

The sale of add-on motor vehicle financial
risk products: Summary of changes to draft
product intervention order

Legal Aid NSW submission to ASIC

21 August 2020

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). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships

include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. This submission draws on the casework experience of our civil lawyers in providing these services.

Legal Aid NSW welcomes the opportunity to make a further submission to ASIC's consultation on the use of the product intervention order for add on motor vehicle financial risk products. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to ASIC's amended product intervention order intended to address consumer harm arising from the sale of add-on financial products through caryard intermediaries.

Legal Aid NSW previously provided a submission in response to ASIC's 2019 Consultation paper 324: *Product Intervention: the sale of add-on financial products through caryard intermediaries* (**2019 submission**). Legal Aid NSW also provided a submission in response to ASIC's 2017 Consultation Paper 294: *The sale of add-on insurance and warranties through caryard intermediaries* (**2017 submission**). Both earlier submissions are attached for reference.

Summary of Legal Aid NSW's position

Our casework demonstrates that significant consumer harm is experienced as a result of being sold add-on insurance and warranties by caryard intermediaries. We support ASIC's proposal to introduce a deferred sales model, and complementary obligations.

We remain concerned that the proposed deferral period of 4 days is too short to enable the consumer to properly consider all the financial products being marketed to the consumer. We maintain our position that a period of 30 days would be more effective in achieving the aim of reducing consumer detriment.

Legal Aid NSW is concerned that some of the proposed changes to the Draft Instrument weaken its effectiveness. These changes include the removal of the unconscionability and manipulation condition and the unsuitable classes condition.

Legal Aid NSW remains concerned about the decision not to include 'knock-out' questions to restrict sales of inappropriate and low value products. We consider this may limit the effectiveness of the proposed order in addressing the consumer harm that has been identified by ASIC.

Overall these changes reflect an emphasis on consumer education rather than prohibiting certain types of conduct such as unfair sales practices. We recognise that this Draft Instrument works alongside the Design and Distribution Obligations (DDO). However, given the delay in the implementation of the DDO now due to commence in October 2021, Legal Aid NSW supports strengthening the current Draft Instrument to target poor sales practices at the point of distribution. We urge ASIC to reconsider the inclusion of the unconscionable and manipulative conduct condition, the unsuitable class condition and 'knock-out' questions.

Our responses to the specific questions for feedback are informed by our relevant casework experience. We have not provided a response to questions 4 and 5.

We have responded to questions 1 to 3 below.

1. Please summarise your views on any of the changes made to the revised draft product intervention order, including whether the changes would be more or less effective in addressing the significant consumer detriment previously identified by ASIC, including in CP 324. Please explain the reasons for your position.

We consider the following changes would be **more** effective in addressing significant consumer detriment;

1. Additional conditions on the sale of mechanical risk products set out in sections 12 and 13.

These additional conditions effectively address the consumer harm detailed on page 11 of our 2019 submission and in CP324.

We consider the following changes would be **less** effective in addressing significant consumer detriment;

1. Removal of prohibition on *unconscionable conduct or manipulation*

The ‘unconscionable conduct or manipulation’ condition has been removed from the proposed product intervention order.

Section 8 under the previous Draft Instrument required intermediaries not to engage in conduct that involves a technique that should “*not in good conscience have been used or which manipulates the client*”. Legal Aid NSW urges ASIC to consider retaining this section.

Explicitly prohibiting unconscionable conduct and manipulation in the sale of add-on insurance would likely directly address the significant consumer detriment. Legal Aid NSW considers that the unfair sales tactics identified by ASIC at 73-76 in CP324 may be considered unconscionable or manipulative. Legal Aid NSW considers that the inclusion of this prohibition would increase the effectiveness of the product intervention order by targeting this type of predatory and manipulative behaviour.

2. Removal of the *unsuitable classes* condition

The ‘unsuitable classes’ condition has been removed from the proposed product intervention order.

Section 6(b) under the previous Draft Instrument placed a condition upon intermediaries to identify unsuitable classes of consumers that the intermediary reasonably believed would not benefit from acquiring the add on insurance or extended warranty product. An intermediary was then prohibited from making those products available to the consumer in the online consumer roadmap.

As identified by ASIC at 169-171 of CP324, poor consumer outcomes in relation to motor vehicle financial risk products result from the sale of low value products which do not operate as the consumer reasonably would expect. Our casework supports this

conclusion. Relevant client case studies are included on pages 4, 7 and 11 of our 2019 submission.

By removing the 'unsuitable classes' section together with not introducing knock-out questions to restrict sales, zero value or low value products may continue to be marketed to consumers. These products provide little or no benefit to the consumer but have a significant financial impact. In our casework we often see consumers who are financing the purchase of their motor vehicle through a credit loan, and the cost of the add on insurance is included in the loan. This means that consumers pay interest for the lifetime of the loan on the purchase of the add-on insurance, even though they derive no benefit from it.

Legal Aid NSW supports the reintroduction of the unsuitable class condition which would seek to reduce unsuitable products being offered to consumers and address consumer detriment.

2. Do you consider that any further changes should be made to the revised draft order before ASIC proceeds to a final decision on whether to exercise the product intervention power?

Extend Deferral Period

As indicated in our 2019 and 2017 submissions, Legal Aid NSW supports ASIC's proposal for a deferred sales model to allow consumers to make decisions in an environment free from high pressure sales tactics and/ or decision fatigue.

