



ASIC

Australian Securities & Investments Commission

[PF 189] Pro Forma 189 Responsible entity authorisation and licence conditions

Policy Statement 130

Reissued 15/10/2003

Pro Forma 189 sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to operate a particular kind of managed investment scheme. See Policy Statement 130 and [IR 99/28].

If you are operating an investor directed portfolio service or a time-sharing scheme, Pro Forma 196 [PF 196] and Pro Forma 204 [PF 204] contain the standard licensing conditions that will usually be applied to licences authorising a person to operate this type of scheme and service.

Australian Securities and Investments Commission
Corporations Act 2001 — Paragraph 786(1)(b)

Authorisation

1. This licence authorises the licensee:
 - (a) to operate the following managed investment schemes:
[insert individually named schemes or kinds of schemes]; and
 - (b) to carry on a securities business in its capacity as responsible entity of the above schemes.

No investment advice

2. *[insert if relevant]* The licensee is not authorised to provide investment advice in relation to securities.

Key person

3. *[insert if relevant]* The licensee must immediately notify ASIC, in writing, if the following officer(s) or key person(s) cease to be officers of the licensee or to perform duties on behalf of the licensee with respect to its securities business:
- (a) *[insert name of key person]*; and
 - (b) *[insert name of key person]*.

Systems to ensure compliance with law and licence

4. The licensee must establish and maintain adequate training, supervision and compliance procedures designed to ensure, as far as is reasonably practicable, that the licensee and its representatives, employees or agents comply with and do not contravene:
- (a) the provisions of a securities law;
 - (b) the conditions of this licence; or
 - (c) the constitution of a registered scheme operated by the licensee.

Production of licence certificate

5. The licence certificate, or a certified copy of the certificate, must, upon request, be made available by the licensee within a reasonable time for inspection by any person that transacts or intends to transact any business with the licensee.

Financial Transaction Reports Act 1988

6. The licensee must acquaint itself with and comply with the provisions of the Financial Transaction Reports Act 1988 and s243D of the Australian Securities and Investments Commission Act 2001.

Disclosure of referral fee

7. *[insert if relevant]* The licensee must disclose to the client at the time of making a securities recommendation any fee, commission or any other benefit or advantage paid or payable to a person who referred the client to the licensee or to someone nominated by that person.

Notification of breach

8. The licensee must as soon as practicable after it becomes aware of the matter but no later than 14 days after becoming aware, notify ASIC in writing of any matter that may constitute a contravention or breach by the licensee or its representatives, employees or agents of:
- (a) the Act; or
 - (b) the constitution of a registered scheme operated by the licensee;
- that has had, or is likely to have, individually or collectively with other breaches, a material adverse effect on clients' interests or a material effect on the operations of the licensee.

Net tangible assets

9. The licensee must ensure that at all times the value of the licensee's net tangible assets is maintained at a minimum of \$50,000; or where the value of all scheme property of registered schemes operated by the licensee is greater than \$10,000,000, an amount equal to not less than 0.5% of that scheme property, up to a maximum of \$5,000,000.

Cash requirements

10. The licensee must ensure that at all times it has sufficient financial resources, or access to sufficient financial resources, to enable it to meet all financial obligations of the licensee that may reasonably be foreseen to arise in the following 3 months relating to the operation of all registered schemes for which it is the responsible entity.

Professional indemnity and fraud insurance

11. The licensee must at all times maintain an insurance policy covering professional indemnity and fraud by officers that:
- (a) is adequate having regard to the nature of the activities carried out by the licensee under the licence; and
 - (b) covers claims amounting in aggregate to whichever is the lesser of:
 - (i) \$5,000,000; or

- (ii) the sum of the value of all scheme property of registered schemes for which it is the responsible entity.

When licensee must use a third party custodian

12. The licensee must not hold scheme property of a registered scheme and must appoint another person or persons to hold that property unless:

- (a) the licensee has net tangible assets of not less than \$5,000,000; or
- (b) in relation to a registered scheme, the scheme property consists only of one or more of the following kinds of property:
 - (i) real property (including mortgages over, leases over or licences in relation to real property) that will be kept for the whole duration of the scheme or the relevant mortgage;
 - (ii) physical assets;
 - (iii) cash or deposits held in a regulated trust account:
 - (A) for up to 6 months pending its initial investment; or
 - (B) for up to 13 months pending initial expenditure; or
 - (iv) assets falling within paragraph (c) below;

and the licensee has net tangible assets of not less than \$500,000 or, if the value of the scheme property of all the registered schemes operated by the licensee is greater than \$100 million, an amount equal to not less than 0.5% of the value of that scheme property, up to a maximum of \$5,000,000; or

