

Compliance for insurance professionals

Paul Muir
Compliance Advocacy Solutions



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Compliance Advocacy Solutions

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We are *Insurance* Compliance Specialists

We provide specialist compliance services to all sectors of the insurance industry including Insurers, Underwriting Agencies (UWA), Lloyd's Coverholders, TPAs and Claim Managers, Insurance Brokers, Tuffness providers and Service Suppliers and Insurtechs.

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COMPLIANCE & MORE

Our Services

- Compliance Reviews
- Compliance Documentation
- Compliance Training
- Compliance Licensing
- Compliance Advice
- Compliance Resourcing
- Inside Insurance



Paul Muir

- 37 years insurance experience
- Previously held executive risk and compliance roles at an ASX listed insurer
- LLB (*Honours*) ANZIIF CIP (*Fellow*)
- Founded Compliance Advocacy Solutions in 2017
- AFCA Industry Panel Member (General Insurance)



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What will we be talking about?

The Regulatory Environment

Compliance Governance

Licence Management

Distribution Arrangements

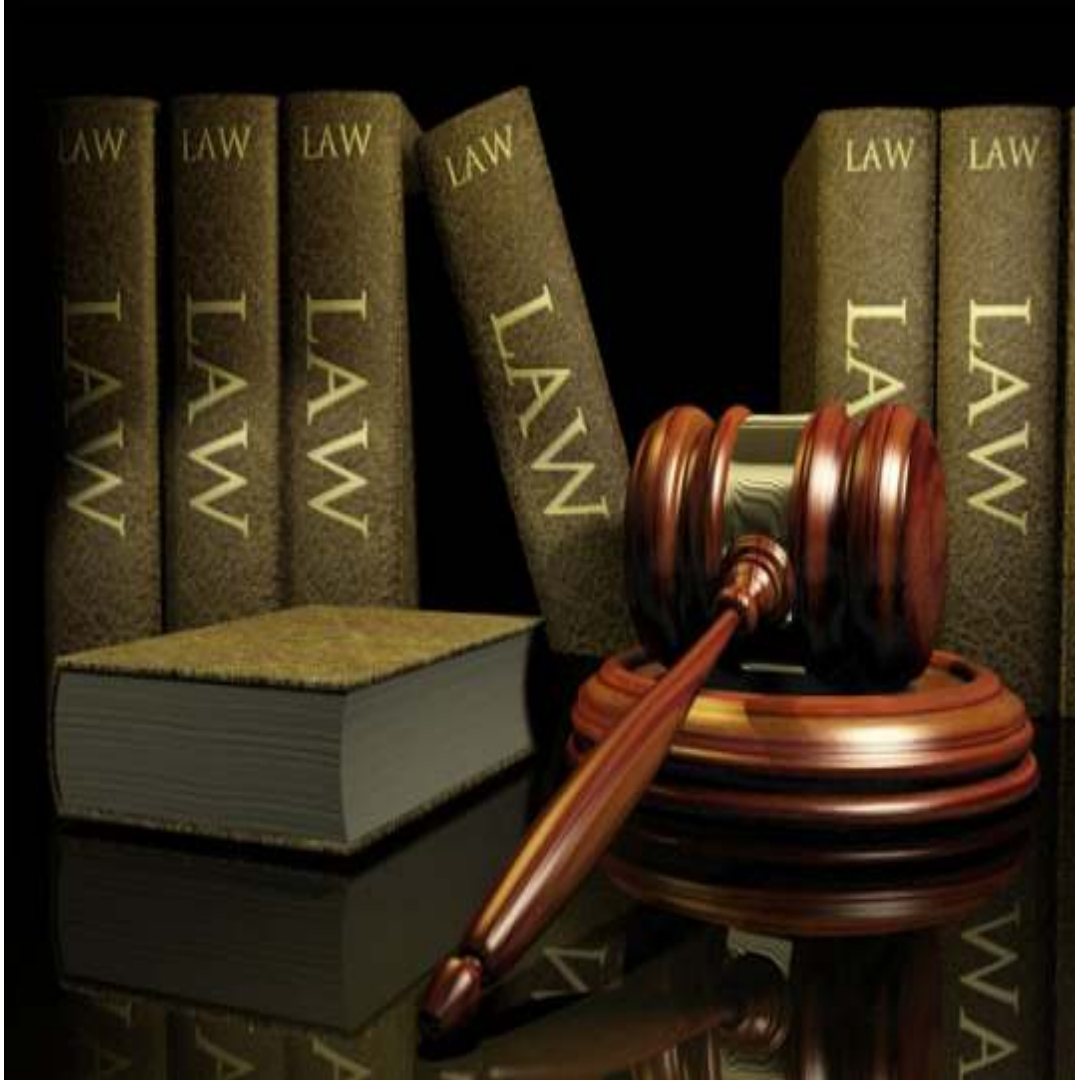
Claims Handling and Settling Arrangements

Material Obligations

Monitoring and Supervision

Incident and breach management





Part 1:

The Regulatory Environment



Regulator	Purpose
ASIC	ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator
APRA	The Australian Prudential Regulation Authority is an independent statutory authority that supervises institutions across banking, insurance and superannuation and promotes financial system stability in Australia
ACCC	The ACCC promotes competition and fair trade in markets to benefit consumers, businesses, and the community. We also regulate national infrastructure services. Our primary responsibility is to ensure that individuals and business comply with Australian competition, fair trading, and consumer protection laws
OAIC	OAIC is the independent national regulator for privacy and freedom of information . We promote and uphold your rights to access government-held information and have your personal information protected
AFCA	AFCA's role is to assist consumers and small businesses to reach agreements with financial firms about how to resolve their complaints . If a complaint does not resolve between the parties, AFCA will decide an appropriate outcome
CGC	The Code Governance Committee is the independent body that monitors and enforces insurers' compliance with the General Insurance Code of Practice . The CGC's purpose is to drive better Code compliance, helping the insurance industry to improve its service to consumers



Financial Services Laws

A licensee must comply with the Financial Services Laws (s912A(1)(c) Corporations Act).
The financial services laws include:



Corporations Act – Chapter 7

Promotes fairness, honesty & professionalism in providing financial services.

ASIC Act – Part 2 Division 2

Prohibits unconscionable conduct & provides consumer protection.

Insurance Contracts Act

Regulates the conduct of insurers under contracts of insurance.

Privacy Act

Protects the personal information of individuals





Authorisations and Licences



Conducting insurance business

Who needs a general insurance licence?

Under the Insurance Act 1973 (the Insurance Act), it is an offence to conduct insurance business in Australia without the proper authority. If your business intends to conduct any business that can be classed as insurance business, you need a licence from APRA giving you the authority to conduct insurance business in Australia.

Part 3 of the Insurance Act defines 'insurance business' as the business of undertaking liability by way of insurance (including reinsurance), in respect of any loss or damage. It includes liability to pay damages or compensation, contingent upon the happening of a specified event, and any business incidental to insurance business as so defined. There are some exclusions to the definition of insurance business, such as life insurance (covered by the Life Insurance Act 1995) and health insurance (covered by the Private Health Insurance Act 2007).

The Insurance Act only allows corporations or Lloyd's underwriters to carry out insurance business in Australia, which means APRA cannot consider applications from partnerships or unincorporated entities



Lloyds Underwriters

Part VII, section 93 of the Insurance Act 1973 authorises Lloyd's Underwriters to write Australian insurance business. Sections 65 to 73 of the Act provide for special Australian policyholder protection provisions associated with Lloyd's.

Lloyd's underwriting members, whether as individuals or companies, conduct their business in groups known as 'syndicates'. A member may belong to a number of syndicates, varying in size and underwriting different types of insurance and levels of risk.

Each syndicate is an annual venture - at the end of each year, the syndicate ceases writing new business and new syndicates are formed for the following year. It is relevant to note that a member underwrites for its own account on a syndicate; it is not in partnership and does not have any joint liability with any other members underwriting on that syndicate.

In practice, the member usually arrange their own participation in a syndicate or syndicates in conjunction with the advice they may receive from their registered 'members' agent'. Each member must appoint a Lloyd's registered members' agent who will select and/or give advice on syndicate participation and generally administer the member's insurance business.

Syndicates are managed by Lloyd's registered 'managing agents'. A managing agent is responsible for the underwriting and management of each syndicate it establishes. The managing agent does not perform the underwriting role; this role is performed by suitably qualified and experienced underwriters who are appointed to each managed syndicate. It is the syndicate members who undertake liability under the insurance contracts arranged by these underwriters. Syndicates may also issue authorities to certain underwriting agents and brokers ([known as coverholders](#)) in Australia to accept business within specified classes on their behalf.



The need for an Australian financial services licence

- A person who carries on a financial services business in Australia must hold an AFS Licence (s911A(1) Corporations Act), unless subject to an exemption (s911A(2)); or
 - Providing the financial services as an Authorised Representative of a Licensee (s916A)
- Financial services (for general insurance) include:
 - Dealing in a general insurance product
 - Advising on a general insurance product
 - Providing a claims handling and settling service
- Providing a financial service without a licence (or not acting under an exemption or as an AR) is an offence (see subsection 1311(1) Corporations Act)
- Dealing includes issuing, applying for, acquiring, varying or disposing of a general insurance product and includes 'arranging' general insurance products



Financial Product Advice

RG 36.4 – What is financial product advice?

A recommendation or statement of opinion, or a report of either of those things, constitutes financial product advice under s766B if:

- (a) It is intended to influence a person or persons in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence; and
- (b) It is not exempted from the definition of ‘financial product advice’

RG 36.5 – When do you ‘provide’ financial product advice?

