



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 98

Licensing: Administrative action against financial services providers

April 2006

Note: Cross-references in this guide were updated in February 2008 to reflect ASIC's current regulatory document framework.

What this guide is about

1 This publication provides guidance to financial services industry participants about the administrative powers the Australian Securities and Investments Commission (ASIC) uses to enforce financial services laws. It describes the administrative actions we have available, and indicates the matters we generally take into account, with some illustrative examples, when exercising these powers.

2 In publishing this guide, we also aim to inform the broader community including consumers, who entrust their funds to financial services providers. In this guide, we explain how we approach our task of protecting the public and reinforcing the integrity and reputation of the industry.

3 This guide focuses solely on our options for administrative action. We do not discuss our other complementary criminal and civil enforcement powers in this guide.

Note: For a list of administrative remedies available to ASIC, see paragraph 1.5 in Section 1 of this guide.

4 This guide should be read in conjunction with policy statements and guidance we have published on how we will administer the financial services provisions of the *Corporations Act 2001* (Corporations Act): see 'Related papers' in this guide.

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Important note: This publication is issued as a general guide to how we apply our administrative enforcement powers. It is your responsibility to determine your obligations under the *Corporations Act 2001* and *Corporations Regulations 2001*. Examples provided in this guide are purely for illustrative purposes; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you.

Section 1: ASIC's administrative powers

Our responsibilities

1.1 ASIC is responsible for regulating persons who carry on a financial services business in Australia, as well as those who provide financial services on behalf of persons who carry on a financial services business.

1.2 One aspect of this responsibility is licensing persons who wish to carry on a business of providing financial services in Australia. These persons are generally required to hold an Australian financial services (AFS) licence: s911A.

Note: References in this guide to legislative provisions are to the Corporations Act, unless otherwise indicated.

1.3 ASIC is also responsible for monitoring licensees for ongoing compliance with their licence and other legal obligations. This involves, among other things, influencing the behaviour of licensees, with the aim of promoting compliance with the law and raising the ethical standards of business conduct. To this end we:

- (a) monitor compliance with the law by, among other things, conducting surveillance; and
- (b) intervene where we detect non-compliance, particularly where investors or market integrity may be harmed.

1.4 Lastly, ASIC is responsible for taking action to enforce the law when it is breached by a licensee or a person who provides financial services on behalf of others. If appropriate, that enforcement action may involve the use of an administrative remedy, sometimes in addition to civil or criminal remedies. We will use the remedy, or combination of remedies, that best achieves the aims set out in paragraph 1.3 of this guide.

1.5 If we determine that administrative action is necessary or desirable, we have a number of options available. The main options that may be available to us are:

- (a) immediately suspending or cancelling a licence in certain limited circumstances;
- (b) suspending or cancelling a licence after offering a hearing;
- (c) banning a person from providing financial services, immediately in certain limited circumstances or after offering a hearing (banning order); or
- (d) varying licence conditions after offering a hearing.

Note: ASIC has a broad range of other administrative remedies (e.g. stop orders) that are beyond the scope of this guide.

Power to suspend or cancel an AFS licence

Immediate suspension or cancellation

1.6 If appropriate, we may suspend or cancel an AFS licence in certain circumstances without giving the licensee an opportunity to appear or be represented at a hearing before us and to make submissions: s915B.

1.7 The circumstances vary according to whether the licensee is a natural person, a partnership, a body corporate or a trustee. For instance, if the AFS licensee is a body corporate, ASIC may cancel the licence if the body corporate:

- (a) ceases to carry on the financial services business covered by the AFS licence;
- (b) becomes an externally-administered body;
- (c) is a responsible entity of a registered scheme whose members have suffered, or are likely to suffer, loss or damage because the body has breached the Corporations Act; or
- (d) applies to ASIC to have the AFS licence suspended or cancelled.

Note: See s915B for when a licence held by a natural person, a partnership or a trustee can be suspended or cancelled without a hearing.

