



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 266

Remaking ASIC class orders on managed investment schemes: Not for money

August 2016

About this paper

This consultation paper sets out ASIC's proposals to remake three of our class orders on managed investment schemes. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from operators and promoters of managed investment schemes on our proposals to remake, without significant changes, the following class orders:

- [Class Order \[CO 02/210\]](#) *Interests in film and theatrical ventures*, which is due to expire on 1 April 2017;
- [Class Order \[CO 02/211\]](#) *Managed investment schemes: Interests not for money*, which is due to expire on 1 April 2017; and
- [Class Order \[CO 02/236\]](#) *Film investment schemes*, which is due to expire on 1 April 2017.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 266.

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 10 August 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.

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
Class orders on managed investment schemes: Not for money	7
Key terms	11

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 9 September 2016 to:

Mai Go
 Lawyer, Investment Managers & Superannuation
 Australian Securities and Investments Commission
 Level 7, 120 Collins Street
 Melbourne Vic 3000
 facsimile: 03 9280 4730
 email: mai.go@asic.gov.au

What will happen next?

Stage 1	10 August 2016	ASIC consultation paper released
Stage 2	9 September 2016	Comments due on the consultation paper
Stage 3	December 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 *Legislation Act 2003*, 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 Legislation (FRL). 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 orders

Key points

We are proposing to remake, as a single new instrument, the following class orders, which sunset on 1 April 2017:

- [Class Order \[CO 02/210\]](#) *Interests in film and theatrical ventures*;
- [Class Order \[CO 02/211\]](#) *Managed investment schemes: Interests not for money*; and
- [Class Order \[CO 02/236\]](#) *Film investment schemes*.

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, 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 266.

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.

Class orders on managed investment schemes: Not for money

- 7 We seek to provide certainty that the managed investment, Australian financial services (AFS) licensing, anti-hawking and product disclosure provisions of the *Corporations Act 2001* (Corporations Act) do not apply to certain managed investment schemes that:
- (a) arise from arrangements negotiated with a person because of the particular nature of their business, profession or calling; and
 - (b) do not involve raising money.
- 8 The types of arrangements under the class orders would otherwise be regulated by the Corporations Act due to the wide scope of the definition under the Act of a managed investment scheme and this regulation is generally inappropriate given the nature of the arrangements.

Background to [CO 02/210]

- 9 [CO 02/210] gives relief from the managed investment, AFS licensing, anti-hawking and product disclosure provisions where a person is involved in the film, writing and entertainment industries. Our view is that, in the circumstances contemplated by [CO 02/210], distributors and broadcasters of films (i.e. persons whose ordinary business is or includes broadcasting or distributing films) do not require protection as investors to the extent provided to other unrelated bodies.

Background to [CO 02/211]

- 10 [CO 02/211] gives relief from the managed investment, AFS licensing, anti-hawking and product disclosure provisions. It is our view that interests not for money schemes generally do not have a predominant investment character. As a result, we consider that these schemes are not intended to be captured and regulated by the provisions of the Corporations Act which regulate managed investment schemes.

Background to [CO 02/236]

- 11 [CO 02/236] gives relief from the managed investment, AFS licensing, anti-hawking and product disclosure provisions where the managed investment scheme:
- (a) has members that are limited to persons who would not be required to be given a Product Disclosure Statement (PDS); or
 - (b) is operated by certain film bodies who carry on a business or governmental activity of financing films.
- 12 The Australian film industry is characterised by ongoing participation by film distributors and broadcasters. Investment by these bodies is often sought by producers so as to enable them to secure an assured outlet or market for completed films.
- 13 Distributors and broadcasters, on the other hand, often seek to invest in film production for the purpose of securing suitable Australian products for distribution or broadcast. Distributors and broadcasters can also be motivated by the opportunity to exercise some artistic and financial control over the individual product where they have made a commitment to purchase that product or provide distribution or broadcasting services.
- 14 Such control would be exercised by a distributor or broadcaster for the purpose of ensuring that the final product is marketable and suitable for its particular purpose.
- 15 Control could be exercised, for example, by the investing distributor or broadcaster requiring that certain criteria be met in relation to cast, direction,

- storyline and so on before agreeing to distribute or broadcast the film. Under normal circumstances, the meeting of such requirements would be a precondition to any agreement to distribute or broadcast and to any investment.
- 16 In some instances, participation by the broadcaster or distributor in profits from the film beyond those made under the distribution or broadcast agreement within Australia may be incidental to the main purpose of the investment—that is, the supply of product to enable a distributor or broadcaster to carry on its principal business. In this context, a bona fide distribution or broadcasting agreement may be subject to Ch 5C and AFS licence requirements in the Corporations Act.
- 17 A particular feature of the film investment industry in Australia is the participation of the Commonwealth and state governments through several statutory authorities, government departments and wholly owned companies, including, in particular, Screen Australia.
- 18 It is our view that the interest that an investor acquires under a film scheme in return for making an investment in the development or production of a film may fall within the definition of a managed investment scheme in s9 of the Corporations Act. The interest acquired is usually an interest in the copyright in the finished film and the right to participate in the proceeds from the marketing of the finished film by way of recoupment of investment and participation in profits.
- 19 Without the relief in [CO 02/236], a promoter of a film investment scheme, under which issues of interests, offers or invitations will be made, may need to comply with the managed investment, AFS licensing, anti-hawking and product disclosure provisions.

Proposal

B1 To preserve the effect of [CO 02/210], [CO 02/211] and [CO 02/236] beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by these class orders in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/XX attached to this consultation paper. You can access the current instruments at www.legislation.gov.au by clicking on the following direct links: [\[CO 02/210\]](#), [\[CO 02/211\]](#) and [\[CO 02/236\]](#).

The only changes proposed are to:

- (a) combine [CO 02/210], [CO 02/211] and [CO 02/236] into a single instrument;
- (b) update the name of the legislative instrument;
- (c) reflect current drafting practice and update the format of the current document;

- (d) simplify the drafting to give greater clarity;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Rationale

20 We have reached the preliminary view that [CO 02/210], [CO 02/211] and [CO 02/236] 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.

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 14/26] (for example)	An ASIC class order (in this example numbered 14/26) 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
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.
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