

Consultation Paper 272: Remaking ASIC class orders on time-sharing schemes

Legal Aid NSW submission to the
Australian Securities and
Investments Commission

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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 28 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.

Consumer issues constitute the largest category of service for our Civil Law

Division. In 2014-2015 Legal Aid NSW provided 4,887 advice and 5,477 minor assistance services in consumer law matters. More than one quarter of these matters dealt with credit products, including consumer leases. This submission draws on the casework experience of civil law solicitors in providing these services.

Legal Aid NSW welcomes the opportunity to provide a submission to *Consultation Paper 272: Remaking ASIC class orders on time-sharing schemes*. We have answered select questions in the Consultation Paper and our submission follows the numbering of the questions outlined in the Consultation Paper.

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List of recommendations

- 1. Consumer protections against unsolicited sales should be extended to include situations where a consumer has been induced to attend the offices of a licensee, or a seminar, presentation or talk run by the licensee.**
- 2. ASIC should provide guidance in RG 160 to licensees about conduct that constitutes an unsolicited sale.**
- 3. Licensees should be subject to greater disclosure obligations at the point of sale about consumer rights regarding unsolicited sales.**
- 4. The cooling-off provisions should be consistent in respect of all licensees, regardless of whether they subscribe to the Australian Timeshare and Holiday Ownership Council's Code of Practice.**
- 5. An opt-in cooling-off approach should apply to all sales of time-sharing interests.**
- 6. The opt-in period should begin 48 hours after the sale and signing of the contract, and should end seven days after the signing of the contract.**
- 7. In the alternative, the cooling-off period should be extended to 21 days and not begin until the consumer has returned to their usual address, if they entered into the agreement while on holiday.**
- 8. If the consumer exercises their cooling-off rights, any costs should be paid by the licensee and credit provider, if applicable, not the consumer.**
- 9. Licensees should provide a warning statement to the consumer at the point of sale.**
- 10. Consumers should be required to receive independent financial advice before purchasing a time-sharing interest.**

Incorporating the template cooling off statement under PF 208

B5Q1 Do you agree with our proposal to incorporate the template cooling-off statement under PF 208 into the new instrument for entities that are dealing in interests or operating a registered time-sharing scheme?

Yes. Legal Aid NSW supports ASIC's proposal to incorporate the template cooling off-statement under PF 208 into the new instrument.

We support ASIC's proposal to make the statement easier for consumers to understand. We suggest that the cooling-off statement should:

- display information about the time to exercise cooling-off rights in very prominent, large lettering
- allow consumers the option to exercise their rights by providing notice to the licensee verbally by telephone or in person, or in writing by email or post, and
- include information about seeking assistance from NSW Fair Trading or LawAccess (for NSW sales).

Further detail about cooling-off arrangements is provided in our response to B6Q7.

Incorporating AFS licence conditions under PF 209

B6Q5 Please describe your experience with how time-sharing interests are sold

In our experience, sales representatives often approach consumers unsolicited and offer a prize to induce consumers to find out more about time-sharing interests. The interests can be sold using high-pressure sales tactics, and by providing misleading, deceptive or incomplete information to the consumer. The case study below is illustrative of these practices.

Case study – Mr and Mrs Robbo

Mr and Mrs Robbo are middle-aged, middle-class consumers from a regional area. Mr Robbo receives the Disability Support Pension. During a holiday on the Gold Coast, the Robbos obtained a 'scratchie' from a stall at Dreamworld after being told they could win money or a holiday. The scratchie indicated that they had won so they returned to the stall and were told that all they had to do to claim their prize was attend a presentation and that there was no obligation to sign anything further.

The Robbos attended the presentation in offices at a nearby shopping centre. They told the sales agent that they were not going to sign anything on that day. The sales agent took the Robbos to see an apartment that 'would be just like the ones' they could stay at through the holiday club he was pitching. The Robbos were also taken through a one page 'holiday planner' that determined their dream holiday were they ever to have the

money. They were told that if they signed up on that day only, they would get a special offer of 30 points and would accrue more points each year they were in the club.