The licensing provisions apply to persons who ‘provide’ financial product advice. The person who *provides* the advice will generally include the author(s) of the advice as well as the principal for whom they act. It also includes any other person who endorses the advice, or any person who causes or authorises the provision of the advice: see s52.

However, a person does not provide financial product advice in certain circumstances specified in the Corporations Act (e.g. where the person’s conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (see RG 36.35))



Personal advice: ASIC v Westpac

Facts

- Westpac conducted a campaign to encourage existing members to roll over superannuation accounts held with other entities into their BT account.
- Quality Management Framework (QMF) purported to provide general advice including a general advice warning.
- 'Social proofing' component of QMF involved uncovering the personal motivation of the customer (during phone calls) & linking that motivation to influence the customer to roll over their external superannuation accounts into the customer's BT account.

Court findings

- s766B(3)(b) contemplates consideration of at least one aspect of the client's objectives, financial situation or needs
- Objective test – '*consideration of at least one ...*' involves a reasonable person's expectation, being a reasonable person standing in the shoes of the person receiving the advice.
- S 766B(3) is engaged if an adviser considers at least an aspect of one of the three categories – namely, a person's objectives, financial situation or needs – and whether that has occurred will be a fact specific inquiry.

Insights

- Consider overall impression & circumstances if 'personal advice' – the subject matter of the advice; relationship with the customer, purpose & tenor of phone calls or other communication; & the customer's objectives;
- Doesn't need to take into account the whole of customer's objectives, financial situation or needs, 'at least an aspect of one'.
- Warnings and disclaimers can assist.

Refer RG 36.23 and Table 1

Factual information is objectively ascertainable information whose truth or accuracy cannot be reasonably questioned.



Dealing in a general insurance product

RG 36.36 – What is dealing?

The following conduct constitutes dealing in a financial product within the meaning of s766C(1) (unless the conduct is exempt from the definition of dealing: see RG 36.41):

- a) Applying for or acquiring a financial product;
- b) Issuing a financial product;
- d) Varying a financial product; or
- e) Disposing of a financial product.

Note that (c) is not relevant to general insurance & therefore not included.

'Arranging' for a person to engage in conduct referred to in RG 36.36 also constitutes dealing unless:


- a) The actions concerned amount to providing financial product advice (s766C(2)); or
- b) The conduct is exempt from the definition of dealing (e.g. cash & clerks exemption applies).


Arranging refers to the process by which a person negotiates for, or brings into effect, a dealing in a financial product. The person who is arranging may be acting for a product issuer, seller or consumer (RG 36.38).





Claims and Handling & Setting as a financial service


If your company undertakes certain specific claim activities in relation to an insurance product, it is providing a claims handling and settling service (s766G). The activities comprise the following:


- 


1 Making a recommendation or stating an opinion in response to an inquiry about a claim or potential claim
- 


2 Making a recommendation or stating an opinion that could influence a decision about making or continuing with a claim
- 


3 Assisting another person to make a claim
- 

4 The person represents a person insured
Note: claimant intermediary only.
- 

5 Assessing whether an insurer is liable under an insurance product
- 

6 Making a decision to accept or reject all or part of a claim
- 

7 Quantifying an insurer's liability under an insurance product
- 

8 Offering to settle all or part of a claim
- 

9 Satisfying a liability of an insurer under a claim



General Insurance Code of Practice

The Code applies to all insurers who have adopted it (paragraph 6). An organisation may adopt the Code if the organisation is a member of the Insurance Council of Australia; a general insurer; or approved by the Insurance Council of Australia.

Lloyd's Australia Limited

Due to the unique nature of the Lloyd's market, Lloyd's has adopted the Code subject to the condition that it only applies to policies issued by an Australian Coverholder under a binding authority agreement and claims managed in Australia.

A list of Code subscribers is available at www.insurancecouncil.com.au



Which of the following must hold an AFS Licence? (more than one correct answer)

1. An APRA regulated insurer providing ISR cover to wholesale clients only?

2. An Underwriting Agency who provides home & motor insurance on behalf of an APRA regulated insurer. The insurer does not appoint Authorised Representatives

3. A lawyer providing financial advice to their high wealth client in respect of whether an exclusion applies under their insurance policy?

4. A motor vehicle repairer who has authority from an APRA regulated insurer to partially reject claims?





Part 2: Compliance Governance



The Role of the Board in compliance

- Demonstrate an active, visible, consistent and sustained commitment towards a common standard and behaviour and conduct that is required throughout the business;
- Identify and approve relevant Policies, to give operational effect to a common standard and behaviour and conduct that is required throughout the business;
- Ensure that the Manual and compliance arrangements are established and are compatible with the strategic direction of the company;
- Ensure the integration of the compliance arrangements into business processes;
- Ensure that the resources (financial, technological and human) needed for compliance are available;
- Communicate the importance of effective compliance arrangements and of conforming to the compliance arrangements requirements;
- Ensure that the compliance arrangements achieve the intended result(s);
- Direct and support people to contribute to the effectiveness of the compliance arrangements;
- Promote continual improvement; and
- Where appropriate to do so, delegate the establishment, review and challenge of particular compliance procedures to a suitably skilled and qualified Risk and Compliance Committee.



Risk Appetite Statement

The risk appetite is part of a broader framework to manage risk as detailed in a board approved Risk Management Policy (or framework). Risk appetite represents the amount and type of risk the board is willing to take in pursuit of your company's strategic objectives

Regulatory and Compliance Risk can be described as 'the impact (positive or negative) of regulatory change and compliance outcomes on the ability of your company to achieve its objectives.'

Targets and tolerances are set by the board for each key component of regulatory and compliance risk.



Roles & Responsibilities – 3 lines of defence model

1. The first line of defence is provided by front line staff and operational management
2. The second line of defence is provided by the risk management and compliance functions
3. The third line of defence is provided by the internal audit function

The confusion often rests between the 1st and 2nd line

Below are the usual functions conducted by 1st and 2nd line compliance teams

1st Line (the business)

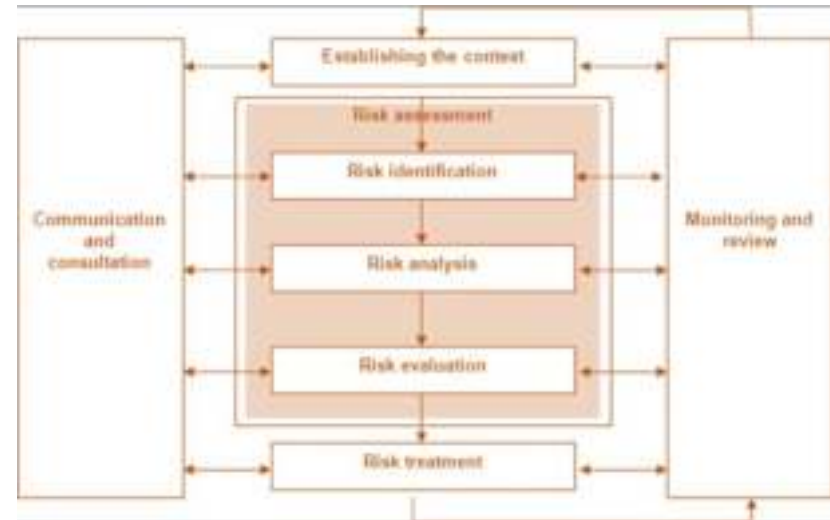
- Conduct business activities within boundaries of compliance arrangements (policies, systems, training, process and procedures)
- Responsible for managing obligations within the area of responsibility (allocated from obligations register or own compliance plan)
- Design, implement & test controls (to manage obligations: these controls are the process, procedures, systems & people that manage compliance) & report outcomes
- Quality assurance activity to validate control testing outcomes
- Identify and raise incidents of non-compliance and complaints
- Monitor External Representatives
- Monitor and Train staff
- Report on Compliance Data

