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Australian Securities and Investments Commission (ASIC)

By email: deferred.sales.model@asic.gov.au

CONSULTATION PAPER 339

Implementing the Royal Commission recommendations: The deferred sales model for add-on insurance

Thank you for the opportunity to provide this submission in response to the above.

1. ABOUT NIBA AND INSURANCE BROKERS

- (a) NIBA is the industry association for insurance brokers across Australia. The association has around 350 member firms, employing over 4,000 insurance brokers in all States and Territories, in the cities, towns and regions of Australia.
- (b) NIBA is committed to high standards of professionalism in insurance broking in Australia. Insurance brokers work with their clients to assist them to:
 - (i) understand and manage their risks, including the risk of loss of or damage to property as a result of adverse weather or other climate related events;
 - (ii) obtain appropriate insurance cover for their risks and their property; and
 - (iii) pursue claims under their policies when an insured event occurs, in which case the insurance broker becomes the advocate for the client during the assessment and resolution of the claim.
- (c) NIBA notes that this legislation is extremely complex and unlikely to be understood easily by most small businesses. This makes it more important for ASIC to provide practical guidance with useful example real life scenarios.
- (d) We provide or response to the questions below [our comments are in **yellow**] and are happy to engage in any discussion on any issues or queries ASIC may have.

2. SPECIFIC QUESTIONS FOR FEEDBACK

1. B Complying with the deferred sales model

1.1 B1 As the deferred sales model is prescriptive, and there are significant consequences of breaching the requirements, we propose to publish a detailed regulatory guide.

Your feedback

B1Q1 Do you agree with our approach of providing detailed guidance on the deferred sales model? Please explain your view.

Detailed guidance is useful to the extent it provides clarity on how ASIC intends to interpret any relevant provision, especially where they may not be clear in scope. This provides industry with a degree of greater compliance certainty.

Providing such proposed guidance in draft is valuable as it gives industry an opportunity to raise any issues with ASIC's approach and ASIC the opportunity to consider and respond on such issues. Ultimately, this can make it easier for industry to comply and provide clearer and simpler information to consumers. NIBA sets out its comments below regarding the draft ASIC guidance.

B1Q2 Do you consider that ASIC could provide less guidance? If so, what parts of our proposed guidance should be deleted?

If ASIC is seeking to include information on how it intends to apply the law – especially where the law may be unclear on an issue – it is useful for industry to understand ASIC's likely approach. However, it is important that ASIC be transparent and make it clear when this is the case to avoid confusion. We comment below on any issues identified by us relevant to the Guidance.

1.2 B2 We propose to publish a regulatory guide on the deferred sales model, which covers:

- (a) a description of the scope of the deferred sales model;
- (b) what we expect providers will need to do to comply with the deferred sales model; and
- (c) how we will approach applications for exemption (see Section C of this paper) from the deferred sales model.

Your feedback

B2Q1 Do you agree with the proposed guidance in draft RG 000?

Please explain your view.

NIBA notes that the guidance generally repeats and seeks to summarise the law and explanatory memorandum guidance. This is useful because it is complex law.

The material regarding record keeping in RG 000.107-110 is helpful and clearly identifies it is “a matter of good business practice, and to comply with general business record-keeping obligations”.

In terms of insurance brokers, they will typically either provide:

- a service to customers of advising on how to manage risks followed by product recommendations including insurance and arrangement of the insurance products; or
- arrangement of or advice on specific insurance products without broader risk management advice.

In such cases, we do not believe that an insurance product sold or arranged as part of the general risk advice service is:

- another product or service; and/or
- managing financial risk relating to the principal product or service because:
 - regarding the provision of risk management advice – the insurance covers a risk of the customer not one related to the risk management advice service itself provided as the principal product or service;
 - regarding specific insurance arranged/advised - the insurance covers a risk of the customer not one related to the advice /arrangement service provided as the principal product or service.

This is to be clearly contrasted with the sale of a bike and insurance that covers risk related to the bike.

