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The College of Law

Licensing a Responsible Entity

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on the law is required it should be sought on a formal basis.

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6. The Rights of Mortgagees *10 Nov 2005*
7. Mortgagees Power of Sale *23 May 2006*
8. Discharge of Mortgage *28 Nov 2006*
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11. Variation, Assignment & Transfer of Mortgages *12 Sept 2007*
12. Mortgagor's power to mortgage *13 Nov 2007*
13. Regulatory Structure of Managed Investments *23 Feb 2008**
14. Licensing a Responsible Entity *20 March 2008**
15. Proportionate Liability in claims against Valuers *29 Oct 2008**
16. Examinations under the Corporations Act and ASIC Act *5 March 2012[†]*

**Presented jointly with Kate Cooper of Bransgroves Lawyers*

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1. The Regulatory Structure of Managed Investments *23 Feb 2008**
2. Licensing a Responsible Entity *20 Mar 2008**
3. Proportionate Liability in claims against Valuers *29 Oct 2008**
4. Proportionate Liability 5 years on *13 May 2010*
5. Enforcement of Mortgages *24 Nov 2010*

**Presented jointly with Matthew Bransgrove of Bransgroves Lawyers*

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The Licensing requirement

Section 601FA provides that Responsible Entities operating registered managed investment schemes must to hold an Australian Financial Services Licence for that purpose:

CORPORATIONS ACT 2001 - SECT 601FA

Responsible entity to be public company and hold Australian financial services licence

The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme.

This is reinforced by the general requirement in section 911A:

CORPORATIONS ACT 2001 - SECT 911A

Need for an Australian financial services licence

- (1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

Likewise by s766A which defines when a person provides a financial service (and thus triggers s911A):

CORPORATIONS ACT 2001 - SECT 766A

When does a person provide a financial service?

- (1) For the purposes of this Chapter... a person provides a *financial service* if they:
 - (d) operate a registered scheme;

The requirement applies for temporary responsible entities:

CORPORATIONS ACT 2001 - SECT 601FK

Requirements of section 601FA must be met

A company cannot be chosen or appointed as the responsible entity or temporary responsible entity of a registered scheme unless it meets the requirements of section 601FA.

Section 914A(8) of the Act provides for AFSL conditions to be proclaimed by regulation (these conditions ASIC is not allowed to revoke or vary). These conditions are implied and do not appear on the licence. One such condition is proscribed in regulation 7.6.04 (1)(j):

CORPORATIONS REGULATIONS 2001 - REG 7.6.04

Conditions on Australian financial services licence

- (1) For subsection 914A(8) of the Act, an Australian financial services licence is subject to the following conditions:
 - (j) a condition that, on the request of any person, the financial services licensee must make available a copy of its financial services licence within a reasonable time for inspection by that person.

The licensing process

The Corporations Act provides that the application for a Australian Financial Services Licence is made to ASIC:

CORPORATIONS ACT 2001 - SECT 913A Applying for a licence

A person may apply for an Australian financial services licence by lodging an application with ASIC that:

- (a) includes the information required by regulations made for the purposes of this paragraph; and
- (b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph.

Notwithstanding s913A the regulations that have been made (reg 7.6.03) is sparse in its provisions:

CORPORATIONS REGULATIONS 2001 - REG 7.6.03 Applying for Australian financial services licence

For paragraph 913A (a) of the Act, the following information is required as part of an application by person for an Australian financial services licence:

- (a) if the person is a body corporate:
 - (i) the person's name (including the person's principal business name, if any); and
 - (ii) the name and address of each director; and
 - (iii) the name and address of each secretary;
- (b) if the person is applying on behalf of a partnership - the partnership's name and address, and the name of each partner;
- (c) if paragraphs (a) and (b) do not apply - the person's name (including the person's principal business name, if any);
- (d) the person's principal business address;
- (e) if the person has an ABN -- the ABN;
- (f) a description of the financial services that the person proposes to provide;
- (g) the arrangements (including a description of systems) by which the

person will comply with its general obligations set out in section 912A of the Act;

- (h) any other information that ASIC requires for the purpose of considering the application.

The bulk of the information ASIC requires is detailed in the following three regulatory guides:

RG 1 AFS Licensing Kit: Part 1 - Applying for and varying an AFS licence

RG 2 AFS Licensing Kit: Part 2 - Preparing your AFS licence application

RG 3 AFS Licensing Kit: Part 3 - Preparing your additional proofs

The expressions “*proofs*” denotes documents which evidence the information provided in the application form. These vary considerably depending upon the category of licence and complexity and size of the licensee.

Section 913B sets out when ASIC may grant a licence:

CORPORATIONS ACT 2001 - SECT 913B

When a licence may be granted

- (1) ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):
 - (a) the application was made in accordance with section 913A; and
 - (b) ASIC has no reason to believe that the applicant will not comply with the obligations that will apply under section 912A if the licence is granted; and
 - (c) the requirement in whichever of subsection (2) or (3) of this section applies is satisfied; and
 - (ca) the applicant has provided ASIC with any additional information requested by ASIC in relation to matters that, under this section, can be taken into account in deciding whether to grant the licence; and
 - (d) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph.
- (2) If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the applicant is not of good fame or character.
- (3) If the applicant is not a single natural person, ASIC must be satisfied:
 - (a) that:
 - (i) if the applicant is a body corporate--there is no reason to believe that any of the applicant's responsible officers are not of good fame or character; or
 - (ii) if the applicant is a partnership or the trustees of a trust--

there is no reason to believe that any of the partners or trustees who would perform duties in connection with the holding of the licence are not of good fame or character; or

- (b) if ASIC is not satisfied of the matter in paragraph (a)--that the applicant's ability to provide the financial services covered by the licence would nevertheless not be significantly impaired.
- (4) In considering whether there is reason to believe that a person is not of good fame or character, ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to:
- (a) any conviction of the person, within 10 years before the application was made, for serious fraud; and
 - (b) whether the person has held an Australian financial services licence that was suspended or cancelled; and
 - (c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and
 - (d) any other matter ASIC considers relevant.
- (5) However, ASIC may only refuse to grant a licence after giving the applicant an opportunity:
- (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC in relation to the matter.

ASIC has used the power in s913B(ca) to give itself broader and more flexible approach in processing applications. This subsection essentially allows it to require anything it wants to (without the need for the requirements to be specified in the regulations). This power has been regularised through the use of the Regulatory Guides. In addition to the Licensing Kit (RG1-3) these are:

- RG 98 Licensing: Administrative action against financial services providers
- RG 104 Licensing: Meeting the general obligations
- RG 105 Licensing: Organisational competence
- RG 126 Compensation and insurance arrangements for AFS licensees
- RG 146 Licensing: Training of financial product advisers
- RG 165 Licensing: Internal and external dispute resolution
- RG 166 Licensing: Financial requirements
- RG 167 Licensing: Discretionary powers
- RG 175 Licensing: Financial product advisers - conduct and disclosure
- RG 176 Licensing: Discretionary powers - wholesale foreign financial services providers
- RG 181 Licensing: Managing conflicts of interest

As well as the above arguably all Regulatory Guides are part of the licensing process and ASIC uses the licensing power and particularly its power to deny or make conditions to implement its policies across the entire range of the regulatory activity.

The broad thrust of the licensing process is explained in Regulatory Guide 1.3:

- RG 1.3 ASIC assesses applications for AFS licences as part of our role as regulator of the financial services industry. When we assess a licence application we consider whether you:
- (a) are competent to carry on the kind of financial services business you are applying for;
 - (b) have sufficient financial resources to carry on the business you are proposing - unless you're regulated by the Australian Prudential Regulation Authority (APRA); and
 - (c) can meet your other obligations as a licensee if we grant you a licence.

The online form

- RG 1.16 The AFS licence application, form FS01, is an electronic form that you complete online using our eLicensing system. To access it you need to go to our website at www.asic.gov.au/afsl.
- RG 1.17 Part 2 (RG 2) explains how to get a user name and password for the eLicensing system so that you can start your application. Once you've started your application you can save and resume it as many times as you like before you finalise and submit it to us. You can also print off a copy of your draft application at any time. The information you enter in your online application is protected by industry-standard encryption and stored on a secure server at ASIC.
- RG 2.2 One of the benefits of applying online is that you can start your application, save it as a draft and resume it as many times as you like before you finalise and submit it to us. You can also print off a copy of your draft application at any time.
- RG 2.8 The eLicensing system will ask you to select a user name and password so that you can control access to your online application. Your user name must have a minimum of 6 characters (all letters) and your password a minimum of 6 characters (including at least one numeric character). Both your user name and password are case-sensitive, so remember whether you have used upper or lower case

- RG 2.9 The eLicensing system will also generate a reference number for your application and ask you to make a note of it. The security of your application reference number, user name and password is your responsibility.
- RG 2.10 You will need your user name, password and reference number to resume your application at a later time. If you forget your password you can get a new one from the system using your reference number and user name. However, if you forget your user name or reference number you won't be able to resume your application—you will need to start again.
- RG 2.19 Both the FS01 and FS03 online applications are designed so that you can't progress to the next screen until you have completed the screen you are on, although you can go back to a completed screen to amend it. Your application is automatically saved to the ASIC server every time you hit 'Next'. If you are disconnected from the internet or you close out of the application, you will have saved all information up until the question you were last entering.

Content of the form

- RG 1.19 The FS01 has five parts:
- (a) Part A is where you enter your details as the applicant and the details of a contact person, select the financial services and products you want to be authorised to provide and answer questions that give us a basic description of your business.
 - (b) Part B is where you will be asked questions that relate to the obligations you will have as an AFS licensee and your ability to meet them.
 - (c) If you've selected certain complex financial services or products in Part A, the system will trigger more detailed questions about those services or products in Part C.
 - (d) In Part D the system will generate declarations and certifications based on your answers in Parts A and B (and C, if relevant). You will be signing these declarations when you sign a print-out of your application.
 - (e) Part E is where the system identifies the core proofs you need to send with your application, as well as listing some other proofs. If we later ask you to provide additional proofs, these will generally be one or more of the other proofs listed in Part E.

Submission

- RG 1.22 After you've answered all of the questions it's important to print off your application and review it carefully before you finalise it. Make sure your answers are correct and you understand the certifications

and declarations (Part D) that you'll be signing. It's a criminal offence to make false or misleading statements in your application. Once you've finalised your application you won't be able to change your answers.

- RG 1.23 When you're satisfied that your application is complete, the system will lead you through steps to finalise, print and submit it. You need to sign the printout and assemble the core proofs listed in Part E.
- RG 1.27 After you've finalised and submitted your online application, you need to send us, in one bundle:
- (a) the signed print-out of your FS01 (or the signed paper application we've tailored to you if you can't apply online);
 - (b) a cheque (if you haven't already paid the application fee by BPAY), and
 - (c) copies of the four core proofs outlined in RG 1.30 (for some proofs you'll need to provide certified copies). Part 2 (RG 2) explains these proofs in more detail, including the information you must include in them. You'll need to read Part 2 before you prepare your core proofs.
- RG 1.28 If you're applying online, we'll need to receive this bundle within 20 business days of you submitting your online application. You should also keep a copy of your application and core proofs for your own records.
- RG 1.29 We won't begin to assess your online application until we receive this bundle. If we don't receive it within 20 business days, we will automatically reject your application and you'll need to re-apply.

The proofs

- RG 1.30 The four core proofs you must send us are:
- (a) Business Description,
 - (b) People Proofs for each responsible manager,
 - (c) Organisational Competence - this includes a Table of Organisational Competence and, if relevant, a Submission on a Responsible Manager's Competence; and
 - (d) Financial Statements and Financial Resources - you don't need to send this proof if you're regulated by APRA
- RG 1.31 We'll scan your core proofs into our document imaging system and then destroy them, so only send us copies of your proofs (or, where required, certified copies), not your original documents.

Declarations

- RG 2.226 The general declarations include that:
- (a) you have taken reasonable steps to ensure that, to the best of your knowledge, the information supplied in, and with, your application is complete and accurate;
 - (b) if granted an AFS licence, you will comply with your AFS licence obligations;
 - (c) you acknowledge that we may take action to verify that the statements and certifications you have made in your application are not false or misleading; and ...

Pre-lodgment check

- RG 1.38 After we receive your signed application and core proofs we'll do a 'prelodgement check' on them to ensure that they are complete and acceptable for lodgement. If your application (including your core proofs) doesn't pass the pre-lodgement check, we'll send it back to you and you'll have to reapply.
- RG 1.40 Once your application passes pre-lodgement we'll assign it to one of our licensing analysts for assessment.

Analysis

- RG 1.6 How long it takes us to decide your application for an AFS licence will vary depending on our analysis of your business and the market you propose to operate in.
- RG 1.41 When we assess applications our level of assessment will vary depending on our analysis of your business and the market you propose to operate in. We've developed this approach to make our assessment process as efficient and effective as possible.
- RG 1.42 If we need more information, such as additional proofs, we'll send you an email or letter or contact you by telephone. You should respond to all our requests promptly and within any timeframe we specify. If you don't, it will delay our decision, or we may decide your application on the basis of the information we do have.

Draft licence

- RG 1.51 If we decide to grant you an AFS licence, we'll first send you a draft licence containing the proposed service and product authorisations and other conditions on your licence. We'll send your draft licence by email to the address that you've given us in Part A of your application.

- RG 1.53 If your draft licence looks right, you must formally consent to it before we can send you your final licence. Do this by printing off the accompanying consent notice, signing it and sending it back to us.
- RG 1.54 Your draft licence will also include a ‘requirements letter’ listing any outstanding matters you need to finalise before we can grant your final licence. For example, you might need to provide us with details of your professional indemnity insurance. You’ll need to finalise these outstanding matters as quickly as possible. If you don’t do this in a reasonable timeframe, we may withdraw our offer of a licence. You’ll need to contact us if you have any problems finalising these outstanding matters.

Registering the managed investment scheme

- RG 1.55 If your service authorisations include operating a registered managed investment scheme, you need to register your scheme with us after you receive your draft licence. Don’t lodge your scheme documents for registration before then. Once you’ve received your draft licence you have up to four months to lodge your scheme documents. You’ll find more information about registering a managed investment scheme on our website at www.asic.gov.au/mis.
- RG 2.81 Before you can register the scheme(s) you are applying to be authorised for, you need to lodge your AFS licence application and be assessed as having the organisational competence and capacity to operate those scheme(s).
- RG 2.82 If you are, we will send you a draft licence. After you receive your draft licence you have up to four months to register your scheme(s) with us. You should not lodge your scheme documents with us before you receive a draft licence.
- RG 2.83 If we agree to register the scheme(s) and you have met the licensing requirements and agreed to the draft licence conditions, we will grant your licence and register the scheme(s) on the same day. RG 2.84 For more information about registering schemes see our website at www.asic.gov.au/mis.

Final licence

- RG 1.56 After we’ve received your signed consent to your draft licence we’ll send your final licence by email to the address that you’ve given us in Part A of your application.

- RG 1.57 If you've applied to operate a registered managed investment scheme and we agree to register the scheme, we'll grant your final licence and register the scheme on the same day.

Refusal

- RG 1.60 When we assess your application we may conclude that you don't meet all of the requirements in s913B of the Corporations Act. For example, if we have reason to believe you don't have the capacity to provide the financial services and products you've asked to be authorised for, and therefore won't be able to comply with your licensee obligations, we must refuse to grant you an AFS licence.
- RG 1.61 Before we can refuse to grant an AFS licence, we will refer your application to an ASIC 'delegate', who is an impartial person authorised to make the final decision. If the delegate is thinking of refusing to grant you an AFS licence, they'll send you a letter explaining why and giving you two options:
- (a) You can appear at a hearing and/or make submissions. This will give you an opportunity to further explain why you believe you should be granted an AFS licence. If, after considering any submissions, the delegate decides not to grant you an AFS licence, they will send you a further letter setting out their decision and reasons why. They'll also tell you how to apply to the Administrative Appeals Tribunal for a review if you're unhappy with the final decision.
 - (b) You can choose to withdraw your application. If you take this option, we'll send your proof documents back to you. However, we won't be able to refund your application fee or hold it over if you decide to reapply.

