



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 140

Serviced strata schemes

Related instruments [CO 98/2284], [CO 98/2286], [CO 98/2287], [CO 99/460], [CO 99/461], [CO 99/462], [CO 99/463], [CO 99/1015], [CO 00/191], [CO 00/198], [CO 00/208], [CO 00/209], [CO 00/216], [CO 00/570], [PF 184], [PF 186], [PF 187]

Chapter 5C — Managed investment schemes

Chapter 6D — Fundraising

Chapter 7 — Securities

Parts 7.3, 7.4, 7.5, 7.6 and 7.7 — Licensing of dealers and investment advisers

Reissued 13/11/2000

Previous version reproduced as [SPS 140C] in the ASIC Digest on CD-ROM.

From 5 July 2007, this document may be referred to as Regulatory Guide 140 (RG 140) or Policy Statement 140 (PS 140). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 140.1) or their policy statement number (e.g. PS 140.1).

What this guide is about

RG 140.1 This guide gives guidance on the application of the Law to arrangements involving property under strata title or community title and under adjoining freehold titles or leasehold interests. In particular, it provides guidance on:

- A** what operators of serviced strata schemes must do to comply with the Law. This chapter is only a summary and you must read the

relevant parts of this policy to understand what are your obligations under the Law.

see RG 140.2–RG 140.15

B what serviced strata arrangements we consider are managed investment schemes;

see RG 140.16–RG 140.42

C exemptions for promoters and operators of management rights schemes;

see RG 140.43–RG 140.56B

D what other exemptions are available for promoters and operators of serviced strata schemes and commercial and residential letting arrangements;

see RG 140.57–RG 140.69

E what promoters and operators of non complying serviced strata schemes must do so they will not contravene the Law;

see RG 140.70–RG 140.89

F what responsible entities of registered serviced strata schemes must do to comply with the Law; and

see RG 140.90–RG 140.107

G what people who are involved in selling real estate to which a serviced strata scheme applies must do to comply with the Law.

see RG 140.108–RG 140.118

Contents

What this guide is about	1
A Serviced strata arrangements and compliance with the Law.....	4
Our policy	4
Underlying principles	9
Explanations	10
B Which strata arrangements are managed investment schemes?	14
Our interpretation.....	14
Underlying principles	15
Explanations	15
Further examples.....	19
C Exemption for management rights schemes	22
Our policy	22
Underlying principles	24
Explanations	25
D Other exemptions for serviced strata schemes.....	28
Our policy	28
Underlying principles	29
Explanations	30
E Non complying serviced strata schemes	32
Our policy	32
Underlying principles	35
Explanations	35
F Registered serviced strata schemes	39
Our policy	39
Underlying principles	40
Explanations	41
G Serviced strata schemes: Licensing of intermediaries	44
Our interpretation.....	44
Underlying principles	45
Explanations	45
Key terms.....	47
Related information	49
Annexure: Summary of point of sale disclosure.....	51
What is being offered?.....	52
What are the risks and returns?	52
What are the fees, charges, expenses and taxes?	53
Who is operating it?	54
How can investments be withdrawn or transferred?	54
What information can be obtained?.....	54
Getting more advice	55

A Serviced strata arrangements and compliance with the Law

Our policy

RG 140.2 Not all serviced strata arrangements must comply with the Law. We consider that only arrangements which are *serviced strata schemes* must comply. This chapter summarises what promoters and operators of serviced strata schemes must do to comply with the Corporations Law. **However, you should not rely on just this chapter alone. You should read all of Regulatory Guide 140 and get appropriate professional advice.**

See RG 140.11–RG 140.12 for an explanation about how the key terms “promoter”, “operator”, “strata unit”, “serviced strata arrangement” and “serviced strata scheme” are commonly used in this guide.

RG 140.3 In general, operators of serviced strata schemes must comply with the managed investment, fundraising and licensing provisions of the Corporations Law.

See RG 140.13 for an explanation of the terms “managed investment”, “fundraising and licensing provisions”.

See also RG 140.14–RG 140.15 for a brief description of what complying with the managed investment, licensing and fundraising provisions of the Corporations Law involves.

What is a serviced strata scheme?

RG 140.4 In general we consider that there is likely to be a serviced strata scheme when an investor’s right to a return depends (totally or partially) on either or both of the following two factors:

- the use of other investors’ strata units; or
- the use of their strata unit as part of a hotel, motel, resort or serviced apartment complex.

An investor that has an understanding with a promoter that they will get the return is treated as having a right to that return.

See Chapter B of this guide for a detailed explanation of when we consider a serviced strata scheme exists (see RG 140.16–RG 140.17 in particular). This chapter also includes three typical examples of when a serviced strata scheme may or may not exist (see RG 140.38–RG 140.42).

Relief from the Corporations Law

RG 140.5 We have given promoters and operators of some types of serviced strata schemes conditional relief from the Corporations Law. This means that if you operate a scheme of this type (or offer interests in a scheme) you may not have to comply with some, or all, of the managed investment, licensing and fundraising provisions of the Corporations Law.

RG 140.6 This relief is given in “class orders” or in some circumstances on a case by case basis under a “pro forma”. In order to obtain the benefit of relief under a pro forma you must apply for relief in relation to a particular scheme. You do not need to apply for relief if there is a class order. The class order and pro forma relief are conditional. This means that you must meet the conditions that are listed in any relevant class order or pro forma if you want to take advantage of our relief.

RG 140.7 We can not give relief that changes whether acts or omissions before the relief were in breach of the Corporations Law. However, in some circumstances we will take no enforcement action for past acts or omissions (a “no action position”). This means that investors may exercise their rights for past acts or omissions.

Illustrative tables

RG 140.8 Two tables follow. Table 1 illustrates the relevant provisions of the Corporations Law and ASIC Act which apply to the operation of a serviced strata scheme. See also RG 140.14 and RG 140.15 for a brief description of what complying with the managed investment, licensing and fundraising provisions of the Corporations Law involves. Table 2 summarises how the Corporations Law applies to a promoter or operator of some types of serviced strata arrangement. Table 2 also refers to the relevant relief that we:

- (a) have given in class orders, or
- (b) will consider giving you under a pro forma if you apply.

You must not rely on the following tables alone. You must read the relevant parts of Regulatory Guide 140 and the relevant class order or pro forma which apply to your type of scheme. You must read it to fully understand your obligations under the Corporations Law.

Table 1 — Illustration of key provisions under the Corporations Law and ASIC Act which apply to the operation of a serviced strata scheme

Important note: This table illustrates the relevant provisions of the Corporations Law and ASIC Act which apply to the operation of a serviced strata scheme. We have given relief from all or some of the managed investment, licensing and fundraising provisions of the Corporations Law to promoters and operators of some types of serviced strata schemes. See Table 2 which follows for a summary of the relief we have given for operation of some types of serviced strata schemes. Whether you rely on relief or not **all** promoters or operators of serviced strata schemes must not breach the general misleading and deceptive conduct provisions of the Corporations Law and the ASIC Act.

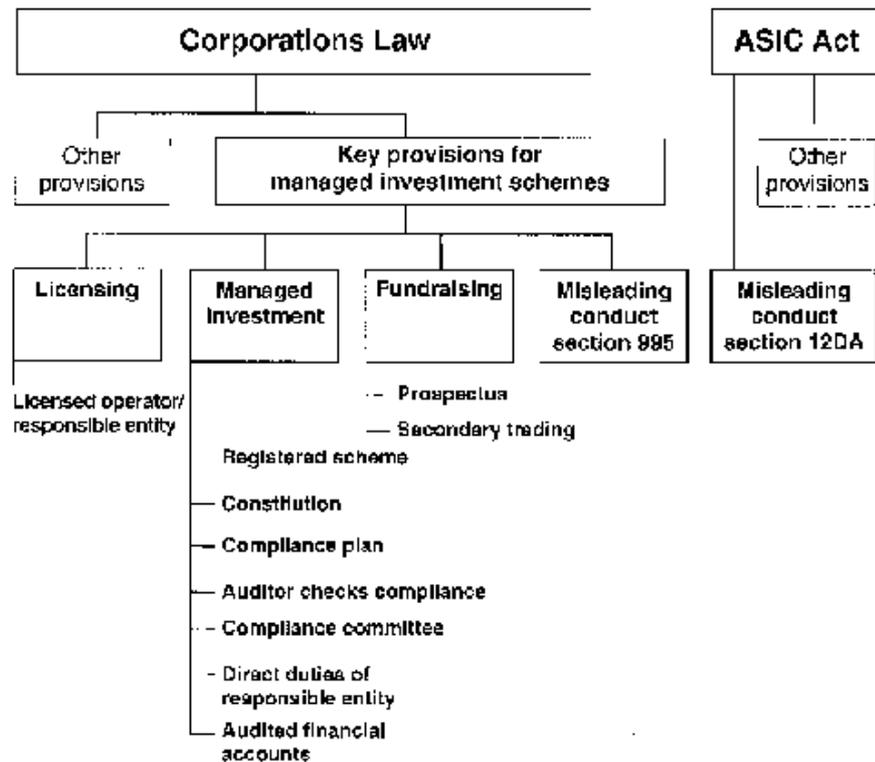


Table 2 — How the Corporations Law and ASIC Act applies to a promoter or operator of a serviced strata arrangement

Important note: *This table summarises how the Corporations Law and ASIC Act applies to a promoter or operator of a serviced strata arrangement. This includes whether we have given relief from some or all of the managed investment, licensing and fundraising provisions of the Corporations Law. With the exception of the first type of serviced strata arrangement, even if you have relief from the managed investment, licensing and fundraising provisions of the Corporations Law, you:*

