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Claims handling and settling as a financial service – A step closer...

Since the Hayne Royal Commission, the insurance industry has waited with baited breath to see what the proposed changes to claims handling might look like. Only last week, the industry moved a step closer to understanding the impact of these changes and preparing accordingly, with ASIC releasing a draft Information Sheet on insurance claims handling and settling, '[How to comply with your AFS licence obligations](#)'; the aim being to provide industry participants as much time as possible to consider whether they need to obtain (or vary) an Australian Financial Services Licence (AFSL), and if so, what they will need to do.

A Brief Re-Cap

Currently, insurance claims handling is not included as a '*financial service*' under the *Corporations Act* 2001 (the Act) and as such, insurance claims handlers have not before been subject to the obligations of AFSL holders under the Act. Such obligations include '*acting efficiently, honestly and fairly, complying with license conditions and financial services law, ensuring adequate training of staff and complying with IDR and EDR requirements.*'

However, since the Royal Commission, changes have been afoot and the long awaited passing of the *Financial Sector Reform (Hayne Royal Commission Response) Bill* 2020 (the Bill) from 1 January 2021 will give effect to Hayne Recommendation 4.8 and ensure that those who provide claims handling and settling services must hold an AFSL and that the claims handling carve out under the Act is removed. Also, a broad definition of claims handling will include '*assessing, settling and assisting in claims*' thereby extending to a great number of industry participants including insurance claims managers, insurance brokers, financial advisors and claimant intermediaries, some of whom may already hold an AFSL but whom may now have to apply for variation.

Claims Handling and Settling Services

The draft Information Sheet, to be issued in final form on the ASIC website once the Bill has passed before the end of the year, provides further clarity around '*claims handling and settling*' services, being an activity that includes, among other things,

'making a recommendation or stating an opinion in response to an inquiry about a claim or potential claim, making a recommendation or stating an opinion that could influence a decision about making or continuing with a claim, representing someone in pursuing a claim, assisting another person to make a claim or making a decision to accept or reject all or part of a claim'.¹

Applying for AFSL or Variation

Any person performing these functions will be required to have an AFSL authorising the provision of these services or be authorised by a person who holds a claims handling authorisation. This will apply to all persons providing claims handling and settling services in relation to any insurance claim made

on or after 1 January 2021, regardless of when the policy of insurance commenced. Table 1 on page 3 of the Information Sheet provides a useful guide.

Those seeking to apply for an AFSL or a variation to their existing AFSL need only select those elements of a claims handling and settling service that apply to them. That is, not every entity will require authorisation for all the elements of a claims handling and settling service under s766G. ASIC will assess each application based on the particular claims handling activities specified by the applicant.

Those persons exempt from requiring an AFSL include loss assessors or loss adjusters, experts providing an opinion to inform the claims assessment, investigators and independent medical examiners. Lawyers providing professional legal services in relation to insurance claims handling and settling are specifically exempt and while registrable superannuation entity (RSE) licensees (i.e. a superannuation trustee regulated by APRA) fall under the general exemption, their AFSL must provide for a *'superannuation trustee service'* as a *'new financial service'* in accordance with the *Financial Sector Reform Act*. ASIC has provided clear examples within the draft Information Sheet as to what type of entity may require an AFSL with claims handling and settling authorisation.

AFSL Obligations

As an AFSL holder and for those persons performing claims handling and settling services, there are certain obligations with which they must comply under the Act. One of the principal obligations in this regard is to *'do all things necessary to ensure that the financial services covered by the AFSL are provided efficiently, honestly and fairly'*. This means that claims handling and settling services will need to be provided in a timely way; in the least onerous and intrusive way possible, fairly and transparently and in a way that supports consumers, particularly ones who are experiencing vulnerability and hardship. Importantly, the obligation to provide *'transparency and fairness'* requires that:

- claimants know what to expect from you in the claim process; they know what you will expect of them; they know how long it generally takes for a decision; they know why you need certain information from them and they are regularly told about the progress of their claim;
- you provide the claimant procedural fairness (i.e. you explain any adverse findings to the claimant and give them an opportunity to respond and provide additional information);
- you explain to the claimant why you rejected their claim or part of their claim; and
- you inform the claimant of their right to make a complaint and how to access internal and external dispute resolution.

