Asia Pacific Insurance - Australia

Guide for Insurance Sales, Advisory and Distribution

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# What are the different types of insurance intermediaries in the market and do they need to hold any licenses and minimum qualification to conduct business?

In Australia, a person commits an offense if the person carries on an insurance business and is not a general insurer authorized to do business in Australia by the Regulator (the Australian Prudential Regulation Authority or APRA). This also applies to foreign general insurers. Intermediaries of authorized general insurers are any persons, including agents and brokers, who provide financial product advice or deal in insurance contracts. They must obtain an Australian Financial Services License (AFSL) unless they do so as a representative of an existing license holder, or fall within certain exceptions. Several requirements must be satisfied for the grant of an AFSL. These requirements include training of representatives, adequacy of dispute resolution systems, systems for the management of conflicts of interest, and adequate resources including financial, technological and human, which relate to risk management. If a person is to conduct business as a representative of an AFSL holder that is an authorized general insurer, that person must hold an approved formal qualification, meet statutory work experience standards, be "fit and proper" and demonstrate approved evidence of ethical compliance.

# Is it mandatory for insurers to offer customers the option of purchasing insurance products directly from them without going through financial advisers or intermediaries?

No. Certain types of products may be purchased directly from insurers and others are more commonly purchased through intermediaries. It is not mandatory to offer insurance directly to customers first. Whether an insurer can offer products directly depends on the terms of the insurer's AFSL. Most general insurers in Australia sell retail insurance via a "no advice or general advice" model and will not be licensed to advise customers on insurance products. Typically, an intermediary will advise customers and will have product advice allowances under its own AFSL (or under that of the person of whom it is an authorized representative). Intermediaries have obligations if they are providing personal or general advice to customers. They must issue Financial Services Guides that contain warnings to protect the customer and disclosure of commission if the service is typified as "personal" under the Corporations Act 2001 (Cth).

# Do agreements between insurers and their agents need to take a certain form?

No. There is no restriction on the format of such agreements. Any written authorization by an AFSL holder in favor of a third party to be its representative can only carry with it such rights as are conferred upon the AFSL holder under the terms of its license. All such authorizations must also be notified to ASIC within 30 business days.

# Can insurers pay volume-based commission to their appointed agents?

Generally, no. Volume-based commission is assumed to be "Conflicted Remuneration" under the Corporations Act 2001 (Cth). It is an offense under section 963 of the Corporations Act 2001 to facilitate it or collect it. There are some exceptions, such as where the commission (or benefit) is given to the AFS License holder or broker solely in relation to a general insurance or life risk product.

# Are insurers liable for any mis-selling of its agents or appointed distributors?

Yes. Under Chapter 7 of the Corporations Act 2001, there is a general liability of AFSL holders for the acts of their agents. In addition, the Act contains more specific provisions that impose strict liability upon an AFSL holder (sections 917B and 917C) for the acts and omissions of its authorized representatives. The quantum of liability is for any loss or damage suffered by the customer (section 917E).

# Are there rules on the number of insurers that insurance brokers need to present to their customers?

No. However, there is a common law duty of care not exempted by the Act that requires an agent to act in the best interests of its client. In addition, under sub sections G, H and J of the Corporations Act, which apply to authorized representatives, the authorized representatives must provide appropriate advice to the customer that must not be based on incomplete information. Further, under section 961J, where there is a conflict of interest, the authorized representative must give priority to the customer's interests when giving the advice. There is an exception where the subject matter is in relation to a general insurance product. It is possible to be the authorized representative of more than one AFS License holder (section 916C of the Corporations Act 2001), though this can only occur if each AFSL holder consents to the other, and to the authorization of the common representative. If there are two AFSL holders, one can be appointed as the authorized representative of the other but only where one is an insurer and there is a "binder" given by the insurer.

# Can insurance brokers receive commission from both insurers and their customers? If so, can they be volume-based commission?

There is no statutory prevention from receiving commission generally from both insurers and the customer. Volume-based commission is illegal unless it is in relation to a general insurance or life risk product (section 963 of the Act). Where commission is received from both customer and insurer, the party in whose interests the broker is acting particularly may also lead to conflict of interest, which is also a breach of the Corporations Act 2001. In addition, the Corporations Act 2001 requires brokers who provide general or personal financial advice to issue a "Financial Services Guide" to the customer. Where the advice is considered personal to the customer, then all
remuneration and commission must be fully disclosed in advance of the service being provided.

