

Licensing guide for MIS managers of forestry schemes

About this guide

This guide supplements [Part B](#) of our [licensing application guides](#). It explains to businesses providing a managed investment scheme (MIS) service of a forestry scheme how to approach their licence application under the [Financial Markets Conduct Act 2013](#) (FMC Act).

Forestry schemes that are MISs are classified as ‘managed investment products in other schemes’ for the purposes of the [Financial Markets Conduct Regulations 2014](#).

In their application, managers of forestry schemes need to consider all the minimum standards and commentary in the licensing application guide, as well as the notes in this guide.

This guide clarifies some of the considerations unique to a manager of a forestry scheme. It also provides context for responding to the questions. Your application should include responses to this guide as well as to the licensing application guide.

If your forestry scheme is not an MIS, then the business or entity providing management services to your forestry scheme need not apply for an MIS manager licence (see below).

Who will benefit from this guide?

We recommend you read this guide if you are a manager of a forestry scheme and plan to apply for an MIS manager licence. This guide doesn’t change any of your legal requirements. It is to help you with the application process.

Why do I need to be licensed?

The FMC Act and related legislation are aimed at raising the standards of New Zealand's market service providers. Licensing MIS managers and keeping minimum standards similar to other professionals who manage investor assets will help lift consumer confidence in our financial markets.

You need to be licensed if you are a manager of an MIS. To date, forestry partnerships were participatory securities under the Securities Act 1978 but not all forestry partnerships will be MISs under the FMC Act. Deciding whether or not a scheme is an MIS is a significant decision. We discuss our view of the relevant considerations next. You may wish to seek legal advice if you are unsure if your scheme is an MIS.

Definition of MIS

In general terms, an MIS pools money from investors who rely on the investment expertise of the scheme manager. The definition in the FMC Act (s 9) is broad, and will include most of the structures used in forestry schemes, including those that were participatory securities under the [Securities Act 1978](#).

A scheme is not an MIS if the investors principally produce the financial benefits or have day-to-day control of the operation of the scheme (ss 9(1) (b) and (c) of the FMC Act).

Ask the following questions to help decide whether you are an MIS:

- what activities principally produce the financial benefits, and who performs them (s 9(1) (b)). For some forestry schemes, a forestry manager will exercise skill, and provide expertise and decision-making in managing the forest, while investors have an oversight role. In that situation, the forestry manager plays the principal role in producing the financial benefits. For other schemes, the investors manage the scheme and contract with different specialists for limited purposes.
- who has day-to-day control (s 9(1) (c)). Investors may have this role or their input may be limited to more high-level control, leaving day-to-day control to a forestry manager. In some years, there will be little day-to-day activity by anyone, but in early years, and also as harvest approaches, there will be more activity. Identifying who exercises the day-to-day control will therefore involve looking at the forest's entire life.

Small schemes are more likely than larger schemes to fall outside the statutory definition, as the investors are more likely to be actively involved in producing the financial benefits, and in day-to-day control. For efficiency reasons, larger schemes might need to devolve management responsibilities and day-to-day tasks, and they will generally be MISs.

Some schemes may delegate the management to a sub-committee of investors so an assessment will need to be made of whether that arrangement is self-managed. It will be relevant to know whether the makeup of the committee changes from time-to-time (for example, by a vote at the AGM, and also whether committee members are paid for their services). If someone is paid for the services, it is more likely the investors are relying on that person's efforts. Another important indicator is whether investors are able to sue a manager for failure to perform some scheme activity, or instead whether they must sue contractors directly.

Also, a scheme is not an MIS if it meets the criteria in s 9(2). One of the criteria is that the value of an investor's interest is not substantially dependent on contributions by other participants or the use of other participants' contributions. In the case of forestry schemes, we consider this criterion would usually not be met. The value of each person's interest would usually be dependent on the use of other participants' contributions because of the ability to invest in larger forests, and to share costs.

If investors receive shares but no other interest in a scheme, then the scheme is not an MIS. Shares are equity securities under the FMC Act. Companies that issue equity securities are subject to different obligations under the FMC Act from an MIS. Unlike an MIS, companies are not required to have a licensed manager or supervisor, or a governing document. Other obligations apply under the [Companies Act 1993](#) to protect shareholders' interests, such as directors' duties. There is more detail about companies' FMC Act obligations [here](#).

