



ASIC

Australian Securities & Investments Commission

REPORT 423

ASIC regulation of corporate finance: July to December 2014

February 2015

About this report

This report is for companies, lawyers, corporate advisers and compliance professionals working in corporate finance.

It highlights and discusses key statistical information, observations and our work in the regulation and oversight of fundraising, mergers and acquisitions transactions, corporate governance, and other general corporate finance areas for the period 1 July to 31 December 2014.

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 advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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Overview

Regulation of corporate finance activity

- 1 ASIC is responsible for the regulation and oversight of corporate finance activity in Australia, with a particular focus on corporate transactions such as fundraising, takeovers, schemes of arrangement, share buy-backs, compulsory acquisitions, employee incentive schemes and financial reporting.
- 2 Within ASIC, the Corporations and Emerging Mining and Resources (EMR) teams are responsible for regulating disclosure and conduct by corporations in Australia in these areas. As part of this work, we:
 - (a) assess applications to ASIC for relief from certain parts of the *Corporations Act 2001* (Corporations Act), including Chs 2M, 6 and 6D; and
 - (b) review certain documents lodged with ASIC relating to various corporate transactions.
- 3 We also engage with stakeholders, conduct targeted surveillances of identified risk areas, publish regulatory guides, and conduct enforcement activities in relation to corporate finance.
- 4 The EMR team is located in Perth and has a particular focus on small capital and mining exploration companies. The Corporations team is based in Sydney, Melbourne and Brisbane.

Corporate Finance Liaison meeting

- 5 We hold a twice-yearly Corporate Finance Liaison meeting to engage with stakeholders and provide insight into our current policy and regulatory approaches regarding corporate fundraising, mergers and acquisition activity, and other corporate transactions. At these meetings, Corporations and EMR staff present on current topics in the marketplace and answer questions from the audience.
- 6 Corporate Finance Liaison meetings are held in Sydney, Melbourne, Brisbane, Perth and Adelaide. Lawyers, corporate advisers and compliance professionals working in corporate finance and mergers and acquisitions are welcome to attend these meetings.
- 7 This report covers issues to be discussed at our February and March 2015 Corporate Finance Liaison meetings.

The purpose of this report

- 8 The purpose of this report is to provide greater transparency about the role that ASIC plays in the regulation of corporations in Australia.
- 9 The report highlights and discusses key statistical information, observations and our work in the regulation of fundraising, mergers and acquisitions, corporate governance, and other general corporate finance areas for the period of 1 July to 31 December 2014 (this period).
- 10 The report provides limited commentary on applications for relief from certain parts of the Corporations Act. Please see our regular reports on our relief decisions for more detailed information on novel relief applications. We have published two recent reports on relief decisions:
- (a) Report 411 *Overview of decisions on relief applications (February to May 2014)* (REP 411), which was published in September 2014; and
 - (b) Report 420 *Overview of decisions on relief applications (June to September 2014)* (REP 420), published in January 2015.

A Fundraising

Key points

This section sets out statistics and observations from our work in relation to fundraising. We review prospectuses and process applications for relief from Ch 6D of the Corporations Act.

More disclosure documents have been lodged with ASIC than in the previous period, and in a significant number of cases we have had to intervene to improve the disclosure provided to help investors make an informed investment decision.

In this period we undertook a number of policy initiatives in relation to CHES Depository Interests (CDIs) and the sunseting of class orders.

Statistics and observations

- 11 In this period there was a 39% increase in the number of disclosure documents¹ lodged with ASIC (compared to the period 1 January to 30 June 2014 (previous period)), and a slight increase in applications for relief from Ch 6D: see Figure 2. For details of historical lodgements, see Figure 9 in the appendix.
- 12 Table 1 depicts the top 10 public fundraising transactions by value of the offer based on disclosure documents lodged with ASIC in this period. Hybrid securities make up a notable portion of these fundraisings. This type of securities remain an area of focus for ASIC. As indicated in Report 365 *Hybrid securities* (REP 365), the complexity of these products pose particular challenges in achieving clear, concise and effective disclosure.

Table 1: Top 10 primary fundraising transactions by value (1 July to 31 December 2014)

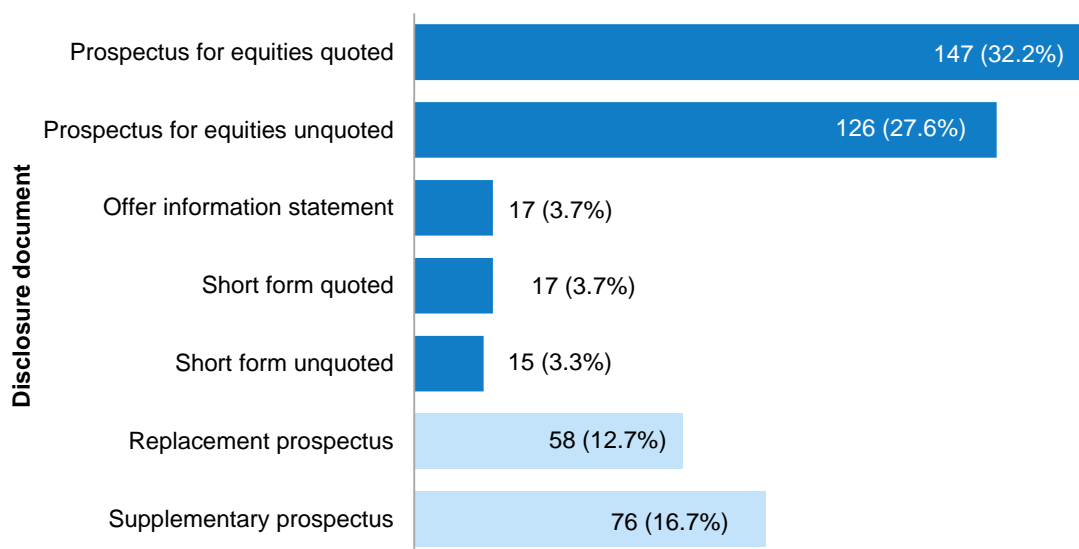
Issuer	Date of lodgement	State	Value	Industry	Security type
Medibank Private Limited	20/10/2014	Vic.	\$5673m	Private health insurance	Shares
Commonwealth Bank of Australia	18/08/2014	Vic.	\$3000m	Banks	Hybrid securities
Yancoal SCN Limited	24/11/2014	NSW	\$1801m	Energy	Hybrid securities

¹ This excludes replacement and supplementary disclosure documents.

Issuer	Date of lodgement	State	Value	Industry	Security type
Estia Health Limited	17/11/2014	Vic.	\$725m	Health care equipment and services	Shares
Regis Healthcare Limited, Regis Saleco Limited	18/09/2014	Vic.	\$485m	Health care equipment and Services	Shares
Macquarie Bank Limited	15/09/2014	NSW	\$429m	Banks	Convertible notes
Challenger Limited	27/08/2014	NSW	\$345m	Diversified financials	Hybrid securities
APN Outdoor Group Limited	20/10/2014	NSW	\$329m	Media	Shares
Global Wealth Partners Fund Limited ²	11/08/2014	NSW	\$300m	Listed investment company	Shares
Perpetual Equity Investment Company Limited	07/10/2014	Qld	\$250m	Investment company	Shares

13 Figure 1 illustrates the number of disclosure documents (by type) lodged with ASIC in this period. Initial public offering prospectuses for equities to be listed were the most common disclosure documents lodged with ASIC.

Figure 1: Number of disclosure documents by type (1 July to 31 December 2014)



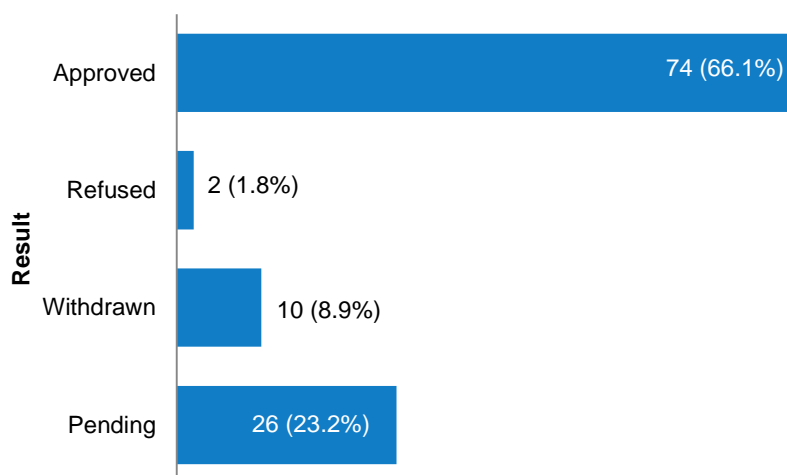
Note: Original lodgements are shown in dark blue, with documents supplementing the original lodgements shown in light blue. This graph has also been adjusted to exclude 127 supplementary prospectuses lodged by one entity due to changes to the structure of the product offered.

² The initial public offering by Global Wealth Partners Fund Limited was unsuccessful.

Applications for relief

- 14 During this period, we received 112 applications for relief under s741. The most common types of relief sought were to:
- (a) extend the offer period of a prospectus as quotation of securities would not be achieved within three months;
 - (b) facilitate the escrow of shares voluntarily for initial public offerings; or
 - (c) facilitate offers of shares to employees without lodging a disclosure document with ASIC.
- 15 Of the 112 applications we granted relief for 74 applications (66.1%): see Figure 2.

Figure 2: Results of applications under s741 (1 July to 31 December 2014)



- 16 We publish a regular report that provides an overview of decisions made on novel relief applications, including those made in relation to fundraising transactions. Our most recent report is REP 420.

ASIC's review of prospectuses

- 17 The Corporations and EMR teams review prospectuses and other disclosure documents for offers of securities, which are required to be lodged with ASIC under Ch 6D.