Both the draft Information Sheet and the Explanatory Memorandum to the Bill give examples of conduct which meets or fails to meet the requirement to handle and settle claims efficiently, honestly and fairly. (See pages 28-29 of the draft Information Sheet). Otherwise, ASIC Commissioner Sean Hughes said in relation to a recent FCA decision that *'ASIC expects those involved in handling insurance claims to act consistently with the commercial standards of decency and fairness, ensuring claims are handled in a fair, transparent and timely manner.'*²

Significantly though, the obligations under s912 of the Act extend to notifying AISC of any breach or likely breaches. ASIC can also take enforcement action if there has been a breach and that may include cancelling or suspending your AFSL or imposing conditions, as well as seeking civil penalties.

Transitional Timeframes

1 January 2021	30 June 2021	31 December 2021
<ul style="list-style-type: none"> • From 1 January 2021, you 	<ul style="list-style-type: none"> • Even if you have submitted 	<ul style="list-style-type: none"> • The transitional

<p>can apply for a new AFSL with claims handling authorisation or vary your existing AFSL to include claims handling authorisation.</p> <ul style="list-style-type: none"> You can continue to provide claims handling and settling services up to 30 June 2021 without having lodged an application. You can continue to provide claims handling and settling services from 1 July 2021, if you have lodged your application before 30 June 2021. 	<p>an application before 30 June 2021, from 1 July 2021, you must stop providing claims handling and settling services if, <i>inter alia</i>:</p> <ul style="list-style-type: none"> your application is rejected; or you are not granted an AFSL or variation with a claims handling authorisation by 31 December 2021. 	<p>arrangements end on 31 December 2021 unless the Minister extends the end date.</p> <ul style="list-style-type: none"> From 1 January 2022, you must hold an AFSL with a claims handling authorisation to continue to provide these services. If you only intend to provide claims handling and settling services from 1 January 2022 you can apply for an AFSL or variation at any time before you provide these services.
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Implications

ASIC's draft Information Sheet, though not intending to cover the whole of the relevant law, makes it abundantly clear that time is of the essence. For those entities providing claims handling and settling services or intending to do so after 1 January 2021, applications for an AFSL or a variation to their existing AFSL must be lodged as soon as possible.

'Preparedness' is the objective here so as to ensure that all industry participants are fully compliant and have their house in order by the time these transitional arrangements expire on 31 December 2021. Therefore, if industry participants have not done so already, now is the time to assess whether you will require an AFSL or a variation to your existing AFSL providing authorisation for claims handling and settling services. However it doesn't stop there. Industry participants will need to be aware of those entities performing claims handling and settling services on their behalf, e.g. authorised representatives or claims intermediaries, and what, if any, AFSL authorisations they will have in place, thereby guarding against any inadvertent provision of a 'claims handling and settling service' constituting a 'financial service' under the Act.

Furthermore, though industry participants will have taken giant leaps in recent years to improve claims handling and settling services, having adapted to the introduction of AFCA and a new regulatory regime focused on 'fairness' for the consumer; and in particular for life insurers and the need to comply with the Life Insurance Code of Conduct, the inclusion of claims handling and settling as a financial service, though carrying with it increased administrative costs and burdens, makes it all the more important for industry participants to have robust claims handling systems in place to ensure compliance with the Act and the specified obligations.

As foreshadowed by the Hayne Royal Commission, ASIC will have the power to penalise industry participants for any breach (whether self-reported or otherwise) of the obligations and whilst the exact circumstances in which ASIC may take action in this regard remains unclear, these impending changes makes compliance an ever present focus in the post Hayne Royal Commission environment.

¹ Attachment 1 to Media Release (20-300MR): Draft Information Sheet

² <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-302mr-youi-breached-duty-of-utmost-good-faith-royal-commission-case-study/>