The Robbos understood that if they signed up, their payments would be going towards the payment of future holidays, or accommodation points that could be exchanged for accommodation at any time. It was not explained that they were actually purchasing membership of a club and that they would be required to outlay more money to purchase accommodation points. Mrs Robbo asked the sales agent if they could get out of the agreement if they changed their mind. The sales agent said 'make sure you are sure, once you sign you cannot change your mind. It is a legally binding contract'. Within an hour of attending the presentation the Robbos signed up to a \$9,350, 15-year membership of a timeshare holiday club and a linked credit contract with a credit provider. The contract will ultimately cost them \$12,426 over five years.

After leaving the offices, the Robbos felt sick about the commitment they had made. They wanted to undo the contract, but remembered what the sales agent had told them. When the Robbos approached Legal Aid NSW for advice, we discovered that the complete contract was never disclosed, referencing 'general terms and conditions' that were not provided at any time. The contract also did not indicate that the Robbos would be provided the 30 accommodation points promised on the day of signing. The Robbos were not informed of their cooling-off rights and were shocked to learn that they had entered a time-sharing interest. Had this been disclosed, the Robbos never would have signed up, given its association with being an expensive and complex financial product.

B6Q6 Do the sales practices involve any unsolicited meetings or telephone calls? If so, should any additional restrictions or obligations be imposed on licensees in relation to these practices to ensure that consumers understand what they are being offered and are not misled?

Yes. Many of the clients we advise about time-sharing interests report that they were approached unsolicited by licensees.

Case study – Mr Sulli

Mr Sulli is from a non-English speaking background. He is employed but his income is modest and he has a low level of financial literacy. While walking down the street on holiday with his wife and young children, Mr Sulli was approached by a sales representative who asked if he wanted 'free tickets to the theme parks'. Mr Sulli agreed and was told he needed to attend an information seminar before he could obtain the tickets.

Mr Sulli attended the seminar and was subjected to a high level, high-pressure sales pitch for a time-sharing interest. He was told that if he signed up for membership he would be able to take a holiday at any time he wanted for the rest of his lifetime.

Mr Sulli was in fact sold a very complex holiday club membership product which was financed by a linked credit contract. The credit contract was for a period of ten years and the total cost was over \$44,000. It was not adequately explained to Mr Sulli that he was entering into a credit contract, he had no opportunity to obtain independent legal advice and the actual cost of the product was not fully disclosed to him.

Mr Sulli did not receive any free theme park tickets either; he only received a 50% discount on the entry fee.

Further guidance about what constitutes an unsolicited sale

We are concerned that the current law on unsolicited sales practices does not go far enough in protecting consumers of time-sharing interests. Often there is arguably technical compliance with the law on the part of the licensee, but the overall circumstances of the sale appear unsolicited.

Mr and Mrs Robbo's case study outlined at B6Q5 provides a good example of this. There was an unsolicited inducement when the Robbos were handed a scratchie with a redeemable prize for the small price of attending a presentation. There was no 'informed request' to attend the meeting with the licensee as the Robbos only realised at the presentation what was in fact being presented to them. There was no indication that the stall at Dreamworld or the scratchie was associated with the licensee. However, the protections around 'unsolicited agreements', as reflected in the current law, are ambiguous. Under the Australian Consumer Law, the unsolicited agreement cannot occur at the place of business of the supplier,¹ which is arguably where the Robbos agreed to go, as most reasonable people would after being promised a prize. Under the hawking prohibitions in the *Corporations Act 2001* (Cth) (**the Corporations Act**), which are probably more likely to apply in this context,² it is even more difficult to argue that attendance at the presentation does not constitute an 'unsolicited meeting'.

We note that the sales practices of one particular licensee became the subject of Supreme Court undertakings.³ The undertaking included an obligation on the licensee to use a marketing script, amongst others. In our experience, those agreed practices and scripts imposed by the undertaking are not being adhered to.

Legal Aid NSW recommends that the protections against unsolicited sales be extended to include situations where a consumer has been induced to attend the offices of a licensee. Legal Aid NSW also recommends that ASIC provide guidance in RG 160 to licensees about what constitutes an unsolicited sale. This could include case studies or examples of conduct considered to be unsolicited sales practices.

