



ASIC

Australian Securities & Investments Commission

REPORT 395

Overview of decisions on relief applications (October 2013 to January 2014)

May 2014

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 our decisions on relief applications during the period 1 October 2013 to 31 January 2014. 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 2013 to 31 January 2014 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.

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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. We use our discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit, or where we can facilitate business or cut red tape without harming other stakeholders.
- 2 This report deals with the use of our exemption and modification powers under the provisions of the following chapters of the Corporations Act: Chs 2M (financial reports and audit), 5C (managed investment schemes), 6 (takeovers), 6D (fundraising) and 7 (financial services and markets).
- 3 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).
- 4 ASIC issues no-action letters in some circumstances as discussed in Regulatory Guide 108 *No-action letters* (RG 108). A no-action letter states to a particular person that ASIC does not intend to take regulatory action over a particular state of affairs or particular conduct. This report summarises examples of situations where we have provided, or refused to provide, a no-action letter in relation to non-compliance with certain provisions of the Corporations Act.
- 5 The purpose of this report is to provide transparency and increase 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.
- 6 This report covers the period beginning 1 October 2013 and ending 31 January 2014. During this period, we received 1117 applications. We granted relief in relation to 565 applications and refused relief in relation to 30 applications; 111 applications were withdrawn. The remaining 411 applications were decided outside of this period.
- 7 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.

- 8 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.
- 9 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). A register of waivers, including class rule waivers, granted under ASIC market integrity rules is available via www.asic.gov.au/markets under ‘Market integrity rules’. 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 and related provisions. It also outlines the publications we issued that relate to licensing relief.

Financial service providers

Relief to avoid employed financial advisers having to be authorised representatives

- 10 We granted relief to two AFS licensees: a company operating a financial advice business and a superannuation trustee that held all of its shares. The relief facilitates new arrangements for representatives who provide financial product advice to members of the superannuation fund, as well as non-members, on behalf of both entities.
- 11 The relief was sought to avoid the employed representatives having to be authorised representatives, which would have been required under s911B of the Corporations Act because the requirements of s911B(1)(a) were not satisfied. Under s911B(1)(a), it is only lawful for employees who provide financial services to act on behalf of two AFS licensees as representatives that are not authorised representatives if the entities are related bodies corporate. As a result of s48 of the Corporations Act, the relevant entities were not related bodies corporate because the shares held by the superannuation trustee were held in its capacity as a fiduciary.
- 12 The relief was granted because we considered there would be an unreasonable burden placed on the individual employee advisers if they were subject to personal liability under Ch 7 of the Corporations Act as an authorised representative, especially as this was required solely because of the application of s48.
- 13 We granted the relief by way of a declaration that s48 be disregarded for the purposes of determining whether the entities are related bodies corporate, when determining if an employee representative could act on behalf of a licensee under s911B. When giving financial product advice to retail clients, the modified provisions require the advisers to provide a written statement disclosing the licensee responsible for the advice.

Relief from the requirement to appoint authorised representatives

- 14 We granted relief from the requirement to appoint authorised representatives to an entity that arranges for the issue of certain non-cash payment facilities. The relief we provided deems the entity and its franchisees, licensees and staff to be the representatives (as opposed to authorised representatives who must comply with certain obligations, and are subject to liability, under Ch 7 of the Corporations Act) of the specified third-party AFS licensees who issue the non-cash payment facilities.
- 15 Relief was granted because we considered the cost of compliance with Ch 7, including the requirement to appoint authorised representatives, was unduly burdensome given the significant size of the entity's franchisee and licensee networks.
- 16 However, we considered that it was appropriate for the entity to review other options for compliance with the licensing regime, such as obtaining an AFS licence. Accordingly, relief was given for an interim period until December 2015. We considered that granting relief for the interim period involves minimal risks to consumers because the relevant persons continue to act as representatives of a licensee who is responsible for their conduct.

Publications

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

Regulatory guides

RG 166 Licensing: Financial requirements

- 18 RG 166 sets out the financial requirements AFS licensees must meet. The requirements vary depending on the financial products and services offered.
- 19 The guide has been updated to accommodate industry practice of custody of certain assets—like derivatives, certain bank accounts and private equity interests—when these are held by a responsible entity of a managed investment scheme where existing financial resource requirements would not otherwise allow this.

Reports

REP 377 *Review of advice on retail structured products*

- 20 REP 377 summarises the results of a review of personal advice to invest in unlisted and unquoted retail structured products. It is relevant to financial advisers and others involved in financial advice businesses who provide advice on structured products and other complex investments. It provides examples of good practices we identified, and highlights some of the risks and common pitfalls for advisers who advise on these products.

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. It also outlines the publications we issued that relate to disclosure relief.

