
FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE-
PROTECTING CONSUMERS (2020 MEASURES)) BILL 2020

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AFCA	Australian Financial Complaints Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Bill	Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Chapter 1

Implementing Recommendation 4.8 of the Financial Services Royal Commission

Outline of chapter

1.1 This Chapter provides an overview of the amendments in Schedule [x] to the Bill to implement recommendation 4.8 of the Financial Services Royal Commission to remove the exclusion of handling and settling an insurance claim, or potential insurance claim, from the definition of a ‘financial service’ in the *Corporations Act 2001*.

Context of amendments

1.2 For consumers, the intrinsic value of an insurance product lies in the ability to make a successful claim when an insured event occurs. Insurers and their representatives are expected to handle and settle an insurance claim fairly, transparently and without delay. When an insurance claim is not handled and settled in this manner, it can lead to disputes and financial loss to the insured, which can undermine public trust in the financial system.

1.3 The *Corporations Act 2001* sets out a regulatory regime designed to protect consumers of financial products and services. The regime generally requires persons that provide financial products or financial services to be licensed, comply with various conduct obligations including acting efficiently, honestly and fairly and disclose information to consumers about their products and services. This regime is overseen by ASIC, who can take enforcement action if licence holders breach their obligations.

1.4 Handling and settling an insurance claim is excluded from being a financial service by regulation 7.1.33 of the *Corporations Regulations 2001*. The effect of the exclusion is that persons are not obliged to act efficiently, honestly and fairly or comply with other disclosure or conduct obligations.

1.5 A number of recent inquiries have recommended removing the exclusion including:

- ASIC REP 633 Holes in the safety net: A review of Total and Permanent Disability insurance claims;
- the Financial Services Royal Commission;

- the Parliamentary Joint Committee Report on Corporations and Financial Services: Inquiry into life insurance industry; and
- ASIC REP 498 Life insurance claims: An industry review.

1.6 In recommendation 4.8 of the Financial Services Royal Commission, Commissioner Hayne recommended removing the exclusion of handling and settling an insurance claim from the definition of a ‘financial service’ in the *Corporations Act 2001*. Commissioner Hayne observed that there is no basis in principle or in practice for continuing to exclude handling and settling an insurance claim, or a potential insurance claim, from the definition of a ‘financial service’ in the *Corporations Act 2001*, as for consumers the intrinsic value of an insurance product lies in the ability to make a successful claim when an insured event occurs.

1.7 In response to the Financial Services Royal Commission, the Government agreed to implement recommendation 4.8. In March 2019, Treasury released a consultation paper seeking feedback on options to include handling and settling an insurance claim in the definition of ‘financial service’ in the *Corporations Act 2001*.

1.8 The regulation of handling and settling an insurance claim by registrable superannuation entity licensees will be addressed as part of the Government’s response to the Financial Services Royal Commission recommendations related to superannuation regulators (recommendations 3.8, 6.3-6.5). Consultation on that legislation will take place in early 2020.

Summary of new law

1.9 There are two key components in the Bill.

1.10 First, the Bill creates the new ‘financial service’ of handling and settling an insurance claim under the *Corporations Act 2001*. A person handles and settles an insurance claim for the purposes of the *Corporations Act 2001* if they:

- make a recommendation or state an opinion that could influence a decision whether to make an insurance claim;
- assist another person to make an insurance claim;
- assess whether an insurer is liable under an insurance product;
- make a decision to accept or reject all or part of an insurance claim;
- quantify an insurer’s liability under an insurance product;

- offer to settle all or part of an insurance claim; or
- satisfy a liability of an insurer under an insurance claim.

1.11 Secondly, the Bill amends the *Corporations Act 2001* to tailor the application of the existing financial services regime to the new financial service of handling and settling an insurance claim. These changes include:

- requiring the following persons to either hold an Australian financial services licence that covers handling and settling an insurance claim or become an authorised representative of such a licence holder in order to handle and settle an insurance claim:
 - an insurer;
 - a loss assessor or loss adjustor acting on behalf of an insurer;
 - an insurance fulfilment provider with authority to reject all or part of a claim;
 - an insurance claims manager;
 - an insurance broker who handles an insurance claim on behalf of the insurer; or
 - a person who provides financial advice to an insured and who handles and settles an insurance claim on behalf of the insurer;
- excluding recommendations or opinions that are reasonably necessary as part of handling and settling an insurance claim from the financial product advice regime; and
- requiring persons to provide a Statement of Claim Settlement Options to insureds who are retail clients if the insurer is offering to settle all or part of a general insurance claim through cash settlement instead of repairing or replacing the insured product.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
On 1 July 2020, handling and settling an insurance claim will be a ‘financial service’ regardless of when the insurance product was entered into.	Handling and settling an insurance claim is not a ‘financial service’ due to regulation 7.1.33 of the <i>Corporations Regulations 2001</i> .
The persons listed below who handle and settle an insurance claim on and after 1 July 2020 may be required to hold an Australian financial services licence that covers handling and settling an insurance claim, or become an authorised representative of such a licence holder: <ul style="list-style-type: none"> • insurers; • loss assessors and loss adjusters; • fulfilment providers with authority to reject all or part of a claim; • claims managers; • certain insurance brokers; and • certain financial advisors. 	Persons are not required to hold an Australian financial services licence to handle and settle an insurance claim.
Recommendations or opinions that are reasonably necessary as part of handling and settling an insurance claim are not considered financial product advice.	Recommendations made during handling and settling an insurance claim are not financial product advice.
Persons must provide a Statement of Claim Settlement Options if offering to settle a general insurance claim for a retail client through a cash settlement.	Persons handling and settling an insurance claim are not required to comply with any disclosure obligations.

