularly the requirement of ASIC-approved EDR schemes handling complaints under their terms of reference or rules when members of the schemes commence legal proceedings to recover a debt from a consumer. The review found a number of opportunities for improvement, including:

- credit licensees taking steps to better identify hardship in its earlier stages, and providing better resourcing and training to their complaints handling teams so they become more efficient and effective;
- ASIC-approved EDR schemes (the Credit Ombudsman Service Limited and the Financial Ombudsman Service Ltd) improving their operations by working with scheme members and consumer representatives to improve scheme handling and processing of debt recovery legal proceedings complaints; and
- enhanced consumer understanding of how an EDR scheme's debt recovery legal proceedings jurisdiction can assist them, as well as the continued obligation to make repayments where possible.

CP 198 *Review of the effectiveness of an online database for small amount lenders*

82 CP 198 explained the background and scope of our review of whether an online database or similar system would be of assistance in determining whether consumers applying for a small amount loan have outstanding small amount debts and whether the contracts offered by the credit licensee are consistent with regulations.

83 CP 198 sought the views of consumers, consumer representatives, industry and other interested stakeholders so that we may assess whether any amendments to the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* are necessary and provide a report to Government.

Reports

REP 308 *Response to submissions on CP 172 Review of EDR jurisdiction (debt recovery legal proceedings)*

84 REP 308 highlights the key issues that arose out of written submissions and informal discussions, as well as the findings of our review, commenced by CP 172. This report accompanied CP 190: see paragraphs 80–81.

85 CP 172 examined the jurisdiction of EDR schemes over consumer complaints, in cases where scheme members have commenced legal

proceedings to recover debts from consumers, and sought feedback on the policy settings outlined in RG 139—in particular, RG 139.77–RG 139.79.

REP 313 *Response to submissions on CP 178 Advertising credit products and credit services*

86 REP 313 highlights the key issues that arose out of the submissions received on CP 178 and details our responses to those issues. CP 178 sought feedback on good practice guidance for credit and examples for advertising credit products and credit services.

87 We received 10 submissions to CP 178 from financial services and credit providers and industry associations, consumer groups and publishing stakeholders. As a result of the feedback received, we updated Regulatory Guide 234 *Advertising financial products and services (including credit): Good practice guidance* (RG 234) to include guidance that helps promoters comply with their legal obligations when advertising financial and credit products and services.

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 participants in the financial services and capital markets industry. It also outlines further publications we issued.

Financial reporting

Financial reporting relief to corporate group with conditional relief to holding company

88 We granted financial reporting relief to all companies in a corporate group except the holding company in circumstances where all of the companies in the corporate group were subject to a deed of company arrangement. We granted relief because existing pooling arrangements meant that these companies now held nil balances in their financial statements and the administrators confirmed to us that they were to be deregistered shortly.

89 For the holding company, we granted financial reporting relief for the shorter of two years or the termination of the deeds of company arrangement conditional on:

- financial information, not otherwise required to be disclosed (as the administration commenced before this obligation was imposed under s44J of the Corporations Act), being provided at each of the six-month intervals by the deed administrator, equivalent to the information that would be provided in Form 524 *Presentation of accounts and statement* about the current status of the administration; and
- this information being made available on the deed administrator's website.

90 We also provided consequential annual general meeting (AGM) relief to these companies.

Short selling

Relief granted in line with [CO 09/774] to cover an entity that conducts 'naked' short selling to hedge the market-making activities of a related entity

91 We granted relief modelled on Class Order [CO 09/774] *Naked short selling relief for market makers* to enable a related body of a market maker to conduct naked short sales in the course of hedging the risk of the market

maker's activities. The relief available under [CO 09/774] permits a market maker to conduct naked short sales in the course of hedging the risk of market-making activities. [CO 09/774] presumes that the same entity will make a market and hedge the risk of these market-making activities.

92 The applicant was unable to rely on [CO 09/774] because its business model is such that one entity conducts the risk management for the group (including hedging the risk of market-making activities), and another entity conducts the market making in certain products. We granted conditional relief because we were satisfied that this was in line with the policy underlying [CO 09/774] and settlement risk was not increased under this arrangement.

ePayments Code modification

Declaration for a modification under the ePayments Code

93 We made a declaration which granted a prepaid travel card issuer a modification of clause 21.2 of the ePayments Code (Code) to a subset of users whose facilities were created before the issuer subscribed to the Code and who had not provided the issuer with their electronic contact details. The declaration enables the issuer to meet its Code obligations for that subset of users by making the information available at an electronic address.

