

# The sale of add-on insurance and warranties through caryard intermediaries

Legal Aid NSW submission to ASIC  
*October 2017*

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**Legal Aid**   
NEW SOUTH WALES

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# About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to provide a submission to ASIC's Consultation Paper 294, *The sale of add-on insurance and warranties throughout caryard intermediaries*.

Legal Aid NSW's Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, insurance, employment, social security and access to essential social services. The Civil Law practice provides legal services to people through the Central Sydney office and 13

regional offices. Currently, we have over 150 civil lawyers who provide advice across all areas of civil law, and specialist teams that assist with insurance issues affecting particularly disadvantaged clients.

This submission draws on the casework experience of our civil lawyers in providing these services.

Our submission addresses the questions in the Consultation Paper, following the numbering set out in the Paper. The names of individuals and companies in the case studies have all been changed.

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## Introduction

Legal Aid NSW welcomes ASIC's consultation on the sale of add-on insurance and warranties through caryard intermediaries.

Legal Aid NSW strongly supports the proposal to establish a deferred sales model for add-on insurance products and warranties. A deferred sales model is vital to reduce the significant consumer harm occurring through the sale of add-on insurance by caryard intermediaries.

A deferred sale model would prohibit the sale of add-on insurance products until the expiration of a defined period after the sale of a car. Add-on insurance products include:

- consumer credit insurance (CCI), covering a borrower's capacity to make repayments under a car loan
- loan termination insurance, where the consumer returns the vehicle
- guaranteed asset protection (GAP) insurance, covering the difference between what a consumer owes on their car loan and an amount received under their comprehensive insurance policy, if the car is a total loss
- tyre and rim insurance, and
- mechanical breakdown insurance (which often only commences after the manufacturer's warranty has expired).

The deferral period should start after delivery of the car and it should be thirty days long. This would allow the consumer time to compare and consider their options, absent the decision fatigue induced by the car purchase experience. It is also likely that the consumer will have made at least one payment towards any car loan during the thirty day period, meaning that the consumer is better equipped to assess their financial situation, particularly their ability to finance extra insurance, after the car purchase.

The deferred sales model is only one component in improving consumer outcomes in the add-on insurance industry. Another key component is improving consumer understanding of, and engagement with, their decisions about add-on insurance. To achieve this, interactive and meaningful communication with the consumer about the cost, coverage and value of add-on insurance is essential.

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## Deferred sales model

*E1Q1 Do you consider that it is appropriate to apply a deferral period to the sale of add-on products by caryard intermediaries?*

*E1Q2 To what extent would a deferral address the consumer harms identified in this market?*

Yes. Legal Aid NSW considers that a deferral period should apply to the sale of add-on products by caryard intermediaries.

ASIC's Reports 470, 471 and 492<sup>1</sup> describe key failings in the add-on insurance market, including that add-on insurance products represent poor value for consumers, and that the payment of high commissions creates a risk of unfair sales and adverse outcomes. This reflects our casework experience. These failings disproportionately affect our clients who are the most vulnerable in the community, often with complex needs or mental health issues.

### **Case study: Mr Smith**

Mr Smith is a middle-aged Aboriginal man living in a rural part of Northern NSW. Mr Smith is in and out of work and currently receives Newstart Allowance.

In 2016, Mr Smith purchased a car on finance through Star Automotive. Upon his purchase, the caryard intermediary also sold him CCI and GAP insurance on behalf of the insurer, Star Insurance.

The CCI premium was \$4834.75 and the GAP insurance premium was \$1435. Star Automotive received 20 per cent commission for the sale of CCI and 50 per cent commission for the sale of GAP insurance.

During the sale, the salesperson told Mr Smith that he had to buy the add-on products as part of the loan. The salesperson rushed through the sales process, and did not give Mr Smith an opportunity to properly read the paperwork or ask questions before he signed the contract. The salesperson did not explain that the premiums would exceed \$6,000, and that interest would accrue on the premiums over the term of the loan.

