

Submission to ASIC

Consultation Paper 250: Remaking ASIC class orders on property, strata and management rights schemes

Proposal	
B1	<p>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].</p> <p>The only changes proposed are to:</p> <ul style="list-style-type: none"> (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.

ASIC query		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.	Yes.
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.	We are not aware of any such arrangements.
B1Q3	Is there difficulty complying with [CO 02/182] in its current form? If so, please give details.	We are not aware of difficulty in complying with CO 02/182 in its current form.
B1Q4	Do you rely on the relief in [CO 02/182]? Are you aware of widespread reliance on [CO 02/182]? Please give details.	We do not have any clients who currently rely on this relief.
B1Q5	What benefits do you consider will result from this proposal? If possible, please quantify these benefits.	We consider it beneficial for the CO 02/182 relief to continue in a new legislative instrument as proposed by ASIC.

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.

Your feedback	
C1	We are not aware of any of our clients relying on this relief.

Proposal	
D1	<p>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].</p> <p>The only changes proposed are to:</p> <ul style="list-style-type: none"> (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	
D1	We agree with ASIC's proposal to continue the CO 99/463 relief as a legislative instrument.

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.

ASIC query

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.

We agree with ASIC's proposal to continue the CO 99/463 relief as a legislative instrument, subject to our comments below.

D2Q2 Do you agree with the proposal in D2(b) to convert the relief from an exemption to a declaration?

Yes, subject to our comments below.

ASIC query	Your feedback
<p>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.</p>	<p>Yes.</p> <p>Application to developers</p> <p>In our experience, a developer may undertake a development which intends to rely on the CO 02/185 relief and engages in off-the-plan sales of strata units with purchase prices of more than \$500,000. The developer offers purchasers the opportunity to join the scheme at the time they sign a contract for the purchase of the strata unit (with the scheme, and purchaser's involvement in the scheme, commencing upon completion of the development and the settlement of the purchase of the strata unit).</p> <p>However, it is not the developer who will operate the scheme rather than another entity who is appointed at the time the development is completed and often does not exist at the time purchase contracts for the off-the-plan sales are entered into.</p> <p>Accordingly we recommend ASIC extend the proposed declaration in Part 4 of ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX (Instrument) to cover promoters of the scheme (such as a developer).</p> <p>Impact of decline in market value</p> <p>Another issue with the relief which we have seen arise in practice is where an operator relies on the relief, a investor purchased an apartment for \$500,000 and is a member of the scheme, the investor subsequently sells their apartment but is only able to secure a sale price of less than \$500,000 (as the market value has declined) and the new owner is unable to participate in the scheme as the \$500,000 condition is not met.</p> <p>We recommend ASIC consider revising the draft legislative instrument to enable persons to be treated as wholesale clients/participate in the scheme where the amount paid for the interest, or amount paid by a former owner (other than the operator or developer or an associate of the operator or developer) who previously held an interest in the scheme corresponding to the real property owned by the person, is at least \$500,000. This will ensure that the scheme continues to be available to investors where the 'value' of the strata unit has declined to be less than \$500,000, due to changes in market conditions, where</p>

ASIC query	Your feedback
	those strata units were originally, or previously, purchased for \$500,000 or more.
D2Q4 Is there difficulty complying with [CO 02/185] in its current form? If so, please give details.	<p>The two difficulties we have encountered with the current relief, as explained at D2Q3, are:</p> <ul style="list-style-type: none"> (a) the application to a promoter of the scheme (specifically, a developer) who offers interests in the scheme prior to both its commencement and the establishment or identification of the scheme operator; and (b) the circumstance where the value of a strata unit falls below \$500,000 and consequently a purchaser of such property is unable to participate in the scheme (which is likely to be detrimental to the purchaser as the scheme will typically be the only avenue for onsite management and letting of their strata unit).
D2Q5 Do you rely on the relief in [CO 02/185]? Are you aware of widespread reliance on [CO 02/185]? Please give details.	We have clients who currently rely on the CO 02/185 relief.

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.

ASIC query	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.	We are not aware of any arrangements that do not fall within the current terms of the relief in CO 02/245 that should be included.
D3Q2 Do you rely on the relief in [CO 02/245]? Are you aware of widespread reliance on [CO 02/245]? Please give details.	We have clients who currently rely on the CO 02/245 relief.

Proposal
<p>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].</p> <p>The only changes proposed are to:</p> <ul style="list-style-type: none"> (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.

