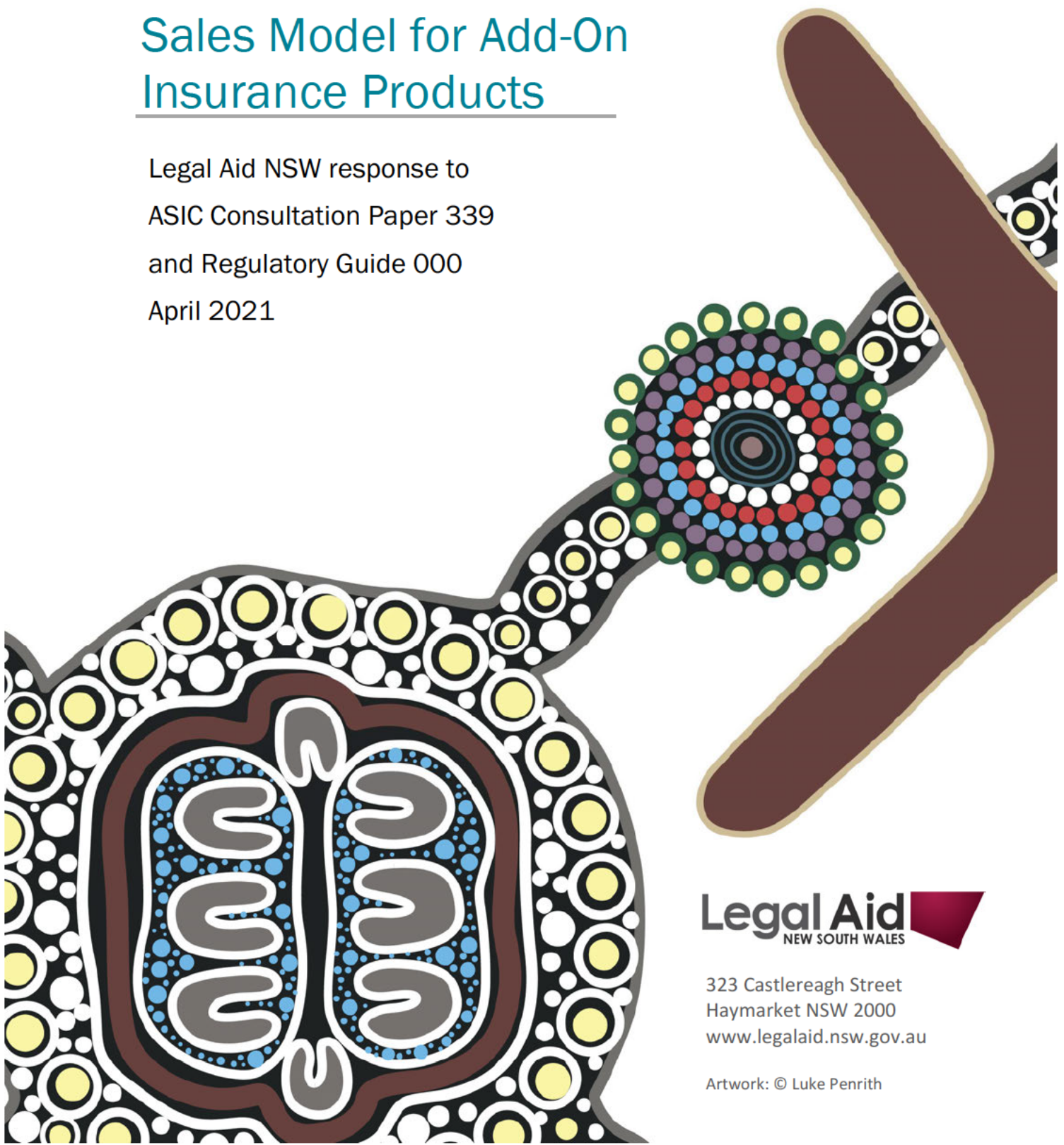


Implementing the Royal Commission recommendations: Deferred Sales Model for Add-On Insurance Products

Legal Aid NSW response to
ASIC Consultation Paper 339
and Regulatory Guide 000
April 2021



