



Insurance Council
of Australia

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Dear Mr Garofano

CONSULTATION PAPER 346: ANTI- HAWKING LEGISLATION - CONSULTATION PAPER 346

The Insurance Council of Australia (**Insurance Council**) welcomes the opportunity to provide our feedback to Consultation Paper 346 and the proposed updates to Regulatory Guide 38 dated July 2021 (**RG 38**).

The Insurance Council is the representative body of the general insurance industry in Australia and represents approximately 95 percent of private sector general insurers. As a foundational component of the Australian economy the general insurance industry employs approximately 60,000 people, generates gross written premium of \$53.9 billion per annum and on average pays out \$166.2 million in claims each working day (\$41.5 billion per year).

Executive Summary

The Insurance Council supports the updates being made to RG 38, however submits that further guidance is required in relation to:

- the consent provided by consumers in a range of situations, particularly relating to calls to and by insurer's contact centres;
- the facts and circumstances that will break the "*causal nexus*" between an unsolicited contact with a consumer and a subsequent offer, request or invitation in relation to an insurance product;
- the offer of bundled or related insurance products which may be "*reasonably within the scope of the consumer's consent*"; and
- how the prohibition applies to the purchase of insurance products based on information in an advertising pamphlet.

This submission includes, in sections 1 to 4 below, practical scenarios to illustrate how these issues can arise in an insurance context, along with proposals for further guidance.

It also includes, in section 5, the Insurance Council's feedback on questions asked in CP 346, where that has not been covered in sections 1 to 4 and an additional point needs to be made.

1. Identifying the consumer's consent

The Insurance Council submits that further guidance is needed regarding the consent provided by consumers in a range of situations, particularly relating to calls to and by insurer's contact centres. Without that guidance, uncertainty regarding whether discussion on an insurance product can proceed could lead to considerable inconvenience and frustration by consumers.

Four common scenarios, which are illustrative of the issue and for which the Insurance Council seeks further guidance, are set out below.

Scenario 1: Consumer calls insurer contact centre

In this scenario, a consumer initiates a call to an insurer's contact centre to enquire about a particular type of insurance, for instance car insurance. After some discussion on that topic, and potentially the purchase of a car insurance product, the consumer asks about another type of insurance product, such as home insurance.

While section 992A(5)(c) requires a consumer's consent to have been given "*before the start of the contact*", it should be uncontroversial that where a consumer has initiated contact with an insurer by telephone, as in this scenario, they should be taken as having given their consent in relation to any products they choose to discuss, unprompted by the insurer.

It is submitted that this should be the case irrespective of how the consumer raises products with the insurer. They may choose to ask about several products together at the beginning of the call or instead raise them in sequence or following a discussion which assists them in determining their needs. Their approach to doing so should not alter the scope of the consent provided by making the call.

In this scenario, therefore, the insurer should not be prevented, by section 992A, from discussing and where appropriate making an offer, request or invite, in relation to the home insurance product, notwithstanding that the consumer did not mention that at the start of the call.

We note that ASIC states in its draft RG 38 that:

if a consumer contacts a product offeror or consents to being contacted about a product, the offeror cannot in the course of that contact offer another product outside the scope of consent even if the consumer gives further consent during the contact. (RG 38.70)

It is submitted that this statement should be clarified with respect to this scenario.

If this is not done, this guidance may be interpreted as preventing an insurer from making an offer, request or invite in relation to the other type of insurance in this scenario. It would, instead, have to inform the customer that it is prohibited from doing so, notwithstanding the consumer's request and clear consent to do so, and arrange another call or communication with the consumer.

That is likely to be at least inconvenient and frustrating for the consumer. It may also cause consumer detriment if the consumer therefore delays the purchase of insurance which is needed to cover an immediate risk. It is also submitted that a requirement that the insurer arrange another call to the consumer does not benefit or protect the consumer in any way in these circumstances.

For these reasons, the Insurance Council requests that ASIC consider refining its guidance to clarify how section 992A would apply to this scenario and it submits that that should be in line with the submission set out above.

