



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 67

Real estate companies

Related instruments [CO 00/213] varied by [CO 02/266], [CO 05/1243]

Chapter 7 — Financial services and markets

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From 5 July 2007, this document may be referred to as Regulatory Guide 67 (RG 67) or Policy Statement 67 (PS 67). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 67.1) or their policy statement number (e.g. PS 67.1).

What this guide is about

RG 67.1 This guide sets out our policy on relief from certain provisions of the *Corporations Act 2001* (Corporations Act) for the sale and valuation of shares in a real estate company.

RG 67.2 It gives guidance on:

A our general policy on relief (including what is a ‘real estate company’ for the purposes of this guide)

see RG 67.3–RG 67.8

B what relief is available from the requirements in Ch 6D for an offer to sell shares in a real estate company by or on behalf of the owner of the shares (the vendor) (fundraising relief)

see RG 67.9–RG 67.26

- C** what relief is available from the requirement to hold an Australian financial services (AFS) licence (licensing relief) for:
- (a) licensed real estate agents when offering shares in a real estate company for sale; and
 - (b) persons providing valuations of shares in a real estate company (valuers).

see RG 67.27–RG 67.46

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A Our general policy on relief

Our policy

RG 67.3 We have given class order relief from:

- (a) the disclosure and licensing requirements of the Corporations Act for persons who are involved in selling shares in a real estate company (Class Order [CO 00/213]); and
- (b) the licensing requirements of the Corporations Act for persons who are providing valuations of shares in a real estate company (Class Order [CO 05/1243]).

Note: To be eligible for relief, you may need to meet certain conditions set out in the class orders: see Section B 'Fundraising relief' and Section C 'Licensing relief'.

Underlying principles

RG 67.4 Real estate companies were developed to enable their shareholders to enjoy the occupation or use of particular premises and are generally associated with the ownership of real estate.

RG 67.5 Offers for purchase or invitations to buy shares in real estate companies, transfers of shares in such companies and valuations of the shares are generally incidental to the transfer of the right to occupy real estate, and should not be subject to full regulation under the Corporations Act.

Explanation

RG 67.6 In this guide, a 'real estate company' means a company that fits into one of the categories in Table 1. Real estate companies have become less common with strata title and methods of converting real estate company title to strata title. However, they are still used where owners wish to exercise control over occupiers or where conversion to strata title is not practicable.

RG 67.7 Given the existence of real estate companies, secondary sales for some properties will involve an offer for purchase or invitation to buy shares in a real estate company followed by a transfer of shares in that company. In many cases, persons involved in these sales will provide financial services, such as dealing and giving financial product advice.

Note: For example, a bank or other financial institution may issue a share valuation (i.e. financial product advice) when shares are used as security on a mortgage for a company title property.

RG 67.8 Without relief, vendors involved in secondary sales of shares in these companies may need to meet the full disclosure requirements of the Corporations Act that apply to securities. Agents involved in arranging for and advising on the purchase of the shares and valuers engaged to value the shares would need to hold an AFS licence.

Table 1: Categories of 'real estate company'

Company title	<p>A company that meets <i>all</i> of the following requirements:</p> <ul style="list-style-type: none"> (a) The company is not listed on a prescribed financial market as defined in reg 7.1.01. (b) The company is either the proprietor or the lessee under a Crown lease granted for a period of not less than 99 years of land on which a building (or buildings) divided into individual areas is erected. (c) The company's shareholders, by holding their shares, have rights to exclusive occupancy of a particular area or areas within a building and the right to the use of any common areas. (d) Either: <ul style="list-style-type: none"> (i) the company's constitution prohibits the payment of a dividend to its members other than on the winding up of the company; or (ii) the company operates principally for the purposes of: <ul style="list-style-type: none"> (A) facilitating and enforcing the rights of shareholders in relation to the exclusive occupation of those areas; and (B) maintaining any common areas. <p>Note: Many older residential apartments in Sydney and Melbourne are company title buildings.</p>
Stratum title	<p>A company associated with stratum title in Victoria that is a service company as defined in the <i>Transfer of Land Act 1958</i> (Vic) for a building subdivision as defined in that Act.</p> <p>Note: Under stratum title (or stratum estate), a share or shares in a service company are associated with a fee simple interest in land and cannot be transferred separately. The service company owns the property and performs services such as external repairs.</p>
Lake title	<p>A company of the type associated with lake title in Queensland that is a company described in s5.10(4) of the repealed <i>Local Government (Planning and Environment) Act 1990</i> (Qld).</p> <p>Note: In a lake property development, a company owns common property. The owners of associated residential properties hold the shares in the company.</p>
Court title	<p>A company that owns common area access ways of the type associated with court property developments in Queensland. Court property developments provide for the acquisition of fee simple estates in lots on which dwellings are erected together with a shareholding in the company. The lots on which the dwellings are built have easement rights over the common area lot owned by the company.</p>

