



ASIC

Australian Securities & Investments Commission

REPORT 81

Overview of decisions on relief applications (April to June 2006)

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About this report

1 ASIC has powers under the *Corporations Act 2001* (the Act) to exempt a person or class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons. This report deals with the use of our exemption and modification powers under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Act.

2 The purpose of the report is to improve the level of transparency and the quality of information available about decisions we make when we are asked to exercise our discretionary powers to grant relief from provisions of the Act.

3 The report covers the period beginning 1 April 2006 and ending 30 June 2006. During this period we decided 744 applications. We granted relief in relation to 647 applications and refused relief in relation to 97 applications.

4 This report does not provide details of every single decision made in that period. It is intended to provide examples of decisions that demonstrate how we have applied our policy in practice. We use our discretions to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit, or where we can facilitate businesses without harming other stakeholders.

5 In this report we have outlined matters in which we refused to exercise our discretionary powers as well as matters in which we granted relief. Prospective applicants for relief may gain a better insight into the factors we take into account in deciding whether to exercise our discretion to grant relief. We have also included some examples of limited situations in which we have been prepared to take a no-action position when instances of non-compliance have been brought to our attention.

6 The appendix to this report details the relief instruments we have executed for matters referred to in the report. Class orders are available from our website via www.asic.gov.au/co. Instruments are published in the ASIC Gazette, which is available via www.asic.gov.au/gazettes. The information releases referred to throughout the report are available via www.asic.gov.au/mr.

7 Applications for relief are assessed by the Applications and Advice division of ASIC's Regulation directorate. Applications must be in writing and should address the requirements set out in Policy Statement 51 *Applications for relief* [PS 51]. Relief applications can be submitted electronically to **applications@asic.gov.au**. More information on applying for relief is available at **www.asic.gov.au/fsrrelief**.

8 Throughout this report, references to particular sections, subsections and paragraphs of the law are references to the *Corporations Act 2001* and references to particular regulations are references to the Corporations Regulations 2001.

Section 1: Licensing relief

1.1 This section outlines some of our decisions on whether to grant relief under s911A(2) and s926A(2) from the requirement to hold an Australian financial services (AFS) licence.

Foreign financial services providers

FFSP registered with US SEC but not incorporated in the US

1.2 We granted licensing relief to a foreign financial services provider (FFSP) incorporated in Belgium but registered with the Securities Exchange Commission (SEC) in the United States (US), which was seeking to offer securities to wholesale clients in Australia. The FFSP could not rely on Class Order [CO 03/1100] *US SEC regulated financial service providers* because it was not incorporated in the US. Relief was granted on the basis that, even though the FFSP was not incorporated in the US, the SEC did not regulate the FFSP any differently to US-incorporated advisers. Further, the only staff offering services in Australia were those operating under the FFSP's SEC registration.

Employee share schemes

Foreign quoted instruments representing ordinary shares

1.3 We granted licensing relief to the operator of an employee share scheme for the offer and issue of options and shares in 2005 and the proposed offer of ordinary shares in 2006. The operator could not rely on Class Order [CO 03/184] *Employee share schemes* because the ordinary shares were not quoted on an approved foreign exchange, as required under [CO 03/184]—rather, due to restrictions under Dutch law, bearer depository receipts (BDRs) were. We considered that the schemes met our policy because the BDRs, for these purposes, represented the ordinary shares in the operator. Relief was based on [CO 03/184].

Other licensing relief

Specialist credit card institution providing bill processing services

1.4 We granted licensing relief to a specialist credit card institution seeking to expand its business activities to include processing services for billers to handle direct debits and BPAY transactions. We considered the operation to be a non-cash payment facility. We considered the requirement to hold an AFS licence for this facility to be disproportionately burdensome to the specialist

credit card institution, given it was regulated by the Australian Prudential Regulation Authority (APRA), the Reserve Bank of Australia (in relation to its exchange settlement accounts) and other payments system regulations and protocols.

Intermediaries arranging to deal in equity finance mortgages

1.5 We refused to declare that equity finance mortgage (EFM) products were not financial products. However, we granted conditional relief to intermediaries from the need to hold an AFS licence for arranging to deal in the financing and distribution of those EFMs. The EFM allowed a person to borrow money to purchase property without having to pay the lender any money until the property was sold—with the repayment amount dependent on the capital gain or loss from the sale of the property. Although a credit provider is exempt from certain limited activities under the Act, an intermediary would need to be licensed to offer this product. We granted relief on condition the intermediary provide access to an effective dispute resolution process and enhanced ongoing disclosure to ensure investors understood the nature of the product. We also granted relief from certain licensee obligations that would otherwise apply in Part 7.6.

Financial services provided to entities within a group

1.6 We granted relief to a wholly owned subsidiary of a government-owned corporation, which held shares on behalf of a state government from the need to hold an AFS licence. The wholly owned subsidiary only provided financial services to the state government. Relief was granted on the basis that:

- the relationship between the entities was akin to a financial service provided within a corporate group;
- potential consumer detriment was low; and
- the cost of compliance was disproportionately burdensome.

Guernsey foreign collective investment schemes

1.7 We granted licensing relief to a Guernsey-based operator of foreign collective investment schemes so that it could offer interests to Australian investors. The relief was granted because, in accordance with Policy Statement 178 *Foreign collective investment schemes* [PS 178], the financial services laws in Guernsey are, and continue to be, sufficiently equivalent to the Australian regulatory regime.

Restructure of superannuation fund resulting in the issue of a new financial product

1.8 We granted licensing relief to the trustee of a closed superannuation scheme for the issue of a new financial product after a restructure resulted in the scheme no longer being regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS Act). The new arrangements resulted in a facility through which a person managed a financial risk (s763C), and the scheme was therefore a financial product. We granted licensing relief on the basis that the conduct that required relief only involved the initial issue of the facility in a closed scheme with less than 30 members. We considered that to require an AFS licence for this limited purpose would provide limited benefit, given the cost and administrative burden involved.