If a company is part of an MIS, such as a land-owning company where the shares are held by the partners in a limited partnership, the scheme will still have obligations under the FMC Act as an MIS.

However, we also have power to designate how new financial products are categorised under the FMC Act. A relevant consideration is the economic substance of the investors' interests in the scheme. For example, if a share has terms that mean, in substance, it is similar to a managed investment product, we can declare it to be a managed investment product in an MIS.

Under the FMC Act, there is a statutory exclusion for small schemes (cl 16 of schedule 1, small schemes exclusion). Offers of interests in an MIS are not regulated under the FMC Act where:

- there are five or fewer scheme participants
- the scheme is not promoted by a person or an associate who is in the business of promoting schemes.

This small schemes exclusion only applies to new schemes offered under the FMC Act.

The exclusion recognises that investors in small schemes will be more likely to have access to information, and to take part in management of the scheme, than investors in large schemes. The costs of compliance may also be proportionately higher for investors in small schemes. Without relief, these factors might inhibit the establishment of small property schemes and therefore would reduce investment opportunities in the market.

When counting scheme participants, joint owners are counted as one, and an interest held on trust may be taken to be held by the beneficiary. Also, we have the power to determine that all participants in several schemes are counted as if they were one scheme.

FMA's licensing approach

Our approach to licensing is to ensure the approach to meeting the minimum standards is fit for purpose. In other words, the approach is scaled up or down depending on the applicant's circumstances and the degree of risk inherent in the scheme or in the manager.

This guide is intended to help you work your way through the application process. We encourage you to engage with your supervisor and the FMA if you have any questions. In many cases, you will not need high-level legal or accounting services to complete the application.

Exemptions available

The FMA has granted certain exemptions to address some issues faced by forestry schemes in complying with the FMC Act. You should review our update on forestry class exemptions on our website to see if it helps. However, as discussed above, unless your scheme does not require registration or you do not need to become licensed, your forestry scheme must be registered, and you must have a licensed manager and supervisor.

When will I need to apply for a licence?

MIS managers have until 1 December 2016 to make a transition to the FMC Act. To ensure we can give you the right level of support to meet the deadline, we strongly recommend you talk to your supervisor and to us about your application. Plan to submit your application in the first half of the year.

It is important to know that if your forestry partnership is an MIS under the FMC Act, manager licensing is only one aspect of complying with the FMC Act.

Once licensed, you will then need to make arrangements to move your forestry partnership or scheme to the new regime. This process of 'transition' involves a number of other steps, including ensuring:

- you have a licensed supervisor
- your governing documents comply with the FMC Act (e.g. such as your partnership agreement)
- you give 20 working days' notice of transition to the new regime on the [Disclose Register](#).

If your scheme is still open and accepting new members, you will need to ensure you lodge a product disclosure statement on the Disclose Register. It is important that you factor these aspects of the process into how long it will take you both to become a licensed manager, and to move your forestry scheme to the FMC Act regime.

Tips before you start

In preparing your application, please make sure your responses take into account the minimum standards for each section. The questions and commentary in the licensing application guide suggest extra information that helps us to consider how the minimum standards are met, but it is the achievement of the minimum standards that is central to our assessment. The minimum standards that apply for each MIS are those that are relevant to the nature, size and complexity of that MIS. We do not expect a small forestry scheme to incorporate the same standards as a managed fund MIS (for example a unit trust or KiwiSaver scheme). We would expect you to have systems, processes and policies in place that are appropriate for your particular MIS. If you need help in clarifying this, please contact us.

Please note that some application terminology may need clarification for a forestry scheme. The application and guide references to 'property' or 'scheme property' refer to all assets held by the scheme. This would include real property as well as non-real property, such as any securities, rights, contracts, or other items that may have value. These terms also refer to money held by the scheme, unless noted separately, for example 'scheme monies and scheme property'.

We recommend you meet with your licence assessor early in the process. It helps us to quickly understand unique aspects of your application.

If you have questions about interpreting an application question or a minimum standard, please contact us.

Make sure you include a simple overview of the business. It is one of the most important aspects of your application.

Diagrams such as organisation charts really help us understand the parties involved in your business or who you outsource to.

If you intend only to manage forestry schemes, consider requesting a condition or restriction to a licence for an MIS manager of a forestry scheme only. This helps us tailor our licensing assessment to those aspects relevant to a forestry scheme and simplifies the application process.

