



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 51

Applications for relief

December 2009

About this guide

This guide is for applicants and advisers who are applying to ASIC for relief from the:

- *Corporations Act 2001* (Corporations Act);
- *Superannuation Industry (Supervision) Act 1993* (SIS Act);
- *National Consumer Credit Protection Act 2009* (National Credit Act) or
- *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act).

It sets out the types of applications that can be made, how to lodge applications, our general approach to applications for relief and the types of relief available.

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
- 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.

Document history

This version was issued 18 December 2009 and is based on legislation and regulations as at 18 December 2009.

Previous versions:

- Superseded Policy Statement 51, issued 14 September 2006, rebadged as a regulatory guide 5 July 2007.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act, the SIS Act, the National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

ASIC has discretionary powers to grant relief from the provisions of the *Corporations Act 2001*, the *Superannuation Industry (Supervision) Act 1993*, the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*: see RG 51.1.

There are three types of applications for relief—standard applications, minor and technical applications and new policy applications: see RG 51.6.

Applications for relief must identify the type of application and the relief being sought, contain all the information required for the type of application, and be accompanied by the prescribed fee: see RG 51.8–RG 51.9.

In determining applications for relief, we attempt to achieve two broad objectives—consistency and definite principles: see RG 51.11.

Generally, we do not have power to grant retrospective relief. In some circumstances, we may give relief from future consequences of past conduct, although our policy is not to do so: see RG 51.16.

Where the effect of the law in a particular case is uncertain or unclear, we may grant comfort relief: see RG 51.17.

Our discretionary powers

RG 51.1 We may exercise our discretionary powers to grant relief from the provisions of the:

- (a) *Corporations Act 2001* (Corporations Act);
- (b) *Superannuation Industry (Supervision) Act 1933* (SIS Act);
- (c) *National Consumer Credit Protection Act 2009* (National Credit Act);
or
- (d) *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act).

Note: References in this guide to the National Credit Act include references to the Transitional Act.

This relief includes exemptions from and modifications to the provisions of these Acts.

RG 51.2 The provisions of the Corporations Act where we most frequently exercise our discretionary powers involve accounting, takeovers, fundraising,

managed investment schemes, licensing, and disclosure requirements for financial products. However, this guide applies to all applications for relief. It does not apply to our registration approval or licensing powers under the Corporations Act: see, for example, s913A and 1279 of that Act.

- RG 51.3 Other published ASIC policy may include details about how to apply for particular kinds of relief. Where those details are inconsistent with this policy statement, this guide prevails.
- RG 51.4 This guide should be read in conjunction with Regulatory Guide 92 *Procedural fairness to third parties* (RG 92) and Regulatory Guide 57 *Notification of rights of review* (RG 57). For a more comprehensive list of relevant regulatory guides, see ‘Related information’.

Types of applications

- RG 51.5 The types of applications that can be made are described in Section B.
- RG 51.6 There are three types of applications for relief:
- (a) standard applications—seeking relief in accordance with published ASIC policy and pro forma instruments (see RG 51.19);
 - (b) minor and technical applications—involving the application of existing policy to new situations (see RG 51.20–RG 51.22); and
 - (c) new policy applications—requiring us to formulate substantive new policy (see RG 51.23–RG 51.24).
- RG 51.7 All standard applications must contain the information listed in RG 51.25. Minor and technical or new policy applications should address those matters and the additional matters in RG 51.26. Applications for minor and technical or new policy relief should include reasons why we should grant the relief: see RG 51.27.

Applying for relief

- RG 51.8 The application process is described in Section C. We will only be able to determine applications for relief that are complete, in sufficient detail and accompanied by the prescribed fee.
- RG 51.9 All applications must:
- (a) be in writing;
 - (b) clearly identify the type of application—standard, minor and technical, or new policy (see Section B);

Note: If you are still unsure what category your application falls into after reading Section A, please contact the ASIC office in your state or territory.

- (c) contain *all* the relevant information for that type of application (see RG 51.25–RG 51.26);
- (d) clearly identify the type of relief being sought (see Section E); and
- (e) be accompanied by the prescribed fee: see Corporations (Fees) Regulations 2001 and National Consumer Credit Protection (Fees) Regulations 2010.

