



**ASIC**

Australian Securities & Investments Commission

**REPORT 88**

**Overview of decisions  
on relief applications  
(July to September 2006)**

January 2007

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## About this report

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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 the following Chapters of the Act: 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).

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 July 2006 and ending 30 September 2006. During this period we decided 578 applications. We granted relief in relation to 482 applications and refused relief in relation to 96 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 discretion to vary or set aside certain requirements of the law where the burden of complying with the law significantly detracts from its overall benefit, or where we can facilitate 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](http://www.asic.gov.au/co). Instruments are published in the ASIC Gazette, which is available via [www.asic.gov.au/gazettes](http://www.asic.gov.au/gazettes). The information releases referred to throughout the report are available via [www.asic.gov.au/mr](http://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** and **www.asic.gov.au/cfrelief**.

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 (the Regulations).

## Section 1: Licensing relief

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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

#### NZ bank direct marketing to existing Australian clients

1.2 We refused to grant licensing relief to a New Zealand bank for the provision of financial services to existing clients in Australia. The bank was intending to send promotional material about its other financial products to existing clients in Australia. The bank submitted there was uncertainty about whether the mail-out would have disentitled it from relying on the licensing exemption in s911A(2D). We refused to grant relief because the positive action by the bank to attract persons in Australia to acquire financial products, despite being existing members, amounted to active solicitation of clients in this jurisdiction.

#### Singaporean research house holding a Singaporean financial advisory licence

1.3 We granted licensing relief to a Singaporean research house so that it could provide financial product advice (research reports) to Australian wholesale clients. The research house is regulated by the Monetary Authority of Singapore (MAS) but did not qualify for relief under Class Order [CO 03/1102] *Singapore MAS regulated financial service providers* because it did not hold a Singaporean capital markets, banking or merchant banking licence. The research house held a Singaporean financial advisory licence, which was the only licence it was required to hold to conduct its business in Singapore. We assessed the matter against the principles in Policy Statement 176 *Licensing: Discretionary powers—wholesale foreign financial services providers* [PS 176] and considered the MAS's regulation of Singaporean financial advisers produced sufficiently equivalent regulatory outcomes to Australian regulation.

### Other licensing relief

#### Legal advice and conduct in relation to cash management trusts

1.4 We were asked to declare that advice and conduct by lawyers about a certain cash management trust was not a financial service. We refused to grant the relief on the basis that it was unnecessary. The conduct included giving advice on the availability of cash management trusts (CMTs) and the

investment of client money held in the lawyer's trust account in CMTs as directed by the client. We considered that the Act clearly exempts advice given by lawyers in their professional capacity on legal and other incidental issues: s766B(5). Further, the investment of client money on trust in CMTs is exempt under reg 7.1.35A and reg 7.1.40. To the extent that the advice or conduct fell outside existing exemptions, we did not consider it appropriate to grant relief.

### **Lawyers receiving benefits for providing general insurance product to clients**

1.5 We refused a request to grant licensing relief by extending the exemption in reg 7.1.35A. Regulation 7.1.35A exempts a financial service provided by a lawyer acting on a client's instructions from constituting dealing in a financial product. The insurer was concerned that lawyers informing their clients about the insurer's product would not be able to rely on reg 7.1.35A because the lawyers received benefits in the form of the insurer's waiver of subrogation rights. We refused relief on the basis that such arrangements are already exempt under Class Order [CO 05/1070] *General insurance distributors*, which provides licensing relief to the distributors of AFS licensees for arranging to deal in general insurance products, provided that any benefits are adequately disclosed and no advice is given.

### **Group tax audit insurance held by accountants**

1.6 We refused to grant licensing relief to accountants holding a tax audit insurance policy for dealing in a financial product on the basis that relief was unnecessary. However, we granted relief for the avoidance of doubt relating to the provision of custodial and depository services. The policy covered the cost of the accountants' services in acting for any client being audited by regulatory authorities, either:

- by providing a blanket cover for all clients of the accountants at any point in time (blanket cover); or
- through the accountants acquiring the policy, then for their clients electing whether or not they wished to take the cover (declaration cover).

We considered relief from dealing unnecessary because, on the facts of this case, we accepted the applicant's submission that the activity was an incidental component of the accounting service to which it related, and therefore not a financial product for the purposes of Chapter 7: s763E.

**Corporate structure of entities likened to ‘related bodies corporate’**

1.7 We granted licensing relief to the operator of a betting exchange for making non-cash payments through a facility linked to the operation of the betting exchange. The betting exchange enabled customers to place bets on sporting and other events. Before a wager could be made, payments were made by the user to an entity (trustee) on behalf of the user. Payments under the facility were then made according to the outcome of the wager. The operator sought to rely on an extension of the single merchant exemption under reg 7.601(1)(1b), but the 50:50 joint venture ownership of the operator’s parent company meant that the relationship between the operator and the trustee did not strictly fall within the ‘related bodies corporate’ definition in reg 7.6.01(1)(1b). We considered the corporate structure was sufficiently similar to the ‘related bodies corporate’ relationship in reg 7.6.01(1)(1b) and granted relief on that basis.

**Replacing the requirement to state the expiry date on a gift card**

1.8 We granted licensing relief to the operator of a gift card facility so that the operator could rely on relief similar to that provided in Class Order [CO 05/738] *Gift card facilities* but without having to set out a specific expiry date on its gift cards. The relief was conditional on the card stating the date of issue followed by a statement identifying the time period, from the date of issue, before the card expired rather than the expiry date itself. Relief was consistent with the purpose underpinning the requirement—namely, to provide consumers with a prominent warning about the limited period by which to use the gift card before the value was forfeited.