Variation

- RG 1.68 If your business changes, e.g. you want your AFS licence to cover more financial services or products, you need to apply to vary your licence.
- RG 1.65 To lodge the relevant form, go to the Licensees portal at www.asic.gov.au/licensees. To access the Licensees portal you'll need the user name and password you selected when you applied for your licence. If you've forgotten them or you need extra ones for staff, apply for them online via the Licensees portal.
- RG 1.69 To vary your licence you need to complete and lodge ASIC form FS03. The process for this is very similar to the process for completing and lodging form FS01, which is outlined in earlier sections of this guide.

- RG 1.71 FS03 is an electronic form that you complete online using our eLicensing system. To access it you need to go to the Licensees portal at www.asic.gov.au/licensees. You'll need your licence number, plus the user name and password you selected when you initially completed your AFS licence application. If you've forgotten your user name or password or you need extra ones for staff, apply for them online via the Licensees portal.
- RG 1.76 If you're applying online the system will provide you with a free-text box to type in so that you can explain to us which conditions you want to vary and why you should be allowed to do this.
- RG 1.96 If you're applying to vary your authorisations or other conditions, and you also want to add or remove one or more responsible managers, you need to also complete and submit form FS20 as well as form FS03. This form is available from the Licensees portal at www.asic.gov.au/licensees.
- RG 1.97 If you're adding responsible managers, you'll need to provide People Proofs for each new person. People Proofs include:
- (a) a Statement of Personal Information, including certified copies of qualification certificates;
 - (b) certified copy of bankruptcy check;
 - (c) certified copy of criminal history check; and
 - (d) certified copies of two business references (at least one of these must be from someone external to the responsible manager's organisation).
- RG 2.15 The online application to vary an AFS licence (form FS03) follows the same five-part structure as the FS01 online application. To access it, go to the Licensees portal at www.asic.gov.au/licensees. Before you use the Licensees portal you should click on 'How the Licensees portal works'.

Authorisation

Categories of license

While there is a single Australian Financial Services Licence there are many different categories of licence (distinguished by their different authorisations and conditions). The authority to operate a managed investment scheme will usually require multiple authorisations. This is explained in RG 2.78:

- RG 2.78 When you operate a registered scheme, you will generally also be carrying on dealing activities (e.g. issuing interests in the scheme and perhaps dealing in scheme investments that are financial products).

Most applicants who apply to operate a registered scheme will also need the dealing authorisation. For example, if you operate a managed investment scheme that holds derivatives to hedge your scheme asset holdings, you will generally need an authorisation to deal in derivatives.

Authorisations in pro forma 209

Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence. Below is an extract from PF 209 on Authorisations:

Authorisation

(This condition expressly authorises the type of financial services a licensee can provide on specific types of financial products. This condition will be tailored to the licensee's individual circumstances, including the types of clients that the licensee provides financial services to or transacts with. Where appropriate, specific capacity, method and product limitations will be incorporated into this condition.)

1. This licence authorises the licensee to carry on a financial services business to:
 - (a) provide financial product advice for the following classes of financial products:
 - (i) [all products listed]; and
 - (b) deal in a financial product by:
 - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products;
 - (A) [all products listed]; and
 - (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of financial products:
 - (A) [all products listed]; and
 - (iii) underwriting:
 - (A) [securities or managed investment interests]; and
 - (iv) arranging for another person to issue, apply for, acquire, vary or dispose of a financial product in respect of the following classes of financial products:

- (A) [all products listed]
 - (v) arranging for another person to apply for, acquire, vary or dispose of a financial product in respect of the following classes of financial products
 - (A) [all products listed]
 - (vi) arranging for another person to underwrite:
 - (A) [*securities or managed investment interests*]
 - (c) make a market for the following financial products:
 - (i) [*all products listed*]; and
 - (d) operate the following kinds of registered managed investment schemes (including the holding of any incidental property) in its capacity as responsible entity of:
 - (i) [insert name of scheme] scheme, a scheme which only holds [insert kind of scheme] (ARSN: xxx xxx xxx); and/or
 - (ii) [*insert kind(s) of scheme*]; and
 - (e) provide the following custodial or depository services:
 - (i) [*all services listed*];
- to retail and/or wholesale clients.

Financial Services

- RG 2.49 ... you will be asked to select one or more financial services from the following list:
- (a) Provide Financial Product Advice (commonly referred to as ‘advising’)
 - (b) Deal in a Financial Product (commonly referred to as ‘dealing’)
 - (c) Make a Market for a Financial Product
 - (d) Operate a Registered Scheme
 - (e) Provide a Custodial or Depository Service.
- RG 2.56 Dealing in a financial product is defined in s766C. You will be dealing if you do any of the following, either as principal or as an agent of another person:
- (a) apply for, acquire, issue, vary or dispose of a financial product;

or

- (b) in relation to securities or managed investment interests, underwrite the securities or interests.

The terms acquire, dispose and issue are defined in s761A and 761E.

RG 2.58 you will be asked to select either:

- (a) Deal in a financial product (i.e. dealing)—select this authorisation if you will be dealing, or dealing and arranging; or
- (b) Arrange for a person to deal in a financial product (i.e. arranging) - select this authorisation if you will only be arranging. If you choose arranging you will not be able to deal as principal or as an agent of another person.

In the application you can only choose dealing or arranging because dealing includes arranging.

RG 2.59 ... you will be asked to select the particular types of dealing or arranging services that you want to be authorised for. You can choose one or more of the following:

- (a) Issue, apply for, acquire, vary or dispose of a financial product—this authorisation generally applies to product issuers, such as responsible entities, life companies, fund managers and general insurers. However, it can apply to anyone who wants to provide any of these types of dealing or arranging services as principal or as an agent; and/or
- (b) ‘Apply for, acquire, vary or dispose of a financial product on behalf of another’-select this authorisation if you intend to provide any of these types of dealing or arranging services on behalf of another person); and/or
- (c) ‘Underwrite an issue of securities or interests in managed investments’—this includes interests in both unregistered and registered managed investment schemes.

Financial Products

RG 2.91 In the application the financial product authorisations are grouped under 11 broad categories based on the definitions in s761A and 764A. Before you select your product authorisations you need to think about each particular product you will be providing and what category it fits under. We encourage you to carefully check the definitions.

RG 2.92 The following broad categories are designed to cover all types of financial products:

- (a) Deposit and payment products—this includes basic deposit, non-basic deposit and non-cash payment products;

- (b) Derivatives;
- (c) Foreign exchange contracts;
- (d) General insurance;
- (e) Government debentures, stocks or bonds;
- (f) Life products—this includes any products issued by a registered life insurance company that are backed by one or more of its statutory funds;
- (g) Managed investment schemes—this includes interests in both registered and unregistered schemes;
- (h) Retirement savings accounts;
- (i) Securities;
- (j) Superannuation;
- (k) Miscellaneous financial facilities.

Registered Schemes

- RG 2.69 If you will be the responsible entity of a registered scheme, you will be operating a registered scheme. A registered scheme is a managed investment scheme that is registered with ASIC under s601EB.
- RG 2.70 To operate a registered scheme, you must be a public company that holds an AFS licence authorising you to do so: see s601FA.
- RG 2.73 ...you will be asked to select whether you want to be licensed to operate:
- (a) Named scheme(s) - these are specific schemes that will be named on your licence; and/or
 - (b) Scheme(s) of a particular asset kind(s) - if you select this authorisation, what will appear on your licence is not the individual scheme name(s) but the particular kind(s) of asset or business they invest in. You can be authorised to operate more than one kind of scheme.
- RG 2.74 If you select scheme(s) of a particular asset kind you won't have to apply to vary your licence every time you want to register a scheme of that kind. However, you should only apply for this authorisation if you can demonstrate that you have the organisational competence and the capacity (e.g. systems and resources) to operate schemes with assets or businesses of that type: see Section D of RG 105. Otherwise, you should apply to operate a named scheme.
- RG 2.75 ...you will be asked to select what kind(s) of scheme you want to operate. Even if you apply to operate a named scheme, you still need to select what kind of scheme that named scheme is.

RG 2.76 Where you intend to operate a scheme that is made up of more than one asset kind, you need to select each particular asset kind that is relevant to the scheme. However, if you hold assets that are only ‘incidental property’ (as defined in Pro Forma 209 Australian financial services licence conditions (PF 209)), you don’t need to select an asset kind for these assets. ‘Incidental property’ covers certain assets necessary or incidental to the effective operation of your registered scheme that are a small proportion of assets of the scheme, as well as certain liquid financial assets held for a short period, and derivatives for certain limited purposes.

RG 2.77 The following are the kinds of scheme you can apply for authorisation to operate:

- (a) Derivatives—this covers schemes that hold derivatives for hedging or other purposes, other than as incidental property;
- (b) Direct real property—this includes listed property trusts, serviced strata schemes and stable property trusts or syndicates;
- (c) Film schemes—this covers schemes with the sole purpose of producing and/or exploiting a cinematograph film (as defined in the Copyright Act 1968);
- (d) Financial assets—this covers schemes that hold cash, cheques, orders for payment of money, bills of exchange, promissory notes, securities, deposit products and interests in managed investment schemes, but does not include derivatives;
- (e) IDPS-like—this covers IDPS-like services provided through a registered scheme under Chapter 5C of the Corporations Act. For more information see RG 148;
- (f) Mortgages—this covers both pooled mortgage schemes and contributory mortgage schemes. For more information see Regulatory Guide 144 Mortgage investment schemes (RG 144);
- (g) Primary production—this covers aquaculture, cattle breeding, forestry, horse breeding, horticulture, livestock grown for fleece, ratites (ostriches/emus), tea trees, viticulture or other specialised schemes; and
- (h) Time-sharing schemes—for further information see Regulatory Guide 160 Time-sharing schemes (RG 160).

RG 2.78 When you operate a registered scheme, you will generally also be carrying on dealing activities (e.g. issuing interests in the scheme and perhaps dealing in scheme investments that are financial products). Most applicants who apply to operate a registered scheme will also need the dealing authorisation.

RG 2.79 You may also need to be authorised to provide financial product advice, depending on how you distribute interests in your scheme.

Custodial services

RG 2.89 Even if your custodial or depository services will be ‘incidental’ to the other financial services you will provide, you still need the ‘Provide a Custodial or Depository Service’ authorisation. While we impose different financial requirements for ‘incidental’ custodial or depository services, this doesn’t change the need for you to be authorised to provide those services. For more information on the financial requirements for incidental custodial or depository services, see Regulatory Guide 166 Licensing: Financial Requirements (RG 166) at RG 166.63(a) and RG 166.75.

Duties of licensees

The general duties of licensees are laid out in sections 912A and 912B. The duties of the licensee under these sections may be summarised as a duty to ensure:

- (a) The financial services are provided efficiently, honestly and fairly,
- (b) It has arrangements in place for the management of conflicts of interest,
- (b) It complies with the conditions on the licence,
- (c) It complies with the financial services laws;
- (d) It’s representatives comply with the financial services laws,
- (e) It has adequate financial technological and human resources to provide the licensed financial services and to carry out supervisory arrangements (if not APRA regulated),
- (f) It maintains its organisational competence to provide the financial services,
- (g) Its representatives are adequately trained and competent to provide the licensed financial services,
- (h) It has an internal and external dispute resolution system (for retail clients),
- (i) It has adequate risk management systems (if not APRA regulated),
- (j) It has in place compensation arrangements (for retail clients).

ASIC does not simply enforce these duties after a licence has been issued but also requires the capacity to comply with the obligations exists prior to the grant of the licence.

RG 1.11 If we grant you an AFS licence, you must comply with each of these obligations from day one in relation to all of the financial services and products covered by your licence. You need to have systems and processes in place that will enable you to comply with these obligations at the time you apply for your licence. When you complete your application form, you’ll be asked to make declarations

and certifications to this effect.

RG 104.5 If you are applying for an AFS licence, you must be able to show that you can comply with the general obligations from the time you are granted a licence, and on an ongoing basis: reg 7.6.03(g). We cannot grant you a licence if we have any reason to believe you will not be able to comply with your general obligations once you have a licence: s913B(1)(b).

This is in line with the Act:

CORPORATIONS ACT 2001 - SECT 913B

When a licence may be granted

- (1) ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):
 - (b) ASIC has no reason to believe that the applicant will not comply with the obligations that will apply under section 912A if the licence is granted; and

and Regulations:

CORPORATIONS REGULATIONS 2001 - REG 7.6.03

Applying for Australian financial services licence

For paragraph 913A (a) of the Act, the following information is required as part of an application by person for an Australian financial services licence:

- (g) the arrangements (including a description of systems) by which the person will comply with its general obligations set out in section 912A of the Act;

Financial requirements

Under the Act

The Act requires that licensees have in place adequate financial resources:

CORPORATIONS ACT 2001 - SECT 912A

General obligations

- (1) A financial services licensee must:
 - (d) unless the licensee is a body regulated by APRA - have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements...

APRA regulated bodies

RG 104.12 If you are a body regulated by APRA... the general obligations

to have adequate resources and risk management systems do not apply to you: s912A(1)(d) and (h). This is the case even if only a part of your financial services business is an activity that APRA regulates. APRA, not ASIC, imposes any requirements for risk management and resources that apply to you.

Note: The term ‘body regulated by APRA’ has the meaning given in s3(2) of the Australian Prudential Regulation Authority Act 1998.

RG 166.2 If you are a body regulated by the Australian Prudential Regulation Authority (APRA) as defined in s3(2) of the Australian Prudential Regulation Authority Act 1998, this guide does not apply to you. APRA, and not ASIC, imposes any requirements for financial resources that are to apply to the bodies APRA regulates. This applies even if only a part of your financial services business is an activity that is regulated by APRA.

Interplay with risk management

RG 166.7 To satisfy your obligation under s912A(1)(h), we expect your risk management systems to specifically deal with the risk that your financial resources will not be adequate to ensure that you are able to carry on your business in compliance with the licensee obligations, or to wind up your business in an orderly manner.

Purpose of requirements

RG 166.11 We impose financial requirements to help ensure that:

- (a) you have sufficient financial resources to conduct your financial services business in compliance with the Corporations Act 2001 (Corporations Act) (including carrying out supervisory arrangements);
- (b) there is a financial buffer that decreases the risk of a disorderly or non-compliant wind-up if the business fails; and
- (c) there are incentives for your owners to comply through risk of financial loss.

RG 166.12 In setting licence conditions for financial requirements, we seek to set minimum standards that are framed as clearly and simply as possible so as to provide certainty. We seek to avoid any:

- (a) unreasonable burden in maintaining particular levels of assets or in reporting; and
- (b) unjustifiable barriers to market entry for providing different kinds of financial services.

Documentation

- RG 1.37 Unless you're regulated by APRA, you also need to provide this core proof to show that you have the financial resources to carry on the business you're proposing. In it you need to identify which financial requirements apply to you and provide documents, including financial statements, demonstrating that you can comply with them...
- RG 166.20 Assets used to meet one licence condition may be used to meet another condition. For example, if you are a responsible entity and need to have \$5 million NTA under Section C, you can take into account the assets that give you that NTA to meet our cash needs requirement under paragraph (c) of RG 166.25.
- RG 2.292 For this core proof you need to:
- (a) identify which financial requirement(s) under Regulatory Guide 166 Licensing: Financial requirements (RG 166) apply to you and provide financial documents demonstrating that you can comply with these financial requirements; and
 - (b) provide a description of your processes for ensuring that you comply with RG 166, including your processes for:
 - (i) monitoring and reporting on financial obligations, including reporting lines and the frequency of reporting;
 - (ii) ensuring that you have adequate funds to properly carry out your responsibilities under your AFS licence, now and in the future; and
 - (iii) ensuring compliance with all ongoing record keeping obligations.
- RG 2.300 ... you must provide financial statements demonstrating that you have positive net assets and solvency: see RG 166.25. These must include:
- (a) a balance sheet;
 - (b) an income statement (if already operating); and
 - (c) a statement of cash flows (if already operating).
- RG 2.298 Any financial documents you give us, except for cash flow projections, must comply with all relevant accounting standards.
- RG 2.301 Your financial statements must be no more than 3 months old. You should preferably provide audited financial statements. However, if your last audited financial statements are more than 3 months old, you should provide signed unaudited financial statements that are no more than 3 months old.