Note: Where an applicant seeks relief involving the exercise of more than one statutory head of power (e.g. relief under s655A and 669 of the Corporations Act), an application fee is payable for each one, even when relief is contained in a single instrument: see generally Regulatory Guide 21 *How ASIC charges fees for relief applications* (RG 21) and Regulatory Guide 208 *How ASIC charges fees for credit relief applications* (RG 208).

RG 51.10 If you are applying for:

- (a) an extension of time to hold an AGM for unlisted companies, send your application directly to:
Information Processing Centre
PO Box 4000
Gippsland Mail Centre
VIC 3841
- (b) any other kind of relief (e.g. relief involving accounting; managed investment scheme; licensing; product disclosure or takeovers provisions), send your application to applications@asic.gov.au.

You can also contact ASIC's Infoline on 1300 300 630 for information and assistance.

Our general approach to relief

- RG 51.11 Our general approach to relief is described in Section D. In determining applications for relief, in particular minor and technical and new policy applications, we attempt to achieve two broad objectives—consistency and definite principles: see RG 51.51–RG 51.56.
- RG 51.12 We will generally only grant relief in new policy applications where there is a net regulatory benefit, or any regulatory detriment is minimal and is outweighed by the commercial benefit: see RG 51.57–RG 51.62.
- RG 51.13 Where we have the power and it is appropriate to do so, we will make a class order, to avoid the need for applicants to apply on an individual basis: see RG 51.63–RG 51.64.
- RG 51.14 Where class orders are not appropriate or we do not have the power to make them, we will publish clear policies for exercising discretionary powers on a

case-by-case basis and may publish pro forma instruments relating to these policies: see RG 51.65–RG 51.66.

Different types of relief

- RG 51.15 The types of relief we may grant are discussed in Section E of this guide.
- RG 51.16 Generally, we do not have power to grant retrospective relief. To the extent that we can give relief from future consequences of past conduct, our policy is not to do so. However, we may give relief in these circumstances if no mischief has occurred yet and the regulatory detriment is minimal and clearly outweighed by the commercial benefit: see RG 51.67–RG 51.68.
- RG 51.17 Where the effect of the Corporations Act or National Credit Act in a particular case is uncertain or unclear, we may grant comfort relief, provided this relief is legally and commercially necessary and would be consistent with our policy: see RG 51.71–RG 51.75.
- RG 51.18 We will usually only consider applications for relief from provisions or regulations that are in force. We may consider new policy applications relating to uncommenced provisions or regulations in certain circumstances: see RG 51.76.

B Types of applications

Key points

There are three types of applications for relief:

- standard applications—seeking relief in accordance with published ASIC policy and pro forma instruments (see RG 51.19);
- minor and technical applications—applying existing policy to new situations (see RG 51.20–RG 51.22); and
- new policy applications—requiring us to formulate substantive new policy (see RG 51.23–RG 51.24).

All applications must contain the information outlined in RG 51.25 and Table 1. In addition, minor and technical or new policy applications should address the matters in RG 51.26 and Table 2, including reasons why we should grant the relief.

We will only consider urgent applications in exceptional circumstances, where urgency results from factors beyond your control: see RG 51.31–RG 51.32.

Standard applications

- RG 51.19 Standard applications are applications that seek relief precisely in accordance with the terms of published ASIC policy and pro forma instruments (where relevant). All other applications are classified as:
- (a) minor and technical applications; or
 - (b) new policy applications.

Minor and technical applications

- RG 51.20 Minor and technical applications are applications that:
- (a) are not completely standard but are *clearly* within the policy of the Corporations Act, the National Credit Act or existing ASIC policy; and
 - (b) do not raise issues of such significance as to require our extensive consideration.

In effect, they involve the application of existing policy to new situations, either legislative or administrative (e.g. where there is an existing policy, but it needs to be adapted to cover the application).

- RG 51.21 These applications can concern:
- (a) relief from the requirements of the Corporations Act or the National Credit Act;
 - (b) minor changes to relief previously granted to the applicant (where there has been no significant change in the circumstances surrounding the granting of relief or in existing policy); or
 - (c) relief or changes to relief arising from changes in existing policy. This includes, but is not limited to, published ASIC policy.
- RG 51.22 Minor and technical applications typically concern unusual situations or new developments that are not anticipated in the Corporations Act, the National Credit Act or in existing ASIC policy. In particular, our published policy cannot specify every possible set of circumstances to which it may be applied. Rather, it sets out general principles and illustrates them by way of common examples. Our officers, therefore, often consider applications that, although not specifically covered by published policy, can be determined using the general principles set out in that policy.

