ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 81

Management rights schemes

May 2007

What this paper is about

1 This consultation paper sets out our proposals to amend Policy Statement 140 *Serviced strata schemes* [PS 140] in relation to management rights schemes. These proposals are about:

(a) how the AFS licensing requirements apply to people giving financial product advice about participating in a management rights scheme;

(b) how the product disclosure regime in Part 7.9 of the *Corporations Act 2001* applies to management rights schemes; and

(c) a range of other specific issues such as rental guarantees given by operators and furniture and fittings expenditure funds.

2 The development of these proposals were foreshadowed in Policy Statement 167 *Licensing: Discretionary powers* [PS 167] and Policy Statement 169 *Disclosure: Discretionary powers* [PS 169], following the enactment of the *Financial Services Reform Act 2001* (the FSR Act).

3 The 'Key terms' section contains definitions of certain words used in this paper. The Appendix provides a brief background on selected requirements under the law and ASIC policy as relevant to management rights schemes.

4 We will also be updating the remainder of [PS 140] to reflect changes in the law since it was issued.

Making a submission

5 You are invited to comment on our proposals. These proposals are only an indication of an approach we may take and are not our final policy.

6 As well as responding to the specific proposals and questions, please describe any alternative approaches you think would achieve our objectives. We would also like to hear from you on any related issues you consider important.

7 As we are particularly keen to fully understand and assess the competitive, financial and other impacts of our proposals and any alternative approaches, we ask you to comment on:

(a) the likely effect on competition;

(b) the likely compliance costs; and

(c) other impacts, costs and benefits.

8 Where possible, we are seeking both quantitative and qualitative information. Your comments will help us update our policy on management rights schemes as appropriate. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator report and/or a Regulation Impact Statement as required by the Office of Best Practice Regulation (see Section 8).

9 All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential. However, submissions about the costs and benefits of our proposals (see Q3.1 in Section 3) will be treated as confidential unless you specifically request that we treat the whole or part of your submission in this area as not confidential.

10 After the comment period, we aim to publish our final policy by November/December 2007.

Your comments

Comments are due by 9 July 2007 and should be sent to:

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Australian Securities & Investments Commission
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You can also contact ASIC Infoline on 1300 300 630 for information and assistance.

Contents

To help you understand our policy proposals the Appendix includes a summary of some relevant provisions of the law and ASIC policy.

Please note that any discussion in this paper, including the Appendix, of current requirements that apply under the Act and aspects of the ambit of relief under our current policy do not constitute legal advice. Nor is this paper an exhaustive discussion of all legal requirements applicable to these schemes.

Management rights schemes

Section 1: Current relief

1.1 Management rights schemes typically involve holiday letting arrangements for strata units. A more detailed definition is set out in the Key Terms section of this paper.

1.2 Management rights schemes are a managed investment scheme under the *Corporations Act 2001* (the Act). As such they are a financial product and the financial services provisions under the Act apply to the operation of these schemes if the schemes are registered, or to certain services provided in relation to these schemes, unless we give relief.

> **Note:** [PS 140] details how we regulate the serviced strata industry (which includes management rights schemes) and identifies when we would give relief from some or all of the managed investment, licensing and hawking provisions of the Act for serviced strata schemes.

1.3 Under [PS 140], operators of management rights schemes that fall under the definition in [PS 140.41] benefit from relief under Class Order [CO 02/304] *Management rights schemes* and Class Order [CO 02/305] *Management rights schemes* from the:

(a) managed investment scheme provisions;

(b) licensing requirements for dealing in interests in these schemes; and

(c) hawking provisions of the Act.

1.4 This relief applies if the schemes comply with various requirements set out in the class order.

> **Note:** No relief is given from Part 7.9 *Financial product disclosure and other provisions relating to issue sale and purchase of financial products* of the Act.

1.5 Similar relief is given on a case-by-case basis, under Pro Forma 187 *Management rights schemes where the strata unit cannot be used as a residence* [PF 187], for schemes with apartments that cannot be used as a residence due to zoning restrictions.