- *must comply with the relevant conditions of the relief; and*
- *must not engage in misleading or deceptive conduct (see s995 of the Corporations Law and s12DA of the Australian Securities and Investments Commission Act 1989).*

<i>Type of arrangement</i>	<i>What relief we have given</i>	<i>Paragraph references</i>
ordinary sales of strata title units	No relief is provided as it is not a managed investment scheme. Not required to comply with the Corporations Law or ASIC Act.	RG 140.23
one-off serviced strata schemes with less than 20 members	Not required to comply with the managed investment, licensing and fundraising provisions.	RG 140.100 and RG 140.101
residential or commercial letting arrangements which could be managed investment schemes	Relief is given from the managed investment, licensing and fundraising provisions. See [CO 00/209].	RG 140.57 and RG 140.61
strata arrangements which incidentally involve a managed investment scheme	Relief is given from the managed investment, licensing and fundraising provisions. See [PF 184].	RG 140.58, RG 140.62, and RG 140.65

serviced strata schemes which are management rights schemes	Relief is available from the managed investment, licensing and fundraising provisions. Relief is conditional, for example, on issuing a concise disclosure statement.	RG 140.16, RG 140.20, RG 140.24–RG 140.27, RG 140.36, RG 140.41, RG 140.42, and Chapter C (paras RG 140.43–RG 140.56)
	See [CO 99/460], [CO 00/570] and [PF 187].	
serviced strata schemes sales when all of the strata units are sold for over \$500,000	Relief is given from the managed investment, licensing and fundraising provisions.	Chapter B, RG 140.59, and RG 140.63
	See [CO 00/191].	
serviced strata schemes which are managed investment schemes not for money	Relief is given from the managed investment, licensing and fundraising provisions.	Chapter B, RG 140.60 and RG 140.66 See also Regulatory Guide 80 <i>Managed investment schemes—interests not for money</i> (RG 80)
	See [CO 00/198].	
serviced strata schemes which are participating property syndicates	Relief is given from the managed investment and licensing provisions. Fundraising provisions apply.	Chapter B, RG 140.60 and RG 140.67 See also Regulatory Guide 77 <i>Property trusts and syndicates</i> at RG 77.96B–RG 77.96Y
	See [CO 98/64].	
serviced strata schemes which are small property syndicates	Relief is given from the managed investment, licensing and fundraising provisions.	Chapter B, RG 140.60 and RG 140.67
	See [CO 98/78] and [CO 00/215].	See also Regulatory Guide 77 <i>Property trusts and syndicates</i> at RG 77.96ZA

closed serviced strata schemes as at 6 October 1999	Relief is given from the managed investment, licensing and fundraising provisions.	Chapter B, RG 140.70–RG 140.75 and RG 140.78–RG 140.84
	See [CO 99/461], [CO 00/216].	
	No action position for operations before 6 October 1998.	
well advanced serviced strata schemes as at 6 October 1998	Relief is given from the managed investment, licensing, and fundraising provisions.	Chapter B, RG 140.77–RG 140.78 and RG 140.86–RG 140.89
	See [PF 186].	
	No action position for operations before issue date of relevant pro forma relief.	
other serviced strata schemes	Must comply with the managed investment, licensing and fundraising provisions. However, relief has been given from the duty to value scheme property regularly (see [CO 99/463]).	Chapter B, RG 140.76, RG 140.85, RG 140.86 and Chapter F (see paras RG 140.90–RG 140.107)
	Relaxed custodial capital requirements apply.	

Underlying principles

RG 140.9 In general, serviced strata schemes should comply with the managed investment, licensing and fundraising provisions of the Corporations Law.

RG 140.10 However, we have given relief and will give relief from some or most of the provisions of the Corporations Law if appropriate when:

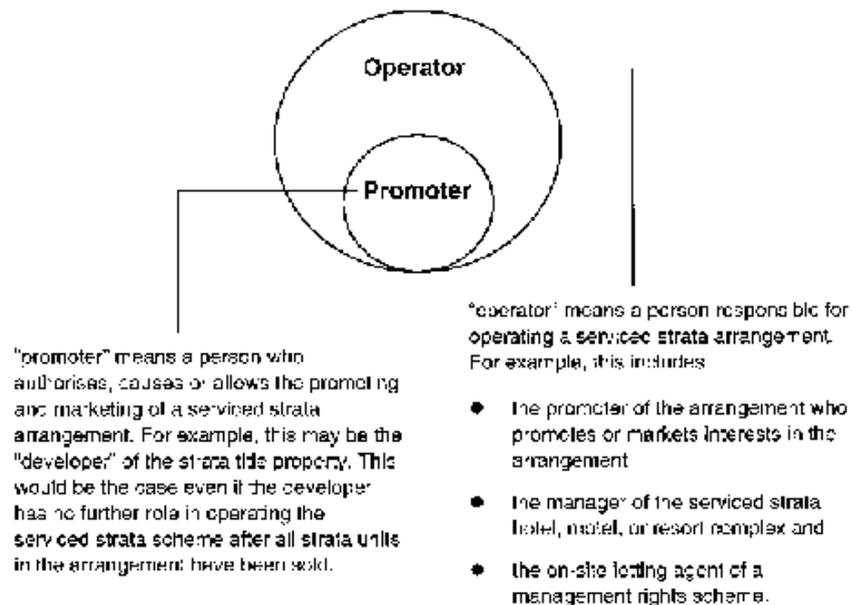
- (a) strictly complying with the Corporations Law would be impossible or disproportionately burdensome;
- (b) people acquiring or holding interests in a scheme would still have the protection that Parliament intended they would have; and
- (c) there would be commercial benefit to the parties to the scheme.

Explanations

Note that the definitions of the terms in the Explanation section of this chapter are repeated in the Key Terms section of this guide at RG 140.119.

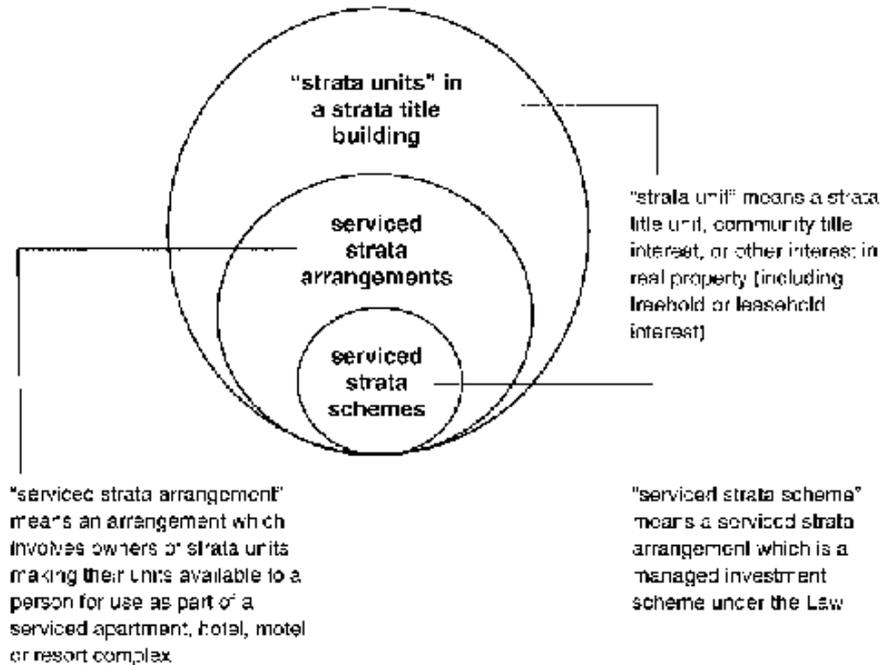
“Promoters” and “operators”

RG 140.11 The following diagram and definitions will help you understand how we have used the words “promoters” and “operators”.



“Strata unit”, “serviced strata arrangement” and “serviced strata scheme”

RG 140.12 The following diagram and definitions will help you understand how we have used the terms “strata unit”, “serviced strata arrangement” and “serviced strata scheme”.



"Managed investment, licensing and fundraising provisions" of the Corporations Law

RG 140.13 The following definitions will help you understand how we have used the terms "managed investment", "licensing" and "fundraising provisions" in this guide:

"Managed investment provisions"

This means those provisions in Chapter 5C of the Corporations Law on the:

- (a) requirements for registering a managed investment scheme. In general, a scheme must be registered if it has more than 20 members or has been promoted by a person who is in the business of promoting schemes. The key exception is in s601ED(2); and
- (b) obligations when operating a registered scheme.

"Licensing provisions"

This means those provisions in Parts 7.3 to 7.7 of the Corporations Law about:

- (a) the need to have a dealers licence which authorises a person to operate a managed investment scheme (that is, the responsible entity); and

- (b) the obligations of the holder of a dealers licence (for example, financial statements and audit; dealers account).

In general, a person who is excluded under the Corporations Law or exempt because of relief given by ASIC to operate a managed investment scheme is not required to comply with the licensing provisions (see reg 7.3.11(1)).

“Fundraising provisions”

This means those provisions in Chapter 6D of the Corporations Law concerning fundraising and securities hawking (for example, telephone selling).

How to comply with the Corporations Law

RG 140.14 In general, you must meet the following three requirements of the Corporations Law if you want to operate a managed investment scheme:

- (a) the operator must be a public company and be licensed;
- (b) the scheme must be registered; and
- (c) a prospectus must be issued.

