

[CO 02/239] Participating property syndicates

Issued 1/3/2002

Effective 11/3/2004 on commencement of Schedule 1 to the Financial Services Reform Act 2001

Class Order [CO 02/239] gives relief from the managed investments provisions of the Corporations Act for certain property syndicates, known as “participating property syndicates”, in relation to which investors are able to exercise a significant level of control over the management of their investment. The relief is given subject to conditions designed to entrench key powers in the hands of investors and ensure adequate disclosure by promoters. Conditions are described in Policy Statement 77 [PS 77] and include requirements for certain provisions to be included in syndicate agreements and a 14 day cooling-off period for investors. See also para (c) of [PS 136.34]. This class order revokes [CO 98/64].

Amending Class Order	Date of operation
[CO 02/735]	28/6/2002
[CO 04/1550]	21/12/2004
[CO 05/986]	27/9/2005

For details of amendments see historical notes in this class order.

Australian Securities and Investments Commission Corporations Act 2001 — Paragraphs 601QA(1)(a) and 911A(2)(l) — Revocation and Exemption

- 1 Under paragraph 601QA(1)(a) of the *Corporations Act 2001* (the “Act”) the Australian Securities and Investments Commission (“ASIC”) hereby revokes Class Order [98/64].
- 2 Under paragraph 601QA(1)(a) of the Act ASIC hereby exempts the class of persons referred to in Schedule A from compliance with Chapter 5C of the Act in the case referred to in Schedule B on the conditions set out in Schedule C and for as long as they are met.
- 3 Under paragraph 911A(2)(l) of the Act, ASIC hereby exempts:
 - (a) each person in Schedule A from the requirement to hold an Australian financial services licence for the provision of financial services by that person in relation to interests in a managed investment scheme of the kind referred to in Schedule B for so long as the conditions in Schedule C are met; and

- (b) each other person from the requirement to hold an Australian financial services licence for the provision of financial services by that person in relation to interests in a managed investment scheme of the kind referred to in Schedule B operated on a basis which appears to meet the conditions in Schedule C except where the person is aware, or ought reasonably to be aware, that those conditions have not been met.

SCHEDULE A

Persons (“Promoters”) who operate a managed investment scheme referred to in Schedule B (“Syndicate”).

SCHEDULE B

The operation of a managed investment scheme under which each interest in the scheme (a “Syndicate Interest”) arises out of:

- (a) an agreement in relation to the scheme (“Syndicate Agreement”) that complies with Schedule D between the persons (“Investors”) who are to purchase or who hold legally and beneficially a fee simple title to real property or fee simple titles to adjoining real properties (“Syndicate Property”); and
- (b) any agreement (“Management Agreement”) between Investors and a person (“Manager”) that the Manager will provide property management services including arranging leases, collecting rent, arranging repair and maintenance work that complies with Schedule E.

[Historical note: Sch B amended 28/6/2002 [CO 02/735] by replacing “1 July 2002” with “31 December 2004”.

Further amended 21/12/2004 [CO 04/1550] by replacing “31 December 2004” with “30 September 2005”.

Further amended 27/9/2005 [CO 05/986] by deleting the words ‘on or before 30 September 2005’.

SCHEDULE C

All Promoters must:

- (a) not make available any Syndicate Interest that would result in more than 15 Investors (with joint holders and tenants in common being counted separately) holding Syndicate Interests or any Investor having a Syndicate Interest of value less than 5% of the total value of all the Syndicate Interests if all Syndicate Interests which Promoters are permitted in accordance with the Disclosure Document to offer were subscribed for;

