



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 133

# Managed investments: Scheme property arrangements

Related instruments [CO 98/51]

**Chapter 5C — Managed investment schemes**

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*From 5 July 2007, this document may be referred to as Regulatory Guide 133 (RG 133) or Policy Statement 133 (PS 133). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 133.1) or their policy statement number (e.g. PS 133.1).*

## What this guide is about

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In order to gain a full understanding of our policy in this area you should read all the parts of this guide, including the Underlying Principles and the Explanations.

RG 133.1 This guide gives guidance on:

**A** the standards a custodian of scheme property should meet;

see *RG 133.2–RG 133.15*

**B** what the responsible entity should do when it appoints an agent as custodian;

see *RG 133.16–RG 133.20*

- C** what should be included in a compliance plan about holding scheme property; and  
see *RG 133.21–RG 133.29*
- D** what relief we have given from the duty to separate scheme property from other assets.  
see *RG 133.30–RG 133.39*

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## A The standards for scheme property custodians

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### Our policy

RG 133.2 A custodian of scheme property, whether it is the responsible entity or its agent, must meet standards on:

- (a) organisational structure;
- (b) staffing capabilities;
- (c) ability and resources to perform core administrative activities;
- (d) arrangements on how various assets are held; and
- (e) custody-related financial resources (detailed in Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131]).

RG 133.3 A responsible entity which does not meet these standards will still be given a licence if it meets our other licensing requirements. However, its licence will be subject to a condition that another entity which meets the standards must be the custodian of all the property of any scheme which the responsible entity operates.

### Underlying principles

RG 133.4 The Law highlights the importance which is placed on the arrangements that the responsible entity will put in place to ensure proper standards for the safe keeping of scheme property. We believe that members' interests will be better protected if the scheme property is held only by entities which meet minimum standards.

Our standards seek to ensure that:

- (a) scheme property is not exposed to unnecessary risks because of the way it is held; and
- (b) efficient operational arrangements exist for holding and dealing with scheme property.

## Explanations

### ***Standards for holding scheme property***

RG 133.5 We expect that in most cases, the standards will be met by the responsible entity appointing a third party custodian. We have not attempted to prescribe detailed requirements which custodians must meet. Instead, in RG 133.6–RG 133.13 we have set out what we consider are the minimum outcomes which a custodian must achieve, whether the custodian is the responsible entity or its agent.

### Organisational structure

RG 133.6 The custodian must have an organisational structure that supports the segregation of scheme property from its own assets. This segregation should happen regardless of whether the custodian is the responsible entity or its agent.

RG 133.7 There may be a conflict of interest between the custody operations and other operational areas of the custodian. If there could possibly be a conflict, the custodian must make sure that custody staff are segregated in a way that minimises the potential for conflict.

RG 133.8 At a minimum, the custodian should be structured so that custodial staff are able to report directly to the compliance committee or board of directors of the responsible entity. They should report to these groups rather than to people who are responsible for other functions such as investment, marketing or operations. The organisation should also be structured to ensure that the duties of custody staff are appropriately segregated from the duties of other employees. This would mean, for example, that custody staff must not also be responsible for investment decisions, trading decisions or other decisions resulting in the movement of scheme property. This may also mean, in some circumstances, that custody staff are physically separated from other staff of the responsible entity.

### Staffing capabilities

RG 133.9 Custody staff must have the experience, qualifications, knowledge and skills necessary to perform their functions properly. The entity must undertake adequate ongoing training and educational programs so that the officers' knowledge remains at a level necessary for performing assigned responsibilities.

RG 133.10 The entity should make available to custody staff resources in specialist areas which may be necessary for them to adequately carry out their duties.

## Administrative resources

RG 133.11 The custodian must have the necessary capacity to perform the core administrative activities associated with holding scheme property. This will vary depending on the nature of the scheme and its assets.

Generally, however, this capacity is likely to include having:

- (a) computer systems which are secure and capable of handling the record keeping and transaction processing for the scheme (having regard to the volume of transactions) and the capacity to separately identify scheme property;
- (b) procedures in place for accurately recording all scheme property, all movements of scheme property, and all income, pricing and other related core administrative activities;
- (c) access to information sources which may be relevant to corporate actions and proxy voting, or for pricing information;
- (d) memberships at depositories relevant to the scheme property;
- (e) access to and if necessary, membership of, relevant settlement and clearance systems; and
- (f) access to relevant domestic or global sub-custodial networks.