Certain card facilities given more time to comply with [CO 05/738]

1.9 We granted relief to the operator of a number of gift card facilities and its franchises to enable it to rely on licensing relief similar to relief provided under Class Order [CO 05/738] *Gift facilities*. The operator had significant stockpiles of cards and could not comply in a cost-effective way with a condition of [CO 05/738] requiring it, from 1 June 2006, to prominently set out the expiry date on the card in a manner that makes it clear that there is an expiry date. We considered gift card facilities to be well understood products and that strict compliance with the condition by the deadline specified in [CO 05/738] would be unreasonably burdensome. The relief extended the deadline for prominently displaying the expiry date until 1 September 2006.

Media and information releases

1.10 The following media and information releases relate to the licensing relief granted during the period of this report.

Media and information releases

[MR 06-115] *ASIC helps consumers understand reverse mortgages and home reversion schemes.*

[IR 06-13] *ASIC guidance on use of administrative powers in enforcing financial services laws.*

[IR 06-19] *Further extension of interim relief for actuaries and general insurers.*

Section 2: Disclosure relief

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

Relief relating to prospectuses

Consent to include ratings of debt products

2.2 We refused to grant relief to the issuer of a stapled security from the requirement in s716(2) and s1013K(1) to obtain consent before including certain statements in a prospectus or PDS. The issuer wanted to include the product rating of a product other than the one being offered under the disclosure document. We refused to grant relief on the basis that the other product, and therefore its rating, was not directly relevant to the offer of the stapled security. Our general policy for granting relief from this requirement only extends to citations for products being offered under that particular disclosure document.

On-sale relief for shares sold by a controller

2.3 We granted relief to the controller of a company listed on the Australian Stock Exchange (ASX) so that it could rely on the exemption in s708A (on-sale disclosure exemption). Unmodified, the provision exempts a person from the need to provide a prospectus where the security is on-sold within 12 months. The controller could not rely on this on-sale disclosure exemption because it does not cover on-sales by a controller. Relief was conditional on both the controller and the ASX-listed company providing a notice containing certain information to the market. We considered that relief did not offend the legislative intent behind the on-sale disclosure exemptions, i.e. to give investors reasonable access to information equivalent to that otherwise contained in a disclosure document.

Prospectus and on-sale relief for a UK scheme of arrangement

2.4 We granted prospectus and on-sale disclosure relief to a company incorporated in the United Kingdom (UK) for the issue, and subsequent on-sale within 12 months, of securities to persons in Australia under a UK scheme of arrangement. The relief was granted in accordance with our proposed policy in Policy Proposal Paper *Disclosure in reconstructions* (July 2005). We considered that relief was appropriate as the offer was made under a UK scheme of arrangement, the regulation of which has the same essential characteristics as Australian schemes of arrangement under Part 5.1 of the Act.

The relief was analogous to that given in relation to Australian schemes of arrangement in s708(17) and Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products*.

Relief relating to PDSs

Restructure of superannuation scheme resulting in the issue of a new financial product

2.5 In the matter referred to at paragraph 1.8, we refused to grant general relief to the trustee from the need to provide a PDS. We considered that the PDS would ensure that members of the superannuation scheme would receive sufficient information to make a decision whether to agree to the restructure of the scheme. We were willing to consider more specific exemptions to accommodate the process required under the SIS Act and by APRA for the issue of the new financial product.

Using the same PDS for a new offer of financial products in the same class

2.6 We refused to grant relief to the responsible entity of a scheme from the need to provide a PDS in relation to the on-sale of interests as a result of a proposed placement to wholesale investors. The scheme sought to raise funds to acquire assets in Poland. The responsible entity had issued PDSs for other offers of the same class of financial products in the last six months to acquire property, but in other jurisdictions. The responsible entity submitted that the information in the PDSs was current and that the scheme was subject to continuous disclosure on the ASX. We refused relief on the basis that there was clear regulatory intent that disclosure must be provided in those circumstances and we were not satisfied the regulatory burden was disproportionate to the regulatory benefit.

PDS may be given more than three months after successor fund transfer

2.7 We granted relief to the trustee of a superannuation fund from s1012F(b) and s1012I(1) to allow the trustee to give a PDS to members and employers more than three months after the date of a successor fund transfer. On the date of transfer, members would be placed in a special division of the new superannuation fund, which replicated a member's position in the old fund. Members were only later integrated into the new fund. We were satisfied that the transfer to the special division would not warrant a PDS at that time, particularly given that members and standard employer sponsors (SEs) would receive a PDS on the date of integration into the new fund, which was due to occur shortly after the transfer. The relief was subject to conditions that:

- a member would hold identical rights, benefits and entitlements in the special division as in their old fund;
- all SESs and members had received all the information required to be in a PDS prior to the transfer date; and
- the trustee disclosed on its website that this information had been provided.

We were unwilling to extend relief beyond the date of integration into the new fund because we considered the integration date to be the time an SES must make a decision about whether to remain as an SES of the new fund.

Relief relating to FSGs

FSG intermediaries arranging to deal in equity finance mortgages

2.8 In the matter referred to at paragraph 1.5 we granted relief from the need to provide an FSG for this financial service.

Combined PDS and FSG not allowed where secondary service is not integral to the offer

2.9 We refused to grant relief to the operator of a liquidity facility from the obligation to issue a separate FSG for the facility. Interest holders in a stapled structure would be able to sell their unlisted interests through the facility. We refused relief because interest holders were not bound to use the facility. We considered that combining the PDS (for the offer) and the FSG (in relation to the facility) might confuse investors into believing they had no choice but to use that particular facility, and that the service was an integral part of the offer under the PDS when it was not.

Other disclosure relief

Foreign quoted instruments representing ordinary shares

2.10 In the matter referred to at paragraph 1.3, we granted conditional relief to the provider of an employee share scheme from the disclosure provisions in Part 7.9 of the Act for the offer and issue of options and shares in 2005 and the proposed offer of ordinary shares in 2006. The form of relief was based on Class Order [CO 03/184] *Employee share schemes* but did not extend to past conduct.

