



AUTHORISED REPRESENTATIVE AGREEMENTS – THE ESSENTIAL TERMS

As licensees or authorised representatives of licensees, you will no doubt be aware of the requirements in the *Corporations Act 2001* (Cth) (“the Act”) that persons carrying on a financial services business must either hold an Australian Financial Services Licence (“licence”) or be a representative of a licence – holder (section 911A of the Act).

The authorised representative agreement, apart from satisfying the legislative requirements, is fundamental in terms of setting out both the general boundaries and the specific details which will govern the relationship between a licensee and its authorised representative.

This article discusses:

1. **The legislative requirements** – what should be included in the authorised representative agreement;
2. **The different types of authorised representative agreements** – corporate authorised representative agreements, individual authorised representative agreements, the role of employment agreements;
3. **The essential terms** - fee structure, termination, warranties by the authorised representative, and so on.

1. The legislative requirements:

Sections 911A and 911B(1) of the Act provides that a person may only provide financial services if they hold a licence, or they are a director or employee of a licensee, or they are an authorised representative of a licensee.

Only a body corporate, natural person, partnership (see s761F) or a group of individuals that act as trustee (see s761FA) may be an authorised representative of an AFS licensee.

Appointment and revocation:

The appointment of a person (whether an individual or company) as an authorised representative must authorise the person to provide either all or some of the financial services which the licensee is authorised to provide, under the terms of their licence. It is important that the authorisations granted to the representative do not exceed the authorisations granted to the licensee under the terms of its licence.

Directors and employees of the licensee do not need to be appointed as authorised representatives of the licensee. They are automatically entitled to provide financial services on behalf of the licensee – provided, of course, that they are appropriately qualified to do so.

An authorised representative agreement which attempts to authorise a person to provide a financial service which is not covered by the licence, or attempts to authorise a person to provide financial

services who is subject to a banning or disqualification order, will be void (section 916A).

An authorisation may be revoked at any time by the licensee giving written notice to the authorised representative (s916A(4)).

Requirements:

It is important to note that an authorised representative agreement:

- must be in writing;
- must not authorise a person to provide a financial service which is not covered by the licensee's licence;
- must not authorise a person to provide financial services on behalf of the licensee if the person is subject to a banning or disqualification order by ASIC; and
- cannot authorise an existing licensee to be an authorised representative of another licensee.

Notifying ASIC:

Section 916F states that subject to some exceptions¹, ASIC must be notified of

the appointment of an authorised representative within **15 business days** of the appointment.

Liability for actions of authorised representatives:

Sections 917A to 917F provide that if:

- an authorised representative;
- acting within the authority granted by the licensee;
- makes a representation (a statement or promise);
- which is relied upon by a client in good faith;

then the licensee will be responsible for the conduct of the authorised representative, and thus, may be held liable for any damage or loss caused.

There are some exceptions to these provisions, one being that the licensee will not be liable for any actions of an authorised representative if the representative is acting outside their authorisations, and this was disclosed to the client before the client relied on the conduct.

¹ This requirement does not apply to the appointment of authorised representatives whose authorisations only relate to the provision of general advice and/or dealing in relation to a general insurance product, a basic deposit product, a facility for making non-cash payments that is related to a basic deposit product, a consumer credit insurance product, and/or a cash management trust interest, or a FHSA product (Regulation 7.6.04A).

This obligation also extends to sub-authorized representatives – that is, the licensee will also be liable for their conduct, subject to the limitations set out above.

Training and education:

Licensees are also required to ensure that their authorised representatives are adequately trained and are competent to provide the financial services offered by their licence. In practice, this means providing training where advice is provided, to the standards set out in ASOC Regulatory Guide 146 and in all cases, in relation to the licensee's products and services, and also providing them with all supporting documentation, as well as the licensee's compliance manual or similar document.

2. Different kinds of authorised representative agreements:

- (a) individual authorised representative – this is when the licensee appoints an individual to provide financial services on its behalf.
- (b) corporate authorised representative – this is when the licensee appoints a company to provide financial services on its behalf.
- (c) sub-authorized representative – under s916B of the Act, an authorised representative may sub-authorise individuals to provide financial services on behalf of the licensee, but only where the licensee consents in writing. A body

corporate that is an authorised representative will generally need to sub-authorise its directors and employees in order to provide financial services on behalf of a licensee.

This agreement can form part of a more general employment agreement, but is more often contained in a separate document, as this kind of appointment will require the consent of the licensee.

We will discuss the terms and conditions which should form part of each of these agreements further on in the article.

