



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 250

Remaking ASIC class orders on property, strata and management rights schemes

February 2016

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on property, strata and management rights schemes. Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from industry associations in the Australian property and managed investment sector on our proposals to remake the following class orders: [CO 99/463], [CO 02/182], [CO 02/185], [CO 02/245], [CO 02/303], [CO 02/304], [CO 02/305] and [CO 07/189]. We are also seeking feedback on our proposal to repeal [CO 02/183].

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 250.

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 8 February 2016 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.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on property, strata and management rights schemes. 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 Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

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 8 March 2016 to:

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What will happen next?

Stage 1	8 February 2016	ASIC consultation paper released
Stage 2	8 March 2016	Comments due on the consultation paper
Stage 3	April to May 2016	Commencement of remade instruments

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 instrument without substantive changes.

B Remaking ASIC class order on property rental schemes

Key points

We are proposing to remake Class Order [CO 02/182] *Real property rental schemes*, which sunsets on 1 October 2017. We have formed the preliminary view that [CO 02/182] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

The class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. 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 250.

Your feedback

- 6 In this section, we have invited specific feedback on proposed minor policy changes. However, you are invited to comment on our proposal to remake the ASIC class order in this section, including whether the class order is currently operating effectively and efficiently. The proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 02/182] *Real property rental schemes*

Background

- 7 [CO 02/182] was intended to address the situation where certain kinds of arrangements that involve a landowner giving another person the power to lease the land and exercise the rights of the owner under a lease on a day to-day basis may be a managed investment scheme.
- 8 If the arrangement is not part of a tourist accommodation facility, but some other kind of residential or commercial letting arrangement, whether the arrangement is a managed investment scheme depends on the terms of the arrangement (e.g. whether any rent is pooled).
- 9 The relief in [CO 02/182] gives certainty to a person who is exercising the rights of an owner and who is a licensed real estate agent under state or territory law that they are not required to comply with requirements in the *Corporations Act 2001* (Corporations Act) relating to the registration of a

managed investment scheme, the holding of an Australian financial services (AFS) licence or financial product disclosure.

Proposal

B1 To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 02/182] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Property Rental Schemes) Instrument 2016/XX at Attachment 1 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following link: [\[CO 02/182\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Your feedback

B1Q1 Do you agree with the proposal to continue the relief in [CO 02/182] and the terms of the relief? If not, please give reasons.

B1Q2 Are there arrangements that do not fall within the current terms of the relief in [CO 02/182] that should be included? If so, please give details of the arrangements and their features.

B1Q3 Is there difficulty complying with [CO 02/182] in its current form? If so, please give details.

B1Q4 Do you rely on the relief in [CO 02/182]? Are you aware of widespread reliance on [CO 02/182]? Please give details.

B1Q5 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

10 We have reached the preliminary view that [CO 02/182] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

11 The policy principles that underlie the relief are still applicable. We have considered the level of consumer protection in:

- (a) state and territory legislation that regulates the services of real estate and letting agents, as well as the transactions that lead to a purchase of interests in real property; and
- (b) the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

12 We consider that generally there will be less dependency on the performance of a person exercising letting rights where a scheme does not involve holiday lettings, which tend to be short stay and so require more maintenance, booking and marketing arrangements, and rent and expense allocation principles.

C Repealing ASIC class order on small property syndicates

Key points

We are proposing to repeal Class Order [CO 02/183] *Small property syndicates*, which sunsets on 1 October 2017.