Exemptions – we recommend you engage with us early if you want to rely on exemptions. These take time to put in place and we have limited powers to grant them.

Initial questions

The initial questions in the licensing portal ask specific questions about your business. For certain questions, you should interpret the question as referring to your forestry scheme:

- total MIS funds under management – read as – the total value of the forest(s) and other assets held in each scheme or partnership that you manage as at the financial reporting date
- how many MIS funds you manage – read as – how many forestry schemes you manage
- how many MIS investors in retail schemes – read as – how many investors you have in all the forestry schemes you manage, without double-counting those in multiple schemes. This need not be an exact figure, a good approximation is fine
- is your entity a qualifying financial entity (QFE) – this is unlikely. If you are a QFE, you will already know that

- what experience do your investment managers have – your response should consider various positions related to forestry scheme management and operational roles within forestry management.

‘Fit and proper’

This section helps us to assess whether the people who control your business are experienced in managing similar businesses, and whether they might act inappropriately. Please explain how you ensure your directors and senior managers meet and maintain the minimum ‘fit and proper’ standards.

It’s the licensed business (the MIS manager) as a whole that’s responsible for meeting these standards. The business will need processes and controls, such as regular management meetings, to ensure everyone’s still working to the required standards.

There must be periodic checks that the directors remain ‘fit and proper’. It is not a one-time test.

Your people

Name all the directors and senior managers of the MIS manager. Include CVs and position descriptions so we can check they have appropriate qualifications and experience. We collect signed declarations from all current and proposed directors and senior managers of an MIS manager. These give us authority to conduct good character checks.

For a small business, name all the key people and explain their roles and responsibilities. Key people will generally be the directors or senior managers but if there is anyone else who is not one of these but plays a key role in the business, please provide details. Explain who performs which function.

Name any board committees, who sits on these committees, and whether there are any terms of reference for these committees.

Please note:

- Only people with a significant influence over the management or administration of the business need to complete a declaration.
- Having decided that your forestry scheme is an MIS, it should be reasonably clear who the manager of the scheme is. Its directors and senior managers must complete the declarations.

The declarations are provided on our website.

Capability

This section helps us ensure you have the right mix of people, with the right skills and experience, and in the right roles, to manage your licensed business properly and effectively.

Please explain how your management team, collectively, has the right skills and experience.

Many MIS managers of forestry schemes won't have a different management team from the directors and senior managers already described in the 'fit and proper' section. In this case, answer this question by confirming that you don't have anyone else involved in the management of the business.

If you do have other key management staff, such as a forestry and/or management consultant, tell us what they do and what their experience is.

Tell us how you define the roles, responsibilities and accountabilities of your staff.

You don't need fully documented job descriptions, but you still need to tell us who's responsible for key activities.

Please explain the recruitment, training and human resource processes you use to ensure your management team each have the right skills and experience for their roles. If your business is small and does not have many staff, this may not apply to you. Please just briefly explain this to us.

Explain how you access external advice when your management team's capabilities aren't sufficient.

Please explain what succession plans you have in place for key personnel. For instance, for a small business, what happens if a key person is unable to continue in that position but had sole control over important functions or processes (for example, access to records and information no one else knows about or can access; for instance, if only that person has access to, or knows, passwords). What processes, policies or systems do you have in place to ensure the business can continue to function?

Different businesses will need different amounts of external help. If there's a particular person in your business who decides when external help is needed, tell us who this is. For example, if you have used or use people outside your business – such as forestry consultants or contractors for planting, pruning, thinning or harvesting, or to help with your licence application – tell us how you decide what help you need and how you choose the right people. We don't expect more than a couple of sentences of information — just enough to demonstrate that you know when you need outside help and that you'll get it when needed.

Operational infrastructure

This section describes how your business operates, including your systems, processes, structures, policies, procedures and controls. Please provide key documents that will help us understand these.

Please note parts of this section may not be relevant to your business or may only be partly relevant, particularly if your scheme is a closed scheme. If you don't think the information requested is relevant, simply make a note of this, briefly explain why this is the case, and how you are able to meet the overriding requirement (in italics, just above the minimum standards in the licensing application guide).