Detailed explanation of new law

1.1 The *Corporations Act 2001* sets out a regulatory regime designed to protect consumers of financial products and services. The regime requires persons that provide financial products or financial services to be licensed and comply with various conduct obligations including acting efficiently, honestly and fairly and disclosing information

to consumers about their products and services. In addition, if the ‘financial service’ is provided to a retail client, the person must have an internal dispute resolution process in place and be a member of AFCA. ASIC has oversight of the regime and can take enforcement action if licence holders breach their obligations.

1.2 Handling and settling an insurance claim is excluded from being a ‘financial service’ by regulation 7.1.33 of the *Corporations Regulations 2001*. The effect of the exclusion is that persons handling and settling an insurance claim are not obliged to act efficiently, honestly and fairly, disclose important information to insureds or, if the claim is in relation to retail clients, have an internal dispute resolution process in place or be a member of AFCA.

1.3 The Bill and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020* make handling and settling an insurance claim a ‘financial service’. The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020* repeal regulation 7.1.33 of the *Corporations Regulations 2001*, removing the exclusion of handling and settling an insurance claim from the definition of a ‘financial service’ in the *Corporations Act 2001*. The Bill makes handling and settling an insurance claim a ‘financial service’ under the *Corporations Act 2001*.

1.4 The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020* also tailor the financial services regime under the *Corporations Regulations 2001* to the new ‘financial service’ of handling and settling an insurance claim.

Making handling and settling an insurance claim a ‘financial service’

1.5 The Bill and the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020* make handling and settling an insurance claim a ‘financial service’.

1.6 Financial services are listed in section 766A of the *Corporations Act 2001*. Section 766A is amended to include the new ‘financial service’ of handling and settling an insurance claim. A note is added to direct readers to the definition. [*Schedule [x], items 1, 4 and 5, sections 9, 761A and 766A of the Corporations Act 2001*]

1.7 A definition of handling and settling an insurance claim is added to the *Corporations Act 2001*. A person handles and settles an insurance claim if they:

- make a recommendation or state an opinion in response to an inquiry about a potential claim that could influence a decision to make an insurance claim;
- assist another person make an insurance claim;
- assess whether an insurer is liable under an insurance product;
- make a decision to accept or reject all or part of an insurance claim;
- quantify an insurer’s liability under an insurance product;
- offer to settle an insurance claim; or
- satisfy the liability of an insurer under an insurance claim.

[Schedule [x], items 1 and 8, section 9 and subsection 766G(1) of the Corporations Act 2001]

1.8 The definition of handling and settling an insurance claim captures a broad range of activities which extend from the initial inquiry by an insured before a claim is lodged to the formal lodgement and assessment of a claim.

Example 1.1

Theresa has insurance for her rare sports car. After being involved in a crash, she makes a claim on her insurance policy. The insurer appoints a claims management firm to handle Theresa’s claim, who then appoint a crash investigator and an assessor to investigate the crash and assess the damage to her car, as well as a private investigator and a medical professional to assess the extent of Theresa’s injuries and whether she was representing them accurately to the claims handler. Each of these parties are handling and settling Theresa’s insurance claim. However not all parties will be required to be licensed.

Example 1.2

Anita has a home and contents insurance policy covering her house. Anita’s shed in her backyard burns down in a fire. Anita makes an inquiry to her insurer to ask whether her shed is covered in her home and contents policy, but she is yet to formally lodge a claim. Representations made by her insurer about whether the shed is covered, or if Anita should lodge a claim, are part of handling and settling Anita’s claim.

