

# Attachment 2 to CP 250: Draft instrument



**ASIC**

Australian Securities & Investments Commission

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## **ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX**

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Dated 2016

<signature>

<insert name>

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## Part 1—Preliminary

### 1 Name of legislative instrument

This instrument is the *ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/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 <http://www.comlaw.gov.au>.

### 3 Authority

This instrument is made under subsections 601QA(1) 926A(2), 951B(1), 992B(1) and 1020F(1) of the *Corporations Act 2001*.

### 4 Definitions

*Act* means *Corporations Act 2001*.

*affected auditor* has the same meaning as in *ASIC Class Order [CO 14/757]*.

*excluded person* means a person who has been notified in writing by ASIC that the person is excluded from relying on this instrument and that notice has not been withdrawn.

*FFE Fund* means a fund established for an investor consisting of money paid by the investor and any interest accrued on that money, to be used from time to time in accordance with the agreement referred to in paragraph 5(2)(h) for the replacement, repair or refurbishment of furniture, fittings and equipment of the strata unit made available by the investor for use as part of a strata scheme.

*independent real estate agent* means, in relation to a strata scheme, a person:

- (a) who is licensed under a law of a State or Territory to lease real property; and
- (b) who is not the operator of the scheme or an associate of the operator of the scheme.

*investor* means in relation to a strata scheme, a person who is the owner of a strata unit that is used in the scheme.

**management rights** means, in relation to a strata scheme, all real or personal property (including contractual rights) held by the operator or any of its associates that facilitates the operation of the scheme.

**operator** means a person who:

- (a) operates a strata scheme; and
- (b) is:
  - (i) a real estate agent; or
  - (ii) a financial services licensee.
- (c) is not an excluded person.

**real estate agent** a person who is licensed to manage real property under the law of a State or Territory in this jurisdiction.

**registered strata scheme** mean a registered scheme that involves persons making available real property for use as part of a serviced apartment, hotel, motel or resort complex where members of the scheme have no right to be paid an amount that is related to the value of scheme property on their withdrawal from the scheme.

**regulated person** has the same meaning as in section 1011B of the Act.

**scheme members** means, in relation to a strata scheme, investors in the scheme other than the operator and its associates.

**strata scheme** means a managed investment scheme that involves owners of strata units making their unit available for use as part of a serviced apartment, hotel, motel or resort complex.

**strata units** means strata title units, community title interests or similar interests in real property.

**transfer** means, in relation to management rights, to assign or transfer the management rights or to cause another person to become the holder of those rights or rights substantially the same as those rights.

## **Part 2—Exemptions for management rights schemes**

### **5 Exemption for operators from requirement to register the scheme, hold a financial services licence and the share hawking provisions**

- (1) An operator of a strata scheme does not have to comply with any of:
  - (a) subsection 601ED(5) of the Act in relation to the scheme;
  - (b) subsection 911A(1) of the Act to the extent that it requires the operator to hold an Australian financial services licence covering the provision of general advice in relation to, and dealing in, interests in the strata scheme;
  - (c) sections 992A and 992AA of the Act in relation to an offer for issue of interests in the strata scheme.
- (2) This exemption may be relied on where all of the following are satisfied:
  - (a) either:
    - (i) each strata unit to which the scheme relates can be lawfully used as a residence; or
    - (ii) the operator has given to ASIC a written statement from an independent real estate agent that, in relation to each strata unit to which the scheme relates, the agent:
      - (A) would be willing and able to offer the unit for letting at a reasonable rate having regard to the value of the unit; and
      - (B) would expect that there would be a reasonable degree of occupancy of the unit at that rate;
  - (b) each investor and the operator may withdraw from the scheme on no more than 90 days' notice;
  - (c) an investor who withdraws from the scheme will not be bound after their notice under paragraph (b) expires to allow use of their strata unit except for occupation of the unit:
    - (i) by a person other than the operator or an associate of the operator; and
    - (ii) under an agreement that the operator made with that person before the notice was given;
  - (d) each investor may, if they withdraw from the scheme, appoint another person to manage their strata unit;

(e) if the operator is managing the letting of the strata units, the operator has not agreed after the commencement of this section to:

- (i) make payments to investors (whether by way of guarantee or otherwise); or
- (ii) cover or reimburse in whole or in part (whether under an indemnity or otherwise) payments that are made by any other person to investors,

in relation to the use of the strata units of investors after the operator withdraws from the scheme;