RG 2.302 Unaudited financial statements should be signed by the authorised person(s) and include the printed name and capacity of the signatory and the date of signing. People authorised to sign unaudited financial statements are:

(b) for a company, a director or secretary;

Base level requirements

RG 2.299 The base level requirements in Section B of RG 166 apply to all applicants except bodies regulated by APRA and market and clearing participants that are exempt from them under Section D of RG 166.

RG 2.308 The financial requirements in Section C of RG 166 generally apply to:

(a) responsible entities of managed investment schemes;

(c) providers of custodial or depository services.

RG 166.25 You must:

(a) at all times be solvent—that is, be able to pay all your debts as and when they become due and payable;

(b) have total assets that exceed total liabilities (as shown in your most recent annual balance sheet lodged with us), and at all times have no reason to suspect that total assets would no longer exceed total liabilities on a current balance sheet;

(c) meet our cash needs requirement by complying at all times with one of Options 1 to 5 (see RG 166.26 and Tables 1A to 3); and

Note: We expect that most small business licensees will only need to consider complying with Options 1 or 2, and will generally prefer Option 2.

(d) meet the audit requirement set out in RG 166.27–RG 166.28.

RG 166.30 We set minimum financial resource requirements to promote appropriate financial risk management, taking into account the nature, scale and complexity of a licensee’s business. Our aim is not to ensure that licensees do not fail, but to help ensure that cash shortfalls do not put compliance with the licensee obligations at risk.

RG 166.33 If a licensee does not have enough cash to meet its liabilities, particularly over a short time frame like 3 months, there is a greater risk that the licensee may not provide financial services in compliance with the licensee obligations under Chapter 7 of the Corporations Act. If cash outflow is planned for and covered, it is less likely that a licensee will feel pressured to cut costs on its compliance arrangements or engage in non-complying conduct.

RG 166.34 Budgeting to meet current and future liabilities and to take into account risks facing the business is good business practice. Planning and monitoring will help a licensee to put in place and maintain appropriate arrangements (including compliance measures) to ensure adequate financial resources are available when required. This is particularly relevant in periods of higher risk for the business (e.g. when a business is growing rapidly or when a new business is in its early stages).

RG 166.46 To provide a yardstick, you must also calculate how much cash you might have to hold as a cash buffer based on the previous financial year's cash outflow (if you have done a profit and loss statement for a previous financial year).

Options for calculating baseline requirements

ASIC provide 5 options for calculating a licensee's baseline financial requirements:

RG 166.26A A short description of the options follows:

- (a) Option 1 is designed for licensees that maintain a certain level of cash or other liquid financial resources at all times (e.g. by way of commitments by a parent company);

Note: We expect this option will be relevant for some small business licensees.

- (b) Option 2 is suitable for all kinds of licensees including small business licensees that do not always maintain cash or commitments of support from others. We expect most small business licensees will prefer this option;

Important note: We expect this option will be most relevant for small business licensees.

- (c) Option 3 is relevant to licensees that can draw on financial backing from an Australian ADI or a relevantly recognised foreign regulated deposit-taking institution;

Note 1: We expect this option will not be relevant for small business licensees.

Note 2: For further information, see RG 166.26C and RG 166.49B. See also Information Release [IR 03-26].

- (d) Option 4 is relevant to subsidiaries of certain prudentially regulated bodies; and

Note 1: We expect this option will not be relevant for small business licensees.

Note 2: For further information, see RG 166.26D and RG 166.49C. See also Information Release [IR 03-44] ASIC provides further options to meet cash needs requirements.

- (e) Option 5 is relevant to licensees in corporate groups that plan cash flows on a group basis.

RG166 Table 2: Option 1—Reasonable estimate projection plus cash buffer

You must meet all these requirements	
Projection	<ol style="list-style-type: none"> 1. Prepare a projection of cash inflow and outflow (cash flows) over at least the next 3 months based on your <i>reasonable estimate</i> of what is likely to happen over this term. 2. Document your calculations and assumptions, and describe in writing why they are the appropriate assumptions. 3. Update the projection of cash flows when it ceases to cover the next 3 months, or if you have reason to suspect that an updated projection would show you were not meeting your licence conditions.
Financial resources	<ol style="list-style-type: none"> 4. Show, based on your projection of cash flows, that you will have access as needed to enough financial resources to meet your liabilities over the projected term of at least the next 3 months, including any additional liabilities you project you will incur during that term. 5. Have in cash an amount equal to 20% of the greater of: <ol style="list-style-type: none"> (a) the cash outflow for the projected period of at least the next 3 months, (if the projection covers a period longer than 3 months, the cash outflow may be adjusted to produce a 3-month average); or (b) your actual cash outflow for the most recent financial year for which you have prepared a profit and loss statement, adjusted to produce a 3-month average.

RG166 Table 3: Option 2—Contingency-based projection

You must meet all these requirements	
Projection	<ol style="list-style-type: none"> 1. Prepare a projection of cash inflow and outflow (cash flows) over at least the next 3 months that shows your estimate of what would happen if your ability to meet your liabilities over the projected term was adversely affected by <i>commercial contingencies</i>. This includes any liabilities you might incur during the term of the projection. You have to take into account all contingencies that are sufficiently likely for a reasonable licensee to plan how they might manage them. 2. Document your calculations and assumptions, and describe in writing why they are the appropriate assumptions. 3. Update the projection of cash flows when it ceases to cover the next 3 months, or if you have reason to suspect that an updated projection would show you were not meeting your licence conditions.
Financial resources	<ol style="list-style-type: none"> 4. Show, based on the projection of cash flows, that you will have access as needed to enough financial resources to meet your liabilities over the projected term of at least the next 3 months, including any additional liabilities you might incur during that term.

- RG 166.44 We expect that Option 1 would be more suitable for larger businesses or those that have external sources of financial support. Option 1 allows you to rely on a simpler calculation based on having in effect 18 days outgoings (i.e. 20% of 3 months) available to you in liquid form. By having a cash buffer, you will have a buffer to help you manage commercial contingencies.
- RG 2.305 If you choose Option 1 or Option 2, you must provide a signed 3-month (month-by-month) cash flow projection demonstrating that you have met the cash needs requirement. In preparing your cash flow projection you must document the projections, calculations and your assumptions. You must explain why these assumptions are appropriate, particularly when relying on the conduct of people not under a legal commitment, e.g. sales from repeat business. This helps to show that you will comply with your obligations.

Auditing and monitoring

- RG 166.51 Since Part 7.8 already requires audited accounts, asking for opinions in the annual audit on a licensee's compliance with our financial requirements is unlikely to be a significant additional expense, and will substantially enhance compliance by the licensee with its financial resources and risk management obligations under s912A(1).
- RG 166.27 The audit report you must give us for each financial year under s989B(3) must also contain information about compliance with our financial requirements. If you do not have to provide an audit report under s989B(3), you must still provide us with an audit report about compliance with our financial requirements. You must also give us this information if we request it for a specified period at another time: see s912C(2).
- RG 166.53 We will not routinely monitor your compliance with financial requirements. Normally, when we want to check compliance, we will consider asking for an audit. We envisage asking for an audit if we suspect that you may not be complying with your financial resources or risk management obligations (e.g. because of credible complaints). We will allow a reasonable time for you to comply as appropriate in the circumstances.

Base level requirements in pro forma 209

Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence. Below is an extract from PF 209 on Base Level Requirements:

Base Level Financial Requirements

(This condition is imposed on all licensees who are not a body regulated by APRA: see ASIC Policy Statement 166.)

13. The licensee must:
- (a) be able to pay all its debts as and when they become due and payable; and
 - (b) either:
 - (i) have total assets that exceed total liabilities as shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's total assets would currently not exceed its total liabilities; or
 - (ii) have adjusted assets that exceed adjusted liabilities calculated at the balance date shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's adjusted assets would currently not exceed its adjusted liabilities; and
 - (c) meet the cash needs requirement by complying with one of the following five options:
 - (i) Option 1 (reasonable estimate projection plus cash buffer)—refer to definition of “Option 1” under this licence; or
 - (ii) Option 2 (contingency based projection)—refer to definition of “Option 2” under this licence; or
 - (iii) Option 3 (financial commitment by an Australian ADI or comparable foreign institution)—a requirement that an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider gives the licensee an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of the demand to the licensee's creditors or a trustee for the licensee's creditors, that the licensee reasonably expects will apply for at least three months, taking into account all commercial contingencies for which the licensee should reasonably plan; or
 - (iv) Option 4 (expectation of support from an Australian ADI or comparable foreign institution)—a requirement that the licensee:

- (A) is a subsidiary of an Australian ADI or a corporation approved by ASIC in writing for the purpose of this condition; and
 - (B) reasonably expects that (based on access to cash from its related bodies corporate) it will have adequate resources (when needed) to meet its liabilities for at least the next three months (including any additional liabilities that the licensee might incur during that period), taking into account all adverse commercial contingencies for which the licensee should reasonably plan; and
 - (C) ensures that a responsible officer of the licensee has documented that the officer has the reasonable expectation for at least the following three month period together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; or
- (v) Option 5 (parent entity prepares cash flow projections on a consolidated basis)—a requirement that the licensee ensures that:
- (A) the cash flows of the licensee and each of its related bodies corporate, other than any body regulated by APRA (“licensee group”), are managed on a consolidated basis; and
 - (B) there is a body corporate within the licensee group of which all members of the licensee group are subsidiaries that is not a body regulated by APRA (“parent entity”); and
 - (C) the parent entity complies with Option 1 or Option 2 as if it were the licensee, cash flows of any member of the licensee group were cash flows of the licensee and any cash held by a member of the licensee group, other than as trustee or as trustee of a relevant trust, were so held by the licensee; and
 - (D) a report by the parent entity’s auditor that is a registered company auditor is given to ASIC with the licensee’s annual audit report under condition 28 of this licence, in relation to each financial year of the licensee and for any other period that ASIC requests, by a date that ASIC requests, with respect to

compliance by the parent entity with Option 1 or Option 2 as they would apply in accordance with subparagraph (C), reflecting the report that would be required from the auditor of a licensee, for that period purporting to comply with Option 1 or Option 2; and

- (E) either of the following applies:

Alternative A—the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee’s liabilities which the licensee reasonably expects will apply for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan; or

Alternative B—the licensee reasonably expects that (based on access to cash from members of the licensee group), it will have adequate resources to meet its liabilities (including any additional liabilities that the licensee might incur while the commitment applies) for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan and a responsible officer of the licensee has documented that the officer has the reasonable expectation in respect of at least the following three months together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; and

- (F) the licensee has no reason to believe that the parent entity has not complied with the requirement at subparagraph (C) or has failed to comply in a material respect with its obligations under Chapter 2M of the Act or, if the parent entity is not a company, under any other laws (whether law in Australia or not) relating to financial reporting that apply to it.

For 5 years after the end of the last financial year that includes a part of the period to which any document prepared for subparagraph (c)(iv)(C) or Alternative B in subparagraph (c)(v)(E) relates, the licensee must keep the document and give it to ASIC if ASIC requests.

Net tangible assets

RG 166.56 If you are a responsible entity, you must hold at all times a minimum NTA of 0.5% of the value of:

- (a) the assets; plus
- (b) any other scheme property not counted in calculating the value of the assets,

of the registered schemes you operate, with a minimum requirement of \$50,000 and a maximum requirement of \$5 million.

RG 166.58 You must hold \$5 million NTA rather than the amount required by RG 166.56, unless for each registered scheme you operate one of the following is satisfied:

(a) all the scheme property and other assets of the scheme not held by members are held by a custodian appointed by you that has \$5 million NTA or is an eligible custodian;

Note: For a definition of 'eligible custodian', see RG 166.62A.

(b) all the scheme property or assets of the scheme not held by members are special custody assets or tier \$500,000 class assets, each of which are held by you or a custodian appointed by you (or a sub-custodian appointed by that custodian), and:

(i) if you hold the scheme property or assets, you have \$500,000 NTA; or

(ii) if a custodian or sub-custodian holds the scheme property or assets, the custodian has \$500,000 NTA, or is an eligible custodian; or

Note 1: For a definition of 'eligible custodian', see RG 166.62A.

Note 2: For a definition of 'special custody assets', see RG 166.181.

Note 3: For a definition of 'tier \$500,000 class assets', see RG 166.184.

(c) the only scheme property and other assets of the scheme not held under paragraph (a) or (b) are special custody assets, each of which is held by:

(i) you;

(ii) a custodian that has the level of NTA that you are required to have or is an eligible custodian; or

Note: For a definition of 'eligible custodian', see RG 166.62

(iii) the members of the scheme.

RG 166.178 NTA means the licensee's adjusted assets less adjusted liabilities.

RG 166.56A The value of assets and other scheme property must be determined as follows:

(a) in the case of assets that would be recognised in preparing a

balance sheet for members under Chapter 2M—their value as if, at that time, such a balance sheet was being prepared; and

(b) in the case of any other scheme property—its market value.

RG 2.310 Your NTA calculation must be based on a recent balance sheet (preferably no more than 3 months old). The balance sheet must be signed and dated by a director and provided to us with your NTA calculation.

RG 166.57 For the purpose of this calculation, mortgages held by members of a mortgage scheme and managed as part of the scheme must be treated as assets of the scheme.

RG 166.66 If the responsible entity has \$5 million NTA, no NTA requirement will apply to the custodian under the responsible entity's licence. However, the custodian may be required to have \$5 million NTA under its own licence (if it has one).

Note: A person that is merely acting as a responsible entity, or who merely holds the assets of a registered scheme, is not performing a custodial or depository service under s766E(3)(b). Consistent with the focus of regulation of the operation of registered schemes being on the responsible entity, we impose the responsibility for ensuring adequate financial standing of custodians for registered schemes on the responsible entity.

RG 166.68 We will not require the NTA calculation to address market or credit risks to assets, or the risk of contingent liabilities crystallising. NTA is a measure of general financial standing. It includes non-current assets and is not specifically a measure of capacity to meet financial obligations.

RG 166.69 Generally, a custodian (whether it is you or a third party custodian) must have at least \$5 million NTA. This ensures that a custodian is an entity of some substance and also that it has sufficient financial resources to enable assets to be transferred if it ceases to be a custodian. Not all custodians of registered schemes must maintain \$5 million NTA. This recognises that, in certain circumstances:

- (a) it would be unreasonably costly for operators of schemes to retain a custodian that can meet the \$5 million NTA requirement;
- (b) the custodial systems for some scheme property need not be as sophisticated as for other schemes; and
- (c) the prospect of loss of certain types of assets due to custodial failure is less than for others, and there is a low risk of misappropriation of those asset types.

RG 166.70 Serviced strata schemes and mortgage syndicates not involving nominees are examples of contractual-based schemes where the contractual rights (or leases) involved may, by their nature, be unable to be misappropriated or assigned without the investors' consent.

Further types of contractual rights that do not give rise to the same degree of custodial risk as liquid assets may include:

- (a) licences of copyright in a film scheme;
- (b) the right in some agricultural schemes to enter the land and cultivate, harvest and remove the produce; and
- (c) the right to receive rent from a real property syndicate.

Net tangible assets in pro forma 209

Below is an extract from PF 209¹:

Financial Requirements for Managed Investments and Custody Services

...Where the licensee is authorised to operate registered schemes in the capacity of a responsible entity, the following conditions will be imposed.

14. The licensee must hold at least \$5 million net tangible assets (“NTA”), unless for each registered scheme operated by the licensee at least one of the following is satisfied:
- (a) all the scheme property and other assets of the scheme(s) not held by members are held by a custodian appointed by the licensee that has \$5 million NTA or is an eligible custodian; or
 - (b) all the scheme property and other assets of the scheme(s) not held by members are special custody assets or the Tier \$500,000 class assets held by the licensee or a custodian appointed by the licensee (or a sub-custodian appointed by that custodian), where the person holding the scheme property or other assets is:
 - (i) the licensee and the licensee has \$500,000 NTA; or
 - (ii) the custodian or sub-custodian and the custodian has \$500,000 NTA or is an eligible custodian; or
 - (c) the only scheme property and other assets of the scheme(s) that are not held under paragraph (a) or (b) of this condition are special custody assets, each of which is held by:
 - (i) the licensee; or
 - (ii) an eligible custodian; or
 - (iii) a custodian that has the same level of NTA as the licensee is required to have under the remainder of this condition; or
 - (iv) the members of the scheme.

