



ASIC

Australian Securities & Investments Commission

REPORT 49

Overview of decisions on relief applications from financial service providers (January to April 2005)

July 2005

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About this report

1 ASIC is vested with a number of 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 managed investments provisions of Chapter 5C and the financial services provisions of Chapter 7 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 January 2005 and ending 30 April 2005. During this period we decided 481 applications concerning Chapter 5C, Chapter 7 and related provisions of the Act. We granted relief in relation to 404 applications and refused relief in relation to 77 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. Our general policy is to only consider granting relief from the requirements of Chapter 5C and Chapter 7 to address atypical or unforeseen circumstances and unintended consequences of those provisions.

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 also available via www.asic.gov.au/co. The information releases referred to throughout the report are available via www.asic.gov.au/mr.

7 Applications for relief from the provisions of Chapter 5C and Chapter 7 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 **fsr.applications.manager@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 significant decisions on whether to exercise our power under s911A(2)(1) to exempt a person or class of persons from the requirement to hold an Australian financial services (AFS) licence.

Non-cash payment facilities

1.2 Our relief decisions in this part of the report were made before the release of the Australian Government's proposals paper *Refinements to Financial Services Regulation* (May 2005). Under the refinement proposals, Treasury has indicated that the unintended application of the financial services regime to certain kinds of non-cash payment facilities will be dealt with as part of ASIC's policy review of non-cash payment facilities foreshadowed in the policy proposal paper (PPP) *Non-cash payment facilities* (December 2004). We expect to release a final policy on non-cash payment facilities in September 2005.

Scope of loyalty schemes interim relief extended

1.3 We have expanded the scope of the circumstances in which we will grant interim exemptions for the operation of non-cash payment facilities used in loyalty schemes. In Information Release [IR 04-06] *ASIC guidelines for interim relief for loyalty schemes*, we indicated that we would grant relief where the operator of the loyalty scheme and issuer of the non-cash payment facility was a merchant and the scheme provided incentives designed to promote spending on the merchant's goods or services. In a number of cases we have been prepared to grant exemptions for loyalty schemes, operated by third parties who are not merchants, that encourage spending with a number of 'participating merchants'. We consider that, in these circumstances, there may be a greater risk that the third party operator will be unable to meet its financial obligations to loyalty scheme members than there is where the issuer is a merchant. Therefore, we have imposed an additional condition on relief granted to non-merchant issuers that requires them to hold funds attributable to loyalty scheme members on trust in an account with an authorised deposit-taking institution (ADI) or a cash management trust.

Expansion of standard terms of non-cash payment facilities relief

1.4 Our standard relief instrument for non-cash payment facilities requires the issuer of the facility to provide a disclosure document to the client 'on the next practicable date' when any other written material is provided to the client. We were prepared to relax this condition in circumstances where the issuer's clients had already received a disclosure document that complied with our relief

conditions, save that it did not prominently inform clients of the issuer's rights to unilaterally vary the terms and conditions of the relief. We considered that it would be disproportionately burdensome if the issuer had to send out 40,000 copies of a revised disclosure document that did not contain any substantive changes to the terms and conditions. The relief that we granted instead allowed the issuer to update existing clients with the correct details of the issuer's right to vary the terms of the product by sending to these clients at the next mail-out date (or as soon as reasonably practicable) a clear, concise and effective statement of the relevant conditions.

1.5 We exempted an issuer that was an AFS licensee for providing a non-cash payment facility to university students without holding the appropriate licence authorisation. The issuer met all the criteria for relief set out in Information Release [IR 04-07] *ASIC guidelines for interim relief for non-cash payment facilities*. The conditions we imposed on the relief instrument regarding the disclosure document that must be provided to customers differed from our standard form relief in two respects. We allowed the issuer to include its physical, electronic and mailing contact details in the document rather than its registered office and principal place of business. We did this because the issuer's solicitors had informed us that the issuer's clients normally contacted the issuer by emailing its administration office or by physically attending its on-campus office. We also allowed the issuer to email the disclosure document to its customers on the basis that email was the usual form of communication between the issuer and its customers.

No-action position for later provision of loyalty scheme disclosure documents

1.6 We issued a no-action letter to a number of organisations operating loyalty schemes that are non-cash payment facilities as part of their banking services. We had given each organisation relief that required it to give a disclosure document containing certain provisions to its customers at the time it invited the customers to participate in the loyalty scheme. The no-action letter related to the organisations' failure to meet this obligation and was subject to a condition that the organisations give the disclosure document to their customers before they first issued interests in the relevant loyalty scheme to the customers.

1.7 We also issued a no-action letter to an issuer of non-cash payment facilities that were used to pay motorway tolls. The issuer had not provided a disclosure document to its customers before the offer was made and was unable to meet this requirement because customers acquired the non-cash payment facilities by telephone through a call centre. We imposed a condition that required the issuer to ensure that the facilities were not activated until customers had received the disclosure document.

1.8 Given that our *Non-cash payment facilities* PPP expressly raised the issue of the timing for giving disclosure documents, we considered that it was appropriate to take a limited no-action position in the above matters pending finalisation of our policy.