If ASIC accepts this submission, the Insurance Council also requests guidance from ASIC to confirm that this approach would not be negated by an insurer providing reasonable responses to the consumer's questions and issues arising from them, provided the insurer does not:

- initiate an unprompted discussion regarding another product; or
- pressure or manipulate the consumer into, themselves, initiating discussion regarding another product.

It is submitted, for instance, that the insurer should be able to:

- provide an explanation of relevant differences between products where that is reasonably required to respond to a question or issue raised by the consumer;



Insurance Council
of Australia

- provide an explanation of the operation of multi-policy discounts where those apply to a product about which the consumer has contacted the insurer and the explanation is reasonably required to respond to a question or issue raised by the consumer; and
- ask general questions such as "*Is there anything else I can do to help you today?*",

and that, if any of these result in the consumer asking about another type of insurance product, they should thereby be regarded as having consented to the insurer making an offer, request or invitation in relation to that product.

If ASIC takes a different view on how section 992A applies to this scenario, the Insurance Council requests guidance on that view, including:

- whether the insurer would be required (and permitted) to arrange a separate call with the consumer in relation to the other type of insurance and, if so, whether that call could be made by the same representative of the insurer, in order to provide the consumer with some continuity in relation to the discussion; and
- whether the insurer would need to allow a period of time to pass before making that call and, if so, some guidance on the length of time needed.

Scenario 2: Consumer consents to call from insurer contact centre

In this scenario, a consumer provides their consent to receive a call from an insurer's contact centre to discuss a particular type of insurance. This may be done, for instance, during the process of requesting an online quote for the insurance product, as is set out in Example 5 at RG 38.55. Unlike in scenario 1, therefore, the consumer will have communicated a clearly delineated consent to the insurer prior to the contact being made.

A representative of the insurer's contact centre calls the consumer in response to their request. During the telephone discussion the consumer asks about another type of insurance.

The Insurance Council submits that section 992A should apply to this scenario in the same way as for scenario 1 above, notwithstanding that the insurer called the consumer in response to consent provided through the online form, instead of the consumer calling the insurer.

The Insurance Council requests that ASIC provide guidance confirming that is the case, or otherwise clarifying any different approach an insurer would need to take to comply with section 992A in these circumstances.

Scenario 3: Consumer visits insurer for face-to-face discussion

In this scenario, a consumer attends an insurer's branch or other face-to-face setting to discuss a particular type of insurance. During the discussion, the consumer asks about another type of insurance.

Members expect that the inconvenience and frustration caused to the consumer if the insurer is required to inform the consumer that it is prohibited from making an offer, request or invitation in relation to the other type of insurance product in this scenario, is likely to be heightened given that the consumer will have taken the trouble to attend the meeting face-to-face.

The Insurance Council submits that it will be important, therefore, that section 992A apply to this scenario in the same way as for scenarios 1 and 2 above, notwithstanding that the discussion is face-to-face rather than over the telephone.



Insurance Council
of Australia

The Insurance Council requests that ASIC provide guidance confirming that is the case, or otherwise clarifying any different approach an insurer would need to take to comply with section 992A in these circumstances.

Scenario 4: Consumer calls insurer contact centre for Roadside Assistance

In this scenario, a consumer initiates a call to an insurer's contact centre to report a mechanical breakdown of their motor vehicle and request Roadside Assistance. The insurer's representative accesses the consumer's records, notices that their comprehensive motor insurance has expired and informs the consumer of this fact. The consumer asks the insurer's representative to purchase the missing insurance cover.

The Insurance Council submits that section 992A should apply to this scenario in the same way as for scenarios 1 to 3 above, on the basis that the information volunteered by the insurer's representative is a reasonable response to the consumer's request for Roadside Assistance and an issue arising from that request. Section 992A should not, therefore, prevent the insurer from assisting the consumer by issuing the missing insurance product.

The Insurance Council requests that ASIC provide guidance confirming that is the case, or otherwise clarifying any different approach an insurer would need to take to comply with section 992A in these circumstances.