**Stored value cards used to settle insurance claims**

1.9 We granted licensing relief to the issuer of insurance claim cards for the operation of its non-cash payment facility. Under the facility, a customer could elect to receive an insurance claim card for goods for the settlement of a claim for lost, damaged or stolen goods. The cards were credited with monies from the insurance payout. We had previously granted relief so that customers could use the credit stored on the card at the store of the issuer or any one of its named wholly owned subsidiaries. The issuer sought an extension of the previous exemption so that one of the named subsidiaries could remain as a payee under the facility, despite eventually ceasing to be wholly owned by the issuer. We considered that relief maintained the status quo between the issuer, the named payees and the facility.



### **Acquisition and sale of assets through transfer of shares in a company**

1.10 We granted licensing relief for the avoidance of doubt to a foreign company registered in Australia for the provision of advisory type services. The company provided its services to large oil and gas companies seeking to buy, sell or swap gas and oil assets by locating buyers or sellers, evaluating and advising on those assets, and having some involvement in effecting the transaction. At times, such acquisitions or disposals were executed by the purchase or sale of shares in an unlisted wholly owned subsidiary of the seller or buyer, where that subsidiary held, or intended to hold, the assets, rather than by their direct transfer. We granted relief on the basis that the cost of obtaining and maintaining an AFS licence would place a heavy burden on the company's resources, particularly as:

- the financial service was provided by a small business to very well-resourced companies;
- the transactions were infrequent; and
- the company's business would continue to have a small client base.

We also considered potential consumer detriment to be minimal in these circumstances.

### **Intermediary providing clearing and settlement services**

1.11 We granted licensing relief to an Australian authorised deposit-taking institution (ADI) to enable the ADI, as an intermediary, to make non-cash payments between accounts operated by financial institutions. The ADI was wholly owned by a number of credit unions (members). The ADI could offer intermediary payment-related services because the ADI, unlike its members and clients, was a participant of various payment systems. Clients accessed these payment systems for the benefit of their own customers. We considered the cost of obtaining an AFS licence outweighed the benefit of regulating an entity that provided the facility to mostly wholesale clients, particularly given APRA's existing regulation over the ADI. Further, the only retail clients concerned could be expected to have a comprehensive knowledge of the payments systems, given the environment in which they conducted business. The relief was conditional on the ADI informing clients that it would not be treated as a retail client for the purposes of the licensing and disclosure provisions, and the consequences of such treatment.

### **Instrument conferring right to use primary production land must be registered**

1.12 We refused to vary the AFS licence conditions of a responsible entity of a number of primary production schemes. A variation was sought from the need to register the legal instrument that confers the right to use the land on which the primary production occurs. The responsible entity could not meet the requirement because the right to use the land was created under specific state legislation. It was not a right which could be registered under the relevant state or territory land titles law. We were not satisfied that the reasons submitted demonstrated circumstances that justified departure from existing policy. In particular, we were not satisfied that the level of protection under the specific regime was sufficient to protect against risks in the event of the registration of incompatible interests to the title of the land or in the event of the insolvency of the licensee of the land.

### **Relief for the operation of a recreational time-share scheme**

1.13 We granted licensing relief to the operator of a fractional boat owning syndicate for providing financial advice on, arranging to deal in, and operating, a registered recreational time-share scheme. We considered the nature of the proposed activities were peripheral to financial services regulation and that syndicate members purchasing time-sharing rights were not acquiring a financial product for the purposes of financial investment. The relief was conditional on certain prominent warnings being made in the Product Disclosure Statement.

### **Co-operative operating a grain pool**

1.14 We granted licensing relief to a co-operative operating a grain pool in the Australian grain market for the operation of a managed investment scheme. The grain pool involved the sale of grain over a given period of time, an interim remittance payment, and the final payment upon the physical delivery of the grain. The operation of the grain pool was limited to growers. We considered relief was appropriate given the nature of the grain pool meant that participants would be predominantly wholesale clients. Class Order [CO 02/211] *Managed investment schemes—interests not for money* would have provided the requisite relief, but it was not always applicable because sometimes a participant would be a retail client. We also considered the purpose of the grain pool was incidental to the business of growing and exporting grain, as opposed to the operation of an investment business.

## **Information release**

1.15 The following information release relates to licensing relief granted during the period of this report.

[IR 06-32] *ASIC provides transparency about how it reduces burdens on business.*

## Section 2: Disclosure relief

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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 other disclosures.

### Relief relating to prospectuses

#### NSX listed company continuously issuing shares under prospectus

2.2 We granted relief from s723(3) to an investment company listed on the Newcastle Stock Exchange so that the company could continuously issue shares during the life of a prospectus. Section 723(3) requires all securities issued under a prospectus to be listed within three months of the date of the prospectus. We did not consider investors would be disadvantaged because, under the terms of the relief granted, the company was required to issue listed shares in respect of each application for shares no later than one month after the application was received. Similar relief had been granted in the past to Australian Stock Exchange (ASX) listed companies that continuously issue shares.

#### Disclosure for securities converting into interests in a managed investment scheme

2.3 We granted relief from the need to prepare a prospectus under s710 to an issuer of convertible securities that convert into interests in a managed investment scheme. We granted relief on the same policy rationale as Class Order [CO 00/195] *Offer of convertible securities under s 713*, which amends the operation of s710 for the offer of convertible securities that convert into 'continuously quoted securities'. [CO 00/195] allows an entity to use a transaction specific-disclosure document under s713 rather than a prospectus. In this case, disclosure about the underlying product (i.e. the interest in a managed investment scheme) was regulated by Part 7.9 of the Act. Relief was conditional on the offer document containing information required for a short-form PDS for the underlying product and the information set out in s713(2) for the convertible securities.