Your feedback

- 13 You are invited to comment on our proposal to repeal the ASIC class order in this section, including whether the class order is currently operating effectively and efficiently. The proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 02/183] *Small property syndicates*

Background

- 14 Schemes that fall within the definition of ‘managed investment scheme’ and have issued interests in circumstances requiring disclosure to investors must be registered with ASIC under Pt 5C.1 of the Corporations Act, unless the scheme (or a group of related schemes):
- (a) has no more than 20 members; and
 - (b) is not promoted by a person in the business of promoting managed investment schemes.
- 15 We define a ‘property syndicate’ as a managed investment scheme under which investors have legal title to the syndicate’s real property. This includes situations where syndicate members may:
- (a) each own a specific property or share an interest in a property;
 - (b) already own the property or properties in question and, for example, want to pool income from the properties; or
 - (c) want to combine to buy a property or properties.
- 16 The relief was originally provided for small property syndicates for consistency with the exemptions for private trusts and joint ventures contained in reg 7.12.04 of the then Corporations Regulations 1990. As syndicates are not trusts, they did not fall within the private trust exemption

from the fundraising provisions (reg 7.12.04(c)), and the joint venture exemption (reg 7.12.04(b)) was unlikely to apply.

- 17 We define a ‘small property syndicate’ as a scheme with 15 or fewer members (including joint members) that is not promoted by a person who is, or whose associate is, in the business of promoting property syndicates or, in relation to which, no participant is able to receive a benefit not available to other participants.
- 18 [CO 02/183] provides relief from the requirement to register a small property syndicate as a managed investment scheme and certain other requirements that relate to licensing and disclosure. The relief applies to small property syndicates that are either not promoted as a business, or that do not provide any incentives for involvement by promoters. If a person in the business of promoting property syndicates is involved, the person must be part of the syndicate throughout its life and may benefit from the syndicate only on the same basis as all the other investors.

Proposal

c1 We propose to repeal [CO 02/183], which would otherwise sunset on 1 October 2017, unless we receive feedback from the property sector indicating that the relief is relied on.

Rationale

- 19 We have reached the preliminary view that the relief in [CO 02/183] may not be widely used. We consider that, if this is the case, it is more appropriate for an operator to apply for individual relief from the requirements to become a public company, obtain an AFS licence, register the scheme and give an investor a Product Disclosure Statement (PDS).

D Remaking ASIC class orders on serviced strata schemes and management rights schemes

Key points

We are proposing to remake as a single new instrument:

- Class Order [CO 99/463] *Serviced strata scheme valuations*, which sunsets on 1 April 2018;
- Class Order [CO 02/185] *Sale of strata units for \$500,000 or more*, which sunsets on 1 April 2018;
- Class Order [CO 02/245] *Closed schemes*, which sunsets on 1 April 2017;
- Class Order [CO 02/303] *Management rights schemes—amendment*, which sunsets on 1 October 2017;
- Class Orders [CO 02/304] *Management rights schemes* and [CO 02/305] *Management rights schemes*, which sunset on 1 October 2016; and
- Class Order [CO 07/189] *Management rights schemes where the strata unit cannot be used as a residence*, which sunsets on 1 October 2017.

We are also proposing to provide relief for well-advanced schemes in the same instrument. This relief is currently provided on a case-by-case basis.

We have formed the preliminary view that the class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. We are proposing some minor policy changes, and are seeking specific feedback on these changes.

The class orders have been redrafted into a single new instrument using ASIC's current style and format, while preserving the current effect of the 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 250.

Your feedback

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In this section, we have invited specific feedback on any proposed minor policy changes. However, 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.

What is a serviced strata scheme?

- 21 In general, a serviced strata scheme is a managed investment scheme under paragraph (a) of the definition of ‘managed investment scheme’ in s9 of the Corporations Act.

Member contributions

- 22 Generally, a member of a serviced strata scheme contributes:
- (a) a right to occupy the strata unit (e.g. a lease or licence); or
 - (b) a right to let or license the strata unit (i.e. as an agent of the strata unit owner).
- 23 By making available these rights to their strata unit, the retail client is making a contribution to acquire interests in the scheme. We consider that this is the case even though the freehold title to the strata unit is not contributed and is not property of the scheme.

Note: See the definition of ‘property’ in s9, which includes an intangible right (i.e. a ‘chose in action’).

