



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 36

# Licensing: Financial product advice and dealing

August 2013

### **About this guide**

This guide is for persons who may provide financial product advice or deal in a financial product as defined in the *Corporations Act 2001* (Corporations Act) and their professional advisers (such as lawyers).

It gives guidance on the meaning of 'provide financial product advice' and the meaning of 'deal in a financial product'. It also provides guidance on the obligations that apply to providers of financial services.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This version was issued in August 2013 and is based on legislation and regulations as at the date of issue. The guide was revised to include technical updates and to incorporate former QFS 125 *What is our approach to 'arranging'?* (now withdrawn).

Previous versions:

- Superseded Regulatory Guide 36, issued 5 July 2007 and reissued 1 April 2011
- Superseded guide *Licensing: The scope of the licensing regime: Financial product advice and dealing*, issued 28 November 2001, updated 1 November 2002, 1 May 2005 and 28 May 2007

### Disclaimer

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

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

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## A Overview

### Key points

To determine your obligations under the licensing provisions you first need to consider whether you provide a 'financial service': see RG 36.1–RG 36.2.

You provide a financial service if (among other things) you:

- 'provide financial product advice' (see RG 36.3–RG 36.6); or
- 'deal in a financial product' (see RG 36.7–RG 36.8).

Arranging for a person to engage in certain conduct, such as applying for or acquiring a financial product (see RG 36.36), will constitute dealing unless it amounts to providing financial product advice or is exempt: see RG 36.9–RG 36.11.

If you provide a financial service you need to consider whether you must hold an Australian financial services (AFS) licence or hold an authorisation from a licensee: see RG 36.12–RG 36.14.

Licensees and their representatives must comply with certain obligations: see RG 36.15–RG 36.18.

### What is a 'financial service'?

RG 36.1 To determine your obligations under the licensing provisions you first need to consider whether you provide a 'financial service'.

RG 36.2 Generally, a person provides a financial service if they:

- (a) provide financial product advice;
- (b) deal in a financial product;
- (c) make a market for a financial product;
- (d) operate a registered scheme;
- (e) provide a custodial or depository service;
- (f) provide traditional trustee company services; or
- (g) engage in conduct of a kind prescribed in the Corporations Regulations 2001 (Corporations Regulations) (see s766A of the *Corporations Act 2001* (Corporations Act)).

Note: This guide does not provide guidance on the types of financial service set out in RG 36.2(c)–RG 36.2(g).

## What is the meaning of ‘provide financial product advice’?

RG 36.3 The licensing provisions apply to persons who ‘provide financial product advice’. To determine whether you provide financial product advice, it is necessary to separately consider two questions:

- (a) What is ‘financial product advice’?
- (b) When do you ‘provide’ financial product advice?

### What is financial product advice?

RG 36.4 A recommendation or a statement of opinion, or a report of either of those things, constitutes financial product advice under s766B if:

- (a) it is intended to influence a person or persons in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence; and
- (b) it is not exempted from the definition of ‘financial product advice’.

### When do you ‘provide’ financial product advice?

RG 36.5 The licensing provisions apply to persons who ‘provide’ financial product advice. The person who *provides* the advice will generally include the author(s) of the advice as well as the principal for whom they act. It also includes any other person who endorses the advice, or any person who causes or authorises the provision of the advice: s52. However, a person does not provide financial product advice in certain circumstances specified in the Corporations Act (e.g. where the person’s conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers).

RG 36.6 The meaning of ‘provide financial product advice’ is considered in more detail in Section B.

## What is the meaning of ‘deal in a financial product’?

RG 36.7 The licensing provisions apply to persons who ‘deal in a financial product’. To determine whether you deal in a financial product it is necessary to consider the following questions:

- (a) What is ‘dealing’ within the meaning of s766C(1)?
- (b) What is ‘arranging’ within the meaning of s766C(2)?
- (c) What conduct is exempt from the definition of ‘dealing’?

RG 36.8 The meaning of ‘deal in a financial product’ is considered in more detail in Section C.

## What is the meaning of ‘arranging’?

- RG 36.9 ‘Arranging’ for a person to engage in certain conduct, such as applying for or acquiring a financial product (see RG 36.36), constitutes dealing unless:
- (a) the actions concerned amount to providing financial product advice (s766C(2)); or
  - (b) the conduct is exempt from the definition of dealing—for example, if the clerks and cashiers exemption applies (s766A(3)).
- RG 36.10 Arranging occurs when a person brings into effect the issue, variation, disposal or acquisition of, or application for, a financial product. Ultimately, whether a person’s activities constitute arranging is a question of degree.
- RG 36.11 The meaning of ‘arranging’ is considered in more detail in Section D.

## What obligations apply to providers of financial services?

- RG 36.12 If you provide a financial service you may need to hold an AFS licence.
- RG 36.13 You will need to hold an AFS licence if you carry on a financial services business in this jurisdiction, unless an exemption in s911A(2) (or regulations made for the purposes of that provision) applies. For example, due to the exemption in s911A(2)(a), you do not need an AFS licence to provide financial services as a *representative* of a licensee.
- RG 36.14 To determine whether you need to hold an AFS licence to provide a financial service it is necessary to consider the following questions:
- (a) When do you satisfy the business test? (RG 36.61)
  - (b) Does an exemption from the requirement to hold an AFS licence apply? (RG 36.62)
- RG 36.15 Licensees must comply with various obligations, including the general licensee obligations set out in s912A and 912B.
- RG 36.16 If you provide financial services as a *representative* of a licensee, you may need to hold an authorisation from that licensee.
- RG 36.17 While the primary obligation to ensure compliance with the financial services laws is imposed on licensees, some obligations in the law apply directly to representatives.
- RG 36.18 The obligations that apply to providers of financial services are considered in more detail in Section E.

## B What is the meaning of ‘provide financial product advice’?

### Key points

The licensing provisions apply to persons who ‘provide financial product advice’.

To determine whether you provide financial product advice it is necessary to separately consider two questions:

- What is financial product advice? (see RG 36.19–RG 36.32); and
- When do you ‘provide’ financial product advice? (see RG 36.33–RG 36.35).

### What is financial product advice?

- RG 36.19 A recommendation or a statement of opinion, or a report of either of those things, constitutes financial product advice under s766B if:
- it is intended to influence a person or persons in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence; and
  - it is not exempted from the definition of financial product advice.

Note: There are two types of financial product advice under the Corporations Act—personal advice and general advice: see s766B(2)–(4). For a brief description of these two types of advice, see RG 36.100–RG 36.103. These paragraphs describe some key obligations that apply depending on whether a person is providing personal or general advice. For further guidance about the distinction between personal advice and general advice and your obligations, see Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) and Regulatory Guide 244 *Giving information, general advice and scaled advice* (RG 244).

- RG 36.20 Financial product advice will generally involve a qualitative judgement about, or an evaluation, assessment or comparison of, some or all of the features of one or more financial product(s).

Note: For example, a service that involves rating some or all of the features of one or more superannuation products will generally constitute financial product advice. Such a service involves making an evaluation, assessment or comparison of some or all of the features of one or more financial products.

### Consider the overall impression and circumstances

- RG 36.21 You will need to take into account the overall impression created by a communication, and all the surrounding circumstances in which it is

provided, to determine whether it constitutes financial product advice under the test set out in s766B.

RG 36.22 This will mean you need to consider, among other things:

- (a) the means by which the provider(s) of the communication (and their associates) are remunerated; and
- (b) any representations made to the person to whom the communication is provided (who may be a retail or wholesale client).

For example, a communication is more likely to be financial product advice if its provider (or associate) is remunerated by the client or stands to benefit depending on the decisions made by a client. This is because an intention to influence may be more readily inferred.

### **The distinction between factual information and financial product advice**

RG 36.23 If a communication is a recommendation or a statement of opinion, or a report of either of those things, that is intended to, or can reasonably be regarded as being intended to, influence a client in making a decision about a particular financial product or class of financial product (or an interest in either of these), it is financial product advice. Communications that consist only of factual information (i.e. objectively ascertainable information whose truth or accuracy cannot be reasonably questioned) will generally not involve the expression of opinion or recommendation and will not, therefore, constitute financial product advice.

Note: For example, factual information will generally include information about the rights and obligations of persons under relevant legislation (such as the *Superannuation Guarantee (Administration) Act 1992*).

RG 36.24 However, in some circumstances, a communication that consists only of factual information *may* amount to financial product advice. Where factual information is presented in a manner that may reasonably be regarded as suggesting or implying a recommendation to buy, sell or hold a particular financial product or class of financial products, the communication may constitute financial product advice (e.g. where the features of two financial products are described in such a manner as to suggest that one compares more favourably than the other).

