



Getting (and then varying) your licence

Did you know that if you laid out every Financial Services Regulation (FSR) related *Corporations Act* and *Regulations* amendment, ASIC Regulatory Guide, Class Order, Information Release, FS Form, Licensing Kit, Consultation Paper and Information Statement, you would have a paper-trail long enough to reach the moon and back five times?

I can't substantiate that claim, but I don't think I'm far off. Regardless, I know first-hand that providers of financial services often hesitate before getting or varying an Australian Financial Services Licence (AFSL). Information overload, combined with potentially increased legal risk and uncertainty makes obtaining (and varying) an AFSL seem daunting.

Drawing from our experience in successfully obtaining numerous AFSLs and AFSL-variations, this article attempts to provide you with some practical tips to help you understand and navigate your way through the quagmire of licensing in Australia. I've tried not to just regurgitate ASIC guidelines (which can be found on www.asic.gov.au), but to offer useful tips and suggestions.

Getting your licence

Why get your own licence?

We receive lots of different reasons from potential applicants who:

1. are unhappy paying licensee fees for the privilege of being authorised;
2. although running their own corporate authorised representative, want to be "their own boss" in a more true sense;
3. are tax or business specialists, who sit on the fringes of FSR and have some big deals that they want to get involved in, but know that an AFSL would be needed;
4. want to set up a new dealer group;

5. want to set up in competition with their authorising licensee (subject to any restraint of trade, of course);
6. are multi-national companies wanting to set up in Australia;
7. have been issued a stop order from ASIC for operating an unlicensed financial services business; or
8. want to raise capital; and
9. want to "commercialise" a successful money-making activity.

Can you relate to any of these? After discussing the pros and cons of obtaining a licence, including the threshold issues required (see step 1 in diagram), we find that about half of inquirers don't proceed immediately. They either seek an alternative to obtaining their licence (eg. become an authorised representative), complete further training, or try to find someone who would be more likely to meet the organisational competency requirements. "Organisational competency" refers to the skills and qualifications of your proposed Responsible Managers, and really means "Responsible Managers competency". Responsible Managers are the people who are appointed as being responsible for overseeing the provision of the organisation's financial services. They will make or break your AFSL application. This will be discussed in more detail throughout this article.

Pros

The advantages of holding an AFSL are more obvious than the disadvantages. You are your own boss. You have a licence that sets out exactly the ambit of your business' authority. You can authorise others (usually for a fee) to come under your banner. You can apply to vary your licence to include any type of financial service that is listed under the *Corporations Act* and *Regulations*, as long as you can show organisational competency. You can operate your business anywhere in Australia, and be "ready for anything" if you want to apply for licenses in other countries, such as Singapore, the UK, Hong Kong, Canada and the US. You'll also be on the front foot to tackle the money laundering legislation procedures

which apply to most licensees, because there's slight overlap between the requirements of that legislation and FSR.

Cons

The cost of compliance is the main barrier to entering the land of the AFSL. If outsourced, the cost of obtaining a licence can easily exceed \$15,000.00. The ongoing costs are much higher. Annual compliance reviews (usually around \$5,000 - \$25,000), adviser reviews, annual financial audits (usually around \$10,000), monitoring, supervising and training representatives (including authorised representatives), external dispute resolution scheme membership, legal costs, insurance costs and minimum funds requirements are factors that must be considered by potential licensees. Some of the obligations listed above are waived if you're only applying to provide financial services to wholesale clients, and others are waived if you don't provide financial advice.

Uncertainty about whether you will even succeed in your application to obtain a licence is another consideration, as some aspects of assessment by ASIC are subjective. However, uncertainty can be minimised by dealing carefully with the threshold issues (see step 1 of the diagram). The biggest threshold issue is organisational competency. Organisational competency is only a disadvantage if you don't have someone in your organisation who meets one of the 5 alternatives in RG 105. For example, is there someone with at least 3 in the last 5 years' experience in overseeing the provision of (or providing) the exact financial services that you're applying for? If so, that's a good start.

If ASIC decides to reject your application, it then goes to a delegate and you get to attend an informal hearing to put your case before a decision is made to reject the application.

