



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 67

Real estate companies

November 2015

About this guide

This guide is for vendors, real estate agents and valuers.

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

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.

Document history

This guide was issued in November 2015 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 67, issued October 1993, reissued December 1994, July 1996, December 2006, rebadged as a regulatory guide 7 July 2007

Disclaimer

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

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

A real estate company is used for the purpose of owning and managing land and buildings with common areas and is considered an alternative to strata title.

We have provided relief from certain provisions of the *Corporations Act 2001* (Cwlth) (Corporations Act) for the sale and valuation of shares in a real estate company.

Our relief recognises that shares in real estate companies are commercially regarded as real estate interests and there is adequate consumer protection if these interests are treated like real estate interests.

Our approach to real estate companies

- RG 67.1 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 67.2 The Corporations Act regulates interests in real estate companies. This is because they involve ownership of shares in a company. Two main requirements apply to real estate companies:
- (a) The offer for sale of shares must be disclosed to investors in certain circumstances (s707 of the Corporations Act). 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.
 - (b) A person carrying on a financial services business must hold an Australian financial services (AFS) licence (s911A(1)). 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.
- RG 67.3 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.

Our general policy on relief for real estate companies

- RG 67.4 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 67.5 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 67.6 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.
- RG 67.7 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.
- RG 67.8 We have given relief (in ASIC Corporations (Real Estate Companies) Instrument 2015/1049) from:
- (a) the disclosure and licensing requirements of the Corporations Act for persons who are involved in selling shares in a real estate company; and
 - (b) the licensing requirements of the Corporations Act for persons who are providing valuations of shares in a real estate company.

Note: To be eligible for relief, you may need to meet certain conditions set out in the instrument. See Section C for the conditions for fundraising relief and Section D for the conditions for licensing relief.

Fundraising relief

- RG 67.9 We consider that disclosure for offers of shares in real estate companies should be regulated like offers of real estate, and have provided conditional relief from the disclosure requirements of s707 on this basis: see Section C.

Licensing relief

- RG 67.10 We have provided relief, in certain circumstances, from the requirement to hold an AFS licence for real estate agents involved in arranging for and advising on the sale of the shares and valuers engaged to value the shares: see Section D.

B Our approach to real estate companies

Key points

There are a number of different categories of real estate company.

Shares in real estate companies are commercially regarded as real estate interests.

State or territory conveyancing laws generally regulate real estate transactions between vendors and purchasers.

- RG 67.11 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 since the development of 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 67.12 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 67.13 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.
- RG 67.14 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 general advice. 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.

Table 1: Categories of ‘real estate company’

Company title	<p>A company:</p> <ul style="list-style-type: none"> • that is not listed on a prescribed financial market as defined in reg 7.1.01 of the Corporations Regulations 2001; • that 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; and • whose 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. <p>The company must also either:</p> <ul style="list-style-type: none"> • have a constitution that prohibits the payment of a dividend to its members other than on the winding up of the company; or • operate principally for the purposes of: <ul style="list-style-type: none"> – facilitating and enforcing the rights of shareholders in relation to the exclusive occupation of their particular areas; and – maintaining any common areas. <p>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>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>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>

C Fundraising relief

Key points

In the absence of a disclosure document, the on-sale provisions in s707 may apply to the offer for sale of shares in a real estate company.

These anti-avoidance provisions may not be warranted in relation to a real estate company, because traditionally it is the underlying property rights attaching to the shares in a real estate company that have been the sole focus of the market.

We consider that disclosure for offers of shares in real estate companies should be regulated like offers of real estate and have provided conditional relief from the disclosure requirements of s707 on this basis.

Disclosure

Disclosure requirements under the Corporations Act

RG 67.15 The Corporations Act regulates interests in real estate companies. This is because they involve ownership of shares in a company. Under s707, the offer for sale of shares must be disclosed to investors (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)); 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 (s707(5)).

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.

Relief from the disclosure requirements

RG 67.17 If you offer for sale shares in a real estate company, you will be exempt from the disclosure requirements in s707 for this transaction if you meet the conditions in ASIC Corporations (Real Estate Companies) Instrument 2015/1049: see Table 2.

- RG 67.18 This relief applies to secondary sales of shares in real estate companies, regardless 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 relief);
 - (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 the relief relating to disclosure

Property and occupancy	<p>The contract must set out:</p> <ul style="list-style-type: none"> • particulars of the areas to which the shares relate, title particulars of the property to which the shares relate and any interests affecting that property; and • all occupancy and any usage rights to the areas to which the shares relate.
Title	<p>The contract must specify that on completion:</p> <ul style="list-style-type: none"> • the vendor will be, or will be entitled to be, the registered holder of the shares; and • 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	<p>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 property other than as clearly accepted by the purchaser in the contract.</p>
Warranty	<p>The contract must include a warranty that, as far as the vendor is aware after making reasonable inquiries of the directors and except as disclosed in the contract:</p> <ul style="list-style-type: none"> • the real estate company has no actual or contingent liabilities (except for normal operating expenses for its current financial year); • there are no defects (whether 'latent' or 'patent') in any common areas requiring repair or replacement (other than ordinary wear and tear); • the real estate company is not subject to external administration or in the process of being wound up; and • there are no court proceedings pending against the real estate company that might prejudice or detrimentally affect it or its assets.
Annexures	<p>The contract must include current copies of:</p> <ul style="list-style-type: none"> • the title documents for the property to which the shares relate; and • the constitution and any other charter documents of the real estate company.