B Fundraising relief

Our policy

Disclosure

RG 67.9 If you offer for sale shares in a real estate company, you will be exempt from the disclosure requirements in s707 of the Corporations Act for this transaction if you meet the conditions in [CO 00/213]: see Table 2.

RG 67.10 This relief applies to secondary sales of shares in real estate companies irrespective of the use of the premises. The relief does not apply to:

- (a) companies engaging in business activities such as property development or management. It is our policy not to provide relief to property development or management companies. (In general, such companies will not fall within the definition of real estate companies and, therefore, will not be covered by the class order);
- (b) the primary issue of shares; or
- (c) the prohibition against engaging in conduct that is misleading or deceptive (s1041H).

Table 2: Summary of conditions in [CO 00/213] relating to disclosure

Property and occupancy

The contract must set out:

- (a) particulars of the areas to which the shares relate, title particulars of the land to which the shares relate and any interests affecting that land; and
- (b) all occupancy and any usage rights to the areas to which the shares relate.

Title

The contract must specify that on completion:

- (a) the vendor will be, or will be entitled to be, the registered holder of the shares; and
- (b) the title of the real estate company to the land will be unencumbered, except for any matter affecting the title disclosed in the contract.

Requisitions

The contract must entitle the purchaser to make requisitions on the vendor's title to the shares and the real estate company's title to the land other than as clearly accepted by the purchaser in the contract.

Note: For full details of the conditions, see [CO 00/213].

Warranty

The contract must include a warranty that as far as the vendor is aware after making reasonable enquiries of the directors and except as disclosed in the contract:

- (a) the real estate company has no actual or contingent liabilities (except for normal operating expenses for its current financial year); and
- (b) there are no defects (whether latent or patent) in any common areas requiring repair or replacement (other than ordinary wear and tear);
- (c) the real estate company is not in liquidation, subject to external administration or being wound up; and
- (d) there are no court proceedings pending against the real estate company that might prejudice or detrimentally affect it or its assets.

Annexures

The contract must include current copies of:

- (a) the title documents for the land to which the shares relate; and
- (b) the constitution and any other charter documents of the real estate company.

Unsolicited meetings and telephone calls

RG 67.11 We have not given any relief from the hawking prohibition in s736 for offers of shares in real estate companies.

Underlying principles

RG 67.12 Interests in real estate companies are regulated under the Corporations Act because they involve ownership of shares in a company. However, such interests are commercially regarded as real estate interests. State or territory conveyancing laws generally regulate real estate transactions between vendors and purchasers.

RG 67.13 We consider that there is adequate consumer protection if these interests are treated like real estate interests in terms of contractual disclosure, rather than as shares.

Explanations

Disclosure

What are the requirements under the Corporations Act?

RG 67.14 The Corporations Act regulates interests in real estate companies. This is because they involve ownership of shares in a company. Under s707, the sale of shares must be disclosed (unless an exclusion in s708 applies), if:

- (a) the person making the offer controls the body and the securities are not quoted (s707(2));
- (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 (s707(3)); and
- (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 (s707(5)).

RG 67.15 These requirements apply to both the primary issue and secondary sales of shares. *The Corporate Law Economic Reform Program Act 1999* removed the previous requirements that dealt separately with secondary trading in unquoted shares.

RG 67.16 Without relief from s707, vendors of shares in real estate companies may have to issue a prospectus or other disclosure document that complies with Ch 6D.

Real estate laws

RG 67.17 Real estate conveyancing laws, which vary depending on the state or territory, regulate real estate transactions between vendors and purchasers.