Employee incentive schemes

Relief to facilitate an offer of performance rights under an employee incentive scheme

- 21 We granted disclosure, licensing and hawking relief in similar terms to Class Order [CO 03/184] *Employee share schemes* in connection with a demerger scheme of arrangement under Pt 5.1 of the Corporations Act, to enable a company to make offers of performance rights to eligible employees of the demerged entity under an employee incentive scheme. The offers were proposed to be made to eligible employees transferring from the scheme company to the demerged entity as part of the demerger, for the purposes of appropriately incentivising those employees after the demerger.
- 22 One of the reasons why the company was not able to rely on the class order relief is because offers were proposed to be made prior to the demerged entity being listed on the ASX. A condition of [CO 03/184] is that the issuer is listed on the ASX or an approved foreign market throughout the 12-month period prior to the offer without suspension for more than two trading days (12-month listing requirement). The purpose of the 12-month listing requirement is to ensure that eligible employees have reliable information about the value of the shares, or cash equivalent, that they will receive.
- 23 We granted relief in these particular circumstances because we were satisfied that:
- adequate disclosure would be provided to eligible employees in the form of the booklet for the demerger scheme of arrangement and offer booklet for the employee incentive scheme;
 - the offer supported mutual interdependence between, and is for the long-term benefit of both, the company and its employees; and
 - the offer to employees was not for the purpose of fundraising.

Rights issues

Refused relief to allow a company to rely on s708AA

- 24 We refused an application for relief to enable a company to rely on s708AA for a proposed entitlement offer. At the time of the proposed offer, it was expected that securities in the company would have been suspended from trading for more than five days during the last 12 months. In this instance, the length of suspension was a maximum of 10 trading days during the last 12 months.
- 25 At the time of the application and almost immediately before the proposed offer was to be made, trading in the company's securities was suspended pending the announcement of material information about its operations.
- 26 After reviewing the proposed announcement by the company, we considered the application did not satisfy the policy considerations for granting relief outlined in Regulatory Guide 189 *Disclosure relief for rights issues* (RG 189) because:
- in the context of the nature of the announcement, which not only contained material information but was subject to a number of critical uncertainties about the company's position, we considered there would be regulatory benefit in the company preparing and lodging a prospectus; and
 - we were not satisfied that the securities would be adequately priced and the market fully informed at the time the offer was made as:
 - it was difficult to predict how the market would react to the significant change in the company's position and whether the market would have adequate time to assess all relevant issues; and
 - there was a risk that the final position would still be unclear at the time the entitlement offer was made.

Publications

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

Class orders

Superseded Class Order [SCO 13/1128] Amendment of Class Order [CO 12/749]

- 28 [SCO 13/1128] amends the definition of a hedge fund in Class Order [CO 12/749] *Relief from the Shorter PDS regime*. The revised definition

relieves some lower-risk funds from the more extensive disclosure obligations imposed on a hedge fund under Regulatory Guide 240 *Hedge funds: Improving disclosure* (RG 240).

29 The amended definition of a hedge fund ensures our disclosure requirements are appropriately targeted at those funds that pose more complex risks to investors. It also more clearly differentiates hedge funds from other types of managed investment schemes so that investors can better understand and assess these products.

30 RG 240 has also been updated to reflect the revised definition: see paragraphs 40–42.

Class Order [CO 13/1534] *Deferral of Stronger Super amendments in relation to PDS and periodic statement disclosure*

31 [CO 13/1534] provides relief to assist the industry with the introduction of the Stronger Super reforms. The class order:

- changes the start date for compliance with new fees and costs disclosure arrangements from 31 December 2013 to 1 July 2014; and
- provides interim relief so that Registrable Superannuation Entity (RSE) licensees do not have to provide a hard copy of the product dashboard with the periodic statement.

32 We have also provided a no-action position for RSE licensees so that information about accrued default amounts does not need to be included in an exit statement.

33 The relief and no-action position we have provided is consistent with our facilitative compliance approach for entities undergoing implementation of the Stronger Super reforms, and ensures that trustees have adequate time to comply with the reform timetable: see Media Release 13-342MR *ASIC provides relief from new super disclosure requirements* (16 December 2013).

Consultation papers

CP 218 *Employee incentive schemes*

34 CP 218 is for persons offering and receiving shares or other financial products under employee incentive schemes.

35 It sought feedback on our proposals to revise our current relief in [CO 03/184] and our guidance in Regulatory Guide 49 *Employee share schemes* (RG 49) to cover a wider range of employee incentive schemes. The proposals include:

- expanding the classes of financial products that may be offered;

- expanding the categories of persons who can participate;
 - providing greater flexibility in the way employee incentive schemes can be structured to better reflect market practices (e.g. amending the requirements for trust, contribution and loan arrangements);
 - reducing the administrative burden of having to provide copies of documents to ASIC; and
 - expanding the types of situations where unlisted bodies may offer employee incentive schemes.
- 36 Submissions on CP 218 were due on 31 January 2014. A report on our response to submissions has not been released at the date of this report.

Information sheets

INFO 155 Shorter PDSs: Complying with requirements for superannuation products and simple managed investment schemes

- 37 INFO 155 provides concise guidance on technical issues related to the implementation of the product disclosure regime under Pt 7.9 of the Corporations Act and the related Corporations Regulations 2001 (Corporations Regulations) for superannuation products and simple managed investment schemes, referred to as ‘the shorter PDS regime’.
- 38 After full commencement of the shorter PDS regime in June 2012, we reviewed a sample of shorter PDSs for superannuation and simple managed investment schemes. We found that issuers have made a good effort to comply with the regime and any non-compliance tended to be technical rather than substantive.
- 39 We also identified areas where industry may benefit from further guidance when preparing a shorter PDS and have updated INFO 155 to clarify:
- page restrictions, font size and formatting of ‘warnings’;
 - employer-sponsored members and employer PDSs;
 - whether and how investment options may change; and
 - treatment of accumulation and pension interests in the one superannuation fund.

