



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 139

Compensation and insurance arrangements for trustee companies providing traditional services

September 2010

About this paper

This consultation paper sets out ASIC's proposal for administering the compensation and insurance arrangements for trustee companies providing traditional trustee company services (traditional services) to retail clients.

The purpose of this paper is to seek feedback on our proposal from trustee companies, their clients and legal advisers, and other interested parties.

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 paper was issued on 23 September 2010 and is based on the Corporations Act as at 23 September 2010.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposal in this paper, which is only an indication of the approach we may take and is not our final policy.

As well as responding to the specific proposal and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposal and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the compensation and insurance arrangements for trustee companies that provide traditional services to retail clients. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see Section C Regulatory and financial impact, p. 14.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 18 October 2010 to:

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Australian Securities and Investments Commission
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What will happen next?

Stage 1	23 September 2010	ASIC consultation paper released
Stage 2	18 October 2010	Comments due on the consultation paper
	October 2010	Drafting of amendments to RG 126
Stage 3	November/December 2010	Release of updated RG 126

A Background to the proposal

Key points

Traditional trustee company services (traditional services) are regulated as a financial service under the Corporations Act.

Trustee companies that provide traditional services are required to hold an AFS licence covering those services.

From 1 May 2011, trustee companies that provide traditional services to retail clients will be required to meet the compensation requirements under s912B.

This paper sets out our proposal for administering the compensation requirements for trustee companies.

Regulation of trustee companies providing traditional services

- 1 The Council of Australian Governments agreed on 26 March 2008 that the Australian Government would assume responsibility for regulating traditional services provided by trustee companies.
- 2 The *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Modernisation Act) was enacted on 6 November 2009. It amends the *Corporations Act 2001* (Corporations Act) to regulate traditional services provided by trustee companies as financial services under Chs 5D and 7 of the Corporations Act.

Note: Section 601RAC(1) of the Corporations Act defines traditional services as:

 - (a) performing estate management functions (as defined in s601RAC(2));
 - (b) preparing a will, a trust instrument, a power of attorney or an agency arrangement;
 - (c) applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate;
 - (d) establishing and operating common funds; and
 - (e) any other services prescribed by the regulations for the purpose of s601RAC(1).
- 3 The Corporations Amendment Regulations 2010 (No. 3) (Amendment Regulations) were made on 6 May 2010. The Amendment Regulations update the Corporations Regulations 2001 (Corporations Regulations) in relation to traditional services.

Note: Section 601RAB(1) of the Corporations Act provides that a trustee company is an entity that is prescribed by the regulations as a trustee company. The Corporations Regulations list the names of trustee companies providing traditional services for the purposes of s601RAB(1): see reg 5D.1.01(1) and Sch 8AA of the Corporations Regulations.

4 Traditional services provided by a trustee company are specifically included as a financial service under s766A(1A). This means that a trustee company providing traditional services is required to obtain an Australian financial services (AFS) licence and is subject to the conduct obligations in Ch 7 of the Corporations Act, including the requirement to have arrangements for compensating retail clients for losses they suffer as a result of a breach by the trustee company or its representatives of their obligations.

5 Under the Amendment Regulations, traditional services are taken to be provided to a person as a retail client unless:

- (a) the service is provided to the person for use in relation to a business that is not a small business; or
- (b) the person to whom the service is provided is a professional investor (reg 7.1.17C).

Note: 'Small business' is defined in s761G(12) and 'professional investor' is defined in s9.

6 We are aware that some trustee companies already hold an AFS licence which, among other things, authorises them to provide custodial or depository services. Custodial or depository services are not considered to be traditional services provided by trustee companies but are regulated under Ch 7 of the Corporations Act as a separate type of financial service. Trustee companies that already hold an AFS licence will need to vary their licence to obtain an authorisation to provide traditional services.

Note: Section 601RAC(3) excludes from the definition of traditional services the following activities:

- (a) operating a registered scheme;
- (b) providing a custodial or depository service;
- (c) acting as trustee for debenture holders under Ch 2L;
- (d) acting as a receiver or other controller of property of a corporation under Part 5.2;
- (e) acting as trustee of a superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or
- (f) acting in any other capacity prescribed by the regulations for the purpose of s601RAC(3)(f).

7 The following transitional arrangements apply to the process of licensing trustee companies:

- (a) current AFS licensees must vary their licence to cover traditional services by 6 November 2010; and
- (b) trustee companies that do not already hold an AFS licence must obtain one covering traditional services by 1 May 2011.