#### Disclosure relief where restructured body listed for less than 12 months

2.4 We granted relief to enable a body to use a transaction-specific prospectus under s713, be able to rely on s708A(5) (which allows continuously quoted securities to be on-sold without a prospectus in certain circumstances),

and make offers without disclosure under an employee share scheme. The restructured body could not rely on existing provisions and class order exemptions in this regard because, as a result of a scheme of arrangement, the newly restructured body was not listed for the requisite period of 12 months. We granted relief on the basis that there had been no change in the underlying assets or business of the body as a result of the restructure. In addition, the restructured body's predecessors were listed on the ASX and London Stock Exchange for more than 12 months, which we considered an adequate 'proxy' for listing of the restructured body in the particular circumstances.

### **Scheme of arrangement under NZ law**

2.5 We granted fundraising relief to a company making a share offer and subsequent entitlements offer in conjunction with the divestment of a subsidiary under a New Zealand scheme of arrangement (NZ scheme). If the NZ scheme was approved, shares in a subsidiary were to be transferred to the shareholders of the holding company as consideration for the divestment. Documentation sent to shareholders was a combined NZ scheme booklet, Australian prospectus for the offer of shares under the scheme and Australian prospectus for the entitlements offer. Firstly, we granted relief from the need to attach an application form for the offer of shares under the NZ scheme. The relief facilitated the transfer of shares in the subsidiary to the holding company shareholders, without them having to complete an application form for those shares. Secondly, we granted relief to allow the NZ scheme explanatory material to be used as disclosure for the subsequent entitlements offer instead of requiring a separate prospectus to be issued. The entitlements offer was to be made a short time after the NZ scheme had been effected. The relief allowed the subsidiary to use the combined prospectuses and scheme explanatory material issued at the time of the NZ scheme as disclosure for the entitlement offer where they also sent a personalised entitlement and application form.

## **Relief relating to PDSs**

### **NZ bank offering and issuing a NZ basic deposit product in Australia**

2.6 In the matter referred to at paragraph 1.2 we decided to grant conditional relief to the bank so that it did not need to provide a PDS for the offer or issue of the NZ basic deposit product and linked non-cash payment facilities. The bank was not an ADI and therefore, although a deposit-taking facility, the product was not a 'basic deposit product' in this jurisdiction, as defined in s761. Although the bank's parent would have been able to rely on conditional PDS relief under s1012D(7A) if it offered the product, the bank itself could not rely on that statutory exemption. We granted relief because:

- the nature of the product (a NZ basic deposit product) was functionally equivalent to an Australian basic deposit product;
- compliance would have been disproportionately burdensome; and
- potential consumer detriment was minimal.

### **Intermediary providing clearing and settlement services**

2.7 In the matter referred to at paragraph 1.11 we also granted conditional relief to the ADI from the need to provide a PDS.

### **Insurance products issued under the same PDS**

2.8 We refused to grant relief to an insurance broker to allow it to provide one PDS covering four separate, but ‘similar’, motoring insurance products issued by different insurers. The broker submitted that separate PDSs had the potential to create significant and unintended confusion for its clients, which were primarily wholesale clients. The broker did not wish to rely on the exemption provided by Class Order [CO 03/1092] *Further relief for joint product disclosure statements* because the issuers of the insurance products were unwilling to accept joint liability for any cover that was bound by one of its competitors. We considered that [CO 03/1092] only required issuers to be jointly liable for the content of the PDS, rather than for the product. Further, although the terms of the insurance policies had the same wording, the insurers were still offering different products.

### **Enhanced fee disclosure regulations for serviced strata and agribusiness schemes**

2.9 We were asked to grant relief to the operators of a number of serviced strata schemes and an agribusiness scheme from the need to comply with the enhanced fee disclosure regime for PDSs (reg 7.9.16J, reg 7.9.16K and Schedule 10 of the Regulations). The operators argued that the structure of the enhanced fee disclosure regime was suitable for financial asset schemes, but its application to serviced strata schemes would be misleading and provide limited value for comparison between like products. The operators considered the PDS in its current form contained sufficient fees and costs information and worked examples suitable to that type of scheme. We decided the operator could comply with the enhanced fee disclosure regime and that the regime was sufficiently flexible to permit a description of the relevant fees and costs for the products in the format required by the Regulations. We considered that where the fees and costs of a particular managed investment product could not be described using the ‘Example of annual fees and costs’ format required under enhanced fee disclosure, then the product issuer should adapt the format of the

‘Example’ to ensure the PDS contained an accurate and not misleading example of the annual fees and costs of the product. We refused the relief applications.

### **Provision of PDS to named beneficiary of allocated pension fund**

2.10 We refused to grant relief to the trustee of a pension fund from the need to provide a PDS to named beneficiaries of pensioners under an allocated pension fund. Where a pensioner dies before his or her account balance is exhausted, the pension payment reverts to the named beneficiary. The trustee was concerned that it would be required to provide a PDS to the named beneficiary at the time the pension payment reverted to them. The trustee submitted that it would provide a document to beneficiaries that would contain all information necessary to understand the product and make informed decisions about it. We were not satisfied that compliance with the obligation to provide a PDS was disproportionately burdensome or impossible, considering the regulatory benefit of the disclosure.

### **Extension of on-sale disclosure relief to different class of interest**

2.11 We granted relief to the responsible entity of a registered scheme from the need to provide a PDS for the on-sale of interests as a result of a placement. The responsible entity could not rely on the existing secondary sale exemption in s1012DA(5) because, amongst other things, the fully paid interests in the scheme had not been listed for the prescribed period of 12 months. The partly paid interests in the scheme had been listed for the requisite time period. The issue arose because the scheme’s constitution required all interests in a class to be of equal value, which meant that the partly paid interests and fully paid interests could not be in the same class. We granted relief on the basis that the partly paid interests had been quoted for the prescribed time and were subject to the continuous disclosure obligations, which effectively provided the market with disclosure for both classes of interests.

## **Other disclosure relief**

### **Relief from the disclosure provisions in Part 7.9**

2.12 In the matters referred to at paragraphs 1.7, 1.8, and 1.14, we also granted relief from the disclosure provisions in Part 7.9 of the Act.