Suspension or cancellation after offering a hearing

1.8 We may also suspend or cancel an AFS licence after giving the licensee an opportunity to appear or be represented at a private hearing before us and to make submissions: s915C. The circumstances giving rise to this hearing requirement are:

- (a) the application for an AFS licence contained materially false or misleading information or omitted material information;
- (b) the licensee failed to comply with its obligations as a financial services licensee as specified in s912A, or ASIC has reason to believe that the licensee will not comply with those obligations;
- (c) if the licensee is a natural person, ASIC is no longer satisfied as to the person's good fame or character;
- (d) if the licensee is a body corporate, ASIC is no longer satisfied as to the good fame or character of one or more of the licensee's responsible officers;
- (e) if the licensee is a partnership, ASIC is no longer satisfied as to the good fame or character of one or more of the partners;
- (f) a banning order or disqualification is made against the licensee;

- (g) a banning order or disqualification order is made against a representative of the licensee, and ASIC considers that the representative's involvement in the provision of the licensee's financial services will significantly impair the licensee's ability to meet its obligations under Chapter 7.

Note: The principles and procedures we adopt for these hearings are set out in our *Hearings Practice Manual* at www.asic.gov.au/hearingsmanual. For details of our overall approach to the obligations of a licensee, see Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104) and Regulatory Guide 105 *Licensing: Organisational competence* (RG 105).

1.9 If we suspend or cancel an AFS licence, we may however specify that the AFS licence continues in effect, for the purposes of specified provisions of the Corporations Act, in relation to specified matters, or for a specified period, or both: s915H.

Note: An example of when we might allow an AFS licence to continue in effect for a specified purpose would be to enable consumers affected by a licensee's conduct to have their complaint investigated and acted upon by the Financial Industry Complaints Service (FICS). When an AFS licence is suspended or cancelled, the licensee ordinarily ceases to be a FICS member, preventing consumers from accessing the service.

Power to make a banning order

What is a banning order?

1.10 A banning order is a written order by ASIC that prohibits the banned person from providing financial services, whether as an AFS licensee or representing an AFS licensee. We can make an order that either prevents a person from providing all financial services, or from providing specified financial services, in specified circumstances. A banning order may be permanent or for a specified period. If we have reason to believe that a person is not of good fame or character, the banning order will be permanent: s920B.

1.11 A person subject to a banning order cannot be granted an AFS licence contrary to the banning order: s920C.

Make a banning order

1.12 We can ban a person from providing financial services by making a banning order: s920A.

1.13 We can make a banning order which has immediate effect, without giving the person the opportunity of a hearing, if the person has been convicted of serious fraud, or the person's AFS licence has been suspended or cancelled under s915B: s920A(3).

1.14 In other cases we can only make a banning order after giving the person the opportunity to appear or to be represented at a private hearing and to make submissions: s920A(1) and (2).

1.15 The grounds upon which we can make a banning order under s920A are:

- (a) we have suspended or cancelled an AFS licence held by the person;
- (b) the person has not complied with their obligations under s912A;
- (c) we have reason to believe that the person will not comply with their obligations under s912A;
- (d) the person becomes an insolvent under administration;
- (e) the person is convicted of fraud;
- (f) the person has not complied with a financial services law; or
- (g) we have reason to believe that the person will not comply with a financial services law.

Note: For some illustrative examples of factors likely to lead to a banning for a greater or lesser period of time, see Table 2 in Section 2.

Other action ASIC may take

Variation of AFS licence conditions

1.16 We may impose conditions, or further conditions, on an AFS licence at any time, whether at the time of granting the AFS licence or subsequently, and may vary or revoke the conditions: s914A(1).

1.17 Before imposing any such conditions after the AFS licence has been granted, or before varying any such conditions, we must give the licensee an opportunity to appear or be represented at a private hearing and to make submissions to ASIC: s914A(3).

1.18 If appropriate, we may use our power to impose additional licence conditions to address systemic compliance issues. These AFS licence conditions may, for example, preclude the licensee from providing certain types of financial services, or may impose different or additional compliance obligations on the licensee, such as requiring the licensee to engage an independent external compliance consultant and provide ongoing reporting to ASIC of the licensee's progress in remedying previously identified deficiencies in compliance measures.

Direction to provide a statement

1.19 We may give written notice to an AFS licensee to provide statements containing specified information about its financial services business or the financial services provided by the AFS licensee or its

representatives. We may also require the statements to be audited before being given to us: s912C.

Enforceable undertakings

1.20 We may accept an enforceable undertaking as an alternative to pursuing other remedies in certain circumstances. The factors that we might consider when deciding whether to accept an enforceable undertaking are set out in Regulatory Guide 100 *Enforceable undertakings* (RG 100). We will not, however, accept an enforceable undertaking in lieu of commencing criminal proceedings against a party.