However, we consider that a longer deferral period of 30 days would be more beneficial to provide consumers with additional time to:

- consider their insurance options, and compare products if necessary;
- seek advice about the suitability of the add-on financial product/s;
- work out the affordability of the product, and how much extra it will cost to have the add-on financial product/s;
- make at least one payment to their lender to allow them to have a better understanding of their financial position and to assess if they can afford an increased payment to take out an insurance product.

Introduce 'knock-out' questions

At 132 of CP324, ASIC identifies three aims of the proposed obligations:

- a) identify which products should not be offered to consumers (through 'knock-out' questions or filters)
- b) provide better information to consumers about products and costs (through the roadmap), and
- c) address the risk of pressure selling and unfair tactics at the point of sale (through the deferral sales model).

The current Draft Instrument addresses (b) and goes some way to addressing (c) but in our view does not comprehensively restrict sales of low benefit or inappropriate motor vehicle financial risk products, as the unsuitable classes condition and unconscionable conduct and manipulation conditions have been removed in the product intervention order's latest iteration.

As stated above, we support the inclusion of the new mechanical risk conditions as one example of a filter to restrict the sale of a financial product where the consumer stands to receive no benefit. However, we consider that 'knock-out' questions could be another effective filter to add-on products that offer little or no benefits to consumers and should be introduced.

In order to avoid unfair sales tactics and pressure, Legal Aid NSW suggests the 'knock-out' questions should be in writing and require a written response (whether on paper or on a device). A 'knock-out' questionnaire should include a notice to the consumer that they are not required to take out add-on insurance products in order to purchase or lease the vehicle. This notice would mimic the requirement under the Draft Instrument to display a prominent statement in the online consumer roadmap which informs the consumer that they are under no obligation to buy any add-on financial risk product.

To ensure that consumers understand the questions and their purpose, the 'knock-out' questions should employ plain language principles and infographics for consumers with low literacy and be offered in multiple languages to assist consumers who have limited English skills.

3. Do you consider there is a significant risk of avoidance of the revised draft order as a result of any changes made by ASIC? If so, should ASIC introduce additional measures to address that risk?

Protocols should be developed regarding consumer-initiated contact during the deferral period

The Draft Instrument requires the intermediary to refrain from initiating 'any contact with the retail client about an add-on motor vehicle financial risk product during the deferral period' (section 11(2)). However, the Draft Instrument's phrasing does not prevent the intermediary from initiating contact about other issues (for example about the car or the loan). If such contact occurs, there is a risk that one of the parties might extend the discussion to add-on products.

Without the inclusion of protocols surrounding consumer-initiated contact during the deferral period together with the removal of the sections prohibiting unconscionable conduct and manipulation, we consider that there is significant risk of avoidance and an increased risk of consumer detriment.

We suggest that the Draft Instrument also make it clear that if the consumer initiates contact with the intermediary regarding an add-on motor vehicle financial risk product

during the deferral period, the intermediary should refer the consumer to the roadmap and should not provide any other information and/or an opinion.

Lack of guidance about consumer roadmap could lead to inconsistencies

Legal Aid NSW supports the use of an online consumer roadmap, which will provide consumers with individualised information about the products available to them and the cost of those products. The roadmap will require consumers to engage with the disclosure material, increasing the likelihood that consumers will understand the information and make informed decisions.

Legal Aid NSW supports the additional form and contents requirements set out in the current Draft Instrument e.g. “where those choices are presented to the client in a way that does not highlight one choice over another choice”. However, guidance does not go far enough to ensure consistency across industry.

We also support ASIC’s suggested inclusions in the consumer roadmap outlined at 144-149 of CP324 but there is an elevated risk of avoidance without greater consistency and ongoing oversight of the roadmap’s implementation. Legal Aid NSW supports standardising the roadmap content across industry to ensure the online consumer roadmap delivers accessible information for all consumers.

We refer to our comments about innovative product disclosure on page 6 of our 2019 submission and note our suggestions that:

- plain language principles and infographics should be used;
- the roadmap should have a function to read the information to consumers, which would benefit consumers with low literacy or those who are visually impaired;
- the platform could require consumers to confirm their understanding of a product before expressing interest—for example, a test which poses a series of questions about the product, including what it is, how it operates and its cost;
- the roadmap should be available in multiple languages;
- some consumers will not be able to engage with technological disclosure and a paper-based version of the roadmap should still be available.

There should be sanctions for non-compliance

As set out in our 2019 submission, Legal Aid NSW supports the implementation of sanctions to deter misconduct and encourage compliance with the Draft Instrument.

We refer to our 2017 Submission, which supported the monitoring role proposed by ASIC, and suggests ASIC could consider the following sanctions:

- financial penalties for both insurers and intermediaries for repeated instances of avoiding their obligations under the Draft Instrument;
- removal or suspension of authorisations and licences to sell insurance products;

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- clawbacks of commissions paid where obligations were avoided or not complied with; and
 - active identification and compensation of consumers who have purchased unsuitable products as a result of intermediaries avoiding their obligations.

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

Legal Aid NSW submits that industry bodies should agree on a standardised compliance supervision protocol to ensure consistent behaviour across providers of insurance products. In addition to requirements to report to ASIC, this could also include a provision for post-sale interviews with individual consumers as a means of assessing the effectiveness of the obligations placed on intermediaries at the point of sale and during the deferral period.