### **Relief for the operation of a recreational time-share scheme**

2.13 In the matter referred to at paragraph 1.13, we refused to grant relief to the operator of the fractional boat owning syndicate from Part 7.9 disclosure obligations. We considered that disclosure, in particular PDS disclosure with certain prominent warnings, would provide a basic consumer protection

mechanism without imposing disproportionately burdensome additional regulation in the form of licensing and scheme registration.

### **Client consent where there is a change in an IDPS's CMT**

2.14 We refused to grant relief to an operator of an investor directed portfolio service (IDPS) to allow it to operate the IDPS without receiving an application form under s1016A. Section 1016A requires the issuer to receive an eligible application before it can issue the relevant financial product. The operator sought to change the current cash management trust (CMT) for the IDPS to a CMT operated by a related entity. The operator submitted that Class Order [CO 02/294] *Investor Directed Portfolio Services* was ambiguous because clients were able to select the CMT as an investment option under the IDPS, as well as using the CMT for receiving funds that clients paid to the IDPS. We considered that changing the CMT as an investment option would require client consent and trigger the PDS and application form requirements. We did not consider client consent and the attaching obligations necessary for clients who did not choose the CMT as an investment option and therefore refused relief on that basis.

### **Documents forming a periodic statement to be provided at the same time**

2.15 The trustee of a closed superannuation fund requested relief so that periodic statements consisting of more than two separate documents could be given at different times (i.e. relief from s1017D as modified by reg 7.9.71). The trustee also requested an extension of the maximum periodic member reporting period of one year (i.e. relief from s1017D(2)(a) as modified by Part 16 of Schedule 10A of the Regulations). The trustee submitted that the cost of administering this legacy product on separate information technology systems was significant and prohibitive. We refused to grant relief because we did not accept that the trustee had demonstrated any exceptional circumstances to warrant relief or a departure from our policy, nor did we consider the requirements to be unduly burdensome on the trustee.

### **Periodic statements for schemes must include the indirect cost reporting**

2.16 We refused to grant relief to the operator of a cash management trust from having to include indirect cost reporting in periodic statements, as required under the enhanced fee disclosure regime (cls 301 and 302 in Schedule 10 of the Regulations). We considered the enhanced fee disclosure regulations were expressly intended to apply to all managed investment schemes, including in the operator's circumstances where the cash management had some features similar to a bank account. Further, there had been sufficient



time since the introduction of the enhanced fee disclosure regulations in March 2005 for schemes to prepare to comply with those requirements by 1 July 2006.

### **Periodic statements excluding information on the performance of other strategies**

2.17 We granted relief to the trustee of a superannuation master trust with a number of underlying investment options and/or sub-plans from the requirement to include certain information in its annual periodic statement. In particular, the trustee sought relief from the need to include a description of the investment strategy of the fund trustee and investment objectives (reg 7.9.36(b)) or a statement of the asset allocation for that year (reg 7.9.37(f)). The relief was based on there being additional consumer protections under the *Superannuation Industry (Supervision) Act 1993* requiring a trustee to make additional disclosure to members before a change is made to their investment strategy. The relief was conditional on the trustee providing the omitted information on its website and a hard copy free of charge on request. Relief enabled members to be provided with information relevant to their own investment strategy, and not information on the performance of other strategies unless they asked for it.

### **Periodic statement relief for legacy superannuation product issuing new interests**

2.18 We granted interim relief to the trustee of a superannuation fund from the need to describe the source of a superannuation contribution (reg 7.9.60B(4)) where the transaction was the receipt of that contribution. The trustee could not rely on Class Order [CO 06/602] *Transitional periodic statement relief for legacy superannuation products* because the trustee would continue to issue new interests in the fund. We granted interim relief for the same two-year period as in [CO 06/602] because of the very limited scope of the relief required and because the trustee was able to satisfy all other aspects of [CO 06/602].

## **Information releases and class orders**

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

### **Information releases**

[IR 06-23] *ASIC issues updated fees and costs disclosure guide.*

[IR 06-25] *ASIC provides exit statement relief for winding up superannuation funds.*

[IR 06-26] *ASIC puts focus on superannuation reporting practices.*

[IR 06-29] ASIC policy on how to deliver product disclosure about super investment strategies.

[IR 06-32] ASIC provides transparency about how it reduces burdens on business.

**Class orders**

[CO 06/602] Transitional periodic statement relief for legacy superannuation products.

[CO 06/636] Superannuation: Delivery of product disclosure for investment strategies.

## Section 3: Managed investments relief

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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

#### Relief from the need to register a scheme

3.2 In the matters referred to at paragraphs 1.13 and 1.14 we also granted relief from the need to register the scheme.

### Other managed investments relief

#### Issue price relief for placement of hybrid securities

3.3 We granted relief to the responsible entity of a number of stapled trusts to allow it to set the issue price of options, and the issue price of interests issued under the options, for a placement, without the constitution making adequate provision for the consideration that is to be paid to acquire an interest in the scheme under s601GA(1)(a). We considered the placement of an option over quoted interests did not represent a greater or lesser threat of dilution than the direct placement of the underlying quoted interest permitted under Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests*. Further, the options formed part of the terms of issue of an offer of interests in a listed scheme, which occurred at the same time as a pro-rata rights offer as part of a broader capital raising. The conditions of relief aimed to protect members from the risk of dilution, having regard to the time difference between the issue of the option and the exercise of the option.