- (c) the licensee is only holding scheme property which falls within the following categories:
 - (i) physical assets which as a matter of reasonable practice can not be physically held by a custodian (such as livestock, agricultural produce, machinery or film sets);
 - (ii) contractual, lease or licence rights which are

not assignable or only assignable with the consent of the member (other than to a new responsible entity) and any documents evidencing those contractual, lease or licence rights;

- (iii) assets of trivial value;
- (iv) cash held for up to 3 months in an audited trust account:
 - (A) pending payment to members;
 - (B) for the purposes of working capital (such as maintenance of real property or physical assets) which is reasonably necessary to meet expected expenditures over a 3 month period; or
 - (C) pending payment in acquiring a mortgage and paying fees or costs incidental to the acquisition; or
- (v) mortgages or documents of title held under a mortgage where:
 - (A) particular members have a specific beneficial or legal interest in the mortgage;
 - (B) the mortgage was acquired after disclosure in writing to the relevant members (at the time of the acquisition) of all matters that the members and their advisers would reasonably require and expect to find to make a decision to agree to the mortgage being acquired;
 - (C) either of the following applies:
 - (i) the mortgage was acquired on the specific direction of the relevant members (at the time of acquisition of the interest); or
 - (ii) if the members have not specifically advised the licensee that they wish to acquire the mortgage they are able to withdraw from that mortgage for a period of 14 days commencing on the date of disclosure; and

- (D) the scheme does not involve the mortgage being sold prior to its discharge; or
- (vi) where the scheme involves owners of interests in real property making their real property available for use as part of a serviced apartment, hotel, motel or resort complex — cash held in a regulated trust account:
 - (A) for the purpose of refurbishment and improvement of real property associated with the scheme; or
 - (B) for the purpose of alleviating seasonal fluctuations in payments of income from the scheme in accordance with provisions in the constitution;

provided that no more is held than the licensee reasonably considers necessary for the relevant purpose.

Custodian must have net tangible assets

13. Subject to paragraph 14 of this licence, if the licensee appoints another person (“the custodian”) to hold scheme property of a registered scheme, the licensee must ensure that at all times:
- (a) the custodian has net tangible assets (calculated as if the custodian were the licensee) of not less than \$5,000,000; or
 - (b) the custodian is only holding assets described in paragraph 12(b) of this licence and the custodian has net tangible assets (calculated as if the custodian were the licensee) of not less than \$500,000 or, if the value of the scheme property of all the registered schemes operated by the licensee is greater than \$100 million, an amount equal to not less than 0.5% of the value of that scheme property; or
 - (c) the scheme property consists only of property set out in paragraph 12(c) of this licence and the custodian has net tangible assets (calculated as if the custodian were the licensee) of an amount of not less than that required of the licensee under paragraph 9 of this licence; or
 - (d) the custodian is an Australian ADI.

If the only scheme property the custodian is holding is the regulated trust account described in paragraph 12(b)(iii) or 12(c)(vi) of this licence, the custodian does not need to meet any minimum level of net tangible assets.

Guarantees in lieu of custodian's net tangible assets

14. In calculating the net tangible assets of a custodian, the licensee may accept a guarantee in substitution for net tangible assets on the same basis that ASIC will accept a guarantee as described in paragraph [PS 131.26] of ASIC Policy Statement 131. The licensee must obtain a statutory declaration in a form which is the same (with only such changes as are necessary) as that set out in Pro Forma 173 [PF 173].

Agreement with custodian

15. If the licensee appoints a custodian to hold scheme property, the licensee must ensure that at all times a written agreement is in place between the licensee and the custodian that clearly specifies:
 - (a) the nature of the arrangement and the obligations of each party;
 - (b) the rights that the licensee will have in relation to ongoing review and monitoring of the custodian and the standards against which the custodian's performance will be assessed;
 - (c) how the custodian will certify to the licensee that it complies with, and will continue to comply with, the requirements of ASIC Policy Statement 133 (as in force at the date of issue of this licence) relating to the holding of scheme property;
 - (d) how instructions will be given by the licensee to the custodian;
 - (e) how clients will be compensated if the clients suffer any loss due to a failure by the custodian to comply with its duties and the extent to which the custodian must maintain a minimum level of professional indemnity insurance;
 - (f) prohibitions against the custodian taking any charge, mortgage, lien or other encumbrance over, or in relation to scheme property other than in respect of expenses and outlays made within the terms of the

agreement (but not including unpaid fees of the custodian) or in accordance with the licensee's instructions;