Regulatory guides

RG 240 Hedge funds: Improving disclosure

- 40 RG 240 is for those involved in the issue and sale of hedge funds. It sets out our guidance for improved disclosure to investors to help them understand and assess these products.

- 41 Following extensive consultation with industry, we have amended the definition of a hedge fund in [CO 12/749] to ensure our disclosure requirements are appropriately targeted at those funds that pose more complex risk to investors: see paragraphs 28–30.
- 42 RG 240 has been updated to reflect the revised definition and provides guidance around the characteristics that prompt a registered managed investment scheme to be classified as a hedge fund.

Reports

REP 384 *Regulating complex products*

- 43 REP 384 examines the risks posed to retail investors by complex products, our work in regulating complex products and opportunities for us to undertake further work in this area, including working with industry where appropriate. Our objective in publishing the report is to facilitate discussion between ASIC and interested stakeholders on the scope of the risks posed to investors by complex products, and the effective management of those risks.
- 44 REP 384 sought feedback from financial services businesses and issuers involved in the development and distribution of complex products, providers of financial advice relating to complex products, and those with an interest in engaging with us on our approach to regulating complex products. Feedback on the report was due on 31 March 2014.

C Managed investment relief

Key points

This section sets out some of the circumstances in which we have granted or refused relief under s601QA from the provisions of Ch 5C of the Corporations Act. It also outlines the publications we issued that relate to managed investment relief.

Scheme registrations

Refused scheme registration relief for an online lending platform

- 45 We refused to give relief to an operator of an online lending platform from the requirement to register the platform under s601ED of the Corporations Act. The platform facilitates loans between unrelated lenders and borrowers without the intermediation of any financial institution or bank. The loans are unsecured and effected under terms agreed to by lenders and borrowers who are able to set the loan term and interest rate. The operator of the platform holds the benefit of any principal and interest payments on trust for the relevant lender. The operator of the platform is also responsible for certain decisions such as assessment of a borrower's creditworthiness and undertaking loan recovery action where a borrower defaults on a loan.
- 46 We refused to give relief because we considered the removal of the consumer protections under Ch 5C to members of the platform would involve a significant regulatory detriment. We were not satisfied that compliance with the usual obligations that would apply to the platform would be impossible or disproportionately burdensome. While the operator would hold an AFS licence in relation to the provision of financial services and a credit licence to engage in credit activities, there would be limited protections for scheme members (i.e. the lenders).

Publications

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

Class Orders

Class Order [CO 13/1406] *Land holding for primary production schemes*

48 [CO 13/1406] notionally inserts s912AAB into the Corporations Act. The section contains the minimum standards that a responsible entity must meet in relation to the holding of interests in land required for the operation of a registered scheme, to ensure the land holding arrangements enable the scheme to be operated efficiently, honestly and fairly.

49 Regulatory Guide 133 *Managed investments and custodial or depository services: Holding assets* (RG 133) has been revised to reflect the requirements in this class order: see paragraphs 58–59.

Class Order [CO 13/1409] *Holding assets: Standards for responsible entities*

50 [CO 13/1409] notionally inserts s601FCAA and s601FCAB into, and provides relief from s601FC(1)(i)(ii) of, the Corporations Act to impose minimum standards on responsible entities for holding and dealing with scheme property, to ensure that efficient operational arrangements exist and to ensure that scheme property is not exposed to unnecessary risks because of the way it is held.

51 RG 133 has been revised to reflect the requirements in this class order: see paragraphs 58–59.

Class Order [CO 13/1410] *Holding assets: Standards for providers of custodial and depository services*

52 [CO 13/1410] notionally inserts s912AAC, s912AAD and s912AAE into the Corporations Act to impose minimum standards on custodians for holding custodial property, to ensure that efficient operational arrangements exist and to ensure that custodial property is not exposed to unnecessary risks because of the way it is held.

53 RG 133 has been revised to reflect the requirements in this class order: see paragraphs 58–59.

Reports

REP 376 *Response to submissions on CP 197 Holding scheme property and other assets*

54 REP 376 highlights the key issues that arose out of the submissions received on Consultation Paper 197 *Holding scheme property and other assets* (CP 197) and outlines our responses to those issues.

- 55 In CP 197, we consulted on proposals to update our guidance for responsible entities of registered schemes on holding scheme property and other assets.
- 56 We received 10 responses to CP 197 from lawyers, industry bodies, custodians, banks and one compliance specialist. Of these, two submissions were confidential.
- 57 Feedback received on CP 197 helped us to finalise our guidance, which is published in the final updated RG 133 (see paragraphs 58–59), and related class orders (see paragraphs 48–53).

Regulatory guides

RG 133 *Managed investments and custodial or depository services: Holding assets*

- 58 RG 133 explains the AFS licence obligations in relation to holding assets that apply to:
- responsible entities of registered managed investment schemes;
 - licensed providers of custodial or depository services;
 - operators of managed discretionary account services that are responsible to clients for assets held under that service; and
 - investor directed portfolio service operators that are responsible to clients for assets held under an that service.
- 59 The guide has been revised to cover updates to existing requirements to:
- apply minimum standards to asset holders for managed investment schemes and holders of financial products;
 - ensure agreements with asset holders have certain minimum terms; and
 - require responsible entities of primary production schemes to safeguard the land on which the scheme operates (see paragraphs 48–53).