1.6 The Appendix provides more background on the application of the *Corporations Act 2001* to management rights schemes and the nature of our current relief.

Section 2: Licensing requirements for financial product advice

Our proposals

2.1 We propose to give relief so that certain providers of general or personal financial product advice on interests in a management rights scheme do not need to hold an Australian financial services (AFS) licence (see paras 1 to 10 in the Appendix for an overview of relevant licensing requirements).

2.2 We propose that the relief be limited to circumstances when the provider of the advice is either:

(a) licensed under State or Territory laws as a real estate agent, conveyancing agent, business agent or property developer; or

(b) registered as a representative of one of these licensees or acting on behalf of the licensee, as permitted by the relevant State or Territory law.

2.3 This proposal aims to:

(a) recognise that the real property industry is regulated under a different regime;

(b) alleviate the need for sales intermediaries in the real estate industry to obtain an AFS licence;

(c) recognise the context in which advice is given on interests in management rights schemes when the substantial aspect of the transaction advised on generally concerns the purchase of real estate rather than a financial product; and

(d) rely on the degree of consumer protection in State or Territory licensing regimes.

Your Feedback

Q2.1 Is it appropriate for ASIC to give licensing relief for financial product advice for the relevant persons? If so why, and if not, why not, and what alternative, if any, would you propose? Are there any significant consumer risks from the proposed relief?

Q2.2 Should we instead, or also, invite individual applications for relief with conditions tailored to address specific character and competency requirements? If so, on what basis should we consider this alternative and what conditions would be appropriate and sufficient?

Q2.3. Should we limit any licensing relief to general financial product advice? If so why and if not why not?

Section 3: Application of the product disclsoure provisions

Our proposals

3.1 We propose to continue not to give relief from any of the product disclosure provisions in Part 7.9 applicable to operators of management rights schemes. These provisions are:

(a) Division 2, PDS requirements;

(b) Division 4, the advertising provisions;

(c) Section 1017A, further information on request;

(d) Section 1017B, significant events disclosure;

(e) Section 1017F, confirming transactions; and

(f) Section 1017G, alternative dispute resolution requirements.

> **Note:** We discuss application of the periodic statement requirements under s1017D in the next section of this paper.

3.2 We believe that compliance with Part 7.9 is not unreasonably burdensome and that these are important consumer protections that should continue to apply for the benefit of retail clients participating in management rights schemes.

3.3 The PDS requirement (see paras 11 to 17 in the Appendix) broadly reflects the obligation to give a disclosure statement required under earlier management rights scheme relief that applied before the transition to the PDS regime over 2002 to 2004.

Your Feedback

Q3.1 Does compliance with the relevant provisions of Part 7.9 impose an unreasonable level of burden for operators? If so, why and, if not, why not? Please give examples and when possible quantify costs. The following examples of costs would be useful to us: the cost of producing a PDS; the cost of legal advice on Part 7.9 obligations; the cost of dealing with the complaints process under an approved external dispute resolution scheme. This information will be treated as confidential unless you make a specific request to the contrary.

Q3.2 Is relief from any or all these provisions justifiable having regard to the protection they give investors? If not, why not and if so, why and please address why consumer risks do not arise in this regard?

Q3.3 Based on 2006 figures, we expect the cost of complying with the external dispute resolution requirement to be a one off cost under $4,000 for voting membership of the Financial Industry Complaints Scheme (FICS) and a couple of thousand dollars a year in levy (the exact amount of the annual levy being dependent on the size of the scheme). We would envisage additional costs in the form of time spent in completing administrative details for FICS membership and time spent dealing with complaints referred to FICS and any costs of awards paid, etc. Are there any further costs to complying with the alternate dispute resolution requirements that we are unaware of?

Q3.4 Is a comparable level of protection for retail clients given by any external dispute resolution regime applying to management rights schemes, where the external dispute resolution regime is outside the scope of the Corporations Act?