1.9 For the purposes of the *Corporations Act 2001* the ‘financial service’ of handling and settling an insurance claim will be taken to be provided to the insured under the relevant insurance product (who may be a person insured as a third party beneficiary under the insurance contract). This will mean that if the insured is a retail client, the service will be treated as being provided to a retail client, and the Australian financial

services licence holder will need to comply with a variety of additional obligations under the *Corporations Act 2001*. [*Schedule [x], item 8, subsection 766G(3) of the Corporations Act 2001*]

Example 1.3

Tomislav is a member of his local sports club and is covered by the personal injury insurance arranged by the club. Whilst playing a match Tomislav is seriously injured and the club makes a claim on his behalf. The claim is handled by an external claims management firm acting on behalf of the insurer. The claims management firm is handling and settling the insurance claim despite the fact they are not the insurer under the insurance product. For the purposes of the *Corporations Act 2001*, the firm is taken to be handling and settling Tomislav's insurance claim, as Tomislav is the insured beneficiary, not the sports club or the insurer.

1.10 The 'financial service' of handling and settling an insurance claim can only be provided in relation to insurance products. The definition of a handling and settling an insurance claim is linked to the definition of an 'insurance product' in section 761A of the *Corporations Act 2001*. The definition of 'insurance product' does not include contracts of insurance that are not financial products such as health insurance, insurance provided by the Commonwealth, State and Territory insurance, insurance entered into by the Export Finance and Insurance Corporation¹ and reinsurance (see paragraphs 765A(1)(c) to (g) of the *Corporations Act 2001*). Such products are therefore outside the scope of these reforms. The handling and settling of a claim in relation to self-insurance and other insurance-like products are also outside the scope of these reforms.

1.11 Certain activities are excluded from handling and settling an insurance claim. The following activities, if undertaken by a lawyer, are not handling and settling an insurance claim:

- providing advice in a professional capacity as a lawyer, about matters of law, legal interpretation or the application of the law to any facts;
- providing advice in the ordinary course of activities as a lawyer that is reasonably regarded as a necessary part of those activities (except as prescribed by the regulations);
- any action taken by a lawyer to determine whether an insurer is liable to another person under an insurance product or to quantify the extent of the insurer's liability;
- any negotiation by a lawyer of the settlement of a claim under an insurance product; or

¹ Trading as Export Finance Australia.

- any conduct by a lawyer on behalf of another person if they are acting on instructions in their professional capacity, the conduct can be regarded as a necessary part of acting on those instructions and the lawyer is not receiving any benefit in relation to the conduct, other than their professional charges and reimbursement for expenses.

[Schedule [x], item 8, subsection 766G(2) of the Corporations Act 2001]

1.12 A regulation making power is provided to prescribe circumstances in which advice provided by a lawyer in the ordinary course of activities as a lawyer is part of handling and settling an insurance claim. This allows the Government to respond quickly and effectively to changing industry practices and ensure the regulatory regime is fit for purpose and achieves the policy intent. The regulation making power is consistent with the treatment of other financial services such as dealing in a financial product (see subsection 766C(7) of the *Corporations Act 2001*). *[Schedule [x], item 8, paragraph 766G(2)(b) of the Corporations Act 2001]*

Tailoring the financial services regime for handling and settling an insurance claim

1.13 A person handling and settling an insurance claim will only be required to hold an Australian financial services licence covering handling and settling an insurance claim or become an authorised representative of such a licence holder if they are one of the following persons:

- the insurer who issued the insurance product;
- a loss assessor or loss adjustor acting on behalf of an insurer;
- an insurance fulfilment provider who has authority to reject all or part of a claim;
- an insurance claims manager;
- an insurance broker who handles an insurance claim on behalf of the insurer; and
- a person who provides financial advice to an insured and also handles and settles an insurance claim on behalf of the insurer.

[Schedule [x], item 9, paragraph 911A(2)(ek) of the Corporations Act 2001]

1.14 An ‘insurance fulfilment provider’ is defined as a person who carries on a business of providing goods or services to a person insured under an insurance product in satisfaction of an insurance provider’s liability to the insured person. Examples of insurance fulfilment providers include smash repairers or builders contracted by an insurer to fulfil a

claim. Following natural disasters, insurers may provide fulfilment providers with delegated authority to accept a claim and begin immediate repair, under which the fulfilment providers would not require licensing. *[Schedule [x], item 4, the definition of ‘insurance fulfilment provider’ in section 761A of the Corporations Act 2001]*

1.15 An ‘insurance claims manager’ is defined as a person who carries on a business of handling and settling insurance claims on behalf of one or more insurers. *[Schedule [x], item 4, the definition of ‘insurance claims manager’ in section 761A of the Corporations Act 2001]*

1.16 A ‘loss assessor’ (also known as a loss adjuster) is defined as a person who carries on a business of either investigating the validity of claims under insurance products or assessing the extent of an insurers’ liability under insurance products in relation to which a claim is made. *[Schedule [x], item 4, the definition of ‘loss assessor’ in section 761A of the Corporations Act 2001]*

