

EXPLANATORY STATEMENT for
ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company)
Instrument 2017/1063

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (8 Daphne Street Botany Limited – Real Estate Company) Instrument 2017/1063* under subsections 741(1) and 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 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.

1. Background

8 Daphne Street Botany Ltd ACN 622 833 863 (the **Company**) is a company which wishes to offer company title in real estate through offers of its shares to members of the public. The Company applied to ASIC for disclosure and financial services licensing relief equivalent to the relief in *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* as if the definition of 'real estate company' was modified to apply to it.

The Company could not fit within the definition of 'real estate company' in *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* as the shareholders would not have exclusive occupation of the real estate in which they have company title. This is because the Company operates as a general boarding house in accordance with the *Boarding Houses Act 2012 (NSW)* and for the purpose of the NSW Government's Low Income Housing Initiative. As a result the real estate can only be leased to eligible occupants and cannot be occupied by the shareholders of the Company.

2. Purpose of the instrument

The purpose of *ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063* is to incorporate the exemptions and conditions in *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* to ensure that:

- (a) vendors involved in secondary sales of shares in the Company;
- (b) real estate agents who market and sell shares in the Company; and
- (c) valuers who provide valuations of shares in the Company,

are not subject to an onerous regulatory burden that would be imposed on these persons under the financial services regulatory regime, while maintaining appropriate consumer protections that would otherwise be provided for the sale of real estate interests.

The policy underlying the instrument is that the Company should have the benefit of the same relief as other real estate companies notwithstanding that it technically does not meet the definition of 'real estate company' in *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* due to the requirements of its operation as a general boarding house.

A legislative instrument is considered necessary because the financial services licensing relief relates to two classes of persons that may not be associated with the Company, being real estate agents and valuers.

3. Operation of the instrument

ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063 operates to make the exemptions, and impose the conditions, made and imposed by *ASIC Corporations (Real Estate Companies) Instrument 2015/1049*. This exempts persons who sell shares in the Company from the requirement to provide a disclosure document under Chapter 6D of the Act where a number of conditions are met, including that:

- (a) the offer to sell the shares is made by or on behalf of the vendor;
- (b) the draft contract for sale is publicly available at the time of the offer;
- (c) the terms of the sale contract include certain provisions regarding the Company and the property it owns.

The instrument also gives relief from the financial services licensing provisions of the Act for:

- (a) persons who provide general advice and dealing in relation to shares in the Company; and
- (b) persons who provide general advice which relates to a valuation of shares in the Company.

In addition to the conditions imposed by *ASIC Corporations (Real Estate Companies) Instrument 2015/1049*, *ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063* requires that the Company fall within existing exemptions under the Act from the requirement to register a managed investment scheme.

4. Documents incorporated by reference

ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063 imposes exemptions and conditions made by *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* which may be obtained from the Federal Register of Legislation.

5. Consultation

ASIC has not consulted publicly on this instrument because ASIC believes this instrument is minor and machinery, as it applies *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* to the Company with minor and technical variations specific to the Company. ASIC consulted publicly on *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* in August 2015 in Consultation Paper 237 *Remaking ASIC class orders on real estate companies* and received 1 written response supporting the re-making of that relief.

Given the nature of the relief, ASIC believes no Regulation Impact Statement is required.

Statement of Compatibility with Human Rights

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

ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063

ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063 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

ASIC Corporations (8 Daphne Street Botany Ltd – Real Estate Company) Instrument 2017/1063 exempts:

- persons who sell shares in 8 Daphne Street Botany Ltd 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 8 Daphne Street Botany Ltd from the requirement to hold an Australian financial services licence; and
- persons who provide valuations of shares in 8 Daphne Street Botany Ltd from the requirement to hold an Australian financial services licence.

The relief is provided on the basis that shares in real estate companies such as 8 Daphne Street Botany Ltd 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.

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.