## Arrangements on how various assets are held

RG 133.12 A responsible entity and any of its agents must hold scheme property in a way which ensures that those assets are clearly identified as scheme property and held separate from the property of the responsible entity and property of any other scheme: s601FC(1)(i). We are relying on the responsible entity to ensure that custodial arrangements are suitable for the particular assets being held. Therefore, we have not prescribed specific custodial arrangements for different asset types.

## Financial resources

RG 133.13 A custodian must continue to meet our financial requirements relating to custodians, as set out in [SPS 131].

## ***Custodial standards and licensing***

RG 133.14 Once a licence is issued, the custodian must continue to meet the minimum standards set out in this guide. If it does not continue to meet those standards, we will consider revoking or varying the licence of the responsible entity.

## **B Appointing an agent as custodian**

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### **Our policy**

RG 133.15 In order to ensure that agents meet the same minimum standards as custodians, we have set out the following guidance for responsible entities who engage agents to act as custodians.

RG 133.16 You must:

- (a) ensure that your agent meets the minimum standards for holding scheme property set out in RG 133.6–RG 133.13,
- (b) describe, in your licence application, the process which you have followed or will follow when making the appointment, and
- (c) make a written agreement with your agent addressing the key issues set out in RG 133.20. Your licence will be conditional on this written agreement being made.

### **Underlying principles**

RG 133.17 The same standards that apply to a responsible entity, should apply to any agent of the responsible entity. Accordingly, it is important that any agent meet the minimum standards for holding scheme property set out in RG 133.6–RG 133.13. A key element in achieving this is for the responsible entity to follow a structured and systematic process in selecting agents. This process must be designed to ensure that the agent is capable of holding scheme property in a way which meets its obligations under the Law.

### **Explanations**

RG 133.18 As a responsible entity you may engage an agent as custodian, either because you are required to do so by your licence or because you do not wish to undertake the custodial function yourself. Regardless of the reason, you remain responsible for the actions, or failures to act, of your agent: s601FB(2).

### ***Describe process in licence application***

RG 133.19 We will not normally require you to justify your choice of custodian to us. However, we do want to know in your licence application how you will go about appointing or replacing an agent.

Further guidance on describing the appointment process is given in the *ASIC Licence Application Form*. If we have concerns we may ask you further questions about the appointment of agents.

Applicants who meet our standards for holding scheme property, and who will be holding scheme property themselves, will not need to describe the process of appointing a custodian.

### **Agreement with agent**

RG 133.20 As a condition of your licence, you must make a written agreement with the agent who you appoint as custodian. This agreement should clearly cover:

- (a) what are the scope and expectations of the relationship;
- (b) the rights that you will have in relation to ongoing review and monitoring of the agent and the standards against which that agent's performance will be assessed;

*[Historical note: RG 133.20(b) replaced 2/6/1999. Para (b) formerly read: "what methods and standards you will use when assessing the agent's performance".]*

- (c) how the agent will provide assurances that it meets the standards set out in this guide;
- (d) how you will give authorised instructions to the agent;
- (e) how the scheme will be compensated if there is a loss to the scheme as a result of the agent failing in its obligations under the agreement and the extent to which the custodian must maintain a minimum level of professional indemnity insurance;

*[Historical note: RG 133.20(e) amended 2/6/1999 by inserting the words "and the extent to which the custodian must maintain a minimum level of professional indemnity insurance".]*

- (f) that the agent is prohibited from taking a charge, mortgage, lien or other encumbrance over, or in relation to, assets of the scheme. They may, however, do this for expenses and outlays made within the terms of the agreement (but not including unpaid custodian fees);

*[Historical note: RG 133.20(f) amended 6/10/1998 by replacing in the first sentence the word "giving" with the word "taking".]*

- (g) what should be in the written agreement between the agent and any sub-custodians used. A written agreement should be in place when practicable. The agreement should cover, to the extent practicable and relevant, the same issues which should be covered in the agreement between you and the agent. The agreement

should also cover the liability of the sub-custodian to the responsible entity and the agent when acts or omissions of the sub-custodian make them liable;

[*Historical note:* RG 133.20(g) amended 2/6/1999 by inserting in the second sentence the words “practicable and”.]