When Mr Smith left the caryard, he realised he would have to pay \$65,000 on a car worth \$34,000. Mr Smith already had Total and Permanent Disability and Temporary Salary Continuance cover through his superannuation. The CCI policy was less beneficial and substantially more expensive than the policies connected to Mr Smith's superannuation.

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<sup>1</sup> ASIC (2016) *Buying add-on insurance in car yards: Why it can be hard to say no* (REP 470); ASIC (2016) *The sale of life insurance through car dealers: Taking consumers for a ride* (REP 471); ASIC (2016) *A market that is failing consumers: The sale of add-on insurance through car dealers* (REP 492).

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Had there been a deferral period for the sale of the add-on products commencing upon delivery of the car, Mr Smith would have had the opportunity to calculate the overall amount payable on the loan, review his existing insurance policies, work out the true cost of the add-on products versus the actual cover provided, and seek legal advice if necessary. Mr Smith instructs that had he known this information he would not have purchased the policies.

As the case study shows, a deferral period would allow consumers, like Mr Smith, relief from the high-pressure sales tactics often found in caryard sales and the decision fatigue that results. It would provide consumers with the time necessary to consider their insurance options, seek advice, and understand the affordability and value of the product. With this information, the consumer is better placed to decide if the add-on insurance product is suitable for them and worth purchasing.

*E1Q4 Would the model need to apply differently to the new and used car markets? In what ways could the model differ to be effective across the two markets?*

No. The model should not apply differently to the new and used car markets.

We cannot identify any differences in the sale of add-on insurance between the two markets which would justify a different model. A consistent model has the benefits of reducing consumer and industry confusion, and reducing costs to industry and the regulator in enforcing compliance.

*E1Q5 What are the preconditions for a competitive online market? How can a deferred sales model contribute to this outcome?*

Comparable and complete information about the costs, risks and benefits of products are needed to ensure a competitive online market. A deferred sales model would provide consumers with the opportunity to investigate these options prior to purchase, in the same way that many consumers will research their car purchase.

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*E1Q6 – Could the objectives of a deferred sales model be achieved in a different way or could any complementary measures better ensure our objectives are achieved?*

As noted at E1Q1 and E2Q2, the current sales process for add-on products is not designed to empower consumers or to assist them to make informed decisions. If the proposed deferral model is introduced it should be complemented by a strategy to improve consumer understanding about add-on insurance products.

While the deferred sales model may work to insert a pause into the sales process for add-on products, this pause does not provide full protection to consumers. Consumers will inevitably be approached at some point to purchase the add-on products. It is at this point that the consumer should be educated and aware of the products on offer so they may make an informed choice.

Consumer engagement, education and awareness must be delivered through strong and effective consumer communication. Effective communication should go beyond merely referring consumers to a link for more information or handing them a booklet to read. In our view, this approach is too passive and is a likely reason for the limited impact of the UK deferred sales model.<sup>2</sup>

Our responses to E1.3Q1, E1.3Q4 and E1.3Q5 provide further detail about how robust consumer communication might be achieved.

*E1Q7 If a deferred sales model was introduced, are there any existing related obligations on insurers, finance providers and car dealers that would no longer be appropriate and could be removed?*

No. We do not consider that there are any existing obligations on insurers, finance providers and car dealers that could be removed should the deferred sales model be introduced. In our view, additional obligations should be placed on insurers and distributors of insurance products in conjunction with the deferred sales process.

We note the comments in our submission to Treasury's Design and Distribution Obligations and Product Intervention Power proposals paper<sup>3</sup> that there should be design and distribution obligations for issuers and distributors of financial products, specifically insurance products.

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<sup>2</sup> See p39-40 of the Consultation Paper, noting that the UK reforms have had little impact on the volume of sales.

