



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 77

Property trusts and property syndicates

Chapter 7 — Securities

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From 5 July 2007, this document may be referred to as Regulatory Guide 77 (RG 77) or Policy Statement 77 (PS 77). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 77.1) or their policy statement number (e.g. PS 77.1).

Editor's note: See RG 136.30–RG 136.66 for information about how this guide applies to managed investment schemes.

Headnotes

Relief for indirect property trusts, unlisted property trusts and incidental property trusts; redeemable listed property trusts; listed property trusts; relief for fixed term property trusts and syndicates; restructuring as fixed term property trust — inadequate liquidity; s1069(3); reg 7.3.02A.

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Purpose

RG 77.1 In this guide, the ASC sets out its policy on relief from the Corporations Law (Law) for property trusts and fixed term property syndicates. It also includes the ASC's policy on indirect property trusts. It takes into account changes in the Law, its regulations (reg) and other ASC policies that have been introduced since Superseded Policy Statement 16 [SPS 16] was adopted in February 1992.

RG 77.2 This guide replaced [SPS 16]. It should be read in conjunction with Superseded Policy Statement 55 [SPS 55].

RG 77.3 The principal purpose of this guide is to explain the ASC's policy in relation to the exercise of its power under s1069(3) of the Law where it differs from [SPS 55]. The basis on which the ASC considers applications for relief under s1069(3) as set out in [SPS 55] applies (see para 15). The ASC will adopt the same approach in exercising its other discretionary powers dealt with in this policy. Pro

Forma instruments relating to the relief set out in this policy will be published shortly.

RG 77.4 The ASC will not revoke or vary any previous instruments to make them conform to this policy. However, if the ASC has given standard relief under [SPS 16] it will give the equivalent relief available under this policy on application.

Part I: Background

RG 77.5 The main objects of [SPS 16] were to promote stability in the property trust industry and restore investor confidence. The conversion of many unlisted property trusts into either fixed term (unlisted) property trusts or listed property trusts, and the impact of the new Regulations has reduced the need to continue with many of the more prescriptive elements of the previous policy.

RG 77.6 Since [SPS 16] was released in early 1992, the ASC revised its general policy on relief for prescribed interest schemes. The release of [SPS 55] followed a detailed examination of policy in this area. This guide sets out the additional relief available for property trusts and property securities trusts. For example, in the case of listed property trusts, the ASC is of the view that these should be subject to the same conditions of buy-back relief as other listed prescribed interests. The policy on covenants in deeds for listed prescribed interests is contained in [SPS 55].

RG 77.7 The Law and ASC policy in this area developed in light of significant problems experienced by the property trust industry from 1990 which led to a reduced level of investor confidence.

RG 77.8 The most critical problem that [SPS 16] addressed was the diminished liquidity of unlisted property trusts. This arose out of the mismatch of the buy-back periods available to investors (often as little as two weeks) and the illiquidity of the underlying assets of the trusts in a depressed property market.

RG 77.9 These problems were aggravated in 1991 by a rapidly falling property market, which caused significant discrepancies to arise between the prices at which units could be redeemed by investors and their “current” values. This sometimes led to outgoing unit holders obtaining an unfair advantage over incoming and continuing unit holders.

RG 77.10 The *Corporations (Unlisted Property Trusts) Amendment Act 1991* and [SPS 16] were both directed at stabilising the industry and restoring lost investor confidence.

RG 77.11 The property trust industry has undergone major restructuring over the past three years. Many unlisted property trusts have rationalised their property portfolios and converted to listed or fixed term status, eliminating the requirement to maintain a buy-back capability.

RG 77.12 This guide reflects these changes. It recognises the increased importance of fixed term (unlisted) property trusts and syndicates. It also takes into account the impact of the Unlisted Property Trust Regulations which came into effect on 8 September 1992. They put many of the prudential requirements previously imposed by [SPS 16] into law.

Part II: The Law

RG 77.13 Interests in property trusts are prescribed interests for the purposes of the Law (as are other unit trust vehicles). They are regulated as securities by Ch 7 of the Law and the corresponding regulations. As with other unit trusts, persons who offer or sell interests in property trusts must comply with the provisions of Pt 7.12.

RG 77.14 Property trusts are also subject to a range of special requirements that are not imposed on other prescribed interest schemes. These requirements, some of which are prudential, are now imposed by the Law and have been imposed by the ASC in response to problems that have affected the property trust industry. The requirements introduced into the law in the *Corporations (Unlisted Property Trusts) Act 1991* and the Unlisted Property Trust Regulations 1992 (Cth) were designed to ensure that unlisted property trusts, in particular, were regulated further.

RG 77.15 These provisions:

- (a) require the buy-back and redemption notice periods for unlisted property trusts which existed before July 1991 to be brought more closely into line with the liquidity of the underlying investments of the trust. Accordingly, the buy-back and redemption period for these trusts is 12 months, unless unit holders agree otherwise (Subdivision C of Pt 7.12 Div 5A of the Law);
- (b) require unlisted property trusts to maintain a minimum level of liquidity to ensure that buy-back and redemption requests can be satisfied within a reasonable time (reg 7.12.15A(5) and 7.12.15A(7));
- (c) govern restructuring (the conversion of illiquid unlisted property trusts into alternative structures) and ensure that unit holders are given adequate opportunity to give directions to the trustee and the management company in situations of illiquidity (reg 7.12.15A(6), 7.12.15A(8) and 7.12.15A(9)); and
- (d) impose higher prudential standards on the industry, particularly in relation to minimum capital requirements for managers of unlisted property trusts (reg 7.3.02A) and borrowing limitations (reg 7.12.15(5)(q) and 7.12.15(r))

Part III: Indirect property trusts

RG 77.16 Division 5A of Pt 7.12 of the Law is not intended to apply to an indirect property trust (a trust that is constituted by an approved deed and is a property trust merely because it holds more than 20% by value of real property indirectly by holding units in property trusts). This intention is reflected in reg 7.12.12A which was made under s30 of the Corporations Act 1989 to limit the operation of Div 5A of Pt 7.12.