Employee share schemes

1.9 We exempted an issuer for the operation of its employee incentive scheme, which involved paying cash awards to senior executives of the issuer and its related bodies corporate. Relief was not available under Class Order [CO 03/184] *Employee share schemes* because the issuer was providing cash awards that were derivatives (rather than securities) to some of its senior executive employees and the securities of the issuer had not been listed for the minimum 12-month period. This matter differed from previous cases in which we have granted exemptions for employee share/incentive schemes involving derivatives because the scheme was limited in its operation to Australian employees rather than being part of a global employee incentive scheme. Also, although the issuer's securities had been listed for less than 12 months, all of the components of the stapled securities had been listed for a considerable length of time before the stapling restructure and we were of the view that the stapling restructure did not change the underlying businesses. Further, we were satisfied that the senior employees who were to participate in the employee incentive scheme had direct and extensive knowledge of the stapling restructure and of the financial performance of the underlying businesses. We also limited the number of offers of cash awards that could be made each year. We considered that granting relief to the applicant was broadly consistent with our policy as set out in Policy Statement 49 *Employee share schemes* [PS 49].

1.10 We issued a no-action letter to an issuer that lodged its offer document for its employee share plan one day after it was required to under [CO 03/184]. We decided it was appropriate to take a no-action position because the breach was inadvertent and had been promptly remedied. We also issued a no-action letter on the same basis to an issuer that was three days late in lodging its offer document.

1.11 We issued a no-action letter to an issuer that had failed to comply with [CO 03/184] in the following respects:

- the offer document was not provided within seven days of making the offer (the issuer took five to six weeks to do this);
- trading in the issuer's shares had been suspended for more than two days in the preceding 12 months (shares had been voluntarily suspended for four days);

- there was a limit on the employees' ability to discontinue their participation in the contribution plan (employees were not allowed to discontinue before a certain date); and
- the offer document did not provide details of the Australian ADI where contributions were to be held, how long they would be held there and the rate of interest payable (if any).

We took a no-action position because we were satisfied that these breaches were inadvertent, no mischief had been caused (shares had not been issued under the plan), the issuer remedied the breaches promptly and had given offerees the right to withdraw their acceptances.

1.12 We refused to issue a no-action letter to an issuer that had failed to comply with some of the conditions in [CO 03/184] in operating its employee share schemes. The offer documents it had provided to some of its Australian employees did not include some of the information required under [CO 03/184] and were not lodged as required. We were not satisfied that the applicant's non-compliance was due to mere inadvertence, nor that the applicant had alleviated any mischief that may have resulted from the non-compliance.

1.13 However, we granted an exemption to the issuer referred to in paragraph 1.12 that covered its ongoing dealings in the relevant schemes (but did not cover the offers that had already been made in breach of the class order). We required the issuer to provide the employee participants with the disclosure that should have been made at the time the offers were made. We noted that future offers under those employee share schemes would comply with the class order and therefore the issuer would not need to be licensed to make the future offers. Therefore, we considered that it would be unreasonably burdensome to require the issuer to obtain an AFS licence solely to enable it to deal with those interests offered without the benefit of class order relief. In our view, once appropriate disclosure had been made to the 32 affected employees, their interests in the employee share schemes should be treated in the same manner as those of future participants.

Foreign financial services providers

1.14 We exempted a bank that was incorporated in France for its provision to wholesale clients in Australia of derivative products that involved interest rate swaps. We considered that the French regulatory regime governing investment services was sufficiently equivalent to our regulation of financial services involving derivatives. There were effective co-operation arrangements in place between ASIC and the relevant French regulators. Therefore, it was appropriate to grant relief because the criteria set out in Policy Statement 176 *Licensing*:

Discretionary Powers—wholesale foreign financial services providers [PS 176] were satisfied.

1.15 We exempted an offshore foreign insurer that was regulated by the Monetary Authority of Singapore. The applicant was wholly owned by a subsidiary of an Australian company and was to provide insurance solely within one corporate conglomerate group. We imposed a condition on the relief that required the insurer to ensure that its provision of insurance in Australia complied, as far as possible, with the regulatory requirements that would apply if the insurance was being provided in Singapore. Our decision was made subject to the Federal Government’s review of direct offshore insurers and mutual discretionary funds.

Other licensing relief

Licence required for advice in educational seminars

1.16 We refused to grant an exemption or issue a no-action letter to a training provider that proposed to give educational training seminars to clients about trading shares on the Australian Stock Exchange (ASX). We considered that the information provided at the seminars could be financial product advice because it involved making a recommendation to trade in shares on the ASX. We were not satisfied that there were any compelling reasons to grant relief and depart from the consumer protection objectives of Chapter 7 of the Act.

Failure to obtain proper authorisation not sanctioned

1.17 We refused to issue a no-action letter to an AFS licensee that was dealing in interests in pooled superannuation trusts without the appropriate authorisation under its AFS licence (in breach of s911A and s912A). Although we recognised that the breach may have resulted from inadvertence, we considered that the applicant’s 11-month delay in reporting the breach did not justify a no-action letter.

Interim exemption for the operation of an acquired business

1.18 We temporarily exempted a financial services provider to allow it to operate the business of another AFS licensee, which it was in the process of acquiring, until its own AFS licence was varied to cover the provision of financial services carried out by the business it was acquiring. We considered that there were relatively few risks for consumers because both the applicant and the prior operator of the business were AFS licensees and the applicant’s additional activities would be limited to general advice and personal advice to wholesale clients. It was a condition of the relief that the applicant applied for the variation within a short period of time after it acquired the business.