¹ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

Where paragraph (a), (b) or (c) is satisfied, the licensee must hold NTA of 0.5% of the value of:

- (d) assets (including mortgages held by members of a mortgage scheme and managed as part of the scheme); plus
- (e) any other scheme property not counted in calculating the value of assets;

of the registered scheme(s) operated by the licensee with a minimum NTA requirement of \$50,000 and a maximum NTA requirement of \$5 million.

15. The custodian need not have the required NTA under paragraph 14(c)(iii) of this licence if the only assets it holds for the scheme are those contained in paragraphs (a), (c) or (g) of the definition of “special custody assets” under this licence, or if the audited trust account is a regulated trust account, described in paragraph (d) of the definition of “special custody assets” under this licence.

Surplus liquid funds

RG 166.97 If at any time, you:

- (a) are required to hold money in a separate account under Div 2 of Part 7.8;
- (b) hold money or other property on trust for a client or are required to do so under reg 7.8.07(2) or otherwise; or
- (c) have the power to dispose of a client’s property under power of attorney or otherwise,

you must hold at least \$50,000 in SLF unless the value of the money and property for all clients in total is less than \$100,000.

RG 166.99 If a licensee does not have a certain buffer of liquid assets, there is an increased risk that client money or property may be applied to meet the licensee’s financial obligations, rather than being held in accordance with its duties to clients.

RG 166.103 We do not base the amount of SLF required on the amount of client money or property you hold. We are only seeking to reduce a risk that, at a particular time, you will be subject to pressure to use client money or property to meet your own liabilities. We are not seeking, by imposing financial requirements, to provide a source of compensation for clients whose money or property is misused.

RG 166.72 If the responsible entity holds scheme property, then it must generally also comply with Section E. If Section E requires \$50,000 SLF, the responsible entity must comply with this requirement in addition to the NTA requirement in RG 166.58–RG 166.59. For example, a

responsible entity that was required to have \$100,000 NTA would need another \$50,000 in assets that counted towards NTA if it had:

- (a) no liabilities; and
- (b) \$50,000 credit in an on-demand account it beneficially held with an ADI.

These assets would not be required to be current assets, as the \$50,000 in the ADI account satisfies the SLF requirement.

RG 2.311 If Section E of RG 166 applies to you, you must provide a calculation of the amount of surplus liquid funds (SLF) you actually hold.

RG 2.312 Your SLF calculation must be based on a recent balance sheet (preferably no more than 3 months old). The balance sheet must be signed and dated by a director and provided to us with your SLF calculation.

Surplus liquid funds in pro forma 209

Below is an extract from PF 209²:

Financial Requirements for Holding Client Money or Property

(This condition is imposed on all licensees who are not a body regulated by APRA, as described in ASIC Policy Statement 166. However it is only triggered if the licensee holds \$100,000 or more of client money or property.)

21. If at any time the licensee:

- (a) is required to hold money in a separate account under Division 2 of Part 7.8 of the Act; or
- (b) holds money or other property on trust for a client or is required to do so under Regulation 7.8.07(2) of the Corporations Regulations or otherwise; or
- (c) has the power to dispose of a client's property under power of attorney or otherwise;

the licensee must ensure that the licensee has at least \$50,000 in surplus liquid funds ("SLF") unless the total value of the money and property for all clients is less than \$100,000 excluding:

- (d) money that has satisfied a client's liability on an insurance contract where the licensee is acting under a binder or section 985B of the Act applies, or property acquired by investment of that money; or

² Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

- (e) the value of property where the licensee merely holds a document of title, and the client has legal title to the property.

Notification

Under regulation 7.6.04 the licensee is required to notify ASIC of any material adverse changes to its financial position:

CORPORATIONS REGULATIONS 2001 - REG 7.6.04 Conditions on Australian financial services licence

- (1) For subsection 914A(8) of the Act, an Australian financial services licence is subject to the following conditions:
 - (a) if the financial services licensee is not a body regulated by APRA – a condition that, if any event occurs that may make a material adverse change to the financial position of the financial services licensee by comparison with its financial position:
 - (i) at the time of the application for the Australian financial services licence; or
 - (ii) as described in documents lodged with ASIC after the application for the Australian financial services licence;

the financial services licensee must lodge with ASIC in the prescribed form a notice setting out particulars of the event as soon as practicable, and in any case not later than 3 business days, after the financial services licensee becomes aware of the event;

Auditing

RG 2.170 you will be asked whether you have appointed an ASIC-registered auditor or firm of auditors. You will generally need to appoint an ASIC registered auditor within one month of being granted an AFS licence: see s990B(1).

RG 2.171 If you have already appointed an auditor because you are a public company, you don't need to reappoint the auditor—just provide your auditor's details.

Also see standard Conditions 27 – 28 in pro forma 209.

Organisational structure

Business description

Central to the licensing process is ASIC's understanding of the nature of your business. The business description will determine what authorisations are possible, conditions need to be imposed and personnel requirements and the like.

RG 2.113 ... you will be asked about your proposed business activities so that

we can understand how your business will work and the relevance of the licence authorisations you have selected...

- RG 2.246 At a minimum, the description of your business must include:
- (a) the financial services and products you will provide, including details of the particular types of products involved. For example:
 - (i) if you will be operating a managed investment scheme, the types of asset(s) the scheme services hold, whether it will issue stapled securities, whether it will operate as a hedge fund etc.; and/or
 - (ii) if you will be dealing in or advising on derivatives or foreign exchange contracts, the particular products this involves (e.g. exchange traded options, OTC transactions, trading warrants, contracts for difference etc.);
 - (b) how you will generate income from providing those financial services and products (e.g. whether you will charge a fee-for-service, receive commissions, use a buy-sell spread etc.);
 - (c) the proportion of your total income that you estimate each type of financial service and product will generate;
 - (d) how quickly you anticipate your business will grow;
 - (e) who your typical client(s) will be for each type of financial service and product you will provide, whether they will typically be retail and/or wholesale clients, and what their typical financial goal(s) in using your services or product will be (e.g. investing in long-term growth assets, hedging risks, speculating etc.);
 - (f) if you are a product issuer, the distribution channels you will use to distribute your products (e.g. authorised representatives, other AFS licensees etc.);
 - (g) how you will deliver those financial services and products to your clients - i.e. who will provide the services and by what means (e.g. through a call centre, face-to-face interviews, internet etc);
 - (h) whether your business will operate from a location other than your principal place of business (e.g. other offices within Australia or within other countries). If so, indicate where the other locations are and describe the services that will be provided and how will you supervise and monitor compliance across these different locations; and
 - (i) whether some of your financial service-related functions will be outsourced. If so, describe the functions that will be outsourced, how and who will perform these functions, and in what location.

- RG 2.243 You must provide this core proof if you are:
- (a) applying for an AFS licence;
 - (b) varying the financial service and/or product authorisations on your AFS licence; or
 - (c) varying the ‘other conditions’ on your AFS licence (e.g. key person or standard licence conditions).
- RG 2.244 We need this information so that we can understand how your business will work and the relevance of the licence authorisations you have selected (including any new ones).
- RG 2.115 You will need to identify whether your clients are retail clients and/or wholesale clients. These terms are defined in s761G.
- RG 2.117 If you identify that you will have retail clients, we expect that you will have a greater focus on consumer protection through, for example, your dispute resolution procedures and your compensation arrangements. The types of clients you have can also affect the licence conditions we put on your AFS licence.

Organisational chart

- RG 2.248 As part of this core proof you must also provide an organisational chart illustrating the overall structure of your business and clearly identifying:
- (a) the number of employees and authorised representatives in each functional area;
 - (b) the position(s) held by each of your responsible managers;
 - (c) the person responsible for monitoring ongoing compliance with your AFS licence obligations, and their reporting lines;
 - (d) the person responsible for reporting breaches of your AFS licence obligations directly to ASIC (e.g. under s912D); and
 - (e) if applicable, the relationship between you, as the applicant entity, and any ultimate holding company or other companies in your corporate group.

Business size

- RG 2.133 ... you will be asked about the size of your business. These questions are designed to help us determine what arrangements you should have in place to meet your licensee obligations under s912A. Your answers ... are not binding. However, if you are not sure what the size of your business will be, you should either estimate the size or rely on forecasted estimates for your first year of operation.

RG 2.134 If you are a responsible entity or superannuation trustee, when estimating the size of your business don't include the assets and revenue of your managed investment scheme(s) or superannuation fund(s).

Growth

RG 2.246 At a minimum, the description of your business must include:
(d) how quickly you anticipate your business will grow;

RG 2.185 If you anticipate growth in your business, you must be able to demonstrate how your capacity will grow to match business growth.

Outsourcing

RG 2.166 ... you will be asked whether you will outsource any substantial activities under your AFS licence. You should only answer 'yes' if you will be outsourcing any parts of your financial services business, e.g. training of representatives or part of your compliance function. Don't answer 'yes' if the activities you will be outsourcing are not related to your financial services business, e.g. professional advice outsourced to lawyers.

RG 2.167 If you outsource activities under your AFS licence, under the Corporations Act you will still be responsible for complying with all of your AFS licensee obligations in relation to them: see s769B and RG 104.33–RG 104.36. For example, if you outsource the training of your representatives, you will still be responsible for ensuring that your representatives are competent and adequately trained.

RG 2.168 If you are going to outsource any of your activities under your AFS licence (whether or not within your corporate group), we expect that you will have appropriate processes in place to ensure that you:

- (a) have taken due skill and care in choosing a suitable service provider;
- (b) will monitor their ongoing performance; and
- (c) can deal effectively with any breaches of the outsourcing agreement or actions that lead, or might lead, to a breach of your licensee obligations.

RG 104.34 If you outsource functions that relate to your AFS licence, you remain responsible for complying with your obligations as a licensee: see s769B... Under s601FB(1) of the Corporations Act, responsible entities retain ultimate responsibility for the operation of a managed investment scheme.

- RG 104.35 If a third party provides financial services to clients on your behalf, they will generally need to be your authorised representative or hold their own AFS licence: see s911B(1). If they are a licensee, they will generally be taken to be the provider of the financial services and will be responsible for complying with the general obligations in relation to the provision of those services: see s911B(3).

Scheme property arrangements

The financial aspects of ASIC's approach to scheme property arrangements is set above under the heading *Nett Tangible Assets*. The balance of the regulator's approach can be found in Regulatory Guide 133 *Managed investments Scheme property arrangements*. This topic will also be covered in depth in the seminar in this series entitled: *The Custody of Managed Investment Scheme Property* - Tuesday 1 July 2008: 9.00am-12.15pm.

- RG 133.2 A custodian of scheme property, whether it is the responsible entity or its agent, must meet standards on:
- (a) organisational structure;
 - (b) staffing capabilities;
 - (c) ability and resources to perform core administrative activities;
 - (d) arrangements on how various assets are held; and
 - (e) custody-related financial resources
- RG 133.3 A responsible entity which does not meet these standards will still be given a licence if it meets our other licensing requirements. However, its licence will be subject to a condition that another entity which meets the standards must be the custodian of all the property of any scheme which the responsible entity operates.
- RG 133.4 The Law highlights the importance which is placed on the arrangements that the responsible entity will put in place to ensure proper standards for the safe keeping of scheme property. We believe that members' interests will be better protected if the scheme property is held only by entities which meet minimum standards.
- Our standards seek to ensure that:
- (a) scheme property is not exposed to unnecessary risks because of the way it is held; and
 - (b) efficient operational arrangements exist for holding and dealing with scheme property.
- RG 133.5 We expect that in most cases, the standards will be met by the responsible entity appointing a third party custodian. We have not attempted to prescribe detailed requirements which custodians must

meet. Instead, in RG 133.6–RG 133.13 we have set out what we consider are the minimum outcomes which a custodian must achieve, whether the custodian is the responsible entity or its agent.

- RG 133.8 At a minimum, the custodian should be structured so that custodial staff are able to report directly to the compliance committee or board of directors of the responsible entity. They should report to these groups rather than to people who are responsible for other functions such as investment, marketing or operations. The organisation should also be structured to ensure that the duties of custody staff are appropriately segregated from the duties of other employees. This would mean, for example, that custody staff must not also be responsible for investment decisions, trading decisions or other decisions resulting in the movement of scheme property. This may also mean, in some circumstances, that custody staff are physically separated from other staff of the responsible entity.
- RG 133.11 The custodian must have the necessary capacity to perform the core administrative activities associated with holding scheme property. This will vary depending on the nature of the scheme and its assets. Generally, however, this capacity is likely to include having:
- (a) computer systems which are secure and capable of handling the record keeping and transaction processing for the scheme (having regard to the volume of transactions) and the capacity to separately identify scheme property;
 - (b) procedures in place for accurately recording all scheme property, all movements of scheme property, and all income, pricing and other related core administrative activities;
 - (c) access to information sources which may be relevant to corporate actions and proxy voting, or for pricing information;
 - (d) memberships at depositories relevant to the scheme property;
 - (e) access to and if necessary, membership of, relevant settlement and clearance systems; and
 - (f) access to relevant domestic or global sub-custodial networks.
- RG 133.19 We will not normally require you to justify your choice of custodian to us. However, we do want to know in your licence application how you will go about appointing or replacing an agent. Applicants who meet our standards for holding scheme property, and who will be holding scheme property themselves, will not need to describe the process of appointing a custodian.
- RG 133.20 As a condition of your licence, you must make a written agreement with the agent who you appoint as custodian. This agreement should clearly cover:

- (a) what are the scope and expectations of the relationship;
- (b) the rights that you will have in relation to ongoing review and monitoring of the agent and the standards against which that agent's performance will be assessed;
- (c) how the agent will provide assurances that it meets the standards set out in this guide;
- (d) how you will give authorised instructions to the agent;
- (e) how the scheme will be compensated if there is a loss to the scheme as a result of the agent failing in its obligations under the agreement and the extent to which the custodian must maintain a minimum level of professional indemnity insurance;
- (f) that the agent is prohibited from taking a charge, mortgage, lien or other encumbrance over, or in relation to, assets of the scheme. They may, however, do this for expenses and outlays made within the terms of the agreement (but not including unpaid custodian fees);
- (g) what should be in the written agreement between the agent and any sub-custodians used. A written agreement should be in place when practicable. The agreement should cover, to the extent practicable and relevant, the same issues which should be covered in the agreement between you and the agent. The agreement should also cover the liability of the sub-custodian to the responsible entity and the agent when acts or omissions of the sub-custodian make them liable;
- (h) how records identifying the scheme's assets will be maintained; and
- (i) how and when you will receive periodic reports, including notifications of any transfers to, or from, the scheme's account.

Pro forma 209: external custodian is used

Below is an extract from PF 209³:

Agreement with Holder of Financial Product on Trust

(This condition is imposed on all licensees who are authorised to operate a registered scheme in the capacity of a responsible entity and/or operate an IDPS as an IDPS operator and/or provide a custodial or depository service).

34. If the licensee:

- (a) operates a registered scheme in the capacity of a responsible entity; or

³ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

- (b) operates an IDPS as an IDPS operator; or
- (c) provides a custodial or depository service;

and in the course of operating that scheme or providing that service the licensee enters into an arrangement:

- (d) with another person (“holder”) to hold scheme property, IDPS property or to hold financial products on trust for or on behalf of the licensee or another person; or
- (e) between a responsible entity or IDPS operator in that capacity and another person (“master custodian”) under which the master custodian is authorised to arrange for a third person (“subcustodian”) directly or indirectly to hold scheme property or IDPS property; or
- (f) with a subcustodian arranged by a master custodian;

the licensee must ensure that at all times:

- (g) the arrangement is covered by a contract that is in writing; and
- (h) the contract clearly specifies:
 - (i) the nature of the arrangement and the obligations of each party; and
 - (ii) the rights that the parties will have in relation to ongoing review and monitoring of the holder or any subcustodian or for an agreement made by the licensee with a master custodian (“master agreement”), the master custodian and the standards against which their performance will be assessed; and
 - (iii) how the holder, any subcustodian, or for a master agreement, the master custodian, will certify that it complies with, and will continue to comply with, the requirements of ASIC Policy Statement 133 when read in conjunction with ASIC Policy Statements 148 and 167 (as each of those Policy Statements is in force as at the date of this licence); and
 - (iv) how instructions will be given to the holder, subcustodian or for a master agreement, the master custodian; and
 - (v) how the client of the licensee will be compensated if the client suffers any loss due to a failure by the holder, any subcustodian, or for a master agreement, the master

custodian, to comply with its duties or to take reasonable care based on the standards applying in the relevant markets for the assets held and the extent to which the holder, any subcustodian, or for a master agreement, the master custodian, must maintain a minimum level of professional indemnity insurance; and

- (vi) that the holder, any subcustodian and, for a master agreement, the master custodian is prohibited from taking a charge, mortgage, lien or other encumbrance over, or in relation to, the assets held under the arrangement unless it is for expenses and outlays made within the terms of the contract (but not including any unpaid fees of the holder, master custodian or subcustodian) or in accordance with the licensee's instructions; and
- (vii) in the case of a responsible entity or IDPS operator who has a master agreement, what should be in the written contract with any subcustodian used in accordance with these conditions including the liability of the subcustodian to the master custodian and the licensee when acts or

omissions of the subcustodian are in breach of the subcustodian's obligations; and

- (viii) how records of the assets held will be kept and maintained by the holder, any subcustodian, or for a master agreement, the master custodian; and
- (ix) requirements for reporting by the holder, any subcustodian, or for a master agreement, the master custodian, including notifications of any dealing in or transfers of the assets; and
- (x) requirements for the holder to provide all reasonable access and assistance to any registered company auditor engaged to conduct an audit in relation to the licensee.

