ASIC
Australian Securities & Investments Commission

REPORT 371

Overview of decisions on relief applications (February to May 2013)

September 2013

About this report

This is a report for participants in the capital markets and financial services industry who are prospective applicants for relief.

This report outlines some of ASIC's decisions on relief applications during the period 1 February to 31 May 2013. It summarises examples of situations where we have exercised, or refused to exercise, our exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising or financial services provisions of the *Corporations Act 2001*, the *National Consumer Credit Protection Act 2009* or the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009.*

It also refers to a number of publications issued by ASIC during the period 1 February to 31 May 2013 that may be relevant to prospective applicants for relief, including class orders, consultation papers, regulatory guides and reports.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal, financial or other professional advice. We encourage you to seek your own professional advice, including finding out how the *Corporations Act 2001*, the *National Consumer Credit Protection Act 2009* or the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, and other applicable laws apply to you. It is your responsibility to determine your obligations and to obtain any necessary professional advice.

Contents

Overview

1 ASIC has powers under the *Corporations Act 2001* (Corporations Act) to exempt a person or a 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 Corporations Act: Chs 2D (officers and employees), 2J (transactions affecting share capital), 2L (debentures), 2M (financial reports and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of listed companies and managed investment schemes), 6D (fundraising) and 7 (financial services and markets).

2 ASIC has powers to give relief under the provisions of Chs 2 (licensing) and 3 (responsible lending) of the *National Consumer Credit Protection Act 2009* (National Credit Act) and from all or specified provisions of the National Credit Code, which is in Sch 1 of the National Credit Act. ASIC also has powers to give relief from the registration provisions under Sch 2 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act).

3 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 Corporations Act, the National Credit Act and the Transitional Act.

4 This report covers the period beginning 1 February and ending 31 May 2013. During this period, we received 875 applications. We granted relief in relation to 425 applications and refused relief in relation to 25 applications; 72 applications were withdrawn. The remaining 353 applications were decided outside of this period.

5 This report does not provide details of every single decision made in the 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 business without harming other stakeholders.

6 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.

7 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. Please note that during the period February to May 2013, we did not release any new class orders. Instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes, or under 'Credit relief' on our website (for credit instruments). For information and media releases on the matters and publications referred to in this report, see www.asic.gov.au/mr.

A AFS licensing relief

Key points

This section outlines some of our decisions on whether to grant relief under Ch 7 of the Corporations Act, including under s911A(2) and 926A(2), from the requirement to hold an Australian financial services (AFS) licence. It also outlines the publications we issued that relate to licensing relief.

Financial requirements relief

Approval under RG 166 of an eligible provider

8 We considered an application for relief seeking approval to treat an associate of a licensee as an 'eligible provider' of undoubted financial substance, in exceptional circumstances, under Regulatory Guide 166 *Licensing: Financial requirements* (RG 166) at RG 143(g) so that the licensee could comply with its financial requirements under its AFS licence conditions.

9 The applicant sought to treat certain assets as not being 'excluded assets' for the purpose of calculating its financial requirements in accordance with RG 166 as they would be 'adequately secured' as owing from an eligible provider.

10 The applicant:

- offered wholesale market-making services in a fixed income trading business and sought to treat its over-the-counter (OTC) derivatives hedging transactions (receivables) with its associate as not being excluded assets;
- received futures execution and clearing services from its associate and sought to treat margins (receivables) as not being excluded assets; and
- entered into repurchase and stock lending agreements with its associate and sought to treat margins (receivables) as not being excluded assets.

11 We exercised our discretion to provide approval of the related entity as an 'eligible provider' under RG 166.143(g) in relation to the OTC derivatives hedging transactions referred to in paragraph 10 in the following limited circumstances:

- the AFS licensee's wholesale clients receive transaction-specific guarantees from a prudentially regulated entity;
- the transactions are on standard commercial terms on an arm's length basis;
- a credit support arrangement exists between the licensee and the associate in relation to all the OTC derivative contracts; and
- there are no material adverse changes to the financial position of the associate.

12 We did not exercise our discretion to provide approval of the associate as an 'eligible provider' in relation to the other balance sheet transactions referred to in paragraph 10 as this could result in a transfer of counterparty risk offshore to a non-prudentially regulated entity.

Relief from AFS licensing requirements due to financial requirements for retail OTC derivatives issuers

13 We granted conditional relief to an AFS licensee, authorised to make a market in derivatives contracts to retail clients, who sought relief from the financial requirements for AFS licensees on the basis that it is prudentially regulated in the United Kingdom. This application was of a type foreshadowed in RG 166.18 relating to foreign prudentially regulated licensees. The licensee emphasised that the application was driven by the new financial requirements for retail OTC derivatives issuers, of which this licensee is one, that came into force at the end of January 2013.

14 We granted the relief on the basis that the AFS licensee:

- remain prudentially regulated;
- retain client money in client trust bank accounts;
- inform ASIC of any failure to meet prudential standards; and
- submit branch-level accounts each year, along with its company-level financial statements.

15 We granted the relief because:

- the licensee is prudentially regulated by the Financial Conduct Authority (FCA) in the United Kingdom in a manner broadly equivalent to APRA regulation (see RG 166.19);
- we were satisfied that the FCA regulation is an alternative form of foreign prudential regulation that appropriately addresses the licensee obligations for financial resources and risk management;
- granting the relief will therefore reduce regulatory duplication (see RG 166.18); and
- we did not believe that granting the relief, in this case, would undermine the policy objectives of the financial requirements for AFS licensees.