Intervention by obtaining amendment, extension of exposure period and stop orders

- 18 As a result of our review of prospectuses and offer documents lodged with ASIC under s718, in this period we:

- (a) raised disclosure concerns with over 33% of the documents lodged—subsequently, changes were made to over 75% of the documents where concerns were raised (or 20% of all documents lodged);
 - (b) extended the exposure period 35 times—up from 21 times in the previous period, but roughly equivalent to the 31 times in the last six months of 2013;
 - (c) issued 27 interim stop orders in relation to 18 offers³ (5.6% of all offers) and seven final stop orders⁴ (2.2% of all offers)—we issued eight interim stop orders and two final stop orders in the previous period; and
 - (d) revoked seven interim stop orders⁵—we revoked five interim stop orders in the previous period.
- 19 Overall, we extended more exposure periods and issued more interim and final stop orders in this period than the previous period. This is partly due to a general increase in fundraising activity, including backdoor listings: see paragraph 32. Some of the prospectuses appeared to be prepared in haste, perhaps seeking to take advantage of favourable market conditions for initial public offerings.
- 20 In Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) we stress that in order to produce effective disclosure for retail investors, it is important that the prospectus is carefully tailored to the particular business. Our recent experience has suggested that prospectuses are in some instances being produced in a formulaic way. We are also concerned that due diligence practices can vary widely, with the result that in some instances we have questioned the reliability of the information provided in a prospectus.
- 21 Some of the types of disclosure concerns raised in our review of prospectuses in this period are discussed below.

Intervention using ASIC's power to make determinations

- 22 On 15 August 2014, we made a s713(6) determination that Padbury Mining Limited may not use a short-form prospectus until 1 May 2015. The determination was made on the basis that the company breached its continuous disclosure obligations by failing to disclose key terms associated

³ The interim stop orders were issued to ODFL1 Limited (in relation to two separate offerings), Migme Limited, Tinhon Union Group (Australia Limited), Red Fox Capital Limited, Green Invest Ltd, US Residential Ltd (and USA Residential Funds Management Ltd), Viculus Limited, Alt Resources Limited, Ki Plantations Ltd, Xiaoxiao Education Limited, XTV Networks Ltd, Cell Aquaculture Ltd, Quintessential Resources Limited, Bridge Global Capital Management Limited, Martin Aircraft Company Limited, Australia Santia Jinnai Culture Development Limited and Dalmatia Avenue Syndicate Limited.

⁴ The final stop orders were issued to Victory Mines Limited, ODFL1 Limited (in relation to two separate offerings), Sapphire Care Pty Ltd, Ki Plantations Ltd, Xiaoxiao Education Limited and Alt Resources Limited.

⁵ We revoked the interim stop orders on Migme Limited, Tinhon Union Group (Australia Limited), Green Invest Ltd, US Residential Ltd (and USA Residential Funds Management Ltd), XTV Networks Ltd and Cell Aquaculture Ltd.

with a secured funding facility announced on 11 April 2014. Those terms required certain conditions be met prior to Padbury Mining accessing the funding facility.

23 For more information, see Media Release (14-203MR) *ASIC update on ongoing investigation into Padbury Mining* (15 August 2014).

24 We continue to use s713(6) determinations, requiring the lodgement of s710 prospectuses—for example, where we hold concerns about a company’s continuous disclosure, or where they have failed to lodge financial reports.

Disclosure concerns

25 When reviewing prospectuses in this period, among other things, we responded to the following trends:

- (a) financial information (including pro-forma financial information) that is not sufficiently complete or adequately reviewed by a third party such as an auditor;
- (b) an increase in backdoor listing prospectuses;
- (c) poor quality information about companies operating in an emerging market; and
- (d) an increase in the number of listed investment companies seeking quotation.

Financial disclosures

26 Financial disclosures are of significant concern to ASIC, as they paint a picture of the history of the performance of the company and effectiveness of management. Financial information, both statutory and pro forma, is essential to informing investors about the past performance and future prospects of the company.

27 Some of the concerns with the disclosure of financial information we identified include:

- (a) pro-forma adjustments described as one-off events;
- (b) a lack of prominent disclosure of material differences between statutory and pro-forma financial results; and
- (c) multiples not being included for all forecast periods.

28 We recognise that pro-forma financial information may be of benefit to investors. Regulatory Guide 230 *Disclosing non-IFRS financial information* (RG 230) provides guidance in relation to disclosing this information. It is important that pro-forma financial information is prepared with the aim of providing an accurate view of the financial position and performance of the

company, rather than in a way that maximises the attractiveness of the offer to investors.

29 See Table 2 for a description of some of the issues we have observed with pro-forma financial information.

Table 2: Issues observed with pro-forma financial information

One-off adjustments	When reviewing prospectuses, we often carefully consider one-off adjustments that may appear in the pro-forma accounts. We consider the materiality of these adjustments and may discuss these with a company where we have concerns. For example, where a company has lost a material contract it may be more appropriate to discuss and disclose this loss rather than make a pro-forma adjustment to eliminate it (which can have a misleading effect on year-on-year comparisons).
Adjustments to audited results	<p>In this period we have observed some substantial pro-forma adjustments to the statutory audited accounts. We consider that where statutory historical results vary substantially from the pro-forma results, this should generally be highlighted in the investment overview.</p> <p>This disclosure may be made by:</p> <ul style="list-style-type: none"> • a cautionary statement regarding the pro-forma financial information and cross-referencing the statutory results elsewhere in the prospectus; or • including a summary of the pro-forma results in the investment overview, highlighting any differences from the statutory results, and again cross-reference the results.
Multiples	<p>We have also observed that where a prospectus contains forecast financial information, the investment overview will generally contain multiples such as 'earnings before interest and taxes' or 'earnings before interest, taxes, depreciation and amortisation'. Often the prospectus will only publish these multiples for full forecast periods.</p> <p>We consider that where a company elects to disclose these multiples, all forecast periods should generally appear in the investment overview. This includes years where a mix of actual and forecast results have contributed to the calculation of the multiples.</p>
Ratios	<p>While not a concern, we consider it important to clarify that where pro-forma financial information has been included in a prospectus, we acknowledge it is generally appropriate for issuers to use ratios based on those pro-forma figures. It will not generally be necessary to also include ratios based on statutory financial accounts, either in the investment overview or in the detailed financial information.</p> <p>Of course, ratios must only be disclosed if they have a reasonable basis and provide meaningful information, consistent with our policy in RG 228. We do note that cross-referencing the pro-forma results or including disclosure regarding the basis of the ratios may help avoid confusion.</p>

Backdoor listings

30 In this period we reviewed disclosure by 30 companies seeking admission to ASX by way of a backdoor listing—that is, a company seeking to access

capital by selling their business into a company that is already listed on an Australian exchange.

- 31 Businesses offering web-based products and services or start-up technologies are the most common type of business currently seeking admission by way of backdoor listing. These often have unique businesses requiring technical explanation of a high proportion of intangible assets in their financial statements. With these characteristics it is difficult for investors to make an informed decision unless:
- (a) considerable care is taken in explaining the business without the use of jargon; and
 - (b) a justification for the valuation of intangible assets is provided.
- 32 We raised concerns with 22 (73%) of these offer documents, with our concerns being addressed by way of supplementary disclosure. In six instances we made interim stop orders in relation to backdoor listing prospectuses;⁶ two stop orders were revoked, one had a final stop order made and three prospectuses are still subject to those interim stop orders.
- 33 Other concerns identified in a number of backdoor listing prospectuses include:
- (a) insufficient financial disclosure, including a lack of operating history, lack of audited financial information, and disclosure of information presented other than in accordance with accounting standards (non-IFRS financial information);
 - (b) insufficient disclosure of a company's business model and use of proceeds;
 - (c) disclosure of directors' history not consistent with our policy in RG 228; and
 - (d) risk disclosure not adequate or appropriately tailored to a company's circumstances.
- 34 Half of the businesses seeking a backdoor listing come from a foreign jurisdiction, with the majority of these from an emerging market. We continue to consider the challenges facing these entities—as set out in Report 368 *Emerging market issuers* (REP 368)—when reviewing a prospectus, and will raise concerns where we consider disclosure is inadequate or misleading.
- 35 With the slowdown in the mining sector we expect backdoor listing activity to remain strong. Accordingly, this will continue to be an area of focus in the coming months.

⁶ Interim stop orders made in relation to backdoor listings include Viculus Limited, Xiaoxiao Education Limited, Cell Aquaculture Ltd, XTV Networks Ltd, Bridge Global Capital Management Limited and Quintessential Resources Limited.

Reliability of financial information of companies with significant foreign exposure

- 36 In August 2013, we published REP 368, which outlined key observations from our review of publicly available information on entities listed on Australian markets with a substantial connection to emerging markets.
- 37 We have continued to see a significant number of companies with connections to emerging markets seek quotation on ASX, either by a traditional initial public offering or by way of a backdoor listing (as described at paragraph 34). As discussed in Report 406 *ASIC regulation of corporation finance: January to June 2014* (REP 406), we have made inquiries into the due diligence practices of foreign companies through the use of ASIC's notice powers where appropriate.
- 38 We have reviewed the performance of auditors and found, consistent with REP 368 that in some instances:
- (a) auditors did not adequately review the work of overseas auditors before relying on their findings; and
 - (b) there is little evaluation of the competence and independence of experts or component auditors.
- 39 In relation to the audit of mining and energy companies, we found instances where the auditor did not:
- (a) confirm the existence and value of significant and material assets;
 - (b) corroborate the existence of tenement rights; or
 - (c) engage their own expert in circumstances when it would have been appropriate to do so.
- 40 We caution auditors to closely review the work of foreign auditors to discharge their obligations. This may include obtaining direct audit evidence attesting the existence and value of underlying assets and operations. Auditors have a key role to play in minimising the risk of Australian investors losing money through fraudulent capital raisings.