Extension of relief for New South Wales Government energy service corporations

1.19 We extended relief granted in February 2004 that enabled New South Wales Government energy service corporations to provide certain financial product advice to wholesale clients outside of New South Wales without holding an AFS licence. The original relief applied until 11 March 2005 and was extended until 1 July 2005.

Extension of operation of transition period for a responsible entity under a deed of company arrangement

1.20 We further extended the transition period in s1431(1)(a) of the Act, until 10 April 2005, for a responsible entity under a deed of company arrangement in certain limited circumstances. The original relief applied until 10 June 2004. The conditions imposed on the extension were designed to limit the responsible entity's activities. The conditions did not permit the responsible entity to offer or issue any new interests and required it to remain subject to the deed of company arrangement unless it transferred the scheme to another responsible entity, obtained an AFS licence authorising it to operate the scheme or wound up the scheme.

Licence required for credit card currency conversion service

1.21 We refused to exempt an applicant that was dealing in derivatives and/or foreign exchange contracts with wholesale clients for the purpose of enabling foreign credit card holders purchasing goods or services in Australia to pay for the goods or services in a foreign currency (at an exchange rate offered by the applicant) rather than in Australian dollars. We considered that Parliament intended that the derivatives and foreign exchange contracts ought to be considered and regulated separately from the credit card transactions. Therefore, we were not prepared to exempt the applicant on the basis that the financial services it provided had a connection with a credit facility (which is not regulated by the Act). We considered that, like other parties who deal in derivatives and foreign exchange contracts, the applicant ought to be licensed. However, we took an interim no-action position regarding the applicant's provision of financial services while it applied for an AFS licence.

Unlicensed operator of contributory mortgage scheme

1.22 We refused to issue a no-action letter to the responsible entity of a managed investment scheme that was a contributory mortgage scheme regarding the responsible entity's failure to hold an AFS licence. We decided that it was not in the public interest for us to take a no-action position regarding the applicant's non-compliance with the Act in circumstances where the

applicant had previously operated unregistered managed investment schemes that were required to be registered.

Licensing information releases and class orders

1.23 The following information releases and class orders relate to the licensing relief granted during the period of this report.

Information releases

[IR 05-01] *ASIC issues licensing relief for securitisation special purpose vehicles.*

[IR 05-02] *ASIC issues licensing relief for some overseas dealers or market makers in derivatives and foreign exchange contracts.*

Class orders

[CO 05/415] *Credit rating agencies—amendment.*

[CO 04/1570] *Licensing relief for some overseas dealers or market makers in derivatives and foreign exchange contracts.*

Section 2: Disclosure relief

2.1 This section identifies the types of applications we have decided that relate to Chapter 7 requirements to provide disclosure documents such as Product Disclosure Statements (PDSs).

Relief relating to PDSs

‘Continuously quoted securities’ concept extended to cover corporate restructure

2.2 We granted relief so that a transaction-specific PDS or prospectus could be used for the issue of stapled securities that included shares in a company and interests in two managed investment schemes. Without the relief, the issuers could not technically use a transaction-specific PDS (under s1013FA) or prospectus (under s713) because the stapled securities in their present form had not been quoted on the ASX for 12 months and therefore were not ‘continuously quoted securities’ within the meaning of the Act. We considered that, as stapled securities consisting of interests in the same schemes stapled to shares in a different company had been continuously quoted from 2000 up until a corporate restructure that changed the identity of the stapled company, it was appropriate to treat the stapled securities as if they were ‘continuously quoted’.

Consent required for including database information in PDS

2.3 We refused to grant an exemption from the requirement in s1013K(1) to obtain consent for inclusion in a PDS of information in certain public information databases. We were not satisfied that the makers of the statements in those information databases would have no connection with the issuer of the PDS.

No-action position for s1012IA non-compliance

2.4 We issued a no-action letter to the manager of a public offer superannuation fund regarding its failure to provide a PDS covering the underlying financial products in accordance with s1012IA. We decided to take a no-action position on the basis that there was some uncertainty surrounding the application of s1012IA to superannuation products and our policy about s1012IA had not been finalised. We also took into account the applicant’s argument that the fund members had received adequate disclosure through a prospectus and FSG relating to the underlying financial products.

Dispensation of PDS requirement for future interests

2.5 We granted relief from the requirement to provide a PDS for the future issue of interests in a registered managed investment scheme. We consider that the legislative intent of s1011C was to have a similar effect for interests in a managed investment scheme as s702 has for shares. The effect of s702 is that if a disclosure document is provided for an option and there is no further offer involved in exercising the option, then the issue of underlying securities on exercise of the option does not need a disclosure document. We granted relief so that one PDS covering tranches of interests could be provided when the first tranche of interests was issued because we considered that it was unnecessary to update or reissue another PDS at the time the later tranche of interests was issued.

Disclosure relief for providers of non-cash payment facilities

2.6 In the matters referred to at paragraphs 1.3 to 1.8, we also exempted the issuers from the requirement to provide a PDS or provided a no-action letter covering the failure to do so.