- 24 In general, we consider that an arrangement is likely to be a serviced strata scheme if a retail client has an understanding that they will get a return on their investment and that this return depends (totally or partially) on the use of other retail clients’ strata units and/or the use of their strata unit as part of a serviced apartment, hotel, motel or resort complex.

What is a management rights scheme?

- 25 The term ‘management rights’ refers to the practice of buying that part of the complex that has the fittings and location that enable it to function as a front office for the complex. Management rights schemes are a subset of serviced strata schemes. A typical management rights scheme involves an operator who resides in a holiday accommodation complex and who:
- (a) provides short-term leases or licences to visitors;
 - (b) markets the complex;
 - (c) manages the common property;
 - (d) provides an office and caretaking facilities;
 - (e) collects the rent or licence fees; and
 - (f) pays expenses out of the rent or licence fees collected and then pays the proceeds to the owner.
- 26 Management rights schemes are managed investment schemes under the Corporations Act. Unless we have given relief, the interests in the scheme

may be a financial product and the financial services provisions in the Corporations Act may apply.

Obligations of operators of serviced strata schemes and management rights schemes

- 27 In general, serviced strata schemes, including management rights schemes, must comply with the managed investment, licensing and fundraising provisions of the Corporations Act. This requires the operator of a scheme to be a public company and hold an AFS licence. The scheme itself must also be registered and there must be disclosure relating to the issue of interests in the scheme.
- 28 The managed investment provisions of Ch 5C set out the requirements for registering a managed investment scheme if the scheme has more than 20 members or has been promoted by a person who is in the business of promoting managed investment schemes. AFS licensing and fundraising provisions of the Corporations Act may also apply to serviced strata schemes and management rights schemes.
- 29 As the operator of a registered managed investment scheme, a responsible entity must also comply with:
- (a) the AFS licensing provisions in Ch 7—the responsible entity must hold an AFS licence that authorises it to operate a registered managed investment scheme; and
 - (b) the Ch 7 disclosure and hawking obligations.
- 30 The class orders in this section, which we are proposing to remake into a single new instrument, provide relief from these provisions in certain circumstances.

Class Order [CO 99/463] *Serviced strata scheme valuations*

Background

- 31 [CO 99/463] exempts responsible entities of registered managed investment schemes from the requirement to comply with s601FC(1)(j) for schemes that involve persons making available real property for use as part of a serviced apartment, hotel, motel or resort complex where the 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.

- 32 The relief applies when the responsible entity ensures that each item of property of a registered managed investment scheme is valued as soon as practicable after the responsible entity has reasonable grounds to believe that a valuation of that item is in the best interests of members or is needed to be fair to all members.
- 33 The relief is based on the cost of undertaking routine property valuations being in some cases unreasonable when the valuation does not give any indication of the value of the interest in the scheme.

Proposal

D1 To preserve its effect beyond the sunset date of 1 April 2018, we propose to continue the relief currently given by [CO 99/463] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX at Attachment 2 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following link: [\[CO 99/463\]](#).

The only changes proposed are to:

- (a) combine the class order with the other class orders in this section and update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

- 34 We have reached the preliminary view that [CO 99/463] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Class Order [CO 02/185] *Sale of strata units for \$500,000 or more*

Background

- 35 In some serviced strata schemes all the interests are offered to investors who already have or, if they take up the offer, will have strata units for which they have paid, or will pay, \$500,000 or more (taking into account any associated furniture and costs).