RG 36.25 We will not treat factual information given by you as general or personal advice if:

- (a) you clarify at the outset that you are giving the client factual information where there is a reasonable likelihood of doubt; and



- (b) the information is not intended to imply any recommendation or opinion about a financial product.

Note: See RG 244.29–RG 244.32 for more guidance on how we distinguish factual information from general or personal advice.

RG 36.26 The examples in Table 1 illustrate the distinction between factual information and financial product advice.

**Table 1: Examples of the distinction between factual information and financial advice**

Example	
<b>Superannuation</b>	<p>A client asks a fund representative about salary sacrifice arrangements and superannuation. The representative informs the client what is generally understood by the term 'salary sacrifice arrangement'. This is likely to constitute the provision of factual information.</p> <p>If, however, the representative expresses a qualitative or comparative judgement about salary sacrifice arrangements (e.g. 'sacrificing salary into a superannuation fund is very tax effective' or 'sacrificing salary into a superannuation fund is more tax effective than negative gearing'), this would be likely to constitute the provision of financial product advice.</p>
<b>Call centres and general insurance</b>	<p>A client contacts a call centre wanting to buy insurance for their motor vehicle. The client asks the operator to explain the difference between third-party liability and comprehensive cover and asks for two quotes.</p> <p>Note: Telling an inquirer the cost or estimated cost of a financial product does not constitute the provision of financial product advice: s766B(6).</p> <p>The operator simply explains the differences in policy coverage between the two policies and provides the requested quotations. This is likely to constitute the provision of factual information.</p> <p>However, suppose the client has obtained two quotes to insure their motor vehicle: one covers third-party liability, the other is for comprehensive cover. The client asks whether it is worth taking out comprehensive cover. The operator explains the differences in policy coverage between the two policies. Without referring to any particular circumstances of the client, the operator says that comprehensive cover is the best choice for most people. This is likely to constitute the provision of financial product advice, because the context in which the response is given suggests a value judgement about the comparative merits of the two policies.</p>
<b>Branch staff and a spare \$10,000</b>	<p>A client visits their local bank branch with \$10,000 to deposit. The client asks for the different interest rates on a savings account and a term deposit and is referred to a customer service officer. The officer provides the interest rates for each of these facilities. This is likely to constitute the provision of factual information.</p> <p>However, suppose the officer not only explains the interest rates for each of these facilities but also adds that there is an 'attractive special rate' available on term deposits for a six-month term. This is likely to constitute the provision of financial product advice because it is a matter of opinion as to whether the special rate is 'attractive' and the teller could reasonably be regarded as intending to influence the client to choose the term deposit.</p>

**Example****Seminars**

A financial institution organises a seminar on investment. Fifteen people attend the seminar. The presenter merely provides a general description of the different types of financial products that are available for investment purposes. This is likely to constitute the provision of factual information only.

However, suppose the presenter claims that, during periods of stock market volatility, property trusts are more desirable than shares because they offer more consistent returns. This is likely to constitute the provision of financial product advice. The desirability of property trusts is a matter of opinion and the presenter's statements could reasonably be regarded as intending to influence the attendees to invest in property trusts.

**Cross-selling**

A client approaches a financial institution to ask about a home mortgage. The client also asks the customer service representative about income protection insurance. The representative confirms that the financial institution also offers income protection insurance products. This is likely to constitute the provision of factual information.

However, suppose that the customer service representative suggests that the client should consider taking out income protection insurance because it can give 'peace of mind' in meeting mortgage payments. This is likely to constitute the provision of financial product advice because whether income protection insurance provides peace of mind or not is a matter of opinion. The representative's suggestion could reasonably be regarded as intending to influence the client to purchase income protection insurance.

Note: For further guidance and examples illustrating the difference between factual information and financial product advice, see RG 244.

## A decision on a particular financial product or class

- RG 36.27 A specific issue that arises is the meaning in s766B(1) of 'decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products'. This expression includes any decision to buy, sell or hold a particular financial product or class of financial products. Examples include a decision to:
- (a) exercise a right or option to acquire or dispose of a financial product;
  - (b) acquire an equitable interest in a financial product; or
  - (c) accept or reject a takeover offer.
- RG 36.28 Section 766B(1) encompasses decisions made by consumers to make additional payments or contributions in relation to financial products held by them (whether or not the making of such additional payments or contributions involves the issue of a financial product: see s761E). It also encompasses decisions made by consumers about investment strategies or options that they may select within a fund.
- RG 36.29 In the context of superannuation, s766B(1) encompasses (but is not limited to) decisions made by consumers about:
- (a) joining a superannuation fund;

- (b) the level of contributions to be paid to a superannuation fund (including altering the level of contributions);
- (c) selecting a particular investment or insurance option within a superannuation fund;
- (d) moving funds between sub-plans within a fund;
- (e) claiming superannuation benefits; and
- (f) moving funds from one fund to another fund.

RG 36.30 Clearly, decisions that relate only to things that are not financial products (e.g. a credit facility as defined in s765A(1)(h)(i) and related regulations) are not caught by s766B(1). However, these may be caught by other legislation such as the *National Consumer Credit Protection Act 2009*.

### Use of disclaimers

RG 36.31 If your communications include information about financial products, but do not constitute financial product advice, you should consider giving consumers a disclaimer to the effect that you are not providing financial product advice, and that consumers should consider obtaining independent advice before making any financial decisions. This will help avoid misleading or confusing consumers about the purpose of the communication.

Note: A disclaimer will not, of itself, determine whether a communication constitutes financial product advice.

### When is a communication exempt from the definition of financial product advice?

RG 36.32 A communication is exempt from the definition of financial product advice in s766B if it is:

- (a) advice given by a lawyer in the circumstances set out in s766B(5)(a) or (b);
- (b) advice given by a registered tax agent in the circumstances set out in s766B(5)(c); or
- (c) a quote relating to the cost of a financial product or the rate of return on a financial product in the circumstances set out in s766B(6) or (7).

Note: Apart from these exemptions, you will not be providing financial product advice in any of the circumstances listed in RG 36.34. Even if you are providing financial product advice, you may not need an AFS licence or authorisation, depending on the circumstances: see Section E.

## When do you ‘provide’ financial product advice?

RG 36.33 The licensing provisions apply to persons who ‘provide’ financial product advice. The person who *provides* the advice will generally include the author(s) of the advice as well as the principal for whom they act. It also includes any other person who endorses the advice, or any person who causes or authorises the provision of the advice: s52.

Note 1: For further guidance on s52 and the provision of financial services through a licensed intermediary, see RG 175.

Note 2: Financial product advice may be provided by traditional means (e.g. verbally or by paper) or electronically (e.g. via a website).

### Circumstances where a person does not provide financial product advice

RG 36.34 You are *not* providing financial product advice when:

- (a) you provide an exempt document or statement (s766B(1A)). The expression ‘exempt document or statement’ is defined in reg 7.1.08;

Note 1: We have given class order relief from the requirement to hold an AFS licence for the issue of certain documents that contain general advice (e.g. documents prepared for the purposes of the Corporations Act): see Class Orders [CO 03/606] *Financial product advice—exempt documents* and [CO 03/911] *Licensing relief for self-dealers who provide general product advice about own securities*.

Note 2: A recommendation or statement of opinion made by an ‘outside expert’ (defined in s766B(9)(b)), or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice. Under the law, the advice is provided by the outside expert and not the issuer of the exempt document: see also reg 7.6.01(1)(u).

- (b) you provide certain kinds of business, structural and risk-related advice in the circumstances set out in reg 7.1.29(3);

Note: These services are an ‘exempt service’ within the meaning of reg 7.1.29(1).

- (c) you are registered as an auditor under Pt 9.2 and perform any of the functions of a cover pool monitor mentioned in s30(4) of the *Banking Act 1959* (reg 7.1.29(3A));

- (d) the conduct is the provision of advice about the taxation implications of a financial product in the circumstances set out in reg 7.1.29(4);

Note: This is an ‘exempt service’ within the meaning of reg 7.1.29(1).

- (e) you provide advice about the establishment, operation, structuring or valuation of a superannuation fund (other than advice for inclusion in an exempt document or statement) in the circumstances set out in reg 7.1.29(5);

Note 1: This is an ‘exempt service’ within the meaning of reg 7.1.29(1).

Note 2: The requirement in reg 7.1.29(5)(c)(ii) (that the advice does not include a recommendation that a person acquire or dispose of a superannuation product) does not apply to a recommendation by a recognised accountant in relation to a self-managed superannuation fund: see reg 7.1.29A. The term 'recognised accountant' is defined in reg 7.1.29A(2): see also Class Order [CO 02/551] *Recognised accountant*.