- (b) ensure that any Disclosure Document in relation to a Syndicate Interest states that applicants may, by written notice (“Withdrawal Notice”) to a Promoter received at an address of the Promoter in Australia specified in the Disclosure Document not later than 14 days from the date the application form is signed by the applicant (“cooling-off period”) withdraw the application and elect not to proceed and to be immediately repaid the application moneys without penalty;
- (c) ensure that a Withdrawal Notice in the form of Schedule F is included in any Disclosure Document issued by a Promoter in relation to Syndicate Interests, referred to on the front cover of the Disclosure Document and is not returned by the Investor to the Promoter other than to withdraw the application;
- (d) ensure that there is forwarded to each Investor:
 - (i) a copy of the Syndicate Agreement and any Management Agreement that has been executed and any other agreement relating to the Investor's Syndicate Interest that has been executed of which a Promoter is aware and a list of the full names and postal addresses of all other Investors within two months of the Investor becoming bound by the Syndicate Agreement; and
 - (ii) a new list including particulars for all the Investors within 1 week if any Syndicate Interests are issued to a person that was not in the previous list sent to the Investor;
- (e) if the title to the Syndicate Property is not held by the Investors within 6 months after the first Investor made an application under a Disclosure Document in relation to Syndicate Interests and the Syndicate Agreement is terminated at the request of an Investor pursuant to the Syndicate Agreement, ensure that there is returned to all Investors within 14 days any money paid to a Promoter of the Syndicate or its associates by Investors in connection with Syndicate Interests (together with any interest that has accrued on that money) less any expenses permitted under the Syndicate Agreement and specified in the relevant Disclosure Document;
- (f) ensure that any money paid to subscribe for the Syndicate Interests:
 - (i) where that money is required to be paid into an account under section 1017E — is not taken out of the account pending title to the Syndicate Property being held by the Investors despite paragraph 1017E(3)(b) and is

disbursed only in accordance with the Syndicate Agreement; or

- (ii) otherwise — is immediately deposited by a promoter on trust for the Investors in a separate account with an Australian ADI or in units in a cash management trust that is a registered scheme pending title to the Syndicate Property being held by the Investors and is disbursed only in accordance with the Syndicate Agreement;

Note: Subscription money will be required to be paid into an account under section 1017E if the Syndicate Interests are not issued immediately after receiving the subscription money.

- (g) ensure that any Disclosure Document issued in relation to Syndicate Interests prominently discloses:
 - (i) the extent of the likelihood of a Promoter (including the Manager) of the Syndicate or any of its associates being an Investor;
 - (ii) the extent to which the Syndicate Agreement allows a Promoter of the Syndicate or its associates (as Investors or otherwise) to vote or otherwise be involved in decisions made by the Investors; and
 - (iii) the extent to which any Management Agreement referred to in the Disclosure Document allows the Syndicate Interests of the Manager, any associates of the Manager or any Investor who will benefit in another capacity to be taken into account when calculating if Investors hold Syndicate Interests of sufficient value to:
 - (A) issue a Termination Notice; or
 - (B) determine any other matter under the Syndicate Agreement;
- (h) ensure that any Disclosure Document issued by a Promoter in relation to Syndicate Interests prominently discloses that:
 - (i) the investment should be considered as long term;
 - (ii) the Syndicate Interests are likely to be illiquid due to the absence of a secondary market; and
 - (iii) there is no obligation for a Promoter to purchase or redeem either the Syndicate Interests or the Syndicate Property after the cooling-off period;

- (i) ensure that no charge, mortgage or other security interest (“mortgage”) applies to any part of the Syndicate Property when it is vested in the Investors except as specified in the Disclosure Document unless all Investors who are registered proprietors of that part of the Syndicate Property agree to that mortgage;
- (j) not be involved in the creation of any mortgage not specified in the Disclosure Document except in accordance with the Syndicate Agreement;
- (k) not agree to or be involved in any amendment to the Syndicate Agreement or the Management Agreement that causes non-compliance with Schedule D or E;
- (l) comply with its obligations under the Syndicate Agreement or the Management Agreement if it is a party;
- (m) in the case of Syndicate Interests to which the new product disclosure provisions (as defined in subsection 1438(2) of the Act) do not apply at the time of their issue — comply with, and accept liability that would apply under Chapter 6D of the Act, as applicable, with respect to all offers of such Syndicate Interests for issue or sale made after 12 March 2000, as if the Syndicate were a registered scheme and all Syndicate Interests were securities;
- (n) in the case of Syndicate Interests to which the new product disclosure provisions (as defined in subsection 1438(2) of the Act) do not apply at the time of their issue — ensure that in relation to each offer of such Syndicate Interests each person referred to in items 1 to 5 (inclusive) of the table in subsection 729(1) of the Act has irrevocably covenanted by deed poll to:
 - (i) accept the liability for loss or damage which would apply to that person under subsection 729(1) of the Act; and
 - (ii) to comply with section 730 of the Act,

