



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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www.asic.gov.au

Discretionary Payments Team
Risk & Claims Branch
Department of Finance

7 December 2020

Dear Sir/Madam,

ACT OF GRACE APPLICATIONS SUBMITTED BY s22(1)(a)(ii)

1. ASIC refers to six applications submitted by s22(1)(a)(ii) to the Department of Finance (**Finance**) from 28 September 2020 to 9 October 2020 seeking act of grace payments (**Applications**).
2. s22(1)(a)(ii) submitted the Applications on behalf of investors in SFS Global Group Pty Ltd (**SFS Global**) and Suncoast Financial Solutions Pty Ltd (**Suncoast Financial**) listed in in the excel spreadsheet found at **Annexure 1 (Applicants)**.
3. The Applications were made under s65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) in relation to the loss of the Applicants' investments in SFS Global and Suncoast Financial.
4. ASIC notes that the Applications are accompanied by forms signed by the Applicants authorising s22(1)(a)(ii) from s22(1)(a)(ii) to act on behalf of the Applicants as their representative.

SUMMARY OF ASIC'S RESPONSE

5. ASIC recommends that Finance finalises the Applications as they do not disclose any 'special circumstances' within the meaning of s65(1) of the PGPA Act or *Resource Management Guide 401: Requests for*

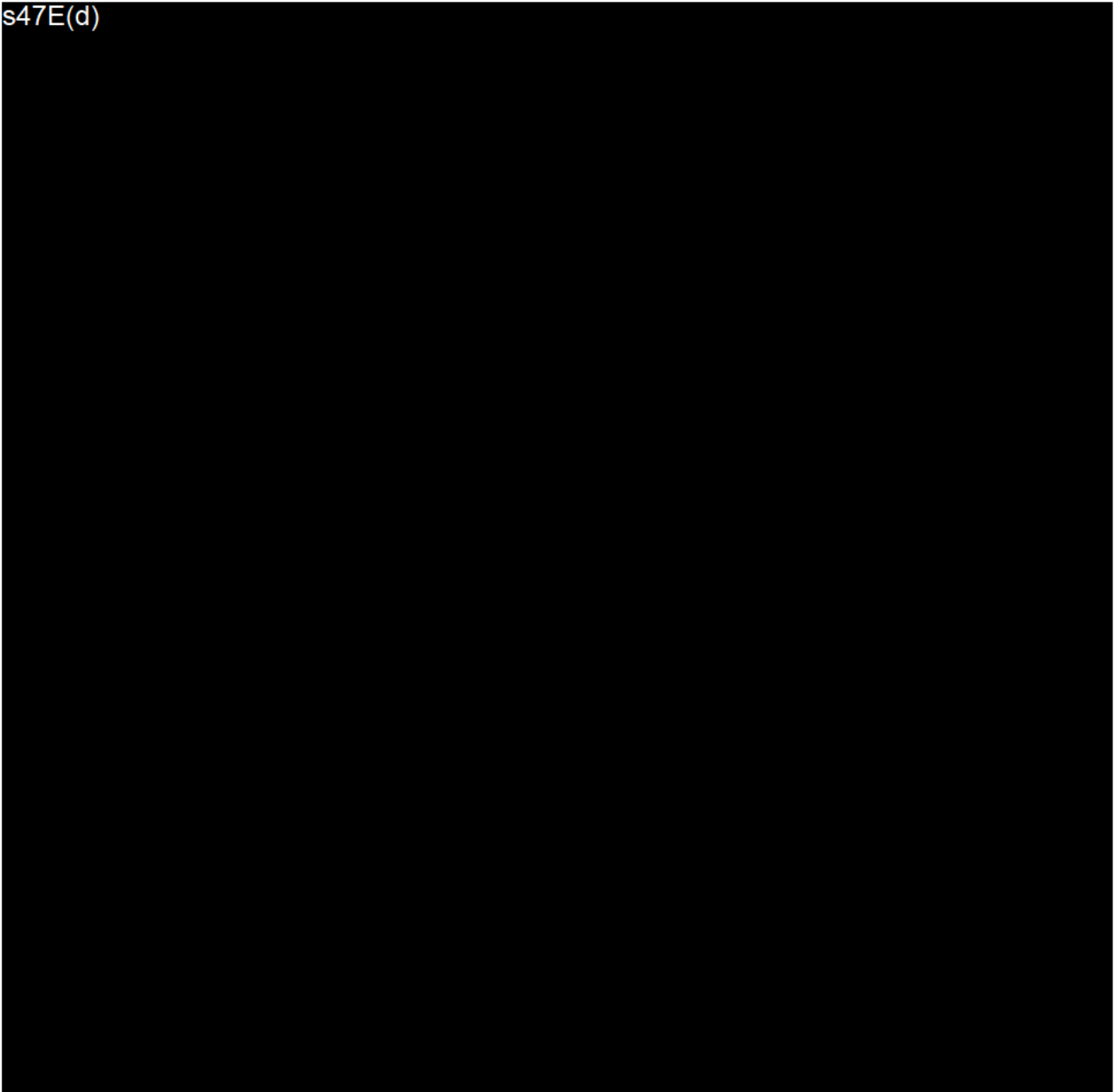
discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013 ([RMG 401](#)).

6. ASIC's steps in relation to SFS Global, Suncoast Financial and their **s47F**, were appropriate and in accordance with its statutory obligations. **ss37(2)(b), 47E(d) and 47F**

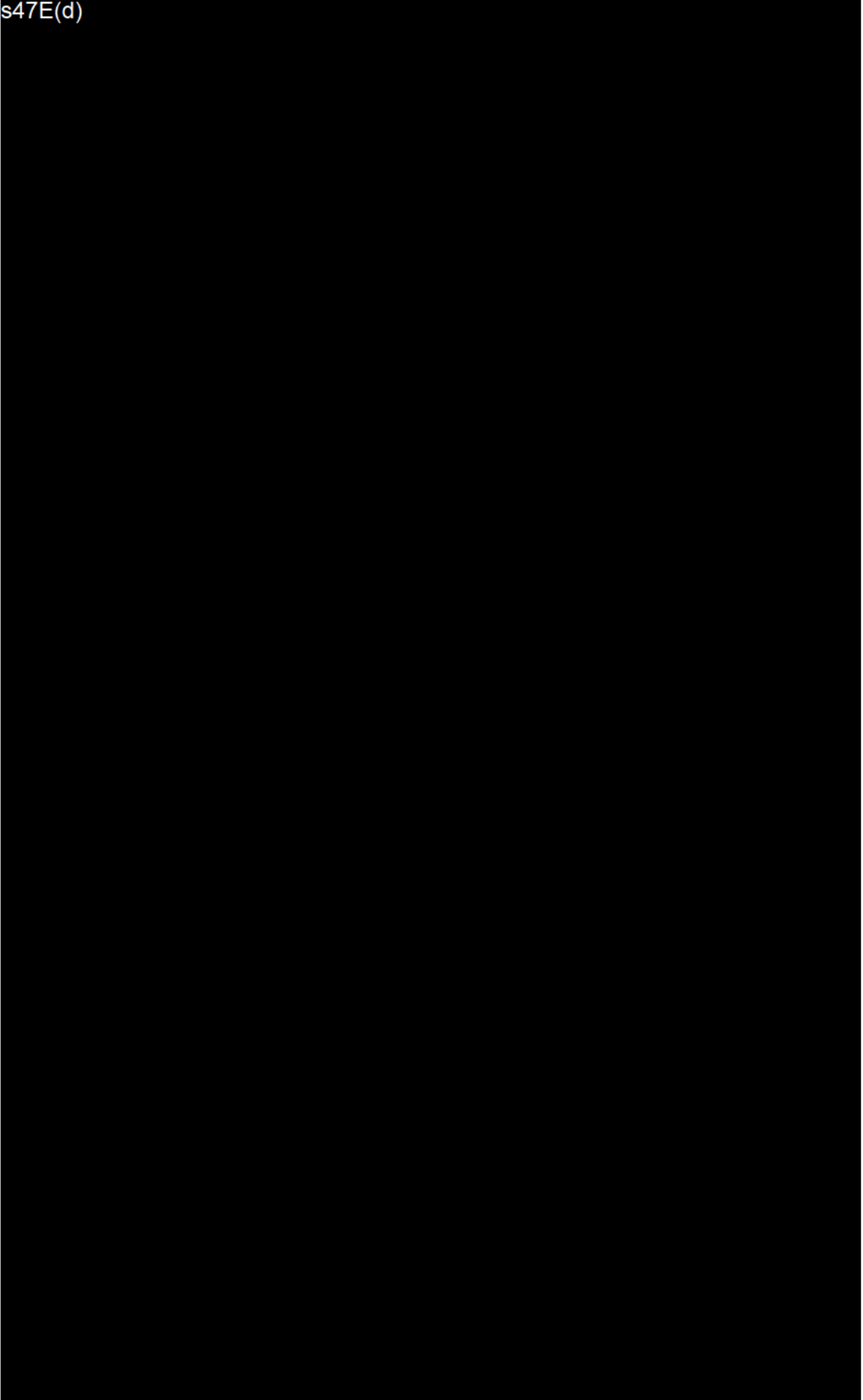
 In any event, the loss of the Applicants' investments in SFS Global and Suncoast Financial cannot be attributed to any acts or omissions by ASIC.

BASIS OF CLAIM

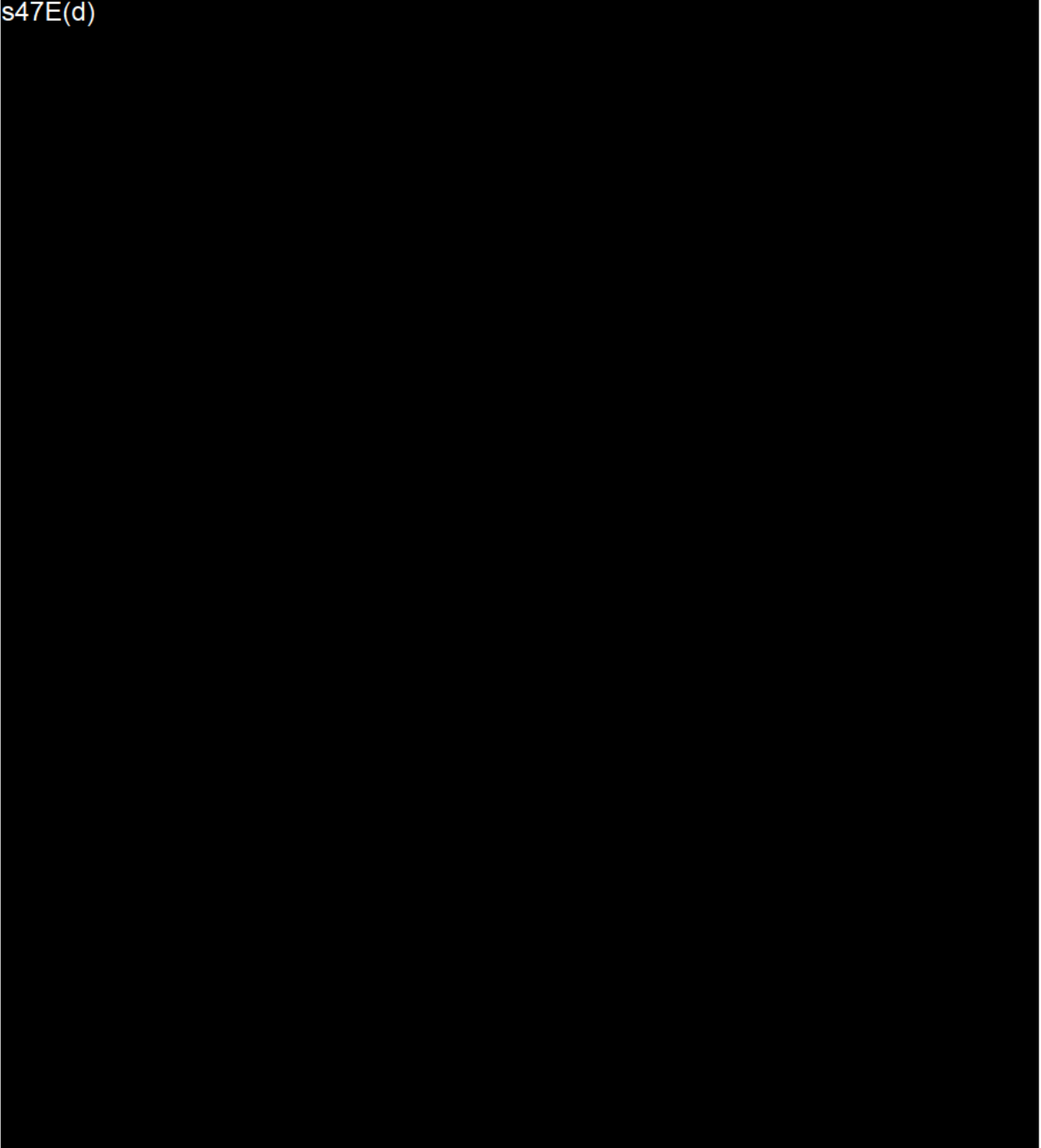
s47E(d)



s47E(d)



s47E(d)



Victim Impact Statements

14. ASIC notes that the Applications are supported by Victim Impact Statements. The **s22(1)(a)(ii)** Report states that the purpose of the Victim Impact Statements is *'to illustrate the severity of the misconduct perpetrated upon'* the Applicants.

15. ASIC is sympathetic to the suffering of the Applicants as a result of the losses of their investments in SFS Global and Suncoast Financial and considered each of the Victim Impact statements in the preparation of this submission in determining whether any special circumstances for the

purposes of s65(1) of the PGPA Act existed. For practical reasons, ASIC will not comment on any circumstances specific to the Applicants as referred to in their Victim Impact Statements.

STATUTORY FRAMEWORK FOR ACT OF GRACE PAYMENTS

16. Subsection 65(1) of the PGPA Act sets out the statutory basis for the Finance Minister to authorise an act of grace payment to an applicant. It states:

*'The Finance Minister may, on behalf of the Commonwealth, authorise, in writing one or more payments to be made to a person if the Finance Minister considers if **appropriate to do so because of special circumstances**.*

Note 1: A payment authorised even though the payment or payments would not be authorised by law or required to meet a legal liability.

Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity's annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.

(emphasis added)

17. The terms 'appropriate' and 'special circumstances' are not defined in the PGPA Act. However, ASIC understands that the act of grace payment scheme is discretionary and that it is intended to promote fairness and equity in certain circumstances.

18. RMG 401 states at paragraph 10 that examples of special circumstances which may make it appropriate to approve an act of grace payment include where:

- a. an act of an NCE has caused an unintended and inequitable result to the individual seeking the payment;
- b. Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the claimant's circumstances; or

- c. the matter is not covered by legislation or a specific policy, but the Commonwealth Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively.

19. RMG 401 also states:

'3. The act of grace mechanism is generally a remedy of last resort and it is not used when there is another viable remedy available to provide redress in the circumstances giving rise to the application.

4. If other avenues exist for a person to receive financial assistance from the Commonwealth (such as existing legislation or schemes), it is recommended that those avenues are investigated before a request is made for an act of grace payment.'

ASIC RESPONSE

20. ASIC understands that the concerns expressed in the **s22(1)(a)(ii)** Report are:

- a. ASIC failed to perform the duties conferred on it by the ASIC Act, by allowing **s22(1)(a)(ii)** to operate an investment scheme while contravening numerous laws and legislative requirements;
- b. ASIC failed to regulate **s22(1)(a)(ii)** and take enforcement action against him, allowing him to operate without membership of an EDR scheme; and
- c. The Applicants are unable to obtain redress elsewhere.

21. In preparing its response, ASIC considered the statutory framework for act of grace payments and RMG 401, as referred to at paragraphs 16 to 19 above.

22. ASIC will address each of these concerns below.

Statutory objectives of ASIC

23. ASIC regulates corporations, managed investment schemes, participants in the financial services industry and people engaged in

credit activities under a number of Commonwealth laws. These laws include the Act and the ASIC Act.

24. Section 1 (2) of the ASIC Act sets out ASIC's objectives. It states that:

'In performing its functions and exercising its powers, ASIC must strive to:

[...]

(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.'

25. It is clear from the statutory language of s1 (2) of the ASIC Act that ASIC generally does not operate under any legal duty to take any particular action in any given set of facts.

ASIC's oversight in regulation and failure to take enforcement action


26. ASIC refers to *Info Sheet 151: ASIC's approach to Enforcement* ([INFO Sheet 151](#)) which sets out how ASIC selects matters for formal investigation.

27. INFO Sheet 151 states that ASIC considers the following issues when deciding whether to take enforcement action:

- a. ASIC's strategic priorities, taking into account matters such as the seriousness of the alleged misconduct;
- b. the regulatory benefits of pursuing the alleged misconduct;
- c. the issues specific to a case, such as the availability of evidence admissible in court and whether the alleged conduct is continuing; and
- d. alternatives to a formal investigation which might address ASIC's concerns more effectively, such as engagement with stakeholders and surveillance.

ASIC action

s37(2)(b) and s47E(d)




29. ASIC refers to *Information Sheet 153: How ASIC deals with reports of misconduct* ([INFO Sheet 153](#)) which states that:

- a. ASIC records every report of misconduct it receives;
- b. ASIC makes preliminary enquiries and conducts initial assessments of reports it receives to determine whether a law relating to corporations or financial services has been broken;
- c. ASIC weighs every report of misconduct it receives against four basic questions:

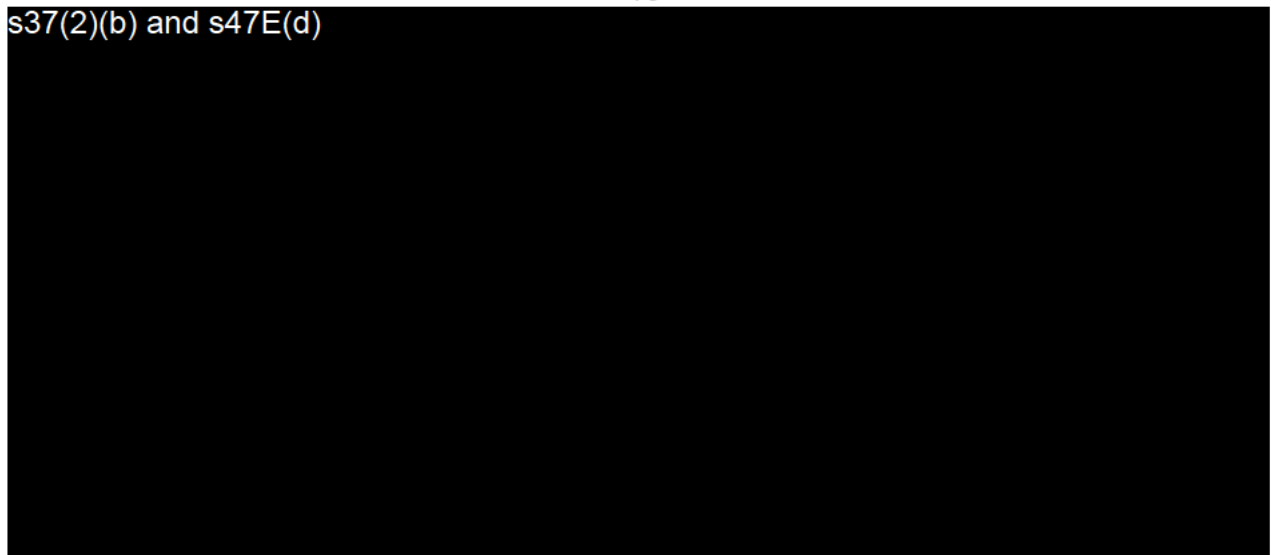
- i. what is the extent of harm or loss;
 - ii. what are the benefits of pursuing the misconduct;
 - iii. how do other issues, such as the type or seriousness of the misconduct and the evidence available, affect the matter; and
 - iv. is there an alternative course of action;
- d. All reports of misconduct provide ASIC with valuable information but not every matter brought to ASIC's attention requires ASIC to take action; and
- e. Under the laws ASIC administers, ASIC has the discretion to decide whether to take further action on reports of misconduct it receives.

30. Consumer reports of misconduct by a person or entity are a valuable source of intelligence for ASIC and assist ASIC to identify potential targets for enforcement action.

s37(2)(b) and s47E(d)



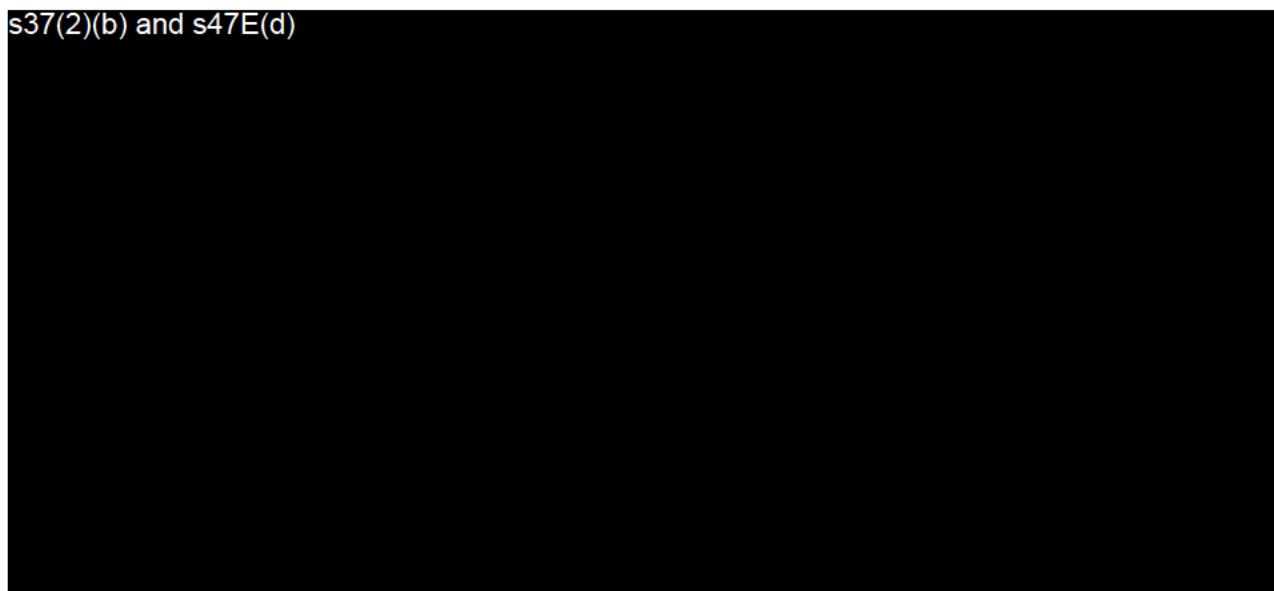
s37(2)(b) and s47E(d)



s47C



s37(2)(b) and s47E(d)



s37(2)(b) and s47E(d)

s47C

Final Report

41. ASIC also notes the submission in the **s22(1)(a)(ii)** Report with respect to comments in the Final Report about ASIC's performance. ASIC's initial response to the Final Report is found on ASIC's website³. ASIC subsequently provided an update on the implementation of recommendations in the Final Report⁴. ASIC makes no further comment about this submission.