RG 77.17 The ASC recognises that some management companies, trustees and their legal advisers have concluded that some indirect property trusts are subject to Div 5A, despite reg 7.12.12A. It appears that reg 7.12.12A does not apply to indirect property trusts which are not “predominantly” invested in property securities. The ASC does not have the power to grant exemptions from the operation of the Law in relation to Div 5A. However, it can grant them in relation to the property trust covenants in regs 7.12.15 and 7.12.15A and the net tangible asset conditions in reg 7.3.02A.

RG 77.18 The ASC has decided that indirect property trusts should not be regulated as property trusts, consistent with the intention reflected in reg 7.12.12A. To remove any doubt, the ASC will grant relief from the statutory covenants that relate only to property trusts in regs 7.12.15 and 7.12.15A and from reg 7.3.02A. Relief the ASC grants will be limited to indirect property trusts as defined in para 16 (see Pro Formas 124, 125 and 126).

RG 77.19 This decision is supported by the fact that with indirect property trusts, the downstream trusts in which units are held are subject to regulation as property trusts (if they are “property trusts” as defined in s1076A).

Part IV: Unlisted property trusts

Buy-back and redemption

RG 77.20 Trustees of unlisted property trusts may apply to the ASC for redemptions of units in the trust to be restricted (s1076E). Section 1076F provides for the ASC to prohibit redemptions if they are likely to disadvantage continuing unit holders. If the ASC is satisfied that the redemptions will have this effect, it must make an order prohibiting them (s1076F).

RG 77.21 Applications under s1076E should:

- (a) specify the subsection the application is made under;
- (b) state the nature of the prohibition being sought;
- (c) set out in detail the trustee's reasons for concluding that the redemptions would be likely to have a material adverse effect;
- (d) state what this effect would be (instead of the normal requirement for a trustee's certificate on relief);
- (e) explain why the trustee considers the particular prohibition to be the most appropriate;
- (f) include relevant background to the redemption requests and/or the period for which an order is sought;
- (g) specify whether or not the management company supports the application; if not, state its reasons for opposing it (that are available to the trustee at the time of applying); and
- (h) enclose comprehensive up to date financial information on the trust.

RG 77.22 An order under s 1076F does not affect the buy-back obligations of the management company. See [SPS 55] for the ASC's general policy on relief from the buy-back covenants.

Liquidity

RG 77.23 The management company and the trustee of an unlisted property must take a range of measures whenever the combined liquidity of the management company and the trust falls below 15% (reg 7.12.15A). They include the obligation to call a meeting of unit holders to consider options concerning the future of the trust.

Relief from reg 7.12.15A

RG 77.24 The ASC will exempt a trust from the liquidity requirements if either there is no currently operating buy-back or there is no currently operating redemption obligation (see Pro Forma 127). It will not grant relief if the buy-back or redemption obligation (as the case may be) is merely qualified (for example, relief under [SPS 55] for small parcels or suspended for less than 12 months. If the buy-back or redemption obligation subsequently comes into operation, the ASC will not continue the relief.

RG 77.25 Examples of trusts which might not have a buy-back obligation are:

- (a) a fixed term property trust; or
- (b) a wholesale property trust comprised solely of interests that are made available as excluded issues, which has obtained relief from buy-back under [SPS 55] (para 80-87).

If there is either no buy-back or no redemption obligation, the main reason for strictly maintaining minimum liquidity levels is removed.

RG 77.26 The ASC does not envisage granting exemptions from the covenants required by regs 7.12.15A(5) and 7.12.16A(7), except for complete exemptions granted under reg 7.12.15A(2) where there is either no current buy-back obligation or no current redemption obligation.

Approval of financial institutions

RG 77.27 A bank line of credit may be taken into account when calculating a trust's or management company's liquidity. Lines of credit from other financial institutions may also be taken into account if the financial institutions are approved by the ASC (reg 7.12.15A(3)) (see Pro Forma 128).

RG 77.28 The ASC will approve a financial institution:

- (a) if the management company of the trust certifies that:
 - (i) having made reasonable enquiries, it is not aware of any reason why the relevant financial institution would be unable to fulfil its line of credit obligation; and
 - (ii) the institution is regulated under the Financial Institutions Code or is a state bank; or

- (b) the trustee or management company presents sufficient other evidence to the ASC showing that the financial institution concerned will be able to fulfil its line of credit obligation.

Additional matters to be put to unit holders

RG 77.29 Trustees and management companies of unlisted property trusts must covenant to put any other matter requested by the ASC to unit holders at the meeting that must be held after the 15% liquidity threshold is breached (regs 7.12.15A(6)(e)(vi) and 7.12.15A(8)(c)(vi)). The ASC will not usually require that additional proposals be put to unit holders. It will only intervene where necessary.

Relief from the covenants

RG 77.30 Regulation 7.12.15A(6) prescribes a number of covenants binding the management company which apply if the trust's combined liquidity is or becomes less than 15% of its average asset value.

RG 77.31 The ASC may notify a management company that it does not have to comply with one or more of these covenants (reg 7.12.15A(6)(l)) (see Pro Forma 129). This allows the ASC to give relief which can have effect without waiting for amendments to a deed. This may be appropriate in urgent circumstances where compliance with the particular covenants would trigger an expensive range of measures that might be detrimental to the trust, the trustee and the management company.

Meeting and withdrawal covenants

RG 77.32 The ASC can issue notices exempting management companies from complying with some of the key covenants:

- (a) the meeting covenants (notifying unit holders and holding a meeting to consider a number of prescribed proposals, including listing or winding up of the trust (reg 7.12.15A(6)(c) and 7.12.15A(6)(d)); and
- (b) the withdrawal covenants (withdrawing the current prospectus, ceasing to make offers and issuing units and returning application money (reg 7.12.15A(6)(h), 7.12.15A(6)(j) and 7.12.15A(6)(k)).