ASIC query	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?	Yes.
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.	CO 02/303 applies to operators of management rights schemes where offers of interests were made before 15 May 1999. We note the effect of paragraph 16 of Part 5 of the Instrument is to enable entities currently relying on CO 02/303 to continue to do so (rather than being subject to Part 2 of the Instrument). Given CO 02/303 only applies where offers of interests were made

ASIC query	Your feedback
	<p>before 15 May 1999 we think it unlikely there will be any 'new' operators (i.e. persons relying on the Instrument who would otherwise have relied on CO 02/303 and are not currently doing so). Therefore, we support the proposed Instrument even though there are other differences between the Instrument and CO 02/303 (such as no prohibition on the pooling of income, and no specific list of questions to be addressed in the disclosure statement/PDS) as it will not impact entities currently relying on CO 02/303 and we do not believe there will be any new operators who would be eligible to rely on CO 02/303 and are not currently doing so.</p>

Proposal
<p>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].</p> <p>The only changes proposed are to:</p> <ul style="list-style-type: none"> (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.

ASIC query	Your feedback
<p>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.</p>	<p>Yes, to the extent real estate agents are involved in promoting management rights scheme we consider it appropriate for them to be granted the licensing relief proposed.</p>
<p>D5Q2 Do you support proposal D5(b) to allow upfront payments for standard furniture packages? Please give reasons.</p>	<p>Yes. To enable an operator to manage a serviced apartment, hotel, motel or resort complex to an appropriate standard it is generally necessary for the furnishings to be of consistent quality and type and an obligation on potential scheme members to acquire a furniture package can achieve this consistency for the benefit of all scheme members.</p> <p>We support the proposal for the legislative instrument to expressly recognise that an operator may require members to purchase a furniture package and such payment will not constitute an amount paid to join the scheme (which would otherwise be in contravention of the instrument). This proposal removes the uncertainty which exists with the current class orders.</p> <p>Further, as joining the scheme is voluntary, there is no obligation upon a purchaser of a strata unit to purchase a furniture package.</p>
<p>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?</p>	<p>We consider setting the same monetary limit for all furniture, fittings and equipment sinking funds fails to recognise that the cost of furniture, fittings and equipment may vary considerably between management rights schemes depending on the quality and size of the underlying strata unit.</p> <p>For example, the cost of furniture, fittings and equipment in a luxury apartment in a 'premium' building, or of a hotel room in a six star hotel, may be significantly higher than the cost for an apartment in a 'standard' building (and, even though, the purchase price of a luxury apartment or hotel room may exceed \$500,000 the operator may still prefer to rely on the management rights scheme relief, rather than the CO 02/185 relief, given the management rights scheme relief provides a licensing exemption).</p> <p>We recommend ASIC consider linking the monetary limit on the sinking fund to a percentage of the original purchase price of the strata unit to recognise that the furniture, fittings and equipment cost can differ considerably depending on the 'standard' of the underlying strata unit.</p>

ASIC query	Your feedback
	<p>If ASIC does not agree with our proposal, we recommend the existing \$5,000 limit be increased to \$10,000 (and subsequently adjusted for CPI changes) as we note the limit has not been increased since the original relief was granted.</p>
D5Q4	<p>Do you have any views on proposal D5(c) to index the monetary limit?</p>
D5Q5	<p>We would support a proposal to index the monetary limit of the furniture, fittings and equipment sinking fund.</p> <p>We not consider the clarification will created unintended consequences or unreasonable burdens for operators.</p> <p>We note any scheme operators who currently provide such guarantees and rely on the management rights scheme relief (and we are not aware of any) will not be impacted as, pursuant to Part 5 of the Instrument, operators currently relying on CO 02/304 or CO 02/305 will continue to do so (rather than being subject to Part 2 of the Instrument).</p>
D5Q6	<p>Are rental guarantees, provided directly or indirectly by the operator, common in practice? In what circumstances might they be more likely to be offered?</p> <p>In our experience, a rental guarantee provided by an operator of a management rights scheme is uncommon.</p> <p>We have seen fixed or indexed return arrangements where a rental guarantee is provided by the parent company or associated entity (who is an entity of financial substance) of an operator in the context of serviced strata arrangements which are not serviced strata schemes (as investors understand that, if necessary, all of their return is likely to come from an entity of financial substances). However, these arrangements will not be impacted by the Instrument.</p>
D5Q7	<p>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.</p> <p>Yes.</p> <p>Similar to our comments at D2Q3 above, it is a common occurrence for a developer to offer prospective strata unit purchasers the opportunity to join a management rights scheme at the same time as the purchaser is provided with a purchase contract for the property.</p> <p>The developer will give prospective purchaser a PDS, issued by the developer, and a prospective purchaser can apply to join the scheme with the scheme, and purchaser's participation, commencing upon completion of the development and the settlement of the purchase of a strata unit by the purchaser.</p>

ASIC query

Your feedback

Generally, another entity (i.e. not the developer) is established to operate the scheme and it is this entity to whom the purchaser will lease or licence their strata unit. This entity may not exist or be identified at the time the PDS was provided to the purchaser.