94 We were satisfied that the declaration was appropriate given the nature of the product and its use, and that the costs of implementing system changes to enable paper-based communication would outweigh the benefit to users. Other important considerations included the transitional nature of the arrangement, and the fact that the number of affected users will decrease rapidly after the issuer subscribes to the Code. The issuer also committed to a number of measures to reduce the number of users who are not contactable electronically.

95 This matter represents the first instrument made under clause 43 of the Code, which provides ASIC with a new general power to exempt and modify the application of the Code.

Public-offer superannuation fund

Relief refused to a company to be treated as a public offer superannuation fund in satisfying superannuation fund benefits

96 We refused to grant relief to a company as trustee of a non-public-offer superannuation fund to be treated as a public-offer superannuation fund and satisfy benefit payments in accordance with s155 of the SIS Act.

97 We refused relief on the basis that:

- the use of our discretionary powers under s328 of the SIS Act to modify s155 of the SIS Act as requested would result in the use of our powers to effect law reform;
- modifying the provision to have application to a trustee of a non-public offer superannuation fund would reverse the usual and intended effect of s155 of the SIS Act;
- the use of our discretionary powers as requested would amend or displace existing benefits of members of the superannuation fund and result in regulatory detriment, which was not outweighed by the commercial benefits in the circumstances; and
- the application did not raise compelling reasons to depart from ASIC's policy position under Regulatory Guide 51 *Applications for relief* (RG 51).

Publications

98 We issued the following publications during the period of this report.

Consultation paper

CP 195 *Proposed amendments to ASIC market integrity rules: ASX 24 and FEX markets*

99 CP 195 set out our proposals for amending the ASIC Market Integrity Rules (ASX 24 Market) 2010 and the proposed market integrity rules for the FEX Global Pty Ltd (FEX) market. The proposed amendments relate to rules on:

- risk management requirements for market participants that trade on a house account on the ASX 24 and/or FEX markets;
- supervision policy and procedure requirements for market participants that trade on the ASX 24 and/or FEX markets;
- minimum presence requirements for foreign market participants that trade on the ASX 24 and/or FEX markets and that do not hold an AFS licence; and
- capital, reporting, margins and disclosure requirements in relation to clearing arrangements for market participants that trade on the FEX market.

100 CP 195 asked respondents to consider if the proposals would result in adverse or unintended consequences, raise any compliance issues and whether there are any other mechanisms to achieve the desired regulatory outcome.

Reports

REP 311 *Response to submissions on CP 179 and CP 184 Australian market structure: Draft market integrity rules and guidance*

101 REP 311 highlights the key issues that arose out of the submissions received on Consultation Paper 179 *Australian market structure: Draft market integrity rules and guidance* (CP 179) and Consultation Paper 184 *Australian market structure: Draft market integrity rules and guidance on automated trading* (CP 184). It details our responses to those issues, and should be read in conjunction with the following ASIC guidance:

- updated Regulatory Guide 223 *Guidance on ASIC market integrity rules for competition in exchange markets* (RG 223);
- the addendum to Regulatory Guide 172 *Australian market licences: Australian operators* (RG 172); and
- Regulatory Guide 241 *Electronic trading* (RG 241).

102 We received 10 responses to CP 179 and 16 responses to CP 184 from a range of stakeholders, including market operators, market participants, associations, superannuation funds, proprietary trading firms and a high-frequency trading firm. Based on the feedback received, we have made new or amended market integrity rules and have issued new or amended regulatory guidance relating to the proposals consulted on in CP 179 and CP 184.

REP 318 *Response to submissions on CP 171 Strengthening the regulation of research report providers*

103 REP 318 highlights the key issues that arose out of the submissions received on CP 171 and details our responses to those issues.

104 We received 27 responses to CP 171 from research houses, industry associations, banking entities, stockbroking firms, securities and advisory firms, compliance firms as well as individual submissions. The main issues raised by respondents related to:

- the scope of our guidance and definitions (e.g. for ‘research report provider’);
- the proposed compliance reporting requirement;
- managing conflicts of interest for ‘issuer pays’ research;
- research currency; and
- disclosures about research.