The contract is not required to contain the matters specified in paragraph (iii), (v) or (vi) or to be in writing to the extent that the licensee establishes by documentary evidence that it is not practicable for the licensee to:

- (a) hold the relevant financial products (being property outside Australia) itself; or
- (b) engage a custodian that is willing to include such matters in the contract to hold that property on reasonable commercial terms;

and provided that the licensee has disclosed to the client that these terms will not be included.

Pro forma 209: in-house custody

Below is an extract from PF 209⁴:

Property

(This condition is imposed on all licensees who are authorised to operate a registered scheme in the capacity of a responsible entity, operate an IDPS as an IDPS operator and/or provide custodial or depository services. Outlined below is the scenario where the licensee is authorised to perform all three roles described above, to guide you on the type of condition that will be imposed. If you perform only one or some of the roles outlined above, your licence will be tailored to reflect this.)

35. The licensee must ensure that at all times:
- (a) if the licensee is responsible to clients of the IDPS for the holding of the IDPS property, each person who holds IDPS property complies with the requirements of ASIC Policy Statement 133, except requirements expressed to apply to duties under s601FC(1)(i), when read with ASIC Policy Statement 148 (as each of those Policy Statements is in force as at the date of this licence) relating to the holding of IDPS property and maintains proper records identifying the IDPS property; and
 - (b) in relation to a registered scheme for which the licensee is the responsible entity, the holder of any scheme property complies with the requirements of ASIC Policy Statement 133 (as in force as at the date of this licence) relating to the holding of scheme property and maintain proper records identifying the scheme property; and
 - (c) in relation to any custodial or depository service that the licensee provides other than as the operator of an IDPS, the holder of any property complies with the requirements of ASIC Policy Statement 133 except requirements expressed to apply to duties under s601FC(1)(i), when read with ASIC Policy Statements 148 and 167 (as each of those Policy Statements is in force as at the date of this licence) and maintains proper records in relation to the financial products held.

⁴ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

Information technology resources

Under s912A a licensee is required to have available adequate technological resources:

CORPORATIONS ACT 2001 - SECT 912A

General obligations

(1) A financial services licensee must:

- (d) unless the licensee is a body regulated by APRA - have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

RG 104.93 Whether your technological resources are adequate will depend on the nature, scale and complexity of your business: However, you need to have enough technological resources to enable you to:

- (a) comply with all of your obligations under the law;
- (b) maintain client records and data integrity;
- (c) protect confidential and other information; and
- (d) meet your current and anticipated future operational needs.

RG 104.94 We know that the financial services industry uses a variety of technological resources, ranging from phones, faxes and personal computers to sophisticated networks and/or customised IT systems. We do not think you need to have sophisticated IT systems if simpler systems enable you to meet the criteria in RG 104.93.

RG 104.95 You need to regularly review the adequacy of your technological resources.

RG 104.96 When reviewing your IT systems, you need to consider:

- (a) your IT system security;
- (b) the currency of your hardware and software;
- (c) the quality and relevance of the applications you use;
- (d) your disaster recovery systems and business resumption capacity;
- (e) the number of users;
- (f) the ongoing viability of software and other service providers;
- (g) the response times of your IT systems;
- (h) the down times of your IT systems;
- (i) your use of legacy IT systems; and

- (j) complaints (e.g. from staff, clients or service providers) about your IT systems.

Responsible managers

Role of the responsible manager

- RG 105.24 The people you nominate as responsible managers need to have direct responsibility for significant day-to-day decisions about your financial services. A compliance manager or financial controller, for example, might not have this direct responsibility. If you are a body corporate, the people you nominate do not need to be ‘officers’ of the body corporate or ‘responsible officers’ as defined in s9 of the Corporations Act.

- RG 105.26 The job description and title of responsible managers will vary from business to business. For example, in a small advisory business the directors are likely to be the main people who have direct responsibility for significant day-to-day business decisions, but in a larger financial services group anyone ranging from the chief executive officer down to middle management might have the required direct responsibility. For licensees that are regulated by APRA, the people with direct responsibility would usually include those who are ‘responsible persons’ for the purposes of APRA’s fit and proper standards.

- RG 105.27 Having direct responsibility for significant day-to-day decisions about your financial services includes having enough time available to do so. ...

Nomination & notification

- RG 105.14 You must nominate your responsible managers when you apply for an AFS licence or apply to vary your licence authorisations. You must also notify us if you change any of your responsible managers.

- RG 2.150 You can nominate up to 15 responsible managers. The appropriate number of responsible managers will depend on the nature, scale and complexity of your business. In the case of a large business, we expect that there will be several responsible managers. In the case of a small business, we recognise that there may only be one responsible manager, but generally we expect that a licensee will have at least two responsible managers.

- RG 105.39 If you operate a large business, you will usually only need to nominate a subset of the people who can be responsible managers. If you are a smaller business, you may need to nominate everyone who can be a responsible manager. If you are an individual who holds or is applying for an AFS licence in your own name, you will need to

nominate yourself as the responsible manager.

Note: The maximum number of responsible managers you can have nominated at any given time is 20.

Single responsible manager

- RG 105.40 In some cases we may accept you having only one responsible manager, e.g. where you operate a one-person advisory business or where your main business is not the provision of financial services.
- RG 2.151 If you are nominating only one responsible manager, you will need to be able to demonstrate that you have a documented risk management strategy in place to ensure you will continue to meet your organisational competence obligations if your responsible manager is unavailable at any time. For example, you will need to have procedures in place to ensure that your business could continue operating even if the sole responsible manager is unexpectedly unavailable.

One manager: multiple AFS licensees

- RG 105.27 ... Before you nominate a person as a responsible manager, you need to consider whether they are already acting as a responsible manager for one or more other licensees. If they are, you need to consider whether they have enough time available to act as a responsible manager for you.
- RG 2.155 If you nominate a person who is already a responsible manager for another licensee, you will need to be able to demonstrate in your .. Organisational Competence core proof that this person will actually be able to spend enough time fulfilling their duties as your responsible manager...
- RG 2.288 You must provide a submission demonstrating that you will be able to meet your ongoing organisational competence obligations, even though a responsible manager will have responsibilities to other AFS licensees.
- RG 2.289 Your submission must include a description of:
- (a) how the responsible manager will allocate their time to ensure that they can properly perform their role as both your responsible manager and the responsible manager of another AFS licensee; and
 - (b) how you will manage any conflicts of interest that may arise from the responsible manager acting on behalf of multiple AFS licensees.

People proofs

- RG 1.34 You need to provide the following People Proofs for each responsible manager:
- (a) Statement of Personal Information, including certified copies of qualification certificates;
 - (b) certified copy of a bankruptcy check;
 - (c) certified copy of a criminal history check; and
 - (d) certified copies of two business references (at least one of these should be from someone external to the responsible manager's current organisation).
- RG 2.256 The eLicensing system will print a Statement of Personal Information for all responsible managers you have nominated at B1 in your online application.
- RG 2.257 All responsible managers must answer all of the questions in the Statement of Personal Information and it must be signed and witnessed.
- RG 2.258 ... the Statement of Personal Information requires you to provide, for each responsible manager, details of their educational qualifications that are relevant to the types of financial services and products you are applying for under your AFS licence.

Good fame and character

- RG 105.33 When nominating your responsible managers, you also need to ensure they are of 'good fame and character'. Responsible managers are the people whose good fame and character we consider when we assess an application for an AFS licence.
- RG 2.264 You can get criminal history (or police) checks on your responsible managers from the Australian Federal Police (AFP). The criminal history checks you provide to us must be no more than 12 months old.
- RG 2.265 Criminal history checks can take up to 6 weeks or more to obtain, so apply for them early. You should send us a certified copy of the criminal history check and retain the original.
- RG 2.266 The check you need is called a 'Name Check—ASIC Licensing'. We will not accept other police documents or police checks, such as those for applications for firearm licences.

Bankruptcy check

RG 2.273 You can get bankruptcy checks on your responsible managers from the Insolvency Trustee Service of Australia (ITSA). The bankruptcy checks you provide to us must be no more than 12 months old. You should send us a certified copy of the bankruptcy check and retain the original.

Experience

RG 2.157 You will be asked ... to select a category for each responsible manager that best describes their overall experience. ...

RG 105.45 Your responsible managers need to have experience and qualifications or training that are relevant to their role in your business. This means that their experience and qualifications or training need to be relevant to one or both of the following:

- (a) the financial services and products that their role relates to;
- (b) if you operate a registered scheme... the assets under management or business that their role relates to..

RG 105.77 When you apply for an AFS licence or to vary your licence authorisations, you must nominate your responsible managers in your application and answer questions about their role, training and experience, and which of the five options they meet. You must also support your application with a 'core proof' demonstrating that your responsible managers:

- (a) individually meet one of the five options ... for demonstrating appropriate knowledge and skills; and
- (b) together have appropriate knowledge and skills to cover all of your financial services and products: see Section B.

RG 105.43 You need to be able to demonstrate that each of your responsible managers has appropriate knowledge and skills for their role in your business. There are five options for demonstrating this: see Table 1.

Table 1: The five options

Option	Knowledge component (qualifications, training etc)	Skills component (experience)
Option 1	Meet widely adopted and relevant industry standard or relevant standard set by APRA	3 years relevant experience over past 5 years
Option 2	Be individually assessed by an authorised assessor as having relevant knowledge equivalent to a diploma	5 years relevant experience over past 8 years
Option 3	Hold a university degree in a relevant discipline and complete a relevant short industry course	3 years relevant experience over past 5 years
Option 4	Hold a relevant industry- or product-specific qualification equivalent to a diploma or higher	3 years relevant experience over past 5 years
Option 5	If not relying on Options 1–4, you need to provide a written submission that satisfies us that your responsible manager has appropriate knowledge and skills for their role. Your submission must cover all of the information in RG 105.66	

Option 1: Relevant industry or APRA standard

RG 105.50 We will accept a wide range of relevant standards for the knowledge component of Option 1. The onus is on you to demonstrate the relevance of a standard to your responsible manager’s role. Your responsible manager must also have three years relevant experience over the past five years.

Option 2: Individual assessment

RG 105.53 Individual assessment means an assessment of a person’s capability to undertake their current duties, taking into account their previous work experience. This type of assessment does not necessarily include a formal written examination. It may take the form of an oral or practical test, on-the-job assessment or some other form.

RG 105.54 Individual assessment must be carried out by an authorised assessor. The assessor must verify that your responsible manager has knowledge relevant to their role and equivalent to a diploma.

Note: You can find authorised assessors that carry out individual assessment by looking at the ASIC Training Register:

Option 3: University degree and short industry course

RG 105.56 Under Option 3, we will accept a responsible manager with a university degree that is only broadly relevant to their role if they have also completed a short industry course covering the specific knowledge not covered by their degree. Your responsible manager

must also have three years relevant experience over the past five years.

RG 105.59 To rely on Option 3, your responsible manager’s short industry course must be specifically relevant to the industry or product their role relates to.

Option 4: Industry- or product-specific diploma (or higher)

RG 105.61 To rely on Option 4, your responsible manager must have a diploma (or higher) that is specifically relevant to the industry or product their role relates to. They must also have three years relevant experience over the past five years.

RG 105.62 We will accept relevant qualifications that are:

- (a) listed on the ASIC Training Register.; or
- (b) approved under the Australian Qualifications Framework or self-accredited by a university or other institution of higher education

RG 105.65 If you operate a registered scheme, Table 2 below sets out some of the qualifications we accept under Option 4 as demonstrating that your responsible managers have appropriate knowledge for the asset under management or the business operated by a registered scheme. However, you can rely on any of the five options to demonstrate that your responsible managers have appropriate knowledge and skills—you do not have to rely on Option 4.

Table 2: Relevant asset specialist qualifications for operating a registered scheme

Type of asset or business	Qualification
Financial assets Derivatives Mortgages IDPS-like schemes	Tertiary qualification (at least diploma) in business, accounting or actuarial studies
Primary production	Tertiary qualification (at least diploma) relevant to the underlying product (e.g. horticulture, viticulture, forestry)
Direct real property Time-sharing schemes	Tertiary qualification (at least diploma) in real estate or property, or a real estate agent’s licence

Option 5: Other demonstration of knowledge and skills

RG 105.66 If you do not rely on Options 1 to 4, you need to be able to satisfy us that your responsible manager has appropriate knowledge and skills for their role by providing us with a written submission. Your submission must explain:

- (a) the nature of your responsible manager’s role;

- (b) any relevant qualifications or courses they have completed;
- (c) their relevant experience over the past 10 years (this does not necessarily mean they need 10 years relevant experience);
- (d) any relevant credentials they have, including association membership or affiliation, or skills or knowledge recognised by an industry association, a regulatory body such as APRA, or some relevant overseas body; and
- (e) why you think they have appropriate knowledge and skills for the financial services and products their role relates to.

If a responsible manager is relying on Option 5:

RG 2.287 You must provide a submission describing:

- (a) the nature of the role performed by the responsible manager;
- (b) any relevant qualifications or courses completed by the responsible manager and the dates they were completed;
- (c) the responsible manager's relevant experience over the past 10 years (this does not necessarily mean they need 10 years relevant experience);
- (d) any relevant credentials of the responsible manager, including association memberships or affiliations, or skills or knowledge recognised by an industry association, a regulator such as APRA, or some relevant overseas body; and
- (e) why you think the responsible manager has appropriate knowledge and skills for the financial services and products their role relates to.

Business references

RG 2.279 The references must:

- (a) be signed and dated and clearly state the full name and title of the referee. References must be no more than 12 months old at the time you lodge your application;
- (b) specifically relate to the work the responsible manager has performed in the industry in connection with the types of financial services and products that you are applying for; and
- (c) confirm whether the responsible manager is of good fame and character.

RG 2.281 We will not accept references where your responsible managers provide references for each other.

RG 2.282 Referees are reminded that providing false or misleading information to ASIC is an offence.

Key persons

- RG 2.153 If a licensee is heavily dependent on the expertise of one or more responsible managers, we refer to these people as ‘key persons’ and will usually name them on the licence in a ‘key person condition’.
- RG 105.84 If a responsible manager who is a key person leaves your business, the licence condition will require you to:
- (a) nominate another responsible manager to replace them, or if you have not appointed someone to replace them, give us reasons why not; and
 - (b) demonstrate that you continue to have the organisational competence for all of your financial services and products.
- RG 2.154 If we put a key person condition on your licence, you will have additional obligations. These will include:
- (a) notifying us if your key person leaves or is about to leave your business; and
 - (b) nominating another suitably qualified person to take over from them.

Key persons in pro forma 209

Below is an extract from PF 209⁵:

Key Person Requirements

(This condition is imposed at ASIC’s discretion having regard to various issues, including organisational structure of the licensee and the organisational competence of the licensee.)

