



**ASIC**

Australian Securities & Investments Commission

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**[PF 186]**

**Pro Forma 186**

**Well advanced schemes**

*Issued: 4 June 2003*

(Previous version issued 7 February 2001, superseded 4 June 2003)

**Pro Forma 186** [PF 186] provides for relief in relation to certain serviced strata schemes that were well advanced on 6 October 1998. The relief exempts these schemes from compliance with the managed investments provisions where a disclosure statement is provided, limited offers are made and additional information has been provided to ASIC.

Australian Securities and Investments Commission

*Corporations Act 2001* – paragraphs 601QA(1)(a), 911A(2)(l), 992B(1)(a)  
and 1020F(1)(a) – Exemption

- 1 Under paragraph 601QA(1)(a) of the *Corporations Act 2001* (“the Act”) the Australian Securities and Investments Commission (“ASIC”) hereby exempts the persons referred to in Schedule A in the case referred to in Schedule B on the conditions set out in Schedule C from compliance with section 601ED.
- 2 Under paragraphs 911A(2)(l), 992B(1)(a) and 1020F(1)(a) of the Act ASIC hereby exempts the persons referred to in Schedule A in the case referred to in Schedule B on the conditions set out in Schedule C from:
- (a) sections 992A, 992AA and 1017F of the Act; and
  - (b) the requirement to hold an Australian financial services licence for the provision of financial services by that person in relation to dealing in or advising on interests in a managed investment scheme of the kind and offered on the basis referred to in Schedule B.
- 3 Under paragraph 992B(1)(a) of the Act ASIC hereby exempts a person (other than a person referred to in Schedule A) in the case of an offer to sell an interest in a managed investment scheme referred to in Schedule B and offered on a basis that appears to comply with Schedule C, from sections 992A, and 992AA of the Act.

#### **Schedule A**

- 1 [*List names and ACNs of each identified developer, promoter and operator*];
- 2 Any other person who from time to time operates the scheme referred to in Schedule B who has undertaken to ASIC in writing that they have read and will comply with the conditions set out in Schedule C; and
- 3 Any person who is an employee or agent of a person referred to in paragraph 1 or 2 of this Schedule A.

The persons described in this Schedule A are referred to in this instrument as “Promoters”.

#### **Schedule B**

Operating a managed investment scheme (“Scheme”) that involves registered proprietors of [*Insert the relevant reference – strata title units, community title interests or interests in real property*] located at [*Insert address details of the real property location*] (“strata units”), making their strata units available to a Promoter for use as part of a serviced apartment, hotel, motel or resort complex where every interest in the Scheme (“Interest”) has been issued because of an offer:

- (a) made before 2 March 2000;
- (b) made after 1 March 2000 and before 1 January 2001 and a Promoter provided to each person to whom the offer was made at or before the

making of the offer, a document that the Promoter reasonably believed complied with Schedule D that was signed and dated by the person operating the serviced apartment, hotel, motel or resort complex (“operator”) or, if the operator was not knowingly concerned in the offer, by a Promoter;

- (c) made after 31 December 2000 where:
  - (i) the offer relates only to the making available of strata units that on 31 December 2000 were owned by, or in relation to which there was a binding contract of sale with, a person other than a Promoter or any other person that a Promoter has reason to suspect was involved in development of the strata units or the operation of the Scheme; and
  - (ii) no more than 20 persons (other than persons that were members on or before 31 December 2000) become members of the Scheme in any 12 months starting after 31 December 2000 because of an offer by a Promoter other than an offer permitted by paragraph (e), (f) or (g);
- (d) made after 31 December 2000 where:
  - (i) the offer is in accordance with a description of intended offers lodged with ASIC prior to the offer being made, and ASIC has not notified the Promoter in writing that such offer should not be made or issued;
  - (ii) the description lodged includes:
    - (A) the number of strata units planned in the real property to which the Scheme relates;
    - (B) the anticipated completion date of each incomplete building;
    - (C) the number of strata units that:
      - (I) are held by a Promoter or its associate that the Promoter intends to be sold other than to a Promoter or its associate;
      - (II) are held by a Promoter or its associate that the Promoter does not intend to be sold to a person other than a Promoter or its associate; and
      - (III) have been sold to a person that is not a Promoter or an associate of a Promoter;
    - (D) whether there have been any changes to the structure of the Scheme or other material changes to the information that has been given to ASIC in relation to the Scheme; and
    - (E) the anticipated completion of all currently intended sales; and

