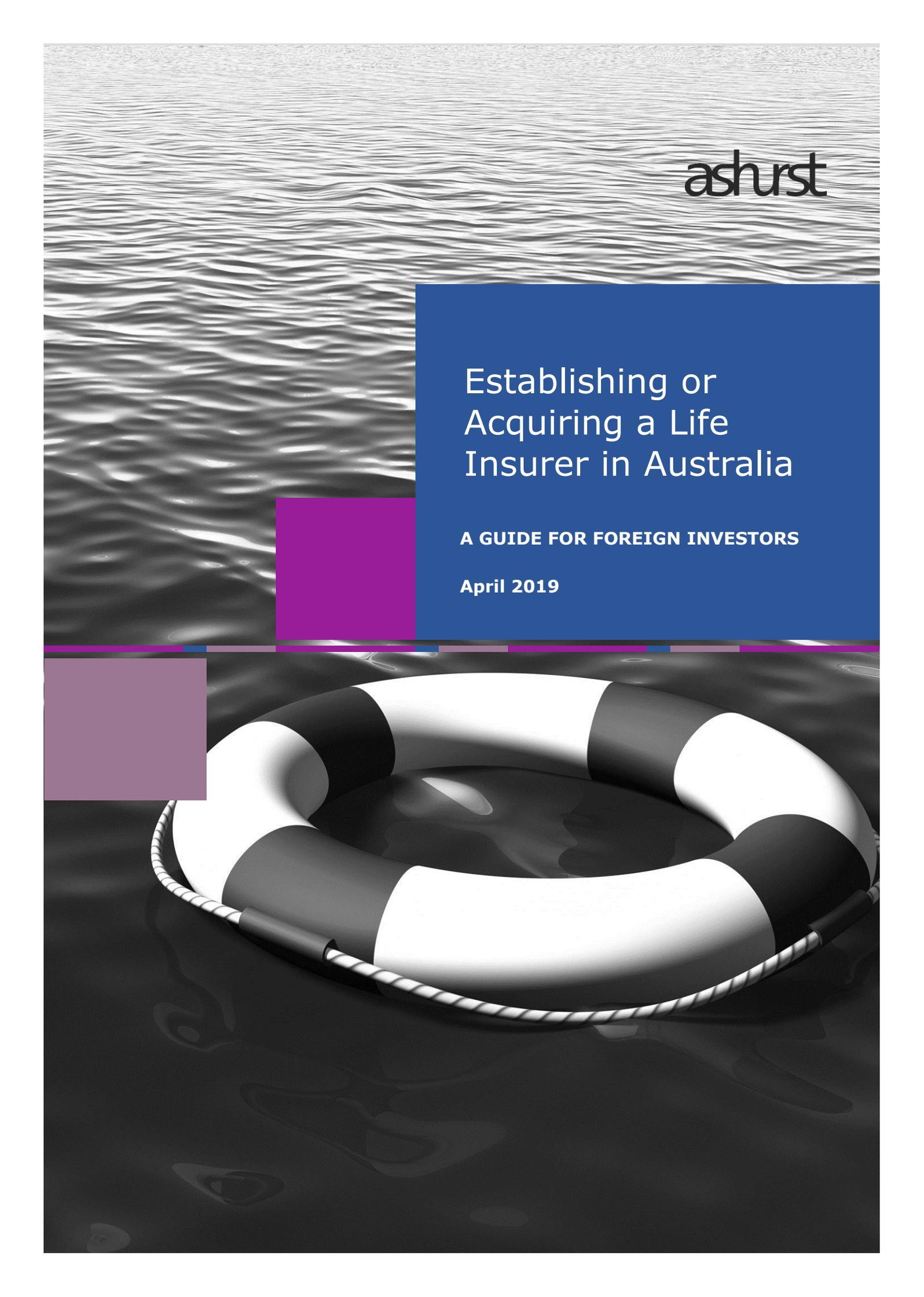


The logo for the law firm Ashurst, featuring the name in a lowercase, sans-serif font.The background of the cover is a grayscale image of water with ripples. In the lower half, a white and black striped lifebuoy with a rope is floating on the surface. The text is overlaid on a blue rectangular area in the upper right, and there are several colored squares (purple, blue, and light purple) scattered across the page.