You must meet these requirements unless your scheme is a one-off promotion with no more than 20 members, all the interests are issued in circumstances that would not need disclosure under Chapter 6D or you have been given relief by us from the need to register your scheme.

Operator

The operator of the scheme must be a public company and licensed to operate the managed investment scheme as a responsible entity (certain minimum capital requirements apply).

Registered scheme

The scheme must be registered, which means that there must be:

- (a) a constitution and compliance plan which meet the requirements of the Corporations Law;
- (b) an auditor appointed to review compliance with, and the adequacy, of the scheme’s compliance plan;

- (c) either at least half of the operator's board must be composed of external members or the operator must appoint a compliance committee, the majority of which is composed of external members. (The board or compliance committee must monitor compliance with the scheme's compliance plan.); and
- (d) at least annual audited financial statements for the scheme lodged with us and provided to members of the scheme.

Prospectus

Generally offers of interests in the scheme must be made in a prospectus to facilitate an investor making an informed decision about whether to invest in the scheme or not.

RG 140.15 We have issued some general regulatory guides about complying with the managed investment provisions.

See our Regulatory Guides RG 130–RG 134 on Managed Investments. A list of these guides is included in the Related Information section of this guide at RG 140.120.

B Which strata arrangements are managed investment schemes?

Our interpretation

Interdependency between owners

RG 140.16 We consider that there is likely to be a serviced strata scheme when an investor in a strata unit has a right (including by agreement or an understanding with the promoter) to a return which depends, in whole or in part, on the use of other investors' strata units (as opposed to common property). For example, the investor's return depends on an arrangement for pooling income or for fairly allocating tenants.

see *RG 140.24–RG 140.27*

Dependency on the serviced strata arrangement

RG 140.17 We consider that there is likely to be a serviced strata scheme when an investor in a strata unit has a right (including by agreement or an understanding with the promoter) to a return which depends, in whole or in part, on an investor's strata unit being used as part of a serviced strata arrangement. For example, the investor depends on the serviced strata arrangement to receive some kind of fixed or indexed return.

see *RG 140.28–RG 140.32*

Deferred pool or common enterprise

RG 140.18 A serviced strata arrangement is likely to be a managed investment scheme even if one of the situations discussed at RG 140.16 and RG 140.17 exists only after some period during which investors derive returns in some other way, such as, fixed or indexed rent is paid regardless of the success of the operation of a serviced strata arrangement.

see *RG 140.33*

Pre-packaged sale of interests

RG 140.19 A serviced strata scheme may exist although the interests in the scheme are sold as part of a pre-packaged resale of

interests. For example, interests initially issued to a promoter or its associate are resold.

see *RG 140.35*

What is scheme property?

RG 140.20 In a serviced strata scheme:

- (a) when the operator has a right to occupy the strata unit, the principal scheme property is generally the lease or licence. (The investor retains the freehold which is not scheme property.); or
- (b) when the operator has the right as agent of the strata unit owner to enter leases or licences of the strata unit, the principal scheme property is generally that right.

see *RG 140.36*

Underlying principles

RG 140.21 We consider that the managed investment provisions of the Law apply to certain arrangements for using strata units. The provisions apply when the arrangement has the characteristics of a managed investment (for example, investments in a serviced apartment, hotel, motel or resort complex).

Explanations

Definition of “managed investment scheme”

RG 140.22 In general serviced strata schemes are managed investment schemes under paragraph (a) of the definition of “managed investment scheme” in s9 of the Law which is as follows:

“(a) a scheme that has the following features:

- (i) people contribute money or money’s worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as

contributors to the scheme or as people who have acquired interests from holders);

- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).”

A retirement village scheme (as defined in s9) is not a managed investment scheme unless it is a time-sharing scheme.

Sales of strata units

RG 140.23 Managed investment schemes do not exist when there are:

- (a) ordinary sales of standard, completed strata units; or
- (b) “off the plan” sales. These are sales when the only money paid by the investor before they settle, and take possession of the completed strata unit, is a deposit that is held by a stakeholder.

Interdependency between owners

RG 140.24 There may be an agreement or understanding between the promoter and the investor that the operator will operate a serviced strata arrangement on the basis that the return to the investor from the use of the investor’s strata unit will be affected by the use of other investors’ strata units (as opposed to common property). In such cases, we consider that there will normally be a serviced strata scheme. For example, this applies to a serviced strata scheme when there is an agreement or understanding that:

- (a) an investor’s return depends on a fair allocation of rent or prospective tenants between participating investors; or
- (b) the serviced strata arrangement will operate on the basis that income from using the strata units will be pooled.

RG 140.25 We consider that the pooling of amounts payable by investors to a body corporate of a strata title property:

- (a) relating to the use of common property; or
- (b) under the by-laws of the strata title property, does not give rise to a managed investment scheme.

RG 140.26 A serviced strata arrangement can be a managed investment scheme even though joining is voluntary for people who own units in a particular location. However, if joining the scheme is compulsory, this supports an inference that there is a common

enterprise (see para (a)(ii) of the definition of managed investment scheme at RG 140.22).

RG 140.27 Interdependence and a common enterprise exist if moneys are, in some way, used in common to operate the serviced strata arrangement. There may be interdependence and a common enterprise regardless of whether money is mixed in one bank account.

Dependency on the serviced strata arrangement

Proportionate return arrangements

RG 140.28 Generally there is a serviced strata scheme if the promoter and investor agree, or have an understanding, that the investor's return depends on using their strata unit as part of a serviced strata arrangement.

RG 140.29 In the simplest case, the investor's return is a share of the profit on the use of the whole complex. In these circumstances, there is a common enterprise between the investor and the operator. This is because the return to each is likely to depend on the success or failure of the serviced strata arrangement.

Fixed or indexed return arrangements

RG 140.30 Generally there is a serviced strata scheme even if the promoter and investor agree, or have an understanding, that the investor's return is a promised fixed or indexed amount. However, in some arrangements an investor's return may not materially depend on the arrangement involving their unit. We only consider an arrangement is a serviced strata scheme if the investors have the understanding that their return will materially depend on the arrangement. If investors are not to have that understanding, promoters can make this clear to investors from the nature of the serviced strata arrangement, the marketing documents and other disclosures. Promoters must make sure that they do not make false or misleading statements about the arrangements.

RG 140.31 For example, there will be no understanding that returns will materially depend on the serviced strata arrangement when an investor understands that:

- (a) if necessary, all of their return is likely to come from an entity of financial substance; or
- (b) the serviced strata arrangement is a non-material part of the operator's overall business operations.

RG 140.32 We consider that our view is consistent with relevant case law including the decision in *Maunder-Hartigan v Hamilton* (1984) 2 ACLC 438. In that case it was not demonstrated there was any reasonable expectation of profits, rents or interest from the efforts of the operator of a serviced strata arrangement.

Deferred pool or common enterprise

RG 140.33 Sometimes a promoter and investor agree or come to an understanding that a common enterprise or pool will operate at some time after the strata unit is first made available. We would generally consider that this is a serviced strata scheme. For example, this applies to a common enterprise that commences after a period when an investor is entitled to payments that are not dependent on the enterprise involving their units. In this example, the serviced strata scheme exists from when the investor first has an agreement or understanding that they have a prospective interest in the scheme (see definition of “interest” in s9).

Indications of a serviced strata scheme

RG 140.34 A serviced strata scheme is more likely to be found if one or more of the following applies:

- (a) the strata units are not suitable for use other than as part of a hotel, motel, resort or serviced apartment complex (including whether or not there are zoning restrictions on the use of the strata units);
- (b) nothing is stated about what will happen at the end of a period during which returns do not depend on the use of the units. This is particularly important for short term fixed or indexed return arrangements of up to 5 years;
- (c) there is any agreement with each investor that other investors make similar contracts;
- (d) there is pooling of expenses relating to the use of the strata units in a serviced strata arrangement;
- (e) there is an understanding that the strata units will be used for short term tenancies, for example less than 3 months; or
- (f) the investor places a strong reliance on the activities of the management for the generation of the investor’s return.

Pre-packaged sale of interests

RG 140.35 It does not affect the determination as to whether a serviced strata arrangement is a managed investment scheme that interests in the arrangement are initially issued to a promoter or its associate before being resold. If interests require disclosure under s707, the arrangement will still need to be registered as a scheme (ie s601ED(2) will not apply).

What is scheme property?

RG 140.36 Generally the scheme property in a serviced strata scheme is the right to occupy the strata unit (for example, a lease or licence) or a right to let or licence as the strata unit owner's agent. In serviced strata schemes the investor is making available rights to their strata unit as their contribution to the scheme. An investor's contribution of rights to their strata unit is a contribution to acquire interests in the scheme. We consider this even though the freehold is not contributed and is not scheme property (see s9 where "property" includes a chose in action). As scheme property, the lease, or licence, or right to let or licence must be regularly valued (see s601FC(1)(j)) unless the scheme has been given relief from the Law, see RG 140.93.

The Law before the Managed Investments Act

RG 140.37 The *Managed Investments Act 1998* amended the Law. It commenced on 1 July 1998. There are some differences between interests in managed investment schemes and prescribed interests (which is how these types of investments were described in the Law before 1 July 1998). However, we consider that, in general, a serviced strata scheme that is now regulated under the Law as a managed investment scheme would have previously been regulated under the Law as a prescribed interest.