Other disclosure relief

Disclosure of significant events and periodic statements to agent of client not permitted

2.7 We refused to grant relief that would allow an AFS licensee to receive periodic statements (required under s1017D) and documents disclosing changes and significant events (required under s1017B) from product issuers on behalf of its clients. The applicant—a financial planning business—proposed to receive these documents on behalf of its clients as part of a document collection service. Under reg 7.9.75A(5) the applicant was not able to receive the correspondence as agent for its clients because it was providing financial product advice to its clients and acting in its capacity as a licensee. In our view, the applicant's proposed action carried a risk of consumer detriment because there was a possibility that the documents, and information contained in the documents, would not be passed on to the clients. Given that the Chapter 7 statutory regime seeks to help consumers understand their investments and make informed decisions by ensuring that they receive adequate point-of-sale and ongoing disclosure, we considered that it would be inappropriate and contrary to Parliament's intent to grant the relief sought.

Failure to provide timely periodic statements

2.8 We refused to issue a no-action letter or grant relief to a superannuation trustee that had failed to provide periodic statements to members of the fund within six months of the end of the reporting period. The applicant was unable to meet the reporting deadline because an error in its unit pricing required correction. We considered that these circumstances differed from other matters in which we have been prepared to extend the reporting period and/or take a no-action position. Given that the unit pricing error may amount to a breach of a condition of the trustee's AFS licence, we considered that it would not be appropriate for us to issue a no-action letter for a breach connected with that error.

Disclosure information releases and class orders

2.9 The following information release and class orders relate to the disclosure relief granted during the period of this report.

Information release

[IR 05-04] *ASIC seeks comment on draft updated practice note: consent to quote.*

Class orders

[CO 05/27] *Financial services guides—tailoring relief.*

[CO 05/142] *Use of transaction specific disclosure documents.*

Section 3: Managed investments relief

3.1 This section sets out some of the circumstances in which we have exercised (and refused to exercise) our discretionary powers under s601QA to grant relief from the provisions of Chapter 5C.

Registration requirement

Prescribed interest schemes

3.2 In a number of cases, we refused to extend transitional relief from the requirement to register a managed investment scheme under Chapter 5C that had been granted to a trustee of a number of non-transitioning prescribed interest schemes. We refused the application because the manager of those schemes disputed the trustee's application and the manager and trustee were engaged in a legal dispute that concerned the issue of whether the schemes had already been terminated. We considered that it would be inappropriate for ASIC to grant relief because any relief granted would not resolve the substantive questions about whether the schemes had been wound up or any competing claims in respect of the scheme property.

3.3 In another matter concerning a non-transitioning prescribed interest scheme, we extended the transition period in s1454(2) of the Corporations Law, as at 1 July 1998. The applicant advised us that it would be able to certify the required matters set out in Information Release [IR 03-5] *ASIC grants further extension of relief for non-transitioning managed investment schemes* in due course but that it was unable to meet all of them at the time the application was made due to time constraints. We extended the transition period in the interim, on the basis that the applicant already met some of the requirements but would satisfy all of them in due course.

Interim exemption for unregistered scheme

3.4 Although we refused to issue a no-action letter to a viticulture scheme that appeared to have been operating illegally for many years, we granted the receivers and managers who had been appointed to operate the scheme conditional relief from the requirement to register the scheme until 30 June 2005 (when the scheme was due to terminate). We decided that the costs of registering the scheme would outweigh the regulatory benefit. The relief was conditional on the receivers and managers reporting to scheme members on a periodic basis, indemnifying the investors for any loss in continuing to operate the scheme, and ensuring appropriate dispute resolution procedures were in place.

Other managed investments relief

Compliance plan audit

3.5 We refused to grant the responsible entity of a scheme that was being deregistered relief from the s601HG requirement to audit its compliance with the scheme's compliance plan. An application for scheme deregistration was lodged a week before the end of the scheme's financial year and had not been processed by the end of the scheme's financial year. Therefore, a compliance plan audit was required. We were not prepared to grant relief because we consider that the compliance plan audit requirement is fundamental to the assessment of the responsible entity's fulfilment of its compliance responsibilities.

Relief from illiquid withdrawal provisions

3.6 We granted relief from Part 5C.6 of the Act (which governs withdrawals of interests from schemes that are not liquid) to a responsible entity so that it could issue convertible hybrid units in a sub-trust that would initially pay a fixed rate of return, with an option, at the responsible entity's complete discretion, to modify the return or convert the sub-trust units to ordinary units in the head trust at a later date. The applicant needed relief from Part 5C.6 so that it could redeem sub-trust units by exchanging them for units in the head trust rather than for cash. We granted relief because we considered that it was unnecessary to restrict the withdrawal of interests, regardless of the liquidity of the fund, where redemption requests could be met from other sources without the need to liquidate scheme property.

Relief to facilitate transfer of IDPS property to ASIC

3.7 We granted relief extending the operation of s601NG (which requires unclaimed property of registered managed investment schemes to be transferred to ASIC) to enable the operator of an investor directed portfolio service (IDPS) scheme (which was not a registered managed investment scheme) that had been wound up to transfer suspended securities and unclaimed money to ASIC. We were prepared to apply similar procedures to those used for the winding up of registered managed investments schemes in this matter, even though it may have been open to the operator to apply to the relevant State Supreme Court for an order to distribute property and wind up the IDPS. We preferred this approach because the value of the unclaimed property was relatively small and the Supreme Court procedure was likely to be costly and time-consuming.