# Establishing or Acquiring a Life Insurer in Australia

**A GUIDE FOR FOREIGN INVESTORS**

**April 2019**

# Establishing or Acquiring a Life Insurer in Australia

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## Background

Japanese investors have shown, and continue to show, a strong interest in Australian life insurers. There are further investment opportunities in this sector in Australia as banks sell their life insurance operations. Ashurst acted on the two most high profile life insurance acquisitions by Japanese investors being Nippon Life Insurance's acquisition of MLC in 2016 and Daiichi's acquisition of TAL in 2008.

This brochure outlines the key regulatory issues for foreign investors looking to establish or acquire a life insurance business in Australia based on Ashurst's practical experience from the transactions mentioned above and many others on which Ashurst has worked.

Ashurst also assisted in the post-merger integration phase, including by assisting with the management of both Australian and Japanese employees. Although, not discussed in this brochure, we are able to provide advice on all phases of the transaction, including the structure of any post-completion integration based on our experience in the insurance market.

## Acquire an existing business or establish a new one?

There are a number of regulatory requirements that prospective entrants to the Australian life insurance market should be aware of.

One of the first issues that needs to be considered by a foreign investor is whether to establish its own operation in Australia as a new market entrant, or whether to instead acquire all or a part of an existing Australian life insurance company.

In summary, a market entrant that decides to establish a new life insurer can expect to be required to:

- Incorporate a local subsidiary company in Australia or, where permissible, a local branch of a foreign life insurer;
- Apply to become a registered life insurer, or registered foreign life insurer; and
- Apply for an Australian financial services (**AFS**) licence.

Alternatively, a market entrant looking to acquire the assets of or shares in an existing life insurer can avoid the time and expense involved in becoming a registered life insurer and obtaining an AFS licence. However, this is not necessarily an easier or faster option as the purchase must be negotiated, due diligence must be carried out, past liabilities will likely be assumed and regulatory approvals will still be required and these are set out below.

## Establishing operations in Australia

Foreign investors that wish to become a new market entrant are generally required to establish a locally incorporated subsidiary in order to carry on life insurance business in Australia.

An exception is made for life insurers who are incorporated in New Zealand or the United States of America and who are authorised to carry on life insurance business in those countries. These life insurers are permitted to operate in Australia through a branch as an 'eligible foreign life insurance company' (**EFLIC**).

## APRA authorisations

In order to carry on life insurance business in Australia, a foreign investor will need to make an application to the insurance regulator, the Australian Prudential Regulatory Authority (**APRA**), for the

locally incorporated subsidiary, or EFLIC, to become a registered life insurer under the *Life Insurance Act 1995* (Cth) (**Life Insurance Act**).

If the parent company of a locally incorporated subsidiary is a local holding company that does not itself carry on life insurance business (known as a non-operating holding company or **NOHC**), the NOHC may also need to be registered with APRA. If the life insurer is part of a group that includes an Australian authorised general insurer, any NOHC will be authorised and regulated under the *Insurance Act 1973* (Cth).

While the timetable for the registration process depends on the complexity and completeness of the material provided by the applicant and the applicant's ability to meet APRA's requirements from day one, the process generally takes between three and 12 months to complete. APRA encourages prospective applicants to contact it as early as possible during their planning process to discuss their plans.

**Appendix A** contains a summary of the application process and criteria required to become registered as a life insurer.

### Australian financial services licence

In addition to being a registered life insurer, a life insurer will also generally be required to hold a licence to carry on a financial services business to meet the requirements of Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**).<sup>1</sup>

Applications for Australian financial services (**AFS**) licences are made to the corporate regulator, the Australian Securities and Investments Commission (**ASIC**) and generally take up to four months to complete.

