



*[This article written by Samantha Kimpton, a solicitor with Holley Nethercote Commercial Lawyers, appeared in Money Management magazine on 26 October 2006 and was titled **In the line of duty.**]*

So you're a Responsible Officer. Maybe your boss came into your office two years ago and said, "Bob, we need you to be a Responsible Officer so we can get our licence." Maybe you run your own business and you're the only Responsible Officer. However it happened, you now bear that mysterious title. But you've never been quite sure what it means, what you're supposed to do or, most importantly, whether it means you can get sued.

What am I?

If your licensee is a corporation (as most are), you have been created by the *Corporations Act 2001*. A Responsible Officer is "an officer of the [corporation] who would perform duties in connection with the holding of the [Australian financial services] licence" (section 9). Some people will meet this definition without even realising it and without being named a "Responsible Officer" under their licence. Let's put them to one side. Your licensee has named you as a Responsible Officer. This means that it has put its hand up and said, "Hey, everyone! Bob is an officer of our company who performs duties in connection with the holding of the licence!"

So, you're now clearly an officer of the company. You might have been an officer before. (An officer can be someone "who makes, or participates in making, decisions that affect the whole or a substantial part of the business of the corporation" – section 9.) But now there is no doubt. You're an officer – and that brings with it certain responsibilities, and exposures.

How did I get here?

Let's go back a step. ASIC will not let the licensee (or an applicant) nominate any old Responsible Officers under its licence. To be a *nominated* Responsible Officer your licensee will have to show ASIC you meet some basic requirements:

1. You meet one of five different combinations of qualifications and experience specified by ASIC. For example, you might have a relevant university degree, three years of relevant experience in the past five years (at the time you were appointed as Responsible Officer) and completed a short course on the ASIC training register. Your combination of qualifications and experience relates to at least one of the financial services and one of the financial products authorised under your licence. (If your licensee operates a registered managed investment scheme, you must meet an extra layer of requirements for qualifications and experience.)
2. You are "responsible for significant day-to-day business decisions about the ongoing provision of the financial services by the licensee" (Policy Statement 164).

Your licensee also has to demonstrate to ASIC that you are of good fame and character. This involves you providing an Australian Federal Police check, a bankruptcy check, overseas police and bankruptcy checks (if you have lived overseas in the ten years prior to being appointed), business references and a signed personal information statement (in which you declare any prior misconduct).

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Why am I needed?

ASIC will only grant a licence (and let an organisation continue to hold its licence) if it meets the “organisational competency obligations”. This is ASIC’s shorthand way of describing the following two requirements from the *Corporations Act 2001*:

1. The licensee must have adequate human resources to provide the financial services and to carry out supervisory arrangements, unless it is regulated by APRA (s912A(1)(d)).
2. The licensee must maintain the competence to provide the financial services (s912A(1)(e)).

The licensee depends on you and its other Responsible Officers to help meet these requirements. What does this mean? It means that as long as all the Responsible Officers are “responsible for significant day-to-day business decisions about the ongoing provision of the financial services by the licensee”, and they have the qualifications and experience to cover all the financial services (and the products to which they relate) under the licence, ASIC will grant the licence (or, in the case of existing licensees, leave the licence in place).

It may be that each of the Responsible Officers has the requisite qualifications and experience for all the financial services and products offered under the licence. Or it may be that, between you, you and the other Responsible Officers cover off on the authorisations under the licence. For example, you have qualifications and experience in providing personal advice and dealing in relation to life risk insurance and another Responsible Officer has qualifications and experience in providing personal advice and dealing in relation to superannuation and investment products.

What am I supposed to do?

We now know why you’re needed. But, apart from just being there, what are you supposed to do? ASIC says:

1. You must ensure the quality of the services provided by the licensee is adequate (PS 164.73A).
2. You must ensure that the licensee is complying with its licence obligations (PS 164.73A).
3. You must maintain your knowledge and skills (PS 164.82).