Conflicted remuneration

No-action letter for certain service-based commissions

16 We took a limited and conditional no-action position in relation to an AFS licensee. The licensee's employees are remunerated for advice that they provide to clients based on a commission structure. The advice relates only to technical features of the licensee's non-cash payment facility for receipt of

payments by clients from customers through the facility and a related deposit product, and how to integrate those features into the clients' websites. Payment of these commissions may constitute a breach of Div 4 of Pt 7.7 of the Corporations Act where the clients are retail clients.

17 We took a no-action position in these circumstances because the commissions are tied to the level of service provided by employees and are designed to increase services levels, and we considered that full compliance would not result in greater alignment of client and adviser interests. Additionally, many of the clients dealt with by the relevant employees may be wholesale clients, which we considered limited the risk of consumer detriment if a no-action letter were to be granted.

18 The no-action position does not apply to other commissions paid to any other representatives of the licensee or in relation to any other financial product advice.

Refusal of no-action letter for personal advice given to both employers and employees

19 We declined to give a no-action letter in relation to anticipated breaches of the conflicted remuneration provisions in Div 4 of Pt 7.7A of the Corporations Act. The anticipated breaches arose in the context of an adviser group that provided advice, including intra-fund advice, and relationship management services to both employers, in relation to the choice of a default superannuation fund, and employees.

20 The adviser group included adviser firms providing financial advice to employers about the choice of a default superannuation fund in return for a service fee paid by the employer. Further, a member of the adviser group was paid a service fee by the administrator of the relevant superannuation fund where general advice services were provided to an employee. The substance of the advice given by the adviser firm in relation to a default superannuation fund might be influenced by the payment of the service fee.

21 This was because the adviser would have been aware that, if an employer was given advice about the choice of default fund, there was a prospect that the adviser would be asked to provide advice services to the employees of the relevant employer in return for the payment of a service fee. The existence and possible extent of fees from giving advice to employees in the future, particularly where some default superannuation funds will be known by the adviser to pay higher fees than other funds, might have influenced the adviser in giving advice to the employer in the first instance.

22 We declined to give the no-action position because:

- there was a real risk that benefits paid to members of the adviser group for the provision of advice services could have been used to influence the advice provided to employers and employees. This is the mischief that the conflicted remuneration provisions were designed to prevent;

- the adviser group's situation was not unforeseen and the application of the ban on conflicted remuneration did not produce an anomalous result; and
- it appeared open for the adviser group to change their structure so that their members would not be caught by the ban on conflicted remuneration.

Risk insurance products

Appointment of authorised representative in relation to risk insurance products

23 We granted relief from s916D(1) of the Corporations Act to enable an intermediary with a AFS licence to appoint another AFS licensee as an authorised representative in relation to dealing in and providing general financial product advice for life risk products. We granted this relief because we considered that it represented a relatively minor extension of the existing policy of granting relief to insurance providers with an AFS licence to appoint another AFS licensee as an authorised representative.

24 The relief applies in circumstances where the AFS licensee appointed as an authorised representative does not hold any authorisation in relation to the risk insurance products under its AFS licence. We were satisfied in the circumstances that the risk of consumer confusion about who was responsible for the provision of services was minimised by the inclusion of conditions ensuring adequate disclosure. Further, the consumer was protected from the risk of loss by the inclusion of a condition to ensure that the licensee is responsible for the conduct of the authorised representative, as well as a requirement that they hold adequate professional indemnity insurance.

Publications

25 We issued the following publications in relation to AFS licensing relief during the period of this report.

Consultation papers

CP 200 *Managed discretionary accounts: Updates to RG 179*

26 CP 200 set out proposed changes to our regulatory approach to managed discretionary accounts (MDAs), as contained in Regulatory Guide 179 *Managed discretionary account services* (RG 179) and Class Order [CO 04/194] *Managed discretionary accounts*. We sought feedback on our proposals from MDA operators, investor-directed portfolio service (IDPS) operators, AFS licensees, stockbrokers, industry associations, MDA service providers, consumer and investor representatives, and other interested parties.

27 MDAs are arrangements that involve a person (an MDA operator) managing a portfolio of assets for a client on an individual basis. There are a wide variety of arrangements that can constitute an MDA. CP 200 followed our review of the MDA sector in 2012 as a result of the recent growth in the number of offerings and increased interest from financial planners as a result of the Future of Financial Advice (FOFA) reforms.

28 In CP 200, we proposed to:

- revoke two temporary no-action positions which cover certain MDA arrangements and incorporate our final position on those issues into our main guidance and relief;
- implement one of three alternative proposals which seek to ensure that investors in MDAs are adequately informed when their MDA operator has discretion to invest in products where recourse is not limited (e.g. contracts for difference);
- insist on more detailed and specific upfront disclosure from MDA operators on key issues;
- update our guidance to provide greater certainty, and to reflect the changes in the law that have been implemented as part of the FOFA reforms; and
- update the financial requirements for MDA operators to ensure they are consistent with the obligations imposed by ASIC for other financial products.

29 Submissions on CP 200 were due on 19 April 2013. A report on our response to submissions has not been released at the date of this report.

