

ASIC Corporations (Property Rental Schemes) Instrument 2016/870

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investment Commission (**ASIC**) makes *ASIC Corporations (Property Rental Schemes) Instrument 2016/870* under subsections 601QA(1), 926A(2), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the **Act**)

Subsection 601QA(1) provides that ASIC may declare that Chapter 5C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 926A(2) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8).

Paragraph 992B(1) provides that ASIC may exempt persons or a class of persons, a financial product or a class of financial products from a provision of Pt 7.8 of the Act.

Subsection 1020F(1) provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or class of persons or financial products as if specified provisions were omitted modified or varied as specified in the declaration.

1. Background

This instrument remakes ASIC Class Order [CO 02/182] *Real Property Rental Schemes* which is due to sunset on 1 October 2017 under the Legislation Act 2003.

The relief in Class Order [CO 02/182] gives certainty to a person who is exercising the rights of an owner and who is a licensed real estate agent under state or territory law that they are not required to comply with requirements in the Corporations Act 2001 (Corporations Act) relating to the registration of a managed investment scheme, the holding of an Australian financial services (AFS) licence, or financial product disclosure.

Some investors engage an agent to let out their strata unit for residential or commercial purposes. In these circumstances, certain kinds of arrangements involved a landowner giving another person the power to lease the land and exercise the rights of the owner under a lease on a day to-day basis. It was considered that these arrangements could be considered a managed investment scheme.

Where the strata unit is not part of a serviced strata arrangement in a tourist accommodation facility, ASIC considered that the arrangement should not be regulated as a managed investment scheme.

Investors in a serviced strata arrangement rely on the skill, care and diligence of an operator. They rely more on their operator than investors in an ordinary residential or commercial letting arrangement.

The relief was provided in the context that the difference between the commercial letting arrangements and serviced strata schemes related to the level of reliance of investors on the

services provided by the serviced strata scheme operator for a return on their investment. This is not the case, to the same extent with a commercial letting arrangement.

2. Purpose of the instrument

The purpose of the *ASIC Corporations (Property Rental Schemes) Instrument 2016/870* is to:

- (a) Continue the effect of ASIC Class Order [CO 02/182]
- (b) Update the name of the legislative instrument;
- (c) Reflect current drafting practices and update the format of the current document;
- (d) Simplify the drafting to give greater clarity.

ASIC has continued relief regarding commercial letting arrangements where the ordinary business of real estate agents in leasing or managing property does not generally or necessarily involve a managed investment scheme where, for example, the owner of the property has the day to day control of the property through being able to give directions to their agent. The relief is given for the avoidance of doubt and to provide legal certainty.

3. Operation of the Instrument

Section 4 provides the definition of a property rental scheme as being a managed investment scheme, which involves owners of interests in real property making their interests available for commercial or residential letting or rental purposes (including day to day management of any lease arrangement), who have not acquired their interests in real property jointly as a result of participating in the scheme, and which does not involve a serviced apartment, hotel, motel or resort complex.

Section 5 exempts a real estate agent who operates a property rental scheme from the requirement that it needs to comply with subsection 601ED(5) of the Act and register the scheme.

Subsection 601ED(5) of the Act provides that a person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under s. 601ED unless the scheme is so registered.

Section 6 provides relief to a person who provides a financial service in relation to a property rental scheme as defined in the instrument, from complying with subsection 911A(1) of the Act so that they do not have to obtain a financial services licence in relation to that service.

Subsection 911A(1) of the Act provides the circumstances in which a person must hold a financial services licence

Section 6 also refers to *ASIC Corporations (Effect of Licensing exemptions) Instrument 2015/1115*, which provides relief from subsection 911B(1) of the Act to a person who provides financial services on behalf of a person who does not need an Australian financial services licence because of an exemption under section 926A of the Act.

Section 7 provides that the interest in the property rental scheme as defined in the Instrument is exempt from the prohibition on hawking of certain financial products and the prohibition on hawking managed investment products.

Section 8 provides that an interest in a property rental scheme is exempt from the financial product disclosure requirements contained in Divisions 2 to 4, of Part 7.9 of the Act.

Part 7.9 of the Act sets out the provisions in relation to financial product disclosure requirements, and related disclosure provisions for all financial products.

The note to Section 8, ASIC makes it clear that the relief provided in sections 5 to 8 does not mean to imply that the ordinary business of real estate agents in leasing or managing property generally or necessarily involves a managed investment scheme. The relief is given for the avoidance of doubt and to provide legal certainty.

The Instrument refers to the conditional relief available in relation to arrangements involving a serviced apartment, hotel, motel or resort complex in *ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/869*.

3. Consultation

ASIC consulted with industry stakeholders on its proposal to remake ASIC Class Order [CO 02/182] in Consultation Paper 250 *Remaking ASIC class orders on property, strata and management rights schemes* published on 8 February 2016.

The feedback received was broadly supportive of the proposals in the Consultation Paper.

Statement of Compatibility with Human Rights

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

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The instrument is 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 of the legislative instrument

ASIC Corporations (Property Rental Scheme) Instrument 2016/870 (the **Instrument**) continues the effect of ASIC Class Order [CO 02/182] by providing relief in relation to property rental schemes that do not involve a serviced apartment, hotel, motel or resort complex. Relief is provided (for the avoidance of doubt and to provide legal certainty) from various requirements of the *Corporations Act 2001* relating to the registration of a managed investment scheme, the holding of an Australian financial services licence and financial product disclosure.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.