The process (see diagram)

The process of getting your AFSL can be explained as a 7 step process:

1. **Clarify threshold issues:** The threshold issues, discussed above, must be clarified before you proceed. If you don't do this initially, ASIC will ask you to clarify these issues during assessment, after you've spent time and money getting to that stage. In any application, ASIC will make its own assessment as to: whether you actually need the licence for what you propose to do; whether you're asking for the right authorisations; whether you or other proposed Responsible Managers have the competency required; and whether there are any other issues that merit further questioning. Also, ASIC has in-house lawyers who might review your submissions, depending on the authorisations you're choosing.
2. **Consider the cost:** What is your time worth to you? You'll have to balance the cost of outsourcing the application or doing it yourself. If you outsource it, you'll still be quite involved in the process. If you do it yourself, you'll need to create everything from scratch. Your business procedures will need to meet the requirements of your proposed licence conditions, the *Corporations Act and Regulations*, ASIC's RG 104 and RG 105 and about half a dozen other regulatory guides, although this varies if you're only going to have wholesale clients. Some potential applicants, when they're faced with the costs, decide that it isn't viable to proceed as planned, and look at their other alternatives (eg. remaining an authorised representative). This is particularly the case with 1 or 2-person businesses.
3. **Prepare the documentation:** There are three categories of documentation: (a) the online form; (b) supporting proofs; and (3) underlying procedures. ASIC's Licensing Kit walks you through the questions in the online form (but is a bit sketchy). The supporting proofs include a business description, a description of your financial resources and a description of your proposed Responsible Managers. After they're

submitted to ASIC (see step 5), ASIC may ask for more proofs (up to 12 more). If you're preparing the application yourself, make sure you follow the requirements of ASIC's kit *to the letter*. We would suggest adopting their requirements as headings, and going from there.

4. **Finalise the issues that require external input:** We've had applications being held up for months because accountants, insurers or banks have been slow in getting the required documentation into our hands, for submission to ASIC. If you're aware of the possibility, take action early.
5. **Submit the application:** The online application is submitted electronically (no surprises there). The proofs must be sent in to ASIC within 20 business days of submitting the online application. We usually do it all on the same day.
6. **Liase with ASIC:** If you're applying for a miscellaneous financial product authorisation, be prepared for a very long wait (sometimes months) before getting a response from ASIC. If not, you've got plenty of directly relevant experience and have prepared thoroughly, the assessment stage could take as little as two weeks until completion. ASIC's response time will also be longer if you have a complex or unusual business model.
7. **AFSL obtained:** ASIC will give you a draft licence. If you're happy with it, it will issue you a final licence. Be aware that if you're issued an AFSL in May or June, you'll still be required to have a proper financial audit done of your business (because it is a requirement that you have this done each financial year that you hold your licence – even if it's only a couple of weeks until 30 June). This assumes your financial year ends on 30 June.

Varying

Licensees often want to vary their licenses to branch out into other sectors of the financial services market. One advantage of holding an AFSL is that you don't need to apply for another one – you just add to the one you have.

The disadvantage of varying your licence is that it is very similar to, and almost as onerous as, applying for a new licence. However, you won't be required to provide as many supporting documents as with the original application.

You'll still need to go through the seven steps outlined above. In particular, you'll most likely need to appoint another Responsible Manager who has the requisite competence to oversee the provision of the new financial services that you're planning to do.

Don't be caught out! Some licensees treat a variation with contempt and don't devote adequate resources or attention to the detail associated with the variation. This can lead to a number of problems, including the rejection of the application, at great cost to the licensee.

Top ten tips

1. Organisational competency will make or break your application.
2. Get good legal advice on the need for a licence, and what types of authorisations you'll need.
3. It may be possible to get a licence even if you've been a little bit naughty!
4. Financial proof documentation takes forever to prepare.
5. If you have overseas experience and you're applying to be a Responsible Manager, make sure you can show knowledge of the Australian regulatory environment (this might require you doing a short course).
6. Decide whether or not to outsource the application or variation early! If you don't have time to do it properly, outsource it.

7. Balance up the ongoing costs before proceeding – is it worth it?
8. Give yourself plenty of time to get your licence.
9. Have one or two backup Responsible Managers, in the event that ASIC doesn't think your number one applicant/s is/are competent under RG 105 during assessment.
10. Don't cut corners!

What not to do

People often come to us after unsuccessfully obtaining or varying their licence themselves. Common mistakes are:

- assuming that their many years of experience will satisfy ASIC's organisational competency requirements as set out in RG 105;
- ignoring ASIC's Licensing Kit;
- thinking "close enough is good enough";
- providing insufficient information describing their business;
- submitting too few "Responsible Managers" for complex business models;
- providing unlicensed financial services in *any* shape or form; and
- not ascertaining the correct types of authorisations for their proposed business model.

Often it's a combination of many of these factors. I hope, however, that after reading this article, you'll be able to make an educated assessment about whether you'd

like to go ahead with that application or variation.

When you've made that decision, good luck!

PS: An AFSL application is not to be confused with an Australian Credit License (ACL) application. We can help you apply for, vary and maintain your ACL. Just contact us on the details below.

The law is current as at May 2011.



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.ccct.com.au.

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