

Attachment to CP 237: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Real Estate Companies) Instrument 2015/XX

I, Grant Moodie, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Dated 2015

Grant Moodie

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Part 1—Preliminary

1 Name of legislative instrument

This instrument is *ASIC Corporations (Real Estate Companies) Instrument 2015/XX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Note: The register may be accessed at www.comlaw.gov.au.

3 Authority

This instrument is made under section 741 and subsection 926A(2) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

eligible shares, in relation to a real estate company, means shares in the real estate company other than shares which entitle the holder to an interest in a time-sharing scheme.

licensed real estate agent means a person licensed as a real estate agent in a State or Territory in this jurisdiction.

property means land in relation to which a real estate company is the owner or lessee under a Crown lease.

real estate company means a company, other than a company included in the official list of a prescribed financial market, that satisfies any of the following paragraphs:

- (a) a company that is the owner of property, or the registered lessee of property under a Crown lease granted for a period of not less than 99 years, on which a building divided into separate areas and areas for common use is erected, where:
 - (i) the shareholders of the company are entitled, because of the shares they hold in the company, to the exclusive occupation of one or more of those areas and to the use of any common areas; and
 - (ii) either:

- (A) the company's constitution prohibits the payment of any income or dividend to shareholders other than on the winding up of the company; or
 - (B) the company operates principally for the purpose of facilitating and enforcing the rights of shareholders in relation to exclusive occupation of those areas and maintaining any common areas;
- (b) a company that is a service company, in respect of a building subdivision, within the meaning of the *Transfer of Land Act 1958* of Victoria (commonly known as stratum title companies);
 - (c) a company of the type described in section 5.10(4) of the repealed *Local Government (Planning and Environment) Act 1990* of Queensland (commonly known as lake title companies);
 - (d) a company that is the owner of property which adjoins property owned by its shareholders and is subject to easements of right of way in favour of those adjoining properties (commonly known in Queensland as court title companies).

vendor means a person, being an owner of shares in a real estate company, who proposes to sell the shares.

Part 2—Exemptions

5 Shares in real estate companies

Vendors

- (1) A person that makes an offer for sale of eligible shares in a real estate company does not have to comply with section 707 of the Act in relation to the offer where all of the following are satisfied:
 - (a) the offer to sell the shares in the company is made by or on behalf of the vendor;
 - (b) a copy of the draft contract for sale of the shares is publicly available at the time of making the offer;
 - (c) the terms of the draft contract include particulars as to:
 - (i) the area or areas to which the shares relate and title particulars of the property and any interest affecting that property; and
 - (ii) the occupancy and any usage rights in respect of the area or areas to which the shares relate; and
 - (d) it is an essential term of the draft contract that on completion of the contract:
 - (i) the vendor will be or will be entitled to be the registered holder of the shares; and
 - (ii) the title of the company to the property will be unencumbered, subject only to any matter affecting that title described in the contract;
 - (e) the draft contract contains a warranty by the vendor that, so far as the vendor is aware, after making reasonable enquiries of the directors of the company:
 - (i) other than as disclosed in the contract, the company has no actual or contingent liabilities (except normal operating expenses for its current financial year) nor are there any defects (whether patent or latent) in any common property which may involve the company incurring the expenditure of money for repair or replacement (other than ordinary wear and tear); and
 - (ii) the company is not being wound up and, other than as disclosed in the contract and so far as the vendor is aware:

- (A) the company is not subject to any external administration or liable to be wound up;
 - (B) no action is pending in any court for the winding up of the company;
 - (C) no meeting has been called for the purpose of winding up the company; and
- (iii) there are no proceedings pending in any court against the company that might prejudice or detrimentally affect it or its assets;
- (f) under the terms of the draft contract the purchaser may make requisitions in relation to the vendor's title to the shares and the company's title to the property other than in respect of any matter fully disclosed and clearly described in the draft contract and identified as acceptable to the purchaser;
- (g) annexed to the draft contract are copies of:
- (i) the title documents in respect of the property which are current as at the date of the sale offer; and
 - (ii) the constitution and any other charter documents of the company which are current as at the date of the sale offer.

Real estate agents

- (2) A licensed real estate agent that, in relation to an offer for sale of eligible shares in a real estate company, provides general advice to a vendor in relation to the shares or deals in the shares on behalf of a vendor, does not have to comply with the requirement in subsection 911A(1) of the Act to hold an Australian financial services licence covering the provision of those financial services provided:
- (a) the offer satisfies the requirements of subsection (1);
 - (b) the agent has, before providing any of the financial services to the vendor, disclosed to the vendor the following information in writing:
 - (i) the agent does not hold an Australian financial services licence;
 - (ii) the relationship between the agent and the vendor is governed by the real estate licensing provisions in the relevant State or Territory.

Valuers

- (3) A person that provides general advice to another person in relation to eligible shares in a real estate company does not have to comply with the requirement in subsection 911A(1) of the Act to hold an Australian financial services licence covering the provision of the advice where the advice relates to a valuation of eligible shares in the real estate company or a valuation of property, provided the person has, before providing the general advice to the other person, disclosed to the other person in writing that they do not hold an Australian financial services licence.