2nd Line

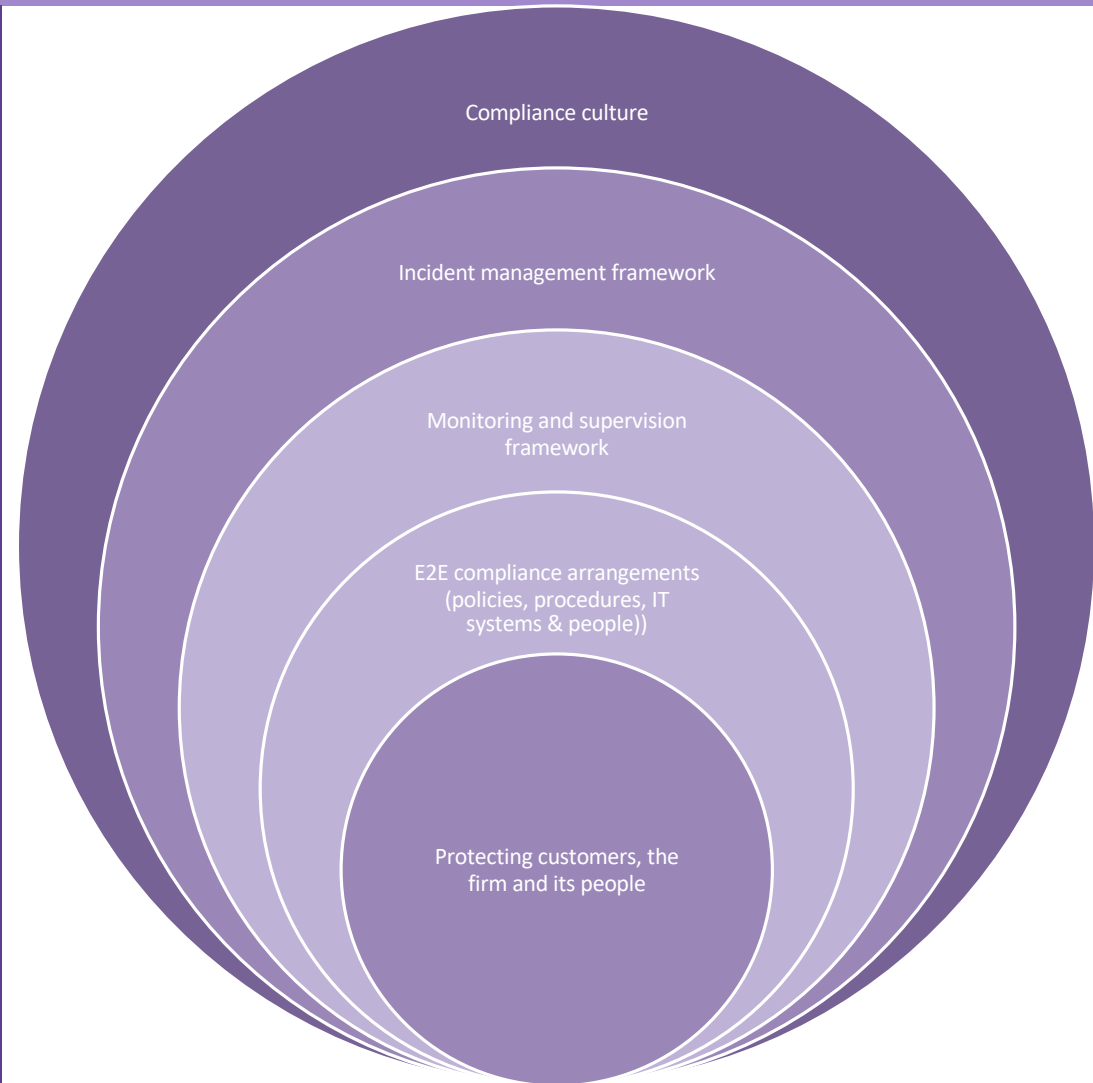
- Develop & Maintain a Compliance Framework
- Develop & Maintain Compliance Policies
- Develop & Maintain the Obligations Register and other registers
- Licence Management
- Regulatory Liaison including breach reporting
- Provide compliance advice on complex matters
- Develop Compliance Training
- Receive Compliance data to enable them to monitor & supervise 1st line



Risk Management Framework



The Compliance framework



Documenting compliance arrangements

Overarching	Policies (minimum)	Registers (minimum)
Compliance manual (framework)	<ul style="list-style-type: none">• Complaints and Disputes• Conflicts of Interest• Compliance Manual• Financial Crimes (Lloyds requirement)• Risk Management Framework• Customer Experiencing Vulnerability• Incident and Breach Management• Monitoring and Supervision	<ul style="list-style-type: none">• Complaints• Incident and Breach• Obligations• Risk• Training (required by law)



Obligations Management

Provides an end-to-end approach for a company to manage its obligations. Obligations include regulatory, Code and material agreements. The approach can be summarised as follows:

- Record all material obligations in the Obligations register (including new obligations as a result of a change to regulations, Code or agreements);
- Assign key control(s) against each obligation in the Obligations register;
- Periodic testing of key controls, adopting a risk-based approach, and ensuring all controls are tested at least annually;
- Oversight & supervision through monitoring and supervision activity.;
- Validate through data including incident & Breach data and complaints data;
- Oversight by the Risk and Compliance Committee; and
- Reporting to the Board

Companies should adopt a multi layered approach to managing its obligations, consisting of:

- Management of regulatory change
- Management of regulatory and compliance risk; and
- Maintenance of compliance arrangements including registers



Management of regulatory change

Identifying the source of regulatory change is critical:

General Obligation	Specific Obligation (not exhaustive)	Source for updates
APRA Prudential Standards	<ul style="list-style-type: none">• <i>Insurance Act 1973</i>• Prudential standards and guidelines	<ul style="list-style-type: none">• https://www.apra.gov.au/• https://www.apra.gov.au/legislation-for-general-insurers
Consumer Financial Laws	<ul style="list-style-type: none">• Chapter 7 of the <i>Corporations Act 2001</i>• <i>Australian Securities and Investments Commission Act 2001</i>• <i>Insurance Contracts Act 1984</i>• Regulatory Guides• Privacy Act and Australian Privacy Principles	<ul style="list-style-type: none">• https://asic.gov.au/• Regulatory Guides For Financial Services - https://asic.gov.au/regulatory-resources/regulatory-index/financial-services/• https://www.oaic.gov.au/
GI Code of Practice	General Insurance Code of Practice 2020	https://insurancecouncil.com.au/cop/



Compliance Reporting

Reporting to the Risk and Compliance Committee, Senior Management and the Board should include:

- Material regulatory change impacting your company;
- Licence management issues including changes to responsible managers
- Control testing outcomes and action plans;
- Training records and overdue training for representatives including employees;
- Regulatory and compliance incidents and breaches;
- Regulatory and compliance events outside or at the boundary of tolerances of Risk Appetite;
- Material complaints;
- Systemic issues;
- Monitoring and supervision outcomes; and
- Outcomes of audits.

In addition, the following must be reported immediately:

- Significant, wilful or fraudulent regulatory incidents of non-compliance or breaches.



Risk & Compliance Committee

- A risk and compliance committee provides a degree of independence and objectivity to managing compliance.
- The committee provides a single view of compliance across the business.
- The committee should include representatives from across the business together with Responsible Managers, specialist compliance roles and, where relevant, external compliance specialist.
- The Committee is informed through formal reporting mechanisms.





Part 3: Licence Management





Why is this
Important?



Why is this important?



So you want to drive a car?



You need to be licensed



The licensing process requires learning, understanding & applying the road rules



There may be conditions imposed:

- Type of vehicle; or
- Wearing glasses.

To protect:

- You;
- Your loved ones;
- Other road users; and
- The community



Why is AFS Licensing Important?



So you want to provide financial services?



You need to be licensed by ASIC

The licensing process requires learning, understanding & applying company policies, guidelines, training processes and systems (collectively compliance arrangements)



There may be conditions imposed:

- Class of insurance – General Insurance Products
- Comply with general obligations & financial services laws

To protect:

- You;
- Your loved ones;
- Your Company
- Customers; and
- The community (consumers)





Compliance Its Everyone's Responsibility

What can you do to help protect your company, its customers and yourself?

- Adopt a mindset of 'licensing is your friend';
- Adhere to your company's Policies, Guidelines, Processes and Systems;
- Think of process as an enabler;
- Raise and report incidents of non-compliance promptly;
- Adopt a conservative approach when raising compliance incidents;
- Help create a safe environment that fosters raising & reporting compliance incidents; and
- Remember that the quick identification and raising of a incidents of non-compliance, assists in minimising customer and consumer harm, and damage to your company and its people



Strengthened penalties for breaches of Corporate Laws

- The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 commenced on 13 March 2019, strengthening existing penalties and introducing new penalties for those who breach the corporate laws of Australia
- Under the new penalty provisions:
 - Maximum prison penalties for the most serious offences have increased to 15 years – including breaches of director’s duties, false or misleading disclosure and dishonest conduct
 - Maximum civil penalties for individuals and companies have significantly increased; and
 - Civil penalties now apply to a greater range of misconduct – including a licensee’s failure to act efficiently, honestly and fairly, failure to report breaches and defective disclosure
- The new penalty provisions enable ASIC to pursue harsher civil penalties and criminal sanctions under the following ASIC-administered legislation:
 - Corporations Act 2001
 - Australian Securities and Investments Commission Act 2001
 - Insurance Contracts Act 1984
- Under the new penalty provisions, the maximum civil penalty for individuals is the greater of 5,000 penalty units (currently \$1.11 million) or three times the benefit obtained and detriment avoided
- The maximum civil penalty for companies is the greater of:
 - 50,000 penalty units (currently \$11.1 million)
 - Three times the benefit obtained and detriment avoided, or
 - 10% of annual turnover, capped at 2.5 million penalty units (currently \$555 million)

The value of a penalty unit is prescribed by the Crimes Act 1914 and is currently \$222 for offences committed on or after 1 July 2020



Licence Management

Your Company can manage its AFS Licence through:

- Maintaining an Obligations register that records Licence obligations and conditions and, assigns controls to manage those obligations including:
 - Advising ASIC of changes to Responsible Managers due to a Licence variation or when changing a Responsible Manager (refer RG 105 & Corps Regs 7.6.05 & 7.6.04(1)(b));
 - Advising ASIC of changes to Fit and Proper people due to a Licence variation (ASIC INFO 240);
 - Complying with Licence conduct obligations;
 - Monitoring Representatives; and
 - Managing conditions imposed upon licensees and as prescribed by regulations.