<sup>3</sup> Legal Aid NSW submission to the Treasury, *Design and Distribution Obligations and Product Intervention Power*, March 2017

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At a minimum, we consider that the design and distribution obligations should require insurers to design products that meet the needs of a clearly identified target market, and that provide a tangible benefit for these consumers at reasonable value. Insurers and distributors should also ensure that their products do not reach consumers for whom they are ill-suited and offer little benefit. A target claims ratio that sets a benchmark for the number of claims that are approved each year could be developed for each product so that there is quantitative evidence that consumers in the target market do in fact benefit from the product.

Insurers should have processes in place for monitoring their compliance with these obligations, including

- monitoring the number of complaints
- collecting data relating to claims outcomes
- assessing whether an insurance product is reaching its target market, and
- assessing whether the product continues to offer a benefit to consumers.

### Testing consumer comprehension

*E1Q8 What is the most effective way of testing whether consumer understanding has improved due to a deferred sales model? What metrics would provide the best way of measuring consumer comprehension?*

As noted at our response to E1Q6, improving consumer understanding of add-on insurance products is essential. Legal Aid NSW supports consumer testing to measure the success of the reforms, and to shape future reforms.

#### *A market study*

One option is to conduct a market study of consumers. This could be conducted at the point where the consumer signs up to the add-on insurance product. The study could test the consumer's knowledge of the product at point of sale using questions such as: what is the product you have purchased; what are the main features of the product; what are the main exclusions of the product; and how much is your premium? Where the consumer does not pass the test, there could be an obligation to provide further information.

A market study could also be conducted after a longer period of time, such as a year. The second study could ask similar questions to the first study, and also ask: what is the value of the product to you; have you claimed on the product; and do you want to continue paying for the product? The results from the market studies could be compared against the consumer evidence provided to ASIC during the preparation of Reports 470, 471 and 492 to show how consumer understanding has changed.

Consumer testing should have the following characteristics:

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- Testing should be done by an independent body, such as ASIC, or a research body, such as a university.
  - Testing should focus on a representative group of consumers with a variety of demographic indicators, including vulnerable consumers.
  - Testing should be done at various times, including just after the product has been bought and again after a period of time has passed.
  - Testing should generate data on the value of the car bought, whether it was a new or used car, the nature of the add-on insurance, and whether the customer made any claims in relation to it.
  - Testing should ask the consumer to explain the key features of the product purchased and compare this to the contract documents.
  - Testing should ask questions such as why the consumers bought the product, or why they did not, whether they would have bought the product in hindsight, whether the product was useful, whether they asked for independent financial or legal advice, whether they thought it was good value at first and whether their view changed.
  - If it becomes clear at the end of the testing that the consumer did not understand the product, the test should provide the consumer with referrals information should the consumer wish to challenge the sale of the product.
  - Testing should generate data on various dealers and if possible, this information should be published. These published figures would exert appropriate competitive pressure for dealers to act more ethically and ensure that their customers understand the products they are sold.

#### *Other approaches*

We note that some recent research points to the limitations of disclosure in ensuring consumer comprehension.<sup>4</sup> In our view, it is important for ASIC to adopt innovative approaches, in conjunction with disclosure, to enhance consumer understanding.

As the ASIC Consultation Paper notes at paragraph 221, the use of websites and apps could facilitate the development of an online distribution channel, with its potential benefits for competition. A website and/or app could function as an online marketplace for all purchases of add-on insurance. The marketplace could enable users to compare different products and encourage competition between insurers. It could also incorporate interactive tools for better understanding, including an online test for the consumer prior to purchasing the product to make sure they understand the product's key features. However, we note that some vulnerable consumers with low computer literacy or limited

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<sup>4</sup> See for example: Insurance Council of Australia *Consumer research on general insurance product disclosures* (2017)

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access to smartphones and tablets may not be able to access a website or app. Alternative measures should be put in place to ensure accessibility for all consumers.

Another approach to improving consumer comprehension is ‘performance based regulation’ as suggested by Professor Lauren Willis.<sup>5</sup> This type of regulation creates performance standards for consumer comprehension or suitable consumer product use. Providers of financial products are motivated to ensure that customers understand products and purchase appropriate products, in order to comply with regulation. Such an approach can align the interests of industry with the goals of regulators.