Further examples***"Fixed or indexed return" arrangement***

RG 140.38 An example of a serviced strata arrangement that we consider *is* a managed investment scheme is:

- (a) a person (buyer) is invited to buy a strata unit from a developer and to lease the strata unit to another person (operator). The operator intends to operate a serviced apartment arrangement using the strata unit and other property;

- (b) the lease is for 5 years (renewable at the option of the operator for 3 further periods of 5 years). The rent is promised at 7% (CPI indexed) of the price paid for the strata unit;
- (c) the operator must ensure the strata unit is given back in good condition at the end of the lease;
- (d) the operator and the buyer understand that the operator has day to day operating control of the serviced apartment arrangement;
- (e) the buyer has the right to terminate the lease on 30 days notice;
- (f) the buyer is told that the operator is a substantial company;
- (g) the buyer is told that the operator will operate a serviced apartment arrangement. However, the operator has no legally enforceable obligation to operate a serviced apartment arrangement;
- (h) the likelihood of the rent being paid in its entirety will be materially affected by whether the operator operates the serviced apartment arrangement profitably; and
- (i) buyers come to an explicit (or implicit) understanding with the developer (through sellers acting on behalf of the developer) that the serviced apartment arrangement will be operated so as to assist the operator in paying the rent.

RG 140.39 An example of a serviced strata arrangement that we do not consider is a managed investment scheme is when paragraph (i) in RG 140.38 does not exist. However, when paragraph (h) in RG 140.38 exists paragraph (i) will normally be inferred. It may be represented to an investor that the success of the serviced strata arrangement will not affect their return. If any such suggestion is made it must not be false or misleading.

RG 140.40 We consider that in some situations, even though RG 140.38(h) applies, it may be able to show that buyers do not have the understanding in RG 140.38(i). This can happen when the circumstances clearly indicate that buyers believe that it is unlikely that payment of the rent will be materially affected by whether the operator operates the serviced strata arrangement profitably. This will apply for example when the operation of the serviced strata arrangement is a small part of the activities of the operator.

A “management rights scheme”

RG 140.41 Another example of a serviced strata arrangement that we consider *is* a managed investment scheme is:

- (a) a person (buyer) is invited to buy a strata unit from a developer. They are told that they can give an on-site letting agent the right to let, or licence use of, the strata unit;
- (b) the buyer is told that the on-site letting agent will operate a serviced apartment arrangement using the strata unit and other strata units made available in a similar manner. The buyer is also given to understand that they will not be involved in the day to day operation of the arrangement;
- (c) the buyer is told that what they are paid by the on-site letting agent will be based on the rent and licence fees received after the on-site letting agent deducts their costs and fees;
- (d) the buyer may live in their strata unit or use their own off-site letting agent. Therefore, joining the on-site letting agent's serviced apartment arrangement is voluntary;
- (e) the buyer has a right to terminate participation in the serviced strata arrangement on 90 days notice;
- (f) buyers come to an explicit (or implicit) understanding with the on-site letting agent about how strata units will be allocated to visitors looking for accommodation. They agree that the operator will allocate units on the basis of what the visitors prefer. However, they also agree that this will be done, as far as possible, in a way that fairly allocates income between the owners of the strata units who join the arrangement.

RG 140.42 We believe that schemes that are commercially known as “management rights schemes” in Queensland typically operate along these lines. Therefore management rights schemes are usually managed investment schemes.

C Exemption for management rights schemes

Important note: See Chapter E of this guide for a description of the relief:

- we have given for the operation of closed serviced strata schemes as at 6 October 1998 (see in particular RG 140.70–RG 140.75 and RG 140.81–RG 140.84); and
- we will give for the operation of well advanced serviced strata schemes as at 6 October 1998 (see in particular RG 140.77, RG 140.78 and RG 140.87–RG 140.89).

Where this relief applies, the conditions of relief for management rights schemes do not apply.

Our policy

RG 140.43 If you operate a management rights scheme you do not have to comply with the managed investment, licensing and fundraising provisions of the Law. This is because we have issued [CO 99/460] and [CO 00/570] which give you an exemption from those provisions of the Law. However, you are only exempted from the Law if you meet the following conditions:

- (a) there are no restrictions on the use of any of the strata units as a residence. For example, there are no restrictions imposed by the local authority under zoning restrictions or a development approval;
- (b) each owner of a strata unit may withdraw from the scheme on no more than 90 days notice. This is subject to any rights to occupy a strata unit that a third party was given before the owner gave notice that they were withdrawing from the scheme;
- (c) the ongoing operator (usually the on-site letting agent) is licensed to conduct letting services under the law of a State or Territory or holds a (ASIC) securities dealers licence;
- (d) scheme property held in cash or on deposit in financial institutions must be held in a trust account. It must be audited by a registered company auditor at least annually;
- (e) except for amounts covering fees and expenses for up to 3 months, owners do not pay money for joining the scheme (as opposed to buying the strata unit);

- (f) the owner may use any letting agent they choose. Therefore, joining the serviced strata scheme is voluntary;
- (g) there is no misleading or deceptive conduct when interests are offered in the serviced strata scheme;
- (h) a disclosure statement including particular information must be given to each person before they agree to join the serviced strata scheme, see RG 140.45;
- (i) nobody has an obligation to make sure that other owners of strata units agree to join on the same or similar terms; and
- (j) the terms of agreement between the ongoing operator (usually the on-site letting agent) and each owner must allow a majority of the unit owners in the scheme to make the ongoing operator transfer, any rights and property it uses for operating the scheme to a nominated new operator. This demand to the ongoing operator must be made by a signed direction.

[Historical note: RG 140.43(k) removed as a result of the introduction of CLERP in March 2000.]

RG 140.44 A person may be invited to join a management rights scheme:

- (a) before they have agreed to buy a strata unit. In this situation they must be given the disclosure statement required by RG 140.43(h) before they agree to buy the unit; or
- (b) after they have agreed to buy a strata unit. In this situation they must be given the disclosure statement required by RG 140.43(h) before they agree to join the scheme.

RG 140.45 The disclosure statement required by RG 140.43(h) must include information about the scheme. If the ongoing operator (usually the on-site letting agent) is involved in the offer, the statement must be based on the knowledge of the ongoing operator. If the ongoing operator is not involved in the offer of interests in the scheme before the strata units are sold, the disclosure statement must be based on the knowledge of the promoter (usually the developer of the strata title property). For a summary of what must be included in a disclosure statement, see the Annexure to this guide at RG 140.121–RG 140.130.

RG 140.46 We will consider giving relief equivalent to that contained in [CO 00/570] to management rights schemes which are subject to the relief contained in [CO 98/2287] or [CO 99/460]. This relief will only be available where a majority of the members of the scheme and the body corporate have agreed to vary their existing

rights. ASIC will give this relief on a case by case basis, provided that prior to any vote adequate disclosure has been made to members concerning the change in their rights. The relevant disclosure documents must be provided to ASIC before they are sent to members. ASIC must also be notified of the outcome of any vote or meeting.

RG 140.47 We will consider giving relief to management rights schemes without imposing the condition in RG 140.43(a), that is, there are no restrictions on the residential use of units. Promoters of schemes can apply for this relief: see [PF 187]. We will give this relief if we are satisfied that, despite use restrictions, it will be commercially practicable for members to:

- (a) withdraw from the scheme; and
- (b) arrange for their strata unit to be let by a real estate agent of their choice.

How to apply for relief

- . Lodge your application with the prescribed fee at any ASIC Regional Office

- . Make sure your application complies with Regulatory Guide 51 *Applications for relief* RG 51

You don't have to apply for relief if a class order applies to you.

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

Underlying principles

RG 140.48 The benefits of regulation are less significant and can be adequately addressed by conditions of exemption when members of a management rights scheme:

- (a) are not likely to be significantly relying on the skill of a particular letting agent (whether on-site or off-site); and
- (b) may decide to withdraw from a scheme or, by a majority, replace the ongoing operator (usually the on-site letting agent).

Explanations

RG 140.49 Management rights schemes are exempted because compliance with all aspects of the managed investment, licensing and fundraising provisions would be an unreasonable burden (see [CO 99/460] and [CO 00/570]). These schemes are usually small, and there would be limited benefit in requiring registration or a prospectus. Investors are unlikely to lose too much from participating in the scheme because they have the option to withdraw (on short notice) their unit and arrange for it to be managed separately. Investors join voluntarily. They will not have been induced to join on the basis of the management expertise of a particular letting agent operator. This is because the ongoing operator (usually the on-site letting agent) can withdraw on limited notice.

RG 140.50 We consider that the relief we have given to the operator of a management rights scheme should be subject to the conditions set out in RG 140.43. These conditions restrict the types of serviced strata schemes eligible for the relief and set reasonable operational obligations.

RG 140.51 It is appropriate that investors get simple but meaningful information about these schemes. The disclosure statement required may form part of, or accompany, any disclosure required under State or Territory legislation about the scheme or strata unit. The requirement for a simple disclosure document protects investors at a reasonable cost.

RG 140.52 Interests in management rights schemes may be offered by a promoter (for example, a developer or vendor) before the ongoing operator (usually an on-site letting agent) is appointed. Mere reference by a promoter to a body corporate's power to appoint an ongoing operator (usually an on-site letting agent) is not an offer of an interest in a scheme that the agent may operate. However, prospective buyers of strata units may be led to understand that the promoter will arrange for an ongoing operator (usually an on-site letting agent) to be appointed to operate a management rights scheme. If they are led to believe this, then the prospective buyers may have been offered an interest.

RG 140.53 The disclosure statement required under [CO 99/460] and [CO 00/570], see RG 140.43(h), must be signed by:

- (a) the promotor(s) (usually the developer or vendor) when the offer of interests in the management rights scheme does not involve a particular ongoing operator (for example, because the on-site letting agent has not been selected yet);

- (b) the ongoing operator when the offer of interests in the management rights scheme involves a particular ongoing operator (usually an on-site letting agent).