¹ Section 69(1)(b) of the *Australian Consumer Law* (sch 2 to the *Competition and Consumer Act 2010* (Cth))

² See s95 of the *Australian Consumer Law* and s992A of the *Corporations Act 2001* (Cth).

³ We are unable to disclose details of this matter as it is ongoing.

Information about consumer rights

Legal Aid NSW recommends that licensees be subject to greater disclosure obligations at the point of sale about consumer rights regarding unsolicited sales. This could take the form of an information statement provided to each consumer and displayed wherever the licensee is selling the product and on its website.

The information statement should:

- be eye-catching, prominent and user-friendly
- be in colour and include an example using graphics, diagrams or pictures to illustrate the consumer's rights
- include information about seeking assistance from NSW Fair Trading or LawAccess (for NSW sales), and
- be displayed prominently and consistently by licensees.

The National Credit Code places an obligation on the credit provider to give the debtor a copy of an information statement in a prescribed form setting out the debtor's statutory rights.⁴ This form could be used as a model for an information statement for consumers of time-share agreements.

Recommendations

- **Consumer protections against unsolicited sales should be extended to include situations where a consumer has been induced to attend the offices of a licensee, or a seminar, presentation or talk run by the licensee.**
- **ASIC should provide guidance in RG 160 to licensees about conduct that constitutes an unsolicited sale.**
- **Licensees should be subject to greater disclosure obligations at the point of sale about consumer rights regarding unsolicited sales.**

B6Q7 In relation to current cooling-off rights:

(a) Do you think the cooling-off rights based on consumers having to opt out to cool-off are working?

No. Legal Aid NSW does not consider that the current cooling-off arrangements are working because there are a number of barriers to consumers adequately exercising their cooling-off rights.

Consumers often have a very limited understanding of their cooling-off rights based on their discussions with the licensee, or are not aware of their rights at all. It is also impractical for consumers to exercise their cooling-off rights, as notice must be given in a

⁴ Form 5 Information Statement, paragraph 16(1)(b) of the National Credit Code, regulation 70 of the National Consumer Credit Protection Regulations 2010 (Cth).

prescribed form and in writing to a particular office of the licensee. Exercising these rights is especially difficult for:

- consumers who live regionally and rely on an infrequent postal service to communicate
- consumers who are on holiday when they sign up, or
- consumers who have limited literacy skills.

Further, the notice must be provided to the licensee within a very short period of time and that period is inconsistent between licensees, depending whether they subscribe to the Australian Timeshare and Holiday Ownership Council's Code of Practice.

Case study – Mr Din

Mr Din works in a low skilled job and has only basic literacy. He suffers from several medical problems, which are worsened by stress.

Mr Din attended an RSL club to view a car exhibition. A sales agent approached Mr Din and told him that if he attended a presentation he would get a scratchie where he was guaranteed to win a prize. At the presentation, Mr Din experienced high pressure sales tactics over several hours, such as being introduced to many sales agents, being shown images of holidays and asked to select his favourite, and being told that he had to sign certain documents to progress to the next stage of the presentation. When Mr Din signed the documents, he understood that he would get accommodation for free whenever he wanted to take a holiday. He did not understand that he would need to purchase points prior to being eligible to book accommodation. He did not understand that he was also entering into a loan to finance the purchase of the membership. At the end of the presentation, Mr Din did not receive his prize.

Mr Din instructs that the sales agent told him that there was a cooling-off period, but not how many days he had to give notice. Three days after attending the presentation, Mr Din discussed the contract with some friends who explained its terms and conditions. Shortly after, Mr Din called the licensee to terminate the contract. He was advised that that particular office could not process termination requests. Mr Din telephoned the other office, which told him to make the request in writing on a workday, not a weekend. Following this advice, Mr Din emailed Customer Service twice stating that he wished to terminate the contract. He did not use the prescribed cooling-off form. A week later, Mr Din forwarded his email to the licensee on to the credit provider. The licensee and the credit provider refused to terminate the contract based on Mr Din's requests.

(c) If the applicant has questions, should the cooling-off period stop and start afresh from the time that the further information has been provided by the licensee to the applicant?