RG 67.18 However, in some cases, only the Corporations Act imposes disclosure requirements for transactions relating to shares in real estate companies. This is because state conveyancing laws relate to dealings in land, and real estate company transactions do not in general confer an interest in the land owned by the company: see *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

Note: For example, New South Wales conveyancing laws do not apply to sales of company title units, while sales of shares associated with stratum title premises in Victoria are regulated by that state's conveyancing laws.

Why are we giving relief?

RG 67.19 We consider that disclosure for offers of shares in real estate companies should be regulated like offers of real estate. It would be too onerous to apply the disclosure requirements under the Corporations Act.

RG 67.20 Shares in real estate companies are marketed as real estate. Purchasers buy shares in a real estate company that may have an occupancy right to a particular area conferred by the company's constitution (or by a licence or a lease), or usage rights to any common areas. Like a title to real estate, each bundle of shares to occupy a particular area is unique.

RG 67.21 This is the case regardless of whether the premises are used for residential or commercial purposes. However, it is not the case:

- (a) if the principal purpose of adopting the company structure is not facilitating possession of a particular area and the use and maintenance of any common areas by the owner of the shares (e.g. if the company manages or leases premises on behalf of the owners or provides business services to the owner); or
- (b) for interests in a managed investment scheme.

Why are we giving conditional relief?

RG 67.22 In many cases, granting an unconditional exemption for offers of shares in real estate companies would mean that no disclosure requirements apply to those transactions. The conditions of our relief

ensure that the vendor includes certain information in the relevant contract for sale, so that the purchaser has contractual remedies.

RG 67.23 The conditions of relief also take into account state or territory conveyancing laws that give a purchaser various rights to ensure the purchaser obtains clear title to the property. If clear title cannot be provided, the purchaser may rescind the contract. A purchaser of shares in a real estate company needs to obtain clear title to the shares and also needs to ensure that the real estate company has clear title to the land on which the building is located. The absence of either may effectively prevent a purchaser from being able to occupy the land as they expect.

Unsolicited meetings and telephone calls (s736)

RG 67.24 Under s736, a person may not offer securities for sale in the course of, or because of, an unsolicited meeting with or a telephone call to another person.

RG 67.25 This prohibition applies to offers of shares in real estate companies. It does not apply:

- (a) to offers made to certain sophisticated or professional investors;
- (b) to existing clients of a licensed securities dealer; or
- (c) where the shares are listed and the offer is made by a licensed securities dealer (s736(2)).

RG 67.26 We have not given relief from this prohibition. It does not prevent ordinary marketing of real estate interests and we think the prevention of pressure selling of shares in real estate companies provides an important protection for retail clients.

Note: For more guidance, see Regulatory Guide 38 *The hawking prohibitions* (RG 38).

C Licensing relief

Our policy

Real estate agents

RG 67.27 If you are a licensed real estate agent providing financial services (for example, dealing or giving financial product advice) for an offer of shares in a real estate company, you will be exempt from the requirement to hold an AFS licence for these services if you meet the conditions in [CO 00/213]: see Table 3.

RG 67.28 Our relief applies only to services you provide as a licensed real estate agent for offers of shares in real estate companies. If you carry on any other type of financial service, you may need to hold an AFS licence. This applies, for example, to time-shares, rental pools and property trusts or syndicates.

Table 3: Summary of conditions in [CO 00/213] relating to licensing

Disclosure in writing

You must advise the client in writing that:

- (a) you do not hold an AFS licence; and
- (b) the relationship between you and the client will be governed by the real estate licensing requirements in the relevant state or territory.

Contract

The contract for the sale of the shares must comply with the conditions in **Table 2**.

Note: For full details of the conditions, see [CO 00/213].

Valuers

RG 67.29 If you are a person providing a valuation of shares in a real estate company, you may be exempt from the requirement to hold an AFS licence to provide financial product advice when valuing the shares: see [CO 05/1243].

RG 67.30 In general, to rely on our relief, the real estate company must *not*:

- (a) be on the official list of a financial market; or
- (b) operate a time-sharing scheme.

Note: For full details of the relief, see [CO 05/1243].

Underlying principles

RG 67.31 Shares in real estate companies are usually marketed in the same way as real estate, and sold through real estate agents who are licensed under state or territory law.