Yours faithfully,

Australian Securities and Investments Commission

³ [MR 19-020 Statement from ASIC Chair James Shipton on the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#)

⁴ [MR 10-035 ASIC update on implementation of Royal Commission recommendations Report - ASIC update on implementation of Royal Commission recommendations - February 2019](#)



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4 March 2021

Dear Sir / Madam,

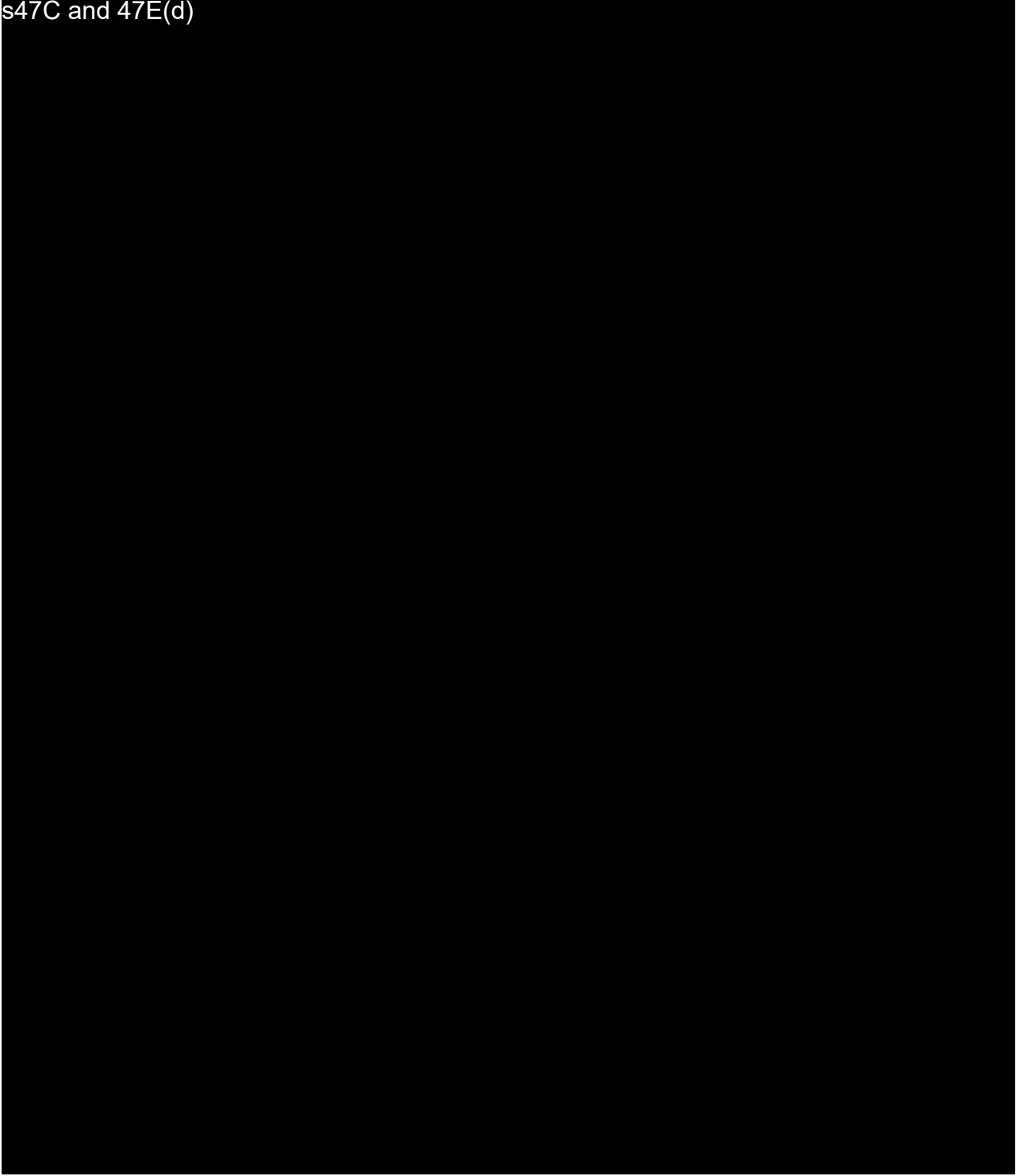
**ACT OF GRACE APPLICATIONS SUBMITTED BY s22(1)(a)(ii) – SFSGLOBAL GROUP
PTY LTD**

1. We refer to your request of 11 December 2020 for additional information concerning applications for act of grace payments lodged by the s22(1)(a)(ii) in relation to s22(1)(a)(ii) and SFSGlobal Group Pty Ltd (**Applications**).
2. In summary, ASIC repeats its submissions of 7 December 2020 and submits that the Applications do not identify any special circumstances. As detailed below, ASIC's conduct in this matter was appropriate and reasonable in light of the information received by ASIC and the enquiries it made at the relevant time.

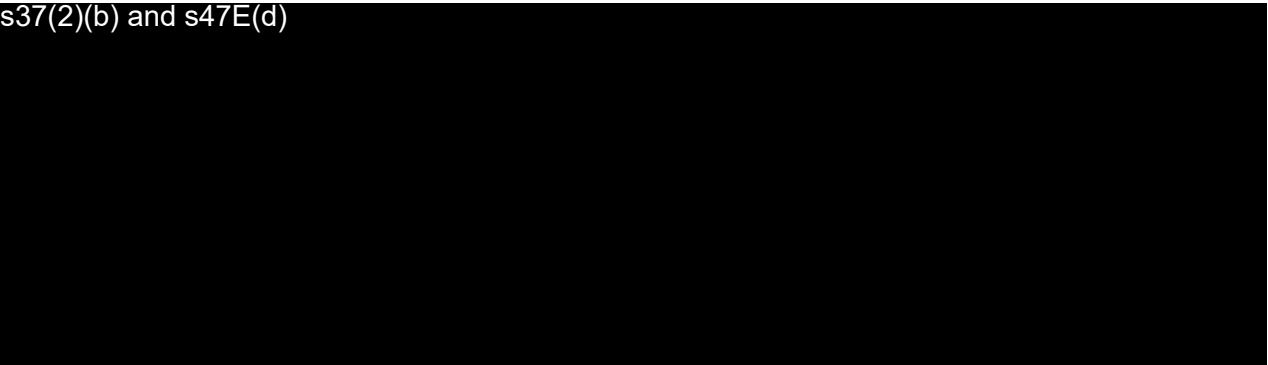
s47C and s47E(d)



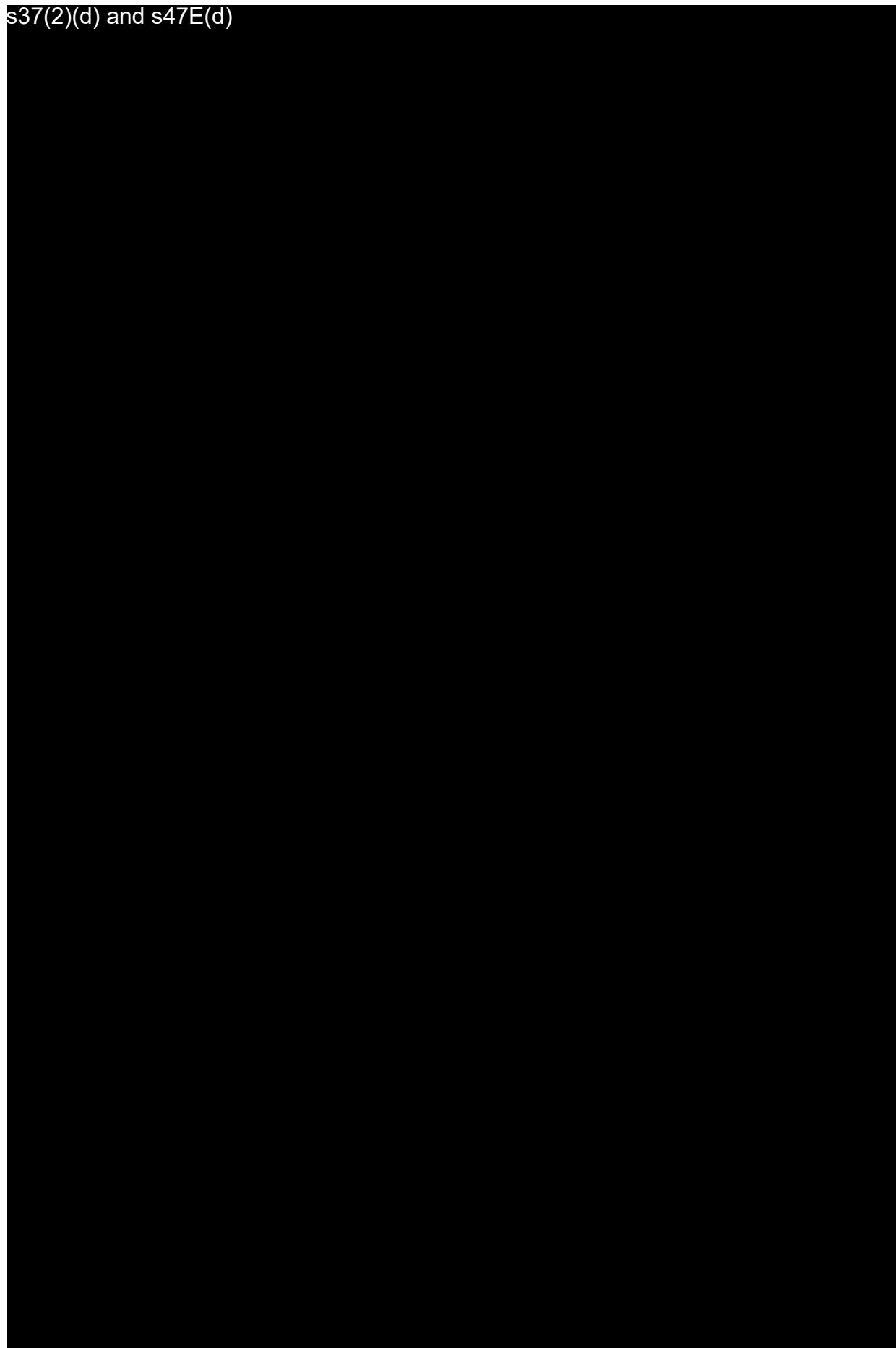
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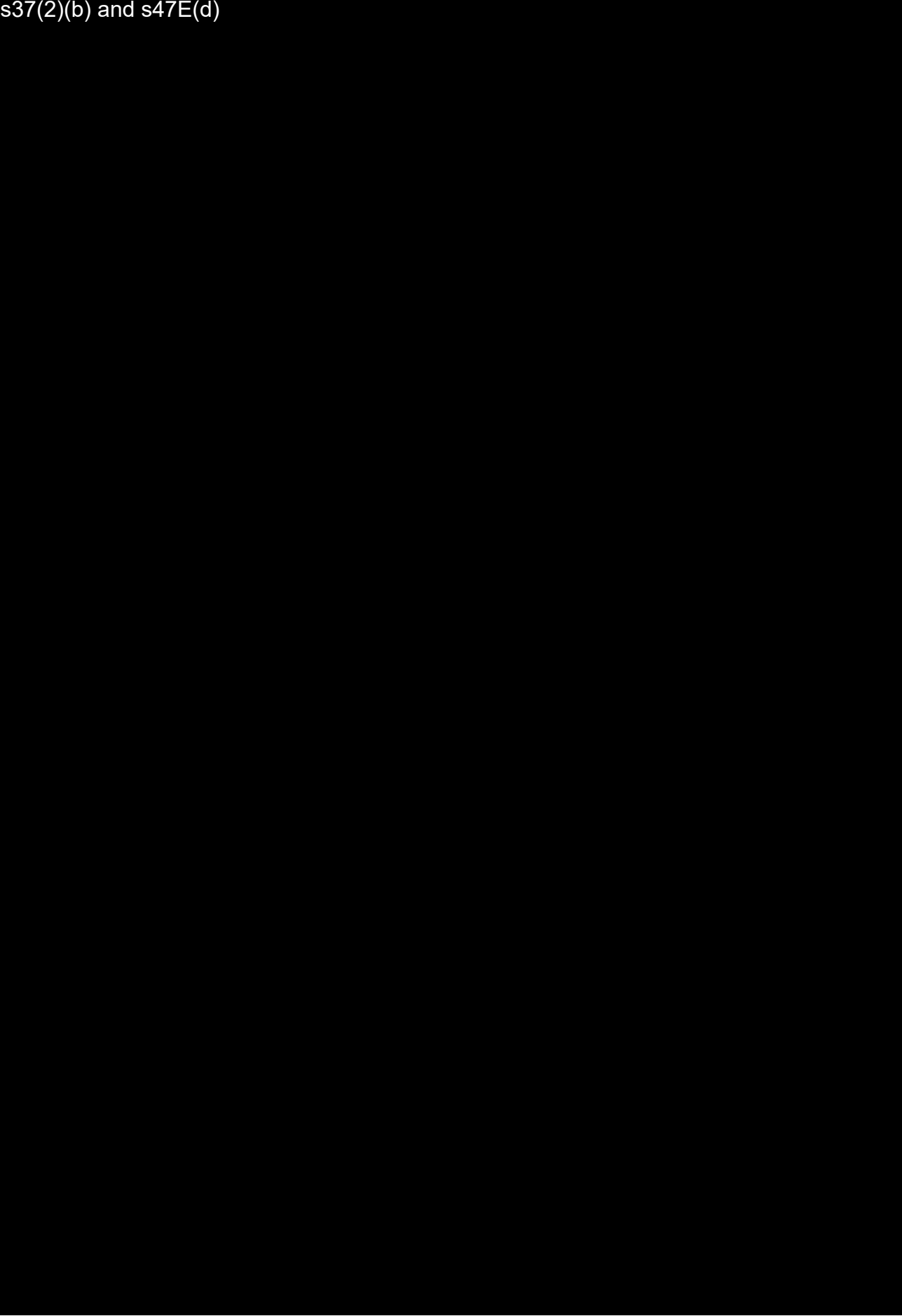
s37(2)(b) and s47E(d)



s37(2)(d) and s47E(d)



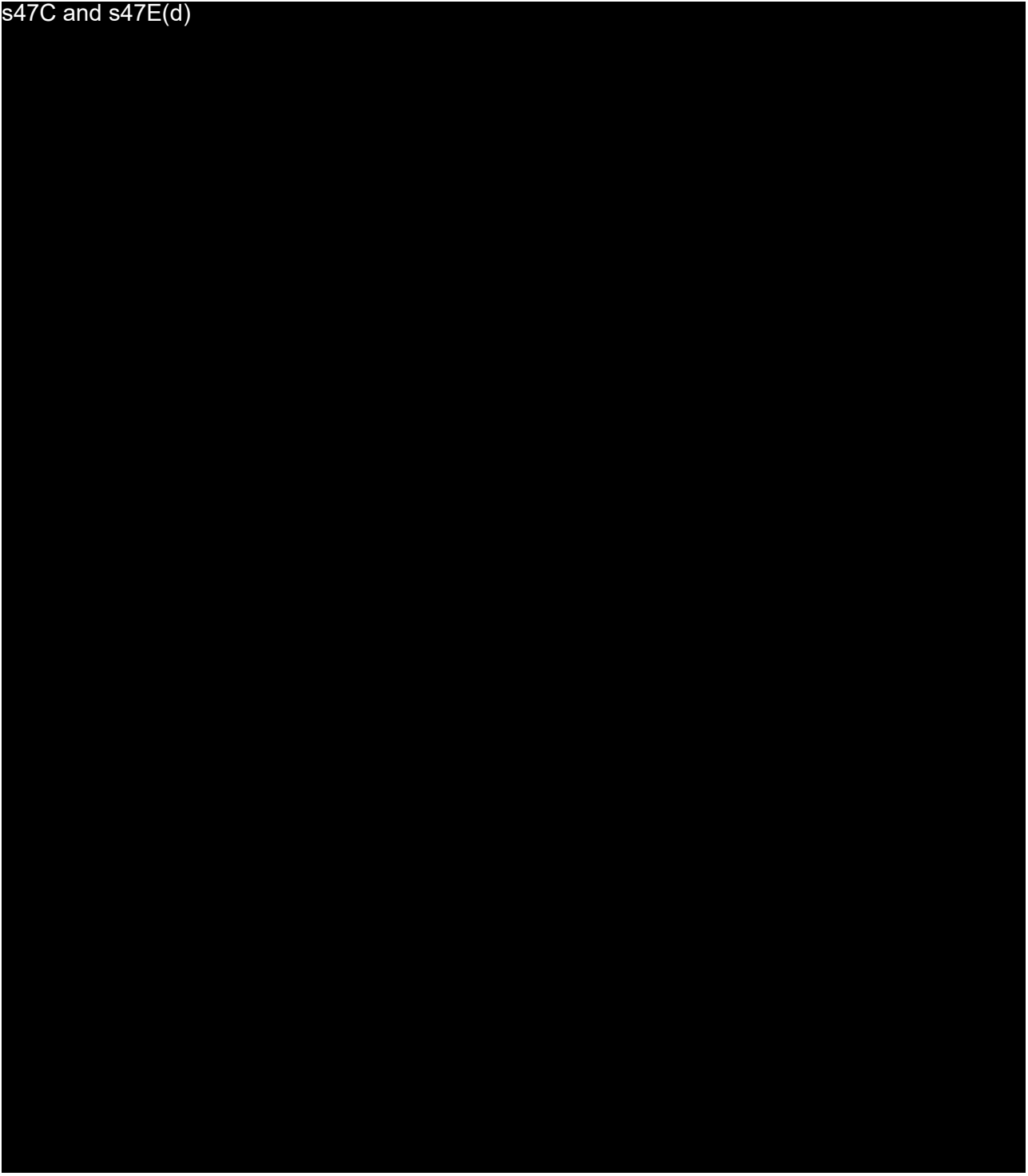
s37(2)(b) and s47E(d)



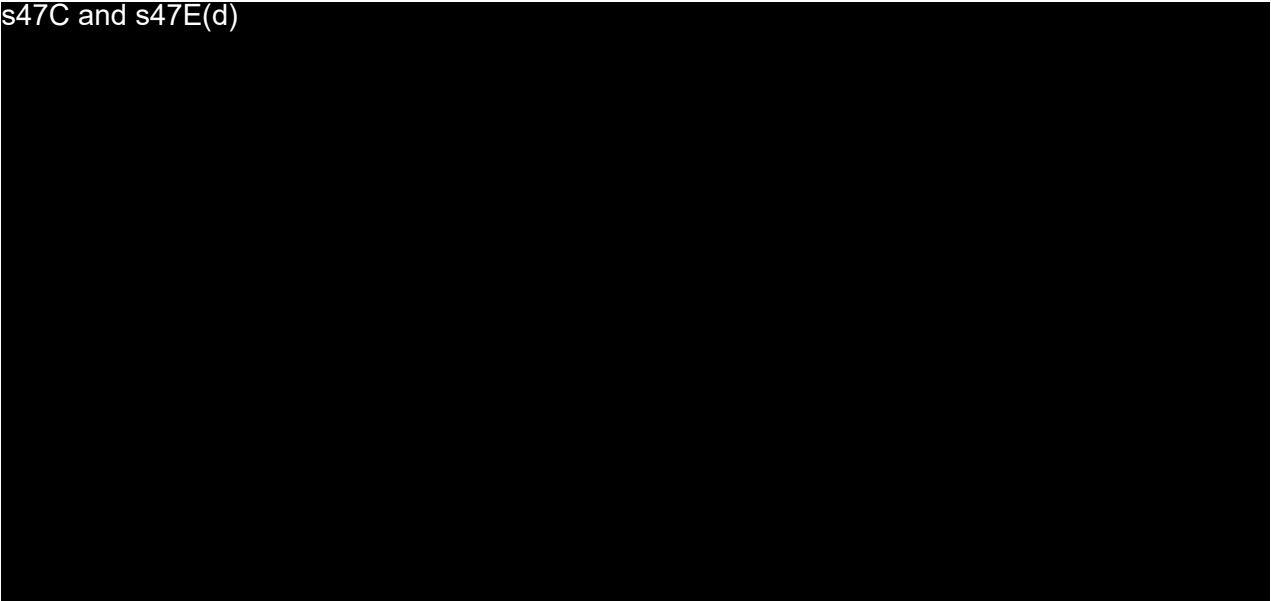
Sheet 151: ASIC's approach to enforcement ([INFO Sheet 151](#)) which sets out how ASIC selects matters for further investigation.

24. As noted in ASIC's response dated 7 December 2020, INFO Sheet 151 states that ASIC considers various issues when deciding whether to take enforcement action.⁸
25. ASIC also refers to Information Sheet 153: How ASIC deals with reports of misconduct ([INFO Sheet 153](#))⁹.

s47C and s47E(d)



s47C and s47E(d)



33. We would be happy to discuss the contents of this submission or provide any further information you consider necessary to resolve the applications.

Yours faithfully,

Australian Securities and Investments Commission

s47E(d)



ANNEXURE A

Relevant Legislation

Section 911A(1) Corporations Act 2001 (Cth)

Need for an Australian financial services licence

- 1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

Section 911B(1) Corporations Act 2001 (Cth)

Providing financial services on behalf of a person who carries on a financial service business

- 1) A person (the **provider**) must only provide a financial service in this jurisdiction on behalf of another person (the **principal**) who carries on a financial services business if one or more of the following paragraphs apply:
 - a) these conditions are satisfied:
 - i) the principal holds an Australian financial services licence covering the provision of the service; and
 - ii) the provider is an employee or director of the principal or of a related body corporate of the principal; and
 - iii) the provider is not an employee or director, or authorised representative, of any other person who carries on a financial services business and who is not a related body corporate of the principal; and
 - iv) the provider is not an employee or director, or authorised representative, of a related body corporate of a person of the kind mentioned in subparagraph (iii);
 - b) these conditions are satisfied:
 - i) the principal holds an Australian financial services licence covering the provision of the service; and
 - ii) the provider is an authorised representative of the principal; and
 - iii) the authorisation covers the provision of the service by the provider; and
 - iv) in the case of a provider who is an employee or director of any other person (the **second principal**) who carries on a financial services business, or of a related body corporate of such a second principal— if the provider provides any financial services in this jurisdiction on behalf of the second principal, the

- provider does so as an authorised representative of the second principal;
- c) these conditions are satisfied:
 - i) the principal holds an Australian financial services licence covering the provision of the service; and
 - ii) the provider is an employee of an authorised representative of the principal; and
 - iii) the authorisation covers the provision of the service by the authorised representative; and
 - iv) the service is the provision of a basic deposit product or of a facility for making non-cash payments (see section 763D) that is related to a basic deposit product, or is the provision of a financial product of a kind prescribed by regulations made for the purposes of this subparagraph;
 - d) the provider holds their own Australian financial services licence covering the provision of the service;

Section 763B Corporations Act 2001 (Cth)

When a person makes a financial investment

For the purposes of this Chapter, a person (the **investor**) makes a financial investment if:

- a) the investor gives money or money's worth (the **contribution**) to another person and any of the following apply:
 - i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
 - ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
 - iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
- b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Note Examples of actions that constitute making a financial investment 1: under this subsection are:

(a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or

(b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and

the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).

Note Examples of actions that do not constitute making a financial investment under this subsection are:

(a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or

(b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

Section 601ED Corporations Act 2001 (Cth)

When a managed investment scheme must be registered

- 1) Subject to subsections (2) and (2A), a managed investment scheme must be registered under section 601EB if:
 - a) it has more than 20 members; or
 - b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investments schemes; or
 - c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.
- 2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.
- 3) ASIC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. ASIC must give written notice of the determination to the operator of each of the schemes.

Section 1012E Corporations Act 2001 (Cth)

Small scale offerings of managed investment and other prescribed financial products (20 issues or sales in 12 months)

- 1) This section applies only to financial products that are:
 - a) managed investment products; or
 - b) financial products of a kind prescribed by regulations

- 2) Personal offers of financial products do not need a Product Disclosure Statement under this Part if:
 - a) all of the financial products are issued by the same person (*the issuer*); and
 - b) none of the offers results in a breach of the 20 purchasers ceiling (see subsections (6) and (7)); and
 - c) none of the offers results in a breach of the \$2 million ceiling (see subsections (6) and (7)).



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Discretionary Payments Team
Risk & Claims Branch
Department of Finance

26 May 2021

By email: sfc@finance.gov.au

Dear Sir / Madam,

**ACT OF GRACE APPLICATION SUBMITTED BY s22(1)(a)(ii) ON BEHALF OF
INVESTORS IN SFSGLOBAL PTY LTD**

1. ASIC refers to applications for act of grace payments submitted to the Department of Finance (**Finance**) by s22(1)(a)(ii) (**Applications**) relating to SFSGlobal Pty Ltd (**SFSGlobal**).
2. ASIC notes the following correspondence:
 - a. ASIC's submission dated 7 December 2020 in response to the Applications (**December Submission**);
 - b. s22(1)(a)(ii) Letter dated 3 February 2021 (**February s22(1)(a)(ii) Letter**);
 - c. ASIC's further submission in response to questions from Finance dated 4 March 2021 (**4 March Submission**) which was supported by a chronology;
 - d. ASIC's further submission dated 18 March 2021 in response to the February s22(1)(a)(ii) Letter (**18 March Submission**); and
 - e. s22(1)(a)(ii) Letter dated 22 April 2021 (**April s22(1)(a)(ii) Letter**).
3. The purpose of this letter is for ASIC to respond to the April s22(1)(a)(ii) Letter.