REP 322 *Response to submissions on CP 186 Clearing and settlement facilities: International principles and cross-border policy (Update to RG 211)*

105 REP 322 highlights the key issues that arose out of the submissions received to CP 186 and details our responses to those issues. In CP 186, we sought feedback on proposals to amend the existing Regulatory Guide 211 *Clearing and settlement facilities: Australian and overseas operators* (RG 211) to:

- adopt the Committee on Payment and Settlement Systems of the Bank for International Settlements (CPSS) and the Technical Committee of IOSCO *Principles for financial market infrastructures* (CPSS–IOSCO Principles) for clearing and settlement (CS) facilities, to the extent possible in our jurisdiction; and
- provide certainty and transparency on how we intend to put in place measures and update our existing guidance to ensure there is appropriate regulatory influence over cross-border CS facilities, as envisaged under the Council of Financial Regulators' framework described in its paper *Ensuring appropriate influence for Australian regulators over cross-border clearing and settlement facilities*.

106 We received six written submissions to CP 186 from a range of stakeholders, including industry associations representing market participants and other stakeholders, a current CS facility licensee, a market operator and a CS facility operating in another jurisdiction. The respondents:

- sought clarity on:
  - how we would work with the Reserve Bank of Australia to avoid duplication in the annual assessment process;
  - our approach to equivalence assessments; and
  - how we work with overseas regulators;
- agreed with our proposals about our use and adoption of the CPSS–IOSCO Principles, disclosure framework and assessment methodology when considering applications for and assessing CS facilities, but expressed concerns about our approach to the annual assessment process; and
- agreed with our approach to update RG 211 to provide more clarity and transparency. In response to the feedback, we have taken steps to amend RG 211.

Appendix: ASIC relief instruments

Table 1 lists the individual 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
7–8	Matcham Capital Investment Management FNOS 160 460 140	12-1526 (in A080/12)	26/10/2012	s911A(2)(l) of the Corporations Act Exemption from the requirement to hold an AFS licence under s911A(1) to a fund manager who provided financial services to wholesale clients situated outside Australia.	
29–31	National Australia Bank Limited ACN 004 044 937	13-0153 (in A07/13)	13/02/2013	s741(1)(b) of the Corporations Act Relief modifying s713 and the definition of 'continuously quoted security' under s9 to enable a bank to offer convertible securities under a transaction-specific prospectus.	
32–33	Site Group International Limited	12-1654 (in A086/12)	07/12/2012	s741(1)(a) of the Corporations Act Relief modifying Condition 3(b) of Class Order [CO 03/184] to allow the 5% cap to be calculated by disregarding shares that have been bought back and cancelled by the issuer under Part 2J.1 of the Corporations Act and in accordance with the terms of the employee share scheme.	

Report para no.	Entity name	Instrument no. (*Gazette* no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
61–63	Elph Pty Ltd ACN 070 012 252	12-1776 (in A001/13)	18/12/2012	s655A(1) of the Corporations Act Declaration modifying the application of Ch 6 to permit the applicant to extend its offer under a takeover bid to securities issued during the offer period under an announced entitlement offer.	
74–75	UniSuper Limited ACN 006 027 121	13-0125 (in A06/13)	08/02/2013	s196 of the Corporations Act Conditional relief from s195 to facilitate participation by four directors who hold a material personal interest to attend and vote at board meetings. The instrument is based on Pro Forma 90 *Voting by interested directors* (PF 90).	
91–92	Barclays Capital Securities Limited ACN 088 271 792	12-1181 (in A086/12)	29/11/2012	s1020F(1)(a) of the Corporations Act Conditional relief from the prohibition on 'naked' short selling in s1020B(2) of the Corporations Act in circumstances where one entity in a group conducts naked short sales to hedge the risk of another entity's market-making activities.	
93–95	Commonwealth Bank of Australia ACN 123 123 124	12-1624	22/11/2012	Clause 43.1 of the ePayments Code Declaration to modify clause 21.2 of the ePayments Code to travel money cards issued before the bank subscribed to the Code, whose holders had not provided the bank with their electronic contact details. (The instrument is available on ASIC's website under 'Instruments issued under the ePayments Code'.)	