Legal Aid
NEW SOUTH WALES

323 Castlereagh Street
Haymarket NSW 2000
www.legalaid.nsw.gov.au

Artwork: © Luke Penrith

Acknowledgement	3
1. About Legal Aid NSW	4
2. Executive Summary	5
Recommendations:	6
Recommendation 1	6
Recommendation 2	6
Recommendation 3	6
Recommendation 4	6
Recommendation 5	6
Recommendation 6	6
3. Regulatory Guide on the deferred sales model for add-on insurance .	7
3.1 Use of examples	7
Recommendation 1	7
3.2 Language of the Regulatory Guide	8
Recommendation 2	8
3.3 Guidance on customer-initiated contact	8
3.4 Guidance on customer right of return and refund	8
Recommendation 3	9
3.5 Guidance on exemptions	9
3.6 Ensuring compliance with the deferred sales model for add-on insurance	10
Recommendation 4	10
4. Customer Information	11
4.1 Content	11
Recommendation 5	11
Recommendation 6	12
4.2 Mode of delivery	12
4.3 Time of delivery	12

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. 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 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

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 community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

Solicitor
Combined Civil Law Specialist Teams
Civil Law Division
T:
E:

or

Law Reform Officer
Strategic Law Reform Unit
T:
E:

2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to ASIC's Consultation Paper 339 – Implementing the Royal Commission recommendations: The deferred sales model for add-on insurance (**Consultation Paper**), and the ASIC Regulatory Guide 000: The deferred sales model for add-on insurance (**Regulatory Guide**). We note that 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* and 2017 Consultation Paper 294 – *The sale of add-on insurance and warranties through caryard intermediaries*. These are attached for reference.

Legal Aid NSW has raised serious concerns about the sale of add-in insurance products in our previous submissions.¹ Our casework experience, which mostly centres on the sale of add-on insurance in the context of caryard sales, shows that the add-on insurance market often represents poor value for consumers, and that provision of incentivised commission payments creates a high risk of unfair sales and adverse outcomes.² Our clients experience significant harm as a result of being sold add-on insurance and warranties by caryard intermediaries. Accordingly, we have advocated for the prohibition on the sale of add-on insurance by motor vehicle dealers. In the alternative, we support the establishment of a deferred sales model with a 30-day deferral period for purchases of add-on motor vehicle insurance.³

While the provisions regarding the sale of add-on insurance in the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* do not go as far as we would have preferred, we welcome the introduction of the deferred sales model and the four-day deferral period. We recognise that these changes signal an important step in protecting consumers from low-value products in a high-pressure sales environment.

Legal Aid NSW recognises that the deferred sales model is complex and accordingly we support clear guidance by way of the Regulatory Guide. Overall, we are satisfied with the form and content of the Regulatory Guide and the sample Customer Information notice.

¹ Legal Aid NSW submission to the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Round 6 Hearing (September, 2018); Legal Aid NSW submission in response to Financial Services Royal Commission Interim Report, (October 2018); Legal Aid NSW Submission No 15 to Australian Securities and Investments Commission, *Consultation Paper 294 – The sale of add-on insurance and warranties through caryard intermediaries*, (October 2017).

² Legal Aid NSW submission to the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Round 6 Hearing (September 2018).

³ Legal Aid NSW, Submission to Australian Securities and Investments Commission, *Consultation Paper 324 – Product Intervention: The sale of add-on financial products through caryard intermediaries*, (November 2019).

We have made a number of suggestions to clarify the content of the Regulatory Guide to ensure both industry and consumers understand their rights and obligations under the model, to facilitate better compliance and safeguard consumers from high pressure sales tactics of low value insurance products.

Recommendations:

Recommendation 1

Provide additional examples in the Regulatory Guide to demonstrate different stages of the deferred sales model and clarify acceptable and prohibited conduct during each phase.

Recommendation 2

ASIC should use plain English throughout the Regulatory Guide.

Recommendation 3

Clarify the scope of consumer refunds and remedies available after the six-week period following the sale of add-on insurance in breach of protections.

Recommendation 4

In addition to providing regulatory guidance, ASIC should employ a range of strategies to ensure compliance with the deferred sales model and Regulatory Guide.

Recommendation 5

Consider changing the phrase “Customer Information” throughout the Regulatory Guide to less ambiguous wording that is more aligned with the notice’s purpose, to clarify a customer’s right to say no to being sold insurance.

Recommendation 6

Apply the Australian Government logo to both hardcopy and electronic customer information statements and consider prescribing the form of the document for electronic distribution.

3. Regulatory Guide on the deferred sales model for add-on insurance

Legal Aid NSW recognises that the deferred sales model is complex, particularly when it comes to identifying the triggers for the commencement of each phase of the model and what constitutes permissible conduct during each of those phases. Legal Aid NSW therefore supports prescriptive guidance in the form of the Regulatory Guide to assist both industry and consumers in understanding their rights and obligations, aid consistency and ensure overall compliance in such a technical area.