ASIC'S RESPONSE

4. ASIC thanks Finance for the opportunity to comment on the April s22(1)(a)(ii) Letter and submits that:

- a. the matters raised in the April **s22(1)(a)(ii)** Letter have been addressed by ASIC in its previous submissions; and
 - b. the April **s22(1)(a)(ii)** Letter does not raise any new information which supports the existence of special circumstances which would warrant an act of grace payment under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth).
5. ASIC otherwise makes no further comments in response to the April **s22(1)(a)(ii)** Letter.

Yours faithfully,

s22(1)(a)(ii)

Senior Lawyer, Chief Legal Office

Australian Securities and Investments Commission



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Investments Commission

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Discretionary Payments Team
Risk & Claims Branch
Department of Finance

25 November 2020

Dear Sir/Madam

ACT OF GRACE PAYMENT APPLICATIONS SUBMITTED TO APRA BY s22(1)(a)(ii)

I refer to a letter from s22(1)(a)(ii) dated October 2020 (**Letter**) responding to submissions from APRA with respect to act of grace applications submitted by s22(1)(a)(ii) on behalf of investors in schemes managed by Trio Capital Limited (**Trio Capital**).

ASIC notes an additional point raised in the Letter that the s22(1)(a)(ii) believes should qualify as 'special circumstances' for the purposes of s65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**). Trio Capital, as the responsible entity of the Astarra Strategic Fund (**ASF**), held an Australian financial services licence (**AFSL**). s22(1)(a)(ii) asserts that in 2009, when Trio Capital collapsed, there was no legislative requirement for Trio Capital, as an AFSL holder, to be a member of an external dispute resolution (**EDR**) scheme.

ASIC understands that Trio Capital was a member of the Financial Industry Complaints Service from early 2004 until its membership was transferred to the Financial Ombudsman Service (**FOS**) in July 2008 as part of a scheme merger. Trio Capital was a member of FOS until June 2010.

ASIC notes that Trio Capital's membership of FOS in 2009 was in accordance with its obligation as an AFSL holder under ss 912A(1)(g) and 912(2)(b), as these provisions existed in 2009.

ASIC makes no further comment about the concerns raised by the s22(1)(a)(ii) in the Letter.

Yours faithfully,

Australian Securities and Investments Commission



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Discretionary Payment Team
Risk & Claims Branch
Department of Finance

13 July 2021

Dear Sir / Madam,

**ACT OF GRACE PAYMENT APPLICATIONS SUBMITTED BY s22(1)(a)(ii) ON BEHALF
OF INVESTORS IN TRIO CAPITAL LIMITED**

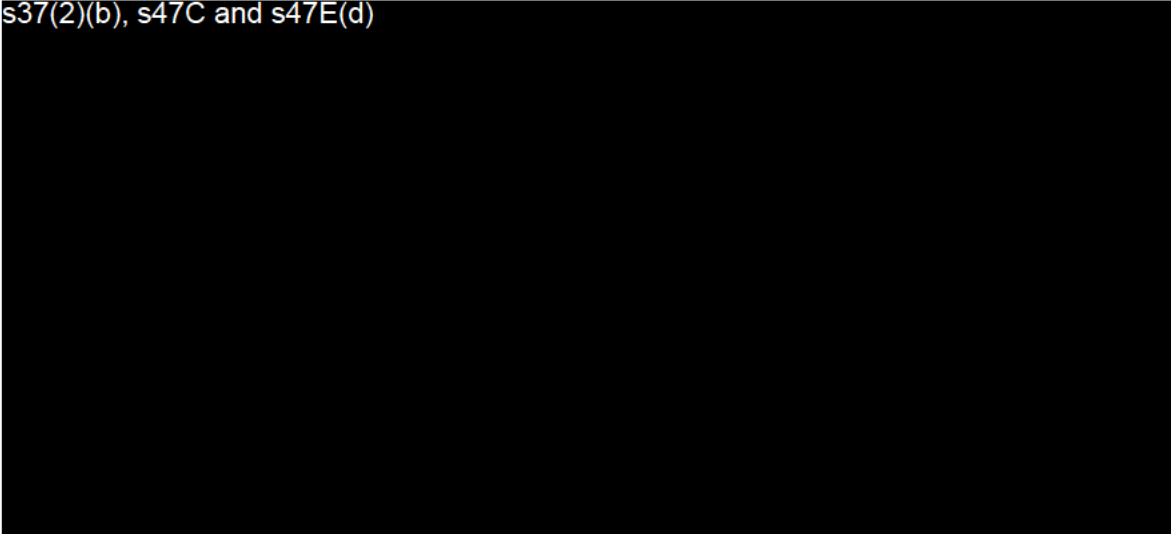
1. ASIC refers to the applications submitted by the s22(1)(a)(ii) to the Department of Finance (**Finance**) on behalf of investors (**Applicants**) in Trio Capital Limited (**Trio Capital**) (**Applications**).
2. The Applications are made under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) and seek act of grace payments in respect of losses incurred by the Applicants, as a result of alleged 'defective administration and conduct' by the Australian Prudential Regulation Authority (**APRA**).
3. The Applications are accompanied by forms signed by the Applicants authorising s22(1)(a)(ii) of s22(1)(a)(ii) to act on behalf of each Applicant as their representative. The Applications are supported by a report prepared by s22(1)(a)(ii) on behalf of each of the Applicants titled 'Application for an Act of Grace Payment' (s22(1)(a)(ii) **Submission**).
4. ASIC has reviewed APRA's responses to the Applications dated 30 July 2020 (**APRA Submission**) and 12 January 2021 (**APRA Further Submission**).
5. The APRA Submission provides at paragraphs 5 to 6 a summary of the legal basis for act of grace payments. ASIC considers that this is an accurate summary of the statutory framework.
6. The purpose of this submission is to respond to Finance's request for a response from ASIC to any concerns or matters raised by s22(1)(a)(ii) in the Applications that ASIC considers it is appropriate for it to address.

ASIC RESPONSE

7. There are only limited references to ASIC in the s22(1)(a)(ii) Submission, and no specific contentions of defective administration. The primary purpose

of this submission is therefore to assist Finance by providing contextual information that ASIC considers is relevant to assessing the Applications.

s37(2)(b), s47C and s47E(d)



9. For the reasons set out in this submission, ASIC considers its actions in relation to Trio Capital were appropriate.

Role of ASIC and its regulatory objectives

10. ASIC regulates corporations, managed investment schemes, participants in the financial services industry and people who engage in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**).
11. ASIC was established by section 7 of the *Australian Securities and Investments Commission Act 1989* (Cth). The objectives of ASIC, as set out in subsection 1(2) of the ASIC Act, relevantly include that ASIC 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it': see subsection 1(2)(g).
12. It is clear from the terms of subsection 1(2) of the ASIC Act that it does not impose a legal duty, obligation or requirement on ASIC to take any particular action on any given set of facts. ASIC must strive to achieve its objectives but is not under an obligation to anybody to take any particular action.¹
13. ASIC's *Information Sheet 151: ASIC's approach to enforcement* ([INFO Sheet 151](#)) sets out how ASIC selects matters for formal investigation. INFO Sheet 151 states that ASIC considers the following issues when deciding whether to take enforcement action:
 - a. ASIC's strategic priorities, taking into account matters such as the seriousness of the alleged misconduct;

¹ *Bhagat v Global Custodians Ltd* [2000] NSWSC 321 at [8] and [12].

- b. the regulatory benefits of pursuing the alleged misconduct;
 - c. the issues specific to a case, such as the availability of evidence admissible in court and whether the alleged conduct is continuing; and
 - d. alternatives to a formal investigation which might address ASIC's concerns more effectively, such as engagement with stakeholders and surveillance.
14. ASIC's statutory obligations mean that ASIC is obliged to take such enforcement action as it decides is best suited to the evidence available to it at the relevant times. As stated in INFO Sheet 151, ASIC:

' ... can pursue a variety of enforcement remedies, dependent on the seriousness and consequences of the misconduct. Some remedies involve relatively minor consequences while others will be serious, such as imprisonment and high monetary penalties. We will pursue the enforcement remedies best suited to the circumstances of the case and what we want, and are able, to achieve.

We can take enforcement action designed to punish wrongdoers, protect investors, preserve assets, correct disclosures and compensate people. We can also try to resolve matters through negotiation or issuing infringement notices.'

ASIC's actions in relation to Trio Capital

15. As noted in the **s22(1)(a)(ii)** Submission, ASIC took action against current and former directors, auditors and financial advisers of Trio Capital. The results of ASIC's actions are summarised at **Annexure A**.
16. The **s22(1)(a)(ii)** Submission refers to criticism by Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) about the timing of the commencement of ASIC's investigation into Trio Capital in October 2009, and a lack of communication between APRA and ASIC.
17. Detailed consideration of the chronology of events regarding Trio Capital, and an assessment of APRA and ASIC's conduct, is contained in the Treasury report *Review of the Trio Capital Fraud and Assessment of the Regulatory Framework* (April 2013) ([Treasury report](#)) and the *Report by the Parliamentary Joint Committee on Corporations and Financial Services; Inquiry into the collapse of Trio Capital* (May 2012) ([PJC report](#)). As stated in these reports:
- a. Between 2003 and mid-2009, ASIC investigated Trio Capital or related parties for various minor regulatory breaches (including inadequate disclosure of commissions, Trio Capital's marketing materials and late lodgement of compliance plan audits). These

issues were subsequently remedied and did not point to fraud within any of the funds managed by Trio Capital.²

- b. In mid-2009, ASIC commenced surveillance work in the hedge fund sector in response to the Bernie Madoff case in the United States of America.³ In the course of this work, ASIC identified some potential issues with Trio Capital and the Astarra Strategic Fund (**ASF**) (for which Trio Capital was the Responsible Entity).⁴ The ASF was one of 100 funds (from a total of approximately 650 funds) identified in mid-2009 for further investigation.⁵
- c. In September 2009 ASIC received a formal complaint from John Hempton about the ASF.⁶ At that time, ASIC had already identified ASF as a fund of high risk requiring further enquiry.⁷ ASIC was then of the view that it had sufficient credible evidence to conduct a more intensive investigation of the ASF, and acted promptly in doing so. As described by the Treasury report, '*[t]he additional information combined with ASIC's own internal analysis, accelerated ASIC's concerns*'.⁸ ASIC communicated this information to APRA in late September 2009.⁹
- d. On 2 October 2009, ASIC commenced formal investigations. On 16 October 2009, ASIC issued an interim stop-order, preventing offers, issuances, sales or transfers of interests in the ASF.¹⁰

s47C



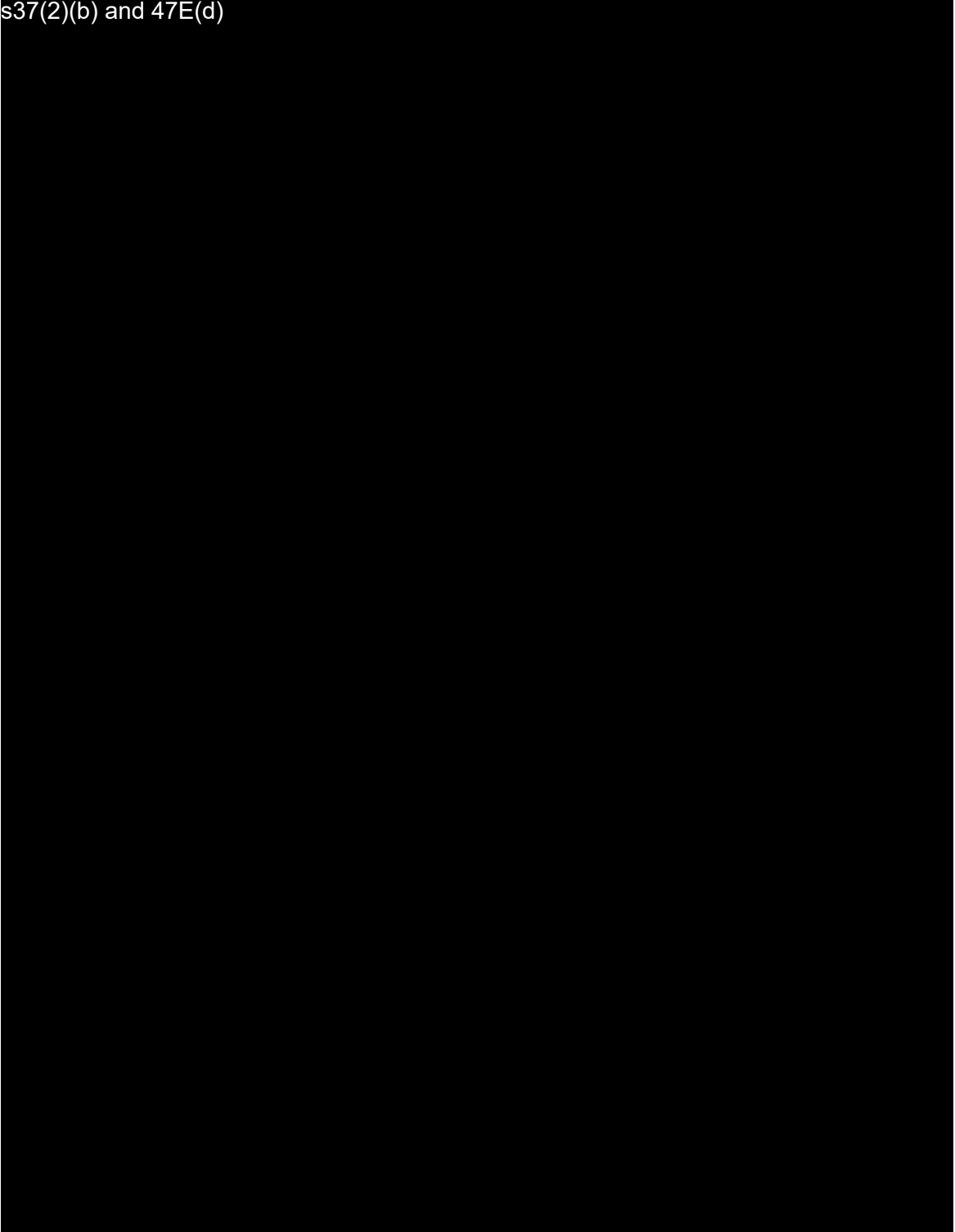
2 Treasury report p 11.
3 PJC report, p 76.
4 PJC report, p 76.
5 Treasury report p 12.
6 PJC report pp 109, 125; p xx (20) of Executive Summary of PJC report
7 PJC report, p 76.
8 Treasury report p 13.
9 Treasury report p 13.
10 Treasury report p 13.
11 Treasury report, p 5.
12 Treasury report, p 15.
13 PJC Report 4.68, 9.16.

s47C

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s37(2)(b) and s47E(d)

s37(2)(b) and 47E(d)



35. The grant of an AFSL to Trio Capital, including the appointment of Shawn Richard as a responsible officer, was considered in detail in the PJC report.¹⁷ In particular, consideration was given to submissions made by

¹⁴ *Corporations Act 2001* (Cth) ss 1410, 1430, 1431, 1433 (as at December 2003).

¹⁵ ASIC, *Policy Statement 164 Licensing: Organisational capacities* (issued 28 November 2001; updated on 8 November 2002) pp 24-33 (**Annexure B**); *Corporations Act 2001* (Cth) s 912A(1) (as at 18 August 2004).

¹⁶ Refer to page 15 of PS164

¹⁷ PJC report, pp 79-83, 116-118, 127-128,

ASIC about the adequacy of licensing arrangements at the time, and the regulatory arrangements for entities regulated by both ASIC and APRA.

36. As acknowledged in the PJC report, ASIC's submissions to the PJC emphasised that there were limitations provided by the AFSL regime at the relevant time, which set the threshold for obtaining an AFSL relatively low and the threshold for cancelling an AFSL relatively high, and focused on the licensed entity rather than the directors, employees or other representatives.¹⁸
37. The PJC report acknowledged the difficulties with the licensing system in place at the time,¹⁹ but did not make any criticism of ASIC regarding the grant of an AFSL to Trio Capital. Relevant provisions of the Corporations Act were subsequently amended to give ASIC greater discretion in granting and cancelling AFSLs. However, as stated by ASIC in its submission to the inquiry, while the amendments may have enabled ASIC to act at an earlier stage had they been enacted at that time, they would not necessarily have prevented investor losses.²⁰

Conclusion

38. While ASIC acknowledges the difficult circumstances described in the statements accompanying the Applications, and the substantial impact that the loss of their investments has had on the Applicants, ASIC considers that the Applicants' loss was the regrettable result of the fraudulent conduct by Trio Capital. ASIC also notes and endorses the comments made in the APRA submissions concerning the role of a regulator more generally.
39. ASIC would be happy to provide any further information which may assist Finance in its consideration of these applications.

Yours faithfully,

s22(1)(a)(ii)

Senior Lawyer

Australian Securities and Investments Commission

Annexure A: Overview of ASIC's Enforcement Outcomes

Annexure B: ASIC, Policy Statement 164 Licensing: Organisational capacities (issued 28 November 2001; updated on 8 November 2002)

¹⁸ PJC report pp 79-80.

¹⁹ PJC report p 128.

²⁰ PJC report p 81.

Annexure A

Overview of ASIC's Enforcement Outcomes

ASIC's enforcement outcomes include:

- Shawn Richard, former investment manager of ASF, being sentenced to 3 years and 9 months jail with a minimum of 2 years and 6 months. ASF was one of the managed investment schemes operated by Trio. Mr Richard pleaded guilty to two offences involving dishonest conduct in carrying on a financial services business. Mr Richard also admitted to making a false statement about a financial product.
- The sentencing of Tony Maher (changed his name from Paul Gresham) to 25 months jail with a non-parole period of 15 months. Mr Maher was the investment manager of ARP, a managed investment scheme operated by Trio. Mr Maher pleaded guilty to 20 charges of making false or misleading statements to obtain a financial advantage.
- The permanent banning of Eugene Liu, ASF's chief investment strategist, from providing financial services.
- Enforceable Undertakings with five former Trio directors by which they agreed not to be involved in the financial services industry or manage a company for between two and 15 years. The former directors are Natasha Beck, Keith Finkelde, David O'Bryen, David Andrews and Rex Phillpott.
- An Enforceable Undertaking with planning firm Kilara Financial Solutions to address compliance issues.
- An Enforceable Undertaking with Tony Maher to never provide financial services or manage a company.
- Suspending the licence of financial planners Seagrims, and subsequent cancellation of this licence at the company's request on 19 September 2011.
- Banning Seagrims directors Peter Seagrim and Anne-Marie Seagrim for three years. Their bans were subsequently reduced to 6 months by the Administrative Appeals Tribunal (**AAT**) on review.
- An Enforceable undertaking with former ASF auditor Timothy Frazer, that he would not act as a registered company auditor for three years.
- Banning Ross Tarrant from providing financial services for 7 years, a ban that was subsequently upheld by the AAT. Mr Tarrant's appeal to the Full Court of the Federal Court was unsuccessful.
- Permanent banning of Jeffrey Revell-Reade from providing financial services in Australia.

Some of the Enforcement Outcomes in Detail

Richard

- Shawn Richard served his minimum jail term of two and a half years and was released from prison on 20 January 2014.
- This sentence was imposed after Mr Richard pleaded guilty to 2 offences involving dishonest conduct in carrying on a financial services business. Mr Richard also admitted to making a false statement about a financial product.
- Mr Richard entered into an Enforceable Undertaking with ASIC on 3 December 2010 and has permanently undertaken not to participate in the Australian financial services industry.

Maher

- On 27 June 2014 Tony Maher, the former director of the investment manager of ARP was sentenced in the District Court of New South Wales to a total of 25 months imprisonment with 15 months to be served before he is eligible for parole.
- This sentence was imposed after Mr Maher pleaded guilty to 20 criminal charges including publishing false statements for the purpose of obtaining a financial advantage.
- In February 2012 ASIC accepted an Enforceable Undertaking from Maher that he would not ever again work in the Australian financial services industry or manage a corporation.

Liu

- On March 2013, an ASIC delegate permanently banned Eugene Liu, the former Chief Investment Strategist for ASF from providing financial services.
- Mr Liu sought a review of the decision to ban him in the AAT. On 31 October 2014 the AAT affirmed the decision of ASIC's delegate to ban him permanently.

Tarrant

- Ross Tarrant was the sole director and authorised representative of a financial services business operating in Wollongong which invested more than \$23 million of its clients' funds in the ASF.
- On 8 January 2014, the AAT affirmed ASIC's decision to ban Mr Tarrant from providing financial services for 7 years.
- Mr Tarrant was banned on the basis that he failed to disclose in statements of advice that he was receiving a marketing allowance from Shawn Richard; and failing to have a reasonable basis for the advice he provided to 8 clients.
- Mr Tarrant then appealed the AAT's decision to the Full Court of the Federal Court.
- The Full Court handed down its decision on 6 February 2015. The Full Court dismissed Mr Tarrant's appeal as they did not identify any error of law by the AAT and the 7 year ban stands.

Revell-Reade

- On 5 May 2015, ASIC served an order on Jeffrey Revell-Reade banning him permanently from providing financial services in Australia.
- Revell-Reade is currently serving a 9 and half year sentence in the UK for his involvement in a conspiracy to defraud UK investors through the mis-selling of shares through boiler rooms operating from Spain.
- Revell-Reade is an Australian citizen and is likely to be deported to Australia on his release (either at the end of his sentence or on parole).

- Revell-Reade was banned from providing financial services in Australia on the basis of his conviction in the UK.



ASIC

Australian Securities & Investments Commission

[PS 164]

Licensing: Organisational capacities

Chapter 7 — Financial services and markets

Issued 28/11/2001

Updated 8/11/2002

What this policy statement is about

[PS 164.1] This policy statement outlines:

- A** ASIC's overall approach to the obligations of an Australian financial services licensee (licensee)
see [PS 164.4]–[PS 164.10]
- B** what ASIC generally expects of licensees and Australian financial services (AFS) licence applicants to meet those obligations
see [PS 164.11]–[PS 164.42]
- C** guidance on a licensee's compliance measures in relation to all of the licensee obligations
see [PS 164.43]–[PS 164.56]
- D** guidance on a licensee's procedures for monitoring, supervision and training of representatives (s912A(1)(c) and (f))
see [PS 164.57]–[PS 164.71]
- E** what organisational expertise we expect of a licensee (s912A(1)(e))
see [PS 164.72]–[PS 164.104C]

- F** guidance on a licensee's systems for managing risk (s912A(1)(h))
see [PS 164.105]–[PS 164.119]
- G** what non-financial resources a licensee should have (s912A(1)(d))
see [PS 164.120]–[PS 164.138]

Note: Sections F and G do not apply to a licensee that is a body regulated by APRA.

[PS 164.2] To provide further guidance, we also include a Schedule showing some typical issues a licensee should think about when designing its measures, arrangements, procedures and processes to comply with its obligations.

Important related publications

[PS 164.3] This policy statement should be read together with ASIC's other publications released as part of the framework to implement the FSR Act. These publications include guidance about the scope of the licensing regime, more details about our policy on specific licensing obligations (eg dispute resolution procedures), and how to apply for an AFS licence. The most relevant publications are:

- (a) *Licensing: The scope of the licensing regime: Financial product advice and dealing — An ASIC guide* (November 2001, updated November 2002);
- (b) Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146];
- (c) Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165];
- (d) Policy Statement 166 *Licensing: Financial requirements* [PS 166] (December 2001, updated November 2002);
- (e) Policy Statement 167 *Licensing: Discretionary powers and transition* [PS 167] (November 2001, updated November 2002);
- (f) *Licensing and disclosure: Making the transition to the FSR regime - An ASIC guide* (October 2001, updated November 2002);
- (g) *Australian Financial Services (AFS) Licensing Kit* (Version 2, October 2002);
- (h) *Making the transition to an AFS licence: pre-FSR licences and insurance broker registrations – An ASIC Guide* (April 2002); and
- (i) Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209].

Important note:

This policy statement was first published on 28 November 2001. It has been amended to reflect regulations made before 1 November 2002, and to provide some clarifications.

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A Our overall approach in this policy statement

[PS 164.4] We have issued this policy statement to help licensees and AFS licence applicants:

- (a) develop appropriate arrangements (ie measures, processes and procedures) to meet their ongoing requirement to comply with the licensee obligations;

Note: See [PS 164.16A] and [PS 164.16B] for a description of what we mean by “measures, processes and procedures”.