Yes. Legal Aid NSW submits that the cooling-off period should start afresh from the time that the further information has been provided to the applicant. This will allow time for the applicant to consider the agreement, with all of the available information, and make an informed choice.

(d) Should the cooling-off rights alternatively be on an opt-in basis?

Yes. Legal Aid NSW supports the introduction of an opt-in cooling-off period. As outlined at B6Q7(a), consumers, particularly vulnerable consumers, find it difficult to exercise their cooling-off rights. Given how complicated and expensive the product is, and the circumstances in which it is often sold, an opt-in mechanism would ensure that only consumers who genuinely wish to proceed with the sale are obliged to do so.

The opt-in mechanism could be modelled on the approach now taken with regard to VET FEE-HELP loans, where students who have enrolled in a course are not permitted to apply for a loan for two days after enrolling. The opt-in mechanism for time-sharing interests should allow the consumer two days to consider the purchase. There should then be a five-day period during which the consumer can opt in to the sale. The licensee should not be permitted to contact the consumer during the seven-day period. The licensee and credit provider, if applicable, should bear the costs of termination of the contract if the consumer does not opt-in.

In the alternative, Legal Aid NSW recommends that the cooling-off period be extended to 21 days, and that the form of notice be verbal by phone or in person, or in writing by post or email. Our response to B5Q1 provides further detail.

Recommendations

- **The cooling-off provisions should be consistent in respect of all licensees, regardless of whether they subscribe to the Australian Timeshare and Holiday Ownership Council's Code of Practice.**
- **An opt-in cooling-off approach should apply to all sales of time-sharing interests.**
- **The opt-in period should begin 48 hours after the sale and signing of the contract, and should end seven days after the signing of the contract.**
- **In the alternative, the cooling-off period should be extended to 21 days and not begin until the consumer has returned to their usual address, if they entered into the agreement while on holiday.**
- **If the consumer exercises their cooling-off rights, any costs should be paid by the licensee and credit provider, if applicable, not the consumer.**

B6Q12 Are there any additional protections to assist consumers that we should include as obligations?

Warning statement

Legal Aid NSW recommends that licensees provide a warning statement to the consumer at the point of sale. The warning statement should:

- state in large, prominent writing that the product is a ‘time-sharing product’
- advise that the time-sharing interest may not be a suitable product
- advise that the time-sharing agreement may involve a long-term, ongoing and significant financial commitment
- provide information about the cost of the time-sharing interest in comparison to the cost of a comparable holiday, and
- include information about seeking assistance from NSW Fair Trading or LawAccess (for NSW sales).

We note that the National Credit Code places an obligation on a credit provider to give the debtor a copy of a disclosure statement in a prescribed form setting out what to do ‘before you sign’ and ‘things you must know’.⁵ This form could be used as a model for a warning statement for consumers of time-sharing interests.

Obligation to get financial advice

Legal Aid NSW recommends that consumers be required to receive independent financial advice before purchasing a time-sharing interest. We refer to our response to B6Q6 for further detail.

Recommendations

- **Licensees should provide a warning statement to the consumer at the point of sale.**
- **Consumers should be required to receive independent financial advice before purchasing a time-sharing interest.**

⁵ Form 6 Disclosure about credit contracts, ss17(16) of the National Credit Code, reg 74(2) of the *National Consumer Credit Protection Regulations 2010* (Cth); Form 8 Disclosure about guarantees, s55 of the National Credit Code, reg 81 of the *National Consumer Credit Protection Regulations 2010* (Cth).

Incorporating modifications to the enhanced fee disclosure requirements

B7Q9 Do you agree with the template for the periodic statement for disclosure of fees and costs during the reporting period?

Yes. Legal Aid NSW supports disclosure of all fees and costs to consumers at point of sale.

Regulatory Guide 160 *Time-sharing schemes*

E1Q2 Do you agree with the proposed amendments to the guidance?

Yes. Legal Aid NSW agrees with ASIC's proposed amendments to RG 160, especially the proposal to provide additional guidance on ASIC's expectations for compliance with the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth). We refer to our response to B6Q6 for further detail.