
REIA Guidelines

Distribution of general insurance products

1. The following Real Estate Institute of Australia Guidelines have been developed to assist real estate agents ('Agent', 'you', 'your') in complying with Chapter 7 of the Corporations Act 2001 (Cth) ('Corporations Act'). These Guidelines are based on general legal advice from McCullough Robertson Lawyers and Agents should obtain their own independent legal advice if they have any doubts as to whether they are complying with the Corporations Act.
2. This guidance note examines the various levels of Agent involvement in the distribution of general insurance products and includes discussion on the general exemptions under the Corporations Act (Section 1), becoming an insurance distributor under ASIC Class Order [CO 05/1070] General Insurance Distributors ('Class Order') (Section 2) and becoming an authorised representative of a Australian financial services licensee ('AFS licensee') (Section 3).
3. In summary, the main points of this guidance note include:
 - a. Agents recognise the importance of landlord insurance and assistance this provides to landlords, but Agents are limited in the information, advice or services they can provide to customers (landlords) depending upon the degree to which they are authorised by an AFS licensee.
 - b. Agents may utilise the 'mere referral exemption' contained in the Corporations Act to refer a customer to an insurer (or one of the insurer's representatives) who is able to provide a particular financial service. Agents may receive a commission from the insurer for this service provided that, among other things, the Agent discloses at the time of making the referral to the customer any benefits (including commission) that are received by the Agent in respect of the referral.
 - c. Agents may be able to undertake some basic administrative tasks in relation to general insurance products under what is known as the 'clerks and cashiers' exemption contained in the Corporations Act (s766A(3)). This exemption would allow an Agent to pay a premium (e.g. by posting a cheque to an insurer) at the direction of his or her customer provided that the Agent did nothing more in relation to the insurance. There is a subtle difference between actions which are viewed as purely administrative (and therefore exempt) and those which are sufficiently connected to the issue or renewal of a policy (and therefore regulated). Agents must be careful not to overstep this boundary.
 - d. Agents can provide a broader range of general insurance services, such as arranging the issue of policies of insurance or collecting and paying premiums (including renewal premiums) from a customer on behalf of an insurer, if they have been appointed as an 'insurance distributor' of an AFS licensee under the Class Order. The Class Order does not allow Agents to provide any financial services where they are not acting as a representative of the licensee that has appointed them or to provide financial product advice.
 - e. Agents may enter into a written agreement with a customer to forward a cheque to an insurer on the customer's behalf when renewal premiums become due, for instance, as part of an agency agreement e.g. under the Clerks and Cashiers exemption provided that the Agent does no more than forward monies, as an insurance distributor or as an authorised representative. The REIA urges caution in this regard due to liabilities that may arise and recommends that Agents obtain specific legal advice before entering into such agreements.
 - f. Agents wishing to provide financial product advice to a landlord must either hold an Australian

financial services licence ('AFSL') or be appointed as an 'authorised representative' of an AFS licensee to carry out the specific tasks in question.

g. In general, Agents are under no legal obligation to be involved in providing information, advice or services relating to general insurance products and are unlikely to be subject to any legal liability for choosing not to do so. However, Agents may choose to alert their clients to the availability of landlord insurance.

4. More detailed guidance is provided in the sections to follow.

Special Note on Insurance Commissions and Agents in Victoria

5. Under the terms of the Victorian Estate Agents Act 1980, an Agent who is engaged or appointed to do any estate agency work (such as property management) for a client is not entitled to retain any amount the Agent receives as a "rebate" in respect of outgoings, prepayments or other payments made by the client to another person in respect of the estate agency work. The Act defines rebates as any discount, commission or other benefit. The effect of this legislation generally compels Victorian Agents to immediately pass any referral fee received by the Agent from an insurer to their client where the estate agency work includes dealing with property insurance. However, the specific contractual arrangements entered into between an insurance broker/insurer and the Agent and the contractual arrangements entered into by the property owner and the Agent may have a bearing on whether or not the referral fee is considered a "rebate" under the Act. Victorian Agents intending to receive insurance referral fees should first seek legal advice with regard to their particular circumstances to ascertain whether such payments would be allowable under the Estate Agents Act 1980.

Section 1: General exceptions under the Corporations Act

Mere referral exemption

6. The mere referral exemption in regulations 7.6.01(1)(e) and 7.6.01(1)(ea) of the Corporations Regulations 2001 (the Regulations) exempts a person from the requirement to hold an AFSL for the provision of a financial service if:

- a. the service consists of the person ('Agent') informing another person ('Customer') that an AFS licensee (or one of their representatives) is able to provide a particular financial service;
- b. the Agent provides the Customer with information about how to contact the AFS licensee or their representative;
- c. the Agent is not a representative of the AFS licensee; and
- d. the Agent discloses to the Customer, at the time when the service is provided, any benefits including commissions that the Agent or an associate of the Agent may receive in respect of or attributable to the service.