*E1Q9 Should a consumer opt-out mechanism be included?*

No. Legal Aid NSW strongly opposes a consumer opt-out mechanism. We share the concerns expressed in the Consultation Paper at paragraphs 191–192 about introducing an opt-out mechanism.

As noted at our responses to E1Q1 and E1Q2, a mandated deferred sales model would provide all consumers with relief from high-pressure sales environments to assess the cost, suitability and value of add-on products and make an informed decision about purchasing those products. Including an opt-out mechanism in these reforms would create a risk of caryard intermediaries engaging in unfair practices to avoid the deferral period. Further, it could be difficult for consumers to prove that caryard intermediaries have engaged in such unfair practices.

Legal Aid NSW notes that the UK deferred sales model for GAP insurance includes an opt-in arrangement to reduce the deferral period from 4 days to 1 day after GAP insurance product information has been provided to the consumer. We consider this element of the UK model to be a weak point that may have contributed to the limited success of reforms in the UK.<sup>6</sup>

## Commencement of the deferral period

*E1.1Q1 Which of the proposed options in paragraph 193 for commencement of the deferral period would be preferable and why (please suggest other options if relevant)?*

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<sup>5</sup> See for example: Willis, LE ‘Performance Based Consumer Law’ (2015) 82 *University of Chicago Law Review* 1309

<sup>6</sup> See pages 39-40 of the Consultation Paper.

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The deferral period should start after the vehicle has been delivered to the consumer and the consumer communication has been provided (Option C). Legal Aid NSW recommends that intermediaries should be prevented from making the consumer communication (and triggering the deferral period) until at least one day after the consumer has taken possession of the vehicle. Our preference is for the deferral period to operate as follows:

*Delivery of car → Consumer communication provided at least 24 hours later → Deferral period commences after consumer communication provided.*

One of the most common scenarios that arises in our add-on insurance casework is consumers confusing optional add-on products with comprehensive insurance required under the loan. Mandating that consumers have possession of the vehicle before the consumer communication takes place would help to disconnect the purchase of add-on products from the purchase of comprehensive insurance and vehicle finance approval. This would help make clear to consumers that the add-on products are optional. Delivery also provides the most easily documented, readily verifiable commencement point for the deferral period. More detail can be found at our response to E1Q1.3.

If the deferral period commences as we propose, consumers could use this period to assess the cost, suitability and value of add-on products and make an informed purchasing decision outside the high-pressure sales environment.

<p><i>E1.1Q2 Which sales sequence is most likely to meet our stated objectives and why?</i></p>
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Sales sequence B, where the consumer is asked to select the add-on products they want to buy after they have chosen the vehicle and finance is approved, is most likely to mitigate consumer harm from the inappropriate sale of add-on insurance and warranties.

Provided ASIC adopts Legal Aid NSW's proposal in E1.1Q1 that the deferral period not commence until after the vehicle is delivered, sales sequence B would benefit consumers in the following ways:

- consumers can assess add-on products based on risks associated with the particular car
- consumers know the exact cost of add-on products (because interest rate and loan term are finalised)
- consumers can assess the impact of add-on products on the loan amount borrowed and loan term and can compare the total loan cost with and without add-on products, and
- consumers are less likely to experience decision fatigue relating to vehicle selection, finance, compulsory third party and comprehensive insurance.

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One disadvantage of sales sequence B relates to the timing of vehicle finance. If the consumer proposes to finance the add-on product under a related loan contract, the consumer and lender will have to adjust the loan amount or term to fund the add-on products. However, we note that if the deferral period applies after vehicle delivery, this disruption will apply to all proposed sales sequences. We do not think that this disadvantage outweighs the benefits of sales sequence B. Further, we consider that it may be overcome by establishing clear communication channels between the lender, intermediary and consumer.

In our view, the consumer protection advantages of sales sequence B are necessary to counteract the systematic problems with add-on insurance sales, and outweigh any potential inconvenience.