Note: See Pt 10.12, Div 2 of the Corporations Act for more information about the transitional arrangements that apply.

- 8 Trustee companies remain subject to relevant state and territory laws that require a company to have (or to have staff who have) certain qualifications or experience if the company is to provide traditional services of a particular kind: s601RAE(3). The Amendment Regulations prescribe relevant state and territory laws that will or will not apply to trustee companies: s601RAE(4).

Compensation requirements for trustee companies

- 9 In this paper, the requirements in the Corporations Act and Corporations Regulations are referred to as the ‘compensation requirements’.
- 10 From 1 May 2011, trustee companies that provide traditional services to retail clients will be subject to the compensation requirements under s912B. The primary way to comply with this obligation is to have professional indemnity (PI) insurance cover.
- 11 The compensation arrangements of trustee companies must:
- (a) satisfy the requirements in the Corporations Regulations, which require licensees to obtain PI insurance cover that is adequate having regard to the nature of the licensee’s business and its potential liability for compensation claims (reg 7.6.02AAA); or
 - (b) be approved by ASIC as an alternative arrangement.
- 12 The Corporations Regulations provide exemptions from the compensation requirements for some licensees that are regulated by APRA or related to an entity regulated by APRA: reg 7.06.02AAA(3).
- 13 As part of our role as regulator of the financial services industry, we are responsible for administering the compensation requirements that licensees must meet. Our approach to administering these requirements is set out in Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126).
- 14 We administer the compensation requirements to maximise their potential to achieve the objective of reducing the risk that licensees cannot meet claims for compensation due to insufficient financial resources.
- 15 But it is important to recognise the limitations of PI insurance as a consumer protection mechanism. PI insurance is not designed to protect consumers directly and is not a guarantee that compensation will be paid. It is designed to protect the insured (i.e. the licensee) against the risk of financial losses arising from poor quality services (e.g. poor advice or execution of services) and other misconduct by a financial services provider (e.g. fraud by its representatives).

- 16 Traditional services provided by trustee companies have not previously been regulated as a financial service under the Corporations Act. Accordingly, we want to ensure that our proposed approach to administering the compensation requirements for trustee companies providing traditional services to retail clients is appropriate.
- 17 We have set out how we propose to administer the compensation requirements for trustee companies providing traditional services to retail clients in Section B of this paper. This is consistent with our approach in RG 126.

B Proposal to ensure trustee companies have adequate compensation and insurance arrangements

Key points

RG 126 sets out how we administer the compensation requirements for AFS licensees under s912B of the Corporations Act.

We propose to administer the compensation requirements for trustee companies providing traditional services to retail clients by adopting the approach set out in RG 126.

Application of the approach in RG 126

- 18 Under the previous state laws, different compensation requirements applied to trustee companies. However, we think it is preferable to adopt a uniform approach to the administration of the compensation requirements for trustee companies for the following reasons:
- (a) the current requirements are inconsistent between the states;
 - (b) the current requirements contain little guidance on the features a PI insurance policy should have (e.g. some states don't give any guidance on what would be an adequate amount of PI insurance cover); and
 - (c) otherwise, the requirements for trustee companies would be inconsistent with those for other licensees.
- 19 From 1 May 2011, trustee companies that provide traditional services to retail clients will be required to meet the compensation requirements under s912B. This means that trustee companies that hold an AFS licence with an authorisation to provide traditional services to retail clients must have arrangements for compensating those clients for losses they suffer as a result of a breach by the trustee company or its representatives of their obligations in Ch 7 of the Corporations Act (s912B). The primary way to comply with this obligation is to have PI insurance cover.
- 20 RG 126 sets out how we administer the compensation requirements for licensees under s912B of the Corporations Act. We propose to administer the compensation requirements for trustee companies providing traditional services to retail clients by adopting, without distinction, the approach set out in RG 126.

