



ASIC

Australian Securities & Investments Commission

REPORT 505

Response to submissions on CP 266 Remaking ASIC class orders on managed investment schemes: Not for money

December 2016

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 266 *Remaking ASIC class orders on managed investment schemes: Not for money* (CP 266) and details our responses to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 80 Managed investment schemes: Interests not for money](#) (RG 80).

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A Overview/Consultation process

- 1 In [Consultation Paper 266](#) *Remaking ASIC class orders on managed investment schemes: Not for money* (CP 266) we consulted on proposals to remake our class orders that give relief to certain managed investment schemes from the managed investment, Australian financial services (AFS) licensing, anti-hawking and product disclosure provisions of the *Corporations Act 2001* (Corporations Act).
- 2 In CP 266, we sought feedback on our proposals to remake, without significant changes, the following class orders:
 - (a) Class Order [CO 02/210] *Interests in film and theatrical ventures*, which is due to expire on 1 April 2017;
 - (b) Class Order [CO 02/211] *Managed investment schemes: Interests not for money*, which is due to expire on 1 April 2017; and
 - (c) Class Order [CO 02/236] *Film investment schemes*, which is due to expire on 1 April 2017.
- 3 This report highlights the key issues that arose out of the submissions received on CP 266 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 266. We have limited this report to the key issues.
- 5 We received nine non-confidential and two confidential responses to CP 266, which were all from entities in the grain pool industry. We are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 266, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 266.

Responses to consultation

- 7 The main issues raised related to:
 - (a) whether relief under [CO 02/211] should continue to apply to grain pools; and
 - (b) whether additional conditions of relief should be included in [CO 02/211] specifically to regulate grain pool participants.

B Remaking ASIC class orders

Key points

This section outlines the key issues raised by respondents—and our responses to those issues.

[CO 02/210] and [CO 02/236]

8 No key issues were brought to our attention.

[CO 02/211] and its applicability to grain pools

- 9 For [CO 02/211], the main issues raised related to:
- (a) whether relief should continue to apply to grain pools; and
 - (b) whether additional conditions of relief should be included specifically to regulate grain pool participants.
- 10 Grain pooling is a marketing method available to Australian grain growers that allows them to combine their grain with other growers to create larger parcels more suitable for international markets.
- 11 There was general support for the proposal to continue the relief available under [CO 02/211] for grain pool participants. However, some respondents expressed concern that if the relief were to continue on substantively the same terms, grain pool participants who rely on the relief would be subject to insufficient regulatory supervision from ASIC.
- 12 Concerns were expressed that the current self-regulation by grain pool participants using Grain Trade Australia's *Australian Grain Industry Code of Practice Technical Guideline Document No. 4: Operating Standard for Grain Pool Providers* (Code of Practice) is insufficient to monitor grain pools and full regulatory oversight of grain pools by ASIC is required.
- 13 As the Code of Practice is not legally binding and therefore not enforceable, there is concern that it does not afford grain pool participants the same level of protection as other investors of financial products.
- 14 A particular concern that was raised regarding self-regulation by grain pool participants is the potential for discrepancies between the estimated pool return and the final pool return.

- 15 Some submissions opposing the remaking of [CO 02/211] for grain pool participants provided an alternative solution of including conditions in the relief specific to grain pool participants (e.g. making adherence to the Code of Practice mandatory).

ASIC's response

ASIC has made [ASIC Corporations \(Managed Investment Schemes: Interests Not For Money\) Instrument 2016/1107](#) to continue the relief under [CO 02/210], [CO 02/211] and [CO 02/236].

The fundamental policy principles that underpin the relief are unchanged and no substantive changes have been made to the parameters and requirements of the relief. Subject to some minor refinements, the substance of the proposals set out in CP 266 for interests-not-for-money schemes has been implemented in the new instrument.

For [CO 02/211], because the relief available is not specific to grain pool participants and also applies to other interests-not-for-money schemes, we consider it inappropriate to remove the relief.

On balance, we do not consider that the terms of the relief should build in requirements or safeguards specific to grain pool participants, such as the Code of Practice. Our view is that the concerns raised in the submissions would appear to be most effectively dealt with by the grain pool industry, such as by increased adherence to the Code of Practice and/or increasing protections and requirements under the Code of Practice, where appropriate. As a result, at this stage we do not consider that the policy principles underpinning our relief should be changed or made dependent on the Code of Practice.

We note that as with all our relief, reliance on the relief available under ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/1107 is optional. Grain pool participants that want full regulatory oversight by ASIC may apply to register the grain pool as a managed investment scheme: see [starting a managed investment scheme](#) on our website.

Grain pool participants that fall outside the parameters of the relief may apply for individual relief. We may grant relief from requirements under the Corporations Act, including the requirement that a managed investment scheme be registered under Ch 5C, on a case-by-case basis in certain circumstances: see [Regulatory Guide 51 Applications for relief](#) (RG 51).

Appendix: List of non-confidential respondents

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- Agfarm Pty Ltd
 - AgRisk Management Pty Ltd
 - Cargill Australia Limited
 - CBH Grain Pty Ltd
 - Grain Growers Limited
 - Grain Producers Australia Limited
 - Grain Producers SA Ltd
 - Grain Trade Australia Limited
 - Victorian Farmers Federation Grains Group
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