Section 4: Periodic reporting

Our proposals

4.1 The terms of our original management rights scheme relief did not contemplate a periodic reporting requirement for these schemes. Periodic reporting relating to each client's investment in financial products under s1017D was introduced by the *Financial Services Reform Act 2001* and applies to all registered managed investment schemes.

> **Note:** See paras 35-37 of the Appendix for an overview of the periodic reporting requirements in s1017D.

4.2 Our general policy, as stated in [PS 169.24], is to require operators of schemes granted relief from the managed investment scheme provisions (Chapter 5C), to comply with s1017D, the periodic reporting requirement.

> **Note:** Management rights schemes are granted relief from the managed investment scheme provisions under the Act. This relief prevents the classification of interests in the scheme as a 'managed investment product' under the Act and thus technically removes the application of the periodic reporting requirement under s1017D to management rights schemes.

4.3 We are now reviewing our management rights scheme policy in light of the product disclosure provisions in Part 7.9 and are considering if we should apply our general policy on requiring compliance with s1017D to management rights schemes. Instead of requiring strict compliance with s1017D, we propose to apply a modified version of periodic reporting as a condition of class order relief for operators of management rights schemes.

4.4 We propose that the class order would require:

(a) a management rights scheme operator to give each retail client participating in the scheme a periodic statement;

(b) the periodic statement to be given at least annually by the operator; and

(c) the periodic statement to detail any transactions affecting the member's entitlement in the management rights scheme during that period. This may include, for example, rental receipts and operator's fees.

4.5 This proposal aims to:

(a) maintain a basic consumer protection mechanism by giving periodic disclosure for retail clients;

(b) avoid duplicating detailed periodic reporting requirements that may be required under individual State or Territory legislation yet maintain a minimum national requirement for the industry; and

(c) reflect good commercial practice as currently implemented by many in the management rights scheme industry.

Your Feedback

Q4.1 Are there any circumstances where it would not be of value to provide a minimum periodic reporting requirement for consumers?

Q4.2 What, if any, burden would be imposed on operators in complying with this proposal? For example, would this proposal require operators to take many additional steps from their current practice? If so, please specify and quantify where possible any additional costs that arise.

Q4.3 Do you consider the proposed conditions in paragraph 4.4 appropriate? If not, why not and what alternative, if any, would you propose? Is there any other information that should be required in the periodic statements?

Q4.4 Would it be preferable to require compliance with the periodic statement requirement in s1017D as if the scheme was a registered scheme instead (i.e. not apply a modified requirement as proposed)? If so, why and, if not, why not?

Section 5: Who can issue a PDS

Our proposals

5.1 We propose to give relief so that the developer of a strata scheme complex may be the responsible person for the issue of a PDS before the operator's appointment when:

(a) developers offer to arrange for the issue of interests in a management rights scheme; and

(b) the operator has yet to be appointed.

> **Note:** A 'developer' for the purposes of our proposal is defined in the Key Terms section of this paper as 'a person that arranges for the building of strata complexes and for the sale of the built complex or units in the complex'.

5.2 Our proposal aims to:

(a) ensure that retail clients receive timely disclosure before they purchase real estate that will allow them to obtain an interest in a management rights scheme;

(b) accommodate the commercial reality of such developments that sales of strata units that may participate in management rights schemes may be made before the appointment of an operator of such a scheme; and

(c) recognise that after an operator of the management rights scheme is appointed a supplementary PDS will be required under Part 7.9 to give disclosure to retail clients.

5.3 Our proposed relief is consistent with the earlier terms of relief for management rights schemes, when developers were permitted to issue the relevant disclosure statement for consumers.

Your Feedback

Q5.1 Is it appropriate for ASIC to give relief for developers to issue a PDS? If not, why, and what alternative, if any, would you propose? Are there any significant consumer risks from the proposed relief?

Q5.2 Is there a need for ASIC guidance on conduct that a developer may engage in without triggering the PDS requirements? Would this guidance be a suitable alternative to the proposed relief?