CP 201 *Derivative trade repositories*

30 CP 201 sought feedback on draft rules and regulatory guidance to establish a trade repository regime, being the next step in implementing Australia's international commitments on OTC derivatives such as credit default swaps. CP 201 sets out proposals for the licensing of and rules governing derivative trade repositories, or data warehouses, which maintain an electronic database of records of derivative transactions.

31 CP 201 was accompanied by the draft ASIC Derivative Trade Repository Rules 2013, which set out our proposed requirements for Australian derivative trade repository (ADTR) licensees, and the draft regulatory guide which set out our approach to granting ADTR licences and our guidance on the rules.

32 Submissions on CP 201 were due on 12 April and Report 356 *Response to submissions on CP 201 Derivative trade repositories* (REP 356) was released on 11 July 2013.

CP 203 *Age pension estimates in superannuation forecasts: Update to RG 229*

33 CP 203 sought feedback on proposed reforms to Regulatory Guide 229 *Superannuation forecasts* (RG 229) and Class Order [CO 11/1227] *Relief for providers of retirement estimates*. This class order gives superannuation fund trustees providing retirement estimates (which may be personal advice) relief from the licensing, conduct and disclosure requirements for general and personal advice in the Corporations Act.

34 In CP 203, we proposed reforms based on submissions made after the publication of RG 229 and [CO 11/1227], including to:

- allow super funds to include the age pension as part of a retirement estimate;
- clarify that super funds may rely on the prescribed assumptions about contributions and earnings in calculating a member's retirement estimate. We do not expect the super fund to make specific inquiries to determine whether the member's individual circumstances match the prescribed assumptions; and
- make other minor amendments to improve the operation of the relief.

35 Submissions on CP 203 were due on 19 April 2013. A report on our response to submissions has not been released at the date of this report.

CP 205 *Derivative transaction reporting*

36 CP 205 sought feedback on our proposals to implement a derivative transaction reporting regime under Pt 7.5A of the Corporations Act.

37 The draft ASIC Derivative Transaction Rules (Reporting) 2013 attached to CP 205 set out our proposed requirements for the reporting of OTC derivative transactions to licensed derivative trade repositories or prescribed derivative trade repositories, including the details of transactions that will need to be reported.

38 Under our proposals:

- major financial institutions (being those with at least $50 billion of notional outstanding positions in OTC derivatives on 30 September 2013) would be subject to a reporting obligation in some asset classes from 31 December 2013; and
- other smaller financial institutions would be subject to a reporting obligation in some asset classes from 30 June 2014.

39 Entities that do not hold an AFS licence using OTC derivatives from the end of 2014 will have new reporting obligations. However, this will be subject to further public consultation and an ASIC rule change. The proposals under CP 205 are the next step in Australia meeting its G20 commitments to OTC

derivatives reform, and should be read in conjunction with Consultation Paper 201 *Derivative trade repositories* (CP 201): see paragraphs 30–32.

40 The consultation concluded on 1 May 2013 and Report 357 *Response to submissions on CP 205 Derivative transaction reporting* (REP 357) was released on 11 July 2013.

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

41 CP 209 relates to a review into our approach to the resignation, removal and replacement of auditors and an update to Regulatory Guide 26 *Resignation of auditors* (RG 26). Our consent is required under legislation for the resignation of public company auditors, the resignation and removal of scheme or AFS licensee auditors, and the resignation or replacement of auditors of Australian credit licensee trust accounts.

42 In CP 209, we sought views on matters such as whether we should continue to:

- normally consent to the resignation of a public company auditor at the next annual general meeting;
- normally consent to the resignation or removal of scheme auditors within one month after lodgement of the annual audit report; and
- give consent only if the entity has obtained a possible replacement auditor.

43 We will be considering whether to fundamentally change our approach to consenting to the resignation, removal and replacement of auditors with regard to feedback received, legislative independence requirements introduced since the current regulatory guide was issued, and experiences under our current approach and those in other jurisdictions.

44 Submissions on CP 209 were due on 30 August 2013. A report on our response to submissions has not been released at the date of this report.

Regulatory guide

RG 246 *Conflicted remuneration*

45 RG 246 is for AFS licensees and their representatives and other entities that need to comply with the provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the Corporations Act. These provisions apply to financial product advice given to retail clients. RG 246 sets out our guidance on complying with these provisions and how we will administer them.

Reports

REP 328 *Response to submissions on CP 189 Future of Financial Advice: Conflicted remuneration*

46 REP 328 highlights the key issues that arose out of the submissions received on Consultation Paper 189 *Future of Financial Advice: Conflicted remuneration* (CP 189) and details our responses in relation to these issues.

47 We received 36 responses (including 10 confidential responses) from industry associations, banks, trustees of superannuation funds, financial advisory and stockbroking firms, and legal practitioners. We also held roundtable discussions with a number of groups and their members.

REP 329 *Response to submissions on CP 191 FOFA: Approval of codes of conduct for exemption from opt-in requirement*

48 REP 329 highlights the key issues that arose out of the submissions received on Consultation Paper 191 *Future of Financial Advice: Approval of codes of conduct for exemption from opt-in requirement* (CP 191) and details our responses to those issues.

49 We received 12 responses to CP 191 from AFS licensees, industry associations, a law firm and a joint consumer submission. We have taken this feedback into account in our final updated guidance: see Section E of the revised Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183). Our new guidance should assist code applicants in deciding whether to submit a new or existing code for approval. It will also help licensees and representatives to decide whether to comply by opting-in or subscribing to an approved code.