If ASIC has a contrary view, could it let NIBA know as soon as possible as relief would need to be sought.

We note some specific queries below worthy of guidance or further clarity:

- *RG 000.15 ASIC considers the concepts of ‘offer’, ‘sale’ and ‘sold’ are relatively broad and take their ordinary meaning. The terms are intended to capture the actions of principal providers, third-party providers and other issuers of add-on insurance.*

The above is not overly helpful to industry. It would be useful for ASIC to provide details on how broad it believes this scope is by way of examples of what it thinks will and won't be caught by these terms.

For example, is having a marketing poster of an insurer on a wall of a principal provider's premises or provision of information in a brochure on a front counter or in other areas of a store with nothing more considered offering or selling, or is something more required? Where in ASIC's view is the line drawn?

- *RG 000.17 However, ASIC does not consider that an insurance product is complimentary if a component of consideration (payment by the customer for the insurance) is built into the price of the principal product or service,*

or the product cost is met by the seller and then passed on to the customer.

RG 000.18 This means that an offer or sale may occur where the cost of the insurance is bundled with the principal product or service, or where acquiring insurance is the 'default' option when purchasing another product or service. The add-on insurance product need not be wholly separate from the principal product or service.

The above guidance is unclear to us and an example would assist regarding the concept in the last paragraph. As we read it, it appears to suggest that if a product is:

- (i) automatically provided as part of the principal product or service and complimentary – as described by ASIC above, it won't ever be "offered or sold" and the deferred sales model does not apply – note the anti-hawking provision may apply;
 - (ii) offered as a separate choice to the consumer from the principal product or service (ie as a stand-alone offer not an automatic part of the principal product or service) even if at no cost – it is caught; or
 - (iii) offered as an option as part of the principal product or service even if at no cost – it is caught.
- *RG 000.19 -0000.22 covers when an add-on insurance product will be offered or sold 'in connection with' a principal product or service.*

ASIC has not provided any practical examples of where a connection might not exist other than the general example already provided by Treasury, so this is not overly helpful.

Some examples would assist. For example, stores may have marketing posters of an insurer/its product on a wall of a principal provider's premises or have information in a brochure on a front counter or in other areas of a store. Where the principal provider selling the principal product or service does not otherwise raise the insurance product with the customer in selling the principal product enough to trigger the "in connection with" concept? Where in ASIC's view should the line be drawn? ASIC specifically talks about a "referral of the customer to a third-party provider being caught RG000.19. If the provision of marketing in store also caught without anything more?

ASIC does not appear to have provided any practical examples of where a connection might not exist other than the general example already provided by Treasury, so this is not overly helpful.

- RG 000.39 refers to the concept of "(b) permitting another person to offer or sell an add-on insurance under an arrangement to which it is a party".

Practical examples of this type of scenario will be useful to industry. For example, if marketing/ product information can be provided in store by an

insurer without meeting the offered or sold and in connection with tests and the store paid for this with no other requirement regarding the sale of the principal product or service being sold and the insurance (e.g no referral or other arrangement by the store regarding the insurance), would this be such an “arrangement”?

Also, if a store enters into a marketing arrangement with an advertising company to sell advertising space and the advertising company arranges for the insurer’s products to be displayed in the advertising space sold by the store (there being no agreement between the store and the insurer and the store playing no other roles regarding the insurance), is this caught as an arrangement to which the provider of the principal product or service is a party? If so, an example will be helpful.

ASIC provides a diagram in Fig 1 of the Draft Regulatory Guide 000 pg 15.

This does not indicate that anti hawking could apply pre the Pre deferral period. What is concerning is the clack of clarity that can arise if a customer disputes they indicated an intention to acquire the principal product or service triggering the pre deferral period. If they succeed, s992A might apply if the customer is a retail client.

A practical example of such a scenario would be useful. If the client is a retail client and:

- no indication to acquire to acquire a principal product or service has happened; or
- an indication to acquire to acquire a principal product or service has happened but 6 weeks have passed,

anti hawking under s992A can apply. As Government (and we expect ASIC) had scenarios in mind, examples would be helpful to explain the scenarios and expectations that led to this provision.

