

## COUNTDOWN TO FINANCIAL SERVICES REFORM

### **I am the nominated responsible officer of our Australian Financial Services Licence (AFSL). What am I responsible for and what am I potentially liable for?**

The role of a responsible officer is really quite important; it is central to obtaining an AFSL. The view of the Australian Securities and Investments Commission (ASIC) is that a responsible officer “is someone on whom a licensee depends for its organisational competency...who is directly responsible for significant day-to-day business decisions about the ongoing provision of financial services by the licensee”. Essentially, they are the person within the AFSL who is responsible for ensuring that the right people are in the right jobs and carrying out the right functions in the right manner within the context of the AFSL that is held and the business it conducts.

But none of this tells us whether you are liable. To put it simply, a responsible officer holds a position of responsibility, but can the responsible officer be held liable for their actions, or lack of actions?

When in Financial Services Reform (FSR) doubt, always go to the source and look at the law. Section 9 of the Corporations Act defines a responsible officer to be “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”. It also defines an officer to be a director or a person who makes, or participates in making, decisions that affect the whole or a substantial part of the business of the corporation or its financial standing.

For the purposes of whether a responsible officer may be liable, it is important to understand that the Corporations Act recognises not only that a director is a director, but it also includes a person if they act in a manner that is consistent with the position of a director, even though they have not been officially registered as such with ASIC.

Clearly, where a responsible officer is also a director of the organisation they will suffer direct potential liability in their capacity as a director. If we revisit the ASIC view of a responsible officer, it would suggest that in at least some circumstances a responsible officer would be deemed to be a director. So, being a responsible officer, but not being named as a director, does not provide the protection you might otherwise think, as the law will deem you to be a director where you act like one.

If you are a responsible officer but not a director of the organisation, you really should rethink your position. Where, by the nature of your job you will be deemed to be a director, you will have liability, but no right of indemnity under the constitution of the AFSL, because you are not a director of it.

And you will have no right to information or access to material that may be important to your future ability to defend a claim against you.

What should you do? The answers are simple; if the nature of your responsible officer job is such that you will be deemed a director, either step down from the job or officially become a director.

If you are a director or you become one, examine the company constitution for your rights of access to information (both when an employee and after) and the extent that the company must indemnify you for the costs that you may incur. If these rights are fine, move on to the next point. If your information

access and indemnity is not adequate, consider requiring the company to enter into an Access and Indemnity deed, but make sure that it does not go too far so as to be invalid – these deeds cannot secure more than what the law allows.

Finally, set about doing your job, this is the best protection you can get. If you are seen to be doing the responsible things in a responsible way, you will have been responsible enough and will have no further responsibility.