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Responsible Officer: What Am I Responsible For?

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This presentation will look at

- a. what are the responsibilities of a responsible officer?
- b. is the responsible officer liable for the licensee's conduct?
- c. are you the right person for the job?

“Responsible Officers” regulated by ASIC not those regulated by APRA.



What are the responsibilities of the responsible officer?

All AFS licensees required to provide financial services in compliance with their licence obligations.

All licensees must maintain competence to provide the financial services they provide under their licence (s.912A(1)(e)).

ASIC refers to these obligations as the “organisational competency obligations”.

What are the responsibilities of the responsible officer?

ASIC considers that the people on whom a licensee depends for its organisational competency are the licensee's responsible officers (as defined in s.9 of the Corporations Act) who are directly responsible for significant day-to-day business decisions about the ongoing provision of financial services by the licensee.

What are the responsibilities of the responsible officer?

Section 9 of the Corporations Act defines responsible officer

“in relation to a body corporate that applies for a licence”

to be

“an officer of the body who would perform duties in connection with the holding of the licence”.



What are the responsibilities of the responsible officer?

Section 9 defines “officer” to include:

- a director, or
- a secretary, or
- a person who makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation, or
- a person who has the capacity to affect significantly the corporations financial standing, or
- a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding professional advisers).

It is curious that the term “responsible officer” is not used again in either the Corporations Act or Regulations.

What are the responsibilities of the responsible officer?

- Employment status not relevant
 - Role in the company must be the performance of “duties in connection with the holding of the licence”.
-

What are the responsibilities of the responsible officer?

ASIC's views about responsible officers are set out in

- Policy Statement 164 (see para 164.75)
 - ASIC Guide
“Responsible Officers: Demonstrating compliance with organisational competency obligations”.
-

What are the responsibilities of the responsible officer?

To demonstrate organisational competency the relevant RO's are likely to be:

- directors employed full time in the business,
- key managers, or
- agents of the licensee

who have the requisite direct responsibility as described.



What are the responsibilities of the responsible officer?

RO is not expected to be responsible for every aspect of a licensee's organisational competency (PS 164.77)

PS 164.98 also states that licensees authorised to conduct a range of financial services in relation to different kinds of financial products will need to have nominated responsible officers with appropriate competency relevant to each service or kind of product.

What are the responsibilities of the responsible officer?

Although ASIC accepts that responsible officers will rely on technical experts to carry out various functions of specific expertise, the nominated responsible officer will still need to have enough knowledge and skill to understand and manage the application of that technical expertise to the licensee's business.

What are the responsibilities of the responsible officer?

But what is

“enough knowledge and skill to understand and manage”
that technical expertise?

The answer is: no-one knows except ASIC
and they won't even know until they assess the licensee's business. In
other words it depends on the circumstances of each particular case.

What are the responsibilities of the responsible officer?

It depends on the

- size
- complexity, and
- type

of

- the licensee's business
- the products issued or traded in that business, and
- the market that operates in respect of those products.

ASIC will always ere on the side of caution and prudence so if they're in any doubt the decision will go against the licensee.



What are the responsibilities of the responsible officer?

Responsible officers must between them take responsibility for the licensee's general obligations which according to s.912A of the Corporations Act are:

- **provide financial services efficiently honestly and fairly**
 - **have in place adequate arrangements for the management of conflicts of interest**
 - **comply with license conditions**
 - **comply with financial services laws**
 - **ensure that the licensee's representatives comply with financial services laws**
-

What are the responsibilities of the responsible officer?

s.912A of the Corporations Act (cont):

- **ensure that the licensee has adequate resources available to provide the financial services**
 - **maintain competence to provide the financial services**
 - **ensure representatives are adequately trained and competent**
 - **have a dispute resolution system in place, and**
 - **have adequate risk management systems in place.**
-

What are the responsibilities of the responsible officer?

PS 164 divides the responsibilities up into the following groups:

- **GENERAL**
 - **ORGANISATIONAL EXPERTISE**
 - **RISK MANAGEMENT**
 - **COMPLIANCE**
 - **HUMAN RESOURCES**
 - **MONITORING, SUPERVISION & TRAINING**
 - **TECHNOLOGICAL RESOURCES**
-



What are the responsibilities of the responsible officer?

GENERAL

competence to provide the relevant services

ORGANISATIONAL EXPERTISE

running the business efficiently
all aspects of it are efficiently managed & co-ordinated
ensuring the competency to deliver to its customers

RISK MANAGEMENT

ensuring the business has adequate risk
management systems including

- identification of risks
 - measurement of risk
 - establishment of necessary structured risk management processes and procedures
 - maintenance and ongoing management of those processes and procedures
-



What are the responsibilities of the responsible officer?