Specialist credit card institution providing bill processing services

2.11 In the matter referred to at paragraph 1.4, we refused to grant disclosure relief to a specialist credit card institution seeking to provide direct debit and

BPAY processing services for billers. The specialist credit card institution would be required to provide a PDS to a small business biller when offering the service to them and to comply with the confirmation rules (s1017F) and dispute resolution requirements for unlicensed product issuers (s1017G). We considered that compliance with these statutory obligations was essential to allow billers to make informed decisions.

Guernsey foreign collective investment schemes

2.12 In the matter referred to at paragraph 1.7, we also granted relief to the operator from the disclosure requirements in Part 7.9 of the Act. We were satisfied that Guernsey's disclosure regime was sufficiently equivalent to Australia's disclosure regime.

Certain card facilities given more time to comply with [CO 05/738]

2.13 In the matter referred to at paragraph 1.9, we also granted the operator of the gift card facilities and its franchises disclosure relief similar to that under Class Order [CO 05/738] *Gift facilities*. The relief provided an extension of time, until 1 September 2006, for the operator to comply with all of the conditions of the relief under [CO 05/738].

Consent relief for ratings statement for offer of hybrid product

2.14 We granted the responsible entity of a registered scheme relief from s1012K to allow it to quote credit ratings in a PDS without the consent of the ratings agency in relation to an offer of preferred units (a type of convertible hybrid instrument). The proceeds of the offer were to be on-lent to the responsible entity's parent company, a large bank, in consideration for the bank issuing notes to the responsible entity for the scheme. The preferred units exhibited the characteristics of a debt instrument because distributions to preferred unit holders were directly funded from interest payments by the bank to the responsible entity in respect of the notes. We granted conditional relief on the basis that the relief sought was within our policy in Draft Practice Note 55 *Disclosure documents and PDS: consent to quote* [PN 55]. Relief facilitated the inclusion of material information where it was impractical for the issuer to obtain consent from a major ratings agency.

Eligible application relief where additional interests are purchased

2.15 We granted the responsible entity of a number of schemes conditional relief so that it could issue interests to existing members of a scheme without receiving an eligible application required under s1016A(2)(a) and s1016E. Class Order [CO 02/262] *Applications to switch managed investment products* only applies where a member withdraws from a scheme and uses those proceeds to invest in another scheme of the responsible entity. In this case, the

responsible entity sought relief so that an investor could make an investment in another scheme operated by the responsible entity without the member divesting himself/herself of their original investment. The relief enabled an investor to purchase additional interests without lodging an eligible application. The decision was based on the same policy rationale as in superseded Class Order [CO 00/217] *Additional investment applications*. Relief was conditional on the investor having received a copy of the most up-to-date version of the PDS when making their investment.

Condition about ability to trade on a financial market

2.16 We refused to grant relief to the responsible entity of a registered scheme to modify s1016D(2) so that it could issue interests in the scheme more than three months after the date of the PDS. The PDS stated that interests in the scheme would be listed on a financial market. The responsible entity did not intend offering subscribers a right to withdraw their application during the extended period sought. Although the PDS stated that the interests would only be issued after certain conditions precedent were met, a specific time frame was not nominated. We were not convinced that the circumstances were so unique or unusual as to justify departure from legislative protections. The listing condition deadline and one-month withdrawal period were important investor protections that we considered should not be reduced in order to ameliorate the responsible entity's commercial risks.

2.17 However, we granted relief to the responsible entity of two stapled schemes from s1016D and s1016E in different circumstances. The responsible entity had applied for relief before the PDS had been lodged and before any offer of interests had been made. The ability for the interests to be able to be traded on a financial market was dependent on outstanding conditions precedent being necessary approvals of a local government agency and outside the control of the applicant. The conditions precedent were to be met by a specified date (less than three weeks after the statutory time limit), otherwise all application monies would be returned to any subscribers to the offer. The relief was given on condition that:

- the PDS prominently disclose the date when all conditions precedent were required to have been met;
- the stapled schemes were benefiting from ASIC relief; and
- application monies would be returned if the conditions precedent were not met by that date.

Verbally providing information of issuer's name and contact details

2.18 We refused to grant relief to an insurance company from the need to verbally provide the name and contact details of the issuer (s1012G) where the customer instigates contact, requires the issue of a general insurance product immediately, and it is not practicable to provide the customer with a PDS before they make their decision. We considered that this information is important and should, at minimum, be orally communicated to a customer because customers might think a product is to be issued by a particular issuer when, in fact, the product is issued by another provider. We were not satisfied that the obligation was unduly burdensome.

Enhanced fee disclosure in a superannuation PDS

2.19 We refused to grant relief to the trustee of a superannuation fund from the enhanced fee disclosure regulations. The trustee submitted that its clients (other superannuation trustees), although characterised as retail clients under the Act, were professional investors, and compliance with the requirement would be confusing and impracticable given that many of its investments were in offshore funds with varying fee structures. ASIC was not persuaded that the trustee had shown there were atypical or unforeseen circumstances resulting in unintended consequences.

Use of percentages in periodic statements for legacy products

2.20 We granted interim relief to the responsible entity of a number of schemes from s1017D(5A) so that the responsible entity could continue to express the return on investment for the schemes' periodic statements as a percentage, rather than in dollar amounts. The matter concerned legacy schemes that were closed to new members and involved a significant amount of funds under management. Without relief, immediate compliance with the dollar disclosure requirements would have been unreasonably burdensome, particularly because it related to a small proportion of the total schemes operated by the responsible entity but resulted in a significant cost due to its outmoded computer systems. The relief was within our policy in Policy Statement 182 *Dollar disclosure* [PS 182]. In the interim, the responsible entity was required to provide dollar amounts at the specific request of a scheme member.

UK scheme of arrangement involving unsolicited offers to purchase

2.21 We granted relief for the avoidance of doubt to an FFSP from the provisions regulating unsolicited off-market offers to purchase financial products (Division 5A of Part 7.9) in relation to a UK scheme of arrangement. The FFSP could not rely on Class Order [CO 05/850] *Unsolicited offers under a regulated foreign takeover bid* because the class order did not extend to

foreign schemes of arrangement. Despite this, we considered the UK scheme of arrangement provisions to be sufficiently similar to the scheme of arrangement provisions in Part 5.1 of the Act, and granted relief based on the same underlying policy objectives.