RG 140.54 We will review what must be included in a disclosure statement for management rights schemes after this exemption has been operating for a reasonable period.

RG 140.55 It is appropriate that participants of a management rights scheme have the right to decide to replace the ongoing operator (usually the on-site letting agent). See the requirement in RG 140.43(j). This right of the participants of a management rights scheme reflects a key aspect of the managed investment provisions which enables members of a managed investment scheme, by a majority, to replace the operator of the scheme (see s601FM). The requirement that an ongoing operator must transfer at market value, any property it uses for operating the management rights scheme to the new ongoing operator is appropriate to limit the possibility that this right is undermined.

RG 140.56 We consider that:

- (a) any rights that the body corporate of a strata property under legislation in Queensland to remove an ongoing operator of a management rights scheme in circumstances of misconduct; or
- (b) the rights of each participant of a management rights scheme to terminate their arrangement with the ongoing operator,

do not adequately substitute for the right of participants of a management rights scheme to collectively, by majority, replace the ongoing operator of the scheme. Ongoing operators of management rights schemes could limit how affected they would be by any forced transfer by negotiating for any property rights they will use to operate the scheme to be by leasehold or under licence rather than freehold.

RG 140.56A We consider that it is appropriate to allow operators of management rights schemes, that are currently subject to the conditions of [CO 99/460] or [CO 98/2287], to take advantage of relief, equivalent to that contained within [CO 00/570]. However, this relief should only be available where the members of the scheme have exercised their rights collectively to approve any change to their rights under the applicable relief. The rights in relation to removal of the operator are not rights that have any value individually, but only when members act collectively. If the majority of members are willing in advance to change their rights, then no member will be unfairly prejudiced.

RG 140.56B To allow members to make an informed decision regarding any proposed changes to their rights, it is appropriate that members receive adequate and relevant disclosure. Members should receive information in relation to the rights being given up and the new rights of the members being proposed. This disclosure should also provide information on any other effects of the transition to the new relief. ASIC requires the lodgment of this information to ensure adequate levels of disclosure are maintained.

D Other exemptions for serviced strata schemes

Important note: See Chapter E of this guide for a description of the relief:

- we have given for the operation of closed serviced strata schemes as at 6 October 1998 (see in particular RG 140.70–RG 140.75 and RG 140.81–RG 140.84); and
- we will give for the operation of well advanced serviced strata schemes as at 6 October 1998 (see in particular RG 140.77, RG 140.78 and RG 140.87–RG 140.89).

Where this relief applies, the conditions of relief described in this chapter do not apply.

Our policy

Residential or commercial letting arrangements

RG 140.57 Some investors engage an agent to let out their strata unit for residential or commercial purposes. If their strata unit is not part of a serviced strata arrangement, we consider that the arrangement should not be regulated as a managed investment scheme. To avoid any doubt we have given class order relief so that such arrangements do not have to register as managed investment schemes (see [CO 00/209]).

see RG 140.61

Strata arrangements which incidentally involve a scheme

RG 140.58 Some strata arrangements may be managed investment schemes merely because they offer incidental rights of personal consumption or use. We will exempt such schemes from the managed investment provisions of the Law. For the time being, this relief will be given case by case (see [PF 184]).

see RG 140.65

Sale of strata units for \$500,000 or more

RG 140.59 In some serviced strata schemes all the interests are offered to investors who already have or, if they take up the offer, will have strata units for which they have paid or will pay \$500,000 or more (taking into account any associated furniture and costs). In Class Order [CO 00/191] we have exempted:

- (a) these schemes from the requirements to be registered; and
- (b) the promoter of such schemes from the requirement to issue a prospectus.

see RG 140.63

Other related policy exemptions

RG 140.60 Before we issued this guide, we had already given relief under other policies. This relief that may be relevant for certain types of serviced strata schemes, is for:

- (a) managed investment schemes not for money (see [CO 00/198]); and

see RG 140.66

- (b) participating property syndicates (see [CO 98/64]) and small property syndicates (see [CO 98/78] and [CO 00/215]).

see RG 140.67 and RG 140.68

Underlying principles***Residential or commercial letting arrangements***

RG 140.61 Investors in a serviced strata arrangement rely on the skill, care and diligence of an operator. They rely more on their operator than investors in an ordinary residential or commercial letting arrangement.

Strata arrangements which incidentally involve a scheme

RG 140.62 It is not appropriate that a serviced strata scheme should be regulated as a managed investment scheme because of characteristics that are only incidental factors in the decision of members to join.

Sale of strata units for \$500,000 or more

RG 140.63 Our relief when an investor subscribes more than \$500,000 for both the strata unit and an interest in the management rights scheme is consistent with the provisions of the Law under (s708(8)(a)).

Other related policy exemptions

RG 140.64 The rationale for relief for:

- (a) managed investment schemes not for money is set out in Regulatory Guide 80: *Managed investment schemes— interests not for money* RG 80; and
- (b) participating and small property syndicates is set out in Regulatory Guide 77: *Property trusts and property syndicates* RG 77.

Explanations**Strata arrangements which incidentally involve a scheme**

RG 140.65 Unless incidental benefits that comprise rights of personal consumption or use (eg, rights to occupy hotel rooms at discounted rates) are a significant part of the value of an investment, regulation would not be an appropriate means of protection. Such incidental benefits may be an interest in a time-sharing scheme as defined in s9.

Other related policy exemptions

RG 140.66 Class Order [CO 00/198] gives relief from registering a managed investment scheme or from having a prospectus. Relief is available when offers are only made to persons who could contribute property that they owned for at least 6 months before they began negotiating for an interest.

RG 140.67 Class Order [CO 98/64] gives relief from registering a managed investment scheme for participating property syndicates. These are small syndicates characterised by a high potential for investor involvement. This relief is discussed in Regulatory Guide 77 *Property trusts and property syndicates* at RG 77.96B–RG 77.96Y] and Regulatory Guide 136 *Managed Investments: Discretionary powers and closely related schemes* at RG 136.34(c) and RG 136.53.

RG 140.68 Class Order [CO 98/78] and [CO 00/215] gives relief from registering a managed investment scheme and from issuing a prospectus for certain small property syndicates. If a promoter is involved, the promoter must be part of the syndicate throughout its life and may benefit from the syndicate only on the same basis as all the other investors. This relief is discussed in Regulatory Guide 77 *Property trusts and property syndicates* at RG 77.96ZA.

Applications for relief

RG 140.69 Under Regulatory Guide 136 *Managed Investments: Discretionary powers and closely related schemes* RG 136, we will consider giving relief from the provisions of the Law which apply to serviced strata schemes. We will consider relief on the basis of assessing when:

- (a) strict compliance with the Law would be impossible or disproportionately burdensome;
- (b) people acquiring or holding interests in a scheme would still have the protection that Parliament intended them to have; and
- (c) there would be commercial benefit to the parties to the scheme.

How to apply for relief

- . Lodge your application with the prescribed fee at any ASIC Regional Office

- . Make sure your application complies with Regulatory Guide 51 *Applications for relief* RG 51

You don't have to apply for relief if a class order applies to you.

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

E Non complying serviced strata schemes

Our policy

Closed schemes

RG 140.70 Some serviced strata schemes are “closed”. This normally means that all the strata units in the scheme were sold and no offers to join the scheme were made after 6 October 1998. Some closed schemes did not comply with the Law at that time, that is, they are “closed non-complying” schemes. We have given operators of these closed, non-complying, serviced strata schemes relief from the Law: see [CO 99/461]. They have relief from:

- (a) registering the scheme; and
- (b) getting a licence to operate that scheme.

RG 140.71 We have also given relief under [CO 99/461] to sellers of interests in closed, non-complying, serviced strata schemes. Sellers are given relief from the need to make a secondary sales notice available.

RG 140.72 The normal meaning of a closed scheme is that no offers to join were made after 6 October 1998 (see RG 140.70). However, the relief in [CO 99/461] is available to closed, non-complying schemes when limited offers are made after this date. The relief will also allow offers of interests without a prospectus or the need to register the scheme if no more than 20 new members join the scheme in any 12 months after 6 October 1998 (other than by excluded offer). All the offers (other than excluded offers) made after 6 October 1998 must relate to strata units in the relevant complex that have been sold by 6 October 1998. At that date the strata units must not be held by:

- (a) the promoter or its associates; or
- (b) the operator and its associates.

The offer of an interest in the scheme may be made to a person who already owns a strata unit or a person who is also offered a strata unit for sale. Under this relief, excluded offers includes offers we will treat as excluded: see RG 140.59.

RG 140.73 The relief under [CO 99/461] only applies for serviced strata schemes that involve units under strata, community and like title. However, we will consider applications asking for similar relief

for serviced strata schemes that involve other freehold and leasehold title.

RG 140.74 We will only take enforcement action against promoters and operators of closed, non-complying, serviced strata schemes in limited circumstances. For instance, we may take action if it appears to us that there has been misleading conduct or intentional or reckless breach of duties by the operator of the scheme to the material detriment of members. When we take action we may require:

- (a) investors to be given an informed opportunity to ask for their money back; and
- (b) the scheme to be registered and the operator to be licensed.

We will not take enforcement action in relation to secondary sales before granting the relief set out in RG 140.70.