- (b) understand what we look for when we assess an application for an AFS licence; and
- (c) understand what we look for when we assess whether licensees are complying with their licensee obligations.

[PS 164.5] In our view, the primary goals of all the licensee obligations are to promote:

- (a) consumer confidence in using financial services; and
- (b) the provision of efficient, honest and fair financial services by all licensees and their representatives.

[PS 164.6] We are responsible for implementing the *Corporations Act 2001* (Corporations Act) (as amended by the *Financial Services Reform Act 2001* (FSR Act)) so as to promote these important consumer protection and other regulatory outcomes. In administering the law, we will have them continually in mind.

[PS 164.7] At the same time, we recognise that the licensing regime introduced by the FSR Act is designed to work in a flexible way. It makes licensees responsible for complying with the obligations that the legislation places on them as licensees. This means it is up to the licensee to decide on the way it will meet its obligations under the Corporations Act. This also means it will be up to an AFS licence applicant to demonstrate at the time of applying for a licence that it has the capacity to meet and comply with the licensee obligations.

[PS 164.8] What an individual licensee needs to do to comply with the law will generally vary according to the nature, scale, and complexity of the business the licensee carries on or will carry on. In many cases, there may be a number of possible ways for licensees to comply with what the law requires. In the way we administer the legislation, we will seek as far as possible to retain this flexible character.

Note: See [PS 164.17] and [PS 164.18] for a general description of what we mean by “nature, scale and complexity”.

[PS 164.9] We do not think we can or should give comprehensive guidance on what a licensee must put in place to satisfy its obligations. The licensee is best placed to determine what will work for them. We aim to assist licensees and applicants by providing guidance on what we consider are the processes they should go through to determine what is appropriate for them. We also aim to provide certainty by indicating how we would expect them to demonstrate to us that they have put in place appropriate measures and gone through the processes to achieve compliance. This includes providing guidance about how we will satisfy ourselves that an applicant for an AFS licence can and will comply, if we grant a licence. This guidance:

- (a) in some cases — describes our broad expectations on what a licensee needs to put in place to comply with the licensee obligations; and
- (b) in most cases — outlines issues we consider a licensee should normally take into account when it determines what to put in place to comply with the licensee obligations.

[PS 164.10] In formulating the guidance contained in this policy statement, we have drawn on our considerable experience as a regulator of financial service providers and our knowledge of regulatory regimes in other countries. This experience is especially reflected in the questions we suggest licensees might consider when they are thinking about how to ensure they comply with their obligations.

B Our general approach to licensees' obligations

[PS 164.11] In Sections C to G of this policy statement, we deal with some specific licensee obligations and how we think they can be met. We consider that the law places particular emphasis on these obligations and that they are particularly important in making sure a licensee complies with all its obligations. In addition, if applicants for AFS licences (as well as existing licensees) understand our thinking on these obligations, it will help us to deal with licence applications efficiently and cost-effectively for applicants and for us.

[PS 164.12] In this section, we cover some more general issues that are likely to be important in licensees' thinking about their obligations under the law. These are:

- (a) licensees' responsibility for compliance;
- (b) industry standards and codes;
- (c) outsourcing;
- (d) licensees also regulated by the Australian Prudential Regulation Authority (APRA); and
- (e) the licence application process.

Licensees' responsibility for compliance

[PS 164.13] Under the law, a licensee is responsible for ensuring that it complies on an ongoing basis with its obligations as a licensee, and for ensuring its representatives comply. A licensee therefore has to determine on an ongoing basis what measures, processes and procedures it needs to have in place to ensure it satisfies the licensee obligations, taking into account the nature, scale and complexity of its business.

[PS 164.14] The guidance set out in this policy statement is intended to provide a useful starting point for a broad range of licensees in designing their own measures, processes and procedures, so they can make sure they comply with their obligations.

[PS 164.15] At a minimum, we expect that licensees will establish and maintain compliance measures, processes and procedures that ensure, as far as reasonably practicable, that the licensee complies with the financial services laws (Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209], Condition 4. See also reg 7.6.03(g)). Measures, processes and procedures need to be documented in some form. Because

the nature, scale and complexity of licensees' businesses will vary, the compliance measures, processes and procedures they need to adopt will vary according to their business. For example, a licensee who deals in a narrow range of simple products as an incidental part of its main business or are a very small business may satisfactorily meet its compliance obligations by having a checklist focusing on those compliance risks that would adversely affect consumers and the provision of efficient, honest and fair financial services. On the other hand, a licensee who deals in a broader range of financial products, has numerous staff that are spread out geographically and whose main business is to provide financial services and products is more likely to satisfactorily meet its compliance obligations by having measures, processes and procedures that involve the use of manuals, programs and dedicated compliance staff.

[PS 165.15A] We also expect, as a minimum, that licensees will have in place monitoring and reporting processes and procedures, so that their measures can be monitored and any compliance breaches can be reported and acted upon. (Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209], Condition 4. See also reg 7.6.03(g)). We expect that the licensee will document in some way the monitoring process and procedures, as well as keep records of reports on compliance and breach notifications. In our view, it is more difficult to show compliance where documentation is not in place. Documentation allows the licensee to demonstrate, either to ASIC or itself, that it knows whether or not it is complying with the financial services laws.

Note: Depending on the nature, scale and complexity of the licensee's business and the different monitoring processes and procedures that are in place, we recognise appropriate documentation may consist of a single page or something longer.

[PS 164.16] We want to ensure the licensee or applicant understands what it needs to do, has put in place measures to help it know what to do, and has also put in place procedures to check their work.

Measures, processes and procedures

[PS 164.16A] In this policy statement, we refer to “measures, processes and procedures”, “measures” and “processes and procedures” (together). These terms are not intended to be used as terms of art or scientifically. When we use these terms in this policy we are referring to the ways a licensee (or an AFS licence applicant) ensures it complies with its obligations (including the financial services laws). These might include one or a number of different documents and any of a variety of stand-alone or integrated IT systems. As a general rule, the smaller and simpler the business, the smaller and simpler we expect its measures, processes and procedures to be.

[PS 164.16B] To assist you to determine what you need to do to comply with your obligations, consider the following questions:

- (a) do you know what you need to do to comply with your obligations (including the financial services laws)?

Note: For example, you might have in place traditional compliance checklists of obligations or a compliance manual that show you what your obligations are and what you need to do to comply with your obligations.

- (b) how do you know whether or not you are complying with your obligations? and

Note: For example, you might have systems in place for monitoring compliance with a checklist of obligations.

- (c) if you do not comply with your obligations, do you know what to do to rectify this non-compliance and notify those who need to know about the breach?

Note: For example, you might have systems in place to ensure reporting and breach notifications.

Nature, scale and complexity

[PS 164.17] In this policy statement, we refer to the nature, scale and complexity of a licensee's financial services business. This expression is intended to reflect the reality that there will be many different kinds of licensees providing diverse financial services. What a licensee needs to do to comply with its obligations will vary according to a number of factors, including:

- (a) the products and services the licensee offers;
- (b) the diversity and structure of its operations (including the geographical spread of its operations and the extent to which it outsources any of its functions);
- (c) the volume and size of the transactions the licensee is responsible for;
- (d) how many of the licensee's clients are retail, and how many wholesale;
- (e) whether the licensee gives personal advice or general advice;
- (f) whether the licensee's main business is the provision of financial services; and
- (g) the number of people in the organisation.

[PS 164.18] We do not take a “one-size-fits-all” approach and to do so would, in our view, undermine the focus of the legislation on regulatory outcomes.

Acting efficiently, honestly and fairly

[PS 164.19] The law imposes some quite specific obligations on licensees. It also imposes a general obligation that licensees must do all things necessary to ensure that the financial services covered by the AFS licence are provided efficiently, honestly and fairly: see s912A(1)(a).

[PS 164.20] We see the obligation in s912A(1)(a) as both:

- (a) a stand-alone obligation that a licensee must satisfy; and
- (b) an obligation that encompasses other obligations under an AFS licence.

[PS 164.21] So, a licensee may be in breach of its obligation to provide services efficiently, honestly and fairly even though it is complying with all of its other specified obligations. When we are assessing an AFS licence application, we will also need to be satisfied about the applicant’s ability to meet this overall requirement as well as other, more specific, obligations.

Industry standards, practices and codes

[PS 164.22] In the way we administer the law, we often take into account whether a licensee complies with established industry practices or standards, as well as what the law explicitly requires. Reference to industry standards and practices is often a useful way for an applicant or a licensee to show us that they meet a certain expected standard. For some licensees it may also be a requirement of the law, or a licence condition.

[PS 164.23] We aim to work with industry and consumer groups to develop industry standards as a means of setting good practice for compliance with the licensee obligations. We will also approve codes of conduct where we have a regulatory responsibility to do so.

[PS 164.24] ASIC has released interim policy on how we propose to approach our discretion to approve codes of conduct under the Corporations Act: see our FSRB Policy Proposal Paper No 9 *Approval of codes* (June 2001).

Note: As stated in the *Supplement* (September 2001) to our paper *Building the FSRB Administrative Framework — Policy to implement the Financial Services Reform Bill 2001* (April 2001), the policy proposals in PPP No 9 have the status of interim policy.

Outsourcing

[PS 164.25] We recognise that many licensees outsource some or most parts of their operations or functions to third party providers (including within a corporate group). Some licensees may also outsource a significant proportion of the services they provide under the AFS licence.

[PS 164.26] Even if functions are outsourced, licensees remain responsible under the Corporations Act for complying with the licensee obligations: see s769B. We also note that under the *Superannuation (Industry) Supervision Act 1993*, superannuation trustees retain ultimate responsibility for operation of the superannuation fund; and under s601FB(1), responsible entities retain ultimate responsibility for operation of a registered managed investment scheme.

[PS 164.27] If a licensee uses external providers to provide functions that relate to the AFS licence, we recognise that a licensee will need to put in place compliance measures different to those it would need if it provided the functions itself.

Note: In corporate groups, it is common for a service company within the group to be responsible for administrative or operational functions including the employment of most or all of the group's staff. If a licensee (or an AFS licence applicant) is a member of such a corporate group and its staff are employed by the service company rather than the licensee itself, for these purposes we consider such functions would not generally be functions that relate to the AFS licence.

[PS 164.28] If a licensee uses, or plans to use, third party providers (whether or not within a corporate group) to assist it to provide a service that is part of the financial services business covered by its AFS licence and which relates to its AFS licence, we expect that the licensee will be able to show us that it:

- (a) has measures, processes and procedures in place to ensure that due skill and care has been taken in choosing suitable providers;
- (b) can and will monitor their ongoing performance; and
- (c) will deal effectively with any breaches of the service agreement or actions that lead, or might lead, to a breach of the licensee obligations, including reporting where appropriate.

Note: If the third party provider is providing services on behalf of the licensee to clients of the licensee, it will generally need to be authorised as a representative of the licensee or provide the services under its own AFS licence: see s911B(1)(d).

[PS 164.29] We acknowledge that what a licensee needs to do in terms of supervising those to whom it outsources will vary according to circumstances.

Licensees also regulated by APRA

[PS 164.30] In some cases, licensees will also be regulated by other bodies (eg APRA) for some aspects of the financial services they provide. This overlap is reflected in the Corporations Act by:

- (a) making allowances to minimise duplicative regulation of the same matters (eg the obligation in s912A(1)(h) to have adequate risk management systems does not apply to bodies regulated by APRA);
- (b) providing for consultation between ASIC and APRA in relation to the variation or cancellation of certain AFS licences (see s915I(1)); and
- (c) designating the Minister as the decision maker in some cases in relation to the variation or cancellation of certain AFS licences (see s915I(2)).

[PS 164.31] Against this background, ASIC will seek to avoid regulatory overlap where possible in assessing organisational capacities (including on an ongoing basis). We will accept, in support of the licence application, copies of relevant documentation the applicant has previously given to APRA. ASIC may also obtain information from APRA about APRA regulated licensees.

The licence application process

[PS 164.32] When we assess an application, we need to form a view about whether the AFS licence applicant has the skills, expertise and capacity to meet its obligations under the AFS licence on an ongoing basis. The applicant will need to be able to show us that it will continue to meet each of the licensee obligations.

[PS 164.33] When a person applies for an AFS licence, the applicant must provide ASIC with a range of information: refer to *Australian Financial Services (AFS) Licensing Kit* (Version 2, October 2002).

[PS 164.34] Normally, when a person applies for an AFS licence, the applicant will be asked to:

- (a) answer questions about its compliance measures, processes and procedures;
- (b) provide details about business activities, key personnel and any outsourcing arrangements;
- (c) provide information about how it will ensure compliance with the licensee obligations including its measures, processes, procedures and resources. As reflected in [PS 164.17], we expect that these

compliance measures, processes and procedures will vary, depending on the nature, scale and complexity of the applicant's business;

- (d) provide details about how it identifies risk, the risks it has identified, and how it will address those risks, ie its risk management systems and resources (except APRA-regulated applicants);

Note: We discuss risk management systems in Section F of this policy statement.

- (e) provide information to satisfy us that the measures, processes, procedures and resources are regularly monitored and evaluated to ensure continuing compliance with the licensee obligations; and
- (f) declare that the information supplied in and accompanying the application is complete and accurate to the best of its knowledge.

Full and complete application

[PS 164.35] Applicants for an AFS licence must provide us with an application that:

- (a) responds to all questions;
- (b) makes all the relevant declarations and certifications;
- (c) is accompanied by all requested supporting documentation (including where relevant a copy of any pre-existing licence under the old Corporations Act or insurance broker registration); and

Note: Those applicants entitled to apply for an AFS licence under s1433 (ie legislative streamlining) will be required to submit limited accompanying supporting documentation.

- (d) is accompanied by the prescribed fee (electronic payment facilities are available).

[PS 164.36] If an application has not been duly completed (ie not all relevant questions have been answered; not all relevant declarations have been made; not all relevant accompanying documentation has been provided), it may not be accepted for lodgement: see s1274(8). This means we will return the application and intended application fee payment to the applicant. If a person still wishes to apply for an AFS licence, they will need to make another application and submit it with the prescribed application fee.

Note: We may refuse to process any application which is otherwise duly completed, but which is lodged without the prescribed fee, until that fee is paid: see s1355.

[PS 164.37] In assessing a completed application, we need to decide whether we have no reason to believe that the applicant will not comply

with the licensee obligations: see s913B(1)(b). To make this decision, we may seek more information or supporting documentation from the applicant: see s913B(1)(ca). This is likely to occur where the application is complete for the purposes of lodgement under the Corporations Act, but does not contain all the information we need to assess it. We will not continue to assess an application until this further information is provided. If this information is not provided in a reasonable time, we may assess the application on the basis of the information already provided to us. If that information is insufficient to enable us to decide to grant the applicant an AFS licence under s913B, we will refuse to grant the licence.

[PS 164.38] We need to be confident that an AFS licence applicant will comply with all the licensee obligations from the time we issue its licence (even if its business is not yet operating at the time of its AFS licence application). This means that the applicant will need to certify and declare, as well as satisfactorily outline, its ability to comply at the time it applies for an AFS licence.

[PS 164.39] To assist applicants in applying for an AFS licence:

- (a) they can apply through the Internet via an electronic application;
- (b) the electronic application has been prepared with in-built prompts to assist applicants in making sure their application meets the minimum content and any supporting documentation requirements;
- (c) we have designed the electronic application so that it contains mostly “yes” or “no” answers or answers via drop-down boxes (a “no” answer does not mean you will not receive a licence); and
- (d) most of the supporting documentation that applicants will be required to provide is of a kind that is likely to already exist.

[PS 164.40] If an AFS licence applicant supplies us with information that is false or misleading about a material matter, or leaves out something that is material to our decision to issue an AFS licence, we:

- (a) can suspend or cancel any AFS licence we issue (see s915C(2)); and
- (b) will have grounds for prosecution (see s1307).

If your business is not yet operating

[PS 164.41] Even if an AFS licence applicant’s business is not yet operating, enough information must be provided in its application to show that it will be able to meet and continue to meet the licensee obligations. For instance, the applicant must prove that it has measures, processes, procedures and resources in place to ensure compliance at the

time of application and on an ongoing basis. We do not expect the applicant to be fully operational at the time it applies for a licence, but it must have significant infrastructure already in place.

If you already have a licence

[PS 164.42] If an AFS licence applicant is a licensee under the old Corporations Act, it will need to review what measures, processes and procedures it currently has in place, in light of the licensee obligations and this policy statement before it applies for a new AFS licence.

C Compliance measures, processes and procedures

Appropriate compliance measures, processes and procedures — general requirement

[PS 164.43] A person who holds an AFS licence must comply at all times with their obligations as a licensee: see s912A(1)(c). These obligations include the obligations listed in s912A(1), and the conditions of their AFS licence.

[PS 164.44] Before we issue an AFS licence, we must decide whether or not we believe the applicant will not comply with its obligations if the licence is granted: see s913B(1)(b). This means we must ask ourselves about an applicant's likely compliance with all obligations in s912A(1).

[PS 164.45] Similarly, if we have reason to believe that a licensee has not complied with its obligations, we can give notice of our intention to suspend or cancel an AFS licence.

[PS 164.46] The following guidance on compliance is designed to help applicants think systematically through what compliance measures, processes and procedures they may need. It also gives guidance on how licensees can show us that the arrangements they have are adequate to ensure they comply with the legislation. By providing this guidance, we aim to make our interactions with licensees effective and cost efficient. We will also use this guidance to help us make efficient decisions when we assess licence applications, or when we consider whether to take action against an existing licensee.

[PS 164.46A] In general, we expect that the appropriate compliance measures, processes and procedures will vary depending on the nature, scale and complexity of the business. For example, for licensees whose main business is not the provision of financial services or the business is very small, it may be appropriate to use simple checklists focusing on those compliance risks that would materially adversely affect consumers and the provision of efficient, honest and fair financial services.

What we expect

[PS 164.47] The main focus of the licensee obligations is on protecting consumers' interests and making sure that financial services are provided efficiently, honestly and fairly. At a minimum, we require licensees to establish and maintain compliance measures, processes and procedures

that ensure, as far as reasonably practicable, that the licensee complies with the financial services laws (Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209], Condition 4. See also reg 7.6.03(g)).

[PS 164.47A] We acknowledge that compliance measures, processes and procedures will vary from one licensee to another. However, at least we expect to see compliance measures, processes and procedures that:

- (a) are directed towards ensuring compliance with the licensee obligations (including licence conditions) and any other requirements of the financial services laws that apply to the licensee;
- (b) take into account the specific compliance risks of the business, especially those that may materially affect consumers and the provision of efficient, honest and fair financial services; and
- (c) enable the licensee to determine how:
 - (i) its representatives know what they need to comply with;
 - (ii) it monitors compliance with its obligations as a licensee (including its licence conditions and any other requirements of the financial services laws that apply to the licensee); and
 - (iii) any compliance breaches are addressed and/or reported.

[PS 164.48] As with other measures, processes and procedures (see [PS 164.15 and PS 164.15A]), compliance measures, processes and procedures are usually documented in some form and used as the basis for monitoring, and reporting on, the licensee's compliance with its obligations. We understand that in some instances, the monitoring and reporting measures, processes and procedures are built into business processes and procedures that have been put in place. We also acknowledge that a licensee's compliance measures, processes and procedures may reflect its corporate group's overall approach to compliance. Whatever the case, licensees will need to be able to show us how they are able to monitor their compliance and appropriately address any compliance breaches.

Note: For more information on the type of documentation we accept, please see *Australian Financial Services (AFS) Licensing Kit* (Version 2, October 2002).

[PS 164.49] We anticipate that a licensee will ensure that its measures, processes and procedures are reviewed when its obligations, business, or the environment in which it operates changes. We also anticipate that licensees will ensure that they have monitoring procedures in place to identify changes that may result in non-compliance because of the impact of the changes on their measures, processes and procedures.

[PS 164.50] In some cases, it may be sensible for licensees to consider external review of their compliance measures, processes and procedures to evaluate their appropriateness and effectiveness. Where compliance issues have arisen (such as major breaches or repeated compliance failures), external compliance review is particularly appropriate.

Internal compliance structures and responsibilities

[PS 164.51] It may be appropriate for licensees to have a separate compliance function (which may be outsourced to a third party). This is likely to be the case for larger, more complex businesses (including a corporate group), but not for licensees whose business is smaller or whose main business is not the provision of financial services.

[PS 164.52] Even where there is not a structurally separate compliance function, we anticipate that a licensee will allocate to a director or senior manager responsibility for:

- (a) overseeing compliance measures, processes and procedures; and
- (b) reporting to the governing body (including having ready access to the governing body).

[PS 164.53] A licensee is responsible for ensuring that the area responsible for compliance:

- (a) is independent enough to do its job properly;
- (b) is adequately staffed and resourced; and
- (c) has access to relevant records.

Australian Standard on Compliance Programs

[PS 164.54] In deciding whether a specific licensee's compliance measures, processes and procedures are adequate, the licensee may wish to refer to the Australian Standard on Compliance Programs (AS 3806–1998). The standard is a useful benchmark that we expect licensees to use as a guide in planning and implementing compliance measures, processes and procedures.

[PS 164.55] We accept that there may be compliance arrangements that are not consistent with every element of AS 3806–1998 but which nevertheless may ensure compliance with the licensee obligations (eg local subsidiaries of global companies which adopt the compliance measures, processes and procedures of their parent globally across the organisation, or systems specifically developed for an entity). Nonetheless, AS 3806–1998 can play a role in helping a licensee decide

whether such compliance measures, processes and procedures are adequate to ensure the licensee complies with Australian law.

Small business

[PS 164.56] Appendix A to AS 3806–1998 recognises that the standard requires some adaptation for use by small businesses. This is consistent with our policy that appropriate compliance measures may vary depending on the nature, scale and complexity of the licensee’s business.

Issues to consider: compliance measures

See [PS 164.138A] for issues we encourage licensees to consider when addressing compliance.

Table 1 is moved to [PS 164.138A].

D Monitoring, supervision and training of representatives

Licensees' obligations

[PS 164.57] A licensee must monitor and supervise the activities of representatives to ensure they are complying with the financial services laws: see s912A(1)(ca). Licensees must also ensure that their representatives are adequately trained and are competent to provide financial services: see s912A(1)(f).

Note: The obligation to monitor and supervise applies in relation to all representatives of a licensee (whether or not the representative provides financial services). The obligation to ensure its representatives are competent and trained applies only to a licensee's representatives that provide financial services.

[PS 164.58] These obligations are part of licensees' overall obligations, intended to result in:

- (a) consumer confidence in using financial services; and
- (b) licensees providing financial services in an efficient, honest and fair way.

[PS 164.59] We expect licensees to have adequate measures, processes and procedures in place to monitor, supervise and train representatives as part of their overall compliance measures, processes and procedures. We expect most licensees to have documented procedures in some form for meeting these obligations: see also [PS 164.15], [PS 164.15A] and [PS 164.48]. We recognise the appropriate measures, processes and procedures will vary depending on the nature, scale and complexity of the business.

[PS 164.60] Measures, processes and procedures to ensure a licensee complies with its obligations to monitor, supervise and train its representatives will normally show how the licensee:

- (a) ensures all its representatives are appropriately authorised (if required);
- (b) takes reasonable steps to ensure that its representatives are complying with all of their obligations under the financial services laws;
- (c) analyses potential risks arising from representatives' conduct (eg recommending inappropriate products, not undertaking satisfactory needs analysis);

- (d) responds to compliance failures (or breaches);
- (e) ensures its representatives who provide financial services are and remain appropriately trained and competent to provide the financial services they have authority to provide;
- (f) ensures the financial service activities of its representatives (including its authorised representatives) are within the scope of its authority;
- (g) monitors and supervises its representatives to prevent them from providing financial services outside the licensee's authority (unless the conduct is within the authority of another licensee) — and thus protects consumers from loss and the licensee from potential liability;
- (h) ensures appropriate assessments and background checks are carried out for the appointment of new representatives, including the person's identity and whether the person has already been allocated a number by ASIC as an authorised representative (see reg 7.6.04(1)(e));
- (i) ensures compliance with its notification obligations to us in relation to its authorised representatives (see s916F); and
- (j) maintains a record of the training that each of its representatives who provides financial services has undertaken (see reg 7.6.04(d)).

What activities must a licensee monitor?