- (iii) no promoter is aware that any disclosure statement required to be given to a person under this instrument or any Product Disclosure Statement required to be given to a person under the Act in relation to the scheme, was not given or was given but did not comply with this instrument or the Act as the case may be;
- (e) that is an excluded offer or an excluded invitation (as defined by subsection 66(3) of the Corporations Law as it stood prior to 13 March 2000) or an offer to which ASIC Class Order 98-1931 or a replacement for that Class Order applies;
- (f) that would not need disclosure to investors under Part 6D.2 of the old Corporations Act 2001 (as defined in subsection 1410(1) of the Act) because of section 708 (other than subsection 708(1)) assuming that the Scheme is registered and that Interests are securities; or
- (g) that would not need disclosure to investors under Division 2 of Part 7.9 because of section 1012D.

### **Schedule C**

- 1 Each Promoter must not engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive in relation to the Interests.
- 2 Each Promoter must not intentionally or recklessly fail to comply with its obligations to any member of the Scheme in relation to an Interest to the material detriment of the member.
- 3 Each Promoter must notify ASIC in writing immediately if:
  - (a) it is, or becomes aware that there is reason to suspect that a Promoter has:
    - (i) engaged in misleading or deceptive conduct or conduct that is likely to mislead or deceive in relation to the Interests; or
    - (ii) not complied with its obligations to any member of the Scheme to the material detriment of the member,

whether that conduct or non-compliance occurred before or occurs after the date of this instrument; and
  - (b) ASIC has not previously been notified of the conduct or non-compliance.
- 4 Each Promoter must ensure that, where the Promoter makes an offer of Interests for issue to which paragraph (c) of Schedule B applies during the transition period (within the meaning of subsection 1438(3) of the Act), the Promoter provides to each person to whom the offer is made at or before the making of the offer a document that the Promoter reasonably believes complies with Schedule D (“Disclosure Statement”) that is signed and dated

by the operator or, if the operator is not knowingly concerned in the offer, by the Promoter.

- 5 Each Promoter must ensure that, where the Promoter makes an offer of Interests for issue to which paragraph (d) of Schedule B applies during the transition period (within the meaning of subsection 1438(3) of the Act), the Promoter provides to each person to whom the offer is made at or before the making of the offer, a document that the Promoter reasonably believes complies with Schedule D that is signed and dated by the operator or, if the operator is not knowingly concerned in the offer, by a Promoter, and the document clearly and prominently discloses:
- (a) the extent (if any) to which members of the Scheme have the same rights as those which are described in Schedule E of ASIC Class Order 02-88 (being rights to replace the operators of certain schemes);
  - (b) extent (if any) to which members of the Scheme do not have such rights; and
  - (c) the substance of the rights referred to in sub-paragraphs (a) and (b).

#### **Schedule D**

- 1 The Disclosure Statement must:
- (a) describe the main features of the Interests;
  - (b) set out the main terms and conditions of the offer;
  - (c) provide answers to the questions set out in paragraph 2 of this Schedule (the questions need not be set out, and the answers can be provided in any order or format), sufficiently to enable a typical person that may be offered Interests (“investor”) to make an informed decision whether to become a member of the Scheme, having regard to every matter which is material to such a decision that:
    - (i) is known to any person who authorised or caused the issue of the Disclosure Statement; or
    - (ii) it would be reasonable for such a person to obtain by making inquiries; and
  - (d) be a copy of a disclosure statement that has been given to ASIC, if ASIC has requested a Promoter in writing that any disclosure statement relating to the Scheme be given to it.
- 2 The questions are:
- (a) What is being offered?
    - (i) How are the investor’s property rights affected by holding an Interest?
    - (ii) What key rights will investors have in relation to the use of their strata unit by the operator?

- (iii) What sort of serviced apartment, hotel, motel or resort complex is being operated under the Scheme and how will it be operated?
- (iv) What are the key terms of any lease, licence or rights that investors are to confer on the operator in relation to the operation of the Scheme?
- (v) Does the operator own or have rights in relation to any property that may adversely affect:
  - (A) how the Scheme would operate if the operator were changed; or
  - (B) the amount investors are likely to receive for use of their strata unit if the property ceases to be available (for whatever reason),and, if so, what are those rights? How could the adverse effect happen?
- (b) What are the risks and returns of the investment?
  - (i) How, in general terms, will the operation of the serviced apartment, hotel, motel or resort complex generate returns for investors?
  - (ii) When and how are these returns to be calculated and made available to investors?
  - (iii) Are investors in the Scheme guaranteed or promised that they will receive a particular rate of return from the Scheme? If so:
    - (A) what are the conditions for receiving the benefits of this guarantee or promise;
    - (B) what (if any) are the circumstances in which the person providing the guarantee or promise may be unable to honour it;
    - (C) what is the financial position of the person giving the guarantee or promise; and
    - (D) on what basis do investors receive returns once the guarantee or promise expires?
  - (iv) If no particular rate of return is guaranteed or promised:
    - (A) is the operator aiming to achieve a particular return;
    - (B) can investors expect any particular return; and
    - (C) are returns from the Scheme uncertain?
  - (v) If returns from the Scheme may vary from what is aimed for or expected, or are otherwise uncertain, what are the main factors which will affect the level of return? If occupancy rates will affect