- 36 [CO 02/185] exempts operators of serviced strata schemes from the requirement to register a managed investment scheme or comply with hawking provisions. It also exempts operators of serviced strata schemes from the requirement to provide a PDS.
- 37 For the exemption in [CO 02/185] to apply, all of the offers of interests in the scheme have to involve payment for the interest and any strata units, costs and expenses and associated chattels of at least \$500,000. The price of the interest in the serviced strata scheme can include the cost of acquiring the real estate where the real estate is offered together with the interest.
- 38 The threshold of \$500,000 is intended to reflect the policy of reg 7.1.18(2) of the Corporations Regulations 2001. This policy infers that persons paying at least \$500,000 for an investment-based financial product have the capacity and incentive to protect their interests sufficiently to be treated as wholesale clients.
- 39 The relief in [CO 02/185] is likely to be relevant when the freehold of the strata unit is not contributed to the serviced strata scheme, but only the right to use it.
- 40 If [CO 02/185] were allowed to sunset, the operators of these serviced strata schemes may be required to become a public company, register the schemes, comply with the hawking provisions and give an investor a PDS.

Proposal

D2 To preserve its effect beyond the sunset date of 1 April 2018, we propose to continue the relief currently given by [CO 02/185] in a new legislative instrument that reflects current drafting practice, with certain changes: see draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX at Attachment 2 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following link: [\[CO 02/185\]](#).

The only changes proposed are to:

- (a) combine the class order with the other class orders in this section and update the name of the legislative instrument;
- (b) convert the relief from an exemption to a declaration. The declaration will confer on investors in serviced strata schemes the status of wholesale clients for the purpose of Pts 7.6 (except Divs 4 and 8) 7.7, 7.8 and 7.9 of the Corporations Act. The declaration will apply to investors if they would be wholesale clients under reg 7.1.18; namely where the price paid to invest in a scheme (including the value of any associated chattels and any costs and expenses of acquisition) is at least \$500,000;
- (c) reflect current drafting practice and update the format of the current document; and
- (d) simplify the drafting to give greater clarity.

Your feedback

- D2Q1 Do you agree with the proposal to continue the relief in [CO 02/185] and the terms of the relief? If not, please give reasons.
- D2Q2 Do you agree with the proposal in D2(b) to convert the relief from an exemption to a declaration?
- D2Q3 Are there arrangements that do not fall within the current terms of the relief in [CO 02/185] that should be included? If so, please give details of the arrangements and their features.
- D2Q4 Is there difficulty complying with [CO 02/185] in its current form? If so, please give details.
- D2Q5 Do you rely on the relief in [CO 02/185]? Are you aware of widespread reliance on [CO 02/185]? Please give details.

Rationale

- 41 We have reached the preliminary view that [CO 02/185] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 42 We are proposing that the relief be drafted with a modification to more closely align with the policy of reg 7.1.18 on the basis that the included costs are treated as part of the cost of the interest in the serviced strata scheme.
- 43 One effect of the proposed modification is that relief will extend to ensuring that affected clients are not treated as retail clients. This means that requirements that apply to retail clients in the provisions covered by the modification do not apply to affected clients. These requirements include the requirements for a dispute resolution system complying with s912A(2), having compensation arrangements complying with s912B or providing a Financial Services Guide as required by Pt 7.7.
- 44 As a result of clients not being retail clients, no PDS will be required to be given under Pt 7.9, and the offer or issue of interests in a strata title scheme to clients will not give rise to a requirement for the scheme to be a registered scheme under s601ED(2).
- 45 Another effect of the proposed modification will be that if there is any change in the amount of investment required to qualify as a wholesale client in reg 7.1.18, then the changed amount will also apply for the purposes of offers and issues of interests in those strata title schemes which are affected by the proposed instrument.