- (g) if the custodian is permitted to use sub-custodians to hold scheme property — a requirement that, where practicable, a written agreement be in place at all times between the custodian and any sub-custodian addressing to the extent practicable and relevant the matters required by paragraph [PS 133.20] of ASIC Policy Statement 133 to be included in the agreement between the licensee and the custodian;
- (h) how records of scheme property will be kept and maintained by the custodian;
- (i) requirements for reporting by the custodian to the licensee, including notifications of any transfers to, or from, the scheme's accounts; and
- (j) requirements for the custodian to provide all reasonable access and assistance to any registered company auditor engaged to conduct an audit in relation to any registered scheme for which the licensee is the responsible entity.

Scheme property

- 16. The licensee must ensure that each person who holds scheme property of a registered scheme it operates (whether it is the licensee or a custodian) at all times:
 - (a) complies with the requirements of ASIC Policy Statement 133 (as in force at the date of issue of this licence) relating to the holding of scheme property; and
 - (b) keeps and maintains proper records identifying scheme property.

Protection of underlying land in primary production schemes

- 17. *[insert if relevant]* The licensee must, by the time specified in condition 18, ensure (in relation to each scheme) that an instrument that confers the right, for the purpose of the scheme, to use the land on which any primary production will occur in the operation of the scheme, is lodged for registration under State or Territory land titles law, in the name of :

- (a) the members collectively; or
- (b) each member in relation to that portion of the land on which the primary production business in which the member has an interest is being conducted; or
- (c) the custodian where it holds the interest as trustee for the members; or
- (d) the licensee, either:
 - (i) as trustee for the members; or
 - (ii) beneficially in the course of and in accordance with its duties as responsible entity; or
- (e) any nominee of the members that is entitled to hold scheme property, where it holds the interest as trustee for the members; or
- (f) a company, provided that, for the duration of the scheme:
 - (i) all the issued shares in the company are held by all the members in the scheme;
 - (ii) the proportion of issued shares held by each member is the same as the proportion of interests in the scheme held by that member; and
 - (iii) the constitution of the company contains provisions that can only be modified by unanimous resolution of members of the company and that prohibit:
 - (A) disposing of, or otherwise dealing with, the land in whole or part except after the primary production business to which the scheme relates is completed; and
 - (B) the conduct by the company of any business or activity other than the making of the land available for primary production to occur in the operation of the scheme or any other business or activity that the company may be required to conduct by law.

- (g) the custodian or another person as agent for the licensee for the purpose of the licensee holding the interest on trust for members.
18. The time specified for the purpose of lodgment under condition 17 is either:
- (a) prior to or immediately after the issue of the interest in the scheme; or
 - (b) if each of the requirements in subparagraphs (i) to (v) is satisfied — as soon as reasonably practicable, and in any event within 9 months, after the issue of the interest in the scheme:
 - (i) the interest in the scheme is issued on or before 30 June 2006;
 - (ii) the only primary production under the scheme is planting and tending trees for felling; and
 - (iii) at the time of the issue of the interest in the scheme the licensee reasonably believes that there is no material risk that:
 - (A) an interest in land will not be granted to the member; or
 - (B) an instrument of the kind referred to in condition 17 in relation to that interest in land will not be lodged for registration,
 within 9 months after the issue of the interest in the scheme; and
 - (iv) the licensee uses its best endeavours to cause:
 - (A) an interest in land to be granted to the member; and
 - (B) an instrument of the kind referred to in condition 18 in relation to that interest in land to be lodged for registration,
 as soon as reasonably practicable, and in any event within 9 months, after the issue of the interest in the scheme; and
 - (v) the disclosure document or Product Disclosure Statement (“offer document”) under which

interests in the scheme are offered prominently discloses:

- (A) the extent to which any interest in land on which any primary production will occur under the scheme has been secured at the date of the offer document;
 - (B) the steps proposed for securing any further interest in land necessary for primary production under the scheme;
 - (C) that there is a risk that the licensee will be unable to secure an interest in land for grant to a person applying for an interest in the scheme under the offer document within 9 months after the issue of that interest; and
 - (D) in the event that no such grant occurs within that time, the licensee will, within 14 days after receiving a written request from the member, issue to the member a full refund of the amount the member has invested.
19. *[insert if relevant]* The licensee must use its best endeavours to cause each instrument which is lodged for registration under condition 17 to be registered as soon as possible after lodgment and to be registered in such a way that it cannot be adversely affected by any existing or subsequent mortgagee, secured creditor or transferee (other than in connection with a borrowing or other transaction that is entered into by the licensee in accordance with the constitution of the scheme and its duties as responsible entity).