Use of offer information statement for half-yearly accounts

2.22 We granted relief to a company from s715(2) to allow it to issue an offer information statement (OIS). The company did not otherwise qualify for using an OIS because its financial reporting balance date did not occur within six months before the securities were to be first offered under the statement. A condition of the relief was that the OIS contained various full-year and half-year financial reports prepared and audited in accordance with either Australian Generally Accepted Accounting Principles or Australian International Financial Reporting Standards (AIFRS), as appropriate.

Extension of time to lodge a cleansing notice with the ASX

2.23 We granted relief to an issuer of securities from s708A(6)(a) so that the date for giving a notice to the relevant market operator under that provision extended from five business days to 10 business days. The company gave its notice to the ASX more than five business days after it had made a placement of shares and options to investors. We considered it appropriate to grant relief in these circumstances, given that the issuer's securities were subject to a trading halt for a number of days after the placement and investors had not traded in the company's securities from the date of the placement up until the date of the notice. No sale offer was made during that time. Further, the issuer did not appear to have withheld material information from the market. It had also immediately lodged the notice once it realised that it had inadvertently failed to comply with lodgement.

Information releases and class order

2.24 The following information releases and class order relate to the disclosure relief granted during the period of this report.

Information releases

[IR 06-20] *ASIC helps to simplify disclosure for deposit products.*

[IR 06-22] *Interim relief extended for superannuation investment strategy product disclosure.*

Class order

[CO 06/538] *Relief from enhanced disclosures in exit statements.*

Section 3: Managed investments relief

3.1 This section sets out some of the circumstances in which we have granted or refused relief under s601QA from the provisions of Chapter 5C.

Registration requirement

Intermediaries arranging to deal in equity finance mortgages

3.2 In the matter referred to at paragraph 1.5, we granted technical relief to the provider from the need to register the EFMs as managed investment schemes.

Guernsey-operated foreign collective investment scheme

3.3 In the matter referred to at paragraph 1.7, we also granted relief to the operator from the need to register the foreign collective investment scheme as a managed investment scheme.

Other managed investments relief

Differential treatment by cashing out foreign unit holders

3.4 In the matter referred to in paragraph 2.14, we also granted relief to the responsible entity from the requirement under s601FC(1)(d) to treat foreign unit holders equally to Australian unit holders. We granted relief so that the responsible entity could cash out any foreign unit holder where a conversion or exchange event occurred and compliance with the laws of the foreign jurisdiction in relation to the issue of financial products on conversion or exchange would not be disproportionately burdensome.

3.5 In the same matter, we also granted relief from the withdrawal provisions in s601GA(4) and Part 5C.6. Relief was granted for the avoidance of doubt because there was uncertainty as to whether Part 5C.6 applied to the scheme. The formal withdrawal offer protections in Part 5C.6 only apply to non-liquid schemes. The assets of the scheme were solely comprised of the notes issued by the bank. These notes may or may not have been 'debentures' (and therefore may or may not have been 'marketable securities', creating uncertainty as to whether the scheme was 'liquid' or 'non-liquid' for the purposes of Pt 5C.6). There was the additional uncertainty whether Part 5C.6 applied in any event because of the compulsory nature of the conversion and exchange features, which would have been triggered on the happening of certain prescribed events and would have applied to all scheme members. The relief was granted on the basis that there was no policy mischief in the proposed withdrawal procedures for the scheme.

Discounted interests issued to an associate of the responsible entity

3.6 We granted conditional relief to the responsible entity of a registered scheme from the notional s601GAA(2)(b) inserted into the Act by Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests*. The responsible entity wanted to issue discounted interests in a placement to associates that would acquire and hold those interests in a fiduciary capacity. We granted relief on the condition that the relevant associate's proportionate holding in the scheme did not increase as a result of the placement.

Posting of withdrawal offers on the Internet

3.7 We refused to grant relief to the responsible entity of a non-liquid registered scheme from the requirement in s601KB(2), which requires withdrawal offers to be made in writing to scheme members. The responsible entity wanted to post withdrawal offers on its website that, according to the PDS, would be offered every three months. We were concerned that a client might not be aware of offers being posted or might forget how and when offers would be posted.

Removal of minority restriction condition for foreign collective investment schemes

3.8 We granted relief to the responsible entities of several registered schemes from the minority restriction condition—i.e. the need to ensure that investing scheme property in foreign collective investment schemes (FCISs) only represents a minority of interests before investing in an FCIS listed on an approved foreign exchange. We had previously granted relief from s601FC(4) so that the responsible entities could invest in foreign unregistered FCISs, provided they observed the minority restriction condition. We deleted that condition because the applicants' submissions were persuasive about the practical difficulties, cost and delay caused by having to meet this condition, and the fact that listing itself provided an anti-avoidance mechanism the condition was designed to achieve. The jurisdictions that we will consider removing the minority restriction condition for include Japan, Hong Kong, Singapore and the US.

Section 4: Mergers and acquisitions relief

4.1 This section outlines some of the circumstances in which we have granted or refused relief under s655A from the provisions of Chapter 6.

Downstream acquisition of a relevant interest

4.2 We refused to grant a company relief from s606 to facilitate its acquisition of relevant interests in two listed ‘downstream’ entities as part of a restructure transaction. The company was proposing to acquire the interests in the downstream entities as a result of its merger with an unlisted entity that held the interests in the downstream entities. We refused to grant relief under our downstream acquisition policy in Policy Statement 71 *Downstream acquisitions* [PS 71] because the merger was not being conducted by way of a takeover bid or a similarly regulated procedure. Further, the upstream entity was not listed. We also refused to accept submissions that relief should be granted because ‘effective control’ over the downstream entities would not change as a result of the merger. The company submitted that ‘effective control’ did not change, even though none of the existing controllers of the downstream entities would have more than 20 per cent voting power individually in those entities after the merger. We did not accept that this new concept of control should be used as a basis for relief.