Relief granted to allow mixing of woodchips

3.8 We granted relief to the responsible entity of 11 timber-growing registered managed investment schemes from its duty under s601FC(1)(i) to

ensure that scheme property is held separately from property of any other scheme. The relief, which was an extension of our omnibus account structures policy set out in Policy Statement 133 *Managed investments: Scheme property arrangements* [PS 133], enabled the responsible entity to woodchip the timber from a number of different schemes and store all of those schemes' woodchips together. We decided to grant relief on the basis that the bulk stockpiling, storage and shipping of woodchips resulted in economies of scale that increased the schemes' profitability and therefore was in the best interests of members of the schemes.

No-action position for failure to call meeting

3.9 We issued a no-action letter to the manager of a non-transitioning prescribed interest scheme concerning its failure to call a meeting of members (to decide whether to appoint a responsible entity or wind up the scheme) before a date specified in an ASIC instrument. We decided it was appropriate to take a no-action position because:

- all investors in the scheme were wholesale clients and therefore Chapter 5C would not require the scheme to be registered;
- the manager had not asked us to further extend the transition period for the scheme, but we may have done so if an application had been made;
- the scheme was in the process of divesting its remaining assets and would terminate once this was done; and
- investors in the scheme had voted to extend the operation of the scheme to allow for the divesting of the assets.

We imposed conditions on the no-action letter that were consistent with the requirements of our policy for further extending the transition period as set out in Information Release [IR 03-05] *ASIC grants further extension of interim relief for non-transitioning prescribed interest schemes*.

Extension of time to lodge notice of change of responsible entity

3.10 We granted relief from the requirement in s601FL to lodge a notice with ASIC within two business days of scheme members passing a resolution to replace the responsible entity. We accepted that it would be problematic for the scheme to meet this requirement because the scheme was to be delisted from the ASX and this could not happen until at least five business days from the date the resolution was passed. The new responsible entity did not have the capacity or experience to operate a listed scheme and therefore it could not effectively take over as responsible entity until delisting had occurred. The two business days requirement in s601FL was intended to ensure that there was minimal delay between members deciding to replace the responsible entity and

the change taking effect. We granted relief to facilitate the delisting of the scheme on the basis that this would not contradict the underlying policy of s601FL.

3.11 We granted relief that allows a registered scheme to invest in listed US real estate investment trusts (REITs). Subsection 601FC(4) does not allow the responsible entity of a registered scheme to invest scheme property in an unregistered scheme. Class Order [CO 98/55] *Investments in unregistered schemes* permits investments in unregistered schemes that are regulated as collective investment schemes in certain foreign jurisdictions but it does not extend to REITs because they are not regulated as collective investment schemes in the United States. We granted relief on the basis that the anti-avoidance principles underlying s601FC(4) and Policy Statement 178 *Foreign collective investment schemes* [PS 178] were not directed at schemes like REITs. Although REITs are not regulated as collective investment schemes under US law, we considered that the risks associated with investing in these REITs were minimised because the REITs were listed on specific markets and were registered with the US Securities and Exchange Commission.

Managed investment scheme information releases

3.12 We issued the following information release relating to managed investments during the period covered by this report.

Information release

[IR 05-15] *ASIC further extends interim relief for managed investment scheme constitutions.*

Section 4: Conduct relief

4.1 This section details some of our decisions on whether to grant relief from certain conduct obligations that Chapter 7 imposes on persons who provide financial services in Australia.

Financial reporting for AFS licensees

4.2 We granted relief to an AFS licensee from the requirement in s989B to prepare and lodge financial statements where the licensee had ceased to carry on business and had applied for the cancellation of its AFS licence before its obligation to lodge financial statements was triggered. We granted relief on the basis that former licensees have no obligation to lodge financial statements or an auditor's report. This is because our interest in a licensee's financial position is whether that licensee has the financial capacity to continue to fulfil its obligations as a licensee.

4.3 However, in another matter we refused to grant relief from s989B when the applicant had breached this provision before it applied for relief. The applicant was required to lodge the financial statements and auditor's report by 30 September 2003 but did not apply for relief until 18 August 2004. As our exemption and modification powers generally do not extend to granting relief with retrospective effect, we were not satisfied that it was appropriate to grant relief in this case.

No relief granted for employee incentive scheme breach of s991F

4.4 We refused to grant an exemption from, or issue a no-action letter for a breach of, the prohibition in s991F on AFS licensees advancing credit to their employees so that the employees can acquire financial products. The employer licensee was unable to rely on the exception in reg 7.8.21 (which allows credit to be provided to enable employees to purchase shares in the employer company) because the credit advanced to the employees was to be used to buy shares in a company in which the employer held a major stake rather than to buy shares in the employer company itself. In another matter, we refused to grant relief from s991F to allow an AFS licensee to provide credit to its employees to enable them to purchase interests in unregistered managed investment schemes operated by the licensee. In each of these matters, we did not accept the applicant's arguments that relief should be granted because the employees would benefit from the relevant arrangement. In our view, s991F plays an integral role in prevention of conflicts of interest and is primarily directed to protecting the licensee and financial markets generally rather than just the licensee's employees.