- (f) your conduct consists *only* of passing on, publishing, distributing or otherwise disseminating a document that contains financial product advice in the circumstances described in reg 7.1.31. This may include a publisher or internet portal operator;
- (g) your conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (s766A(3) and RG 36.35);
- (h) your conduct consists only of advising another person about the manner in which voting rights attaching to securities or interests in managed investment schemes may or should be exercised in the circumstances set out in reg 7.1.30;
- (i) you provide advice to another person that relates only to the structuring of remuneration packages for that other person's employees (reg 7.1.32);
- (j) your conduct consists only of providing a recommendation or statement of opinion in the course of, and as a necessary or incidental part of, the handling or settlement of claims or potential claims for an insurance product (reg 7.1.33(1));
- (k) your conduct consists only of providing a recommendation or statement of opinion about the allocation of the funds among the general asset types listed in reg 7.1.33A. This exemption does not apply if the recommendation or statement of opinion relates to specific financial products or specific classes of financial product;
- (l) you prepare general advice, as a product issuer, about your own product(s), but only where a third party licensee gives the advice to its recipients (reg 7.1.33B). In this situation the licensee will be taken to be the provider of the financial product advice;
- (m) you provide advice about the existence of a custodial or depository service in the circumstances set out in reg 7.1.33E;
- (n) you provide general advice intended to influence a decision on school banking and you are employed by a school or provide the service on behalf of a school in the circumstances set out in reg 7.1.33F;
- (o) you provide general advice that is not about a particular financial product and is not intended to influence a person in making a decision about a particular financial product or an interest in a particular financial product (or could not reasonably be regarded as being intended to have such an influence), and you or your associate does not receive any remuneration, commission or other benefit for the advice (reg 7.1.33G); or

- (p) you provide general advice, as a product issuer, about your own products in circumstances where you are not licensed to provide financial product advice and, at the time of giving the advice, advise the client that you are not licensed, recommend that the client obtain and read a copy of the Product Disclosure Statement (PDS) or Short-Form PDS for the product before making a decision about the product and notify the client about any cooling-off period (reg 7.1.33H).

Note 1: Apart from the circumstances set out in RG 36.34, you will not be providing financial product advice if the communication in question falls within an exemption listed in RG 36.32. Even if you are providing financial product advice, you may not need an AFS licence or authorisation, depending on the circumstances: see Section E, especially RG 36.62.

Note 2: The list of circumstances in RG 36.34 that do not amount to financial product advice under the Corporations Act is not exhaustive. In determining whether or not your conduct constitutes the provision of financial product advice you should look at the Corporations Act, relevant regulations and ASIC instruments, as well as other ASIC publications. ASIC instruments and other ASIC publications are available at [www.asic.gov.au](http://www.asic.gov.au).

Note 3: Certain products are subject to specific disclosure regimes. Superannuation products, simple managed investment schemes and margin lending facilities are subject to a shorter PDS regime: see Corporations Amendment Regulations 2010 (No. 5). For more information on the shorter PDS regime that applies to these products, see Information Sheet 133 *Shorter PDS regime: Superannuation, managed investment schemes and margin lending* (INFO 133). Modified disclosure regimes also apply to general insurance products and first home saver accounts: see Pt 7.9 of the Corporations Regulations.

## Clerks and cashiers

RG 36.35 A person's conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (and, therefore, the person does not 'provide financial product advice') if it merely involves:

- (a) posting, handing out, or otherwise distributing or displaying, documents such as prospectuses, PDSs, Short-Form PDSs or Financial Services Guides (FSGs);
- (b) answering routine questions from consumers by giving factual information (see RG 36.23–RG 36.25), such as minimum investment amounts of funds accepted, whether a particular offer is still open or the nature of investments made by a specific trust;
- (c) collecting payments (e.g. subscription money) and issuing receipts;
- (d) performing the routine or administrative function of assisting consumers to complete application forms and send completed application forms to the relevant product issuer; or

Note: This applies only where the consumer has already made the decision to acquire the financial product. It does not apply where the person helps the consumer make their decision to acquire the financial product.

- (e) performing other routine or administrative functions that do not involve a judgement about what financial products, or classes of financial products, are appropriate or should be considered by a consumer.

Note: This is not intended to be an exhaustive list of conduct that may fall within s766A(3). In interpreting s766A(3), it is important to note that the provision is prefaced with the words 'to avoid doubt'. Licensees must monitor and supervise their clerks and cashiers to ensure that the licensee complies with its obligations relating to the provision of financial services: see Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104) and Regulatory Guide 105 *Licensing: Organisational competence* (RG 105).

## C What is the meaning of ‘deal in a financial product’?

### Key points

The licensing provisions apply to persons who deal in a financial product.

To determine whether you deal in a financial product it is necessary to consider the following questions:

- What is dealing within the meaning of s766C(1)? (see RG 36.36);
- What is arranging within the meaning of s766C(2)? (see RG 36.37–RG 36.40); and
- What conduct is exempt from the definition of dealing? (see RG 36.41).

### What is dealing?

RG 36.36 The following conduct constitutes dealing in a financial product within the meaning of s766C(1) (unless the conduct is exempt from the definition of dealing: see RG 36.41):

- (a) applying for or acquiring a financial product;
- (b) issuing a financial product;
- (c) for securities or managed investment schemes, underwriting the securities or interests;
- (d) varying a financial product; or
- (e) disposing of a financial product.

### What is arranging?

RG 36.37 Arranging for a person to engage in conduct referred to in RG 36.36 also constitutes dealing unless:

- (a) the actions concerned amount to providing financial product advice (s766C(2)); or
- (b) the conduct is exempt from the definition of dealing—for example, if the clerks and cashiers exemption applies (s766A(3)).

RG 36.38 Arranging refers to the process by which a person negotiates for, or brings into effect, a dealing in a financial product (e.g. an issue, variation, disposal, acquisition or application). The person who is arranging may be acting for a product issuer, seller or consumer.



- RG 36.39 Arranging includes ‘arranging contracts of insurance’ as that expression has been interpreted in relation to the *Insurance (Agents and Brokers) Act 1984* (now repealed). However, arranging is not limited to arranging contracts of insurance—it extends to all financial products.
- RG 36.40 For further guidance on our approach to arranging, see Section D.

## What conduct is exempt from the definition of dealing?

- RG 36.41 You are *not* dealing when:
- (a) you deal on your own behalf, unless you are a product issuer dealing in your own products (s766C(3));
  - (b) you are a government or local government authority, a public authority or instrumentality or agency of the Crown, or a body corporate or an unincorporated body, and you deal in your own securities (s766C(4));
- Note: A body corporate or an unincorporated body is not exempt under s766C(4) if it is an investment company: see s766C(5).
- (c) you act as a sub-underwriter (s766C(6));
  - (d) your conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (s766A(3): see RG 36.35);
  - (e) you arrange for another person to deal in interests in a self-managed superannuation fund in the circumstances set out in regs 7.1.29(5)(b) and (c) (reg 7.1.29(3)(f));
  - (f) you arrange for another person to deal in a financial product by preparing a document of registration or transfer in order to complete administrative tasks on instruction from the person (reg 7.1.29(3)(g));
  - (g) you deal in an insurance product as a necessary or incidental part of handling or settling insurance claims or potential claims (reg 7.1.33(2));
  - (h) you arrange for the issue or acquisition of a school banking product and are employed by a school or provide the service on behalf of a school in the circumstances set out in reg 7.1.33F;
  - (i) you enforce rights under a credit facility, including under a power of attorney (reg 7.1.34(2)(a));
  - (j) you dispose of a financial product that is subject to a mortgage or transfer such a product to the mortgagor, whether the disposal or transfer is carried out at the direction of the mortgagor or occurs as a result of the mortgagor fulfilling its obligations under the mortgage (reg 7.1.34(2)(b));

Note: Regulations 7.1.34(2)(a) and 7.1.34(2)(b) do not apply to a margin lending facility.

- (k) you deal in a product held on trust for another person and the holding of the financial product does not constitute the provision of a custodial or depository service under reg 7.1.40 (reg 7.1.35(1)); or
- (l) you are a lawyer and you arrange for a person to deal in a financial product or you deal in a financial product as the agent of a client, an associate of a client or a relative of a client, and you do so in the circumstances set out in reg 7.1.35A.

Note 1: Even if you are dealing, you may not need an AFS licence or authorisation, depending on the circumstances: see Section E, especially RG 36.62.