1.17 An insurance broker is defined in the *Insurance Contracts Act 1984* as a person who carries on the business of arranging contracts of insurance, whether in Australia or elsewhere, as agent for intending insureds. The regime will include brokers acting on behalf of insurers. *[Schedule [x], item 4, paragraph 911A(2)(ek) of the Corporations Act 2001]*

1.18 A person who holds an Australian financial services licence is required to comply with the general conduct obligations under section 912A of the *Corporations Act 2001*. This includes obligations to do all things necessary to ensure it acts efficiently, honestly and fairly in relation to handling and settling an insurance claim and to comply with the financial services law. At a minimum this will require licence holders to handle and settle an insurance claim:

- in a timely way, without undue delay, balancing the negative effects of delay on insureds with the insurer’s reasonable requirements for handling and settling an insurance claim;
- in the least onerous and intrusive way possible, including requesting information, medical examinations, surveillance and undertaking other assessment methods if it is strictly relevant to the claim;
- fairly and transparently, with information about the handling and settling process, the reason for information requests, and reasons for decisions provided to insureds; and
- in a manner that ensures adequate support is provided for insureds, in particular for vulnerable consumers.

Example 1.4

Jamie has two properties in different locations covered by separate insurance policies. They are both affected by a natural disaster. One property is located in an isolated area. The other property is in an area

that is easily accessible, which is quickly assessed and repaired by representatives of the insurer. In the isolated area the insurer has experienced a sudden spike in claims and has delegated the authority to accept a claim to a building professional. The building professional takes longer to attend to Jamie’s second claim due to the property’s isolation and the peak in claims. However, both insurance claims can be considered to have been handled and settled in a timely manner when taking into account the context of each insurance claim.

Example 1.5

Tien has a total and permanent disability policy from an insurer. Tien has an accident that prevents her from working and she makes a claim on her policy. The insurer collects information from Tien, appoints a claim assessor and requires Tien to be examined by an independent orthopaedic surgeon to assist with the claim. After the medical professional provides an opinion favourable to Tien, the insurer seeks the opinion of a second and third independent orthopaedic surgeon, requiring Tien undergo the same medical examination multiple times and causing significant delays. This would likely be unfair and inefficient, as the insurer is not handling and settling Tien’s insurance claim in a timely fashion, nor in the least onerous and intrusive way.

Example 1.6

Emily has an income protection insurance policy from an insurer. Emily is injured at work and lodges a claim with the insurer. The insurer appoints a claim assessor, and requires Emily undergo a number of medical examinations with independent medical practitioners. Due to Emily’s injuries she requires her husband to take time off work to assist her to attend the examinations. Emily informs the insurer she is unable to make one of the upcoming appointments because her husband is unable to take time off work that day and asks if it is possible to reschedule to the following week. The insurer refuses to reschedule and advises her payments may be suspended if she does not attend that appointment. This would likely be unfair as the insurer is not providing adequate support when handling and settling an insurance claim for a claimant they know to be vulnerable.

Example 1.7

Angus lodged an insurance claim for his stolen car. The insurance company appointed an investigator. As the investigation occurred, Angus’s insurer was increasingly difficult to contact. The claims manager failed to return phone calls and then went on holiday without a new manager being appointed. Angus contacted the insurer regularly. He was told to contact the investigator who would simply refer him back to the insurer. This conduct would likely be both unfair and inefficient when handling and settling Angus’s insurance claim.

Example 1.8

Xiaoxin claimed on her home and contents insurance policy in relation to a burglary. The insurer appointed an investigator to investigate Xiaoxin's claim. The investigator asked Xiaoxin to provide the following information in relation to her claim: extensive personal details, a police report number, criminal record checks, bank account statements, loan statements, telephone records (in a specific format) and a list of every person Xiaoxin had contacted over a specific time period, including their full names and addresses. The investigator did not explain why they needed this information. Xiaoxin made initial attempts to gather this information but finding it too onerous withdrew her claim. This conduct would likely not be honest or fair when handling and settling Xiaoxin's insurance claim.

1.19 In most cases, the insurer under the insurance product will be the holder of an Australian financial services licence that covers handling and settling an insurance claim, and therefore primarily responsible for the provision of those services. The insurer may appoint an authorised representative (for example, claims managers or loss assessors) or engage service providers to assist in the assessment or fulfilment of the claim (for example, medical practitioners, investigators, and other fulfilment providers). This will require the insurer to ensure all its representatives who handle and settle an insurance claim on its behalf have the relevant qualifications and are adequately trained to handle and settle an insurance claim in an efficient, honest and fair way.

Example 1.9

Lucas has an income protection policy with an insurer. Lucas has an accident that prevents him from working. Lucas lodges a claim with his insurer, who requires Lucas to be examined by a medical professional. The medical professional however was not qualified in the specific medical field in which they provided an opinion, and the insurer had received multiple complaints previously around their conduct. The medical professional is only responsible for the provision of their expert opinion. However, the insurer is responsible for failing to ensure that Lucas was examined by a medical professional who was qualified and competent to provide their opinion, and for continuing to engage this professional in spite of a number of complaints.