1.21 We will generally only consider accepting an enforceable undertaking when we:

- (a) consider the enforceable undertaking to be an appropriate regulatory outcome having regard to the significance of the issues to the market and community;
- (b) consider the person is likely to comply with the enforceable undertaking (any history of complaints may be relevant); and
- (c) have considered the nature of the alleged breach and the regulatory impact of the enforceable undertaking compared to that of other available enforcement remedies.

1.22 For example, if there is a range of remedial action that can be taken to rectify the consequences of the misconduct, we may consider an enforceable undertaking as a more effective and flexible outcome. However, an undertaking offering a voluntary disqualification for a specified period may not provide an appropriate regulatory outcome and we may regard a banning order to be a more appropriate regulatory outcome as:

- (a) we maintain a public register where consumers and investors can find information about persons who have been banned by ASIC;
- (b) a banning order clearly expresses ASIC's view of the nature and extent of the misconduct; and
- (c) breach of a banning order is a criminal offence under s920C (this is not the case with a breach of an enforceable undertaking).

Note: This approach is consistent with the approach taken in *Sage v Australian Securities and Investments Commission* [2005] FCA 1043 where an undertaking offered to the court as an alternative to banning action was not considered to be an adequate alternative.

Section 2: When we will take administrative action

Our general approach

2.1 The financial services licensing regime is intended to ensure that consumers can feel confident when dealing with persons (or those who act on their behalf) who are licensed to provide financial services or products, because such providers are subject to the legal obligations that attach to their licensee status. Our powers to protect the public include the power to apply a variety of remedies against providers of financial services who breach these obligations, where this is appropriate.

2.2 To promote the public's continued confidence in the financial services industry, we endeavour to ensure that providers of financial services comply with their obligations and meet community expectations. We educate consumers so that they will be in a better position to make informed decisions when entrusting their money to a participant in the financial services industry. We also educate industry participants to raise compliance standards generally. Where necessary, we will take action to protect the public as well as deter financial services participants from engaging in misconduct.

2.3 The legislation for which we have jurisdiction sets out the remedies available to us. These remedies can be broadly categorised as:

- (a) criminal action;
- (b) civil action; and
- (c) administrative action.

We may use these remedies in combination.

2.4 Factors underlying our decisions about whether to take enforcement action (and what type of enforcement action to take) include whether:

- (a) we have jurisdiction in the matter;
- (b) the matter involves serious corporate wrongdoing or serious risk or detriment to consumers and the market;
- (c) an achievable or appropriate remedy exists for us to pursue; and
- (d) the matter satisfies our regulatory and enforcement priorities, including deterrence and public education.

2.5 In determining the type of administrative action which may be taken we consider the circumstances of each matter on a case-by-case basis. Any administrative action we take may supplement other civil or criminal action we are taking against the person or business.

Note: We do not discuss our other complementary criminal and civil enforcement powers in this guide.

2.6 In general, we are likely to suspend, cancel or vary an AFS licence or ban a person where we have serious concerns about the person, or the way their business is being or has been conducted. This is particularly so in instances where there is a need to protect the public and where conduct may result in consumer detriment.

Relevant factors

2.7 Whether administrative action will be taken will turn on the facts of each matter. While it is not possible to identify all factors relevant to that decision, Table 1 on the next page sets out factors that may be taken into account. Table 2 on the following page provides examples of conduct and indicates the potential consequences which may follow from engaging in that conduct.

Table 1: Key factors we consider in deciding to take administrative action

See Table 2 for how these factors might apply to banning actions. It also provides examples of conduct and indicates the potential consequences which may follow from engaging in that conduct.

These lists are not exhaustive and there will be other factors or conduct that are not mentioned in this guide that could lead to these outcomes.