For example, if you were relying on the exemption related to having an independent custodian for real property, you would note that fact and the rationale in this section. You also would discuss how scheme money and non-real property were held to ensure that the overriding requirement of holding scheme money and property at arm's length was met; that is, how you ensure that scheme property is safe-guarded for investors.

Scheme formation

For new schemes only: Demonstrate how the scheme will conform with the requirements of the FMC Act, including how the statement of investment policy and objectives (SIPO) will be tailored to the unique nature of the scheme.

For closed schemes: Discuss what steps you have taken, or will take, to meet the requirements of the FMC Act. This should include how the SIPO will be tailored to the unique nature of the scheme. 'Investment governance' in this context refers to the body that will make key decisions about the management of the scheme, such as harvesting.

Advertising and disclosure

For new schemes only: Provide a clear description of how you promote the scheme. Note who prepares the product disclosure statement (PDS) and any marketing material.

For closed schemes: It is helpful to explain the nature of the scheme promoted to investors when they first joined. A very brief explanation or overview is all that is required.

Selecting investments

We appreciate that investment selection and monitoring may not appear to be that applicable to forestry schemes. However, an MIS will still need to lodge a SIPO on the Disclose Register. We do not expect a forestry scheme to produce a SIPO that is equivalent to that of a managed fund MIS (such as a unit trust or KiwiSaver scheme). What we are asking you to do is to provide an explanation on what is the 'investment story' for your scheme, and to explain any important and relevant aspects of your scheme that touch on investment selection and monitoring. There are no set rules for doing this. Check our [guidance](#) on how an MIS such as a forestry scheme should consider producing a SIPO.

A simple explanation on the nature of the scheme is sufficient, and might include information such as the age of the forest, expected time to harvest, any current or expected sources of revenue, and how decisions will be made to manage scheme assets.

SIPO

A SIPO describes how the manager will manage the scheme and sets out the investment objectives and rules for the scheme. It enables a supervisor to ensure a manager is managing investments within established rules. These rules should reflect the terms on which the scheme was presented to the participants.

Briefly, you should consider the following:

- Describe the investment philosophy and strategies at a general level and explain, in a practical way, how the investment strategy is implemented and monitored. This should include an explanation of revenue sources, on-going expenses, and how cash is managed. It could also discuss whether the scheme is allowed to borrow to cover expenses, or whether investors might be called on to cover operational costs. The aim is to inform investors of key policies affecting the management of their investments, of any decisions to change that approach, and of any scheme activities that are inconsistent with this.
- Outline key policies such as management policies and objectives for forest maintenance, insurance, emissions trading units, anticipated end-use of harvested product, and the timing and approach to harvesting. Some

schemes may already have a governing document setting out these matters and would not need to do anything further. Other schemes will need to amend their documents or create a new one.

Investment monitoring

Provide an overview of the processes you have in place during the lifespan of the forest, and when and why additional funds may be required from investors.

Describe the requirements in the Deed of Participation (or equivalent governing document) for monitoring the growth of the forests against targeted growth.

Describe how you monitor activity to ensure it conforms with SIPO requirements, and how any breaches of those requirements would be reported to the supervisor. If there are no measurable limits in the SIPO or governing document, and therefore no possibility of a breach, then explain that.

Custody

We expect that your scheme property generally consists of land and/or forestry rights and that the scheme property is held by the supervisor.

A class exemption has been granted for this minimum standard, and applies where the supervisor holds a first-ranking encumbrance over the real property. The encumbrance will need to provide that the land cannot be transferred, nor can trees be disposed of outside the scheme, without the supervisor's consent.

We expect confirmation that the land can't be sold, or trees disposed of, outside of the scheme. Please describe the ownership of the land and the arrangements in place for the forestry scheme. Also refer to our communication on the class exemption.

Scheme property that is not real property must be held at all times by the supervisor or a nominated custodian. This includes any cash revenues or holdings, as well as any rights that could be sold or leased independently from the real property. As the scheme approaches harvest, it may be beneficial to nominate a custodian.

Where the scheme property is held by investors, then the issues around custody will not be relevant.

Check that your supervisor is a party to your Deed of Participation and confirm this in your application.

Asset valuations

- Investors require periodic valuation of their investment. Please provide an explanation of how often the forest is valued, how it is done, who does this (including a description of who provides the valuation and their qualifications) and how the information is communicated to investors.
- The valuation must meet the requirements of NZ GAAP.
- Confirm any requirements prescribed in the Deed of Participation.