REP 337 *SMSFs: Improving the quality of advice given to investors*

50 REP 337 summarises the findings from the first major project undertaken by ASIC's self-managed superannuation fund (SMSF) taskforce and provides a number of practical tips that advice providers can use to improve the quality of advice on SMSFs that they provide to investors.

51 We reviewed over 100 pieces of advice on SMSFs provided to investors and found that, while most advice provided was rated as adequate, there were pockets of poor advice. We found issues in the following areas:

- advice was not sufficiently tailored to the needs of the investor;
- replacement product disclosure was absent or inadequate;
- insurance recommendations were absent or inadequate;
- an inappropriate single asset class was provided to investors;
- suitable alternatives to an SMSF were not considered; and
- there was inadequate consideration of the investor's long-term retirement planning objectives.

B Disclosure relief

Key points

This section outlines some of the applications we have decided that relate to the requirements in Ch 6D of the Corporations Act to provide prospectuses and other disclosure documents and the Ch 7 requirements to provide Product Disclosure Statements (PDSs) and Financial Services Guides (FSGs). It also outlines the publications we issued that relate to disclosure relief.

Company restructure

Relief in relation to a demerger

52 We provided fundraising and on-sale disclosure relief under Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173) and Regulatory Guide 188 *Disclosure in reconstructions* (RG 188) to a US corporation in relation a proposal to demerge certain of its businesses into a separate listed company.

53 Under the proposal, the applicant would provide its shareholders with an *in specie* distribution of shares in the separate listed company. We took the view that an invitation to the applicant's shareholders to vote on amendments to its constitution that are needed to facilitate the proposed demerger constituted an offer of shares in the separate company for the purposes of Ch 6D of the Corporations Act.

54 Relief was provided because we were persuaded the separation would not result in a change to the underlying business of the applicant and the decision to vote on the constitutional amendments would therefore not involve an investment decision.

Relief granted to allow a company to undertake an equal reduction in capital without a prospectus

55 We granted relief to allow a company to undertake an internal restructure by way of a spinoff. The spinoff was conducted through an equal reduction in capital by way of an *in specie* distribution of shares to members of the company without a disclosure document as required under Ch 6D of the Corporations Act. Further, the entity in the spinoff changed from a listed entity to an unlisted entity.

56 Relief was granted as:

- the issue of shares did not result in a significant change to shareholders' overall investment and nature of interest; and
- there was no change to the underlying assets or business of the company.

57 The relief was conditional on the company providing disclosure to shareholders on the impact of the entity in the spinoff changing from a listed entity to an unlisted entity.

58 We also granted standard secondary sales relief to the company.

Employee share schemes

Relief granted to allow a company to issue shares listed on the Stockholm Exchange upon vesting of performance rights

59 We granted relief to allow a company to operate an employee share scheme on terms substantially the same as those in Class Order [CO 03/184] *Employee share schemes*, except for minor changes to the 'Interpretation' section. The changes included the insertion of a definition for certain performance rights and changes to the definition of 'approved foreign market' to include the Stockholm Exchange.

60 We granted this relief because the performance rights to be granted under the applicant's employee share scheme were derivatives and the terms of the employee share scheme satisfied our policy as the grant of these performance rights were not for the purposes of fundraising, promoted long-term mutual interdependence and investors would be provided with adequate disclosure.

61 Further, although the Stockholm Exchange is not an approved foreign exchange, we considered that it was appropriate to grant relief to the applicant as the Stockholm Exchange is internationally recognised, has rules that meet ASX Corporate Governance Principles and Recommendations and is sufficiently regulated by a government authority.

Relief in connection with an IPO

Disclosure relief for on-sale of shares issued upon the exercise of options

62 We granted secondary sales relief by way of a modification to s707(3) and (4) of the Corporations Act to enable holders of shares that may be issued upon the exercise of outstanding options which were issued without disclosure to on-sell those shares following the initial public offering (IPO) of shares in the company without requiring further disclosure.

63 Relief was provided on the basis that adequate disclosure to retail investors would be provided under the IPO prospectus and there was no benefit in the company preparing further disclosure for the on-sale of these shares as on market buyers would have the benefit of full, proximate disclosure in the IPO prospectus. The relief was provided only for shares which would be issued on the exercise of options within 12 months from the time that the company had lodged its IPO prospectus.

64 In addition, we granted standard relief from the pre-prospectus advertising and publicity rules in s734(2) of the Corporations Act to permit the company to communicate with its employees and existing shareholders in relation to the IPO.

Publications

65 We issued the following publications in relation to disclosure relief during the period of this report.

Consultation papers

CP 199 *Debentures: Reform to strengthen regulation*

66 CP 199 sought feedback on reform proposals to strengthen the regulation of companies that issue debentures to retail investors. This consultation followed a number of high-profile collapses in the sector and the subsequent formation of an ASIC debenture taskforce and the Australian Government's announcement about law reform in this sector.

67 We consulted on:

- mandatory minimum capital and liquidity requirements for debenture issuers;
- proposals to strengthen disclosure to investors about debenture issuers;
- clarifying the powers and duties of debenture trustees; and
- the role of auditors.

68 Submissions on CP 199 were due on 28 March 2013. A report on our response to submissions has not been released at the date of this report.