2. Offers made "because of" unsolicited contact

The Insurance Council submits that further guidance is needed regarding the facts and circumstances that will break the "*causal nexus*" between an unsolicited contact with a consumer and a subsequent offer, request or invitation in relation to an insurance product. Without that guidance:

- members will face considerable uncertainty as to whether such offers, requests or invitations could be said to have arisen "*because of*" the original unsolicited contact and, so, be prohibited by section 992A; and
- on that basis, members may need to curtail a range of communications which, currently, are of significant benefit to consumers.

Two common scenarios, which are illustrative of the issue and for which the Insurance Council seeks further guidance, are set out below.

Scenario 5: Third party distributors

Members appoint a variety of third-party distributors that meet with and have other real-time interactions with consumers for the purpose of providing other goods or services. These could include, for instance, retailers, financial institutions and professional service providers.

If, during a meeting or other real-time interaction with a consumer, such a third-party distributor obtains the consumer's consent to discuss insurance products, a question arises as to how and when the third-party distributor, or the insurer by which it has been appointed, may then contact the consumer without any offer, request or invitation in relation to the insurance products thereby being made "*because of*" the original unsolicited meeting.

The Explanatory Memorandum to *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* confirms that the "*causal nexus*" between an unsolicited meeting and subsequent contact can be broken in certain circumstances. It states:



The causal nexus will be broken between unsolicited contact and a subsequent offer, request or invitation if, after the unsolicited contact occurs:

- *the consumer takes active steps to consent to further contact involving an offer, request or invitation in relation to the financial product (for example, calling the person to ask for the product or emailing the person to ask to be contacted about acquiring the financial product); and*
- *the consumer has had a reasonable opportunity after the unsolicited contact to consider any information that they have been provided about the financial product and assess its suitability.* (paragraph 5.55)

This commentary indicates that, in a third-party distribution scenario, if the consumer takes an "active step" to provide their consent to discuss insurance products and is given a period of time to consider any information provided about the insurance products, any subsequent offer, request or invitation in relation to the insurance products will not be prohibited.

The Insurance Council requests that ASIC provide further guidance in RG 38 regarding how that would operate in this third-party distribution scenario and submits that, consistent with paragraph 5.55 of the Explanatory Memorandum, it should include the following:

- that if, after a reasonable time has passed for the consumer to consider any information provided to them, the insurer contacts the consumer to discuss the insurance products the subject of the consumer's consent, the causal nexus between the original unsolicited meeting and the insurer's contact would be sufficiently broken and any offer, request or invitation made by the insurer will not be prohibited; and
- similarly, that if, after a reasonable time has passed for the consumer to consider any information provided to them, a different person at the third-party distributor contacts the consumer to discuss the insurance products the subject of the consumer's consent, the causal nexus between the original unsolicited meeting and contact by that different person at the third-party distributor would be sufficiently broken and any offer, request or invitation made by that person will not be prohibited.

If ASIC takes a different view on how section 992A applies to this scenario, Insurance Council members would appreciate clear guidance in that regard.

We note that ASIC also states in its draft RG 38 that:

The prohibition may still apply to offers, requests or invitations that take place through a medium other than one that is a real-time interaction. For example, emailing a consumer an offer during or directly after an unsolicited outbound sales call with them would be 'because of' that call. (RG 38.25)

The Insurance Council submits that there should be no objection to an insurer or third-party distributor sending an email or other written communication to a consumer, with an offer, request or invitation, provided that is done once a reasonable time has passed after the real-time interaction has been completed, for the consumer to consider any information provided to them, and subject to compliance with other applicable law. The consumer will be free to act on the offer in their own time, or to ignore the communication as they see fit.

The Insurance Council requests that ASIC provide further clarification on this point also.



Insurance Council
of Australia

Scenario 6: Third party referrers

A similar scenario can arise in relation to third-party referrers. Members may appoint third parties, that meet with and have other real-time interactions with consumers, to provide those consumers with information about insurance products, normally through a brochure or online information, along with contact details of the insurer. For example, the organisers of a motor meet may have a stand for a specialist car insurer.

Under this "*mere referer*" model, the third-party is not authorised to provide advice on or deal in the insurance product, so does not make any offer, invitation or request of the customer. However, the information and insurer contact details may be provided by the third party during an unsolicited meeting with the consumer.