Note 2: The list of circumstances in RG 36.41 that do not amount to dealing under the Corporations Act is not exhaustive. In determining whether or not your conduct constitutes dealing in a financial product, see the Corporations Act, relevant regulations and ASIC instruments, as well as other ASIC publications at [www.asic.gov.au](http://www.asic.gov.au).

## D What is the meaning of ‘arranging’?

### Key points

‘Arranging’ is a broad concept under the Corporations Act. Whether a person’s activities constitute arranging is a question of degree.

This section details the indicators we look for when assessing whether a person is arranging (see RG 36.45), as well as indicators that conduct may amount to arranging (see RG 36.46).

Some types of conduct are not arranging within the meaning of the Corporations Act: see RG 36.47. However, this conduct may constitute the provision of another financial service.

The final part of this section contains examples to help determine whether particular conduct is arranging: see RG 36.57–RG 36.58.

### What is arranging?

RG 36.42 Arranging is a broad concept under the Corporations Act and its scope has not been fully determined by the courts. Arranging occurs when a person brings into effect the issue, variation, disposal or acquisition of, or application for, a financial product.

RG 36.43 Your conduct may constitute arranging if:

- (a) your involvement in the chain of events leading to the relevant dealing is of sufficient importance that without that involvement the transaction would probably not take place (e.g. where you are the main or only person consumers deal directly with in a particular transaction);
- (b) your involvement significantly ‘adds value’ for the person for whom you are acting; and
- (c) you receive benefits depending on the decisions made by the person for whom you are acting.

Note: This is not intended to be an exhaustive list of potentially relevant factors. In determining whether you are arranging, the presence (or absence) of any one or more of the listed factors is not conclusive.

RG 36.44 As an example, the activities of an order router will generally involve arranging (i.e. where a service provider takes steps to bring into effect an acquisition or disposal of a financial product, albeit that another intermediary is also involved in the process and executes the customer’s order). On the other hand, the operator of a business introduction service will probably not be arranging where the operator does not play a significant role and does not benefit from investment decisions made by consumers.

RG 36.45 Table 2 shows what we look for when assessing whether a person is arranging, to assist you in understanding our approach. Ultimately, whether a person's activities constitute arranging is a question of degree.

**Table 2: Indicators of arranging**

Indicator	Behaviours that exemplify this conduct
The intermediary plays an important role for the consumer in relation to the financial product and the transaction probably would not have proceeded without the intermediary's involvement	The consumer communicates with the intermediary as a key person about the transaction
The intermediary adds value for one or more of the parties to the transaction	The intermediary negotiates the terms of the financial product between the product issuer and the consumer. Generally, the more active the intermediary is in facilitating the transaction between a consumer and a product issuer, the more likely their activity is to be arranging

RG 36.46 Table 3 shows indicators that particular conduct may amount to arranging, especially when they occur alongside other activities. Ordinarily, one of these indicators alone would not amount to arranging.

**Table 3: Indicators that conduct may amount to arranging**

Indicator	Behaviours that may exemplify this conduct
The collection and transmission of money	The intermediary receives money and passes it on to the product issuer to pay for the acquisition of a financial product
Receipt of benefits based on sales.	The intermediary is paid by the product issuer if a person purchases a financial product. The receipt of benefits is an indication of the intermediary's motivation to effect a transaction and may suggest a more active involvement by the intermediary in the completion of the transaction  Note: This kind of benefit could amount to conflicted remuneration if the intermediary is providing financial product advice to a retail client and would be banned unless it falls under an exclusion, such as benefits for advice on general insurance products. See Regulatory Guide 246 <i>Conflicted remuneration</i> (RG 246) for more information.

## What is not arranging?

RG 36.47 The conduct listed and described in RG 36.48–RG 36.56 is not arranging within the meaning of the Corporations Act. However, it is important to note that this conduct may constitute the provision of another financial service.

## Dealing in a financial product as principal

- RG 36.48 Dealing in financial products in your own name is not arranging. In most cases, dealing as principal does not require a licence: s766C(3)–(5).

## Dealing in a financial product as agent

- RG 36.49 When you are dealing as agent you are not arranging. Dealing as agent includes issuing, applying for, acquiring or disposing of a financial product in a second person's name where you have power to bind that second person.

### Example 1: Dealing in a financial product as agent

#### Scenario

A consumer appoints a real estate professional (the agent) to manage a rental property on the consumer's behalf. As part of this arrangement, the agent has the power to bind the consumer in relation to a number of transactions, including acquiring insurance for loss of income should the rental property become vacant (usually by organising the insurance cover and paying the premium out of the rent account managed by the real estate agent).

#### Commentary

Here, the agent has acquired a financial product (general insurance) as agent for the consumer, and the agent would need a licence with an authorisation to deal (by acquiring a financial product) on behalf of another, or be authorised to provide that service on behalf of a licensee with the relevant authorisation.

A person acting as agent may also engage in conduct that amounts to arranging. The licence authorisation to 'deal on behalf of another' also covers arranging activities.

## Insurance distributors

- RG 36.50 If you are appointed as an insurance distributor you can deal in general insurance products as long as you are acting on behalf of the licensee that has appointed you when you provide this service.
- RG 36.51 Class Order [CO 05/1070] *General insurance distributors* grants relief to AFS licensees, giving them the option to appoint distributors to deal in general insurance products on their behalf, without having to appoint the distributor as an authorised representative. Under this relief the licensee remains responsible for the activities of the distributors they appoint. Any financial service provided by a person as a general insurance distributor must be provided on behalf of the licensee that has appointed them as their distributor (i.e. the distributor must be acting as a representative of that licensee).

**Example 2: Insurance distributors****Scenario**

A real estate agent appointed as a general insurance distributor enters into a rental property agreement with a landlord client. Under this agreement, the real estate agent agrees to renew the clients' property insurance on an ongoing basis, as long as the real estate agent provides the financial service (i.e. the insurance service) at all times on behalf of the licensee that has appointed them and makes this clear to their client. The real estate agent expressly advises the client:

- that in arranging for the renewal of the client's insurance, the real estate agent is acting at all times for the licensee;
- of the name and contact details of the licensee they are acting for when providing the financial service;
- of details of any remuneration or benefit that the person will, or is likely to, receive from the licensee for performing the service on their behalf; and
- of the details of the external dispute resolution scheme of the licensee.

**Commentary**

If you are appointed as an insurance distributor you can deal in general insurance products provided you are acting on behalf of the licensee that has appointed you when you provide this service. You will be acting on behalf of the insurer if you have agreed with the insurer that you will deal in insurance products with the client on the insurer's behalf. This applies even if, when providing the dealing services, you are also acting on behalf of the client to whom the services are provided.

You must make it clear to your clients that you are acting on behalf of the insurer. You should tell your clients the name of the insurer, details of any remuneration you will receive from the insurer and information about any external dispute resolution scheme that the insurer belongs to.

The relief provided under [CO 05/1070] would not prevent general insurance distributors from also acting as agents for their clients. Therefore, the real estate agent could also act as the managing agent of the property for the landlord. Similarly, a lawyer who organised property insurance for a client could also undertake the legal conveyancing services for and on behalf of the client, and a travel agent who organised travel insurance could also arrange holiday bookings for the client.

**Making a recommendation or statement of opinion about a financial product**

RG 36.52 Where conduct amounts to the provision of financial product advice, that conduct is not arranging: s766C(2). This will occur where your conduct is intended to influence a decision about a financial product or if it could be reasonably construed as such: s766B.

### Merely providing purely factual information

- RG 36.53 Providing a person with information that is objectively ascertainable (i.e. information whose truth or accuracy cannot be reasonably questioned) is unlikely to constitute arranging.

Note: See Section B of RG 244 for more guidance on providing factual information.

### Acting within the scope of the clerks and cashiers exemption

- RG 36.54 The clerks and cashiers exemption is set out in s766A(3): see RG 36.35. This kind of work is generally of a merely routine and administrative nature or a merely processing or receipting nature. It does not generally require technical competence or skills. This conduct is of a kind that typically is carried on by individual staff members, rather than by corporations or other operators of businesses.
- RG 36.55 We consider that, in the case of a corporation or a business, the aggregation of the individual clerical activities carried out within that economic entity may (in many, but not all, cases) amount to a financial services business of dealing, arranging and/or advising, even if each individual clerical activity is itself exempt under s766A(3).