Listed investment company disclosure

- 41 In the last year we have seen an increase in the number of initial public offerings of listed investment companies. These are entities that seek to make a return for investors through their investment activities rather than through operating a business. This raises a few disclosure concerns unique to listed investment company prospectuses.
- 42 Firstly, listed investment companies often have similar characteristics to a hedge fund, and may use complex strategies like leverage, short selling and derivatives. These can be quite challenging to explain, and we are concerned

that retail investors may struggle to understand how a company intends to make money—particularly when jargon is used excessively. If a listed investment company has similarities to a hedge fund, then it should make disclosure that is similar to that provided by a hedge fund. In addition to RG 228, we use Regulatory Guide 240 *Hedge funds: Improving disclosure* (RG 240) to assess the prospectus disclosure of these types of listed investment companies.

- 43 Another feature of listed investment companies is that they can have an external manager that may be a related party. The fees charged by the external manager can have a material impact on investors' returns and, where this is the case, the prospectus should give meaningful disclosure. For example, in some circumstances it may be more appropriate to include a worked example or explain the practical effect of a fee, rather than just cite a complex formula. Where a performance fee formula means that investors' returns are capped at 10%, it is not sufficient to disclose the formula. The prospectus must clearly and prominently disclose that investors' returns will not exceed 10%.
- 44 Finally, listed investment company prospectuses often seek to include disclosure setting out the past performance of other entities managed by their manager. Concerns about these disclosures are commonly raised by ASIC. Regulatory Guide 53 *The use of past performance in promotional material* (RG 53) sets out what information can be disclosed. Companies must also bear in mind the general principles of RG 228 and ensure the disclosure is presented in a balanced way.

Other disclosure concerns

- 45 In our review of prospectuses lodged with ASIC during this period, we noted concerns, requested amended disclosure, or intervened in offers of securities where there was:
- (a) inappropriate disclosure of financial accounts and company solvency (almost 15% of all prospectuses lodged, which is consistent with the previous period); and
 - (b) improper disclosure of forecast financial information (in 11.8% of prospectuses lodged, up from 10.8% in the previous period).
- 46 We also noted concerns, requested amended disclosure, or intervened in a number of offers due to insufficient disclosure about the structure of the offer; for example, in all prospectuses lodged during this period:
- (a) control issues were identified in about 4% of prospectuses (down from 8% in the previous period). While the number of prospectuses in which control concerns have arisen has decreased, the potential effect and value of these has been significant; and

- (b) related party issues were evident in 7.5% of prospectuses (down from 9.5% in the previous period).
- 47 We also raised a number disclosure concerns in this period in relation to:
- (a) funding or financing (in 9.5% of prospectuses lodged, up from 5% in the previous period);
- (b) compliance with industry reporting codes, such as the Australasian Code for Reporting of Explorations Results, Minerals Resources and Ore Reserves (JORC Code) in mining prospectuses (approximately 2% of prospectuses lodged).
- 48 In most instances, changes were made to the disclosure in response to our concerns.

Structural concerns

Initial public offerings with conditional and deferred settlement

- 49 Some large initial public offerings contain a conditional and deferred trading window, which operates prior to the commencement of regular trading of the initial public offering securities. We consider that where a shareholder seeks to sell shares in this window, it is arguable that they do not yet have the exercisable and unconditional right to trade those securities.
- 50 This may technically breach the short-selling provisions of the Corporations Act.
- 51 We recently granted individual relief to an issuer in these circumstances. While we may consider class order relief in the future, issuers presently considering conditional and deferred settlement terms in their offers should approach ASIC for relief.

Enforcement action

Sino Australia Oil and Gas Ltd

- 52 In November 2014, we filed civil proceedings in the Federal Court of Australia against Sino Australia Oil and Gas Ltd and its former chairman, seeking financial penalties and disqualification orders.⁷
- 53 We are seeking declarations the company breached its continuous disclosure obligations and made misleading and deceptive statements in its prospectus

⁷ Media Release (14-321MR) *ASIC takes legal action against Sino Australia Oil and Gas and its former chairman* (28 November 2014).

during 2013. We are also seeking an order imposing a pecuniary penalty on the company.

- 54 In civil action against Tianpeng Shao, Sino's former chairman and executive director, we are seeking declarations that Mr Shao failed to act with the proper degree of care and diligence as a director and breached continuous disclosure laws, and that he be disqualified from managing companies.
- 55 Sino listed on ASX in December 2013 after raising nearly \$13 million from investors.
- 56 In March 2014, we obtained an injunction on an urgent basis following concerns that Sino was about to transfer \$7.5 million—representing almost all of the cash held by the company in Australia—to bank accounts in China for purposes that were not disclosed, or not properly disclosed, in the 2013 prospectus. The injunction, which has been extended on a number of occasions, is in place until 6 March 2015.
- 57 The proceedings are listed for a directions hearing in the Federal Court in Melbourne on 6 March 2015.
- 58 Other enforcement outcomes in this period are discussed in Report 421 *ASIC enforcement outcomes: July to December 2014* (REP 421).

ASIC policy initiatives

CHESSE Depository Interests

- 59 In October 2014 we released Regulatory Guide 253 *Fundraising: Facilitating offers of CHESSE Depository Interests* (RG 253), which provides guidance to help foreign companies make offers of CDIs over their shares to investors in Australia. RG 253 clarifies how CDIs are characterised, which disclosure regime applies to offers of CDIs, and who offers and issues CDIs.
- 60 To address uncertainty in the market about how offers of CDIs over foreign shares are regulated under the Corporations Act we issued Class Order [CO 14/827] *Offers of CHESSE Depository Interests* which modifies the disclosure provisions in Ch 6D and gives relief from the licensing provisions in Pt 7.6.
- 61 In particular, [CO 14/827]:
- (a) clarifies that foreign companies, and not the depository nominee, are responsible for providing disclosure to retail investors for offers of CDIs under Ch 6D;
 - (b) ensures that the disclosure provisions in Ch 6D operate effectively for offers of CDIs over shares in a foreign company; and

- (c) provides relief so that the foreign company issuing the underlying foreign shares is not required to hold an Australian financial services (AFS) licence for arranging for others to deal in CDIs over its shares.

62 Report 414 *Response to submissions on CP 220 Fundraising: Facilitating offers of CHESSE Depositary Interests* (REP 414) summarises the seven submissions we received during the consultation period and our response to the matters raised.

Sunsetting of class orders

63 As noted in REP 406, under the *Legislative Instruments Act 2003*, legislative instruments cease automatically after 10 years, unless action is taken to exempt or preserve them. This process is known as ‘sunsetting’. ASIC is one of a number of government agencies affected by this legislation.

64 The purpose of sunsetting is to ensure that instruments (including ASIC class orders) are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

65 As part of the sunsetting project we published Consultation Paper 225 *Remaking ASIC class orders on offers of foreign securities* (CP 225) in December 2014. CP 225 proposed to remake the class orders with minor revisions, to better reflect the current law, and also to reduce some regulatory requirements, including:

- (a) removing requirements to lodge offer documents with ASIC for foreign rights issues;
- (b) reducing the quotation requirement for foreign rights issues from 36 months to three months; and
- (c) allowing offer documents to be in a foreign language (where no English version is available).

66 Our policy on offers of foreign securities is set out in Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72). While there are no proposed substantive changes to this policy, RG 72 has been revised to reflect the proposed changes to the class orders.

67 The consultation period closed on 9 February and we received no submissions. We expect to release the instruments and updated RG 72 in the first half of 2015.

68 Another project we are undertaking involves reviewing the class orders on other prospectus disclosure relief, including the class orders covered by:

- (a) Regulatory Guide 55 *Statements in disclosure documents and PDSs: Consent to quote* (RG 55);
- (b) Regulatory Guide 66 *Transaction-specific disclosure* (RG 66); and

(c) Regulatory Guide 152 *Lodgement of disclosure documents* (RG 152).

69 The project considering these 26 class orders is ongoing and will be discussed further in the next report, with public consultation expected in the second half of 2015.

70 We appreciate responses from stakeholders and encourage your participation in the consultation process.

Stamping and brokerage fees

71 In November 2014 the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 was disallowed. The legal position reverted back to the position that existed prior to the introduction of the regulation on 1 July 2014. ASIC's no action position in relation to stamping fees that had applied prior to the introduction of the regulation was then re-enlivened, consistent with the approach outlined in Media Release (14-307MR) *Disallowance of FOFA regulations* (19 November 2014).

72 The no-action position in relation to stamping fees is no longer necessary, due to changes to reg 7.7A.12B implemented by the Corporations Amendment (Revising Future of Financial Advice) Regulation 2014. These changes took effect on 16 December 2014.

B Mergers and acquisitions

Key points

This section sets out statistics and observations from our work in relation to mergers and acquisitions. As part of ASIC's regulatory function, we review disclosure and monitor conduct in takeover transactions. In addition, we appeared in court in relation to two control transactions during this period.

In addition to reviewing bid and scheme transactions during this period, much of our regulatory work focused on the control issues concerning entities needing to raise capital as a result of experiencing financial distress.

We continue to identify matters that may warrant enforcement action arising from our day-to-day surveillance and monitoring of control transactions.

Statistics and observations

- 73 The number of public merger and acquisition transactions in this period has been relatively stable compared to the previous period.⁸ Compared to the previous period, there has been:
- (a) little change in the number of bidder's statements lodged;
 - (b) an increase in the number of scheme explanatory statements lodged;
 - (c) an increase in use of schemes of arrangement for corporate restructures;
 - (d) an increase in merger and acquisition applications; and
 - (e) a decline in transaction size.
- 74 Table 3 sets out the top 10 control transactions by value, where disclosure documents were formally lodged with ASIC in this period.