Following completion of that meeting, the consumer may choose to initiate contact with the insurer. If they do so, the insurer may make an offer, invitation or request of the customer in relation to the insurance product/s concerned.

The Insurance Council requests that ASIC provide further guidance in RG 38 on this scenario and submits that it should include that:

- the action taken by the consumer to contact the insurer, in these circumstances, would constitute an "*active step*" which breaks the causal nexus between them being provided with information by the third-party and the insurer's offer, invitation or request of the customer; and
- as such, the insurer would not be prohibited from making an offer, request or invitation in those circumstances.

3. Reasonably within scope

The Insurance Council welcomes ASIC's guidance on products that come "*reasonably within the scope of the consumer's consent*", but requests clarification of that guidance in two respects.

Scenario 7: Small business enquiry

Small business insurance is often provided to the consumer as a bundled insurance contract. That insurance offers a range of small business covers and often includes retail covers such as for property and motor vehicles.

Similar to scenario 1 above, if a small business consumer initiates a call to an insurer's contact centre to enquire about a particular type of insurance, for instance commercial motor vehicle insurance, they may subsequently ask about other insurance covers in the bundled insurance contract.

The *Corporations Act 2001* (the **Act**) treats each cover in such a bundled contract as a separate financial product. It follows that section 992A might have the effect of preventing the insurer from making offers, requests or invitations in relation to covers in the bundled insurance contract which were not the subject of the small business consumer's original enquiry, even where the consumer subsequently consents to that being done.

The Insurance Council submits that, given that all covers contained within a small business bundled insurance contract are designed to cover typical risks that small business owners face, an insurer should not be prohibited from making offers, requests or invites for other covers under the contract if the initial enquiry relates only to one of those covers. In support of this view, the Insurance Council submits that any offer regarding other covers contained within the business package would be reasonably within the scope of the consumer's consent for the purposes section 992A(5)(a)(ii) and 992A(5)(b)(ii) of the Act.



On this basis, the Insurance Council requests that ASIC consider refining its guidance to clarify how section 992A would apply to this scenario, and it submits that that should be in line with the submission set out above.

If ASIC takes a different view on how section 992A applies to this scenario, the Insurance Council requests guidance on that view, including:

- whether the insurer would need to arrange a separate call with the small business consumer in relation to other covers under the small business insurance contract and, if so, whether that call could be made by the same representative of the insurer, in order to provide the consumer with some continuity in relation to the discussion; and
- whether the insurer would need to allow a period of time to pass before making that call and, if so, some guidance on the length of time needed and whether that could be dispensed with if the small business consumer needs to purchase insurance more promptly.

Scenario 8: Car insurance and Compulsory Third Party (CTP) insurance

It is common for consumers that contact an insurer in relation to car insurance to also need CTP insurance, and vice versa, given that these products often align with the purchase date of the motor vehicle to which they relate. Many member insurers sell both car insurance and CTP insurance in a relevant jurisdiction. The Insurance Council submits that:

- it should be "*reasonably within the scope of the consumer's consent*" when making an enquiry in relation to one only of these products that the insurer may also make an offer, request or invitation to the consumer in relation to the other; and
- if ASIC's view is that section 992A prohibits insurers from doing so, that may lead to an increased risk of consumers failing to purchase or renew one of these products and thereby becoming exposed to the risk of an uninsured loss (most likely in relation to car insurance, given that vehicle registration is dependent on the purchase of CTP insurance).

The Insurance Council requests that ASIC provide guidance confirming that is the case, noting that this could be done as an example of its guidance in RG 38.69.

4. Advertising and giving information

The Insurance Council welcomes the guidance provided in relation to the operation of section 992A(7) of the Act, however seeks clarification as to its operation in the following scenario.

Scenario 9: Advertising Pamphlets

In the scenario described in Example 9 in RG 38.65, the Gold Standard Bank sales representative gives Kathleen a pamphlet with information relating to income protection insurance during their meeting at the bank. The pamphlet includes details of a link to the insurer's website, which provides an online process for purchasing the insurance product. Kathleen goes online and purchases the product.