Material changes affecting eligibility for a licence

20. The licensee must notify ASIC in writing of any matter which may reasonably be expected to affect the licensee's eligibility to hold a licence (for example, loss of key personnel or a change in the nature of the licensee's business) as soon as practicable after it becomes aware of the matter but no later than 14 days after becoming aware.

Internal complaints handling procedure

21. The licensee must have in place, to deal with complaints from investors relating to its operation of registered schemes,

internal complaints handling procedures, that are in accordance with Australian Standard AS4269:1995, Complaints Handling.

External complaints resolution scheme membership

22. The licensee must be a member of an external complaints resolution scheme, approved by ASIC, that can deal with complaints relating to its operation of registered managed investment schemes.

Interpretation

In this licence, references to sections, Parts and Divisions are references to provisions of the Act unless otherwise specified. Headings contained in this licence are for ease of reference only and do not affect interpretation. Terms used in this licence have the same meaning as is given to them in the Act and the following terms have the following meanings:

[insert if relevant] “accessible investments” means assets that may be held through an IDPS-like scheme, including accessible securities.

“audited trust account” means an account styled as a trust account which is audited at least once every 6 months and for which the auditor’s report is provided to the board or compliance committee (as appropriate) of the licensee.

[insert if relevant] “derivative” means an agreement:

- (a) the value of which is ultimately derived from or varies according to, the value of one or more assets, rates, indices or other underlying elements (“the derived value element”); or
- (b) whereby one or both parties, at some future time, may have to provide cash or other consideration (excluding any initial or periodic consideration that is fixed at the time the agreement is entered into) to the counterparty or a substitute counterparty (such as a clearing house), that consideration ultimately being determined in whole or in part by reference to the derived value element;

but does not include:

- (c) agreements under which physical delivery of a commodity other than a currency is mandatory;
- (d) agreements where the consideration can be varied only by reference to an inflation index (such as the consumer price index);

- (e) at-call or term deposits with banks or other financial institutions;
- (f) insurance contracts; or
- (g) chattel and real property mortgages.

“expenditure” means the application of money for purposes other than investment.

[insert if relevant] “financial asset” means an asset in the form of cash or a security but does not include a derivative.

[insert if relevant] “IDPS-like scheme” means a registered managed investment scheme which has a constitution that provides that:

- (a) a member may direct that an amount of money corresponding to part or all of the amount invested by the member in the scheme be invested in specified securities (“accessible securities”) or other accessible investments; and
- (b) the distributions of capital and income from the scheme to the member in relation to their interests in the scheme will be determined by reference to amounts received by the custodian in relation to the accessible investments acquired in accordance with that direction.

“investment” means the application of money to acquire an asset for the purpose of gaining monetary return by way of income or capital gain from that asset.

“net tangible assets” means net tangible assets as calculated in accordance with Schedule A.

“physical assets” means personal property which is tangible and movable but does not include cash or deposits.

“regulated trust account” means:

- (a) a trust account maintained by an authorised trustee under state or territory legislation;
- (b) a solicitor’s trust account;
- (c) a real estate agent’s trust account; or
- (d) a trust account maintained by an entity other than the licensee which provides protections similar to the accounts described in sub-paragraphs (a) to (c) and which is approved by ASIC.

[insert if relevant] “stable property trusts/syndicates” means a trust or syndicate which only holds property (including interests in stable property trusts or syndicates which are a managed investment scheme operated by the licensee) that has been specifically agreed by the members and which is to be held for the duration of the scheme.

SCHEDULE A

Net tangible assets must be calculated on the basis of assets and liabilities as they would appear if a balance sheet were made up for lodgment as part of a financial report under Chapter 2M at the time of calculation on the basis that the licensee is a reporting entity. In the attached licence “net tangible assets” means the total tangible assets of the licensee or the custodian (referred to below as “the licensee”), plus any guarantee approved by ASIC, less any adjusted liabilities.