- 21 The requirements in RG 126 vary in their application depending on all of the facts and circumstances, including the nature, scale and complexity of the licensee’s business, and its other financial resources. Our approach to the administration of the compensation requirements is guided by the key principles set out in Table 2 of RG 126: see Appendix 1.
- 22 Whether a PI insurance policy is ‘adequate’ depends on several factors, including:
- (a) the amount of cover;
 - (b) the scope of cover;
 - (c) whether the terms and conditions of the cover detract from the overall effect (e.g. by excluding cover for key aspects of the licensee’s business); and
 - (d) whether the licensee has sufficient financial resources to enable the PI insurance policy to work in practice.
- 23 Table 3 of RG 126 gives guidance on the processes we think a licensee should go through to determine what is adequate PI insurance for it: see Appendix 1. Table 4 of RG 126 gives guidance on the features and minimum requirements we think a PI insurance policy should have in order for it to be adequate: see Appendix 1. Importantly, it will be up to each trustee company to determine what is adequate PI insurance for them to meet their obligations under s912B and obtain such PI insurance.
- 24 Trustee companies will remain subject to relevant state and territory laws on matters relating to the role of trustee companies as guardians and administrators of estates (on behalf of persons not fully able to manage their own affairs). Therefore, we will amend Table 4 of RG 126 to ensure that PI insurance policies don’t have the effect of excluding awards by state boards and specialist tribunals for claims against trustee companies acting in their role as guardians and administrators of estates.
- 25 RG 126 also sets out our approach to assessing applications for the approval of alternative compensation arrangements under s912B(2)(b). In approving alternative arrangements, we must take into account the factors used to assess the adequacy of PI insurance arrangements in reg 7.6.02AAA(1).
- 26 Some trustee companies may already be required to hold PI insurance because they provide other types of financial services. For example, a trustee company that is authorised to provide custodial or depository services to retail clients should already have arrangements for compensating those clients for breaches of Ch 7 and would be familiar with our guidance in RG 126.

Note: Even if a trustee company already has PI insurance cover in place, they should review their operations to assess the adequacy of their existing cover to provide traditional services to retail clients.

Proposal

- B1** We propose to administer the compensation requirements for trustee companies providing traditional services to retail clients by adopting, without distinction, the approach set out in RG 126.

Your feedback

- B1Q1** Do you agree that our approach to administering the compensation requirements in RG 126 should apply, without distinction, to trustee companies providing traditional services to retail clients? If you don't agree, please give reasons.
- B1Q2** Do you agree that a trustee company's PI insurance policy should satisfy each of the policy features in Table 4 of RG 126? If you don't agree, please give reasons.
- B1Q3** Please tell us if you don't think PI insurance cover that meets each of the policy features in Table 4 of RG 126 is practically available in the market.
- B1Q4** Do you agree that the minimum amounts of PI insurance specified in Table 4 of RG 126 are adequate for trustee companies providing traditional services to retail clients? Do you have any experience which suggests that a trustee company carries a higher risk of claims or is exposed to a higher volume of claims and therefore requires a larger amount of PI insurance cover? Please provide details.
- B1Q5** Are there any aspects of traditional services that make this proposal impractical?
- B1Q6** Please give details of any additional costs associated with the implementation of this proposal.

Rationale

- 27 The compensation requirements apply to all licensees (except those regulated by APRA) that provide financial services to retail clients.
- 28 We believe that it is appropriate to apply our guidance in RG 126 to trustee companies providing traditional services to retail clients for the following reasons:
- (a) While the policy objective of the compensation requirements is to reduce the risk that successful compensation claims by retail clients cannot be met by a licensee due to a lack of available financial resources, PI insurance is not designed to protect consumers directly and is not meant to be a guarantee that compensation will be paid.
 - (b) Trustee companies that provide traditional services have a similar fiduciary role to that of superannuation trustees and custodians, and they should therefore be subject to similar compensation requirements.

- (c) RG 126 does not differentiate between the minimum amounts of PI insurance cover based on the type of financial service provided. We see no basis for treating licensees that provide traditional services differently from licensees that provide other types of financial services.
- (d) Although we specify in Table 4 of RG 126 what we consider to be the minimum amount of PI insurance cover, our guidance is clear that it is up to each licensee to determine what is adequate PI insurance for them to meet their obligations under s912B and obtain such PI insurance.

Note: reg 7.1.17C defines 'retail clients' for the purpose of traditional services.

C Regulatory and financial impact

29 In developing the proposal in this paper, we have carefully considered its regulatory and financial impact. On the information currently available to us we think it will strike an appropriate balance between:

- (a) reducing the risk that successful compensation claims to retail clients cannot be met by trustee companies due to a lack of available financial resources; and
- (b) administering the compensation requirements in a way that is not overly burdensome for trustee companies.

30 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR);
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

31 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

32 To ensure that we are in a position to properly complete any required RIS, we ask you to provide us with as much information as you can about:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits,

of our proposal or any alternative approaches: see 'The consultation process' p. 4.