What would happen if a second indication to acquire happened? Does the 6 week timing reset?

- *RG 000.63 During the pre-deferral period, and before the hawking prohibition applies, a principal provider or a third-party provider can:*
 - (a) *offer an add-on insurance product for issue or sale to the customer; or*
 - (b) *request or invite the customer to:*
 - (i) *ask or apply for an add-on insurance product; or*
 - (ii) *purchase an add-on insurance product: s12DR(2)(a).*

RG 000.64 This allows the provider to advertise and discuss the add-on insurance product in the pre-deferral period. There are no restrictions on what can be discussed during this period. The provider may answer any questions from customers and provide any information they wish, including in document form. However, the provider cannot sell the add-on insurance product.

Example 1: Communication during the pre-deferral period

Anh buys a mobile phone in-store. Zayn, the salesperson, offers Anh mobile phone insurance. Zayn has not given Anh the Customer Information and so the deferral period has not started. Anh asks a question about exclusions under the insurance policy. Zayn answers verbally and outlines the exclusions under the policy. Zayn also explains the cover under the policy and gives Anh some marketing materials. Zayn has not committed an offence because the deferral period has not started and he has not sold the product.

Can ASIC clarify in the Guidance examples of what it considers to be an "offer" of an add-on insurance product for issue or sale.

Can ASIC confirm in the guidance by an example if completion of an application by a customer which is not binding on the customer would be permitted in this pre deferral period or not – ie further action is required by customer to complete any sale?

- **Deferral period and Post Deferral Period Prohibition on offers, request and invites other than in writing**

Deferral period

RG 000.75 During the deferral period, a principal provider or a third-party provider cannot offer, request or invite the customer to ask for, apply for, or purchase an add-on insurance product for issue or sale other than in writing: s12DR.

RG 000.76 This means that a provider cannot discuss add-on insurance during any phone calls or in-person meetings with a customer during the deferral period, subject to the rules for customer-initiated contact: see RG 000.77– RG 000.84.

Responding to customer-initiated contact

RG 000.77 The prohibition on making offers, invites and requests to a customer during the deferral period does not apply where:
(a) the offer, request or invitation is made in response to contact initiated by the customer; and
(b) the offer, request or invitation relates only to the purpose for which the customer initiated the contact: s12DR(4).

RG 000.78 For example, if the customer contacts the provider about the principal product or service, the provider can respond using any method of communication, but cannot initiate a discussion about the add-on insurance. On the other hand, if the customer initiates a discussion about the add-on insurance product during a telephone call with the provider, ASIC considers that the discussion of the insurance was part of the customer's purpose for initiating the contact.

RG 000.79 If a customer initiates contact for the sole purpose of discussing an add-on insurance product, the provider can respond using

any method of communication. For example, if the customer emails the provider questions about an add-on insurance product, the provider can respond by telephone.

RG 000.80 At all times, a provider must limit the communication to the purpose for which the customer initiated the contact. For example, if a customer initiates contact to discuss home building insurance offered with a home loan, the provider cannot discuss another add-on insurance product (e.g. consumer credit insurance) unless the customer raises it.

RG 000.81 The prohibition on selling insurance during the deferral period remains and cannot be waived. Even if the customer says they wish to buy the add-on insurance product, the provider cannot sell the add-on insurance product until the deferral period ends.

RG 000.82 For example, if a customer calls a provider during the deferral period and asks for information about an add-on insurance product's claims ratio, the provider can give the customer that information over the telephone, because the customer initiated the contact. However, it would be an offence for the provider to then offer to sell the customer the add-on insurance product during the customer-initiated telephone call. Note: See Explanatory Memorandum, Examples 3.9 and 3.10.

RG 000.83 Providers of add-on insurance products need to be able to demonstrate that the offer, request or invitation to a customer relates only to the purpose for which the customer has initiated the contact.

Note: See Explanatory Memorandum, paragraph 3.79.