Interim relief from s981B account requirements for online payment facility operator

4.5 We granted an interim exemption for a period of eight months to the operator of an international online payment facility from the requirement under s981B to hold client money separately in an account with an Australian ADI or approved foreign bank. The relief allowed the operator to hold its Australian clients' money in pooled accounts that were set up for each currency that was used to make payments through the facility and included money belonging to clients that were not in this jurisdiction. We accepted that there were minimal regulatory risks relating to client money in circumstances where they are held on trust with a foreign bank prudentially regulated in the United States and guaranteed by an Australian ADI. The interim relief is in line with APRA's interim banking policy on purchase payment facilities.

Conduct related information releases and class orders

4.6 The following information releases and class orders concern the conduct related relief granted during the period of this report.

Information releases

[IR 05-07] *ASIC provides relief on timing of auditor's independence declarations.*

[IR 05-08] *ASIC releases policy on approving codes of conduct.*

[IR 05-10] *ASIC and APRA facilitate 'intra-fund' superannuation member benefit transfers.*

[IR 05-12] *ASIC warns AFS licensees to lodge overdue accounts.*

Class orders

[CO 04/1574] *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund.*

[CO 05/21] *Clarification of requirement for the appointment of auditors by financial services licensees.*

[CO 05/83] *Timing of auditor's independence declaration.*

Section 5: Other relief

5.1 This section outlines 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 industry.

Application forms for successor superannuation fund

5.2 We refused to exempt the trustee of a superannuation fund from the s1016A(3) requirement to obtain application forms from employer-sponsors who were transferring members' entitlements as part of a successor fund transfer, on the basis that regulations under the Act already granted an exemption from this requirement.

Extension of reporting period for superannuation fund

5.3 We extended the reporting period by three months for a superannuation fund's member information and periodic statements. We granted relief on the basis that the Australian Taxation Office had required the fund to change its financial year and that this brief extension would not adversely affect members of the fund.

Licensee obligation to have adequate fraud and professional indemnity insurance

5.4 We refused to vary the AFS licence condition that requires AFS licensees to maintain adequate professional indemnity (PI) and fraud insurance for the responsible entity of a direct real property scheme and the responsible entity of a viticulture scheme. We were not satisfied that PI and fraud insurance were unavailable for responsible entities generally or for responsible entities of direct real property and/or viticulture schemes. In any event, we were not satisfied in either case that the licensees had adequate alternative arrangements for compensating clients for loss caused by negligence or fraud by officers.

5.5 We refused to allow an AFS licensee to provide managed discretionary account (MDA) services where it only held \$1 million fraud and PI insurance rather than the required \$5 million. The licensee submitted that compliance with this requirement would be unreasonably burdensome because its premium would increase by 90% and it would need to have 71% of its funds under management insured. We considered that the required level of insurance cover was 'reasonably obtainable' and we were not convinced that the licensee had adequate alternative compensation arrangements in place.

Consent to not treat AFS licensee's receivables as 'excluded assets'

5.6 We allowed an AFS licensee to treat receivables owed from a trustee secured by an equitable mortgage over trust units as if they were not 'excluded assets' under the terms of its AFS licence. We gave our consent because we were satisfied that the assets did not arise from a transaction to avoid ASIC's financial requirements, that recovery was highly probable and that it would be unreasonably burdensome to have structured the transaction so that the amount owing was not an excluded asset.

Modification of MDA class order audit requirements

5.7 We granted relief from the audit requirements under Class Order [CO 04/194] *Managed discretionary accounts* to enable an MDA operator to synchronise the timing of the two audit reports required under the class order (an audit report on the internal controls and an audit report on whether the operator has documented measures for compliance with the class order). Without the synchronisation provided by the relief, the operator would have been required to engage an auditor twice a year because of the operator's balance date, which would have involved additional and unnecessary costs.

Interim no-action position for MDA operator pending licence variation

5.8 We issued an interim no-action letter to the operator of an MDA service that would not be eligible for the relief contained in [CO 04/194] until its AFS licence was varied. Our no-action position applied until the applicant varied its licence, after which time it would be eligible for the class order relief.

No-action position for failure to have company name on public documents due to name change

5.9 We decided to take a no-action position regarding a breach of the s153(1) requirement that a company set out its name on all public documents and negotiable instruments. The breach occurred because of a change of company name. We considered that a no-action position was appropriate because there was minimal consumer detriment or impact on the efficiency of the market resulting from the breach.

Information releases on other relief

5.10 The following information releases relate to other relief granted during the period of this report.

Information releases

[IR 05-09] *ASIC seeks comment on policy for better experts' reports.*

[IR 05-14] *Changes to financial reporting relief for wholly owned entities.*

[IR 05-16] *ASIC guidance on disclosing the impact of IFRS for full-year financial reports.*

Appendix: ASIC relief instruments

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

Note that 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.

Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
1.3, 2.6	Pinpoint Pty Ltd ACN 002 693 656	[05/71]	28/1/2005	s911A(2)(l) and 1020F(1)(a) <i>This instrument grants licensing and disclosure relief to operate loyalty schemes in accordance with [IR 04-06]</i>	30/6/2005
1.3, 2.6	Loyalty Pacific Pty Ltd ACN 057 931 334 Tickoth Pty Ltd ACN 062 340 103 Relationship Services Pty Ltd ACN 062 806 893	[05/297]	25/3/2005	s911A(2)(l) and 1020F(1)(a) <i>This instrument grants licensing and disclosure relief to operate loyalty schemes in accordance with [IR 04-06]</i>	30/6/2005
1.4, 2.6	Tollaust Pty Ltd ACN 050 538 693	[05/176]	23/2/2005	s911A(2)(l) and 1020F(1)(a) <i>This instrument grants licensing and disclosure relief to operate non-cash payment facilities in accordance with [IR 04-07]</i>	30/6/2005

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
1.5, 2.6	Tuscan GPO Melbourne Pty Ltd ACN 080 966 034 Transfield (OMH) Pty Ltd ACN 111 131 483 Calliva Group Ltd ACN 107 185 106	[05/388]	19/4/2005	s911A(2)(l), 951B(1)(a), 992B(1)(a) and 1020F(1)(a) <i>This instrument grants licensing, disclosure and Part 7.8 relief in accordance with [IR 04-07] to the operator of the RMIT Village Old Melbourne U Card System, a low value non-cash payment facility</i>	30/6/2005
1.9	Westfield Holdings Ltd ACN 001 671 496	[04/1599]	23/12/2004	s601QA(1)(a), 911A(2)(l), 992B(1)(a) and 1020F(1)(a) <i>This instrument grants relief from Chapter 5C and some parts of Chapter 7 in the case of an offer to Australian employees of Westfield Holdings Ltd under an employee incentive scheme</i>	N/A
1.13	Abacus Corporate Trustee Ltd, a foreign trust company incorporated under the laws of Jersey HSBC Holding plc, a public listed company registered in the United Kingdom	[05/405]	27/4/2005	s741(1)(a), 911A(2)(l) and 1020F(1)(a) <i>This instrument grants licensing and disclosure relief for the provision of specified financial services for the HSBC employee share scheme</i>	N/A
1.14	Dexia Credit Local SA, a foreign company incorporated in France	[05/371]	15/4/2005	s911A(2)(l) <i>This instrument grants licensing relief for the provision of specified financial services involving derivatives where Dexia Credit Local SA is authorised in France to provide those financial services</i>	N/A

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
1.18	Standard & Poors Information Services (Australia) Pty Ltd ACN 096 167 556 Assirt Pty Ltd ACN 009 176 078	[05/121]	10/2/2005	s911A(2)(l) <i>This instrument grants licensing relief</i>	N/A
1.19	Delta Electricity ACN 139 819 642 Eraring Energy ACN 357 688 069 Macquarie Generation ACN 402 904 344 Australian Inland Energy Water Infrastructure ACN 854 879 489 Country Energy ACN 428 185 226 Energy Australia ACN 505 337 385 Integral Energy Australia ACN 253 130 878	[05/79]	28/1/2005	s911A(2)(l) <i>This instrument varies ASIC instrument [04/164], extending the temporary relief given to NSW energy services corporations from 11 March 2005 to 1 July 2005</i>	1/7/2005
1.20	Australian Growth Managers Ltd ACN 079 141 969	[05/95]	2/2/2005	s1437(2)(b) <i>This instrument varies ASIC instrument [04/313], extending the expiry of the FSR transition period from 10 June 2004 to 10 April 2005</i>	

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
1.23	Licensing relief for some overseas dealers or market makers in derivatives and foreign exchange contracts	[CO 04/1570]	23/12/2004	s911A(2)(l) <i>This class order grants licensing relief to overseas counterparties who are making a market in foreign exchange contracts and derivatives and dealing in foreign exchange contracts. The relief is on similar terms to the licensing relief for dealing activities in derivatives that is contained in reg 7.6.01(1)(ma)</i>	N/A
1.23	Credit rating agencies—amendment	[CO 05/415]	26/4/2005	s911A(2)(l) <i>This class order amends [CO 03/1093] by extending the date referred to in paragraph (d) of the class order from 1 July 2005 to 31 December 2005</i>	31/12/2005
2.2	Macquarie Infrastructure Bermuda Ltd, a company incorporated in Bermuda Macquarie Infrastructure Management Ltd ACN 072 609 271 Macquarie Infrastructure Trust (I) ARSN 092 863 780 Macquarie Infrastructure Trust (II) ARSN 092 863 548	[05/13]	12/1/2005	s741(1)(b) and 1020F(1)(c) <i>This instrument grants disclosure relief in relation to a distribution plan and the secondary sale of the stapled security, and deems interests in the stapled security to be 'continuously quoted'</i>	N/A
2.5	Macquarie ProLogis Management Ltd ACN 100 226 293 Macquarie ProLogis Trust ARSN 100 649 536	[05/172]	23/2/2005	s1020F(1) <i>This instrument grants disclosure and conduct relief from the requirements of s1012B, 1012C(6), 1012C(7) and 1016A(2) in relation to conversion of Step-up Hybrid Exchangeable Distributing Securities in the Macquarie ProLogis Income Trust</i>	N/A