Warning of liquidity problem

RG 77.33 Each of the actions required in these covenants (see para 32) must be taken “as soon as practicable”. A management company may convince the ASC that an anticipated liquidity shortage will only be of very short duration and is unlikely to recur. In this case, the ASC may grant temporary relief from the meeting and withdrawal covenants, depending on the circumstances. If it appears that a liquidity shortage of this type may arise, the management company should advise the ASC as soon as possible and keep it informed of developments. The ASC is not able to grant relief without reasonable warning of a liquidity problem. It will assess the conditions of relief in light of the particular circumstances.

Threshold broken

RG 77.34 If the management company breaks the 15% threshold and the ASC has not granted relief, the management company should issue instructions without delay to withdraw the prospectus, return application money and cease making offers, invitations and issues in relation to the trust. The ASC recognises actually returning the money and withdrawing the prospectus may take longer but as the covenants only require that action be taken “as soon as practicable”, no relief should be necessary.

RG 77.35 However, the meetings covenants will take longer to implement. The management company has to consider the information unit holders require (such as the advantages and disadvantages of each proposal). This process will probably be further delayed by the need to involve external advisers.

Liquidity failure ceases

RG 77.36 If the liquidity failure ceases, it is not clear that the obligations under the withdrawal and meeting covenants also cease. Accordingly, the ASC will issue a notice that the management company does not have to comply with the covenants in relation to that liquidity failure. The ASC will only grant this relief if liquidity has been restored and it is satisfied that a failure is unlikely to recur.

Trustee's obligations

RG 77.37 If a trust's combined liquidity is less than 15%, similar covenants for the trustee apply (reg 7.12.15A(8)(b) and 7.12.15A(8)(f)). These are intended to complement the obligations of

the management company. The trustee must comply with them if the management company defaults. The ASC will grant relief from these covenants whenever it gives relief to the management company. The ASC will decide which conditions it imposes in light of the particular circumstances of that trust (see Pro Forma 130).

Other obligations

RG 77.38 Any relief the ASC grants under these conditions will not affect the obligations that management companies have under Pt 7.11 of the Law or the prospectus provisions.

Valuations

RG 77.39 The Corporations (Unlisted Property Trust) Regulations 1992 introduced a number of new statutory covenants in relation to the valuation obligations of management companies and trustees.

RG 77.40 It is crucial to value trust assets properly so that unit holders are treated fairly. This is because the Regulations are framed on the basis that valuations are used to determine unit price for buy-back and redemption of units and because they are usually the major reference point for pricing new issues.

Exemption from valuation covenants

RG 77.41 The ASC has considered various arguments put forward in relation to exemption from the valuation covenants, particularly from the covenants for the trustee:

- (a) to ensure that one valuer does not undertake more than two consecutive valuations of a property (reg 7.12.15(5)(f)); and
- (b) to provide details of a valuation at the written request of a unit holder (reg 7.12.15(5)(gc)).

RG 77.42 The covenant requiring new valuers in reg 7.12.15(5)(f) is fundamental to ensure that the integrity of trust property valuations is maintained. For this reason, the ASC will not grant relief on the basis of cost if frequent valuations may be required. It is in these circumstances where the independence of valuations is most important.

RG 77.43 The covenant that requires the trustee to give unit holders details of a valuation on request in reg 7.12.15(5)(gc) gives effect to the Law's policy of providing full disclosure of valuations.

The ASC will not grant relief on the basis of a perceived commercial disadvantage to the trust from a unit holder obtaining information for his or her own purposes. It is clear from the extent of the reporting obligations for property trusts that the motivations of unit holders are not relevant.

RG 77.44 The trustee must ensure that the trust's accounts are sent to unit holders not more than two months after the end of the financial year (reg 7.12.15(5)(o)). This obligation is consistent with the trustee's covenant in s1069(1)(f) of the Law. Regulation 7.12.15(5)(p) sets out matters which should be disclosed in the accounts. The ASC will give relief from the covenants in regs 7.12.15(5)(o) and 7.12.15(5)(p) whenever relief is given under [SPS 55] from the covenant in s1069(1)(f) and on corresponding conditions (see Pro Forma 131).

Fixed term property trusts

RG 77.45 The trustee must covenant to obtain a valuation if it considers a property's value has significantly changed. Further, if there is a buy-back obligation, it must obtain a valuation at least every 12 months. Otherwise it must obtain a valuation at least every three years (reg 7.12.15(5)(g)). The trustee must also obtain a valuation when the management company advises of a significant change of value (reg 7.12.15(5)(ga)).

RG 77.46 The ASC will give relief from the covenants in regs 7.12.15(5)(g) and 7.12.15(5)(ga) to the trustee of a fixed term property trust which has a buy-back exemption under this policy. This relief will be on condition that the trustee obtains a valuation when it is in the interests of unit holders (in the opinion of the trustee or as advised by the management company) and at least every three years.

RG 77.47 This relief is offered on the basis that a fixed term property trust which has relief from the buy-back requirement will not be holding property with a view to selling it within the fixed term (up to 12 years). A requirement for valuation of trust property whenever there is a significant change would impose an unnecessary cost burden. However, the ASC considers that unit holders should have some indication of the changing value of their investment through the life of the trust. For this reason, the ASC will retain the minimum requirement for a valuation every three years (as in reg 7.12.15(5)(g)).

Prudential requirements

Borrowing limitations

RG 77.48 The trustee of an unlisted property trust must covenant, in effect, to impose a 20% borrowing limitation on an unlisted property trust and, where borrowings exceed that limit, to take steps to reduce the level of borrowings (regs 7.12.15(5)(q) and 7.12.15(5)(r)). However, there is a specific exclusion for unlisted property trusts which have a fixed term and no buy-back or redemption obligation (reg 7.12.15(5A)).