Upon commencement of the scheme, the operator (and not the developer) will issue and provide a PDS to further prospective scheme members (such as people who purchase strata units from existing owners).

In our view, the legislative instrument does not, and should, grant licensing relief to a developer (as someone offering an interest in such scheme for issue).

We note paragraph 10 of Part 2 of the Instrument grants licensing relief for a person who provides a financial service on behalf of an operator of a strata scheme or a real estate agent. However, we are concerned developers will be unable to rely on such relief as the operator will not exist at the time financial services are provided by the developer (and, in the absence of ASIC confirmation, we do not believe a person can provide financial services on behalf of another who does not exist).

Further, while paragraphs 8 of Part 2 of the Instrument grants licensing relief for real estate agents, generally a developer is not, and is not required to be, a real estate agent.

Paragraph 2(f) of Part 2 of the Instrument restricts the circumstances in which investors are required to make payments to participate in the management rights scheme. For some management rights schemes, the operator may arrange for costs which the investor incurs as an owner of the apartment (i.e. costs which apply irrespective of whether they participate in the scheme), such as rates, body corporate levies, etc., to be paid from the investor's rental returns from the scheme (and, where payments exceeds the rental return, the operator can recover them from subsequent rental payments or from the investor directly).

This provides administrative efficiencies for the investor as any amounts payable by the investor as a participant in the scheme or owner of the apartment as paid on their behalf by the operator and, after the end of each financial year, the operator can provide the investor a single statement summarising all income received and expenses paid in

<p>ASIC query</p>	<p>Your feedback</p> <p>connection with their strata unit.</p> <p>We recommend ASIC consider amending para 2(f) to also cover amounts payable by an the investor as the owner of the apartment (i.e. independent to their participation in the scheme).</p> <p>Finally, a PDS for a management rights scheme is required to include the enhanced fee disclosure regulation material in the fees and costs section of the PDS. We consider this information, in particular the example of annual fees and costs and consumer advisory warning, to be confusing and potentially misleading for investors given they are predicated on the assumption the investors has contributed an amount to an investment or has an investment balance, whereas a condition of the management rights scheme relief is that no amount is paid to join the scheme (with minor exceptions).</p> <p>We recommend ASIC exempt PDSs for management rights schemes from the requirement to comply with the enhanced fee disclosure regulations or confirm that ASIC considers it is reasonable for a management rights scheme PDS to exclude the enhanced fee disclosure regulation disclosure pursuant to section 1013F Corporations Act.</p> <p>We also consider such exemption or clarification should apply to registered strata schemes.</p>
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Proposal	
D6	<p>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].</p> <p>The only changes proposed are to:</p> <ul style="list-style-type: none"> (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.

ASIC query		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?	<p>We support ASIC's proposal to incorporate the requirements of CO 07/189 into the proposed legislative instrument.</p> <p>However, we are concerned that the wording in para (2)(a)(ii) of Part 2 of the Instrument, specifically 'reasonable rate having regard to the value of the unit' and 'reasonable degree of occupancy of the unit at that rate', lacks certainty. We recommend para (2)(a)(ii) be amended to recognise the reasonableness of the rate and occupancy should be considered by reference to the scheme's circumstances to provide context for what is considered 'reasonable'.</p>
D6Q2	Do you have any views on proposal D6(b) to remove relief provided under PF 187 from the requirement to confirm transactions (s1017F)?	We do not consider removing the relief (and therefore requiring transactions to be confirmed) provides any significant or tangible benefit for investors and will result in additional administrative cost for operators.
D6Q3	Are there arrangements that do not fall within either the current or proposed changes to the terms of the relief that should be	We are not aware of any such arrangements in relation to the CO 07/189 relief.

ASIC query	Your feedback
included? If so, please give details of the arrangements and their features.	Our comments at D5Q7 also have application to relief granted in the form of PF 187.

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.

ASIC query	Your feedback
D7Q1	We agree with the ASIC's proposal.
	Do you have any comments on our proposal to give relief from the requirement in s1017G to have dispute resolution processes?