New policy applications

- RG 51.23 New policy applications are applications that require us to formulate substantive new policy, because they:
- (a) raise policy considerations which are entirely new;
 - (b) involve more than minor and technical variations of existing ASIC policy; or
 - (c) involve a significant change to, or reversal of, existing ASIC policy.

Every application that is neither standard nor minor and technical is a new policy application.

- RG 51.24 New policy applications should be made as early as possible to ensure that we have sufficient time to consider them. Decisions can then be carefully and properly considered and other applications will not be unfairly delayed. We will refuse to grant relief if an applicant requires relief by a particular time and this requirement would not give us sufficient opportunity to consider whether the relief is appropriate.

What to include in an application

Standard applications

- RG 51.25 All standard applications should contain the following information.

Table 1: Standard applications—information required

What relief is sought?	<p>Specify what relief is being sought and explain why it should be given, in view of:</p> <ul style="list-style-type: none"> the relevant published policy; and the relevant facts. <p>Note: The application must give sufficient details to enable us to determine whether the facts meet the prerequisites of the relevant published policy. It should advise of any facts that may imply that it would be inappropriate to apply the relevant published policy to the particular case and reasons why this is so. Details should include the sections of the Corporations Act or National Credit Act (whichever is relevant) under which relief is sought and any provisions of the relevant Act that are affected by the application.</p>
Other relevant information	Provide any other information required by any relevant published policy.
Relevant contacts	<p>Provide details and names of relevant ASIC officers where there has been prior contact about the application: see RG 51.34.</p> <p>Note: The application should also provide details of any prior discussions with other regulatory organisations or bodies such as ASX Limited (ASX).</p>
Relevant interests	<p>The application must:</p> <ul style="list-style-type: none"> state whether there are any third parties whose interests would be adversely affected if the application was granted; and address all other requirements of RG 92 to the extent relevant.

Minor and technical and new policy applications

RG 51.26 All minor and technical applications, to the extent relevant, and new policy applications should address:

- the matters in RG 51.25 as for standard applications; and
- the additional matters in Table 2.

Table 2: Minor and technical or new policy applications—information required

What are the facts?	<p>Explain the proposed commercial activity to be undertaken and advise of any factual matter that:</p> <ul style="list-style-type: none"> could reasonably be considered to be relevant for the application; or may have implications for how the relevant legislative provisions or existing ASIC policy is applied in the circumstances of the particular case.
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<p>What is the impact of legislative provisions or existing ASIC policy?</p>	<p>State how legislative provisions or existing ASIC policy would impede the applicant's proposed activity and why the applicant cannot adapt its proposal to comply with these provisions or with existing statutory or class order relief.</p> <p>Discuss uncertainties (if any).</p> <p>Explain precisely how the proposed relief would operate to facilitate the applicant's proposal.</p>
<p>What relief is sought?</p>	<p>State the extent and nature of the relief being sought.</p> <p>Note: Details should include the sections of the Corporations Act or National Credit Act (whichever is relevant) under which relief is sought and any provisions of the relevant Act that are affected by the application.</p>
<p>Why should the relief be granted?</p>	<p>Explain the consequences of granting the relief and the reasons why it should be granted from:</p> <ul style="list-style-type: none"> • a legal perspective. For example, why is the relief required as a matter of law? • a commercial perspective. For example, why is it not commercially feasible to comply with the Corporations Act or National Credit Act (whichever is relevant) or existing ASIC policy? • a policy perspective. For example, identify the net regulatory benefit that would result if the relief is granted. In particular, balance commercial considerations against any relevant consumer interests. <p>Note: See RG 51.54–RG 51.55 and RG 51.58–RG 51.59 for further details.</p>
<p>What conditions should be imposed on the relief?</p>	<p>Discuss any suitable limitations or conditions that should be placed on the relief. This should include identifying any regulatory detriment to investors if the relief were granted and how such detriment could be avoided.</p> <p>Note: Draft instruments of relief may also be submitted with the application: see RG 51.30.</p>

Why should relief be granted?

