Tips and traps for authorised representative agreements

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From The Fold Legal

If you are appointed to provide financial services on behalf of an Australian financial service licensee, you must enter into an authorised representative (AR) agreement. In this blog we set out some tips and traps to be aware of when negotiating this agreement.

Authorisations

Of course you should only enter into an AR agreement with a licensee who has the appropriate authorisations for the services you want to provide. Other points to consider are:

Are you able to sub-authorise representatives? Consider who is doing what in your business – your business may require you to sub-authorise one key adviser.

Will you need the ability to sub-authorise advisers in the future? For example, will your business expand in the future? If you don't need this ability, it's not necessary to negotiate to include it, however you should ensure that you have the right to vary the agreement later in case it is required.

If you're able to sub-authorise advisers, are you or the licensee responsible for making the notifications to ASIC? Noting that these notifications must be made within certain periods of time.

For general insurance businesses, having the ability to sub-authorise employees and contractors to provide financial services may be essential to delivery of the financial services. Provided they have appropriate training and qualifications, their appointment as ARs can be managed by the corporate authorised representative/business rather than the licensee. Licensees can set conditions about who you can sub-authorise in the AR agreement.

Don't forget that, generally, a licensee cannot appoint another licensee as an authorised representative. However, a licensee who is an insurer can appoint another licensee as an AR if they act under a binder with the insurer. Read the blog on negotiating binder agreements[1] if you're considering putting one in place.

The licensee may want to vary or replace the authorisations granted under the AR agreement if the licensee is planning to revise their service offering. In this situation, if the changes no longer suit the business and would restrict your delivery of services, you may need the ability to quickly terminate the AR agreement and find a new licensee with the appropriate authorisations.

Revenue and client servicing rights

The AR agreement must be clear about the revenue allocations. It's common for the revenue to belong to the AR but be collected by the licensee. This is because, in some cases, it has to be banked in a statutory trust account managed by the licensee, but in other cases the product issuers will only deal with a licensee. Where the licensee collects revenue earned from services provided by the AR and it is owed a licensee fee, they may deduct their fees from the revenue before remitting the money to you.

Ensure there is transparency over the amounts collected and deducted. You should be able to request information from the licensee including tax invoices and revenue statements (within reasonable timeframes).

Client servicing rights should belong exclusively to the person who has the client relationship – and this means the AR. However, if there are issues in terms of delivery of the services (for example, the AR is incapacitated, suspended or banned and cannot service the clients), this might justify a situation where the licensee may need the right to step in and advise the clients directly.

Client records – confidentiality and intellectual property

The AR agreement should contain intellectual property obligations to protect both parties' intellectual property, including where the AR is using the licensee's branding. Both parties should be subject to confidentiality provisions, which should at a minimum apply to:

- Intellectual property;
- Client data and transaction/advice records;
- Business and finance data;
- Trade secrets; and
- Business operations and processes.

If you and the licensee will develop products, processes, strategies and other intellectual property together, ensure there are obligations in the AR agreement that clearly set out who owns the rights in that intellectual property.

Liability

An AR agreement will include liability and indemnity provisions. Licensees will want to be fully indemnified for any losses, costs and liabilities they have arising from your activities under their licence. However, it is important to ensure that your liability under the AR agreement reflects the extent to which you caused or contributed to the loss or damage, i.e. you should include 'proportionate liability' principles.

Many ARs do not negotiate changes to the liability provisions and simply accept them on a 'take it or leave it' basis. It is possible to negotiate reasonable changes to the AR Agreement to adjust your liability position.

You should ensure that your liability under the AR agreement will be limited to a specific amount, in the event that your insurance policies will not respond. If claims for client remediation are made and they relate to advice you gave or products you sold, you may be liable for those claims without recourse to insurance.

However, you should still be liable to the licensee for specific types of losses that are within your control, for example:

- Serious adviser misconduct
- Dishonesty
- Gross misconduct
- Fraud.

Depending on your relationship with the licensee, they may ask you to be liable for other losses. For example, AFCA claims, judgements and costs of insurance policy excesses. Never agree to provide a personal guarantee for these losses, as agreeing to this could expose you to personal bankruptcy if the licensee enforces its rights to be indemnified against your business and your business cannot pay.

Termination, cessation, and suspension

Termination, cessation, and suspension are three different things but they should all be addressed in the AR agreement.

Parties should be able to terminate the AR agreement for at least three reasons:

- If a party cannot perform the agreement. For example, if a party is insolvent/bankrupt, the AR is banned or disqualified by ASIC or the licensee's licence is suspended or revoked. For serious events like these, termination is necessary and appropriate;
- A party has breached the agreement and failed to remedy the breach within a reasonable time frame; and
- A party voluntarily terminates by giving notice in advance. This is common where an AR is terminating because they will have their own licence or they are moving to another licensee.

Suspending the agreement might be appropriate in other cases, for example where the AR's conduct is being investigated or where the AR is unwell for a temporary period and the licensee steps in to service the clients. It is important to ensure that suspensions are not indefinite. They should run for a reasonable period and, if the suspension exceeds this timeframe, it should become a termination event for which the agreement can be terminated.

If your AR agreement is suspended or terminated because a party has been banned or lost their authorisation, the agreement should cover how the services can continue to be provided to clients:

If the AR is banned, is the licensee able to contact the clients to service them? If not, what happens to the clients? It's essential that they continue to receive appropriate services.

If the agreement is terminated because the licensee loses their licence, who is responsible for notifying the clients? Can the AR work with another licensee to ensure continuity of the services for the clients?

Where the agreement is terminated for any reason, the parties must agree what happens after termination to the clients, the client data and records, confidential information/intellectual property and revenue. Non-solicitation clauses and other restraints are common in AR agreements where the AR wants to protect the goodwill in their business.

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