We note that ASIC states in its draft RG 38 that:

For the avoidance of doubt, where advertising or giving information involves practices that are not in the nature of a conversation, discussion, or real-time interaction, such as brochures, television or radio advertising, it is not within the scope of the prohibition. (RG 38.38)



Insurance Council
of Australia

However, it also states that a condition of such advertising being allowed is that "*no offer, invitation or request is made during, or because of, the advertisement or provision of information*" (RG 38.27). In this scenario, it could be said that Kathleen's online purchase has been made "*because of*" the pamphlet provided to her.

The Insurance Council submits, in relation to this example, that where a consumer has taken "*active steps*" to acquire a product based on information set out in an advertisement or pamphlet, for instance by visiting the insurer's website and purchasing a product online, there would be no breach of section 992A.

The Insurance Council requests that ASIC provide guidance to confirm that, provided there is no conversation, discussion or real-time interaction between Kathleen and the Gold Standard Bank in this case, the insurer would not be in breach of section 992A by allowing Kathleen to go ahead with a purchase of the insurance product through the insurer's online process.

5. CP 346 Questions

The Insurance Council appreciates the opportunity to provide feedback in response to the questions asked in CP 346. Most of that feedback has been provided above, so we have limited our further feedback to additional points only.

B2Q3: Do you anticipate any practical issues associated with your implementation of our guidance on the creation and maintenance of records, including practices that may help offerors meet their obligations?

The Insurance Council requests further guidance to recognise that it may not be possible to maintain records of consent in all cases, particularly in relation to inbound calls. For instance:

- not all members have call recording facilities available to them for the purposes of keeping records of consent (in any case a consumer may elect to opt out of call recording);
- the *Privacy Act 1988 (Cth)* requires insurers to give consumers the option to deal with them anonymously (see Australian Privacy Principle 2), which would limit the extent to which records could be kept in those cases; and
- contacts made with consumers following an enquiry through an aggregator's website may be made with only the limited contact details entered by the consumer in that website.

In those circumstances, an insurer's records of consent may be limited.

The Insurance Council also requests clarification from ASIC that it regards records of consent to fall within the category of "*other records*" for the purpose of section 1101C(3) of the Act, and so should be preserved for 5 years.

B3Q1: Do you agree with our proposed guidance on offering products that are within reasonable scope of a consumer's consent? If not, why not?

In addition to the submissions made in section 3 above, the Insurance Council submits that Example 12 will be more useful if it is amended to more closely reflect common consumer behaviour. In practice, consumers would not normally contact an insurer to request protection for house fire; they would ask for home insurance and then typically discuss with the insurer the types and levels of cover available. The Insurance Council requests that Example 12 be amended to reflect that, for instance to read as follows:



Insurance Council
of Australia

Emmily telephones Venture Insurance Co and speaks with a sales representative about acquiring insurance. During the discussion Emmily states that she is looking ~~to be protected in the event of a housefire at her place of residence~~ for home insurance. To better understand Emmily's ~~needs situation~~, the sales representative confirms that Emmily owns her home. ~~As a result, in addition to offering her contents insurance, the sales representative also offers her home building insurance~~. While Emmily did not request either building or contents insurance by name, Emmily's initiation of contact constitutes consent to offer her multiple insurances covering the same financial risk—loss she may suffer to her building and contents ~~as the result of a fire~~: see further RG 38.61. As the sales representative established that Emmily owned her place of residence, the offer of both contents and home building insurance does not breach the prohibition.

C1Q1: Does the payment of refunds for financial products raise any practical issues?

ASIC states in its draft RG 38 that:

For insurance products, the consumer's right to a refund entitles them to a refund of all premiums paid. (RG 38.112)

While the Insurance Council supports that position generally, it submits that a full refund should not be required where:

- the consumer has made a valid claim on the product during its currency, which requires a payment in excess of the refundable premium; or
- the product is a short-term class of insurance, such as short-term travel insurance, for which the period of insurance has expired.

In those cases, the consumer will already have received a payment of benefit equal to or greater than the full premium amount.

If you have any questions or comments in relation to our submission please contact Aparna Reddy, the Insurance Council's General Manager, Policy – Regulatory Affairs, on telephone: [REDACTED] or email:

Yours sincerely

Andrew Hall
Executive Director and CEO