RG 140.75 However, we will not give relief from the consequences under the Law for unlawful offers for subscription of interests in a closed, non-complying serviced strata scheme. For example, investors' right to avoid contracts under s 601MB.

see RG 140.81–RG 140.84

Open schemes

RG 140.76 Some serviced strata schemes are “open”. This means that not all the strata units in the scheme were sold and some offers to join the scheme were made after 6 October 1998 outside that permitted under RG 140.72. Some open schemes do comply with the Law, that is they are “non-complying, open” schemes. Our policy on these schemes (that do not have relief because they are “well advanced” under RG 140.77) is that:

- (a) the operator of the scheme must stop offering interests in the scheme until:
 - (i) a prospectus for the scheme is issued; and
 - (ii) the scheme is registered and the operator is licensed as a responsible entity; and
- (b) after all existing investors get a prospectus, they can ask for their money back.

We will not take enforcement action on any secondary sales that are made while the scheme is not registered.

see RG 140.85–RG 140.86

Well advanced schemes

RG 140.77 Operators of well advanced, open, non-complying serviced strata schemes can apply for relief from complying with the managed investment licensing, and fundraising provisions of the Law. We will consider each application on a case by case basis. If we give relief it will be based on Pro Forma 186 [PF 186].

RG 140.78 The relief will also allow offers of interests without a prospectus or the need to register the scheme if no more than 20 new members join the scheme in any 12 months after 31 December 2000 (other than by an offer which does not require disclosure: see RG 140.63). The offer of an interest in the scheme may be made to a person who already owns a strata unit or a person who is also offered a strata unit for sale. Under this relief excluded offers are those offers which do not require disclosure under s708 of the Law.

RG 140.78A Operators of schemes that have been granted relief through [PF 186], may make offers, not restricted to those set out in RG 140.80, after 31 December 2000 if they provide further information including details of any uncompleted stages in the scheme and the progress of sales. There will be an ongoing requirement for the provision of a disclosure statement in relation to sales in the scheme after 31 December 2000.

How to apply for relief for well advanced, open, non-complying serviced strata schemes

If you are applying for relief your application should include the following information:

- . a description of the strata arrangement and what investors are to receive (including the number of proposed units); the proposed purchase price for units; any promises and expectations about rental returns; details of any pooling of income or expenses or promotional or advertising levies
- . details of the promoter, the operator and any guarantor (including any financial details of any guarantor of rental returns). Any interrelationships or dependencies between the above parties should also be disclosed, for example, common directors etc
- . copies of any standard contracts for sales, leaseback and agencies
- . details of any legal advice as to whether the scheme was regulated under the Law or if in fact legal advice was sought at all. If legal advice was obtained, a copy of that advice or a description of its conclusions

. the status of the development on 6 October 1998 including: costs incurred to date; liabilities outstanding to third parties; the number of contracts exchanged; the progress of construction; whether the scheme is a staged scheme; what sort of existing infrastructure existed; and whether any common property is part of the scheme

. copies of all marketing material given to investors including: advertisements; and a description of the method(s) of selling, for example, brochures, cold calling, real estate agents, accountancy/adviser network

. details of any other special features of the scheme, for example: Was there a prospectus for a development trust in relation to the scheme? Do special zoning restrictions apply? For example, can the units be owner occupied or are they only short term stays? Are the units designed for residential purposes?

. where relief is required to allow sales after 31 December 2000, you should include details of the proposed completion dates of any construction and anticipated sales after 31 December 2000.

Lodge your application and supporting documentation with the Managed Investments Team in the ASIC Regional Office of the State in which the scheme is located.

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

Underlying principles

RG 140.79 We consider that requiring operators of closed or well advanced, non-complying, serviced strata schemes to comply with the Law, when there is no misleading conduct or impropriety, would be disproportionately burdensome and likely to disadvantage members.

RG 140.80 It is not appropriate for unconditional relief to be indefinitely extended to new offerings of interests. This would lead to distortions in the market for such investment opportunities.

Explanations

Closed schemes

RG 140.81 We acknowledge that there was uncertainty about how the Law applied to serviced strata arrangements involving strata units under strata, community or like title:

- (a) before it was amended by the *Managed Investments Act 1998* (1 July 1998); and particularly

(b) before we issued Interim Policy Statement 140 on 6 October 1998.

RG 140.82 We looked at what would happen if operators of closed, non-complying strata schemes involving strata units under strata, community or like title had to prepare and issue a disclosure notice to existing strata unit owners. These notices would allow existing owners to make an informed decision about whether to ask for their original investment to be returned. However requiring these notices would be disproportionately burdensome and inappropriate, especially when schemes have been operating for some years. Further there may not be a person who can be licensed as a responsible entity that is willing to operate the scheme. If continuing operation without registration is not permitted, the scheme may be required to be wound up to the disadvantage of members.

RG 140.83 In many schemes there will be continual changes in ownership of strata units and persons who formerly lived in their strata units will want to become members. A prospectus may be unreasonably burdensome when:

- (a) no more than 20 new persons can become members of a scheme; and
- (b) there was no prospectus for the original offering of interests before 6 October 1998.

RG 140.84 Some of the considerations discussed at RG 140.81–RG 140.83 may apply to serviced strata schemes that have adjoining land or land under lease (such as car parking schemes or marina berthing schemes). We will consider applications for relief for particular serviced strata schemes or types of serviced strata schemes that do not have strata, community or like title.

Open schemes

RG 140.85 The Law, as amended by the *Managed Investments Act 1998*, applies regulatory outcomes flexibly across the spectrum of managed investment schemes, including serviced strata schemes. Therefore, we consider that operators of open, non-complying serviced strata schemes should comply with the Law before continuing with any offers of interests in the scheme unless the scheme is well advanced.

RG 140.86 The reference to asking for “their money back” in RG 140.74 and RG 140.76 implies:

- (a) terminating the lease, licence or agreement empowering the operator to grant leases or licence of units as agent for the strata unit owner. This would happen if a serviced strata scheme was offered to persons who already owned the strata units; or
- (b) refunding the purchase price of the strata unit and any costs in return for transfer of the strata unit to the promoter. This would happen if joining the scheme was offered as an inducement to buy a strata unit.

Well advanced schemes

RG 140.87 Operators of open and well advanced, non-complying serviced strata schemes can apply for relief from compliance with the managed investment, licensing and fundraising provisions of the Law. We will consider their applications on a case by case basis. This relief is given for similar reasons to that in RG 140.81 and RG 140.82. We recognise that expecting operators to immediately comply with the fundraising provisions would be unreasonably burdensome when the project is already well advanced.

RG 140.88 For the reasons set out at RG 140.83 fundraising relief applies after 31 December 2000 but only if no more than 20 new persons become members in any 12 months. Relief will be available in relation to offers of interests in the scheme made after 31 December 2000 relating to strata units owned on 31 December 2000 by the developer or the operator or their associates, where the further requirements set out in RG 140.88A have been met.

RG 140.88A It is a requirement of continuing relief, allowing sales of units, after 31 December 2000, that the operator provides ASIC with up to date information in relation to uncompleted stages of the development, the progress of proposed sales and expected time frames in relation to units unsold. Where it would appear that the scheme has substantially changed (for example the structure of the scheme has been changed or the information is in conflict with the original application) from that which was granted relief, ASIC may take action to restrict further offers. ASIC may follow up promoters at a later date to confirm the status of the scheme on an ongoing basis.

RG 140.89 We are likely to give relief to serviced strata schemes that involve units under strata, community or like title when, among other things, it can be demonstrated that, before 6 October 1998, significant financial commitments have already been made in:

- (a) developing the strata or community title property (for example, construction has commenced); or

(b) promoting the scheme (for example, contracts of sale have been entered into).

We will only give relief when there is no indication of misleading conduct or impropriety, such as pressure selling practices.

F Registered serviced strata schemes

Our policy

[*Historical note:* RG 140.90 removed as a result of the introduction of CLERP in March 2000.]

Prospectus information about the strata unit

RG 140.91 We consider that ordinarily prospectuses for interests in serviced strata schemes that are being offered together with strata units must contain information about the main factors that will affect the value of the strata unit when it is sold, while the scheme operates and when it terminates. The prospectus does not have to include information about the strata unit which buyers would normally get in a contract of sale, or by searches or enquiries normally obtained by, or provided to, the buyer as part of conveyancing practice.

see *RG 140.104*

Holding scheme property

RG 140.92 We will only require the person holding scheme property of a serviced strata scheme to have the amount of net tangible assets that is required of a responsible entity of that scheme under s784(2A). This applies to a serviced strata scheme when the scheme property is limited to:

- (a) a lease, licence or right to let or licence real property as agent given by members;
- (b) the benefit of leases or licences entered with those staying at the serviced apartment, hotel, motel or resort;
- (c) rights to physical assets such as furniture and fittings; and
- (d) cash and deposits in an authorised deposit taking institution for the purpose of the Banking Act, a State bank or a building society, credit union or special services provider under the State or Territory AFIC Codes. The cash and deposits are held:
 - (i) as working capital (such as maintenance of real property or physical assets) and are not more than reasonably necessary to meet expected expenditures over a three month period; and

- (ii) in a regulated trust account (such as a solicitor's or real estate agent's trust account) pending distribution within 3 months to those entitled; or
- (e) assets of trivial value.

see RG 140.107

RG 140.92A There are some restrictions on the way some of the scheme property set out at RG 140.92 may be held. For example, contractual rights and leases and licences must be either not assignable or assignable only with the consent of the member. For particulars of the financial requirements relating to holding scheme property see Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131] and our determination [CO 99/558].

[*Historical note:* RG 140.92A inserted 2/6/1999.]

