Restrictions for licensees in intermediary authorisation agreements

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Australian financial services (AFS) licensees with an agreement with an unlicensed product provider cannot deal in a financial product unless they are issuing, varying, or disposing for the product issuer, according to The Fold Legal.

In an analysis the firm's solicitor director, Jamie Lumsden, said such an agreement would give an "intermediary authorisation" for a product issuer to provide products to retail clients without an AFS licence.

However, under the intermediary authorisation a product issuer cannot deal directly with customers under any circumstance, Lumsden said.

The analysis said: "The AFS licensee cannot deal in a financial product unless they're issuing, varying or disposing for the product issuer. This means you can't:

- Make a market for the financial product;
- Operate a registered scheme;
- Provide a custodial or depository service; or
- Provide a crowd-funding service.

This means the exemption can never be used by:

- The trustee of a registered scheme (including peer-to-peer lenders);
- The trustee of an unregistered scheme that has the custodial and depository services authorisation. In this arrangement, the only option available to the trustee is to hold its own AFS licence. But it can be used by the trustee of an unregistered scheme that does not hold any financial products in custody, like a property scheme which only holds real property, provided the trustee only deals with investors through the licensee; and
- Non-cash payment providers that allow direct access to their services".

Lumsden noted the agreement would only be valid if the arrangement included a written agreement that:

- Authorises the AFS licensee to make offers to arrange for the product issuer to issue, vary or dispose of the financial products;
- Specifies that the product issuer will actually issue, vary or dispose of the products in accordance with any offers made by the licensee; and
- Only involves offers made by the licensee that are covered by the authorisations on that licensee's AFS licence.

Such arrangements could be used by insurers who entered the Australian market by granting a binding authority to an agent or non-cash payment products as long as customers did not have direct access to their services.