7. If the Agent is an authorised representative of the AFS licensee (refer Section 3) or has been appointed by the AFS licensee under the Class Order (refer Section 3) they must inform the Customer of this fact.

What does this mean for Agents?

8. An Agent is not required to hold an AFSL, or to be authorised by an AFSL holder, if the Agent does no more than merely provide someone with the name and contact details of an appropriately licensed or

authorised person who may be able to assist the Customer with their financial services requirements. This exemption may best be illustrated by considering the following scenario and accompanying sample script.

Sample Script

Jim has just purchased an investment property through your agency. You are not an authorised representative of an AFS licensee and have not been appointed as an insurance distributor under ASIC Class Order [CO 05/1070], therefore you are permitted to say:

'If you require financial product advice or other financial services in relation to general insurance products, you may wish to contact [AFS licensee or representative] who may be able to assist you. You can contact [AFS licensee or representative] on [phone number/email]. I will receive [insert percentage] commission based on the value of any financial products that are issued or sold through [AFS licensee or representative] attributable to this referral.'

9. Under no circumstances are you entitled to provide financial product advice to a customer under the 'mere referral exemption'. Behaviour that may constitute financial product advice is discussed in Section 2 of these Guidelines.

Clerks and cashiers exemption

10. The 'clerks and cashiers exemption' is designed and intended for individuals performing basic administrative or procedural tasks only, such as drawing monies from a trust account held by the Agent on behalf of a customer and forwarding a cheque to the insurer to pay a renewal premium on the customer's instruction. There is a subtle difference between actions which are viewed as purely administrative (and therefore exempt) and those which are sufficiently connected to the issue or renewal of a policy (and therefore regulated).

11. Conduct that is likely to fall within the exemption includes:

- a. merely pointing out to a Customer how they should complete their details in an application form for a financial product; and
- b. an individual working as a real estate Agent who, at some stage merely handled, in an administrative fashion, the money used to pay the premium for a new insurance policy (or a renewal premium).

12. Conduct that would probably not fall within the exemption includes:

- a. selling general insurance products and receiving commission for the sale (this conduct is likely to involve more than merely performing the tasks of a clerk or cashier); and
- b. distributing general insurance (e.g. 'dealing' in insurance), such as taking active steps to arrange for a policy of insurance to be issued to a Customer including, making a decision on the type of coverage purchased or entering into an insurance contract on the customer's behalf.

13. If you refer a customer to an insurer in accordance with the 'mere referral exemption' and, at some later stage, you forward an insurance premium cheque to an insurer after being specifically requested by the customer to do so, it is likely that you will still be entitled to rely on the 'clerks and cashiers' exemption for the act of forwarding the cheque.

14. You may enter into a written agreement with a Customer to forward a cheque to the insurer on the Customer's behalf when renewal premiums become due, for instance, as part of an agency agreement. Your role in the renewal process must not exceed that outlined elsewhere under the 'clerks and cashiers exemption' sub-section of these Guidelines. Refer to the specific guidance concerning 'Renewal Agreements' in Section 2 of these Guidelines for further information.

15. To minimise the risk that your behaviour may be considered outside the scope of the 'clerks and cashiers exemption', we recommend that insurance renewal documentation be sent by the insurer directly to the customer and not to the Agent. In this way, there is less chance that the actions of the Agent will be sufficiently connected to the renewal of a policy and therefore it is more likely that the Agent's actions will fall outside the scope of regulated behaviour.

16. Agents who want to distribute general insurance products will need to be appointed as a general insurance distributor under the Class Order (see Section 2).

17. Agents who seek broader and more flexible options in relation to the provision of financial services may wish to consider either becoming an AFS licensee or an authorised representative of an AFS licensee (see Section 3).

Section 1: Class Order (05/1070) - General insurance distributors

18. ASIC Class Order [05/1070] General Insurance Distributors allows an Agent to be appointed as an 'insurance distributor' of an AFS licensee and to deal in general insurance products ('Products') on behalf of the AFS licensee without the need to hold an AFSL or to be appointed as an authorised representative of an AFS licensee. This appointment allows the Agent to sell insurance on behalf of the insurer, who takes responsibility for the Agent's actions under the Class Order.

How do I become an 'insurance distributor'?

19. In order to become an insurance distributor:

- a. the AFS licensee (i.e. the insurer) must issue you with a written notice authorising you to provide the designated financial services;
- b. you must not be an authorised representative of the AFS licensee; and
- c. the authorisation to deal must be only in relation to either or both of general insurance products and bundled consumer credit insurance products.