Example 1.10

Eben has a life insurance policy that he purchased directly from an insurer. The insurer appoints an external claims management firm as an authorised representative to handle and settling their insurance claims. After Eben passes away, his family lodges a claim. After some delay, the external claims management firm assesses the claim and recommends to the insurer that it be accepted. The insurer accepts the claim within two days of its receipt. Eben's family complain that the claim has taken an unreasonable amount of time to be settled. In determining which party may have unduly delayed the claim, the

claims management firm would be responsible for delays in processing lodgement and assessment. However the insurer remains responsible for any delay caused by its authorised representative, and for the entire process of handling and settling the insurance claim.

Example 1.11

Xue has a car insurance policy. Xue was recently involved in a car accident. Xue submits a claim to her insurer and after assessing the damage, the insurer authorises a preferred smash repairer to fix the car. However the preferred smash repairer rushed the job and did not repair the car back to a safe driving condition. Xue then became concerned about the roadworthiness of her car and produced a report from an independent repairer indicating the unsafe condition of her car. In this instance, the insurer was responsible for its preferred smash repairer’s action even though the smash repairer was the responsible party causing detriment to Xue.

1.20 Other licensed parties appointed by the insurer who are involved in handling and settling an insurance claim are only responsible for their own conduct.

Example 1.12

A loss adjusting firm with its own licence for handling and settling insurance claims has been managing a claim on behalf of an insurer. During the course of handling and settling the claim, the firm receives a complaint about the conduct of the appointed loss adjuster. As an Australian financial services licence holder, the loss adjusting firm has its own internal dispute resolution processes in place to independently review complaints, and is also a member of AFCA. The firm refers the file to the internal disputes resolution team and notifies the insurer of the dispute.

1.21 A person who handles and settles an insurance claim under an arrangement between a licensed intermediary and the insurer will generally not be required to obtain an Australian financial services licence. This is consistent with the treatment of other financial services such as dealing (see paragraph 911A(2)(b) of the *Corporations Act 2001*).

1.22 An insurance product issuer can handle and settle an insurance claim of a retail client without holding an Australian financial services licence if:

- the issuer has an arrangement with an intermediary that covers handling and settling an insurance claim; and
- the intermediary holds an Australian financial services licence covering handling and settling an insurance claim.

[Schedule [x], item 9, paragraph 911A(2)(e) of the Corporations Act 2001]

1.23 A insurance product issuer can handle and settle an insurance claim of a wholesale clients if:

- the issuer has an arrangement with an authorised intermediary (whether or not the arrangement covers handling and settling an insurance claim); and
- the authorised intermediary holds an Australian financial services licence (whether or not the licence covers handling and settling an insurance claim).

[Schedule [x], item 9, paragraph 911A(2)(em) of the Corporations Act 2001]

Example 1.13

An overseas insurer has an authorised intermediary in Australia that sells its products to retail clients. The authorised intermediary has a financial services licence. The intermediary authorisation does not cover the handling and settling of insurance claims and the intermediary's financial services licence does not cover the handling and settling of insurance claims. The insurer must either obtain its own financial services licence to handle insurance claims or the authorised intermediary must vary its licence and have the intermediary arrangement varied to cover the handling and settling of insurance claims.

1.24 A person who sells insurance products directly to a wholesale client and who is regulated by APRA, will be able to handle and settle their own wholesale insurance claims without needing to hold an Australian financial services licence. This preserves the existing exemption in paragraph 911A(2)(g) of the *Corporations Act 2001* and is consistent with the treatment of other financial services such as dealing.

Changes to financial product advice

1.25 Advice given in relation to financial products or classes of financial products is generally regulated as 'financial product advice'. When financial product advice is provided to a retail client, certain disclosure and conduct obligations apply under Parts 7.7 and 7.7A of the *Corporations Act 2001*.

1.26 Section 766B of the *Corporations Act 2001* is amended so that advice that may reasonably be regarded as a necessary part of handling and settling an insurance claim is excluded from being financial product advice. *[Schedule [x], items 6 and 7, subsection 766B(7A) and (7B) of the Corporations Act 2001]*

1.27 This will allow a person handling and settling an insurance claim to provide recommendations or opinions that are a necessary part of handling and settling an insurance claim without, for example, needing to comply with obligations that apply when personal advice is provided to a retail client, such as providing a Statement of Advice.

1.28 However, a person who holds an Australian financial services licence covering handling and settling an insurance claim will still be required to comply with the general obligations under section 912A of the *Corporations Act 2001*, including to act efficiently, honestly and fairly in relation to the provision of such recommendations or opinions.