**Appendix B** contains a high level summary of the information that is required for AFS licence application.

### Foreign ownership approvals

A foreign investor that intends to enter the market through an asset or share acquisition of an existing registered life insurer will need to consider its obligations to obtain regulatory approvals from APRA under the following legislation:

- the *Financial Sector (Shareholdings) Act 1998* (Cth) (**FSSA**) – which regulates the acquisition of shareholdings in Australian-registered life insurers or their holding companies; and
- the *Insurance Acquisitions and Takeovers Act 1991* (Cth) (**IATA**) – which regulates the acquisition of the assets of, or the acquisition of control by agreement over, Australian-registered life insurance companies.

The FSSA is the main regulatory process through which APRA will grant approval for the acquisition of a life insurance business in Australia by a foreign investor. It is often the case that IATA approval will also be required, in which case both applications are made (and dealt with) concurrently.

In addition, the Australian government screens foreign investment proposals through the Foreign Investment Review Board (**FIRB**) and under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) to ensure they are not contrary to Australia's national interest. The Treasurer can prohibit foreign investment proposals found to be contrary to the national interest, or can impose conditions on an investment to address national interest concerns.

In general, while proposals to acquire an interest of 20% or more in any business valued at over \$266 million (or the higher threshold of \$1,154 million for agreement country investors from Canada,

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<sup>1</sup> Subject to certain licensing exemptions that exist.

Chile, China, Japan, South Korea, Mexico, New Zealand, Singapore, and the United States) require prior FIRB approval, acquisitions of interests in insurance companies or their holding companies are excluded from the process of FIRB approval and are dealt with instead under the FSSA application process.<sup>2</sup>

All foreign government investors require FIRB approval to acquire a direct interest in an Australian entity or business or to start a new Australian business, regardless of the value of the investment (\$0 threshold).

### **Federal court approval for asset sales**

Where a foreign investor acquires the assets of an Australian life insurer other than by way of a share sale, the acquisition process has to involve a scheme that is confirmed by the Federal Court of Australia, exercising its jurisdiction under the Life Insurance Act to protect the interests of policyholders.

Life insurance schemes can take between 12 and 18 months to complete, depending on the nature and size of the underlying life business. While the commercial risks can be managed, a scheme creates delay and cost for the transaction process which offsets the benefit of an asset sale in allowing the purchaser to isolate and purchase selected assets.

A share acquisition avoids the need for a life insurance scheme and this is the reason why a number of recent transactions in the life insurance sector have involved share sales.<sup>3</sup> The disadvantage of a share sale, however, is that a purchaser will generally need to acquire all of the assets and business of the life insurer. The purchaser may then need to consider any post-completion divestment of unwanted parts of the life business.

### **Foreign regulatory approvals**

Foreign regulatory approvals may also be required where the acquirer is a life insurer in other jurisdictions. The requirements of foreign regulators should be identified and factored in to the acquisition timetable.

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<sup>2</sup> Section Part 3, Div 3, Sub-Div C of the *Foreign Acquisitions and Takeovers Regulations 2015* (Cth).

<sup>3</sup> For example, the acquisition by Nippon Life Insurance Company of an 80% shareholding in the life insurance business of National Australia Bank, MLC, in 2016, and the acquisition by Dai-ichi Mutual Life Insurance Company of its shareholding in Tower Australia Group Limited in 2008. Ashurst acted for the foreign investors in both of these transactions.