Factors	Relevant considerations
Nature and seriousness of the suspected misconduct	<ul style="list-style-type: none"> • Whether the misconduct involved dishonesty • Whether the misconduct was deliberate, reckless or negligent, or inadvertent • The duration of the misconduct • The amount of any benefit gained or detriment caused as a result of the misconduct • The impact of the misconduct on the financial market, including whether public confidence in the market has been damaged • The amount of any loss caused to consumers
Internal controls on the licensee or person	<ul style="list-style-type: none"> • Whether the licensee or person had in place effective internal procedures to ensure compliance with obligations • Whether those procedures were complied with • Where the misconduct was committed by an individual employee, whether it indicates a systemic compliance failure of the licensee
Conduct of the licensee or person after the misconduct occurs	<ul style="list-style-type: none"> • Whether the licensee drew the misconduct to ASIC's attention (apart from in circumstances where it was obliged to under s912D) • The nature of the action taken by the licensee to deal with the misconduct and its consequences, including the degree of cooperation the licensee or person showed during our investigation of the misconduct • Remedial steps the licensee or person has taken or intends to take to minimise harm arising from the misconduct, including appropriate complaints handling procedures and compensation to affected consumers • The likelihood that the same type of contravention may recur if no administrative action is taken by us
Previous regulatory record of the licensee or person	<ul style="list-style-type: none"> • Whether we have taken any previous action resulting in adverse findings against the licensee or person • Whether the licensee or person has previously given us any undertakings not to do a particular act or engage in particular behaviour • The general compliance history of the licensee or person

Table 2: Factors and examples of conduct relating to specific periods of banning

These factors are indicative examples only. Each case must depend on its particular circumstances and will be determined on a case-by-case basis. The factors in this table have been compiled having regard to the propositions formulated in HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re: ASIC v Adler, (2002) 168 FLR 253. A combination of more than one example of misconduct can increase the seriousness of the misconduct, so that a longer banning than indicated by this table is merited. Consumer loss is not a prerequisite for a period of banning.

Outcome	Factors	Examples of conduct (indicative only)
Permanent banning	<ul style="list-style-type: none"> • Dishonesty and intent to defraud • Disregard for the law and compliance with regulations • Large financial loss • Previous contraventions of the law • Serious incompetence and irresponsibility • A likelihood that the person will engage in similar contravening conduct in the future 	<ul style="list-style-type: none"> • Misappropriates client funds or otherwise engages in fraud or theft • Conceals or deliberately destroys records required to be kept • Engages in a pattern of persistent contraventions that indicates systemic failure or a general lack of understanding of and regard for compliance
Banning from 3–10 years	<ul style="list-style-type: none"> • A significant loss • A deliberate course of conduct to enrich themselves at others' expense but with a lesser degree of dishonesty • Incompetence and irresponsibility but with the possibility that the person may develop requisite skills and abilities • Continued, knowing and willful contraventions of the law and disregard of legal obligations 	<ul style="list-style-type: none"> • Does not have a reasonable basis for advice provided, such as making inappropriate recommendations in high risk schemes <small>Note: For our policy on what is 'appropriate' advice within the meaning of s945A(1)(c), see Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure (RG 175).</small> • Offers or recommends interests in managed investment schemes which need to be, but have not been registered • Provides financial services which are not covered by an AFS licence if one is required • Fails to keep financial records that must be kept • Fails to comply with disclosure requirements, including not disclosing commissions and other benefits <small>Note: For our policies on disclosure, see 'Related papers'.</small>
Banning for under 3 years	<ul style="list-style-type: none"> • Some loss to client, but as a result of carelessness or inadvertence rather than dishonesty • Has attempted to remedy the contravention and person has fully cooperated with ASIC • No previous history of contraventions • Indications of clear intention to comply with legal obligations by 	<ul style="list-style-type: none"> • Fails to give disclosure document or statements within required time • Fails to lodge documents with ASIC as required • Fails to notify ASIC about an authorised representative's breach of their licensing obligations • Fails to make adequate inquiries about clients' personal circumstances

Outcome	Factors	Examples of conduct (indicative only)
	demonstrated behaviour	

Cancelling or suspending an AFS licence

2.8 As noted in paragraphs 1.16–1.22, we can vary AFS licence conditions, direct a licensee to provide statements containing specified information or accept an enforceable undertaking. In cases where misconduct cannot be addressed by these actions, we may cancel a licence: see paragraphs 1.6–1.9.

2.9 Examples of misconduct that may result in a licence being cancelled are:

- (a) dishonesty by a licensee;
- (b) systemic or persistent breaches of the licensee’s obligations (and the licensee has failed to address these issues after they were brought to its attention) where there is actual or potential significant risk to clients or market integrity;
- (c) the licensee does not have the organisational capacity to continue to meet its obligations and there is actual or potential significant risk to clients or investors; and
- (d) the licensee has, at senior levels of management, misled or hindered ASIC, including concealing or deliberately destroying records required to be kept.