Why is Licence Management important? (select one correct answer)

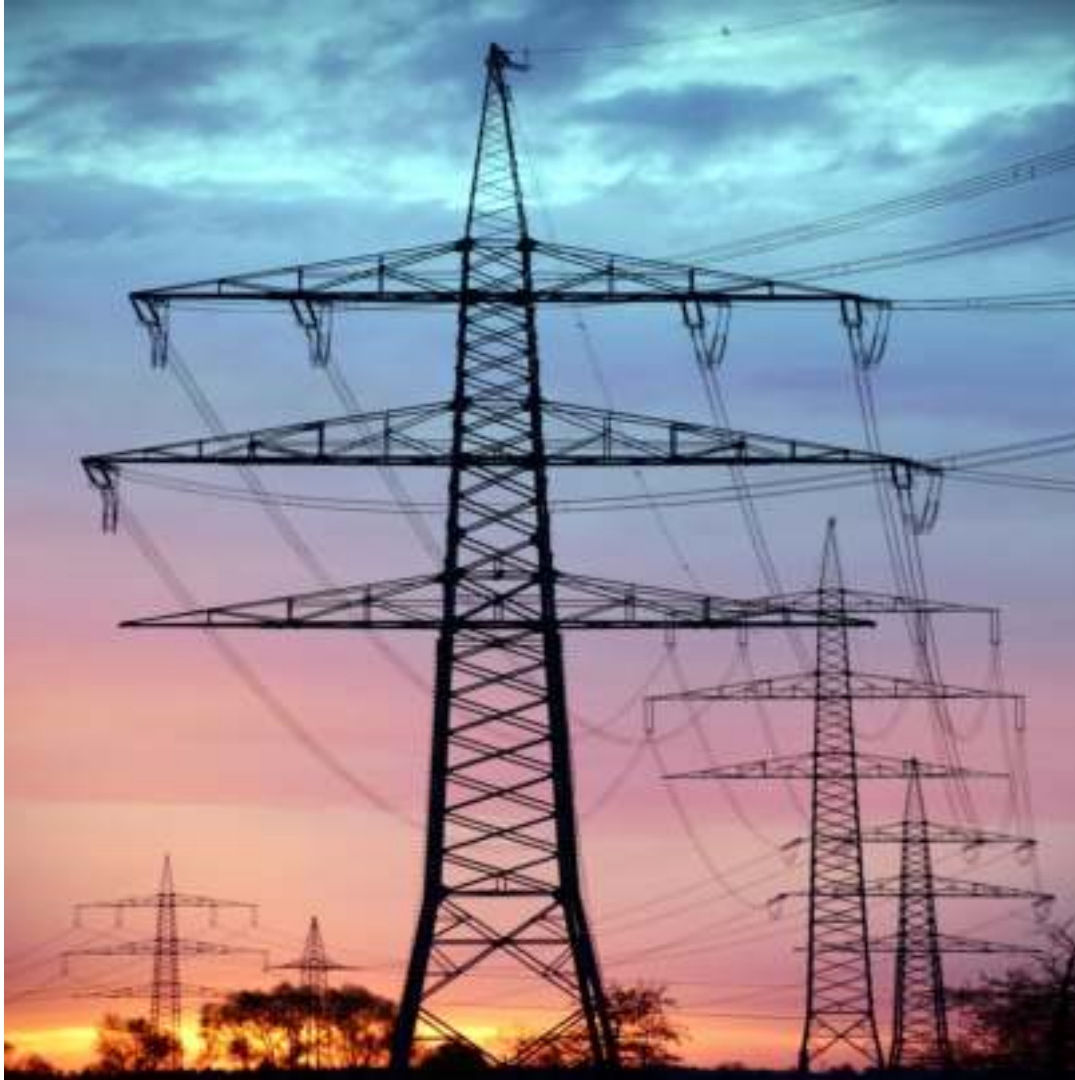
1. To protect the Licensee, its customers and people?

2. To avoid the risk of civil penalties for non-compliance?

3. To enable the Licensee to report changes in Responsible Managers to ASIC?

4. All of the above





Part 4: Distribution Arrangements



Who are Representatives?

Section 910A Corporations Act

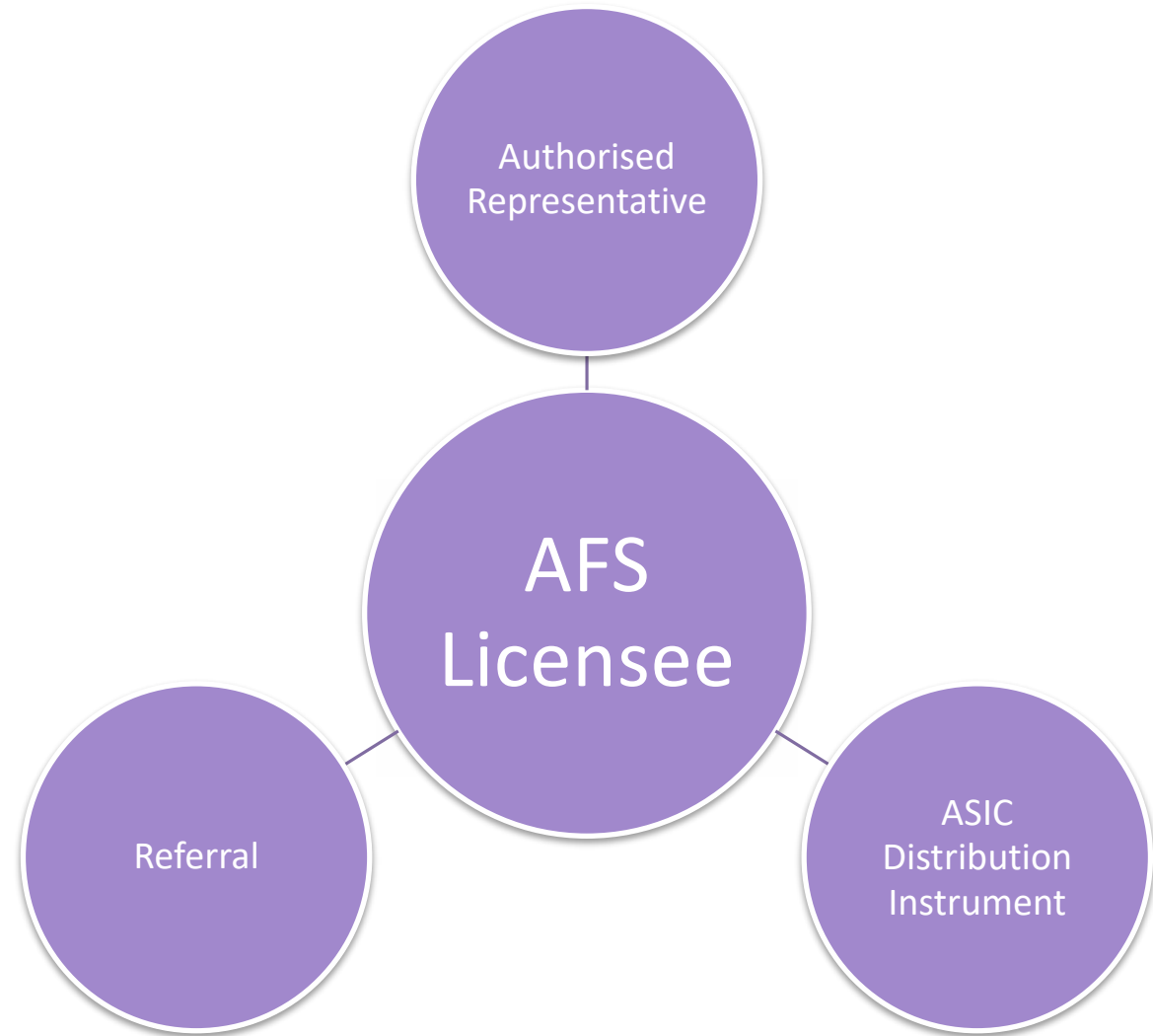
representative of a person means:

- An authorised representative of your company
- Employee or director of your company
- Employee or director of a related body corporate &
- Any other person acting on behalf of your company (even if they have their own Licence – in this case you have obligations to monitor & supervise)



Distribution Arrangements

Refer to Appendix





Part 5: Claims handling and settling arrangements



Who must hold an AFSL with claims handling authorisation?

Category	Description
Insurer	You are the issuer of the insurance product
Insurance Fulfilment Provider	You carry on a business of providing goods or services to satisfy an insurer's liability to the insured person and have authority from an insurer to reject all or part of a claim
Insurance Claims Manager (refer s761DA Corps Act)	You provide a claims handling and settling service on behalf of one or more insurers and do so as a business or as a primary part of your business
Claimant Intermediary (refer s761CAA Corps Act)	<p>You carry on a business of representing insured people in pursuing a general insurance claim and do so in return for any benefit (monetary or otherwise) which is given to you or a person nominated by you.</p> <p>Certain person are exempt from being claimant intermediaries, even if they meet the definition above. For example, exempt persons include: mortgage brokers, insurance brokers, qualified accountants, financial advisers, property managers and estate mangers</p>
Insurance Broker	You carry on a business of arranging contracts of insurance for intending insureds <i>and</i> provide a claims handling and settling service on behalf of the insurer
Financial Adviser	You provide financial product advice to an insured person (including a third-party beneficiary) <i>and</i> provide a claims handling and settling service on behalf of the insurer

General exemption s911A(2)(ek)(i)-(vi) means that some people involved in the claims handling process do not need to hold a licence. Some examples include loss assessors or loss adjusters; experts providing an opinion of cause of damage; investigators; other insurance fulfilment providers (builders & smash repairers unless authorised to reject claims); independent medical examiners and debt collection agents.



Additional obligations for Claims Handling Authorisation

Cash Settlement Fact Sheet – 948B-948F and 952A-953C Corps Act

A financial services licensee must give a Cash Settlement Fact Sheet to retail clients who are offered a cash payment to settle part or all of a general insurance claim. The CSFS must be provided to the client before the payment unless there is an immediate need and the payment is less than \$5,000 (*ASIC Corporations (Cash Settlement Fact Sheet) Instrument 2022/59*)

Claimant intermediaries must provide an FSG s941c(7A)

Only a claimant intermediary needs to provide a FSG when representing the client in pursuing an insurance claim

Confirmation of transactions s1017F and reg 7.9.62

Certain transactions between the Licensee and retail clients are required to be confirmed by the Licensee in writing or electronically. These transactions include:

- The acceptance of an insurance claim; and
- The settlement of an insurance claim

The confirmation of the transaction must be provided to the client or made available through a facility as soon as practicable after the transaction.