RG 51.27 As set out in Table 2, an applicant should give reasons why we should grant the requested relief. For example, if the applicant proposes:

- (a) a minor and technical variation of a provision of the Corporations Act or National Credit Act, the application should explain why the application is within the policy underlying that provision;
- (b) a departure from existing ASIC policy, the application should set out the extent of the departure; or
- (c) a variation of an instrument that already applies to the applicant, the application should:
 - (i) confirm that the basis of the original relief still applies; and
 - (ii) explain why the variation is required.

The application should include any information we will need in considering the issues set out under our general approach to relief in Section D.

Applicants are also invited to submit views about the directions they see as appropriate for policy to develop.

- RG 51.28 Applicants should consider obtaining legal advice before making minor and technical or new policy applications. A legal analysis of the applicant's need for relief often helps us deal with the application promptly and effectively.

Submitting a draft instrument

- RG 51.29 When making a minor and technical or new policy application, the applicant may submit a draft instrument. This draft instrument may be helpful in clarifying the exact relief sought. However, we will only use the draft instrument as an aid in assessing the application. If we decide to grant the relief sought, we may do so on terms other than those of the draft instrument.
- RG 51.30 Wherever appropriate, a draft instrument should be adapted from a class order or pro forma instrument. The adaptations should be explained and any changes highlighted in the application.

Urgent applications

- RG 51.31 In certain situations, we may consider applications on an urgent basis (i.e. within a specific and short time frame). However, we will only do so in exceptional circumstances because this would give the urgent application priority over other applications lodged earlier.
- RG 51.32 The applicant must clearly demonstrate that the urgency results from factors beyond its reasonable control that it could not have reasonably foreseen. Self-imposed deadlines are not a sufficient basis for urgent consideration. Applications that are not lodged with us at the earliest practicable time run the risk of being refused because we have not had the opportunity to fully consider the application. If we have not had time to reach a clear view that the application should be granted, we may refuse the application.

C The application process

Key points

You must ensure your application seeks all relief that will be required for the proposed commercial activity and includes all relevant information. We may refuse an application that does not address all relevant issues: see RG 51.33–RG 51.35.

We will only determine applications that are complete, have sufficient detail and are accompanied by the prescribed fee: see RG 51.36.

We will assign an officer to your application. You can deal directly with this officer: see RG 51.37.

If your standard application satisfies the prerequisites for relief, the ASIC officer will notify you and execute an instrument of relief. Otherwise, the officer will notify you, giving reasons for the decision: see RG 51.38–RG 51.40.

For minor and technical applications, the ASIC officer must be satisfied the policy variation requested is no wider than is reasonably necessary to achieve your commercial objectives: see RG 51.41–RG 51.43.

New policy applications may take longer, as the ASIC officer may need to obtain legal or policy advice. We may also seek public comment on some applications: see RG 51.44–RG 51.45.

You should apply for relief as early as possible when planning the proposed activity and obtain legal advice at this time: see RG 51.46–RG 51.49.

Preparing an application

- RG 51.33 Applicants and their advisers are responsible for:
- (a) applying to ASIC for all appropriate relief; and
 - (b) including *all* the relevant information to support their application (see RG 51.25–RG 51.26).

We will analyse the applicant's proposed commercial activity to decide whether the relief applied for is necessary and sufficient to overcome the legal obstacles identified in the application. We will not necessarily look for other legal obstacles to the applicant's proposed course of action.

- RG 51.34 Discussions with ASIC officers are not a substitute for legal advice, or for referring to our published policy in the *ASIC Digest*, or on our website at www.asic.gov.au. An application that has been preceded by discussions with

ASIC staff will not receive any priority on that account alone, and the views of individual ASIC officers on policy issues are not binding on ASIC.

Note: In referring to relevant published policy, applicants should consider if there is any specific policy regarding the use of our discretionary powers that is relevant to the application. For example, Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167) or Regulatory Guide 169 *Disclosure: Discretionary powers* (RG 169). For a list of policies dealing with our discretionary powers see 'Related information'.

- RG 51.35 We may refuse an application that does not fully address all of the relevant issues. Where possible, our officers will advise the applicant before refusing an application for that reason and may give the applicant an opportunity to provide the additional information. However, if all of this information is not supplied within a specified time, the application will be refused.

Lodging an application

- RG 51.36 All applications for relief should meet the guidelines set out below. We will only be able to determine applications for relief that are:
- (a) complete and in sufficient detail; and
 - (b) are accompanied by the prescribed fee.