### Operating a market or a licensed clearing and settlement facility

- RG 36.56 Operating a market may constitute arranging and/or dealing; however, a person who provides a service that is (or that is provided incidentally to) the operation of a licensed market is exempt: s911A(2)(d). Operating a licensed clearing and settlement facility is also exempt. If your arranging activity involves the operation of a financial market, you will need to comply with Pt 7.2: see Regulatory Guide 172 *Australian market licences: Australian operators* (RG 172).

## Examples of our approach to determining what is arranging

- RG 36.57 The examples in Table 4 illustrate our general approach to determining whether particular activities constitute arranging.

**Table 4: Examples to help determine whether particular activities are arranging**

<b>Example</b>	<b>Scenario</b>	<b>Commentary</b>
<b>Completing an application form</b>	You assist a consumer to complete an application form for a financial product by pointing out where the consumer should complete their details on a form, or typing those details into an electronic form (e.g. the details of the client's name and address).	Without any further actions, this is likely to be merely processing at the direction of the consumer and unlikely to be arranging.
<b>Completing an application form with explanation</b>	You assist a consumer to complete an application form by explaining the meaning of questions on the form or suggesting answers to those questions. Where the form involves a choice, you guide the consumer in their choice.	Without any further actions, this is likely to be merely processing at the direction of the consumer and unlikely to be arranging.
<b>Displaying brochures and advertising literature for another person's products</b>	You display brochures and advertising literature for another person's products. You have no other role in relation to these products.	Without any further actions, you are unlikely to be arranging, as your conduct does not provide a sufficiently close connection in facilitating any subsequent transaction between the consumer and product issuer. In this instance the consumer independently decides whether to purchase the advertised product. This is the case whether or not you actively refer the consumer to the existence of the advertising material.
<b>Forwarding brochures and advertising literature for another person's products</b>	You forward brochures and advertising literature for another person's products. You have no other role in relation to these products.	You are not likely to be arranging if you merely direct the consumer to the product issuer and you have nothing further to do with the transaction.
<b>Displaying or forwarding brochures and receiving benefits</b>	You display brochures and advertising literature for another person's financial products, or forward that material to consumers, and you receive benefits based on sales of the financial products attributable to you.	Without any further actions, you are not likely to be arranging.
<b>Forwarding brochures with your contact details</b>	You forward brochures and advertising literature for another person's products to consumers and you include instructions for consumers to contact you if they wish to acquire the product.	You are more likely to be arranging as you are taking on a more active role in bringing into effect a dealing in a financial product. One reason for this is that the transaction would be less likely to occur if you had not been involved (because you are likely to be a key person with whom the consumer communicates about the particular transaction)



Example	Scenario	Commentary
<b>Displaying advertising material and receiving/transmitting premium</b>	You display advertising material relating to the insurance product, you receive the premium for the insurance product and transmit that premium to the relevant insurance company	When this conduct is viewed as a whole it is highly likely to amount to arranging
<b>Providing direct access to a product issuer</b>	You provide a computer or telephone on your premises so a consumer can contact a product issuer directly.	Without further action, this is not likely to be arranging. This is the case whether or not you actively refer the person to the existence of the link to a product issuer.
<b>Providing direct access to a product issuer</b>	You provide a computer as an internet link between the consumer and the product issuer. Either the consumer or a clerk enters the consumer's details and their credit card details to pay for the product. The consumer acquires the product when the computer notifies that payment has been accepted.	You are not likely to be arranging, as this is merely a processing task which the consumer could have done themselves on their own computer.
<b>Providing direct access to a product issuer</b>	You provide a computer as a special direct link between the consumer and the product issuer. The link cannot be accessed in any way apart from through your business.	You are likely to be arranging, as you have a sufficiently close connection with the completion of the relevant transaction. The transaction is unlikely to occur without that special link. In this example, the activities of your business (which are likely to amount to arranging) should not be confused with the activities of individual staff members who undertake some of the routine or administrative activities that would fall within the scope of the clerks and cashiers exemption (and would not be arranging).
<b>Payment facilities</b>	A financial intermediary offers a general purpose facility for making payments that can be used to purchase insurance.	Without further action, this is not likely to be arranging for the purpose of the end-product. Your bank is not arranging for you to purchase insurance merely because it pays an insurer on a cheque you write or it makes available a facility for electronic transfer of funds to the insurer.

RG 36.58 Example 3 sets out the type of different activities that, although they individually do not constitute arranging, when taken together are highly likely to constitute arranging.

**Example 3: Collection and transmission of money****Scenario**

A travel agency business organises the travel insurance for its clients (by having travel insurance brochures on the front desk and assisting the consumer to fill in the application form). The travel agent is paid the premium that the travel agency then forwards to a product issuer.

**Commentary**

The travel agency business is highly likely to be arranging. Where you receive money and pass it on to the product issuer to pay for the acquisition of a financial product and you combine this activity with other conduct that relates to the dealing in that product, even though that activity might not by itself be arranging, those activities in combination are highly likely to be arranging. This is because the travel agency business is taking on a role where its involvement is fundamental to the finalisation of the relevant transaction. We consider that the consumer protection protections afforded by the AFS licensing regime are intended to apply where intermediaries are collecting and transmitting money on behalf of other parties.

The activities of the travel agency should not be confused with the activities of the individual clerk or cashier who actually receives the money on behalf of the agency. The mere receipt of money is work ordinarily done by clerks and cashiers and should be distinguished from the collection and transmission of money on behalf of third parties, which requires additional skill and a system within the organisation as a whole. In this example, the travel agency business is highly likely to need a licence with an authorisation to deal by arranging, or be authorised to arrange general insurance products on behalf of a licensee with the relevant authorisation. Individual staff members may require an authorisation if the conduct they engage in extends beyond mere receipting and includes arranging.

## E What obligations apply to providers of financial services?

### Key points

If you provide a financial service you may need to hold an AFS licence: see RG 36.59–RG 36.60.

To determine whether you need to hold an AFS licence to provide a financial service it is necessary to consider the following questions:

- When do you satisfy the business test? (see RG 36.61); and
- Does an exemption from the requirement to hold an AFS licence apply? (see RG 36.62–RG 36.96).

Licensees must comply with the various obligations, including the general licensee obligations set out in s912A and 912B: see RG 36.97–RG 36.103.

If you provide financial services as a *representative* of a licensee, you may need to hold an authorisation from that licensee: see RG 36.104–RG 36.106.

Some obligations in the law apply directly to representatives: see RG 36.107.

### The need to hold an AFS licence

- RG 36.59 You will need to hold an AFS licence if you carry on a financial services business in this jurisdiction, unless an exemption in s911A(2) (or regulations made for the purposes of that provision) applies. For example, due to the exemption in s911A(2)(a), you do not need an AFS licence to provide financial services as a *representative* of a licensee.
- RG 36.60 In the absence of an exemption, you will need to hold an AFS licence whether you provide financial services to retail or wholesale clients (provided the business test is satisfied).

### When do you satisfy the business test?

- RG 36.61 The business test is satisfied where a person provides financial services with system, repetition and continuity. Paragraph 11.5 of the Explanatory Memorandum to the Financial Services Reform Bill 2001 states that ‘one-off transactions relating to the provision of financial services and financial products are unlikely to be caught by the new regime’. There is no requirement for a profit motive for the business test to be satisfied.

## Does an exemption from the requirement to hold an AFS licence apply?

### Exemptions under s911A(2)

- RG 36.62 The exemptions from the requirement to hold an AFS licence are set out in s911A(2) and regulations made for the purposes of that provision. RG 36.65–RG 36.91 set out the circumstances in which you do not need to hold an AFS licence.
- RG 36.63 You need to consider this list of exemptions only if you are providing a financial service. If you are not providing a financial service, you do not need to hold an AFS licence.
- RG 36.64 This list of exemptions is not exhaustive. To determine whether or not your conduct is exempt from the requirement to hold an AFS licence, see the Corporations Act, relevant regulations and ASIC instruments, as well as other ASIC publications at [www.asic.gov.au](http://www.asic.gov.au).

### Representatives of licensees

- RG 36.65 If you provide financial services as a *representative* of a licensee (or as a representative of a person exempt from the requirement to hold an AFS licence), you do not need to hold an AFS licence: s911A(2)(a). See RG 36.93–RG 36.96 for more information.

### Product providers

- RG 36.66 If you are a product provider who *issues, varies or disposes* of a financial product under an arrangement with a licensee as specified in s911A(2)(b), you do not need to hold an AFS licence.

### Product issuers

- RG 36.67 You do not need to hold an AFS licence if you are a product issuer who *varies or disposes* of a financial product at the direct request of the product holder (rather than through an intermediary): s911A(2)(c). An AFS licence is also not required for providing *general advice* in the media in the circumstances set out in reg 7.6.01(1)(o).