*E1.1Q3 How could the point at which the deferral period commences be easily documented to be readily verified by all relevant parties?*

Legal Aid NSW considers that vehicle delivery is the most easily documented and readily verifiable point in the sales process. Delivery follows loan approval, which is already extensively documented. The caryard also documents car delivery and it is the point in the sales process that consumers are most likely to remember in detail.

The caryard intermediary should bear the onus of establishing that they have complied with and accurately documented the start of the deferral period.

*E1.1Q4 If the deferral period commenced at vehicle delivery, could short-term 'bridging' insurance be offered to cover the deferral period? What does insurers' claims data demonstrate about the likelihood of a claim shortly after delivery?*

Short-term bridging insurance should not be offered to cover the deferral period. Although we acknowledge there is some risk associated with this cover not being offered, we consider this risk small when compared with the additional cost and consumer harm that may result from bridging insurance.

It is likely that the sale of bridging insurance would occur in similar poor conditions to the current sale of add-on insurance. It may give rise to high-pressure sales of a low value product at a time when consumers feel decision fatigue and may not be equipped to understand the terms and conditions of the product. For these reasons, we consider that bridging insurance is unnecessary and may continue the consumer harms that the proposed reforms are trying to remedy.

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## Duration of the deferral period

*E1.2Q1 What would be the appropriate duration of the deferral period within the range of 4-30 days and why?*  
*E1.2Q2 Should the duration of the deferral period be different for new and used cars?*

Legal Aid NSW considers that the appropriate duration of the deferral period is 30 days from the date the consumer communication is provided, at least one day after car delivery. Our response at E1.1Q1 provides further detail as to how this could operate.

A 30-day deferral period means it is likely that the consumer will have made at least one payment to their lender. This will allow the consumer to have a better understanding of their financial position following the purchase, and assess if they are able to afford an increased payment to take out an insurance product.

A 30-day deferral period would also allow the consumer the necessary time after a pressured sales experience to consider the value of the product to them, seek advice and research other alternatives.

We do not consider that the duration of the deferral period should be different for new and used cars. We refer to our response at E1Q4 for further detail.

## Consumer communication

*E1.3Q1 Should providers be required to take active steps to ensure consumers read and understand information about their products before they can buy them?*

Yes. Providers should be required to take active steps to ensure that consumers understand information about add-on products before they can buy them. In our view, a crucial part of the success of the deferred sales model is increased consumer engagement with and understanding of add-on insurance.

Legal Aid NSW's client base includes some of the most vulnerable consumers, including those who have low literacy levels, come from culturally and linguistically diverse backgrounds, are elderly or have disabilities. Any efforts to ensure consumers read the relevant information must be tailored to the most disadvantaged consumer.

Our responses to E1.3Q2 – E1.3Q5 provide further detail about how these obligations on providers might operate in practice.

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*E1.3Q2 What forms of innovative disclosure could be used to better inform consumers about their insurance decision?*

Legal Aid NSW supports the use of innovative disclosure to ensure that all consumers, especially vulnerable consumers, understand the relevant information and to encourage consumer engagement with the decision-making process. Any disclosure communication should be developed in consultation with consumer advocates.

We suggest that plain language principles and infographics could be employed to better inform consumers about their insurance decision. As a good example of this in practice, we note the Consumer Financial Protection Bureau's recent redraft of a credit card agreement. The agreement is a simple, easy to read document which provides relevant information about the product's terms and conditions.<sup>7</sup>

Legal Aid NSW would also support the use of an online 'app', as suggested in paragraph 219 of the Consultation Paper, to engage consumers with the information gathering and decision-making process. If consumers are required to engage with disclosure material, they are more likely to understand the information and make informed decisions about whether the product is appropriate for them.

The platform could require the consumer to confirm their understanding of a product before signing up.<sup>8</sup> This could be a test, which poses a series of questions about the product, including what it is, how it operates and its cost.

The platform could have a function to read the information to consumers and show a video displaying the information pictorially. This would be of particular benefit to consumers with low literacy or consumers who are visually impaired. Ideally, the platform would also have the ability to provide information in multiple languages to assist consumers who have limited English skills.