#### Unfavourable differential treatment of parties associated to the responsible entity

3.4 We granted relief to the responsible entity of two related registered schemes from the requirement to treat members equally under s601FC(1)(d) and to ensure that all payments out of scheme property are made in accordance with the schemes' constitutions under s601FC(1)(k). Relief enabled the responsible entity to treat majority holders differently by reducing their pro-rata entitlement to income and capital in order to give effect to the decision of minority holders to implement the proposal. The majority holders were associates of the responsible entity and had agreed to accept the lower distributions. We granted conditional relief on the basis that the associated majority holders were the only adversely affected parties. Given the proposal was approved by minority holders, we were satisfied that the commercial result

would be fair in all the circumstances. We required the explanatory material accompanying the notice of meeting to contain a prominent statement to the effect that the grant of relief was not an expression of ASIC's view on the merits of the proposal.

### **Removal of minority restriction condition for FCIS listed in Canada**

3.5 We granted relief to the responsible entity of a registered scheme from s601FC(4), which prohibits a registered scheme from investing in unregistered schemes. The responsible entity sought to invest in Canadian real estate investment trusts (REITs) listed on the Toronto Stock Exchange that were not regulated as foreign collective investment schemes (FCISs). We granted relief even though Ontario's regulatory regime does not require operators of REITs to be licensed and did not require the separation of client assets. We considered that the legislative purpose of s601FC(4) was not to exclude registered schemes from participating in international commerce. Further, the listing of REITs on an approved foreign exchange provided some protections for consumers and obligations of disclosure. In granting relief, we did not limit the percentage of FCISs that the responsible entity could invest in Canada. This was consistent with our approach to REITs in the United States, Singapore, Hong Kong and Japan.

### **Information releases**

3.6 The following information releases relate to the managed investments relief granted during the period of this report.

#### **Information releases**

[IR 06-30] *ASIC to develop policy on listed managed investment scheme buy-backs.*

[IR 06-32] *ASIC provides transparency about how it reduces burdens on business.*

## Section 4: Mergers and acquisitions relief

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4.1 This section outlines some of the circumstances in which we have granted or refused relief under s655A and s673 from the provisions of Chapters 6 and 6C and in which we have exercised our powers under s672A.

### **Issue of tracing notice where bidder is not a member of a listed company**

4.2 We agreed to act on a request made by a bidder, who was not a member of the company at the time of the request, for ASIC to exercise its powers under s672A(1) to issue tracing notices on certain members of the target company. Section 672A(1) gives ASIC the power to direct a member of a company to disclose the beneficial ownership of shares held by that member. We considered it important, in the takeover context, for a bidder to have access to information that enables it to determine the identity of the underlying beneficial holders of the target company's shares. We also considered that granting the request facilitated the policy behind these provisions, i.e. to promote a fully informed market.

### **Consent of person to whom statement is attributed**

4.3 We granted relief to a target company from the requirement in s638(5) for a company to obtain consent from a person before it can quote a statement in a target statement. One of the reasons s638(5) requires such consent is to attach liability for statements included in a target statement. The target company sought to include in its target statement a statement made by the bidder's parent company in compliance with the rules of the Alternative Investment Market of the London Stock Exchange (AIM). We considered the relief to be within our policy in Policy Statement 171 *Anomalies and issues in the takeover provisions* [PS 171] because statements that have been made in compliance with the rules of AIM may have liability consequences similar to those arising from a prospectus. However, we refused to grant relief to permit the target to include in its target statement without consent statements made on the bidder's parent's official website. These statements would not necessarily carry similar liability.

### **Company listing shares on AIM through a depository service provider**

4.4 We granted relief to an Australian company by modifying s609 to facilitate its listing on AIM. AIM, under Certificateless Register of Electronic Stock and Shares Transfer (CREST) Regulations, does not allow companies incorporated outside of the United Kingdom to directly list their shares for trading. The company therefore proposed to transfer its shares to a depository

service provider (DSP), which in turn would issue AIM traded depository interests to investors. The DSP would hold the company's shares as trustee and would have, under CREST Regulations, a discretion over disposal rights in relation to the shares. This discretion constitutes a relevant interest in the shares of the company. Our relief modified s609 so the DSP does not have a relevant interest in the shares of the company as a result of these discretions.

### **Bid consideration made in NZ dollars**

4.5 We granted relief from s619(1) to a bidder for a target company with a significant number of shareholders residing in New Zealand. Section 619(1) requires all offers made under an off-market bid to be the same. The bidder sought to offer holders residing in NZ a facility to receive their consideration in NZ dollars rather than Australian dollars. We granted relief as we considered that it did not offend the equality principle underlying the requirement of s619(1) because NZ holders were offered the number of NZ dollars equivalent to the number of Australian dollars under the bid and because NZ holders had the right to elect to receive Australian dollars as consideration.

### **Reduction of minimum bid price**

4.6 We granted relief from s621(3) to a takeover bidder so that the consideration paid under the bid could be reduced by the amount of a special dividend paid during the offer period by the target company. Section 621(3) requires the minimum bid consideration to be equivalent to the highest price for which a bidder purchased securities in the four months prior to the bid. We considered that a reduction in bid consideration equivalent to the amount paid by way of a dividend at or before the time the bid consideration was paid would not offend the minimum bid price principle.

### **Acquisition arising from entry into a joint bidding agreement.**

4.7 We granted relief to joint bidders from s606, which prohibits certain acquisitions of relevant interests in voting shares. The joint bidders required relief because entry into a joint bidding agreement for the purposes of making a joint bid for a target company would have been prohibited under s606. This is because one of the bidders already held more than 20% of the target company. We granted relief in accordance with our general policy in Media Release [MR 01/395] *ASIC clarifies its policy on joint bids* (20 August 2001). However, the conditions of relief were distinguished from our policy in [MR 01/295] in two ways:

- the relief was made conditional on the joint bid being subject to a defeating condition which operated if the joint bidders did not receive acceptances in respect of at least 50.1% of the fully paid ordinary shares

in the target held by persons not associated with any of the joint bidders ('share-count test' as opposed to a 'head count' test); and

- we did not impose Condition 2 referred to in [MR 01/295]. Condition 2 requires the joint bidders to accept a rival higher bid, unless they match the rival bidder's price. We considered the condition unnecessary because the creation of the joint bidding group did not result in the creation of a larger voting stake (only one joint bidder held a relevant interest in voting shares of the target prior to entry into the joint bidding agreement).