You should refer to RG 51.8–RG 51.10.

Processing an application

- RG 51.37 After an application has been lodged, an ASIC officer will be assigned to the application. The applicant should deal directly with this nominated officer.

Note: Applicants should clearly indicate if the application is confidential up to a particular point in time, including the reason(s) for its confidentiality. In this case, the applicant should advise ASIC the name of the person to receive all communications regarding the application.

Standard applications

- RG 51.38 In dealing with a standard application, the ASIC officer will:
- (a) determine whether the applicant satisfies the prerequisites for the relief, by reference to the relevant regulatory guide; and
 - (b) make and record the decision.
- RG 51.39 If the application is successful, the ASIC officer will then:
- (a) execute an instrument of relief;
 - (b) give the applicant notice of the decision and a copy of the instrument; and

- (c) arrange for the instrument to be gazetted (if necessary), reproduced by our DOCIMAGE system and entered onto our public database, and forward the necessary details of the instrument for inclusion in the *ASIC Digest* as soon as possible.

Note: Certain instruments that are governed by the *Legislative Instruments Act 2003* are also required to be tabled in Parliament and are potentially subject to a process of disallowance.

RG 51.40 If the application is unsuccessful, the ASIC officer will notify the applicant and briefly set out the reasons for the decision.

Note: If an application is to be withdrawn, the applicant should advise ASIC in writing of that fact. Generally, any application fees cannot be refunded.

Minor and technical applications

RG 51.41 In dealing with a minor and technical application, the ASIC officer must be satisfied that:

- (a) the departure from existing policy is in fact minor and technical (see RG 51.20); and
- (b) the request for a variation to the existing policy is no wider than is reasonably required to achieve the applicant's commercial objectives.

RG 51.42 Excessively wide applications will be refused or limited. Where we can accommodate the applicant's objective with standard relief, the ASIC officer will offer to deal with the application as a standard application under the relevant published policy.

RG 51.43 After an application has been determined as either successful or unsuccessful, the process is the same as for standard applications (see RG 51.38–RG 51.40).

New policy applications

RG 51.44 When considering a new policy application, the ASIC officer will:

- (a) obtain internal legal advice on the relief sought, if needed—applicants should be aware that this takes time;
- (b) consider the policy implications of the application to determine whether the relief should be granted and, if so, on what conditions (this may involve liaising internally on policy issues and as such may also take time); and
- (c) conclude the application as for a standard application (see RG 51.38–RG 51.40).

RG 51.45 New policy applications often raise issues on which we want to obtain public comment. We may seek public comment through hearings or submissions,

either before or after the application is finalised. Where extensive liaison with the public is required before a general policy decision can be made, we may give interim relief or a no-action letter to the applicant, if appropriate, pending final resolution of the application.

Processing times

- RG 51.46 We encourage applicants to enquire at the relevant ASIC office where the application is being handled about the processing times for their application. In appropriate circumstances, we may advise that an application has been transferred to another office where processing times are shorter.
- RG 51.47 Processing times given by ASIC officers are indicative only. They are also based on the assumption that applications are fully and carefully made in accordance with any relevant existing policy. We do not guarantee that any application will be processed by a specified date, even if we treat it as urgent: see RG 51.31.
- RG 51.48 Applicants are urged to apply for relief as early as possible when structuring the proposed activity. They are also urged to obtain legal advice at this time. Both will assist in ensuring that applicants structure their activities and their applications in an appropriate way. It will also help us deal with applications in a timely and efficient way.
- RG 51.49 If an application for relief is made before the relevant proposed activity is settled, the applicant may make the application on a tentative basis. If the applicant wants us to indicate our 'in principle' approval based on such application, we must consider our obligations to record and make public our decisions.

D Our general approach to relief

Key points

In determining applications for relief, in particular minor and technical or new policy applications, we will attempt to achieve two broad objectives:

- consistency (see RG 51.51–RG 51.52); and
- definite principles (see RG 51.53–RG 51.56).

We will generally only grant relief in new policy applications where we consider that there is a net regulatory benefit, or any regulatory detriment is minimal and is outweighed by the commercial benefit: see RG 51.57–RG 51.62.

Where we have the power and it is appropriate to do so, we will make a class order, to avoid the need for applicants to apply on an individual basis: see RG 51.63–RG 51.64.