Table 3: Top 10 control transactions by value where documents lodged with ASIC (1 July to 31 December 2014)

Target	Bidder	Type	Industry	Value
Australand Property Group	Frasers Amethyst Pte Ltd	Bid	Real estate	\$2594m
Goodman Fielder Ltd	First Pacific Company Ltd	Scheme	Food, beverage and tobacco	\$1320m
Wotif.com Holdings Ltd	Expedia Australia Investments Pty Ltd	Scheme	Retailing	\$648m

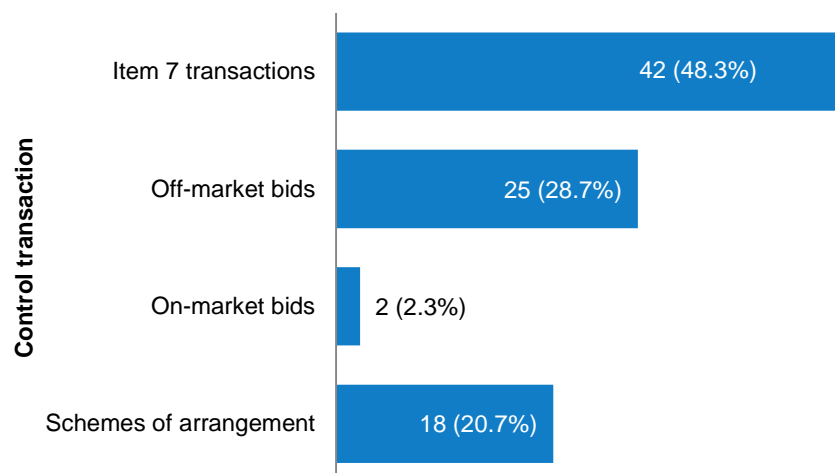
⁸ For details of historical bidders' statement and scheme booklet lodgements, see Figure 10–Figure 11 in the appendix.

Target	Bidder	Type	Industry	Value
Roc Oil Company Ltd	Transcendent Resources Ltd	Bid	Energy	\$474m
Indophil Resources NL	Alsons Prime Investments Corporation	Scheme	Metals and mining	\$361m
Iron Ore Holdings Ltd	BC Iron Ltd	Bid	Metals and mining	\$228m
Country Road Limited	Woolworths International (Australia) Pty Ltd	Bid	Retailing	\$213m
Dart Energy Ltd	iGas Energy PLC	Scheme	Energy	\$210m
Oakton Ltd	Dimension Data Australia Pty Ltd	Scheme	Software and services	\$171m
Orbis Gold Ltd	SEMAFO Inc	Bid	Metals and mining	\$162m

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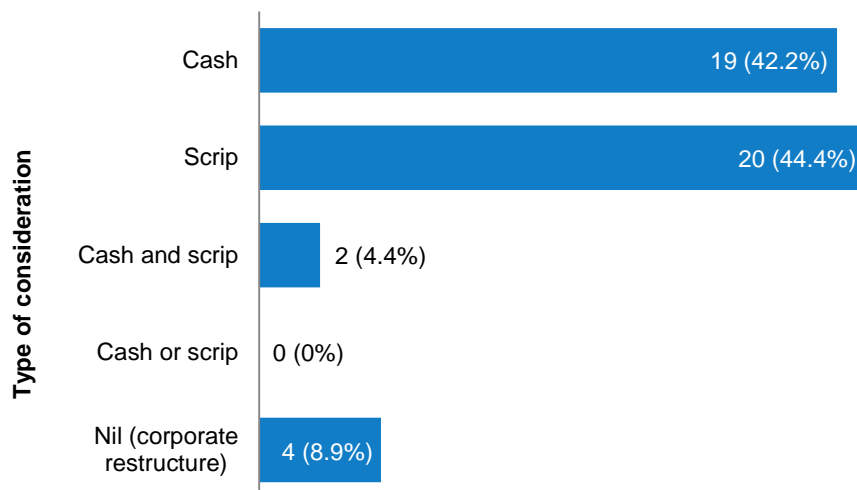
Figure 3 illustrates that transactions approved under item 7 of s611 (item 7 transactions) were the most common (48.3%) type of control transaction notified to ASIC in this period. While Regulatory Guide 74 *Acquisitions approved by members* (RG 74) encourages entities to provide ASIC with draft item 7 transaction documents for review, not all of these are given to ASIC prior to dispatch to members. Regardless, the number of item 7 transaction documents provided to ASIC for review in this period substantially increased. Many of these concerned placements. Off-market bids remained popular, but more schemes of arrangement were lodged than the previous period (18, up from 11). Only one proportional off-market bid was made during this period.

Figure 3: Control transactions lodged with ASIC by type (1 July to 31 December 2014)



76 Figure 4 illustrates a breakdown of the types of consideration offered in control transactions (excluding item 7 transactions) that commenced in this period. There was an almost equivalent number of cash and scrip acquisitions proposed.

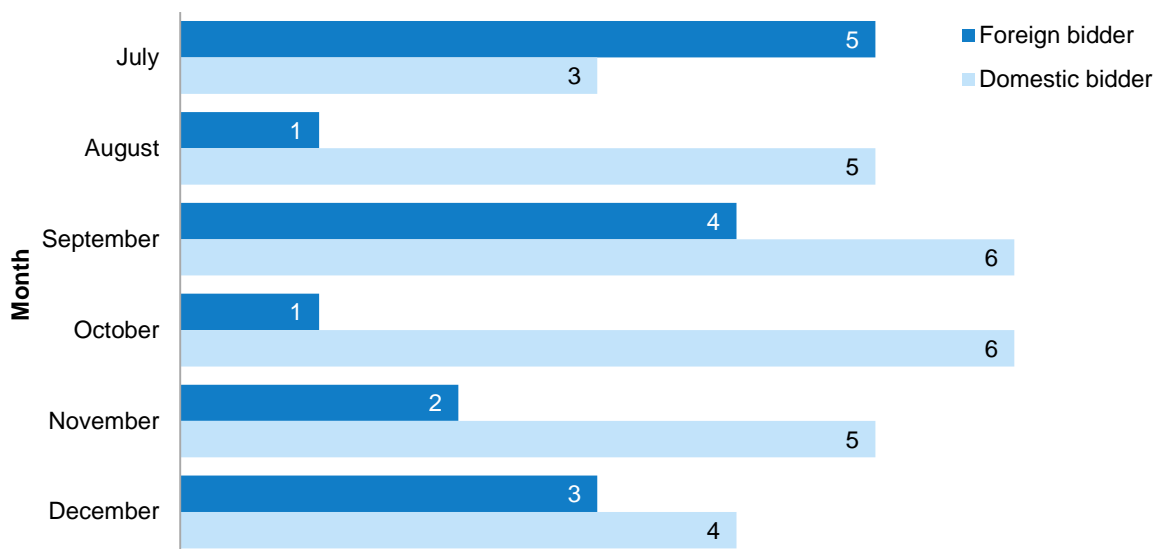
Figure 4: Type of consideration offered in bids and schemes (1 July to 31 December 2014)



Note: Graph excludes item 7 transactions.

77 Figure 5 illustrates the continued takeover activity undertaken by foreign bidders. During this period, 16 out of 45 (35.6%) schemes of arrangement and takeover bids involved foreign acquisition of ASX-listed entities. In the last three years, foreign acquisitions as a proportion of all acquisitions have consistently been around 35%–40%.

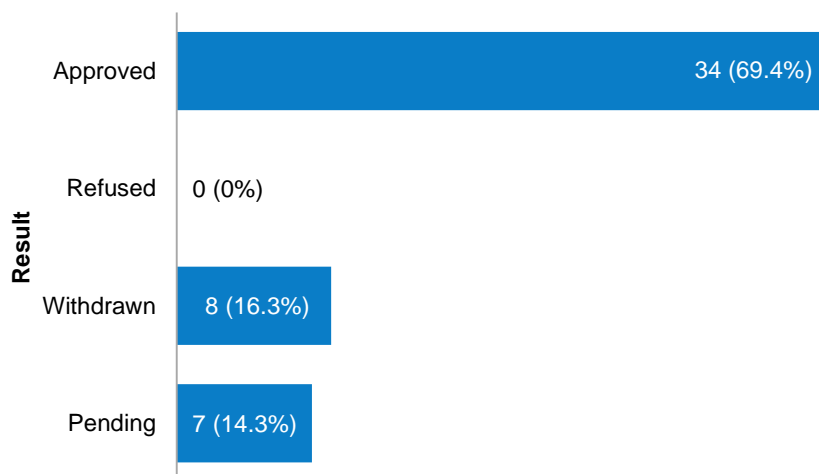
Figure 5: Number of foreign and domestic bidders (in schemes and bids) by month (1 July to 31 December 2014)



Applications for relief

78 We received 48 applications for relief under s655A, and one under s669 during this period: see Figure 6. This is up from 40 applications received in the previous period. There was again an increase in the volume of voluntary escrow applications associated with initial public offerings in this period.

Figure 6: Results of applications under s655A and s669 (1 July to 31 December 2014)



79 We publish a regular report that provides an overview of decisions made on novel relief applications, including those made in relation to mergers and acquisitions transactions. Our most recent report is REP 420.

Takeovers Panel

80 We made submissions on four of the 12 applications to the Takeovers Panel lodged in this period. In the other eight matters the Takeovers Panel declined to conduct proceedings. The matters we made submissions on were:

- (a) Gondwana Resources Ltd 02;
- (b) Blackham Resources Ltd;
- (c) Celamin Holdings NL; and
- (d) Yancoal Australia Ltd.

81 We did not initiate any Takeovers Panel applications during this period.⁹

⁹ We did make application to the Takeovers Panel on 12 January 2015 on an equal access buy-back proposed by PAYCE Consolidated Limited: see Takeovers Panel Media Release (TP15/007) *PAYCE Consolidated Limited—Application received and withdrawn* (13 January 2015). As this ASIC action was taken outside the period of this report, we will comment further on this matter in our next report.

ASIC's review of takeover documents

82 We review disclosure and monitor conduct in takeover transactions to ensure that adequate information is being provided and all relevant parties act in a way that promotes a fair and efficient market.

83 Where concerns are raised by us, they are often addressed with amendments to the offer structure or other action taken by the issuer. Some of the issues we have seen in this period are discussed in paragraphs 84–91.

Misuse of takeover exceptions

84 In this period we again encountered a number of novel transaction structures that sought to rely on an exception in s611 in a way that is technically possible, but gives rise to concerns regarding whether it meets the underlying purposes of the exception or Ch 6 generally.