20. Once you have been appointed in accordance with the Class Order [CO 05/1070] you can begin acting as an insurance distributor. When you provide financial services as a distributor you must:

- a. give the customer written information about who you act for when providing the financial service i.e. the AFS licensee;
- b. give the customer written information about any remuneration or other benefits, including commissions, that you receive for providing the financial service; and
- c. specifically draw the customer's attention to the availability the AFS licensee's dispute resolution system that covers complaints by the customer in relation to the financial service and how that system may be accessed.

The Class Order permits the insurance distributor to 'deal'. What is 'dealing'?

21. Dealing in financial products includes issuing, applying for, varying or disposing of a financial product or 'arranging' for a person to do one of those things. The term 'arranging' refers to the process by which a person brings into effect the issue, application for, variation or disposal of a financial product. Arranging would normally be carried out by an intermediary (such as an Agent) between the Customer and Product issuer. ASIC takes the view that you are likely to be arranging for others to deal in financial products if there is a sufficient degree of connection between your actions and the issue of the financial products to the Customer.

22. As an insurance distributor you will generally be dealing in insurance products by arranging for an AFS licensee to issue them. For example, the following actions might constitute arranging to deal in insurance products:

- a. helping a customer complete an application form for a financial product and explaining the meaning of the questions on the form;
- b. if the form involves a choice, guiding the customer in his or her choice;
- c. otherwise adding value for the customer (e.g. providing information to the customer regarding the features of a product or renewing a policy).

Who can I provide the dealing service on behalf of if I am a distributor?

23. The Class Order requires that in providing the 'dealing' financial service you must be acting on behalf of the licensee (i.e. you must be acting as a representative of the AFS licensee who appoints you as their insurance distributor and must not be holding yourself out as someone who has their own AFS license). For example, in your role as an insurance distributor, you will be able to deal in general insurance products by issuing, or arranging for the issue, of a new insurance policy to a customer on behalf of the insurer. You may collect premiums (including renewal premiums) from Customers on behalf of the insurer.

24. It is also possible to purchase or renew insurance on behalf of a customer if you are appointed as an insurance distributor and are acting as a representative of the licensee that has appointed you at the time you provide this financial service to the Customer. You may not however provide financial advice to the Customer or make decisions on their behalf as to whether or not to purchase the financial product.

Renewal Agreements

25. You may enter into a written agreement with a Customer to renew their insurance policy in perpetuity, for instance, as part of an agency agreement. We recommend that such agreements should:

- a. be specific to a particular insurance policy (or policies as the case may be). In the event that the policy content or premium is varied by the insurer, you must seek new instructions (or a new Renewal Agreement) from the Customer which are specific to the modified policy or policies;
- b. make it clear that it is the Customer who has taken the decision to renew the policy in perpetuity – not the Agent;
- c. specify that the Agent is acting at all times on behalf of the AFS Licensee;
- d. include the name and contact details of the AFS Licensee on who's behalf the Agent is acting;
- e. specify that the Customer remains responsible for making any required disclosures to the insurer, such as declaring any change in circumstance that may affect the policy;
- f. include details of any remuneration or benefit the Agent will, or is likely to, receive from the AFS

Licensee for performing the service on their behalf; and
g. refer to details of the AFS Licensee's dispute resolution system.

26. In entering into standing agreements you will become responsible for ensuring that all included instructions are executed correctly. In the event that instructions are not carried out as per the agreement, the Customer may seek to make a claim against you for any damages suffered as a result. For example, if a Customer is unable to make a claim against a specific policy due to an Agent's failure to pay a renewal premium and keep it valid, the Customer may instead seek to make the claim against the Agent. For this reason, the REIA advises caution in entering into such standing agreements. To minimise risks, Agents should consider:

- a. whether or not your office procedures are able to accommodate the ongoing renewal of insurances for selected Customers;
- b. whether or not you have sufficient professional indemnity insurance to cover you in the event that instructions are not executed correctly; and
- c. obtaining legal advice to ensure that any specific agreement entered into does not carry an unacceptable level of risk for the Agent.

27. It is useful to consider the following scenario.

Scenario 1

George has decided to purchase an insurance policy from the AFS licensee who has appointed you as an insurance distributor. You assist George to complete the form and you submit the form to the relevant AFS licensee.

This is likely to constitute dealing and is permitted by the Class Order.

11 months later, George contacts you as his insurance premium is shortly due for renewal. He instructs you to transfer to the insurer from the moneys you hold for him in your trust account the amount of the renewal premium.

This payment, without more, is unlikely to constitute a financial service or alternatively attracts the 'clerks and cashiers' exemption.

Next year, George asks you to renew the policy of insurance on his behalf on an ongoing basis without bothering George with the details (or renewal documentation) each year and without waiting for specific advice from George as to whether or not he has made a decision to renew the policy. You enter into a written agreement with George which permits you to pay the insurance premium on George's behalf when it falls due provided that there have been no changes to the content or the price of the insurance policy. The agreement stipulates that George remains responsible for making any required disclosures to the insurer.