2.10 In appropriate cases, public protection considerations may be satisfied by suspending rather than cancelling an AFS licence (e.g. to enable necessary remedial or compliance measures to be put in place by the AFS licensee).

Variation or cancellation of banning orders

2.11 We may vary or cancel a banning order if we are satisfied that ‘it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order’: s920D(1). We may do so on our own initiative or if the person against whom the order was made lodges an application for ASIC to cancel the AFS licence.

2.12 If we propose not to vary or cancel a banning order in accordance with an application lodged by a banned person, we must give the person an opportunity to appear or be represented at a private hearing and to make submissions: s920D(3).

2.13 The criterion on which we may base a decision to vary or cancel a banning order (i.e. ‘a change in any of the circumstances based upon which ASIC made the order’) is broad. While it is not possible to identify

all of the matters that may be relevant to a decision whether to vary or cancel a banning order, they may include the following:

- (a) the seriousness of the misconduct that resulted in the order;
- (b) the period that has elapsed since the order was made and whether the person continues to pose a risk to consumers or to confidence in the financial system by reason of the conduct based upon which we made the banning order;
- (c) any action taken by the person to remedy the misconduct or the cause of the misconduct (e.g. if the misconduct was the result of incompetence, the person may have remedied this by satisfactorily completing relevant training and obtaining relevant qualifications); and
- (d) any information which, if it had been known to us at the time, would have been relevant to our decision to make the banning order.

2.14 If the person applying for the variation or cancellation of a banning order is doing so to work in the financial services industry (as will usually be the case), it is likely that we will want to take the following matters into account:

- (a) the nature of the financial services the person proposes to be involved in providing and the capacity in which they will do so;
- (b) where the person proposes to act as a representative of an AFS licensee, the compliance record of the AFS licensee; and
- (c) details of the compliance and supervisory regime under which the person would operate, if their application is granted by ASIC, including details of any independent auditing of the person's activities.

Public comment

2.15 If we take enforcement action against a financial services provider, our approach to public comment on that action will be governed by our stated policy: see Regulatory Guide 47 *Public comment* (RG 47). As a general principle it is our view that there is significant public interest in ensuring that consumers, industry and the broader community are aware and informed about action taken by ASIC. Transparency and disclosure are important factors in market integrity and consumer confidence and serve to promote deterrence as well as to educate.

Key terms

In this guide, the following terms have the following meanings:

AFS licence 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.

AFS licensee A person who holds an AFS licence.

ASIC or we The Australian Securities and Investments Commission.

ASIC Act The *Australian Securities and Investments Commission Act 2001* and includes regulations made for the purposes of the ASIC Act.

consumer Includes an existing, potential or prospective client.

Corporations Act The *Corporations Act 2001* including regulations made for the purposes of the Corporations Act.

financial product 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 of the Corporations Act for the exact definition.

financial service provider A person who provides a financial service as defined in s766A of the Corporations Act.

financial services business A business of providing financial services.

Note: This is a definition contained in s761A. The meaning of *carry on* a financial services business is affected by s761C.

financial services law Has the meaning given by s761A of the Corporations Act.

licensee An AFS licensee.

provide a financial service To:

- (a) provide financial product advice;
- (b) deal in a financial product;
- (c) make a market for a financial product;

- (d) operate a registered scheme; or
- (e) provide a custodial or depository service.

Note: This is a definition contained in s766A.

representative (of a licensee) Is:

- (a) an authorised representative of the licensee;
- (b) an employee or director of the licensee;
- (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.

representative (of any other person) Is:

- (a) an employee or director of the person;
- (b) an employee or director of a related body corporate of the person; or
- (c) any other person acting on behalf of the first person.

Note: This is a definition contained in s910A.

s912A (for example) A provision of the Corporations Act (in this example numbered 912A), unless a contrary intention appears.

Related papers

Regulatory guides

RG 100 *Enforceable undertakings*

RG 104 *Licensing: Meeting the general obligations*

RG 105 *Licensing: Organisational competence*

RG 175 *Licensing: Financial product advisers—Conduct and disclosure*

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