3. If any of the following officer(s) or key person(s) cease to be officers of the licensee or to perform duties on behalf of the licensee with respect to its financial services business:

(a) **[insert name of key person]**; and

(b) **[insert name of key person]**

the licensee must notify ASIC in writing within 5 business days of the following matters:

(c) the date the officer or key person ceased to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business; and

⁵ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

- (d) the name, address, date of commencement, educational qualifications and experience of any replacement officer or key person the licensee has appointed to perform duties on behalf of the licensee with respect to its financial services business; and
- (e) if the licensee does not have a replacement officer or key person, detailed reasons as to why the licensee has not nominated a replacement; and
- (f) a detailed description of how the licensee will continue to comply with the Act and the conditions of this licence following the officer(s) or key person(s) identified above, or any replacement of such person, ceasing to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business.

Representatives

Definition of representative

CORPORATIONS ACT 2001 - SECT 910A
Definitions

In this Part, unless the contrary intention appears:

"representative" of a person means:

- (a) if the person is a financial services licensee:
 - (i) an authorised representative of the licensee; or
 - (ii) an employee or director of the licensee; or
 - (iii) an employee or director of a related body corporate of the licensee; or
 - (iv) any other person acting on behalf of the licensee; or
- (b) in any other case:
 - (i) an employee or director of the person; or
 - (ii) an employee or director of a related body corporate of the person; or
 - (iii) any other person acting on behalf of the person.

Training & competency

A licensee has an obligation to ensure that it has available adequate human resources and that its representatives are adequately trained and competent:

CORPORATIONS ACT 2001 - SECT 912A

General obligations

- (1) A financial services licensee must:
 - (f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; ...

Training

- RG 104.77 We expect you to:
- (a) identify the knowledge and skills your representatives need to competently provide your financial services;
 - (b) ensure that they have the necessary knowledge and skills;
 - (c) ensure that they undertake continuing training programs to maintain and update their knowledge and skills; and
 - (d) maintain a record of the training they have undertaken (this is required under reg 7.6.04(1)(d)).
- RG 104.78 We have specified minimum training standards for representatives (and natural person licensees) who provide financial product advice to retail clients. These are set out in Regulatory Guide 146 Licensing: Training of financial product advisers (RG 146). The training standards are knowledge and skills requirements that can generally be met by completing appropriate training courses on the ASIC Training Register or being individually assessed as competent by an authorised assessor listed on the ASIC Training Register.
- RG 104.82 We have not specified training standards for representatives (and natural person licensees) providing services other than financial advice to retail clients. However, you must still ensure that your representatives providing other services are trained and competent to perform their role and functions.

Training requirements in pro forma 209

Below is an extract from PF 209⁶:

Training Requirements for Representatives

(This condition is imposed on all licensees authorised to provide financial product advice to retail clients. This condition relates to ASIC Policy Statement 146.)

6. The licensee must for any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
 - (a) identify the tasks and functions that person performs on behalf of the licensee; and
 - (b) determine the appropriate knowledge and skills requirements required to competently perform those tasks and functions; and
 - (c) implement procedures for continuing training.
7. The licensee must ensure that any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
 - (a) has completed training courses at an appropriate level that are or have been approved by ASIC in writing that are relevant to those functions and tasks; or
 - (b) has been individually assessed as competent by an assessor that is or has been approved by ASIC in writing; or
 - (c) in respect of financial product advice on basic deposit products and facilities for making non-cash payments that are related to a basic deposit product, has completed training courses that are or have been assessed by the licensee as meeting the appropriate level that are relevant to those functions and tasks.
8. Condition 7 does not apply in relation to:
 - (a) a natural person who is a customer service representative and who provides financial product advice:
 - (i) derived from a script approved by a natural person who complies with paragraphs 7(a), (b) and (c) (“qualified person”); or

⁶ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

- (ii) under the direct supervision of a qualified person present at the same location; or
- (b) a natural person who is a para-planner or trainee adviser and who provides advice under the direct supervision of a qualified person who is, in addition to the licensee, responsible for:
 - (i) ensuring that any financial product advice that is provided by the para-planner or trainee adviser for which a Statement of Advice must be given, is reflected in a Statement of Advice that has been reviewed by the qualified person before the Statement of Advice is given, to ensure that the Statement of Advice would comply with all the requirements of the Act; and
 - (ii) managing and leading any verbal explanation of the financial product advice to the client,

where the licensee has established procedures to ensure that the natural person does not provide financial product advice to retail clients on behalf of the licensee, other than in the manner specified in this paragraph, and the licensee monitors whether or not those procedures are effective.

Training condition implied by the regulations

These terms are implied by regulations and do not appear on the license:

CORPORATIONS REGULATIONS 2001 - REG 7.6.04
Conditions on Australian financial services licence

- (1) For subsection 914A(8) of the Act, an Australian financial services licence is subject to the following conditions:
 - (d) a condition that the financial services licensee must maintain a record of the training (relevant to the provision of financial services) that each of its representatives has undertaken, including:
 - (i) training undertaken after the representative became a representative of the licensee; and
 - (ii) any training undertaken before the representative became a representative of the licensee to the extent that the financial services licensee is able to obtain the information by reasonable inquiry;

Adequacy

CORPORATIONS ACT 2001 - SECT 912A

General obligations

(1) A financial services licensee must:

- (d) unless the licensee is a body regulated by APRA - have available adequate resources (including ... human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

RG 104.89 Whether your human resources are adequate will depend on the nature, scale and complexity of your business: see RG 104.22. However, you need to have enough people to enable you to:

- (a) comply with all of your obligations under the law;
- (b) carry out monitoring and supervision; and
- (c) meet your current and anticipated future operational needs.

RG 104.90 Your measures for ensuring that you have enough people will normally include:

- (a) recruitment processes and succession planning;
- (b) systems for inducting and training new staff;
- (c) performance management systems; and
- (d) processes for staff retrenchment and redundancy.

RG 104.92 We expect that you will identify key indicators that your human resources are inadequate. These key indicators are likely to include:

- (a) customer complaints about the quality of customer service or financial product advice;
- (b) a low ratio of compliance staff to representatives;
- (c) not enough compliance staff to conduct a periodic (e.g. annual) review of representatives who give personal advice to retail clients;
- (d) client accounts and interests not being monitored when staff are absent;
- (e) a large number of inexperienced staff (e.g. staff who have been in your business less than six months); and
- (f) a large number of vacant positions.

Monitoring and supervision

RG 104.70 To ensure your representatives comply with the financial services laws, we consider that you need to monitor and supervise them.

- RG 104.72 The level of monitoring and supervision your representatives need will depend on the nature, scale and complexity of your business (e.g. the function your representatives perform, whether your business operates from one or a number of locations etc.).
- RG 104.74 We expect your measures for monitoring and supervision will include carrying out appropriate background checks before you appoint new representatives. These checks could include referee reports, searches of ASIC's Register of Banned and Disqualified Persons, police checks etc.

Authorised representatives

Definition

- RG 2.175 Your 'representatives' are the people who act on your behalf. They can include people who are:
- (a) internal to your organisation (i.e. employees and directors); and/or
 - (b) external to your organisation (i.e. authorised representatives authorised to act on your behalf).
- RG 2.176 Don't confuse the term 'representatives' with 'responsible managers'. Your responsible managers are the people you nominated ... as directly responsible for the significant day-to-day decisions about your financial services business. Your representatives are the people who provide financial services or otherwise act on your behalf.

Authorisation

The process for creating an authorized representative is laid down in section 916A:

CORPORATIONS ACT 2001 - SECT 916A

How representatives are authorised

- (1) A financial services licensee may give a person (the *authorised representative*) a written notice authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee.
- (2) The financial services specified may be some or all of the financial services covered by the licensee's licence.
- (3) An authorisation under subsection (1) is void to the extent that it purports to authorise a person to provide a financial service:
 - (a) that is not covered by the licensee's licence; or
 - (b) contrary to a banning order or disqualification order under Division 8.
- (3A) A person must not give a purported authorisation if that purported

authorisation is void to any extent under subsection (3).

- (4) An authorisation may be revoked at any time by the licensee giving written notice to the authorised representative.

The process for sub-authorisation is laid down in section 916B:

CORPORATIONS ACT 2001 - SECT 916B

Sub-authorisations

- (1) Subject to subsection (3), an authorised representative of a financial services licensee cannot, in that capacity, make a person their authorised representative or an authorised representative of the licensee.

- (2) A purported authorisation contrary to this section is void.

- (2A) A person must not give a purported authorisation if that purported authorisation is contrary to this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) A body corporate that is an authorised representative of a financial services licensee may, in that capacity, give an individual a written notice authorising that individual, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee, but only if the licensee consents in writing given to the body corporate.

- (4) The financial services specified may be some or all of the financial services covered by the licensee's licence.

- (5) The licensee may give consent under subsection (3) in respect of either a specified individual or a specified class of individuals (the membership of which might change from time to time).

- (5A) If a licensee gives consent under subsection (3) to a body corporate, the licensee must keep a copy of the consent for 5 years after the day on which it ceases to have effect.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) An individual who is authorised as mentioned in subsection (3) is an authorised representative of the relevant licensee.

- (7) An authorisation of an individual as mentioned in subsection (3) may be revoked at any time by:

- (a) the licensee; or
- (b) the body corporate that gave the individual the authorisation; giving written notice to the individual.

- (8) If a person revokes the authorisation of an individual under subsection (7), that person must inform, in writing, the other person who could have revoked the authorisation.

- (9) To avoid doubt, an authorisation given as mentioned in subsection (3) is taken, for the purposes of sections 916C to 916F, to be given by the body corporate, not the licensee.

Notification

RG 2.183 After you receive your AFS licence you will generally need to notify us of the appointment of your authorised representatives within 15 business days: see s916F. You can do this by completing form FS30, which is available from the Licensees portal on our website.

Conditions implied by the regulations

These terms are implied by regulations and do not appear on the license:

CORPORATIONS REGULATIONS 2001 - REG 7.6.04 Conditions on Australian financial services licence

- (1) For subsection 914A(8) of the Act, an Australian financial services licence is subject to the following conditions:
 - (ca) a condition that the financial services licensee must ensure that each representative of the financial services licensee that may give an authorisation to another representative is aware of the requirements in subsections 916F (1) and (3) of the Act;
 - (e) a condition that the financial services licensee must ensure that, before:
 - (i) the financial services licensee authorises a person to provide a financial service on its behalf as mentioned in section 916A of the Act; or
 - (ii) body corporate that is an authorised representative of the financial services licensee authorises an individual to provide a financial service on behalf of the financial services licensee as mentioned in section 916B of the Act;reasonable inquiries are made to establish:
 - (iii) the person's identity; and
 - (iv) whether the person has already been allocated a number by ASIC as an authorised representative;
 - (f) a condition that the financial services licensee must ensure that, if:
 - (i) ASIC has allocated a number to an authorised representative; and
 - (ii) the financial services licensee, or a body corporate that has authorised an individual to provide a financial service on behalf of the financial services licensee as mentioned in section 916B of the Act, lodges a document with ASIC that refers to the authorised representative;the document refers to the number.
 - (g) a condition that the financial services licensees must provide a copy of an authorisation of any of its authorised representatives:
 - (i) on request by any person; and

- (ii) free of charge; and
 - (iii) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request;
- (h) a condition that the financial services licensees must take reasonable steps to ensure that each of its authorised representatives supplies a copy of its authorisation by the financial services licensee:
- (i) on request by any person; and
 - (ii) free of charge; and
 - (iii) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request;

These are the sections in the Act referred to in the regulations:

CORPORATIONS ACT 2001 - SECT 916F
Obligation to notify ASIC etc. about authorised representatives

- (1) A person must lodge with ASIC a written notice (in accordance with subsection (2)), within 15 business days, if the person authorises a representative to provide a financial service as mentioned in section 916A or 916B.⁷
- (3) A person must notify ASIC, by lodging a written notice, within 10 business days if:
 - (a) the person authorised a representative under section 916A or 916B and there is a change in any details relating to the representative that are required to be included under subsection (2); or
 - (b) the person revokes an authorisation to which subsection (1) applied.

Organisational competence

The requirement

The requirement for adequate organisational competence is found in s912A(1)(d):

CORPORATIONS ACT 2001 - SECT 912A
General obligations

- (1) A financial services licensee must:
 - (d) unless the licensee is a body regulated by APRA - have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and

⁷ Failure to comply with this subsection is an offence (see subsection 1311(1)).

to carry out supervisory arrangements...

Required from the outset

- RG 105.9 If you are applying for an AFS licence, you must be able to show that you can comply with the organisational competence obligation from the time you are granted a licence, and on an ongoing basis. We cannot grant you a licence if we have any reason to believe you will not be able to comply with this obligation: s913B(1)(b).
- RG 105.76 You must demonstrate your organisational competence when you apply for an AFS licence. You may also need to demonstrate your organisational competence if you later apply to vary your licence authorisations.

Required to maintain

- RG 105.6 You also need to have measures in place to ensure you maintain your organisational competence at all times: see condition 4 of the standard licence conditions in Pro Forma 209 Australian financial services licence conditions [PF 209].
- RG 105.10 Once you have an AFS licence, you must maintain your organisational competence at all times. If we have reason to believe that you are not complying, we may take administrative action, which could include suspending or cancelling your licence, or imposing additional licence conditions: s915C(1)(a) and 914A(1).
- RG 105.7 We expect your measures for complying with the organisational competence obligation will ensure that you:
- (a) review your organisational competence on a regular basis and whenever your responsible managers or business activities change;
 - (b) maintain and update the knowledge and skills of your responsible managers; and
 - (c) keep records showing that you have reviewed your organisational competence and the steps you have taken to maintain your organisational competence.

Review before making changes

- RG 105.13 We expect you to review your organisational competence and ensure you will maintain it before you make any changes to your business, such as expanding your range of financial services or products or replacing a responsible manager.

Based on collective competence of responsible managers

- RG 105.2 We assess your compliance with this obligation by looking at the knowledge and skills of people who manage your financial services

business. We refer to these people as your ‘responsible managers’.

- RG 105.34 Together, your responsible managers need to have knowledge and skills that demonstrate you:
- (a) can provide all of the financial services and products covered by your licence and understand the legal and compliance obligations relating to those services and products; and
 - (b) if you operate a registered scheme, unregistered scheme (including an IDPS or MDA service) or custodial service—understand the investment and operational issues of all the kinds of assets under management or, if relevant, the business operated by the scheme.

- RG 105.83 If we are satisfied with your organisational competence but we think you are heavily dependent on the knowledge and skills of one or two responsible managers, we will generally impose a ‘key person condition’ on your licence. For example, we may impose a key person condition if you are a small organisation with one or two principals, or if only one responsible manager has knowledge and skills relevant to a particular financial service or product. The key person condition will name those responsible managers whose competence we think you heavily depend on.

Broad authorisation dependant on track record

- RG 105.80 If you want to operate a registered managed investment scheme or an investor-directed portfolio service (IDPS), you can either apply for a narrow authorisation—i.e. a ‘named scheme’ or ‘named IDPS’—or apply for the broad ‘schemes of a particular kind’ authorisation or IDPS authorisation.
- RG 105.81 The narrow authorisation will only permit you to operate the particular registered scheme or IDPS named on your licence. The broad authorisation will allow you to operate more registered schemes of the same asset kind, or more IDPSs, without varying your licence. However, you must ensure that you have the organisational competence for the extra schemes or IDPSs before you start operating them.
- RG 105.82 Before we can grant you a broad authorisation, you must first be able to demonstrate that you have the organisational competence and capacity (e.g. systems and resources) to operate multiple schemes of the same asset kind, or more IDPSs. You can generally demonstrate this if you have been operating two or more registered schemes or IDPSs for at least the past two years. If you are a first-time applicant, we will consider granting you a broad authorisation if you can show that you have the same level of competence and capacity as an experienced licensee.

Core proof

- RG 1.36 We need this core proof to make sure you have the organisational competence to provide the financial services and products you've selected in your application. We assess your organisational competence by looking at the competence of your responsible managers. In this core proof you need to detail each responsible manager's experience and qualifications against each authorisation you've selected in your application. ...
- RG 2.286 If you set out your Table of Organisational Competence in the same format as the example provided in Appendix 2, it will help us to assess your application efficiently. For each responsible manager you must set out:
- (a) their experience and qualifications in relation to each financial service and product authorisation you are applying for under your AFS licence;
 - (b) which of the five options in RG 105 for demonstrating appropriate knowledge and skills they meet; and
 - (c) if you will be operating a registered scheme, unregistered scheme (including an IDPS or MDA service) or custodial service, their knowledge and skills in relation to:
 - (i) the operation of the scheme; and
 - (ii) the assets under management or the business operated by the scheme.