85 We also identified a significant number of control concerns in s713 prospectuses, particularly when entities rely on the rights issue exception in item 10 of s611 and/or the underwriting exception in item 13 of s611.

86 As in the previous period, we continue to monitor disclosure documents with both control and fundraising purposes where there is technical reliance on the following exceptions in s611:

- (a) item 4—we had concerns that some scrip takeovers resulted in a reverse takeover by a person;
- (b) item 10—we had concerns that some participants in rights offers had control intentions and an abuse of the exception might be occurring;
- (c) item 13—we had concerns that some underwriting arrangements involved little assumption of risk by the underwriter or the underwriter or sub-underwriter had control intentions; and
- (d) item 14—we had concerns that some downstream acquisitions may have resulted in an inappropriate change of control.

Engagement of experienced independent experts

87 We have raised concerns with a number of independent expert reports regarding the quality of the report and the experience of the engaged expert. These concerns are arising most commonly in reports produced at considerably lower pricepoints than those by other independent experts.

88 In these cases, concerns regarding the quality of the expert report have resulted in transaction delays and additional costs associated with engaging a new expert.

89 We note that it is incumbent on the commissioning party to ensure that the engaged expert is suitably experienced, licensed and qualified to provide an independent expert report for the relevant transaction.

90 We continue to monitor expert reports to ensure appropriate providers are being engaged and reports are of a suitable standard.

Change of control of financially distressed entities

91 In the past six months we have observed an increase in the use of s611 exceptions to gain control of financially distressed entities. Particularly, we have seen highly dilutionary rights issues that result in a change of control and reduce the influence of minority shareholders. In some of these transactions, minority shareholders have made an application to the Takeovers Panel.

92 We consider the individual circumstances of each transaction with control implications. While we will take into account a company's need for funds, financial distress is not a safe harbour.¹⁰

93 Directors of a distressed company should genuinely consider the company's options, and seek an outcome that will comply with the provisions and spirit of Ch 6.

94 If directors decide a rights offer is the best alternative for the company, we consider that the offer must be genuinely accessible to all shareholders and that a company should seek to minimise potential control implications when designing a rights offer. The shareholder protections underpinning the takeovers provisions apply regardless of the company's financial position.

Shareholder rights in matters generally reserved for the board

95 In this period, we have noticed a new feature arising in some control transactions, giving certain substantial shareholders veto rights over matters normally the domain of the board (sometimes known as 'reserved matters'). These rights are more commonly found in other jurisdictions, and may:

- (a) inappropriately give effective control over these matters to one particular shareholder or a particular group of shareholders; or
- (b) serve as a device to deter or hinder potential bids or other control proposals in relation to the company.

¹⁰ In 2013 we made an application to the Takeovers Panel regarding a rights issues proposed by Laneway Resources Limited where the entity was distressed: see *Reasons for decision Laneway Resources Limited* [2013] ATP 7.

- 96 Both of these consequences may negatively affect other shareholders in the company and be inconsistent with the aims of the takeover provisions, as set out in s602.
- 97 In one transaction we reviewed, shareholders were asked to vote on a resolution that gave a substantial shareholder veto rights over significant strategic and operational decisions. This would give the shareholder a level of ongoing control that was disproportionate to its equity holding.
- 98 While reserved matters are common in debt arrangements, the veto rights would ordinarily be limited to circumstances regarding the ability for the borrower to repay debt, not to gain control over the company. Further, reserved rights in these circumstances are generally extinguished on the repayment or refinancing of the debt.
- 99 We will closely examine a transaction where it appears that reserved matters are included in an agreement between a company and a substantial shareholder in a way that is contrary to the underlying principles of Ch 6. Obtaining shareholder approval for the reserved matters may not necessarily allay our concerns, particularly where the approval of reserved matters are inter-conditional with numerous other steps in the transaction and the company is in financial distress.

ASIC intervention in control transactions

Court appearance in relation to share transfer under s444GA

- 100 In June 2014, Nexus Energy Ltd entered into voluntary administration following a general meeting at which shareholders rejected a proposed scheme of arrangement from the sole senior lender, Seven Group.
- 101 Following the appointment of administrators, a sale process of Nexus's assets was conducted, where a deed of company arrangement (DOCA) proposal from Seven was the only offer. Under the proposal Seven offered to acquire all the shares in Nexus. The DOCA was approved by creditors in August 2014, subject to two conditions:
- (a) the Federal Court making an offer under s444GA, granting leave to transfer all Nexus shares for nil consideration. The court can make this order where it is satisfied that this will not cause 'unfair prejudice' to shareholders; and
 - (b) ASIC granting relief from s606, given Seven was acquiring 100% of Nexus.
- 102 After assessing the relevant materials and policy underlying the law, we granted the relief from s606 conditional on the court approving the scheme. We carefully reviewed and placed reliance on the content of an independent

expert report prepared on the instruction of Nexus's administrator. The report set out the expert's opinion of the company's:

- (a) residual equity on a going concern basis; and
- (b) value on a non-going concern basis, which took into account the current facts and circumstances, such as the lack of offers from the sales process and significant funding constraints.

103 The independent expert found there was no value on a non-going concern basis, with a range between -15 to -10 cents per Nexus share.

104 The court subsequently approved the transfer of shares to Seven.

105 Throughout proceedings a significant group of minority shareholders in Nexus appeared to oppose the DOCA. These minority shareholders filed an appeal with the Full Court of the Federal Court of Australia in January 2015.

Court appearance in relation to The President's Club

106 In June 2012 The President's Club, a time-share scheme operating at the Palmer Coolum Resort, sought orders in the Takeovers Panel that Queensland North Australia Limited (QNA) had breached the takeovers provisions. QNA purchased the resort in the second half of 2011 and in doing so acquired an approximate 40% interest in The President's Club in contravention of s606. In March 2012, QNA made a takeover offer for the remaining interests in The President's Club. The Takeovers Panel considered that the bid offended the minimum bid price principle and that the acquisition of control by QNA was likely to inhibit an efficient, competitive and informed market in the shares of The President's Club.

107 In June 2012 the Takeovers Panel made a declaration that unacceptable circumstances existed and that QNA's interest in The President's Club was to be frozen, with no ability to vote or otherwise deal with the interests, until such time as a takeover offer satisfying a number of conditions was made.

108 QNA sought judicial review of this decision in the Federal Court, and a hearing was held in July 2013. The applicant alleged a denial of procedural fairness and natural justice during the Takeovers Panel proceedings, on a number of bases. We were a party to this proceeding where we acted as the contradictor to QNA, under the Hardiman principle. In June 2014 the Federal Court dismissed QNA's application with costs.

109 QNA appealed the decision of the Federal Court and the appeal was heard by the Full Court of the Federal Court of Australia in November 2014. We appeared as a party to the appeal on the basis that we were a party to the decision of the Federal Court in first instance. QNA appealed findings of fact made by the Federal Court involving the jurisdiction of the Takeovers Panel

and a denial of natural justice and procedural fairness in the original Takeovers Panel proceedings. Judgement in the appeal has been reserved.

Enforcement action

- 110 Following the release of our updated takeovers guidance in 2013,¹¹ we are continuing to focus on identifying takeovers matters that may warrant enforcement action during our day-to-day surveillance and monitoring of transactions.
- 111 We seek to address concerns identified in takeover documents in the most cooperative and least commercially disruptive manner that the circumstances, and our regulatory objectives, allow. However, our teams will refer matters to ASIC's Enforcement teams when we consider further action is necessary.
- 112 A number of significant enforcement matters from this period are set out in paragraphs 113–123.

Mariner Corporation Limited

- 113 In April 2014, we commenced civil penalty proceedings against Mariner Corporation Limited and its current and former directors, seeking financial penalties and disqualification orders in connection with Mariner's bid for Austock Group Limited. We allege that:
- (a) Mariner's bid was reckless because the company did not have the resources to meet its obligations under the bid;
 - (b) the bid announcement was misleading because the bid was at a price less than permitted by the minimum bid price rule; and
 - (c) the directors breached their duties by failing to give sufficient consideration to the steps that needed to be taken before making the announcement.
- 114 For more information, see Media Release (14-067MR) *ASIC takes civil action against Mariner and its directors* (3 April 2014). The matter was heard in the Federal Court in November 2014. Judgement has been reserved.

Aurora Funds Management Limited

- 115 We have accepted an enforceable undertaking from Aurora Funds Management Limited, the responsible entity of a number of ASX-listed managed investment schemes. This follows a surveillance that identified

¹¹ Media Release (13-148MR) *ASIC releases consolidated guidance on takeovers* (21 June 2013).

failings in Aurora's practice of on-market acquisitions and disposals of units in their schemes.

116 We found that Aurora acquired units on market in four of their schemes numerous times between 2007 and 2013. We were concerned that Aurora did not comply with the substantial holding disclosure obligations and that in one instance they contravened s606 by acquiring more than 20% of the voting power of a listed scheme.

117 In 2007, we issued Class Order [CO 07/422] *On-market buy-backs by ASX-listed schemes* to regulate on-market buy-backs by responsible entities of units in their schemes. Aurora has agreed to comply with [CO 07/422] under its enforceable undertaking.

118 For more information, see Media Release (14-300MR) *ASIC acts on trading in listed fund units* (13 November 2014).

Avestra Asset Management

119 In December 2014, Avestra Asset Management pled guilty in the Melbourne Magistrates Court to breaching the takeover prohibitions in s606 and failing to lodge substantial holding forms in contravention of s671B.

120 In March 2013 Avestra acquired an initial substantial interest (22.17%) in AG Financial Limited, in contravention of s606. Over the next five months, Avestra increased its holding further to 56.28%. It was not entitled to rely on any of the exceptions to the s606 prohibition and all of the acquisitions were unlawful.

121 In the period from March 2013 Avestra lodged some substantial holding notices. They were, however, lodged in the name of managed investment schemes, and not in Avestra's name as responsible entity for those schemes. These forms also contained other errors and were lodged late.