Q5.3 Is it feasible for operators to be appointed at an earlier stage in the process?

Section 6: Furniture

Our proposals for upfront furniture packages

6.1 We propose to amend the relevant instruments implementing our policy on management rights schemes [CO 02/304], [CO 02/305] and [PF 187] to allow for furniture packages. In particular, we propose to allow the operator to require a person to pay for acquiring standard furniture packages if they want to participate in a management rights scheme.

6.2 Currently the relevant instruments include a prohibition on requiring any payment to join the scheme. However, if the operator buys the furniture and then seeks reimbursement there is the opportunity for such a cost to be charged as a scheme expense as 'one or more payments of the Investors reasonable proportion of the Operator's fees and expenses with respect to the management of the Scheme': [CO 02/304], [CO 02/305], [PF 187].

6.3 We propose to permit the operator to require payment for a standardised furniture package when:

(a) the payment is applied to the purchase of furniture on an individual or bulk purchase basis with other members; and

(b) all furniture acquired in such a manner becomes the property of the particular scheme member to whom the money provided to acquire it is attributable.

6.4 Our proposal aims to:

(a) make it clear that the current class orders permit the upfront acquisition of standard furniture packages; and

(b) recognise the commercial value of standard furniture packages for strata units participating in management rights schemes.

6.5 We see this proposal as a clarification of the existing class orders.

Your Feedback

Q6.1 Do you have any comments on this clarification?

Our proposals for furniture fund limits

6.6 We invite comment on whether any changes are needed to the monetary limits on the amount that may be held in a furniture and fittings expenditure fund (FFE fund) to cover the cost of refurbishing and

replacing furniture and fittings. We may change the existing limits if it can be demonstrated that the:

(a) current limitations are unreasonably low; and

(b) the funds of participants in management rights schemes are adequately protected.

6.7 Our current policy on furniture fund limits permit an operator to hold up to $5,000 per scheme participant in an FFE fund, with annual payments into the fund of 3% or less of the gross scheme revenue attributable to the investor for that year.

Your Feedback

Q6.2 Should the FFE fund limit be increased? If so, please give us reasons as to:

(a) why the current limit ($5,000) may be insufficient?

(b) what the limit should be if any?

(c) what risks and benefits arise from the operation of FFE funds?

(d) how should any increase in risks to client funds, by the holding of larger amounts than currently permitted in an FFE fund, be addressed?

Section 7: Operator's rental guarantees

Our proposals

7.1 We propose to clarify [CO 02/304], [CO 02/305] and [PF 187] to provide that relief is not available to a scheme if its operator, directly or indirectly, offers rental guarantees to participants that can apply after the operator has chosen to withdraw as scheme operator. This clarification will only apply to rental guarantees given after the instruments are changed.

7.2 This would mean that relief under our management rights scheme policy will not be available in the case where:

(a) a scheme operator;

(b) is obligated, directly or indirectly, for example by indemnifying another person who provides a guarantee;

(c) to provide a guaranteed level of rental payment to scheme members; and

(d) this rental guarantee is required to be fulfilled by the operator even after the operator ceases to operate the scheme because the operator has exercised its power to terminate.

7.3 Our proposal will cover instances when such guarantees are made:

(a) directly by the operator; or

(b) indirectly through another party, whom the operator will have to indemnify for any rental guarantee payments made.

7.4 An example of an indirect relationship is when:

(a) a developer undertakes to make any necessary payments to scheme participants to meet the rental guarantee obligation on the agreement; and

(b) the operator indemnifies the developer for any amounts that they have to pay on the operator's behalf.

7.5 We are not concerned about rental guarantees offered in the following scenarios, when:

(a) the guarantee is offered by the developer, and the developer bears the risk of the guarantee being called on, rather than having an indemnity from the operator;

(b) the guarantee is a part of a leaseback agreement with the operator and the obligation to provide the rental guarantee ends when the

operator terminates the agreement and ceases to manage the scheme.