[PS 164.61] Given the diversity of industries and industry participants that are subject to the licensing regime, no single set of measures, processes and procedures for monitoring, supervision and training will be suitable for all licensees. So each licensee must ensure that the particular measures, processes and procedures it adopts are appropriate to the individual characteristics of its business.

[PS 164.62] We do not anticipate that this will involve the licensee scrutinising every activity of all its representatives. But a licensee's monitoring and supervision measures, processes and procedures will generally be adequate only if they:

- (a) allow the licensee to determine whether its representatives are complying with the legislation (including licence conditions); and
- (b) establish a robust mechanism for remedying any breaches.

[PS 164.63] In the Schedule at [PS 164.138B], we provide guidance on what licensees may wish to consider as they design or review the

monitoring and supervision aspects of their measures, processes and procedures.

Training of representatives

[PS 164.64] The need for appropriate training applies in relation to all representatives who provide financial services. We do not specify detailed training obligations for representatives who provide financial services other than financial product advice to retail clients. It is a licensee's responsibility to determine the appropriate knowledge and skills that its representatives who provide financial services need to have in order to competently perform their tasks and functions. It is also a licensee's responsibility to ensure that its representatives undertake continuing training programs to maintain and update the knowledge and skills needed for their role and functions.

[PS 164.65] We have outlined specific and detailed training standards applying to representatives who provide financial product advice to retail clients: see Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146] and Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209], Conditions 6 and 7.

[PS 164.66] Deleted

Use of para-planners

[PS 164.67] A specific issue is how a licensee's obligations operate where it (including its employee representatives and authorised representatives) use the services of a para-planner — who does not meet the training standards set out in [PS 146] (training standards) — to assist in the provision of financial product advice to clients. The para-planner may assist the licensee by, for example:

- (a) collecting information directly from clients about their objectives, financial situation and needs;
- (b) preparing draft Statements of Advice (which identify the authorised representative as the providing entity, but do not include any reference to the para-planner);
- (c) assisting the authorised representative to explain these Statements of Advice in discussion with the clients.

Note: For our policy on who must meet the training standards when a licensee uses para-planners in the provision of financial product advice see [PS 146.17]–[PS 146.18].

[PS 164.68] The licensee remains ultimately responsible for all the financial services provided under its licence, regardless of how those services are provided. Accordingly, if a licensee uses the services of a para-planner, who does not meet the training standards, to assist in the provision of financial product advice, the licensee remains responsible for that advice and the conduct of its employee representatives, authorised representatives and the para-planner in relation to the provision of that advice.

[PS 164.69] We also consider that the licensee is likely to be breaching its duties if it does not have measures, processes and procedures in place designed to ensure that a person, such as an employee representative or authorised representative, who meets the training standards (person A) plays a material role in, and remains responsible for (together with the licensee), the provision of advice to clients.

[PS 164.70] The requirement for person A to play a material role in the provision of the advice does not mean that person A must personally perform all the functions associated with the provision of the advice. Rather, person A must:

- (a) review any draft Statements of Advice prepared by the para-planner with a view to assessing whether all legal obligations have been complied with, and take any necessary action to ensure such compliance (this may mean that person A needs to obtain further information from the client or may need to alter the draft Statement of Advice); and
- (b) manage and lead any verbal explanation of the financial product advice to the client.

[PS 164.71] As a general rule, if a licensee uses a disproportionately high number of para-planners who do not meet the training standards compared to the number of the licensee's employee representatives and authorised representatives that do meet the training standards, we believe that there is an increased risk that the licensee will not be satisfying its obligations.

Issues to consider: monitoring, supervision and training

See the Schedule at [PS 164.138B] for issues licensees may wish to consider when addressing monitoring, supervision and training.

Table 2 is moved to [PS 164.138B].

E Organisational competency

The organisational competency obligations

[PS 164.72] All licensees (other than APRA-regulated applicants) must have available adequate human resources to provide the services the AFS licence allows them to provide (see s912A(1)(d)) and all licensees (whether regulated by APRA or not) must maintain the competence to provide those financial services: see s912A(1)(e). We refer to these obligations as the “organisational competency obligations”.

Note: In Section G of this policy statement, we consider more generally the obligation of a licensee to have adequate human resources as part of the obligation of a non APRA-regulated licensee to have adequate resources.

[PS 164.73] This section of the policy statement provides guidance on how licensees can comply with the organisational competency obligations. Fundamentally it is up to the licensee to decide on ways it can demonstrate how it meets these obligations.

[PS 164.73A] This section also:

- (a) focuses on the knowledge and skills of the people whose training and experience results in the licensee complying with its organisational competency obligations. These are the people who manage the licensee’s business and ensure that the quality of services the licensee provides is adequate and that the licensee complies with the licensee obligations; and
- (b) outlines some of the alternatives open to a licensee under which the licensee can most easily demonstrate to ASIC it meets the organisational competency obligations. However, even if these alternatives are not adopted, a licensee can still demonstrate to us that it meets the organisational competency obligations.

[PS 164.73B] This section does not deal with the operation of our training and experience requirements applying to natural persons who provide financial product advice as set out in Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146]. Therefore, the requirements in that policy statement should not be read as implying how our approach in this section of this policy statement is to be understood or applied.

[PS 164.74] As with the other sections in this policy statement, what is needed to demonstrate compliance with the organisational competency obligations depends on the nature, scale and complexity of a licensee’s business. It also depends on the role that individuals play in the licensee’s

business. In analysing how best to comply with these obligations, a licensee will generally need to identify:

- (a) the people whose expertise the licensee relies on to meet its organisational competency obligations; and
- (b) what kind of training and experience these people need to have to ensure they have the knowledge and skills to carry out their functions and demonstrate that the licensee meets its organisational competency obligations.

Whose organisational competency does the licensee rely on?

[PS 164.75] We consider that the people on whom a licensee depends for its organisational competency are the licensee's responsible officers (as defined in s9 of the Corporations Act) who are directly responsible for significant day-to-day business decisions about the ongoing provision of financial services by the licensee.

Note: The definition of "responsible officer" at s9 of the Corporations Act means in relation to a body corporate that applies for a licence, "an officer of the body who would perform duties in connection with the holding of the licence".

[PS 164.76] We acknowledge the definition of a responsible officer under the Corporations Act is broad. We use this term for convenience as it is a generally understood term. For the purposes of the organisational competency obligations, this means that the relevant responsible officers will not be all a licensee's responsible officers as defined in the Corporations Act. Nor will they be those responsible officers who do not have direct responsibility for the provision of the financial services (eg the compliance manager). For the purposes of demonstrating organisational competency the relevant responsible officers are likely to be directors employed full time in the business, key managers or agents of a licensee who have the requisite direct responsibility as described in [PS 164.75]. A person is not a responsible officer merely because they have competency qualifications.

[PS 164.76A] When applying for an AFS licence the applicant should nominate those of its responsible officers that:

- (a) have the requisite direct responsibility as described in [PS 164.75]; and
- (b) the licensee considers demonstrate and meet the needs of the organisational competency obligations (the nominated responsible officers).

Note: The definition of responsible officer is only applicable to a licensee that is a body corporate. However, we consider that the concept of a nominated responsible officer should be applied with any necessary adaptation for a licensee that is not a body corporate (eg partnerships and trustees).

[PS 164.77] In larger organisations, we expect an AFS licence applicant to nominate only those of its responsible officers in key positions of direct responsibility as described in [PS 164.75] rather than all those involved in the management of the provision of financial services. We would *generally* expect an AFS licence applicant to nominate two or more responsible officers. However, in some cases a single responsible officer may be adequate. An example is where the applicant's main business is not the provision of financial services, but this will depend on the nature, scale and complexity of the business.

Note: See [PS 164.104A] and [PS 164.104B] for a discussion of when we will apply "key person" license conditions.

[PS 164.77A] The remainder of this section discusses how a licensee (and an AFS licence applicant) can demonstrate to us it meets the organisational competency obligations.

[PS 164.78] Moved to [PS 164.104A]

[PS 164.79] Moved to [PS 164.104B]

Demonstrating competency

[PS 164.80] In articulating our expectations about the types and levels of training and experience that will enable a licensee (and an AFS licence applicant) to demonstrate it meets the organisational competency obligations, we have focused on the:

- (a) benefits for consumers if they can rely on the expertise and professionalism of licensees that provide financial services; and
- (b) advantages for licensees if we strike the right balance between flexibility, efficiency and certainty in the way we administer the licensing regime.

[PS 164.81] As discussed at [PS 164.73], a licensee is responsible for ensuring that it satisfies the organisational competency obligations, and that appropriately trained and experienced nominated responsible officers (including any relevant key staff of its agents) undertake the relevant roles within the entity.

Note: As discussed at paragraph (b) of [PS 164.74] nominated responsible officers need to have appropriate training and experience to ensure they have the knowledge and skills to carry out their functions.

[PS 164.81A] However, to assist licensees (and AFS licence applicants) to demonstrate to us that they meet the organisational competency obligations, our approach will generally be to look to a nominated responsible officer's training and experience. We will seek evidence that the nominated responsible officer has the knowledge and the skills they need to carry out their functions as a nominated responsible officer.

[PS 164.81B] Often a licensee (or an AFS licence applicant) and its responsible officers will rely on the technical expertise of specialists to carry out functions covered by the licence. This technical expertise may be in the law or other technical specialities. While we take this into account in our own assessment of the licensee (or the AFS licence applicant), the nominated responsible officers will still need to have enough knowledge and skill to understand and manage the application of that technical expertise to the licensee's (or the applicant's) business.

[PS 164.82] It is up to the licensee to ensure that it has officers with the appropriate knowledge and skills. We expect a licensee (or applicant) will:

- (a) identify the knowledge and skills its responsible officers need to have to ensure the licensee meets its obligations;
- (b) review its responsible officers to determine whether they have the knowledge and skills needed;
- (c) ensure its responsible officers do have the necessary knowledge and skills; and
- (d) monitor the maintenance of the necessary knowledge and skills.

[PS 164.83] We understand that the level of knowledge and skills required by responsible officers will depend on the size and complexity and type of business of the licensee. It will also depend on the type of products and the markets, if any, on which the products are issued or traded.

[PS 164.83A] Some types of licences will require a higher standard than others. Our focus is to ensure that the licensee has the appropriate knowledge and skills to the necessary standard. We aim to be flexible, but ultimately it is up to the licensee to ensure it knows what standard of knowledge and skills are necessary and that it meets the organisational competency obligations including by its nominated responsible officers having the necessary standard of knowledge and skills.

Knowledge and skills

[PS 164.83B] For a licensee (or AFS licence applicant) to determine whether its nominated responsible officers have the necessary knowledge and skills needed for their roles we expect the licensee (or applicant) would consider:

- (a) what the responsible officer is responsible for;
- (b) the responsible officer's education background;
- (c) the responsible officer's relevant experience;

Note: Refer to [PS 164.93] – [PS 164.94] for our views concerning a nominated responsible officer's relevant experience.

- (d) any other credentials of the responsible officer including association membership or affiliation, or skills or knowledge recognised by an industry association, a regulatory body such as APRA, or some relevant overseas body; and
- (e) any other reasons why the responsible officer can perform in the role, including client feedback, complaints and performance measures.

Knowledge

[PS 164.84] A licensee can ensure and show us that its nominated responsible officers have the knowledge needed for their roles in a number of ways. The most common are:

- (a) *Alternative 1*: meet widely adopted and relevant industry standards, or relevant standards set by APRA; or
- (b) *Alternative 2*: successfully complete an individual assessment at a level relevant to the particular industry; or
- (c) *Alternative 3*: hold a university degree in a relevant discipline and complete a relevant short industry course; or

Note: We understand a person as satisfying the requirements of this alternative if this person's university degree covers those services for sectors not covered by his or her approved relevant short industry course.

- (d) *Alternative 4*: hold a relevant industry qualification at a minimum of a full diploma recognised under the Australian Qualifications Framework or by a university, or the Financial Planning Association's Diploma of Financial Planning; or

- (e) *Alternative 5*: provide a detailed submission to ASIC that satisfies us that the responsible officers nominated have the necessary skills and knowledge.

Note 1: These alternatives are set out in more detail in a table at [PS 164.104C].

Note 2: In order for a licensee or AFS licence applicant to convince us that its nominated responsible officer has the necessary skills and knowledge, the licensee (or licence applicant) would need to address each of the factors referred to at paragraphs (a) to (e) of [PS 164.83B].

Note 3: See paragraphs [PS 164.102A]-[PS 164.102F] for a discussion of what we generally understand in Alternatives 1 to 4 by way of qualifications, short industry courses and industry and APRA standards.

[PS 164.85] In the case of a licensee that provides financial product advice, we think it might typically adopt Alternatives 2 to 4 for its nominated responsible officers. We consider this will generally be needed to ensure the licensee is able to consistently provide quality financial product advice to retail clients.

[PS 164.86] Moved to [PS164.102A]

[PS 164.87] Moved to [PS164.102B]

[PS 164.88] Moved to [PS164.102C]

[PS 164.89] Deleted

[PS 164.90] Moved to [PS164.102D]

[PS 164.91] Moved to [PS164.102E]

[PS 164.92] Moved to [PS164.102G]

Skills

[PS 164.93] In our view, a nominated responsible officer will be unlikely to be able to carry out their functions as a nominated responsible officer unless they have at least 3 years relevant experience over the immediate past 5 years. Relevant experience is experience in a role that enables the person to understand the responsibilities and requirements of the current role.

[PS 164.94] Formal qualifications may assist the licensee to demonstrate that a nominated responsible officer has the requisite skills. If a person has no formal qualifications, it may be prudent for the licensee to look for a longer period of relevant experience (eg 5 years experience over the immediate past 8 years).

Continuing knowledge and skills development

[PS 164.95] A licensee must continuously ensure that it is meeting its organisational competency obligations. This will usually mean having measures, processes and procedures in place to ensure that it and its nominated responsible officers maintain and update their expertise.

[PS 164.96] Deleted

[PS 164.97] Deleted

Licensees that conduct multiple financial services

[PS 164.98] A licensee that is authorised to conduct a range of financial services (eg advising and dealing) in relation to different kinds of financial product (eg general and life insurance products) will need to have nominated responsible officers with appropriate competency (ie knowledge and skills) relevant to each service kind of product. The same applies for an AFS licence applicant for a licence proposing to conduct more than one financial service.

[PS 164.98A] To illustrate the principle in [PS 164.98] a person can be put forward as a responsible nominated officer if he or she satisfies the competency requirements for some kinds of services or products, but not for all. If a nominated responsible officer (A) does not satisfy all the competency requirements for the services and kinds of product relevant to the licensee's business, the licensee must nominate at least one other responsible officer who satisfies those requirements for the remaining services and kinds of products. Alternatively, A could undertake further training so as to satisfy the competency requirements for all services or kinds of product provided by the licensee, (eg by completing an approved relevant short industry course or by completing relevant additional modules relating to those other services before they apply for a licence).

Note: For example, a licensee authorised to advise and deal in life and general insurance products could have nominated responsible officer A with knowledge and skills in advising on and dealing in life insurance products and nominated responsible officer B with knowledge and skills in advising on and dealing in general insurance products.

Other issues

Status of Policy Statement 138 Personal competencies for licensees

[PS 164.99] Our policy in [PS 164] supersedes the education and experience requirements in Policy Statement 138 *Personal competencies for licensees* at [PS 138.15]–[PS 138.28].

[PS 164.100] We will continue to accept the educational and industry qualifications approved by ASIC as listed in [LIC 15] of the *ASIC Digest*. The lists in [LIC 15] should be read in conjunction with the Australian Financial Services (*AFS*) *Licensing Kit* (Version 2, October 2002).

Note: The lists in [LIC 15] were prepared for the purposes of [PS 138] (now superseded). See [SPS 138] in the *ASIC Digest* for historical background on the development of these lists.

[PS 164.101] We will continue to accept satisfaction of the standards outlined in [PS 138] as evidence of expertise. However, various industry sectors have established industry and professional expertise standards. To acknowledge this fact, we will also accept appropriate satisfaction of certain industry standards as evidence of expertise for some AFS licence types.

Responsible entities

[PS 164.102] Policy Statement 130 *Managed investments: Licensing* [PS 130] outlines the organisational expertise standard for an operator of a managed investment scheme (including any dealing activities incidental to the operation of the scheme): see [PS 130.34] and [PS 130.43]–[PS 130.52]. Our policy on organisational expertise obligations in Section E of this policy statement does not apply to operators of managed investment schemes unless they provide:

- (a) advice on interests in the schemes (see [PS 130.12]); or
- (b) financial services unconnected with the operation of the scheme.

Qualifications, short industry courses, and industry and APRA standards

What qualifications and industry standards are used?

[PS 164.102A] ASIC is not a training provider or assessor and therefore will not be directly involved in the assessment of qualifications and courses. However, because we have considerable experience in issuing licences and assessing licensees' compliance with their organisational

competency obligations, we have developed useful benchmarks that are reflected in this policy statement. Our approach has been strongly influenced by the Australian Qualifications Framework, and the role played by short industry courses and industry standards.

Australian Qualifications Framework

[PS 164.102B] The Australian Qualifications Framework, which incorporates qualification levels and titles, is a government initiative that provides a nationally consistent framework for all qualifications in post compulsory education.

[PS 164.102C] For a qualification to be accepted under the Australian Qualification Framework, it must be assessed by a registered training organisation or university as meeting certain standards.

Note: For more information about qualifications that are recognised under the Australian Qualifications Framework, see the National Training Information Service database (www.ntis.gov.au) and the Australian Qualifications Framework Advisory Board database (www.aqf.edu.au).

Short industry courses

[PS 164.102D] A licensee may also use as evidence of appropriate knowledge, completion of an approved relevant short industry course. Formal assessment by a university or approved professional or industry body will normally be a reliable guide to a course's quality and relevance.

Note: For a list of recognised courses, see the ASIC Training Register at www.asic.gov.au.

Industry and APRA standards

[PS 164.102E] Various industry sectors have already developed standards that are recognised by participants in that sector as prerequisites for certain activities or as preferred entry standards. A number of standards are already recognised within industry (eg AFMA dealer accreditation, and various insurance and financial planning industry accreditations). We are prepared to accept a wide range of recognised standards where they are relevant to the nominated responsible officer's role ie where meeting the recognised standard will indicate that the responsible officer has the required knowledge for his or her role.

[PS 164.102F] We will also accept standards set by APRA where they are relevant to the nominated responsible officer's role. The onus is on

the AFS licence applicant to demonstrate the relevance of the standard, which also includes how current the particular standard is.

[PS 164.102G] To be a reliable way of demonstrating that nominated responsible officers have the appropriate knowledge, industry standards generally need to:

- (a) be endorsed by the appropriate industry body or bodies;
- (b) have been developed with industry;
- (c) address the competencies required in that sector/financial service/product; and
- (d) represent the views of a significant number of industry participants.

Foreign qualifications

[PS 164.103] Some recognised foreign qualifications can be used in the Australian context. If you are applying for an AFS licence, you can refer in your licence application to evidence that training completed by your nominated responsible officers has been recognised by a relevant overseas regulatory body (eg Financial Services Authority (UK), National Association of Securities Dealers (US), Canadian Dealers Association, Securities and Futures Commission (Hong Kong), and the Monetary Authority of Singapore). Relevant foreign university qualifications should be verified by the National Office of Overseas Skills Recognition in Canberra.

[PS 164.104] Foreign qualifications will almost certainly not have addressed Australian regulatory requirements, or features of the financial services industry peculiar to Australia (such as taxation, superannuation and other retirement savings vehicles). To remedy this, we will generally expect nominated responsible officers of AFS licence applicants that wish to provide financial product advice to undertake an approved short industry course to become familiar with Australian requirements.

“Key person” licence conditions

[PS 164.104A] If the licensee is heavily dependent on the expertise of one or two responsible officers in positions of direct responsibility as described in [PS 164.75] (eg in a small organisation with one or two principals), we will generally decide that those people are “key persons”. Accordingly, where a licence applicant nominates only one or two responsible officers, we will generally treat them as “key persons”. We will name them on the licence as such, and will require the licensee to:

- (a) notify us if any key person leaves or is about to leave the business; and

(b) nominate another suitably qualified person in such an event.

Note: Refer to Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209], Condition 3.

[PS 164.104B] Having a key person condition ensures that a licensee will only continue to operate with the involvement of responsible officers who satisfy the organisational expertise obligations.

Some alternatives for meeting organisational competencies obligations

See [PS 164.104C] on the next page.

Some alternatives for meeting the organisational competency obligations

[PS 164.104C] There are a number of ways you can meet your organisational competency obligations. As a guide, we have set out in summary form at [PS 164.84] and in more detail in the following table, alternatives we think a licensee might adopt in making sure its nominated responsible officers meet appropriate standards for knowledge and skills: see [PS 164.73] and [PS 164.81]. Our aim is to ensure that the licensee has the required knowledge and skills to provide the services in accordance with the Corporations Act.

Alternative 1	<p>Meet widely adopted and relevant industry standards (see [PS 164.102]–[PS 164.102G] or relevant standards set by APRA</p> <p>AND</p> <p>The equivalent of at least 3 years relevant experience over the immediate past 5 years in a role that enables the person to understand the responsibilities and requirements of the current role</p>
Alternative 2	<p>Successfully complete an individual assessment (or recognition of current competency) by an authorised assessor at the equivalent of full diploma level, relevant to the particular industry and/or product.</p> <p>AND</p> <p>The equivalent of at least 5 years relevant experience over the immediate past 8 years in a role that enables the person to understand the responsibilities and requirements of the current role</p> <p>Note: As a guide to an authorised assessor process readily acknowledged by us, see Policy Statement 146: <i>Licensing: Training of financial product advisers</i> [PS 146] at [PS 146.52] – [PS 146.53].</p>
Alternative 3	<p>A university degree in a discipline relevant to the activities being carried out (eg economics, commerce, business, accounting, information technology, geology or other technical qualification)</p> <p>AND</p> <p>An approved relevant short industry course listed in the ASIC Training Register. The course must cover generic and relevant specialist knowledge (this includes existing approved qualifications)</p> <p>AND</p> <p>The equivalent of at least 3 years relevant experience over the immediate past 5 years in a role that enables the person to understand the responsibilities and requirements of the current role</p> <p>Note: For Alternative 3, an approved relevant short industry is only necessary if your university degree does not cover all requisite areas of knowledge.</p>

Alternative 4

A qualification which is:

- (a) specifically relevant to the particular industry and/or product;
- (b) at least the equivalent of a minimum of a full diploma; and
- (c) recognised under the Australian Qualifications Framework, or by a university or another institution of higher education (this includes, but is not limited to, existing approved qualifications, such as the diploma courses, listed in the ASIC Training Register)

AND

The equivalent of at least 3 years relevant industry experience over the immediate past 5 years in a role that enables the person to understand the responsibilities and requirements of the current role

Alternative 5

Where a licensee chooses to adopt some other possibility to demonstrate a nominated responsible officer has the necessary knowledge, the licensee (or AFS licence applicant) will need to provide us with the following details:

- (a) the nature of the role performed by the officer;
- (b) any relevant qualifications or courses completed by the officer;
- (c) the experience history of the officer over the last 10 years (or thereabouts);
- (d) any relevant credentials of the officer including association membership or affiliation, or skills or knowledge recognised by an industry association, a regulatory body such as APRA, or some relevant overseas body; and
- (e) why the licensee or applicant is of the view the officer has the necessary knowledge and skills to carry out the officer's function.

Note 1: We would typically expect a licensee that provides financial product advice to adopt Alternatives 2 to 4 for those nominated responsible officers whose role relates to the provision of advice. However, depending on the nature, scale and complexity of the licensee's business, evidence that Alternative 1 or some other alternative has been met may be appropriate: see [PS 164.85].

Note 2: For licence applicants wishing to operate a registered scheme, see the requirements in Policy Statement 130 *Managed investments: Licensing* [PS 130].

F Risk management

Note: This section does not apply to a licensee that is a body regulated by APRA.

Risk management generally

[PS 164.105] A licensee must establish and maintain adequate risk management systems: see s912A(1)(h). A licensee that is regulated by APRA must have the risk management systems that APRA requires.

[PS 164.106] The requirement for risk management systems ensures licensees explicitly identify the risks their businesses face, and have measures, processes and procedures in place to keep those risks to an acceptable minimum. Risks in this context include risks to:

- (a) consumers who use a licensee's services; and
- (b) the integrity of markets in which the licensee is active.

