

## **Financial Services Bulletin**

### **March 2010**

#### **ASIC on the hunt again**

##### **Surveillance**

It should come as no surprise to hear the Australian Securities and Investments Commission (ASIC) has already ramped up its surveillance program in response to a number of factors.

##### **Rippoll recommendation**

The report from the Rippoll inquiry flagged surveillance as a key area in which ASIC needed to improve. This was one of the recommendations from the inquiry that did not require legislative intervention for immediate changes to take effect. The inquiry also recommended ASIC perform shadow shopping exercises, at least annually, which is another form of surveillance which licensees (in particular financial planners) can expect later this year.

##### **Current investigation**

Many of you would have read about ASIC's current investigation into the operations of the country's largest Australian financial services licensees.

Twenty to thirty of Australia's largest institutionally owned and independent dealer groups received an 800+ questionnaire just before Christmas last year. The questionnaire (in the form of a Notice of Direction) required the dealer groups to provide information on representatives, number of clients (including active clients), types of financial products promoted and remuneration practises, such as soft dollar incentives. Responses to the questionnaire were due on 5 March 2010 which some industry pundits considered was not long enough.

Despite calls for ASIC to reveal its intentions, ASIC has not provided any indication of the purpose of the investigation or what it will do with the data. By targeting the largest dealer groups, ASIC will have effectively collated data on an estimated 70 percent of the financial planning network. It is therefore likely that ASIC will use the data to develop policy around remuneration practises and disclosure requirements which will impact on all advisory based licensees. This means changes are almost certain to occur as a result of the investigation.

##### **Proposed increase in powers**

The Federal government announced a number of proposed changes earlier this year aimed at strengthening the investigative powers of ASIC and increasing penalties for market-related offences. The proposals, to be more formally addressed in an

exposure draft later this year, aim to increase the maximum criminal penalties that can be imposed when individuals and corporations breach market misconduct provisions, such as insider trading. The proposed increase in powers is clearly designed to act as a deterrent.

It would also not come as a surprise if the exposure draft includes amendments to the *Corporations Act 2001* which would aim to make the enforceability of the market misconduct provisions easier for ASIC.

The enforcement of the misconduct provisions still remains a difficult issue for ASIC, highlighted by the case it lost against Fortescue Metals Group and its chief executive Andrew Forrest. In fact, ASIC’s Project Mint (which was established in March 2008 to investigate false rumours) has resulted in only one broker having been banned. Incidentally, the broker intends to apply to have the decision overturned.

**Conclusion**

We will keep you informed of the results of these various investigations and initiatives, as they are likely to have a direct impact on licensees. McMahon Clarke Legal can assist you in determining whether or not your organisation is ready for a surveillance visit.



If you would like more information, then please contact **David MacLeod** by email or on 07 3239 2906.

**Australian credit licence—commencement and registration**

**Deferred start of credit regime**

The implementation of the National Consumer Credit Protection Package (which includes the licensing regime) has been deferred. The timeframe for registering and applying for an Australian credit licence has been delayed, as follows:

1.	Persons engaging in credit activities to register with ASIC	From 1 April 2010 to 30 June 2010 (previously 1 November 2009 to 31 December 2009)
2.	Persons engaging in credit activities either to be registered or to hold a licence	From 1 July 2010 to 31 December 2010 (previously from 1 January 2010)
3.	All registered persons must have applied for a licence	By 31 December 2010 (previously by 30 June 2010)

4.	All registrations cancelled (all participants must be licensed)	By 30 June 2011 (no change)
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### **Do you need to hold a licence?**

Deciding whether the new national consumer credit regime affects you and whether you need to register or apply for a licence can be difficult, particularly if you intend to engage in credit related activities for the first time.

If you previously engaged in credit activities under a State or Territory based credit regime, and you wish to continue to engage in credit activities, then you will most likely need to be registered (and then licensed) under the new regime.

If you plan to engage in credit activities for the first time, then you should consider whether your proposed activities fall under the new regime, and whether any exemptions apply.

ASIC has released [Regulatory Guide 203 \*Do I need a credit licence?\*](#) to assist people to determine whether an Australian credit licence is required.

### **Requirement to register**

If you decide that the new credit regime applies to your credit activities or intended credit activities, then you will need to apply to ASIC to be registered. As outlined above, registration applications can only be made within a three month window from 1 April to 30 June 2010.

ASIC has stated that they will make a decision on all registration applications by 30 June 2010, if received by 18 June 2010. Therefore, it will be particularly important for those already engaging in credit activities under the various State and Territory based regimes to ensure your application is lodged by no later than 18 June 2010 to ensure you are able to continue engaging in credit activities after 1 July 2010.