- (h) how records identifying the scheme’s assets will be maintained;  
and
- (i) how and when you will receive periodic reports, including notifications of any transfers to, or from, the scheme’s account.



## **C Compliance plan covers scheme property**

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### **Our policy**

RG 133.21 There will be different risks to members of the scheme arising out of the different ways that scheme property is held. The compliance plan must be designed to minimise those risks. These risks will vary depending on whether the property is held by:

- (a) the responsible entity (see RG 133.25); or
- (b) by a third party custodian (see RG 133.26).

RG 133.22 The compliance plan for each scheme must describe arrangements for ensuring that scheme property:

- (a) is clearly identified as scheme property; and
- (b) is held separately from the property of the responsible entity and property of any other scheme.

### **Underlying principles**

RG 133.23 We have not prescribed what exact measures should be included in a compliance plan when the responsible entity or an agent holds scheme property. Such an approach would be inconsistent with our general approach to preparing compliance plans. This is set out in Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132).

Because there are risks to scheme assets depending on how the scheme property is held, we do expect that the compliance plan will describe in some detail scheme property arrangements.

### **Explanations**

RG 133.24 A compliance plan of a registered scheme must set out arrangements for ensuring that scheme property is clearly identified as scheme property and held separately from the property of the responsible entity and property of any other scheme: s601HA. Part 1 of the annexure to Regulatory Guide 132 *Managed investments: Compliance plans* at RG 132.25 sets out examples of outcomes which might typically be included in a compliance plan to address this. In

addition to those general outcomes, there are specific measures which you should consider including in a compliance plan if:

- (a) an agent is appointed as custodian; or
- (b) the responsible entity holds scheme property.

### ***Compliance plan content when a custodian is appointed***

RG 133.25 As the responsible entity, you may engage a custodian of your scheme's property. If you do engage an agent, you must ensure that your members are protected from the possible risks arising from this arrangement. Therefore, your compliance plan must set out what measures you will take to minimise these risks. This may, for example, include measures for ensuring that:

- (a) the agent continues to meet the standards for holding scheme property;
- (b) the activities of the agent are actively monitored;
- (c) contractual arrangements entered into with the agent remain current and respond to necessary changes; and
- (d) the agent maintains appropriate arrangements with information providers, registries, sub-custodians and clearing systems.

### ***Compliance plan content when responsible entity holds property***

RG 133.26 As the responsible entity, you may hold scheme property. If you do, the compliance plans of schemes operated by you must set out how you will deal with risks to members because you hold scheme property. We expect that your compliance plan will include:

- (a) measures which will satisfy the board or compliance committee, on a regular basis, that you are meeting your duties under s601FC(1)(i);
- (b) regular checks to ensure that all record keeping for scheme property is carried out in a timely and accurate manner; and
- (c) measures for making sure that the standards on organisational separation are strictly enforced.

RG 133.27 When the responsible entity holds scheme property, it is essential that custody staff are appropriately segregated from the rest of the organisation. As explained in RG 133.8, this means that staff

responsible for making and maintaining records for scheme property must not also be responsible for making investment decisions, trading decisions or other decisions resulting in the movement of scheme property.

RG 133.28 There should be specific compliance arrangements for when the responsible entity holds real property in its own name. This is because registration requirements may prohibit the title from indicating any interest of the scheme. In this case, the compliance plan would have to include specific measures to ensure that the responsible entity and its officers comply with their duties to scheme members for that real property. The plan might, for example, include special authorisation procedures for any dealings with that real property.

### Related parties holding scheme property

RG 133.29 We expect that the types of measures that will be necessary if the responsible entity is the custodian will also be relevant if the responsible entity appoints a third party custodian which is legally or commercially related to it.

## **D Relief from duty to separate assets**

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### **Our policy**

RG 133.30 In certain circumstances, it may not be practical or may be too costly to separate scheme property from property from other schemes. We have modified the Law to give limited relief from s601FC(1)(i), which requires that scheme property must be held separate from the property of other schemes. This relief applies to financial assets when:

- (a) the property of the scheme is held separately from the assets of the responsible entity and the custodian;
- (b) the custodian performs regular reconciliation procedures appropriate to the nature of the assets held; and
- (c) the responsible entity reasonably considers that holding scheme property separately from property of other schemes is not in the interests of members.