[PS 164.107] The nature and scope of a licensee's risk management systems are dictated by the nature, scale and complexity of its business and its risk profile. What is required will be different in the case of each licensee. We recognise that the appropriate risk management systems for licensees whose business is small or whose main business is not the provision of financial services will not be the same as for a large organisation.

[PS 164.107A] It should not be assumed that the obligation to have risk management systems refers to having an electronic system or set of systems. The rest of this section discusses what we understand by the obligations for a licensee to have risk management systems.

Note: We refer to systems in this section to reflect its use in the phrase "risk management systems", again not to necessarily imply some form of electronic system.

What we expect

[PS 164.108] As with other requirements for measures, processes and procedures (see [PS 164.15], [PS 164.15A] and [PS 164.48]), we expect that licensees will usually document in some form their risk management systems, including the systems they use for monitoring and reporting on risk management issues.

[PS 164.109] Generally, we anticipate a licensee's risk management systems will:

- (a) be based on a structured and systematic process that takes into account the licensee's obligations under the Corporations Act;
- (b) identify risks of non-compliance with the financial services laws, focusing on those risks which would materially adversely affect consumers or market integrity objectives;
- (c) set out steps to be taken if there are possible breaches of the financial services laws that may detrimentally affect consumers or the integrity of the markets in which the licensee operates; and
- (d) establish and maintain measures, processes and procedures (including compliance measures, processes and procedures) designed to address those risks.

Using the Australian and New Zealand Standard on Risk Management Systems

[PS 164.110] In deciding whether a specific licensee's risk management systems are adequate, the licensee may wish to refer to the Australian and New Zealand Standard on Risk Management Systems (AS/NZS 4360–1999). The standard is a useful benchmark that we expect licensees to use as a guide in planning and implementing risk management systems.

[PS 164.111] We accept that there may be risk management systems that are not consistent with every element of AS/NZS 4360–1999, but which may still ensure compliance with the licensee obligations. Nonetheless, AS/NZS 4360–1999 can play a role in helping a licensee decide whether its risk management systems are adequate to ensure the licensee complies with the Australian law.

[PS 164.112] Adopting a methodology based on AS/NZS 4360–1999 will assist a licensee to establish appropriate risk management systems by accurately identifying, assessing and prioritising risks. If these steps are not conducted properly, significant risk areas may not be identified.

Financial risks

[PS 164.113] A licensee's risk management systems normally address the risk that its financial resources will not be adequate. We have set out the required financial requirements (for non APRA-regulated licensees) in Policy Statement 166 *Licensing: Financial requirements* [PS 166]. These requirements are applied by imposing licence conditions: see Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209].

Compliance measures, processes and procedures

[PS 164.114] Risk management systems will include compliance measures, processes and procedures as a means to address identified risks. However, compliance measures, processes and procedures might only be one of the measures adopted under risk management systems to minimise risk to a licensee's operations (including the risk of non-compliance with its obligations under the Corporations Act).

APRA-regulated licensees

[PS 164.115] We consider that the need for compliance measures, processes and procedures, applies to all licensees, including licensees regulated by APRA. This is because all licensees are required to comply with a range of licensee obligations, of which the obligation to have adequate risk management systems is only one.

[PS 164.116] Some APRA-regulated entities may include compliance with obligations under the Corporations Act as part of the risk management systems required by APRA. If so, they should be able to draw our attention to where the particular compliance issues are dealt with in those systems.

Review

[PS 164.117] Risk management systems established to address identified risks will need to adapt to business developments and any changes in business risk profile over time. If a licensee makes material changes to the business structure that may affect its risk profile, it will usually need to adapt its risk management systems to address those changes.

Governing body commitment

[PS 164.118] For risk management systems to work effectively in practice, a licensee's governing body (or a sub-committee of this body) should understand and be committed to the systems' successful operation. This helps ensure risks are effectively managed, both at initial application of the systems and on an ongoing basis, and that the risk management processes and procedures are integrated into the culture of the organisation.

[PS 164.119] The level of governing body commitment may extend to:

- (a) communicating the risk management processes to those responsible for implementing them and to those with a vested interest;

- (b) ensuring staff education and awareness of the processes and procedures;
- (c) implementing clear reporting lines for the risk manager; and
- (d) receiving regular reports on risk management.

Issues to consider: risk management systems

See the Schedule at [PS 164.138C] for issues licensees may wish to consider when addressing risk management systems.

Table 4 is moved to [PS 164.138C].

G Non-financial resources

Note: This section does not apply to a licensee that is a body regulated by APRA.

The obligation to have adequate non-financial resources

[PS 164.120] A licensee must have adequate resources to provide the financial services covered by its AFS licence and to carry out supervisory arrangements: see s912A(1)(d). This obligation includes financial, technological and human resources.

[PS 164.121] This section of the policy statement deals with a licensee's obligation to have adequate non-financial resources. Our policy on financial requirements is set out in Policy Statement 166 *Licensing: Financial requirements* [PS 166]. These requirements are applied by imposing licence conditions: see Pro Forma 209 *Australian Financial Services Licence conditions* [PF 209].

[PS 164.122] Having sufficient non-financial resources is crucial to an applicant's ability to demonstrate it has the capacity to carry on the business in compliance with the licensee obligations. What is adequate will vary from licensee to licensee and will depend on the nature, size and complexity of the business a licensee carries on.

What we expect

[PS 164.123] To ensure it complies with its non-financial resources obligation, we expect a licensee will have enough technological and human resources to enable it to:

- (a) effectively implement measures, processes and procedures to meet its compliance and (except for licensees that are bodies regulated by APRA) risk management obligations; and
- (b) meet current and anticipated future operational needs.

[PS 164.124] In most cases, licensees will document how they have analysed their compliance with the non-financial resources obligation, and the conclusions they have reached. This documentation will assist in demonstrating to us how a licensee, or an applicant for an AFS licence, complies with the obligation.

Technological resources

[PS 164.125] What technological resources are adequate will vary from one licensee to another and will depend on the nature, scale and complexity of a licensee's business. It will also vary according to the types of systems a licensee uses in its business and the role IT systems and other technological resources have in its operations. We envisage licensees will use a spectrum of technological resources, ranging from simple manual systems to sophisticated IT systems.

Are current IT systems adequate?

[PS 164.126] To ensure licensees continue to meet their licensee obligations, we expect licensees using IT systems to regularly review:

- (a) their IT system security;
- (b) the currency of hardware and software;
- (c) the quality and relevance of applications in use;
- (d) their disaster recovery systems and business resumption capacity;
- (e) the number of users;
- (f) the ongoing viability of software and other service providers;
- (g) the response times of their IT systems;
- (h) the down times of their IT systems;
- (i) their use of legacy IT systems; and
- (j) complaints from staff and clients about their IT systems.

[PS 164.127] If a licensee does not currently use IT systems, it may need to review its present system to decide whether:

- (a) its present system is sufficient to ensure that it will continue to satisfy the licensee obligations; or
- (b) an IT system would better maintain client records and data integrity.

Small business

[PS 164.128] A number of small business licensees may not use IT systems to operate their businesses. We do not think the legislation requires the use of IT systems if current manual systems are sufficient to conduct properly the full range of their business activities.

Human resources

[PS 164.129] In our view, a licensee's general obligation to have adequate human resources has two main components. The licensee must have:

- (a) a large enough level of human resources to enable it to carry on its licensed business in full compliance with the law; and
- (b) adequate arrangements to fulfil its obligations relating to the people who provide services on its behalf.

Note: In Section E, we also consider a licensee's obligation to have adequate human resources in the context of meeting its organisational expertise obligations.

Level of human resources

[PS 164.130] Failure to have enough human resources may create an unacceptable risk that a licensee cannot comply with all its obligations.

[PS 164.131] The level of human resources required depends on:

- (a) the number of clients a licensee has;
- (b) how many representatives it has;
- (c) the number of transactions a licensee is likely to enter into;
- (d) the likely size of the transactions;
- (e) the nature of the products the licensee is involved with; and
- (f) the level of IT system used, if used.

[PS 164.132] Whether a licensee's level of human resources is sufficient will be influenced by its organisational structure and the necessary monitoring and supervision of representatives.

Licensees' obligation to have adequate human resources

[PS 164.133] A licensee must ensure that people who provide financial services on its behalf are authorised (if required by s911B and 912A(1)(c)), and are of good fame and character (where they are responsible officers: see s913B. It must also ensure it trains, supervises and monitors them: see Section D of this policy statement.

[PS 164.134] There are a number of steps a licensee can take to ensure it meets its obligations relating to the people who provide services under the AFS licence. It is those representatives who enable the licensee to comply with all its obligations. Measures taken should ensure that:

- (a) the licensee has appropriate internal control procedures and that staff are trained in their use;
- (b) when staff are absent, client accounts and interests continue to be monitored;
- (c) consumer complaints and queries can be responded to quickly and accurately;
- (d) staff are monitored and supervised and, particularly where the licensee's operations are diverse, supervisors have sufficient capacity to adequately supervise staff; and
- (e) future operational demands are continuously assessed to ensure there are sufficient resources to meet demands.

[PS 164.135] Measures that a licensee takes to ensure these outcomes will normally relate to a number of aspects of its business including:

- (a) the recruitment process — whether police checks, reliable referee reports and statements of employment are obtained prior to engagement;
- (b) succession or recruitment planning, to ensure that there is continual access to the requisite mix and range of skills;
- (c) the performance management system;
- (d) the process for staff retrenchment and redundancy; and
- (e) systems for induction and training of new staff.

[PS 164.136] In documenting measures for monitoring adequacy of human resources, licensees will normally describe key indicators that will reveal if the level of human resources is inadequate, or if those who provide services on behalf of the licensee are inadequately monitored, supervised and trained. Key indicators are likely to include a high level of:

- (a) customer complaints about the quality of customer service;
- (b) customer complaints about advice;
- (c) staff with a short period of service (eg less than 6 months); and
- (d) vacant positions.

Review

[PS 164.137] Licensees must have adequate non-financial resources on an ongoing basis. To ensure compliance with this obligation, a licensee will need to have processes in place to ensure that it can monitor and report on the sufficiency of its non-financial resources.

[PS 164.138] We recognise that licensees may have different monitoring arrangements to determine whether their technological and human resources are adequate.

Issues to consider: non-financial resources

See the Schedule at [PS 164.138D] for issues licensees may wish to consider when addressing non-financial resources.

Table 5 is moved to [PS 164.138D].

Schedule: Other issues to consider

This Schedule provides further guidance by showing some typical issues a licensee should think about when designing its measures, processes and procedures to comply with its obligations. It covers issues relating to:

- (a) compliance measures, processes and procedures ([PS 164.138A]);
- (b) monitoring, supervision and training ([PS 164.138B]);
- (c) risk management systems ([PS 164.138C]); and
- (d) non-financial resources ([PS 164.138D]).

Compliance measures, processes and procedures — issues to consider

[PS 164.138A] We encourage licensees to consider the following issues when addressing compliance with the licensee obligations. It is not suggested that all the matters in this table are relevant to every particular licensee or that they are exhaustive. Licensees should determine which matters are relevant to their business. These are the types of matters that we will consider in assessing AFS licence applications and carrying out surveillance. We will review them in light of our experience in administering the Corporations Act.

The following issues to consider should be applied with any necessary adaptation where compliance measures, processes and procedures include the use of third parties (whether external or within a corporate group).

Requirement	Issues
<p>Documented compliance measures, processes and procedures</p> <p>Note: We may require a copy of your compliance measures, processes and procedures during the licence assessment process.</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><i>Hint: Documentation may consist of training material, board reports or IT system specification</i></p> </div>	<ul style="list-style-type: none"> • Have you documented your compliance measures, processes and procedures? • Have they been approved (signed off) by the governing body? • Are those compliance measures, processes and procedures monitored? • How are your compliance measures, processes and procedures communicated to your directors, employees and representatives? Do you make use of facilitative communication tools (such as electronic systems)? • Are the compliance measures, processes and procedures integrated into relevant operational processes? • Can you identify who in your business is responsible for monitoring compliance with the measures, processes and procedures?
<p>Clear and convincing measures, processes and procedures</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><i>Hint: Do they explain what you do to ensure compliance – it could only be one page?</i></p> </div>	<ul style="list-style-type: none"> • Are your compliance measures, processes and procedures clear and convincing? • Do your compliance measures, processes and procedures promote a culture of compliance? • What testing of comprehension of your compliance measures, processes and procedures do you undertake?

Requirement	Issues
<p>Updating of measures, processes and procedures</p> <div data-bbox="236 394 539 501" style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><i>Hint: How do you know they are working?</i></p> </div>	<ul style="list-style-type: none"> • On what basis and how often are your compliance measures, processes and procedures updated? • On what basis and how often are your compliance measures, processes and procedures reviewed? • On what basis is the monitoring of your compliance measures, processes and procedures reviewed? • Do you undertake regular external and internal audit reviews of your compliance measures, processes and procedures and their monitoring? • How do you communicate changes in your compliance measures, processes and procedures, so that your directors, employees and representatives understand the changes?
<p>Compliance function</p> <div data-bbox="236 898 539 1043" style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><i>Hint: This may not be necessary for small business</i></p> </div>	<ul style="list-style-type: none"> • Have you set up a separate compliance function within your organisation? • Have you a person in the compliance manager role? • Is the allocation of responsibilities for the compliance function clear and understood by your directors, employees and representatives? • Does the compliance manager have reporting access to the governing body (or its delegate)? • Do the compliance function staff have access to relevant information held by the organisation in order to effectively perform their compliance responsibilities? • Do you have compliance measures, processes and procedures to quickly fill vacancies in the compliance function staff? • Are the compliance function staff adequately trained and qualified in compliance responsibilities?
<p>Reporting breaches</p>	<ul style="list-style-type: none"> • Is there a clear, well-understood and documented process for reporting breaches of the financial services laws (including licence conditions) and for escalating reported breaches (including to the governing body or its delegate)? • Is there a review of the compliance measures, processes and procedures to take into account breaches of the financial services laws (incl. Licence conditions) by the organisation? • Is there a method to identify and address breaches of the financial services laws (including systemic breaches)? • Is it clear within the organisation when you should report breaches of the financial services laws (including licence conditions) to ASIC?

Requirement	Issues
<p>Delegation and outsourcing of tasks</p> <div data-bbox="236 392 539 504" style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><i>Hint: Does what you do actually work?</i></p> </div>	<ul style="list-style-type: none"> • What arrangements do you have in place to supervise delegation of tasks and functions (including by the use of outsourced agents) and to monitor the discharge of the delegate's functions or tasks? • What arrangements do you have in place to assess the initial and ongoing suitability of a delegate to undertake the function or task? • Do you obtain sufficient information from your agents and employees to enable you to assess the impact of outsourcing on your compliance measures, processes and procedures?
<p>Segregation of duties</p>	<ul style="list-style-type: none"> • What arrangements do you have in place (where possible and appropriate) to segregate the duties of individuals and departments in such a way as to reduce opportunities for misappropriation or contraventions of the financial services laws (eg back office and front office functions)?
<p>Managing information</p>	<ul style="list-style-type: none"> • What arrangements do you have in place to provide your governing body (or its delegate) with the information it needs to play its role in identifying, measuring, managing and controlling risks of non-compliance with the financial services laws (including licence conditions)?
<p>Safeguarding client money and assets</p>	<ul style="list-style-type: none"> • What controls do you have to ensure that client monies and assets are separated from your monies and assets as required under Part 7.8 of the Corporations Act? • What arrangements are in place to ensure that any person (other than you) holding client money or assets on your behalf meets the requirements under the Corporations Act for holding client money or assets?
<p>Accounts and record keeping</p> <div data-bbox="236 1590 539 1702" style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><i>Hint: Don't forget about privacy</i></p> </div>	<ul style="list-style-type: none"> • What arrangements are in place to ensure that accounting records and other evidence about your business will be adequate to allow you and ASIC to conduct reviews of your business activities? • What procedures ensure that appropriate taxation and accounting requirements are adhered to? • What procedures ensure that all statutory deadlines for reporting are complied with? • What measures are in place to ensure that records are maintained for the statutory period? What measures ensure that records for compliance monitoring are kept? • What arrangements are in place to monitor compliance with

Requirement	Issues
	<p>financial resource requirements imposed as a condition of your AFS licence (for licensees not regulated by APRA)?</p>
<p>Conduct of business obligations</p>	<ul style="list-style-type: none"> • What measures are in place to ensure that applicable “conduct of business” requirements under the Corporations Act are complied with on an ongoing basis (eg requirements about giving personal advice to retail clients; trading requirements for best execution and fair allocation; conflicts of interests are managed; all applicable financial product advice disclosures and warnings are provided)?
<p>Disclosures and reporting</p>	<ul style="list-style-type: none"> • What procedures are in place to ensure that all your publications (eg advertising, Product Disclosure Statements, Financial Services Guides) comply with the requirements of the Corporations Act (eg timing, content, not misleading)? • What arrangements are in place to ensure that your financial statements and any of your products are true and fair and when relevant, appropriate continuous disclosure/significant event disclosures are made?
<p>Related party issues</p>	<ul style="list-style-type: none"> • What controls are in place to ensure that flows of information between you and your related bodies corporate are appropriately protected (eg to minimise inside information and to manage conflicts of interests)? • What measures are used to ensure that the use of a related third party service provider is in your and your clients’ best interests?
<p>Fees and expenses</p>	<ul style="list-style-type: none"> • What procedures are used to ensure that only authorised fees and expenses are charged to a client and that the fees and expenses are calculated correctly?

Monitoring, supervision and training — issues to consider

[PS 164.138B] Licensees may wish to consider the following issues when addressing the monitoring, supervision and training obligations. It is not suggested that the matters in this table are relevant to every particular licensee or that they are exhaustive. Licensees should determine which matters are relevant to their business. These are the types of matters that we will consider in assessing AFS licence applications and carrying out surveillance. We will review them in light of our experience in administering the Corporations Act.

Requirement	Issues
Representatives	<ul style="list-style-type: none"> • Have you identified all your representatives (in particular, any persons or entities other than employees, directors and authorised representatives who are acting on your behalf)? • Do you have measures, processes and procedures in place to ensure that only appropriate persons are appointed as your representatives, including the use of individual assessments and background checks where necessary? • Do you know what activities your representatives undertake and the level of training they have achieved? • Have you established a clear reporting and supervisory structure that is applicable to all your representatives?
Compliance arrangements	<ul style="list-style-type: none"> • Are your representatives aware of relevant compliance arrangements, and do they understand them? • Have you ensured that these arrangements are updated as necessary (eg to deal with new products)?
Assessing representatives' compliance	<ul style="list-style-type: none"> • What monitoring and supervision measures, processes and procedures have you adopted to determine whether representatives are complying with the financial services laws? • Do your monitoring and supervision procedures address higher risk activities of your representatives, such as providing retail financial product advice? • How do you ensure that you are not receiving inaccurate information (eg reports that are based on “guess work” or that are sanitised)? • Who carries out these measures, processes and procedures? How often? • How are breaches rated?

Requirement	Issues
Remedial action — correction, prevention and disciplinary action	<ul style="list-style-type: none"> • What arrangements are in place to ensure you take effective remedial action in response to compliance failures? • What arrangements are in place to ensure you take appropriate action to correct compliance failures? • What arrangements are in place to ensure you take appropriate action to prevent further breaches, such as: <ul style="list-style-type: none"> (a) feedback and further training; (b) special supervision; and (c) addressing trends or patterns of compliance failures (eg by adjusting procedural controls, or by adjusting induction and continuous education training programs)? • Have you provided your representatives with your disciplinary policy for breaches? Is this policy applied? Does this policy ensure that representatives are not rewarded, particularly financially, as a result of breaches occurring?
Reporting	<ul style="list-style-type: none"> • What controls are in place to ensure that all breaches of the financial services laws by representatives are reported to the appropriate level of management? • How do you ensure that breaches are reported to ASIC as required by s912D? Who is responsible for reporting to ASIC?
Training responsibilities	<ul style="list-style-type: none"> • Have you ensured that your training programs or individual assessment methods for representatives who provide financial services address the relevant ASIC requirements at the appropriate education level? • Have you implemented measures, processes and procedures for the continuing training of your representatives who provide financial services?
Continuing training	<ul style="list-style-type: none"> • Have you nominated a person who is responsible for continuing training? • Have you established an annual training program for each representative who provides financial services? • Are you keeping records of training programs: see reg 7.6.04(d)? • Have you determined how much training each representative who provides financial services needs each year?

Risk management systems — issues to consider

[PS 164.138C] We do not intend to issue checklists of risks that licensees should be assessing, or detailed measures, processes and procedures to address risks. However, the following provides general guidance as to some issues licensees may wish to consider when addressing the licensee obligations. It is not suggested that the matters in this table are relevant to every particular licensee or that they are exhaustive. Licensees should determine which matters are relevant to their business. These are the types of matters that we will consider in assessing AFS licence applications and carrying out surveillance. We will review them in light of our experience in administering the Corporations Act.

Requirement	Issues
Context	<ul style="list-style-type: none"> • What is your defined corporate governance approach? • What is your management structure supporting your risk management processes? • What strategies will your risks be measured against?
Identifying risks	<ul style="list-style-type: none"> • Have you focused on the identification of risks to consumers and market integrity? • Have you considered all your obligations under the Corporations Act (including the regulations and licence conditions)? • Have you identified the risks of non-compliance with these? • What systems and controls do you currently have in place to address risk? • Are these systems and controls adequate to meet your obligations? • Are your governing body, management and staff skilled, competent and fit to carry out their responsibilities? • Do you have a “compliance culture” within your organisation (including where relevant within your corporate group)? If so, have you recently assessed whether it is working? If not, what education and information distribution processes are in place to build one? • Is the sophistication level of your consumers matched to the products you offer?
Assessing risks	<ul style="list-style-type: none"> • Have you established the probability of a risk event occurring and the impact of the problem if the risk occurs? • Have you combined the probability and impact factors to determine the overall risk?

Requirement	Issues
Evaluating risks	<ul style="list-style-type: none"> • Have you prioritised the assessed risks and established which risks need to be treated?
Treating risks	<ul style="list-style-type: none"> • Have you treated those risks with appropriate measures?
Documenting risk management systems to control risk	<ul style="list-style-type: none"> • Have you documented the risks you have assessed and how you arrived at this assessment? • Have you documented the risk management processes and procedures that you have determined will address these risks and how you arrived at this determination? • Have you in place a documented organisational structure that clearly specifies where the risk management responsibilities lie?
Adapting to change in risk dynamics	<ul style="list-style-type: none"> • Are your systems able to keep pace with new products and industry technology?
Governing body commitment	<ul style="list-style-type: none"> • Has your governing body signed off on the risk management systems and made a commitment to ongoing risk management processes? • Have you appointed senior management to oversee risk management processes? • Do you have procedures in place to educate staff on risk management processes?
Audit and review processes and procedures	<ul style="list-style-type: none"> • Have you integrated annual reviews of your risk management processes and procedures into your business plan? • Are independent evaluations being conducted?
Reporting processes and procedures	<ul style="list-style-type: none"> • Do your representatives know to whom they are to report and who will report to them? • Do your representatives understand what they are required to report on, and when?

Non-financial resources — issues to consider

[PS 164.138D] Licensees may wish to consider the following issues when addressing the non-financial resources. It is not suggested that the matters in this table are relevant to every particular licensee or that they are exhaustive. Licensees should determine which matters are relevant to their business. These are the types of matters that we will consider in assessing AFS licence applications and carrying out surveillance. We will review them in light of our experience in administering the Corporations Act.

Requirement	Issues
Technological resources	<ul style="list-style-type: none"> • Do you have sufficient IT and communications systems? • Do you have a reliable reporting system? • Do you have an early warning system, such as a system that provides automated exception reports? • Do you have sufficient technological resources to retain, store, access and keep secure your records? • Do you have sufficient technological resources to protect confidential and other sensitive information you possess? • How regularly do you back up your data? • If data is backed up, is your back-up adequately stored? • Have you contractual agreements with third parties for the development and maintenance of your IT system? If so, are there measurable service level targets in these contracts? • Is there an IT strategy to support business operational and strategic imperatives? • Do you have a dedicated in-house organisational structure to provide and/or manage the delivery of IT services? If no, how are IT services managed and delivered? • Do you have data back-up and recovery plans? • Is data back-up executed daily and stored off-site? • Do you have disaster recovery plans and are they regularly tested? • Is access to physical IT infrastructure restricted? • Are operational service level agreements established and reported against for key performance indicators? • Do you have network (Internet, WAN, LAN) security controls in place? How do you keep viruses out of your system?