### Providing general advice

- RG 36.68 You do not need to hold an AFS licence if you provide *general advice*:
- (a) by publishing a newspaper or periodical that is generally available to the public (otherwise than only on subscription) and where the sole or principal purpose of the newspaper or periodical is not the provision of financial product advice (s911A(2)(ea));

- (b) in transmissions made by means of an information service where the transmissions are generally available to the public and where the sole or principal purpose of the transmissions is not the provision of financial product advice (s911A(2)(eb)); or
- (c) in sound recordings, video recordings or data recordings that are made publicly available and where the sole or principal purpose of the recordings is not the provision of financial product advice (s911A(2)(ec));

Note: The media exemptions referred to in RG 36.68 are subject to a condition concerning the disclosure of remuneration and pecuniary or other interests set out in reg 7.6.01B.

### Wholesale clients

RG 36.69 If you provide the service *only* to wholesale clients and you are a body regulated by the Australian Prudential Regulation Authority (APRA) and the service is one for which APRA has regulatory or supervisory responsibilities (s911A(2)(g)), you do not need to hold an AFS licence. Similarly, if you are regulated by an overseas regulatory authority, and the provision of the service is covered by an exemption specified by ASIC (s911A(2)(h)), you do not need to hold an AFS licence.

Note: For information about our approach to applications under this provision, see Regulatory Guide 176 *Licensing: Discretionary powers—Wholesale foreign financial services providers* (RG 176).

### Dealing in a financial product

RG 36.70 You do not need to hold an AFS licence if you *deal* in a financial product in the capacity of trustee of a non-public offer superannuation entity (reg 7.6.01(1)(a)) or a pooled superannuation trust (PST) where:

- (a) the PST is not used for the investment of assets of a regulated superannuation fund (reg 7.6.01(1)(d));
- (b) the regulated superannuation fund investing its assets in the PST has net assets of at least \$10 million (reg 7.6.01(1)(b)); or
- (c) the regulated superannuation fund investing its assets in the PST has net assets of at least \$5 million where you reasonably expect that the superannuation fund will have net assets of at least \$10 million within three months (reg 7.6.01(1)(c));

RG 36.71 If you are a trustee of a superannuation fund *dealing* in a financial product only by paying the benefits of a member into a superannuation product or retirement savings account (RSA) product (reg 7.6.01(1)(ha)), you do not need to hold an AFS licence.

RG 36.72 You do not need to hold an AFS licence if you are an employer-sponsor *dealing* in a financial product only by:

- (a) paying contributions on behalf of an employee into a superannuation product or RSA product (reg 7.6.01(1)(h)); or
- (b) arranging for the issue of a superannuation product to an employee (reg 7.6.01(1)(hc));

RG 36.73 If you are an RSA provider *dealing* in a financial product only by paying the benefits of an RSA product holder into a superannuation product or RSA product (reg 7.6.01(1)(hb)), you do not need to hold an AFS licence.

### Referrals

RG 36.74 You do not need to hold an AFS licence if you provide a *financial service* that consists *only* of a referral—that is:

- (a) informing another person that a licensee (or one of its representatives) is able to provide a particular financial service or class of financial services; and
- (b) giving that other person contact details for the licensee or representative.

RG 36.75 Unless you are a representative of the licensee (or a related body corporate of the licensee), you must disclose any benefits (including commission) that you (and your associates) are to receive in respect of, or that are attributable to, the service: regs 7.6.01(1)(e) and 7.6.01(1)(ea).

### Sub-custodians

RG 36.76 If you provide the service as a sub-custodian in the circumstances set out in reg 7.6.01(1)(k), you do not need to hold an AFS licence.

### Non-cash payment systems

RG 36.77 You do not need to hold an AFS licence if you *advise* other persons about, and arrange for the use of, non-cash payment facilities in the ordinary course of your business, but only if you do not provide financial services as a significant part of your business (reg 7.6.01(1)(l)).

Note: See also regs 7.6.01(1)(la), 7.6.01(lb) and 7.6.01(lc) and Class Order [CO 03/705] *Non-cash payment facilities—licensing relief* for other licensing exemptions for the provision of financial services in relation to non-cash payment facilities.

### Dealing on your own behalf

RG 36.78 You do not need to hold an AFS licence if you *deal* on your own behalf in (but do not make a market in) derivatives or foreign exchange contracts for the purpose of managing a financial risk that arises in the ordinary course of a business, but only if you do not deal in derivatives or foreign exchange contracts as a significant part of your business (reg 7.6.01(1)(m)).

**Dealing in regulated emissions units**

- RG 36.79 You do not need to hold an AFS licence if you deal in regulated emissions on your own behalf (e.g. acquiring regulated emissions units for your own use). This does not constitute dealing and is not an activity that requires an AFS licence (s766C(3)). However, this exemption does not extend to dealings that involve the issue of derivatives over emissions units. When two parties enter into a derivative contract, both are considered to be issuing a financial product. Both parties may require a licence, if they are carrying on a financial services business.

Note: See also reg 7.6.01(1)(ma) for the circumstances in which dealing in regulated emissions units or their derivatives is exempt. For more guidance on AFS licensing exemptions for types of dealings in regulated emissions units by particular entities, see Section E of Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?*

**Medical indemnity insurance**

- RG 36.80 If you provide financial product advice about, and deal in, a medical indemnity insurance product (reg 7.6.01(1)(t)), you do not need to hold an AFS licence.

**Takeover bids or offers**

- RG 36.81 If you provide advice in a document that is issued in connection with a takeover bid or an offer of a financial product and the advice relates to matters other than financial products (e.g. a geologist's report) in the circumstances set out in reg 7.6.01(1)(u), you do not need to hold an AFS licence.

**Nominee companies**

- RG 36.82 You do not need to hold an AFS licence if you are a nominee company that is a wholly owned subsidiary of a licensed market participant and you hold a financial product, or the beneficial interest in a financial product, on trust for a client of the participant in the circumstances set out in reg 7.6.01(1)(v).

**Entities located and providing financial services outside Australia**

- RG 36.83 You do not need to hold an AFS licence if you are located and provide a financial service outside Australia to a person who is an Australian citizen or resident in Australia and you do not engage in conduct that is intended to or likely to induce people in Australia to use the service: reg 7.6.02AG, which inserts s911A(2A) into the Corporations Act.
- RG 36.84 Similarly, you do not need to hold an AFS licence if you provide the financial service to another person and you:
- (a) believe on reasonable grounds that the person to whom you are providing the financial service is also not located in Australia;

- (b) are a participant in a financial market in Australia that is licensed under s795B(2); and
- (c) provide a financial service that relates to a financial product traded on the licensed market (reg 7.6.02AG, which inserts s911A(2B) into the Corporations Act).

RG 36.85 You will also not need to hold an AFS licence if you provide the financial service to another person who holds an AFS licence, or is exempt from the requirement to hold a licence under s911A(2)(h), and is not, in relation to the service:

- (a) acting as a trustee;
- (b) acting as a responsible entity of a registered managed investment scheme; or
- (c) otherwise acting on someone else's behalf (reg 7.6.02AG, which inserts s911A(2C) into the Corporations Act).

RG 36.86 If you are providing the financial service to another person in Australia and the service relates to a financial product acquired while the person was not in Australia or on the application or enquiry of the person and you do not actively solicit the person or persons in Australia in relation to financial products (reg 7.6.02AG, which inserts s911A(2D) into the Corporations Act), you will not need to hold an AFS licence.

RG 36.87 You do not need to hold an AFS licence if you are providing the financial service to another person who is a professional investor and the service consists only of any or all of the following:

- (a) dealing in derivatives or foreign exchange contracts;
- (b) providing advice on derivatives or foreign exchange contracts; or
- (c) making a market in derivatives or foreign exchange contracts (reg 7.6.02AG, which inserts s911A(2E) into the Corporations Act);

#### **Eligible employee share schemes**

RG 36.88 If you are giving general advice in connection with an eligible employee share scheme and you are the issuer of the financial products covered by the scheme (e.g. you are the employer) or an entity controlled by the issuer (s911A(2)(ed)), you do not need to hold an AFS licence.

Note: Eligible employee share scheme is defined in s9 of the Corporations Act.

RG 36.89 You do not need to hold an AFS licence if you are dealing in a financial product in connection with an eligible employee share scheme where:

- (a) the scheme requires that any purchase or disposal of the financial product under the scheme occurs through either an AFS licensee or a foreign entity licensed to deal in their own country; and



- (b) you are the issuer of the financial products covered by the scheme (e.g. you are the employer) or an entity controlled by the issuer (s911A(2)(ee)).