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. We did not issue any relevant publications in relation to mergers and acquisitions relief during the period of this report.

Takeover bids

Relief granted to resolve Takeovers Panel proceedings

- 60 As part of a proposal to settle a dispute before the Takeovers Panel by way of undertaking, we granted relief to enable a bidder to offer target holders the opportunity to withdraw or affirm their acceptances. The undertaking was given in the matter of *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16 to address concerns arising from announcements made by the bidder and target instituting, and then departing from, a proposal to conditionally pay a special dividend.
- 61 Relief was required to allow the bidder to offer withdrawal rights and to ensure that existing takeover contracts were amended to accommodate the withdrawal and affirmation process—including necessary changes to the timing for payment of the bid consideration.
- 62 Our consideration of the relief request was expedited by affording procedural fairness to the parties to the proceedings at the same time as the Takeovers Panel’s invitation for parties to comment on the proposal, and because we had been an active party to the proceedings. We decided to grant relief given its remedial purpose and the general policy that appropriate undertakings may be offered and accepted as a quicker and more flexible alternative to Takeovers Panel orders.

Refused relief abridging time for dispatch of bidder’s statement

- 63 We refused an application for relief to allow a bidder to dispatch their bidder’s statement within three days of lodgement rather than the minimum 14 days, so that target holders would have time to review the bidder’s statement prior to the close of an alternative offer.

- 64 In deciding to refuse relief we considered the following key issues:
- the underlying policy of item 6 of s633(1)—which has historically been a key protection enabling members of a target board and other interested parties (including ASIC) to consider their response to a bid, assess the adequacy, accuracy and presentation of disclosures and decide whether to act to seek orders restraining dispatch or requiring amended disclosure;
 - the applicant had made the application without seeking consent from the target for early dispatch;
 - in the course of considering the application, the target raised a number of concerns with the disclosure in the bidder’s statement; and
 - we were not satisfied that the benefits of permitting early dispatch necessarily outweighed the benefits of dispatching documents that the target’s board had been given a reasonable amount of time to fully consider and respond to, in accordance with the policy underlying item 6.

Acquisitions under item 7 of s611

Refused relief to allow prohibited members to vote

65 We intended to refuse an application to modify item 7(a)(ii) of s611 to allow members from whom the acquisition would be made to vote in favour of the acquisition. The application was made by an unlisted public company for the purposes of being acquired by a listed shell company. The listed company was to make a scrip offer to the applicant’s shareholders to acquire 100% of its share capital and proposed to conduct this transaction through an item 7 meeting of shareholders. It was submitted that this would be the most cost-effective and timely method. Regulatory Guide 74 *Acquisitions approved by members* (RG 74) indicates that we must take a conservative approach in providing this kind of relief.

- 66 We intended to refuse the application as:
- we were concerned that the protections and principles of Ch 6 or Pt 5.1 of the Corporations Act may be undermined if we provided relief to permit the transaction to proceed via an item 7 resolution;
 - we were not satisfied that it was not commercially or legally practical to structure the offer as a takeover bid or scheme of arrangement; and
 - we consider the cost and the time it takes to ensure shareholders have been provided the appropriate protections under the Corporations Act cannot of itself be considered to be unreasonably burdensome.

67 The application was subsequently withdrawn.

Relevant interests

Relief to facilitate escrow arrangements on a foreign exchange

- 68 We granted relief to modify s609 of the Corporations Act (as modified by Class Order [CO 13/520] *Relevant interests, voting power and exceptions to the general prohibition*) to a company seeking to move their listing offshore in order to facilitate an escrow arrangement required by the foreign exchange.
- 69 Relief was required as the foreign exchange required promoter securities to be escrowed in favour of the joint issue managers of the float, despite these securities previously free-floating and being subject to price discovery in another exchange. Under the terms of the arrangement, the joint issue managers may have otherwise acquired a relevant interest in the promoter securities.
- 70 This escrow-style arrangement differed from listing rule escrows provided for under [CO 13/520], as the escrow was required to be given in favour of the joint issue managers rather than the exchange.
- 71 Relief was granted on the condition that the terms set out in Table 11 of Regulatory Guide 5 *Relevant interests and substantial holding notices* (RG 5) be satisfied and that further disclosure be provided to members.
- 72 We granted the relief because we were satisfied that there was no unacceptable control purpose and it was a pre-condition to the company listing on the foreign exchange.

Refused relief for acquisition of relevant interest by company in its own shares

- 73 We intended to refuse an application to modify s609, s610 and s671B of the Corporations Act. In this case, the company intended to enter into a deed poll with a director that would restrict the director's ability to exercise any vote, or procure the exercise of any vote, attached to any shares in the company in which he had a relevant interest. Relief was sought so that:
- entry by the director into the deed poll with the company would not result in the company acquiring a relevant interest in its own shares in which the director had a relevant interest; and
 - the director would not become an 'associate' of the company by his entry into the deed poll.

- 74 We intended to refuse the application because:
- the relief sought failed to meet the requirements and criteria outlined in our policy for ‘voluntary escrow’ arrangements as described in RG 5 as:
 - the proposed arrangement restricted voting rather than disposal of shares;
 - the relevant shares were not newly issued securities; and
 - the period of ‘voluntary escrow’ under the proposed arrangement was indefinite;
 - we considered the relief was unnecessary as the applicant could rely on item 7 of s611 to obtain shareholder approval of its acquisition of relevant interest over the shares, thus avoiding a contravention of s606 of the Corporations Act; and
 - the benefits of shareholder approval outweighed any inconvenience to the applicant in convening a general meeting.
- 75 The application was subsequently withdrawn.

