



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 237

Remaking ASIC class orders on real estate companies: [CO 00/213] and [CO 05/1243]

August 2015

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders relating to real estate companies into ASIC instruments. Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from real estate agents and valuers on our proposals to remake and consolidate, without significant changes, the following class orders:

- Class Order [CO 00/213] *Real estate companies*, which is due to expire on 1 October 2016; and
- Class Order [CO 05/1243] *Licensing relief for valuers providing valuations of shares in real estate companies*, which is due to expire on 1 April 2016.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 237.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This paper was issued on 26 August 2015 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process	4
A Background	5
Purpose of ‘sunsetting’ legislative instruments	5
Our approach to remaking legislative instruments	5
B Remaking ASIC class orders	7
Your feedback	7
Real estate companies—[CO 00/213] and [CO 05/1243]	7
Key terms	12

The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 23 September 2015 to:

Michèle Whittle
 Lawyer
 Financial Advisers
 Australian Securities and Investments Commission
 GPO Box 9827
 MELBOURNE VIC 3001
 facsimile: 03 9280 3444
 email: michele.whittle@asic.gov.au

What will happen next?

Stage 1	26 August 2015	ASIC consultation paper released
Stage 2	23 September 2015	Comments due on the consultation paper
Stage 3	27 January 2016	Commencement of remade instrument

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of ‘sunseting’ legislative instruments

- 1 Under the *Legislative Instruments Act 2003* (Legislative Instruments Act), legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislative Instruments (FRLI). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

Our approach to remaking legislative instruments

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC’s priorities of promoting investor and financial consumer trust and confidence and ensuring markets are fair, orderly and transparent.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
 - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.
- 5 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian](#)

Government Guide to Regulation. We will review, including public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the class order without substantive changes.

B Remaking ASIC class orders

Key points

We are proposing to remake:

- Class Order [CO 00/213] *Real estate companies*, which sunsets on 1 October 2016; and
- Class Order [CO 05/1243] *Licensing relief for valuers providing valuations of shares in real estate companies*, which sunsets on 1 April 2016.

We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

Each class order has been redrafted using ASIC's current style and format into a single instrument, while preserving the effect of the current instruments. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 237.

Your feedback

- 6 You are invited to comment on any of our proposals to remake the ASIC class orders in this section, including whether the class orders are currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

Real estate companies—[CO 00/213] and [CO 05/1243]

Background

- 7 A real estate company is a company formed for the purpose of owning and managing land and buildings. Shares in real estate companies are held by persons who wish to have an exclusive right of occupation and use of a particular area within the land or building owned by the real estate company. A real estate company is less common than strata title and has historically been used where owners wish to exercise control over occupiers, or where conversion to strata title is not practicable.

Note: In this consultation paper, a 'real estate company' means a company that meets the definition of real estate company in draft ASIC Corporations (Real Estate Companies) Instrument 2015/XX at Attachment 1 to this consultation paper.

Disclosure requirements

- 8 The *Corporations Act 2001* (Corporations Act) regulates interests in real estate companies because they involve ownership of shares in a company. Under s707, the sale of shares must be disclosed to investors (unless an exclusion in s708 applies) if:
- (a) the person making the offer controls the body and the securities are not quoted (s707(2));
 - (b) the offer of shares is made within 12 months after their issue without disclosure to investors and the purpose for the issue was on-sale (s707(3)); or
 - (c) the offer of shares is made within 12 months after being sold by the controller of the body without disclosure to investors, the shares are not quoted and the purpose for the issue was on-sale (s707(5)).
- 9 Without relief from s707, vendors of shares in real estate companies may have to issue a prospectus or other disclosure document that complies with Ch 6D.

Licensing requirements

- 10 A person carrying on a financial services business must hold an Australian financial services (AFS) licence: s911A(1). ‘Financial services’ includes providing financial product advice and dealing: s766A(1).
- 11 Section 766B states that a person provides financial product advice if they provide a recommendation or a statement of opinion, or a report of either of those things, that:
- (a) is intended to influence a person in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
 - (b) could reasonably be regarded as being intended to have such an influence.
- 12 Under the Corporations Act, there are two types of financial product advice—‘personal advice’ and ‘general advice’: s766B(2). Personal advice is financial product advice that is given or directed to a person in circumstances where the provider of the advice has considered one or more of the person’s objectives, financial situation and needs (or a reasonable person might expect the provider to have considered one or more of those matters): s766B(3). General advice is financial product advice that is not personal advice: s766B(4).

Real estate agents

- 13 Real estate agents or others who regularly market or sell shares in real estate companies may need to hold an AFS licence because they are dealing in or providing general advice in relation to shares, and shares are a financial product.

- 14 Without relief, vendors involved in secondary sales of shares in real estate companies may need to meet the full disclosure requirements of the Corporations Act that apply to securities. In addition, agents involved in arranging for and advising on the sale of the shares would need to hold an AFS licence and comply with the Ch 7 obligations of an AFS licensee.