3.1 Use of examples

We note that the Regulatory Guide is detailed and comprehensive. The use of the infographic⁴ is helpful at demonstrating different phases of the model, although we have found it easier to understand the infographic *after* reading the guidance that follows. Equally, the use of examples aids an understanding of how the model works in practice. We agree that without examples, it can be confusing for both consumers and industry which modes of communication are permissible in which phase of the deferred sales model and when specific phases are triggered.

What would also be useful in our view, is if the scenario in Example 1 of the Regulatory Guide⁵ was expanded to cover each of the phases of the model, thereby giving both industry and consumers a complete example of how the model works in practice. Additional acceptable and non-acceptable examples of permissible modes of communication in different phases could also be added as an appendix to the Regulatory Guide for further guidance.

Further, while the Regulatory Guide notes the intersection of anti-hawking laws with the deferral period, we suggest demonstrating this by way of an example, so that those less familiar with hawking prohibitions understand how the two regimes operate side by side.⁶

Recommendation 1

Provide additional examples in the Regulatory Guide to demonstrate different stages of the deferred sales model and clarify acceptable and prohibited conduct during each phase.

⁴ Australian Security and Investments Commission ASIC *Consultation Paper 339 Implementing the Royal Commission recommendations: The deferred sales model for add-on insurance* (March 2021); Australian Security and Investments Commission ASIC *Regulatory Guide 000 The deferred sales model for add-on insurance* (March 2021), 15.

⁵ Australian Security and Investments Commission ASIC *Regulatory Guide 000 The deferred sales model for add-on insurance* (March 2021), 18.

⁶ Ibid [RG 000.48]-[RG 000.53].

3.2 Language of the Regulatory Guide

We note that for those familiar with the language of the legislation, the content of the Regulatory Guide is clear. However, for those less familiar, or for consumers trying to understand their rights of redress, the language can still appear overly complex and legalistic at times. Accordingly, we recommend greater use of plain English throughout the Regulatory Guide. Additional examples would also assist consumers to gain a better understanding of the more complex aspects of the model.

We are also of the view that the use of the phrase “Customer Information” may be confusing to consumers. Rather than conveying information which needed to be provided *to* consumers, it suggests information which consumers needed to provide to businesses in the course of their purchase, or alternatively, how customer information is treated by providers (akin to privacy policies). We make further comments and suggestions on this matter below under “Customer Information”.

Recommendation 2

ASIC should use plain English throughout the Regulatory Guide.

3.3 Guidance on customer-initiated contact

Legal Aid NSW supports prohibitions on the sale of add-on insurance products during the deferral period even following customer-initiated contact,⁷ and agrees that the onus should be on the provider to demonstrate that any offer, request or invitation relates only to the purpose for which the customer-initiated contact.

3.4 Guidance on customer right of return and refund

The Regulatory Guide explains the customer’s rights of return and refund where an add-on insurance product was sold to them in breach of the prohibition on selling.⁸ It further provides that no customer should be made to pay a penalty when they access their right to a refund.⁹

However, the Regulatory Guide is silent on whether customers who purchase add-on insurance on finance and thereby incur interest on premiums are entitled to a refund on the interest accrued on those premiums as well. Legal Aid NSW submits that if the principle behind the customer’s right of return and refund is to ensure that the customer is not required to pay a penalty (or otherwise be worse off) when they exercise their

⁷ Ibid [RG 000.81].

⁸ *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) Schedule 3, ss 12DQ and 12DT

⁹ Ibid s 12DT.

rights, then the Regulatory Guide should clearly set out that any interest accrued in connection with purchasing the add-on insurance policy is refundable as well.

Legal Aid NSW is also concerned that the Regulatory Guide is unclear on what remedy, if any, is available to customers after the six-week period following the sale of add-on insurance in breach of the provisions. In our experience, it can take years for customers to become aware of add-on insurance products. Their remedies, if any, in those situations should be clearly stated in the Guide.

Case Study: Ms Wheeler¹⁰

Ms Wheeler* is a young Aboriginal and Torres Strait Islander woman who at the age of 19 years old was coerced by her then partner to purchase a car on finance for his benefit. Due to her personal circumstances it took a number of years to seek assistance in relation to this debt. She only then discovered that her finance arrangement included the purchase of two separate add on insurance products. Despite raising complaints with the insurers, the remedy was limited to a refund of premiums, although Ms Wheeler had paid years of interest on the premiums borrowed.

Recommendation 3

Clarify the scope of consumer refunds and remedies available after the six-week period following the sale of add-on insurance in breach of protections.