RG 77.49 The ASC has considered whether it should grant relief from these borrowing covenants where there is no currently operating buy-back or redemption obligation. The ASC will not give relief solely on this basis as the borrowing limitation is not primarily to support buy-back. It is a prudential measure designed to prevent excessive risk in view of the particular valuation problems of property trusts.

RG 77.50 The ASC has also considered whether it should grant relief from the covenants in regs 7.12.15(5)(q) and 7.12.15(5)(r) where unit holders have voted to permit the trust to exceed the 20% borrowing limit. It has been argued that if the unit holders (and presumably the trustee and management company) approve the borrowing, the ASC should not make commercial judgements about levels of debt for individual property trusts.

RG 77.51 However, this relief would be inconsistent with the externally imposed prudential standard and the nature of statutory covenants which are deemed to apply regardless of the parties' wishes. Accordingly, the ASC will not grant relief simply on the basis of unit holder approval, particularly in view of minority holders' interests.

RG 77.52 The ASC will not grant exemptions from the borrowing limitation covenants to allow a trust to avoid the necessity of selling a property. The covenant in reg 7.12.15(5)(r) is sufficiently flexible to enable the trust to comply over a reasonable period of time, if necessary. Also, reg 7.12.15(5B) ensures that trustees cannot be placed in the position of having to conduct fire sales in order to observe the 20% restriction.

Minimum capital requirements

RG 77.53 Requirements for the minimum net worth of a management company of an unlisted property trust are now imposed by reg 7.3.02A as conditions for a securities dealer's licence.

RG 77.54 The ASC will grant relief to exclude the regulation from applying to a particular trust while there is no currently operating buy-back obligation (see Pro Forma 132). In these cases the need for maintaining a minimum level of capital is reduced.

RG 77.55 For example, the ASC will exercise its discretion when a trust has a buy-back exemption because it meets the conditions for buy-back relief for a fixed term property trust set out in para 70 to 82 below.

Part V: Incidental property trusts

RG 77.56 The ASC recognises that some unlisted property trusts are regarded as “incidental” because they arise from the direct holding of real property for the main purpose of conducting a business (for example, a casino trust), rather than for deriving a profit or gain from the sale or rental of the property itself. However, in the ASC’s view, it is not possible to conclude that it was an unintended consequence that these trusts fall within the definition of “property trust” in s 1076A. On the contrary, the low threshold in the definition and the very limited exceptions suggest that Parliament intended a wide net to be cast. Therefore, the ASC will give relief for incidental property trusts from the requirements which relate particularly to property trusts only after it has been demonstrated that they are inappropriate.

RG 77.57 The ASC will give exemptions from the valuation frequency covenants in reg 7.12.15(5)(g) and 7.12.15(5)(ga) (see Pro Forma 133). This is because these trusts will not normally wish to dispose of the real property on which the business is conducted. Applications for this relief will be considered whether or not a buy-back obligation applies to units in the incidental property trust. Relief will be on the same terms as relief for fixed term property trusts described below.

RG 77.58 Application for exemption from liquidity requirements will be granted where there is no currently operating buy-back obligation or no currently operating redemption obligation (see para 24). If there is a buy-back obligation and a redemption obligation, the ASC considers that these prudential requirements should be maintained because of the illiquidity of the underlying assets. The ASC does not envisage any additional relief from property trust requirements for incidental property trusts as such. For example, the ASC envisages granting applications for exemption from the minimum capital requirements only if there is no currently operating buy-back obligation (see para 54).

Part VI: Redeemable listed property trusts

RG 77.59 A Redeemable Listed Property Trust (RLT) is a property trust the units of which are listed on the ASX (or other stock exchange) and are subject to a limited right of redemption, but which does not offer a buy-back facility.

RG 77.60 This class of property trust was seen as an alternative structure which unlisted property trusts might use to move to listed status.

RG 77.61 The RLT structure has not gained substantial acceptance. There are no RLTs currently operating.

RG 77.62 Therefore, the ASC has decided to discontinue its formal policy on RLTs. It will review this decision if the market demand warrants it. The ASC will consider applications to establish RLTs on a case by case basis.

Part VII: Fully listed property trusts

RG 77.63 Fully listed property trusts are now regulated in the same way as other listed prescribed interests. Applicants for relief should refer to [SPS 55] and see Pro Formas 36 and 37.

RG 77.64 This means that the ASC no longer requires listed property trusts to value their real property assets annually. This change acknowledges the requirement in the Regulations that these assets need only be valued annually when a buy-back obligation is present. Nevertheless, the ASC has not diminished the importance it places on frequent and accurate valuations of property trust assets. Trustees of property trusts still have fiduciary obligations in relation to valuation of assets. They also have an obligation to conduct a valuation whenever there is a significant change in the value of the property (reg 7.12.15(5)(g)). Trustees of listed property trusts should also pay particular attention to the relevant ASX Listing Rules.

RG 77.65 The ASC no longer requires all units in a listed property trust to be quoted. However, if a listed property trust has more than one class of unit, any unquoted class is subject to buy-back unless another basis for relief applies. A requirement that all classes should be quoted is an issue more appropriately dealt with under the ASX Listing Rules.

Part VIII: Fixed term property trusts

RG 77.66 Many investors are attracted to an investment in real property which allows them to target particular properties or property portfolios where their investment will remain in the chosen property or portfolio of properties for its entire duration. The ASC's policy to give relief from the buy-back requirements in relation to fixed term property trusts recognises this. A fixed term property trust acknowledges the inherent illiquidity of the underlying investment by, in effect, deferring liquidity by up to 12 years. Also, investors are fully aware of the limited liquidity of the investment. The relief the ASC will give for fixed term property trusts is outlined in Pro Forma 134.