7.6 Our proposal recognises that:

(a) our current relief is unclear on its application to rental guarantees;

(b) the underlying principle of requiring that an operator must be able to withdraw is undermined if the operator would still have to honour a rental guarantee for a period after it withdrew. An investor could reasonably assume that an operator would be unlikely to withdraw if it must still be responsible for ensuring members receive their rent. Excluding relief in this situation will better reflect ASIC's intent that relief should not apply when scheme participants rely on the continuing services of a particular operator; and

(c) there are ways to offer a rental guarantee while the management rights scheme relief applies to the scheme.

7.7 We also recognise that it may be possible for schemes involving holiday resorts, hotel or motel arrangements with multiple unit owners, to be structured to offer a rental guarantee by the operator for a fixed term and not fall within the definition of a serviced strata scheme. This would be possible where the operator has sufficient financial substance: see [PS 140.30] to [PS 140.32].

Your Feedback

Q7.1 Will this clarification create any unintended consequences or unreasonable burden for operators of certain kinds of schemes? If so, how?

Q7.2 Are rental guarantees provided directly or indirectly by the operator, common in practice? In what circumstances might they be more likely to be offered?

Section 8: What happens next?

Regulatory and financial impact

8.1 We have carefully considered the regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating financial services relating to management rights schemes, the risks to clients, the integrity of the markets for those products and associated financial services.

8.2 Before settling on our final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:

(a) considering all feasible options;

(b) undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy if regulatory options are under consideration;

(c) consulting with OBPR to determine the appropriate level of regulatory analysis if our proposed option has more than low impact on business and individuals or the economy; and

(d) conducting the appropriate level of regulatory analysis, that is, completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).

8.3 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

8.4 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can in response to our proposals or any alternative approaches about:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

Note: See ‘ Making a submission’ at the beginning of this paper.

Your Feedback

Q8.1 Taking into account information we have, including data from the Queensland Office of Fair Trading (regarding restricted letting agent licensees) we estimate that there might be roughly 1000 to 2000 management rights schemes across Australia (as defined in [PS 140.41]) that could rely on our class order relief. However we are uncertain about the accuracy of this estimate and therefore seek your comment on its accuracy and any alternate data you may have. This information will assist us in completing our regulatory impact analysis.

Q8.2 Taking into account data regarding average weekly earnings in the property and business services industry from the Australian Bureau of Statistics, we roughly estimate that the cost of time spent on compliance for management rights scheme operators might be approximately $60 an hour. Is this amount a reasonable estimate of an operator's cost of compliance? If not, please provide us with an alternate figure and the basis for your estimate.

Development of final policy

8.5 This paper is not ASIC policy. Any application for relief outside existing policy will continue to be considered under the current framework in:

(a) Policy Statement 140 *Serviced strata schemes* [PS 140];

(b) Policy Statement 136 *Managed investments: Discretionary powers and closely related schemes* [PS 136];

(c) Policy Statement 167 *Licensing: Discretionary powers* [PS 167]; and

(d) Policy Statement 169 *Disclosure: Discretionary powers* [PS 169].

8.6 We expect to publish policy by November/December 2007, after considering any comments or feedback you send us on these proposals.

Key terms

In this paper, unless a contrary intention appears, the following terms have the following meanings:

Act The *Corporations Act 2001* including regulations made for the purposes of the Act.

AFS licence An Australian financial services licence.

ASIC The Australian Securities and Investments Commission

AFS licensee A person who holds an AFS license

[CO 02/305] (for example) An ASIC Class Order (in this example numbered 02/305)

Developer A person that arranges for the building of strata complexes and for the sale of the built complex or units in the complex.

FFE Furniture, fixtures and equipment fund as provided for under management rights scheme class order [CO 02/304] and [CO 02/305].

FICS Financial Industry Complaints Scheme

Management rights schemes are serviced strata schemes that fall into the definition found in [PS 140.41]: [when]:

‘(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 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.'