### **Disaggregation relief from minimum bid price requirements**

4.8 We made an in-principle decision to grant relief to a bidder from the restriction on the minimum bid price for a security in the bid class in s621(3). The bidder sought relief so that its bid price did not have to equal or exceed the price provided by its associates, where the associates were externally managed funds. We decided to grant relief on the basis that the bidder and its associates had no ability to control the investment decisions of the external manager, and the external manager had the express right to exercise voting and disposal rights for target securities under its management. The decision only applied where the external manager was not a body in which the bidder (or a related body corporate of the bidder) had a relevant interest in more than 20% of its securities. No instrument of relief was executed as the application was withdrawn.

### **Extension of time for target statement to be lodged**

4.9 We extended the time for a target company in an off-market bid to lodge its target statement under items 11 and 12 of s633(1) by four days. The target company sought an extension so that certain geological and consultant's reports would be available with the target statement, despite such reports not being mandatory. The target company submitted that the reports were material and the timing of their availability was beyond the full control of the target company. We considered the relief to be within our policy in Policy Statement 159 *Takeovers, compulsory acquisitions and substantial holdings* [PS 159]. Further, the provision of the reports would mean the proposed acquisition could take place in an efficient, competitive and informed market.

### **Acquisitions of relevant interests in voting shares**

4.10 We refused to grant relief from s606(1) to permit the acquisition, for estate planning purposes, of a relevant interest in a listed company above the 20% threshold. The company sought relief from s606 to permit the acquisition of relevant interests arising from the transfer of control over certain shares from

one family member to another, via a trust structure. We refused to grant relief because we considered that item 7 of s611 (under which a person can make such acquisitions where non-associated shareholders have approved the proposed acquisition at a general meeting of the company) already provided an appropriate and available exception to s606(1).



## Section 5: Conduct relief

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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.

### Financial service provider requirements

#### Relief from the hawking provisions

5.2 In the matters referred to at paragraphs 1.7, 1.8 and 1.14 we also granted relief from the hawking provisions in the Act.

#### Overseas client monies held in non-ADI accounts

5.3 We granted relief to an AFS licensee from s981B, which requires money received in connection with the provision of a financial service or product to be paid into a specified type of account. The relief enabled the licensee to hold money from overseas clients in segregated accounts with three foreign financial institutions that were not Australian ADIs. We considered that relief facilitated the licensee's business while maintaining the protections in Part 7.8 for overseas clients.

### Financial reporting and auditor requirements

#### Relief where auditing obligation covers a period of one day

5.4 We granted relief to a licensee from the requirement under s989B to lodge with ASIC its annual profit and loss statement and balance sheet, together with an auditor's report. The obligation commenced on the day the licensee obtained its AFS licence, being 30 June 2006. After a review of the licensee's unaudited financial statements for the last financial year, we considered there was little regulatory benefit in requiring the licensee to comply to produce these documents covering a period of one day.

### Information releases and class orders

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

#### Information releases

[IR 06-24] *ASIC announces change to registered scheme financial reporting.*

[IR 06-32] *ASIC provides transparency about how it reduces burdens on business.*

**Class orders**

[CO 06/623] *Relief for certain general insurers from s981B account requirements.*

[CO 06/709] *Variation and revocation of financial reporting class orders.*

## Section 6: Other relief

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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.

### **Extended motor vehicle warranty from a second-hand car dealership**

6.2 We were asked to declare that the extended motor vehicle warranty issued by a second-hand car dealership was not a financial product for the purposes of Chapter 7. Although the warranty provided cover for costs such as towing and accommodation after the breakdown of the vehicle, we considered those costs as related to the quality of the vehicle and as costs that would typically arise from mechanical defect. Based on the information provided, we considered that the warranty was covered by the ‘incidental product’ exemption in s763A and we therefore refused relief on the basis that it was not necessary.

### **Modification of ‘sophisticated investor’ definition**

6.3 We refused to modify the definition of ‘sophisticated investor’ in s708(8)(c) to make it consistent with the determination of ‘wholesale investor’ in s761G(7)(c), on the basis that the harmonisation of these definitions was being proposed for law reform.

### **Market stabilisation arrangements conducted under an initial public offer**

6.4 We granted a no-action letter to the issuers and underwriters of securities in a newly listed entity from certain prohibited conduct, including market manipulation (s1041A), market rigging (s1041B and s1041C), misleading and deceptive conduct (s1041H) and insider trading (s1043A). The no-action position applied to the over-allocation or ‘green shoe’ option issued to underwriters to absorb share price volatility in the period immediately after the securities in the entity are floated. The relief enabled those parties to participate in a market stabilisation program for a period of 30 calendar days following the commencement of trading in those securities. We followed our interim policy in Information Release [IR 00-31] *ASIC interim guidance on market stabilisation*, which included an obligation that stabilisation brokers identify stabilisation bids on ASX’s Stock Exchange Automated Trading System.

## **Information release**

6.5 The following information release relates to other relief granted during the period of this report.

### **Information release**

[IR 06-32] *ASIC provides transparency about how it reduces burdens on business.*

## 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](http://www.asic.gov.au/co). The instruments are published in the *ASIC Gazette*, which is available via [www.asic.gov.au/gazettes](http://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
1.3	DBS Vickers Research (Singapore) Pte Limited (a company incorporated in Singapore)	[06/0642] (in <a href="#">30/06</a> )	26/07/2006	s911A(2)(l)  This instrument exempts a Singaporean research house from the need to hold an AFS licence for the provision of financial product advice to Australian wholesale clients.	
1.6	Vero Insurance Limited (ACN 005 297 807)	[06/0604] (in <a href="#">28/06</a> )	06/07/2006	s911A(2)(l)  This instrument grants licensing relief to accountants for the provision of custodial and depository services in relation to a specified group insurance contract.	
1.7 2.12 5.2	Betfair Pty Limited (ACN 110 084 985)	[06/0633] (in <a href="#">29/06</a> )	29/07/2006	s911A(2)(l)  This instrument exempts the operator of a betting exchange from the need to hold an AFS licence for the provision of a non-cash payment facility associated with the betting exchange.	