### **Lodging a registration application**

Applicants can lodge an online registration application (form CS01) with ASIC from 1 April 2010. Paper based applications will only be allowed in limited circumstances. The form CS01 can be found on ASIC's website at [www.asic.gov.au/credit](http://www.asic.gov.au/credit). If you are an Australian financial services (AFS) licensee, then the registration application can be accessed through the AFS licensee portal at [www.asic.gov.au/licensees](http://www.asic.gov.au/licensees).

Before lodging an application, you must attend to a number of things, including the following:

1. If you are an AFS licensee or a company, then you must ensure your information on ASIC's registers is up-to-date. The application system will pre-fill any information which ASIC already has for AFS licensees and

companies, and an application cannot be completed until your information in ASIC's registers is up-to-date.

2. Become a member of an ASIC approved external dispute resolution scheme, such as the Financial Ombudsman Service ([www.fos.org.au](http://www.fos.org.au)) or the Credit Ombudsman Service Ltd ([www.cosl.com.au](http://www.cosl.com.au)). This is a requirement for all persons who wish to be registered and licensed under the new regime.
3. Perform background checks such as bankruptcy, credit and criminal history checks on people who make significant decisions about how your business is run (e.g., directors, secretary, senior employees). Applicants do not need to provide ASIC with the checks for the registration process however, they are required to make certain declarations as to the past conduct of these people, and they must be provided for a licence application.

It is important to undertake the background checks well in advance as some of the checks may take up to six weeks to return.

### Assistance

ASIC has released [Regulatory Guide 202 Credit registration and transition](#) (RG 202) to assist applicants to make a registration application. RG 202 also provides guidance on the obligations of registered persons, authorisation of credit representatives, financial records and audit reports, the responsible lending obligations (which include the provision of credit guides and other disclosure documents), and the transition process to holding a licence.

If you require assistance with deciding whether you are required to hold a credit licence or to complete a registration application, then McMahon Clarke Legal can assist you.



If you would like more information, then please contact **Shawn Chan** by email or on 07 3239 2906.

## Dispute resolution procedure—headaches and breaches

### Significant impact

The announcement by the Australian Securities and Investments Commission (ASIC) in May 2009 of the changes to its internal and external dispute resolution policy certainly had all the hallmarks for an uncontroversial policy update with only a minor impact on licensees. The media release from ASIC focused on the increase in the value of claims that external dispute resolution schemes, such as the Financial Ombudsman Service, were authorised to deal with as opposed to the changes to the policy that will impact on licensees.

However, on closer inspection there are a number of changes to ASIC's policy, in particular ASIC Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165), which may have a significant consequences. Whilst the changes to RG 165 are primarily designed to reflect the new Australian standard for complaints handling (AS ISO 10002-2006), they have the potential to cause a lot of headaches for licensees.

### **The relevant changes**

The changes to RG 165 primarily consist of the following:

1. A new definition of 'complaint', which is now defined as—

*“an expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or a resolution is explicitly or implicitly expected”.*

This means any complaints handling policy which required complaints to be made in writing must be amended to also include verbal complaints. In addition, the complaints handling policies adopted by licensees must also be sophisticated enough to be able to record details of these verbal complaints.

2. Complaints must now be acknowledged immediately, rather than “as soon as possible”. A final response to a complaint must be provided within 45 days.

The changes to the internal and external dispute resolution procedures took effect from 1 January 2010, i.e., all dispute resolution procedures for licensees must comply with the policy from this date.

### **Who is affected?**

These changes will impact on every licensee that is authorised to provide financial services to retail clients. All such licensees are required to have a compliant dispute resolution system.

These changes will also have a direct impact on the dispute resolution procedures set out in the constitution for registered schemes. Responsible entities of registered schemes will need to ensure their scheme constitutions comply with the new requirements.

### **What should you do?**

Step 1—review your dispute resolution procedures to ensure they comply with RG 165, including ensuring the definition of 'complaint' is broad enough to comply with the updated policy and Australian Standard.

Step 2—review your complaints handling systems to ensure they are robust and adequate to record and report on all complaints, including verbal complaints.

Step 3—if you are a responsible entity, then you will have documented complaints handling arrangements set out in the constitutions of your registered schemes, as required under the *Corporations Act 2001*. The changes to RG 165 mean that you should review your constitutions to ensure the complaints handling provisions for the scheme comply with RG 165. If not, then you may need to amend the constitutions.

Step 4—if your dispute resolution procedures require amendment post 1 January 2010, then it is likely you will need to record a breach for failing to update the procedure before the commencement date of the revised policy. You will then need to consider whether it must be reported to ASIC as a significant breach.

### Assistance

If you require assistance with reviewing or amending your dispute resolution procedures, including constitutions for registered schemes, to ensure compliance with RG 165, then McMahon Clarke Legal can assist.

If you would like more information, then please contact—



**Shawn Chan** by email or on 07 3239 2906.



**David MacLeod** by email or on 07 3239 2906.

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