Where class orders are not appropriate or we do not have the power to make them, we will publish clear policies for exercising discretionary powers on a case-by-case basis. We may also publish pro forma instruments relating to these policies: see RG 51.65–RG 51.66.

Broad objectives

- RG 51.50 We will consider and determine all applications for relief on the basis of the facts, circumstances and merits of each individual application. In making such determinations and particularly when considering minor and technical and new policy applications, we attempt to achieve two broad objectives: consistency and definite principles.

Note: Of course, these considerations apply equally to standard applications, but are dealt with when we formulate our published policy.

Consistency

- RG 51.51 This objective ensures that we exercise our discretions consistently and on the basis of consistent regulatory objectives, without turning our administrative policies into inflexible rules.
- RG 51.52 Accordingly, we will normally only depart from existing ASIC policy that is relevant to an application (particularly where that policy has been published) where we are satisfied that the policy:
- requires significant change or reversal; or
 - is inapplicable due to special features of the application.

Definite principles

- RG 51.53 This objective ensures that we decide applications on the basis of principles which are definite and whose limits are clearly defined. In this way, we can:
- (a) use each decision as a precedent when similar applications arise in the future; and
 - (b) distinguish the precedent when it is inapplicable.
- RG 51.54 Accordingly, an application for minor and technical or new policy relief should explain the commercial and legal nature of the proposal for which the relief is sought. This is required for consideration of both the specific application and the more general precedent it may set. On the one hand, we are required by administrative law to have regard to the effect of relief in the particular fact situation in which it will operate. On the other hand, we cannot foresee what precedent we will set by making a decision, unless we understand the particular transaction for which the relief is required.
- RG 51.55 Applicants should therefore explain any commercial and legal constraints that form part of the reason why the relief should be granted. In general, if there is a lawful and effective way of doing a thing without relief (or with standard relief only), we will be inclined to refuse relief (or non-standard relief) as unnecessary.
- Note: For our approach to confidentiality, see generally Regulatory Guide 103 *Confidentiality and release of information* (RG 103) and RG 92. We are also subject to Commonwealth Freedom of Information legislation and court and parliamentary process requiring production of documents.
- RG 51.56 As mentioned above, every decision sets a precedent. Even where we are willing to give relief to allow a proposal to proceed, we may give relief in terms different from those proposed by the applicant to set a precedent that is more consistent with the development of policy.

Regulatory objectives

- RG 51.57 When considering new policy applications, we attempt to weigh the commercial benefit and any net regulatory benefit or detriment that would flow from granting the sought relief on the conditions proposed. We will generally grant relief where:
- (a) we consider that there is a net regulatory benefit; or
 - (b) the regulatory detriment is minimal and is clearly outweighed by the resulting commercial benefit.

Note: More specific guidance on the use of our discretionary powers is set out in other regulatory guides (e.g. RG 167 or RG 169). For a list of policies dealing with our discretionary powers, see 'Related information'.

- RG 51.58 We will scrutinise very carefully any argument that the ordinary costs associated with, or the ordinary inconvenience of compliance with the Corporations Act, the National Credit Act or existing published ASIC policy are excessive. Any applicant who claims to be particularly affected by compliance costs will need to explain why the effect of the law in their circumstances is anomalous.
- RG 51.59 In any discussion about the commercial benefits of granting relief, dollar estimates should be made relating to:
- (a) the cost of compliance with the Corporations Act or National Credit Act (whichever is relevant) if no relief were granted; and
 - (b) the potential costs and benefits if relief as sought is granted.
- In addition, the basis on which the dollar estimates are calculated should be clearly explained. Failure to include this information may result in a delay in deciding the application or in it being refused.
- RG 51.60 We will also refer to the purpose of the particular provisions in relation to which relief is sought. We will not consider individual provisions in a vacuum. Rather, we will promote the policy objectives underlying the Corporations Act or National Credit Act (whichever is relevant) and exercise our powers in accordance with the aims in s1(2) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- Note: For example, in applications concerning Ch 6 of the Corporations Act, we will consider the criteria set out in s602 of that Act. In applications made under s 340(1) or 341 of the Corporations Act, we will consider the criteria set out in s 342 of that Act.
- RG 51.61 The fact that we have not published a policy about a particular activity does not mean that we have a policy for or against that activity.
- RG 51.62 In general, we will not use our discretionary powers to effect law reform. That is, relief will not be given to reverse the usual and intended effect of the Corporations Act or National Credit Act.