Rights issues

Relief from the requirement to appoint a foreign holder nominee

- 76 We granted relief from the requirement to appoint a nominee to deal with ineligible foreign shareholders’ entitlements under item 10, s611 of the Corporations Act.
- 77 Relief was provided on the basis that excluded foreign shareholders constituted a very small percentage of the company’s share register and the costs involved with complying with the s615 procedure would have exceeded the amount raised from sale of the entitlements, meaning it was unlikely that any proceeds from the sale of securities would be remitted to those foreign shareholders.
- 78 We were also satisfied that the rights issue exception was not being used for control purposes and the company had demonstrated an urgent need for capital.

E Conduct relief

Key points

This section outlines some of the circumstances where we have granted or refused relief from the conduct obligations in Chs 2D, 2G, 2M, 5C and 7 of the Corporations Act. This section also outlines the publications we issued that relate to conduct relief.

Financial reporting

Relief to extend time for half-year financial reporting

- 79 We granted relief extending the time for half-year financial reporting by a listed disclosing entity to six months from the half-year balance date. The disclosing entity's quoted securities comprised stapled units in two registered managed investment schemes.
- 80 We also granted relief to the schemes, responsible entity and companies controlled by the schemes from the continuing obligation to lodge reports for previous financial periods, by providing an extension of time for lodgement of those historical reports.
- 81 We granted relief because:
- the responsible entity and controlled companies were subject to deeds of company arrangement and had receivers and managers appointed;
 - trading in the disclosing entity's securities was suspended;
 - there were no appointed directors of the responsible entity or the controlled companies;
 - we were satisfied that the external administrators exercised all or most of the management functions and powers of the responsible entity and the controlled entities;
 - it was uncertain whether unit holders would have an ongoing economic interest in the disclosing entity; and
 - the external administration was large and complex.
- 82 Relief was granted on the condition that the responsible entity:
- have in place arrangements to answer reasonable enquiries from unit holders about the consequences of the external administration;

- make a copy of the orders granting relief available on a website maintained by the deed administrator and on the ASX market announcement platform; and
- provide a status update to the market within five business days of any meeting of creditors of the responsible entity, and within 28 days from each quarter, including a statement:
 - about the current status of the sale process;
 - on the amount of cash funds currently available to schemes;
 - on the likely liabilities of the schemes for the next quarter;
 - advising that all secured and unsecured creditors must be paid prior to any return of capital to unit holders; and
 - that a copy of the minutes of meeting of creditors of the responsible entity and the controlled companies has been lodged with ASIC and may be obtained from ASIC on payment of the relevant statutory fee.

Publications

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

Class orders

Class Order [CO 13/721] *Relief to facilitate quotation of exchange traded funds on the AQUA Market*

- 84 [CO 13/721] provides relief to facilitate quotation of exchange traded funds (ETFs) on the AQUA Market. In effect, this class order:
- grants relief from the equal treatment duty under s601FC(1)(d) to allow the responsible entity to normally restrict withdrawal from the ETF to authorised participants only and to provide certain information to authorised participants before other members of the ETF;
 - grants relief from ongoing obligations in relation to disclosure of material changes and significant events under s1017B to allow the responsible entity to provide continuous disclosure to the market (on its website), rather than providing individual notifications to each retail investor;
 - grants relief from the takeover provisions in Ch 6 and the substantial holding notice obligation in Ch 6C so that the ETF's acquisition and withdrawal facility does not give the authorised participants a relevant interest in the securities that comprised the ETF; and

- allows members of the ETF, in assessing their obligations to disclose their substantial holding under s671B, to assume that the composition of the ETF's underlying securities is the same as the creation basket disclosed by the responsible entity at the beginning of the day.

Class Order [CO 13/1050] *Financial reporting by stapled entities*

- 85 [CO 13/1050] allows issuers of stapled securities to present consolidated or combined financial statements. The class order has been amended by Superseded Class Order [SCO 13/1644] *Amendment of Class Order [CO 13/1420]* to extend the relief given to stapled entities for future financial years pending further consideration of reporting requirements by the International Financial Reporting Standards Interpretations Committee.
- 86 Under the new Australian Accounting Standard AASB 10 *Consolidated financial statements*, it is not clear that stapled entities would be permitted to prepare consolidated financial statements in the absence of the class order. The amended class order provides certainty that entities can continue their previous consolidated or combined reporting.
- 87 The amended class order also requires the entity to disclose in the relevant financial report:
- that the class order has been relied on and whether consolidated financial statements or combined financial statements have been presented; and
 - where consolidated financial statements are presented, the amounts of the non-controlling interests that are attributable to the stapled security holders.