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

PDS Product disclosure statement

[PS 140.41] (for example) A paragraph of an ASIC policy statement (in this example paragraph 41 of policy statement numbered 140)

Reg 7.1.33H (for example) A regulation of the *Corporations Regulations 2001* (in this example numbered 7.1.33H)

s1017G (for example) A section of the Act (in this example numbered 1017G) unless otherwise specified.

SOA Statement of advice

Strata includes strata title, community title and similar real property interests.

Appendix: Selected requirements under the law and ASIC policy

Licensing requirements for financial product advice under the Act

Financial product advice

1. Providers of financial product advice are subject to the licensing and disclosure provisions under the Act. Representations involve financial product advice if recommendations or statements of opinion are made that are (or could reasonably be regarded as being) intended to influence the user in making a decision about a particular financial product or class of financial products (s766B). Whether representations made involve financial product advice will depend on the facts of the particular case.

> Note: For a discussion of the meaning of financial product advice, see *Licensing: The scope of the licensing regime: Financial product advice and dealing—An ASIC guide* (November 2001, reissued May 2005).

Obligation to hold an AFS licence

2. In general, a person carrying on a business of providing financial product advice must hold an AFS licence unless otherwise exempt (s911A(1), s911A(2)).

Disclosure obligations

3. There are two types of financial product advice: personal advice and general advice. Different disclosure requirements apply depending on whether advice is personal or general (Part 7.7). As a general rule, AFS licensees and authorised representatives giving financial product advice to retail clients are required to give those retail clients a Financial Services Guide (s941A and s941B).

Additional requirements for personal advice

4. 'Personal advice' is financial product advice given to a person when the provider of advice has considered the objectives, financial situation and needs of the person, or when the person might reasonably expect that the provider has considered these matters (s766B(3)).

5. If personal advice is given to a retail client, the provider (the AFS licensee or authorised representative) must comply with the personal

advice regime in Division 3 of Part 7.7 of the Act. Under these provisions the following requirements generally apply:

(a) there must be a reasonable basis for the advice and the advice must be appropriate (s945A);

(b) the client must be warned if the advice is based on incomplete or inaccurate information about the client's relevant personal circumstances (s945B); and

(c) the client must be given a Statement of Advice (SOA) setting out, among other things, the advice and the basis upon which it is given (s946A).

Additional general advice requirements

6. 'General advice' is financial product advice that is not personal advice (s766B(4)). When a person gives general advice to a retail client, no SOA is required. However, at the time of giving the general advice and by the same means as the general advice is given, the licensee or authorised representative giving the advice must warn the client that:

(a) the advice has been prepared without taking account of the client's objectives, situation and needs; and

(b) they should therefore consider the appropriateness of the advice to their situation before acting on the advice (s949A).

Financial advice on interests in management rights schemes

7. Currently we do not give licensing exemptions for general or personal financial product advice on participation in management rights schemes. Developers, promoters, operators and real estate agents making general or personal recommendations to participate in a management rights scheme may reasonably influence the decision of a person to acquire a strata unit as a precursor to participating in a scheme. If they give such recommendations then they are generally required to:

(a) hold an AFS licence or be an authorised representative of an AFS licensee; and

(b) give the necessary disclosures discussed above.

8. Operators**,** as product issuers, however, do have some scope to give general advice without an AFS licence under reg 7.1.33H of the *Corporations Regulations 2001*.

9. Generally, the issuer of a financial product is the person responsible for the obligations owed under the terms of the product to a client or a person nominated by that person (s761E(4)).

10. Reg 7.1.33H states that a product issuer who gives another person general advice about a product they issue, does not provide a financial service, provided that they also:

(a) inform the person that the product issuer is not licensed to give financial product advice; and

(b) recommend that the person obtain a Product Disclosure Statement (PDS) before acquiring the product.

Product disclosure provisions under Part 7.9

11. Point of sale disclosure is required for financial products through the giving of a PDS (Div 2, Part 7.9).

When is a PDS required?