as if the Syndicate were a registered scheme, all Syndicate Interests were securities, the offer of Syndicate Interests were an offer of securities under a disclosure document and the person were subject to sections 728, 729 and 730 of the Act with respect to that offer; and
- (o) include in each Disclosure Document for offers referred to in paragraph (m) of this Schedule a statement that enforceable and irrevocable covenants as required by paragraph (n) of this Schedule have been made.

SCHEDULE D

The Syndicate Agreement must contain provisions to the effect of the following:

- (a) identifying the Syndicate Property by its address and particulars of title or, if this is not known when the Syndicate Agreement is entered into, describing the type of property to be purchased by reference to its physical location, its function, the desired annual yield or return and price range;
- (b) if the Syndicate Property is not identified in the Syndicate Agreement, that no Syndicate Property will be purchased without the approval in writing of all Investors to the purchase of that property;
- (c) if the Investors do not contract to buy a Syndicate Property within 6 months after the first Investor made an application under the relevant Disclosure Document or if title is not acquired by the Investors within 9 months after the first Investor made an application under a Disclosure Document in relation to Syndicate Interests, the Syndicate Agreement will be terminated automatically at the request of any Investor and all money held on behalf of the Investors under the Syndicate Agreement (including any interest that has accrued on that money) must be returned to Investors (less any expenses incurred by the Promoter in paying persons other than its associates permitted under the Syndicate Agreement) in proportion to the value of their Syndicate Interests within 14 days of such a request;
- (d) if the Syndicate Property is sold, the proceeds from the sale (and any other money referable to the Syndicate Agreement) after any expenses and fees permitted under the Syndicate Agreement have been deducted, must be paid to the Investors in the same proportion that the value of their Syndicate Interests bears to the total value of all Syndicate Interests as soon as practicable or within such other period as may be agreed by the Investors not exceeding 2 months;
- (e) if the Investors did not hold their titles to the Syndicate Property before being offered Syndicate Interests or invited to subscribe for Syndicate Interests, the Syndicate Property must be sold at the expiry of 12 years from the date the first Investor applied for Syndicate Interests (or such shorter period as is specified in the relevant Disclosure Document) unless all Investors otherwise agree in writing not before 6 months prior to the end of the period to continue for a further specified period which is no more than 12 years subject to provision for further extensions on this basis;

- (f) if the Investors did hold title to the Syndicate Property before being offered Syndicate Interests or invited to subscribe for Syndicate Interests, the Syndicate Agreement must terminate at the expiry of 12 years from the date the first Investor applied for Syndicate Interests (or such shorter period as is specified in the relevant Disclosure Document) unless all Investors otherwise agree in writing not before 6 months prior to the end of the period to continue for a further specified period which is no more than 12 years subject to provision for further extensions on this basis;
- (g) no mortgage over any part of the Syndicate Property other than any mortgage specified in each Disclosure Document relating to Syndicate Interests and the Syndicate Agreement may be created unless all Investors who are registered proprietors of that part of the Syndicate Property agree to that mortgage;
- (h) the agreement is to hold and lease the Syndicate Property (if necessary after having purchased it) as an investment and not for any other purpose that is not incidental to the purchase, leasing and holding of the Syndicate Property for gain;
- (i) if any moneys are paid to a Promoter or its associates in relation to Syndicate Interests the moneys will be immediately deposited on trust for the Investors in a separate account with an Australian ADI or in units in a cash management trust that is a registered scheme and disbursed only in accordance with the Syndicate Agreement;
- (j) no Investor may sell or make available any Syndicate Interest if it would result in more than 15 Investors (with joint holders being counted separately) holding Syndicate Interests or any Investor having a Syndicate Interest of value less than 5% of the total value of all the Syndicate Interests if all Syndicate Interests to be offered were subscribed for;
- (k) applicants for Syndicate Interests may, by Withdrawal Notice to a Promoter received at an address of the Promoter in Australia specified in the Disclosure Document within the cooling-off period, withdraw the application and elect not to proceed and to be immediately repaid the application moneys without penalty; and
- (l) the Syndicate Agreement may not be amended unless all Investors agree in writing and the amendment does not result in the Syndicate Agreement not complying with this Schedule.