Class Order [CO 13/1200] *Periodic statements relief for AQUA quoted and listed managed investment scheme manager*

- 88 [CO 13/1200] temporarily exempts issuers of interests in an AQUA quoted and listed managed investment scheme from the obligation under s1017D to give periodic statements to scheme members. The temporary exemption provides a transition period to help issuers prepare for compliance with s1017D. The exemption is for each reporting period ending on or before:
- 31 December 2013, for issuers of interests in a registered scheme that is an AQUA product and is admitted to trading status; and
 - 29 June 2014, for issuers of interests in a registered scheme that is a quoted enhanced disclosure security.
- 89 The class order also aims to help issuers to overcome practical difficulties in preparing periodic statements for scheme members by modifying the obligation permanently to:

- allow issuers to exclude transaction values and investment return information from the periodic statements where the issuer does not know the price of the transactions. Issuers may still use either net asset value or last market price in preparation of the statement if it is not misleading to investors;
- require issuers to provide a clear and prominent explanation of the price used to determine the dollar values on the statement;
- require issuers to report on the statement whether the scheme has met its investment objective over the last one-year and five-year periods; and
- allow issuers to not include the termination value of investors' interest in the scheme.

Class Order [CO 13/1420] *Interim relief from separately reporting low income superannuation contributions in members' periodic statements*

- 90 [CO 13/1420] provides temporary relief from reg 7.9.20(2A) of the Corporations Regulations, which requires that superannuation trustees separately report low-income superannuation contributions in members' periodic statements. Superannuation trustees seeking to operate under the exemption must give disclosure to members in one of two alternative forms, provided for under the conditions of the exemption. Both conditions require that the member is informed about a low-income superannuation contribution, either in the periodic statement or in a document accompanying the periodic statement.
- 91 On 24 October 2013, the Government released an exposure draft of the Minerals Resources Tax Repeal and Other Measures Bill 2013. This Bill proposed to abolish the payment of low-income superannuation contribution for all financial years starting on or after 1 July 2014. In the event that the Bill is passed, low-income superannuation contributions will only be paid in relation to the 2012-13 financial year.
- 92 The class order attempts to achieve a balance between minimising consumer detriment to fund members and facilitating business and minimising compliance costs during this period of uncertainty regarding the Bill. We have provided the two alternative forms of disclosure to accommodate the varying systems capabilities across the industry, while also building in consumer protections to ensure the information presented to fund members is clear and effective.
- 93 Specifically, the class order seeks to:
- facilitate business given the short length of time within which superannuation trustees had to build, test and implement systems changes necessary to comply;

- mitigate costs involved with systems changes and with managing operational risk arising out of complying with the new obligation in a short timeframe; and
- provide certainty to industry pending the outcome of the Minerals Resources Tax Repeal and Other Measures Bill 2013.

Class Order [CO 13/1621] *Exemption and declaration for the operation of mFund*

- 94 [CO 13/1621] provides relief that facilitates retail clients applying for interests in managed investment schemes through the mFund Settlement Service (mFund).
- 95 Investors use mFund to apply or redeem units electronically through ASX participants. The orders will be transmitted through the financial market infrastructure of ASX Limited and ASX Settlement Pty Limited to the responsible entities. Confirmation that a current PDS is provided to an investor is achieved through electronic messaging by the market participants.
- 96 The relief exempts responsible entities from having to comply with s1016A(2) of the Corporations Act, which requires an application form to be included in, or accompany, a PDS.
- 97 We provided relief because:
- we were satisfied that the control measures put in place in mFund were sufficient to ensure that a PDS will be provided to an investor and a responsible entity will not issue any product without an electronic confirmation that a current PDS was provided;
 - we published Consultation Paper 208 *ASX Managed Funds Service: Relief from the application form requirement* (CP 208) and all submissions received supported granting the relief (see paragraphs 110–113); and
 - we considered that granting the relief would have a net positive impact for the managed funds industry and would not have any significant adverse impact on retail clients.

Consultation papers

CP 217 *Presentation of financial statements by stapled entities*

- 98 CP 217 sets out our proposal to issue a class order to allow stapled entities to present combined or consolidated financial statements covering all entities in a stapled group. We have prepared this paper because stapled entities may not be able to present combined or consolidated financial statements covering all entities in a stapled group under AASB 10 that applies for reporting periods commencing on or after 1 January 2013.

- 99 CP 217 sought feedback on proposals to:
- provide class order relief to allow stapled entities to present combined financial statements;
 - require such statements to be audited or reviewed;
 - state that combined financial statements are necessary to meet the true and fair view requirement;
 - not relieve stapled entities from presenting the financial statements required by accounting standards; and
 - continue to allow the financial statements of all stapled group entities to be presented together in a single financial report.
- 100 Submissions on CP 217 were due on 30 November 2013. A report on our response to submissions has not been released at the date of this report. However, interim relief was provided in Class Order [13/1050] *Financial reporting by stapled entities* on 22 August 2013 and subsequently extended on 14 January 2014: see paragraphs 85–87.

Information sheets

INFO 170 *MySuper product dashboard requirements for superannuation trustees*

- 101 INFO 170 gives guidance to superannuation trustees and other persons in relation to the product dashboard requirements in s1017BA of the Corporations Act for MySuper products.
- 102 The product dashboard requirements were introduced by the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (Tranche 3 Act), with changes being made by the *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013*.
- 103 The product dashboard requirements took effect on 31 December 2013 for MySuper products. On 5 May 2014, the Government announced that it has decided to defer the start date for Choice investment options to 1 July 2015.
- 104 The product dashboard is intended to provide members with key information about the product in relation to five separate measures detailed in s1017BA:
- the return target;
 - the returns for previous financial years;
 - a comparison between the return target and the returns for previous financial years;
 - the level of investment risk; and
 - a statement of fees and other costs.