CP 207 *Charitable investment fundraisers*

69 CP 207 sought feedback on two options for amending exemptions currently available to charitable investment fundraisers under Regulatory Guide 87 *Charities* (RG 87). The proposed options were to:

- remove all existing exemptions for new investment fundraising, except exemptions from the AFS licensing requirements of the Corporations Act for fundraisers that only raise investment funds from associated entities (Option 1); or
- retain existing exemptions (with some modification) for new investment fundraising but on the basis that they are only available if existing conditions and a number of new conditions are satisfied (Option 2).

70 Currently, we provide extensive relief to charities under RG 87. This includes relief from the fundraising, managed investment, debenture and licensing provisions of the Corporations Act.

71 Submissions on CP 207 were due on 15 July 2013. A report on our response to submissions has not been released at the date of this report.

Regulatory guides

RG 245 *Fee disclosure statements*

72 RG 245 is for AFS licensees and representatives of AFS licensees who enter into or have an ongoing fee arrangement with retail clients who must now provide their retail clients with a fee disclosure statement (FDS) on an annual basis. The guide explains:

- the FDS obligations in Div 3 of Pt 7.7A of the Corporations Act; and
- the obligations they create for persons who provide personal advice to retail clients under an ongoing fee arrangement.

73 RG 245 also provides guidance on:

- how to prepare an FDS; and
- how and when an FDS should be given.

RG 247 *Effective disclosure in an operating and financial review*

74 RG 247 is for listed entities and their directors. It sets out our guidance for directors on providing useful and meaningful information to shareholders or unit holders when preparing an operating and financial review (OFR) in a directors' report. The purpose of this guidance is to:

- promote better communication of useful and meaningful information to shareholders; and
- assist directors in understanding the existing OFR requirements.

Report

REP 334 *Response to submissions on CP 187 Effective disclosure in an operating and financial review*

75 REP 334 highlights the key issues that arose out of the submissions received on Consultation Paper 187 *Effective disclosure in an operating and financial review* (CP 187) and details our responses to those issues. The OFR forms part of a listed entity's annual report and contains information investors would reasonably require to make an informed assessment of the entity's operations, financial position, business strategies and future prospects. It is a key part of annual disclosure by a listed entity.

76 We received 25 responses to CP 187 from companies, industry bodies, accounting firms, accounting and auditing standard setters and other interested parties. As a result of the feedback, we released RG 247 to lift the standard of disclosure: see paragraph 74.

C Managed investment relief

Key points

This section sets out some of the circumstances in which we have granted or refused relief under s601QA from the provisions of Ch 5C. It also outlines the publications we issued that relate to managed investment relief.

Hardship relief

Hardship relief refusal

77 We refused two applications for hardship relief from a responsible entity for two non-liquid managed investment schemes that sought to allow members to withdraw their investment on hardship grounds under our published hardship relief policy in Media Release (09-148MR) *ASIC expands relief for hardship withdrawals from frozen mortgage funds*.

78 The grant of hardship relief applies where members have invested in the managed investment scheme with an expectation that they would be able to withdraw their interests from time to time where that ability to withdraw has subsequently been suspended due to the 'freezing' of the scheme.

79 We refused relief as the schemes were structured in a manner where the members had invested on the basis that they will not be able to withdraw their investment until the expiry of the investment term. Accordingly, the schemes fell outside our policy basis for granting relief for non-liquid schemes on hardship grounds.

Buy-back relief

Withdrawal of application for relief to facilitate an off-market buy-back

80 We considered an application for relief from the withdrawal provisions in Pt 5C.6 and s601GA(4) of the Corporations Act in connection with a proposed off-market buy-back of stapled securities. The applicant was unable to rely on relief under Class Order [CO 07/422] *On-market buy-backs by ASX-limited schemes* as the stapled securities were listed on the National Stock Exchange of Australia (NSX) and the proposed buy-back is to be conducted off-market.

81 It was proposed that the off-market buy-back price would be fixed at a discount to net asset value. We considered that granting relief would not be

consistent with previous decisions to grant relief which involved an off-market buy-back with a price set by a tender process. Our general view is that a price discovery tendering process allows participating members to consider what an acceptable buy-back price is and the interests of participating members are effectively represented or bargained for. We considered this would be of particular relevance in these circumstances where the last trading price on the NSX occurred in 2009.

82 The application was subsequently withdrawn on the basis that relief was no longer required to proceed with the proposed buy-back.

Relief to extend [CO 07/422] to facilitate an on-market buyback

83 We granted relief to two responsible entities of managed investment schemes to extend the application of [CO 07/422] in circumstances where there was more than one class of interests in the listed schemes. Units in each scheme are part of a stapled security which is traded on ASX. The responsible entities could not rely on [CO 07/422] to conduct an on-market buy-back of the stapled securities in the absence of relief as the schemes had issued a series of options which resulted in there being multiple classes of interests in the schemes. Under [CO 07/422], a condition of relief is that there is only one class of interests in the listed scheme.

84 We were satisfied that, in the circumstances, the commercial benefits that flowed from granting relief outweighed the regulatory detriment. In particular, all options over the units were held by entities related to the stapled entity and were ultimately owned by the stapled security holders. Accordingly, the fact that there are different classes of interests did not result in any third party having an interest in the schemes. We were also satisfied that an on-market buy-back of stapled securities would not have the effect of diluting the interest holders' holdings without their consent, as each option-holder provided their consent to the relief.