122 We brought proceedings in the Melbourne Magistrate's Court against Avestra, and they were fined a total of \$40,000 by the court. In addition, Avestra has divested itself of the shares in AG Financial to now hold less than 20%.

123 For more information, see Media Release (14-339MR) *Avestra Asset Management fined for breaching takeover laws* (17 December 2014).

ASIC policy initiatives

Sunsetting of class orders

- 124 In addition to the fundraising class orders being reviewed, set out in paragraphs 63–70, seven additional class orders relating to control transactions are also due to expire in the next two years.
- 125 While most are proposed to be remade without substantial policy changes, Class Order [CO 02/259] *Downstream acquisitions: foreign stock markets* and Class Order [CO 00/2338] *Relief from the minimum bid price principle—s621(3)* are expected to require some policy review.

C Corporate governance

Key points

This section sets out statistics and observations from our work in relation to corporate governance matters, including:

- related party transactions;
- reporting of production targets by mineral exploration companies;
- employee incentive schemes; and
- collective action by institutional investors.

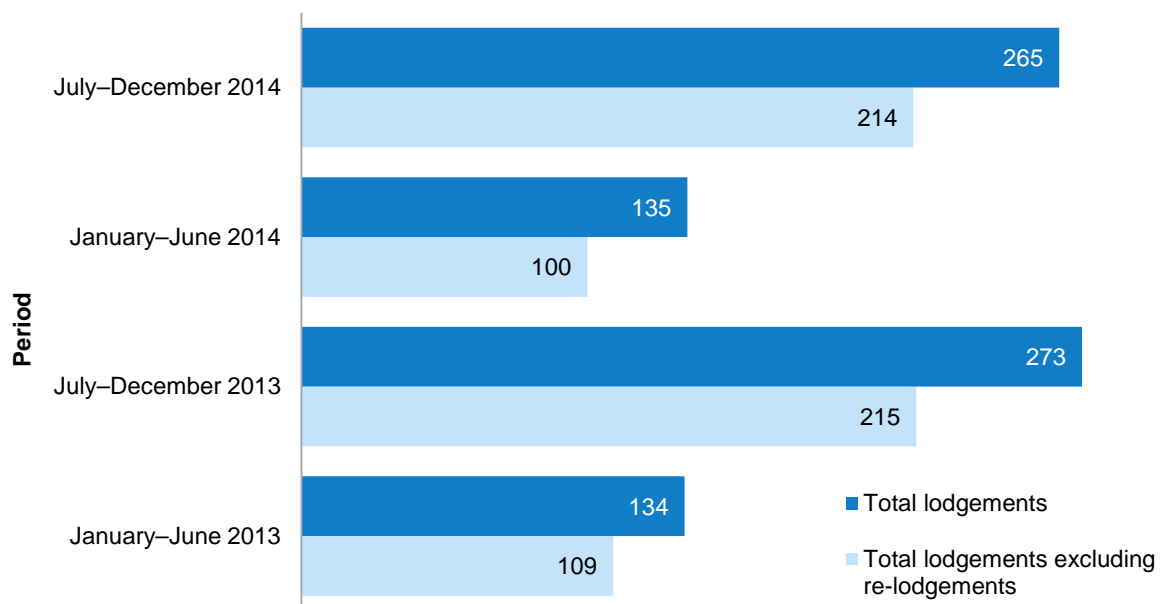
Statistics and observations

Related party notices

126 In this period, we received 265 related party approval notices under s218, of which 209 (78.8%) requested we abridge the 14-day review period. This is up from the previous period, but comparable to the last six months of 2013.

127 Figure 7 sets out the number of related party approval notices we received in this period and previous periods.

Figure 7: Related party approval notices (January 2013 to December 2014)



Industry liaison

Reporting of production targets

- 128 On 1 December 2012, the 2012 edition of the JORC Code was released and implemented in Chapter 5 of the ASX Listing Rules. Since this time, we have worked, and continues to work, closely with industry to ensure their understanding and compliance with the Corporations Act, JORC Code and the ASX Listing Rules, and presents from time to time at industry events.
- 129 Of particular concern to ASIC presently is the reporting of certain forward-looking statements. Production targets and forecast financial information—including income-based discounted cash flows or net present values—are all forward-looking statements and, like any forecast, a company must have reasonable grounds to support that statement.
- 130 What constitutes a reasonable basis depends on the facts of each case. Cautionary language, qualification and disclaimers are not sufficient to prevent forward-looking statements being misleading where no reasonable grounds exist for making the statement.

Enforcement action

- 131 We monitor the conduct of directors and other important gatekeepers in the financial system. Where necessary, we will refer matters to ASIC's Enforcement teams to take action against those who do not meet their obligations. For more information on corporate governance enforcement action in this period, see REP 421.

NuSep Holdings Limited

- 132 In December 2014, we accepted an enforceable undertaking from biotechnology company NuSep Holdings Limited after identifying concerns with their corporate governance, including potential breaches of continuous disclosure laws. We conducted an investigation into NuSep's conduct between 2009 and 2012 and identified the following concerns:
- (a) instances where inaccurate information was released to the market;
 - (b) occasions where the company acquired shares in itself by issuing and holding shares in a suspense account;
 - (c) inadequate record keeping; and
 - (d) issuance of bonuses to former executives who may have contravened the Corporations Act while in office.

- 133 The terms of the enforceable undertaking require NuSep to appoint an independent expert to review their compliance with disclosure requirements and assess their corporate governance. NuSep is required to develop a plan to rectify any deficiencies identified by the expert. NuSep is also required to adopt and publish an executive remuneration policy consistent with the ASX Corporate Governance Council's *Corporate governance principles and recommendations*.¹²
- 134 For more information, see Media Release (14-341MR) *ASIC investigation prompts NuSep into enforceable undertaking* (19 December 2014).

ASIC policy initiatives

Employee incentive schemes

- 135 In October 2014 we reissued Regulatory Guide 49 *Employee incentive schemes* (RG 49), following consultation in late 2013. While we have broadened the scope of the relief offered to better facilitate employee incentive schemes and to reduce the red tape associated with notifying ASIC, we have not altered our fundamental policy settings.
- 136 We have expanded the types of products that can be offered, the categories of people who can participate and the structures that can be used for employee incentive schemes. Of note, we have reduced the requirements in relation to contractors and removed the restrictions applying to non-executive directors.
- 137 We have provided more relief for unlisted companies than has been given in the past. However, given there are fewer regulatory reporting and compliance obligations applying to unlisted bodies, and no readily available market price for their financial products, our class order relief for unlisted bodies is still more conditional than for listed bodies.
- 138 Our approach to class order relief is to cater for the majority of common circumstances in which employee incentive schemes are offered. We will, however, consider case-by-case relief for incentive schemes offered in more unusual circumstances. Our class order relief is contained in:
- (a) Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies*; and
 - (b) Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies*.

¹² ASX Corporate Governance Council, *Corporate governance principles and recommendations*, 3rd edition, March 2014, www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf.

139 The reissued RG 49 and associated class orders were revised following a consultation process and consideration of a number of the submissions that we received. Details of these changes, and the submissions received are contained in Report 417 *Response to submissions on CP 218 Employee incentive schemes* (REP 417).

Collective action by institutional shareholders

140 We are currently consulting on our policy in Regulatory Guide 128 *Collective action by institutional shareholders* (RG 128), including the relief granted under Class Order [CO 00/455] *Collective action by institutional investors*: see Consultation Paper 228 *Collective action by investors: Update to RG 128* (CP 228).

141 RG 128 sets out our view on when institutional investors that hold shares in a company can collectively discuss their intentions about voting at a meeting of that company without becoming associates or entering into a relevant agreement, which could result in a breach of s606.

142 We are considering the policy following a review of the current practices of institutional investors and other shareholders' engagement with companies. We recognise the need to balance the ability of shareholders to engage effectively with companies with the preservation of the right of all shareholders to a premium on the passing of control of the company.

143 The draft updated RG 128 includes:

- (a) updated guidance on how the takeover and substantial holding notice provisions apply to collective action by investors, including illustrative examples;
- (b) an outline of when we are likely to take enforcement action; and
- (c) details of other legal and regulatory issues that can arise in relation to investor engagement.

144 We are also proposing to discontinue [CO 00/455], as it does not reflect the way in which institutional investors engage with entities.

145 CP 228 was released on 17 February 2015 with the consultation period closing on 20 April. For more information, see Media Release (15-027MR) *ASIC consults on collective action by investors* (17 February 2015).

D Other corporate finance areas

Key points

This section sets out statistics and observations from our work in other corporate finance areas.

A number of policy, surveillance and enforcement initiatives in relation to financial reporting have been undertaken by ASIC in this period and are set out below.

Statistics and observations

Findings from financial report reviews

- 146 On 12 December 2014, we published Media Release (14-332MR) *ASIC findings from review of 30 June 2014 financial reports*. This summarised the results of our review of the 30 June 2014 financial reports of 300 listed and other public interest entities.
- 147 Following the review, we made inquiries of 55 entities on 73 matters seeking explanation of their accounting treatments. We continue to identify concerns regarding assessments of the recoverability of the carrying values of assets, including goodwill, other intangibles, exploration and evaluation expenditure, and property, plant and equipment. The largest number of our inquiries relate to asset values and impairment, and include companies in mining and mining services.
- 148 From 1 July 2014, we commenced publicising material changes made to financial reports of companies previously provided to the market following contact from ASIC. These announcements are intended to make directors and auditors of other companies more aware of our concerns so that they can avoid similar issues.
- 149 Details of thematic matters identified in the review of the 30 June 2014 financial reports and three announcements specific to individual companies are set out in 14-332MR and its attachment.