1.29 If a recommendation or opinion is not a necessary part of handling and settling an insurance claim, the exclusion from the financial product advice regime will not apply. This means the person providing the advice will be required to provide appropriate disclosure and comply with other requirements under the financial product advice regime.

1.30 Types of advice that could reasonably be regarded as a necessary part of handling and settling an insurance claim, and therefore not require the disclosure typically associated with financial product advice, would include:

- recommendations of the most effective manner of submitting an insurance claim;
- recommendations of the most effective manner to obtain information necessary as part of submitting an insurance claim;
- recommendations as to the appropriateness of repairing or replacing an item in relation to an insurance claim;
- recommendations of ways to mitigate the extent of loss or damage associated with an insurance claim; and
- recommendations of ways to protect against the same or a similar loss in the future, that do not relate to different financial products.

1.31 A regulation making power allows Government to prescribe circumstances in which advice could reasonably be regarded as a necessary part of handling and settling an insurance claim. Prescribing certain types of advice as part of handling and settling an insurance claim will provide industry with greater certainty about whether certain recommendations and opinions are excluded from the financial product advice regime. Regulations made under this power would be subject to disallowance and therefore subject to appropriate parliamentary scrutiny. *[Schedule [x], item 6, subsection 766B(7B) of the Corporations Act 2001]*

1.32 Another regulation making power allows Government to prescribe circumstances in which advice could not reasonably be regarded as a necessary part of handling and settling an insurance claim. Similarly this power will provide industry with certainty about whether certain recommendations and opinions are subject to the financial product advice regime, in turn creating better outcomes for insureds. Regulations made

under this power would be subject to disallowance and therefore subject to appropriate parliamentary scrutiny. *[Schedule [x], item 6, subsection 766B(7B) of the Corporations Act 2001]*

Statement of Claim Settlement Options

1.33 If, instead of repairing or replacing the insured item, a person offers a cash settlement to settle all, or part of, an insurance claim for a retail client in relation to a general insurance product, a Statement of Claim Settlement Options must be given to the insured at the time the offer is made. *[Schedule [x], item 12, section 948B to 948D of the Corporations Act 2001]*

1.34 A note is added to direct readers to the definition of a Statement of Claim Settlement Options. *[Schedule [x], item 4, section 761A of the Corporations Act 2001]*

1.35 The Statement of Claims Settlement Options must be given to the insured by the person holding an Australian financial services licence covering handling and settling an insurance claim who is making the offer or their authorised representative. In most cases, this will be the insurer under the insurance product, or an authorised representative of the insurer. *[Schedule [x], item 12, section 948B of the Corporations Act 2001]*

1.36 A Statement of Claim Settlement Options is only taken to be given by a person to a client if it is in printed or electronic form, and:

- given to the client or their agent personally; or
- sent to the client or their agent at a nominated address or fax number; or
- otherwise made available to the client or their agent, as agreed between all parties.

[Schedule [x], item 10, subsection 940C(1) of the Corporations Act 2001]

1.37 The person providing the Statement of Claim Settlement Options must ensure the Statement is titled as such and includes the following:

- the options for settlement legally available under the insurance contract (for example, the option to have the insured product repaired or replaced and the option to receive a cash payment); and
- a statement setting out the amount of the cash settlement being offered and the sum insured under the insurance product; and
- a statement that the insured should obtain independent financial advice before settling; and
- any other information prescribed by the regulations.

[Schedule [x], item 12, section 948F of the Corporations Act 2001]

Example 1.14

Shirley lost her house in a fire. Shirley makes a claim on her home and contents insurance policy. The insurer assesses and accepts the claim. Shirley is provided with a statement of claim settlement options. The statement outlines that there are two options under the contract:

Option A: The insurer will rebuild Shirley’s home. This may take 12- 24 months.

Option B: The insurer will pay Shirley a cash settlement worth \$300,000, which Shirley may use to rebuild her home.

1.38 The regulations may prescribe further information that is required to be included in a Statement of Claim Settlement Options. This will provide Government with sufficient flexibility to respond to changing industry practices, and is expected to be used to take into account the various insurance industries and their practices. The regulations would be subject to disallowance and therefore will be subject to appropriate parliamentary scrutiny. *[Schedule [x], item 12, paragraph 948F(1)(d) of the Corporations Act 2001]*

1.39 A Statement of Claim Settlement Options must also be in writing, worded in plain English and presented in a clear and concise manner. This will assist insureds to make informed decisions about settling an insurance claim. *[Schedule [x], item 12, subsection 948F(5) of the Corporations Act 2001]*

1.40 Failures relating to Statements of Claim Settlement Options will trigger the general offences, civil penalty and civil liability provisions in Division 7 of Part 7.7 of the *Corporations Act 2001*. This ensures Statements of Claim Settlement Options are treated consistently in the *Corporations Act 2001* with other important disclosure documents and statements, such as Financial Services Guides and Statements of Advice.