The platform could present information about add-on products in a standardised way so that consumers may easily compare products. This could be in a table format, which clearly sets out information about coverage, costs and the likelihood of events occurring in separate categories.

We note that some consumers will not be able to engage with a technological disclosure model and so paper-based disclosure should still be available.

The disclosure process could also prompt a consumer to use a Moneysmart calculator to calculate the cost and value of the add-on insurance product. This may be a useful and engaging way to prompt consumers to consider the utility and affordability of the product prior to purchasing.

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<sup>7</sup> Consumer Financial Protection Bureau, *Know Before You Owe: Credit Cards*

<https://www.consumerfinance.gov/data-research/credit-card-data/know-you-owe-credit-cards/>

<sup>8</sup> See ASIC Consultation Paper 294 at [222]

*E1.3Q3 What information should the consumer communication include?*  
*E1.3Q4 Should providers be required to inform consumers about the availability of other products that provide similar cover, but may be cheaper?*  
*E1.3Q5 If so, what information should the consumer communication include?*

Employing the disclosure techniques discussed at E1.3Q2, the consumer communication should include:

- notice to the consumer that they are not required to take out add-on insurance products in order to purchase or lease the vehicle
- information about the key terms and conditions of the product, including what events the product covers
- information about the recent claims ratio for the product
- information about the commissions that the intermediary receives from the insurer
- the total cost of the product, including a worked example of what the consumer would pay with and without the add-on insurance
- links to Moneysmart calculators so consumers can calculate the costs of products
- information about referrals to financial counselors and legal advice, including Legal Aid NSW and community legal centres
- a comparison with other add-on products in terms of the cost, coverage and claims ratio, and
- if the product is essentially a warranty against defects, a clear statement about the trader's obligations and the consumer's rights under the Australia Consumer Law and any relevant state based motor dealer legislation.

## Mechanical breakdown insurance and warranties

*E1.4Q1 Should a separate deferred sales model be introduced for these products? If not, how could the particular risks associated with these products be addressed?*

No. We do not consider that a separate deferred sales model should operate in respect of mechanical breakdown insurance and warranties.

Legal Aid NSW is concerned about the particular risks to consumers purchasing these products. In particular, because cover under these products often commences only after the manufacturer's warranty ends, they typically represent little, if any, value to

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consumers, as the case study below shows. Our submissions to the Australian Consumer Law Review also provide further detail about our concerns with mechanical breakdown insurance and warranties.<sup>9</sup>

**Case study: Daniel**

Daniel purchased a second hand vehicle from a car dealership. At the point of sale, Daniel was told that he should purchase mechanical breakdown insurance to protect him in case the car breaks down. Daniel initially said that he did not want it, but the sales person told him that he would regret it if his car broke down, so he agreed to purchase the insurance at a significant cost.

Daniel was not told that the mechanical breakdown insurance he purchased would not come into effect for seven years. Three years later, Daniel sold the car, at which point the car was still under the manufacturer's warranty. Daniel lost money paying the premium for this product before he was even entitled to make a claim under it.

In circumstances where products represent very little or nil value to consumers, or do not provide a sufficiently tangible benefit to consumers, we do not think that these products should be offered to consumers at all.

However, if these kinds of products are to be sold to consumers, Legal Aid NSW considers that the same deferred sales model should apply to these products as to other add-on insurance products.

Applying the same deferred sales model will allow for a uniform and consistent approach, ensuring that consumers and providers are not required to navigate varying sales processes when buying and selling these products.

Consumer communication for mechanical breakdown insurance should ensure that consumers understand:

- the date at which cover under a policy will commence
- the specific events the insurance will cover
- the risks associated with buying the product
- that the vehicle is subject to consumer guarantees under the Australian Consumer Law
- any other guarantees or warranties that apply to the vehicle that may affect the value of any mechanical breakdown insurance being offered, and

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<sup>9</sup> Legal Aid NSW submission to Consumer Affairs Australia and New Zealand (December 2016), 'Australian Consumer Law Review – Interim Report'; Legal Aid NSW submission to Consumer Affairs Australia and New Zealand (May 2016), 'Australian Consumer Law Review'

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- any terms of cover that restrict the capacity of consumers to assess the future value of the product.