Regarding ASIC position on Post-deferral period see ASIC RG 000.89-94.

All examples provided appear to relate to a customer physically initiating contact in the period with the relevant person.

What is unclear is whether the following scenario gives rise to contact initiated by a customer in the deferral period or post deferral period.

A customer requests in the pre deferral period that the person contact the customer by telephone to arrange for an indicative or binding quote in the deferral period or post deferral period and/ or to arrange for a call to complete the sale in the post deferral period or after this.

The person contacts the customer post the deferral period via telephone as requested. Is this call by the person contact initiated by the customer.

In our view it would appear to be the case as but for the customer's request the contact would not have occurred. ASIC needs to provide an example in this regard or clarify its position with an explanation of why it believes it is not permitted under the law.

- Section 12DQ Financial advisers exemption

An example would be helpful on when ASIC considers this will and won't apply.

- Section 12DQ Comprehensive motor vehicle insurance

An example would be helpful and when ASIC considers this will and won't apply. ASIC should clarify whether it is of the view that a product of that type containing other types of cover is not caught. E.g Motor vehicle insurance with the above comprehensive motor vehicle insurance covers PLUS mechanical breakdown, tyre and rim cover etc

- ASIC Exemptions

NIBA has made its concerns with the broad catch all approach being taken by Government clear and the under or non-insurance risks to consumers that can arise. ASIC appears to have also supported such an approach.

ASIC's criteria is extremely onerous and the cost to industry of having to make such specific applications relevant to an add on insurance product sold by a specified person or a class of add on insurance products sold by a specified person, is prohibitive. Can ASIC confirm whether applications can be made and granted before the start. If not, few exemptions are likely to be sought as it would be too late by then.

The net result is likely to be that few applications will be lodged and the risk of consumer under or non-insurance will only be discovered after the fact.

In NIBA's view this is a high-risk regulatory approach ie catch everything assuming they are all bad products with no evidence in support, require people to seek an exemption for a significant range of products in an overloaded and overly complex regulatory environment and gamble that a consumer won't be left uninsured where exemptions are not sought or granted.

B2Q2 Do you agree with the proposed examples in draft RG 000?

These mostly mirror the Explanatory Memorandum. NIBA has not identified any obvious issues. It has suggested above that more examples be provided.

Are there additional examples that would be useful?

See above re further example suggestions.

B2Q3 What guidance should we include about the provision of the prescribed customer information (see our proposal for the Customer Information in Section D of this paper)?

See below comments on Section D.

B2Q4 Are there other matters we should consider providing guidance on?

See comments above.

2. C Exemptions from the deferred sales model

2.1 Proposal C1 We propose to provide guidance on:

- (a) how to apply for an exemption;**
- (b) how we will apply each of the factors that we must have regard to when considering whether to grant an exemption; and**
- (c) the types of product data and other information that will assist us in determining an exemption application.**

Your feedback C1Q1

NIBA comment: For each of the following see earlier comments regarding exemptions.

Is there further guidance we should provide on our interpretation of the exemption factors in s12DY(2)?

C1Q2 Are there any other matters that we should consider under s12DY(2)(e)?

C1Q3 Are there any additional data and indicators that would be useful to include in Appendices 2 and 3 of draft RG 000?

C1Q4 Are there additional matters relevant to exemptions on which we should consider providing guidance?

3. D Customer Information

- (a) Generally**
- (b) ASIC states that its aim in prescribing the content, form and manner of provision of the Customer Information is to:**
 - (a) help customers decide whether to buy add-on insurance, by requiring that they are given concise, relevant information they are not likely to otherwise receive as part of the sales process;**
 - (b) alert customers that they can say 'no', and facilitate a customer's opt-out if they do not want to be contacted about add-on insurance;**
 - (c) maximise the likelihood of customers reading, understanding and acting on the Customer Information;**
 - (d) make the process of giving and receiving the Customer Information efficient for industry and customers; and**
 - (e) appropriately balance the regulatory burden on industry.**

- (c) ASIC note that “We have further developed our proposal for the Customer Information, including by targeted engagement with industry and consumer representatives.” D 5
- (d) In developing the proposal, we have balanced considerations such as the practicalities of delivery, regulatory burden and expected outcomes and effect of the Customer Information on consumers.”