Institutional acceptance facility relief

4.3 We granted relief so that a bidder, when calculating its voting power in a target for the purposes of s624(2), could include acceptances received under an institutional acceptance facility. Section 624(2)(b) of the Act provides an automatic 14-day extension of time to the offer period during a takeover bid if a bidder’s voting power in the target reaches 50 per cent within the last seven days of the offer period. A bidder does not generally obtain voting power in the securities accepted through an institutional acceptance facility. Therefore, without relief, such acceptances would be excluded from being accumulated with ordinary acceptances for the purposes of s624(2). We considered that relief was appropriate to address the risk that the bid could fall away if the automatic extension was not triggered, even though the majority of shareholders had indicated their intention to accept the bid. We did not grant this relief until we became satisfied it would be needed.

Withdrawal rights relief

4.4 We granted relief to allow a bidder to offer target shareholders the opportunity to withdraw prior acceptances under the takeover offer. Without relief, s654A(1) would prevent a bidder from offering withdrawal rights because the provision places a limit on a bidder disposing bid class securities

during the bid period. The withdrawal rights offered by the bidder were provided as a consequence of an undertaking provided to, and accepted by, the Takeovers Panel. We considered that the relief did not undermine the policy behind the disposal prohibition in s654A(1)—i.e. to prevent market manipulation by the bidder.

Bidder obtaining a relevant interest in target company's shares

4.5 We refused to modify s606 to permit a bidder, upon acquiring seed options in its target, to obtain a relevant interest in the target's securities upon the exercise of the option. The requested relief fell outside our policy in Policy Statement 159 *Takeovers, compulsory acquisitions and substantial holdings* [PS 159]. If granted, the relief would have left shareholders in the target with insufficient time to contemplate the offer with the benefit of the proposed new information. We considered that the onus was on the bidder to make earlier arrangements for the acquisition of options and preferably through a simultaneous bid.

Extension of time before target statement needs to be lodged

4.6 We extended the time for a target company in an on-market bid to lodge its target statement under Item 10 of s635 by 11 days. We considered this relief to be within our policy in [PS 159]. Relief was granted because of (among other factors) the time needed to procure a mandatory independent expert's report and the time lost because of the announcement of the bid being made the day before a long weekend.

Relief so that escrow agreements not considered a relevant interest

4.7 We granted a company relief from s609 and Part 6C.1 so that it did not acquire a relevant interest in its own securities (escrowed securities) as a result of escrow agreements between the company and various security holders of those securities. However, we did not grant the company relief from the requirement to lodge substantial holding notices. The escrow agreements:

- restricted disposal of, but not the exercise of, voting rights attaching to the escrowed securities;
- terminated no more than 24 months after the earliest date on which the company and the security holders entered into the agreements; and
- allowed the security holders to accept into a takeover bid or to be transferred or cancelled as part of a merger by scheme of arrangement.

The relief was granted in accordance with Section Q of [PS 159].

4.8 In another matter, we granted similar relief to a company and a responsible entity of a managed investment scheme that were issuing stapled securities so that the escrow agreements between them with various security holders did not result in the company and responsible entity holding relevant interests in the stapled securities.

Section 5: Conduct relief

5.1 This section outlines some of our decisions on whether to grant relief from certain conduct obligations imposed by Chapters 2D, 2M and 7 of the Act.

Financial service provider requirements

Relief from the hawking provisions

5.2 In the matters referred to at paragraphs 1.3, 1.5 and 1.9 we also granted relief from the hawking provisions in s992A and/or s992AA.

'Carrying on a business' in Australia is a question of fact

5.3 We refused to grant a no-action letter to two foreign entities for failing to, or from needing to, be registered as foreign companies under s601CD. The foreign entities and another entity (third partner) formed a limited partnership in Australia. They submitted that the partnership was only involved in borrowing funds from an Australian branch of a foreign bank to acquire shares in the third partner's local subsidiary, and therefore it was not 'carrying on a business' in Australia by virtue of it maintaining an office in Victoria. We refused to grant relief because whether the partnership was carrying on a business was a question of fact. ASIC does not have the power to exempt a foreign company from the registration requirement.

Anti-hawking provision is specific to unsolicited telephone call situations

5.4 We refused to grant relief to a general insurer from s992A(3)(c) (anti-hawking provision), which requires the offeror of a financial product to give a person a PDS before issuing the financial product. We did not accept the insurer's argument that the provision contradicts the exemption in s1012G, which allows an issuer to give a PDS after issuing the product in certain situations. We considered that the anti-hawking provision specifically applies to unsolicited telephone call situations while s1012G is far more generic. Further, the cooling off provisions in the Act are clearly intended to provide additional consumer protection, rather than a substitution for the anti-hawking provision.

Financial reporting and auditor requirements

Financial reporting relief for newly formed foreign licensee

5.5 We extended the period before a Singapore-based AFS licensee was required to lodge its first financial year reports under Division 6 of Part 7.8 of the Act. Relief only applied for the licensee's first financial year on the basis

that, for its first financial year, the licensee would lodge its financial statements with ASIC and with its corporate regulator in Singapore by May 2007. We granted relief because the licensee, as a newly formed company, was unable to rely on the relief that would otherwise have been available to it as a foreign licensee under Class Order [CO 06/68] *Conditional relief for foreign licensees from financial reporting and record keeping obligations*. We did not think that being a newly formed company should prevent it from being able to rely on the financial reporting relief normally available to foreign licensees.

Auditor seeking to service same firm for five successive years

5.6 We refused to grant an auditor relief from the rotation obligation in s324DA(1)(a). The auditor was proposing to play a significant role in the audit of a listed company for five successive financial years. We were not satisfied that the application was within our proposed policy as set out in Policy proposal paper *Auditor rotation* (April 2006). In particular, we were not satisfied that:

- Part 2M.4 imposed an unreasonable burden on the auditor, the audit firm, or the client;
- the auditor was the only auditor in the audit firm having specialist knowledge about the company sufficient to justify granting relief;
- there were no other auditors in the audit firm who were sufficiently qualified to undertake the audit role; or
- the adoption of AIFRS and certain complex transactions imposed an unreasonable burden.