(f) an investor does not have to make payments to participate in the scheme other than:

- (i) payments to buy the strata unit; and
- (ii) payments to buy furniture, fittings and equipment for the strata unit where the maximum amount of the payments and the items of furniture, fittings and equipment to be acquired are set out in the agreement referred to in paragraph (h); and

(iii) payments of the investor's reasonable proportion of the operator's fees and expenses with respect to the management of the scheme where:

(A) in any 3 month period the total of such payments relates to a period of no more than 3 months and is reasonably commensurate with the work done or to be done, or the expenses incurred or likely to be incurred (as the case may be), by the operator during the period to which the payments relate; and

(B) where a FFE Fund has been established for the investor — no payment is used for the replacement, repair or refurbishment of furniture, fittings and equipment of the strata unit in relation to the period to which the payment relates unless all money in the Fund has first been expended; and;

(iv) where a FFE Fund has been established for the investor — payments into the Fund where:

(A) each payment is by way of a deduction from rental income of the scheme that would otherwise be paid to the investor in relation to a period set by the operator and does not exceed 3% of the gross rent attributable to the investor for the period; and

- (B) the balance of the Fund is no more than \$5,000 for each strata unit made available by the investor for use as part of the scheme;
  - (g) the purchase of the strata unit by the investor is not conditional on participation in the scheme whether by way of a term of the contract of sale, as a result of an interest (for example, a lease) that the strata unit is subject to immediately after the purchase or otherwise;
  - (h) if the operator is managing the letting of the strata units, the operator has entered into a written agreement with each investor which includes provisions to the effect of those set out in section 12;
  - (i) on 1 March 2000 there was no person who had bought or agreed to buy a strata unit in relation to the scheme and who, before agreeing to buy, had been offered an interest in the scheme.
- (3) This exemption is subject to the conditions in sections 6 and 7.

## **6 General conditions on operators**

- (1) The operator must ensure that:
- (a) any part of the property of the scheme that is cash is promptly deposited with an Australian ADI or a financial institution on trust for investors in a trust account; and
  - (b) the account is subject to audit as to whether the moneys have been dealt with in accordance with the terms of the trust by a registered company auditor or an affected auditor at least annually.
- (2) Where a FFE Fund has been established for an investor, the operator must ensure that:
- (a) the money comprising the Fund is held on trust for the investor in a trust account with an Australian ADI and subject to audit as to whether the money has been dealt with in accordance with the terms of the trust by a registered company auditor or an affected auditor at least annually; and
  - (b) the balance of the Fund is promptly returned to the investor at the termination of the scheme or upon the investor's withdrawal from the Scheme, whichever occurs first.
- (3) If the operator is managing the letting of the strata units, the operator must, as soon as practicable in any event within 6 months after the end of a reporting period, give each investor who was issued an interest in the scheme as a retail client, a written statement for the reporting period which details any transactions in relation to the investor's interest in the scheme.

- (4) If the operator is managing the letting of the strata units, the manager must operate the scheme in accordance with the agreement referred to in paragraph 5(2)(h).
- (5) In subsection (3), a **reporting period** is a period not exceeding 1 year, set by the operator in accordance with the following:
  - (a) the first reporting period starts when the investor and the operator enter into the agreement referred to in paragraph 5(2)(h);
  - (b) each subsequent reporting period starts at the end of the preceding reporting period;
  - (c) if the investor withdraws from participation in the Scheme, the period starting at the end of the preceding reporting period and ending when the investor withdraws from participation in the Scheme is a reporting period.

## **7 Breach reporting condition for operators**

An operator that becomes aware of matters that gives the operator reason to believe that:

- (a) the operator has failed in a material respect to comply with the conditions in section 6; or
- (b) a person required to comply with section 9 has failed to do so in a material respect,

must give full particulars of the failure to ASIC in writing within 15 business days after becoming so aware.

## **8 Exemption for a real estate agent from the requirement to hold an Australian financial services licence**

- (1) A real estate agent does not have to comply with subsection 911A(1) of the Act to the extent that it requires the agent to hold a financial services licence for the provision of the following financial services in relation to interests in a strata scheme that the agent reasonably believes is covered by section 5:
  - (a) general advice;
  - (b) arranging for the operator of the scheme to issue an interest in the scheme;
  - (c) arranging for an investor in the scheme (other than the operator of the scheme) to sell an interest in the scheme.
- (2) This exemption does not apply if the agent:



- (a) is a financial services licensee or a representative of a financial services licensee; or
  - (b) is the operator of a strata scheme; or
  - (c) is an excluded person.
- (3) This exemption is subject to the condition in section 9.