- the returns what are the main factors that will affect occupancy rates?
- (vi) Do investors have potential liability to pay moneys in relation to the Scheme or their ownership of a strata unit in any circumstances? If so, what are these liabilities and what main factors will affect the amount of these liabilities? For example, how will any repairs, refurbishment or replacement of any part of the serviced apartment, hotel, motel or resort complex and its furniture and fittings be paid for?
  - (vii) Is there a suggested minimum period of time that an investor's investment should remain in the Scheme? If so, why is that period of time suggested? What, if any, are the kinds of qualifications on that suggestion?
- (c) What are the fees, charges, expenses and taxes associated with the Scheme?
- (i) What fees, charges, expenses or taxes, if any, may be payable by an investor if they join the Scheme?
  - (ii) What fees, charges, expenses or taxes, if any, may be payable by an investor if they withdraw from the Scheme?
  - (iii) What other fees, charges, expenses or taxes may be deducted from the assets or income of the Scheme or otherwise borne by investors?
  - (iv) What general kinds of tax are likely to be payable on an investor's returns on investment in the Scheme?
- (d) Who is the operator?
- (i) If the operator signs the Disclosure Statement, who is it and what are its credentials in operating hotels, motels, resorts or serviced apartment complexes (including details of its principal activities and relevant experience)?
  - (ii) If the operator does not sign the Disclosure Statement, how, and on what basis, will the operator be selected to undertake the operation of the Scheme?
  - (iii) If the operator signs the Disclosure Statement and the operator is to engage a person to operate the hotel, motel, resort or serviced apartment complex on its behalf, what credentials will that person have to operate the hotel, motel, resort or serviced apartment complex?
  - (iv) What are the custodial arrangements for holding the money of the Scheme including money held for distribution to members and to meet expenses of the Scheme?
- (e) When can investments be withdrawn and transferred?

- (i) When and how can an investor withdraw from the Scheme?
  - (ii) Can an Interest be transferred and, if so, in what circumstances?  
What legal requirements apply?
  - (f) What information can be obtained?
    - (i) How can the entity signing the Disclosure Statement be contacted?
    - (ii) Is there any particular information available to a prospective or existing investor on request made to that entity? If so, how can that information be obtained?
    - (iii) When and how is the operator to report to an investor in the Scheme on the operations of the Scheme (including the Scheme's performance)?
- 3 The Disclosure Statement must also include a prominent statement to the effect that a person should consider whether to consult:
- (a) an investment adviser who is either a financial services licensee or an authorised representative of a financial services licensee;
  - (b) a taxation adviser; and
  - (c) a lawyer,
- making a decision to become a member of the Scheme and if the Disclosure Statement is given to a person that does not own and has not agreed to buy a strata unit to which the Scheme relates, also before signing any contract to buy a strata unit on the basis that the person will become a member.
- 4 The Disclosure Statement must also include a prominent statement to the effect that investors do not have the benefit of the protection that applies to investors in a regulated managed investment scheme and that, in particular:
- (a) the Scheme is not a registered scheme;
  - (b) neither the promoter nor the operator is a financial services licensee;  
and
  - (c) the Disclosure Statement is not a Product Disclosure Statement containing the information required by the Corporations Act.

### **Interpretation**

In this instrument:

- 1 **financial services licensee** means:
- (a) an Australian financial services licensee within the meaning of the Act;  
and
  - (b) a person who, on 11 March 2002, was the holder of a dealers licence within the meaning of the old Corporations Act (as defined in subsection 1410(1) of the Act), until the earlier of:

- (i) if ASIC revokes the person's dealers licence – the date of that revocation; or
- (ii) 11 March 2004; and

2 **offer** is to be interpreted in accordance with subsection 1010C(2) of the Act.

Dated *[Insert Date]*

Signed by *[Insert Name of Delegate]*

as a delegate of the Australian Securities and Investments Commission