COMPLIANCE

ensuring the establishment and maintenance of adequate structured compliance measures, processes and procedures as a means to address identified risks and to ensure ongoing adherence to legal and regulatory obligations

HUMAN RESOURCES

ensuring the business has adequate numbers of people to enable it to carry on the licensed business in full compliance with the law AND that the business has structured processes for ensuring it meets its obligations to those people



What are the responsibilities of the responsible officer?

MONITORING, SUPERVISION AND TRAINING

ensuring the business has adequate structured processes in place to ensure its compliance with its obligations to monitor, supervise and train its representatives

TECHNOLOGICAL RESOURCES

ensuring the business has adequate technological resources to efficiently conduct the licensed business in full compliance and to deliver the licensed financial services

What are the responsibilities of the responsible officer?

This list is not exhaustive

Every item on the list does not apply to all licensees

Depends on the type of business, the type of license and the type of products relevant to that licence.

What are the responsibilities of the responsible officer?

The licensee must find someone with the appropriate knowledge, education and skills to take responsibility for each of these items that apply to that licensee.

What are the responsibilities of the responsible officer?

Where a licensee's only activity is to operate a managed investment scheme the responsible officers will be assessed under the two options in PS 130.

For all other services PS 164.104C outlines the competency tests for responsible officers.

What are the responsibilities of the responsible officer?

If the licensee is heavily dependent on the expertise of one or two responsible officers in positions of direct responsibility ASIC may designate them as “key persons”.

Where a licence applicant nominates only one or two responsible officers ASIC will generally treat them as “key persons”.

What are the responsibilities of the responsible officer?

Key persons are named on the licence as such.

The licensee is required to notify ASIC if the key person leaves or is about to leave and must nominate a suitably qualified replacement in order to retain its licence.

What are the responsibilities of the responsible officer?

A licensee must replace a key person within 5 days and must replace a responsible officer within 10 days.

Is the responsible officer liable for the licensee's conduct?

As a general rule a person nominated as a responsible officer for licensing purposes will not take on any additional responsibility with respect to the licensee, over and above the existing responsibilities they have by virtue of their position as an officer.

Is the responsible officer liable for the licensee's conduct?

ASIC has stated that it is the licensee that is ultimately responsible for complying with all license conditions (see the ASIC Guide).

If an AFS licensee breaches the conditions and obligations of its AFS license it is most likely that ASIC would take action against the licensee (and those directly involved such as directors) rather than the nominated responsible officers as such.



Is the responsible officer liable for the licensee's conduct?

If an AFS license is suspended or cancelled ASIC has the power to make a banning order prohibiting the responsible officer from providing financial services (s.920A).

Not simply because the person held the title of responsible officer as such, but rather because the person:

- did not comply with their obligations under s.912A
 - was insolvent
 - was convicted of fraud, or
 - had not complied with a financial services law.
-

Is the responsible officer liable for the licensee's conduct?

Additionally responsible officers will be liable if:

- the proof documents provided to ASIC are false, materially incorrect or misleading;
 - they fail to ensure the licensee meets its license conditions in respect of their area of responsibility;
 - they fail to maintain their skills and knowledge in their area of responsibility;
-

Is the responsible officer liable for the licensee's conduct?

As noted earlier, responsible officers appear by definition to be officers of the licensee and accordingly will be subject to the statutory obligations imposed on officers of a corporation under the Act.



Is the responsible officer liable for the licensee's conduct?

Existing officers of the licensee assuming the role of responsible officer are unlikely to assume a significantly greater level of personal liability. As an officer they already have significant obligations.

However, those who otherwise would not be an officer of the licensee (eg an external service provider nominated as an RO) may become “officers” under the Act by being nominated as a responsible officer.

Is the responsible officer liable for the licensee's conduct?

Chapter 2D of the Corporations Act obliges officers to:

- exercise their powers and discharge their duties with the degree of due care and diligence or a reasonable person in the officer's position;
 - exercise their powers and discharge their duties in good faith in the best interests of the company and for the proper purpose;
 - not improperly use their position; and
 - not improperly use information obtained as an officer to gain advantage for themselves or cause detriment to the corporation.
-



Is the responsible officer liable for the licensee's conduct?

If RO failed to comply with specific duties and responsibilities to licensee, that failure may very well constitute failure to comply with their statutory duties under Chapter 2D

Potential for a fine of up to \$200,000 and the requirement to pay compensation.