From an ASIC perspective, why was it important to have claims handling & settling service included as a financial service?
(select the most correct answer)

1. So that insurers would have to provide a Cash Settlement Fact Sheet to customers?

2. To ensure that 'storm chasers' would have to be licensed?

3. So that the general obligation to provide financial services 'efficiently, honestly & fairly' applied to claims?

4. To stop delays in settling claims as per the case studies at the Hayne Royal Commission?





Part 6: Material Obligations



Retail or Wholesale?

S 761G(5) Corporations Act - For the purposes of this Chapter, if a financial product is, or a financial service provided to a person relates to, a general insurance product, the product or service is provided to the person as a **retail client** if:

(a) **either:**

(i) the person is an **individual**; or

(ii) the insurance product is or would be for **use in connection** with a **small business** (see subsection (12));

and

(b) **the general insurance product is:**

(i) a motor vehicle insurance product (as defined in the regulations); or

(ii) a home building insurance product (as defined in the regulations); or

(iii) a home contents insurance product (as defined in the regulations); or

(iv) a sickness and accident insurance product (as defined in the regulations); or

(v) a consumer credit insurance product (as defined in the regulations); or

(vi) a travel insurance product (as defined in the regulations); or

(vii) a personal and domestic property insurance product (as defined in the regulations); or

(viii) a kind of general insurance product prescribed by regulations made for the purposes of this subparagraph.

In any other cases, the provision to a person of a financial product that is, or a financial service that relates to, a general insurance product **does not** constitute the provision of a financial product or financial service to the person as a retail client.

(4) For the purposes of this Chapter, a financial product or a financial service is provided to, or acquired by, a person as a **wholesale client** if it is not provided to, or acquired by, the person as a retail client.

(12) In this section:

"small business" means a business employing **less than:**

(a) if the business is or includes the **manufacture of goods**--100 people; or

(b) otherwise--20 people.



Retail Client – Corporation Regs 7.1.11 – 7.17A

General Insurance Product	Reg	Characteristics	What is not included
Motor Vehicle	7.1.11	<p>Motor Vehicle means a vehicle designed to</p> <ul style="list-style-type: none"> • Travel by road & principally propelled by [listed power(s) but not human or animal power] • Carry passengers & includes a motor cycle 	<ul style="list-style-type: none"> • Marine, workers or CTP • Omnibus or tram • Carrying capacity exceeds 2 tonnes
Home Building	7.1.12	<ul style="list-style-type: none"> • Use principally or primarily as a place of residence • Out-buildings, fixtures & structural improvements used for domestic purposes • Fixed wall, ceiling & floor covers (other than carpets) • Services, fences and gates 	<ul style="list-style-type: none"> • Hotel, motel, boarding house • Building under construction • Temporary or demountable • Caravan • Home warranty insurance
Home Contents	7.1.13	<ul style="list-style-type: none"> • Furniture, furnishings, carpet, household goods, clothing & personal effects, picture, work of art, fur, jewellery, gold or silver article, document of any kind • Swimming pools that are not fixtures 	Anything defined as a residential building
Sickness & Accident	7.1.14	<ul style="list-style-type: none"> • Insured person contracting a sickness or disease or sustaining injury • Dies as a result of any sickness, disease or injury 	<ul style="list-style-type: none"> • Policies guaranteed renewable • Marine, workers or CTP • Free 'Driver at fault' cover offered with CTP
Consumer Credit	7.1.15	<ul style="list-style-type: none"> • Death, sickness or disease, injury unemployment • Liability determines under a specified agreement to which insured is a party 	Marine, workers or CTP
Travel	7.1.16	<ul style="list-style-type: none"> • Financial loss of fares or accommodation to be used, loss or damage to personal belongings or sickness or disease in the course of a specified journey and includes • Loss cash or credit cards, legal liability, hijack, kidnap & ransom 	Marine, workers or CTP
Personal & Domestic Property	7.1.17	<ul style="list-style-type: none"> • Loss or damage to property wholly or predominantly used for personal, domestic or household purposes by insured, relative or any person whom the insured resides. Includes moveables, valuables, caravan/mobile home, trailer, marine pleasure craft, domestic pet, mobile phone 	Marine, workers or CTP
Medical Indemnity	7.1.17A	<p>A medical indemnity insurance product is prescribed 761G(5)(b)(viii) and defined in Reg 1.1.02. References the <i>Medical Indemnity (Prudential Supervision and Product Standards) Act 2003</i></p>	N/A

ASIC Corporations (Incidental Retail Cover) Instrument 2022/716

- ASIC has provided relief where an incidental retail cover is included as part of an otherwise wholesale SME insurance policy. However, care needs to be taken as a number of conditions apply
- The effect is that the product is a wholesale product.
- Incidental retail cover refers to retail insurance cover provided to a business that forms a 'minor, incidental & inseparable' part of an otherwise wholesale insurance product
- Incidental takes its ordinary meaning of being in subordinate conjunction with a wholesale product. If the general insurance product is in a standalone section of a package cover, it is less likely to be incidental to a wholesale product
- The relief also includes several conditions to ensure it is appropriately targeted & that the retail covers are genuinely incidental to, & inseparable from, the wholesale insurance product
- The relief commenced on 16 August 2022 and will expire in three years



General AFSL Obligations s912A(1) : A Financial Services Licensee must:

Reference	Obligation	Relevant RG
s912A(1)(a)	Do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and	RG 104
s912A(1)(aa)	Have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative	RG 181
s912A(1)(b)	Comply with the conditions of the licence	RG 104
s912A(1)(c)	Comply with the financial services laws	RG 104
s912A(1)(ca)	Take reasonable steps to ensure that its representatives comply with the financial services laws	RG 104
s912A(1)(d)	Have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements	RG 104 RG 166 (Financial)
s912A(1)(e)	Maintain the competence to provide those financial services	RG 105
s912A(1)(f)	Ensure that its representatives are adequately trained and are competent, to provide those financial services	RG 104
s912A(1)(g)	If those financial services are provided to persons as retail clients: - Have a dispute resolution system complying with subsection 2	RG 271
s912A(1)(h)	Have adequate risk management systems	RG 104
s912A(1)(j)	Comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph (see Reg 7.6.04)	
Reg 7.6.04	(a) advising ASIC of material changes to financial position (b) & (c) changes to the particulars on the ASIC register, including details of Authorised Reps (d) maintaining a record of training for each of its representatives (this term includes employees) (e) & (f) due diligence prior to appointing AR's & that AR's include their AR number in relevant documents (g), (h) & (j) provide a copy of the licence &/or AR authorisation to any person upon request; & (i) advising ASIC of change of control if licensee	

Compensation Requirements

- Under s912B of the Corporations Act, AFS licensees must have arrangements for compensating retail clients for losses they suffer as a result of a breach by the licensee or its representatives of their obligations in Ch 7 of the Corporations Act (also refer RG 126).
- These arrangements must satisfy the requirements in the Corporations Regulations, which are that licensees must obtain PI insurance cover that is adequate, considering the nature of the licensee's business and its potential liability for compensation claims (see reg 7.6.02AAA).
- Otherwise the arrangements must be approved by ASIC in writing (s912B(2)(b))