Note: For full details of the conditions, see ASIC Corporations (Real Estate Companies) Instrument 2015/1049.

Why we are giving relief

- RG 67.19 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 and marketed as real estate interests.
- RG 67.20 Real estate conveyancing laws, which vary depending on the state or territory, regulate real estate transactions between vendors and purchasers. However, in some cases, only the Corporations Act imposes disclosure requirements for transactions relating to shares in real estate companies.
- RG 67.21 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. 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.
- RG 67.22 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 and 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.

Why we are giving conditional relief

- RG 67.23 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 67.24 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 67.25 We have not given any relief from the hawking prohibition in s736 for offers of shares in real estate companies. Under s736, a person may not offer securities for sale in the course of, or because of, an unsolicited meeting with or telephone call to another person.

RG 67.26 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 67.27 We consider 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).

RG 67.28 We do not consider that the prohibition would prevent ordinary marketing of shares in real estate companies as real estate interests, provided the marketing does not involve an unsolicited meeting with or a telephone call to another person.

Note: Examples of ordinary marketing of real estate interests include advertising in newspapers and online.

D Licensing relief

Key points

The Corporations Act requires a person carrying on a financial services business to hold an AFS licence.

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.

We have provided relief, in certain circumstances, from the requirement to hold an AFS licence for real estate agents involved in arranging for and advising on the sale of the shares and valuers engaged to value the shares.

Real estate agents

Licensing requirements under the Corporations Act

- RG 67.29 Under s911A(1), a person carrying on a financial services business must hold an AFS licence. This requirement is intended to control who can operate within the financial services industry and requires those who are licensed to behave with honesty, integrity, fairness and competence.
- RG 67.30 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 67.31 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.

Relief from the licensing requirements

- RG 67.32 If you are a licensed real estate agent providing financial services (e.g. dealing or giving general 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 ASIC Corporations (Real Estate Companies) Instrument 2015/1049: see Table 3.
- RG 67.33 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-sharing schemes, rental pools and property trusts or syndicates.

Table 3: Summary of conditions in our relief relating to licensing

Disclosure in writing	You must advise the client in writing that: <ul style="list-style-type: none"> • you do not hold an AFS licence; and • the relationship between the 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 ASIC Corporations (Real Estate Companies) Instrument 2015/1049.

Why we are giving relief

- RG 67.34 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 67.35 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 67.36 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.
- RG 67.37 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 67.38 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).

Valuers

Licensing requirements under the Corporations Act

- RG 67.39 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.

Relief from the licensing requirements

RG 67.40 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 general advice when valuing the shares: see ASIC Corporations (Real Estate Companies) Instrument 2015/1049.

RG 67.41 In general, to rely on our relief, the real estate company being valued 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 ASIC Corporations (Real Estate Companies) Instrument 2015/1049.

Why we are giving relief

RG 67.42 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; and
- (e) persons arranging for valuations of shares in real estate companies would not expect the valuer to have an AFS licence.

Key terms

Term	Meaning in this document
AFS licence	<p>An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services</p> <p>Note: This is a definition contains in s761A.</p>
AFS licensee	<p>A person who holds an AFS licence under s913B of the Corporations Act</p> <p>Note: This is a definition contained in s761A.</p>
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i> (Cwlth), including regulations made for the purposes of that Act
dealing	Has the meaning set out in s766C
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
financial product advice	<p>A recommendation or a statement of opinion, or a report of either of these things, that:</p> <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or • could reasonably be regarded as being intended to have such an influence. <p>This does not include anything in an exempt document</p> <p>Note: This is the definition contained in s766B of the Corporations Act.</p>
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
general advice	<p>Financial product advice that is not personal advice</p> <p>Note: This is a definition contained in s766B(4) of the Corporations Act.</p>

Term	Meaning in this document
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> • the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or • a reasonable person might expect the person giving the advice to have considered one or more of these matters <p>Note: This is a definition contained in s766B(3) of the Corporations Act.</p>
real estate agent	A person who holds a real estate licence obtained from an Australian state or territory licensing authority.
real estate company	A company that meets the definition of real estate company in ASIC Corporations (Real Estate Companies) Instrument 2015/1049
real estate interest	A share in a real estate company
reg 7.1.01 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.1.01)
s707 (for example)	A section of the Corporations Act (in this example numbered 707)
valuer	A person who undertakes the business of providing valuations of shares in real estate companies
vendor	A person who owns shares in a real estate company and proposes to sell the shares

Related information

Headnotes

AFS licensing relief, company title, conditions of relief, court title, disclosure, lake title, real estate agents, real estate interests, real estate companies, secondary sales, stratum title, stratum estate, valuers, vendors

Legislative instruments

ASIC Corporations (Real Estate Companies) Instrument 2015/1049

Regulatory guides

RG 38 *The hawking prohibitions*

Legislation

Corporations Act, Ch 6D, s707, 708, 736, 911A(1), 1041H

Local Government (Planning and Environment) Act 1990 (Qld), s5.10(4)

Transfer of Land Act 1958 (Vic)

Cases

Macaura v Northern Assurance Co Ltd [1925] AC 619