SCHEDULE E

The Management Agreement must contain provisions to the following effect:

- (a) all money received by the Manager in relation to the Syndicate Property other than fees payable to the Manager under the Syndicate Agreement must be held on trust for Investors in an account with an Australian ADI or in units in a cash management trust that is a registered scheme pending disbursement of such money in accordance with the Syndicate Agreement;
- (b) the Manager must forward to each Investor a financial statement every calendar month until the month after the termination of the Manager's appointment detailing all receipts, expenditures and fees in relation to the Syndicate Property for the previous calendar month;
- (c) the Manager's appointment may be terminated at any time upon 30 days' written notice ("Termination Notice") by Investors who own Syndicate Interests of value that are more than 50% of the total value of all the Syndicate Interests (except any Syndicate Interests excluded under the next paragraph);
- (d) expressly identifying to what extent the Syndicate Interests of the Manager, any associates of the Manager or any Investor who will benefit in another capacity will be taken into account when calculating if Investors hold Syndicate Interests of sufficient value to:
 - (i) issue a Termination Notice; or
 - (ii) determine any other matter under the Syndicate Agreement;
- (e) where a Manager has been removed in accordance with a term to the effect of paragraph (c) of this Schedule, the Manager must not receive any compensation or other payment for such removal, other than for fees and disbursements relating to the period prior to the removal that would be payable if the Manager had not been removed;
- (f) the Manager must keep a list of names and addresses of Investors and record any changes as soon as practicable after it receives notice of any change and must make available the list to any Investor on request for inspection at the Manager's principal place of business free of charge; and
- (g) the Management Agreement may not be amended unless all

Investors agree.

SCHEDULE F

Important: This statement (except for the Withdrawal Notice) must be printed in a 20 point bold typeface.

**IMPORTANT ADVICE
REFUND OPTION**

Promoters must give a copy of this advice to purchasers joining a property syndicate. Before giving this advice to purchasers, promoters must fill in the attached Withdrawal Notice where indicated.

All purchasers should keep this advice, together with a copy of the {prospectus/Product Disclosure Statement (*delete as applicable*)}. All purchasers have a cooling-off period of 14 days from the date of signing the syndicate application form. This right cannot be waived. During the cooling-off period purchasers may withdraw their application or cancel the contract, without penalty. To withdraw, a purchaser must fill in the attached Withdrawal Notice and return it to the promoter, who will then immediately refund all money paid by the purchaser.

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WITHDRAWAL NOTICE

To: [insert name & address of promoter]*

I, [insert name of purchaser] hereby rescind my contract to purchase interest(s) in [insert name of scheme]* property syndicate.

Please return immediately any money I have paid, by way of deposit or otherwise, to:

[insert address of purchaser]

[signature of purchaser] [Date]

Interpretation

For the purposes of this instrument:

- 1 “Commencement Date” means the date of commencement of Schedule 1 to the *Financial Services Reform Act 2001*;
- 2 “Disclosure Document” means:
 - (a) for Syndicate Interests to which the new product disclosure provisions (as defined in subsection 1438(2) of the Act) apply — a Product Disclosure Statement which complies with Part 7.9 of the Act;
 - (b) for all other cases — a disclosure document which complies with Chapter 6D of the Act as in force immediately before the Commencement Date, as if the

Syndicate were a registered scheme and all of the
Syndicate Interests were securities; and

- 3 the value of the Syndicate Interest of an Investor relative to the total value of the Syndicate Interests is to be taken to be the proportion that the amount subscribed for that Syndicate Interest (regardless of any amount paid on a transfer of the interest) bears to the total subscribed for all Syndicate Interests, less any amount repaid after receipt of a Withdrawal Notice.

Commencement

This instrument takes effect on the Commencement Date.

Dated the 1st day of March 2002

Signed by Brendan Byrne
as a delegate of the Australian Securities and Investments
Commission