Requirement	Issues
Human resources	<ul style="list-style-type: none">• What human resources do you have for each of your business activities (including matters such as complaints handling, monitoring and supervision)?• Are extra resources made available for supervising staff or other representatives who have been involved in compliance failures?• What are your recruitment processes? Do you check the prior history of key personnel before you hire them?• What are your systems for inducting and training new staff?• What are your performance management procedures?• Do you have succession planning in place for absences (long or short) to ensure client accounts continue to be managed appropriately?• Are your legal advisers and compliance staff independent?• Do you have appropriate human resources to support your IT needs?• What key indicators have you identified that need to be monitored to assess adequacy of your human resources?

Key terms

[PS 164.139] In this policy statement:

“AFS licence” means an Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services

Note: This is a definition contained in s761A.

“APRA” means the Australian Prudential Regulation Authority

“ASIC” means the Australian Securities and Investments Commission

“authorised representative” of a licensee means a person authorised in accordance with s916A or 916B to provide a financial service or financial services on behalf of the licensee

Note: This is a definition contained in s761A.

“body regulated by APRA” has the meaning given in s3(2) of the *Australian Prudential Regulation Authority Act 1998*

“Corporations Act” means the *Corporations Act 2001* as amended by the FSR Act and includes regulations made for the purposes of the Act

“financial product” means generally a facility through which, or through the acquisition of which, a person does one or more of the following:

- (a) makes a financial investment (see s763B);
- (b) manages financial risk (see s763C);
- (c) makes non-cash payments (see s763D)

Note: See Div 3 of Part 7.1 for the exact definition.

“financial product advice” means a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence.

However, the provision or giving of an exempt document or statement is not to be taken to be a provision of financial product advice

Note: This is a definition contained in s766B(1).

“Financial Services Guide” means a document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Part 7.7

Note: See s761A for the exact definition.

“financial services law” means:

- (a) a provision of Chapter 7 (Financial Services and Markets) or of Chapter 5C (Managed Investment Schemes), 6 (Takeovers), 6A (Compulsory Acquisitions and Buy-Outs), 6B Rights and Liabilities in Relation to Chapters 6 and 6A), 6C (Information about Ownership of Listed Companies and Managed Investment Schemes) or 6D (Fundraising) of the Corporations Act; or
- (b) a provision of Chapter 9 of the Corporations Act as it applies in relation to a provision referred to in paragraph (a); or
- (c) a provision of Division 2 of Part 2 (Unconscionable Conduct and Consumer Protection in relation to financial services) the *ASIC Act 2001*; or
- (d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services

Note: See s761A for the exact definition.

“FSR Act” means the *Financial Services Reform Act 2001*

Note: The provisions contained in Schedule 1 form part of the Corporations Act from 11 March 2002. Schedule 1 contains the financial services licensing provisions under Parts 7.6 to 7.8 and the financial product disclosure provisions under Part 7.9.

“FSR commencement” means 11 March 2002, the date fixed by proclamation under s2(2) of the FSR Act on which Schedule 1 of the FSR Act commenced

Note: Schedule 1 contains the financial services licensing provisions under Parts 7.6 to 7.8 and the financial product disclosure provisions under Part 7.9.

“governing body” means the board of directors, committee of management or other governing body of the entity, including in relation to a licensee who is a natural person, that person

“licensee” means a person who holds an AFS licence

“licensee obligations” means the obligations of a licensee as set out in s912A, 912B and the requirement to be of good fame and character as included in s913B

“old Corporations Act” means the *Corporations Act 2001* as in force immediately before FSR commencement

“Part 7.9” (for example) means a Part of the Corporations Act after FSR commencement (in this example numbered 7.9), unless a contrary intention appears

“personal advice” means financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

- (a) the provider of the advice has considered one or more of the person’s objectives, financial situation and needs; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters

Note: This is a definition contained in s766B(3).

“Product Disclosure Statement” means a document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Part 7.9

Note: See s761A for the exact definition.

“[PS 136]” (for example) means an ASIC policy statement (in this example numbered 136)

“reg 7.6.04” (for example) means a regulation of the *Corporations Regulations 2001* (in this example numbered 7.6.04)

“regulations” means the *Corporations Regulations 2001*

“representative” of a licensee means:

- (a) an authorised representative of the licensee; or
- (b) an employee or director of the licensee; or
- (c) an employee or director of a related body corporate of the licensee; or
- (d) any other person acting on behalf of the licensee

Note: This is a definition contained in s910A.

“retail client” means a client defined as such under s761G and Chapter 7 Part 7.1 Div 2 of the regulations

“s912A” (for example) means a provision of the Corporations Act after FSR commencement (in this example numbered 912A), unless a contrary intention appears

“Statement of Advice” means a document that must be given to a retail client in relation to the provision of personal advice in accordance with Subdivisions C and D of Div 3 of Part 7.7.

Note: See s761A for the exact definition.

Related information

[PS 164.140]

Headnotes

licensee obligations; compliance measures; efficiently, honestly and fairly; outsourcing; licence application process; representatives; para-planners; monitoring, supervision and training of representatives; organisational expertise; risk management systems; non-financial resources; IT systems; technological resources; human resources

Instruments

Pro Forma 209 *Australian Financial Services Licence conditions*
[PF 209]

Policy statements

Policy Statement 130 *Managed investments: Licensing* [PS 130]

Policy Statement 146 *Licensing: Training of financial product advisers* [PS 146]

Policy Statement 165 *Licensing: Internal and external dispute resolution* [PS 165]

Policy Statement 166 *Licensing: Financial requirements* [PS 166]

Policy Statement 167 *Licensing: Discretionary powers and transition*
[PS 167]

Legislation

Corporations Act Chapter 7 Part 7.1 Div 2, Parts 7.6–7.9, s9, 601FB(1), 761A, 761G, 763A(1), 763B–D, 766B(1), 766B(3), 769B, 910A, 911B, 911B(1)(d), 912A, 912A(1), 912A(1)(a), 912A(1)(c), 912A(1)(ca), 912A(1)(d)–(f), 912A(1)(h), 912B, 912D, 913B, 913B(1)(b), 913B(1)(ca), 915C(2), 915I(1), 915I(2), 1274(8), 1307, 1355, 1433, regulations 7.6.04(d), ASIC Act Div 2 Part 2, FSR Act s2(2), Schedule 1, APRA Act s3(2)

Related FSR papers

FSRB Policy Proposal Paper No 2 *Licensing: Organisational capacities* (April 2001)

Building the FSRB Administrative Framework — Policy to implement the Financial Services Reform Bill 2001 (April 2001) and *Supplement* (September 2001)

Licensing: The scope of the licensing regime: Financial product advice and dealing — An ASIC guide (November 2001, updated November 2002)

Licensing and disclosure: Making the transition to the FSR regime — An ASIC guide (October 2001, updated November 2002)

Australian Financial Services (AFS) Licensing Kit (Version 2, October 2002)

Making the transition to an AFS licence: pre-FSR licences and insurance broker registrations – An ASIC guide (April 2002)

The hawking prohibitions – An ASIC guide (July 2002 updated October 2002)

Media and information releases

[MR 98/262] ASIC extends competency consultation timetable, 2 September 1998

[MR 01/135] Policy proposal and process papers for the FSR Bill, 26 April 2001

[MR 01/319] Revised timetable for FSR publications, 11 September 2001

[MR 01/418] ASIC releases policy statements and guidance paper for FSR legislation, 28 November 2001

[IR 00/27] ASIC extends compliance date for training of advisers, 16 August 2000

[IR 00/35] ASIC guidance on the training of authorised representatives, 21 November 2000

[IR 02/02] Training of financial product advisers: pre-1995 training courses, 6 March 2002

[IR 02/10] Compliance with Policy Statement 146, 20 June 2002



ASIC
Australian Securities &
Investments Commission

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Discretionary Payments Team
Risk & Claims Branch
Department of Finance

13 April 2022

By email: sfc@finance.gov.au

Private & Confidential

Dear Sir/Madam

**ACT OF GRACE APPLICATION SUBMITTED BY s22(1)(a)(ii) ON BEHALF OF CLIENTS
OF s22(1)(a)(ii)**

1. ASIC refers to the applications (**Applications**) submitted to the Department of Finance (**Finance**) by s22(1)(a)(ii) seeking act of grace payments totalling \$11,363,828.41 on behalf of 20 individuals (**Applicants**).
2. The Applications are made under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) in relation to losses suffered by the Applicants' dealings with s22(1)(a)(ii) [REDACTED] and his company Papalia Enterprises Pty Ltd (**Papalia Enterprises**). A table listing the Applicants is at **Annexure A**.
3. The Applications are each accompanied by a form signed by each of the Applicants authorising s22(1)(a)(ii) from s22(1)(a)(ii) to act on behalf of each Applicant.

SUMMARY OF ASIC'S RESPONSE

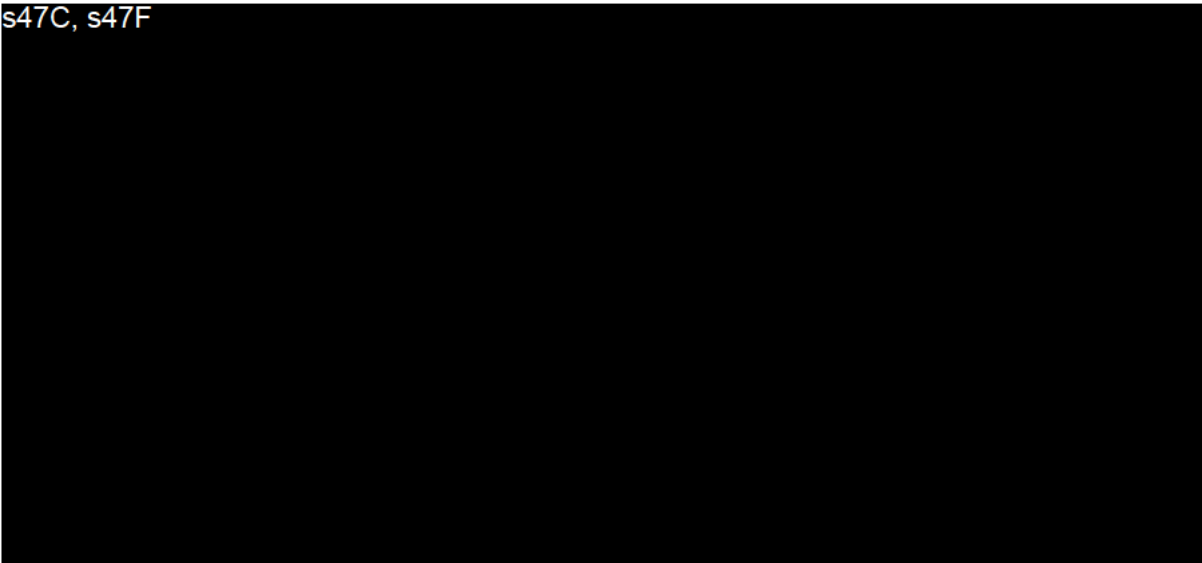
4. ASIC submits that Finance should refuse the Applications as they do not disclose any '*special circumstances*' within the meaning of subsection 65(1) of the PGPA Act.
5. ASIC's actions with respect to **s22(1)(a)(ii)** and Papalia Enterprises were appropriate and reasonable given the information available to ASIC at the time. Further, the Applications do not provide evidence that the loss of the Applicants' investments can be attributed to any acts or omissions by ASIC.

SUMMARY OF THE APPLICATIONS

6. The Applications are supported by a submission prepared by the **s22(1)(a)(ii)** dated 14 February 2022 outlining the circumstances giving rise to each of the Applications (**s22(1)(a)(ii) Submission**).
7. In summary, the **s22(1)(a)(ii)** Submission alleges ASIC was defective in the performance of its regulatory duties which led to financial losses for the Applicants.
8. The **s22(1)(a)(ii)** Submission further alleges that the regulatory and external dispute resolution (**EDR**) framework currently precludes the Applicants from pursuing or obtaining redress and compensation through alternative avenues. Therefore, the Applications constitute actions of last resort for the Applicants.

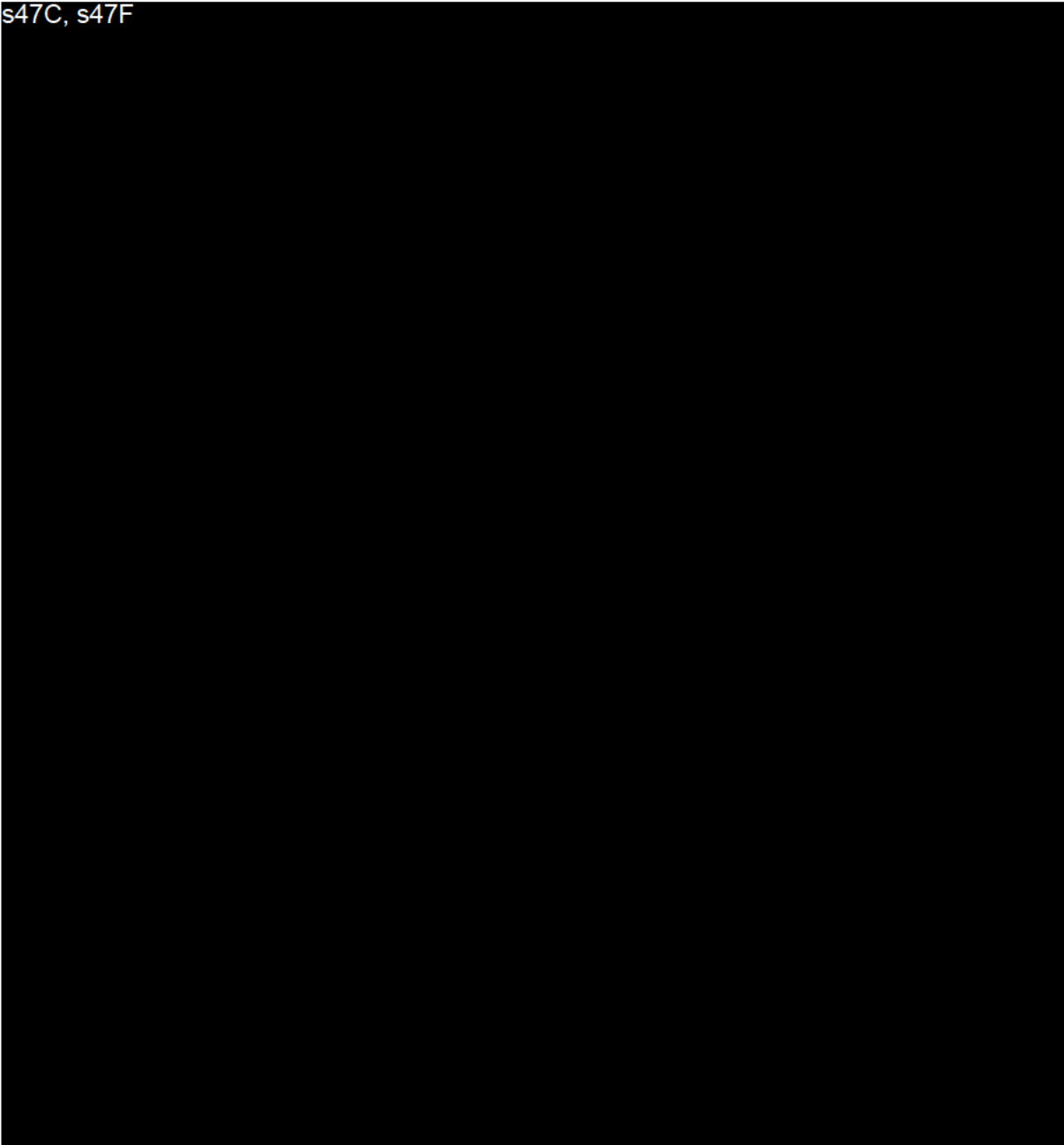
Grounds for compensation

s47C, s47F



¹ **s22(1)(a)(ii)** Submission at page 7, second paragraph

s47C, s47F



Victim impact statements

15. ASIC acknowledges the great distress, financial and emotional, suffered by the Applicants as a result of the loss of their investments. ASIC notes that each of the Applications is supported by a statement prepared by each of the Applicants setting out the impact of the financial losses on the Applicants (**Victim Impact Statements**).

² **s22(1)(a)(ii)** Submission at page 7, last paragraph

³ **s22(1)(a)(ii)** Submission at page 8, first paragraph

⁴ **s22(1)(a)(ii)** Submission at page 8, second paragraph

⁵ **s22(1)(a)(ii)** Submission at page 8, third paragraph

⁶ **s22(1)(a)(ii)** Submission at page 8, last paragraph

STATUTORY FRAMEWORK FOR ACT OF GRACE PAYMENTS

16. Subsection 65(1) of the PGPA Act sets out the statutory basis for the Finance Minister to authorise and act of grace payment to an applicant. It states that:

*The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it **appropriate to do so because of special circumstances.***

(emphasis added)

17. The terms 'appropriate' and 'special circumstances' are not defined in the PGPA Act. Section 65 confers a broad discretion on the Finance Minister or delegate.

18. Resource Management Guide 401: Requests for discretionary financial assistance under the *Public Governance, Performance and Accountability Act 2013* ([RMG 401](#)) describes the types of discretionary financial assistance, including act of grace payments, which may be authorised by the Finance Minister under the PGPA Act.

19. RMG 401 states at paragraphs 3 and 4:

'The act of grace mechanism is generally a remedy of last resort and it is not used when there is another viable remedy available to provide redress in the circumstances giving rise to the application.

If other avenues for a person to receive financial assistance from the Commonwealth (such as existing legislation or schemes), it is recommended that those avenues are investigated before a request is made for an act of grace payment.'

20. RMG 401 states at paragraph 10 that examples of special circumstances which may make it appropriate to approve an act of grace payment include where:

- a. an act of a non-corporate Commonwealth entity has caused an unintended and inequitable result to the individual seeking the payment;
- b. Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the applicant's circumstances and those circumstances were specific to the applicant, outside the parameters of events for which the applicant was responsible or had the capacity to adequately control and consistent with what could be considered to be the broad intention of the relevant legislation; or
- c. the matter is not covered by legislation or a specific policy, but the Commonwealth Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively.

ASIC RESPONSE

21. In preparing its response, ASIC has considered the statutory framework for act of grace payments and RMG 401, referred to above at paragraphs 16 to 20.
22. ASIC notes the contents of its *Information Sheet 152: Public comment of ASIC's regulatory activities* ([INFO Sheet 152](#)) and that ASIC's ability to comment on its regulatory activities is restricted because of legislative restrictions on the disclosure of material provided to ASIC in confidence⁷, the *Privacy Act 1988* (Cth), legal professional privilege and public interest immunity.
23. Subject to the restrictions noted at paragraph 22 above, ASIC has prepared a chronology of key events at **Annexure B**.

ASIC's statutory objectives

24. ASIC regulates corporations, managed investment schemes, participants in the financial services industry and people who engage in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Cth) (**Corporations Act**), *Australian Securities and*

⁷ Section 127(1) of the ASIC Act 2001

Investments Commission Act 2001 (Cth) (**ASIC Act**) and the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**).


25. The objectives of ASIC, as set out in subsection 1(2) of the ASIC Act, relevantly include that ASIC *'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it'*: see subsection 1(2)(g).
26. It is clear from the terms of subsection 1(2) of the ASIC Act that it does not impose a legal duty, obligation or requirement on ASIC to take any particular action on any given set of facts. ASIC must strive to achieve its objectives but is not under an obligation to anybody to take any particular action.⁸
27. ASIC's *Information Sheet 151: ASIC's approach to enforcement* ([INFO Sheet 151](#)) sets out how ASIC selects matters for formal investigation.
28. INFO Sheet 151 states that ASIC considers the following issues when deciding whether to take enforcement action:
- a. ASIC's strategic priorities, taking into account such matters as the seriousness of the alleged misconduct;
 - b. the regulatory benefits of pursuing the alleged misconduct;
 - c. the issues specific to a case, such as the availability of evidence admissible in court and whether the alleged conduct is continuing; and
 - d. alternatives to a formal investigation which might address ASIC's concerns more effectively, such as engagement with stakeholders and surveillance.
29. ASIC's statutory obligations mean that ASIC is to take the enforcement action it decides is best suited to the evidence available to it at the relevant time. As stated in INFO Sheet 151, ASIC:
- ' ... can pursue a variety of enforcement remedies, dependent on the seriousness and consequences of misconduct. Some*

⁸ *Bhagat v Global Custodians Ltd* [2000] NSWSC 321 at [8] and [12]

remedies involve relatively minor consequences while others will be serious, such as imprisonment and high monetary penalties. We will pursue the enforcement remedies best suited to the circumstances of the case and what we want, and are able, to achieve.

We can take enforcement action designed to punish wrongdoers, protect investors, preserve assets, correct disclosures and compensate people. We can also try to resolve matters through negotiation or issuing infringement notices.'

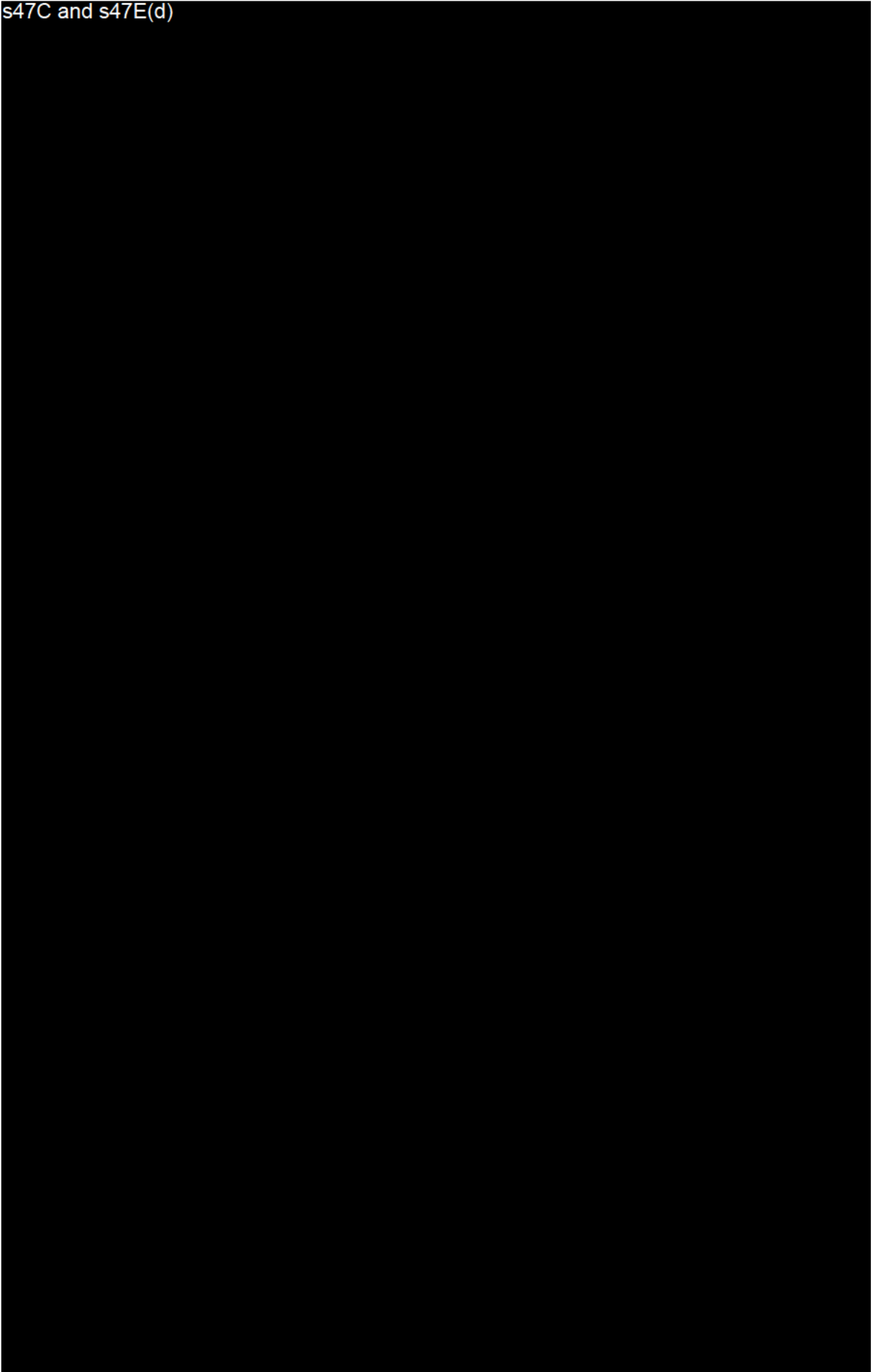
s47C and 47E(d)




32. ASIC's *Information Sheet 153: How ASIC deals with reports of misconduct* ([INFO Sheet 153](#)) states that:

- a. ASIC records every report of misconduct it receives;
- b. ASIC makes preliminary enquiries and conducts initial assessments of reports of misconduct (**ROMs**) it receives to see if the matter should be escalated to a specialist team within ASIC;
- c. All ROMs provide ASIC with valuable information but not every matter brought to ASIC's attention requires ASIC to take action; and
- d. Under the laws ASIC administers, ASIC has the discretion to decide whether to take further action on ROMs it receives.

s47C and s47E(d)



s47C and 47E(d)



40. As noted on ASIC's website,¹² the Banned and Disqualified Register provides information about people who have been:

- a. Disqualified from involvement in the management of a corporation;
- b. Disqualified from auditing self-managed superannuation funds; and
- c. Banned from practising in Australian financial services (**AFS**) or credit industry.