1.41 For this reason, a Statement of Claim Settlement Options will be considered a ‘disclosure document or statement’ for the purposes of Division 7 of Part 7.7 of the *Corporations Act 2001*. *[Schedule [x], items 16 and 25, subsections 952B(1) and 953A(1) of the Corporations Act 2001]*

1.42 These amendments make it an offence if a financial services licensee is required to give a Statement of Claim Settlement Options, and does not give the Statement at the same time the offer of cash settlement is made under section 952C of the *Corporations Act 2001*. The maximum penalty for the strict liability offence in subsection 952C(1) is 50 penalty units, and the maximum penalty for the ordinary offence in subsection 952C(3) is 5 years imprisonment.

1.43 It will also be an offence if a financial services licensee or an authorised representative provides a Statement of Claim Settlement

Options that does not comply with the requirements in section 948E of the *Corporations Act 2001*. This includes the requirement to title the Statement of Claim Settlement Options as such on the cover or near the cover. The maximum penalty for this offence is 30 penalty units. *[Schedule [x], items 12, 22 and 27, section 948E, section 952JA and subsection 952JA(1) of the Corporations Act 2001]*

1.44 A Statement of Claim Settlement Options will be considered defective, if there is an omission from the Statement of material required by section 948F of the *Corporations Act 2001*. An offence or civil penalty may apply in relation to a defective Statement of Claim Settlement Options. *[Schedule [x], items 14, 15, 23 and 24, subsections 925B(1) and 953A(1) of the Corporations Act 2001]*

1.45 In relation to defective Statement of Claim Settlement Options, these amendments make it an offence for:

- a financial services licensee or an authorised representative to provide a defective Statement of Claim Settlement Options that they know to be defective under section 952D of the *Corporations Act 2001* – the maximum penalty being 15 years imprisonment; *[Schedule [x], items 14, 15 and 16, subsections 952B(1) and 952D of the Corporations Act 2001]*
- a financial services licensee or an authorised representative to provide a defective Statement of Claim Settlement Options (whether they know the Statement to be defective or not) under section 952E of the *Corporations Act 2001* – the maximum penalty being 2 years imprisonment; *[Schedule [x], item 17, paragraph 952E(2)(a) of the Corporations Act 2001]*
- a financial services licensee to knowingly provide a defective Statement of Claim Settlement Options or defective material relating to the Statement, to an authorised representative under section 952F of the *Corporations Act 2001* – the maximum penalty being 15 years imprisonment; *[Schedule [x], items 18 and 19, paragraph 952F(1)(b) and subparagraph 952F(1)(c)(i) of the Corporations Act 2001]*
- a financial services licensee to provide a defective Statement of Claim Settlement Options or defective material relating to the Statement, to an authorised representative (whether or not they know the statement to be defective) under section 952G of the *Corporations Act 2001* – the maximum penalty being 2 years imprisonment; and *[Schedule [x], items 20 and 21, paragraph 952G(1)(b) and subparagraph 952G(1)(c)(i) of the Corporations Act 2001]*
- a financial services licensee not to take reasonable steps to ensure its authorised representatives gives a Statement of Claim Settlement Options as and when required, and does not

give a Statement that is defective under section 952H of the *Corporations Act 2001* – the maximum penalty being 5 years imprisonment. *[Schedule [x], items 14, 15 and 16, subsections 952B(1) and 952H of the Corporations Act 2001]*

1.46 The requirement to not provide a defective Statement of Claim Settlement Options by a financial services licensee or an authorised representative (and whether they know the statement is defective or not) is a civil penalty provision under section 952E. The requirement for a financial services licensee to take reasonable steps to ensure its authorised representatives gives a Statement of Claim Settlement Options as and when is required is also a civil penalty provision under section 952H.

1.47 The standard maximum financial penalty for a contravention of a civil penalty provision under the *Corporations Act 2001* is:

- for individuals, the greater of:
 - 5,000 penalty units; or
 - if the court can determine – the benefit derived or detriment avoided because of the contravention, multiplied by three;
- for bodies corporate, the greater of the following:
 - 50,000 penalty units;
 - if the court can determine – the benefit derived or detriment avoided by the body corporate because of the contravention, multiplied by three;
 - 10 per cent of the annual turnover of the body corporate, but to a maximum monetary value of 1 million penalty units.

