

Property Syndicate – Do You Need a Licence?

With bank finance becoming increasingly difficult to obtain, structured non-bank finance for property transactions are looking increasingly attractive to promoters of property investments. Under the *Corporations Act*, the promoter of a property investment company, property trust or property syndicate may need to hold an Australian Financial Services Licence (AFSL).

Corporate Commercial Update

For convenience, in this article we have used the term 'property syndicate' to refer to property trusts, property syndicates and property investment companies.

Decisions in relation to the choice of an appropriate structure are generally made on the basis of the tax treatment they will attract. Whilst tax treatment is unquestionably very important (and will be the subject of a later Jackson McDonald article), it is also important to appreciate the different *Corporations Act* implications relating to the different structures available.

Questions for the promoters of property syndicates include:

- Is an AFSL or authorisation required?
- Is the syndicate a managed investment scheme and if so, is it required to be registered?
- Is a prospectus or a product disclosure statement (PDS) required to offer the property syndicate investment?

This article is the first of a series of articles providing general guidance in relation to these matters. It deals with whether an AFSL or authorisation is likely to be required by the promoter.

Is an Australian Financial Services Licence or authorisation required?

The FSR regime is a licensing, conduct and disclosure regime relating to the provision of 'financial services' in relation to 'financial products'. It is contained in Chapter 7 of the *Corporations Act*.

'Financial products' are defined very broadly and include a broad range of investment and risk products (but not direct investments in land). Relevantly for our purposes, financial products include:

Who does this affect?

Promoters of property investment companies, property trusts or property syndicates.

Article Highlights

- Promoters of property syndicates may require an Australia Financial Services License (AFSL).
- Shares in property investments companies and interests in other property syndicates are deemed other 'financial products'.
- It is important to investigate the potential *Corporations Act* treatment when choosing the financial product structuring.



- Securities (which include shares, debentures and options over unissued shares and interests in some unregistered managed investment schemes); and
- Interests in registered managed investment schemes.

Shares in property investment companies and interests in other property syndicates are often financial products.

The term 'financial services' covers a broad range of activities, including at one end of the spectrum operating a stock exchange and at the other, issuing a gift card. Relevantly for our purposes, it includes:

- 'dealing' in a financial product , (for example, issuing shares or managed investment interests to investors);
- operating a registered managed investment scheme; and
- providing 'financial product advice.

Aside from the genuine 'one off' situation, if you are providing financial services, even as only a small part of your business, you will either need to hold an AFSL covering the services or be authorised by an AFSL holder to provide the services, unless an exemption applies.

Will you be 'dealing'?

Looking first at 'dealing', most companies can issue their own shares to investors without needing an AFSL. This is because of what is referred to as the 'self dealing exemption'. However, the self dealing exemption is not available in the case of what are commonly referred to as 'investment companies'.

Most property investment companies offering their own shares will be classified as 'investment companies' under the tests set out in the *Corporations Act*. Therefore, an AFSL with dealing authorisations must be held or an arrangement must be put in place with the holder of such a licence before any shares can be issued to investors in the company structure.

Where the investment is a managed investment scheme, issuing interests in the scheme generally amounts to dealing. No self-dealing exemption applies. Therefore, an AFSL with dealing authorisations must be held or an arrangement must be put in place with the holder of such a licence.

Are you operating a managed investment scheme?

Operating a property syndicate that is a registered managed investment scheme requires an AFSL with a special authorisation specifically to do this. Strict financial conditions apply to this type of licence authorisation and the cost structure involved in operating under such a licence can be prohibitive in the case of smaller property investment structures.

Where the managed investment scheme is not required to be registered, the

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Corporations Act treatment depends upon the exemptions relied upon. In some instances, no AFSL is required; in other cases it will attract the same licensing requirements as an investment company. More details on managed investment schemes and the registration requirements will be covered in a later article.

Are you providing financial product advice?

Finally, consideration needs to be given to whether financial product advice will be provided- in relation to the investment. 'Advice' in this context includes any recommendation in relation to a financial product, be it to buy, sell or hold, whether expressly stated or implied¹.

Advertising and promotion of a property syndicate investment will invariably involve the provision of financial product advice, triggering the licensing requirement.

There are some useful exemptions to know about. For example, the content of prospectuses or PDS is exempt from the licensing requirement under class order relief granted by ASIC². However, no exemptions are available for general promotional activities, so if you wish to promote a structured property investment product effectively, you either need to hold an AFSL with the appropriate advice authorisations, be authorised by an AFSL holder or outsource the promotional activities to an AFSL holder.

All proposed sales procedures need to be carefully checked in advance to ensure they are compliant with the relevant licence authorisations, and other *Corporations Act* requirements, including in particular the 'anti-hawking' provisions, which regulate the way in which all types of financial products can be marketed. It is important to seek expert advice on this point.

Conclusion

It is obviously important to investigate the potential *Corporations Act* treatment thoroughly when structuring the offering. Failure to comply with the *Corporations Act* requirements can potentially attract severe penalties as well as giving investors the right to withdraw from the investment in some circumstances.

Also, the choice of structure and its means of promotion can have a profound effect upon the up-front and ongoing compliance requirements for the life of the investment. Careful planning and the choice of an appropriate structure are essential to the success of the investment, from the viewpoint of both the promoter and the investors.

This article aims to provide some general guidance as to the sorts of compliance requirements that may apply under the *Corporations Act* and the fundamental

1. There are two main categories of financial product advice – general advice and personal advice and the licensing requirements vary depending upon the type of advice provided.
2. There is also class order relief available for general financial product advice contained in the media or on billboards.



triggers for the AFSL requirement. By its nature, this article can only provide general guidance and should not be relied upon as a substitute for seeking professional advice in what is a very technical area of the law.

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