## Ashurst experience

### Asia/Japan insurance related matters

CLIENT	DESCRIPTION
<b>ACE Limited/Chubb Limited</b>	on the integration and regulatory matters for its USD29.4 billion takeover of Chubb Corp in Asia-Pacific and Latin America- <i>the biggest ever insurance takeover</i> - including various mergers and portfolio transfers in Argentina, Australia, Brazil, Chile, Colombia, Hong Kong, Japan, Korea, Mexico, New Zealand and Singapore.
<b>ACE Insurance Limited</b>	on its court approved portfolio transfer in Australia of the Australian insurance business of Chubb Insurance Company of Australia Limited.
<b>ACE Insurance Company Limited</b>	on its statutory approved portfolio and business transfer of the Federal Insurance Company's Japan branch.
<b>Dai-Ichi Life.</b>	on the acquisition of all the shares in TOWER Australia by way of scheme of arrangement.
<b>Sompo Nipponkoa Holdings Incorporated</b>	on its long term non-life bancassurance arrangement with CIMB Group Holdings Berhad in Southeast Asia, covering Malaysia, Indonesia, Singapore and Thailand.
<b>A Japanese insurance company</b>	as a bidder in Standard Chartered Bank's 15 year Asia-Pacific regional general insurance bancassurance transaction, covering a number of countries including Hong Kong, Singapore, Malaysia, India, Indonesia and Taiwan.

### Australia insurance M&A related matters

CLIENT	DESCRIPTION
<b>AIG Group</b>	on the merger of IAL and CGU and internal restructuring.
<b>AMP General Insurance Company Ltd (shareholder)</b>	on the sale of shares by QBE to remaining shareholders of National Transport Insurance Ltd.
<b>AMP on aspects of sale including employment issues:</b>	on the sale of GIO by AMP to Suncorp.
<b>ANZ Banking Group</b>	on the joint venture between ANZ Life and General Insurance businesses with INGA.
<b>Aon Risk Partners</b>	on the share sale Macquarie Underwriting to Dexta.
<b>Berkshire Hathaway</b>	acting for the Berkshire Hathaway group in its equity investment and strategic relationship with Insurance Australia Group.
<b>Freedom Insurance Group Limited</b>	on its aborted purchase of St Andrew's Group (including a life insurer and general insurer) from Bank of Queensland.

<b>GE Hallmark</b>	on Australian law aspects of the transfer of the business of Simply Insurance NZ to Hallmark General Insurance.
<b>Genworth</b>	on its acquisition of the issued share capital of Vero Lenders' Mortgage Insurance Limited from Promina Group.
<b>GIO</b>	on the sale of GIO by Government of New South Wales (privatisation).
<b>Insurance Australia Group (IAG)</b>	on the integration of acquired Wesfarmers General insurances.
<b>KKR</b>	on its investment in Resolution Group and Australia regulatory implications including approval requirements under the Financial Sector (Shareholdings) Act 1998 (Cth).
<b>KKR, Värde and Deutsche Bank</b>	on its A\$8.2 billion acquisition by of the GE consumer finance business in Australia and New Zealand (which includes the acquisition of a life insurer and general insurer).
<b>Liberty International Underwriters</b>	on the potential acquisition of another general insurer. Advising on regulatory issues, product wordings, and group structuring issues.
<b>Liberty Mutual</b>	on proposed share sale FAI Insurance to Liberty Mutual.
<b>Munich Re</b>	on the sale of Calibre Insurance to Hollard and proposed sale of certain books of Great Lakes Australia and Great Lakes NZ.
<b>New Zealand Insurer</b>	on options for the transfer of its business to Australia (and suggesting an alternative to a formal portfolio transfer which ultimately saved the client a significant amount of time and costs).
<b>Resolution Life Group</b>	on its A\$3.45bn acquisition of AMP Life.
<b>Swiss Re</b>	on its acquisition of QBE's workers' compensation book in Hong Kong by way of acquisition of the economic interest by way of a value in force reinsurance treaty and portfolio transfer scheme.
<b>Tower Australia Limited</b>	on its acquisition of National Financial Solutions Pty Ltd, a life insurance comparison/broker business.
<b>Wesfarmers</b>	on the acquisition of Lumley General Insurance and Lumley Life.

**CASE STUDY:**



**Nippon Life Insurance acquisition of 80% of MLC Limited and  
20 year distribution agreement between MLC and NAB**

We advised Nippon Life Insurance (**Nippon**) on the acquisition of 80% of the outstanding shares of MLC Limited (**MLC**), a subsidiary of National Australia Bank (**NAB**).