3. What should be included in an authorised representative agreement?

The legislation requires that the authorised representative be appointed in writing, and that the appointment sets out the boundaries of their authorisation, that is, the financial products and services that the representative may provide. This could be contained in a one page document. BUT – when appointing an authorised representative, it is advisable to address all of the elements of the licensee/authorised representative relationship, including:

- (a) Liability for the conduct of representatives: to minimise the licensee's risk of being held liable for actions of the representatives, the agreement should state that the representative:

- will only act in accordance with the specific authorisations granted by the licensee;
- warrants that they are not the subject of a banning or disqualification order by ASIC;
- will notify the licensee immediately upon receiving a complaint or notice of a potential complaint from a client; and
- will only appoint sub-authorised representatives who have been approved by the licensee, and ensure that the appointment of any sub-authorised representatives may be revoked (with immediate effect) by the licensee.

(b) Fees and remuneration: the agreement should set out details of all fees and commissions payable, setting out in detail how they will be calculated, method and time of payment, and (if appropriate) when (and how) the fees and commissions will change.

(c) Confidentiality: the authorised representative must be bound to keep confidential all details about the licensee's business, clients and other commercially sensitive information which is provided to the authorised representative. This obligation should continue after the agreement is ended.

(d) Clients: as you may be aware, no-one "owns" a particular client – a client is always free to change advisers. However, the agreement should address treatment of client details by the authorised representative as well as

what happens to information held by the representative about clients when the agreement ends. Also, the agreement should include a process by which disputes relating to clients and client complaints are to be handled.

(e) Appointment of sub-authorised representatives: the licensee may allow the authorised representative to appoint sub-authorised representatives, such as individual employees or officeholders, to provide the financial services. This right should be subject to the licensee's consent to the sub-authorised representative's appointment. Also, the licensee should be able to terminate that appointment immediately, should the sub-authorised representative's conduct have the potential to jeopardise the licensee's standing in any way, including in relation to compliance with its licence and the law.

(f) Relationship between appointment of sub-authorised representative and the employment relationship: an authorised representative may wish to keep the sub-authorised representative appointment agreement separate from the employment agreement, or may wish to combine the two. For example, in some situations, the authorised representative may wish to keep the terms and conditions of the employee's (that is, the sub-authorised representative's) employment (for example, salary details) confidential, and not disclose them to the licensee.

If the two documents are kept separate, some authorised representatives will want each document to include a clause

which states that if one agreement is terminated, the other automatically terminates. For example, some authorised representatives will want to immediately terminate the appointment of an employee as a sub-authorised representative, if they have breached their employment contract by misconduct, or dishonesty, or a failure to meet performance standards.

(g) Insurance: the agreement should include the minimum insurance policies to be maintained by the authorised representatives. In some cases, the licensee will cover its representatives with an “umbrella” policy, and then require each representative to make a proportional contribution to the policy.

(h) Termination: this is a crucial term for all agreements, and should set out the basis upon which the agreement can be terminated by both parties, how the agreement may be terminated, as well as the method, notice periods, payments, return of property and client information, confidentiality obligations and other consequences arising from the termination.

If the agreement is with an authorised representative who has appointed sub-authorised representatives, the existence of the sub-authorised representative agreement is dependent upon the existence of the authorised representative agreement – that is, the termination of the authorised representative agreement must automatically terminate the sub-authorised representative agreement.

The agreement should include a clause which prohibits the authorised representative from poaching any staff or other resources of the licensee, without the licensee being remunerated.

The licensee should also consider including a clause which restricts the individual authorised representative (or the principal of a corporate authorised representative) from competing with the licensee for a certain period after the end of the agreement.

(i) Dispute resolution: the agreement should include a process by which disputes between the licensee and the authorised representative can be resolved.

(j) Trade marks: some licensees will want their authorised representatives to use their brand names and logos. These rights should be retracted when the relationship ends.

(k) Guarantee by the director of a corporate authorised representative: some licensees will require an individual to personally guarantee that the corporate authorised representative will comply with its obligations under the agreement, and indemnify the licensee against any loss it may suffer as a result of the authorised representative's conduct.

The authorised representative agreement is a crucial document for both licensees and representatives, and both parties should consider the issues prior to finalising the terms of their relationship, to ensure compliance with

the laws and also to ensure that both parties' interests are being looked after.

The law is current as at February 2009.

Please note that this paper is a summary of the law only and is not a substitute for legal advice. Holley Nethercote is able to assist companies in meeting their obligations in this area by providing practical and prompt legal advice. Licensing, training and creation of compliance programs are also available via an associated business, Compact- Compliance and Corporate Training – www.compliance-training.com.au.

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