RG 67.32 Valuations of shares in real estate companies are primarily valuations of the real estate that ownership of the shares enables the holder to use.

RG 67.33 We consider there is insufficient regulatory benefit to justify requiring licensed real estate agents or valuers who provide financial services for the sale or valuation of shares in real estate companies to meet the initial and ongoing costs associated with holding an AFS licence.

Explanations

What are the requirements under the Corporations Act?

Carrying on a financial services business

RG 67.34 Under the Corporations Act, a person carrying on a financial services business must hold an AFS licence: s911A(1). This requirement is intended to ensure that unsuitable persons do not offer their services in the financial services industry and that a financial services business is conducted in an honest, efficient and fair manner.

RG 67.35 Generally, owners who engage in occasional real estate company share transactions are not carrying on a financial services business, and would not need to hold an AFS licence.

RG 67.36 Real estate agents or others who regularly sell or provide valuations of shares in real estate companies may be carrying on a financial services business, and would need to hold an AFS licence unless an exemption applies.

Marketing and sale of real estate interests

RG 67.37 Real estate agents or others who regularly market or sell shares in real estate companies may need to hold an AFS licence because they are dealing in or providing advice in relation to shares and shares are a financial product.

Valuation of shares in real estate companies

RG 67.38 Valuers of shares in real estate companies may also need to hold an AFS licence because they are providing advice in relation to shares and shares are a financial product.

Real estate laws

RG 67.39 Real estate agents are licensed under state or territory law. They must meet requirements relating to their qualifications and experience and how they conduct their business, including proper conduct in operating trust accounts and fidelity funds.

RG 67.40 In some cases, these requirements specifically apply to conduct for company title properties. In other cases, if a person is a licensed real estate agent, these requirements may incidentally apply (even though the law does not require a person acting as agent for the sale of company title property to be a licensed real estate agent).

Why are we giving relief?

Real estate agents

RG 67.41 Residential company title properties are usually marketed and sold like other residential properties by the vendor offering the property (i.e. the shares) privately or appointing a real estate agent.

RG 67.42 Shares in companies associated with stratum, lake and court title properties are also attached to a real estate interest and are marketed and sold only with the associated real estate.

RG 67.43 Regardless of how the property is used, vendors and purchasers usually expect to deal with a licensed real estate agent in the sale of the shares, rather than an AFS licensee.

Valuers

RG 67.44 We consider that valuing shares in real estate companies is similar to valuing the real estate to which the shares are attached. This is because:

- (a) Shares attached to a real estate interest can only be sold with the associated real estate.
- (b) Valuers are engaged to value those shares in the same way as for commercial or residential property.
- (c) The real property underlying the shares is usually the primary determinant of valuation.
- (d) In many cases, the valuations are provided to banks or other financial institutions and not to third parties.
- (e) Persons arranging for valuations of shares in real estate companies would not expect the valuer to have an AFS licence.

Key terms

RG 67.45 In this guide, the following terms have the following meanings:

AFS licence An Australian financial services licence issued under s913B

ASIC The Australian Securities and Investments Commission

[CO 00/241] (for example) An ASIC class order (in this example numbered 00/241)

Corporations Act The *Corporations Act 2001* and includes regulations made for the purposes of the Act

dealing The meaning set out in s766C

financial product The meaning set out in s763A

financial product advice The meaning set out in s766B

financial service The meaning set out in s766A

real estate company A company as described in Table 1

regulation 7.1.01 (for example) A regulation of the *Corporations Regulations 2001* (in this example numbered 7.1.01)

s912A (for example) A section of the *Corporations Act* (in this example numbered 912A)

Related information

RG 67.46

Headnotes

Secondary trading of shares in real estate companies, company title, stratum title, stratum estate, lake title, court title, disclosure, conditions of relief, AFS licensing relief, real estate agents, valuers

Class orders

[CO 00/213], [CO 05/1243]

Regulatory guides

RG 38 *The hawking prohibitions*

Legislation

Corporations Act Ch 6D, s707, 708, 911A(2), *Transfer of Land Act 1958* (Vic), *Local Government (Planning and Environment) Act 1990* (Qld) s5.10(4)

Cases

Macaura v Northern Assurance Co Ltd [1925] AC 619