Pricing

Describe the pricing policies and the process required if an investor wants to buy or sell during the life of the scheme.

If you don't consider this section relevant please note this and provide a brief explanation why not. This should include how you are able to ensure investors buy or sell based on accurate, complete, and up-to-date information.

Scheme administration

Provide a simple explanation of how the scheme is administered, who does this and how often investors receive information.

Describe the administration processes that will occur when the scheme is wound up.

Describe the processes, and how you ensure investors' holdings are properly accounted for, should any of them trade their positions.

Explain how fees and expenses are calculated, allocated to investors, and paid.

Describe the nature and frequency of reporting to investors. You may wish to include an example.

Describe how the costs of harvesting will be calculated, allocated to investors, and paid.

Material issues and complaints

Describe your processes and the information available to investors if they wish to lodge a complaint.

Staffing and supervision

If the scheme has no staff, note this.

Broadly describe staff and their roles, training, and supervision. An organisational chart would help.

Include whether you have contracted support, consultants, or third party resources.

Larger managers will need to provide more detail. Smaller managers can provide more general information.

Outsourcing

This is a key area we review. Provide an explanation of any services that are outsourced (such as forestry consultant, accountant, or auditor), and include copies of any outsourcing agreements, including any service level agreements.

Explain how providers are selected and paid, and what legal arrangements and processes are in place to ensure these services are monitored.

Explain how you determine the provider is appropriate and capable of performing the service.

Confirm that outsourcing is allowed under the Deed of Participation.

Records

Ensure that we are able to access company and investor records at any time. This includes ensuring investors consent to us accessing their records as required.

If you do not have investors' consent, explain how this will be achieved.

IT systems and business continuity

Describe your disaster recovery processes and how investors would access information if there was a disruption.

We appreciate that your business may not provide a dedicated IT system to deliver services to investors. If this is the case, please note this and what systems you have in place.

Financial resources

Work through the licensing guide and ensure you explain how the financial information works in practice for your scheme.

Describe any processes for when investors are required to cover additional costs, including the costs of licensing and transitioning to the FMC Act regime.

Explain any professional indemnity or public liability insurance you have, and include a copy of your certificate of currency. If you decided that cover was not required, please provide your rationale.

Governance

You must have a high-level body responsible for overseeing compliance with your obligations as a licensee, and for ensuring appropriate risk management. Key matters include:

- Describing your oversight body. For most forestry managers, it will be the board of directors, or possibly a sole director.
- Describing how your scheme's governance works. If compliance is overseen by your supervisor, the investors, or some other party, please outline this, and describe who, if anybody, they report to and how.

Tell us how often this oversight body meets (if it's an individual, tell us how often the person considers oversight issues) and what matters are considered. It is helpful if you describe the powers and duties of the oversight body. Tell us whether there are any separate documents other than the Deed of Participation that set out the governance, reporting and compliance framework for the MIS.

Culture

Explain how you foster a good compliance culture, and how you comply with your obligations as a licensee, treat investors fairly, and manage risks effectively.

If you have staff, you need to give us enough information to assure us that you are encouraging a professional standard of care. For example, you might tell us about the training you give them when they first start, and the way you conduct performance reviews that encourage a good compliance culture. If you have no staff, please state this.

Compliance assurance

In this section, explain your arrangements for testing compliance with policies, procedures and controls.

Describe how you will provide assurance to the oversight body that the MIS manager is meeting the licensee obligations.

This question is about how you test the effectiveness of your compliance controls – it isn't asking for further information about the compliance controls themselves. Smaller business with relatively simple compliance controls will need less testing than a larger business with more complex controls.

Where practical, your compliance testing should be done independently of those responsible for undertaking, or managing, those functions.

In a very small business it may not always be practical for this testing to be done by someone who is completely independent of the function. For example, in very small forestry scheme, compliance testing may be achieved by the annual audit.

In a single-person business there will still need to be some level of testing of your compliance controls. The level of testing depends on what is reasonable for the nature of the business and for your key risks. You may outsource this task if you don't have the scale or structure to employ someone independent for the role.

Final steps

See the 'Final Steps' section of our licensing application guide for details of the self-certification that needs to accompany your licence application. This section also explains how to pay your licence fee. If you have any questions on the licensing procedure, please refer to the licensing section of our website or call us on 0800 434 567.

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