RG 77.67 The principal features of a fixed term property trust are:

- (a) a stable property portfolio, so that investment is similar to direct investment in real property;
- (b) a relatively limited role for the management company, whose functions do not include buying and selling property but rather the management of, and maximising returns from, properties investors have chosen to invest in on a long term basis; and
- (c) termination at the end of the fixed period, unless all holders agree to extend the life of the trust, in recognition of unit holders' expectation that they would receive access to liquidity at the end of the disclosed fixed period.

These features are reflected in the conditions of relief from the buy-back requirements.

Buy-back relief

RG 77.68 These features imply that there is limited need for the liquidity requirements and accountability provided by buy-back (also bearing in mind the property trust covenants in regs 7.12.15(5) and 7.12.15(7)). Accordingly, the ASC will grant relief from the covenants relating to buy-back (s1069(1)(c), 1069(d), 1069(e)(ii) and 1069f(ii)) on the conditions set out below. If it grants relief from these covenants, there is no need for relief from the covenant by the management company that it will ensure that the buy-back price offered for units reflects the value of the trust assets on the day buy-back occurs (reg 7.12.15(7)(g)). This is because the covenant only relates to buy-backs which actually take place.

Conditions for exemption from buy-back covenants

RG 77.69 The deed of an unlisted property trust will be exempt from having the buy-back covenants, if the deed contains certain covenants (see para 70 to 82 below).

RG 77.70 The deed must provide that:

- (a) the trust will terminate after a fixed period (not more than 12 years), as specified in the prospectus, subject to the procedure set out in para (b) to (d) below;
- (b) between five and six months before the end of the fixed period, the management company may send a notice asking unit holders to advise the trustee in writing whether they wish the trust to continue for a further period specified by the management company (not more than 12 years) or terminate the trust. The notice must be accompanied by all the information holders would reasonably require to evaluate the proposed extension;
- (c) if a holder does not so advise the trustee in writing the holder will be taken to be in favour of termination; and
- (d) if no holders at the end of the fixed period are in favour of termination, the trust will continue for the period specified by the management company.

These provisions apply to the end of the extended period, or any subsequent extension, as if it were the end of the first period.

RG 77.71 The ASC will oppose any compulsory sale of units held by those in favour of termination unless the units purchased are priced on a current valuation of the trust's assets.

RG 77.72 The deed must also prohibit the management company and the trustee from undertaking any obligation to buy-back or redeem units from unit holders except in accordance with the conditions of relief. This is because if a buy-back or redemption facility were included, it may create expectations of liquidity which are inconsistent with a long term investment.

RG 77.73 The deed must also provide that no prospectus can be issued unless it identifies the specific real property held or to be purchased by the trust.

RG 77.74 The deed must also prohibit the purchase of real property by the trust other than that specified in any prospectus.

RG 77.75 The conditions set out in para 73 and 74 above will help to ensure that the investment is more like an investment in real property than a managed fund. They reduce the role of the management company to managing the property rather than selecting investments.

RG 77.76 The deed must also prohibit the sale or disposition of any real property the trust holds. A mortgage or lease expiring before the end of the fixed term would not be regarded as a disposition. However, the deed does not need to prohibit this on termination of the trust.

RG 77.77 Also, a sale or other disposition may take place if the unit holders have given prior approval by passing a separate resolution. This resolution must be agreed to by 75% (by value) of unit holders voting (whether in person or by proxy) where at least 25% (by value) of unit holders eligible to vote do so. However, in this case, all moneys realised after borrowings are repaid and costs and disbursements associated with the sale or repayment are deducted must be distributed to unit holders as soon as practicable (but not later than two months after settlement of the sale or disposition).

RG 77.78 This condition is a very important hallmark of the fixed term property trust. It is implicit in the rationale for relief that if investors no longer have an interest in the real property in which they originally sought to invest their liquidity should be restored.

RG 77.79 The deed must also prohibit units being issued after the acquisition of real property by the trust, except under an offer to existing unit holders. This offer must only be for the purpose of improving, refurbishing or maintaining the real property of the trust or repaying borrowings of the trust. Further funds should not properly be required for anything else, because of the other conditions set out in para 73 to 74 above. This condition ensures that this is the case.

RG 77.80 The deed must also require the prospectus to contain a statement in a prominent position. It must advise potential investors that:

- (a) investments in the trust should be viewed as long term;
- (b) interests in the trust are likely to be illiquid because there is unlikely to be a secondary market; and
- (c) investors have no right to require their interests to be bought by the management company or any other person, or to have their interests redeemed.

RG 77.81 Disclosure of these facts is of great importance to potential investors. It also helps to make clear that the investment is analogous to direct property investment. It is not an onerous condition as it is almost certain that the general disclosure requirement of s1022 would require that all these issues be dealt with in the prospectus if the trust is of the kind the policy is intended to cover.

RG 77.82 The deed must also require that the real property must always represent 80% or more of the trust's assets after the real property described in the prospectus has been purchased (or three months after the offer to subscribe closes, whichever is first). It must require that if this percentage is not maintained for any period longer than two months, the trustee will inform unit holders and the trust may be wound up at the written request of any unit holder.

RG 77.83 This condition ensures that the trust is genuinely a property trust.

Continuation of scheme

RG 77.84 Section 1069(12) allows a scheme to continue beyond the date provided for in its trust deed, if the trustee and management company agree that this is in the interest of unit holders. As this could override the effect of the above conditions, an application for relief from buy-back on these conditions must be accompanied by an application for a declaration under s1084(6), omitting s1069(12).

Liquidity

RG 77.85 See para 23–38 above.

Valuation

RG 77.86 See para 45–47 above.

Prudential requirements

RG 77.87 See para 48–55 above.