Class order relief

- RG 51.63 Where we are empowered to do so and if appropriate, we will execute class orders. This avoids the need for applicants to apply for relief on an individual basis. For this reason, we will only execute a class order where it is not necessary to consider any relevant factual matters on a case-by-case basis.
- RG 51.64 In general, we will only execute class orders on policy that is well settled or after undertaking public consultation. However, we may make exceptions for class orders given on an interim basis.

Case-by-case relief

- RG 51.65 Where class orders are not appropriate or we do not have the power to make them, we:
- (a) develop clear policies for the exercise of discretionary powers on a case-by-case basis and publish these policies; and
 - (b) may support these policies by publishing pro forma instruments.
- RG 51.66 In general, pro forma instruments enable us to administer our policies more efficiently. They also ensure consistency of relief. However, relief is not in fact given on the basis of the pro forma instrument until an ASIC officer has ensured that the particular application meets the prerequisites for that relief as set out in the relevant published policy.

E Different types of relief

Key points

Generally, we do not have power to grant retrospective relief. To the extent that we can give relief from future consequences of past conduct, our policy is not to do so. However, we may give relief in these circumstances if no mischief has occurred yet and the regulatory detriment is minimal and clearly outweighed by the commercial benefit: see RG 51.67–RG 51.68.

The court has some powers to grant retrospective relief, including relief from liability in civil proceedings, under various sections of the Corporations Act: see RG 51.69–RG 51.70.

Where the effect of the Corporations Act or National Credit Act in a particular case is uncertain or unclear, we may grant comfort relief, provided this relief is legally and commercially necessary and would be consistent with our policy: see RG 51.71–RG 51.75.

We will usually only consider applications for relief from provisions or regulations that are in force. We may consider new policy applications relating to uncommenced provisions or regulations in certain circumstances: see RG 51.76.

Retrospective relief

RG 51.67 In general, we cannot give relief for breaches of provisions of the Corporations Act or National Credit Act that have already taken place. In other words, we generally do not have power to grant retrospective relief.

RG 51.68 To the extent that we can give relief that is not clearly retrospective but may take away the future consequences of past conduct, our general policy is not to do so. However, we may give relief in these circumstances where:

- (a) no mischief has yet occurred; and
- (b) the regulatory detriment of the breach is minimal and clearly outweighed by the commercial benefit which would result from us giving the proposed relief.

Our paramount consideration in exercising our powers in these circumstances is whether anyone has already been adversely affected by the previous breach.

Note: Relief under some provisions of the Corporations Act and the National Credit Act only take effect from the date of gazettal of the relevant instrument.

Court relief

- RG 51.69 The court has some powers to grant retrospective relief. For example, under s1322 of the Corporations Act (upon the application of any interested person), the court may make orders about irregularities generally (i.e. validating acts and relieving persons from civil liability): see, for example, *Elkington v. Vockbay Pty Ltd* (1993) 10 ACSR 785. The court also has power under s1318 of the Corporations Act to grant relief from liability to certain persons in civil proceedings to which that section applies and power under s183 of the National Credit Act to grant relief from liability for contravention of civil penalty provisions.
- RG 51.70 The court's retrospective powers and a few express grants of power to give retrospective relief confirm that ASIC's role is generally restricted to giving relief from prospective breaches of the Corporations Act and the National Credit Act.

Comfort relief

- RG 51.71 We may receive applications for comfort relief from the Corporations Act or the National Credit Act. These are made where it is not clear whether the applicant actually needs the relief to proceed with its planned course of action. We may grant comfort relief where we recognise that the effect of the relevant Act in a particular case is uncertain or unclear. However, such relief should not be taken to imply that we have formed any particular view of the effect of the relevant Act in such cases.
- RG 51.72 We will consider a request for comfort relief (on the basis that the Corporations Act or the National Credit Act (whichever is relevant) does apply) where an applicant requests such relief because:
- (a) it is uncertain whether or how the relevant Act applies; and
 - (b) commercially significant effects would flow from its application.
- RG 51.73 Accordingly, we will generally refuse to grant comfort relief if:
- (a) the operation of the relevant provisions of the Corporations Act or the National Credit Act (whichever is relevant) is clear and we consider that the relief is clearly not legally necessary. (In these cases, we will inform the applicant why we have formed the view that the particular relief is unnecessary); or
 - (b) we consider that the relief is commercially unnecessary (i.e. if the applicant's reasonable expectation of loss from the refusal of relief is insignificant).
- RG 51.74 Generally, refusal to grant comfort relief based on the reasons in RG 51.73(a) is in effect giving a no-action letter on the subject matter of the