Disclosure of comparative financial accounts

5.7 We refused to grant a company relief from s295(2) in relation to the requirement to present comparative financial information in its financial reports under Australian Accounting Standards Board 101 *Presentation of Financial Statements* (AASB 101). The company had undergone a significant restructure after its recent acquisition. The company argued that, due to the restructure, the comparative information was inappropriate and the cost and difficulties associated with the preparation of the information were unreasonably burdensome. We refused to provide relief on the basis that:

- we were not satisfied that the comparative information would be inappropriate or misleading if prepared in accordance with AASB 101;
- there may be persons using the financial reports who would be interested in the comparative information to the extent that it provides information on the performance of continuing businesses, the

performance of management and the impact of management decisions regarding the business; and

- we did not consider it unreasonably burdensome on the company to comply with the requirement when weighed against the benefits of the requiring such information.

Annual company report disclosing directors' interests in a scheme

5.8 We refused to grant a company relief from s300(11)(b) in relation to disclosing, in its annual financial report, directors' interests in a cash management trust (CMT) operated by the company as a responsible entity. The company submitted that the inclusion of the information would be misleading because a CMT was equivalent to a bank account and the directors' interests in the CMT were subject to constant change. We refused to grant relief on the basis that the company did not show that compliance with the obligation was unreasonably burdensome. Further, we did not consider a CMT to be equivalent to a bank account, particularly since the relevant accounting standard would have otherwise required a similar, if not higher, level of disclosure for bank accounts held by directors.

Financial reporting relief for parties to a deed of cross guarantee

5.9 We granted relief to wholly owned entities that are members of a group of companies who had entered into a deed of cross guarantee from the preparation, lodgement and auditing requirements in Chapter 2M. The relief granted was on similar terms as that provided by Class Order [CO 98/1418] *Wholly owned entities*. The companies in this case were not able to satisfy all of the conditions of [CO 98/1418] as the holding entity had only recently incorporated and therefore did not have the requisite three-year compliance history required by paragraph (p) of [CO 98/1418] and by the definition of 'certificate' used in [CO 98/1418] and related pro-forma deeds of cross guarantee. We granted relief because all the subsidiaries had demonstrated a good compliance history and because the same personnel that were responsible for the preparation and lodgement of the subsidiaries' financial accounts would also be responsible for preparing and lodging the holding entity's financial reports.

Media and information releases and class order

5.10 The following media and information releases and class order relate to the conduct relief granted during the period of this report.

Media and information releases

[MR 06-111] *ASIC hosts roundtable of independent audit regulators.*

[MR 06-121] *Discussion paper on managing conflicts of interest.*

[IR 06-11] *ASIC seeks comments on proposed auditor rotation policy.*

[IR 06-17] *ASIC welcomes new auditing standards.*

[IR 06-21] *Transitional compensation arrangements extended for AFS licensees.*

Class order

[CO 06/495] *Extension of transitional compensation arrangements.*

Section 6: Other relief

6.1 This section outlines some of the decisions we have made that do not fall within any of the categories mentioned earlier and that may be significant to other participants in the financial services and capital markets industries.

Treating certain debts as not being ‘excluded assets’ under [PS 166]

6.2 We allowed an AFS licensee to treat various debts owed by it as not being ‘excluded assets’ in accordance with Policy Statement 166 *Licensing: Financial requirements* [PS 166] at [PS 166.171]. The transactions were covered by an unlimited guarantee from the parent entity. We were satisfied that restructuring the licensee’s business so the debts would be ‘excluded assets’ would be disproportionately burdensome.

Non-recurring funds transfer via an overseas intermediary

6.3 We refused to make a declaration under s765A(2) that a company’s remittance service was not a financial product under Chapter 7 of the Act. The company intended to offer a ‘one-off funds transfer’ service so an Australian retail client could transfer money to recipients overseas via an associated Nepalese body corporate (the intermediary) by using the conventional Australian banking system (the remittance service). We considered the remittance service was intended to be a financial product and therefore regulated under Chapter 7. We considered that the company could not rely on the statutory exemption, which classifies certain electronic funds transfers as not a financial product (reg 7.1.07G), because it could not establish that it was ‘an operator of a payment system’.

Liability from breach remains with former responsible entity

6.4 We refused to issue a no-action letter to the former responsible entity of a registered scheme for failing to comply with s319, which requires a registered scheme to lodge financial reports for a financial year within three months of the end of that financial year. The former responsible entity failed to comply with s319 in the previous two financial years and, soon after, the scheme changed responsible entities. The scheme’s constitution did not allow the former responsible entity to be indemnified out of scheme property in relation to any apparent breach of s319. The former responsible entity failed to show there was doubt over whether conduct was lawful, in accordance with Policy Statement 108 *No-action letters* [PS 108].

Indirect self-acquisition by investment fund

6.5 We granted conditional relief to an Australian deposit-taking institution (ADI) from s259C(1) so that its controlled entities could hold shares in the ADI. The relief applied to an offer of preferred interests in a wholly owned subsidiary of the ADI, where preferred interests would have the potential to be converted or exchanged into securities in the ADI. Without relief, s259C would operate to void the issues of securities in the ADI upon a conversion or exchange of the preferred interests. Relief was granted on the basis that it was consistent with our policy as set out in the Policy proposal paper *Indirect self acquisition by investment funds* (October 1998). The instrument is due to sunset 12 months after the date of execution.

Media release

6.6 The following media release relates to other relief granted during the period of this report.

Media release

[MR 06-129] *New calculator helps consumers consider risk.*

Appendix: ASIC relief instruments

This table lists the relief instruments we have executed for matters that are referred to in the report. The class orders are available from our website via www.asic.gov.au/co. The instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes.

Note that references in the table to particular provisions of the law are references to the *Corporations Act 2001* and references to particular regulations are references to the *Corporations Regulations 2001*.