3.5 Guidance on exemptions

Legal Aid NSW reiterates and supports ASIC's interpretation of its power that exemptions should only be made in limited circumstances. For this reason, we support the rigorous process around exemption acceptance set out in the Regulatory Guide.¹¹ We agree that where insufficient evidence is provided in support of an exemption, the application should be refused.

¹⁰ All case studies and client stories have been deidentified in this submission.

¹¹ Australian Security and Investments Commission ASIC *Regulatory Guide 000 The deferred sales model for add-on insurance* (March 2021), [RG 000.124].

3.6 Ensuring compliance with the deferred sales model for add-on insurance

Alongside the Regulatory Guide, Legal Aid NSW supports rigorous ASIC oversight of the deferred sales model, deploying “secret shopper” spot checks and auditing records and training modules provided by insurers to ensure compliance with model. Further, crucial to the ultimate effectiveness of the model is thorough evaluation of the Regulatory Guide, which should include benchmarking before and after intervention to assess the effectiveness of regulatory guidance and determine whether any changes are required.¹²

Recommendation 4

In addition to providing regulatory Guidance, ASIC should employ a range of strategies to ensure compliance with the deferred sales model and Regulatory Guide.

¹² See UK model: Financial Conduct Authority, *Evaluation Paper 18/1: An evaluation of our guaranteed asset protection insurance intervention* (July 2018).

4. Customer Information

4.1 Content

As mentioned above, Legal Aid NSW submits that the use of the phrase “Customer Information” in the Regulatory Guide is potentially confusing and suggests information which customers need to give to providers of add-on insurance products, rather than the other way around.¹³ We suggest using an alternative phrase which more explicitly relates to the opt out purpose of the notice, to clarify that customers have a right to say no to being sold insurance. Finally, once the Sample Customer Information statement is settled, it should be attached to the Regulatory Guide. We note that at present the sample notice is only attached to the Consultation Paper.

Recommendation 5

Consider changing the phrase “Customer Information” throughout the Regulatory Guide to less ambiguous wording that is more aligned with the notice’s purpose, to clarify a customer’s right to say no to being sold insurance.

In our view, the language of any customer facing documents should be clear and written in plain language. To that end we are satisfied with the wording of the Customer Information document and welcome the fact that it was user tested. We note that many of our clients who purchased add-on insurance were Aboriginal and Torres Strait Islander and we recommend user testing the Regulatory Guide with Aboriginal and Torres Strait Islander communities, if this has not already occurred.

We agree that there is no need to include the official name of the Customer Information statement on the document itself, however, should that be changed, we prefer renaming the statement to a less ambiguous phrase as discussed above.

Apart from being written in plain and clear language, the statement should be available in different languages and read aloud versions for people with visual impairment.

Finally, it is not clear why the Australian Government logo is only applied to the hardcopy and not the electronic version. To give the document significance and authenticity, and differentiate it from other advertising material, we support the Australian Government logo appearing on both hardcopy and electronic versions of the statement. We also suggest that ASIC consider including its own logo on both versions of the statement.

¹³ Appendix 1 of the Regulatory Guide, ‘Customer Information’ relates to the ASIC-prescribed information that must be provided to a customer to start the deferral period.

Recommendation 6

Apply the Australian Government logo to both hardcopy and electronic customer information statements and consider prescribing the form of the document for electronic distribution

4.2 Mode of delivery

Legal Aid NSW accepts that providing the customer information statement electronically by default assists with respect to record keeping and avoids any delays or possible loss of information through post. We also accept that many customers may prefer to receive information electronically and may feel more comfortable opting out of being contacted about insurance electronically rather than in person, particularly where they wish to do so immediately.

However, for consistency, our preference is for electronic information to also be provided in a prescribed form clearly bearing the Australian Government logo. Alternatively, we agree with mandating key features of electronic provision as per consultation paper.

We note that there is a risk that if the information is provided to customers via email they may not read it. However, we agree that this risk may be somewhat mitigated by specifying that the information must appear in the body of the email rather than only as an attachment.

Finally, use of customer email addresses or other electronic contact details provided for the purposes of receiving the customer information for marketing or other purposes without customers' permission should be expressly prohibited.

4.3 Time of delivery

Legal Aid NSW supports providing customer information at the time of committing to acquire a product and no earlier, and further agrees with customer information being provided each time for repeat purchases.



© Legal Aid Commission of NSW 2021.

You may copy, print, distribute, download and otherwise freely deal with this work for a non-profit purpose provided that you attribute Legal Aid NSW as the owners. To reproduce or modify the work for any other purpose you need to ask for and be given permission by Legal Aid NSW.