Class Order [CO 02/245] *Closed schemes*

Background

- 46 As noted in paragraph 24, we consider a scheme is likely to be a serviced strata scheme if an investor's right to a return depends totally or partially on the use of other investors' strata units and/or the use of their strata unit as part of a serviced apartment, hotel, motel or resort complex.
- 47 'Closed serviced strata schemes' are those schemes in which all the strata units were sold and no offers to join the scheme were made after 6 October 1998. At that time, some schemes were 'closed non-complying schemes' because they did not comply with the old Corporations Law at the time.
- 48 We gave operators of closed non-complying schemes relief from the Corporations Act in [CO 02/245] so that the operators did not have to:
- (a) register the scheme; and
 - (b) obtain an AFS licence to operate the scheme.
- 49 We also gave relief to sellers of interests in closed non-complying schemes so that sellers are not required to give secondary sales notices when the seller controls the issuer of the financial product. Our relief applies only to those schemes that had never been registered as managed investment schemes or did not have an approved deed under the old Corporations Law, which applied before 1 July 1998.
- 50 Due to the uncertainty about how the old Corporations Law applied to arrangements involving units under strata title, community title or similar schemes before the issue of our policy on serviced strata schemes on 6 October 1998, we considered that the benefits of regulation of these schemes were outweighed by the commercial burden of compliance with the regulation.
- 51 We considered that requiring operators of closed non-complying schemes to comply with the Corporations Act, if there was no misleading conduct or impropriety, would be disproportionately burdensome and likely to disadvantage investors who were retail clients.
- 52 We considered that the need for regulation could be adequately addressed by the conditions of [CO 02/245]. Relief for closed non-complying schemes is conditional on there being only limited new issues made after 6 October 1998 (i.e. no more than 20 new members can join the scheme in any 12 months), subject to certain exclusions for issues that do not require a PDS.
- 53 Without the relief in [CO 02/245] an operator of a closed non-complying scheme would incur higher compliance costs because, in some

circumstances, they could be required to register the scheme, hold an AFS licence and give a PDS to investors who are retail clients being offered an interest in the scheme.

Proposal

D3 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/245] in a new legislative instrument that reflects current drafting practice, without any significant changes: see paragraph 16 of the transitional provisions of draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX as Attachment 2 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 02/245\]](#).

The only changes proposed are to:

- (a) combine the class order with the other class orders in this section and update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Your feedback

D3Q1 Are there arrangements that do not fall within the current terms of the relief in [CO 02/245] that should be included? If so, please give details of the arrangements and their features.

D3Q2 Do you rely on the relief in [CO 02/245]? Are you aware of widespread reliance on [CO 02/245]? Please give details.

Rationale

54 We have reached the preliminary view that [CO 02/245] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

55 Continuing the relief in [CO 02/245] would avoid any confusion in the industry sector when interests in closed non-complying schemes are resold.

56 We also consider that regulation in the Corporations Act would be disproportionately burdensome on operators of closed non-complying schemes where schemes have been operating for many years.

Class Order [CO 02/303] *Management rights schemes—amendment*

Background

- 57 [CO 02/303] provides conditional relief for certain persons who operate a management rights scheme (where offers of interests were made before 15 May 1999) from the requirements to register the scheme and hold an AFS licence for dealing in interests in a managed investment scheme. It also provides conditional relief for certain persons and members of a management rights scheme from the hawking prohibition.
- 58 Without the relief in [CO 02/303], the operators of these management rights schemes would be subject to the requirements of the Corporations Act, including the requirement to register the scheme and hold an AFS licence.

Proposal

D4 To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 02/303] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX at Attachment 2 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following link: [\[CO 02/303\]](#).

The only changes proposed are to:

- (a) remove transitional provisions that are no longer relevant;
- (b) remove the requirement to not engage in misleading and deceptive conduct;
- (c) remove the issuer's disclosure notice requirements given the operation of s1017A;
- (d) combine the class order with the other class orders in this section and update the name of the legislative instrument;
- (e) reflect current drafting practice and update the format of the current document;
- (f) simplify the drafting to give greater clarity;
- (g) update legislative references and definitions; and
- (h) correct any minor drafting errors.

Your feedback

- D4Q1 Do you agree with the proposal in D4(c) to remove the issuer's disclosure notice requirements given the operation of s1017A?
- D4Q2 Are there arrangements that do not fall within the proposed changes to the terms of the relief in [CO 02/303] that should be included? If so, please give details of the arrangements and their features.