Doing the first of these things should not be too hard because you should already be “responsible for significant day-to-day business decisions about the ongoing provision of the financial services by the licensee”. If you are concerned that you are not already ensuring the quality of services provided by the licensee is adequate, you might consider:

- involving yourself in the licensee’s compliance, product/research and/or operational committees;
- adopting a more “hands on” role in supervising employees or authorised representatives who provide the financial services;
- vetting the licensee’s operational and compliance manuals.

The second item requires a knowledge of the licensee’s obligations. You should start by reading your licence! This will tell you what your licensee’s authorisations are and what licence conditions it has. You may wish to organise some training for you and your fellow Responsible Officers *which is tailored to your licensee*. You may also find it useful to attend some external Responsible Officer training.

To maintain your knowledge and skills, you should have a documented development plan. This may be prepared by you or someone else in your organisation. The plan should cover your development in relation to the products offered by your licensee and the industry in which it operates on one hand, and your development in relation to the regulatory environment and the licensee's obligations on the other hand. It may include methods such as online training and assessment, seminars, workshops and reading regulatory updates and industry publications. There are no particular rules about the number of hours of professional development to be completed each year or the methods of development (although you may have particular requirements imposed on you by an industry association of which you are a member, such as the Financial Planning Association).

It doesn't stop there. As Responsible Officer, you are now an officer of the licensee. (Remember that most nominated Responsible Officers will, because of their duties, also have been considered an officer of the licensee before their nomination.) Officers have more duties to the organisation than a mere employee, but not quite as many as directors. If you are also a director of the licensee, then you have all the following duties and more. The following duties are explained in the *Corporations Act 2001* and, where stated, in common law (that is, the law made by the courts):

1. You must exercise your powers and discharge your duties with care, skill and diligence (section 180 and common law).
2. You must act "in good faith in the best interests of the corporation" and "for a proper purpose" (section 181 and common law).
3. You must not allow information relating to the company to be given to a director, auditor, shareholder or the ASX if you know the information to be false or misleading (section 1309).
4. You must avoid conflicts of interest (common law).

What's my exposure?

In relation to the three ASIC requirements listed above, you should note that:

1. ASIC has said that the licensee bears the ultimate responsibility for complying with its licence obligations.

ASIC recently raised concerns about Responsible Officers at the National Australia Bank Limited. These concerns were met by an enforceable undertaking *from the licensee*, pledging to improve its procedures for the selection, appointment, monitoring, training and removal of Responsible Officers. It is the licensee, and not the Responsible Officers, who is a party to this undertaking.

2. PS 164 (and other ASIC Policy Statements) are not law. They are only an explanation of ASIC's interpretation of the law. There are no legal sanctions applicable for breaching one of the ASIC requirements listed above – unless, in breaching one of those requirements you have also breached a legal requirement, such as the requirement to discharge your duties as an officer with skill, care and diligence.
3. Therefore, those three ASIC requirements alone do not create a great deal of exposure for you. (However, if they are breached, ASIC may consider that the *legal* requirement on the licensee to maintain competence has been breached, which will have implications for the *licensee*.)

In relation to the duties imposed on officers of a corporation, here's what could happen if you breach them:

1. If somebody has sustained a loss because of your breach, you could be sued for the amount of the loss.
2. You may face fines of up to \$220,000, imprisonment for up to five years and/or disqualification from managing corporations (sections 184, 206C, 206A, 1309, 1317E, 1317G). The penalties are worse (and tend to be criminal in nature) if you have been recklessly or intentionally dishonest.
3. If legal proceedings are brought against you and you lose, you could be ordered to pay some or all of the costs of the other party.

We are not aware of any Responsible Officer being sued for being a Responsible Officer. If you are sued, it will be because by being a Responsible Officer, you are acting as an officer of the licensee. ASIC recently brought civil proceedings against three directors of GIO Insurance for breaching their duties to act with care and diligence and, in one case, for failing to act honestly, when their licensee was the subject of a takeover bid. Although the action was against directors, it involved duties also incumbent on officers – and is a good example of the exposure affecting Responsible Officers.

Help! What can I do to protect myself?

Under the *Corporations Act 2001*, it is very difficult for the licensee to exempt you from, or indemnify you for, liabilities owed to the corporation (or to a third party where you incurred obligations to the third party but not in good faith) (section 199A). There are also limitations on the licensee paying premiums for insurance for you (section 199B).