1.48 Additionally, failure to provide a Statement of Claim Settlement Options in accordance with new Subdivision B of Division 3A of Part 7.7 of the *Corporations Act 2001*, is a civil penalty provision. *[Schedule [x], items 11 and 26, section 948C and subsection 1317E(3) of the Corporations Act 2001]*

1.49 Subdivision B of Division 7 of Part 7.7 will also apply in relation to failures regarding Statements of Claim Settlement Options. This will allow clients to recover loss or damage resulting from specified failures (for example, where the client was not given the Statement of Claim Settlement Options, or the Statement was defective) from the financial services licensee, or in some cases, the authorised representative. *[Schedule [x], items 23, 24 and 25, section 953A of the Corporations Act 2001]*

1.50 The obligations surrounding a Statement of Claim Settlement Options cannot be contracted out of. *[Schedule [x], item 13, paragraph 951A(b) of the Corporations Act 2001]*

Consequential amendments

1.51 The definition of professional investor is amended to allow certain parties handling and settling an insurance claim to be retail clients. Currently under the *Corporations Act 2001* a party is considered a retail client for certain types of financial products as long as they are not a professional investor, in which case they become wholesale clients and lose a variety of consumer protections under the Act. The Act is amended to ensure that small businesses that become licensed due to the removal of the exclusion of handling and settling an insurance claim from the definition of ‘financial product’ will continue to receive the appropriate level of consumer protection under the *Corporations Act 2001*. *[Schedule [x], item 2, section 9 of the Corporations Act 2001]*

1.52 The definition of binder in section 761A of the *Corporations Act 2001* is updated to include the handling and settling an insurance claim. *[Schedule [x], item 3, section 761A of the Corporations Act 2001]*

1.53 A person will not need to provide a client with a Financial Services Guide if the ‘financial service’ provided consists only of handling and settling an insurance claim. This will allow the party handling and settling the insurance claim to process the claim more quickly without unnecessary regulatory burden, particularly in peak periods such as those associated with natural disasters. *[Schedule [x], item 11, subsection 941C(7A) of the Corporations Act 2001]*

Application and transitional provisions

1.54 The legislation commences on 1 July 2020.

1.55 Any person is able to handle and settle an insurance claim without holding an Australian financial services licence up until 31 December 2020. *[Schedule [x], item 28, section 1668 of the Corporations Act 2001]*

1.56 However a person will be only be able to handle and settle an insurance claim without holding an Australian financial services licence between 1 January 2021 and 30 June 2021 if they:

- have lodged a complete application for an Australian financial services licence or to vary an existing Australian financial services licence seeking an authorisation to handle and settle an insurance claim; or
- it is stated that they will be made an authorised representative to handle and settle insurance claims on behalf of the applicant, in either an application for an Australian financial services licence or an application for a variation to an Australian financial services licence which will authorise licensee to the handle and settle an insurance claim.

[Schedule [x], item 28, section 1669 to 1670 of the Corporations Act 2001]

1.57 On and after 1 July 2021, a person handling and settling an insurance claim must either hold the appropriate Australian financial services licence or be an authorised representative of such an Australian financial services licence holder.

1.58 A person who has lodged an application for an Australian financial services licence, or varied an existing licence to cover handling and settling an insurance claim will no longer be able to handle or settle an insurance claim between 1 January 2021 and 30 June 2021 if they:

- withdraw their application for an Australian financial services licence which covers handling and settling an insurance claim or withdraw their application to vary an existing licence to cover handling and settling an insurance claim;
- have their application for an Australian financial services licence which covers handling and settling an insurance claim or their application to vary an existing licence to cover handling and settling an insurance claim rejected for lodgement by ASIC under subsection 1274(8) of the *Corporations Act 2001*; or
- have their application for an Australian financial services licence which covers handling and settling an insurance claim or their application to vary an existing licence to cover handling and settling an insurance claim refused by ASIC.

[Schedule [x], item 28, section 1669 to 1670 of the Corporations Act 2001]

1.59 A person expressly named in an application for an Australian financial services licence which covers handling and settling an insurance claim, or an application to vary an existing licence to cover handling and settling an insurance claim will no longer be able to handle and settle an insurance claim between 1 January 2021 and 30 June 2021 if the applicant that names the person:

- withdraws their application for an Australian financial services licence which covers handling and settling an insurance claim or withdraw their application to vary an existing licence to cover handling and settling an insurance claim;
- has their application for an Australian financial services licence which covers handling and settling an insurance claim or their application to vary an existing licence to cover handling and settling an insurance claim rejected from

lodgement by ASIC under subsection 1274(8) of the *Corporations Act 2001*; or

- has their application for an Australian financial services licence which covers handling and settling an insurance claim or their application to vary an existing licence to cover handling and settling an insurance claim refused by ASIC. *[Schedule [x], item 28, section 1669 to 1670 of the Corporations Act 2001]*

1.60 The reforms will apply to handling and settling an insurance claim or a potential insurance claim that occurs after 1 July 2020 under an existing insurance product. However the reforms will not apply to handling and settling an existing insurance claim or a potential insurance claim that has been made before 1 July 2020. *[Schedule [x], item 28, section 1668 of the Corporations Act 2001]*