As part of the transaction, MLC entered into a 20-year distribution agreement with NAB. NAB will continue to hold the remaining 20% of MLC and seek to expand MLC's business in conjunction with Nippon Life.

A friendly transaction, it was subject to relevant regulatory approvals in Japan and Australia.

Our role on this transaction included a detailed consideration of the requirements of a Part 9 Life Insurance Act portfolio transfer as an alternative to a share acquisition.

In bringing the transaction to completion we dealt with complex business separation issues (including drafting various outsourcing agreements between MLC and NAB), reinsurance considerations and also dealt with regulators, including APRA in relation to IATA approvals. We have a good working relationship with APRA in relation to IATA approvals and understand its approach and requirements.

## Ashurst recognition



### AWARDS / ACCOLADES

*Band 1: Insurance – Policyholder*  
**CHAMBERS ASIA PACIFIC, 2019**

*Winner in the category of Insurance & Reinsurance: Lawyer of the Year, Japan*  
**FINANCE MONTHLY MAGAZINE LEGAL AWARDS, 2019**

*Winner Innovation in Legal Expertise, Insurance: Rehana Box*  
**FINANCIAL TIMES INNOVATIVE LAWYERS AWARDS ASIA-PACIFIC 2018**

*Winner: Insurance Team of the Year*  
**LAWYERS WEEKLY AUSTRALIAN LAW AWARDS, 2017**

*Leading Individual: Rehana Box*  
**LEGAL500 ASIA PACIFIC, 2019**

*Acknowledged for Insurance Law: Rehana Box and Melanie McKean*  
**BEST LAWYERS, 2020**

*Ranked individual: Tracy Whiriskey*  
**CHAMBERS ASIA PACIFIC 2019, JAPAN – INSURANCE**

One interviewee notes that **"the intellectual and technical skills she [Rehana Box] brings to it are second to none,"** while another reports: **"We rely on her quite a lot on any cutting-edge ideas or innovation."**  
**CHAMBERS ASIA PACIFIC 2019, INSURANCE**

Tracy Whiriskey of Ashurst handles mergers and acquisitions in the banking and insurance sectors. **"She has knowledge of Australia and New Zealand businesses, as well as European businesses and tech insurance,"** notes one interviewee.  
**CHAMBERS ASIA PACIFIC 2019, JAPAN - INSURANCE RANKED LAWYER**

## Key contacts at Ashurst

We would be pleased to discuss the issues contained in this publication with you. Please contact:



**Rehana Box**  
Partner  
Sydney

T +61 2 9258 6407  
M +61 418 472 371  
rehana.box@ashurst.com



**Tracy Whiriskey**  
Partner  
Tokyo

T +81 3 5405 6209  
M +81 90 3083 2645  
tracy.whiriskey@ashurst.com



**Natsuko Ogawa**  
Partner  
Melbourne

T +61 3 9679 3833  
M +61 427 481 911  
natsuko.ogawa@ashurst.com

# Appendix A

## Summary of the application process & criteria to become a registered life insurer

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APRA will only authorise or register an applicant which has the capacity and commitment to conduct insurance business in Australia on a continuing basis, with integrity, prudence and professional skill. An applicant must be able to comply with the applicable prudential requirements set out in the Life Insurance Act and APRA's prudential standards, from the commencement of its insurance business and continuously thereafter.

### Application process

The application involves the following steps:

- (a) preliminary consultation between APRA and the prospective applicant to discuss the applicant's plans to carry on insurance business in Australia;
- (b) submission of a draft application and relevant information, as detailed in the APRA registration guidelines, along with the applicable fee; and
- (c) APRA's review of the application. This will normally include meetings with senior officers and other responsible persons, as well as on-site reviews of facilities and systems proposed to be used by the applicant in carrying on its insurance business in Australia.