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
2.9	Financial services guides—tailoring relief	[CO 05/27]	26/4/2005	s951B(1)(a) <i>This class order exempts providing entities from including in an FSG the information required by reg 7.7.04(2) and 7.7.07(2) where that information does not relate to a financial service that the providing entity reasonably believes will be or is likely to be provided to the client, or relates exclusively to financial services which themselves do not require the provision of an FSG because of s941C(2), (3) and (4) or because the financial service would not be provided to the client as a retail client</i>	
2.9	Use of transaction specific disclosure documents	[CO 05/142]	21/2/2005	s741(1) and 1020F(1) <i>This class order allows the use of transaction specific disclosure documents, despite relief granted under [CO 05/83] in relation to the timing of the auditor's independence declaration</i>	N/A
3.3	Australian Growth Managers Ltd ACN 079 141 969 Australian Rural Group Ltd ACN 002 635 501 Plantation Forestry Managers Ltd ACN 079 141 969 Plantation Forestry Land Pty Ltd ACN 079 125 303 Plantation Forestry Hardwood Project 1998	[05/94]	2/2/2005	s601QA(1) <i>This instrument grants relief to facilitate the operation of a prescribed interest scheme until 2010 without requiring it to be registered as a managed investment scheme</i>	1/7/2010
3.4	Tynski Pty Ltd (Receivers and Managers Appointed) ACN 008 162 123	[05/135]	17/2/2005	s601QA(1) <i>This instrument grants an exemption from the requirement to register a managed investment scheme until 1 July 2005</i>	1/7/2005

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
3.6	Macquarie ProLogis Management Ltd ACN 100 226 293 Macquarie ProLogis Income Trust ARSN 112 882 283	[05/171]	23/2/2005	s601QA(1)(b) <i>This instrument grants relief from the requirements of Part 5C.6 and s601GA(4) in relation to redemption and conversion of Step-up Hybrid Exchangeable Distributing Securities in Macquarie ProLogis Income Trust</i>	N/A
3.7	Your Prosperity Ltd ACN 077 305 652	[04/1636]	24/12/2004	s601QA(1)(b) <i>This instrument extends s601NG to Your Prosperity Ltd on the conditions set out in the instrument</i>	N/A
3.8	APT Projects Ltd ACN 054 653 039 Australian Eucalypt Project 1992 ARSN 093 113 163 Australian Eucalypt Project 1993 ARSN 093 113 234 Australian Eucalypt Project 1994 ARSN 093 113 289 Australian Eucalypt Project 1995 ARSN 093 113 305 Australian Eucalypt Project 1996 ARSN 093 113 314 Australian Eucalypt Project 1997 ARSN 093 113 403 Australian Eucalypt Project 1998 ARSN 093 113 501	[05/370]	14/4/2005	s601QA(1) <i>This instrument grants relief from s601FC(1) in order to allow a responsible entity to mix scheme property with other schemes' property</i>	N/A

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
	Australian Eucalypt Project 1999 ARSN 085 687 001				
	APT Eucalypt Project 2000 ARSN 091 023 200				
	APT Eucalypt Project 2001 ARSN 091 023 586				
	APT Plantation Project No. 11 ARSN 092 749 570				
	APT Pine Solidwood Project 2001 ARSN 096 123 027				
	APT Eucalypt Solidwood Project 2001 ARSN 096 080 081				
3.10	Gresham Technology Management Ltd ACN 003 217 703 Equity Trustees Ltd ACN 004 031 298 Technology Investment Fund ARSN 089 174 372	[05/255]	17/3/2005	s601QA(1) <i>This instrument grants relief from the s601FL(2) requirement to notify ASIC of a change in responsible entity of a registered managed investment scheme</i>	N/A
3.11	AMP Capital Investors Limited ACN 001 777 591	[05/99]	18/1/2005	s601QA(1)(a) <i>This instrument grants relief from s601FC(4) to permit the investment of scheme property or the keeping of scheme property in US-listed real estate investment trusts</i>	N/A

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
4.2	Felturn Pty Ltd ACN 073 541 634	[05/52]	17/1/2005	s992B(1) <i>This instrument grants relief from the s989B requirement to lodge with ASIC an annual profit and loss statement and a balance sheet, together with an auditor's report, for the financial year ending 30 June 2004</i>	N/A
4.5	PayPal, Inc. ARBN 111 900 906	[05/222]	10/3/2005	s992B(1) <i>This class order grants an exemption from s981B(1)(a) and (b)</i>	19/10/2005
4.6	Clarification of requirement for the appointment of auditors by financial services licensees	[CO 05/21]	14/1/2005	s992B(1) <i>This class order clarifies the requirement for the appointment of auditors by AFS licensees</i>	N/A
4.6	Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund	[CO 04/1574]	20/12/2004	s1020F(1) <i>This class order grants relief from the application form requirements in s1016A and modifies the cooling off rights under s1019A in relation to transfer of fund members between superannuation products within a regulated superannuation fund as part of the rationalisation of products in the fund in certain circumstances</i>	N/A
4.6	Timing of auditor's independence declaration	[CO 05/83]	4/2/2005	s341(1) <i>This class order allows the auditor's independence declaration to be signed before the directors' report and the auditor's report to be signed after the directors' report. The auditor must provide an update to the independence declaration by way of a statement in the auditor's report</i>	N/A

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Report para no.	Class order title or entity name	Instrument no.	Date executed	Power exercised and nature of relief	Expiry date (if applicable)
5.7	Bell Potter Securities Ltd ACN 006 390 772	[05/295]	29/3/2005	s601QA(1)(a), 741(1)(a) and 1020F(1)(a) <i>This instrument grants relief to permit the audit requirements for MDA services to be conducted every year ending 30 June</i>	N/A