105 INFO 170 provides guidance on what information must be provided by superannuation trustees for each measure in the product dashboard. It also contains an example of what the product dashboard may look like, which incorporates some of the feedback from independent consumer testing. The results of the testing have been released as Report 378 *Consumer testing of the MySuper product dashboard* (REP 378).

Reports

REP 373 Response to submissions on CP 196 Periodic statements for quoted and listed managed investment products and relief for AQUA products

106 REP 373 highlights the key issues that arose out of the submissions we received on Consultation Paper 196 *Periodic statements for quoted and listed managed investment products and relief for AQUA products* (CP 196), and outlines our responses to those issues.

107 In CP 196 we consulted on proposals for relief to allow issuers of interests in registered schemes that can be traded on a licensed financial market to report the balances and values required under s1017D of the Corporations Act on a modified basis. CP 196 also covered proposals for relief to facilitate the trading of interests in a registered scheme on the AQUA market of ASX.

108 We received eight submissions on CP 196 from industry bodies, licensed financial markets, fund managers, and a securities registrations firm. Respondents were generally supportive of our proposals.

109 The feedback received helped us to finalise the relief in [CO 13/721] (see paragraph 84) and [CO 13/1200] (see paragraph 88).

REP 381 Response to submissions on CP 208 ASX Managed Funds Service: Relief from the application form requirement

110 REP 381 highlights the key issues that arose out of the submissions received on CP 208 and outlines our responses to those issues.

111 In CP 208, we consulted on proposals to grant the relief applied for by ASX Limited, subject to certain conditions, to facilitate the introduction of mFund, a facility through which offers to acquire and dispose of financial products can be made to the issuers.

112 We received 22 responses to CP 208 from brokers, fund managers, and industry associations. Eleven of the 22 submissions were confidential. All respondents agreed with our proposal to grant relief and some respondents raised specific issues in relation to our proposed conditions.

- 113 The feedback received helped us make our decision on ASX's relief application. The relief was granted in [CO 13/1621]: see paragraphs 94–97.

F Credit relief

Key points

This section outlines some of our regulatory action in relation to applications under the National Credit Act and the Transitional Act. We did not issue any relevant publications in relation to credit relief during the period of this report.

Credit contracts

Interim relief for certain credit contracts

- 114 We granted interim relief from the obligations that apply to reverse mortgages in relation to certain shared appreciation credit contracts. Under these credit contracts, debtors are lent an amount for the purchase of residential property. Debtors are not required to make interim repayments. However, debtors are required to repay the loan in full (including an amount calculated with reference to the change in value of the property) on the expiry of the loan or sale of the property.
- 115 We considered that the shared appreciation loan may be a reverse mortgage as defined in the National Credit Code. We considered it was contrary to the intention of the reverse mortgage provisions for those obligations to apply to a product designed to assist with the purchase of a property, given reverse mortgages are typically products that allow home owners to access the equity in their place of residence. We provided interim relief until 1 December 2015 to allow the matter to be considered further by Treasury.

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.

Class rule waivers

Relief from Rule 4.1.1(1) (Competition) for ASX participants

116 We granted a class rule waiver to enable participants to execute auction imbalance orders on the ASX market without breaching Rule 4.1.1(1) of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011. This rule provides that a participant must not enter into a transaction unless the transaction is entered into by matching of a pre-trade transparent order on an order book, subject to exceptions.

Note 1: In this document 'ASIC Market Integrity Rules (Competition)' refers to the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011.

Note 2: In this document 'Rule 4.1.1(1) (Competition)' (for example) refers to a particular rule of the ASIC Market Integrity Rules (Competition).

117 Auction imbalance orders trade against any surplus volume remaining at the end of the open and closing auctions of ASX at the equilibrium price set by the auction. An auction imbalance order is not pre-trade transparent.

118 We granted this waiver on the basis that the equilibrium price at the end of the auction, at which the auction imbalance orders execute, is analogous to the 'best mid-point' of a trade with price improvement (Rule 4.2.3(1) (Competition)) which constitutes, in turn, an exception in the pre-trade transparency rule.

119 This relief applies for an indefinite period of time.

Relief from Rule 4.1.2(1) (Competition) for ASX

120 We granted a waiver to enable ASX to offer auction imbalance orders on the ASX market without breaching Rule 4.1.2(1) (Competition). This rule provides that a market operator is to immediately make available pre-trade information.

- 121 We granted this waiver on the basis that the equilibrium price at the end of the auction, at which the auction imbalance orders execute, is analogous to the 'best mid-point' which falls within the definition of a trade with price improvement: Rule 4.2.3(1) (Competition).
- 122 Rule 4.1.2(2)(c) (Competition) states that a market operator is not required to make available pre-trade information in relation to an order on an order book that, if executed, would result in a trade with price improvement.
- 123 This relief applies for an indefinite period of time.

Relief from Rule 4.1.1(1) (Competition) for Chi-X Australia participants

- 124 We granted a class rule waiver to enable participants to execute market on close orders on the Chi-X market without breaching Rule 4.1.1(1) (Competition). This rule provides that a participant must not enter into a transaction unless the transaction is entered into by matching of a pre-trade transparent order on an order book, subject to exceptions.
- 125 Market on close orders result in transactions where the price of the relevant equity market product is the official closing price for the day on ASX. Market on close orders are not pre-trade transparent.
- 126 We granted this waiver on the basis that we consider market on close orders would result in investors receiving a fair price, being the ASX closing single-price auction price. This price is already transparent to the market.
- 127 This relief applies for an indefinite period of time.