Compensation payable to

- **persons to whom the licensee provided financial services, and**
 - **to shareholders of the licensee who lost money as a result of the licensee's loss of licence caused by the responsible officers failure to comply.**
-

Is the responsible officer liable for the licensee's conduct?

Further, a reckless or intentionally dishonest breach of the duty of good faith, use of position or use of information is a criminal offence.



Is the responsible officer liable for the licensee's conduct?

The "Business Judgement Rule" provides a defence where the officer:

- makes a judgement in good faith and for a proper purpose;
 - does not have a material personal interest in the subject matter of the judgement;
 - informs themselves about the subject matter, and
 - rationally believes the judgement to be in the company's best interests.
-

Is the responsible officer liable for the licensee's conduct?

Depending on the type of non-compliance, RO may be able to use the Business Judgement Rule as a defence to a claim under Chapter 2D.

BUT that defence NOT available as a defence to an action by ASIC, such as a banning order,

(may be an argument for mitigation of penalty)

Are you the right person for the job?

RO must be directly responsible for significant day-to-day business decisions about the ongoing provision of financial services of licensee

Are you the right person for the job?

The ASIC Guide provides examples

- financial controller is not “responsible officer” material - no day-to-day responsibility for the delivery of the financial services
 - compliance manager would be responsible officer provided they are directly responsible for significant day-to-day decisions about the monitoring and provision of the financial service.
-

Are you the right person for the job?

In assessing whether a person is suitable for the role, ASIC will consider:

- the nature of the intended business;
 - the scale of the intended business;
 - the complexity of the intended business, and
 - the complexity of each service or product offered by the business.
-

Are you the right person for the job?

The ASIC Guide complains that applicants often

- fail to provide details of their current role
 - fail to assess the relevance and adequacy of their skill and knowledge for the specific role
 - do not contain enough detail.
-

Are you the right person for the job?

PS 164 suggests a three-step exercise:

- first: identify what skills and knowledge would be required for this position
 - second: determine whether the responsible officers have that skill and knowledge
 - third: monitor the maintenance of that skill and knowledge.
-

Are you the right person for the job?

Knowledge: There are 5 alternatives for showing requisite knowledge:

- meet widely adopted and relevant industry standards
 - successfully complete an individual assessment at the appropriate level
 - hold a university degree in a relevant discipline and complete a short industry course
 - hold a relevant industry qualification of full diploma standard
 - other (ie prove to ASIC you've got what it takes)
-

Are you the right person for the job?

Against that background the applicant must show that they have the appropriate level of competence with respect to knowledge and skills relevant to those services and products.

Are you the right person for the job?

Skills: RO must have had at least 3 years relevant experience over the last 5 years.

“Relevant Experience” is experience in a role that enables the person to understand the responsibilities and requirements of the current role.

Experiential periods longer if the person has no formal educational qualifications.

Are you the right person for the job?

It is relevant experience that is important

Lengthy resumes might look good BUT more effective to brush over the irrelevant areas and concentrate on those roles which are relevant to the ROs proposed position.

Are you the right person for the job?

The appendices to the ASIC Guide provide greater detail.

They highlight the formality, conservatism and inherent artificiality of the requirements.

EG: to operate a direct property scheme RO must have a real estate agent's licence or a tertiary qualification in real estate.

Some further comments - 1

A responsible officer is not deemed to be a director of the company just because they fill the role of officer.

But Chapter 2D refers to “directors and other officers”. So RO liable to the same statutory duties as the directors.

RO may be a deemed director if, despite no formal appointment, they act in the position of a director.

Some further comments - 1

Responsible officers who are not directors should ensure they have same protections and rights as directors:

- insurance both during and after their employment, and
 - access to such company documents both during and after their employment to defend themselves against claims,
 - payment by the company of the responsible officer's legal fees to defend claims
-



Some further comments - 2

Licensee's compliance planning must ensure suitable succession plan for their responsible officers.

What if RO dies unexpectedly, resigns unexpectedly, is suspected of financial misconduct, has personal financial difficulties or retires?

Licensee should have plan to put in place a short term solution to enable it to have enough time to find a more permanent replacement for the responsible officer.



Some further comments – 3

Does a responsible officer have to comply with the training requirements under PS 146?

Only if they will be providing financial product advice to retail clients

PS 146 can be used as a guide to the type and level of knowledge and skills that ASIC would expect RO to have.

RO who has responsibility for the quality of the licensee's advice must ensure that representatives providing financial product advice to retail clients are compliant with PS 146.

Some further comments - 4

So is their training available for responsible officers?

Specialist courses for responsible officers are available through organisations such as

- the Financial Services Education Agency Australia and
 - SSAMM Management Consulting.
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