Rationale

- 59 We have reached the preliminary view that [CO 02/303] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Misleading or deceptive conduct protections

- 60 We have proposed removing the requirement to not engage in misleading or deceptive conduct because of sufficient protections in Subdiv D of the ASIC Act.

Disclosure requirements

- 61 We have proposed removing the disclosure requirements, set out in paragraph 3 of Schs C and F of [CO 02/303], given the operation of s1017A, which require the responsible person for the PDS to provide information about the product to certain people on request.

Class Orders [CO 02/304] *Management rights schemes* and [CO 02/305] *Management rights schemes*

Background

- 62 [CO 02/304] and [CO 02/305] provide conditional relief for certain persons who operate a management rights scheme from the requirement to register the scheme and hold an AFS licence for dealing in interests in a managed investment scheme. They also provide conditional relief for certain persons and members of a scheme from the hawking prohibition.
- 63 Without the relief in [CO 02/304] and [CO 02/305], the operators of these schemes would be subject to the requirements of the Corporations Act, including the requirement to register the scheme and hold an AFS licence for dealing in interests in a managed investment scheme.

CP 81 *Management rights schemes*

- 64 In May 2007, we released Consultation Paper 81 *Management rights schemes* (CP 81). We proposed to make the following changes to both [CO 02/304] and [CO 02/305]:
- (a) 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 AFS licence where the provider of the advice is either:

- (i) licensed under state or territory laws as a real estate agent, conveyancing agent, business agent or property developer; or
 - (ii) 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;
- (b) to allow for upfront payments for standard furniture packages—in particular, we proposed allowing the operator to require a person to pay for acquiring standard furniture packages if they want to participate in a management rights scheme when:
- (i) the payment is applied to the purchase of furniture on an individual or bulk purchase basis with other members; and
 - (ii) 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; and
- (c) 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.

Proposal

D5 To preserve their effect beyond the sunset date of 1 October 2016, we propose to continue the relief currently given by [CO 02/304] and [CO 02/305] in a new legislative instrument that reflects current drafting practice: see draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX at Attachment 2 to this consultation paper. You can access the current instruments on www.comlaw.gov.au by clicking on the following links: [\[CO 02/304\]](#) and [\[CO 02/305\]](#).

The only changes proposed are to:

- (a) provide AFS licensing relief for general financial product advice to persons subject to state or territory property licensing laws;
- (b) allow for upfront payments for standard furniture packages;
- (c) provide for indexation of the monetary limit that may be held in a furniture, fittings and equipment sinking fund;
- (d) restrict the relief for rental guarantees;
- (e) combine the class orders with the other class orders in this section and update the name of the legislative instrument;
- (f) reflect current drafting practice and update the format of the current document;
- (g) simplify the drafting to give greater clarity;
- (h) update legislative references and definitions; and
- (i) correct any minor drafting errors.

Your feedback

- D5Q1 Do you support proposal D5(a) on AFS licensing relief for general advice where the provider has a state or territory licence? Please give reasons.
- D5Q2 Do you support proposal D5(b) to allow upfront payments for standard furniture packages? Please give reasons.
- D5Q3 Does the monetary limit on the amount that may be held in a furniture, fittings and equipment sinking fund to cover the cost of refurbishing and replacing furniture and fittings need to be increased?
- D5Q4 Do you have any views on proposal D5(c) to index the monetary limit?
- D5Q5 Will the clarification on rental guarantees in proposal D5(d) create any unintended consequences or an unreasonable burden for operators of certain kinds of schemes? If so, how?
- D5Q6 Are rental guarantees, provided directly or indirectly by the operator, common in practice? In what circumstances might they be more likely to be offered?
- D5Q7 Are there arrangements that would not fall within the current or proposed changes to the terms of the relief in [CO 02/304] and [CO 02/305] that should be included? If so, please give details of the arrangements and their features.