## Supervision obligations for product providers

*E2Q1 Given the limitations in monitoring conduct at the point of sale, what changes would be necessary to ensure providers are effectively supervising their representatives?*

*E2Q2 What risk indicators could be introduced to improve the capacity of providers to monitor their representatives?*

The current level of supervision and monitoring by providers of their authorised representatives is inadequate and ought to be improved alongside the introduction of a deferred sales model.

Legal Aid NSW frequently advises vulnerable consumers who have been subject to unfair sales tactics when purchasing a car. Current arrangements do not adequately protect consumers at the point of sale, especially where sales are substantially driven by the receipt of commissions.

We strongly recommend that product based commissions should be removed altogether. Paying representatives based on sales encourages salespeople to act in their own interests, rather in the consumer's interests. As was clear in ASIC's Reports 470, 471 and 492, this has led to very poor consumer outcomes. We refer to our comments in our submission to the Australian Bankers' Association's *Independent Review of Product Sales Commissions and Product Based Payments* for further detail.<sup>10</sup>

However, if product based commissions are not prohibited, Legal Aid NSW considers that clear minimum requirements on supervision for insurers and product providers should be established. Providers should be required to effectively supervise sales representatives and quickly identify and compensate consumers who have been subject to unfair conduct. Legal Aid NSW expects providers to not only design and implement policies and procedures, but to actively ensure compliance by their representatives.

To achieve this, Legal Aid NSW supports the development and use of sophisticated risk indicators to ensure effective supervision of representatives. We broadly agree with the risk indicators identified at paragraph 257 of the Consultation Paper. In particular, we consider that where a sales representative falls within the categories below, they should be subject to more robust supervision and monitoring by providers:

- where commissions received are solely sales based

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<sup>10</sup> Legal Aid NSW submission to the Australian Bankers' Association *Independent Review of Product Sales Commissions and Product Based Payments* September 2016

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- where a representative earns a high amount of commissions
  - where a representative sells a high volume of add-on insurance
  - where a representative has a history of misconduct, and
  - where a representative is inexperienced in sales.

Legal Aid NSW further submits that representatives should be subject to increased supervision and monitoring based on consumer demographics. Where a particular caryard disproportionately sells add-on insurance products to disadvantaged groups, representatives should be subject to increased monitoring and supervision. This would require some data collection to be undertaken, or alternatively, a focus on caryards located in areas of significant socioeconomic disadvantage.

Industry should agree on a standardised supervision protocol to ensure consistent behaviour across providers of insurance products. This should include an element of oversight by and reporting to a third party, such as ASIC. It should also include a requirement for providers to undertake accreditation checks before appointing representatives, and on a continuing basis. We would also support a requirement for insurers to conduct post-sale interviews with a statistically robust sample of consumers, as suggested in the Consultation Paper at paragraph 258.

*E2Q3 What sanctions would be most effective in deterring representatives from engaging in unfair practices at the point of sale?*

Legal Aid NSW supports the implementation of sanctions to deter misconduct. It is important that these sanctions are widely understood by representatives, and used regularly if appropriate. An independent third party, such as ASIC, may have a role in monitoring misconduct and imposing sanctions. If ASIC takes on this role, it should be adequately funded to do so.

Sanctions could include:

- pecuniary penalties for breaches of the Australian Consumer Law, such as where unfair practices amount to unconscionable conduct or false or misleading conduct
- the removal or suspension of authorisations and licences to sell insurance products
- clawbacks of commissions paid where unfair practices at point of sale have occurred, and
- active identification and compensation of consumers who have been subject to unfair treatment by intermediaries at point of sale.

Information leading to the imposition of sanctions, and the number of sanctions per entity per year, should be published and made available to the public.