Breach reporting

- RG 105. 85 Once you have an AFS licence, you have an ongoing obligation to formally notify us when you change any of your responsible managers. This means you must tell us when you add or remove any of your responsible managers.

CORPORATIONS ACT 2001 - SECT 912D Obligation to notify ASIC of certain matters

- (1) A financial services licensee must comply with subsection (1B) if:
- (a) the licensee breaches, or is likely to breach:
 - (i) any of the obligations under section 912A or 912B, other than the obligation under paragraph 912A(1)(c); or
 - (ii) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b) and (c) of the definition of financial services law in section 761A; or
 - (iii) the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by

paragraph (d) of that definition and that is specified in regulations made for the purposes of this subparagraph; and

- (b) the breach, or likely breach, is significant, having regard to the following:
 - (i) the number or frequency of similar previous breaches;
 - (ii) the impact of the breach or likely breach on the licensee's ability to provide the financial services covered by the licence;
 - (iii) the extent to which the breach or likely breach indicates that the licensee's arrangements to ensure compliance with those obligations is inadequate;
 - (iv) the actual or potential financial loss to clients of the licensee, or the licensee itself, arising from the breach or likely breach;
 - (v) any other matters prescribed by regulations made for the purposes of this paragraph.
- (1A) For the purposes of subsection (1), a financial services licensee is likely to breach an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation.
- (1B) The financial services licensee must, as soon as practicable and in any case within 10 business days after becoming aware of the breach or likely breach mentioned in subsection (1), lodge a written report on the matter with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (1C) A report that a licensee is required to lodge under subsection (1B) is taken to have been lodged with ASIC if:
 - (a) the licensee is a body regulated by APRA; and
 - (b) the report is received by APRA in accordance with the terms of an agreement between APRA and ASIC under which APRA is to act as ASIC's agent in relation to such reports.
- (1D) Subsection (1B) does not apply to a financial services licensee that is a body regulated by APRA in relation to a breach if:
 - (a) the auditor or actuary of the licensee gives APRA a written report about the breach; and
 - (b) the report is given before, or within 10 business days after, the licensee becomes aware of the breach.
- (2) A financial services licensee must give written notice to ASIC, as soon as practicable, if the licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant. The notice must say when this happened and identify the market or facility.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Compliance

Requirement

- RG 2.164 We expect you to establish and maintain compliance measures and conflicts management arrangements that are appropriate to the nature, scale and complexity of your business. In many cases there may be a number of possible ways for you to comply with these obligations. We expect that you will have documented your processes and procedures in some form: see RG 104.24–RG 104.26 and RG 181.44.

Business dependant

- RG 104.21 There are many different kinds of licensees providing a diverse range of financial services. We do not take a ‘one-size-fits-all’ approach to regulation. Rather, we acknowledge that what you need to do to comply with your obligations will vary according to the ‘nature, scale and complexity’ of your business.
- RG 104.44 For example, if you deal in a narrow range of simple products as an incidental part of your main business or you are a very small business, you might meet your compliance obligations by having a checklist focusing on compliance risks that would adversely affect consumers and the provision of efficient, honest and fair financial services.
- RG 104.45 On the other hand, if your main business is to provide financial services and products, you deal in a broad range of products and you have numerous staff that are spread out geographically, you are more likely to meet your compliance obligations by having compliance measures that involve the use of manuals, programs and dedicated compliance staff.

Documentation

- RG 104.26 Documentation helps you demonstrate whether or not you are complying with the general obligations. When you document your measures, we expect this will include details of who is responsible, the time frames involved and associated record-keeping and reporting.
- RG 104.43 Your compliance measures might include one or a number of different documents and any of a variety of stand-alone or integrated information technology (IT) systems. As a general rule, the smaller and simpler your business, the smaller and simpler we expect your measures to be.

Standards

- RG 104.14 In thinking about how to comply with your obligations, you might find it helpful to look at good industry practice as captured in standards. Industry and Australian standards are relevant to most licensees because these have been drafted with the Australian regulatory

environment in mind. For licensees with larger or more complex businesses, or licensees that are part of a global business, international principles might also be relevant.

RG 104.15 We also use standards in a similar way, i.e. as a guide to good industry practice. However, we check compliance with the law and licence conditions, not with standards—unless, the law or your licence conditions require you to comply with a particular standard.

RG 104.42 We also expect that your compliance measures will:

- (a) take into account the specific compliance risks of your business, especially those that may materially affect consumers or market integrity; and
- (b) enable you to:
 - (i) communicate to your representatives what they need to do to comply;
 - (ii) monitor compliance with all of your licensee obligations; and
 - (iii) address and report any compliance breaches.

Note: In thinking through your compliance obligations, you might find it helpful to look at:

- Australian Standard AS 3806–2006 Compliance Programs, available for purchase from www.saiglobal.com/shop; and
- the principles set out in the IOSCO report Compliance Function at Market Intermediaries (March 2006), available from www.iosco.org.

Implementation

RG 104.27 It is not enough just to document your measures. You also need to fully implement them. This means you need to put them into practice and integrate them into the day-to-day conduct of your business.

Required from the outset

RG 104.6 We do not expect your business to be fully operational at the time you apply for an AFS licence. However, when you apply, you must be able to show that you have arrangements in place to ensure compliance once you are granted a licence.

Review

RG 104.32 You need to review your measures when there are changes to your obligations, your business or the environment in which you operate. We expect that you will have a process for identifying changes that may impact on the effectiveness of your measures.

Record keeping and reporting

- RG 104.29 You also need to monitor and report on your compliance, including reporting relevant breaches to us under s912D. We expect that you will keep records of your monitoring and reporting, including records of reports on compliance and breach notifications.

Oversight

- RG 104.49 We expect that you will allocate to a director or senior manager responsibility for:
- (a) overseeing your compliance measures; and
 - (b) reporting to the governing body (including having ready access to the governing body).
- RG 104.50 You need to ensure that the area responsible for compliance:
- (a) is independent enough to do its job properly;
 - (b) has adequate staff, resources and systems; and
 - (c) has access to relevant records.

Outsourcing

- RG 104.51 It may be appropriate for you to have a separate compliance function (which might be outsourced to a third party). This is likely to be the case for larger, more complex businesses (including a corporate group), but not for licensees whose business is small or whose main business is not the provision of financial services.

Compliance conditions in pro forma 209

Below is an extract from PF 209⁸:

Compliance Measures to Ensure Compliance with Law and Licence

(This condition is imposed on all licensees.)

4. The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws

⁸ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

Dispute resolution

The requirement for a dispute resolution system is set out in section 912A of the Act:

CORPORATIONS ACT 2001 - SECT 912A

General obligations

- (1) A financial services licensee must:
 - (g) if those financial services are provided to persons as retail clients - have a dispute resolution system complying with subsection (2); and
- (2) To comply with this subsection, a dispute resolution system must consist of:
 - (a) an internal dispute resolution procedure that:
 - (i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and
 - (b) membership of one or more external dispute resolution schemes that:
 - (i) is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
 - (ii) covers, or together cover, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the *Superannuation (Resolution of Complaints) Act 1993*) against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.
- (3) Regulations made for the purposes of subparagraph (2)(a)(i) or (2)(b)(i) may also deal with the variation or revocation of:
 - (a) standards or requirements made by ASIC; or
 - (b) approvals given by ASIC.

RG 2.191 If you have applied to provide financial services to retail clients, you must have a dispute resolution system in place: see s912A(1)(g) and s912A(2). Your dispute resolution system must consist of both:

- (a) an internal dispute resolution procedure (IDR) that satisfies the requirements set out in Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165); and
- (b) membership of an ASIC-approved external dispute resolution (EDR) scheme or schemes that cover complaints about all of the financial services to be provided under your AFS licence.

- RG 2.192 You will be asked questions about your dispute resolution system if you ... will have retail clients.
- RG 2.193 We may also ask you to provide a ... additional proof (Dispute Resolution System Statement) before we can complete our assessment of your application...
- RG 2.194 Under our requirements for IDR procedures, you must:
- (a) satisfy the Essential Elements of Effective Complaints Handling in Section 2 of the Australian Standard AS 4269–1995: Complaints handling (see RG 165.14–RG 165.15).
 - (b) appropriately document your IDR procedures (see RG 165.17); and
 - (c) have a system for informing complainants about the availability and accessibility of any relevant EDR scheme(s) (see RG 165.18).
- RG 2.196 Before you apply for your AFS licence you must belong to one or more EDR schemes that:
- (a) are approved by ASIC; and
 - (b) cover complaints about all of the financial services to be provided under your AFS licence (other than complaints that may be dealt with by the Superannuation Complaints Tribunal).
- RG 2.197 If you need to belong to one or more EDR schemes but you don't have these in place at the time you apply for your licence, we will assess your application but we cannot grant your final licence until you have the necessary arrangements in place. We will ask for details of your EDR scheme(s) membership when we send you your draft licence. The EDR schemes approved by us are listed in Table 1.

External Dispute Resolution in pro forma 209

Below is an extract from PF 209⁹:

External Dispute Resolution Requirements

(This condition is imposed on all licensees who provide financial services to retail clients.)

32. Where the licensee provides financial services to retail clients, the licensee must be a member of one or more External Disputes Resolution Scheme(s) (“EDRS”) which covers, or together cover, complaints made by retail clients in relation to the provision of all of

⁹ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

the financial services authorised by this licence.

- 33 Where the licensee ceases to be a member of any EDRS, the licensee must notify ASIC in writing within 3 business days:
- (a) the date the licensee ceases membership of the EDRS(s); and
 - (b) the reasons the licensee's membership of the EDRS(s) has ceased (including circumstances where the EDRS is no longer operating, failure by the licensee to renew their membership of the EDRS or where the EDRS has terminated the licensee's membership of the EDRS); and
 - (c) details of the new EDRS(s) the licensee intends to or has joined (including the date the membership commences and the name of the EDRS); and
 - (d) details that provide confirmation that the licensee is covered by EDRS(s) covering complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.

Compensation arrangements

The requirement for compensation arrangements is contained in section 912B:

CORPORATIONS ACT 2001 - SECT 912B

Compensation arrangements if financial services provided to persons as retail clients

- (1) If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives. The arrangements must meet the requirements of subsection (2).
- (2) The arrangements must:
 - (a) if the regulations specify requirements that are applicable to all arrangements, or to arrangements of that kind - satisfy those requirements; or
 - (b) be approved in writing by ASIC.
- (3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:
 - (a) the financial services covered by the licence; and
 - (b) whether the arrangements will continue to cover persons after the licensee ceases carrying on the business of providing financial services, and the length of time for which that cover will continue; and

- (c) any other matters that are prescribed by regulations made for the purposes of this paragraph.
- (4) Regulations made for the purposes of paragraph (3)(c) may, in particular, prescribe additional details in relation to the matters to which ASIC must have regard under paragraphs (3)(a) and (b).

RG 2.208 If you have applied to provide financial services to retail clients, you will need to have arrangements in place for compensating those clients for loss they suffer if you breach your obligations under the Corporations Act. The primary way to comply with this obligation is to have professional indemnity insurance cover: see s912B, reg 7.6.02AAA, condition 29 of PF 209 (for responsible entities and IDPS operators) and CO 04/194 (for MDA operators). Our policy on compensation and insurance arrangements is set out in Regulatory Guide 126 Compensation and insurance arrangements for AFS licensees (RG 126).

RG 2.209 You will be asked questions about your compensation and insurance arrangements if you selected at A5.1 that you will have retail clients.

RG 2.212 [we will] ask if you already have professional indemnity insurance that complies with our policy on compensation and insurance arrangements. Our policy on what we consider to be adequate insurance is set out in Sections C and D of RG 126.

Under s912B, a licensee must have compensation arrangements that comply with requirements in any regulations, or requirements made by us.

Compensation Requirements in pro forma 209

Below is an extract from PF 209¹⁰:

Professional Indemnity Compensation Requirements

Where the licensee is authorised to operate a registered scheme in the capacity of a responsible entity and/or operate an IDPS as an IDPS operator, the following condition will be imposed.

- 29. The licensee must maintain an insurance policy covering professional indemnity and fraud by officers that:
 - (a) is adequate having regard to the nature of the activities carried out by the licensee under the licence; and
 - (b) covers claims amounting in aggregate to whichever is the lesser of:

¹⁰ Pro Forma 209 [PF 209] is a precedent document supplied by ASIC. It sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an Australian financial services (AFS) licence.

- (i) \$5 million; or
- (ii) the sum of the value of all IDPS property of all IDPS for which it is the operator and all scheme property of all registered schemes for which it is the responsible entity.

Conflict management

The requirement

The requirement for having adequate arrangements in place for managing conflicts of interest is found in section 912A(1)(aa):

CORPORATIONS ACT 2001 - SECT 912A General obligations

- (1) A financial services licensee must:
 - (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

RG 181.2 The conflicts management obligation forms part of the licensing regime, which promotes the following primary outcomes:

- (a) confident and informed decision making by consumers;
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products:
s760A

RG 181.16 Licensees are obliged (among other things) to have adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to the provision of financial services by the licensee, or a representative of the licensee, as part of the financial services business of the licensee or the representative (the 'conflicts management obligation').

RG 181.19 Many licensees are also bound by common law obligations that affect their management of conflicts of interest. For example, many licensees have fiduciary obligations to their clients to whom they provide advice or for whom they act in a trustee capacity. These obligations operate in addition to the statutory requirements and should be taken into account when formulating conflicts management arrangements.

Mechanisms of management

- RG 181.20 The three mechanisms that licensees would generally use to manage conflicts of interest are:
- (a) controlling conflicts of interest;
 - (b) avoiding conflicts of interest; and
 - (c) disclosing conflicts of interest.
- RG 181.27 The conflicts management obligation does not prohibit all conflicts of interest. It does not provide that a licensee can never provide financial services if a conflict of interest exists. Rather, the conflicts management obligation requires that all conflicts of interest be adequately managed. Many conflicts of interest can be managed by a combination of:
- (a) internal controls and;
 - (b) disclosures
- However, some conflicts cannot be managed in this way: where conflicts cannot be adequately managed through controls and disclosure, the licensee must avoid the conflict or refrain from providing the affected financial service.
- RG 181.28 To control conflicts of interest a licensee must:
- (a) identify the conflicts of interest relating to their business;
 - (b) assess and evaluate those conflicts; and
 - (c) decide upon, and implement, an appropriate response to those conflicts.
- RG 181.29 Depending on the circumstances and the nature of any given conflict, it may be appropriate to:
- (a) disclose the conflict of interest to the relevant client(s);
 - (b) allocate another representative to provide the service to the particular client;
 - (c) decline to provide services to the particular client; or
 - (d) initiate internal or external disciplinary action (e.g. referring the matter to a professional body or regulator) where warranted.
- RG 181.42 Some conflicts of interest have such a serious potential impact on a licensee or its clients that the only way to adequately manage those conflicts will be to avoid them. In such cases merely disclosing them and imposing internal controls will be inadequate. A licensee's conflicts management arrangements must enable the licensee and its representatives to identify those conflicts of interest that must be avoided.

Disclosure

- RG 181.21 The conflicts management obligation is more than simply a disclosure obligation: the obligation is to have adequate arrangements in place to manage conflicts of interest. We expect that licensees will generally use the three mechanisms of controlling, avoiding and disclosing conflicts. Disclosure alone will often not be enough to manage a conflict of interest.
- RG 181.49 Licensees should make appropriate disclosures to clients as part of their arrangements to manage conflicts of interest. While disclosure alone will often not be enough, disclosure is an integral part of managing conflicts of interest. Licensees should ensure that clients are adequately informed about any conflicts of interest that may affect the provision of financial services to them.
- RG 181.50 Adequate disclosure means providing enough detail in a clear, concise and effective form to allow clients to make an informed decision about how the conflict may affect the service being provided to them. We expect disclosure by licensees to focus on material conflicts.
- RG 181.60 We recognise there are some situations where disclosing a particular conflict will be inappropriate. There may be situations in which conflicts of interest arise that are confidential, and even amount to ‘inside information’ under the insider trading provisions: s1042A. In such situations licensees will need to assess whether any disclosures can be given and whether the conflict can be adequately managed through other mechanisms. It may be that the conflict needs to be avoided by, for example, declining to provide the affected service.