Secondary trading

RG 77.88 The ASC does not consider that there are any features of fixed term property trusts that warrant *specific* relief from any of the requirements of Div 3A of Pt 7.12 of the Law in relation to secondary trading notices. Those requirements are not onerous. ~~2 in relation to secondary trading. While the absence of buy back reduces liquidity, this is on the basis that investors accept the investment as illiquid. Any aid to secondary trading may undermine that expectation.~~

[6/12/1994]

RG 77.88A However, vendors of interests in fixed term property trusts should be aware that some general relief may be available to them from the obligation to prepare and lodge a s1043D secondary trading notice. See Superseded Policy Statement 105 *Secondary trading of unquoted securities* (SPS 105).

[6/12/1994]

Part IX: Restructuring as a fixed term property trust

RG 77.89 As mentioned in para 23 above, reg 7.12.15A prescribes covenants dealing with liquidity of an unlisted property trust. The covenants include requirements that in the event of inadequate liquidity, the management company (or trustee) must call a meeting and put a number of specified proposals to unit holders. The management company or trustee must also put any other proposals considered relevant to the affairs of the trust. One of the proposals that the management company or trustee may decide to put is that the trust should take the steps necessary to effect a fixed term conversion proposal (by fulfilling the conditions for relief from the buy-back covenants for fixed term property trusts outlined in para 70 to 82 above).

RG 77.90 In order for the management company and trustee to fulfil their obligations under the relevant covenants, a fixed term conversion proposal should provide enough information so that unit holders can make an informed decision about a specific proposal (for example, the steps involved, the likely cost, the buildings proposed to be acquired or disposed of, the reasons for that selection and the proposed term of the trust).

RG 77.91 When this has been done and the fixed term conversion proposal has been approved, the ASC will grant the trust relief from the buy-back covenant in relation to requests received from the day the proposal is approved. However, relief will lapse unless all the conditions outlined in para 70 to 82 above are fulfilled by inserting provisions in the deed within 90 days from the meeting date. The conditions in para 73, 74 and 76 above will be required in a modified form. These provisions will apply but the trust must effect the disposals and acquisitions outlined in the fixed term conversion proposal within 12 months from the date of the meeting. If this is not done, the relief will lapse again. The buy-back obligations which come into effect on a lapse of relief are an exception to the prohibition in para 72 above.

Part X: Property syndicates

RG 77.92 A property syndicate is a scheme under which investors have legal title to the real property that is the subject of the scheme. Members of the scheme may each own a specific property (for example under strata title legislation) or share an interest (for example as tenants in common). Usually, each investor will hold (or be entitled to) a certificate of title which states their interest. Members of the scheme may already own the property or properties in question and, for example, want to pool income from the properties. Alternatively, investors may want to combine to buy a property or properties.

[10/7/1995]

RG 77.93 A syndicate involves an agreement between syndicate members and may involve a further agreement with a property manager. Offers of interests in such a scheme may involve offering prescribed interests and, as such, be subject to regulation under Pt 7.12 of the Law. Promoters may need to seek legal advice to determine whether the structure they propose involves offering a prescribed interest. Paragraphs 94 to 96ZB assume that a prescribed interest is involved.

[10/7/1995]

RG 77.93A Property syndicates are not trusts and those provisions of the Law relating to property trusts only (including some of the prescribed covenants under s1069(1)(n) and the Regulations) do not apply to property syndicates. The covenants may apply if they are incorporated in the terms of the deed.

[10/7/1995]

~~[RG 77.92]—A property syndicate is a scheme under which investors have legal title to real property as tenants in common. Each investor holds a certificate of title documenting his or her interest. Being tenants in common does not involve a prescribed interest by itself, but a syndicate often involves an agreement between syndicate members (sometimes with a property manager). Offers of interests in such a scheme may involve offering prescribed interests and these are subject to regulation under Pt 7.12 of the Law.~~

[10/7/1995]

~~[RG 77.93]—However, property syndicates are not property trusts and the provisions of the Law that relate only to property trusts do not apply of their own force to property syndicates. These include many of the prescribed covenants under s1069(1)(n) and the Regulations.~~

[10/7/1995]

Part XI: Fixed term property syndicates

RG 77.94 The ASC will grant property syndicates relief from the buy-back covenants on conditions similar to those imposed on fixed term property trusts under para 70 to 82 (see Pro Forma 135). The relief will also include a condition that provisions to the effect of the covenants in the following Regulations are included in the syndicate deed:

- (a) 7.12.15(5)(a) to 7.12.15(5)(m), 7.12.15(5)(o) and 7.12.15(5)(p), and
- (b) 7.12.15(7)(a), 7.12.15(7)(b), 7.12.15(7)(d), 7.12.15(7)(e), 7.12.15(7)(f), 7.12.15(7)(h), and 7.12.15(7)(j).

RG 77.95 The requirement for the covenants in reg 7.12.15(5)(o) and 7.12.15(5)(p) does not apply when relief is given in relation to the covenant in s 1069(1)(f)(i).

RG 77.96 Fixed term property syndicates operate in a similar manner to fixed term property trusts. Therefore it is appropriate that they are subject to very similar requirements. Imposing the covenants set out in para 94 above also ensures that managers of fixed term property syndicates are accountable for the performance of their functions. This substitutes for the accountability that would otherwise be enforced through the operation of the buy-back. Only those statutory covenants which do not apply are not included above.

RG 77.96A The ASC has given certain additional relief to promoters of property syndicates (see Class Orders [CO 95/820] and [CO 95/821]). The relief was granted in part because land title systems in Australia give security of title. The legal owners of land in all Australian jurisdictions have ultimate control over the disposition of that land. The State and Territory Acts relating to real property and strata titles (under which most real property in Australia is held) make it virtually impossible for title to be transferred without either the permission of the legal owner or order of the court. There are also systems of title registration that regulate dealings in land and provide independent proof of title. This security of title, together with the direct control that may be exercised by the legal owner is, in the ASC's view, a basis for the relief described below. Class Order [CO 95/820] provides for relief from approved deed requirements for participating property syndicates that enable investors to exercise a significant level of control over the management of their property. Class Order [CO 95/821] provides for relief from prospectus and approved deed requirements for other small property syndicates not being promoted as part of a business or in relation to which no participant is able to receive a benefit not available to other participants.