Valuation

RG 140.93 We have given relief from s601FC(1)(j) and s601HA(1)(c): see [CO 99/463]. These paragraphs of the Law require that the responsible entity of a serviced strata scheme must value the scheme property regularly. The relief applies if, under the terms of the scheme, there is no obligation to pay members when they leave the scheme. Under the relief, the responsible entity only has to value an item of scheme property when it has reasonable grounds to believe that a valuation of that item is in the best interests of members or needed to be fair to all members.

Underlying principles

RG 140.94 We consider that, in general, serviced strata schemes should comply with the Law so that different investment opportunities are subject to as similar regulation as possible.

[*Historical note:* RG 140.95 removed as a result of the introduction of CLERP in March 2000.]

Prospectus information about the strata unit

RG 140.96 Prospective investors need information about the strata unit when they are offered the strata unit at the same time as being invited to join a serviced strata scheme. They need this to make an informed assessment of the merits and risks of joining the serviced strata scheme.

Holding scheme property

RG 140.97 It is not appropriate to require the person that holds scheme property to have more net tangible assets than the net tangible assets the responsible entity must have. It is not appropriate when the only scheme property at risk of loss is cash that comes in regularly and is promptly accounted for to members.

Valuation

RG 140.98 It may be unreasonably burdensome to regularly revalue scheme property. We consider it would not be burdensome when a valuation is likely to give relevant information for accounts, calculating members voting or withdrawals rights, the consideration to acquire interests or the proper management of scheme property. Regular valuations for these purposes are not necessary for serviced strata schemes.

Explanations***Existing complying serviced strata schemes***

RG 140.99 If a serviced strata scheme had an approved deed at 1 July 1998, then it must be operated to comply with the Law as it applied before 1 July 1998 until the scheme is registered. The scheme must be registered by 30 June 2000 unless we give an extension under ASIC Regulatory Guide 135 *Managed Investments: Transitional Issues* RG 135.

Small and excluded schemes

RG 140.100 A scheme with less than 20 members is not required to be registered. However, it must be registered if:

- (a) the promoter is in the business of promoting managed investment schemes (see s601ED(1)); or
- (b) the scheme is aggregated with others because of a determination we have made under s601ED(3).

RG 140.101 Schemes where all the interests have been made available by issues that would not need disclosure under Chapter 6D the scheme does not have to be registered (for example: offers where the minimum subscription is \$500,000 or more): see s601ED(2). However, sometimes interests in a scheme are initially issued to a promoter or its associate before being resold, and the interests are sold outside the categories set out in (s708) of the Law. In this case the

scheme must be registered unless it is a one-off promotion and there are no more than 20 members.

[*Historical note:* RG 140.102–RG 140.103 removed as a result of the introduction of CLERP in March 2000.]

Information about the strata unit

RG 140.104 When investors are invited to buy a unit and at the same time to join a serviced strata scheme, they cannot assess the merits and risks of joining a scheme independently of assessing the merits and risks of investing in the strata unit. This is because they need to buy the unit to access the scheme. Usually investors are making one decision, that is, whether to buy a strata unit that will be used as part of the scheme. They will be making assessments about:

- (a) key factors that will affect the market value of the strata unit; and
- (b) how the market value may be affected by how the scheme operates.

They reasonably require and reasonably expect to find information about these issues in a prospectus. However, they do not reasonably expect a prospectus to have information that is generally made available as part of the conveyancing process for real estate transactions.

Investors' rights

RG 140.105 Promoters and operators should be aware that investors may have rights under the Law to withdraw from a scheme and get their money back if:

- (a) interests in a serviced strata scheme have been issued or a person has subscribed for interests in a serviced strata scheme; and
- (b) that strata scheme was not, but should have been, complying with the Law (before or after 1 July 1998).

RG 140.106 Even if we exempt operators of non-complying serviced strata schemes, they are not relieved from the consequences of previous contraventions of the Law.

Holding scheme property

RG 140.107 The level of net tangible assets that must be held by the person holding scheme property is less than in the general policy for managed investment schemes in [SPS 131]. In that policy statement at least \$5,000,000 of net tangible assets must generally be held. This

relaxation will assist some responsible entities holding scheme property. However our custody standards, as set out in Regulatory Guide 133 *Managed investments: Scheme property arrangements* RG 133, still apply. Given the nature of the assets of a serviced strata scheme, the prospect for losing members' assets because of a custodial failure, is less than in many other kinds of managed schemes.

G Serviced strata schemes: Licensing of intermediaries

Our interpretation

RG 140.108 You must, under the Law, be licensed as a dealer, or be a proper authority holder of a licensed dealer, if you carry on a business that includes offering interests in a serviced strata scheme. You need to be licensed or hold a proper authority regardless of whether the marketing occurs at the time of the original sale of the strata units or on a later sale by an individual strata unit owner of their strata unit.

RG 140.109 You must, under the Law, be licensed as an investment adviser or dealer, or be a proper authority holder of a licensed dealer, if you carry on a business that includes giving advice about interests in a serviced strata scheme.

RG 140.110 The licensing requirements described at RG 140.108 and RG 140.109 apply even though you may already hold a real estate agents licence.

RG 140.111 The licensing requirements described at RG 140.108 and RG 140.109 apply to people offering interests or giving advice about serviced strata schemes which:

- (a) are still regulated as prescribed interests under the transitional provisions in the second Div 11 Part 11.2 of the Law; or
- (b) are regulated under the managed investments provisions of Chapter 5C of the Law.

RG 140.112 You do not have to have a licence or be a proper authority holder if the serviced strata scheme you are offering or giving advice on:

- (a) is not required to be registered under s601ED(2) (or have an approved deed); or
- (b) does not have to be registered because we have given relief from Chapter 5C of the Law (or the prescribed interest provisions): see regulation 7.3.11(1)(b).

RG 140.113 However, even if you do not need to be licensed or hold a proper authority, if you make recommendations about joining a serviced strata scheme you have obligations under the Law. You have

these obligations if you carry on a securities business, an investment advice business or hold a proper authority. You have obligations to:

- (a) disclose any interest you have in the recommendation (you must do this under s849 of the Law); and
- (b) have a reasonable basis for the recommendation (under s851).

These obligations apply even though you may already hold a real estate agents licence.

RG 140.114 You can merely refer someone to a licensee (or its representative) within our guidelines without having to hold a proper authority from that licensee: see Superseded Policy Statement 121 *Investment advisory services: mere referrals and other excluded activities* [SPS 121]. You generally do not need a licence if you merely undertake administrative activities by distributing a prospectus. (For example you do not need a licence to display prospectuses, or to be an agent of the issuer who explains what is in a prospectus without giving any opinion or advice).

Underlying principles

RG 140.115 Persons who deal in, or give advice on interests in serviced strata schemes should be subject to the same requirements as apply to persons who deal in, or give advice on interests in other managed investment schemes.

Explanations

RG 140.116 In response to recommendation 16 of the *Financial System Inquiry Final Report 1997* (the Wallis Report), the Government asked us to review the adequacy of the existing regulation of the financial advice activities of real estate agents. The Government response to the Wallis Report stated:

“Licensing of real estate agents who give financial advice

Real estate agents who promote negatively-g geared investment packages are providing retail financial advice. Other financial market participants are subject to registration and licensing requirements. The existing regulation of the financial advice activities of real estate agents will therefore be reviewed for their adequacy, and on the basis that real estate agents providing investment advice should be subject to licensing requirements, unless it can be established that the existing regulatory arrangements are adequate.

This review will be undertaken by the ACFSC [now ASIC], which will be in the best position to coordinate a review of the existing practices and licensing regimes of the States and Territories.”

RG 140.117 This policy helps clarify our views about how serviced strata arrangements are covered by the Law. It is therefore a first step in reviewing the financial advice activities of real estate agents. We announced more details of our review in Media Release [MR 98/304].

RG 140.118 If you are a real estate agent and you sell an interest in a serviced strata scheme for the vendor of a strata unit you must hold a dealers licence or a proper authority from a holder of a dealers licence. This applies when a person who buys the strata unit automatically becomes a member of the scheme, for example, because the strata unit is subject to lease in such a scheme. In other situations you may not be required to be licensed, for example, if you are not:

- (a) issuing interests in serviced strata schemes;
- (b) inducing buyers to become a members of a scheme; or
- (c) giving advice about interests in a scheme.

Key terms

RG 140.119 In this guide, a reference to:

“ASIC Act” means the *Australian Securities and Investments Commission Act 1989*;

“closed” in relation to a serviced strata scheme means that no further primary offers (including offers to which s1030 applies) are to be made, or were after 6 October 1998 made, of interests in the scheme except excluded offers or exempted offers and offers of interests in schemes described in RG 140.72;

“complying” in relation to a serviced strata scheme, means that interests in the scheme were offered for subscription, and the scheme is operated, in compliance with the Law applicable at the time;

“fundraising provisions” means those provisions in Chapter 6D of the Law concerning disclosure documents and securities hawking (for example: telephone selling);

“Law” means the Corporations Law;

“licensing provisions” means those provisions in Parts 7.3 to 7.7 of the Corporations Law about:

- (a) the need to have a dealers licence which authorises a person to operate a managed investment scheme (that is, the responsible entity); and
- (b) the obligations of the holder of a dealers licence (for example, financial statements and audit; dealers account);

“managed investment provisions” means those provisions in Chapter 5C of the Law on the:

- (a) requirements for registering a managed investment scheme. In general, a scheme must be registered if it has more than 20 members or has been promoted by a person who is in the business of promoting schemes. The key exceptions are in s601ED(2) and s708 and include offerings of interests in a scheme for a minimum price of \$500,000; and
- (b) obligations when operating a registered scheme;

“management rights scheme” means a serviced strata scheme to which an exemption under RG 140.43 applies;

“non-complying” in relation to a serviced strata scheme, means a scheme which is not described as complying;

“open” in relation to a serviced strata scheme means not closed;

“operator” means a person responsible for operating a serviced strata arrangement. For example, this includes:

- (a) the promoter of the arrangement who promotes or markets interests in the arrangement;
- (b) the manager of the serviced strata, hotel, motel, or resort complex;
and
- (c) the on-site letting agent of a management rights scheme;

“promoter” means a person who authorises, causes or allows the promoting and marketing of a serviced strata arrangement;

“serviced strata arrangement” means an arrangement which involves owners of strata units making their units available to a person for use as part of a serviced apartment, hotel, motel or resort complex;

“serviced strata scheme” means a serviced strata arrangement which is a managed investment scheme under the Law;

“strata unit” means a strata title unit, community title interest, or other interest in real property (including freehold or leasehold interests); and

“s601ED” (for example) is to a section of the Law.