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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
1.8 2.12 5.2	Woolworths Limited (ACN 000 014 675)	[06/0629] (in <a href="#">29/06</a> )	18/07/2006	s911A(2)(l)  This instrument grants permanent licensing relief to the issuer of a gift card facility on conditions similar to [CO 05/738] except that the gift card need only specify the date of issue and the period of time before expiry (calculated with reference to the date of issue). The instrument also grants interim relief until 31 January 2007 to enable the issuer to deplete its current stock of gift cards.	Interim relief – 31/01/2007
1.9	Coles Myer Limited (ACN 004 089 936)	[06/0710] (in <a href="#">34/06</a> )	25/08/2006	s911A(2)(l)  This instrument exempts the issuer of an insurance claim card from the need to hold an AFS licence for non-cash payments made through an insurance claim card. The card was given to customers electing to be compensated through the insurance claim card rather than cash.	
1.10	Harrison Lovegrove & Co (Australia) Limited (ACN 106 717 971)	[06/0657] (in <a href="#">31/06</a> )	01/08/2006	s911A(2)(l)  This instrument exempts, for the avoidance of doubt, a foreign company registered in Australia from the need to hold an AFS licence for the provision of advisory type services to large oil and gas companies.	
1.11 2.7	Indue Limited (ACN 087 822 464)	[06/0637] (in <a href="#">25/06</a> )	22/06/2006	s911A(2)(l)  This instrument exempts an ADI wholly owned by a number of credit unions to enable the ADI, as intermediary, to make non-cash payments between accounts operated by other financial institutions.	

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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
1.13 3.2	The Cruising Club (Australia) Pty Limited (ACN 118 819 328)	[06/0347] Not gazetted.	12/09/2006	s911A(2)(l) This instrument grants licensing relief to the operator of a fractional boat owning syndicate for the operation of the recreational time-share scheme on the condition that prominent warnings are disclosed in a PDS.	
1.14 2.12 3.2 5.2	Southern Quality Product Co-operative Limited (ACN 057 877 040)	[06/0794] (in <a href="#">38/06</a> )	14/09/2006	s911A(2)(l) This instrument grants licensing relief to a co-operative operating a grain pool in the Australian grain market for the operation of a managed investment scheme.	
2.2	Illuminator Investment Company Limited (ACN 107 470 333)	[06/0795] (in <a href="#">38/06</a> )	14/09/2006	s741(1)(a) This instrument exempts an NSX listed investment company from s711(5) and s724(1) so that the company can continuously issue shares during the life of the prospectus on condition that each issue of securities is admitted to quotation within 7 days of the date of issue.	
2.3	ING Management Limited (ACN 006 065 032) and JP Morgan Australia Limited (ACN 006 344 341)	[06/937] (in <a href="#">46/06</a> )	11/09/2006	s741(1)(a) This instrument exempts the issuer, its directors and underwriters to the issue of convertible securities from the need to prepare a prospectus under s710 where those securities convert into interests in a managed investment scheme.	

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
2.4	Brambles Limited (ACN 118 896 021)	[06/0813] [06/0814] (in <a href="#">39/06</a> )	08/09/2006	s741  This instrument modifies the Act for a body restructured under a scheme of arrangement to enable it to use a transaction-specific prospectus, rely on the cleansing notice provision in s708A(5), and make offers without disclosure under an employee share scheme, where the body's securities have not been listed for 12 months.	
2.5	Tower Limited (ACN 107 488 200) Tower Australia Group Limited (ACN 003 401 698)	[06/0799] (in <a href="#">38/06</a> )	19/06/2006	s741(1)  This instrument removes the requirement for a disclosure document to have an application form, and allows a disclosure document to refer to a future fundraising in connection with a NZ scheme of arrangement.	
2.6	Commonwealth Bank of Australia (ACN 123 123 124) and ASB Bank Limited, (a company incorporated in New Zealand)	[06/0588] (in <a href="#">26/06</a> )	04/07/2006	s1020F(1)(c)  This instrument modifies the Act by inserting s1012D(7AA) so that the bank does not have to provide a PDS for the offer or issue of a NZ basic deposit product to retail clients in this jurisdiction.	
2.11	APN Funds Management Limited (ACN 080 674 479)	[06/0766] (in <a href="#">37/06</a> )	07/09/2006	s1020F(1)(c)  This instrument modifies 1012DA(5) so that the responsible entity can rely on the secondary sale exemption for fully paid interests in the fund where partly paid interests have been listed for the requisite 12-month period.	