Dispute Resolution

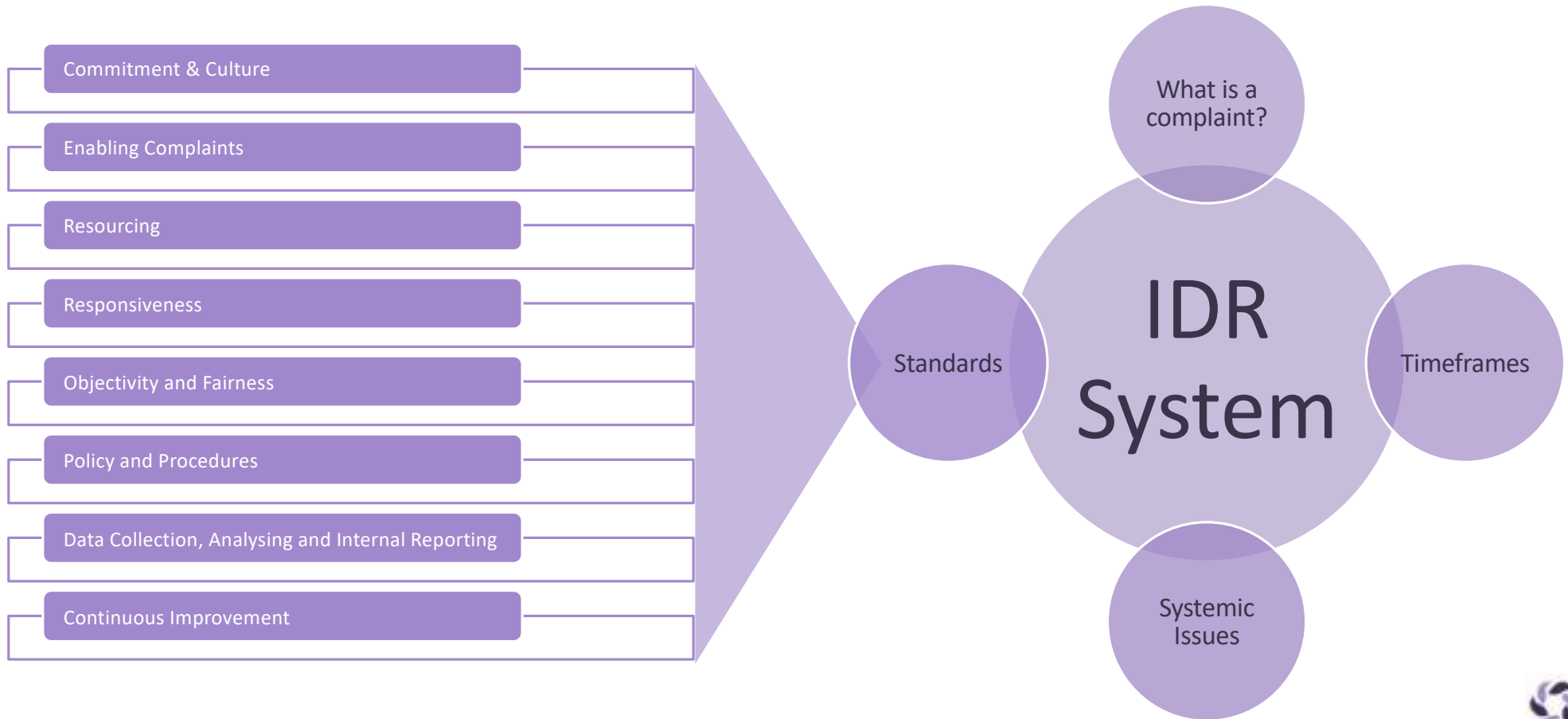
Refer to Appendix

A financial services licensee must:

- If financial services are provided to persons as retail clients, have a dispute resolution system complying with standards determined by ASIC (s912A(1)(g) Corporations Act)
- The dispute resolution system must consist of (s912A(2))
 - IDR procedures that
 - Comply with the standards and requirements made or approved by ASIC:
RG 271
 - Cover complaints made by retail clients in relation to the financial services provided; and
 - Membership of AFCA, the external dispute resolution (EDR) scheme for financial complaints in Australia



Essential Components of an IDR system (RG 271)



Which of the following is not a general obligation under s912A(1) for an APRA regulated insurer? (Select 2 correct answers and for a bonus point, Why?)

1. Have adequate resources (financial, human and technological) to provide the financial service?

2. Ensure representatives are trained and competent?

3. Comply with the financial services laws?

4. Have adequate risk management systems?





Responsible
Managers & Fit
and proper
people





Fit and Proper People

- Arising from the 'Hayne' recommendations, ASIC is required as part of a new or varied AFS licence application to consider whether a wide range of people are fit and proper persons (s913BA Corporations Act)
- Fit and proper persons:
 - Officers of the Licensee
 - Any Controller of the Licensee, and its Officers
 - Officer is defined in the Corps Act
 - Director or Secretary
 - A person whose decision making affects the whole, or a substantial part of the body corporate or significantly affect its financial standing
 - A person whose instructions or wishes the directors of the body corporate are accustomed to act on





Responsible Manager

- Not defined in the Corporations Act
- Concept created by ASIC to demonstrate organisational competence

Responsible Managers are senior managers who are directly responsible for making significant day-to-day decisions regarding the provision of financial services by a Licensee



Liability for Responsible Managers, Directors & Officers

- Responsible Managers will not incur additional liability for their day-to-day business decisions by reason of their appointment. The Licensee itself bears ultimate responsibility for complying with its AFS Licence obligations, however:
- Individuals can be pursued or prosecuted:
 - ASIC can make banning orders against individuals for various breaches
 - Civil and criminal penalties apply to any person who does an act or thing forbidden under the Corporations Act (s1311) including Chapter 7 (Financial services and markets)
 - A director or officer can be prosecuted for breach of good faith obligations

A director or other officer of a corporation must exercise their powers and discharge their duties:

- In good faith in the best interests of the corporation; and
- For a proper purpose

(s181 Corporations Act)



The 5 Options for Demonstrating Skills & Knowledge

You need to be able to demonstrate that each of your responsible managers has appropriate knowledge & skills for their role in the AFS Licensees business

Option	Knowledge Component	Skills Component
Option 1 See RG 105.33 – RG 105.55	Meet widely adopted and relevant industry standard or relevant standard set by APRA	Three years relevant experience over the past five years
Option 2 See RG 105.56 – RG 105.58	Be individually assessed by an authorised assessor as having relevant knowledge equivalent to a diploma	Five years relevant experience over the past eight years
Option 3 See RG 105.59 – RG 105.63	Hold a university degree in a relevant discipline and complete a relevant short industry course	Three years relevant experience over the past five years
Option 4 See RG 105.64 – RG 105.68	Hold a relevant industry-specific or product-specific qualification equivalent to a diploma (or higher)	Three years relevant experience over the past five years
Option 5 See RG 105.69 – RG 105.72	If not relying on Options 1 to 4, you need to provide a written submission that satisfies us that your responsible manager has appropriate knowledge and skills for their role. Your submission must cover all of the information in RG 105.69	





Conduct obligations



Conduct Obligations

As an AFS Licensee, you must comply with various conduct obligations

- Notifying ASIC of 'reportable situations'(1);
- Assisting ASIC in regulatory oversight of your company as an AFS Licensee (2);
- Quoting AFS licence number in documents (3);
- Complying with certain procedures when dealing with client's money (4);
- Keeping financial records and preparing and lodging financial statements (5);
- Prohibition from engaging in market misconduct and other conduct (6) including hawking (7).

(1) Section 912DAA Corporations Act and ASIC RG 78

(2) Section 912E Corporations Act

(3) Section 912F Corporations Act and Regs 7.6.01C(1) and (2) and ASIC RG 36

(4) Section 981B Corporations Act and ASIC RG 166

(5) Part 7.8 Division 6 Corporations Act

(6) Part 7.10 Corporations Act and Part 2 Division 2 ASIC Act

(7) Section 992A Corporations Act and ASIC RG 38.



Dealing with Client's Money

Dealing with Clients' Money

- Part 7.8 Div. 2. *Corporations Act* deals with treatment of client moneys received by a financial services licensee on account of a client
- Note the distinction between client money and insurers money.
- A licensee must pay money, to which Div.2 applies, into an account that satisfies specific requirements (s981B)
- The Licensees own money can not be paid into that account
- Additional requirements for record-keeping, reconciliation & reporting apply
- Part 7.8 Div.4 provides that the insurer rather than the insured bears the risk of funds held by an insurance broker
- Part 7.8 Div.6 sets out certain requirements in relation to accounting and auditing standards and financial practices of licensees



The hawking prohibition

RG 38.5

Under s992A(1), a person (the ‘offeror’) must not offer financial products for issue or sale to a retail client if the offer is made in the course of, or because of, an unsolicited contact

RG 38.6

An offeror includes an issuer or seller of a financial product, as well as their agent or representative: see paragraph 5.31 of the **Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020**. The prohibition also extends to requesting or inviting a retail client to ask or apply for or purchase a financial product: see paragraph 5.28 of the **Explanatory Memorandum**

RG 38.7

“Unsolicited contact” is contact by telephone, face-to-face, or any other real-time interaction in the nature of a discussion or conversation to which the consumer did not consent: see s992A(4)



Is this hawking?

Hong wants to switch comprehensive car insurers. He searches the internet for more information and finds an insurance price comparison website, 'Best Price Compare'. The homepage shows the logos of ten different insurance providers and describes the insurance that they offer. Hong clicks on a button that reads 'Compare your quotes'. Once he clicks on this button a dialogue box appears:

'By providing your details to Best Price Compare you are consenting to be contacted by telephone about offers of comprehensive car insurance by our Best Price Compare members. Do you wish to proceed?'

Hong wants to receive the quotes from Best Price Compare so answers 'Yes' and proceeds to fill out his details on a webform, and submits it. He then compares the quotes that now appear on the page. Hong subsequently receives a telephone call from three of the member insurance providers offering to complete the purchase process





Disclosure obligations





Refer to Appendix

Disclosure to retail clients acquiring financial products

What service am I providing?	Disclosure is in a Financial Services Guide (FSG)
What advice am I providing?	Disclosure is in a Statement of Advice (SOA) if the advice is personal
What product am I selling?	Disclosure is in a PDS and can be in a Short-Form PDS
What class of customers am I selling and distributing to?	Target Market Determinations



The PDS framework for General Insurance Products

The Corporations Regulations provide for a tailored PDS regime for general insurance products by:

- a) removing certain PDS content requirements for general insurance products;
- b) removing certain PDS content requirements where the information is disclosed by the product issuer in another document (e.g. policy terms and conditions);
- c) specifying how a product issuer is to disclose significant characteristics or features of a general insurance product and the rights, terms, conditions and obligations attaching to the product; and
- d) removing the requirement for some significant benefits of general insurance products to be stated in dollar terms.

Under reg 7.9.15D, a PDS for a general insurance product does not have to include information about:

- a) amounts deducted from a common fund (s1013D(1)(d)(iii));
- b) commissions or other similar payments that might impact on returns (s1013D(1)(e));
- c) any significant taxation implications of financial products of that kind (s1013D(1)(h));
- d) how the client can access any other information about the financial product that might be available (s1013D(1)(j));
- e) the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment (s1013D(1)(l));
- f) any significant risks associated with holding the product (s1013D(1)(c)); &
- g) other information that might materially influence a decision to acquire the product (s1013E)

The Insurance Contracts Act 1984 imposes a number of disclosure requirements, including disclosure to a person of the risks associated with holding a general insurance product.