NIBA Comment: NIBA notes that it was not involved in any such consultation.

3.2 Content of the Customer Information Proposal D1

We propose to prescribe the content of the Customer Information, as shown in the appendix to this paper.

The proposed content includes:

- (a) for hardcopy format only—the Australian Government logo;***
- (b) a prominent message that the customer can say ‘no’ and that the add-on insurance ‘is not compulsory’;***
- (c) a statement about the four-day deferral period;***
- (d) information on opting out of being contacted about add-on insurance and a mechanism for customers to do so;***
- (e) two questions for customers to ask themselves as prompts with accompanying text;***
- (f) a link to ASIC’s Moneysmart website; and***
- (g) a statement explaining why the customer has been given the Customer***

Information. Your feedback

D1Q1 Do you support the proposed content of the Customer Information? Please provide evidence to support your view.

D1Q2 Should ASIC prescribe any product-specific content? If so, what content? Please provide evidence to support your view.

If ASIC proposes any such content we are happy to consider further.

D1Q3 Does ASIC need to tailor the content of the Customer Information to suit particular forms of electronic delivery? Please provide evidence to support your view.

No obvious issues NIBA has identified as yet in the time available.

3.3 Form of the Customer Information Proposal D2

For the electronic format—we propose not to prescribe a specific form for the Customer Information, due to the wide range of digital mediums through which it may be given.

However, we propose to prescribe that:

(a) the content must be set out in a specific sequence (as shown in the appendix to this paper);

(b) the font known as Arial must be used and the content must be displayed in a size that is not smaller than it would appear if using Arial font and 10 points in size;

(c) the content must appear in the body of the communication and not be placed in a link or attachment; and

(d) if sent via a digital medium that has a subject line (e.g. email)—the subject line must be ‘You can say no to being sold insurance’.

Your feedback

D2Q1 Do you support our proposals for the form of the Customer Information when it is provided electronically?

No obvious issues NIBA has identified as yet in the time available.

Please provide evidence for your view.

D2Q2 Do you foresee any issues in complying with the proposed form requirements for the electronic format?

If so, please explain and provide relevant information to inform our consideration.

No obvious issues NIBA has identified as yet in the time available.

- 3.4 D3 For the hardcopy format—we propose to prescribe the specific design and layout of the Customer Information. The Customer Information will be made available as a download from the ASIC website that providers can print and provide in hardcopy format.**
Your feedback

D3Q1 Do you support our proposals for the form of the Customer Information when it is provided in hardcopy format? Please provide evidence for your view.

No obvious issues NIBA has identified as yet in the time available.

D3Q2 Do you foresee any issues in complying with the proposed form requirements for the hardcopy format? If so, please explain and provide relevant information to inform our consideration.

No obvious issues NIBA has identified as yet in the time available.

- 3.5 Manner of provision: How to provide the Customer Information Proposal**

D4 We propose to prescribe that:

(a) the default method of providing the Customer Information is electronic, but we will not prescribe exhaustively the available methods for electronic provision;

(b) if the customer does not confirm that they can access the Customer Information electronically, the provider must give the Customer Information in hardcopy format, otherwise the Customer Information will not have been given for the purpose of s12DP(1);

(c) if the Customer Information is sent via postal mail, a return paid and addressed envelope must be included so the customer may return the page with the opt-out tick box checked, and the provider must account for postage time when recording when the Customer Information was given; and

(d) where the customer makes the commitment to acquire the principal product or service in person, the provider must provide the Customer Information electronically and must also give the customer the option of receiving the Customer Information in hardcopy format.

Your feedback

D4Q1 Do you agree that the Customer Information should be provided electronically by default, and that a hardcopy format must be provided if the customer cannot receive it electronically, or requests the hardcopy format in person? If not, why not?