Interpretation

In this Schedule:

1. “Adjusted Liabilities” means total liabilities **plus** the following adjustments:
 - (a) subject to paragraph 2 of this Schedule, amounts owing from, or invested in, any person who:
 - (i) is an associate of the licensee;
 - (ii) was an associate of the licensee at the time the liability was incurred or the investment was made; or
 - (iii) became liable to the licensee because of, or in connection with, the acquisition of interests in a managed investment scheme operated by the licensee; and
 - (b) subject to paragraphs 2 and 3 of this Schedule amounts owing from, or invested in, any:
 - (i) trust, managed investment scheme or prescribed interest undertaking; or
 - (ii) regulated superannuation fund, approved deposit fund, pooled superannuation trust or public sector superannuation scheme within the meaning of the Superannuation Industry (Supervision) Act 1993 (“superannuation scheme”);

in respect of which the licensee or an associate of the licensee may exercise any form of power or control;
and

minus the following adjustments:

- (c) any subordinated debt approved by ASIC; and
 - (d) any ADI undertakings, except to the extent that the payment of any amount under the undertaking gives rise to an obligation, actual or contingent, on the part of the licensee to pay any part of that amount to any person or an obligation of any other person to pay money secured over property of the licensee.
2. The amounts referred to in paragraphs 1(a) and 1(b) of this Schedule are not to be treated as adjustments to total liabilities to the extent that those amounts are:
- (a) adequately secured; or
 - (b) owing from an Australian ADI or owing from a disclosing entity (other than a registered scheme of which the licensee or an associate of the licensee is the responsible entity) that has net tangible assets (as defined in this Schedule) of:
 - (i) more than \$50 million; or
 - (ii) at least 4 times the amount owing;

whichever is the greater as shown in the most recent accounts of the entity lodged with ASIC; or
 - (c) owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of, a superannuation scheme, an IDPS, a registered scheme or a prescribed interest undertaking to which an approved deed relates (“the Scheme”) provided that that amount:
 - (i) exceeds amounts:
 - (A) invested by the Scheme in; or
 - (B) lent directly or indirectly by the Scheme to the licensee or a group entity (other than loans that are deposits with an Australian ADI in the ordinary course of its banking business);

- (ii) if owing by way of fees, represents no more than fees owing for the last 3 months; and
 - (iii) if owing under rights of reimbursement for expenditure by the licensee, has not been owing for more than 3 months.
- 3. The amounts referred to in paragraph 1(b) of this Schedule are not to be treated as adjustments to total liabilities to the extent that those amounts are invested in:
 - (a) a registered scheme; or
 - (b) a prescribed interest undertaking to which an approved deed relates;

unless any part of the amount invested is, in substance, directly or indirectly, invested in the licensee.
- 4. “ADI undertakings” means the amount of a financial commitment provided by an Australian ADI, in the form of an undertaking to pay the amount of the financial commitment to the licensee, characterised by the following:
 - (a) the undertaking is enforceable and unqualified;
 - (b) the undertaking is to pay on written demand by the licensee, except to the extent that payment has previously been made by the ADI to the licensee under the undertaking;
 - (c) the undertaking remains operative (even if, for example the licensee ceases to hold a securities dealers licence or ceases to be a responsible entity of registered schemes), until ASIC has consented in writing to the cancellation of the undertaking or the undertaking is discharged by payment to the licensee of the maximum amount payable under the undertaking (either upon request of the licensee or at the ADI’s initiative).
- 5. “associate” has the meaning set out in Division 2 of Part 1.2, and includes the meaning set out in sections 13 and 15.
- 6. An amount is “adequately secured” if it is secured by:
 - (a) an enforceable charge over securities, promissory notes or bills of exchange (other than securities, promissory notes or bills of exchange of the licensee or any group entity) for which there exists an active market and the market value of these securities, promissory notes or

bills of exchange always equals not less than 105 per cent of the particular amount owing; or

- (b) a registered first mortgage over real estate that has a fair market valuation at least equal to the amount owing.

7. An “active market” is taken to exist for:

- (a) securities, promissory notes or bills of exchange traded in a recognised market in which independent, bona fide offers to buy and sell are regularly made so that a price reasonably related to the last sale price or current bona fide competitive bid and offer quotations can be determined promptly and where payment will be received within the customary period; and
- (b) any security which ASIC has approved in writing for the purposes of this definition.

8. A “group entity” is any entity which controls the licensee or any entity controlled by any entity which controls the licensee.