Related information

RG 140.120

Headnotes

strata units, hotel, motel, serviced apartment, resort, strata title unit, community title interest, real estate agent, managed investment scheme, scheme property, exemption, prospectus, investor rights, management rights schemes, concise prospectus, valuation, common enterprise, letting arrangements, sale of interests, time-sharing scheme, excluded offer.

Class orders and pro formas

[CO 98/64], [CO 98/78], [CO 98/2285], [CO 98/2286], [CO 98/2287], [CO 99/460], [CO 99/461], [CO 99/462], [CO 99/463], [CO 99/1015], [CO 00/191], [CO 00/198], [CO 00/208], [CO 00/209], [CO 00/215], [CO 00/216], [CO 00/570], [PF 184], [PF 186] and [PF 187].

Policy statements

Superseded Policy Statement 131 *Managed Investments: Financial requirements* [SPS 131]

Superseded Policy Statement 137 *Concise prospectuses for managed investments* [SPS 137]

Regulatory guides

RG 51 *Applications for relief*

RG 77 *Property trusts and property syndicates*

RG 80 *Managed investment schemes— interests not for money*

RG 130 *Managed investments: Licensing*

RG 132 *Managed investments: Compliance plans*

RG 133 *Managed investments: Scheme property arrangements*

RG 134 *Managed Investments: Constitutions*

RG 135 *Managed investments: Transitional issues*

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

Legislation

Chapter 5C, Chapter 6D, Chapter 7 Part 7.3, Part 7.4, Part 7.5, Part 7.6, Div 11 Part 11.2, s9, s601ED(1), s601ED(2), s601ED(3), s601FC(1)(j), s601HA(1)(c), s601QA(1), s849, s851, s1069(7), s1069(8), reg 7.3.11(1)(b), reg 7.12.12.

Cases

Maunder-Hartigan v Hamilton (1984) 2 ACLC 438

Consultation papers

Implementation of the Managed Investments Bill 1997: Exemptions and modifications

Media and information releases

[MR 98/214], [MR 98/304], [IR 99/32], [IR 00/4]

Annexure: Summary of point of sale disclosure

RG 140.121 This annexure summarises what you must include in a disclosure statement which offers interests in a management rights scheme. We have given relief for the promotion and operation of management rights schemes and certain well advanced open non-complying schemes when a disclosure statement is provided to investors before they decide to join the scheme (see [CO 99/460], [CO 00/570] and [PF 186]).

[*Historical note:* RG 140.121 amended as a result of the introduction of CLERP in March 2000.]

RG 140.122 A disclosure statement must:

- (a) describe the main features of the interests in the managed investment scheme;
- (b) set out the main terms and conditions of the offer or invitation; and
- (c) give answers to the following questions. You do not need to set out these questions. The answers can be set out in any order or format. However, the information must help a typical person who is being offered membership of the scheme. They must be able to make an informed decision about whether to become a member after considering all matters which are material to making their decision. The questions are:
 - (i) What is being offered in this disclosure statement? See RG 140.123 for a summary of what sort of information must be included in your answer.
 - (ii) What are the risks and returns of becoming a member? See RG 140.124.
 - (iii) What are the fees, charges, expenses and taxes associated with the scheme? See RG140.125.
 - (iv) Who is the ongoing operator (“letting agent”)? See RG 140.126.
 - (v) When can memberships be terminated or transferred? See RG 140.127.
 - (vi) What information can be obtained from the responsible entity/letting agent? See RG 140.128;
- (d) include a statement about consulting people for advice, see RG 140.130.

What is being offered?

RG 140.123 What is being offered in this prospectus, or in the case of management rights schemes, this disclosure statement?

- (a) How would a member's property rights be affected if they hold an interest in the managed investment scheme ("scheme")?
- (b) What key rights will members have on how their strata unit is used by the letting agent?
- (c) What sort of serviced apartment, hotel, motel or resort complex is being operated under the scheme? How will it be operated?
- (d) What are the key terms of any lease, licence or rights that members confer on the letting agent and any person engaged by the responsible entity/letting agent to operate the scheme?
- (e) The letting agent or any person it proposes to engage to operate the scheme may own or have rights to property which is used to facilitate the scheme. What rights do they have? How would their rights adversely affect:
 - (i) how the scheme would be operated by a new letting agent if the responsible entity/letting agent changed; or
 - (ii) the amount members are likely to receive for use of their unit if the letting agent's property or rights to property ceased to be available (for whatever reason)?

What are the risks and returns?

RG 140.124 What are the risks and returns of the investment?

- (a) How, in general terms, will the serviced apartment, hotel, motel or resort complex generate returns for members?
- (b) When and how are these returns to be calculated and made available to members?
- (c) Are members of the scheme guaranteed or promised that they will receive a particular rate of return from the scheme? If "yes":
 - (i) what are the conditions for receiving the benefits of this guarantee or promise;
 - (ii) when (if at all) would the person giving the guarantee or promise be unable to honour it;
 - (iii) what is the financial position of the person giving the guarantee or promise; and

- (iv) on what basis do members receive returns once the guarantee or promise expires?
- (d) If no particular rate of return is guaranteed or promised:
 - (i) is the letting agent aiming to achieve a particular return;
 - (ii) can members expect any particular return; and
 - (iii) are returns from the scheme uncertain?
- (e) Returns from the scheme may vary from what is aimed for or expected, or may be uncertain for some reason. In this case, what are the main factors which will affect the level of return? If occupancy rates will affect the rate of return what are main factors that will affect occupancy rates?
- (f) Do members have a potential liability to pay money to the scheme or their ownership of a strata unit in any circumstances? If “yes”, what are these liabilities and what main factors will affect the amount of these liabilities? For example, how will any repairs, refurbishment or replacement of any part of the serviced apartment, hotel, motel or resort complex and its furniture and fittings be paid for?
- (g) Is there a suggested minimum period of time that a member should remain in the scheme? If “yes”, why is that period of time suggested? What (if any) are the types of qualifications on that suggestion?

What are the fees, charges, expenses and taxes?

RG 140.125 What fees, charges, expenses and taxes are associated with the scheme?

- (a) What fees, charges, expenses or taxes, if any, may be payable by a member if they join the scheme?
- (b) What fees, charges, expenses or taxes, if any, may be payable by a member if they withdraw from the scheme?
- (c) What other fees, charges, expenses or taxes may be deducted from the assets or income of the scheme or otherwise paid by members?
- (d) What general kinds of tax might a member have to pay on their investment in the scheme?

Who is operating it?

RG 140.126 Who is the letting agent?

- (a) What person is the letting agent for the scheme? What are its credentials in operating hotel, motel, resort or serviced apartment complexes? (The answer should include details of the principal activities of the letting agent, and the relevant experience of the letting agent)?

(For schemes in which the letting agent is not involved in the offer of interests in the scheme: the disclosure statement should describe how, and on what basis, an operator will be selected to undertake the ongoing operation of the scheme.)

- (b) A letting agent may engage a person to operate the serviced apartment, hotel, motel or resort complex on its behalf. If it does engage someone, what credentials will that person have to operate the serviced apartment, hotel, motel or resort complex?

(For management rights schemes in which the letting agent is not involved in the offer of interests in the scheme: disclosure statements do not have to include this information.)

- (c) What are the custodial arrangements for holding the money of the scheme? (This includes money held for distribution to members and to meet expenses of the scheme.)

How can investments be withdrawn or transferred?

RG 140.127 When can investments be withdrawn and transferred?

- (a) When and how can a member withdraw from the scheme?
- (b) Can the interest in the scheme be transferred? If “yes”, in what circumstances? What legal requirements apply?

What information can be obtained?

RG 140.128 What information can be obtained from the responsible entity?

- (a) How can the letting agent be contacted?

(For schemes in which the letting agent is not involved in the offer of interests in the scheme: this means “How can the promoter be contacted?”.)

- (b) Is there any particular information available to a prospective or existing member if they ask the letting agent? If “yes”, how can that information be obtained?

(For management rights schemes in which the letting agent is not involved in offering interests in the scheme replace the words “responsible entity” with “promoter”.)

- (c) When and how does the letting agent report to a member on the operations of the scheme (including the scheme’s performance)?

[Historical note: RG 140.129 removed as a result of the introduction of CLERP in March 2000.]

Getting more advice

RG 140.130 The disclosure statement must also include a prominent statement that a person should, before making a decision to become a member of the scheme or signing any contract to buy a strata unit (on the basis that they will become a member), consider whether to consult:

- (a) an investment adviser who is either a securities licensee or an authorised representative of a securities licensee;
- (b) a taxation adviser; and
- (c) a lawyer.