There should be flexibility of approach for the customer and provider. Electronic notice should not be forced on providers. Why limit it to a request in person? If a person wants a hard copy they should be able to ask for this in any manner.

Ultimately the person concerned has to prove the notice was provided and how they do this should be left to them. This appears to make it easier for ASIC as regulator to determine if a breach has occurred or not.

D4Q2 Are there any risks or disadvantages of requiring electronic provision as the default? If so, please detail the risks or disadvantages, and the customers affected.

This may disadvantage smaller businesses.

D4Q3 Do particular methods of electronic provision pose additional risks or disadvantages that ASIC should consider when prescribing the form and manner of provision of the Customer Information? If so, please detail the risks or disadvantages, and the customers affected.

No obvious issues NIBA has identified as yet in the time available.

D4Q4 Should ASIC prescribe permissible and/or impermissible methods of electronic provision? Please provide reasons for your view.

No

D4Q5 Is there anything we should consider regarding provision of the hardcopy format for customers who cannot access the Customer Information in electronic format?

No obvious issues NIBA has identified as yet in the time available.

D4Q6 Is there anything else that should be done to ensure that the Customer Information is accessible to and engaged with by customers?

No obvious issues NIBA has identified as yet in the time available.

D4Q7 Do you foresee any issues in complying with the proposed manner of provision requirements? If so, please explain and provide relevant information to inform our consideration.

NIBA does not support default electronic provision. It supports flexibility of approach.

**3.6 Manner of provision: When to provide the Customer Information Proposal
D5 We propose to prescribe that:**

(a) the Customer Information must be given to the customer only after, not before, they have made a commitment to acquire the principal product or service; and

(b) if a customer makes repeat purchases of the principal product or service, the Customer Information must be given each time the customer has entered into a commitment to acquire the principal product or service.

Your feedback

D5Q1 Do you agree with the proposed requirements for when the Customer Information must be given? Please explain your view.

No. This overly restricts disclosure. It should be allowed to be provided earlier as well provided it is also given after e.g disclosure in pre deferral period and at time of commitment to acquire the principal product or service/acquisition if no prior commitment.

D5Q2 Do you foresee any issues in complying with the proposed manner of provision requirements? If so, please explain and provide relevant information to inform our consideration.

See above.

3.7 Content for electronic provision

(a) The proposed content, and the sequence of the content, for electronic provision of the Customer Information is as follows:

You can say no to being sold insurance. It is not compulsory.

Salespeople must wait 4 days before selling you insurance as an 'extra' to your main purchase.

You can say 'no' to being contacted about insurance as an extra by clicking this link [hyperlink to provider's opt-out mechanism].

If you are unsure, consider your situation and ask yourself:

Do I need and understand this insurance?

Consider what the policy covers and what it excludes. You may already have insurance that will cover any potential loss or damage.

Could I get a better deal somewhere else?

Consider if another insurance product or company can better meet your needs. You may be able to shop around for a better deal.

For more information, visit <https://Moneysmart.gov.au/AddOnInsurance>.

This Customer Information is prescribed as a requirement of the Australian Securities and Investments Commission Act 2001 to reduce the number of poor-quality insurance products being sold in Australia.

NIBA Comments [same for hardcopy – only difference being logo]:

- Likely to be unclear to consumer what 4 days means ie does it include day given information?
- Hyperlink only for opt out too restrictive.
- Should include statement that consumer should consider obtaining advice e.g from an insurance broker.
- Query what value Money smart will add.
- Reference to “to reduce the number of poor-quality insurance products being sold in Australia” at the very least implies that the product being sold is of a type that can be poor quality. In our view this is unnecessary and may be misleading and have a negative sales effect to the detriment of the consumer. On what basis does ASIC propose to make such a broad statement and has it weighed the impact of this statement.

If you have any questions in relation to this submission, please do not hesitate to contact me.

Yours sincerely,

Chief Executive Officer
National Insurance Brokers Association of Australia