RG 36.90 You do not need to hold an AFS licence if you are providing a custodial or depository service dealing in a financial product in connection with an eligible employee share scheme and you are the issuer of the financial products covered by the scheme (e.g. you are the employer) or an entity controlled by the issuer: s911A(2)(ef).

RG 36.91 If you are dealing in an interest in a contribution plan that you operate in relation to an eligible employee share scheme and you are the issuer of the financial products covered by the scheme (e.g. you are the employer) or an entity controlled by the issuer (s911A(2)(eg)), you do not need to hold an AFS licence.

#### **Power to exempt**

RG 36.92 We have the power to exempt a person or a class of persons from the need to hold an AFS licence for conduct that amounts to the provision of a financial service: s911A(2)(l). See Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167) for details about how we might use our exemption power.

#### **Factors to consider to determine whether you are acting as a principal or representative**

RG 36.93 In order to determine whether the exemption from the requirement to hold an AFS licence in s911A(2)(a) applies, you need to consider whether you are acting as a principal or as a representative of a principal. The exemption applies only if you are acting as a representative of a principal.

RG 36.94 You may be acting as a principal and not as a representative if:

- (a) your conduct is not monitored and supervised by someone else;
- (b) you hold out that you are a principal;
- (c) your conduct is not covered by anyone else's compensation arrangements (e.g. professional indemnity insurance);
- (d) client assets are held in an account in your name;
- (e) clients are directed to pay any fees owing for the provision of financial services to you or into an account in your name;
- (f) you receive commissions directly from product issuers; and
- (g) you have ownership of, access to, or liability for, client information.

Note: This is not intended to be an exhaustive list of potentially relevant factors. In determining whether you are acting as a principal, the presence (or absence) of any one or more of the listed factors is not conclusive.

- RG 36.95 You may handle money without being treated as a principal; specifically, when you perform purely administrative or mechanical functions, such as accepting and banking cheques drawn in favour of a licensee or accepting and depositing insurance premiums in an insurance broker's trust account.
- RG 36.96 You will not be holding yourself out to be a principal merely by placing your name on your business documentation (such as letterhead, business cards and promotional material) provided:
- (a) the documentation makes it clear that you are acting as a representative of a licensee (and not as a principal); and
  - (b) the licensee for whom you act is clearly disclosed.

Note: It is also important to ensure that the documentation is not confusing or misleading to consumers.

## What obligations are imposed on licensees?

### General licensee obligations

- RG 36.97 If you are a licensee you must comply with the obligations set out in s912A and 912B, which may be summarised as follows. You must:
- (a) do all things necessary to ensure that the financial services covered by the AFS licence are provided efficiently, honestly and fairly;
  - (b) have adequate arrangements in place to manage your conflicts of interest;
  - (c) comply with your AFS licence conditions;
  - (d) comply with the financial services laws;
  - (e) take reasonable steps to ensure that your representatives comply with the financial services laws;
  - (f) have available adequate resources;
  - (g) maintain the competence to provide the financial services;
  - (h) adequately train your representatives and ensure that they are competent to provide the financial services;
  - (i) have a dispute resolution system that satisfies s912A(2) where financial services are provided to retail clients;
  - (j) have adequate risk management systems; and
  - (k) have compensation arrangements where financial services are provided to retail clients. The type of compensation arrangement that a licensee must have is set out in s912B, which is affected by regs 7.6.02AA and 7.6.02AAA.

Note 1: RG 36.97(f) and RG 36.97(j) do not apply if the licensee is a body regulated by APRA within the meaning of s3(2) of the *Australian Prudential Regulation Authority Act 1998*.

Note 2: For information about how to comply with these obligations, see our other regulatory guides on licensing under 'Related information'.

- RG 36.98 The licensee remains ultimately responsible for all the financial services provided under its AFS licence, regardless of how those services are provided.

## Conduct and disclosure obligations

- RG 36.99 Licensees must also comply with various obligations under the Corporations Act and other financial services laws, including (but not limited to):

- (a) various obligations in Pt 7.6, including the obligation to notify us of significant breaches or likely breaches of certain licensee obligations under s912A, the obligation to provide us with assistance and the obligation to quote the AFS licence number in documents under s912F;

Note 1: The obligation to notify ASIC of a breach or likely breach of a licence obligation applies only to significant breaches of certain obligations: s912D(1)(b). For guidance about complying with this obligation, see Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

Note 2: For details about the obligation to cite AFS licence numbers in documents, see s912F and reg 7.6.01C.

- (b) the financial services disclosure obligations in Pt 7.7 where the licensee is the providing entity. This includes an obligation, in most circumstances, for the providing entity to give an FSG where the financial service is being provided to a retail client (s941A);

Note: For information about complying with the FSG and other disclosure obligations in Pt 7.7, see RG 175.

- (c) the further financial services conduct obligations set out in Pt 7.8;  
(d) some product disclosure obligations under Ch 6D (in the case of securities) or Pt 7.9 (in other cases);

Note: For further information about complying with the product disclosure obligations in Pt 7.9 and how we will approach applications for relief, see our regulatory guides on disclosure under 'Related information'.

- (e) the market misconduct and other prohibited conduct provisions in Pt 7.10; and  
(f) the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

Note: Some of these obligations also apply to persons other than licensees.

## Additional obligations: Financial product advice

- RG 36.100 There are additional obligations under Pts 7.7 and 7.7A where the providing entity or advice provider provides financial product advice to retail clients.

These obligations vary depending on whether the advice is personal advice or general advice. Personal advice is financial product advice given or directed to a person (including by electronic means) in circumstances where:

- (a) the advice provider has considered one or more of the person's objectives, financial situation and needs; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters (s766B(3)).

All other financial product advice is general advice.

Note 1: The definition of 'financial product advice' is set out in RG 36.19.

Note 2: For further information about the distinction between personal and general advice, see Section B of RG 175.

RG 36.101 Generally, if you are the providing entity and the financial service is the provision of personal advice to a retail client, you must give the client a Statement of Advice: s946A.

RG 36.102 Generally, if you are the advice provider and the financial service is the provision of personal advice to a retail client, you must:

- (a) act in the best interests of your client (s961B);
- (b) provide the client with appropriate advice (s961G);
- (c) warn the client if the advice is based on incomplete or inaccurate information (s961H); and
- (d) where there is a conflict with their own interests, or those of one of their related parties, prioritise the client's interests (s961J).

Note: For further information about complying with these additional obligations, see Sections D and E of RG 175.

RG 36.103 If the advice is general advice, you do not need to comply with the obligations referred to in RG 36.101–RG 36.102. However, if general advice is provided to a retail client, the providing entity must warn the client that the advice does not take account of the client's objectives, financial situation or needs: s949A.

Note 1: For further information about complying with this obligation, see Section B of RG 175.

Note 2: We have granted relief to simplify the warning where oral general advice is provided to a retail client. See Class Order [CO 05/1195] *Simplified warning for oral general advice* and Information Release [IR 05/62] *ASIC announces simpler warnings for oral general advice*.

Note 3: We have granted relief so that no general advice warning is required where a product issuer gives general financial product advice in advertisements in the media or on billboards or posters. See Class Order [CO 05/835] *General advice in advertising* and Information Release [IR 05/47] *ASIC grants relief for advertising by product issuers*.

## When do representatives need to hold an authorisation?

- RG 36.104 In general, if you provide financial services in this jurisdiction as a representative of another person (a principal), you need to hold an authorisation under the Corporations Act from that principal (who must in general hold an AFS licence). You do not need to hold an authorisation if you:
- (a) are not providing financial services;
  - (b) are an employee or director of the principal (or a related body corporate of the principal) and the principal holds an AFS licence and the other requirements of s911B(1)(a) are satisfied;
  - (c) are an employee of an authorised representative of the principal, but only if the principal holds an AFS licence, the other requirements of s911B(1)(c) are satisfied and the financial service is the provision of a:
    - (i) basic deposit product;
    - (ii) facility for making non-cash payments that is related to a basic deposit product; or
    - (iii) traveller's cheque;
  - (d) you are a licensee providing the financial service under your own AFS licence (s911B(1)(d) and 911B(3)); or
- Note: As a licensee you cannot be the authorised representative of another licensee except in relation to a binder: see s916D and 916E.
- (e) provide financial services that would be exempt under s911A(2) if they were instead provided by the principal (s911B(1)(e)).

Note: We have given relief to allow licensees who are authorised to deal in general insurance products to appoint distributors to deal in these products on their behalf without the need to appoint the distributors as authorised representatives. See Information Release [IR 05/59] *ASIC offers general insurance dealers choice on how to appoint their distributors* and [CO 05/1070].