## **9 Breach reporting condition for persons other than Operators**

A person that becomes aware of matters that gives the person reason to believe that the person has failed in a material respect to comply with section 10 must give full particulars of the failure to ASIC in writing within 15 business days after becoming so aware.

## **10 Exemption for people acting on behalf of operators and agents**

A person does not have to comply with subsection 911B(1) where:

- (a) the person provides a financial service on behalf of an operator (the *principal*) of a strata scheme or a real estate agent (the *principal*);
- (b) if the principal (rather than the person) provided the service, the principal would not need a financial services licence because the service would be covered by section 5 or 7.

## **11 Exemption for other persons from the prohibition on hawking**

A person does not have to comply with section 992A and 992AA of the Act for an offer to sell an interest in a strata scheme that appears to be covered by section 5.

## **12 Procedures for transferring management rights**

Provisions to the following effect are required to be included in the agreement referred to in paragraph 5(2)(h):

### *Transfer of management rights*

- (a) If a majority of scheme members advise the operator in writing that they wish to terminate the operator's engagement, the operator must within 9 months transfer the management rights to a person:
  - (i) who is chosen by the operator; and
  - (ii) has not been involved in the operation (including promotion) of the scheme; and

- (iii) is not controlled by a person that has been involved in the operation (including promotion) of the scheme.
- (b) If the operator does not complete the transfer within the 9 month period, the operator must cause the transfer of the management rights to a replacement operator named in a written notice given by a majority of scheme members, at the price set out in the notice.
- (c) A transfer referred to in paragraphs (a) or (b) must be done as soon as practicable, but if there is a body corporate for the real property to which the scheme relates, there must be a reasonable time for members of the body corporate to consider whether to make a decision referred to in paragraph (f) unless the body corporate has consented to the transfer.

*Consent of body corporate to new caretaking arrangements*

- (e) If the operator receives a notice under paragraph (b), the operator must advise all body corporate members of the name of the person to whom the transfer is to be made.
- (f) Unless the body corporate has consented to the transfer, an operator does not have to transfer the management rights to the person named in the notice given under paragraph (b) if a majority of body corporate members state in writing to the operator that the person should not be engaged by the body corporate to perform caretaking functions.
- (g) If a majority of body corporate members make a decision referred to in paragraph (f), a majority of scheme members may then at any time name a replacement operator by a written notice, to whom the operator must transfer the management rights at a price set out in the notice and the notice will be taken to be given in accordance with paragraph (b).
- (h) Paragraphs (e) to (g) do not apply if the body corporate or a majority of body corporate members agree in writing to the transfer to the person named in a notice under paragraph (b) or (g) before that notice is given to the operator.

*Price payable on transfer*

- (i) The price specified by scheme members in a notice under paragraph (b) must be one of the following:
  - (i) the average of two valuations of the management rights by independent qualified valuers nominated by the Australian Property Institute (or another relevant independent professional body approved by ASIC); or

- (ii) the highest bona fide bid for the management rights (excluding a bid by the operator or its associates) at an auction of which at least 60 days' notice had been given; or
- (iii) the highest bona fide amount tendered (excluding any tender by the operator or its associates) for the management rights following reasonable efforts to market the property for at least 60 days.

#### *Voting*

- (j) In working out if there is a majority of scheme members or body corporate members, the operator and its associates and any person nominated as a replacement operator and associates of that person must not be counted.
- (k) For scheme members, a majority is based on their entitlement to vote at body corporate meetings if there is a body corporate for the property to which the scheme relates, and otherwise each member shall have one vote.
- (l) For body corporate members, a majority is based on their entitlement to vote at body corporate meetings.
- (m) A scheme member or a body corporate member makes a decision by signing a document that sets out the decision.

#### *Costs*

- (n) Any member may arrange a valuation or auction of, or may market, the management rights before or after the expiration of the 9 month period referred to in paragraph (a) for the purposes of setting a price to be specified in a notice under paragraph (b).
- (o) If a member incurs any reasonable valuation, auction or marketing costs under paragraph (n) that member is entitled to be reimbursed out of the price payable by any person nominated by the members as transferee of the management rights when the price is paid to the operator.