application: see Regulatory Guide 108 *No-action letters* (RG 108). However, such a refusal is not a certification by us that the proposed action will be lawful in every respect. For example, we may refuse to grant relief from Ch 6 of the Corporations Act for a takeover offer on the grounds that the particular relief applied for is not necessary for the transaction. This refusal is no indication that we will not take investigative, surveillance or any other enforcement action over other aspects of the takeover that are not the subject of the application. Further, even if we refuse relief from Ch 6 on the grounds that the relief is not legally necessary, we may still make an application to the Takeovers Panel if there are unacceptable circumstances in relation to the subject matter.

RG 51.75 Applications for comfort relief must be made before the potential breach has occurred. We will grant or refuse such applications on standard policy grounds (i.e. we will not grant relief for which there is no policy justification, purely for the sake of certainty).

Provisions must be in force

RG 51.76 We will not usually consider applications for relief for provisions of (or regulations under) the Corporations Act or the National Credit Act that have not been enacted or made. Where commercial circumstances indicate that it would be prudent and convenient to consider the impact of incoming provisions or regulations before they commence, we will do so. Applications of this kind would be new policy applications: see RG 51.23.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	ASX Limited
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
instrument	Either an ASIC class order or pro forma instrument (or both)
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
RG 92 (for example)	An ASIC regulatory guide (in this example, numbered 92)
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i>

Related information

Headnotes

applications for relief, licensing, disclosure, financial products, securities, extension of time for holding AGM

Regulatory guides

RG 21 *How ASIC charges fees for relief applications*

RG 43 *Financial reports and audit relief*

RG 57 *Notification of rights of review*

RG 92 *Procedural fairness to third parties*

RG 95 *Disclosing entity provisions relief*

RG 103 *Confidentiality and release of information*

RG 108 *No-action letters*

RG 136 *Managed investments: Discretionary powers and closely related schemes*

RG 151 *Fundraising: Discretionary powers*

RG 159 *Takeovers, compulsory acquisitions and substantial holdings*

RG 167 *Licensing: Discretionary powers*

RG 169 *Disclosure: Discretionary powers*

RG 208 *How ASIC charges fees for credit relief applications*

Legislation

ASIC Act s1(2), 11(4), 244A(2)

Corporations Act s111AT, 173(3), 259C(2), 283GA, 340(1), 341, 601JA(3), 601JB(5), 601QA, 602, 655A, 669, 741, 763A, 765A(2), 911A(2)(l), 911A(2)(h), 926A, 951B, 992B, 1020F, 1317D, 1318, 1322, 1437(2), 1442, cl 30(1) of Sch 4, cl 30(2) of Sch 4; Corporations Regulations regs 1.0.02(1), 7.7.11(2), 7.7.11(3), 7.7.11B(1), 7.7.11B(2), 7.7.12(2), 7.7.12(3), 7.7.13(1), 7.7.13A(1), 7.7.13A(2), 7.7.13B(1), 7.7.13B(2), 7.9.15B(1), 7.9.15(B)(2), 7.9.15C(1), 7.9.15C(2), 7.9.19A(2), 7.9.19A(3), 7.9.19B(2), 7.9.19B(3), 7.9.20A(1)(b), 7.9.20A(c), 7.9.20B(2), 7.9.20B(3), 7.9.74A(1), 7.9.74(A)(3),

7.9.74A(4), 7.9.75(4), 7.9.74(5), 7.9.75C(2), 7.9.75C(3), 7.9.75D(2),
7.9.75D(3), 12.8.06(4)

National Credit Act s109, 163, s6 of Sch 1 and Div 5, Pt 12 of Sch 1;
Transitional Act Pt 5 of Sch 2; National Consumer Credit Protection (Fees)
Regulations 2010

SIS Act s328

Cases

Elkington v. Vockbay Pty Ltd (1993) 10 ACSR 785