Rationale

- 65 We have reached the preliminary view that [CO 02/304] and [CO 02/305] are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of these class orders.

Licensing relief for licensed agents

- 66 We recognise that the real property industry is regulated under a different regime, and that our proposed relief will alleviate the need for sales intermediaries in the real estate industry to obtain an AFS licence for the kinds of activities to which the relief applies.
- 67 We also recognise the context in which advice is given on interests in management rights schemes—a substantial aspect of the transaction advised on concerns the purchase of real estate, rather than a financial product, and this transaction is covered by consumer protections in the state and territory licensing regimes. This does not apply to advice about contributing to a self-managed superannuation fund as a vehicle for purchase.

Upfront payments for standard furniture packages

- 68 [CO 02/304] and [CO 02/305] include a prohibition on requiring any payment to join a 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 investor’s reasonable proportion of the operator’s fees and expenses with respect to the management of the scheme’: see paragraph (b)(v)(B) of Sch B to [CO 02/304], paragraph (e)(ii) of Sch B to [CO 02/305] and cl 4(e)(ii) in Pro Forma 187 *Management rights schemes where the strata unit cannot be used as a residence* (PF 187).
- 69 We have clarified that the relief permits the upfront acquisition of standard furniture packages and recognises the commercial value of standard furniture packages for strata units participating in management rights schemes.

Rental guarantees for operators

- 70 We are proposing that our relief for management rights schemes does not apply if the operator who manages the letting of the units, either directly or indirectly, offers rental guarantees to owners that could apply after they are no longer the operator. This is because there should only be limited reliance by an owner on an operator and this is ensured by the ability of the operator to withdraw at short notice. This underlying principle would be undermined if operators provide rental guarantees that they have to honour even after they stop managing the scheme.
- 71 This means that our relief for management rights schemes will not apply if:
- (a) the operator who manages the letting of the strata units is obligated, either directly or indirectly (e.g. by indemnifying another person who provides a guarantee), to provide a guaranteed level of rental payment to owners; and
 - (b) 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 their power to terminate their obligations.
- 72 This clarification to our relief would only apply to rental guarantees given after the instrument is remade.

Class Order [CO 07/189] *Management rights schemes where the strata unit cannot be used as a residence*

Background

- 73 [CO 07/189] exempts a person who operates a management rights scheme from the requirement to register the scheme when we issue an instrument that exempts interests in the scheme from certain requirements of Ch 7 of the Corporations Act. This instrument must be on substantially the same terms as PF 187.
- 74 The purpose of [CO 07/189] is to enable the execution by ASIC of individual instruments based on PF 187 that are not legislative instruments and are capable of facilitating the transfer of management rights between different operators. It ensures that the policy underlying individual instruments based on PF 187 continues to have its intended effect.

Proposal

D6 To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 07/189] in a new legislative instrument that reflects current drafting practice: see draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX at Attachment 2 to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following link: [\[CO 07/189\]](#).

The only changes proposed are to:

- (a) incorporate the requirements of PF 187 into the new instrument, with the commercial practicability of alternative rental arrangements no longer being a precondition for relief but set out as a requirement in the instrument (see paragraph 5(2)(a)(ii) of the draft instrument);
- (b) remove the relief set out in PF 187 to confirm transactions (s1017F);
- (c) combine the instrument with the other class orders in this section and 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) update legislative references and definitions; and
- (g) correct any minor drafting errors.

Your feedback

D6Q1 Do you have any views on proposal D6(a) to incorporate the requirements of PF 187 into the legislative instrument, including benefits and costs saved?

D6Q2 Do you have any views on proposal D6(b) to remove relief provided under PF 187 from the requirement to confirm transactions (s1017F)?

D6Q3 Are there arrangements that do not fall within either the current or proposed changes to the terms of the relief that should be included? If so, please give details of the arrangements and their features.