#### *Assistance*

- (p) The operator must give reasonable assistance to enable the transferee to operate the resort, hotel, motel or serviced apartment complex including making available information about any future bookings.

## **Part 3—Relief for registered schemes**

### **13 Valuation of property of registered serviced apartment schemes**

- (1) The responsible entity of a registered strata title scheme does not have to comply with paragraph 601FC(1)(j) of the Act in relation to the scheme.

*Condition*

- (2) A responsible entity that relies on the exemption in subsection (1) must ensure that an item of scheme property of the scheme is valued as soon as practicable after the responsible entity has reasonable grounds to believe that a valuation of the item is in the best interests of members or is needed for the scheme to operate in a manner that is fair to all members.
- (3) A responsible entity that has not complied with the condition in subsection (2) cannot rely on the exemption in subsection (1).

### **14 Consequential modification of compliance plan requirements**

Chapter 5C of the Act applies to a responsible entity of a registered strata title scheme as if paragraph 601HA(1)(c) were modified or varied by after “valued” inserting “in accordance with the conditions of any exemption under paragraph 601QA(1)(a) that exempts the responsible entity from paragraph 601FC(1)(j) or, if the responsible entity is not covered by such an exemption,”.

## Part 4—Declaration

### 15 Strata scheme where all strata units acquired for at least \$500,000

- (1) Parts 7.6 (other than Divisions 4 and 8), 7.7, 7.8 and 7.9 of the Act apply in relation to an interest in a strata scheme that is operated by a person who is not an excluded person as if subregulation 7.1.18(3) of the *Corporations Regulations 2001* were modified or varied by, after paragraph (a), inserting:

“(aa) subject to paragraph (b) and subregulation (4), includes any amount paid or payable for real property or furniture, fittings and equipment acquired or purchased with the investment-based financial product; and”.

Note: Subregulation 7.1.18(3) of the *Corporations Regulations 2001* applies for the purposes of the definition of *retail client* in section 761A of the Act.

- (2) Subsection (1) applies in relation to a strata scheme where the price for the provision of each interest in the scheme is at least \$500,000.
- (3) For subsection (2), the price for the provision of an interest in the scheme is the price that would be determined for the purposes of paragraph 761G(10)(a) of the Act if subregulation 7.1.18(3) of the *Corporations Regulations 2001* were modified or varied by, after paragraph (a), inserting:

“(aa) subject to paragraph (b) and subregulation (4), includes any amount paid or payable for real property or furniture, fittings and equipment acquired or purchased with the investment-based financial product; and”.

## Part 5—Transitional

### 16 Schemes covered by ASIC Class Orders [CO 02/245], [CO 02/303] and [CO 02/304]

- (1) This section applies in relation to a strata scheme that was operated or purportedly was operated in reliance on ASIC Class Order [CO 02/245] (the *old class order*), [CO 02/303] (the *old class order*) or ASIC Class Order [CO 02/304] (the *old class order*) immediately before their repeal.
- (2) The relevant old class order as in force immediately before its repeal continues to apply in relation to the scheme. The exemption (including any related conditions) in the relevant old class from the requirement to hold an Australian financial services licence that is expressed to be made under paragraph 911A(2)(l) has effect under section 926A of the Act instead.
- (3) Part 2 does not apply in relation to the scheme.

### 17 Schemes covered by ASIC Class Order [CO 07/189]

- (1) This section applies in relation to a strata scheme that was operated or purportedly was operated in reliance on ASIC Class Order [CO 07/189] (the *old class order*) and an instrument (the *old pro forma*) in substantially the same terms as ASIC Pro Forma 187 (as at the date the instrument was made) immediately before the repeal of that class order.
- (2) The old class order as in force immediately before its repeal continues to apply in relation to the scheme despite its repeal.
- (3) Part 2 does not apply in relation to the scheme.

Note: The old class order continues to apply in accordance with its terms. If the operator of the scheme ceases to be able to rely on the instrument substantially the same terms as ASIC Pro Forma 187, they will also cease to be able to rely on the old class order.

### 18 Schemes covered by ASIC Pro Forma 186

- (1) This section applies in relation to a strata scheme that was operated or purportedly was operated in reliance on an instrument (the *old instrument*) in substantially the same terms as ASIC Pro Forma 186 (as at the date the instrument was made) immediately before the commencement of this instrument.
- (2) A person operating the scheme does not have to comply with section 1017G of the Act where the person is exempt from section 601ED of the Act in relation to the operation of the scheme because of the old instrument.