Valuers

- 15 Valuers are engaged to provide a valuation of shares in a real estate company for the purposes of their sale or purchase or their use as security for a mortgage. The most common reason for requiring a valuation is in the context of using the shares as security for a mortgage to permit the purchase of a company title property where the valuation is issued under instructions from a bank or other financial institution and is not available to third parties.
- 16 A person will be providing general advice if they give a valuation report that contains an opinion or is reasonably likely to influence:
- (a) owners to sell their shares;
 - (b) potential owners to purchase shares; or
 - (c) banks or financial institutions to register a mortgage over the shares.
- 17 Therefore, without relief, valuers who provide a valuation of shares in a real estate company would be required to hold an AFS licence and comply with the Ch 7 obligations of an AFS licensee, including providing financial services disclosure.

Class Order [CO 00/213] *Real estate companies*

- 18 [CO 00/213] gives conditional relief from the disclosure and licensing requirements of the Corporations Act for persons who sell or are involved in selling shares in a real estate company.

Class Order [CO 05/1243] *Licensing relief for valuers providing valuations of shares in real estate companies*

- 19 [CO 05/1243] gives unconditional relief from the licensing requirements of the Corporations Act for persons who provide financial product advice where the advice is, or is incidental to, a valuation of shares in a real estate company. This means that the licensing, conduct and disclosure obligations will not apply to those persons in those circumstances.

Proposal

- B1** To preserve their effect beyond the respective sunset dates of 1 October 2016 and 1 April 2016, we propose to continue the relief currently given by [CO 00/213] and [CO 05/1243] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Real Estate Companies)

Instrument 2015/XX at Attachment 1 to this consultation paper. You can access the current instruments on www.comlaw.gov.au by clicking on the following direct links: [\[CO 00/213\]](#) and [\[CO 05/1243\]](#).

The only changes proposed are to:

- (a) clarify that:
 - (i) the licensing relief for real estate agents applies to general advice and dealing; and
 - (ii) the licensing relief for valuers applies to general advice only;
- (b) combine [CO 00/213] and [CO 05/1243] into one instrument, giving relief from s707 and 911A(1) and covering vendors, real estate agents and valuers of real estate companies;
- (c) update the name of the legislative instrument;
- (d) reflect current drafting practice and update the format of the current document;
- (e) simplify the drafting to give greater clarity;
- (f) modernise the language;
- (g) update legislative references and definitions; and
- (h) correct any minor drafting errors.

Rationale

Class Order [CO 00/213] *Real estate companies*

20 The policy underlying [CO 00/213] recognises that shares in real estate companies are commercially regarded as real estate interests and that if these shares are treated as such, rather than as shares, there will be adequate consumer protection.

21 We do not consider [CO 00/213] requires any significant amendment. We have proposed to continue the relief by way of:

- (a) an exemption from disclosure in relation to the sale of shares in a real estate company to vendors; and
- (b) an exemption from the requirement to hold an AFS licence to market and sell shares in real estate companies for licensed real estate agents.

22 [CO 00/213] does not describe the type of financial services to which the relief applies, so we have proposed to clarify that the relief applies to general advice and dealing in relation to shares in a real estate company.

Class Order [CO 05/1243] *Licensing relief for valuers providing valuations of shares in real estate companies*

23 The purpose of [CO 05/1243] is to ensure that persons providing financial services by providing valuations of shares in real estate companies are not subject to burdensome and inappropriate regulation under the financial

services regulatory regime. The valuation of shares in real estate companies is equivalent to valuing and providing advice on the valuation of real estate, rather than providing financial product advice in relation to shares in a company. Granting relief to persons providing financial services by providing valuations of shares in real estate companies ensures a consistent regulatory approach to the regulation of real estate companies and avoids the unreasonable cost burden that would be imposed on these persons.

- 24 We consider that this policy remains appropriate and relevant. There has been no change in the law or shift in our policy for persons providing valuations of real estate companies.
- 25 We do not consider [CO 05/1243] requires any significant amendment. We have proposed to continue the relief by way of exemption from the requirement to hold an AFS licence where the advice is, or is incidental to, a valuation of shares in a real estate company or a valuation of an estate in land to which shares in a real estate company, or a real estate service company, relate.
- 26 [CO 05/1243] does not describe the type of financial advice to which the relief applies, so we have proposed to clarify that the relief applies to general advice.
- 27 For ease of reference, we have proposed to combine [CO 00/213] and [CO 05/1243] into one instrument that will give relief in relation to real estate companies for vendors, licensed real estate agents and valuers.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
[CO 00/213] (for example)	An ASIC class order (in this example numbered 00/213) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
dealing	Has the meaning set out in s766C of the Corporations Act
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
financial product advice	A recommendation or a statement of opinion, or a report of either of these things, that: <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or • could reasonably be regarded as being intended to have such an influence. This does not include anything in an exempt document Note: This is a definition contained in s766B of the Corporations Act.
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
general advice	Financial product advice that is not personal advice Note: This is a definition contained in s766B(4) of the Corporations Act.
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>

Term	Meaning in this document
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> • the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or • a reasonable person might expect the provider to have considered one or more of those matters <p>Note: This is a definition contained in s766B(3) of the Corporations Act.</p>
real estate agent	Any person who holds a real estate licence obtained from an Australian state or territory licensing authority
real estate company	A company that meets the definition of real estate company in draft ASIC Corporations (Real Estate Companies) Instrument 2015/XX
real estate interest	A share in a real estate company
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
valuer	Any person who undertakes the business of providing valuations of shares in real estate companies
vendor	A person, being an owner of shares in a real estate company, who proposes to sell the shares.