Financial reporting relief applications

- 150 During this period, we received 142 applications for financial reporting relief (up from 100 in the previous period). These included:
- (a) 89 applications under s340;
 - (b) six applications under s111AT; and

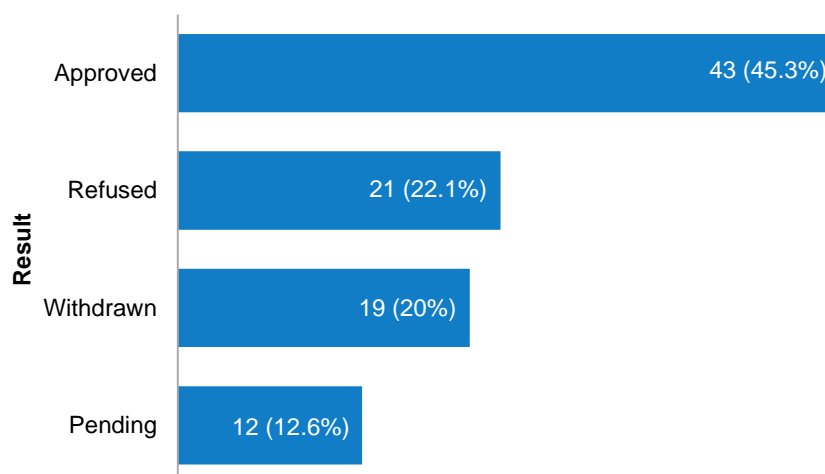
(c) 47 applications for a no-action letters for financial reporting breaches.

151 Of the applications received under s340 and s111AT, 42 were from companies with external administrators appointed (up from 14 in the previous period, and 31 from the last six months of 2013). We approved 27 of the 42 applications from external administrators.

152 Of the 47 applications for a no-action letter, we received 14 applications from companies with external administrators appointed. We approved one of these applications.

153 We approved 43 of the 95 applications received under s340 and s111AT: see Figure 8.

Figure 8: Results of applications under s340 and s111AT (1 July to 31 December 2014)



Share buy-backs

154 There was \$1.63 billion worth of share buy-backs undertaken by 86 companies in this period. In the previous period, share buy-backs totalled \$3.3 billion.

155 We received five applications for relief in relation to share buy-backs during this period. Four applications were approved, and another is still to be decided. The majority of the relief granted was to treat selective buy-backs as equal access schemes where a small number of foreign shareholders were excluded from the offer.

156 In December 2014 an ASX-listed entity, PAYCE Consolidated Ltd, announced an equal access buy-back where they proposed to buy back all of their issued capital, except for that held by their largest shareholder. The

consideration was to be a mix of cash (now and in the future) and the issuance of an unlisted preference share.

- 157 We identified concerns with the proposed buy-back and on 12 January 2015 made application to the Takeovers Panel for a declaration of unacceptable circumstances. As this action was taken outside the period of this report, we will comment further on this matter in our next report. For more information see Takeovers Panel Media Release (TP15/007) *PAYCE Consolidated Limited—Application received and withdrawn* (13 January 2015).

ASIC policy initiatives

Financial reporting by externally administered companies

- 158 In August 2014, we published Consultation Paper 223 *Relief for externally administered companies and registered schemes being wound up: RG 174 update* (CP 223) outlining our proposals to:
- (a) replace individual exemptions with individual deferrals where it is not clear whether the company will continue in business;
 - (b) provide guidance on a number of other potential relief applications, including relief for previously deferred financial reporting obligations and, for registered schemes, compliance plan audit relief; and
 - (c) issue an updated Regulatory Guide 174 *Externally administered companies: Financial reporting and AGMs* (RG 174) and new class order to explain and give effect to the above changes.
- 159 We received six responses to CP 223 from insolvency firms and industry associations. Respondents were generally supportive toward the majority of our proposals; however, some proposals are being considered further in light of the responses received.
- 160 We are currently preparing a report on the submissions and our response to key issues raised by the respondents. We hope to release the report on submissions, reissued RG 174 and new class order in the first half of 2015.

Audit

- 161 In this period, the ASIC Financial Reporting and Audit team worked on a number of policy initiatives concerning auditors.

Auditor resignations, removals and replacements

- 162 In REP 406, we noted that an updated Regulatory Guide 26 *Resignation of auditors* (RG 26) would be released in late 2014. Subsequently, substantial

changes have been proposed, delaying the publication of the revised RG 26. This is now expected to occur in the first half of 2015.

163 Under the proposed revised policy, auditors may resign at any time of the year, unless there is some evidence (such as disagreements with management on accounting treatments) to suggest that we should not give consent to the resignation. Consent would be conditional on disclosures to the market or members about the details of both the resigning and incoming auditor, and the reason for the change. For more information, see Consultation Paper 209 *Resignation, removal and replacement of auditors: Update to RG 206* (CP 209).

164 The proposed revisions to RG 26 highlight the role of directors and audit committees in supporting auditor independence and audit quality. This includes considering the appropriate timing for changes in auditors and the directors' responsibilities in relation to the appointment of auditors.

165 The proposed changes align our approach with a number of international jurisdictions. They also provide a more flexible approach to the timing of resignations for both auditors and entities while also reducing red tape and confusion for businesses (caused by differing auditor appointment and timing requirements for different entity types).

Auditor registration

166 To become a registered company auditor, an applicant must demonstrate that they have the required qualifications and practical experience and meet a fit and proper person test. The practical experience requirement can be met by satisfying an hours-based test or meeting the requirements of an ASIC-approved audit competency standard.

167 The joint accounting bodies have recently drafted a revised competency standard for registration of company auditors. The updated standard incorporates the requirements of the current legally enforceable auditing standards made under the Corporations Act and is rigorous enough to ensure that a person's practical experience is adequate for registration as a company auditor.

168 Once the revised competency standard is approved we will update Regulatory Guide 180 *Auditor registration* (RG 180) for consequential changes incorporating references to the approved auditor competency standard and the applicant's logbook (listing the tasks and activity combinations required to be performed and demonstrated). We also plan to simplify the information requirements for applicants under the hours-based test in RG 180 and expect to release this in the first half of 2015.

Enforcement action

- 169 In December we published Media Release (14-343MR) *ASIC steps up action on lodging financial reports* (19 December 2014), which summarises recent enforcement action against entities that failed to lodge financial reports.
- 170 This campaign has intensified following an agreement with Commonwealth Director of Public Prosecutions allowing ASIC to prosecute particular summary offences, including the failure to lodge financial reports and hold annual general meetings.
- 171 Since July 2014, 10 companies have been prosecuted for 60 offences, with fines totalling \$122,000.
- 172 We consider that financial reporting plays a significant role in maintaining market integrity and investor confidence, and accordingly we are maintaining the enforcement program for failure to lodge financial reports throughout 2015.

Relief applications

ASIC's report on relief applications

- 173 We published our periodic report on relief applications in September 2014. REP 420 covers relief decisions considered during the period 1 February 2014 to 31 May 2014 by teams throughout ASIC. It is intended to provide examples of decisions that demonstrate how we have applied our policy in practice.

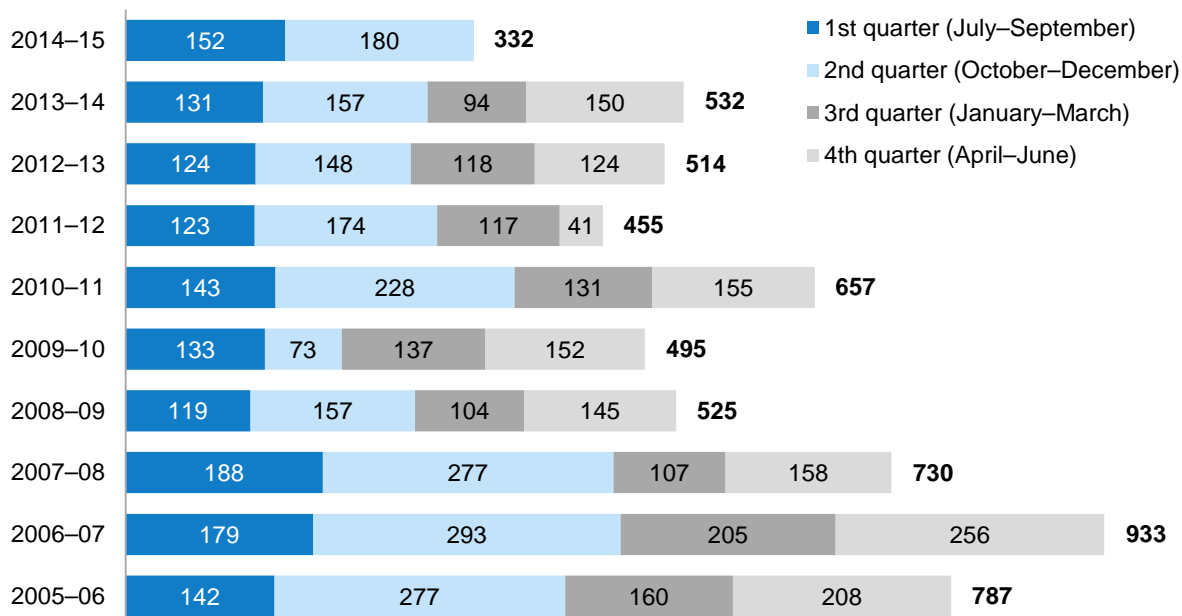
Cost savings

- 174 We are continuing to participate in an Australian Government initiative to understand the role we play in assisting the business community to do business in Australia. This involves asking applicants for information about the costs they believe will be saved by obtaining relief from ASIC.
- 175 We would appreciate applicants providing this information at the time they make application to ASIC.

Appendix: Historical statistics

Fundraising statistics

Figure 9: Total original fundraising documents lodged with ASIC by quarter (2005–06 financial year to 2014–15 financial year)



Note: This graph includes 10 mutual recognition offer documents lodged with ASIC, accounting for the difference compared to original fundraising documents shown at Figure 1.