Appendix 1: Tables 2–4 from RG 126

Table 2: Key principles

Principle 1: Fit to achieve the policy objective	'Adequate' means the compensation arrangements are fit for achieving the policy objective.
Principle 2: Responsibility of licensee to assess	It is the basic responsibility of licensees to determine what is adequate for them.
Principle 3: Practical availability	An element of adequacy is what is practically available at any given time.

Table 3: Initial assessment process

Step 1: Assess the business	Review your business, taking into account any proposed changes to the business. Review your claims history (if any) and risk management procedures.	
Step 2: Assess potential liability	Determine 'the maximum liability that has, realistically, some potential to arise'. We suggest you do this by making a reasonable estimate of the following factors: <ul style="list-style-type: none"> • the maximum exposure to a single client ('worst loss scenario' per client); • the number of claims that could arise from a single event (potential for multiple claims); and • the number of claims that might be expected during the policy period. 	See RG 126.52
Step 3: Approach insurers/brokers	Ask insurers or insurance brokers for a list of key policy features, exclusions and available extensions (based on full disclosure of your assessment in Steps 1 and 2).	See RG 126.68–RG 126.70 about authorised insurers
Step 4: Assess amount of cover	Consider whether the amount of cover is adequate. It should at least meet our minimum requirements.	See RG 126.54 and Table 4
Step 5: Assess scope of cover	Consider whether the scope of cover is adequate.	See RG 126.55 and Table 4
Step 6: Review policy terms and exclusions	Review the policy features using the questions in Table 4. Identify any gaps in cover.	See RG 126.56–RG 126.57 and Table 4

Step 7: Consider financial resources	<p>Check that you have the financial resources to pay the excess on the estimated number of claims and cover any gaps and legal costs (if necessary).</p> <p>Consider how you will cover these claims and retain records of the assessment (e.g. through capital, cash flow, overdraft, support).</p>	See RG 126.58–RG 126.60 and Table 4
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Table 4: Features of adequate PI insurance cover

Policy feature	Minimum requirements and factors to consider
Amount of cover	<p>Minimum requirement: We consider that, to be adequate, a PI insurance policy must have a limit of at least \$2 million for any one claim and in the aggregate for licensees with total revenue from financial services provided to retail clients of \$2 million or less. For licensees with total revenue from financial services provided to retail clients greater than \$2 million, minimum cover should be approximately equal to actual or expected revenue from financial services provided to retail clients (up to a maximum limit of \$20 million).</p> <p>Note 1: Revenue has the same meaning in this context as in AASB 118.</p> <p>Note 2: For the purposes of this minimum requirement, a licensee’s revenue should be calculated including the revenue any authorised representatives receive from providing financial services to retail clients.</p> <p>Revenue may be calculated based on the financial year ended prior to taking out the insurance policy and reassessed on each policy renewal. For new licensees, or if a licensee believes revenue is likely to substantially change, the licensee should make an estimate of expected revenue.</p> <p>Some licensees will require a higher limit of indemnity in order for the insurance cover to be adequate. Licensees must retain records of how they determined what amount was adequate for them.</p> <p>Note: The PII Market Report suggests that most licensees will need a minimum cover of \$2 million. This is likely to be adequate for smaller licensees, but might not be for larger licensees.</p> <p>Factors to consider:</p> <ul style="list-style-type: none"> • Is the level of indemnity adequate to cover claims brought both inside and outside of an EDR scheme? <p style="margin-left: 20px;">Note: The regulation prescribes EDR scheme membership as a key factor in assessing the adequacy of PI insurance arrangements. However, an estimate of claims under the EDR scheme might not always provide an accurate guide to a licensee’s potential liability, as claims could be brought outside the EDR schemes, such as through the courts.</p> • Does the policy cover claims made by wholesale clients or claims that fall outside the scope of s912B? If so, this might reduce the amount of cover available for claims that fall within s912B and licensees might need to increase the amount of cover accordingly. • Does the business carry a higher risk of claims (e.g. does it give advice on higher risk products) or is it exposed to a higher volume of claims and therefore requires a larger amount of PI insurance cover? • Have weaknesses been identified in your compliance systems, such as a high number of claims or high-risk products/practices, which might mean a higher level of cover is required?

