

EXPLANATORY STATEMENT for
ASIC Corporations (Real Estate Companies) Instrument 2015/1049
and
ASIC Corporations (Repeal) Instrument 2015/1050

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes:

- (a) *ASIC Corporations (Real Estate Companies) Instrument 2015/1049*
(the **principal instrument**); and
- (b) *ASIC Corporations (Repeal) Instrument 2015/1050*
(the **repeal instrument**).

The principal instrument is made under subsection 741(1) and subsection 926A(2) of the *Corporations Act 2001* (the **Act**). Subsection 741(1) of the **Act** provides that ASIC may exempt a person, or class of persons, from all or specified provisions of Chapter 6D of the Act, which deals with fundraising. Subsection 926A(2) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 of the Corporations Act (other than Divisions 4 and 8), which deals with the licensing of financial services providers. An exemption may apply unconditionally or subject to specified conditions.

The repeal instrument repeals ASIC Class Order [CO 00/213] and ASIC Class Order [CO 05/1243]. The repeal instrument is made under subsection 741(1) and paragraph 911A(2)(l) of the Act. Paragraph 911A(2)(l) provides that a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide if the provision of the service is covered by an exemption specified by ASIC in writing and published in the Gazette.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument, the power is to

be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal any such instrument.

1. Background

A real estate company is a company formed for the purpose of owning and managing land and buildings. Shares in the real estate company are held by persons who wish to have an exclusive right of occupation and use of a particular area within the land or building owned by the real estate company. A real estate company is less common than strata title and has historically been used where owners wish to exercise control over occupiers, or where conversion to strata title is not practicable.

The Act regulates interests in real estate companies because they involve ownership of shares in a company. Under section 707 of the Act, a sale offer of shares must be accompanied by disclosure to investors if:

- a) the person making the offer controls the body and the securities are not quoted;
- b) the offer of shares is made within 12 months after their issue without disclosure to investors and the purpose for the issue was on-sale; or
- c) the offer of shares is made within 12 months after being sold by the controller of the body without disclosure to investors, the shares are not quoted and the purpose for the issue was on-sale.

Therefore, vendors of shares in real estate companies may have to issue a prospectus or other disclosure document that complies with Chapter 6D of the Act.

Valuers are engaged to provide valuations of shares in real estate companies, particularly for the purposes of their sale or purchase or their use as security for a mortgage. Under subsection 911A(1) and section 766B of the Act, where a valuation report contains an opinion or is reasonably likely to influence:

- a) owners to sell their shares;
- b) potential owners to purchase shares; or
- c) banks or financial institutions to register a mortgage over the shares;

the person providing the report will be considered to be providing financial product advice and must hold an Australian financial services licence and comply with the obligations of a financial services licensee in Chapter 7 of the Act. Real estate agents or others who regularly market or sell shares in real estate companies may also need to hold an Australian financial services licence because they are dealing in or providing advice in relation to shares. Shares are a kind of financial product.

ASIC made ASIC Class Order [CO 00/213] *Real estate companies* and ASIC Class Order [CO 05/1243] *Licensing relief for valuers providing valuations of shares in real estate companies* in recognition that shares in real estate companies are commercially regarded as real estate interests and that if these shares are treated as such, rather than as a financial product, there will be adequate consumer protection. Class Orders [CO 00/213] and [CO 05/1243] ensured that owners of shares in real estate companies, real estate agents and valuers will not be subject to a regulatory burden that is unnecessary and disproportionate to the need for consumer protection.

Under the *Legislative Instruments Act 2003*, legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. To preserve its effect, a legislative instrument must be remade before its sunset date.

[CO 00/213] sunsets on 1 October 2016 and [CO 05/1243] sunsets on 1 April 2016. ASIC has reviewed the operation of these instruments and, as a result of that review, made:

- a) the principal instrument, which has the effect of continuing the relief underlying [CO 00/213] and [CO 05/1243]; and
- b) the repeal instrument, which repeals [CO 00/213] and [CO 05/1243] before their statutory sunset in 2016.

2. Purpose of the instruments

The purpose of the principal instrument is to ensure that:

- a) Vendors involved in secondary sales of shares in real estate companies;
- b) Real estate agents or others who regularly market or sell shares in real estate companies; and
- c) Valuers who provide valuations of shares in real estate companies

are not subject to inappropriate regulation and the unreasonable cost burden that would be imposed on these persons under the financial services regulatory regime.

In combining the previous relief provided under Class Orders [CO 00/213] and [CO 05/1243], the principal instrument will also ensure a consistent regulatory approach to the regulation of real estate companies.

The purpose of the repeal instrument is to discontinue the licensing and disclosure relief provided by [CO 00/213] and [CO 05/1243].

3. Operation of the instrument

The principal instrument exempts persons who sell shares in a real estate company from the requirement to comply with the disclosure requirements in section 707 of the Act where a number of conditions are met, including that:

- a) The sale is made by or on behalf of the vendor
- b) The draft contract for sale is publicly available
- c) The terms of the sale contract include certain provisions regarding the real estate company and the property.

The principal instrument also gives relief from the licensing requirements of the Act for:

- c) persons who provide general advice and dealing in relation to shares in a real estate company; and
- d) persons who provide general advice that is, or is incidental to, a valuation of shares in a real estate company.

This means that the licensing, conduct and disclosure obligations will not apply to those persons in those circumstances.

The repeal instrument repeals [CO 00/213] and [CO 05/1243].

4. Consultation

On 26 August 2015, ASIC released Consultation Paper 237 *Remaking ASIC class orders on real estate companies: [CO 00/213] and [CO 05/1243]* (CP 237) seeking feedback on our proposals to update our guidance for responsible entities of registered managed investment schemes in holding scheme property and other assets. These proposals would also be relevant for licensed custody providers, managed discretionary account operators, and investor directed portfolio service operators. The consultation period closed on 23 September 2015.

ASIC received 1 non-confidential written response to the proposals in CP 237 from the Australian Property Institute (API), which is the peak industry body for property professionals including valuers, property lawyers, property advisers and property managers. The submission from the API supported ASIC's proposals to remake and consolidate [CO 00/213] and [CO 05/1243] into the principal instrument.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Real Estate Companies) Instrument 2015/1049

and

ASIC Corporations (Repeal) Instrument 2015/1050

ASIC Corporations (Real Estate Companies) Instrument 2015/1049 and ASIC Corporations (Repeal) Instrument 2015/1050 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

ASIC Corporations (Real Estate Companies) Instrument 2015/1049 exempts:

- persons who sell shares in a real estate company from the requirement to issue a prospectus or other disclosure document that complies with Chapter 6D of the Corporations Act;
- persons who market or arrange the sale of shares in a real estate company from the requirement to hold an Australian financial services licence; and
- persons who provide valuations of shares in real estate companies from the requirement to hold an Australian financial services licence.

This relief is provided on the basis that shares in a real estate company are commercially regarded as real estate interests and that if they were treated as such, and not as financial products, there would be adequate consumer protection.

ASIC Corporations (Repeal) Instrument 2015/1050 repeals two legislative instruments that have been remade to preserve their effect beyond their sunset dates.

Human rights implications

These legislative instruments do not engage any of the applicable rights or freedoms.

Conclusion

These legislative instruments are compatible with human rights as they do not raise any human rights issues.