

4 August 2025

Australian Securities & Investments Commission
Proposed update to ASIC's guidance on Product Disclosure Statements

By email: rri.consultation@asic.gov.au

Dear Madam/Sir,

We welcome the opportunity to provide feedback in relation to the consultation on the proposed update to ASIC's guidance on Product Disclosure Statements.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, abuse law, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Our Superannuation and Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team. At any one time we provide legal assistance to approximately 3,500 to 4,000 clients.

The inquiry website tells us that:

The proposed update to RG 168 simplifies and consolidates our guidance on Product Disclosure Statements (PDSs), reflecting ASIC's commitment to reducing regulatory complexity, providing practical guidance, enhancing clarity, and improving accessibility for all stakeholders.

We congratulate ASIC for this ongoing commitment to ensuring that ASIC's guidance offered to Financial Services Providers is clear, simple and thorough.

While we see the revised version of RG 168 as an improvement on the previous version, we believe there remain some gaps in the advice in relation to Product Disclosure Statements (PDS). These gaps were extant in the previous version, and have led to poor outcomes for consumers.

Maurice Blackburn understands that most of the proposed adjustments to RG 168 are aimed at simplifying and clarifying existing content. We hope, however, that ASIC will take the opportunity while updating RG 168 to consider some other important adjustments which we believe would make the guidance more complete and beneficial to consumers.

1. PDS compliance with relevant laws

Maurice Blackburn believes that the requirement that a PDS be compliant with relevant laws is understated. We believe that the section of RG 168 entitled "The PDS Requirements"¹ should be explicit that the terms laid out in the PDS should be no less favourable than those laid out in the law.

¹ Incorporating paras RG 168.1 to RG 168.6, on page 4 of the revised version

While paragraphs RG 168.8 to RG 168.13 convey statutory specifications and legislative instruments, they do not explicitly prohibit a PDS from representing a product in terms that are inconsistent with, or less favourable than, the standards and protections afforded under other consumer protection statutes or under the general law.

Although it may seem self-evident that such PDS content would be impermissible, the following case examples demonstrate the importance of making this requirement explicit in the Regulatory Guide.

- In *ASIC v HCF Life Insurance Company Pty Limited [2024] FCA 1240*, the Federal Court found that one of HCF Life's PDSs were misleading under s 12DF(1) of the *ASIC Act*. The PDS failed to disclose that pre-existing condition exclusions were partially unenforceable because they were inconsistent with an important consumer protection contained in s 47 of the *Insurance Contracts Act 1984 (ICA)* (thereby misrepresenting the legal effect of the product terms).

The Court distinguished between the subjective medical opinion used in HCF's exclusion clauses and the objective awareness test under s 47 of the ICA. The PDS presented the exclusion clause as an 'unqualified statement' of when benefits would not be payable, which was misleading because s 47(2) renders such exclusions partially unenforceable. The Court emphasised that misleading conduct under s 12DF does not require proof of actual detriment, and that realistic scenarios exist where the clause would operate inconsistently with s 47.

- Despite the learnings of that case, one doesn't need to look far to see on-market products that similarly fail to ensure the product as represented to consumers is legally compliant. For example, the below is an extracted wording from the on-market PDS of a major super fund:

Limited cover

Limited cover means you don't have full cover and you won't be covered for any pre-existing illnesses or injuries you had before you got your cover. Limited cover may last for different lengths of time and applies to all cover types, including Death cover.

You'll be covered for an illness that becomes apparent, or an injury that occurs on or after the date that your cover starts, restarts or increases. See the tables below and on page 21 for details of circumstances when limited cover applies and for how long.

Full cover means your cover isn't limited cover. You're covered for both pre-existing and new illnesses or injuries, unless exclusions apply.

The statement 'Limited cover means you don't have full cover and you won't be covered for any pre-existing illnesses or injuries you had before you got your cover' is materially similar to the exclusion clauses found to be misleading in the HCF Life case. It fails to acknowledge the operation of s 47(2) of the ICA, which prohibits reliance on such exclusions where the insured was not aware, and could not reasonably have been expected to be aware, of the condition at the time of contracting. As such, the clause is partially unenforceable and its presentation as an absolute exclusion is liable to mislead, thereby breaching s 12DF(1) of the *ASIC Act*.

Further, we believe that the "PDS Requirements" section of the draft revised Regulatory Guide should also contain a note to the effect that breaches of the relevant laws and legislative instruments

(as outlined in paragraph RG 168.2) come with consequences. The revised document, like its predecessor, is relatively silent on the existence and nature of consequences for breaches.

2. PDS inconsistency with underlying contract terms

Maurice Blackburn believes that the guidance should make it clear that it is unacceptable for a PDS to make representations that are inconsistent with the actual contract terms behind the financial product.

Consider the following case example of an extracted wording from a PDS verses the group life policy terms of a major super fund:

PDS (Public-Facing Document)	Group Life Insurance Policy (Binding Contract)
<p>“Members are covered for TPD benefits regardless of the number of hours worked. As an employee, if you work more than 15 hours per week, you can claim for TPD if you can satisfy one of parts 1–5 of the TPD definition. If you work less than 15 hours per week, then you must satisfy one of parts 2–5 in the definition.”</p>	<p>“Subject to the terms of this Policy, where an Insured Member is Gainfully Employed for an average of at least 15 hours per week on a permanent basis or casual basis (including an eligible contractor) and: (a) has worked for at least six consecutive months immediately prior to the Event Date; or (b) has worked for less than six consecutive months immediately prior to the Event Date and has worked for an average of at least 15 hours per week since becoming an Insured Member under the Policy, we will pay you the Total and Permanent Disability Benefit (if it applies) in respect of an Insured Member who satisfies either part 1, 2, 3, 4 or 5 of the TPD definition while the Policy is in force.”</p>

This inconsistency between the PDS and the underlying policy is problematic for several reasons:

- The PDS suggests that members are eligible for TPD benefits regardless of how long they’ve worked, provided they meet the hours threshold. In contrast, the policy imposes a minimum employment duration condition (six months or equivalent average hours since becoming insured). This is a material qualification that is not disclosed in the PDS.
- As established in the HCF Life case, presenting a benefit condition in a PDS without disclosing material limitations or qualifications that exist in the actual policy is liable to mislead the public as to the nature and characteristics of the financial service. The Court held that even technically accurate statements can be misleading if they omit critical context or qualifications.
- A prospective or current super fund member reading this PDS would reasonably believe they are eligible for TPD benefits based solely on their current hours worked, without knowing that they may be excluded due to insufficient employment history. This could lead to false expectations, underinsurance, or unnecessary disputes.

This example underscores the need for RG 168 to explicitly state that it is unacceptable for a PDS to present itself as compliant with disclosure requirements while omitting or misrepresenting material terms of the actual insurance contract.

Maurice Blackburn suggests that Principle 2 ² could be expanded to require that: “Disclosure should be relevant, complete and accurate”.

Please do not hesitate to contact [REDACTED]
[REDACTED] if we can further assist with ASIC’s important work.

Yours faithfully,

[REDACTED]

[REDACTED]

[REDACTED]

Maurice Blackburn

² Ref: Page 28 of the draft revised version