[RG 77.96A inserted 10/7/1995]

Part XII: Participating property syndicates

[Part XII inserted 10/7/1995]

RG 77.96B The ASC has considered the relief that should apply in relation to schemes involving real property held and managed under arrangements between co-owners. In some schemes the promoter (or its associates) may manage the syndicate and the property but in other schemes this function may be performed by some other person. Where the investment is in a single property (and the syndicate ends on sale of that property) the investment is a direct investment in real property rather than in a managed fund. Because the property is held by the investors, there is no need for a trustee to hold the property. The ASC also recognises that the need for an investors' representative is reduced because the management role in such schemes does not involve the active portfolio management associated with unit trusts and many larger property syndicates.

RG 77.96C The ASC has given relief by Class Order from Div 5 of Pt 7.12 of the Law to promoters of schemes offering interests in property syndicates where there is a substantial level of investor involvement. Where relief applies the commercial benefits of flexibility would be disproportionate to any regulatory benefit from having an approved deed. Paragraphs 96D to 96Y below describe in general terms when the relief will be available. See Class Order [CO 95/820].

RG 77.96D Relief is given if the syndicate agreement contains a number of provisions to protect investors' interests. These provisions must continue to apply until the syndicate is wound up and are entrenched in conditions to the relief.

RG 77.96E If the syndicate intends to purchase a property, the syndicate agreement must state that all members must agree on the property to be purchased. The syndicate must relate to the entire title to a single property and the investors must become legal owners of that property. The property may be made up of more than one title. It may, for instance, comprise a number of strata title units making up the whole of the development. In this case, the units may be held by individual investors on separate title. The restriction to one property means the scope and operation of the syndicate should be relatively simple. The role of a manager will be restricted to managing that property and the investment will clearly be a direct investment in real property rather than in a managed fund.

RG 77.96F If the syndicate intends to purchase a property, a particular property need not be identified in the syndicate agreement (or the

prospectus). However, details of a specific type of property must be given. Details must include the type of property (for example, residential, industrial), location, expected return/yield and price range. The details should strike a balance between ensuring that investors know what type of property they will acquire an interest in and allowing the syndicate appropriate flexibility in its purchase. If the promoter is offering a specific property, the syndicate agreements should identify the property rather than merely describing a type of property.

RG 77.96G If the syndicate intends to purchase a property, the agreement must state that if a property is not purchased (that is, contracts are not exchanged with settlement due within nine months from the first investment) within six months from the time the first investor subscribed, the syndicate must be wound up if any investor requests. This requirement is intended to ensure that there will not be too long a delay between an investor joining a syndicate and obtaining a direct interest in real property and is one of the principal grounds for the relief. It is intended to allow for off-the-plan purchases (but not property development schemes). Property development schemes are excluded for the reason that they would involve a much greater degree of reliance on the manager's discretion than would off-the-plan purchases. In the case of off-the-plan purchases the buildings to be purchased will be specified in the prospectus.

RG 77.96H The syndicate and management agreements must state that if the property is sold the syndicate will be wound up. The agreement must also state that the subscription money must be returned to investors (less expenses and costs permitted under the syndicate agreement) within a specified time. This is consistent with the idea of the syndicate having investment in a single property as its only purpose.

RG 77.96I Money held pending any purchase the syndicate is to make must be held in an account with an Australian bank or in interests in a cash management trust on trust for the contributing investors.

RG 77.96J For the duration of the scheme, there must be no more than 15 investors, with each investor having an interest of at least 5% of the value of the property.

RG 77.96K While the requirement of 15 members is an arbitrary limit, the ASC considers that it would often be difficult or impractical for more than 15 members to communicate with each other and be effectively involved in controlling the management of the investment. The ability of investors to communicate with each other quickly and efficiently is an important factor behind the relief. The minimum 5% holding is also an arbitrary limit, but it also helps ensure investor involvement because investors will have a significant stake in the property and may have a degree of influence (whether by voting or otherwise) in management of

the investment. The ASC considers this 5% limit to be important even if the syndicate is an income pooling arrangement between existing owners. The ASC considers that interests in large property projects (such as hotels or serviced apartments) which involve many investors who largely rely on the skills of the hotel or apartment operator for a return are more like an investment in a managed fund. The relief does not apply to such projects.

RG 77.96L Where a promoter is not subject to the controls and duties imposed by Div 5 and there is the possibility of pressure on potential investors to enter a syndicate, it is important that investors have adequate time and opportunity to reconsider their decision and withdraw. This is because they cannot leave the scheme under the buy-back covenant required by Div 5. Agreement to join the syndicate must, therefore, be subject to a non-waivable cooling-off period of at least 14 days. The syndicate agreement must provide for the right to withdraw during this period. The cooling-off period commences from the date the application form is signed and investors must be told in a separate statement that a cooling-off period exists. For the form of statement approved by the ASC see Class Order [CO 95/820].

RG 77.96M The promoter must send each investor details of any agreement entered into by, or on behalf of, the investor in connection with the scheme (of which the promoter is aware). The details must be sent within two months of the investor becoming bound by the agreement. At the same time, the promoter must also send the investor a complete list of names and postal addresses of syndicate members. If the syndicate is not closed at the end of the two month period, the promoter must provide a complete list of investors within one week of the syndicate closing. In addition, any management agreement must require the manager to keep the list of investors up to date and available to all investors on request.

RG 77.96N This condition is intended to ensure that investors can determine their rights and obligations and organise collective action.