Policy feature	Minimum requirements and factors to consider
<p>Scope of cover</p>	<p>Minimum requirement: The policy must indemnify the licensee against liability for loss or damage suffered by retail clients because of breaches of Chapter 7 of the Corporations Act by the licensee or its representatives. This includes liability:</p> <ul style="list-style-type: none"> • for fraud or dishonesty by directors, employees and other representatives of the licensee (although fraud cover is not required for sole traders); and • under EDR scheme awards. <p>Note 1: The policy need not explicitly refer to 'breaches of Chapter 7' or 'EDR scheme awards'. However, the policy must have the effect of providing cover for breaches of the relevant obligations under Chapter 7 and EDR scheme awards.</p> <p>Note 2: The policy must be a contract of PI insurance. This means it must cover negligence, fraud and other misconduct (relating to retail clients) ordinarily covered by a contract of PI insurance.</p>
<p>Exclusions</p>	<p>Minimum requirement: The policy must <i>not</i> have the effect of excluding:</p> <ul style="list-style-type: none"> • EDR scheme awards; • loss caused by the conduct of representatives generally; • fraud and dishonesty by directors, employees and other representatives (although fraud cover is not required for sole traders); • claims for misrepresentations about services; and • claims arising from incidents that have been notified to ASIC (e.g. through a breach report on the basis that, by merely making the notification, the licensee has admitted liability and as a result the insurance policy will not cover the claim). <p>Note: A policy may include a term prohibiting the licensee from admitting liability for any claim, loss or demand provided that it does not prevent the licensee from reporting breaches to ASIC as required under s912D.</p>
<p>Persons covered</p>	<p>Minimum requirement: The policy must cover the acts of the licensee and all of its representatives (either under the policy or separately covered by a policy under which the licensee has a right of indemnity).</p> <p>Note 1: Licensees need to take into account all of their representatives (i.e. not just authorised representatives) when considering the type and extent of cover that will be adequate. A client will generally have the same remedies against the licensee as it has against its representatives.</p> <p>Note 2: The licensee's policy does not need to indemnify the licensee for acts of its representatives if such acts are adequately covered by the representatives' own PI insurance cover and the licensee has a contractual right to be indemnified by its representatives.</p> <p>Factors to consider:</p> <ul style="list-style-type: none"> • Are there many representatives and are they geographically dispersed? If so, the limit of indemnity might need to be higher to manage this risk. <p>Note: In our experience, the greater the number of representatives that are working for a licensee, and the more geographically dispersed they are, the greater the potential for client losses to occur. The number and distribution of representatives might affect the licensee's ability to adequately supervise its representatives and a licensee with a greater number of representatives is likely to provide services to a greater number of clients.</p>
<p>Automatic reinstatements</p>	<p>Minimum requirement: The policy must include at least one automatic reinstatement.</p> <p>Note 1: Automatic reinstatement means that if the limit of the policy is exhausted before the end of the policy period, the limit of indemnity is reinstated for the balance of the period to cover any new claims that might arise. This is important, as licensees must ensure their PI insurance cover is adequate at all times.</p> <p>Note 2: Automatic reinstatement is not necessary where the limit is at least twice the minimum amount of cover referred to above.</p>