### **Underlying principles**

RG 133.31 We have been advised by many market participants that holding certain classes of scheme property separate from the property of other schemes is, in some circumstances:

- (a) inconsistent with prudent market practice;
- (b) impractical; and
- (c) likely to add to the cost of holding scheme assets.

RG 133.32 We have therefore made a class order modifying the Law to relieve those holding financial assets from the obligation to separate scheme property. However, this relief only applies in certain circumstances. Those circumstances are limited because we want to be sure that the interests of investors are not put at any additional risk by any pooling arrangements which are undertaken.

### **Explanations**

RG 133.33 Section 601FC(1)(i) of the Law imposes a duty on a responsible entity to ensure that scheme property is:

- (a) clearly identified as scheme property; and

(b) held separately from property of the responsible entity and property of any other scheme.

RG 133.34 Applied strictly this would mean that omnibus account structures, typically used by custodians to hold financial assets, would be in breach of the duty.

RG 133.35 By Class Order [CO 98/51] we have modified the Law to allow the limited use of omnibus account structures. Custodians will be able to hold financial assets in a way which does not separate those assets from the property of other schemes in the circumstances set out in RG 133.30. Financial assets are cash (including foreign exchange), securities and derivatives.

RG 133.36 One of the limitations to the relief is that it applies only when the responsible entity reasonably considers that holding the scheme property separately from property of other schemes would not be in the interests of members. This limitation may be satisfied, for example, if holding property separate from the property of other schemes would increase the costs to members without providing any improved security. Conversely, mere administrative inconvenience for the custodian would not be an adequate reason.

RG 133.37 We will consider applications for relief which fall outside the terms of [CO 98/51] on a case-by-case basis.

RG 133.38 Real property registration requirements may, in some jurisdictions, prohibit the title from indicating any interest of the scheme. Despite this, we accept that real property may be registered in the name of the responsible entity without breaching the duty in s601FC(1)(i) to hold the property separately from the property of the responsible entity. Therefore, we do not consider it necessary to give any relief from s601FC(1)(i) in this respect. However, as discussed in RG 133.28, compliance arrangements in this situation must particularly address the risks of this holding arrangement.

RG 133.39 It should be noted that the relief referred to in RG 133.30 does not extend to assets other than financial assets (for example it does not extend to real property). Accordingly, a responsible entity could not hold a single piece of real property, in its name, on behalf of several schemes. Such an arrangement would breach the duty in s601FC(1)(i) to hold the property separately from property of other schemes.

## Key terms

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RG 133.40 In this guide, a reference to:

“Act” is to the Managed Investments Act;

“custodian” is to the entity which holds the property of a scheme, which will be either the responsible entity or an agent appointed by the responsible entity;

“the Law” is to the Corporations Law;

“responsible entity” is to a responsible entity of a scheme;

“s601GA” (for example) is to a section of the Law; and

“scheme” is to a registered managed investment scheme or to a proposed registered managed investment scheme.

## Related information

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RG 133.41

### Headnotes

Scheme property arrangements, application for authorisation to operate a managed investments scheme, standards for holding scheme property, organisational structure, staffing capabilities, core administrative activities, compliance plans, sub-custodians, relief from duty to separate property of scheme, omnibus accounts, pooling assets.

### Class orders and pro formas

[CO 98/51]

### Policy statements

Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131]

### Regulatory guides

RG 130 *Managed investments: Licensing*

RG 132 *Managed investments: Compliance plans*

RG 134 *Managed investments: Constitutions*

RG 135 *Managed investments: Transitional issues*

RG 136 *Managed investments: Discretionary powers and closely related schemes*

### Legislation

Chapter 5C

601FB(2)

601FC(1)(i)

### Consultation papers

*Licensing a responsible entity*

*Financial requirements of a responsible entity*

*Compliance plans for managed investment schemes*

*Scheme property arrangements*

*Constitutional issues*

*Transitional issues*

### Information releases

[IR 98/9], [IR 98/10], [IR 99/12]