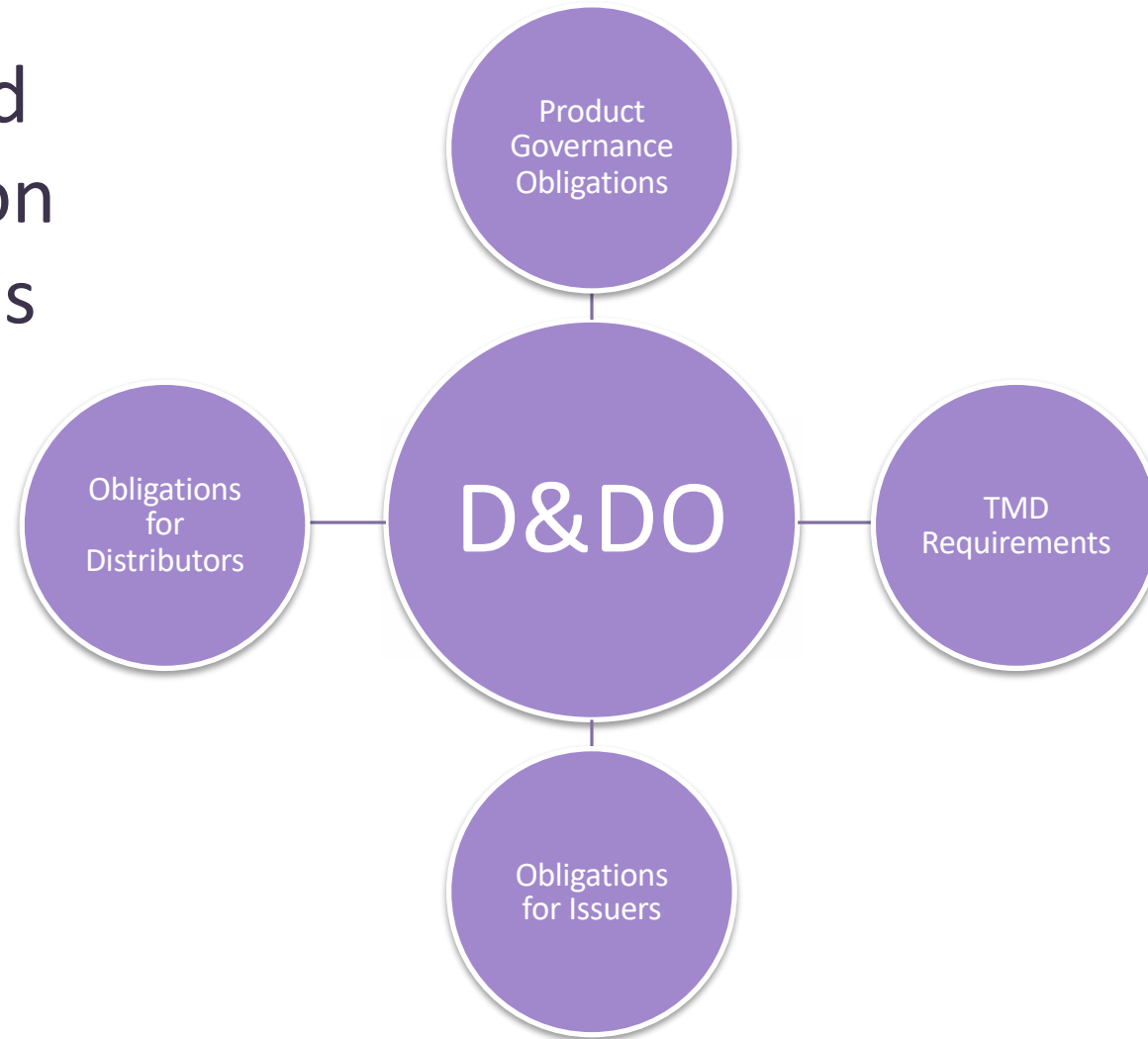
The purpose of removing certain PDS content requirements is to reduce the duplication of information between the PDS and the policy terms and conditions for general insurance products.

Under reg 7.9.15E, a PDS for a general insurance product must include the following more detailed information to satisfy the requirement in s1013D(1)(f) (i.e. to disclose information about any other significant characteristics or features of the product):

- a) the terms and conditions of the policy document (within the meaning of the Insurance Contracts Act); and
- b) any information that the product issuer would have to provide to the person under s35(2) or 37 of the Insurance Contracts Act before the contract of insurance has been entered into.



Design and Distribution Obligations



Design and Distribution Obligations – Key Definitions and Concepts

Retail product distribution conduct in relation to a financial product, means any of the following:

- a. Dealing in the product in relation to a retail client;
- b. Under Part 6D.2, giving a disclosure document in relation to an offer of the product to a retail client ;
- c. Under Part 7.9, giving a Product Disclosure Statement for the product to a retail client;
- d. Providing financial product advice in relation to the product to a retail client

Target Market Determination (TMD)

The issuer prepares the TMD. Generally, that is the person who is required to prepare a PDS.

(s994B(5)) A target market determination for a financial product must:

- a. Be in writing;
- b. Describe the class of retail clients that comprises the target market (within the ordinary meaning of the term) for the product;
- c. Specify any conditions and restrictions on retail product distribution conduct in relation to the product (**distributions conditions**), other than a condition or restriction imposed by or under another provision of this Act;
- d. Specify events and circumstances (**review triggers**) that would reasonably suggest that the determination is no longer appropriate;
- e. Specify the maximum period from the start of the day the determination is made to the start of the day the first review of the determination under section 994C is to finish;
- f. Specify the maximum period from the start of the day a review of the determination under section 994C is finished to the start of the day the next review of the determination is to finish;
- g. Specify a reporting period for reporting information about the number of complaints about the product (see subsection 99F(4)); and
- h. Specify the kinds of information needed to enable the person who made the target market determination to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred and, for each kind of information, specify:
 - i. The regulated person or regulated persons that, under subsection 994F(5), are required to report the information to the person who made the determination; and
 - ii. A reporting period for reporting the information under subsection 994F(5)



Design and Distribution Obligations

Significant Dealing

RG 274.158

The term 'significant dealing' is not defined in the Corporations Act. This is consistent with the term 'significant' being undefined elsewhere in the Act. Whether or not a dealing is significant is a matter to be determined in the circumstances of each case. Issuers, who have an aggregate view of the distribution of their product, will take a more systemic approach to determining whether a dealing is significant.

RG 274.159

ASIC expects that the following factors will be relevant for issuers when determining whether a significant dealing has occurred (these are not intended to be an exhaustive list of potentially relevant factors):

- a. Of those consumers who acquire the product, the proportion of consumers who are not in the target market, including the proportion of consumers who are part of a class that has been excluded from the target market acquiring the product;
- b. The actual or potential harm to consumers, including the amount of any financial loss, resulting from consumers who are not in the target market acquiring the product;
- c. The nature and extent of the inconsistency of distribution with the TMD (noting that distribution to a consumer can be either more or less consistent with a target market along a continuous spectrum);
- d. The proportion of gross income or premium obtained from the product in respect of consumers who are not in the target market acquiring the product; and
- e. The time period in which these acquisitions outside the target market occurred

Key takeaway – identifying and raising incidents when the product is distributed outside the target market is critical. This is part of the D&DO governance requirements.



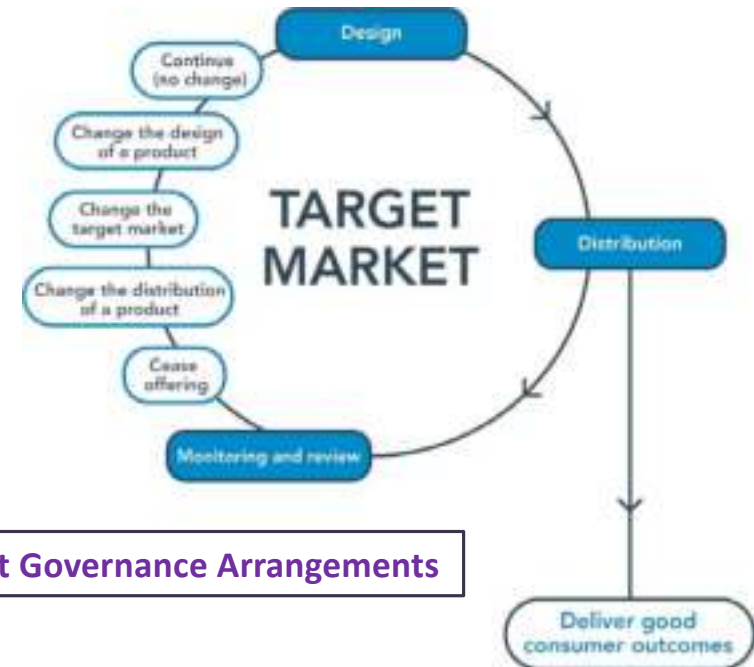
Design and Distribution Obligations

Design Obligations

- Prepare a TMD (s994B)
- Make the TMD publicly available (s994B(9))
- Take reasonable steps in relation to distribution (s994E(1))
- Review the TMD to ensure that it remains appropriate (s994C)
- Notify ASIC of 'significant dealings' (s994G)
- Keep records (s994F(1) and (3))

Distribution Obligations

- Not to distribute unless a TMD has been made (s994D)
- Take reasonable steps in relation to distribution (s994E)(3)
- Notify the issuer of 'significant dealing' (s994F(6))
- Keep records (s994F(3))



Product Governance Arrangements

Notifying ASIC of Significant Dealings (RG 274.157)