- RG 36.105 Accordingly, if you provide financial services as a representative of a licensee, you will generally need to hold an authorisation from that licensee (unless you are an employee or director of that licensee or a related body corporate).

- RG 36.106 Under s766A(4) a person is not regarded as operating a registered scheme merely because they act as an agent or employee of another person who does. This means that if an agent of the operator of a registered scheme merely acts in connection with the operation of the scheme, and does not provide a financial service of a type referred to in s766A(1)(a), (b), (c), (e) or (f), they will not have to hold an authorisation.

Note: The responsible entity remains responsible for the acts of its agents: see s601FB(2).

## What obligations are imposed on representatives?

RG 36.107 The primary obligation to ensure compliance with the financial services laws is imposed on licensees, who are responsible for the conduct of their representatives (as defined in s910A). However, some obligations in the law apply directly to representatives, including (but not limited to):

- (a) the financial services disclosure obligations in Pt 7.7 where the representative is the providing entity (including the additional obligations relating to financial product advice described in RG 36.100–RG 36.103);
- (b) the best interests duty and related obligations in Pt 7.7A;
- (c) the hawking prohibitions in Pt 7.8;

Note: For further information about the hawking prohibitions, see Regulatory Guide 38 *The hawking prohibitions* (RG 38).

- (d) some product disclosure obligations under Ch 6D (in the case of securities) or Pt 7.9 (in other cases);
- (e) the market misconduct and other prohibited conduct provisions in Pt 7.10; and
- (f) the consumer protection provisions in Div 2 of Pt 2 of the ASIC Act (e.g. the prohibition against misleading or deceptive conduct in s12DA).

Note: Some of these obligations also apply to persons other than representatives.

## Key terms

Term	Meaning in this document
advice provider	A person to whom the obligations in Div 2 of Pt 7.7A of the Corporations Act apply when providing personal advice to the client. This is generally the individual who provides the personal advice. However, if there is no individual that provides the advice, which may be the case if advice is provided through a computer program, the obligations in Div 2 of Pt 7.7A apply to the legal person that provides the advice (e.g. a corporate licensee or authorised representative)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A of the Corporations Act.
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
authorised representative of a licensee	A person authorised in accordance with s916A or 916B of the Corporations Act to provide a financial service or financial services on behalf of the licensee  Note: This is a definition contained in s761A of the Corporations Act.
[CO 00/241] (for example)	An ASIC class order (in this example numbered 00/241)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
financial product	Generally a facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (see s763C);</li> <li>• makes non-cash payments (see s763D)</li> </ul> Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition.

Term	Meaning in this document
Financial Services Guide	A document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Pt 7.7 of the Corporations Act  Note: See s761A of the Corporations Act for the exact definition.
FSG	Financial Services Guide
licensee	A person who holds an AFS licence
licensing provisions	The financial services licensing regime under Pts 7.6–7.8 of the Corporations Act (including regulations made for the purposes of those parts)
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9)
PDS	Product Disclosure Statement
Product Disclosure Statement	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act  Note: See s761A of the Corporations Act for the exact definition.
providing entity	A person to whom the obligations in Pt 7.7 of the Corporations Act apply. This is the AFS licensee or an authorised representative that provides the financial product advice.
PST	A pooled superannuation trust as defined in the <i>Superannuation Industry (Supervision) Act 1993</i>
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04)
regulated emissions units	A carbon unit, an Australian carbon credit unit or an eligible international emissions unit, which are: <ul style="list-style-type: none"> <li>• emissions units recognised under the Clean Energy Legislative Package; and</li> <li>• financial products under the Corporations Act</li> </ul>
representative of a licensee	Means: <ul style="list-style-type: none"> <li>• an authorised representative of the licensee; or</li> <li>• an employee or director of the licensee; or</li> <li>• an employee or director of a related body corporate of the licensee; or</li> <li>• any other person acting on behalf of the licensee</li> </ul> <p>Note: This is a definition contained in s910A(a) of the Corporations Act.</p>
RG 175 (for example)	An ASIC regulatory guide (in this example, numbered 175)



Term	Meaning in this document
RSA	Retirement savings account as defined in the <i>Retirement Savings Accounts Act 1997</i>
s912A (for example)	A provision of the Corporations Act (in this example numbered 912A), unless otherwise specified
Short-Form Product Disclosure Statement (Short-Form PDS)	A PDS that complies with the requirements set out in Div 3A of Pt 7.9 of the Corporations Act, which were introduced by the Corporations Amendment Regulations 2005 (No. 5), and which provide issuers with the option of giving retail clients a Short-Form PDS (unless excluded) as long as a full PDS is available on request: see s1017H as inserted by Sch 10BA of the Corporations Regulations
shorter PDS	A PDS that is required to comply with the shorter PDS regime
shorter PDS regime	The requirements set out in Div 3A of Pt 7.9 of the Corporations Act as modified by Subdivs 4.2 to 4.2C and Sch B, C, D and E of the Corporations Regulations, which prescribe the content and length of the PDS for margin loans, superannuation products and simple managed investment schemes
Statement of Advice	<p>A document that must be given to a retail client for the provision of personal advice under Subdiv C and D of Div 3 of Pt 7.7 of the Corporations Act</p> <p>Note: See s761A of the Corporations Act for the exact definition.</p>

## Related information

### Headnotes

arranging, authorisation, best interests duty, business test, clerks and cashiers, conduct and disclosure obligations, dealing in a financial product, factual information, financial product advice, general licensee obligations, licensing exemptions, obligations that apply to providers of financial services, principal, provide financial product advice, representative

### Class orders and pro formas

[PF 209] *Australian financial services licence conditions*

[CO 02/551] *Recognised accountant*

[CO 03/606] *Financial product advice—exempt documents*, as amended by Class Order [CO 03/770] *Financial product advice: exempt documents—amendment* and Class Order [CO 09/69] *Variation of Class Orders [CO 03/606] and [CO 04/671]*.

[CO 03/705] *Non-cash payment facilities—licensing relief*

[CO 03/911] *Licensing relief for self-dealers who provide general product advice about own securities*

[CO 05/835] *General advice in advertising*, as amended by Class Order [CO 05/1195] *Simplified warning for oral general advice*

[CO 05/1070] *General insurance distributors*

[CO 05/1195] *Simplified warning for oral general advice*

### Regulatory guides

RG 1–RG 3 *AFS Licensing Kit*

RG 38 *The hawking prohibitions*

RG 51 *Applications for relief*

RG 78 *Breach reporting by AFS licensees*

RG 79 *Research report providers: Improving the quality of investment research*

RG 90 *Example Statement of Advice: Scaled advice for a new client*

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 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*
- RG 169 *Disclosure: Discretionary powers*
- RG 172 *Australian market licences: Australian operators*
- RG 175 *Licensing: Financial product advisers—Conduct and disclosure*
- RG 176 *Licensing: Discretionary powers—Wholesale foreign financial services providers*
- RG 181 *Managing conflicts of interest*
- RG 182 *Dollar disclosure*
- RG 183 *Approval of financial services sector codes of conduct*
- RG 236 *Do I need an AFS licence to participate in carbon markets?*
- RG 244 *Giving information, general advice and scaled advice*
- RG 246 *Conflicted remuneration*

## **Information sheets**

- INFO 182 *Super switching advice: Complying with your obligations*
- INFO 133 *Shorter PDS regime: Superannuation, managed investment schemes and margin lending*

## **Legislation**

- ASIC Act, Pt 2, Div 2, s12DA
- Australian Prudential Regulation Authority Act 1998*, s3(2)
- Banking Act 1959*, s30(4)

Corporations Act, Pts 7.1, 7.6, 7.7, 7.7A, 7.8, 7.9, 7.10, s52, 766A, 766B, 766C, 910A, 911A, 911B, 912A, 912B, 912D, 912F, 946A, 949A, 961B, 961G, 961H, 961J, Corporations Regulations, regs 7.1.08, 7.1.29–7.1.35, 7.1.40, 7.6.01, 7.6.02AG, 7.9.61AA, Sch 10BA, Corporations Amendment Regulations 2010 (No. 5)

*Insurance (Agents and Brokers) Act 1984* (now repealed)

*National Consumer Credit Protection Act 2009*

*Retirement Savings Accounts Act 1997*

*Superannuation Guarantee (Administration) Act 1992*

### **Consultation papers and reports**

*REP 50 Report to the Parliamentary Joint Committee on late 2004 (and early 2005) superannuation switching advice surveillance*

*REP 69 Shadow shopping survey on superannuation advice*