41. It also provides information about organisations that have been banned from the AFS or credit industry.

42. The Banned and Disqualified Register includes information about individuals that have been:

- a. Disqualified by ASIC from managing corporations for up to 5 years under s 206F of the Corporations Act;

¹⁰ ASIC refers to pages 1 and 2 of the Liquidators' Statutory Report dated 13 December 2021 at **Appendix 1** of the **s22(1)(a)(ii)** Submission.

¹¹ Refer to media reports from WA at **Annexure D**, **Annexure E** and **Annexure F**

¹² Refer to ASIC's website at [Banned and Disqualified](#).

- b. Banned from providing financial services under ss 920A and 920B of the Corporations Act; and
 - c. Banned from engaging in credit activities under ss 80 and 81 of the National Credit Act.¹³
43. ASIC refers to *Regulatory Guide 98: ASIC's power to suspend, cancel and vary AFS licences and make banning orders* ([RG 98](#)) which describes the administrative powers available to ASIC to enforce compliance with the Corporations Act, including the financial services licensing provisions, by suspending, cancelling and varying AFS licences and making banning orders.
44. When deciding whether to take administrative action including making a banning order under s 920A of the Corporations Act, the factors ASIC will consider include:
- a. Whether the proposed action is within ASIC's power;
 - b. Whether taking the action will promote the objects of the financial services regime;
 - c. Whether taking the action will deter misconduct;
 - d. The strategic significance of taking action;
 - e. The need to protect investors and consumers; and
 - f. Other benefits of pursuing misconduct.
45. ASIC notes that under s 920A(1)(c) of the Corporations Act, ASIC can make a banning order against a person convicted of fraud.
46. ASIC also notes that, under s 920A(2) of the Corporations Act, it can only issue a banning order prohibiting a person from provided financial services under section 920B of the Corporations Act¹⁴ against a person if it has given that person an opportunity:
- a. to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - b. to make submissions to ASIC on the matter.¹⁵

¹³ Refer to **Annexure G**

¹⁴ Refer to **Annexure G**

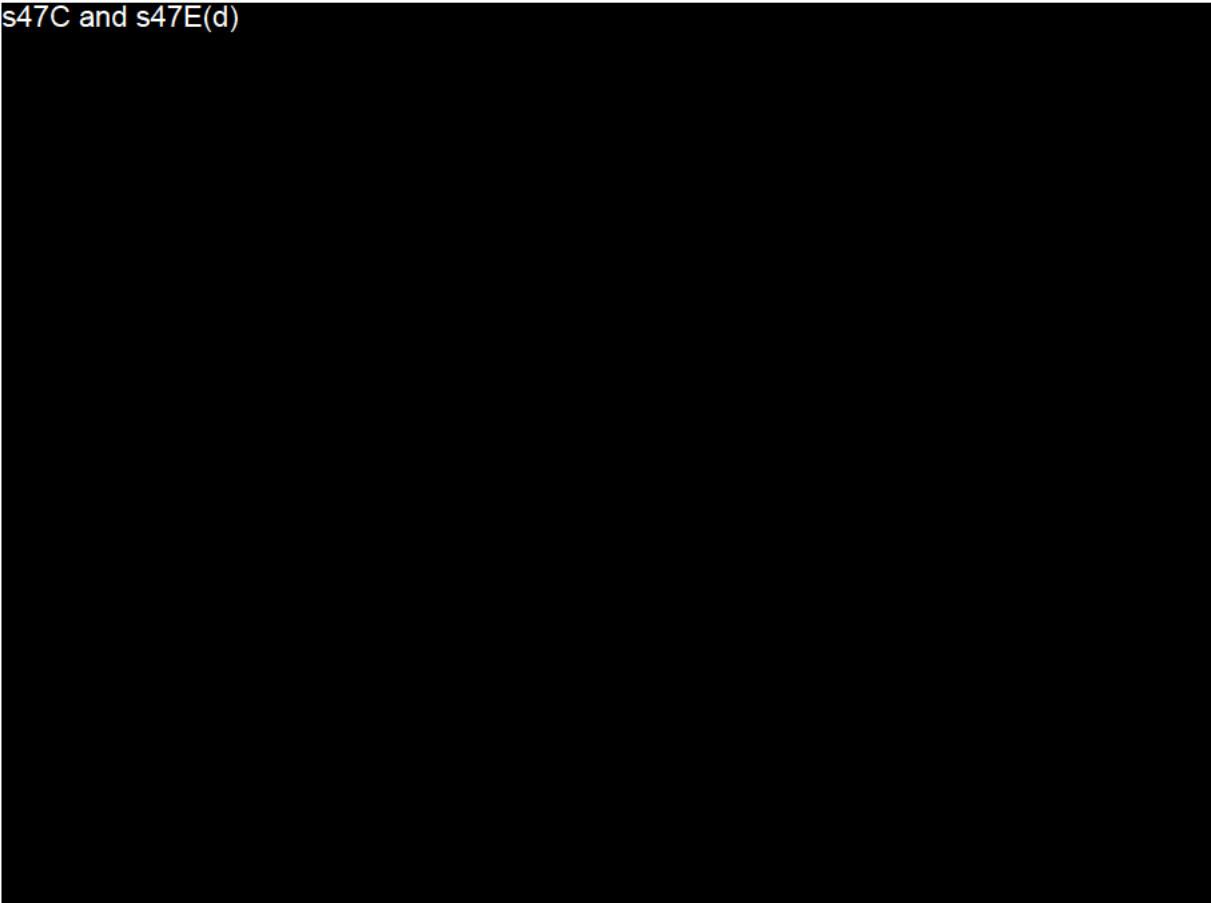
¹⁵ Refer to **Annexure G**. ASIC notes that this requirement is waived where the person has been convicted of serious fraud; s 920A(3)(b).

47. ASIC also refers to *Information Sheet 1: Administrative hearings* ([INFO Sheet 1](#)) and *Regulatory Guide 8: Hearing practice manual* dated May 1999 (updated October 2000 and March 2002) ([RG 8](#)) which set out the principles and procedures adopted by ASIC when conducting administrative hearings. As noted in RG 8, when conducting a hearing, ASIC must ensure:

- a. the person has sufficient time to prepare a response to the issues which are of concern to ASIC;
- b. any findings of fact by a decision maker must be based on material that is relevant, credible and probative; and
- c. each matter is determined on its merits although when making a decision, policy and precedent may be considered.

48. Should a decision be made to ban a person from providing financial services, ASIC is required to give written reasons for that decision.¹⁶

s47C and s47E(d)




¹⁶ RG 8 at 3.16

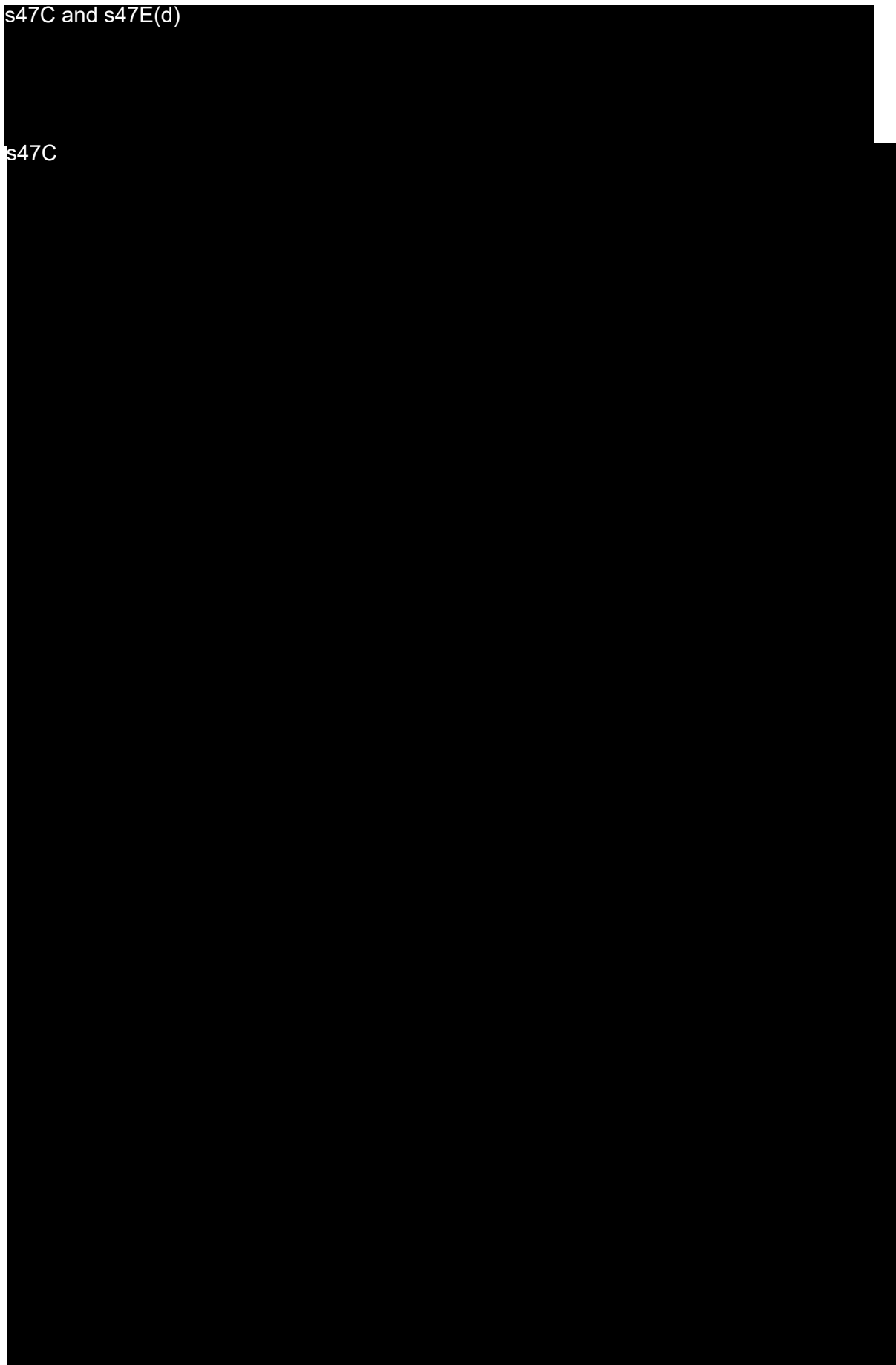
s47C



s47C and s47E(d)



s47C and s47E(d)



s47C

s47C



68. For the reasons set out above, ASIC submits that it acted appropriately and in accordance with legislation and policy and submits that its actions in the present circumstances have not had an unintended or inequitable result.

CONCLUSION

69. In the circumstances described above, the Applications do not demonstrate special circumstances which make it appropriate for act of grace payments to be made.

70. ASIC notes that, according to media reports, the matter is currently before the Court in Western Australia and makes no further comment.

Yours faithfully,

s22(1)(a)(ii)

Senior Lawyer

Australian Securities and Investments Commission

¹⁸ *Bhagat v Global Custodians Ltd* [2000] NSWSC 321 at [8] and [12].

List of Annexures

Annexure A – table listing the Applicants

Annexure B – Chronology of key events.

s47F



Annexure G – Extracts from the *Corporations Act 2001* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth)

Annexure G

Extracts from the *Corporations Act 2001 (Cth)* and the *National Consumer Credit Protection Act 2009 (Cth)*

Section 206F of the *Corporations Act 2001 (Cth)* – ASIC's power of disqualification

Power to disqualify

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
 - (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
 - (i) the person has been an officer of 2 or more corporations; and
 - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts; and
 - (b) ASIC has given the person:
 - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
 - (ii) an opportunity to be heard on the question; and
 - (c) ASIC is satisfied that the disqualification is justified.
- (1A) To avoid doubt, the references in paragraph (1)(a) to corporations include references to Aboriginal and Torres Strait Islander corporations.

Grounds for disqualification

- (2) In determining whether disqualification is justified, ASIC:
 - (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
 - (b) may have regard to:
 - (i) the person's conduct in relation to the management, business or property of any corporation; and
 - (ii) whether the disqualification would be in the public interest; and
 - (iii) any other matters that ASIC considers appropriate.
- (2A) To avoid doubt, the references in subsection (2) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

Notice of disqualification

- (3) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

Start of disqualification

- (4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.

Section 920A of the Corporations Act Corporations Act 2001 (Cth) – ASIC's power to make a banning order

Making a banning order

- (1) ASIC may, in writing, make one or more orders (**banning orders**) against a person if:
- (a) ASIC suspends or cancels an Australian financial services licence held by the person; or
 - (b) the person has not complied with their obligations under section 912A; or
 - (ba) ASIC has reason to believe that the person is likely to contravene their obligations under section 912A; or
 - (bb) the person becomes a Chapter 5 body corporate or an insolvent under administration; or
 - (c) the person is convicted of fraud; or
 - (d) ASIC has reason to believe that the person is not a fit and proper person to:
 - (i) provide one or more financial services; or
 - (ii) perform one or more functions as an officer of an entity that carries on a financial services business; or
 - (iii) control an entity that carries on a financial services business; or
 - (da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to:
 - (i) provide one or more financial services; or
 - (ii) perform one or more functions as an officer of an entity that carries on a financial services business; or
 - (iii) control an entity that carries on a financial services business; or
 - (db) the person has not complied with any one or more of his or her obligations under section 921F (requirements relating to provisional relevant providers); or
 - (dc) both of the following apply:
 - (i) a supervisor referred to in section 921F has not complied with any one or more of his or her obligations under that section in relation to a provisional relevant provider;

- (ii) both the supervisor and the provisional relevant provider are authorised to provide personal advice to retail clients, on behalf of the person, in relation to relevant financial products; or
- (dd) both of the following apply:
 - (i) a provisional relevant provider has not complied with his or her obligations under subsection 921F(7);
 - (ii) the provisional relevant provider is authorised to provide personal advice to retail clients, on behalf of the person, in relation to relevant financial products; or
- (de) ASIC has reason to believe that the person was authorised, in contravention of subsection 921C(2), (3) or (4), to provide personal advice to retail clients in relation to relevant financial products; or
- (e) the person has not complied with a financial services law (other than subsection 921E(3) (relevant providers to comply with the Code of Ethics)); or
- (f) ASIC has reason to believe that the person is likely to contravene a financial services law; or
- (g) the person has been involved in the contravention of a financial services law by another person; or
- (h) ASIC has reason to believe that the person is likely to become involved in the contravention of a financial services law by another person; or
- (i) the person is the operator of, or another person connected with, an Australian passport fund, and each of the following is satisfied:
 - (i) a host regulator for the fund has notified ASIC in writing that it is of the opinion that the person or the fund has not complied, is not complying or is not likely to comply with the law of that host economy to the extent that the law is administered by the host regulator for the fund (including the Passport Rules for the host economy for the fund);
 - (ii) ASIC is of the opinion that it should make the banning order, given the potential impact of the failure, or potential failure, to comply on members or potential members of the fund; or
- (j) the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA relating to a complaint that relates to:
 - (i) a financial services business; or
 - (ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); or
- (k) subsection (1C) applies to the person in relation to 2 or more corporations.

Note: To work out whether a person has been linked as described in paragraph (j), see section 910C.

(1AA) Subsection (1) has effect subject to subsection (2).

When a person is not a fit and proper person

- (1A) For the purposes of paragraph (1)(d), ASIC must have regard to the matters in section 913BB.

When a person contravenes a financial services law

- (1B) To avoid doubt, a person contravenes a financial services law if a person fails to comply with a duty imposed under that law, even if the provision imposing the duty is not an offence provision or a civil penalty provision.

When a person has been an officer of a corporation unable to pay its debts

- (1C) This subsection applies to a person in relation to a corporation if, within the last 7 years:
- (a) the person was an officer of the corporation when the corporation was:
 - (i) carrying on a financial services business; or
 - (ii) engaging in credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); and
 - (b) the corporation was wound up either:
 - (i) while the person was an officer of the corporation; or
 - (ii) within the 12 months after the person ceased to be an officer of the corporation; and
 - (c) a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

- (2) Subject to subsection (3), if ASIC has not delegated its power to make a banning order against a person to a Financial Services and Credit Panel, ASIC may make the order only after giving the person an opportunity:
- (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC on the matter.

Note: If ASIC delegates its power to make a banning order against a person to a Financial Services and Credit Panel, the panel may make the order only after holding a hearing in relation to the proposed order (see section 157 of the ASIC Act).

- (3) ASIC may make a banning order against a person without giving the person the opportunities mentioned in subsection (2) if:
- (a) either:
 - (i) ASIC has not delegated its power to make the banning order to a Financial Services and Credit Panel; or

- (ii) ASIC exercises its power to make the banning order despite such a delegation; and
- (b) ASIC's grounds for making the banning order are or include both of the following:
 - (i) that the suspension or cancellation of the relevant licence took place under section 915B;
 - (ii) that the person has been convicted of serious fraud.

Note: See section 34AB of the *Acts Interpretation Act 1901* (effect of delegation).

Special procedure for RSE licensees

- (3A) If a person against whom ASIC proposes to make a banning order is a financial services licensee who is authorised to provide a superannuation trustee service, the following provisions apply:
 - (a) ASIC cannot make the banning order if doing so would, in ASIC's opinion, have the result of preventing the licensee from providing that service, unless:
 - (i) APRA agrees in writing to the making of the banning order; or
 - (ii) the licensee's RSE licence is not in effect, and is not treated by section 29GB of the *Superannuation Industry (Supervision) Act 1993* as if it were in effect;
 - (b) if ASIC makes the banning order and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.
- (3B) A failure to comply with a requirement of subsection (3A) to get the agreement of APRA about a banning order does not invalidate the action taken.

Copy of banning order to be given to the person

- (4) ASIC must give a copy of a banning order to the person against whom it was made.

Section 920B of the *Corporations Act 2001 (Cth)* – What a banning order prohibits

- (1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
 - (a) providing any financial services;
 - (b) providing specified financial services in specified circumstances or capacities;
 - (c) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;
 - (d) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);

- (e) performing specified functions involved in the carrying on of a financial services business.
 - (2) The banning order may specify that a particular prohibition specified in the order applies against the person:
 - (a) if the sole ground for the banning order is because paragraph 920A(1)(k) applies—for a specified period of up to 5 years; or
 - (b) otherwise—either permanently or for a specified period.
- Note: This subsection applies separately to each prohibition specified in the order.
- (3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:
 - (a) to do specified acts; or
 - (b) to do specified acts in specified circumstances;that the order would otherwise prohibit them from doing.

Section 80 of the *National Consumer Credit Protection Act 2009* (Cth) – ASIC’s power to make a banning order

Making a banning order

- (1) ASIC may, in writing, make one or more orders (**banning orders**) against a person:
 - (a) if ASIC suspends or cancels a licence of the person; or
 - (b) if the person becomes insolvent; or
 - (c) for a natural person—if the person is convicted of fraud; or
 - (d) if the person has:
 - (i) contravened any credit legislation; or
 - (ii) been involved in a contravention of a provision of any credit legislation by another person; or
 - (e) if ASIC has reason to believe that the person is likely to:
 - (i) contravene any credit legislation; or
 - (ii) be involved in a contravention of a provision of any credit legislation by another person; or
 - (f) if ASIC has reason to believe that the person is not a fit and proper person to:
 - (i) engage in one or more credit activities; or
 - (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or
 - (iii) control another person who engages in credit activities; or
 - (fa) if ASIC has reason to believe that the person is not adequately trained, or is not competent, to:
 - (i) engage in one or more credit activities; or

- (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or
- (iii) control another person who engages in credit activities; or
- (fb) if the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*) relating to a complaint that relates to:
 - (i) credit activities; or
 - (ii) a financial services business (within the meaning of the *Corporations Act 2001*); or
- (fc) if subsection (3) applies to the person in relation to 2 or more corporations; or
- (g) if a prescribed State or Territory order is in force against the person; or
- (h) in any other circumstances prescribed by the regulations.

(1A) Subsection (1) has effect subject to subsection (4).

When a person is not a fit and proper person

- (2) For the purposes of paragraph (1)(f), ASIC must have regard to the matters in section 37B.

When a person has been an officer of a corporation unable to pay its debts

- (3) This subsection applies to a person in relation to a corporation if, within the last 7 years:
- (a) the person was an officer (within the meaning of the *Corporations Act 2001*) of the corporation when the corporation was:
 - (i) engaging in credit activities; or
 - (ii) carrying on a financial services business (within the meaning of the *Corporations Act 2001*); and
 - (b) the corporation was wound up either:
 - (i) while the person was such an officer of the corporation; or
 - (ii) within the 12 months after the person ceased to be such an officer of the corporation; and
 - (c) a liquidator lodged a report under subsection 533(1) of the *Corporations Act 2001* (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

- (4) Subject to subsection (5), if ASIC has not delegated its power to make a banning order against a person to a Financial Services and Credit Panel, ASIC may make the order only after giving the person an opportunity:

- (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
- (b) to make submissions to ASIC on the matter.

Note: If ASIC delegates its power to make a banning order against a person to a Financial Services and Credit Panel, the panel may make the order only after holding a hearing in relation to the proposed order (see section 157 of the ASIC Act).

- (5) ASIC may make a banning order against a person without giving the person the opportunities mentioned in subsection (4) if:
 - (a) either:
 - (i) ASIC has not delegated its power to make the banning order to a Financial Services and Credit Panel; or
 - (ii) ASIC exercises its power to make the banning order despite such a delegation; and
 - (b) subsection (6) or (6A) applies.

Note: See section 34AB of the *Acts Interpretation Act 1901* (effect of delegation).

- (6) This subsection applies if:
 - (a) ASIC's grounds for making a banning order against a person include that ASIC has suspended or cancelled a licence of the person (see paragraph (1)(a)); and
 - (b) the suspension or cancellation took place without a hearing under section 54.

- (6A) This subsection applies if:
 - (a) ASIC's grounds for making a banning order against a person include that the person has been convicted of fraud (see paragraph (1)(c)); and
 - (b) the person has been convicted of serious fraud.

Copy of banning order to be given to the person

- (7) ASIC must give a copy of a banning order to the person against whom it was made.

Section 81 of the *National Consumer Credit Protection Act 2009* (Cth) – What a banning order prohibits

- (1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
 - (a) engaging in any credit activities;
 - (b) engaging in specified credit activities in specified circumstances or capacities;
 - (c) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;

- (d) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);
- (e) performing specified functions involved in the engaging in of credit activities.

- (2) The banning order may specify that a particular prohibition specified in the order applies against the person:
 - (a) if the sole ground for the banning order is because paragraph 80(1)(fc) applies—for a specified period of up to 5 years; or
 - (b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

- (3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:
 - (a) to do specified acts; or
 - (b) to do specified acts in specified circumstances;that the order would otherwise prohibit them from doing.
- (4) A banning order is not a legislative instrument.