You may perform this function provided that it is clear within the renewal agreement that George has made the decision to renew the insurance policy in perpetuity and that George remains responsible for making any required disclosures to the insurer.

Three years later, you are advised by the insurer that the terms and/or the price of the insurance policy offered to George have been altered.

You may not renew the insurance policy without specific instructions from George regarding the new policy being offered. Only George may decide whether or not to accept the altered insurance policy being offered and you must not attempt to influence George's decision.

You must not provide financial product advice

28. The Class Order does not permit you to provide financial product advice. Financial product advice is a recommendation or statement of opinion that:

- a. is intended to influence a customer in making a decision in relation to a financial product; or
- b. could reasonably be regarded as being intended to have such an influence (s776B of the Corporations Act).

29. Not all communications with a customer will amount to financial product advice. For example, you can generally give customers factual information about financial products (e.g. the excess attributable to a particular Product) without that communication constituting financial product advice. It is important that you understand what actions may constitute financial product advice.

Factual information versus recommendation or opinion

30. Communications consisting only of factual information are unlikely to constitute financial product advice. Factual information is information whose truth or accuracy can not be reasonably questioned. For example, a statement that Canberra is the capital of Australia is clearly factual information. This is in contrast with a recommendation or statement of opinion which may be disputed. For example, a statement that Canberra is the most cosmopolitan city in Australia is clearly not factual information because it expresses an opinion which could reasonably be questioned.

31. However, it is important to note that if factual information is presented in a manner which implies or suggests a recommendation to acquire a product, it may still fall within the ambit of financial product advice. For example, an express endorsement of a product in response to a question is likely to constitute financial product advice even if factually correct. For example, a customer may ask you whether a particular policy of insurance is better than a policy in which you deal. Your policy may be identical to the competitor's but have a lower excess. If you respond by saying your policy is better, then that response may constitute financial product advice even though the statement may be factually correct. You are entitled to point out to them the features and terms of the policy of insurance however you must avoid making statements of recommendation or opinion that may influence the Customer in relation to the insurance policy.

32. To better explain what is meant by financial product advice, we provide the following scenarios.

Scenario 2

Susan wants to buy insurance for her property. She asks you to explain the difference between 'home and contents cover' and 'contents only cover' and asks for two quotes. You explain the differences in policy coverage between the two policies and provide the requested quotations.

This is likely to constitute the provision of factual information. Telling Susan the cost or estimated cost of a product does not constitute the provision of financial product advice.

Susan then asks whether it is worthwhile taking out home and contents cover. You explain the differences

in policy coverage between the two policies. Without referring to Susan's circumstances, you say that home and contents cover is the best choice for most people.

This is likely to comprise the provision of financial product advice because the context in which the response is given constitutes a value judgement about the comparative merits of the two policies.

Scenario 3

Jane has decided to purchase an insurance policy from the AFS licensee who has appointed you as an insurance distributor. You give Jane a PDS and point out the premiums applicable to home and contents cover and contents only cover.

This is likely to constitute the provision of factual information.

You then explain the significantly extended coverage for home and contents insurance and mention that you think the difference in premium justifies the home and contents cover.

This is likely to constitute the provision of financial product advice because it is a matter of opinion as to whether the home and contents cover is better value than the contents only cover. In these circumstances, you could reasonably regard it as intending to influence Jane to choose the home and contents cover.

33. As an insurance distributor, you will also need to make certain disclosures in relation to the AFS licensee's dispute resolution system and you may need to provide certain disclosure documents to the Customer. You should ask the AFS licensee that appoints you to provide instructions on what disclosures and documents you should give and when to give them.

34. Agents seeking to become an appointed distributor of an AFS licensee should consider whether or not their professional indemnity insurance provides coverage in relation to the activities that will be carried out as an appointed distributor. However, under the Class Order, the AFS licensee is fully responsible for the provision of the financial services by the distributor. Agents appointed as a distributor may wish to confirm this with their AFS licensee, and the Agent may wish to seek an indemnity from the AFS Licensee.

Section 3: Authorised representatives

35. If you wish, you may seek to become the authorised representative of an AFS licensee. This would generally involve entering into an 'authorised representative agreement' with an AFS licensee and notifying ASIC of your appointment. As an authorised representative, you are authorised to provide the financial services that your authorisation permits you to provide.

36. An appointment as an authorised representative may provide you with more broad and flexible options in relation to the provision of financial services. For example, it may be possible to become authorised to provide financial product advice, however, this would require you to meet certain levels of relevant skills and qualifications.

37. Agents seeking to become an authorised representative of an AFS licensee should consider whether or not their professional indemnity insurance provides coverage in relation to the activities that will be carried out as an authorised representative.