# Can agents or appointed distributors offer rebates on insurance premiums or other special concessions to the customers?

Subject to the following, there is no specific legislative prevention. However, in relation to general and other insurance, there are statutory circumstances which govern the cancellation and termination rights of an insurer and which are not capable of being modified or limited by contract. Examples are contained in the Insurance Contracts Act 1984 (Cth). How much premium was rebated would depend on that which is yet to be earned at the time of cancellation or termination and the provisions of the policy. Otherwise, the offering of concessions or rebates to attract customers is likely to attract the adverse attention of both ASIC and APRA (the regulators). For example, it is an offense under section 1041 of the Corporations Act 2001 to create an artificial price or market for the trading of financial products.

# Can insurers appoint offshore agents or accept business from offshore brokers?

Generally, no. If offshore business is to be carried on in Australia, it must be through a registered general insurer who has an Australian Financial Services License. That insurer may accept business under the terms of its Australian Financial Services License. However, if the offshore agent or broker is "carrying on a financial service business" in Australia as defined by Division 4 of Part 7.1 of the Corporations Act, it will likewise require an AFSL to place that business in Australia. If the agent or broker is providing financial product advice (section 766B), or is dealing in a financial product (section 766C), or is making a market for a financial product (section 766D), it may be carrying on such a business. To do so without an AFSL is an offense under section 911A.

# Are there specific requirements on selling products through call centers, telemarketing or other distribution channels?

Yes. There are requirements and restrictions under the Corporations Act 2001 relating to where a financial service is being provided by brokers and intermediaries notwithstanding whether through call centers, telemarketing or other distribution channels. A product disclosure statement must be in writing and be issued to the customer at the point of sale (under Division 2 of Part 7.9 of the Corporations Act 2001). Prior to provision of the service, the provider of a "Financial Service" should also issue a Financial Services Guide to the customer. Whether a distributor is providing a financial service under the Act will depend on the circumstances. There are
requirements concerning the handling of money, the confirmation of transactions (section 101), requirements for marketing (Division 5) and cooling-off periods (Division 5). A regulatory guide issued by ASIC explains the approach to compliance and enforcement (ASIC Regulatory Guide 168). There are a number of specific offenses for non compliance.

# Are there specific requirements on selling products through online channels?

Yes. The Corporations Act 2001 and its regulations contain specific requirements concerning the sale of products online. The usual Corporations Act 2001 requirements concerning product disclosure and financial services guides still apply. Full product disclosure must still be made of the product, at or before sale (section 1012C). If the product is issued online, product disclosure must be provided in electronic form (Reg 7.7.01). Timing is important. In addition and in relation to data security, APRA has issued Prudential Practice Guide "CPG 234 Management of Security Risk in Information and Information Technology," which details the measures it expects to be taken
by insurers to minimize online and technology risk. Examples of these protections include encryption and the use of keys or triple block ciphers (algorithms) to protect authenticity of information and prevent the unauthorized alteration of data. Customers who buy products using electronic payment facilities are protected by the "ePayments Code," which is regulated by ASIC.

# Can insurers share client information with insurance agents and brokers and vice versa? What data privacy or confidentiality laws apply?

The Australian Privacy Act 1988 (Cth) regulates how insurers can share client personal information such as an individual's name, date of birth, address, phone number, etc., with third parties such as insurance agents and brokers and vice versa. Under Australian Privacy Principle (APP) 5, an entity is required to take reasonable steps to notify an individual of certain collection-related information at, before, or if not practicable, as soon as practicable after the time of the collection, including information about any entities to whom that entity usually discloses personal information of the kind collected (in this case, insurers, insurance agents or brokers, as relevant), as well as make available a privacy policy.

Any disclosures to third parties who are not specified in the original collection statement or privacy policy can be made only with the individual's consent unless certain exceptions apply including if disclosure is for a purpose related to the primary purpose of collection and the individual would reasonably expect such disclosure, or where the use or disclosure is required or authorized by an Australian law or court/tribunal order.

For disclosures outside of Australia, reasonable steps must be taken to ensure the overseas recipient does not breach the APPs. The disclosing entity will be strictly liable for any such breach unless certain exceptions apply, including where consent is obtained or where the overseas recipient is subject to a law or binding scheme that has the effect of protecting the information to at least a substantially similar level to the Privacy Act and the individual would have recourse under the relevant law or scheme.

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