85 Relief was granted on condition that the offer to buy-back the stapled securities in the ordinary course of trading on ASX must be accepted within 12 months of the date of relief. The responsible entities asked us to consider whether relief could be granted without a timing restriction. We refused this request on the basis that it is contrary to our policy to grant relief that is wider than what is reasonable necessary to achieve the applicant's commercial objectives.

Compensation arrangements

Equal treatment relief to facilitate compensation arrangements consistent with RG 94

86 We granted relief to a responsible entity to facilitate arrangements to compensate members who were affected by errors made by the responsible entity, where the compensation arrangements were consistent with Regulatory Guidance 94 *Unit pricing: Guide to good practice* (RG 94). Paragraph 6.3 of RG 94 provides guidance on when compensation is payable.

87 RG 94 also provides guidance on how compensation may be made. In particular, for retained members, if the difference (the compensation amount) is equal to or greater that 0.3% (30 basis points) of the value that would have accumulated without the error, the compensation amount should be paid. If the difference is less than 0.3%, the entity should consider whether compensation should be paid (particular considerations are explored further in RG 94). For existing members, compensation should be paid where the amount of compensation is $20 and above.

88 We considered Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* (RG 136) at RG 136.29D. This states that charging members in the same class different fees on the basis of a characteristic of the member (such as the amount they have invested in the scheme) is prohibited under s601FC(1)(d) of the Corporations Act, which requires a responsible entity to treat members equally, and is relevant to the proposed compensation arrangements that are based on a characteristic of a member. The rationale in RG 136.29D should apply equally to such compensation as it does for the charging of fees to a member of a particular class. Accordingly, we accept that relief from s601FC(1)(d) is required to facilitate compensation arrangements that are consistent with RG 94.

89 We granted relief in this case so that the compensation amount will be paid to retained members if the compensation amount is equal to or greater than 0.3% (30 basis points) of the value that would have accumulated without the errors. If the compensation amount is less than 0.3%, the compensation amount will be paid to a charity that was disclosed on the website of the responsible entity.

Publications

90 We issued the following publications in relation to managed investment relief during the period of this report.

Consultation papers

CP 204 *Risk management systems of responsible entities*

91 CP 204 and accompanying proposed guidance set out our proposals for regulatory requirements and guidance relating to the risk management systems of responsible entities in the managed funds sector. The proposals reflect international standards and developments in risk management and include:

- ensuring risk management systems comprise processes to identify, assess and treat risks;
- ensuring these processes are suitable for individual business objectives and operations;
- ensuring that risk management systems address all material risks, including strategic, governance, operational, investment and liquidity risks; and
- reviewing risk management systems regularly, and no less than annually, for appropriateness, effectiveness and relevance to individual businesses.

92 CP 204 follows our recent review of risk management systems of selected responsible entities, the findings of which are discussed in Report 298 *Adequacy of risk management systems of responsible entities* (REP 298) published in September 2012.

93 Submissions on CP 204 were due on 3 May 2013. A report on our response to submissions has not been released at the date of this report.

CP 208 *ASX Managed Funds Service: Relief from the application form requirement*

94 CP 208 relates to relief for retail clients who apply for an interest in a registered simple managed investment scheme through the proposed ASX Managed Funds Service (AMFS). The AMFS is a facility that allows investors to electronically apply for or redeem units in simple managed investment schemes that have been admitted to the service through brokers who are authorised to participate in the service.

95 ASX is seeking relief from the requirement in s1016A where a retail investor must apply using an application form that accompanies a PDS, or an application form prepared and partly completed by an AFS licensee. CP 208 also discusses further regulatory elements that ASX needs to meet in order to operate the AMFS, including being granted an exemption by the Minister from the requirement to hold an Australian market licence to operate the AMFS and amending the ASX Operating Rules and ASX Settlement Rules to accommodate the AMFS.

96 Submissions on CP 208 were due on 11 July 2013. A report on our response to submissions has not been released at the date of this report.

D Mergers and acquisitions relief

Key points

This section outlines some of the circumstances in which we have granted or refused relief from the provisions of Chs 2J, 6, 6A and 6C under s259C, 655A, 669 and 673, respectively, of the Corporations Act.

Rights issue

Withdrawal of application for relief to broaden the rights issue exception

97 We considered an application for relief to broaden the rights issue exception in item 10 of s611 in connection with a proposed rights issue. The relief sought would enable existing shareholders of the company to participate in the shortfall facility to the rights issue, even if by doing so they would exceed the takeover threshold in s606 of the Corporations Act.

98 We intended to refuse relief in this instance because the rights issue had been structured to allow members of the general public to participate in the shortfall facility together with any existing shareholders wishing to take up additional shares under the shortfall. Given this structure, we considered that granting the relief to extend the rights issue exception in circumstances where the shortfall facility would be open to the general public was inappropriate and outside our policy as contained in Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6). RG 6 provides that, in limited circumstances, we may grant case-by-case relief to broaden the rights issue exception to facilitate participation by existing shareholders.

99 After being advised of our position, the applicant made substantial changes to the offer, including limiting participation in the shortfall facility to existing shareholders. A contemporaneous but separate offer was proposed to be made to the general public. In light of these changes, the application was withdrawn as relief was no longer necessary.

Relief in connection with an IPO

Relevant interest relief for the operator of a share sale facility in connection with an IPO

100 We granted relief from s606 and 671B of the Corporations Act in connection with an IPO of shares in a company. The relief was provided to the operator of a share sale facility, the joint lead managers to the offer and the company making the offer. It allowed the sale facility operator to acquire a relevant

interest in 20% or more of shares in the company where the existing shareholders of the company sold or transferred their shares to the sale facility operator who then sold or transferred the shares under the IPO.