RG 77.96O The syndicate agreement must provide that syndicate property must be sold at the expiry of a period of 12 years (or a shorter period specified in the prospectus). However, if all investors agree in writing during the last six months of the specified period, the period can be extended. The syndicate agreement may specify circumstances in which the property may be sold before the end of the period. The requirement to sell the property does not apply if the investors held the property before the formation of the syndicate. However, in this case, the syndicate agreement must provide that the agreement will terminate after 12 years (or a shorter specified period) unless all investors agree in writing during the last six months of the

specified period. The ASC believes that investors ultimately have a right to realise their investment or end the arrangement.

RG 77.96P The property may only be mortgaged by or with the consent of the owners. If there is to be any mortgage or charge over the property when it is transferred to the investors, this must be stated in the prospectus. Any mortgage given subsequently must be executed by all of the investors (where it is over one of the several strata title units which together comprise the property, by all of the owners of that unit) or by their specific authority. None of the documents may purport to confer on any person a general agency to sign mortgages over the property.

RG 77.96Q Investors who mortgage an interest may in effect surrender control of the investment, and reduce effective investor involvement. Mortgaging interests may also make disposal of the property more complicated. The ASC believes investors should not be affected by any security interest unless they agree.

RG 77.96R Any management agreement must provide that all moneys received by a manager in relation to the property are to be held in trust for investors. Any fees and expenses permitted under the manager's agreement with investors may be deducted. This ensures that the manager is accountable to the investors and imposes a minimum safeguard for funds derived from the syndicate.

RG 77.96S Any management agreement must require the manager to send each investor a monthly financial statement. This must list all receipts, expenditures and fees relating to the property in the previous month. This statement ensures that investors are kept informed of the financial position of the property.

RG 77.96T Any management agreement must say that the manager can be removed at any time by 30 days' written notice from syndicate members holding more than 50% by value of the interests in the syndicate. A management agreement must state that if a manager is removed by a resolution it must not be entitled to any compensation or other payment for this removal other than for fees and disbursements relating to the period before removal. This condition is fundamental because it ensures that investors will have ultimate control over who provides day-to-day management of the syndicate. In the absence of a trustee or representative, and where no buy-back is present, accountability of managers to investors in this way is an essential element of the relief. The management agreement may state that the value of interests of the manager and its associates will not be counted (see para 96U below). The agreement may also state that members

cannot vote if they (or associates) may benefit in another capacity if the resolution is passed.

RG 77.96U Unless it limits the manager voting in this way, the prospectus must contain a prominent statement that interests held by a manager or its associates may be voted against removing the manager or that members may benefit in another capacity.

RG 77.96V The prospectus must also contain a prominent statement advising investors about the long-term nature of the investment. This should be equivalent to the statement in para 80 above. Investors will therefore know what potential control a manager could exert over their syndicate and the investment's relative lack of liquidity.

RG 77.96W The ASC will also provide relief from Div 5 of Pt 7.12 of the Law for secondary sales of participating property syndicate interests by persons other than the promoter and its associates. The ASC will not provide any relief from disclosure requirements. For details of the relief see Class Order [CO 95/820]. Paragraphs 96X and 96Y summarise the conditions.

RG 77.96X The syndicate agreement must prohibit a sale of an interest in the syndicate which would lead to:

- (a) more than the 15 investors in the syndicate; or
- (b) any investor having a legal interest in less than 5% of the value of the property.

RG 77.96Y It must require the vendor of an interest to cause the purchaser to become a party to all agreements relating to the syndicate to which the vendor is a party.

Part XIII: Small property syndicates

[Part XIII inserted 10/7/1995]

RG 77.96ZA For a property syndicate to fall within the terms of this relief there must be no more than 15 persons with an interest in the syndicate (with joint holders being counted separately). For the purposes of relief for “Small Property Syndicates”, the limit is set at 15 for consistency with the exemptions for private trusts and joint ventures in reg 7.12.04. As syndicates are not trusts they do not fall within the private trusts’ exemption from the fundraising provisions for private trusts (reg 7.12.04(c)) and the joint venture exemption (reg 7.12.04(b)) is unlikely to apply. A numerical limit has been set because of the desirability of having a certain test for relief.

RG 77.96ZB The policy is intended to provide relief in all circumstances where such small syndicates are not promoted by or on behalf of persons (or their associates) whose ordinary business is or includes the promotion of similar schemes. The relief, however, is also available where such persons (that is, “promoters”) are involved, as long as they are not able to benefit from the scheme other than on the same basis as all the other members. Where a promoter is involved in a small property syndicate, therefore, conditions of the relief will require that it participate throughout the life of the syndicate and on the same basis as all other investors.

RG 77.96ZC The rationale for this relief rests on the ASC’s view that where, as in the above situations, small property syndicates are either genuinely private, in the sense that they do not involve the offering of interests by promoters, or do not provide any incentives for involvement by promoters, compliance costs are likely to be disproportionate to the regulatory benefits of the Law.

RG 77.96ZD Accordingly, the ASC has given relief by Class Order from Div 2, 3, 3A and 5 of Pt 7.12 for schemes with 15 or fewer participants under which:

- (a) either there is no promoter involved or, where there is such involvement, neither the promoter or any associate of the promoter benefits from the promotion or the scheme, except on the same basis as all other investors, proportionate to their respective investments;
- (b) any promoter involved holds at least a 5% interest throughout the life of the scheme;
- (c) the syndicate agreement contains terms which comply with para 96E, 96F, 96G and 96I above; and

- (d) the syndicate agreement provides that if real property (including property under contract, due to be settled within six months) makes up less than 80% of scheme assets for a period of more than three months during the life of the scheme, any investor may require the scheme to be wound up.

Part XIV: Applications

RG 77.97 Applications for relief under this policy can be lodged with any ASC Regional Office. All applications must be accompanied by the appropriate fee and comply with Regulatory Guide 51. If a deed already exists, the application must enclose a trustee's certificate that the relief will not be adverse to the interests of prescribed interest holders (or an explanation for its absence), unless otherwise stated in this policy (see para 21(d)).