Rationale

75 We have reached the preliminary view that [CO 07/189] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Incorporating PF 187 into the legislative instrument

76 ASIC instruments based on PF 187 are only issued to specified named persons rather than ‘any person who operates the scheme’ to avoid the creation of a legislative instrument. However, this approach does not facilitate the transfer of management rights between parties. Each time a different person becomes the operator of a scheme, that person must seek and obtain from ASIC additional relief that specifies the name of that operator.

77 Under our proposed relief, the instrument would apply to the management rights scheme for so long as the operator meets the conditions of the instrument and the operator would not have to apply for individual relief. The relief would apply to subsequent operators if the conditions continue to be met.

78 To ensure that there is no unintended burden and that operators of management rights schemes subject to individual relief instruments continue to be in the same position that they were in before the commencement of the Legislative Instruments Act, we are proposing to remake the class order and incorporate PF 187 into the new instrument.

79 We do not propose to continue the relief in PF 187 in relation to the requirement to confirm transactions (s1017F) because we are of the view that compliance would not be unreasonably burdensome.

Incorporating relief for well-advanced schemes into the new instrument

Background

80 Well-advanced schemes are serviced strata schemes that existed before 6 October 1998. We have given relief to these schemes on a case-by-case basis from the requirement in s1017G (to have dispute resolution processes) to ensure that operators are not subject to an inappropriate regulatory burden. We gave this relief because of the uncertainty about how the Corporations Act applied to serviced strata arrangements during the period before October 1998.

Proposal

D7 To ensure that operators of well-advanced schemes are not subject to inappropriate regulatory burden, we propose to give relief consistent with the relief from s1017G previously granted on a case-by-case basis: see paragraph 18(2) of draft ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX at Attachment 2 to this consultation paper.

Your feedback

D7Q1 Do you have any comments on our proposal to give relief from the requirement in s1017G to have dispute resolution processes?

Rationale

81 We are proposing to give relief, consistent with the existing policy to grant relief on a case-by-case basis, to give operators of well-advanced schemes certainty and to avoid an inappropriate regulatory burden. The relevant operators would, in relation to other regulatory requirements, be able to continue to rely on their case-by-case relief.

82 This will ensure that operators can rely on the relief in the instrument, rather than make individual relief applications to ASIC.

E Regulatory and financial impact

83 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) the effective and efficient regulation of property, strata and management rights schemes without placing an unreasonable regulatory burden on operators of these schemes; and
- (b) ensuring sufficient consumer protection.

84 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

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

86 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

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
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C), unless otherwise specified
closed non-complying scheme	A closed serviced strata schemes (in which all the strata units were sold and no offers to join the scheme were made after 6 October 1998) that did not comply with the old Corporations Law at the time
[CO 02/182] (for example)	An ASIC class order (in this example numbered 02/182) 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
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>
managed investment scheme	As defined in s9 of the Corporations Act
management rights	Means, in relation to a serviced 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
old Corporations Law	The law, set out in s82 of the <i>Corporations Act 1989</i> , which preceded the Corporations Act. A reference to the old Corporations Law is a reference to the law as it stood before the implementation of the <i>Corporate Law Economic Reform Program Act 1999</i>
PF 187 (for example)	An ASIC pro forma (in this example numbered 187)

Term	Meaning in this document
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 5C.1 (for example)	A Part of the Corporations Act (in this example numbered 5C.1), unless otherwise specified
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1 Div 2 of the Corporations Regulations
RIS	Regulation Impact Statement
s9 (for example)	A section of the Corporations Act (in this example numbered 9), unless otherwise specified
serviced strata scheme	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
small property syndicate	A scheme with 15 or fewer members (including joint members) that is not promoted by a person who is, or whose associate is, in the business of promoting property syndicates or, in relation to which, no participant is able to receive a benefit not available to other participants
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
well-advanced scheme	A serviced strata scheme that existed before 6 October 1998