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
1.2	Houlihan Rovers SA (a body incorporated in Belgium)	[06/0283] (in 15/06)	10/04/2006	s911A(2)(l) This instrument grants relief to allow an FFSP to provide financial services to wholesale clients without an AFS licence where the FFSP is not incorporated in the US but is regulated by the US SEC.	
1.3 2.10 5.2	ING Groep NV (a body incorporated in the Netherlands)	[06/0272] (in 14/06)	06/04/2006	s601QA(1)(a), s741(1)(a), s911A(2)(l), s992B(1)(a) and s1020F(1)(a) This instrument exempts the operator of an employee share scheme from the licensing, disclosure, conduct and managed investment scheme provisions.	
1.4	Moneyswitch Limited (ACN 103 575 042)	[06/0270] (in 14/06)	06/04/2006	s911A(2)(l) This instrument exempts a specialist credit card institution from the need to hold an AFS licence in relation to the provision of its processing services for billers to handle direct debits and BPAY transactions.	

OVERVIEW OF DECISIONS ON RELIEF APPLICATIONS

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
1.5 2.8 3.2 5.2	Croesus Capital Limited (ACN 110 587 034) and Rismark International Funds Management Limited (ACN 114 530 139)	[06/0265] (in 14/06)	03/04/2006	s601QA(1)(a), s911A(2)(l), s951B(1)(a), s992B(1)(a) This instrument grants relief to allow an intermediary to arrange to deal in the financing and distribution of certain equity fund mortgages.	
1.6	QBF No. 1 Pty Limited (ACN 051 675 033)	[06/0280] (in 15/06)	11/04/2006	s911A(2)(l) This instrument exempts a wholly owned subsidiary from the need to hold an AFS licence in relation to the provision of financial services to the state government.	
1.7 2.12 3.3	The International Mutual Fund PCC Limited (ACN 117 924 875)	[06/0370] (in 20/06)	10/05/2006	s601QA(1)(a), 911A(2)(l) and 1020F(1)(a) This instrument grants licensing, disclosure and managed investment scheme relief to allow a Guernsey entity to offer its foreign collective investment schemes to Australian investors.	
1.8	Curtin University of Technology (ABN 99 143 842 569)	[06/0304] (in 16/06)	21/04/2006	s911A(2)(l) This instrument gives licensing relief to a superannuation trustee in relation to the issue of a new financial product as a result of a restructure of the superannuation fund.	

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
1.9 2.13 5.2	Woolworths Limited (ACN 000 014 675)	[06/0435] (in 21/06)	25/05/2006	s911A(2)(l), s992B(1)(a) and 1020F(1)(a) This instrument extends licensing, conduct and disclosure relief so that the operator of the gift card facilities does not need to comply with Class Order [CO 05/738] <i>Gift facilities</i> until 1 September 2006.	01/09/2006
1.9 2.13 5.2	Derni Pty Limited (ACN 002 263 872) and Harvey Norman Holdings Limited (ACN 003 237 545)	[06/0502] (in 24/06)	15/06/2006	s911A(2)(l), s992B(1)(a) and 1020F(1)(a) This instrument extends licensing, conduct and disclosure relief so that the operator of the gift card facilities does not need to comply with Class Order [CO 05/738] <i>Gift facilities</i> until 1 September 2006.	01/09/2006
2.3	Oceana Gold Limited (ACN 107 488 200)	[06/0389] (in 20/06)	17/05/2006	s741(1)(b) This instrument grants relief to allow the controller of an ASX-listed company to benefit from the use of notices under s708A in connection with on-sale of securities.	
2.4	New CST plc and Collins Stewart Securities plc (both entities incorporated in the UK)	[06/0395] (in 21/06)	15/05/2006	s741(1)(a) This instrument exempts the issuer from the disclosure requirements of Parts 6D.2 and 6D.3 and modifies the on-sale provisions in s707 in relation to shares issued by two UK companies pursuant to a scheme of arrangement conducted under UK legislation.	

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
2.7	Savings Australia Pty Limited (ACN 006 457 987)	[06/0539] (in 26/06)	26/06/2006	s1020F(1)(a) This instrument permits the trustee of the superannuation fund to defer giving an employer PDS under s1012I(1) and a member PDS under s1012F(b) in particular circumstances of its merger with another superannuation fund.	
2.14	Westpac Funds Management Limited (ACN 085 352 405)	[06/0359] (in 19/06)	10/05/2006	s1020F(1)(a) This instrument grants relief to a responsible entity of a registered scheme from the need to quote credit ratings in a PDS without the need to obtain consent from the relevant credit rating agency.	
2.15	Platinum Asset Management Limited (ACN 063 565 006)	[06/0412] (in 21/06)	17/03/2006	s1020F(1)(a) This instrument gives relief to the responsible entity from the need to receive eligible applications where a member seeks to purchase additional interests in another scheme operated by the same responsible entity.	
2.17	RiverCity Motorway Management Limited (ACN 117 343 361)	[06/0503] (in 24/06)	09/06/2006	s1020F(1)(c) This instrument extends the statutory period of time that the responsible entity of two trusts, which are stapled to each other, can take before the units in the stapled trusts need to be tradeable on a prescribed financial market.	

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
2.20	Colonial First State Investments Limited (ACN 002 348 352)	[06/0393] (in 21/06)	12/05/2006	reg 7.9.74A(3) This instrument gives relief to a responsible entity from the need to disclose certain information, in dollar amounts, in relation the schemes' periodic statements for the period ending 31 August 2006.	
2.21	BOC Group PLC (a body incorporated in the UK) and Linde AG (a body incorporated in Germany)	[06/0504] (in 24/06)	15/06/2006	s1020F(1)(a) This instrument grants relief, for the avoidance of doubt, to an FFSP from the provisions regulating unsolicited offers to purchase products off-market in relation to a UK scheme of arrangement.	
2.22	Jab Technologies Limited (ACN 087 426 953)	[06/0652] (in 31/06)	15/05/2006	s741(1) This instrument grants relief to a company to allow it to issue an offer information statement, notwithstanding that it could not satisfy s715(2)(a).	
2.23	Pan Australian Resources Limited (ACN 011 065 160)	[06/0624] (in 29/06)	17/08/2006	s741(1)(b) This instrument grants relief to a company to allow it to rely on the on-sale disclosure exemptions in s708A(5)(d), notwithstanding that it had lodged the cleansing notice out of the statutory timeframe.	