12. A PDS is to be given when a retail person is considering acquiring a financial product.

13. Broadly speaking the requirement to give a PDS will be triggered for interests in management rights schemes when a person makes an offer to issue, or arrange for the issue, or issues to a retail client an interest in the scheme (s1012B(3)).

14. This may cover circumstances when marketing campaigns are used by, or on behalf of, a developer selling strata units that may participate in management rights schemes. The developer may be offering to arrange for the issue of interests in the management rights scheme.

What content is required in the PDS?

15. Section 1013D lists information that must be included in a PDS. The list is cast in general terms and some of the items required include: name, contact details, fees, commissions, any other significant benefits, risks, characteristics or features, dispute resolution arrangements and taxation implications. These topics need only be included in a PDS when they are relevant to a particular product. This gives flexibility in applying these provisions.

16. The level of information in the PDS is limited to the amount reasonably required by a retail person who is making a decision whether to acquire that product (s1013D(1)).

17. Disclosure is required of any other material information that is actually known to the person preparing the PDS that might reasonably be expected to have a material influence on the decision of a reasonable person to acquire the product as a retail client (s1013E). Information that

a reasonable person would not expect to find in a PDS does not have to be included in the PDS (s1013F).

Advertising requirements

18. An advertisement or promotional material that is reasonably likely to induce people to acquire the financial product must include certain information (s1018A). Advertisements or promotional material must state:

(a) the identity of the product issuer;

(b) either that a PDS is available and where it can be obtained or that it will be made available when the product is released and when and where this is expected; and

(c) that a person should consider the PDS before making a decision whether to acquire the product.

Section 1017A Further information on request

19. Generally, a product issuer who has prepared a PDS is required to give certain additional information about the product that has previously been made publicly available on request by certain persons (s1017A).

Who may request information

20. Any person may ask for more information if they:

(a) have been given or have obtained a PDS about the product;

(b) are not a holder of the product.(s1017A(1)).

When must information be given

21. Information need only be given on request if:

(a) it has previously been made generally available to the public (i.e. confidential information does not need to be disclosed);

(b) it might reasonably influence the decision of a retail person whether to acquire the product; and

(c) it is reasonably practicable to give the information (s1017A(2)).

22. The information must be given as soon as practicable and reasonable efforts must be taken to comply with the obligations within one month of the request.

Provision of the information

23. The requested information can be provided either in writing or in a manner agreed between the responsible person and the person making the request (s1017A(4)). A reasonable cost associated with the giving of the information may be charged by the product issuer (s1017A(5) and (6)).

Section 1017B significant events disclosure

24. Ongoing disclosure of significant changes and new matters must generally be given to investors who acquired a financial product as a retail client within certain time limits (s1017B).

When is disclosure required

25. Disclosure is required where there is a material change to or a significant event affecting any of the information that was required to be included in the PDS.

26. Any changes or events that is adverse to the investors interest must be disclosed:

(a) before the change or as soon as reasonably practicable after it;

(b) in any case, within three months after the change.

27. Changes or events that are not adverse to the holder's interest and that the holder therefore would not expect to hear about promptly must be disclosed no later than 12 months after the change. Changes or events about fees and charges must be notified 30 days before they take effect.

Extent of information to be provided

28. Information that is reasonably necessary for the holder to understand the nature and effect of the financial product will have to be disclosed: s1017B(4). However ongoing disclosure may be provided in a variety of ways for example in writing, electronically or via means provided for in regulations: s1017B(3).

Section 1017F confirmation of transactions

29. Generally, an issuer of a financial product is required to confirm any transactions by a retail client about that product. The confirmation must give the client the information they need to understand the nature of the transactions (1017F(7)). However the confirmation need not repeat information that was in the PDS.

30. Confirmations are not required for a number of transactions including:

(a) debiting fees; or

(b) generating or paying the client by an agreed method of a financial benefit from the product, such as rental receipts from the use of a strata unit in a management rights scheme (s1017F(4)).