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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
2.17	Colonial First State Investments Limited (ACN 002 348 352)	[06/0767] (in <a href="#">37/06</a> )	05/09/2006	s1020F(1)(a)  This instrument exempts the trustee of a superannuation fund from s1017DA(3) to the extent s1017DA(3) requires information to be provided under reg 7.9.36(b) and reg 7.9.37(1)(f) in a periodic statement.	
2.18	Suncorp Superannuation Pty Limited (ACN 009 931 435)	[06/0764] (in <a href="#">36/06</a> )	04/09/2006	s1020F(1)(a)  This instrument provides relief from the requirement to detail the source of a superannuation contribution in a periodic statement (reg 7.9.60B(4)). The instrument provides relief for the same two-year period and on similar terms as [CO 06/602] for exit statements issued before 1 July 2008 and, in relation to other periodic statements, for the reporting period commencing before 1 July 2007.	Exit statements – 30/06/2008  Other statements – 30/06/2007
2.19	<i>Transitional periodic statement relief for legacy superannuation products</i>	[CO 06/602]	26/04/2006	s1020F(1)(c)  This class order provides interim relief to trustees of legacy superannuation products from the additional transaction and management cost disclosures, and common fund expense disclosures, that are required in periodic statements issued after 1 July 2006.	Exit statements – 30/06/2008  Other statements – 30/06/2007

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
2.19	<i>Superannuation: Delivery of product disclosure for investment strategies</i>	[CO 06/636]	02/08/2006	1020F(1)(c)  This class order modifies the disclosure requirements and gives two options for disclosure about accessible financial products so that the superannuation entity's PDS does not need to include the disclosure required under s1013D and s1013E. The class order also provides the trustee with relief from the obligation in s1012IA to give a PDS before each additional acquisition of an accessible financial product where the member has given the trustee a standing instruction to acquire the product.  The class order commences on 1 July 2007.	
3.3	Macquarie Airports Management Limited (ACN 075 295 760)	[06/673] (in <a href="#">32/06</a> )	01/08/2006	s601QA(1)(b)  This instrument modifies s601GAA, as notionally inserted by [CO 05/26], to allow the responsible entity of a number of stapled trusts to set the issue price of options and also the interests issued under the options.	
3.4	Deutsche Asset Management (Australia) Limited (ACN 076 098 596)	[06/0721] (in <a href="#">35/06</a> )	23/08/2006	s601QA(1)(a)  This instrument exempts the responsible entity of two related schemes from the equal treatment provision in s601FC(1)(d) and to ensure all payments out of scheme property are made in accordance with the schemes' constitutions under s601FC(1)(k).	

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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
3.5	ING Management Limited (ACN 006 065 032)	[06/0768] (in <a href="#">37/06</a> )	07/09/2006	s601QA(1)(a)  This instrument exempts the responsible entity of a registered scheme from s601FC(4), which prohibits the investment of scheme property in unregistered schemes. The relief permits the responsible entity to invest in Canadian REITs.	
4.3	Marathon Resources Limited (ACN 107 531 822)	[06/0747] (in <a href="#">35/06</a> )	31/08/2006	s655A(1)(a)  This instrument grants relief to a target from s638(5) to permit the target to include statements in its target statement that had been made by the bidder's parent company in documents required to be lodged in compliance with the rules of AIM on the London Stock Exchange.	
4.4	Capita IRG Trustees Limited (a company incorporated in the United Kingdom)	[06/0697] (in <a href="#">34/06</a> )	18/08/2006	s655A(1)(b) and s673(1)(b)  This instrument modifies s609 so that the Australian company listed on AIM on the London Stock Exchange could transfer its shares to a depository service provider (DSP) without the DSP being regarded as having a 'relevant interest' in the company.	
4.5	Burns, Philp & Company Limited (ACN 000 000 359)	[06/736] (in <a href="#">35/06</a> )	24/08/2006	s655A(1)(a)  This instrument grants conditional relief to the bidder from s619(1) so that the bidder can receive considerations in NZ dollars rather than Australian dollars.	

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
4.6	Colorado Group Limited (ACN 004 327 566)	[06/0835] (in <a href="#">40/06</a> )	21/09/2006	s655A(1)(a)  This instrument exempts the bidder from s621(3) so that consideration paid under the bid could be reduced during the offer period.	
4.7	Chiquita Brands South Pacific Limited (ACN 008 277 816)	[06/628] (in <a href="#">29/06</a> )	17/07/2006	s655A(1)(a)  This instrument exempts the joint bidders from s606 in relation to an acquisition arising solely from the entry into a joint bidding agreement.	
4.9	Sedimentary Holdings Limited (ACN 000 697 183) and Auselect Limited (ACN 077 885 208)	[06/0669] (in <a href="#">32/06</a> )	07/08/2006	s655A  This instrument modifies items 11 and 12 of the table in s633(1) to grant an extension of four days for the target company to lodge its target statement with ASIC and send the target statement to shareholders and the bidder.	
5.3	CMC Markets Asia Pacific Pty Limited (ACN 100 058 213)	[06/0656] (in <a href="#">31/06</a> )	31/07/2006	s992B(1)(c)  This instrument modifies s981(1)(a) to enable money of clients that are resident in specified overseas jurisdictions to be held in accounts with specified overseas financial institutions.	

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
5.4	Foresight Capital Pty Limited (ACN 111 423 440)	[06/730] (in <a href="#">35/06</a> )	28/08/2006	s992B(1)(a)  This instrument exempts a licensee from the requirement in s989B to lodge audited financial statements for the financial year ended 30 June 2006.	
5.5	<i>Relief for certain general insurers from s981B account requirements</i>	[CO 06/623]	20/07/2006	s992B(1)(c) and s1020F(1)(c)  This class order provides relief from the trust account requirements (in Subdiv A of Div 2 of Part 7.8) to insurers who receive client monies on behalf of another insurer that is the insurer of the insurance product. The receiving insurer must hold those monies in a trust account under s1017E.	
5.5	<i>Variation and revocation of financial reporting class orders</i>	[CO 06/709]	31/08/2006	The class order provide minor and machinery variations to various financial reporting class orders ([CO 98/100] <i>Rounding in financial reports and directors' reports</i> , [CO01/1455] <i>Continuously quoted securities</i> and [CO 04/672] <i>Extension of on-sales exemptions</i> as it relates to [CO 98/1418]) and revokes spent class orders [CO 98/1867], [CO 98/1868], [CO 98/1871], [CO 98/1999], [CO 98/2000], [CO 98/2001] and [CO 98/2002], which provided relief in connection with auditor independence requirements that were superseded in 2004.	