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
2.24	<i>Relief from enhanced disclosures in exit statements</i>	[CO 06/538]	306/2006	s1020F(1)(a) This class order provides relief to trustees of superannuation funds that are wound up, exempting them from the requirement to provide former members with an enhanced exit statement. Relief applies only to exit statements where persons ceased to be members of the fund prior to 1 July 2006.	
3.4 3.5	Westpac Funds Management Limited (ACN 085 352 405)	[06/0358] (in 19/06)	10/05/2006	s601QA(1)(a), s601QA(1)(b) and s1020F(1)(a) This instrument grants relief from the managed investment and disclosure provisions, allowing the responsible entity of the registered scheme to issue preferred units in the scheme to Australian members.	
3.6	Challenger Listed Investments Limited (ACN 055 293 644)	[06/0144] (in 09/06)	24/02/2006	s601QA(1)(a) This instrument amends Class Order [CO 05/26] <i>Constitutional provisions about the consideration to acquire interests</i> by granting relief from s601GAA(2)(b) to permit the responsible entity to issue discounted interests in a placement to its associates that hold interests in a fiduciary capacity.	
3.8	Macquarie Investment Management Limited (ACN 002 867 003)	[06/0365] [06/0366] [06/0367] and [06/0368] (in 20/06)	11/05/2006	s601QA(1)(a) These instruments remove the condition imposed by earlier relief granted to the entities, which required them to ensure that Australian holdings in the foreign collective interest schemes only represented a minority.	

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
3.8	BT Funds Management No. 2 Limited (ACN 000 727 659)	[06/0417] [06/0418] [06/0419] [06/0420] [06/0421] and [06/0422] (in 21/06)	23/05/06	s601QA(1)(a) These instruments remove the condition imposed by earlier relief granted to the entities, which required them to ensure that Australian holdings in the foreign collective interest schemes only represented a minority.	
3.8	BT Funds Management Limited (ACN 002 916 458)	[06/0426] [06/0427] and [06/0428] (in 21/06)	23/05/06	s601QA(1)(a) These instruments remove the condition imposed by earlier relief granted to the entities, which required them to ensure that Australian holdings in the foreign collective interest schemes only represented a minority.	
3.8	Westpac Financial Services Limited (ACN 000 241 127)	[06/0423] [06/0424] [06/0425] and [06/0429] (in 21/06)	23/05/06	s601QA(1)(a) These instruments remove the condition imposed by earlier relief granted to entities, which required them to ensure that Australian holdings in the foreign collective interest schemes only represented a minority.	
3.8	AMP Capital Investors Limited (ACN 001 777 591)	[06/0442] (in 22/06)	26/05/2006	s601QA(1)(a) These instruments remove the condition imposed by earlier relief granted to the entities, which required them to ensure that Australian holdings in the foreign collective interest schemes only represented a minority.	

Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
4.3	Toll Holdings Limited (ACN 006 592 089)	[06/0369] (in 20/06)	11/05/2006	s655A(1)(b) This instrument modifies s624 so that directions indicating an intention to accept a takeover offer made by shareholders through an acceptance facility may be used for the purpose of calculating a bidder's voting power.	
4.4	Toll Holdings Limited (ACN 006 592 089)	[06/0325] (in 18/06)	28/04/2006	s655A(1)(a) This instrument provides relief to a bidder from s654A(1) where a disposal arises from the offer of withdrawal rights and modifies s653B(1)(a) to allow a target shareholder to accept a takeover offer where that shareholder had previously exercised withdrawal rights.	
4.6	So Natural Foods Australia Limited (ACN 002 814 235)	[06/0521] (in 25/06)	21/06/2006	s655A(1)(b) This instrument extends the time for a target statement to be lodged under s635.	
4.7	Sedgman Limited (ACN 088 471 667)	[06/0308] Not gazetted	24/04/2006	s655A(1)(b) This instrument grants relief to the issuer of securities so that certain escrow agreements do not result in it acquiring a relevant interest in its own securities. Relief is granted in accordance with our policy in Policy Statement 159 <i>Takeovers, compulsory acquisitions and substantial holdings</i> [PS 159].	

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
4.8	Trinity Consolidated Group Limited (ACN 110 831 288) and Trinity Funds Management Limited (ACN 082 796 101)	[06/0308] (in 17/06)	20/04/2006	s655A(1)(b) This instrument grants relief to a company and a responsible entity of a scheme that were issuing stapled securities so that certain escrow agreements do not result in them acquiring a relevant interest in their own stapled securities. Relief is granted in accordance with our policy in [PS 159].	
5.5	BP Energy Asia Pte Limited (ABN 77 549 205 033)	[06/0451] (in 22/06)	26/05/2006	s992B(1)(a) This instrument grants relief from Division 6 of Part 7.8 so that a Singapore-based AFS licensee does not need to keep, prepare and lodge financial reports for its first financial year until it is so required by its home regulator.	
5.9	VFS Holdings (Aust) Pty Limited (ACN 117 085 159)	[06/0558] Not gazetted	28/06/2006	s340(1) This instrument grants relief to members of a wholly owned group of companies from the need to prepare, lodge and audit financial reports under Chapter 2M. The relief was drafted in similar terms to Class Order [CO 98/1418] <i>Wholly owned entities.</i>	
5.10	<i>Extension of transitional compensation arrangements</i>	[CO 06/495]	07/06/2006	s926A(2)(c) This class order modifies reg 7.6.02AA(2) so that the transitional compensation arrangements currently in reg 7.6.02AA(1) continue to apply until 31 December 2006.	31/12/2006

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Report para no.	Class order title or entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
6.5	Westpac Banking Corporation (ACN 007 457 141)	[06/357] (in 19/06)	10/05/2006	s259C(2) This instrument grants conditional relief from s259C(1) so that the controlled entities of an ADI may hold shares in the ADI, including shares held as a result of the terms of preferred units.	10/05/2007