Method of providing confirmation

31. The confirmation must be given or made available when permitted as soon as reasonably practicable either by:

(a) the product issuer; or

(b) by establishing a standing facility enabling the client to confirm for themselves.

32. A product issuer is able to confirm transactions by means of a standing facility either when the relevant product holder has:

(a) agreed to this arrangement; or

(b) been informed of the facility and has not advised the issuer that they do not agree to its use as a means of getting such confirmations as specified under the Corporations Regulations (s1017F).

Section 1017G Alternative dispute resolution

33. Product issuers are required to maintain internal and external dispute resolution procedures approved by ASIC to resolve complaints between themselves and retail clients (s1017G).

34. The relevant ASIC approved external dispute resolution scheme is the Financial Industry Complaints Scheme (FICS).

Section 1017D Periodic reporting

35. Section 1017D requires issuers of managed investment products to provide periodic reporting. Periodic reports are to cover a reporting period of 12 months or less and must be issued within six months of the end of the reporting period (s1017D(3)).

36. Generally the periodic statement must include information that a holder needs to understand their investment, for example: opening and closing balances for the reporting period, return on investment during the reporting period (on an individual basis if it is reasonably practicable to do so), details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement and other information that is listed in s1017D(5) as relevant.

37. In relation to managed investment schemes, this requirement applies to issuers of managed investment products. Managed investment

products are interests in registered managed investment schemes (s764A(1)(b)).

38. Periodic reporting under s1017D does not apply to management rights schemes because, due to the exemption we have given them from scheme registration, the schemes are unregistered. Therefore interests in the scheme are not managed investment products. Our policy is generally to require operators of schemes that we exempt from registration to comply with the periodic reporting requirements under the conditions of our exemption (see [PS 169.24]).

Requirement for a responsible person for PDS

39. Generally, the product issuer of a financial product must prepare the PDS. This person is known as the 'responsible person' for the PDS (s1013A). The product issuer is regarded as the person who is responsible for the obligations owed under the product to the client or a person nominated by the client (s761E).

40. The details of the product issuer must be included in the PDS (s1013D(1)(a)).

41. The operator of a management rights scheme would be the responsible person for the product with the obligation to issue a PDS.

Furniture and rental guarantees

Current ASIC policy on the upfront acquisition of standard furniture packages

42. Our policy on management rights schemes and the associated Class Orders [CO 02/304] and [CO 02/305] and [PF 187] do not explicitly address whether an operator can make the acquisition of a standard furniture packages a requirement to participate in a management rights scheme.

43. There is a prohibition on requiring any payment to join the scheme. However, if the operator buys the furniture and then seeks reimbursement there is the opportunity for such a cost to be charged as a scheme expense as 'one or more payments of the Investors reasonable proportion of the Operator's fees and expenses with respect to the management of the Scheme': [CO 02/304], [CO 02/305], [PF 187].

Current ASIC policy on the FFE fund limit

44. In 2004 [CO 02/304], [CO 02/305] and [PF 187] were amended to allow a fund to meet future expenditure on furniture and fittings (the FFE provisions).

45. Under these instruments it is possible for an operator to hold up to $5,000 per scheme participant in an FFE fund, with the annual payments into the fund of 3% or less of the gross scheme revenue attributable to the investor for that year. The limit reduces custodial risk. ASIC has not received any applications to increase the limit.

46. The operator also has the option to ask investors to pay for expenses incurred, or likely to be incurred over a three month period to replace or refurbish furniture, fittings and equipment for the investor's unit.

Current ASIC policy on rental guarantees

47. Our policy on management rights schemes and the associated Class Orders [CO 02/304] and [CO 02/305] and [PF 187] do not expressly address how rental guarantees offered to scheme participants may or may not be consistent with the requirement that the operator must be able to withdraw on no more than 90 days' notice. As [PS 140.49] notes this right of withdrawal makes it less likely that investors will have been induced to join the scheme on the basis of the management expertise of a particular letting agent.