Policy feature	Minimum requirements and factors to consider
Excess / deductibles	<p>Factors to consider:</p> <ul style="list-style-type: none"> • Is the excess at a level that the business can confidently sustain as an uninsured loss taking into account the licensee's financial resources? <p>Note 1: A business with a lower cash flow available to meet claims might require a larger amount of cover and/or cover with a lower excess. If there is a limited asset base available to meet claims, a policy with a lower excess might be preferable. We understand from the PII Market Report that currently available PI insurance policies generally have an excess. Therefore we consider that whether a licensee has sufficient cash flow to meet the excess for a reasonable estimate of claims is a relevant consideration in determining whether a PI insurance policy is adequate for that licensee.</p> <p>Note 2: If a PI insurance policy has a significant excess or deductible in proportion to the limit of indemnity, it may not be adequate. However, if the licensee can demonstrate that for other reasons (e.g. other financial resources, systems and controls in place) that their arrangements are adequate overall, they may wish to apply to have this kind of arrangement considered as an alternative arrangement.</p>
Legal costs	<p>Minimum requirement: Defence costs must be 'in addition' to the minimum limit or the level of cover must be sufficiently increased to take into account these costs.</p> <p>Note: The PII Market Report suggests that, as at December 2006, legal costs for a court action were generally between 30%–50% of a claim and a typical defence cost on a claim against a financial planner was between \$4,000–\$5,000 for a small claim, but could be up to \$20,000. The conditions of the PI insurance market change from time to time. This is an example only.</p>
EDR scheme awards	<p>Minimum requirement: The policy must cover EDR scheme awards.</p> <p>Factors to consider:</p> <ul style="list-style-type: none"> • Does the policy cover agreed decisions reached through the EDR scheme conciliation process? (If not, the licensee will be effectively self-insuring to cover any conciliated agreements through its EDR scheme.) • Do lower sub-limits apply to EDR scheme awards and how are claims aggregated for the purpose of these limits? Again, licensees will be effectively self-insuring to cover claims outside these limits. <p>Note: A policy will not be inadequate merely because it contains a lower sub-limit on the amount that can be claimed as a result of an EDR scheme award.</p>
Fraud / dishonesty / infidelity	<p>Minimum requirement: The policy must cover fraud / dishonesty / infidelity by directors, employees and other representatives of the licensee (although fraud cover is not required for sole traders).</p>
Approved product list	<p>Minimum requirement: The policy must be able to cover legitimate switching cases where a client is being switched from a fund or product that is not on an approved product list to another fund or product that is on an approved product list.</p> <p>Factors to consider:</p> <ul style="list-style-type: none"> • Licensees should review the product list on a regular basis and inform the insurer if there are other products that should be included on the product list. • ASIC considers that this is a key area of potential retail client loss and encourages licensees to endeavour to get cover generally for exposure to claims arising from moving a client from a product that is not on an approved product list to a product that is on an approved product list as part of their overall risk management strategy.

Policy feature	Minimum requirements and factors to consider
Retroactive cover	<p>Minimum requirement: If the licensee had an immediately previous PI insurance policy, the policy must provide retroactive cover to the earlier of:</p> <ul style="list-style-type: none"> • the retroactive date specified in the immediately previous PI insurance policy; or • the commencement date of the first PI insurance policy in the series of continuous policies.
'Run-off' cover	<p>Not required: For the avoidance of doubt, the policy is not required to include automatic run-off cover as it is not currently available in the market. We will continue to monitor the availability of automatic run-off cover and may reassess our position should automatic run-off cover become available.</p>

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services <p>Note: This is a definition contained in s761A of the Corporations Act.</p>
Amendment Regulations	Corporations Amendment Regulations 2010 (No. 3)
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
Modernisation Act	<i>Corporations Legislation Amendment (Financial Services Modernisation) Act 2009</i>
reg 7.6.02AAA	A regulation of the Corporations Regulations 2001 (in this example numbered 7.6.02AAA)
RG 126 (for example)	An ASIC regulatory guide (in this example numbered 126)
s9	A section of the Corporations Act (in this example numbered 9), unless otherwise specified
traditional services	Traditional trustee company services as defined in s601RAC(1) of the Corporations Act, which are: <ul style="list-style-type: none"> • performing estate management functions (as defined in s601RAC(2)); • preparing a will, a trust instrument, a power of attorney or an agency arrangement; • applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate; • establishing and operating common funds; and • any other services prescribed by the regulations for the purpose of s601RAC(1).
trustee company	Has the same meaning as in s601RAB of the Corporations Act

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to administer the compensation requirements for trustee companies providing traditional services to retail clients by adopting, without distinction, the approach set out in RG 126.</p>	<p>B1Q1 Do you agree that our approach to administering the compensation requirements in RG 126 should apply, without distinction, to trustee companies providing traditional services to retail clients? If you don't agree, please give reasons.</p> <p>B1Q2 Do you agree that a trustee company's PI insurance policy should satisfy each of the policy features in Table 4 of RG 126? If you don't agree, please give reasons.</p> <p>B1Q3 Please tell us if you don't think PI insurance cover that meets each of the policy features in Table 4 of RG 126 is practically available in the market.</p> <p>B1Q4 Do you agree that the minimum amounts of PI insurance cover specified in Table 4 of RG 126 are adequate for trustee companies providing traditional services to retail clients? Do you have any experience which suggests that a trustee company carries a higher risk of claims or is exposed to a higher volume of claims and therefore requires a larger amount of PI insurance cover? Please provide details.</p> <p>B1Q5 Are there any aspects of traditional services that make this proposal impractical?</p> <p>B1Q6 Please give details of any additional costs associated with the implementation of this proposal.</p>