An issuer must notify ASIC of a significant dealing (except excluded dealings) in a financial product that is not consistent with the product's TMD. Issuers must notify ASIC in writing as soon as practicable, and in any case within 10 business days after becoming aware: see s994G and 1311(1)

Cooling Off Periods

s1019A (1)(a)(i) & (b)

1. Subject to subsection (2), this Division applies if:
 - a. A financial product of one of the following classes is provided in this jurisdiction to a person as a retail client after the commencement of this Chapter:
 - i. Risk insurance products
 - b. the product is provided to the person:
 - i. By way of issue; or
 - ii. By way of sale pursuant to an offer to which section 1012C applies

s1019B (1) and (3)

1. Subject to this section, the client has the right to return the financial product to the responsible person and to have the money they paid to acquire the product repaid.
3. The right to return the product can only be exercised during the period of 14 days starting on the earlier of:
 - a. The time when the confirmation requirement (if applicable) is complied with; or
 - b. The end of the fifth business day after the day on which the product was issued or sold to the client
5. The right to return the product (& have money paid to acquire it repaid) cannot be exercised at any time after:
 - a. The client has exercised a right under the terms applicable to the product e.g., made a claim; or
 - b. The time in which the client can exercise rights under the product has ended e.g., a policy period of 1 week



Unfair Contract Terms

Unfair contract terms in consumer contracts and small business contracts s12BF(1) ASIC Act

1. A term of a consumer contract or small business contract is void if:
 - a. The term is unfair; and
 - b. The contract is a standard form contract; and
 - c. The contract is:
 - i. A financial product; or
 - ii. A contract for the supply, or possible supply, of services that are financial services

Definitions s12BF (3) and (4)

3. A **consumer contract** is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for *personal, domestic or household use or consumption*
4. A contract is a **small business contract** if:
 - a. At the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - b. Either of the following applies
 - i. The upfront price payable under the contract does not exceed \$300,000
 - ii. The contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000

Terms not captured s12BI (1)(b), (d) and (4)

1. Section 12BF does not apply to a term of a contract referred to in subsection (1) of that section to the extent that, but only to the extent that, the term:
 - a. defines the subject matter of the contract;
 - b. sets the upfront price payable under the contract; or
 - d. If the contract is an Insurance Contracts Act insurance contract – is a transparent term that:
 - i. is disclosed at or before the time the contract is entered into; and
 - ii. sets an amount of excess or deductible under the contract
4. For the purposes of applying paragraph (1)(a) to an Insurance Contracts Act insurance contract, have regard to the main subject matter of the contract *only to the extent that it describes what is being insured*

Unfair Contract Terms

ASIC v Bendigo and Adelaide Bank



Facts

- The Bank had standard form contracts in its lending contracts with small business borrowers
- The standard form contracts included indemnity, event, unilateral termination and conclusive evidence clauses all in favour of the Bank

The Court held that the terms:

'create a significant imbalance in the parties' rights and obligations in that:

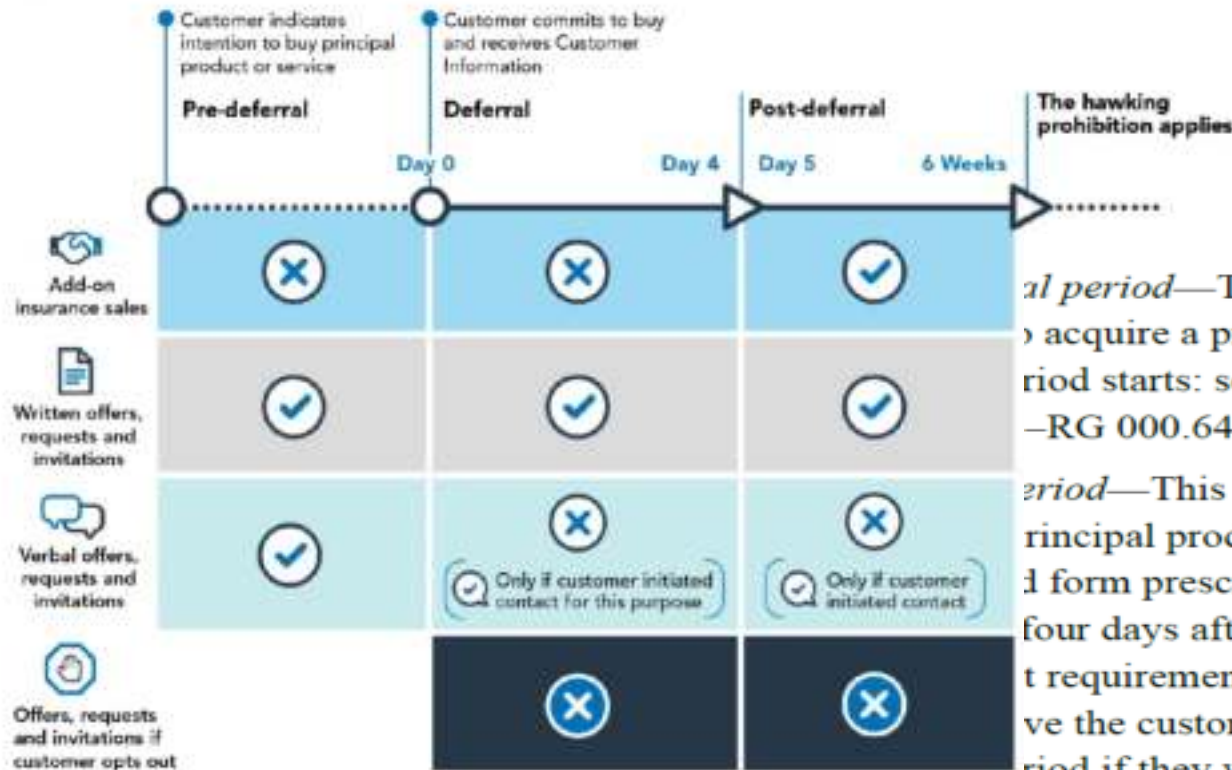
1. the customer has no corresponding rights;
2. the circumstances in which the liability, loss or costs may be incurred are not within the customer's control; and
3. the Bank controls at least some of the circumstances in which the liability, loss or costs may be incurred and can avoid or mitigate that liability, loss or costs'.



Deferred Sales Model for Add-on Insurance

Note the class exemptions

Figure 1: Outline of the deferred sales model



al period—This period starts when the customer indicates intention to acquire a principal product or service and ends when the customer commits to buy and receives the information prescribed by ASIC (Customer Information). It begins four days after the day on which the deferral period begins and ends at requirements set out in RG 000.64.

period—This period starts when the customer commits to buy and receives the information prescribed by ASIC (Customer Information). It begins four days after the day on which the deferral period begins and ends at requirements set out in RG 000.65–RG 000.84. A person may not offer or sell the customer add-on insurance during this period if they wish to offer or sell the customer add-on insurance during this period.

al period—This period starts at the end of the deferral period and ends when the hawking prohibition applies.

Misleading and Deceptive Conduct

Provision	Regulated Conduct
s1041H of the Corporations Act 2001 (Cth)(Corporations Act)	A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive
s12DA of the Australian Securities and Investments Commission Act 2001 (Cth)(ASIC Act)	A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive

Meaning of 'deceptive' conduct

The word 'deceptive' adds nothing to the statutory prohibition. One meaning which the words 'mislead' and 'deceive' share in common is 'to lead into error'. If the word 'deceptive' in s52 stood alone, it would be a question whether it was used in a bad sense, with a connotation of craft or overreaching, but 'misleading' carries no such flavour, and the use of that word appears to render 'deceptive' redundant

Meaning of 'likely to'

The expression 'likely to' only means that conduct has potential to have the required effect. The relevant conduct does not in fact have to mislead or deceive. The word 'likely' can, in some context, mean 'probably' in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a fifty per cent chance ('an odds-on chance'). It can also, in an appropriate context, refer to a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent. When used with the latter meaning in a phrase which is descriptive of conduct, the word is 'equivalent' to 'prone', 'with a propensity' or 'liable'

Objective test for assessing misleading or deceptive conduct

Whether conduct is misleading or deceptive is to be assessed by the court on an objective basis. Further, 'evidence that members of the public have actually been misled is not conclusive'. The key requirement is that the impugned conduct leads, or is likely to lead, a person into error



Duty of Disclosure

An insured (or a reasonable person in the circumstances of the insured) has a duty to disclose to the insurer, before the contract of insurance is entered into, every matter, that is known to the insured and is a matter relevant to the decision of the insurer to accept the risk, and, if so, on what terms.



The law changed from 5th October 2021 for consumer insurance contracts



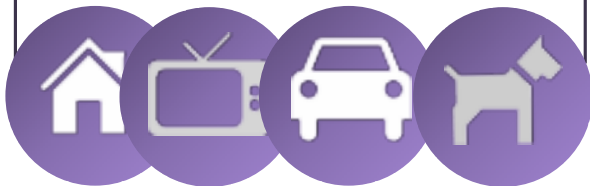
The duty of disclosure will continue to apply to insurance contracts that are not consumer insurance contracts



The duty to take reasonable care not to make a misrepresentation applies to consumer insurance contracts

What is a consumer insurance contract?

When the insurance is obtained wholly or predominantly for the personal, domestic or household purposes of the insured.



What happens from 5th October 2021?

For consumer insurance contracts, the duty of disclosure is replaced by the duty to take reasonable care not to make a misrepresentation.

What does this mean in practice?

This means that the consumer has to honestly answer [only] the questions asked as part of the underwriting process.