However, a number of organisations do maintain directors' and officers' insurance. You may want to ask your licensee if it does this and if you are covered.

A court can grant you relief from liability for negligence, default, breach of trust or breach of duty if you have acted honestly and if there are other reasons why you ought to be excused (section 1318). The message is: act honestly!

You haven't breached your duty to act with care, skill and diligence if, when making a decision whether to do something in respect of a matter relevant to the business operations of the corporation you:

- made the decision in good faith and for a proper purpose;
- made sure you did not have a material personal interest in the matter;
- informed yourself about the subject matter of the decision to the extent you reasonably believed to be appropriate; and
- you rationally believed that the decision was in the best interests of the corporation (section 180 and similar provisions at general law).

This is known as the "business judgment rule." If you follow the points in the business judgment rule you will be helping to protect yourself.

What if I'm a key person?

If a licensee has one or a small number of Responsible Officers and ASIC is concerned about the licensee's ability to maintain competence if one or more of those Responsible Officers ceased being Responsible Officer, ASIC will impose a "key person condition" on the licence and name that or those person(s) on the licence.

If there is a key person condition, the licence lists four pieces of information which the licensee must provide to ASIC in writing within five days of the Responsible Officer departing – including the licensee’s plans for replacing the key person.

Being a key person does not attract any further obligations for you personally (beyond those already held as a Responsible Officer). However, as a key person, it is good etiquette to give plenty of notice to the licensee before ceasing your role as Responsible Officer. Ideally, the licensee will have a contingency plan for your departure as Responsible Officer.

Know the licence obligations

First, you need to know that the licensee’s obligations are found in:

- the *Corporations Act 2001*, the *ASIC Act 2001* and other financial services laws;
- associated regulations, such as the *Corporations Regulations 2001*;
- ASIC Class Orders; and
- the conditions listed on the actual licence.

ASIC Policy Statements and Guidelines are not a source of licence obligations but, rather, explain how ASIC interprets the obligations contained in the above sources.

To some extent, the contents of the licensee’s original licence application (or a more recent variation application) will constitute further obligations on the licensee. This is because the licensee has told ASIC it will do certain things and ASIC has granted the licence (or a variation to the licence) on that basis. However, no business is static and the licensee cannot be expected to operate precisely as it described in its licence application years after the application was submitted.

Second, you need to know that the main things a licensee must do (if they are not APRA-regulated and if they have retail clients) are (section 912A and section 912D):

1. Provide the financial services “efficiently, honestly and fairly.”
2. Have adequate arrangements for managing conflicts of interest.
3. Comply with the licence conditions. (Most conditions are found on the licence itself but additional conditions are imposed by Reg 7.6.04 of the *Corporations Regulations 2001*.)
4. “Comply with the financial services laws.”
5. “Take reasonable steps to ensure that its representatives comply with the financial services laws.”
6. Have adequate financial, IT and human resources.
7. Maintain the competence to provide the financial services. (This is where you come in.)
8. Ensure that its representatives are adequately trained and competent to provide the financial services.

9. Have a dispute resolution system.
10. Have adequate risk management systems.
11. Report any significant breach to ASIC within five days of identifying the breach.

Make sure you are comfortable with the way your licensee handles each of these obligations.

Some practical tips

Feeling confused? Here are some things you should do:

1. Act honestly.
2. Avoid personal conflicts of interest.
3. When making a decision, make sure you're properly informed and acting in the best interests of the licensee.
4. Stay abreast of the licensee's obligations. (Read your licence, subscribe to regulatory updates, visit the ASIC website regularly and attend Responsible Officer training.)
5. Formalise your professional development. (Document your professional development plan and keep records of training completed. Make sure they cover product and industry, as well as regulatory, knowledge and skills.)
6. Ensure proper reporting lines are in place – so you know what's going on.
7. Know whether the licensee is meeting its obligations and, if not, do something.
8. Find out if you're covered by directors' and officers' liability insurance.
9. Get legal advice. (You may also be acting as a director of the company without realising it.)

The law is current as at November 2006.

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.compliancetraining.com.au.

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