In relation to an application to register a life insurer, the company must appoint an actuary under the Life Insurance Act (the appointed actuary). APRA expects the proposed appointed actuary to play a major role in the application. This includes involvement in the development of the business plans, review of the terms and conditions of life insurance policies to be issued by the company, and advice on the appropriateness of the proposed reinsurance arrangements.

### Supporting information

Examples of supporting information required for an application to APRA for registration as a life insurer include, but are not limited to:

- (a) ownership and board management;
- (b) the proposed auditors and actuaries to be appointed;
- (c) a three-year business plan;
- (d) risk and information management;
- (e) existing and proposed subsidiaries; and
- (f) an auditor's certificate.

The above is not an exhaustive list. The exact information required depends on whether the application is to register a locally incorporated company or foreign insurer.

### Registration criteria for life companies

The minimum required criteria for APRA to grant registration under the Life Insurance Act include, but are not limited to:

- (a) governance – applicants must comply with:
  - (i) APRA's Prudential Standard LPS 510 Governance with regard to the composition and functioning of its Board or Compliance Committee.
  - (ii) APRA's Prudential Standard LPS 520 Fit and Proper which sets out the eligibility requirements of directors, compliance committee members and senior management.

- (iii) the requirement to appoint an auditor and actuary in accordance with the requirements of the Life Insurance Act to perform the duties set out in Prudential Standard LPS 310 Audit and Related Matters and LPS 320 Actuarial and Related Matters.
- (b) capital and assets in Australia - applicants must have in place sufficient capital to meet the minimum capital requirements under Prudential Standard PS3 Prudential Capital Requirement and Prudential Standard LPS 6.03 Management Capital Standard at all times. In addition, each statutory fund will need sufficient assets (in excess of liabilities) to meet the requirements of Prudential Standard LPS 2.04 Solvency Standard and Prudential Standard LPS 3.04 Capital Adequacy Standard at all times. APRA will assess the adequacy of start-up capital for an applicant on a case-by-case basis having regard to the size, business mix, complexity and risk profile of the business operations proposed in the business plan.
- (c) risk management framework - applicants must satisfy APRA that its risk management and control framework is adequate and appropriate to monitor and limit risk exposures in relation to the domestic and, where relevant, offshore operations of the life company in accordance with Prudential Standard LPS 220 Risk Management.
- (d) compliance - applicants must satisfy APRA that its processes and systems will ensure compliance with:
  - (i) the Life Insurance Act and regulations;
  - (ii) APRA's prudential standards and prudential rules;
  - (iii) other Australian regulatory and legal requirements; and
  - (iv) foreign regulatory requirements where applicable.
- (e) reinsurance management - applicants must have in place a reinsurance management framework in accordance with Prudential Standard LPS 320 Actuarial and Related Matters and Prudential Standard LPS 230 Reinsurance.
- (f) information and accounting systems - applicants must satisfy APRA that their information and accounting systems are adequate for maintaining up-to-date records of all business undertaken, so as to keep management continuously and accurately informed of the financial condition and the risks to which it is exposed. An applicant must demonstrate to APRA that its systems will be capable of producing all required statutory and prudential information in an accurate and timely manner from the commencement of operations, including information needed by the appointed actuary to perform their statutory functions.
- (g) Supervision by home supervisor - a foreign life company applicant must be an authorised life company in its home country and have received any necessary consent from its home supervisor for the establishment of the proposed life insurance business in Australia. The home supervisor will also need to confirm that the life company is of good financial standing.
 

In assessing applications to establish a foreign-owned subsidiary or an eligible foreign insurer, APRA will consider the level and scope of prudential supervision of the foreign owner or life company in its home country. In doing so, APRA will have regard to the Insurance Core Principles promulgated by the International Association of Insurance Supervisors.
- (h) Intra-group transactions and arrangements - where applicants have multiple businesses, they should have policies addressing how intra-group transactions are to be conducted.
- (i) Please refer to APRA's Guidelines on Registration of Life Companies<sup>4</sup> for further information on the authorisation process, including the documentation to be supplied with the application and the minimum criteria for a foreign insurer and locally incorporated life insurer.