Control transaction statistics

Figure 10: Total bidder's statements lodged with ASIC by quarter (2005–06 financial year to 2014–15 financial year)

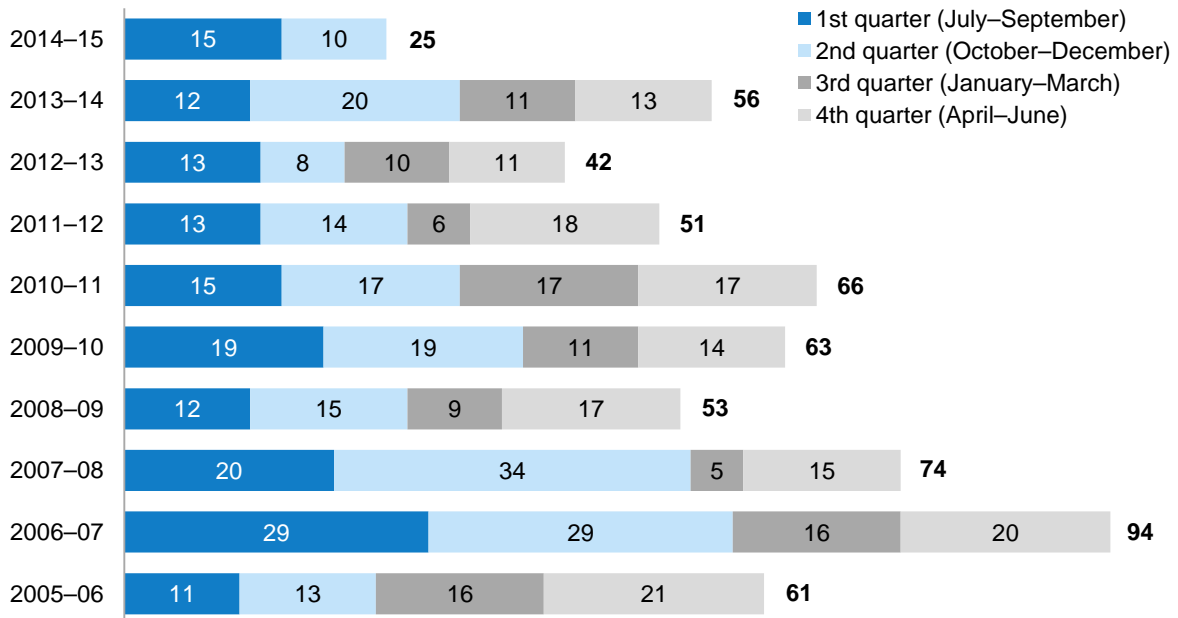
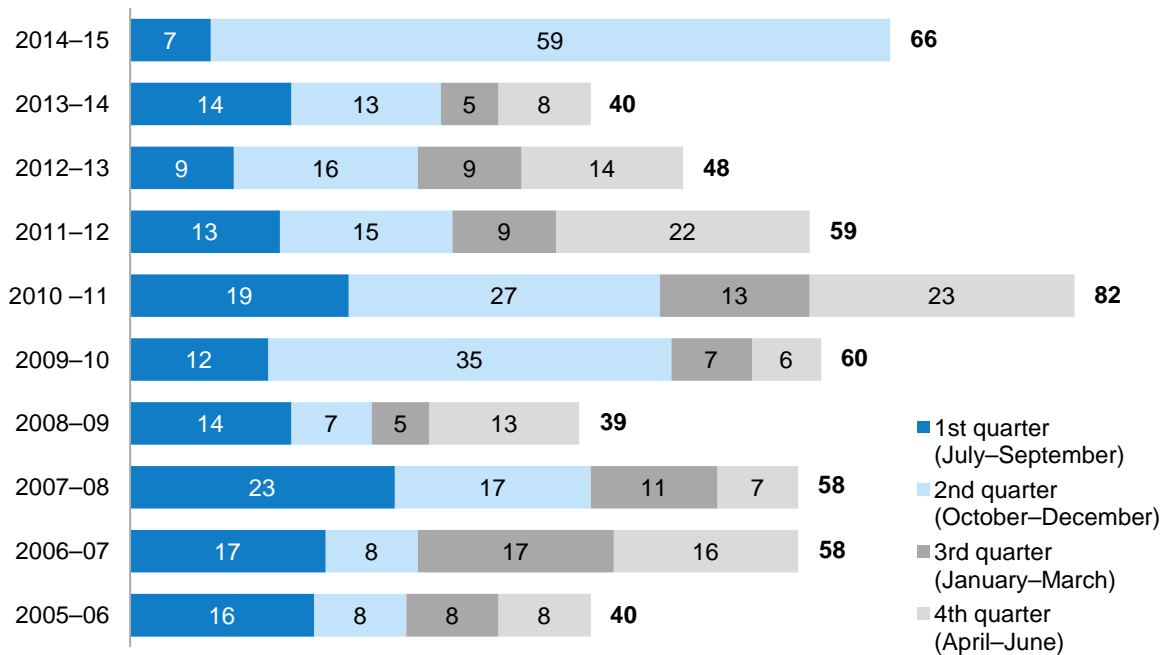


Figure 11: Total scheme booklets lodged with ASIC by quarter (2005–06 financial year to 2014–15 financial year)



Note: This figure shows the total number of scheme booklets lodged. This is distorted by the four restructure schemes which involved multiple entities in the one consolidation. Figure 3 consolidates these schemes into number of transactions.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
CDI (CHESS Depository Interest)	A unit of beneficial ownership in a financial product of a foreign body, where the underlying financial product is registered in the name of a depository nominee for the purpose of enabling the foreign financial product to be traded on ASX
Ch 6D	A chapter of the Corporations Act (in this example numbered 6D), unless otherwise specified
[CO 14/824] (for example)	An ASIC Class Order (in this example numbered 14/824)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
CP 225 (for example)	An ASIC consultation paper (in this example numbered 225)
DOCA	Deed of company arrangement
employee incentive scheme	A scheme that is designed to support interdependence between a body and its eligible participants for their long-term mutual benefit
EMR team	Emerging Mining and Resources team
item 7 (for example)	An item of s611 of the Corporations Act (in this example numbered 7)
item 7 transactions	Control transactions that fall under the exception in item 7
JORC Code	Australasian Code for Reporting of Explorations Results, Minerals Resources and Ore Reserves
previous period	1 January to 30 June 2014
REP 411 (for example)	An ASIC report (in this example numbered 411)

Term	Meaning in this document
reserved matters	Matters normally the domain of the board
RG 228 (for example)	An ASIC regulatory guide (in this example numbered 228)
s674 (for example)	A section of the Corporations Act (in this example numbered 674), unless otherwise specified
this period	1 July to 31 December 2014

Related information

Headnotes

conduct, corporate finance, corporate governance, disclosure, enforcement action, fundraising, mergers and acquisitions, prospectuses

Class orders

[CO 00/455] *Collective action by institutional investors*

[CO 00/2338] *Relief from the minimum bid price principle—s621(3)*

[CO 02/259] *Downstream acquisitions: foreign stock markets*

[CO 07/422] *On-market buy-backs by ASX-listed schemes*

[CO 14/827] *Offers of CHESS Depository Interests*

[CO 14/1000] *Employee incentive schemes: Listed bodies*

[CO 14/1001] *Employee incentive schemes: Unlisted bodies*

Regulatory guides

RG 26 *Resignation of auditors*

RG 49 *Employee incentive schemes*

RG 53 *The use of past performance in promotional material*

RG 55 *Statements in disclosure documents and PDSs: Consent to quote*

RG 66 *Transaction-specific disclosure*

RG 72 *Foreign securities prospectus relief*

RG 74 *Acquisitions approved by members*

RG 128 *Collective action by institutional investors*

RG 152 *Lodgement of disclosure documents*

RG 174 *Externally administered companies: Financial reporting and AGMs*

RG 180 *Auditor registration*

RG 228 *Prospectuses: Effective disclosure for retail investors*

RG 230 *Disclosing non-IFRS financial information*

RG 240 *Hedge funds: Improving disclosure*

RG 253 Fundraising: Facilitating offers of CHESS Depository Instruments

Legislation

Corporations Act, Ch 2M, 6, 6D, Pt 7.6, s111AT, 218, 340, 444GA, 602, 606, 611, 655A, 669, 671B, 710, 713, 741, 769C; Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014; Corporations Amendment (Revising Future of Financial Advice) Regulation 2014

Legislative Instruments Act 2003

Consultation papers and reports

CP 209 Resignation, removal and replacement of auditors: Update to RG 26

CP 223 Relief for externally administered companies and registered schemes being wound up: RG 174 update

CP 225 Remaking ASIC class orders of offers of foreign securities

CP 228 Collective action by investors: Update to RG 128

REP 365 Hybrid securities

REP 368 Emerging market issuers

REP 406 ASIC regulation of corporate finance: January to June 2014

REP 411 Overview of decisions on relief applications (February to May 2014)

REP 414 Response to submissions on CP 220 Fundraising: Facilitating offers of CHESS Depository Interests

REP 417 Response to submissions on CP 218 Employee incentive schemes

REP 420 Overview of decisions on relief applications (June to September 2014)

REP 421 ASIC enforcement outcomes: July to December 2014

Media releases

13-148MR ASIC releases consolidated guidance on takeovers

14-067MR ASIC takes civil action against Mariner and its directors

14-190MR Statement on auditor registration

14-203MR ASIC update on ongoing investigation into Padbury Mining

14-300MR *ASIC acts on trading in listed fund units*

14-307MR *Disallowance of FOFA regulations*

14-321MR *ASIC takes legal action against Sino Australia Oil and Gas and its former chairman*

14-332MR *ASIC findings from review of 30 June 2014 financial reports*

14-339MR *Avestra Asset Management fined for breaching takeover laws*

14-341MR *ASIC investigation prompts NuSep into enforceable undertaking*

14-343MR *ASIC steps up action on lodging financial reports*

15-027 MR *ASIC consults on collective action by investors*

Other documents

ASX Corporate Governance Council, *Corporate governance principles and recommendations*

Reasons for decision Laneway Resources Limited [2013] ATP 7

TP15/007 *PAYCE Consolidated Limited—Application received and withdrawn*