Relief from Rule 4.1.2(1) (Competition) for Chi-X Australia

- 128 We granted a waiver to enable Chi-X Australia to offer market on close orders on the Chi-X market without breaching Rule 4.1.2(1) (Competition). This rule provides that a market operator is to immediately make available pre-trade information.
- 129 We granted this waiver on the basis that we consider market on close orders would result in investors receiving a fair price, being the ASX closing single-price auction price. This price is already transparent to the market.
- 130 This relief applies for an indefinite period of time.

Fee disclosure statements

No-action letter giving additional time to send fee disclosure statement to clients

- 131 We provided a no-action letter in relation to Div 3 of Pt 7.7A of the Corporations Act. The application was made before the Government announced an intention to remove the annual fee disclosure statement (FDS) requirements for pre-1 July 2013 clients on 20 December 2013.
- 132 The applicant sought the no-action letter in relation to not sending an FDS to certain clients until 30 June 2014. The applicant had experienced data errors while migrating client information to a new IT system to comply with the FDS requirements. The data errors would result in incomplete FDSs for clients and needed time to be fixed.
- 133 The no-action letter states that we will not take action where the client does not receive their FDS within the 30-day period required under Div 3 of Pt 7.7A of the Corporations Act.
- 134 We provided the no-action letter for the period prior to 30 June 2014 because giving the no-action letter was consistent with our commitment to adopting a facilitative compliance approach for entities undergoing implementation of the Future of Financial Advice (FOFA) reforms: see Media Release 12-257MR *ASIC consults on code approval under FOFA and confirms facilitative approach to FOFA introduction* (23 October 2012).

Publications

- 135 We issued the following publications during the period of this report.

Consultation papers

CP 219 *Keeping superannuation websites up to date*

- 136 CP 219 sets out our proposals for how remuneration and other information on superannuation websites may be kept up to date under s29QB of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). We offered three options for dealing with the uncertainty as to what ‘up to date at all times’ means in the context of this section. One of these options included a proposal to give trustees a ‘safe harbour’, so that they are taken to comply with the updating obligation if they update the fund website within a specified time (generally, 14 days).
- 137 We sought feedback on these proposals from licensees of registrable superannuation entities.

138 Submissions on CP 219 were due on 3 February 2014. A report on our response to submissions has not been released at the date of this report.

Reports

REP 372 *Insolvency statistics: External administrators' reports (July 2012 to June 2013)*

139 REP 372 provides an overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2012–13 financial year. The report includes information about the profile of companies placed into external administration including:

- industry types;
- employee numbers;
- causes of company failure;
- estimated number and value of a company's unsecured creditor debts; and
- estimated dividends to unsecured creditors.

140 The report shows small- to medium-size corporate insolvencies dominated external administrators' reports. Of note, 85% had assets of \$100,000 or less, 81% had less than 20 employees, and 43% had liabilities of \$250,000 or less.

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’. A register of waivers, including class rule waivers, granted under ASIC market integrity rules is available via www.asic.gov.au/markets under ‘Market integrity rules’.

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
10–13	Health Super Financial Services Pty Ltd ACN 096 452 318 and FSS Trustee Corporation ACN 118 202 672	13-1646 (in A01/14)	23/12/2013	Relief under s926A(2)(c) of the Corporations Act to provide that s48 is to be disregarded for the purposes of determining whether the entities are related under s911B(1)(a)(ii).	N/A
14–16	Australian Postal Corporation ACN 089 538 929	13-0798 (in A59/13)	04/12/2013	Relief under s926A(2)(c) of the Corporations Act to deem certain persons to be representatives of an AFS licensee.	04/12/2015
21–23	Recall Holdings Limited ACN 116 537 832	13-1297 (in A48/13)	16/10/2013	Relief under s741(1)(a), 741(1)(b), 911A(2)(l), 992B(1)(a), 1020F(1)(a) and 1020F(1)(b) of the Corporations Act to facilitate an offer of performance rights under an employee incentive scheme.	N/A
60–62	Saputo Dairy Australia Pty Ltd ACN 166 135 486	13-1603 (in A60/13)	16/12/2013	Relief under s655A of the Corporations Act to facilitate a bidder offering an undertaking to the Takeovers Panel which incorporates an offer of withdrawal and affirmation rights.	N/A
68–72	Credit Suisse (Singapore) Limited ACN 166 847 445	13-1576 (in A59/13)	11/12/2013	Relief under s655A of the Corporations Act to modify s609.	N/A

Report para no.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
76–78	KalNorth Gold Mines Limited ACN 100 405 954	13-1541 (in A58/13)	03/12/2013	Relief under s655A of the Corporations Act to modify item 10(b) of s611.	N/A
114–115	Rismark International Funds Management Pty Ltd ACN 114 530 139, Permanent Custodians Limited ACN 001 426 384 and Perpetual Corporate Trust Limited ACN 000 341 533	13-1392*	20/12/2013	Relief under s163(1)(a) of the National Credit Act and s203A(1) of the National Credit Code to exempt persons from obligations relating to reverse mortgages.	01/12/2015