Licensee dependant

- RG 181.32 It is important that a licensee’s conflicts management arrangements are designed with their own particular circumstances in mind. We encourage licensees to ensure that their conflicts management arrangements are designed or tailored according to the nature, scale and complexity of their business.

Documentation

- RG 181.33 For conflicts management arrangements to be adequate, they need to be documented, with compliance-monitoring records also kept: see RG 181.44–RG 181.48 on documentation and record keeping.
- RG 181.44 For conflicts management arrangements to be adequate, they need to be documented. This generally involves having a written conflicts management policy (which may form part of the licensee’s compliance procedures or manual).

RG 181.45 We expect that licensees will keep records showing what they have actually done to monitor compliance with their conflicts management arrangements. Conflicts management arrangements are unlikely to be adequate if they do not ensure that compliance-monitoring records are kept.

RG 181.46 We expect that licensees will keep, for at least seven years, records of:

- (a) conflicts identified and action taken;
- (b) any reports given to the licensee's owners or senior management about conflicts of interest matters; and
- (c) copies of written conflicts of interest disclosures given to clients or the public as a whole.

Chinese Walls

RG 181.36 Robust information barriers may help a licensee manage their conflicts of interest. They may allow a licensee to insulate one group of staff from the information or other circumstances that give rise to a particular conflict, so that the group is not affected by that conflict. To be effective, such barriers must actually prevent information being passed to the relevant group of staff.

Fairness between clients

RG 181.40 Licensees must ensure that they treat their clients fairly. In considering their obligations, we would generally expect licensees to consider the following questions:

- (a) Are they providing financial services in a manner that unfairly puts the interests of the licensee (or its representatives) ahead of their clients?
- (b) Are they providing financial services in a way that unfairly puts the interests of one client ahead of the interests of other clients?
- (c) Are they using knowledge about their clients in a way that is likely to advance their own interests without sufficient disclosure to affected clients?

RG 181.41 Licensees need to manage conflicts between the interests of various clients (existing or potential clients) as well as conflicts between the licensee's own interests and those of their clients. Generally, they should not provide financial services in a manner calculated to advance one client's interests unfairly ahead of other clients' interests.

Remuneration

RG 181.38 Licensees need to consider their remuneration practices (including non-monetary benefits) as part of ensuring that they operate efficiently, honestly and fairly, and have in place adequate conflicts management arrangements.

Risk management

The requirement

CORPORATIONS ACT 2001 - SECT 912A

General obligations

- (1) A financial services licensee must:
 - (h) unless the licensee is a body regulated by APRA - have adequate risk management systems; and

APRA excepted

RG 104.12 If you are a body regulated by APRA... the general obligations to have adequate resources and risk management systems do not apply to you: s912A(1)(d) and (h). This is the case even if only a part of your financial services business is an activity that APRA regulates. APRA, not ASIC, imposes any requirements for risk management and resources that apply to you.

RG 2.203 Unless you are a body regulated by APRA, you must be able to demonstrate that you have adequate processes for managing risks associated with your business: see s912A(1)(h).

Business Dependant

RG 104.61 The requirement for risk management systems ensures that you explicitly identify the risks you face and have measures in place to keep those risks to an acceptable minimum.

RG 104.63 Your risk management systems will depend on the nature, scale and complexity of your business and your risk profile. They will be different for each licensee.

RG 104.64 Your risk management systems will need to adapt as your business develops and your business risk profile changes over time.

RG 2.207 We expect your risk management processes to be tailored to your financial services business. You will need to identify and address the risks associated with your particular business. For example, if you are a small business with only one responsible manager, your risk management processes should address what will occur if that person is unexpectedly unavailable. Or if you operate a managed investment scheme, your risk management processes should identify and address operational risks related to the loss of, or damage to, scheme property.

Financial Resources Risk

RG 166.7 To satisfy your obligation under s912A(1)(h), we expect your risk management systems to specifically deal with the risk that your financial

resources will not be adequate to ensure that you are able to carry on your business in compliance with the licensee obligations, or to wind up your business in an orderly manner.

Compliance and Risk

RG 104.47 From our experience, it is common for some licensees' compliance measures to be integrated into their risk management systems. Compliance measures can be one of several controls you can use to address or mitigate risks to your business (including the risk of non-compliance with your obligations under the Corporations Act)...

Ongoing notifications

Reporting requirements in the Act

CORPORATIONS ACT 2001 - SECT 912D Obligation to notify ASIC of certain matters

- (1) A financial services licensee must comply with subsection (1B) if:
 - (a) the licensee breaches, or is likely to breach:
 - (i) any of the obligations under section 912A or 912B, other than the obligation under paragraph 912A(1)(c); or
 - (ii) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b) and (c) of the definition of financial services law in section 761A; or
 - (iii) the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this subparagraph; and
 - (b) the breach, or likely breach, is significant, having regard to the following:
 - (i) the number or frequency of similar previous breaches;
 - (ii) the impact of the breach or likely breach on the licensee's ability to provide the financial services covered by the licence;
 - (iii) the extent to which the breach or likely breach indicates that the licensee's arrangements to ensure compliance with those obligations is inadequate;
 - (iv) the actual or potential financial loss to clients of the licensee, or the licensee itself, arising from the breach or likely breach;
 - (v) any other matters prescribed by regulations made for the purposes of this paragraph.
- (1A) For the purposes of subsection (1), a financial services licensee is likely to breach an obligation referred to in that subsection if, and only if, the person is

no longer able to comply with the obligation.

- (1B) The financial services licensee must, as soon as practicable and in any case within 10 business days after becoming aware of the breach or likely breach mentioned in subsection (1), lodge a written report on the matter with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (1C) A report that a licensee is required to lodge under subsection (1B) is taken to have been lodged with ASIC if:

- (a) the licensee is a body regulated by APRA; and
- (b) the report is received by APRA in accordance with the terms of an agreement between APRA and ASIC under which APRA is to act as ASIC's agent in relation to such reports.

- (1D) Subsection (1B) does not apply to a financial services licensee that is a body regulated by APRA in relation to a breach if:

- (a) the auditor or actuary of the licensee gives APRA a written report about the breach; and
- (b) the report is given before, or within 10 business days after, the licensee becomes aware of the breach.

- (2) A financial services licensee must give written notice to ASIC, as soon as practicable, if the licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant. The notice must say when this happened and identify the market or facility.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Reporting requirements in the regulations

Section 914A(8) of the Act provides for AFSL conditions to be proclaimed by regulation (these conditions ASIC is not allowed to revoke or vary). These conditions are implied and do not appear on the licence. One such condition is proscribed in regulation 7.6.04:

CORPORATIONS REGULATIONS 2001 - REG 7.6.04 Conditions on Australian financial services licence

- (1) For subsection 914A(8) of the Act, an Australian financial services licence is subject to the following conditions:

- (b) a condition that, if:

- (i) there is a change in a matter particulars of which are entered in a register of financial services licensees; and
- (ii) the change is not a direct consequence of an act by ASIC;

the financial services licensee must lodge with ASIC in the prescribed form particulars of the change within 10 business days after the change;

- (c) a condition that, if:

- (i) there is a change in a matter particulars of which are entered in a register of authorised representatives of financial services licensees;

and

- (ii) the change is not required to be reported in accordance with section 916F of the Act; and
 - (iii) the change is not a direct consequence of an act by ASIC;
- the financial services licensee must ensure that particulars of the change are lodged with ASIC in the prescribed form within 10 business days after the change;
- (i) a condition that, if a financial services licensee becomes aware of any change in control of the financial services licensee, the financial services licensee must lodge with ASIC, in the prescribed form, particulars of the change not later than 10 business days after the change;

RG 1.63 After you receive your AFS licence, you are obliged under the Corporations Act to notify us about certain things. For instance, you need to tell us when:

- (a) you appoint an auditor (if you haven't already done so in your licence application);
- (b) you appoint authorised representatives to operate under your licence, or you revoke their appointment, or their details change (e.g. address or other contact information); and
- (c) the details of your responsible managers change.

Also see standard Conditions 23 – 26 in pro forma 209.

For guidance on breach reporting, see Regulatory Guide 78 Breach reporting by AFS licensees (RG 78).

Licence conditions

ASICs power

ASIC is given the power to impose conditions on AFSL licensees by section 914A:

CORPORATIONS ACT 2001 - SECT 914A

The conditions on the licence

- (1) Subject to this section, ASIC may, at any time, by giving written notice to a financial services licensee:
 - (a) impose conditions, or additional conditions, on the licence; and
 - (b) vary or revoke conditions imposed on the licence.
- (2) ASIC may do so:
 - (a) on its own initiative; or
 - (b) if the licensee lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

- (3) ASIC may only impose conditions or additional conditions, or vary the conditions, on the licence after giving the licensee an opportunity:
- (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC in relation to the matter.
- This subsection does not apply to ASIC imposing conditions when a licence is granted.
- (4) If the licensee, or a related body corporate, is a body (the *APRA body*) regulated by APRA, other than an ADI (within the meaning of the *Banking Act 1959*), then the following provisions apply:
- (a) ASIC cannot:
 - (i) impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities); or
 - (ii) vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);

unless ASIC has first consulted APRA about the proposed action;
 - (b) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.
 - (i) the procedures for the exercise of the power are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;
 - (ii) ASIC (rather than the Minister) must still conduct any hearing required under paragraph (3)(a) and receive any submissions under paragraph (3)(b);
 - (c) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.
- (5A) A failure to comply with a requirement of subsection (4) or (5) to consult or inform APRA about, or to consider advice from ASIC about, an imposition, variation or revocation of a condition does not invalidate the action taken.
- (6) ASIC must ensure that the licence is subject to a condition that specifies the particular financial services or class of financial services that the licensee is authorised to provide.
- (7) The financial services or class of financial services may be specified by reference to particular financial products, or classes of financial products.

- (8) The licence is subject to such other conditions as are prescribed by regulations made for the purposes of this subsection. However, ASIC cannot vary or revoke those conditions.

Standard conditions

RG 1.12 If we grant you an AFS licence, it will include conditions that support the AFS licensee obligations. You can find a description of the standard conditions that may be put on your licence in Pro Forma 209 Australian financial services licence conditions (PF 209). This is available on our website at www.asic.gov.au/afsl.

Compliance required

CORPORATIONS ACT 2001 - SECT 912A
General obligations

- (1) A financial services licensee must:
- (b) comply with the conditions on the licence; and

Post licensing conditions

Conditions are used as an ongoing regulatory power by ASIC.

RG98.1.16 We may impose conditions, or further conditions, on an AFS licence at any time, whether at the time of granting the AFS licence or subsequently, and may vary or revoke the conditions: s914A(1)(a-b)

RG98.1.17 Before imposing any such conditions after the AFS licence has been granted, or before varying any such conditions, we must give the licensee an opportunity to appear or be represented at a private hearing and to make submissions to ASIC: s914A(3).

RG98.1.18 If appropriate, we may use our power to impose additional licence conditions to address systemic compliance issues. These AFS licence conditions may, for example, preclude the licensee from providing certain types of financial services, or may impose different or additional compliance obligations on the licensee, such as requiring the licensee to engage an independent external compliance consultant and provide ongoing reporting to ASIC of the licensee's progress in remedying previously identified deficiencies in compliance measures.

RG 104.2 You must comply with the general obligations from the time your AFS licence is granted and on an ongoing basis. If we have reason to believe that you are not complying with your obligations, we may take administrative action, which could include suspending or cancelling your licence, or imposing additional licence conditions: s915C(1) and 914A(1).

Discipline

Suspension

- RG 98.1.6 If appropriate, we may suspend or cancel an AFS licence in certain circumstances without giving the licensee an opportunity to appear or be represented at a hearing before us and to make submissions: s915B
- RG 98.1.8 We may also suspend or cancel an AFS licence after giving the licensee an opportunity to appear or be represented at a private hearing before us and to make submissions: s915C. The circumstances giving rise to this hearing requirement are:
- (a) the application for an AFS licence contained materially false or misleading information or omitted material information;
 - (b) the licensee failed to comply with its obligations as a financial services licensee as specified in s912A, or ASIC has reason to believe that the licensee will not comply with those obligations;
 - (c) if the licensee is a natural person, ASIC is no longer satisfied as to the person's good fame or character;
 - (d) if the licensee is a body corporate, ASIC is no longer satisfied as to the good fame or character of one or more of the licensee's responsible officers;
 - (e) if the licensee is a partnership, ASIC is no longer satisfied as to the good fame or character of one or more of the partners;
 - (f) a banning order or disqualification is made against the licensee;
 - (g) a banning order or disqualification order is made against a representative of the licensee, and ASIC considers that the representative's involvement in the provision of the licensee's financial services will significantly impair the licensee's ability to meet its obligations under Chapter 7.

Cancellation

- RG98.2.9 Examples of misconduct that may result in a licence being cancelled are:
- (a) dishonesty by a licensee;
 - (b) systemic or persistent breaches of the licensee's obligations (and the licensee has failed to address these issues after they were brought to its attention) where there is actual or potential significant risk to clients or market integrity;
 - (c) the licensee does not have the organisational capacity to continue to meet its obligations and there is actual or potential significant risk to clients or investors; and
 - (d) the licensee has, at senior levels of management, misled or hindered ASIC, including concealing or deliberately destroying

records required to be kept.

RG 98.2.10 In appropriate cases, public protection considerations may be satisfied by suspending rather than cancelling an AFS licence (e.g. to enable necessary remedial or compliance measures to be put in place by the AFS licensee).

RG 98.2.11 We may vary or cancel a banning order if we are satisfied that 'it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order': s920D(1). We may do so on our own initiative or if the person against whom the order was made lodges an application for ASIC to cancel the AFS licence.

Enforceable undertakings

RG98.1.20 We may accept an enforceable undertaking as an alternative to pursuing other remedies in certain circumstances. The factors that we might consider when deciding whether to accept an enforceable undertaking are set out in Regulatory Guide 100 Enforceable undertakings (RG 100). We will not, however, accept an enforceable undertaking in lieu of commencing criminal proceedings against a party.

RG98.1.21 We will generally only consider accepting an enforceable undertaking when we:

- (a) consider the enforceable undertaking to be an appropriate regulatory outcome having regard to the significance of the issues to the market and community;
- (b) consider the person is likely to comply with the enforceable undertaking (any history of complaints may be relevant); and
- (c) have considered the nature of the alleged breach and the regulatory impact of the enforceable undertaking compared to that of other available enforcement remedies.

Banning orders

RG 98.1.10 A banning order is a written order by ASIC that prohibits the banned person from providing financial services, whether as an AFS licensee or representing an AFS licensee. We can make an order that either prevents a person from providing all financial services, or from providing specified financial services, in specified circumstances. A banning order may be permanent or for a specified period. If we have reason to believe that a person is not of good fame or character, the banning order will be permanent: s920B.

RG 98.1.11 A person subject to a banning order cannot be granted an AFS licence contrary to the banning order: s920C.

- RG 98.1.12 We can ban a person from providing financial services by making a banning order: s920A.
- RG 98.1.13 We can make a banning order which has immediate effect, without giving the person the opportunity of a hearing, if the person has been convicted of serious fraud, or the person's AFS licence has been suspended or cancelled under s915B: s920A(3).
- RG 98.1.14 In other cases we can only make a banning order after giving the person the opportunity to appear or to be represented at a private hearing and to make submissions: s920A(1) and (2).
- RG 98.1.15 The grounds upon which we can make a banning order under s920A are:
- (a) we have suspended or cancelled an AFS licence held by the person;
 - (b) the person has not complied with their obligations under s912A;
 - (c) we have reason to believe that the person will not comply with their obligations under s912A;
 - (d) the person becomes an insolvent under administration;
 - (e) the person is convicted of fraud;
 - (f) the person has not complied with a financial services law; or
 - (g) we have reason to believe that the person will not comply with a financial services law.
- RG 98. 2.6 In general, we are likely to suspend, cancel or vary an AFS licence or ban a person where we have serious concerns about the person, or the way their business is being or has been conducted. This is particularly so in instances where there is a need to protect the public and where conduct may result in consumer detriment.

-End of Paper-