101 We also granted relief from the substantial shareholder requirements in s671B to the share sale facility operator and any person that is an associate by virtue of the operation of s12(2) of the Corporations Act.

Buy-back relief

Share buy-back relief for a private company

102 We granted relief to enable a private company to undertake a tender-style share buy-back without having to seek shareholder approval at a meeting under s257D(1) of the Corporations Act. Although we had granted similar relief to the company on previous occasions, the current application sought to remove the 'final price tender' option from the buy-back procedure.

103 We were concerned that removing the ability for shareholders to tender at the final price would be a significant departure from previous relief provided to the company and would establish a market precedent for tender-style share buy-backs. In particular, we were concerned that removing the ability for shareholders to tender at the final price may result in some shareholders missing out on the benefit of the buy-back where they tender their shares at a discount smaller than that which is acceptable to the board of the company.

104 Relief was provided on the basis that the company retain the 'final price tender' option and that shareholders had enough information to assess the value of their shareholdings before tendering their shares. In this case, the company had provided quarterly valuations on a net tangible asset basis to its shareholders over the last 10 years.

Publications

105 We did not issue any relevant publications in relation to mergers and acquisitions relief during the period of this report.

E Conduct relief

Key points

We did not make any relevant relief decisions from the conduct obligations in Chs 2D, 2G, 2M, 5C and 7 of the Corporations Act. This section outlines the publications we issued which related to this area.

Publications

106 We issued the following publications in relation to conduct relief during the period of this report.

Regulatory guide

RG 248 *Litigation schemes and proof of debt schemes: Managing conflicts of interest*

107 RG 248 sets out our approach on how a person who provides a financial service can satisfy the obligation to maintain adequate practices and follow certain procedures for managing potential and actual conflicts of interest in relation to a litigation scheme or a proof of debt scheme. A person providing financial services for litigation schemes and proof of debt schemes is exempt from the requirements that would otherwise apply under Ch 7 of the Corporations Act, but the person must maintain, for the duration of the scheme, adequate practices for managing any conflicts of interest that may arise in relation to the scheme.

108 RG 248 sets out our expectations for compliance by a person who provides a financial service with the obligation to maintain adequate practices to manage conflicts of interest, including being:

- responsible for determining their own arrangements to manage interests that may conflict; and
- able to demonstrate that they have adequate practices to manage conflicts of interest, including documenting, implementing and reviewing their arrangements.

Report

REP 338 *Response to submissions on CP 185 Litigation schemes and proof of debt schemes: Managing conflicts of interest*

109 REP 338 highlights the key issues that arose out of the submissions received on Consultation Paper 185 *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (CP 185) and details our responses to those issues.

110 We received five responses to CP 185. These responses were from a variety of sources, including law firms, industry bodies and funders. The main issues raised by respondents related to:

- whether our proposed guidance should apply to both funders and lawyers;
- whether we should include guidance on the recruitment of prospective members;
- the method of disclosure to prospective members;
- whether specific terms should be included in the funding agreement; and
- whether any settlement offers or the terms of settlement agreements should be reviewed by counsel or an independent panel.

111 As a result of our consultation and the submissions received, we released Regulatory Guide 248 *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (RG 248): see paragraphs 107–108.

F Credit relief

Key points

We did not make any relevant relief decisions under the National Credit Act or the Transitional Act. This section outlines the publications we issued that relate to credit relief.

Publications

112 We issued the following publications in relation to credit relief during the period of this report.

Report

REP 330 *Review of licensed credit assistance providers' monitoring and supervision of credit representatives*

113 REP 330 was released as a result of our review into how large credit licensees (with a primary credit activity of providing credit assistance) monitor and supervise their credit representatives' compliance with the responsible lending obligations when providing credit assistance for home loans.

114 Our review covered 18 credit licensees who are responsible for over 60% of mortgage broker representatives. It identified a number of compliance risks, including licensees:

- not being able to identify all instances of credit assistance being provided by each of their credit representatives;
- not having direct access to preliminary assessments, or the documents that form the basis of the assessment; and
- not having appropriate practices in place to undertake compliance reviews of their credit representatives.

115 REP 330 recommends eight ways for credit licensees to reduce their risk of non-compliance and outlines a number of instances of good practice, including:

- commencing regular formal reviews of their representatives' compliance;
- upgrading IT systems to better track credit assistance provided by their representatives;
- ensuring they have direct access to their representatives' preliminary assessments of whether a credit contract will be unsuitable for a consumer and all documents supporting those assessments; and
- considering a broader range compliance risks when undertaking compliance reviews.

G Other relief

Key points

This section outlines decisions we have made that do not fall within any of the categories mentioned in previous sections and that may be significant to participants in the financial services and capital markets industry. It also outlines further publications we issued.

Financial planning relief

Relief granted from providing new SOAs to existing clients

116 We granted relief under s951B(1)(c) of the Corporations Act, in accordance with reg 7.7.10AE of the Corporations Regulations 2001, where a new Statement of Advice (SOA) is not required to be provided to existing clients by an entity where particular criteria are met. In this instance the applicant, an AFS licensee, offered employee representatives already providing advice under its licence the opportunity to become authorised representatives of the licensee. Consequently, these authorised representatives would be new providing entities under s944A of the Corporations Act and be required to issue new SOAs to existing clients when providing any further financial advice to them.