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<sup>4</sup> Available online at: <http://www.apra.gov.au/lifs/pages/registration-of-life-companies-and-non-operating-holding-companies-of-life-companies.aspx>.

# Appendix B

## Key information required in an AFS licence application

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An applicant for an AFS licence must demonstrate that it has the capacity and expertise to comply with the obligations imposed by Australian law and that it can maintain the competence to provide the financial services covered by the AFS licence. An applicant for an AFS licence will need to prepare detailed, written "proofs" in support of their application.

Specifically, the application will need to address a number of key matters including:

- (a) What financial services will be provided and the authorisations required (this will depend on the types of financial services provided). The applicant will need to demonstrate that it has people with experience and qualifications in the provision of financial product advice;
- (b) The competence, knowledge and skills of the applicant's "responsible managers", being the people who have direct responsibility for significant day-to-day decisions about the provision of the financial services, as well as their good fame and character. We note that while the number of responsible manager's required depends on the size and complexity of a licensee's business, ASIC generally expects a prospective licensee to nominate at least two responsible managers;
- (c) The training and competence of the applicant's representatives and authorised representatives;
- (d) Compliance and risk management arrangements; and
- (e) The adequacy of the applicant's financial, technological and human resources. This will involve having adequate technological systems, personnel, and policies and procedures appropriate to ensure that, as an AFS licence holder, the applicant will be able to comply with its obligations under the law.

An AFS Licensing Kit is available online at ASIC's website.<sup>5</sup>

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This publication is not intended to be a comprehensive review of the issues discussed in it, and it is not legal advice. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us.

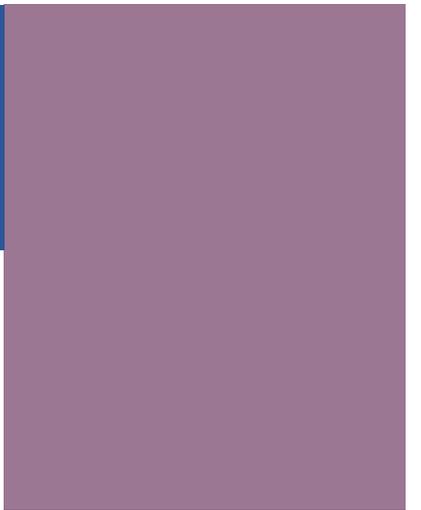
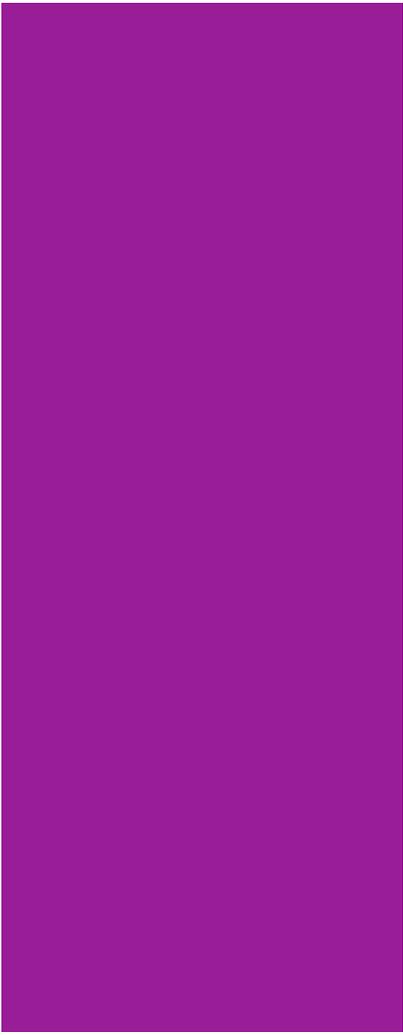
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<sup>5</sup> <http://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/afs-licensing-kit/>



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