117 We provided relief from the obligation to issue a new SOA to existing clients under the AFS licence, where:

- the providing entity has previously given the client an SOA that set out the client's relevant personal circumstances in relation to the advice; or
- three of the following conditions are met:
  - the providing entity is a natural person who is an authorised representative of an AFS licensee;
  - the licensee has previously given the client an SOA that set out the client's relevant personal circumstances in relation to the advice; and
  - the licensee gave the previous advice by acting through that natural person in their capacity as employee of the licensee.

118 We granted relief in these circumstances as it was consistent with the objective of the exemption in reg 7.7.10AE, which is to reduce the compliance burden on entities without limiting the quality of disclosure or the reasonableness of the advice provided to clients.

Publications

119 We issued the following publications during the period of this report.

Report

REP 343 *Response to submissions on CP 195 Proposed amendments to ASIC market integrity rules: ASX 24 and FEX markets*

120 REP 343 highlights the key issues that arose out of the submissions received on Consultation Paper 195 *Proposed amendments to ASIC market integrity rules: ASX 24 and FEX markets* (CP 195) and details our responses to those issues.

121 We received three responses to CP 195, from a market operator, a market participant and an industry body. Generally, the respondents supported the proposed amendments but some respondents:

- expressed concerns about the proposed amendments on the minimum presence requirements and risk management obligations for house accounts;
- had queries about the proposed new market integrity rule for supervisory policies and procedures; and
- suggested minor amendments, including to the proposed rules for disclosure about clearing arrangements for the FEX market.

122 Based on feedback received, we have amended or made new market integrity rules for the ASX 24 market. The rules cover risk management, supervisory policies and procedures, and foreign participants. New ASX 24 market participants will need to comply with the rules immediately. For existing participants, there will be a three-month transition period. We will issue regulatory guidance during this time. We also intend to issue new guidance to address some of the concerns that were raised.

Appendix: ASIC relief instruments

Table 1 lists the individual relief instruments we have executed for matters that are referred to in this report and which are publicly available. The instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes, except for credit instruments (marked with asterisks), which are published on our website under 'Credit relief'.

Table 1: ASIC relief instruments

Report para no.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
13–15	IG Markets Limited ARBN 099 019 851	13-0498 (in A20/13)	22/04/2013	s926A(2)(c) and 992B(1)(c) of the Corporations Act Modification of Pt 7.8 of the Corporations Act by omitting s912AB, notionally inserted in the Act by Class Order [CO 12/752] *Financial requirements for retail OTC derivative issuers*.	
23–24	Lifebroker Pty Ltd ACN 115 153 243	13-0146 (in A07/13)	08/02/2013	s926A(2)(c) and 951B(1)(c) of the Corporations Act Exemption from s916D(1) allowing an AFS licensee who is an intermediary to appoint another AFS licensee as an authorised representative in relation to life risk products.	
52–54	News Corporation ARBN 163 882 933	13-0592 (in A21/13)	07/05/2013	s741(1)(a) and (b), 926A(2)(a) and 1020F(1)(c) of the Corporations Act Relief from fundraising and on-sale disclosure provisions.	
55–58	SVC Group Limited ACN 009 161 522	13-0112 (in A06/13)	06/02/2013	s741(1)(a) and (b) of the Corporations Act Exemption from Pts 6D.2 and 6D.3 and declaration modifying s707 to provide on-sale disclosure relief.	
59–61	Atlas Copco AB NRET 162 708 714	13-0359 (in A14/13)	21/03/2013	s911A(2)(l), 992B(1)(a) and 1020F(1)(a) and (1)(b) of the Corporations Act Exemption from Pt 7.9, granting relief on substantially the same terms as Class Order [CO 03/184] *Employee share schemes* to allow a company to issue shares listed on the Stockholm Exchange upon vesting of performance rights.	

Report para no.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief	Expiry date
62–63	iSelect Limited ACN 124 302 932	13-0585 (in A21/13)	06/05/2013	s741(1)(b) of the Corporations Act On-sale relief for shares issued following the conversion of options.	
64	iSelect Limited ACN 124 302 932	13-0587 (in A21/13)	06/05/2013	s741(1)(a) of the Corporations Act Pre-prospectus advertising relief.	
83–85	Westfield America Management Limited ACN 072 780 619 Westfield Management Limited ACN 001 670 579	13-0163 (in A08/13)	14/02/2013	s601QA(1)(b) of the Corporations Act Declaration to modify s601KF as notionally inserted by Class Order [CO 07/422] *On-market buy-backs by ASX-limited schemes* to enable an on-market buy-back in reliance on that section in circumstances where there was more than one class of interests in the listed schemes.	
86–89	Platinum Investment Management Limited ACN 063 565 006	13-0260	03/05/2013	s601QA(1) of the Corporations Act Exemption from the s601FC(1)(d) to allow different compensation amounts to be paid to different members in registered schemes.	
100–101	iSelect Limited ACN 124 302 932	13-0588 (in A21/13)	06/05/2013	s655A and 673(1)(a) of the Corporations Act Relevant interest relief to facilitate the operation of a share sale facility.	
102–104	The Myer Family Company Holdings Pty Ltd ACN 004 116 296	13-0268	05/03/2013	s257D of the Corporations Act Relief to treat a tender-style buyback as an equal access scheme.	